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THE FINALITY OF THE FILED RATE IN WEST VIRGINIA

THOMAS P. HARDMAN *

FEW propositions are better established at common law than that a public utility may exact only a reasonable rate and that a patron who has been compelled to pay more may maintain an action for the overcharge.[1] The first part of this proposition has been incorporated in almost so many words in our statute creating a public service commission and authorizing it to regulate rates.[2] The second part of this common-law rule was not, however, carried over in full into the statute,[3] and the question therefore arises as to what remedy, if any, a patron may now pursue when he has been required to pay an unreasonable charge. Does the fact that the challenged rate has been filed with the commission —and (1) approved, or (2) not disapproved—give it finality as to all services which have been rendered in accordance with its tenor?

At the outset it should be noted that the West Virginia statute, unlike the public service statutes of some states[4] and unlike the Interstate Commerce Act,[5] does not empower the commission to award reparation, *i. e.*, to upset the rate retroactively and permit a recovery of any provable overcharge.[6] Accordingly, the West Virginia Supreme Court of Appeals intimated in an early case that the patron's remedy, if any, must be before the courts.[7] But is there a judicial remedy? Does the administrative control completely supersede the common-law control on all questions involving the retroactive unreasonableness of the filed rate?

Basically the problem is, of course, one of statutory interpretation in the interrelated fields of public utility law and admin-

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1 West Virginia Transportation Co. v. Sweetzer, 25 W. Va. 434 (1885); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 436, 27 S. Ct. 350, 51 L. Ed. 553 (1907).

2 W. VA. REV. CODE (1931) c. 24, art. 3, § 1: "All charges, tolls and rates shall be just and reasonable."

3 W. Va. REV. CODE (1931) c. 24, art. 4, § 7, provides: "Any person, firm or corporation claiming to be damaged by any violation of this chapter by any public utility subject to the provisions of this chapter, may make complaint to the Commission, as provided herein, and bring suit in his own behalf for the recovery of the damages for which such public utility may be liable under this chapter in any circuit court having jurisdiction."

4 See *e. g.* ILL. REV. STATS. (1935) c. 111a, § 91; *cf.* IND. STATS. ANN. (Burns, 1926) § 12853.

5 49 U. S. C. A. § 16 (1) (1929).

6 See the provision of the West Virginia Code set out in footnote 3. Whether this provision authorizes a judicial recovery of an overcharge is a question discussed in the body of this article.

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istrative law. But what principle of construction governs the measure of supervision which is, or should be, left to the courts and to the administrative tribunal respectively?

One of the earliest cases in point, and a leading authority, is *T. R. Miller Mill Co. v. Louisville & Nashville R. R.*,[8] decided by the Supreme Court of Alabama in 1922. The statute there involved was somewhat more specific than the West Virginia statute, though otherwise similar in substance.[9] The rate in question had been filed with the appropriate administrative tribunal. Apparently the commission had not formally approved the rate. At least the evidence did not disclose the making of any formal order of approval.[10] In a court action for the difference between the alleged reasonable rate and the filed rate it was held that the filed rate whether reasonable or not was the only legal rate as to the past and therefore there could be no recovery. Said the court:

> "Manifestly there can be but one lawful rate in force at any given time, and that rate. . . is the rate which has been filed with and approved by the Commission, and published by the carrier. Behind that rate, so long as it remains unchanged, and so far as its application to specific shipments is concerned neither shipper nor carrier can go, and courts cannot inquire. . .
>
> "It seems to us that this proposition is self-evident and fundamental, and that it is the foundation of our regulatory system, without which it would fail in its primary purposes, which are to stabilize rates and charges, and to insure equality to shippers in their application."[11]

The general problem was presented to the Supreme Court of Appeals of Virginia in 1927 in *Mathieson Alkali Works v. Norfolk & W. Ry.*[12] There the state commission had approved a rate which

[7] See Wheeling Steel Corp. v. Public Service Comm., 90 W. Va. 74, 79, 110 S. E. 498 (1922): "In fact, the jurisdiction and authority of the Public Service Commission extends no further than to prescribe proper rates, and proper practices, and to direct the public service corporations to comply with them in the future." In the syllabus the court says: "The Public Service Commission of West Virginia has no authority to entertain a complaint for the purpose of determining that a public service corporation has charged rates in excess of those authorized, when it appears that the rate which it is contended was applicable, and which such corporation is charged with exceeding, is no longer applicable to the service rendered, and the decision sought could only be for the purpose of fixing a basis for recovery of the amount of the excessive charge."

[8] 207 Ala. 253, 92 So. 797 (1922).

[9] The applicable statutory provisions are set out in T. R. Miller Mill Co. v. Louisville & Nashville R. R., *supra*.

[10] *Id.* at page 256.

[11] *Id.* at page 256.

[12] 147 Va. 426, 137 S. E. 608 (1927).

was filed and collected. In refusing to permit a retroactive upsetting of the rate, the court said:

> "The common law right to recover for extortionate charges is taken care of under the Federal procedure by the power granted the Commission to declare existing rates unreasonable *ab initio*, and award reparation, followed by right of recovery in the common law courts, [13] while in Virginia the common law rights are protected by the prescribing of rates by the Commission, which carry the weight of conclusiveness as to their reasonableness, as long as they are in force.[14]
>
> "There is, therefore, a clear distinction between the Federal law and the Virginia law with reference to the inauguration of rates, and we think the effect of the authority and duties conferred and imposed upon the Corporation Commission here, is to give to legally established rates a sanction which puts beyond question the reasonableness of such rates as long as they remain in force."[15]

A very important but reverse angle of this question was raised in *Minneapolis, St. Paul, etc. Ry. v. Washburn Lignite Coal Co.*[16] In that case there was a legislatively-made rate which the utility claimed deprived it of property without due process. The highest court of the state held otherwise, and ordered enforcement.[17] The rate was filed and charged. The United States Supreme Court later held that the filed rate which the carrier was being compelled to apply deprived the utility of property without due process.[18] After the United States Supreme Court had so held, the utility sued a patron to recover the difference between the filed confiscatory rate, which had been compulsorily collected, and a reasonable rate. But, though the filed rate was unconstitutional and therefore, in the ordinary language of the cases, "void", the court held that the utility was not entitled to reparation.[19] The result reached is undoubtedly correct. As the Supreme Court of North Dakota said in disposing of the claim for reparation:

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[13] The power of the Interstate Commerce Commission to award reparation has been otherwise indicated since this Virginia decision was handed down. See Arizona Grocery Co. v. Atchison, Topeka & Santa Fé Ry., 284 U. S. 370, 52 S. Ct. 183, 76 L. Ed. 348 (1932).

[14] Citing "C. & O. Ry. v. C. V. L. Co., 112 Va. 540, 72 S. E. 116."

[15] Mathieson Alkali Works v. Norfolk & W. Ry., 147 Va. 440-441, 137 S. E. 608 (1927).

[16] 40 N. Dak. 69, 168 N. W. 684 (1918).

[17] State *ex rel.* McCue v. Northern Pac. Ry., 26 N. Dak. 438, 145 N. W. 135 (1914).

[18] See Northern Pac. Ry. v. North Dakota, 236 U. S. 585, 35 S. Ct. 429, 59 L. Ed. 735 (1915).

[19] Minneapolis, St. Paul *etc.* Ry. v. Washburn Lignite Coal Co., 40 N. Dak. 69, 76, 168 N. W. 684 (1918).

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"Sections 4339-4342 of the Revised Codes . . . require, among other things, that the carriers shall print and keep for public inspection schedules showing the rates which are in force at the given time, and they are required to file such schedules with the Railroad Commission. *Manifestly, if shippers rely upon the rates as so published and filed, the requirement of publication becomes a mere trap for the unwary.*"[19] (Italics supplied.)

The United States Supreme Court, on writ of error to review this judgment, rendered an opinion in which, after quoting the italicized sentence of the above excerpt, it dismissed the writ of error.[20]

Many other state courts, including the New York Court of Appeals,[21] have arrived at substantially the same conclusion.[22] In the federal system the cases are also in accord with respect to "commission-approved" rates,[23] though these cases draw a distinction, not within the scope of the present discussion, with respect to so-called "utility-made" rates.[24]

A somewhat different result has been reached, however, in some states.[25] One of the most significant departures from the general current of state authority is the Kansas case of *State ex rel. Boynton v. Public Service Commission.*[26] There the applicable legislation empowered the commission to make reparation awards, but the language of the statute was not altogether specific or clear.[27] In interpreting the statute, the court in effect repudiated the oft-asserted proposition that in the state systems all filed unconditional rates are to be regarded as "commission-approved".[28] The court there takes the position that where rates have been approved by and filed with the commission after a hearing and a deliberate determination reparation may not be had with reference thereto.

[20] Minneapolis, St. Paul *etc.* Ry. v. Washburn Lignite Coal Co., 254 U. S. 370, 41 S. Ct. 140, 65 L. Ed. 310 (1920).

[21] Purcell v. New York Central R. R., 268 N. Y. 164, 197 N. E. 182 (1935).

[22] See, *e. g.*, E. L. Young Heading Co. v. Payne, 127 Miss. 48, 89 So. 782 (1921); Suburban Water Co. v. Borough of Oakmont, 268 Pa. 243, 110 Atl. 778 (1920); Missouri-Kansas & R. R. Co. of Texas v. Railroad Comm. of Texas, 3 S. W. (2d) 489 (Tex. Civ. App. 1928).

[23] See Arizona Grocery Co. v. Atchison, Topeka & Santa Fé Ry., 284 U. S. 370, 52 S. Ct. 183, 76 L. Ed. 348 (1932).

[24] *Ibid.*

[25] See, *e. g.*, Bonfils v. Public Utilities Comm., 67 Colo. 563, 189 Pac. 775 (1920).

[26] 135 Kan. 491, 11 P. (2d) 999 (1932).

[27] The applicable statutory provisions are set out in full in the opinion of the court.

[28] For a common statement of this proposition see Hutcheson, J., in Eagle Cotton Oil Co. v. Southern Ry., 51 F. (2d) 443, 446 (C. C. A. 5th, 1931).

But the court draws the distinction as to rates which have been formally approved and those which have been filed and approved without a formal hearing.

As to the former class of rates, namely, formally-approved rates, the court said:

> ". . . it seems clear that when a rate has been the subject of a deliberate inquiry in which the carriers, the shippers and the commission's own experts have participated, as well as any and all other persons who cared to take a hand in it as the statute provides and permits . . . any rate so prescribed by the commission and put into effect by the carriers may be confidently collected and retained by them as their very own, without misgiving that at some future time a further hearing of the commission may be had and more evidence taken and a different conclusion reached, and those rates condemned as unreasonable, and reparation certificates allowed for the difference between the rates which the commission did authorize and the rates which it should have authorized."[29]

But as to the latter class of rates, the court had this, among other things, to say:

> "Where the only approval given such rates by the public service commission was the merely perfunctory one required to apprise the commission of their filing and to enable it to secure proper supervision of them"

reparation may be had.[30]

The problem was first specifically presented to the West Virginia court in 1932 in *Natural Gas Co. v. Sommerville.*[31] The facts in the case, and the background, were as follows. In 1920 an admittedly valid forty-cent rate was authorized by the commission, filed and put into effect. In 1922 the utility applied to the commission for an increase from the existing rate of forty-cents to a "step-up" scale of rates ranging from forty-five cents to sixty cents. The application was resisted by certain interested municipalities and persons. In 1923 the Public Service Commission, after a hearing and investigation, refused to grant an increase. In 1924 the Supreme Court of Appeals reversed the order of the Public Service Commission and remanded the case

[29] State *ex rel.* Boynton v. Public Service Comm., 135 Kan. 491, 504, 11 P. (2d) 999 (1932).
[30] *Id.*, quotation from point five of syllabus by the court.
[31] 113 W. Va. 109, 166 S. E. 852 (1932).

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to the commission for such further investigation and order as might be proper in the premises.[32]

After numerous negotiations the utility and the protestants, on June 25, 1924, agreed in writing upon a settlement of the case. The agreement contained the following terms and conditions (among others):

> "The Company shall dismiss the pending case without prejudice, and shall be allowed to file tariffs, putting into effect the following rates . . . said rates to be effective from the meter readings beginning about the 15th day of June, 1924, until the meter readings beginning about the 15th day of December, 1927, to-wit:
> "52 cents per thousand cubic feet . . . ."

In purported compliance with these provisions the commission, on June 26, 1924, ordered:

> "(1) That this case be, and the same is, hereby dismissed without prejudice.
> "(2) That the applicant, Natural Gas Company of West Virginia, be, and it is, hereby authorized and allowed to file upon one day's notice to the public and to this Commission, tariffs providing the rates for natural gas as set forth in said agreement, and effective as therein stated."[33]

The tariff filed in alleged accordance with this authorization set out a fifty-two-cent rate and purported to cancel the prior tariff which provided for the forty-cent rate. The filed tariff providing for the fifty-two-cent rate contained no time limitation; it merely provided, in this regard, that the fifty-two-cent rate was "effective from and after meter reading month of June, 1924".

The fifty-two-cent rate, promulgated, filed and published in alleged compliance with the commission's order of June 26, 1924, was charged and collected by the utility without protest on the part of any consumer until August 14, 1931, when the interested municipality instituted a proceeding against the utility before the Public Service Commission for the purpose of an investigation of the justness and reasonableness of the rates for natural gas charged by the defendant.[34] In the same proceeding, upon motion of the complainants, it was asked that the utility be required to charge

[32] Natural Gas Co. of W. Va. v. Public Service Comm., 95 W. Va. 557, 121 S. E. 716 (1924).
[33] See the court's summary of this order in Natural Gas Co. of W. Va. v. Sommerville, 113 W. Va. 100, 102, 166 S. E. 852 (1932).
[34] See City of Wheeling v. Natural Gas Co. of W. Va., Bulletin No. 128, Public Service Commission of West Virginia, Case No. 2149.

a forty-cent rate on the theory that the forty-cent rate had been automatically restored after the meter readings of December, 1927. Upon this motion for an interpretation of its order authorizing the fifty-two-cent rate, the Public Service Commission handed down an opinion in which it held that the West Virginia Public Service Commission Act kept the authorized rate in force during the period involved in this suit.[35]

A representative suit was brought, in a circuit court, seeking reparation with respect to the filed fifty-two-cent rate. A writ of prohibition was then prosecuted to prevent the trial court from proceeding with the case on the ground that the relief sought was administrative rather than judicial.[36] In refusing the writ the Supreme Court of Appeals said, among other things:

> "The case involves a claim of reparation for alleged injuries. The solution will depend not upon whether the charges were in excess of a reasonable rate but whether they were in excess of the lawfully established rate."[37]

Thereupon the case came on for further proceedings. The trial court referred the matter to a special commissioner, directing him to ascertain and report, among other matters, "as to what would have been a fair and legal charge" by the utility in excess of forty cents, if any, from December 15, 1927, to the institution of the suit. Whereupon, in 1934, the plaintiffs sought, by prohibition, to restrain the court and the commissioner from executing the order of reference in so far as it directed the ascertainment of what would have been a fair and legal charge in excess of the forty-cent rate, if any, during the period in question. The writ was awarded.[38] In disposing of the point thus raised the court said,

> ". . . It is, of course, a well recognized principle that when acting within its jurisdiction a trial court should not be interfered with in the manner of resolving issues pending before it; that if it commits error the same may be corrected upon review by the appellate court. But even in a case of which it has unquestioned jurisdiction, a trial court should not be permitted to invoke a procedure involving great delay and stupendous expense for the purpose of determining a

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[35] *Ibid.*
[36] Natural Gas Co. of W. Va. v. Sommerville, 113 W. Va. 100, 166 S. E. 852 (1932).
[37] *Id.* at 105.
[38] Wilson *et al.* v. Brennan *et al.*, 114 W. Va. 777, 174 S. E. 696 (1934).

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matter not within its primary jurisdiction, or necessary to a decision of the pertinent issues.

"Being of opinion that the proposed investigation and determination of reasonable rates is not within the competency of the court, the writ will be awarded."[39]

What then is the effect of these West Virginia decisions? Is the net result that in this state all filed unconditional rates are to be regarded as final with respect to the question of their retroactive unreasonableness?

Since the West Virginia decisions were handed down, this same general question was presented to the highest court of New York under legislation not unlike the West Virginia statute.[40] In New York as in West Virginia the public service commission has no power to award reparation with respect to alleged overcharges made in accordance with the filed rate.[41] Yet the court held that there was no judicial remedy. In arriving at this conclusion the court said:

"The statute creating the Public Service Commission and empowering it to supervise rates and charges was intended to cover the whole subject of rates and supersede all common law remedies. As long as the charges enforced are those on file with the Commission, they are the only lawful charges which may be collected. No departure from the filed rates is permitted.

"The Legislature has provided a means for the protection of shippers against unreasonable rates. The action at law resulted in different rates for different shippers dependent upon the opinion of juries as to what was reasonable. The statute makes the specified rate as fixed uniform and lawful until changed by or with the permission of the Commission."[42]

This conclusion, and the reasons assigned therefor, seem equally applicable to the West Virginia statutory setup. To these reasons may be added the following which have been set forth convincingly by a federal court[43] with respect to the retroactive finality of a filed "commission-approved" rate:

". . . . Assume, for instance, a railroad whose earnings largely depend upon one commodity. A coal-carrying road is an apt illustration. The revenues of this road depend

39 At page 780.
40 Purcell v. New York Central R. R., 268 N. Y. 164, 197 N. E. 182 (1935).
41 *Ibid.*
42 *Id.* at pages 171-172.
43 Eagle Cotton Oil Co. v. Southern Ry., 46 F. (2d) 1006 (D. C. S. D. Miss. 1931).

upon coal which we will assume is 80 per cent of its traffic. We will further assume that, after an investigation, the Interstate Commerce Commission has fixed the rate to be charged on this coal. This rate has remained in effect for a number of years without complaint from any shipper. A tremendous amount of tonnage has moved on said rate. The revenues derived from said rate have been distributed in the payment of dividends and interest on bonds; taxes have been paid; betterments have been made. Can it be contended that the Interstate Commerce Commission has the power to later on declare that the rate was unlawful and unreasonable and then require the carrier to make reparation on every single shipment which moved on said rate? Such a condition would result in chaos. The great transportation systems of this country could not exist in such circumstances . . . . If the carriers cannot use the revenues received from the charging of a rate which the Interstate Commerce Commission has declared to be reasonable and lawful, it is clear to this court that it would result in chaos in the finances and credit of the carriers and would likewise result in breaking down the stability in rate structures which was one of the cardinal reasons for the passing of the Interstate Commerce Act."[44]

Though this was said with respect to rates under the federal system, the reasoning of the court is equally applicable to "commission-approved" rates under the state systems. Perhaps it should be noted in passing that the actual conclusion reached by the court in this federal case was reversed on the ground that the rate in question was not "commission-approved".[45] But the appellate court did not disagree with the lower court as to the law applicable to commission-approved rates.

Since the New York case, but without citing it, the Supreme Court of Appeals of West Virginia has handed down an important decision which, though not squarely adjudicating the point, strongly supports the same sweeping conclusion as that reached by the New York court.[46] The bill of complaint in the West Virginia case, decided in 1937, had a twofold purpose: (1) the proper classification of the plaintiff under a certain tariff, and (2) judgment for the amount charged in excess of the rate prescribed in the tariff. In disposing of the complaint the court cited the following provision from the West Virginia Code:

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[44] *Id.* at page 1009.
[45] Eagle Cotton Oil Co. v. Southern Ry., 51 F. (2d) 443 (C. C. A. 5th, 1931).
[46] Charleston Apartments Corp. v. Appalachian Electric Power Co., 118 W. Va. 694, 192 S. E. 294 (1937).

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"Any person, firm or corporation claiming to be damaged by any violation of this chapter by any public utility subject to the provisions of this chapter, may make complaint to the Commission, as provided herein, and bring suit in his own behalf for the recovery of the damages for which such public utility may be liable under this chapter in any circuit court having jurisdiction."[47]

Apparently the court construed this statutory provision for relief as applicable only to charges made in excess of the "legal" as distinguished from "reasonable" rate. The court said, among other things:

"Whether the amount paid by the plaintiff exceeds the legal rate is purely a judicial question of which the Circuit Court of Kanawha County has jurisdiction. The question is concerned with the construction and applicability of the prevailing tariff, *and not the reasonableness of said tariff.* Clearly, the question is one of law which should be adjudicated by the circuit court."[48] (Italics supplied.)

By reading out of the judicial investigation in this case the problem of the retroactive unreasonableness of the charge, our court has, in the light of the above-mentioned West Virginia cases, which are cited and relied upon, apparently eliminated from judicial inquiry the question of reparation with respect to filed unconditional rates. This does not mean, of course, that there can be no judicial review as to the reasonableness of such rates with respect to the future. That, however, is a problem which does not fall within the purview of this study and has deen dealt with at some length by the writer in previous issues of the Quarterly.[49]

It would seem then that in West Virginia the Public Service Commission now has unchallengeable supervision with respect to the retroactive unreasonableness of a charge made by a public utility—unchallengable, that is, if the filed rate is enforced according to its tenor.[50] Here, as in an increasing number of other

[47] W. VA. REV. CODE (1931) c. 24, art. 4, § 7.

[48] Charleston Apartments Corp. v. Appalachian Electric Power Co., 118 W. Va. 694, 192 S. E. 294 (1937).

[49] See Hardman, *The Extent of the Finality of Commissions' Rate Regulations* (1922) 28 W. VA. L. Q. 111; *cf.* Hardman, *Judicial Review as a Requirement of Due Process in Rate Regulation* (1921) 30 YALE L. J. 681.

[50] To be sure, the supervision of the Public Service Commission is subject to judicial control in certain other respects. See *e. g.,* Natural Gas Co. of W. Va. v. Sommerville, 113 W. Va. 100, 166 S. E. 852 (1932); Charleston Apartments Corp. v. Appalachian Electric Power Co., 118 W. Va. 694, 192 S. E. 294 (1937).

situations, the traditional all-inclusive doctrine of the "supremacy of law", namely, that one whose legally protected interest is infringed has a right, ultimately, to have his claim determined by a judicial tribunal,[51] has yielded, apparently, to the neolegal insistence that in certain fields, once within the domain of the courts, the administrative control is complete and final.

(To be concluded.)

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[51] See DICEY, LAW OF THE CONSTITUTION (8th ed. 1931) 183 *et seq.*; LANDIS, THE ADMINISTRATIVE PROCESS (1939) 123 *et seq.*; *cf.* Brandeis, J., in St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 84, 56 S. Ct. 720, 80 L. Ed. 1033 (1936).

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