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PUBLIC UTILITIES - POWER OF CITY TO REDUCE RATES ALLOWED BY FRANCHISE

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PUBLIC UTILITIES — POWER OF CITY TO REDUCE RATES ALLOWED BY FRANCHISE — The city of Miami gave a franchise to a utility to sell electric power, providing that after a stated period of time it should have the right to

charge rates which would enable it to have an annual return of at least ten per cent on the rate base over and above operating expenses. The right to set rates, however, was made "subject to the lawful regulatory authority of the city or state commission having jurisdiction," and it was further provided that "this grant shall at all times be subject to the right of the state of Florida, directly or through a commission or similar body, to regulate rates and service hereunder." The state had no regulatory commission, but had given to Miami such right to regulate rates as is usually given to state commissions.[1] By ordinance Miami reduced rates of the utility to a point at which it could not realize ten per cent on the rate base. *Held*, that the contract reserved the right to the city to reduce the rates, hence the ordinance did not impair the franchise contract in a manner prohibited by the Federal Constitution. *Florida Power & Light Co. v. Miami*, (C. C. A. 5th, 1938) 98 F. (2d) 180, cert. den. (U. S. 1938) 59 S. Ct. 147.

Because of economic and political reasons, municipalities have frequently entered into agreements respecting rates with those utilities to which they grant franchise rights.[2] Equally good economic reasons have often caused them to attempt to avoid the effects of their agreements.[3] As the cities have only the right of regulation given to them by the legislatures,[4] in the absence of some grant of the police power to the city these attempts have been largely concerned with showing that the original contract was never effective to bind the parties as they had supposed.[5] Thus, if the city can show that it had no power to enter into a contract for rates,[6] or that the utility lacked such power,[7] the existence of the undertakings in the franchise are no bar to regulation. Also, courts have

[1] Charter of Miami, § 3 (k), quoted in principal case.

[2] Collier, "Franchise Contracts and Utility Regulation," 1 GEO. WASH. L. REV. 172, 299 (1933); annotation, 74 L. Ed. 234 (1930).

[3] Ibid.

[4] Wyoming v. Ohio Traction Co., 104 Ohio St. 325, 135 N. E. 675 (1922).

[5] If the contract is found actually to have set the rates, it binds both the city [Detroit v. Detroit Citizens' Street Ry., 184 U. S. 368, 27 S. Ct. 410 (1902)] and the utility [Columbus Ry., Light & Power Co. v. Columbus, 249 U. S. 399, 39 S. Ct. 349 (1919), noted in 33 HARV. L. REV. 97 (1919)], and the fact that the rates are confiscatory does not alter the matter. See 6 A. L. R. 1659 (1920).

On the side of the utilities the contention has been made that they are not bound to the contract because of lack of consideration if the circumstances are such that the city is not bound. Opelika v. Opelika Sewer Co., 265 U. S. 215, 44 S. Ct. 517 (1924); 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). The latter case should be compared with Railroad Commission of California v. Los Angeles Ry., 280 U. S. 145, 50 S. Ct. 71 (1929), noted 28 MICH. L. REV. 774 (1930).

[6] In United Fuel Gas Co. v. Ironton, 107 Ohio St. 173, 140 N. E. 884 (1923), the court found no power to enter into contracts for a period longer than ten years. On the distinction between the power to enter into contracts for rates and the power to regulate them aside from contract, see Wyoming v. Ohio Traction Co., 104 Ohio St. 325, 135 N. E. 675 (1922), construing the Ohio statute.

[7] Collier, "Franchise Contracts and Utility Regulation," 1 GEO. WASH. L. REV. 172 at 193, 299 (1933).

construed the contracts themselves in such a way as to allow subsequent regulation by the municipalities, one court saying that a franchise provision for a five cent railway fare was a mere "rate schedule" rather than a contractual undertaking.[8] A satisfactory means of subsequent regulation is by means of a substituted agreement, but as the utility is by hypothesis objecting to the new rate, it is apparent that difficulty will arise out of the determination whether a new agreement has been entered.[9] In the principal case the city had something more than the mere power to contract for rates, however, for the legislature had given it the right to regulate them.[10] While any contract authorized by the legislature which would impair its police power to the extent of abrogating its right to regulate the health, safety, and morals of its citizens is void,[11] it is clear that generally speaking that part of the police power which gives the legislature the right to regulate rates may be contracted away,[12] and this right may be conferred on municipalities.[13] Inasmuch as the intention of the legislature to contract in this fashion must be clear,[14] however, it is believed that in the principal case the court could easily find that the legislature had not intended to give the city of Miami any such power, although there is one United States Supreme Court decision which would be a real hurdle to this interpretation.[15] Furthermore, there are exceptions to the ability of the state or its agent to enter into a binding contract so that the police power is suspended, one such exception

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

[9] On the problem whether the original contract is abrogated by the practice of using rates other than were contained in it, see Los Angeles v. Los Angeles Water Co., 177 U. S. 558, 20 S. Ct. 736 (1900).

[10] Charter of Miami, § 3 (k), quoted in principal case. Under the charter the city would have the same right to regulate as the state. This situation obtains in some other cases, notably the one in which the state constitution is interpreted to give the city home rule powers over this subject matter. City & County of Denver v. Stenger, (C. C. A. 8th, 1922) 277 F. 865.

When the legislature has not given the city the right to contract away the police power; the state may set rates regardless of the city's contract, and this does not contravene Article I, section 10 of the Constitution. Puget Sound Traction, etc., Co. v. Reynolds, 244 U. S. 574, 37 S. Ct. 705 (1917). See also 28 MICH. L. REV. 774 (1930); 24 MICH. L. REV. 492 (1926); 20 MICH. L. REV. 224 (1921), and other notes there cited; 29 A. L. R. 356 (1924), and former annotations there cited.

[11] Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77 (1898).

[12] Freeport Water Co. v. Freeport, 180 U. S. 587, 21 S. Ct. 493 (1901); Detroit v. Detroit Citizens' 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). See Burdick, "Regulating Franchise Rates," 29 YALE L. J. 589 at 591 (1920).

[13] Ibid.

[14] Ibid.

[15] St. Cloud Public Service Co. v. City of St. Cloud, 265 U. S. 352, 44 S. Ct. 492 (1924). The court in the principal case mentions this case, but finds it unnecessary to rule on the point.

being found when the state constitution prohibits such a procedure.[16] As the courts of Florida have held that under the constitution of that state the right to regulate rates may not be contracted away,[17] it seems likely that the Supreme Court would say that the parties must be held to have entered into the contract subject to this power, and that there has been no impairment of the contract under the Federal Constitution.[18] It was not necessary to decide these questions, however, as the court found in the contract a specific reservation of the right to regulate rates in the future.[19]

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[16] Detroit v. Detroit Citizens' Ry., 184 U. S. 368, 22 S. Ct. 410 (1902); Pawhuska v. Pawhuska Oil & Gas Co., 250 U. S. 394, 39 S. Ct. 526 (1919); State ex rel. City of Sedalia v. Public Service Comm., 275 Mo. 201, 204 S. W. 497 (1918), noted 87 CENT. L. J. 199 (1918).

[17] City of Tampa v. Tampa Water Works, 45 Fla. 600, 34 So. 631 (1903), affd. 199 U. S. 241, 26 S. Ct. 23 (1905); Southern Utilities Co. v. City of Palatka, 86 Fla. 583, 99 So. 236 (1924).

[18] Tampa Water Works v. Tampa, 199 U. S. 241, 26 S. Ct. 23 (1905). The Supreme Court will lean toward the state court's interpretation of the contract. Phelps v. Board of Election of West New York, 300 U. S. 319, 57 S. Ct. 483 (1937); New York Rapid Transit Corp. v. City of New York, 303 U. S. 573, 58 S. Ct. 721 (1938).

[19] The court was not impressed with the argument that under the franchise the city had suspended its regulatory power and that the reservation had reference only to subsequent action of the legislature.