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PUBLIC UTILITIES - CHARGING COMPANIES WITH EXPENSE OF INVESTIGATION - CONSTITUTIONALITY

PUBLIC UTILITIES — CHARGING COMPANIES WITH EXPENSE OF INVESTIGATION — CONSTITUTIONALITY — A Washington statute provides that whenever the public service commission shall deem it necessary in the performance of its duties to make any investigation or valuation of a public service company, the public service company shall pay the expenses reasonably attributable thereto. The statute provides that the commission, after giving an opportunity to be heard, "shall render a bill therefor or for such part thereof as it may find necessary and reasonable." In an appeal by certain public service companies from an assessment made by the commission, *held*, the statute was unconstitutional because of denial of equal protection of the laws and also because it contained an unconstitutional delegation of legislative power since it set forth no standards but authorized the department to charge to the utility all or any part of the expenses of the investigation as it might consider "necessary or reasonable." *State v. Northwestern Electric Co.*, 183 Wash. 184, 49 P. (2d) 8 (1935).

Statutes charging public service companies with the expense of their supervision and regulation by the state now exist in varying forms in thirty-five states.[1] They are generally held to be a valid exercise of the police and taxing power of the state, the assessments being in the nature of privilege taxes.[2] The instant case is the first one in which such a statute has been held invalid. It is axiomatic that the legislature can not lawfully delegate its power to determine the general purpose or policy to be achieved by law or to fix the limits within which the law shall operate, but the legislature may for practical reasons leave to administrative bodies the making of subordinate rules and the determination of facts upon which the declared policy shall operate.[3] A power can not be delegated unless its exercise be governed by standards and limitations. However, it is recognized, especially in the case of public service commissions, that limitations may exist though not literally specified. A general grant of power may be limited by its purpose and the nature of the objects toward which it is directed.[4] A standard of "reasonableness" with regard to a particular service,

[1] For a brief outline of these statutes, see Public Utilities Reports 1932B 327.

[2] Charlotte, C. & R. Ry. v. Gibbes, 142 U. S. 386, 12 S. Ct. 255 (1892); People v. Squire, 145 U. S. 175, 12 S. Ct. 880 (1891); Louis v. Boynton, (D. C. Kan. 1931) 53 F. (2d) 471, Pub. Util. Rep. 1932B 330. The cases involving special assessment for public improvement are comparable. Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 S. Ct. 56 (1896); French v. Barber Asphalt Co., 181 U. S. 324, 21 S. Ct. 625 (1901). See also, TIEDEMAN, LIMITATIONS OF POLICE POWER 281 (1886).

[3] For exhaustive annotations on "Delegation of Legislative Power," see 79 L. Ed. 474 (1935); 12 A. L. R. 1435 (1921); and see 1 Pub. Util. Rep. Digest 542 (1923).

[4] United States v. Baltimore & Ohio R. R., 293 U. S. 454, 55 S. Ct. 268 (1934) (where the only standard was "public interest"). Federal Radio Commission Cases, 289 U. S. 266, 53 S. Ct. 627 (1932) (public interest, convenience or necessity);

in the light of the purposes of public utility regulation, imposes a fairly definite limitation upon the power of such commissions.[5] The power to assess expenses, however, is distinguishable in that it is primarily taxing and not regulatory in its nature. The legislature cannot delegate the power to levy taxes (except to a municipality) without prescribing a rule which in its administration will work out the rate of assessment.[6] In the Washington statute the standard of "reasonableness and necessity," with no enumeration of factors to be considered, sets up no intelligible rule and leaves the commission free to set an arbitrary rate. Such a determination is a matter of policy and cannot be lawfully delegated.[7] The second serious objection to the instant statute was that it violated the "equal protection of the laws" clause of the constitution.[8] While the legislature has a broad discretion in classifying for the purpose of imposing its burdens, the discrimination must not be purely arbitrary. All those similarly situated must be treated alike both as to assessment and exemptions.[9] Here there was no attempt at classification of the public service companies so that the statute in allowing discrimination as to the rate of assessment permitted a denial of "equal protection of the laws." A question of due process may also arise in connection with these "assessment of expense" statutes. It has been recently decided that before expenses are chargeable due process demands that the commission shall have made a formal finding of necessity for conducting the

Detroit Citizens' Street Ry. v. Detroit Ry., 171 U. S. 48, 18 S. Ct. 732 (1898). But compare Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 (1934) (where standard of "public good" was held too general).

[5] Intermountain Rate Cases, 234 U. S. 476, 34 S. Ct. 986 (1913) (commission given power to suspend clause in "special cases"). New York & N. E. R. R. v. Bristol, 151 U. S. 556, 14 S. Ct. 437 (1894); Louisville & N. Ry. v. Kentucky, 183 U. S. 503, 22 S. Ct. 95 (1902); Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914).

[6] Parsons v. District of Columbia, 170 U. S. 45, 18 S. Ct. 521 (1898); Security Bank & Trust Co. v. Hinton, 97 Cal. 214, 32 P. 3 (1893). See 1 COOLEY, TAXATION, 3d ed., 99 (1903).

[7] Somewhat analogous to the principal case, McCabe v. Carpenter, 102 Cal. 469 36 P. 836 (1894), where power given to superintendent of schools to levy such taxes as he deemed desirable was held unlawfully delegated. State v. Des Moines, 103 Iowa 76, 72 N. W. 639 (1897), same as to rate fixing power given to library trustee. But compare Livesay v. DeArmond, 131 Ore. 563, 284 P. 166 (1930).

[8] Fourteenth Amendment, United States Constitution and similar provisions in state constitutions.

[9] Smith v. Cahoon, 283 U. S. 553, 51 S. Ct. 582 (1930); Franklin v. Carter, (C. C. A. 10th, 1931) 51 F. (2d) 345, 284 U. S. 664, 52 S. Ct. 40 (1931); American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43 (1900). Where it was held classification according to gross income was reasonable, New Orleans, M. & C. R. R. v. State, 110 Miss. 290, 70 So. 355 (1915), or requiring contribution toward expense of Railroad Commission in proportion to gross income and mileage, Charlotte, C. & A. R. R. v. Gibbes, 142 U. S. 386, 12 S. Ct. 255 (1892), or exemption of those whose gross receipts do not exceed specified sum, Citizens' Telephone Co. of Grand Rapids v. Fuller, 229 U. S. 322, 33 S. Ct. 833 (1913); State v. Berlin St. Ry., 84 N. H. 313, 150 A. 14 (1930).

investigation.[10] While the Washington statute was poorly drafted to effect its purpose, it would seem that allowing the public service commission a reasonable discretion in the apportionment of investigation expenses is not without merit. As in the apportionment of court costs, elasticity is almost essential to achieve justice under the varying circumstances of each case. Since the orders of the commission are subject to judicial review, there could be no real danger in such a course. Some jurisdictions seem to go on the theory that the taxing of expenses is in the nature of costs assessed by the commission acting as a quasi-judicial body.[11] This theory would seem to avoid the constitutional objections against such discretionary power, it being within the power of the legislature in providing for special proceedings to determine what shall be taxable costs and to authorize the tribunals to fix the amount.[12] It is interesting to note that Pennsylvania and Ohio statutes giving to the public service commission the arbitrary power to apportion investigation expenses seem never to have been challenged.[13]

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[10] Bronx Gas and Electric Co. v. Maltbie, 268 N. Y. 278, 197 N. E. 281 (1935), the expression shall deem it necessary means shall find it necessary, and see, Consumers Power Co. v. Michigan Pub. Util. Comm., 273 Mich. 184, 262 N. W. 664 (1935), to the effect that only expenses in connection with a formal investigation are chargeable.

[11] Public Service Comm. v. Frazee, 188 Ind. 573, 122 N. E. 328 (1919); Ohio Gen. Code (Page 1926), § 614-78.

[12] State ex rel. Judson v. Coates, 11 Ohio Dec. 670 (1901); Wiler v. Logan Natural Gas Co., 17 Ohio Cir. Dec. 257 (1904), where legislature allowed attorneys' fees as costs against public utility company.

[13] Ohio Gen. Code (Page 1926), § 614-78, and 66 Pa. Stat. (Purdon 1930), § 731; but the latter is limited to expenses in connection with a hearing before commission.