BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
	)	
INVESTIGATION AS TO WHETHER A SHOW CAUSE ORDER SHOULD BE ISSUED AGAINST BERRY'S CHAPEL UTILITY, INC. AND/OR LYNWOOD UTILITY CORPORATION FOR VIOLATION OF TRA RULE AND TENNESSEE STATUTES, INCLUDING BUT NOT LIMITED TO, TENN. CODE ANN. §§ 65-4-112, 65-4-113, 65-4-201, AND 65-5-101	)	**DOCKET NO. 11-00065**

REPLY BRIEF OF THE STAFF AND BERRY'S CHAPEL

Pursuant to the Hearing Officer's Order of July 18, 2013, the Party Staff[1] and Berry's Chapel Utility, Inc. ("Berry's Chapel" or "the Company") submit this Reply Brief in response to new arguments raised in the Reply Brief filed by the Consumer Advocate on August 19, 2013.

Argument

I. Public notice will be provided.

Although this docket did not arise as the result of a utility's petition to change rates nor does the recommended Settlement Agreement make any changes in the Company's base rates, the Staff and the Company agree with the Consumer Advocate (Reply Brief, at 5-8) that it is appropriate to publish notice of the upcoming hearing concerning the Settlement Agreement. Therefore, Berry's Chapel will publish notice of the hearing in accordance with Rule 1220-4-1-.05 as soon as the hearing date, tentatively set for September 9, 2013, is confirmed.

[1] The Party Staff or Staff refers to those Authority employees who have been assigned to represent the Authority as a party in this proceeding.

II. Customers of a regulated utility do not have a private right of action against the utility over rates.

The Advocate's Reply Brief states (at 9) that, even if the Authority approves the Settlement Agreement, "consumers have a right to restitution under unjust enrichment or civil damages under conversion as well as other laws, rules and regulations with a private right of action." (Footnotes omitted.) At pp. 12-13, the Advocate goes further, contending that unless the TRA "make[s] the customers whole, the Consumer Advocate has every right to seek recovery to the consumers the monies illegally taken by Berry's Chapel either at the TRA in this Docket, a separate docket or at [sic] any civil or chancery court."

Even if the Consumer Advocate Division had the right to file a private lawsuit on behalf of individual customers (which it does not), it has long been recognized in Tennessee and elsewhere that a utility's customers do not have a private right of action against the utility over a rate dispute. See McCollum v. Southern Bell Telephone and Telegraph Co., 43 S.W. 2d 390 (Tenn. 1931). The McCollum decision explains at some length the reasons why the Authority's exclusive jurisdiction over ratemaking, subject only to judicial review, necessarily precludes the right of individual customers to bring a private cause of action. A copy of the case is attached.

III. The Authority may initiate a proceeding on behalf of ratepayers while, at the same time, acting as the judge of its own actions.

"It is simply unfair," the Advocate claims (at 18) for the Tennessee Regulatory Authority to claim to represent the interests of consumers in this proceeding while purporting to "balance the interests" of consumers and utilities. Implying that the agency's dual roles are incompatible with basic notions of due process, the Advocate insists (at 27) that the Authority's duty is "to fix those rates as an impartial and objective investigator and decision-maker—not as an interested

party." The Authority "cannot be an advocate for either position. Moreover, it contradicts all litigation tenets that one party would be balancing the interests of other parties." Id.

The Advocate's argument presumes that the TRA should operate as if it were a court. It is not a court but a legislative body that performs commingled legislative, executive and judicial functions.

As the Tennessee Supreme Court explained nearly a century ago, the agency "is authorized to initiate and prosecute its own proceedings before itself; and such proceedings are to be heard, decided, and its determination therein is authorized to be enforced by itself." In Re Cumberland Power Co., 249 S.W. 818, 821 (Tenn. 1923). See also, Hoover Motor Express v. Railroad and Public Utilities Commission, 261 S.W. 2d 233, 237-238 (Tenn. 1953). The Cumberland Power opinion discusses why the Tennessee commission, like regulatory commissions in other states and in the federal government, is primarily a legislative body. The state legislature could (and once did) establish utility rates but has delegated that function to the agency. Although the agency's procedures may resemble the procedures of a court, the agency is not a court. It is, literally, a legislature, a prosecutor, and a judge—all combined in one entity. That is why the Authority can both represent consumers and, at the same time, balance the interests of consumers and utilities. A copy of the Cumberland Power case is attached.

Respectfully submitted,

BRADLEY ARANT BOULT CUMMINGS LLP

By: _____ /w/ permission

Henry Walker (B.P.R. No. 000272)
Bradley Arant Boult Cummings, LLP
1600 Division Street, Suite 700
Nashville, TN 37203
Phone: 615-252-2363
Email: hwalker@babc.com

COUNSEL FOR BERRY'S CHAPEL

_____

Shiva K. Bozarth (B.P.R. No. 022685)
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243
Phone: 615-741-2904 (ext. 132)

COUNSEL FOR PARTY STAFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served a copy of the foregoing document on the following persons by U.S. Mail:

Charlena Aumiller
Vance L. Broemel
Assistant Attorney General
Office of Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202

This the 21st day of August, 2013.

Shiva K. Bozarth

C

Supreme Court of Tennessee.
McCOLLUM
v.
SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

Nov. 14, 1931.

Appeal from Chancery Court, Hamilton County; W. B. Garvin, Chancellor.

Bill by George W. McCollum against the Southern Bell Telephone & Telegraph Company. From a decree sustaining demurrer to and dismissing the bill, complainant appeals.

Affirmed.

West Headnotes

Public Utilities 317A ⇐102

317A Public Utilities
317AI In General
317Ak102 k. Constitutional and Statutory Provisions. Most Cited Cases

Act amending original act creating Railroad and Public Utilities Commission and conferring jurisdiction over rates held constitutional. Pub.Acts 1919, c. 49.

Public Utilities 317A ⇐120

317A Public Utilities
317AII Regulation
317Ak119 Regulation of Charges
317Ak120 k. Nature and Extent in General. Most Cited Cases

Utility Commission's power to fix rates is legislative and not judicial.

Public Utilities 317A ⇐141

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(A) In General
317Ak141 k. Nature and Status. Most Cited Cases

Utility Commissions are administrative bodies and not courts.

Public Utilities 317A ⇐181

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(C) Judicial Review or Intervention
317Ak181 k. Jurisdiction of Courts in Advance of or Pending Proceedings Before Commission. Most Cited Cases

Bill alleging that Utilities Commission established unreasonable rates, but not alleging that complainant applied for relief, held demurrable, since rates are primarily exclusively for commission, courts merely correcting errors. Pub.Acts 1919, c. 49.

Public Utilities 317A ⇐181

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(C) Judicial Review or Intervention
317Ak181 k. Jurisdiction of Courts in Advance of or Pending Proceedings Before Commission. Most Cited Cases

Legislature having intended, although statute does not expressly give exclusive jurisdiction over rates to Utility Commission, courts are without jurisdiction until its determination. Pub.Acts 1919, c. 49.

***390** Fred M. Williams, of Chattanooga, for complainant.

Joe V. Williams, of Chattanooga, for defendant.

MCKINNEY, J.

The bill, which was filed in December, 1930, charges that defendant is the exclusive operator of a telephone system in the city of Chattanooga, and that for some years complainant has subscribed for and used one of defendant's telephones, and that the rate charged, and which he has been forced to pay, is unreasonable and unjust. The concluding paragraph of the bill is as follows:

"Complainant avers that the Railroad and Public Utilities Commission of the State of Tennessee, by an order issued on, to wit November 7, 1928, effective on or about June 1, 1929, fixed and established the present rates, tolls and charges to be exacted from complainant and other citizens or telephone users by defendant in Chattanooga, Hamilton County, Tennessee; that said Commission is not a Court; that complainant is entitled to have a judicial review of the decision and order of the Commission."

The prayer of the bill is that the court determine what would be a reasonable and just rate, and that complainant have a decree for all amounts in excess thereof which he has paid to defendant during the six years preceding the filing of the bill.

The bill does not allege that application has been made to the Public Utilities Commission for relief, and it is apparent that no such procedure was followed. The bill was filed upon the theory that the chancery court has original jurisdiction to fix rates.

The chancellor very properly sustained the demurrer to the bill, upon the ground that the matters complained of in the bill are matters committed by statute exclusively to the determination of the Public Utilities Commission in the first instance, and that the courts have no jurisdiction except to correct errors of the commission. Chapter 49 of the Acts of 1919, which is an amendment to the original act of 1897 (chapter 10) creating a Railroad Commission, expressly confers such jurisdiction upon the Public Utilities Commission. The act of 1919 is constitutional. City of Memphis v. Enloe, 141 Tenn. 618, 214 S. W. 71. It is modeled after the Federal Interstate Commerce Act of 1887 (49 USCA § 1 et seq.) New River Lbr. Co. v. Tennessee Ry. Co., 145 Tenn. 284, 238 S. W. 867. The Supreme Court of the United States has in numerous decisions sustained the validity of the federal act. Fargo v. Michigan, 121 U. S. 230, 7 S. Ct. 857, 30 L. Ed. 888; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047; New York, etc., R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 26 S. Ct. 272, 50 L. Ed. 515.

The authorities hold without exception that Utility Commissions are administrative bodies and not courts, and that the power ***391** conferred upon them to fix rates is legislative and not judicial. In re Cumberland Power Co., 147 Tenn. 504, 515, 249 S. W. 818, 821, this court, after reviewing the authorities, said:

"From the foregoing it is apparent that the broad general purpose of the acts in question is to confer upon the Railroad and Public Utilities Commission powers and functions which are primarily legislative and executive, and that the power to hear and determine controversies, the quasi judicial power, is merely incidental thereto. The proposition that the Legislature intended or attempted to create a court by the acts above referred to and to vest it with the power to make rules, interpret and execute them, cannot be successfully maintained."

While the act of 1919 does not expressly state that the fixing of rates by the Public Utilities Commission is exclusive, such, in our opinion, was the legislative intent, and by the great weight of authority the courts do not have jurisdiction over such matters until they have been submitted to and passed upon by the commission. 51 Corpus Juris, 41, 42, and note.

In Texas, etc., R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 355, 51 L. Ed. 553, 9 Ann. Cas. 1079, the court had under consideration the Interstate Commerce Act of 1887, which did not provide that the fixing of rates by the com-

mission was exclusive. The court, in holding that an aggrieved party must apply to the commission for relief before resorting to the courts, said: "For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonablencss by the various courts called upon to consider thc subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy thc prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling thc altcration of thc old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unrcasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of thc act impossible."

The language just quoted was approved by this court in Petition of Southern Lumber & Mfg. Co., 141 Tenn. 335, 210 S. W. 639. The legal profession has generally so construed the act, and we think there can be no doubt but that the Legislature intended to confer upon the commission exclusive jurisdiction, in the first instancc, to establish reasonable rates and charges.

This being true, thc chancellor was correct in sustaining the demurrer and dismissing the bill, and his decree will be affirmed.

Tenn. 1931.
McCollum v. Southern Bell Tel. & Tel. Co.
10 Smith (TN) 277, 163 Tenn. 277, 43 S.W.2d 390

END OF DOCUMENT

Supreme Court of Tennessee.
IN RE CUMBERLAND POWER CO.

April 7, 1923.

Appeal from Railroad Commission.

Proceedings under Pub. Acts 1921, c. 107, before the Railroad and Public Utilities Commission, relative to the approval of a franchise contract between the Cumberland Power Company and the City of Lebanon. From a decision disapproving of the contract, the Cumberland Power Company appeals. Proceeding dismissed.

West Headnotes

Constitutional Law 92 ⟹2355

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2354 Establishment, Organization, and Jurisdiction of Courts
92k2355 k. In General. Most Cited Cases
(Formerly 92k56)

Const. art. 6, § 1, providing that the judicial power of the state shall be vested in one Supreme Court and in such circuit, chancery, and other inferior courts as the Legislature shall from time to time ordain and establish, vests all power, and the Legislature can neither add to nor take away from such grant of power.

Public Utilities 317A ⟹146

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(A) In General
317Ak145 Powers and Functions
317Ak146 k. Legislative and Judicial Powers and Functions. Most Cited Cases
(Formerly 92k56)

Constitutional Law 92 ⟹2355

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2354 Establishment, Organization, and Jurisdiction of Courts
92k2355 k. In General. Most Cited Cases
(Formerly 92k56)

The Railroad and Public Utilities Commission created and given power by Acts 1897, c. 10, Pub.Acts 1919, c. 49, and Pub.Acts 1921, c. 107, having primarily legislative and executive functions, the power to hear and determine controversies, being merely incidental thereto, is not a court within Const. art. 6, § 1, vesting judicial power, a court being a medium for the exercise of the judicial power of the state, and connoting the ordinary attributes of judicial tribunals, a judge or judges and the machinery necessary for the judicial administration of justice.

Courts 106 ⟹246

106 Courts
106VI Courts of Appellate Jurisdiction
106VI(B) Courts of Particular States
106k246 k. Tennessee. Most Cited Cases

Since the Railroad and Public Utilities Commission is not a court, Pub.Acts 1921, c. 107, § 7, providing for an appeal to the Supreme Court from the final finding, order, or judgment of the Commission is unconstitutional and invalid, and therefore no appeal lies from such Commission to the Supreme Court, which, under Const. art. 6, § 2, has appellate jurisdiction only.

***818** Thos. G. Kittrell, of Nashville, Thos. B. Finley, of Lebanon, and Chas. C. Trabue, of Nashville, for Cumberland Power Co.

Seth M. Walker, of Lebanon, for City of Lebanon.

MORISON, Special Judge.

This is an appeal by the Cumberland Power Company from a decision of the Railroad and Public Utilities Commission, disapproving of a certain franchise contract submitted to it under provisions of chapter 107 of Act 1921, entered into by it with the city of Lebanon. The power company contends that the franchise contract should be approved.

In the argument of the case, counsel for the city of Lebanon made the point that this court has no power to hear and determine this matter, because, in legal effect, it is an original proceeding which has not been passed upon by an inferior court, and under the Constitution the jurisdiction of this court is appellate only.

Therefore, the first question is whether or not the said decision of the Railroad and Public Utilities Commission is one which may be reviewed by this court.

The Constitution of Tennessee provides that the judicial power of the state shall be vested in one Supreme Court, and in such circuit, chancery, and other inferior courts as the Legislature shall from time to time ***819** ordain and establish. Article 6, § 1. This article vests all judicial power, and it is not necessary to cite authority for the proposition that the Legislature can neither add to nor take away from this grant of power. Hayburn's Case, 2 Dall. 411, 1 L. Ed. 436.

Section 2 of article 6 provides that the jurisdiction of the Supreme Court shall be appellate only.

In a case decided by this court in 1858, involving the Constitution of 1834, which carried a clause identical with the above, Judge Caruthers, for the court, said:

"It was intended, in all controversies between parties, that they should have the advantage of two tribunals: First, the court established by the Legislature, and then by appeal, the court of last resort established by the Constitution." Miller v. Conlee, 5 Sneed, 432.

This construction has been adhered to by this court. Memphis v. Halsey, 12 Heisk. 210; State v. Gannaway, 16 Lea, 124; Ward v. Thomas, 2 Cold. 565; State v. Hall, 6 Baxt. 7.

Chief Justice Marshall, in Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60, said:

"If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction, made in the Constitution, is form without substance."

In Muskrat v. United States, 219 U. S. 348, 31 Sup. Ct. 250, 55 L. Ed. 246, the court said:

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner."

Is the Railroad and Public Utilities Commission a court within the meaning of the Constitution and the language of our courts construing it? A court has been defined to be "a place where justice is judicially administered." Coke on Littleton, 58; 3 Blackstone's Commentary, 23.

"To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department." Cooley, Const. Lim. 132.

See, also, Bouvier's Law Dictionary, quoted with approval in Lawyers' Tax Cases, 8 Heisk. at page 650.

The Constitution vests the judicial power in--

"one Supreme Court and in such circuit, chancery and other inferior courts as the Legislature shall * * * establish; in the judges thereof, and in justices of the peace."

It is apparent that the word "court," as used in our Constitution, means the medium for the exercise of the judicial power of the state, and connotes the ordinary attributes of judicial tribunals, certainly a judge or judges and the machinery necessary for the judicial administration of justice. Based upon the foregoing conceptions of the judicial power and the courts, did the Legislature, by the act or acts creating the Railroad and Public Utilities Commission, intend to create a subordinate court and to vest in it judicial power within the meaning of our Constitution?

The acts in question are parts of the same general body of legislation affecting public service corporations enacted in 1897 (chapter 10), 1919 (chapter 49), and 1921 (chapter 107). The caption of the act of 1897 is to create a Railroad Commission and to define its powers. The caption of the act of 1919 merely amends the act of 1897 and changes the name of the commission from Railroad Commission to Railroad and Public Utilities Commission. The last act, that of 1921, amends the preceding acts, enlarges the powers, and provides for an appeal to this court. Certainly no one of the captions of the three acts, even by inference, conveys the idea that a court is being created, and, if the body of the acts did create a court by apt and proper language, they would be unconstitutional under numerous decisions in this state, as embracing more than one subject. State v. McCann, 4 Lea, 1; Mayor and Aldermen of Knoxville v. Lewis, 12 Lea, 180; Acklen v. Thompson, 122 Tenn. (14 Cates) 43, 126 S. W. 730, 135 Am. St. Rep. 851.

The three acts above referred to contain 62 sections. It would becloud the question to enter into a minute and detailed discussion of these sections. We have read each one carefully, and it is sufficient to say that they vest in the Railroad and Public Utilities Commission the following power:

(a) To make rules for the future, which is legislative in its nature. This delegated legislative power is characteristic of administrative tribunals. While courts have the power to make rules, these are limited to rules for their own procedure and are not rules for the government of human conduct. The rule-making function is legislative in its nature, distinct from the quasi judicial function, in that such rules are made for future conduct, whereas the settlement of controversies affects only the legality of past acts. Familiar examples of the rule-making functions are the making of regulations by railroad ***820** commissions to be observed by public utilities and public service corporations, safety laws, rules prescribed by workmen's compensation boards, rules and regulations by boards of health. Cases involving typical illustrations and problems are: Woods v. State, 130 Tenn. 100, 169 S. W. 558, L. R. A. 1915F, 531; Selective Draft Law Cases, 245 U. S. 366 (1918), 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856; Monongahela Bridge v. U. S. (1910) 216 U. S. 177, 30 Sup. Ct. 356, 54 L. Ed. 435; Union Bridge Co. v. U. S., 204 U. S. 364 (1907), 27 Sup. Ct. 367, 51 L. Ed. 523; Miller v. Mayor of New York, 109 U. S. 385 (1883), 3 Sup. Ct. 228, 27 L. Ed. 971; St. Louis Indep. Packing Co. v. Houston (D. C.) 231 Fed. 779 (E. D. Mo. 1916); Sears Roebuck Co. v. Federal Trade Comm., 258 Fed. 307 (7th Circ. 1919), 169 C. C. A. 323, 6 A. L. R. 558; Western Union Tel. Co. v. Myatt (C. C.) 98 Fed. 335 (Circ. Ct. D. Kan. 1899); Sabre v. Rutland R. R. Co., 86

Vt. 347, 85 Atl. 693 (1913), Ann. Cas. 1915C, 1269; Erie R. Co. v. Board of Pub. Utility Comm'rs, 87 N. J. Law, 438, 95 Atl. 177 (1915); Stettler v. O'Hara, 69 Or. 519, 139 Pac. 743 (1914), L. R. A. 1917C, 944, Ann. Cas. 1916A, 217; State v. Johnson, 61 Kan. 803, 60 Pac. 1068 (1900), 49 L. R. A. 662; People v. Boggs, 56 Cal. 648 (1880).

(b) The application of these rules in particular cases, which is executive or administrative.

(c) The decision of controversies arising under them, which is judicial in nature or quasi judicial. It has been frequently held that the exercise of a quasi judicial function does not prevent it from being administrative in character.

The case of L. & N. R. Co. v. Garrett, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229, involved the validity of statutes under which the Kentucky Railroad Commission functioned. Mr. Justice Hughes, speaking for the court, said:

"The contention is that, before the Commission makes such an order, it is required to exercise judicial functions. It is first to determine whether the carrier has been exacting more than is just and reasonable; it is to give notice and a hearing; it is to 'hear such statements, arguments or evidence offered by the parties' as it may deem relevant; and it is in case it determines that the carrier is 'guilty of extortion' that it is to prescribe the just and reasonable rate. Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character. Very properly, and it might be said, necessarily--even without the express command of the statute--would the Commission ascertain whether the former, or existing, rate, was unreasonable before it fixed a different rate. And in such an inquiry, for the purpose of prescribing a rule for the future, there would be no invasion of the province of the judicial department. Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. The Legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate and whether other rates should be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. It is 'the nature of the final act' that determines 'the nature of the previous inquiry.' Prentis v. Atlantic Coast Line, 211 U. S. 210, 227, 53 L. Ed. 150, 159, 29 Sup. Ct. Rep. 67."

The determination of pension claims, decisions of the land department adjudicating the rights to public lands, decisions of draft boards upon the eligibility for military service, and decisions of the emigration officials upon deportation of aliens, all involve the power to hear and determine, but have been held properly placed in the executive or administrative department. In re McLean (D. C.) 37 Fed. 648; U. S. v. Lalone (C. C.) 44 Fed. 475; Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929; West v. Hitchcock, 205 U. S. 80, 27 Sup. Ct. 423, 51 L. Ed. 718; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; Selective Draft Law Cases, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856.

(d) The right to initiate investigations and to regulate utilities. Our grand jury and coroner's inquest are about the only bodies attached to the judicial department which retain this right of independent inquiry. This power of initiative is mainly regulatory in character.

All of the above powers are to be exercised with respect of public service corporations devoted

wholly or in part in the service and patronage of the public. The right of governmental control of property and employments devoted to the public use, commonly called public service corporations, although not absolute and subject to certain limitations, is firmly established. Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

In the case of Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, it was held that the Virginia Corporation Commission was not a court.

In Western Union Telegraph Co. v. Myatt (C. C.) 98 Fed. 341, the court said:

"The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as ***821** a rule for future observance, the rates and charges for services rendered, is wholly a legislative or administrative function. The Legislature may, in the first instance, prescribe such regulations, and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions, boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the Constitution itself, and is as much a part of it as though it were definitely defined therein. When the Legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction."

The foregoing powers conferred upon the Railroad and Public Utilities Commission are characteristic of all administrative bodies. The Interstate Commerce Commission, which is vested with broader powers than those conferred by the acts in question, has been held to be an administrative body, although it exercises vastly larger powers of decision. C., N. O. & T. P. R. R. v. I. C. C., 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; I. C. C. v. Brimson, 154 U. S. 447, 155 U. S. 3, 14 Sup. Ct. 1125, 15 Sup. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49; I. C. C. v. C., N. O. & T. P. R. R. Co., 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243; L. & N. R. v. Garrett, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229.

From the foregoing it is apparent that the broad general purpose of the acts in question is to confer upon the Railroad and Public Utilities Commission powers and functions which are primarily legislative and executive, and that the power to hear and determine controversies, the quasi judicial power, is merely incidental thereto. The proposition that the Legislature intended or attempted to create a court by the acts above referred to and to vest it with the power to make rules, interpret and execute them, cannot be successfully maintained. The Railroad and Public Utilities Commission is authorized to initiate and prosecute its own proceedings before itself; and such proceedings are to be heard, decided,

and its determination therein is authorized to be enforced by itself. A tribunal exercising such commingled legislative, executive, and judicial functions, from its very nature cannot be made a court. W. U. Tel. Co. v. Myatt (C. C.) 98 Fed. 335; State ex rel. Godard v. Johnson, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; McNeill v. Southern Ry. Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142.

It follows that section 7 of chapter 107 of the Acts of 1921, providing for an appeal to this court from the final finding, order, or judgment of said commission is unconstitutional and invalid. This section may be eliminated without destroying the remaining sections of the act.

Section 7 being eliminated, there is no specific provision in chapter 107 of the Acts of 1921 for a judicial review of the decisions of the Commission. It is fundamental that every man have his "day in court," and we have no doubt that an appropriate procedure exists, for, as quaintly observed by an ancient English judge, in the case of Rex v. Mayor of Oxford, Palmer, 453:

"The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. 'Adam,' says God, 'where art thou? * * * Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also."

It is not necessary to discuss the other questions presented in the record. The proceeding will be dismissed.

Tenn. 1923.
In re Cumberland Power Co.
147 Tenn. 504, 249 S.W. 818, 20 Thompson 504

END OF DOCUMENT