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Public Utilities - Delegation of the Rate Making Power to a Municipality - Abridgement of the Police Power

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PUBLIC UTILITIES — DELEGATION OF THE RATE MAKING POWER TO A MUNICIPALITY — ABRIDGEMENT OF THE POLICE POWER

Plaintiff, a public utility, brought suit against the defendant municipality to enjoin enforcement of rates in a natural gas franchise granted plaintiff by defendant. The franchise, granted in 1947 for a period of twenty-five years, gave plaintiff the exclusive right to sell and distribute natural gas within the corporate limits of the city of Monroe at rates provided in the franchise. In 1955, plaintiff applied to the Louisiana Public Service Commission for an increase in the rates claiming that they were confiscatory. On the application of the city of Monroe commission proceedings were enjoined by the Louisiana Supreme Court on the ground that the rate-making power for Monroe had been delegated to the municipality and the commission was without jurisdiction.[1] Plaintiff then requested that defendant exercise the delegated power and revise the rates upward, and on defendant's refusal to do so brought the instant action to enjoin enforcement of the schedule of rates contained in the franchise. Plaintiff contended that the twenty-five year franchise agreement could not be considered irrevocable because a municipality could not contract away the delegated police power of the state. Plaintiff therefore claimed that the rates set in the franchise were subject to revision, and, since they were confiscatory, defendant should be required to revise them upwards. The trial court rendered judgment for the plaintiff, granting a preliminary injunction. On appeal the Louisiana Supreme Court, *held*, reversed. Where a municipality which has been delegated the power to fix rates does so by franchise, the terms of the agreement are binding upon the public utility. There is no violation of the constitutional prohibition against abridgement of the police power of the state because the legislature may withdraw the delegated power from the municipality at any time. *United Gas Corporation v. City of Monroe*, 236 La. 825, 109 So.2d 433 (1958).

Because of the nature of their operations,[2] public utilities are subjected to the police power of the state.[3] Since one of the ele-

1. City of Monroe v. Louisiana Pub. Serv. Comm'n, 233 La. 478, 97 So.2d 56 (1957).

2. Springfield Gas & Elec. Co. v. City of Springfield, 292 Ill. 236, 126 N.E. 739 (1920), aff'd, 257 U.S. 66 (1921); State Pub. Util. Comm'n *ex rel.* Macon County Tel. Co. v. Bethany Mut. Tel. Ass'n, 270 Ill. 183, 110 N.E. 334 (1915); Capen v. Portland, 112 Ore. 14, 228 Pac. 105 (1924).

3. Nebbia v. New York, 291 U.S. 502 (1934); O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251 (1931); Williams v. Standard Oil Co., 278 U.S. 235

ments of the police power is the power to fix rates, the government may impose rates upon a utility regardless of the consent of the utility.[4] The fixing of rates by the government is always subject to the constitutional prohibition that private property cannot be taken without due process of law.[5] This has been construed to mean that if the rates imposed do not allow the utility a reasonable return on its investment, a deprivation of property without due process takes place and the rates are then subject to being revised.[6]

The statutes and constitutions of some states, including Louisiana, provide that the police power of the state cannot be abridged.[7] This does not prevent a delegation of the power used in fixing rates to an agency capable of handling it more efficiently, such as a commission created especially for the purpose of fixing rates.[8] The rate-fixing power may also be delegated to a municipality.[9] Usually the authority granted to a municipality is not as broad as the power to fix rates by compulsion, but includes only the power to enter into agreements with the utility and to regulate within the framework of such agreement.[10] In this situation, the power to regulate compulsorily would remain in the state and a contract made by a municipality with a utility would be subject to revision by the state under the police power should the rates established therein become confiscatory, or should they become inimical to the public welfare by being too high.[11] On occasion, however, compulsory rate-fixing power as

(1929); Stafford v. Wallace, 258 U.S. 495 (1922); Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U.S. 372 (1919); Munn v. Illinois, 94 U.S. 113 (1876).

4. Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944); Lenawee County Gas & Elec. Co. v. Adrian, 209 Mich. 52, 176 N.W. 590 (1920).

5. Smyth v. Ames, 169 U.S. 467 (1898).

6. *Ibid.*

7. E.g., LA. CONST. art. XIX, § 18; TEX. CONST. art. I, § 17.

8. Portland R.R. Light & Power Co. v. Railroad Comm'n, 229 U.S. 397 (1913); Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 Pac. 1083 (1914); State *ex rel.* Webster v. Superior Court, 67 Wash. 37, 120 Pac. 186 (1912); LA. CONST. art. VI, § 3.

9. Houston v. Southwestern Bell Tel. Co., 259 U.S. 318 (1922); Cedar Rapids Gas & Light Co. v. Cedar Rapids, 223 U.S. 655 (1912); San Diego Land & Town Co. v. National City, 174 U.S. 739 (1899); Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N.E. 451 (1902); Richmond v. Richmond Natural Gas Co., 168 Ind. 82, 79 N.E. 1031 (1907).

10. City of Monroe v. Louisiana Pub. Serv. Comm'n, 233 La. 478, 97 So.2d 56 (1957); Muncie Natural Gas Co. v. Muncie, 160 Ind. 97, 66 N.E. 436 (1903); Lenawee County Gas & Elec. Co. v. Adrian, 209 Mich. 52, 176 N.W. 590 (1920).

11. People *ex rel.* South Glens Falls v. Public Serv. Comm'n, 225 N.Y. 216, 121 N.E. 777 (1919); Woodburn v. Public Serv. Comm'n, 82 Ore. 114, 161 Pac. 391 (1916); State *ex rel.* Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861 (1912); Benwood v. Public Serv. Comm'n, 75 W.Va. 127, 83 S.E. 295 (1914).

well as the right to fix rates through agreements is delegated to a municipality.[12] This result is possible in Louisiana, even though the Louisiana Constitution of 1921 placed the compulsory rate-fixing power in the Public Service Commission.[13] The Louisiana Supreme Court has decided that the commission was vested by the Constitution with only such compulsory rate-fixing power as had not been previously delegated to the municipalities.[14] Whether a city has been delegated the power to fix rates by agreement and by compulsion depends upon the interpretation given the particular statute granting the power to the municipality.[15]

Although the City of Monroe has been held to possess the power to fix rates by compulsion, it has established rates in a franchise agreement.[16] The question was thus presented as to the validity of the franchise agreement in the light of the constitutional prohibition against abridgement of the police power of the state.[17] If the instant case is interpreted as meaning that *both* parties to the franchise agreement are bound and there is language therein so indicating,[18] it would seem that there was a violation of the constitutional prohibition against abridgement of the state's police power.[19] This theory is supported by the fact that, assuming the city is bound, neither the state nor the city would be able to exercise the police power to revise the rates. The city would not be able to exercise the power because it would be bound by contract. The state could not exercise it until the delegation to the city was withdrawn. The court, however, indicated that the constitutional prohibition is against an irrevocable delegation of the police power.[20] Citing authority for the proposition

12. Home Tel. & Tel. Co. v. Los Angeles, 211 U.S. 265 (1908).

13. LA. CONST. art. VI, § 3.

14. City of Monroe v. Louisiana Pub. Serv. Comm'n, 233 La. 478, 97 So.2d 56 (1957).

15. *Ibid.*

16. *Ibid.* The court decided that the charter creating the City of Monroe gave it the power to regulate by compulsion as well as by agreement.

17. LA. CONST. art. XVII, § 18.

18. In United Gas Corp. v. City of Monroe, 236 La. 825, 845, 109 So.2d 433, 441 (1958), the court stated: "[A]s we have said, a franchise ordinance of the kind with which we are here concerned, *while binding between the parties*, is always subject to the legislative will." (Emphasis added.)

19. Baton Rouge v. Baton Rouge Waterworks Co., 30 F.2d 895 (E.D. La. 1929); O'Keefe v. New Orleans, 273 Fed. 560 (E.D. La. 1921). See also State v. Public Serv. Comm'n, 275 Mo. 201, 211, 204 S.W. 497, 499 (1918), where the court stated that "fixing of reasonable rates for public utilities is in exercise of the sovereign police power of the state. Such power cannot be contracted away, nor can the legislature of the state authorize a municipal corporation to contract it away. It cannot confer more power on one of its creatures (a municipal corporation) than it possesses itself. . . . It cannot legally authorize any creature of the legislature to abridge this sovereign power."

20. United Gas Corp. v. City of Monroe, 236 La. 825, 109 So.2d 433 (1958).

that delegated power is always subject to revocation by the legislature,[21] the court concluded that this was also true here and that the constitutional prohibition was satisfied. It would seem, however, that the fact that the legislature may withdraw the delegated police power from the city does not mean that the power has not been abridged. Apparently the purpose of the constitutional prohibition against abridgement of the police power is to guarantee that the general welfare of the people of the state will not be sacrificed by relinquishment of the state's power to act in preservation of that welfare. Here, if the general welfare of the public was suffering under a franchise agreement binding on the city, relief would not be possible until the legislature acted to withdraw the police power to fix rates compulsorily which had been delegated to the city. Thus, effective relief would depend on what could very well be a lengthy legislative process of reacquiring a police power in order that it might be exercised. Despite the language in the instant case indicating that the franchise agreement is binding on both parties, the holding of the case is only that the utility is bound. If the case stands only for this proposition, then the franchise would not prevent the City of Monroe from exercising the delegated police power to fix rates compulsorily. Under this interpretation of the case, the constitutional prohibition against abridgement of the police power clearly would not be violated, since the power could be exercised immediately, without further action by the legislature. It does not seem too harsh to conclude that the utility is bound unconditionally by the franchise, while the city is bound only conditionally, since it is probable that the utility entered into the contract believing that the franchise would be subject to the police power. However, it might not have been contemplated that the municipality as a party would be able to exercise the police power with respect to that agreement.

In conclusion, it is submitted that if the instant case stands only for the proposition that the utility is bound by the franchise, then the constitutional prohibition against abridgement of the state's police power has not been abridged. On the other hand, if the instant case means that the franchise is binding on both parties, then it is arguable that the police power of the state has been unconstitutionally abridged.

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21. *Ibid.*