

CITIES: )  
PUBLIC SERVICE COMMISSION: ) Public Service Commission Act supersedes  
any contract between city and utility  
as to purity of water.

September 15, 1936.

9-15



Honorable Will C. Lohmeyer  
Commissioner of Public Property and Public  
Utilities of the City of Springfield  
Springfield, Missouri

Dear Mr. Lohmeyer:

This is to acknowledge your letter requesting our opinion concerning the right of the City of Springfield to enforce the terms of Section 11, Ordinance No. 349, to the end that the City shall have the right to take over the present water works and operate same in order to adjust or correct the causes, if any, for complaint concerning the city water.

Section 11, appended to your letter, reads as follows:

"When the city water works are completed and the City Clerk notified thereof, a test for assurance as herein set forth shall be made; then for the full term of this ordinance or extension thereof (except sooner purchased by said city) said Perkins or assigns shall continue to furnish without default a constant and uninterrupted supply of water as herein before set forth.

"Provided for any neglectful default in operating and supplying water as afore-said on the part of said Perkins or assigns. The city may take possession temporarily of said works, machinery and appurtenances and operate the same until insured that the works will be efficiently operated by the said Perkins or assigns, and the expense so incurred by the said city in so operating said works shall be

a lien upon the earnings of said works until paid, and shall be deducted from any sum due said Perkins or assigns."

Assuming this ordinance, when entered into, to be valid and to constitute a valid and enforceable contract between Perkins or assigns and the City of Springfield, the question presents itself as to the validity of such contract subsequent to the passage of the Public Service Commission Act of 1913.

Chapter 33, R. S. Mo. 1929, relates to the "Public Service Commission," and Article 4 of said chapter to "water corporations." Section 5188 of said article and chapter provides in part as follows:

"This article shall apply to \* \* \* \* \* and the supplying and distributing of water for any purpose whatsoever."

Section 5190 provides in part as follows:

"The commission shall: 1. Have general supervision of all \* \* \* water corporations having authority under any special or general law or under any charter or franchise to lay down, \* \* \* pipes, conduits, ducts or other fixtures in, over or under the streets \* \* \* for the purpose of furnishing or distributing water \* \* \*.

2. Investigate and ascertain, from time to time, the quality of \* \* \* water supplied by persons, corporations \* \* \*; examine or investigate the methods employed by such persons, \* \* \* in supplying and distributing water for any purpose whatsoever, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using \* \* \* water, and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions

of the works, \* \* pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of \* \* \* water corporations and municipalities.

3. Have power, by order, to fix from time to time standards for the measurement of the purity \* \* \* of water to be distributed or sold by persons \* \* \* for any purpose whatsoever \* \* \* and for the purpose of determining whether the water furnished or sold conforms to the standard of purity and pressure, and conforms to the orders issued by the commission, the commission shall have power, of its own motion, to examine and investigate the plants and methods employed in manufacturing, delivering and supplying \* \* \* water.

This section of our laws delegates to the Public Service Commission all powers necessary to supervise and regulate water corporations such as the one supplying water to the City of Springfield. The fact that a contract, by way of ordinance or otherwise, existed between the City and the public utility, could not in any wise affect the right of the Public Service Commission to deal with the utility, regardless of the rights and liabilities created by said contract. This is best illustrated by the words of Judge Graves in the case of City of Cape Girardeau v. Railway Co., 305 Mo. 590, 267 S. W. 601:

"The Public Service Commission is not a court and cannot undertake to either enforce or abrogate contracts. It deals with common carriers (by virtue of the written law) upon the theory of public service, and not in view of any contract. What contracts may have been made is not a real consideration of the Public Service Commission, under its limited authority. If a concrete case comes within its purview, the Commission is authorized to make orders (under the police power) which will best subserve the public welfare. This is irrespective of contract rights."

And in the very recent case of State v. Public Service Commission of Missouri (1932), 50 S. W. (2d) 114, the court said:

"A proper disposition of this case by this court lies within narrow compass. That it is within the powers and jurisdiction of the public service commission, under the powers granted that body by the Legislature, to grant to or withhold from a street railroad the right and power to abandon a part or spur of its existing line, has been repeatedly held by this court. Southwest Railroad Co. v. Public Service Commission, 281 Mo. 52, 219 S. W. 380; State ex rel. v. Missouri Southern R. R. Co., 279 Mo. 455, 214 S. W. 381; State ex rel. Carthage v. Public Service Commission, 303 Mo. 505, 260 S. W. 973; City of Cape Girardeau v. Railway Co., 305 Mo. 590, 267 S. W. 601, 36 A. L. R. 1488. The power of the Public Service Commission is an exercise of the police power of the state granted by the lawmaking power to that tribunal and overrides all contracts, privileges, franchises, charters or city ordinances. The exercise of such police powers are by the statutes granting same made subject to review and control by the courts as to being unreasonable or unlawful. The only question for the circuit court on the writ of review, and by this court on appeal, is whether the orders made by the Commission subserve the public welfare in a manner and to an extent reasonable and lawful, and this question is to be solved regardless of contract right or obligations, except as such enter into the reasonableness or lawfulness of the orders made. City of St. Louis v. Public Service Commission, 276 Mo. 509, 526, 207 S. W. 799."

CONCLUSION

Assuming the ordinance in question to be valid and to constitute a still existing contract between the water company and the City of Springfield, certain it is that the City of Springfield could not arbitrarily take possession of the water works. Whether or not there has been any neglectful default in supplying water by the water corporation, is necessarily a question of fact that would have to be determined by a court of law.

Assuming these facts, when finally determined, conclusively showed a neglectful default on the part of the water company, even then the City could take possession and operate the water works only until such time as the neglectful default existed. The default having been corrected, under the very terms of the ordinance, possession and control of the water works would have to be returned to the water company.

It is clear, therefore, that the whole purpose and intent of the ordinance when written was to assure to the people of Springfield a constant and safe supply of water. There was at that time no act similar to the Public Service Commission Act, and it is reasonable to assume that, had there been such an Act, this provision of the ordinance would have been omitted for there would then have been no reason or need for protection other than that guaranteed by the Public Service Commission Act.

It is therefore our opinion that the Public Service Commission Act of 1913 supersedes Section 11 of Ordinance No. 349, and that the proper remedy on the part of the City of Springfield, in case of any neglectful default on the part of the water company supplying water to the City of Springfield, is by way of complaint made to the Public Service Commission, as contemplated by Article IV, Chapter 33, supra.

Yours very truly,

APPROVED:

James L. HonnBostel  
Assistant Attorney-General

JOHN W. HOFFMAN, Jr.,  
(Acting) Attorney-General.

JLH:EG