Volume 69 | Issue 1 Article 12

December 1966

Public Utilities--What Constitutes a Public Utility in West Virginia

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stage. "Where, however, the appellate court finds that the case was impliedly tried below on a theory not expressed in the pleadings, it may allow an amendment on appeal to incorporate such theory."[16]

The principal case offers no guidelines with respect to the amendment issue or recovery on a different theory. The question was not before the court. When the situation does arise, the court may choose to reject a liberal construction of the West Virginia Rules as applied to amendments. However, it seems it should make every effort to decide a case on the merits.[17] And if this be the goal, one may assume that the court will follow the federal lead in construing Rule 15(b) in such a manner as to "do substantial justice."[18]

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D, according to privately negotiated contracts, was to deliver gas from its wells and neighboring wells in Barbour County via its own pipeline to *X* and *Y*, two large Harrison County industrial firms, already being served by *C* Gas Company, a public utility. Acting upon a complaint filed by *C*, the Public Service Commission of West Virginia ordered *D* to discontinue operations until it applied for and received a certificate of public convenience and necessity, a prerequisite to a public utility service.[1] Upon petition for judicial review, *held*, reversed. *D*, serving only *X* and *Y* in accordance with the privately negotiated contracts and with no present intention to serve others, was not holding itself out to serve the public and, therefore, was not a public utility. *Wilhite v. Public Serv. Comm'n*, 149 S.E.2d 273 (W. Va. 1966).

The principal case presents the board inquiry as to what is a public utility, and particularly, whether a company transporting gas via its own pipeline to private customers falls within the defini-

[16] 3 MOORE, FEDERAL PRACTICE § 15.11, at 967 (2d ed. 1964).
[17] United States Fid. and Guar. Co. v. Eides, 144 S.E.2d 703, 710 (W. Va. 1965).
[18] W. VA. R. CIV. P. 1.
[1] W. VA. CODE ch. 24, art. 2, § 11 (Michie 1966).

tion. Public interest demands proper conduct of public utility businesses,[2] subjecting them to regulation by the states under their police powers.[3] West Virginia's law and policy provide for regulation and control of public utility businesses, whether publicly or privately owned, by the Public Service Commission.[4] Consequently, it has become necessary to establish tests for determining which businesses fall within the regulations of the Commission. In the instant case, the West Virginia court applied the traditional "profession to serve",[5] or "holding out to serve the public in general"[6] tests.

The instant controversy arose when *D* filed with the Public Service Commission a petition explaining its proposed venture and asking for a ruling on whether a certificate of public convenience and necessity would be required for its operation. *C* filed an application to intervene in the proceedings, and *D* immediately withdrew its petition without prejudice. *C* thereupon filed with the Commission a complaint alleging that *D* was invading the Clarksburg gas market and that *D* should be required to obtain a certificate of public convenience and necessity or cease construction and operation of the proposed pipeline. Then *D*, denying that it was a public utility subject to the Commission's control, reluctantly answered interrogatories directed to it. After a hearing in which *D's* answers and other evidence provided by *C* were considered, the Commission entered a final order directing *D* to cease construction and operation of the pipeline until a certificate of public convenience and necessity was obtained. The decision apparently was due in large measure to *D's* failure to convince the Commission that it had no excess volume at the time nor anticipated any such excess. After the Commission's refusal of *D's* application for reconsideration, *D* appealed to the West Virginia Supreme Court for determination of its status.

This determination prompted the court to discuss what constitutes a public utility. In applying the traditional "holding out to serve the public" test, the court observed:

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[2] Clarksburg Light & Heat Co. v. Public Serv. Comm'n, 84 W. Va. 638, 100 S.E. 551 (1919).
[3] Munn v. Illinois, 94 U.S. 113 (1877).
[4] W. VA. CODE ch. 24, art. 2, § 1 (Michie 1966).
[5] 1 WYMAN, PUBLIC SERVICE CORPORATIONS § 200 (1911).
[6] Preston County Light & Power Co. v. Renick, 145 W. Va. 115, 113 S.E.2d 378 (1960).

> The test as to whether or not a firm or corporation is a public utility is that there must be a dedication or a holding out either express or implied that such person, firm or corporation is engaged in the business of supplying his or its produce or services to the public as a class or any part thereof as distinguished from the serving of only particular individuals.[7]

The court also indicated that the amount of business done is not a proper test and the fact that a product or service is usually dispensed or sold by a public utility does not convert the business into a utility. The court observed that future expansion by *D* might place it in the public utility field.

The court did not discuss *D's* agreement to furnish land owners free gas in exchange for pipeline right of ways. Apparently, this point has been settled by a prior case[8] wherein a coal company, which supplied electricity to its lessees under private contracts, was held not to be a public utility since there was insufficient public interest involved. Moreover, *D's* purchasing the right of ways indicates that *D* probably did not believe it could qualify as a public utility with the right of eminent domain,[9] a right customarily characteristic of a public utility.[10]

Similar to the coal company case,[11] ultra vires companies, which in some aspect of their business hold themselves out to serve the public, may be considered a public utility to the extent of the public utility phases of the business. In 1960, the West Virginia Court held that a coal company which sold electricity to the *public* was held to be a public utility.[12] Municipalities have also been held to be public utilities to the extent that they engage in operating sewer systems,[13] water systems,[14] toll bridges,[15] and other public services. Other public utilities which fall within the

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[7] Wilhite v. Public Serv. Comm'n, 149 S.E.2d 273, 281 (W. Va. 1966).
[8] Holdred Collieries v. Boone County Coal Corp., 97 W. Va. 109, 124 S.E. 493 (1924).
[9] W. VA. CODE ch. 54, art. 1, § 2 (Michie 1966).
[10] Wingrove v. Public Serv. Comm'n, 74 W. Va. 190, 81 S.E. 734 (1914).
[11] Holdred Collieries v. Boone County Coal Corp., 97 W. Va. 109, 124 S.E. 493 (1924).
[12] Preston County Light & Power Co. v. Renick, 145 W. Va. 115, 113 S.E.2d 378 (1960).
[13] Delardas v. Morgantown Water Comm'n, 148 W. Va. 776, 137 S.E.2d 426 (1964).
[14] Lockard v. City of Salem, 127 W. Va. 237, 32 S.E.2d 568 (1944).
[15] Village of Bridgeport v. Public Serv. Comm'n, 125 W. Va. 342, 24 S.E.2d 285 (1943).

regulatory power of the Public Service Commission have been enumerated by the legislature.[16]

Although the legislature may enumerate and declare what businesses are public utilities, the final determination is a judicial one.[17] In making this determination, the courts give weight to the public policy of the state as expressed by the legislature.[18] The operations and services of a business at a particular time will be determinative of its status.[19] A business, previously considered private, may, by changing its operations and services, become a public utility.[20] Therefore, "precedents are of little value, for what was a private business yesterday may be a public utility tomorrow."[21]

In the principal case, the West Virginia Supreme Court was obliged to reverse the decision of the Public Service Commission since the court, using the "holding out to serve the public" test, did not find *D* to be a public utility. As Mr. Justice Holmes observed many years ago, "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end."[22] The West Virginia court decided the principal case on the record. Subsequent activities by *D* might make it a public utility,[23] but present services of two consumers without a showing of intent to serve the public generally in the future will not.

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[16] W. VA CODE ch. 24, art. 2, § 1 (Michie 1966).

[17] Clarksburg Light & Heat Co. v. Public Serv. Comm'n, 84 W. Va. 638, 100 S.E. 551 (1919).

[18] *Ibid.*

[19] Wingrove v. Public Serv. Comm'n, 74 W. Va. 190, 81 S.E. 734 (1914).

[20] Clarksburgh Light & Heat Co. v. Public Serv. Comm'n, 84 W. Va. 638, 100 S.E. 551 (1919).

[21] Hardman, *What Constitutes a Public Service,* 26 W. VA. L. REV. 140 (1920).

[22] Prentis v. Atlantic Coast Line R.R., 211 U.S. 210, 226 (1908).

[23] The court's concluding remarks contain the warning that "if Wilhite attempts to serve the public in the future or increases its supply of gas for such purpose and uses it for such purpose it may properly be held by the Public Service Commission to be a public utility." Wilhite v. Public Serv. Comm'n, 149 S.E.2d 273, 284 (W. Va. 1966).