



---

Volume 46 | Issue 4

Article 3

---

June 1940

## The West Virginia Public Service Commission: II. Jurisdiction and Powers

C. A. Peairs  
*Northeastern University*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Energy and Utilities Law Commons](#)

---

### Recommended Citation

C. A. Peairs, *The West Virginia Public Service Commission: II. Jurisdiction and Powers*, 46 W. Va. L. Rev. (1940).

Available at: <https://researchrepository.wvu.edu/wvlr/vol46/iss4/3>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## THE WEST VIRGINIA PUBLIC SERVICE COMMISSION\*

C. A. PEAIRS, JR.\*\*

### II. JURISDICTION AND POWERS.

#### 1. *Types of Enterprise Subject to the Commission's Control.*

Under the statute, the jurisdiction of the commission extends to all public utilities, except those under exclusive federal control. In 1931 an exception was made as to utilities operated on streets and roads, because in general such enterprises are subject to control by other agencies; but in 1937 the Motor Carriers Act placed all such carriers again under the commission.<sup>60</sup>

Most of the cases involving this part of the statute raise problems of interpretation or of definition, especially as to the term "public utility". The constitutional point most often raised in West Virginia, as to acts creating administrative agencies or municipal corporations, is that of invalid delegation of powers, especially legislative powers, or of violating the separation of powers provision by combining executive, judicial, and legislative functions in one agency.<sup>61</sup> The latter point was raised soon after the creation of this commission, in *Manufacturers' Light & Heat Co. v. Ott*.<sup>62</sup> There several gas companies, including one Pennsylvania corporation, sought to enjoin rates established by the commission. The suit was brought in the federal district court at Charleston, and an injunction was granted. The fourth circuit court of appeals, in reversing, held that there was no combination of powers in this commission in violation of the West Virginia Constitution. No judicial power is exercised by it, according to the determination of the court; furthermore, none is connoted by the right of judicial review given by the act, since the court merely exercises a slightly expanded mandamus and prohibition jurisdiction, and may not review acts within the commission's statutory powers.<sup>63</sup> The commission was held to have no executive power,

---

\* The first installment of this article appeared in the April issue (1940) 46 W. VA. L. Q. 201.

\*\* Member of the Monongalia County bar; now instructor in law, Northeastern University, Boston, Massachusetts.

<sup>60</sup> W. VA. Acts 1913, c. 9, § 3; W. VA. REV. CODE (1931) c. 24, art. 2, § 1. See the Revisers' Annotations referring to this section (1931).

<sup>61</sup> W. VA. CONST. art. V, Division of Powers: "The Legislative, Executive, and Judicial Departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at one time. . . ."

<sup>62</sup> 215 Fed. 940 (D. C. W. Va. 1914).

<sup>63</sup> *United Fuel Gas Co. v. Public Service Comm.*, 73 W. Va. 571, 80 S. E. 931 (1914).

since it had no control over the machinery for the enforcement of its orders. Finally, the legislative power exercised by the commission was not in violation of the inhibition against delegation of powers, because the commission was merely an agency to carry out the legislative scheme as to public service regulation. The statute here involved was declared to be the same on principle as that in *Interstate Commerce Comm. v. Goodrich Transit Co.*,<sup>84</sup> in which Mr. Justice Day said that while Congress may not delegate legislative power to an administrative commission, it may, having laid down general rules of action for such commission, require it to apply the rules to particular situations, and to issue orders covering new problems as they arise.<sup>85</sup> It seems that this obvious verbal quibble is so widespread today that there is no question of its status in the law.

The question of whether the commission could regulate the rates charged by a natural gas company to its industrial consumers was raised in *Clarksburg Light & Heat Co. v. Public Service Comm.*<sup>86</sup> In that case the utility admitted the jurisdiction of the commission as to its business with domestic consumers, but as to supplying gas to industrial consumers it was contended that that part of the company's service was not a public service and, therefore, was not subject to the regulatory power of the state. The court held that the use which the consumer made of the commodity was not the test as to whether the commission might act, but rather that the duty which the producer had undertaken to perform to the general public was the test, and that in this case when the company entered the public service status it became a public utility as to all its activities, and subject to control in them by the commission.

It may be well before criticizing the logic of the court's position in the *Clarksburg Light Company* case to examine holdings in other cases which may have a bearing on the problem, in order to get a pattern of the court's legal fabric. As to the service to industrial consumers, with no profession to serve the public generally, it seems to be settled by *Avery v. Vermont Electric Co.*,<sup>87</sup> approved in West Virginia, that public regulation will not be permitted. The case of *Fallsburg Power & Mfg. Co. v. Alexander*,<sup>88</sup> a Virginia case, theoretically of great persuasive effect on the West

<sup>84</sup> 224 U. S. 194, 32 S. Ct. 436, 56 L. Ed. 729 (1911).

<sup>85</sup> In which case it is clearly exercising both judicial and legislative powers, as a matter of practice.

<sup>86</sup> 84 W. Va. 638, 100 S. E. 551 (1919); Note (1919) 26 W. VA. L. Q. 140.

<sup>87</sup> 75 Vt. 235, 54 Atl. 179 (1903).

<sup>88</sup> 101 Va. 98, 43 S. E. 194, 61 L. E. A. 129 (1902).

Virginia court, also held that a power company organized to serve a single manufacturing plant, without any holding out to serve all manufacturing plants alike, or to serve any manufacturing plants which it did not choose to serve, was not a public utility. The West Virginia case of *Charleston Natural Gas Co. v. Low & Butler*<sup>69</sup> lays down a test which indicates that the same result would be reached in such a case.

In the case of *Wingrove v. Public Service Comm.*,<sup>70</sup> it was held that a corporation organized under a charter authorizing only mining and sale of coal and the exercise of rights incidental to such business, was subject to regulation as a public utility as to electricity sold by it to the public from the excess furnished by its private plant. The electric plant was installed and maintained for the sole purpose of the operation of the coal company's mining machinery, and the lighting of its stores, offices, tenement houses, and other property. It so happened that the plant produced an excess of current, which the company sold to others in the town, so long as the supply lasted. It was held that the company became a public service company by this act, and that the public service commission might compel it to serve the rest of the population of the incorporated town in which its stores and residences were located, even if such requirement would entail an expansion of the company's electric plant.

A close examination of these cases, together with other propositions approved by the West Virginia court, would seem to lead to the conclusion that the *Wingrove* case and the *Clarksburg Light Company* case cannot logically stand together, although they might very well fall together, since there are serious objections to both decisions, on the score of their place in the pattern of public utility law. There is no suggestion in the *Wingrove* case that the entry into public utility status subjected the company to regulation as to all its business affairs, and as to reports, accounting methods, and similar burdens of public utilities; yet the conclusion is inescapable, since all public utilities are subject to those burdens. In the *Clarksburg Light Company* case the company was not even permitted to classify its business according to the type of service rendered and of representation to the public as to different types of business. The court said "the duty of the petitioner to furnish gas to the public is its paramount duty. It makes no difference

---

<sup>69</sup> 52 W. Va. 662, 44 S. E. 410 (1901).

<sup>70</sup> 74 W. Va. 190, 81 S. E. 734 (1918).

who that public is or to what use the gas is to be appropriated." The court also pointed out the possibilities of discrimination against manufacturing companies whom the petitioner did not wish to serve — a way of begging the question, because such discrimination has no legal significance unless the petitioner was a public utility as to such potential patrons.

Admitting *arguendo* that a distinction might be made between the cases on the ground that the nonregulated business in the *Wingrove* case was of a type never regulated as a public utility, expressly or otherwise (until the Guffey Act), and that the type of service rendered by the Clarksburg Light Company was in both cases one susceptible of regulation in the presence of a proper profession to serve the public, being of the general type of enterprises falling in public utility classifications, the issue arises as to whether a classification may be made between public service and nonpublic service of the same genre by the same company, on another, reasonable, criterion.

In *Terminal Taxicab Co. v. Kutz*,<sup>71</sup> a taxicab company performed *inter alia* the following distinct classes of service: service to all patrons of certain hotels, under exclusive service contracts with such hotels; and garage service, furnished to individuals on telephone call or other request, with no holding out to serve all indiscriminately. The court held in that case that the important thing was not the nature of the service, but what the company did, and since as to the garage service there was no undertaking to serve the public generally, the company might classify its service, and operate free from regulation as to its nonpublic undertaking. Similar problems and holdings are found in cases of carrier classification of service according to the type of article shipped, or of hotel classification according to the type of patrons solicited. Fine distinctions are made as to the type of classifications permitted, but all cases permit a reasonable classification, contrary to the language of the court in the *Clarksburg Light* case. Whether the classification actually proposed was reasonable, would, of course, depend on the type of manufacturing enterprise existent in the city, and on the volume of business done by the company with that type of enterprise, as compared to other similar business contacts of both parties.

The practical difficulty of such a classification under a law similar to that of West Virginia is that a public utility is subject to the control of the commission as to all its affairs, including such

---

<sup>71</sup> 241 U. S. 252, 36 S. Ct. 583, 60 L. Ed. 984 (1916).

matters as the accounting system employed in its management. This difficulty exists, however, in the *Wingrove* case as well, and was disregarded by the court in that case, and seems not to be insuperable in any case. It seems that in a case such as the taxicab or light company case, if the classification were permitted, it would be easy enough to waive the requirements of service for all, and similar, relatively onerous incidents of public utility status, without disturbing the commission's control over the entire enterprise, as to the public utility aspects of the business done.

The Wyman approach<sup>72</sup> may be taken as a basis reaching a sound answer to these cases, and of creating a logical rule for the solution of the various problems as they arise. Under it the business (not the person engaging in the business) is a public utility subject to the extraordinary rigorous regulations and duties imposed upon such enterprises, if (1) it is a business monopolistic in nature, (2) it furnishes an essential service, (excluding such businesses as the theatre, which do not provide a reasonably *necessary* public service<sup>73</sup> and (3) there is a holding out to serve all the public alike (excluding the services in these two cases, as well as those in the Vermont and Virginia cases cited, and the garage service in the taxicab case). Under this logical approach, which rests on the fundamental reasons for the exceptions in the case of public utilities to the general law of free business enterprise<sup>74</sup> and which should therefore be strictly adhered to, the service in question in both of the West Virginia cases under consideration here should have been held without the scope of the commission's jurisdiction. While the *Clarksburg Light Company* case can hardly be considered an outrageous departure from the ordinary rules, even considering the ill-judged dicta and sweeping generalizations of language, the *Wingrove* case represents a fundamental departure from the Wyman pattern of public utility law, existing generally in the country at the time of the decision, and later, at least until the *Nebbia* case.<sup>75</sup> There the corporation not only had not set itself up as a public utility furnishing electric current to all in the town—it would have been *ultra vires*, subject to a writ of prohibition or *quo warranto*, if it had. The case is such a strong one that it is

---

<sup>72</sup> 1 WYMAN, PUBLIC SERVICE CORPORATIONS (1921) §§ 6, 7.

<sup>73</sup> See such cases as *Tyson & Bro. v. Banton*, 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718 (1927).

<sup>74</sup> (Prior to 1933).

<sup>75</sup> See, however, Note (1919) 26 W. VA. L. Q. 140, taking the position that the *Clarksburg Light* case is not justifiable, while approving by implication such a decision as the *Wingrove* case.

cited and quoted widely by those who argue for the extension of business regulation indefinitely, according to court rules parallel to the statute in the *German Alliance* case.<sup>76</sup> It is not a feather in the cap of the West Virginia court that this case is the leading one for that proposition, and it would be to the logical pattern on its escutcheon a considerable improvement if both cases were overruled, excluding both those enterprises from regulation. Both cases may fall as permitting regulation without proper warrant, but they may not stand together because of the regulation of the coal business which would be the result of the application to the *Wingrove* facts of the language of the court in the *Clarksburg Light Company* case.

Prohibition lies against the commission for regulating businesses not within its jurisdiction,<sup>77</sup> and cases arising by use of this writ have delimited the boundaries of the commission's powers, both horizontally, as discussed in this section, and vertically, as discussed in the following section.

A question as to interference with the federal commerce power arose in the case of *Mill Creek C. & C. Co. v. Public Service Comm.*<sup>78</sup> There a hydroelectric company, organized in Virginia to engage in the business of a general electric and power company, and for the sale of current to the public generally, entered West Virginia and sold its product to West Virginia customers. The West Virginia court held that the company, having subjected itself to the laws and regulations of the West Virginia government, the electricity provided by the company to industrial concerns was a "public service", under the commission's authority. This traffic would be subject to the control of Congress if Congress chose to act, but in the absence of such federal regulation, these sales were subject to the control of the state of destination. This case suggests several problems not specifically raised by it, and therefore not within the scope of this paper:—whether the result would be affected by the place of sale being in Virginia rather than in West Virginia; whether if the sale were made at the transmission voltage, without passing through a transformer at the place of destination,

<sup>76</sup> *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011 (1914). See *Chambers v. Spruce Lighting Co.*, 81 W. Va. 714, 95 S. E. 192 (1918), holding that a lighting company jointly owning and operating coal lands is a public utility if it sells current to a half dozen customers. But see *Holdred Collieries v. Boone County Coal Corp.*, 97 W. Va. 109, 124 S. E. 593 (1925), holding a coal company's contract to supply current to its lessee coal operators a private contract, not subjecting it to public utility regulation.

<sup>77</sup> *Huntington v. Public Service Comm.*, 84 W. Va. 81, 99 S. E. 285 (1919).

<sup>78</sup> 84 W. Va. 662, 100 S. E. 557, 7 A. L. R. 108 (1919).

as it might very well be for a large industrial consumer, it would be considered to be in the original package, as it has been in some cases, and whether if it were it would affect the result; and whether Virginia's possible restrictions on the activity affect at all, and if they do to what extent, West Virginia's power of control over the West Virginia activities of such corporations. No questions were raised as to any extraterritorial effect of West Virginia's regulation, nor of the niceties of the law of state regulation of interstate commerce. Since this is the only case in the West Virginia court involving the point, it seems fruitless to discuss it further, without making a detailed study of the matters mentioned above. The result on the facts is not open to serious criticism, and the language of the opinion does not purport to be authoritative on the constitutional point, merely relying on the then latest Supreme Court cases on the point.<sup>79</sup>

Other cases define various services as included or excluded by the terms of the statute, or by interpretation thereof. Few of these cases present any problem other than of dictionary definition of terms.<sup>80</sup> The few problems remaining under the jurisdiction portion of the statute may be better discussed in the section dealing with limitation of powers.

2. *Extent of Regulatory Powers.* By the terms of the statute the commission is given power to investigate all methods of practice of public utilities subject to the provisions of the act, to require them to conform to all its regulations and orders, and to require complete information with regard to operation and rate contracts used by such utilities to be filed with it; the commission may enforce its orders by mandamus, injunction, or any other proper court remedy, and its proceedings have priority over pending cases in the courts. The commission is given power to fix and change rates, including "interstate rates of a local nature", and may prohibit any devices of charging which might lead to discrimination or favoritism. The commission was limited in its rate-setting power as to new plants to a minimum rate which would enable the utility to make a net earning of eight per cent on the "legally recognized

<sup>79</sup> *Public Utilities Comm. v. Landon*, 249 U. S. 236, 39 S. Ct. 268, 63 L. Ed. 577 (1919). Reference was also made to *In re Pennsylvania Gas Co.*, 225 N. Y. 397, 122 N. E. 260 (1919), [later affirmed in 252 U. S. 23, 40 S. Ct. 279, 64 L. Ed. 434 (1920)] as discrediting the Maryland case reaching the opposite result. [*W. Va. & Md. Gas Co. v. Towers*, 134 Md. 137, 106 Atl. 265 (1918)].

<sup>80</sup> *Randall Gas Co. v. Star Glass Co.*, 78 W. Va. 252, 88 S. E. 840 (1916) (natural gas wells subject to the commission); *Princeton Power Co. v. Callo-way*, 99 W. Va. 157, 128 S. E. 89 (1925) (interurban trolley line under commission's jurisdiction).



rate base'', for ten years after the construction of such utility plant, in the original act. This proviso was repealed recently.<sup>81</sup>

Other provisions of the statute expressly conferring jurisdiction on the commission are those relating to unreasonable regulations, practices, and services, to the system of accounts the commission was empowered to establish, and to the information the commission may require the utilities under the act to furnish. The last-named provision merely amplifies the provision cited above, while the others are supplemented by specific provisions directed to the utilities, which will be discussed in another section. The commission is given power to require any person, company, or other agency under the act, to furnish any information concerning charges for or practices in connection with service rendered by it. Such information must be under oath if the commission requires it, and it must be in the form prescribed by the commission.<sup>82</sup> The section concerning uniform accounts is also an expansion of authority granted elsewhere in the act, to prescribe a complete system of accounts and memoranda, for every class of utilities set up by it. Such forms may not interfere with those established by the Interstate Commerce Commission for utilities under the Interstate Commerce Act. But even as to them the commission may require additional accounts and memoranda, beyond those required by the Interstate Commerce Commission.<sup>83</sup>

The section relating to unreasonable regulations, acts, and practices, and to other services falling short of the standard set up by the act, authorizes the commission to remedy such situation by appropriate orders.<sup>84</sup>

The main limitation on the jurisdiction conferred by this section is that it relates solely to matters concerning the rights and duties of public service companies, even though in that field it is plenary. In the case of *Bluefield v. Public Service Comm.*,<sup>85</sup> a water company had laid its mains beneath the street. Later a street-car line laid its lines on the street directly above the water mains. Ac-

<sup>81</sup> W. Va. Acts 1913, c. 9, § 5; W. VA. REV. CODE (1931) c. 24, art. 2, § 2. The proviso as to reduction of rates within ten years of the construction of a public utility plant was repealed by an amendment of 1935 (W. Va. Acts 1935, c. 115). See in connection with the rate-fixing power, *Hope Natural Gas Co. v. Public Service Comm.*, 112 W. Va. 223, 164 S. E. 248 (1932), placing the burden of showing the reasonableness or unreasonableness of proposed rates on the carrier, even where, as here, the shipper was plaintiff.

<sup>82</sup> W. Va. Acts 1915, c. 8, § 26; W. VA. REV. CODE (1931) c. 24, art. 2, § 9.

<sup>83</sup> W. Va. Acts 1913, c. 9, § 21; W. VA. REV. CODE (1931) c. 24, art. 2, § 8.

<sup>84</sup> W. Va. Acts 1915, c. 8, § 23; W. VA. REV. CODE (1931) c. 24, art. 2, § 7.

<sup>85</sup> 94 W. Va. 334, 118 S. E. 542 (1923).

ording to the expert testimony in the case, the electric current used by the trolley cars induced a secondary circuit in the ground beneath, which electrolyzed the water pipes to the tracks; eventually the pipes would spring leaks, which would necessitate tearing up the streets for repairs to the mains, at frequent intervals. The city applied to the Public Service Commission to compel one or the other utility to move its lines, or so to improve its plant as to obviate the public inconvenience caused by the existing situation. This the commission refused to do on the ground of lack of jurisdiction. The city applied to the court for a writ of mandamus to the commission to issue orders to remedy the situation. It was held that the commission had rightly refused to assume jurisdiction over the case. It has no jurisdiction over streets, or other police power than to settle all questions of adequacy of service or reasonableness of rates or regulations of utilities. The facts of the case are so interesting that they may tend to distract the mind from a consideration of the significance of the case here, which is simply that the jurisdiction of the commission is limited to affairs of public service companies as such, and does not extend to all their public relations as citizens, corporations, or property owners.

In the case of *United Fuel Gas Co. v. Public Service Comm.*,<sup>86</sup> decided in 1928, the gas company was organized to serve several towns, limiting itself in its public representation to serve only the thickly populated portions of the towns, and stopping pretty strictly at municipal limits, actual or legal. It had in the town in question made a special contract to serve one customer beyond the territory it normally served. It was attempted to require it to extend its service beyond the urban portion of the town. It was held by the court that the Public Service Commission might not compel a public service company to extend its service beyond its holding out, either as to the type of service rendered or as to territory served, although the utility may be compelled to serve all within that territory without discrimination. The special contract in this case was dismissed as not constituting a holding out to serve outlying districts about the town, due to circumstances showing it to be a special arrangement, as well as to the theory that one swallow does not create a summer. This holding affirmed a decision of the Public Service Commission refusing to compel such an extension of service. A similar holding was made the previous year under

---

<sup>86</sup> 105 W. Va. 603, 144 S. E. 723 (1928).

the same style.<sup>87</sup> There the extension of service proposed was to an area within a reasonable definition of the utility's holding out, but the customer asking the service was already adequately served by another company. The service would therefore have been a duplication of existing, satisfactory (legally) service, and would have required an actual extension of the gas company's main, at an expense not at all justified by the circumstances. Its undoubted effect would have been to drive smaller utilities than the United gradually out of business, without any action on the part of either competing utility, by governmental compulsion. The court held that the commission could not require the extension, and added that it had jurisdiction only in cases where its exercise would be "right and just". The case is practically worthless as authority, due to the outrageous nature of the demand made, as is shown by the sweeping limitations laid on the commission's jurisdiction by the court's language, which might be extended to support almost any degree of judicial review and restraint on commission action. The case is cited here merely as confirming the general impression received as to the spirit of the court toward forced extension of public utility service, as shown in the later case cited above. As to the limitation on the commission's authority, both cases must be considered in the light of the first *United Fuel Gas* case, decided before the others, both of which affirmed commission self-restraint.<sup>88</sup> In that case the entering wedge was the permission by the owner of a large farm to the gas company to lay its main across his farm. Later the farm was split up, and a small community began to grow up near the line of the gas company's mains. One special contract was made for a side line from the main to a manufacturing plant built near it. The cost of the side line was shared by the parties to the contract. Others in the community wished to compel the company to grant them similar contracts, even though their demand for gas was probably not nearly so great as that of the manufacturing company, and therefore should not come so near to making the proposed arrangement a profitable one for the company, and though there was no semblance of a holding out by the company to serve the new community as a utility. The commission, however, issued an order requiring the company to furnish gas to the appli-

<sup>87</sup> *United Fuel Gas Co. v. Public Service Comm.*, 103 W. Va. 306, 138 S. E. 38 (1927).

<sup>88</sup> *United Fuel Gas Co. v. Public Service Comm.*, 95 W. Va. 415, 121 S. E. 281 (1924). This was not the first case under this style, but it was the first of the series involving this point.

cant in this case, and the court affirmed the order of the commission, with a clear intimation in its opinion that the failure to suspend the order was in spite of a feeling that the order was not justified by the facts of the case. The decision seems to rest on judicial reluctance to interfere with the commission rather than on any definition of the commission's power to regulate such companies. The court said that it would never disturb such an order, even though it required the company to construct a new set of branch lines which would probably not be profitable, and though the main line whose traffic would be burdened by this new tap was an interstate line, carrying mostly long-distance shipments in interstate commerce.

Several cases involve the power of the commission to subject railroads, mostly interstate lines, to police regulations, or to public utility regulations of a police nature. The *MacKubin* case<sup>89</sup> involved the power of the state through the commission to require interstate trains to stop at any given point in the state. It was held that the state has the power to do this if there is sufficient local demand for such a stop. This seems to be good constitutional law so far as it goes. The court was a little more unorthodox when it came to the application of the principle to this case, and to the commission's jurisdiction and its extent. It was held that the state acted only through this commission, and that the question of the sufficiency of local facilities for requiring a stop was a question of fact for the commission's determination, and that the court would not interfere with such findings or order pursuant to them, either establishing or discontinuing such a stop, since the order was within the power of the commission.

Several cases decided since the establishment of the commission have raised the question of the commission's power to require or permit the installation, maintenance, and continuation or discontinuance of facilities, or the enlargement of the plant, of any public utility. Most of the cases are railroad cases, and many of them arise in the treatment of other topics in this chapter, but it seems well to give a picture of the group of cases here.

In the case of *Norfolk & Western Ry. v. Public Service Comm.*,<sup>90</sup> it was held that the commission had jurisdiction to compel the railroad, an interstate line, to conform to its rules and regulations. The railroad wished to discontinue some of its facilities at

---

<sup>89</sup> *MacKubin v. Public Service Comm.*, 95 W. Va. 546, 121 S. E. 731 (1924).

<sup>90</sup> 91 W. Va. 414, 113 S. E. 247 (1922).

certain small stations; the commission forbade it, and the railroad appealed to the court to enforce the alleged limitation on the commission's jurisdiction. The court held that the commission's permission was necessary for the proposed discontinuance of facilities. In *Baltimore & Ohio R. R. v. Public Service Comm.*,<sup>91</sup> the commission ordered the railroad to build a switch for public use near a station, to facilitate loadings by warehouses. It appeared that the benefit of the new switch would enure to the public rather than to the railroad, but the court held that the carrier might be compelled to install it and to share the expense of building it, and that such a required expenditure was not a taking of property in violation of the due process clause, if the Public Service Commission ordered it after its usual process. In the case of *Bluefield W. & I. Co. v. Public Service Comm.*,<sup>92</sup> the utility was running at capacity and refused to grant service to an applicant. The commission ordered the water company to serve the applicant, saying that the applicant was within the scope of the utility's holding out, and that it might be compelled to make any extension or addition to its plant necessary to serve all within its holding out. The court affirmed this order, approving an enforced extension to the public utility plant to enable it to render "proper service". These cases seem to establish fairly clearly that the commission has practically unlimited discretion (in view of the rule in West Virginia as to administrative finality) to compel either the creation of new facilities or the improvement or enlargement of existing ones, either to enable the utility to render the service for which it holds itself out, or for the public convenience, if there is no such representation. The converse of these cases is found in *Collins v. Public Service Comm.*,<sup>93</sup> where due to increased motor traffic replacing rail communication between Morgantown and Clarksburg the passenger service on the B. & O.'s line was being operated at a loss. The commission issued an order permitting the service to be discontinued, and on protest the court held this to be within the commission's power, since due to the simple facilities for carrying passengers by motor bus and taxi the order would result in negligible inconvenience and expense to the public, and therefore appeared to be fair under the facts as found by the commission.

The holding in the *Collins* case seems to be not only fair but inevitable, for a reason which renders that of *Chesapeake & Ohio*

---

<sup>91</sup> 90 W. Va. 1, 110 S. E. 475 (1922).

<sup>92</sup> 89 W. Va. 736, 110 S. E. 205 (1921).

<sup>93</sup> 94 W. Va. 455, 119 S. E. 288 (1923).

*Ry. v. Public Service Comm.*,<sup>94</sup> subject to severe criticism. In that case the railroad had a branch line from Ansted to Hawks Nest, for freight traffic only. The commission issued an order, on the petition of certain residents of Ansted, requiring the railroad to commence passenger service on this line. It was held by the court on appeal that the commission might require a utility to maintain adequate service, whether such order would necessitate creating new facilities where none existed before, or merely improving the existing service, and that the order here fell within this power of the commission. The court said that the order here was not confiscatory, even though it appeared that the revenues from the passenger service would be insufficient to pay the expenses of such service, since the branch line treated as a unit would pay its way even after the installation of passenger service. This holding is open to the objection of making Peter pay for Paul's ride. It is obviously unfair to make one patron of a railroad pay part of the fare of another, and that is precisely the result reached by this case and avoided by the *Collins* case, since the railroad would nowhere be permitted to charge discriminatory rates to compensate for this difference.

Several cases involve limitations on the commission's rate-making jurisdiction. The case of *Whitaker Glessner Co. v. Wheeling Terminal Ry.*,<sup>95</sup> establishes that power as to intrastate railroads and limits it as to interstate railroads (subject to the doctrine of the *Shreveport* and *Wisconsin Rate* cases, with their further limitation, of course). The railroad in this case had filed a schedule of rates with the Public Service Commission; a special contract was made to haul slag and ashes for the defendant, in return for a right-of-way over defendant's property. It was held in a suit to enforce the contract specifically and to compel a conveyance of the right-of-way, that the railroad might receive compensation only according to its rate tariff in the commission's files, and that this contract could not only not be specifically enforced, but also that the railroad would be limited to regular rates in any damage calculation for the breach of the contract.<sup>96</sup> The statutory provision for railroad rate-making by the commission was attacked as an unconstitutional delegation of the legislature's rate-fixing power under

---

<sup>94</sup> 75 W. Va. 100, 83 S. E. 236 (1915).

<sup>95</sup> 99 W. Va. 38, 127 S. E. 639 (1925).

<sup>96</sup> See also *Hope Natural Gas Co. v. Public Service Comm.*, 112 W. Va. 223, 164 S. E. 248 (1932). The rate-fixing problem will be dealt with in detail in a later chapter.

the state constitution in *State v. Baltimore & Ohio R. R.*<sup>97</sup> In *Randall Gas Co. v. Star Glass Co.*,<sup>98</sup> the power was held to be legislative, as was also the procedure exercised by the commission in connection with it. In that case the commission changed rates without notice to the industrial consumers affected thereby, and on proceedings by disappointed patrons it was held proper as a nonjudicial process; no notice of the commission's action, pending or past, need be given to the public, if due process is satisfied as to the utility, considered to be the only adverse party to the commission's proceedings. In the *B. & O.* case the delegation by the legislature was approved, on the theory that an arbitrary prescription of rates by the commission under the statute would be improper, but that a quasi-judicial proceeding would be required before a rate would be set by it. The commission was compared to the Interstate Commerce Commission in its function, and approved on that ground. The logic of these two cases is no worse than that of many courts attempting to reconcile the anomalies of administrative law with pre-existing principles of separation of powers.<sup>99</sup>

3. *Special Utility Types.* The Public Service Commission Act gives the commission power of general supervision over all utilities having authority under any municipal or county charter or franchise to use any street, public highway, or other public place for wires, pipes or other fixtures for carrying or distributing gas, water or electricity for public use, and also over oil and gas pipe lines.<sup>100</sup> This section of the law has been widely cited, but few problems of construction have arisen under it. It was held in *Pittsburgh & W. Va. Gas Co. v. Nicholson*<sup>101</sup> that gas used by a lessor for domestic purposes under a lease covenant was not "devoted to a public use" under this provision of the act, and that as to such use it need not be complied with. These provisions, like those relating to connecting carriers and telegraph lines, to be discussed below, seem to be justified by the maxim "*ex abundantia cautelae*" if at all, since

---

<sup>97</sup> 76 W. Va. 399, 85 S. E. 714 (1915).

<sup>98</sup> 78 W. Va. 252, 88 S. E. 840 (1916).

<sup>99</sup> Specific problems related to these will be considered in sections dealing with rate-fixing, procedure, and judicial review. See Hardman, *The Changing Law of Competition in Public Service Regulation* (1927) 33 W. VA. L. Q. 219, (1928) 34 *id.* at 123, commenting on West Virginia cases refusing to grant franchises to competing utilities, where adequate service was already available, and reversing the earlier "free competition" policy of the court. The notes speculate as to the probable effect of these cases on the future law of public utilities in the state.

<sup>100</sup> W. Va. Acts 1913, c. 9, § 10; W. VA. REV. CODE (1931) c. 24, art. 2, § 5 (with slight formal revisions of the original provision).

<sup>101</sup> 87 W. Va. 540, 105 S. E. 784 (1921).

they are in large part repetitions of provisions to be found in the general jurisdictional sections of the act, which would clearly apply unless a question of encroachment on the rights of municipalities should arise.

Other provisions attempt to parallel the Interstate Commerce Act provisions as to connecting and lateral carriers, and as to the use of terminal and trackage facilities. The provision as originally enacted excepted from its terms any requirement that a carrier give the use of such facilities to another carrier engaged in a like business, but the exception was repealed in 1931. The usual precatory provisions as to if "the Commission finds it in the public interest and to be practicable", and "on just and reasonable terms" are included in these sections, which have invoked little litigation. The only case of any importance decided under them, *Rose v. Public Service Comm.*,<sup>102</sup> held that a railroad may grant a local transfer company the exclusive privilege of using part of the railroad station platform for transfer business, and that other transfer companies might not complain of discrimination.

4. *Service Requirements for Utilities.* The statute re-enacts the common law as to the duty of utilities to maintain adequate facilities and safety devices, and to perform adequate service with due regard for the safety of the public and of their employees, at reasonable rates. Discrimination is forbidden, and rates and points of public contact (terminal and switch connections) are subjected to the control of the commission. Utilities may not change the extent or manner of public service except by consent of the commission.<sup>103</sup> The commission must issue an order changing a practice or rate found to be improper, after adequate procedure, and specifying the alternative approved by it.<sup>104</sup> These two sections add little to the scope of governmental control over utilities in the state as defined in sections of the statute treated above; they differ chiefly in that they are directed at the utilities rather than to the commission.

The case law involving these sections is not voluminous, but there are a few leading cases interesting chiefly because of the fact situations to which the statute had to be applied. In *Baltimore & Ohio R. R. v. Public Service Comm.*,<sup>105</sup> a war-time regulation of the

---

<sup>102</sup> 75 W. Va. 1, 83 S. E. 85 (1915).

<sup>103</sup> W. Va. Acts 1913, c. 9, § 4; W. VA. REV. CODE (1931) c. 24, art. 3, § 1.

<sup>104</sup> *Baltimore & Ohio R. R. v. Public Service Comm.*, 81 W. Va. 457, 94 S. E. 545 (1917).

<sup>105</sup> *Ibid.*



railroad provided that so-called "team track" loaders should be provided with box cars by the railroad, while tipple loaders were provided with open-top gondolas or with hopper cars. The regulation was attacked by some small shippers as discriminatory, and the commission ordered it to cease. In a proceeding before the court to suspend the commission's order, it appeared that there was a great shortage of cars for coal shipment, and a tremendous temporary coal traffic, and that "team track" loaders, who loaded from wagons and trucks instead of by tipple, took all day to load a car which could be loaded by tipple in a few minutes, and hence were not a desirable element of the carrier's trade. As a class, they seemed to be a temporary phenomenon, operating on a small margin made possible by high coal prices, and would probably vanish when normal times returned. It was held that extraordinary conditions made this classification and the discrimination thereunder reasonable, and that the act did not remove the right to make such regulations by giving the commission the power to annul an unjustly discriminatory regulation. The case contains several dicta defining the jurisdiction of the commission to issue this type of order, and indicating the limits thereof, but that part of the opinion has been omitted here, since it consisted largely of several re-statements of the statute in different terms.<sup>106</sup>

In *Norfolk & Western Ry. v. Public Service Comm.*, discussed above, the facts were as follows: McCarr Siding was in a village of about 100 population, located on the Tug River, and was the railroad distributing point for about 1,000 people in the vicinity, both in West Virginia and in Kentucky. The railroad discontinued the crossing and other loading facilities at that point due to the poor visibility for approaching trains. Falloway, a shipper who paid about \$300 per month in freight bills, got an order from the Public Service Commission requiring the railroad to furnish a suitable crossing and other loading facilities for Falloway and other shippers of the vicinity. It was held by the court that the facility required by the order was of the type that the railroad was bound under this section of the statute to furnish, that the commission had jurisdiction to issue the order,<sup>107</sup> and that the hearing before the commission before the order was issued satisfied due process requirements. On review by the Supreme Court as to the last point, the judgment was affirmed in an opinion by Mr. Justice But-

---

<sup>106</sup> See § 2 of this chapter for the other point involved in the case.

<sup>107</sup> *Norfolk & W. Ry. v. Public Service Comm.*, 265 U. S. 70, 44 S. Ct. 439, 68 L. Ed. 904 (1924).

ler, which dismissed all due process arguments both as to procedure and as to the nature of the requirement of the order here. The net result of the case, so far as the subject presently under discussion is concerned, is that a railroad regulation for the safety of crossings will be permitted if and only if it does no damage to shippers which is not reasonably compensated for, and which is not commensurate with the danger averted by the regulation. If it had been practicable to relocate the crossing in this case, even at a slight extra expense or inconvenience to the shippers, and the railroad had done so for the reason advanced in support of the discontinuance of the facility here, there is little doubt (as a matter of pure conjecture) that the regulation would have been approved by the commission and court.

That there must in any case be a showing by the complainant of facts rendering the practice of the utility improper under the statute, may be inferred from the cases styled *State v. Baltimore & Ohio R. R.*,<sup>108</sup> both decided before the creation of the commission. The inference proposed to be drawn from these decisions seems a fair one, in spite of the fact that they were criminal proceedings, and weak authority for that reason, and that utilities' duties are generally more onerous today than in the pre-commission era. The court today would probably not look behind a commission order to reaffirm these decisions, but the commission probably feels itself bound by them, and the court probably regards the commission as bound by them, so far as it considers the matter.

In *State ex rel. Croy v. Bluefield Water Works*,<sup>109</sup> a consumer sought to compel the utility by mandamus to furnish water to him. The utility had a regulation requiring all connections to be installed by a plumber specially licensed by the utility. The petitioner Croy had a tap line to the company's line laid and connected by a competent plumber, who was not, however, licensed by the utility. There was no question of improper work in the case, but the company refused to serve Croy because of the infraction of their rule. The court refused to award the writ on a procedural ground — that the petitioner should have applied to the commission for relief first, and that the court had no power under the act to grant direct relief in such a case, but was limited to review of orders of the commission. Judge Poffenbarger concurred in the result, saying that the court could have granted a writ of mandamus to the com-

---

<sup>108</sup> 61 W. Va. 634, 57 S. E. 44 (1907); 61 W. Va. 367, 56 S. E. 518 (1907).

<sup>109</sup> 86 W. Va. 260, 103 S. E. 340 (1920).

mission, if it had refused to issue a proper order in the case, but that it could not proceed against the defendant directly. There is, therefore, no direct holding in the case as to the reasonableness or discriminatory nature of the regulation involved. The language of the court showed clearly, however, that the regulation in question was regarded as outrageous, and as Judge Poffenbarger pointed out, the only reason for refusing relief was that the petitioner had not exhausted his other remedies, and had no standing before the court. The syllabus holding condemns the regulation, and the syllabus is, by dictum, the law of the case in West Virginia, and it seems that this case might be cited for the proposition so stated.

Limiting the intimation in the *Croy* case that the regulation there was unreasonable is the holding in *Huntington D. & G. Co. v. Public Service Comm.*<sup>110</sup> In that case several individuals not within the area served by the utility had formed a company known as the Four Pole Gas Company, and made a special contract for the privilege of tapping the utility's line. The original arrangement provided for payment to the utility by each individual consumer on the Four Pole line, but due to leakage in its lines a supplemental contract was made requiring the Four Pole Company to bear the loss due to leakage in its lines until it kept them in proper repair according to the original contract. The burden of the new contract fell on the original contract members of the Four Pole outfit, and not on consumers who had tapped their lines later. The Four Pole Company asked the utility to take over their lines and to serve all consumers on such lines, and obtained an order of the commission to the gas company to do so, on the ground that it became the duty of the utility to serve all consumers on the Four Pole line when they tapped the utility lines. In reversing this order the court held that the supplemental contract requiring the distributing company to bear the loss from leakage of its lines was not unreasonable or discriminatory as between the individual consumers of the Four Pole Company, and that the commission was without authority to enter the order disregarding such contract, since no question under its jurisdiction (under this section of the act) was involved. It is difficult to assign such cases as this one definitely to the category of "regulation" cases, or not, since many of them involve possible questions of definition of utilities under the commission's jurisdiction, and of their holding out, as well. This case might well have turned on the point of holding out by

---

<sup>110</sup> 105 W. Va. 629, 143 S. E. 357 (1928).

the utility to serve the Four Pole consumers, but is included here because the actual decision was based on this section of the statute.

Another limitation on the jurisdiction of the commission to enter such orders was laid down in *Chesapeake & O. R. R. v. Public Service Comm.*<sup>111</sup> There the Commission ordered the C. & O. to carry the passengers in the "Wheeling Sleeper" daily from Huntington to Charleston without requiring them to change cars, after the B. & O. had carried them from Wheeling to Huntington. The contention was that forcing such passengers to change at Huntington was discriminating against the connecting carrier's passengers. It appeared that the C. & O. furnished adequate sleeper facilities between Huntington and Charleston and that carrying the extra car would entail a pecuniary loss not justified (the court concluded) by the circumstances. The order was therefore suspended, with a *caveat* in a dictum that the pecuniary loss alone, or the burden on interstate commerce alone, would not have sufficed to overthrow it.

It is difficult, as a matter of logical organization, to differentiate the cases in this section involving the validity of commission orders from those treated in the sections on the jurisdiction of the commission, or to keep those involving utility regulations entirely separate from those under the discrimination section, below; however, since the cases arise under different sections of the act, and since the court regards the provisions as distinct, it seems best to treat them under different headings, with cross-references where the same cases arise under two heads. The section on discrimination involves primarily cases on rate discrimination, and touches those on service discrimination, treated here, only by analogy.<sup>112</sup>

5. *Discrimination, Passes, and Reduced Rates.* The statutory provision as to discrimination describes in detail and forbids special rates, rebates, and other devices by which any shipper or other person may be charged more or less than others for substantially the same service, rendered under similar circumstances. No person served may be granted any undue preference or advantage, or be subjected to any undue prejudice or disadvantage, by any utility under the act. These provisions, however, are subject to an exception permitting common carriers to grant free passes or free or reduced rates for persons connected with the granting company, or their families, or for persons in religious, charitable, or literary

---

<sup>111</sup> 78 W. Va. 667, 89 S. E. 844 (1916).

<sup>112</sup> See *Morgantown v. Hope Natural Gas Co.*, 1 Pub. Serv. Comm. Dec'n's 555 (1917) for an example of the treatment by the commission of a problem of forced service by a utility.

pursuits, and to contract with other carriers for the exchange of services or for reciprocal passes for their employees. The cases to be dealt with involve the first two provisions, but not the exception, which has been cited but not questioned. The section on service prejudice falls more nearly under the cases on service regulation, and is not particularly important in this topic.<sup>113</sup>

The limits of the judicial definition of the term "undue or unreasonable advantage", as to what will not be permitted, and what will be deemed a reasonable classification, are indicated by the cases of *Elk Hotel Co. v. United Fuel Gas Co.*,<sup>114</sup> and *United Fuel Gas Co. v. Public Service Comm.*<sup>115</sup> In the *Elk Hotel* case the gas company offered one rate to domestic consumers and another to manufacturing establishments and other large plants, the basis of classification being the type of heater used. Hotels using grates or stoves like those used by domestic consumers were charged a higher rate than those equipped with boilers for steam heat. On the claim of the Elk Hotel that this was an undue discrimination, it was held that the statute of 1913 was not controlling, since it was passed after the litigation was commenced, but that it would be applied, since the parties must act under it in the future anyway. The court held the basis of classification adopted by the gas company to be proper, and that it gave no "undue or unreasonable advantage" under the statute. Since this hotel could change its heating system and obtain the reduced rate, and since the classification was according to circumstances directly affecting the nature of the service the company must render (granting lower rates where the connections were simpler and more up-to-date), no complaint could be made. The court relied on two cases which held that reduced rates for party tickets gave no manifest advantage or disadvantage to any class, and that no complaint might be made against such a classification, in the courts.<sup>116</sup> The analogy may seem strained, and is certainly not clearly enunciated in the opinion, but may be stated as the difference between one big service, to a boiler, or to a party, and many little services, to room-grates, or individual passengers.

<sup>113</sup> W. Va. Acts 1913, c. 9, §§ 6, 7, 20; § 20 was amended as to certain details by W. Va. Acts 1929, c. 59. All these provisions are contained in W. VA. REV. CODE (1931) c. 24, art. 3, §§ 2, 4.

<sup>114</sup> 75 W. Va. 200, 83 S. E. 922 (1914).

<sup>115</sup> 73 W. Va. 571, 80 S. E. 931 (1914). The opinion contained a long discussion of the jurisdiction of the commission in cases of this sort (see section 1 *supra*).

<sup>116</sup> *Interstate Commerce Comm. v. Baltimore & Ohio R. R.*, 145 U. S. 263, 283, 36 L. Ed. 699 (1892), and *Interstate Commerce Comm. v. Cincinnati, etc. Ry. Co.*, 162 U. S. 184, 16 S. Ct. 700, 40 L. Ed. 935 (1896). The latter case seems to have been mis-cited on the point, but the former is authority.

The analogy of course fails if the hotel takes care of its own internal connections, as it did not in this case.

In *United Fuel Gas Co. v. Public Service Commission*, the alleged discrimination was a lower rate for those with whom the company had long-term contracts. The court held that an order of the commission to the gas company to cease these practices would not be suspended, although the court seemed to feel that "the proposition that the nature of the gas business furnished reasonable justification for the discrimination complained of" had "some support in the decisions". The discrimination was held to be sufficiently unreasonable to justify the commission order condemning it. This case would of course be stronger authority as to the classification basis of exclusiveness of contract or contract security if a contrary holding of the commission had been reversed, but such cases are *rarae aves* in the West Virginia reports, and so far as law in action is concerned today, this type of classification is unlawful.

In the case of *Charleston v. Public Service Commission*,<sup>117</sup> the city granted a franchise to a water company on condition of free water service for municipal purposes. The commission seven years later annulled the contract in an order fixing the water company's rates, and ordered the company to charge the city regular rates. The city in addition to a protest against the rates set, entered a claim that the order impaired the obligation of contract, and that it violated the state constitution in invalidating a municipal act. The court held that the water company had no power to grant such a free service contract, and that the commission's order was proper. As to the conflict of powers, it was said that where the municipal proprietary power comes into conflict with the police power of the state, exercised by the commission here, there must be a clear showing of the power of the municipality to make such a contract, in order to limit the power of the commission. It was decided after an examination of the charter of Charleston, that there was no such showing, and that therefore the contract must fall under the commission order, and that since it was a contract improperly entered into by the city, the city might not raise the point under the Federal Constitution. The syllabus paragraph on the last point was that where the police power of the state is exercised to overthrow a contract, the federal guarantee is not violated — a misleading statement of the holding, but probably sufficient for practice, since the result is to throw out this sort of arrangement.

Several cases have raised the question of the power of the com-

---

<sup>117</sup> 86 W. Va. 536, 103 S. E. 673 (1920).

mission to invalidate contracts for free passes existing prior to the passage of this section of the act. The most important of these is perhaps *Shrader v. Steubenville, etc., Traction Co.*<sup>118</sup> There the plaintiff had been given a life pass over a toll bridge as part of his compensation on a materials contract in connection with the construction of the bridge, in 1895. In 1917 the bridge was conveyed to the defendant street-car company, which proceeded to charge plaintiff regular rates for crossing the bridge. Plaintiff sued to enjoin any requirement that he pay toll, or interference with his free use of his pass over the bridge. The court affirmed a holding for defendant, saying that the pass had been invalidated by the Public Service Commission Act.

The bridge in question was over the Ohio River, and a street-car line ran over it. It was contended that the bridge was an instrumentality of interstate commerce, and not subject to the state's control. The court held it to be properly brought under the Public Service Commission's jurisdiction, after a consideration of the Supreme Court cases on the point. It may be well to review those cases briefly here, although they are beyond the scope of this paper, not arising under West Virginia law, since they directly controlled the holding in this case.

That a bridge such as this is an instrumentality of interstate commerce was settled in *Covington & C. Bridge Co. v. Kentucky*,<sup>119</sup> which held that Kentucky could not regulate tolls on such a bridge to the extent of cutting off Ohio's corresponding right, by prescribing round-trip fares, the attempted regulation being an extraterritorial control over interstate commerce even though Kentucky did own the whole Ohio at that point (corresponding to West Virginia's position in the principal case). The Interstate Commerce Commission would control the bridge if it were used in connection with any railroad.<sup>120</sup> But the case of *Omaha & Council Bluffs Street Ry. v. Interstate Commerce Comm.*,<sup>121</sup> settled the status of street-car lines such as the traction company here as excluded from the Interstate Commerce Act provisions. Furthermore, the case of *Port Richmond etc. Ferry Co. v. Board of Chosen Freeholders*,<sup>122</sup> decided after the *Covington Bridge* case, held that in the absence of congressional action, a state may regulate inter-

---

<sup>118</sup> 84 W. Va. 1, 99 S. E. 207 (1919).

<sup>119</sup> 154 U. S. 204, 14 S. Ct. 1087, 38 L. Ed. 962 (1893).

<sup>120</sup> Act to Regulate Commerce, 24 STAT. 379, 381, §§ 1, 6. "The term 'railroad' shall include all bridges and ferries operated in connection with any railroad."

<sup>121</sup> 230 U. S. 324, 33 S. Ct. 890, 57 L. Ed. 1501 (1913).

<sup>122</sup> 234 U. S. 317, 34 S. Ct. 821, 58 L. Ed. 1330 (1914).

state ferry rates from its shore. There is no clear indication, the West Virginia court decided, as to the extent of the limitation placed on the *Covington Bridge* case by the *Port Richmond Ferry* case, but due to the fact that bridges and ferries serve the same purpose, and that they are treated alike in the West Virginia Public Service Commission Act, it was held that this bridge was included in the terms of that act, at least as to rates from the West Virginia shore. It seems that the result could have been reached without recourse to the ferry analogy from the act, or even to the *Port Richmond* case, by a strict and literal reading of the *Covington* case language and holding. However, the result as reached is not subject to criticism on this point.

Having determined that the bridge was under the jurisdiction of the commission, the question still remained as to the validity of the traction company's action in canceling the pass. On this point the court relied heavily on a decision handed down the previous year, involving almost the same point. In *Bell v. Kanawha Traction & Elec. Co.*,<sup>123</sup> and in *Dorr v. Chesapeake & O. Ry.*,<sup>124</sup> the facts were the same. The railroad in each case granted a lifetime free pass as part or all of the consideration for a grant of a right of way to the railroad over the farm of the person issued the pass. After the Hepburn Act<sup>125</sup> and the Public Service Commission Act the carrier rescinded the pass, and the holder sued in equity to enjoin such rescission, or, as alternative relief, to obtain a cancellation of the deed to the right of way. It was held that the legislation in question rendered the pass illegal, that specific performance of the contract might not be had, and that the cancellation of the deed would not be ordered, where the nonperformance of the contract on the railroad's part was due to the statutory prohibition, since such legislation, a proper exercise of the police (or commerce) power, was not an impairment of the constitutional liberty of the citizen to contract, and operated as a supervening impossibility of completing performance. The *Dorr* case relies entirely on the federal legislation, while the *Bell* case, not involving an interstate railroad, assigns, however, both grounds. The substance of their holdings is identical, and authority for the court in the *Shrader* case.

The court in the *Shrader* case, having determined that the traffic in question was subject to the control of the commission,

---

<sup>123</sup> 83 W. Va. 640, 98 S. E. 885 (1919).

<sup>124</sup> 78 W. Va. 150, 88 S. E. 666 (1916).

<sup>125</sup> An Act to Amend the Interstate Commerce Act, 34 STAT. 584, § 6 (1906).



under the Constitution and the West Virginia act, and that under West Virginia decisions the pass had been rendered void by the act, excusing performance of the contract of the traction company, had solved the problem of the case. The rationale of the court's conclusion, however, was not that spelled out above. The process analyzed above was used to clear away the difficulties in the way of this decision: the Public Service Commission Act was passed, as to the section in question, to insure uniformity of charges of companies under the act; to effectuate uniformity there must be an inflexible standard of measurement, and the only possible standard must be expressed in terms of the medium of exchange, money; therefore the issuance and use of passes constitutes a violation of this regulation, and is invalid.

In *State v. Ankrom*,<sup>126</sup> the defendant was indicted for procuring a pass otherwise than under the terms of the statute, and riding on it. On appeal the court held that this was an indictable offense, under the section making any violation of the terms of the act a misdemeanor, and this section limiting the issuance of passes and forbidding discrimination. A limitation on this doctrine, however, is to be found in *Comisky v. Norfolk & W. Ry.*<sup>127</sup> There a railroad conductor arrested a passenger for nonpayment of fare, and the passenger subsequently sued for false arrest. The carrier did not seek to justify under the *Ankrom* doctrine and under the provisions of the Interstate Commerce Act corresponding to the sections of the state act invoked in the *Ankrom* case. It was held that for criminal action for a violation of those statutory provisions there must be, either directly or indirectly, joint participation of carrier and passenger in such violation, and that the mere attempt of the plaintiff here to ride free was not a crime for which he might be arrested. It is not clear how this decision squares with the *Ankrom* case; it may be that the lack of *mens rea* here inspired the decision, or the cases may well be inconsistent, since there was no easily discernible action of the railroad in the *Ankrom* case.

It is difficult to deduce from the decisions discussed here any definite pattern of practice as to discrimination. There seems to be little basis for a distinction between a discrimination in favor of quantity contracts, and one in favor of long-term contracts, although it is true that the service rendered at one time by the utility varies in one case and not in the other. It is difficult to draw a line between procuring a pass and merely failing to pay

---

<sup>126</sup> 86 W. Va. 570, 103 S. E. 925 (1920).

<sup>127</sup> 79 W. Va. 148, 90 S. E. 385 (1916).

for passage; yet in one case there is a clearer showing of criminal intent than in the other, and neither decision seems particularly shocking. None of the cases decided under this section, standing alone, may be severely criticized, and each by itself seems in line with cases in other jurisdictions. Therefore the lack of pattern is more likely due to ineffective analysis than to judicial inconsistency.<sup>128</sup>

*To be continued.*

---

<sup>128</sup> Due to the fact that railroad regulation predated that of other utilities by several decades, so far as statutes are concerned, the provisions on our books for railroad regulation are scattered, and not classifiable as part of the Public Service Commission Act, it seems best not to deal with them in detail here, but merely to cite them as part of the public utility law administered by the commission.

W. VA. CONST. (1872) art. XI, §§ 7-11, deals primarily with railroads, containing various provisions as to reports, enforcements of judgments, stations, and corporate organizations. Section 12 affects the eminent domain rights of railroads, subordinating them to those of the state. Statutory provisions concerning railroads were passed in 1872, 1881, 1895, and 1917. These have been consolidated into W. VA. REV. CODE (1931) c. 31, art. 2. These provisions constitute railroads common carriers, with the duties and liabilities pertaining to that classification; delimit the powers of railroad corporations sharply, especially as to commercial transactions (necessary, in the early days of the state); lay down rigid requirements as to the contents of railroad charters, which must be filed together with maps and profiles of territories through which lines run; specify rights of precedence at crossings, and procedure in such cases (however, these provisions seem to have had no actual effect on the decision of tort cases); and provide for change of corporate structure and safeguard corporate status of all railroad operators (though this seems pointless now that incorporation has been made easy, the legislature refused to accept the suggestion of the revisers to omit this provision). In other respects, railroads are subject to the Public Service Commission Act, and as will be seen from the cases, their control forms a large part of the business of the commission. The court and legislature have displayed some vacillation as to the proper status of motor carriers under the act. It has been contended, not without some force, that this was due to the fact that public ideals were in a state of flux at the time the early motor carrier cases came before the court. See Hardman, *The Changing Law of Competition in Public Service* (1927) 33 W. VA. L. Q. 219, (1928) 34 *id.* at 123. This argument, which seeks to generalize the problem of the three cases (*Princeton Power Co. v. Calloway*, 99 W. Va. 157, 128 S. E. 89 (1925); *Reynolds Taxi Co. v. Hudson*, 103 W. Va. 173, 136 S. E. 833 (1927), and *Monongahela West Penn P. S. Co. v. Public Service Comm.*, 104 W. Va. 183, 139 S. E. 744 (1927) noted in (1928) 34 W. VA. L. Q. 198 and (1928) 76 U. OF PA. L. REV. 456, which turn the tide toward exclusive franchises away from free competition, loses some of its force when it is noted that the legislature had some difficulty even in the next decade in deciding the exact status of the motor carrier, but had no trouble with other classifications of utilities. In 1931 an exception was put into the act in favor of motor carriers, which was removed in 1935, and in 1937 the present Motor Carriers Act was added, fixing the status of those carriers under the commission as the same as that of other utilities, and crystallizing the effect of the trilogy which overrule *Clarksburg Elec. Light & Power Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994 (1900) which was the leading case forbidding exclusive franchises. This statute is to be found in W. Va. Acts 1937, c. 50.