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PUBLIC UTILITIES — MUNICIPAL CORPORATIONS — POWER OF MUNICIPAL CORPORATIONS TO REGULATE PUBLIC UTILITY RATES — FINALITY OF SUCH REGULATION — Since the decision in the case of *Munn v. Illinois*¹ it has been settled that where property is devoted to a public use and is charged with a public interest, the state may prescribe reasonable rates for such public service. However, the question then arises as to the manner in which the state may prescribe these rates, through what agencies it may act, and the effect on the total picture of rate regulation within a state after there has been action by one of the proper agencies. The answers to these questions depend to

¹ 94 U. S. 113 (1876).

a large extent upon the particular statutes in any one state. The extent of this comment is not to offer a compilation of statutes, but rather to present a few illustrative situations, centering for the most part about the actions of municipal corporations in this field.

The weight of authority is that a municipal corporation in the absence of state action may make a contract with a public utility fixing rates to be charged to the inhabitants of the municipal corporation, and such contract is binding between the parties. But the state has the power to increase those rates without infringing the constitutional guaranty.² This power, being a legislative function, may be lodged in a public service commission.³ The state may change the terms of the contract even though it has already been acted upon.⁴ The right of the state to so change this contract is based either on the paramount police power of the state to regulate the rates of a public utility,⁵ or, if the change is prejudicial to the municipality, upon the right of the state as principal to waive its rights in a contract made by the city as agent of the state.⁶ In the absence of any delegated authority from the legislature to the municipal corporation, either expressly or impliedly, the municipality has no power to fix rates other than by contract.⁷ But the power to fix such rates for public utility service, being legislative in its character, may constitutionally be vested by the legislature in a municipal corporation.⁸ And the effect of a contract made between a city and a public utility pursuant to delegated legislative authority is to suspend, during the life of the contract, the governmental power by legislative action of fixing and regulating the rates.⁹ However, in general this power in a municipal corporation to fix rates by irrevocable contract must be clearly given by the legislature, and it will not be implied from the power granted to the municipality to control its streets and regulate the use thereof by a public utility.¹⁰

² 3 A. L. R. 730 (1919); *City of Dawson v. Dawson Tel. Co.*, 137 Ga. 62, 72 S. E. 508 (1911).

³ 5 A. L. R. 36 at 60 (1920); *Public Service Comm. v. United Ry. & Elect. Co. of Baltimore*, 155 Md. 572, 142 A. 870 (1928).

⁴ *Pioneer Tel. & Tel. v. State*, 33 Okla. 724, 127 P. 1073 (1912).

⁵ 3 A. L. R. 730 at 738 (1919).

⁶ 3 A. L. R. 730 at 742 (1919).

⁷ 43 L. R. A. (N. S.) 994 (1913); *St. Mary's v. Hope Natural Gas Co.*, 71 W. Va. 76, 76 S. E. 841 (1912).

⁸ *Home Tel. & Tel. v. Los Angeles*, 211 U. S. 265, 29 S. Ct. 50 (1908).

⁹ *Detroit v. Detroit Citizens St. Ry.*, 184 U. S. 368, 22 S. Ct. 410 (1901); *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 27 S. Ct. 762 (1906); *St. Cloud Public Service Co. v. St. Cloud*, 265 U. S. 352, 44 S. Ct. 492 (1923); *Railroad Commission of California v. Los Angeles R. Corp.*, 280 U. S. 145, 50 S. Ct. 71 (1929).

¹⁰ 3 A. L. R. 730 at 732 (1919).

The Michigan constitution gives to municipal corporations the right to control their streets, and the consent of the municipality must be obtained by a public utility before the utility may use the streets for the purpose of carrying on its business.¹¹ The courts have held that from this power is implied the power in a municipality to contract with a public utility for the rates to be charged to the city's inhabitants for the utility's service.¹² This franchise or agreement, in order to be valid, must be revocable at the will of the city, or be approved by a vote of three-fifths of the electors of the municipality.¹³ The only power that a Michigan municipality in general has to regulate rates is this implied power derived from the constitutional guaranty of the right to control their streets in the use thereof by a utility. It does not have the power to legislate as to rates, that power having been lodged in the Public Utilities Commission.¹⁴

In *Detroit v. Public Utilities Commission*¹⁵ the Michigan Supreme Court held that a consent decree between the public utility and the city is not such a franchise or agreement as is provided for in the constitution,¹⁶ and for that reason the Public Utilities Commission had authority to intervene on the petition of a consumer and itself set the rates for the utility.¹⁷ This consent decree was not a valid franchise or agreement because it was not revocable at the will of the city, nor had it been approved by a three-fifths vote of the electors of the city. If this had been a valid franchise or agreement between the city and the public utility, either because revocable at the will of the city, or approved by a three-fifths vote of the electors of the city, the Public Utilities Commission would have been prohibited from interfering to set rates during the lifetime of that agreement.¹⁸ The maximum duration for such agreement is thirty years.¹⁹ This seems to be the general provision for all cities, villages, and townships of the state.

But as to fourth class cities²⁰ in Michigan, a special rule has been

¹¹ Mich. Const. (1908), art. 8, § 28.

¹² *City of Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146, 166 N. W. 998 (1918); *City of Niles v. Michigan Gas & Elect. Co.*, 273 Mich. 255, 262 N. W. 900 (1935); *Detroit v. Public Utilities Comm.*, 288 Mich. 267, 286 N. W. 368 (1939).

¹³ Mich. Const. (1908), art. 8, § 25; *Detroit v. Public Utilities Comm.*, 288 Mich. 267, 286 N. W. 368 (1939).

¹⁴ *Detroit v. Public Utilities Comm.*, 288 Mich. 267, 286 N. W. 368 (1939).

¹⁵ 288 Mich. 267, 286 N. W. 368 (1939).

¹⁶ Mich. Const. (1908), art. 8, § 28.

¹⁷ Mich. Comp. Laws (1929), § 11009, as amended by Pub. Acts (1931), No. 138.

¹⁸ *Id.*

¹⁹ Mich. Const. (1908), art. 8, § 29.

²⁰ Fourth class cities are incorporated cities having a population not exceeding

provided. The Fourth Class Cities Act²¹ provides that the council of the city may contract for a period of time not exceeding ten years for the furnishing of gas or electricity, or both, to the inhabitants of the city upon such terms and conditions as may be agreed.²² In *City of Niles v. Michigan Gas & Electric Company*²³ it was held that this grant to the city by the legislature of power to fix rates for a public utility is an exercise of the reserved paramount power of the legislature and supercedes the power in the municipal corporation to fix rates implied from the constitution. This statute, which was passed before the adoption of Article VIII, section 28, of the Michigan Constitution of 1908²⁴ was not so repugnant to that provision of the constitution that it was repealed by that constitutional provision. Nor did the constitutional provision withdraw from the legislature the power to delegate to municipal corporations the power to grant franchises, but merely established limitations on such delegable power to grant franchises.²⁵ And as the provision in the constitution to the effect that franchises granted by a municipal corporation regulating rates shall not be for a longer period than thirty years²⁶ is a limitation and not a grant of power, a city of the fourth class is limited in its regulation of public utility rates by contract to a period of ten years.²⁷

The court in the *City of Niles* case makes some very sweeping statements to the effect that the implied power granted by the Michigan constitution to a municipality to regulate rates is inoperative when the legislature exercises its reserved governmental power; and that this implied power would not empower a city to make an irrevocable thirty year contract for rates even by vote of three-fifths of the electors of the city, because such contract would be subject to annulment by the legislative exercise of the superior power of the state. The meaning and authority of these statements is doubtful. If they are taken to apply to all cities, they may very well be dictum, because the court was dealing only with a fourth class city to which special provisions are applicable. At any rate, these statements, whatever their intended meaning and scope might be, were ignored by the court in *Detroit v. Public*

10,000. Mich. Comp. Laws (1929), § 1796.

²¹ Id., c. 48, §§ 1796-2227.

²² Id., § 2107.

²³ 273 Mich. 255, 262 N. W. 900 (1935).

²⁴ The general power of a municipal corporation in Michigan to contract for rates is implied from this article and section of the Michigan Constitution.

²⁵ *City of Niles v. Michigan Gas & Elect. Co.*, 273 Mich. 255, 262 N. W. 900 (1935).

²⁶ Mich. Const. (1908), art. 8, § 29.

²⁷ *City of Niles v. Michigan Gas & Elect. Co.*, 273 Mich. 255, 262 N. W. 900 (1935).

Utilities Commission in dealing with a city not of the fourth class. Inasmuch as municipalities have this constitutional power to regulate the rates of a public utility, it seems doubtful that the court should mean that this power, or the contract resulting from its exercise, could be totally abridged by action of the legislature. If such is the meaning, the constitutional guaranty to these municipalities of such power has been practically interpreted away.

In Ohio the rule seems to be definitely settled that municipalities have the power to make inviolable contracts fixing rates to be charged by a public utility.²⁸ This power arises both from the constitution²⁹ and by statute,³⁰ and is express, not implied. Under the statutory provision the municipality has two separate powers. In the first place it may regulate such rates by an ordinance granting a franchise, this being an exercise of the police power.³¹ Secondly, it may regulate such rates by a contract with the public utility, not to exceed ten years; the contract is deemed to become effective upon the public utility's filing its written acceptance of the price fixed by the municipality.³² Such a contract between the municipal corporation and the public utility suspends the exercise by the municipality of its police power to fix rates by ordinance.³³

In *City of Cincinnati v. Public Utilities Commission*³⁴ it was held that where a municipal corporation had granted a twenty-five year franchise to a public utility, the city had the power upon the expiration of the ten-year rate limitation to set the rates by ordinance for the remaining period of the franchise without the utility's consent thereto. But this decision was overruled in the later case of *United Fuel Gas Company v. City of Ironton*.³⁵ It was there held that although the municipal corporation could grant a franchise for twenty-five years, it could not compel the public utility to accept a rate for that length of time. And if upon the expiration of a rate contract based on ordinance the utility refuses to accept the new rate ordinance, the public utilities

²⁸ 3 A. L. R. 730 at 736 (1919). At one time Virginia conferred the same power on its municipal corporations, *Commonwealth ex rel. Clifton Forge v. Virginia-Western Power Co.*, (Va. St. Corp. Comm. 1918) P. U. R. 1918F 791, but since the case of *Victoria v. Victoria Ice, Light & Power Co.*, 134 Va. 134, 114 S. E. 92 (1922), this power has been held to be no longer vested in the municipalities.

²⁹ Ohio Const. (1851), art. 18, §§ 3, 4; *Cincinnati, N. & C. Ry. v. Cincinnati*, (C. C. A. 6th, 1934) 71 F. (2d) 124.

³⁰ Ohio Gen. Code Ann. (Page, 1939), §§ 3982, 3983.

³¹ *Id.*, § 3982.

³² *Id.*, § 3983.

³³ *Ohio River Power Co. v. Steubenville*, 99 Ohio St. 421, 124 N. E. 246 (1919).

³⁴ 98 Ohio St. 320, 121 N. E. 688 (1918).

³⁵ 107 Ohio St. 173, 140 N. E. 884 (1923).

commission has jurisdiction to determine the reasonableness of a rate schedule filed by the public utility despite the fact that the twenty-five year franchise reserved to the city the power to regulate those rates, such reservation for a period in excess of ten years being void.

According to statute,³⁶ the jurisdiction of the public utilities commission attaches to hold a hearing upon the rates set by a municipal ordinance after the expiration of a contract between the municipal corporation and the public utility upon application within sixty days by either the public utility or the consumers of the service given by the public utility. And if the city fails entirely to set a rate within sixty days after the expiration of a lawful rate in respect to a public utility furnishing water to the inhabitants of the city, the public utilities commission has the power, upon the application of the utility or the consumers, to establish that rate. Further, any public utility may apply to the public utilities commission for an increase in its rates, and the public utilities commission has the power to hold a hearing, and establish a rate³⁷ unless there is an existing rate lawfully established by the municipal corporation, in which case the statute conferring authority on the commission ceases to apply.³⁸ But the public utilities commission has no power over rates agreed upon by a contract between the public utility and the municipality under the constitutional authority of the city.³⁹ Neither does the commission have power to authorize a public utility to charge rates higher than those set by an existing contract between the municipality and the utility.⁴⁰

In the recent case of *City of Norwalk v. Public Utilities Commission*,⁴¹ the city and the utility had a rate contract which expired without the city's establishing another rate within the one-year period prior to the expiration of that contract, as provided by statute.⁴² The utility then filed an application with the public utilities commission for an increase of its rates, pursuant to the statutory provision.⁴³ The court held that although the public utility is given the right by the statute to apply for a rate increase when the city has not adopted an ordinance setting rates, that application does not become an exclusive mode of rate determination, and does not prevent the city from acting under

³⁶ Ohio Gen. Code Ann. (Page, 1939), §§ 614-44, 614-47.

³⁷ Id., § 614-20.

³⁸ Id., § 614-47.

³⁹ *Link v. Public Utilities Comm.*, 102 Ohio St. 336, 131 N. E. 796 (1921).

⁴⁰ *Cleveland & Eastern Traction Co. v. Public Utilities Comm.*, 106 Ohio St. 210, 140 N. E. 139 (1922).

⁴¹ *City of Norwalk v. Public Utilities Comm.*, 133 Ohio St. 335, 13 N. E. (2d) 721 (1938).

⁴² Ohio Gen. Code Ann. (Page, 1939), § 614-44.

⁴³ Id., §§ 614-20, 614-44.

the powers given it.⁴⁴ And because the city not only has authority to regulate rates by ordinance passed one year prior to the expiration of any rate contract, but also the power to regulate by ordinance "at any other time authorized by law,"⁴⁵ the application by the utility to the commission did not prevent the city from passing an ordinance setting the rate prior to the commission's decision on the utility's application. Such application should then be dismissed, or be converted into a review of that rate under the authority of the statute.⁴⁶ Although nothing was said about the power of the city to establish the rate after the commission had approved the application of the utility, it would seem from the statutory provision giving to the city the power to regulate the rates at any time authorized by law, and the trend of this opinion, that the power of the city would be superior even in that situation, and that it could by ordinance alter the rate established by the public utilities commission.

Prior to 1913, the state of Indiana had delegated to its cities the power to fix by contract or franchise the price to be charged by a public utility for its services.⁴⁷ However, in 1913 the Shively-Spencer Act⁴⁸ was passed, the effect of which was to take from the cities all control over public utilities, and such utilities are now operated through the Public Service Commission of the state.⁴⁹ The statute which gave to the cities the right to set public utility rates by contract has never been expressly repealed, but in view of these decisions since the passage of the Shively-Spencer Act, its effect has been rendered nugatory.

The arrangement in New York is very similar to that in Indiana in that practically complete authority over the rates to be charged by a public utility is vested in the public service commission of that state.⁵⁰ By virtue of that authority the public service commission has the power to change the rates charged by a public service corporation despite an existing contract between the city and the utility establishing those rates. Such action does not violate the federal constitutional guaranty of the inviolability of contract,⁵¹ since the court takes the position that the

⁴⁴ *Id.*, §§ 3982, 3983.

⁴⁵ *Id.*, § 614-44.

⁴⁶ *Id.*

⁴⁷ *Ind. Stat. Ann. (Burns, 1933)*, § 48-1407 (36) (Acts 1905, c. 129); *City of Richmond v. Richmond Natural Gas Co.*, 168 *Ind.* 82, 79 *N. E.* 1031 (1906).

⁴⁸ *Ind. Acts (1913)*, c. 76. The public service commission thereby created was reorganized in 1933. *Ind. Acts (1933)*, c. 93, *Stat. Ann. (Burns, 1933)*, § 54-101 et seq.

⁴⁹ *Williams v. Citizens' Gas Co.*, 206 *Ind.* 448, 188 *N. E.* 212 (1933); *City of Huntington v. Northern Indiana Power Co.*, 211 *Ind.* 502, 5 *N. E. (2d)* 889, 6 *N. E. (2d)* 335 (1936).

⁵⁰ *N. Y. Consol. Laws Ann. (McKinney, 1939)*, tit. 47, § 66 (12).

⁵¹ *U. S. Const.*, art. 1, § 10.

provisions of the statute are written into every agreement between the city and the utility and thus the contract itself provides for the change in rates so established by the method provided in the statute.⁵² However, a contract between a city and a transit company providing for the rates to be charged by the transit company, where such contract is made under special authority granted to the city by statute, is not subject to change by the public service commission.⁵³

There seems to be no unanimity among the states as to the respective roles to be played by municipalities and public service commissions in this field. A few states have constitutional provisions like those in Ohio⁵⁴ and Michigan⁵⁵ by which the right of the municipal corporation to regulate rates is guaranteed against reduction beyond a certain limit. However, most states govern this situation by statute, and the tendency seems to be to place the paramount control in a commission. Whether such a tendency is wise is doubtful. At the time that this power was placed in the various commissions, it was done so on the belief that such a move would make for better administration of public utility rates. It was thought that to remove the control from the cities themselves would be to eliminate politics from the situation, and that a greater perspective could be obtained by a body not so closely connected with and interested in the outcome. But experience has shown that the state commissions may become involved in politics, and in addition there is often considerable delay in the adjudication of rate controversies. There is much to be said on the side of local control of public utility rates. The weightiest factor is the increased interest, and the corresponding increase in pressure placed on the authorities for a speedy settlement of a controversy over rates. At any rate it seems desirable to give municipalities the opportunity to regulate rates locally if they so desire.

John S. Pennell

⁵² *Town of North Hempstead v. Public Service Corp.*, 231 N. Y. 447, 132 N. E. 878 (1921); *Niagara, Lockport & Ontario Power Co. v. Seneca Iron & Steel Co.*, 128 Misc. 335, 219 N. Y. S. 418 (1926).

⁵³ *City of New York v. Prendergast*, 202 App. Div. 308, 195 N. Y. S. 815 (1922); *City of New York v. Interborough Rapid Transit Co.*, 136 Misc. 569, 240 N. Y. S. 316 (1930).

⁵⁴ Ohio Const. (1851), art. 18, §§ 3, 4.

⁵⁵ Mich. Const. (1908), art. 8, § 28.