

Public Service Commission, Jurisdiction of. Franchise, Power of Commission to Alter. Rates, Power of Commission Where Fixed by Franchise. Power, of Public Service Commission.

Rates for service of public utility companies fixed by franchise from municipality previous to the passage of Chapter 52 of the Laws of 1913, are not subject to revision by the Public Service Commission.

Feb. 2 ,1916.

Hon. Railroad and Public Service Commission,
Helena, Montana.

Gentlemen:

I am in receipt of your communication under date Jan. 17, 1916, inquiring whether

"the Public Service Commission has any jurisdiction in the matter of rates being charged in municipalities, in cases where the franchise was granted to the utility by the municipality prior to the time of the passage of the law creating the Public Utility Commission, in which cases the franchise granted by the municipality contained a schedule of rates to be charged the municipality and its citizens?"

This office has heretofore had under consideration somewhat similar questions, the result of the consideration given them being found at pp 438-439 Vol. 5, Opinions of Attorney General.

The general rule is that no power to fix rates charged by utilities is presumed in favor of municipalities. Such power must appear by clear and express language. Courts have held that the power to contract with public utilities did not include the power to fix rates; nor is the power included in the general grant of power to provide reasonable regulations for the safe supply, distribution, and consumption of gas.

Lewisville Nat. Gas Co. vs. State, 135 Ind. 49 21 L. R. A. 734.

The Supreme Court of est Virginia recently had occasion to pass upon the precise question here involved.

"The presumption is against exclusive delegation of the legislature's sovereign rate making power to a municipality. Unless there has been such delegation by clear and express terms, the power is reserved in the state which can exercise it at such times and to such extent as may be found advisable."

Citing:

City of Benwood vs. Pub. Ser. Comm., 83 S. E. 295.

Impvt. Co. vs. Bluefield, 69 W. Va. 1, 70 So. E. 772.

Milwaukee E. R. & L. Co. vs. R. R. Comm., 153 Wis. 592, 142 N. W. 491.

It is generally held also, that whenever municipalities do fix rates by franchise, that they do so as agents of the state, and that all parties to such a contract are bound to take cognizance of the fact that their dealings are subject to future exercise of the legislature's power to act. Said the Supreme Court of Wisconsin when the question was before them:

"The contract remained valid between the parties until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid and subsisting obligation."

Mantiwoc vs. Mantiwoc & Nor. T. Co., 145 Wis. 13; 129 N. W. 925, 140 A. S. R. 1056.

In answer to the objection that a change made by a Public Service Commission in a rate fixed by franchise would impair the obligation of a contract the Supreme Court of West Virginia held:

"The contract related to a subject matter belonging to the state. The state had not given the city the power or agency to contract away the right thereto for a given time. The contract having been entered into without express legislative authority was permissive only. It was conditioned upon the exercise of the sovereign power over the subject matter. All this the parties to the contract were bound to know when they entered into it. There can be no impairment of the contract by the act of the state in claiming its own when it was not bound by the contract."

Citing:

City of Benwood vs. Pub. Ser. Comm., supra.

Knoxville W. Co. vs. Knoxville, 189 U. S. 434.

Wyandotte Gas Co. vs. Kansas, 219 U. S. 467.

See also Milwaukee Elec. Ry. vs. Rr. Comm., 238 U. S. 174.

The above quotations and citations represent the weight of authority upon this question. It is to be noted that all of them were under state laws which did not expressly grant the rate making power to municipalities. It remains to be seen whether the legislature of this state has in any way abrogated its powers in these matters.

Rate-making is a legislative function. The legislative functions granted to cities and towns in this state are enumerated in Sec. 3259 R. C. of Montana, 1907. That statute is the measure of their power. No authority is therein expressly given to make rates. The presumption is that this power is reserved in the state; and the state, by enacting Chap. 52, Laws of 1913, has assumed, and made active this

power. It did so with certain restrictions however. Sec. 12 of that act makes the rates fixed by the Commission the lawful rates for public service in this state. The last sentence of that section reads as follows:

"This however, does not have the effect of suspending, rescinding, invalidating or in any way affecting existing contracts."

The only construction which can fairly be given this broad and inclusive language is that the legislature, when it decided to exercise its sovereign rate-making power, determined at the same time to ratify rates which had theretofore been made by municipalities with its tacit consent. This language of the statute must therefore be held to be a limitation upon the power of the Public Service Commission as to these matters.

The conclusion is that your Commission has no jurisdiction under the conditions stated in your question.

Yours very truly,

J. B. POINDEXTER,

Attorney General.