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In both it was held that, under the plaintiff's pleadings, the municipality had breached the contract by refusing to meet to consider any revision of the rates. Accordingly, the waterworks district not only had the legal right to revise its rates upward, but was under an obligation to the holders of its revenue bonds to do so.

PUBLIC UTILITIES

*Melvin G. Dakin**

During the term no appeals of an unusual nature came to the court from the Public Service Commission. The *Faulk-Collier* case[1] involved an attempt by competing carriers to have a new Commission certification annulled on the ground, apparently, that it was more broadly drawn than the public interest required. The Commission was held not to have acted arbitrarily in certifying a carrier to transport, on irregular routes, household goods originating in, or destined for, an area within a 30-mile radius of a designated city where it was shown that no carrier terminals existed within the area; the service was needed, and certification limited solely to the area was found economically not feasible. Since public interest in the area would be served by the certification, it was held to be of no importance that competition would be somewhat increased outside the area.

The *Kemper* opinion[2] was actually decisive of eight appeals. The Public Service Commission had since enactment construed language in the Motor Carrier Act as mandatory in requiring a contract carrier with more than five shipper contracts to be certified as a common carrier.[3] This construction was brought into question by some eight contract carriers submitting for the approval of the Commission one or more additional contracts. Such approval being refused, suits were instituted in district court to compel such approval; from district court judgments dismissing the suits, the present appeals were taken.[4]

In holding against the construction urged by the Commission, the court pointed out that the Motor Carrier Act clearly contem-

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1. Faulk-Collier Bonded Warehouse, Inc. v. Louisiana Public Service Commission, 236 La. 357, 107 So.2d 668 (1958).

2. Kemper, Inc. v. Louisiana Public Service Commission, 235 La. 1035, 106 So.2d 460 (1958).

3. LA. R.S. 45:162(4) (1950).

4. *Ibid.;* 235 La. 1046-52, 106 So.2d 464-67 (1958).

plated the possibility of a contract carrier operating as such despite its having more than five contracts with shippers; the provision in issue was interpreted as a simple prima facie presumption that such a carrier is operating as a common carrier unless it can prove the contrary.[5] The court noted that such proof must be made under a carefully drawn definition that a contract for this purpose is one which "contemplated a reasonably large and regular or periodic movement . . . for a period of time exhibiting some permanence to the arrangement, agreement, or understanding."[6] Since the contract carriers had made no proof on this issue before the Commission or the district court, there could be no review of whether they had in fact rebutted the presumption; the suits were therefore dismissed without prejudice to renewing the applications for approval of contracts in excess of five before the Commission and attempting to rebut, with appropriate proof, the presumption of their common carrier status. To the court there seemed ample statutory authority for the regulation of such carriers so as to prevent the destructive competition which the Commission feared would ensue from approval of shipper contracts in excess of five per carrier.[7]

The Public Service Commission lost another minor bout with the Texas & New Orleans R.R. at the term,[8] this one over the denial of a station-closing application affecting the village of Longstreet. The Commission found that operation of the station did not constitute a drain on railroad revenues and that local citizens had expressed a need for the agency. The court also found no drain on revenues and in fact a slight profit but "not enough to justify the operation of the station." Drawing on *Corpus Juris Secundum*,[9] the court found the general test to be "whether the public good derived from maintenance of the agency station outweighs the expense to the railroad in continuing such agency" and the more specific test to be that "it is unreasonable to require the maintenance of an agency station where the cost of the service is out of proportion to the revenue derived from the portion of the public benefited thereby, particularly where a substitute service may be provided affording the

5. 235 La. 1035, 1045, 106 So.2d 460, 463 (1958).
6. LA. R.S. 45:162(6) (1950).
7. *Id.* 45:163.
8. Texas and New Orleans R.R. v. Louisiana Public Service Commission, 235 La. 973, 106 So.2d 438 (1958). For a comment on the earlier litigation, see *The Work of the Louisiana Supreme Court for the 1957-1958 Term — Administrative Law*, 19 LOUISIANA LAW REVIEW 351, 361 (1959).
9. 74 C.J.S. *Railroads* § 402(2) (1952).

same essential, although less convenient, service." With these principles in mind, and noting that the traffic could be taken care of at nearby agencies with only the inconvenience of a collect telephone call, the court determined "that the findings and conclusions of the Commission do not conform to the law and are not supported by the evidence."

Last term the court concluded, after two rehearings, that the City of Monroe retained the power to fix utility rates and that the Public Service Commission was consequently without jurisdiction to consider an application of United Gas Corporation for relief from what the corporation alleged had become a confiscatory rate structure;[10] the rates attacked were those contained in a 25-year franchise which had been agreed upon between the Commission Council and the corporation and approved by the voters.

It having been determined that the city had the power to regulate rates, the corporation thereafter requested a hearing at which it proposed to adduce evidence demonstrating the confiscatory character of the franchise rates. At this point the city put off its recently vindicated right to regulate utility rates and stated to the corporation that it was adhering to the franchise rates for the effective term of the contract. Thereafter the corporation filed a new schedule of rates and sought a federal district court injunction against interference with the new rates and against attempts to enforce the old franchise rates.[11] Being finally remitted to the state courts by the Fifth Circuit Court of Appeals,[12] it then sought injunctive relief in an appropriate state court. Mindful of the recent determination by the court that the City of Monroe had rate-fixing power, the state district court granted preliminary injunctive relief to the corporation, presumably to afford an opportunity for the city to hold hearings and fix new permanent rates.

On appeal,[13] the city argued that the district court failed to draw the distinction between the two capacities in which the city was authorized to act — proprietary and governmental — and that the franchise rates were reached by agreement between city

10. City of Monroe v. Louisiana Public Service Commission, 233 La. 478, 97 So.2d 56 (1957).
11. United Gas Corp. v. City of Monroe, 154 F. Supp. 667 (W.D. La. 1957).
12. City of Monroe v. United Gas Corp., 253 F.2d 377 (5th Cir. 1958).
13. United Gas Corp. v. City of Monroe, 236 La. 825, 109 So.2d 433 (1959).

and corporation, an exercise of its proprietary capacity, and not by exercise of its governmental rate-fixing power. In this contention the city has now been upheld by the court,[14] it being determined that possession of the governmental rate-fixing power was not fatal to the exercise of proprietary power to enter into a binding rate agreement. This agreement, however confiscatory in nature, need not be reviewed by the city in its governmental capacity and, as noted, is not within the jurisdiction of the Public Service Commission.[15]

At first blush this might seem an abandonment of governmental police power to supervise rates. However, the court notes that no such result follows here because the legislative power is free at any time to revoke its grant of rate-fixing power to the city[16] and presumably to vest it, if it chooses, in the Public Service Commission. However, since the City of Monroe has been found to possess this power by virtue of a combination of constitutional provision and charter powers,[17] it would seem to take something more than a simple act of the legislature to effect such a shift in the rate-fixing power from city to Public Service Commission. The court does not suggest the way in which this is to be done; it merely cites the case of *Shreveport v. Southwestern Gas & Electric Co.*[18] as containing a "full exposition of the law" affecting this area. While the Shreveport decision does uphold the right of a city to hold a utility to a rate agreement for its full term, it is a less complex case than the one presented here, since the court there found no charter and constitutional right in the city to fix rates by compulsion;[19] in other words, there was in this case no delegation of legislative power and consequently no problem of recapturing such power for the Public Service Commission.[20] What the present stalemate will engender in the way of future proposals at the legislative level remains to be seen.

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14. *Ibid.*

15. 233 La. 478, 97 So.2d 56 (1957). See *The Work of the Louisiana Supreme Court for the 1957-1958 Term — Public Utilities*, 19 LOUISIANA LAW REVIEW 376 (1959).

16. 236 La. 828, 844, 109 So.2d 433, 440 (1959).

17. 233 La. 478, 503, 97 So.2d 56 (1957). See *The Work of the Louisiana Supreme Court for the 1957-1958 Term — Public Utilities*, 19 LOUISIANA LAW REVIEW 376, 377 (1959).

18. 151 La. 864, 92 So. 365 (1922).

19. *Id.* at 871, 92 So. at 367.

20. A comment on this and other aspects of the case will appear in a subsequent issue of the *Louisiana Law Review.*