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THE CHANGING LAW OF COMPETITION IN PUBLIC SERVICE—ANOTHER WORD

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In the last volume of the Law Quarterly¹ the writer discussed some pregnant possibilities of the recent Reynolds Taxi Company Case;² and already the third-born³ is being heralded in headlines and editorials as a "startling" prodigy.⁴ Accordingly it is the purpose of this paper to say just a word about the newly arrived by way of an appendix to the writer's more extended discussion of these possibilities.

The last arrived first saw the light of day or—as some seem to think—the darkness of night, on September the twentieth nineteen hundred and twenty-seven, under the following circumstances: Carriers by automobile applied to the State Road Commission for "initial" certificates of convenience to operate bus service over public highways paralleling the lines of established carriers by street car and railroad. Soon afterwards the established carriers,

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¹ T. P. Hardman, "The Changing Law of Competition in Public Service," 33 W. VA. L. QUAR. 219 (April, 1927).

² Reynolds Taxi Co. v. Hudson, 136 S. E. 833 (W. Va. 1927).

³ Monongahela West Penn Public Service Co. et al. v. State Road Commission et al., 139 S. E. 744 (W. Va. 1927). The firstborn, Quesenberry et al. v. State Road Commission et al., 138 S. E. 362 (W. Va. 1927), and United Fuel Gas Co. v. Public Service Commission, 138 S. E. 388 (W. Va. 1927) which however is not a full-blood relative, are hereinafter discussed.

⁴ See, e. g., *The New Dominion* (Morgantown, W. Va.), Sept. 21 and 30, and Dec. 5 (1927).

through their subsidiaries,⁵ also applied for certificates of convenience to operate bus service over such highways. The carriers by automobile were not "established" carriers, but the commission awarded certificates to these carriers apparently "because of priority of application," and refused certificates to the established carriers' subsidiaries, hereinafter called the established carriers.⁶ The circuit court granted writs of *certiorari* and cancelled the certificates awarded by the commission. Where there was nearby adequate street car service paralleling the highway the circuit court did not award any certificate of convenience to operate bus service. But where there was no such parallel street car service, the circuit court awarded certificates of convenience to the established carrier to operate bus service. The Supreme Court of Appeals affirmed the action of the circuit court.⁷ But Judge Woods filed a vigorous and important dissenting opinion. Let us, therefore, examine the dissenting opinion as well as the majority opinion in order to determine what conclusion is socially desirable.

Much could be said against the validity of the action of a court in directly awarding certificates of convenience rather than referring the case back to the commission for correct administrative determination in accordance with doctrines laid down by the court or legislature. Is not such action typically administrative?⁸ Does not such court action violate fundamental principles of administrative law?⁹

⁵ This is the effect of the transactions as interpreted by the majority of the Supreme Court of Appeals. But Judge Woods in his dissenting opinion thinks that in this respect the established carriers' subsidiaries cannot be treated as if they were the established carriers. The majority view, for reasons hereinafter explained, seems correct on this point.

⁶ See note 5, *supra*.

⁷ *Monongahela West Penn Public Service Co. et al. v. State Road Commission et al.*, *supra*, n. 3.

⁸ What is administrative action as distinguished from judicial action? A leading text-writer says: "[As differentiated from judicial action, administrative action] may be distinguished by the fact that the action **** is not necessarily, or even often, the result of any controversy and is not merely dependent on the solution of the question What is the law? but is made also as a result of considerations of expediency. Thus, in the first kind of work [judicial work or action], all the officer has to do [according to the theory of our law] is to determine what is the law applicable to the facts brought before him; in the second kind of work [administrative] he must determine, of course, what is the law in order to determine whether he is competent to act; but furthermore he must decide whether, in case he is competent, it is wise for him to act. In the first case, for example, the officer is to determine whether under the law a given piece of property belongs to A or B; in the second case he is to determine, for example, whether, conceding he has the power, it is wise for him to grant to A a license *****. In these last cases, it is true, the law may provide that before he grants A his license he must hear the objections which A's neighbors may have to the granting of the license *****. In both of these cases, something in the nature of a controversy may thus arise. But it is not a controversy as to the applicability of the law but rather one as to the expediency of the action which it is proposed to take.

"Now the Anglo-American law denominates the first kind of action as judicial, and

The only justification made by the majority for this procedure is that the West Virginia Code¹⁰ requires the circuit court on *certiorari* to "determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter, as law and justice may require"; and that this statute "indubitably" authorizes such procedure. But this quotation from the statute omits the first part of the sentence which is that upon *certiorari* the "circuit court shall in addition to determining such questions as might have been determined upon a *certiorari*, as the law heretofore was, review such judgment, order or proceedings of the **** inferior tribunal upon the merits, determine etc."¹¹ And as the West Virginia Court had previously pointed out, per Brannon, J., the purpose of this statute was "to let the court 'review' the case on the law and evidence, as it was before the lower tribunal, in order to determine whether that tribunal had done injustice * * * *. It says the circuit court shall 'review' the judgment, not re-try the case."¹²

In the principal case the dissenting judge seems to take the position that the action of the commission in determining whether it should grant certificates to this applicant or to that is not subject to judicial review *at all* because "not judicial." But while it is true that such action is not wholly judicial, the better view is that such administrative action is quasi-judicial in that the Commission, much after the manner of a court, has a hearing in which the pecuniary or property interests of contestants are determined by a final order.¹³ And on *certiorari* quasi-judicial determinations of administrative tribunals are "reviewable" by the courts to some extent, *e. g.*, to the extent of ascertaining whether the administrative has correctly applied any applicable legal principle¹⁴ such as

the second kind of action as administrative." GOODNOW, PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES, 9-10 (1905).

This differentiation need not be adopted *verbatim, literatim, et punctatim*, but it will suffice to show that the granting of such licenses as certificates of convenience to operate motor busses is typically administrative rather than judicial action.

⁹ Cf. CONSTITUTION OF W. VA., Art. V, §1, and *Alderson v. Commissioners*, 32 W. Va. 454 (1889) where the W. Va. court points out that the power conferred on the circuit court by the statute in question is to "'review' the case on the law and evidence, as it was before the lower tribunal, in order to determine whether that tribunal had done injustice *****. It [the W. Va. statute] says the circuit court shall 'review' the judgment not re-try the case."

¹⁰ C. 110, §3.

¹¹ *Id.*

¹² *Alderson v. Commissioners*, 32 W. Va. 454, 462 (1889). Italics ours.

¹³ See BAILEY, HABEAS CORPUS AND SPECIAL REMEDIES, §171 *et seq.* (1913). Cf. MECHEM, PUBLIC OFFICERS, §1011 (1890). See *infra*, n. 15.

¹⁴ See MECHEM, *op. cit.*, *supra* n. 13, §1011.

the legal principle laid down by our court that the policy of this state does not favor ruinous competition in public service. On *certiorari*, therefore, the courts can correct any quasi-judicial administrative determination that violates such legal principles,¹⁵ and under our statute on *certiorari* can, *within the limits of appropriate court action*, render such decision as the inferior tribunal should have rendered. But within the limits of typically administrative action expressly entrusted by legislation to a commission, can the courts (as they did here) not simply "review" the case but substitute their administrative opinions for those of the administrative tribunal set up by law for the determination of the question, and administratively award such certificate of convenience as the courts think the administrative should have awarded?¹⁶ That, however, is not primarily a question as to the changing law of competition and, therefore, a full or further discussion thereof is beyond the purview of this article.¹⁷

A point strongly emphasized by the dissenting judge is that in determining whether a certificate of convenience and necessity should be granted to operate a motor vehicle service the granting tribunal "cannot consider other transportation facilities, such as railroads, in passing on the question of convenience and necessity, but must limit inquiry to the motor vehicle business." There is some authority supporting this position.¹⁸ It is submitted, however, that such an unqualified proposition is untenable,¹⁹ in as much as a contrary conclusion is more desirable and is consistent with our statute.²⁰

To illustrate, suppose that the established utility is an ordinary street car line operated by the A Company. The

¹⁵ *Ibid.* Mechem says: "When the writ of certiorari is issued to an officer having only quasi-judicial powers ***** errors and irregularities may be corrected, and the court will examine the evidence, to determine whether there was any competent evidence to justify the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated."

¹⁶ *Cf.* *Alderson v. Commissioners*, 32 W. Va. 454 (1889) and *Dryden v. Swinburn*, 15 W. Va. 234 (1879).

¹⁷ See T. P. Hardman, "The Extent of the Finality of Commissions Rate Regulations," 28 W. VA. L. QUAR. 111 (1922), and T. P. Hardman, "Judicial Review as a Requirement of Due Process in Rate Regulation," 30 YALE L. J. 681 (1921), where the writer has discussed at considerable length the extent to which courts should "review" administrative determinations.

¹⁸ See, *Rapid Railway Co. v. Michigan Public Utilities Commission*, 225 Mich. 425, 196 N. W. 518 (1923), but Mr. Justice Fellows vigorously dissented.

¹⁹ See the forceful argument of Fellows, J., in *Rapid Railway Co. v. Michigan Public Utilities Commission*, *supra*, n. 18.

²⁰ See Acts of W. Va. 1925, c. 17, §82, class H.

B Company applies for a certificate of convenience to operate a motor bus service along the very same street, making stops *at the same times and places* at which the street cars stop. If the service of the street car company is adequate and at reasonable rates, it certainly cannot be said with justification that public convenience and necessity sanction granting a certificate of convenience and necessity to operate such parallel synchronous motor bus service merely because the other service is a street car service rather than a motor car service. The two services are so substantially similar that either service is a permissible substitute service for the other. What the public along the route is entitled to is *proper transportation service*. The law cannot justifiably satisfy the wishes of *a part of the public* who may prefer to travel by bus rather than by street car if street car service is a reasonable substitute for bus service and if to satisfy such wishes, by permitting such competition, will, in the long run, probably prevent the *general public* along the route from getting proper transportation service by street car or by bus or by both. As the public along the route is, by hypothesis, already receiving adequate transportation service at reasonable rates, a duplication of transportation service of the same or such substitute class will in the long run likely prevent the public from being served as efficiently, economically and with as good equipment as the public could be served by a properly regulated single service.

Therefore, in the principal case, if there was already adequate street car service along one of the proposed bus routes, there is no justification for granting a certificate of convenience and necessity to any one to render duplicate transportation service along such route. If the rates by street car are too high, the remedy is a proceeding to lower them to reasonable rates. But if because of infrequency of stops or otherwise the street car or other service is not a reasonable or fair substitute for bus service, so that it cannot be said that the public along the proposed bus route is receiving adequate transportation service of the class proposed to be furnished by the bus line, or a reasonable substitute for such class, then, of course, if there is demand for such service, such public is entitled to receive adequate

service of such class or substitute class. Therefore, the only question is, who is entitled to priority in furnishing such additional service? And in determining this question we must consider not only whether the proposed new public service will in the long run be better rendered by the competitor, but also whether in the long run *the other service*, such as street car service or ordinary railroad service, will be properly rendered by permitting such competition. For along such route the public as a whole, not simply a part of that public, is entitled to the best practicable public service *both by bus and by rail*. And for reasons elaborated in the writer's first article on this question, it is submitted that under proper regulation of the single service, the public service as a whole, that is both by bus and by rail, will in the long run be rendered more efficiently, economically and by the better equipment by preventing such unreasonably wasteful competition where, as in the principal case, it appears that the established carrier by rail can, under proper governmental regulation, be relied upon to render the proposed service properly.

The test, therefore, is whether the granting of initial certificates of convenience to the established utility or to a would-be competitor or to both will better promote the public interest in having adequate and economical public service. It may seem that such a test generally ignores the interest of the competitor. But that interest is a private or individual interest, and the interest in having public service as a whole (not for the moment but for all time) rendered most economically and otherwise satisfactorily is a public or social interest.²¹ This private interest of the competitor to be allowed to render this service conflicts with the public interest in having this service together with the other service rendered, in the long run, more economically and satisfactorily than in all probability such public service both by bus and by rail would, in the long run, be rendered under ruinous competition. Therefore, since the law cannot secure both this private interest and this public interest, the

²¹ This use of the terms "public interests" or "social interests" is explained in the writer's original article. Though the words "public interest" more accurately refer to the claims or wants of the state either as a juristic person or as guardian of social interests, the words, out of deference to common usage, are here used as including the wants or interests of the community or society generally, *i. e.*, social interests.

law secures the more important interest, *viz.*, the public interest. This is simply an application of a universally applicable proposition that the end of the law is to secure, as far as it is practicable to do so, the various human wants or interests (individual, public, social), involved in a case, and where these interests conflict so that it is necessary to sacrifice some of these interests to some extent at least, then to secure the most important of these interests.²²

Thus, individual interests are to be secured only to the extent that the securing of such interests at the same time adequately secures the public interest involved; for it is almost universally conceded today that public or social interests are in general more important than private or individual interests. As the United States Supreme Court has recently put it: "There must be progress, and if in its march private interests are in the way they must yield to the good [i. e., the interests] of the community."²³ So in the principal case, if the interests of the community as a whole will in the long run be better secured by sacrificing the private interest of the would-be competitor in public service, such private interest "must," as the United States Supreme Court put it, "yield to the good of the community."

Another point, perhaps the major point, made by the dissenting judge is that the majority of the court bases its opinion primarily upon the proposition that when one of several applicants for an "initial" permit to operate motor busses is *an established carrier* operating a parallel transportation service, such established carrier has "*a property right*" involved, and that "the policy of the state ***** is to protect such public servants in the enjoyment of their rights." The dissenting opinion denies that the established carrier has "a property right" involved.

Just what the learned judge means here by a property right is not altogether clear. If, as some seem to think, it is meant that the established carrier has a property right in or over the public highway upon which it is proposed to operate busses, of course, there is no such "property right" or property interest. But certainly the established carrier

²² See POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 59-99 (1922).

²³ *Hadacheck v. Sebastian*, 239 U. S. 394, 410 (1915).

has a *property* (right or) *interest* in maintaining its *established* service without financial impairment caused by a competitive service. Therefore, the question is, *inter alia*, whether this property interest is entitled to protection against ruinous competition by a bus service *which is about to be established* over a public highway.

If this property interest is considered solely as the private or individual interest of the carrier, *i.e.*, if we do not consider the public interests involved, the answer is emphatically no; for so considered the private or individual interest of the would-be competitor to operate is equally entitled to protection. But, as the writer pointed out at length in his previous article, it is not primarily the right or interest of the established carrier that the changing law is seeking to protect by preventing ruinous competition: *it is primarily the right or interest of the public* in order that, in the language of the West Virginia Court,²⁴ "*the public may be served most efficiently and economically, and by the best equipment reasonably necessary.*" This primary purpose will result incidentally in protecting the above-mentioned property interest of the established carrier in its investment. And certainly the law should protect such property interest of an established carrier where in protecting such interest such protection, as the writer has shown to be true in this type of case, also best protects the paramount public interest in having the most economical and best practical public service, and where such protection does not sacrifice a more important interest. Apropos of this point the Virginia court has recently said that upon application by a motor vehicle carrier for a certificate of convenience and necessity, "*existing transportation systems should be protected so far as compatible with the public interest.*"²⁵

A further point made by the dissenting judge seems to be that there is no legislation in this state sanctioning a policy against competition in public service, and therefore, apparently, that the courts cannot justifiably declare such a policy. The court, in the syllabus, says that this "policy, as expressed in legislative enactments," requires etc. The

²⁴ In *Reynolds Taxi Co. v. Hudson*, 136 S. E. 833 (W. Va. 1927), but quoted from *Princeton Power Co. v. Calloway*, 99 W. Va. 157, 128 S. E. 89 (1925).

²⁵ *Norfolk Southern Ry. Co. v. Commonwealth*, 141 Va. 179, 189, 126 S. E. 82 (1925).

word policy (a word of objectionable obscurity) is here used, it would seem, in the sense of a legal principle or legal doctrine. Now, it is quite true that legislative enactments in this state do not fully express any such policy or principle, and only to a certain extent can it be said that such a policy or principle can be implied from the "road law."²⁶ Therefore, it does not seem to be justifiable to say, with the court, that this "policy" is "expressed in legislative enactments." But neither does it seem to be justifiable to say that it is never the function of the courts to declare a "policy" or legal principle as to matters affecting the "property" interests of the litigants before the court. That is a question which in this connection involves primarily the doctrine of *stare decisis*, which the writer has discussed at length elsewhere in this quarterly²⁷ and, therefore, will not repeat here. Suffice it to say that, notwithstanding statements to the contrary, where pressing interests so require the common-law courts have frequently declared such so-called "policies." It is true that such a judicial promulgation of such a principle or "policy" is judicial legislation. But even the conservative Mr. Justice Holmes has long since admitted that within certain limits "the judges do and must legislate."²⁸ In the language of another of America's greatest judges,²⁹ "the nature of the judicial process" is such that within its appropriate limits judicial legislation is justifiable. This policy, then, is largely a judge-made policy. And frankness in admitting the fact that courts do so legislate when justice requires will prevent much legal stagnation and promote a more healthy growth of the law.³⁰

The final point emphasized by the dissenting judge is that "even though it be admitted that the **** [established carriers] have a right of priority to pre-empt the field of motor bus service, that right does not necessarily extend to their subsidiaries. These subsidiaries are separate and distinct corporate entities." It is submitted that

²⁶ Acts of W. Va., 1925, c. 17.

²⁷ Thomas P. Hardman, "Stare Decisis and The Modern Trend," 32 W. VA. L. QUAR. 163 (1926).

²⁸ In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221 (1917).

²⁹ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, Lecture III (1922).

³⁰ Cf. CARDOZO, *THE GROWTH OF THE LAW*, 120 (1924). See accord an excellent note by A. L. C., 27 YALE L. J. 668 (1917).

this is unduly emphasizing the form rather than the substance. It is true that for justifiable reasons the law ordinarily treats a corporation as an entity separate and distinct from the persons composing it. But this entity is a mere (though generally useful) fiction, and when pressing interests so require the courts will look behind the corporate fiction and see who are the real persons that constitute the corporation. In this way we see that the established carriers are the real persons that will be benefitted or injured by benefit or injury to their subsidiaries. Therefore, to the extent that the public interest in having proper public service requires us to protect the established carriers we must protect their subsidiaries, otherwise we are not only emphasizing form rather than substance, but we are sacrificing the public interest in having proper public service in order to secure mere form. It would seem, therefore, that in order adequately to secure the paramount public interest in having the most economical and satisfactory public service, we, as did the majority of the court, may in this respect treat the subsidiaries of the established carriers just as if they were the established carriers themselves.

Having attempted to answer the dissent, let us briefly apply the above-discussed³¹ doctrines to the facts of the three recent West Virginia cases. As to the principal case, already considered from the opposite angle, but little more need be said. Where as in this case an "initial"³² permit is sought to operate bus service and one of the several applicants is an established carrier, mere "priority of application," apparently the reason why the commission preferred the not-yet-established carrier, should not be enough to justify a public-granted authorization of competition over the public highway. The public, through its commission and courts, should be allowed to regulate the use of the public highways in the manner that will best promote the public interest. Therefore, if before an "initial" certificate of convenience is finally awarded, an established utility

³¹ Discussed mostly in the original article.

³² The word "initial" was inserted by the court in a "modification" of its original opinion. Apropos of this point, the court says: "The decision **** applies only to a choice of applicants for a permit over a bus route about to be established. It has no reference to a case where a railroad or street car company is an applicant for permission to operate motor vehicles over an established bus route. The holder of the permit over the established route is entitled to the same protection and consideration as any other public utility."

applies for such initial certificate, the award should be made to the utility which, under the above-discussed principles, would in the long run probably insure the better and more economical public service in the *whole* field of service involved, namely, the bus service and the rail service. It is the public interest in the maintenance of adequate and economical public service both by bus and by rail that must be secured. Therefore, on the substantive law as to competition, the conclusion of the court in the West Penn Case seems to be quite justifiable.

In the companion case of *Quesenberry v. State Road Commission*,³³ the court held that as neither of the applicants for initial certificates of convenience was what the court calls an "established" carrier, no "property" right was involved and, therefore, the action of the commission in awarding certificates was "administrative" rather than "judicial" and "does not come within the realm of the judiciary." Hence, the court refused to set aside the action of the commission in granting certificates of convenience to two rival applicants to operate busses over the same route. Here, the court in effect permits competition in public service because it says it is not "within the realm of the judiciary" to correct such non-judicial, administrative action.

It is true that such action of a commission is not wholly judicial. But it is submitted that it is *quasi-judicial*. Each applicant at the time of the application is already actually operating transportation service over the route in question. The commission is determining which of two public carriers is entitled to *continue* to operate and thus secure *property interests*. One of these carriers is contesting the right of the other to secure this property interest. The commission has a hearing much after the manner of court hearings and enters a final judgment or order.³⁴ The proceeding, therefore, partakes of the nature of a litigation in court and involves the property interests of contesting parties. Hence, the administrative determination that one or both of the contestants shall be entitled to this property advantage is quasi-judicial. And it is generally held that quasi-judicial

³³ 138 S. E. 362 (W. Va. 1927).

³⁴ See a description of the proceedings before the commission by Lively J. in *Quesenberry v. State Road Commission*, 138 S. E. 362 (W. Va. 1927).

administrative determinations are reviewable by *certiorari*.³⁵ It would seem, therefore, that such action of the commission is reviewable by the courts.³⁶

But it does not follow that the actual conclusion reached by the court is unjustifiable. It seems that each applicant was properly equipped to render adequate service. The preponderance of the evidence was that one service was sufficient and that two could not operate at a profit, but there was trustworthy evidence to the contrary. Moreover, as already indicated in part, while neither of the applicants is what the court calls an "established carrier," neither bus company having operated under a certificate of convenience, the fact is that *both applicants had for a considerable time prior to their applications actually "operated over the route under their taxi licenses."* As a practical matter, therefore, it would seem that both applicants had acquired business interests which would be protected by a certificate or injured by being refused a certificate. Hence, in a practical sense, both applicants were established common carriers by bus over this route at the time of the application for the initial permit. Furthermore, the court says that an "inference may be drawn [from the evidence] that the commission concluded that the public would be best served by two companies." Hence, if "the public would be best served by two companies," (and the commission is in a better position than the courts to know if this would be true) permitting competition would better secure the paramount public interest in having the "best" public service. Therefore, after the commission has granted certificates to two thus established competitors, can the courts justifiably say, under the circumstances, that there was no competent evidence on which the commission, applying the correct principles as to competition, could reasonably have reached the conclusion which it did? If not, it would seem that, in such cases, the courts should not substitute their judgments for the judgment of the expert administrative tribunal set up by law to determine the question. Due process should not require, an efficient administration of justice does not

³⁵ *Reynolds Taxi Co. v. Hudson*, 136 S. E. 833 (W. Va. 1927) and authorities cited. See MECHEM, PUBLIC OFFICERS, §1011 (1890).

³⁶ See MECHEM, PUBLIC OFFICERS, §1011 (1890).

permit, an "independent judicial re-examination" of such an administrative determination.³⁷

In the writer's former discussion of the so-called "policy" against ruinous competition, it was advocated that the policy should not be confined to "public carriers" or to cases where legislation requires a certificate of convenience. And since then the West Virginia Supreme Court of Appeals has decided an important case which tends to support the argument therein advocated. In that case,³⁸ two natural gas companies, the A Company and the B Company, were serving a community in which a large manufacturing company was located. The rates of the A Company, as limited by the public service commission, were lower than the rates of the B Company. The manufacturing company which, apart from the question of rates, is receiving satisfactory service from the B Company, demands service from the A Company solely because of the lower rates of the A Company. The commission ordered the A Company to supply gas to the manufacturing company.³⁹ This would require an expenditure by the A Company of a very large sum of money. The court reversed the order of the commission, thereby eliminating the *forced* competition. It was "undisputed" that thus to deprive the B Company of its large manufacturing consumer would be to prevent the B Company from making "any appropriate return on the investment." And the decision of the court in this respect seems to go, largely at least, on the theory that when a customer of a gas company is adequately served, apart from the question of rates, to sanction duplication of service to such customer by another company is to sanction unreasonable competition in public service, which is detrimental to public interests. The court intimates that the proper remedy is a proceeding to regulate the rates of the B Company so that the rates charged by the B Company

³⁷ Cf. T. P. Hardman, "Judicial Review as a Requirement of Due Process in Rate Regulation," 30 YALE L. J. 681 (1921), and T. P. Hardman, "The Extent of the Finality of Commissions' Rate Regulations," 28 W. VA. L. QUAR. 111 (1922).

³⁸ United Fuel Gas Co. v. Public Service Commission, 138 S. E. 388 (W. Va. 1927).

³⁹ The commission also permitted the B Company to cease to serve the manufacturing company, if the B Company so desired. But if the B Company ceased to serve this large consumer it could not make an adequate return on its investment.

are no more than reasonable.⁴⁰ In other words, in this respect the practical effect of the decision is to sanction regulated monopoly rather than competition, here compelled competition. The case, therefore, illustrates one aspect of the policy against unreasonable competition in public service, and that too where the utility is not a public carrier and where there is no statutory requirement for a certificate of convenience.

Though the vigorous dissent of two of the judges shows that there is much room for reasonable argument on this question, it is submitted that the majority reach the right conclusion. Where, as here, a single public service is satisfactory apart from the question of rates, and in this respect will, in all probability, continue to be satisfactory, it is economically unsound to compel competitive duplication of service solely for the purpose of securing cheaper service. The economically and legally sound remedy is a thorough, administrative court-reviewable regulation of the single service by requiring adequate service *at reasonable rates*, not an unreasonably wasteful authorization or compulsion of ruinous competition with its probable ultimate sacrifice of the paramount public interest in having the whole community (*i. e.*, the communities of both companies) served "most efficiently and economically, and by the best equipment reasonably necessary."

⁴⁰ The court says: "Why not reduce its rates if too high, and not burden the other utility with a service neither desired nor justly imposed upon it?" May we not say: "Why not reduce its rates if too high, and not burden the public with increased rates based on increased investment and/or with a probable impairment of public service caused by unreasonable competition?"