Michigan Law Review

Volume 37 | Issue 6

1939

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PUBLIC UTILITIES — FRANCHISES — ENFORCEABILITY AGAINST UTILITY OF FRANCHISE PROVISION REGARDING RATES WHEN CITY IS NOT BOUND — The charter of the city of Texarkana, Texas, provided that none of the privileges usually granted public utilities should be enjoyed in the city except such as were permitted by franchise given by the city council, and that such franchises should expressly reserve the right of regulating the utilities.[1] The city entered a franchise agreement with respondent utility by which rates charged in the

[1] Secs. 160, 163, 163A, Charter of Texarkana, quoted in principal case, 59 S. Ct. 450, note 3.

Texas city were not to be higher than those charged in another part of the city which was in Arkansas. The Arkansas rates were lowered by judicial action,[2] and this proceeding was to enforce the lower rates in the Texas city in the future, and to recover for the Texas consumers excessive rates charged in the past. *Held*, that the provision of the franchise selecting the Arkansas charges as a minimum rate was not an abdication of regulatory power [3] that would void the contract, that the United States courts were obliged to follow local law in determining whether the utility was bound to the contract, and that under the law of Texas it was so bound even though the city was free to regulate by virtue of the provisions in its charter. *City of Texarkana v. Arkansas Louisiana Gas Co.*, (U. S. 1939) 59 S. Ct. 448.

The power to regulate rates of public utilities is part of the police power of the state, but generally speaking it may be contracted away, at least for a limited period of time, and a municipality may be empowered to bind the state to such a contract.[4] A municipality may also be authorized to enter contracts as to rates which are binding upon it, although the state, not having given its consent to be bound, remains free to regulate under its general police power.[5] It has been suggested that the same result would obtain even if the city did not have the power to contract, if the elements of estoppel which would be applied against a private corporation were found to exist.[6] On occasions when the courts have found that the municipalities are free to regulate regardless of such contracts, the utilities have contended that because of lack of mutuality they were not bound.[7] In cases of this type coming before the Supreme Court it has been

[2] See the history of the Arkansas litigation as given in the Court's opinion in the principal case.

[3] The city was given regulatory power by sec. 196 of its charter, quoted in the principal case, 59 S. Ct. 450, note 4.

[4] Freeport Water Co. v. Freeport, 180 U. S. 587, 21 S. Ct. 493 (1901); Detroit v. Detroit Citizens' Street Ry., 184 U. S. 368, 22 S. Ct. 410 (1902); Cleveland v. Cleveland City Ry., 194 U. S. 517, 24 S. Ct. 756 (1904); Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 27 S. Ct. 762 (1907); Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265, 29 S. Ct. 50 (1908); Burdick, "Regulating Franchise Rates," 29 YALE L. J. 589 at 591 (1920).

[5] Opelika v. Opelika Sewer Co., 265 U. S. 215, 44 S. Ct. 517 (1924); Southern Utilities Co. v. Palatka, 268 U. S. 232, 45 S. Ct. 488 (1925); Georgia Ry. & Power Co. v. Decatur, 262 U. S. 432, 43 S. Ct. 613 (1923); 33 HARV. L. REV. 97 (1919); 30 COL. L. REV. 527 at 532 (1930). Regulation by the state does not contravene the constitutional prohibition against impairment of contract. Puget Sound Traction, L. & P. Co. v. Reynolds, 244 U. S. 574, 37 S. Ct. 705 (1917); 28 MICH. L. REV. 774 (1930); 24 MICH. L. REV. 492 (1926); 20 MICH. L. REV. 224 (1921); 29 A. L. R. 356 (1924).

[6] Collier, "Franchise Contracts and Utility Regulation," 1 GEO. WASH. L. REV. 172, 299 at 325 (1933). See Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 45 N. E. 390 (1896); Mutual Life Ins. Co. v. Stephens, 214 N. Y. 488, 108 N. E. 856 (1915).

[7] San Antonio v. San Antonio Pub. Serv. Co., 255 U. S. 547, 41 S. Ct. 428 (1921), discussed in 30 COL. L. REV. 527 at 531 (1930); Railroad Commission of California v. Los Angeles Ry., 280 U. S. 145, 50 S. Ct. 71 (1929), noted 28 MICH. L. REV. 774 (1930), 10 BOST. UNIV. L. REV. 252 (1930), 19 NAT. MUN. REV.

pointed out that decision of the matter must follow state law,[8] but because there has usually been no state law on the question the Court has been forced to decide the issue as an original one.[9] In *Railroad Commission of California v. Los Angeles Ry.*,[10] the Court held that as it had previously decided that under the California law the city had no right to bind itself in such a fashion as would prevent its exercising regulatory power given in its charter,[11] the utility was not bound. As the Court did not seem to consider the possibility that the city might have been given the power to bind itself in its proprietary capacity although denied the right to suspend its regulatory power delegated by the state,[12] the conclusion that the city lacked the power to bind itself may have been hasty. Furthermore, as is pointed out in the dissent,[13] even if the city was not permitted to bind itself, it seems clear that it did have the power to contract in its right to grant franchises, and the grant of the privileges would stand as consideration for the promise to maintain certain rates. In the principal case there was state law on the point to which the Court could turn. While it had previously held that under Texas law the utility was not bound when the city was not,[14] since there was a subsequent Texas decision containing dicta to the effect that cities had the power to contract even though they were free to regulate,[15] and as the city charter contained language to this effect,[16] the Court was impelled to hold that under existing Texas law the utility was bound although the city was free to regulate.[17] Inability to enter a contract as to rates which was

51 (1930), 18 CAL. L. REV. 427 (1930), 7 N. Y. UNIV. L. Q. REV. 764 (1930), and discussed in 30 COL. L. REV. 527 at 532 (1930).

[8] Railroad Commission of California v. Los Angeles Ry., 280 U. S. 145 at 151, 50 S. Ct. 71 (1929), citing Georgia Ry. & Power Co. v. Decatur, 262 U. S. 432, 43 S. Ct. 613 (1923). The principal case relies on Erie R. R. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938), noted 36 MICH. L. REV. 1312 (1938), 47 YALE L. J. 1336 (1938), 86 UNIV. PA. L. REV. 896 (1938).

[9] In Railroad Commission of California v. Los Angeles Ry., 280 U. S. 145, 50 S. Ct. 71 (1929), Justice Brandeis, dissenting, thought that the cause should be remanded to the trial court for a decision on the state law.

[10] 280 U. S. 145, 50 S. Ct. 71 (1929).

[11] Home Tel.& Tel. Co. v. Los Angeles, 211 U. S. 265, 29 S. Ct. 50 (1908).

[12] Failure to explore this possibility seems strange in view of the fact that only a few years before this decision, in Southern Iowa Electric Co. v. City of Chariton, 255 U. S. 539, 41 S. Ct. 400 (1920), the Court seems to have appreciated the distinction between the power of a city to contract in its municipal capacity and the power to regulate by virtue of delegated legislative power. On this distinction see also, Wyoming v. Ohio Traction Co., 104 Ohio St. 325, 135 N. E. 675 (1922).

[13] Railroad Commission of California v. Los Angeles Ry., 280 U. S. 145 at 157, 50 S. Ct. 71 (1929). Both Justice Brandeis and Justice Stone make the point.

[14] San Antonio v. San Antonio Pub. Serv. Co., 255 U. S. 547, 41 S. Ct. 428 (1921).

[15] Dallas Ry. v. Geller, 114 Tex. 484, 271 S. W. 1106 (1925), reversing (Tex. Civ. App. 1922) 245 S. W. 254, noted 4 TEX. L. REV. 111 (1925).

[16] See note 1, supra.

[17] The city wished to have the rates set by the contract rather than through its exercise of the delegated regulatory power in order to avoid the issue of confiscation. That confiscation is no defense in such a case, see annotations, 6 A. L. R. 1659 (1920); 10 A. L. R. 1335 (1921).

binding on the city did not necessarily indicate lack of power to contract. The law of Texas, then, is declared to be that advanced in the dissent to *Railroad Commission of California v. Los Angeles Ry.* As a matter of legal analysis the result seems correct. As a matter of policy, the wisdom of the result is not yet clear. So long as franchise contracts simply provided for a flat rate to be charged, changes in conditions often made the contracts either unjust to the public or economically unsound as applied to the utilities,[18] and courts were properly anxious to release the parties from their bargains.[19] Experience and the development of new methods of drafting these agreements [20] have altered the picture to a certain extent. Modern critics assert the propriety of a certain degree of local control of utilities,[21] and if the newer types of franchise prove to be a suitable means of such control [22] the principal case may be important not only for its analysis of the conceptual problems involved, but also as a wise declaration of governmental policy.

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[18] 28 MICH. L. REV. 774 at 776 (1930).

[19] For a discussion from the standpoint of contract law, see 10 BOST. UNIV. L. REV. 252 (1930).

[20] BAUER, STANDARDS FOR MODERN PUBLIC UTILITY FRANCHISES (1930) (Public Administration Service, No. 17).

[21] Ibid., p. 10 ff.

[22] Ibid. On the other hand, it has been suggested that franchises of this type, necessarily being complex, will never be a satisfactory means of control. See WILSON, HERRING and EUTSLER, PUBLIC UTILITY REGULATION 32 (1938).