1976

Cottonwood Mall Shopping Center, Inc v. Public Service Commission of Utah, And Frank S. Warner And Olof E. Zundel, Commissioners, And Utah Power And Light Company : Reply Brief of Plaintiff

Utah Supreme Court

S. G. BAUCOM; Attorneys for Defendant, Utah Power & Light CompanyG. BLAINE DAVIS; Attorney for Division of Public UtilitiesKEITH E. SOHM; Attorney for Plaintiff

Keith E. Sohm
Attorney for Plaintiff
Suite 81 Trolley Square
Salt Lake City, Utah 84102
581-7223

IN THE SUPREME COURT OF THE STATE OF UTAH

COTTONWOOD MALL SHOPPING CENTER, INC.,	:	
Plaintiff,	:	
vs.	:	Case No. 14568
PUBLIC-SERVICE COMMISSION OF UTAH, and FRANK S. WARNER and OLOF E. ZUNDEL, Commissioners, and UTAH POWER AND LIGHT COMPANY,	:	
Defendants.	:	

REPLY BRIEF OF PLAINTIFF

The defendant, Public Service Commission of Utah, rested its whole argument on the question of Res Judicata and that is the principal basis of the arguments of defendant Utah Power and Light Company. The latter defendant also contends the Commission correctly determined the plaintiff was not exempt from regulation. We address ourselves first to the matter of Res Judicata.

Point I

THE DOCTRINE OF RES JUDICATA DOES NOT APPLY IN THE COTTONWOOD MALL CASE BECAUSE:

1. THE FACTS, THE IDENTITY OF THE SUBJECT MATTER AND THE IDENTITY IN THE QUALITY OF PERSONS INVOLVED HAVE CHANGED.

2. THE BURDEN IS ON THE PARTY ASSERTING RES JUDICATA TO ESTABLISH BY AFFIRMATIVE PROOF, THAT THE CAUSE OF ACTION INVOLVED AND THE PARTIES ARE IDENTICAL IN THIS CASE.

3. UNDER THE ERIE CASE THE STATE COURT SHOULD DECIDE HOW UTAH LAW APPLIES IN UTAH.

4. IF RES ADJUDICATA IS TO APPLY, A PERSON SHOULD NOT BE BOUND BY A JUDGMENT UNLESS HE HAS HAD ADEQUATE OPPORTUNITY TO LITIGATE MATTERS ADJUDICATED AGAINST HIM.

5. THE LAW OF THE LAND HAS CHANGED SINCE THE FEDERAL COURT RULED IN THE COTTONWOOD MALL CASE.

1. MOST JURISDICTIONS INDICATED THAT IN ORDER TO APPLY THE RES JUDICATE DOCTRINE, THERE MUST BE FOUR ELEMENTS PRESENT:

   a. Identity of subject matter,

   b. Identity of cause of action,

   c. Identity of persons and parties,

   d. Identity in the quality of persons for or against whom the claim is made.

   Cooper v Warnock, Wash., 134 P^2 706, 709

   Smith v Gray, Nevada, 250 P 369

   Pompanio v Larsen, Colorado, 251 P. 534

   Paroutsis v Gregory, Penn., 35 A^2 559

   Res Judicata can apply only when the issues are identical

   Emerson Estate v Cook, Ill., 50 NE^2 772

   McCormick v Hartman, Mich., 10 NW^2 910

   Klassen v Central Kansas Corp., Kans., 165 P^2 601, 60

   Res Judicata is not available where the issue in an action differs in any way from the issue in our earlier action

the same parties.

Cartey v Klein, New York, 24 NYS^2 67 68

When it appears an issue was not determined by judgment, it is not Res judicata.

Stark v Coher, Calif., 129 P^2 290, 393

Panos v Great Western, Calif., 126 P^2 889, 895

In the case of West Jordon, Inc., 7 Utah 2d 391, 326 P^{2}d105, 1958, certain land owners obtained a judgment for severance from the town by a District Court decree. About two weeks later the town passed an ordinance annexing the lands theretofore severed. The landowner brought another action and the Honorable A. H. Ellett dismissed the suit on grounds of Res Judicata. The Supreme Court reversed the lower court on the theory that the cause of action had changed.

> "Since the lands did not again become part of the territory of the town until two weeks after the severance in the prior action, their petition did not involve the same cause of action even though part of the subject matter was the same and the same reasons were given for desiring the serverance."
>
> "Since this action is based on a new and different ordinance which necessarily requires the determination of essentially different facts from those determined in the previous action that doctrine can have no application to this case."

Obviously this case shows how liberal the Utah Courts are on the matter of Res Judicata. The Cottonwood Mall case has a much stronger basis to show a change of facts and cause of action. In the Cottonwood Mall case the facts have changed, the identity of the subject matter has changed and the identity of the quality of person has changed. One of the principal pegs on which the Federal Court hung its hat was the fact that Eldredge Furniture Company

had purchased its store area and owned that one section of Cottonwood Mall. The fact is that now, and at the time application was made to the Public Service Commission, Eldredge Furniture had sold its space back to the Mall so the plaintiff owned all of the Cottonwood Mall property. Obviously the facts have changed. The identity of the subject matter has changed in that plaintiff now owns all the property. The identity of the quality of person has changed in that the Federal Court found the Mall would be a utility and now it would not be a utility. We do not concede that the Federal Court made a correct decision even in view of the Eldredge ownership, but certainly this change is a material change sufficient to take the case outside of the bounds of Red Judicata and is sufficient to open the matter for a decision of this court on its merits or for a reversal to send back to the Public Service Commission to rule the plaintiff is exempt.

In the case of East Mill Creek Water Co. v Salt Lake, Utah 1945, 159 P2d 863, the court held:

> "Where claim, demand or cause of action is different in the two cases, then judgment in the earlier cases is res judicata of the later only to extent that the earlier judgment actually raised and decided the same points and issues which are raised in the later case.

This case followed numberous other Utah cases as follows:

> Everill v. Swan, 20 Utah 56, 57 P. 716. Glen Allen Mining Co. v. Park Galena Mining Co., 77 Utah 362, 296 P. 231; Leone v. Zuniga, 84 Utah 417, 34 P. 2d 699; Logan City v. Utah Power & Light Co., 86 Utah 340, 16 P. 2d 1097, on rehearing, 86 Utah 354, 44 P. 2d 698; State v. Erwin, 101 Utah 365 at page 422, 120 P 2d 285 at page 315.

46 Am Jur 2d, Judgments §443 states:

"Clearly, the enforcement of the rule of res Judicata may not be avoided by the discovery of new evidence bearing on a fact or issue invovled in the original action, as distinguished from a subsequent fact or event which creates a new legal situation, even though the newly discovered evidence might have been sufficient to justify a new trial in the first case. However, where, after the rendition of a judgment, subsequent events occur, creating a new legal situation or altering the legal rights or relations of the litigants, the judgment may thereby be precluded from operating as an estoppel. In such case, the earlier adjudication is not permitted to bar a new action to vindicate rights subsequently acquired, even if the same property is the subject matter of both actions."

The many footnote cases include California, Idaho and Washington cases.

§443 goes on to say:

"In this connection, it has been declared that the doctrine of res judicata extends only to facts and conditions as they existed at the time the judgment was rendered, and that a judgment is not res judicata as to rights which were not in existence at the time of the rendition of the judgment. It has even been held that the effect of a judgment as res judicata may be preduced by events creating a new legal situation occurring pendente lite before the rendition of the judgment, where a supplemental pleading is not filed."

§382 discussing merger of cause of action in Judgment states:

"However, the doctrine of merger of a cause of action in the judgment rendered thereon is calculated to promote justice, and will be applied with due consideration of the demands of justice and equity; it may be carried no further than the ends of justice require."

Adam v Davies, Utah, 156 $P^2$207 158 ALR 852.§383 tells us that this doctrine and the doctrine of Res Judicata may be regarded as identical.

Restatement Judgments §54 states that where a judgment is rendered for the defendant on the ground of the nonexistence of some fact essential to the plaintiff's cause of action, the plaintiff is not precluded from maintaining an action after such fact has subsequently come into existence.

Even in the Knight case cited by both defendants, only part of the facts were considered as affected by Res Judicata, not the whole case.

In asserting that no facts were presented in evidence at the argument before the Public Service Commission the defendants are admitting that they did not present any evidence to show that the facts in this case are the same as the facts in the case before the Federal Court. The burden is clearly on the moving party to prove circumstances are the same.

> Parties asserting Res Judicata must establish, by affirmative proof, that the cause of action involved and parties are identical as in this case. McCann v Iowa Mutual Liability Ins. 1 NW^2 682, 688

2. NEITHER THE UTAH COURTS NOR OTHER COURTS HAVE STRICTLY FOLLOWED THE PRINCIPLE OF RES JUDICATA. JUSTICE AND PUBLIC POLICY ARE THE CONTROLLING CONSIDERATIONS.

In the recent Utah case of Tates, Inc v Little America, 535 P^2 1228 and 551 P^2 1257, this court first reversed the lower courts judgment for defendant in favor of the plaintiff and remanded the case back to the lower court. The lower court granted the defendant's motion for a new trial and religated the same issues over the objections of the plaintiff. On the second appeal, this court upheld the lower court despite the principle of Res Judicata.

46 Am Jur 2d, Judgments §402 states:

"The doctrine of res judicata may be said to adhere in legal systems as the rule of justice. Hence, the position has been taken that the doctrine of res judicata is to be applied in particular situations as fairness and justice require, and that it is not to be applied so rigidly as to defeat the ends of justice or so as to work as injustice.

The sound policy behind the doctrine is also to be considered in applying the doctrine. . . Moreover, there are exceptions to the doctrine as res judicata based upon other important reasons of policy. In this respect it has been declared that res judicata, as the embodiment of a public policy, must at times be weighed against competing interests, and must, on occasion, yield to other policies. The determination of the question concerning judicial reconsideration is said to require a compromise, in each case of the two opposing policies, of the desirability and finality and the public interest in reaching the right result.

Underlying all discussion of the problem must be the principle of fundamental fairness in the due process sense. It has accordingly been adjudged that the public policy underlying the principle of res judicata must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which to present his case. It has also been declared that a determination of issues in an action between private parties cannot bar a contest to vindicate the public interest."

3. UNDER THE ERIE CASE, THE STATE COURT SHOULD DECIDE HOW UTAH LAW APPLIES IN UTAH.

Justice Brandeis in the Erie v Tompkins case, 304 US 64 in overruling the Tysen case states:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case in the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

and the Justice goes on to say this rule of law is necessary to preserve, "the autonomy and independence of the states -

independence in their legislative and independence in their judicial departments." This principle was followed by Justi Frankfurter in the Guaranty Trust Co, v York case, 326 U.S. 9

The plaintiff contends the Federal Court did not foll the law in Utah, instead it declared that no law had been made on the subject. We contend that the law was made on the subject. We contend that the law was made on the subject as set forth in our main brief pages 10 through 13 both by the court and the legislature. The legislature made it clear that companies like the plaintiff should not be regarded as Utilities but were exempt where distributuion is through "private property, i.e., property not dedicated to public use, solely for his own use or use of his tenants. . . ". The reasoning of counsel for the defendant is fallacious and unsound when they argue that the legislation exception does not apply to Mall because no Malls were in existence in 1917 when the law was enacted. That is like saying the U.S. Constitution does not apply to the jet, rocket, calculator, T.V. and computer a we are in now because they didn't exist 200 years ago. That great constitution still rules our greatly advance civilizat with only a few admendments. The exception doesn't have to identify each case specifically wherein it applies; but, obv the exception applies to all property "not dedicated to publ use".

THE UTAH COURT IS NOT FORECLOSED FROM NOW ANNOUNCING THE LAW IN THIS MATTER.

In the case of Atkins v Schmutz Manufacturing Co., 372 Fed.^{2} 762, decided in 1967, involved a question of whether a Kentucky one-year statute of limitation or a two-year Virginia statute of limitation applies to a complaint filed in a Kentucky Federal Court when the tart occurred in Virginia. The Federal Court had previously held in several cases, following the Kentucky state courts rulings, that the Virginia two-year statute would apply. The plaintiff relied on those federal and state court cases when it filed its complaint in 1963, after the one-year limitation had expired. The Kentucky court suddenly specifically reversed itself and "expressly overruled" its previous cases before this case was concluded which required the Federal Court to reverse its previous decision in order to follow state law. Obviously the state court can reserve its position or clarify its position and the Federal Court must follow the State Courts rulings.

The cases cited by defendant and particularly Ham v. Holy Rosary Hospital are not in point. The Ham case involved constitutional questions that, of course, involved federal law not state law.

4. IF RES JUDICATA IS TO APPLY A PERSON SHOULD NOT BE BOUND BY A JUDGMENT UNLESS HE HAS HAD ADEQUATE OPPORTUNITY TO LITIGATE MATTERS ADJUDICATED AGAINST HIM.

In the Federal Court the plaintiff did not have his day in court and never had an opportunity to present evidence since the Federal Court on a motion to dismiss converted it to a Motion for Summary Judgment and ruled against the plaintiff.

Again before the Public Service Commission the defendant, Utah Power & Light, moved for dismissal and it was granted without taking any evidence or giving the plaintiff a chance to be heard. The case of Davis v. First National Bank of Waco (Texas), 161 SW^2 467, holds that under Res Judicata a person should not be bound by a judgment unless he has had an adequate opportunity to litigate matters adjudicated against him. In the North Dakota case, Knutson v Ekren, 5 NW^2 74, the court held the issues must be fully tried and litigated.

5. THE LAW OF THE LAND HAS CHANGED SINCE THE FEDERAL COURT RULING.

The Judge Ritter decree in the Cottonwood Mall case was dated July 11, 1969, holding the shopping center would not be a public utility. The Lloyd v Tanner case cited and quoted extensively in our original brief was decided by the United States Supreme Court in June, 1972, reversing the lower court and holding that the center was private property and holding that the shopping center had not dedicated any part of its property to public use even though roads through it were public and even though it held the same kind of non business functions that the Cottonwood Mall held. This ruling in effect overruled the former law of the land laid out in the Logan valley decision.

We call to the courts attention a new U.S. Supreme Court case, Scott Hudgens v National Labor Relations Board, 47 L Ed 2d 196, decided March 3, 1976. This case involved picketing of a privately owned shopping center. The shopping center

tried to stop the picketing in the center. The National Labor Relations Board held against the center even in view of the Lloyd case and the Court of Appeals enforced the Board's order. The U.S. Supreme Court vacated the Court of Appeal's judgment and held in favor of the shopping center using the Lloyd case as the chief basis of its ruling. The majority held that the holding in the Lloyd case "amounted to a total rejection of the holding and rational in the Logal valley decision". The shopping center was private property. What the Lloyd case and the Hudgens cases means to the Cottonwood Mall case is that the mall must be held to be private property and the fact that it serves customers and the public both paying and non paying, that its facilities are not converted to public facilities. And the light and power provided whether to paying customers or non paying customers, whether during regular business hours or on off hours, the power is for its own use or its tenants use.

46 Am Jur 2d, Judgment §444

> "It is particularly with respect to the doctrine of collateral estoppel precluding the religation of an issue adjudicated in the previous action on a difference cause of action, that a change in the law after the rendition of the judgment operates to deny conclusiveness to the judgment.
>
> The rules that a judgment may be denied a conclusive effect because there has been a change in the law since its rendition has also been regarded as applicable to a change in the law by intermediate judicial decision of either a state or a federal court."

Point II

THE COTTONWOOD MALL ELECTRICAL PLANT IS EXEMPT FROM REGULATION BY THE PUBLIC SERVICE COMMISSION.

We have already presented argument on this matter in our prior brief so we present only a few cases to further rebut the defendant's allegations.

In the 1968 Massachusetts case, Re Frank Properties, Inc. 72 PUR 3d 305, where applicant applied for an advisory ruling on the question of whether a shopping center landlord proposing to furnish tenants "total energy service" would be subject to regulation. After a well considered opinion, a copy of which is attached, the Public Utilities Department ruled that the landlord would not be a public utility. The ruling has stood in effect thereafter. The case is significant because the analyzed leading court cases dealing with "total energy" from Pennsylvania (Drexellrook Associates v Pennsylvania Public Utility Commission, 1965, 212 A 2d 237), from Wisconsin (Re City of Sun Prairie, 1965, 57 PUR 3d 525 and General Split Corp., 1962, 44 PUR 3d 334), from New Jerse (Freehold Water & Utility Co. v Silver Mobile Home Park, 1967 68 PUR 3d 523).

In the case Cleveland Electric Illuminating Company where the Ohio Shopping Centers Asso. Intervened, 53 PUR 3d 234, 1964, held that the Ohio Public Utilities Commission had no jurisdiction over sales of electrical energy by the Shopp Center and that the Shopping Center was not a public utility.

In Llano, Inc v Southern Union Gas Co., N.M. 1964, 399 P 2d 646, the court considered the case where Llano purchased natural gas for delivery and resale to one industrial custom They quote from 73 CJS Public Utilities §2 and from 43 Am Jr 571 Public Utilities and then states:

"Applying these rules to the facts in the instant case we think the conclusion is inescapable that Llano at no time held itself out as engaged in supplying natural gas "to or for the public," or to any limited portion of the public which might require natural gas, to the extent of Llano's capacity. It is now legally committed to serve but one private industry, and has held itself out as willing to serve only such other private industrial users as its selects, if and when additional natural gas reserves are available to it. Nor do we find any evidence, in support of the Commission's finding and/or conclusion, that Llano has held and is holding itself as ready, willing and able to provide natural gas service to or for the public or any segment thereof."

We also attach a copy of the City of San Prairie case (1967) and the Drexellrook case (1965). Both of these cases involved landlords of big apartment complexes. The Public Utilities laws of each state are about the same as that in the state of Utah "providing gas or electrity to or for the public".

The principal of Res Judicata does not apply in the Cottonwood Mall case and clearly the mall operation is exempt from regulation by the commission.

Wherefore, we pray the Honorable Court reverse the ruling of the Public Service Commission finding the Cottonwood Mall is exempt from regulation by the commission.

Respectfully submitted,

Keith E. Sohm

Copies of the foregoing Reply were served upon defendants by mailing first class to attorneys for defendants, Robert Gordon, P. O. Box 899 Salt Lake City, Utah 84110, and to G. Blaine Davis, 236 State Capitol Building., Salt Lake City, Utah, 84114, dated this 3rd day of November, 1967.

Keith E. Sohm

RE FRANK PROPERTIES, INC.

MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES

Re Frank Properties, Inc.

D.P.U. 15715
January 29, 1968

APPLICATION *for advisory ruling on question whether shopping center landlord proposing to furnish tenants total energy service would be subject to regulation; ruling granted, and proposed operation found not subject to regulation.*

Public utilities, § 11 — Advisory ruling as to utility status — Landlord total energy service.

1. Upon application for an advisory ruling on the question whether a shopping center landlord which proposes to furnish total energy service to its tenants would be subject to utility regulation, the department of public utilities would exercise its discretion to give such a ruling where the landlord proposed to make a substantial investment and where the total energy concept was receiving wide attention at the time, p. 306.

Public utilities, § 23 — Regulation dependent upon sale of service — Statute.

2. A Massachusetts statute which subjects to regulation "all . . . corporations which . . . operate works . . . for the manufacture and sale or distribution and sale of gas . . . or of electricity" makes regulation dependent upon the existence of a sale, unlike statutes in other jurisdictions which make regulation dependent upon the public nature of the activity, p. 307.

Public utilities, § 41 — Landlord "total energy" services to tenants.

3. A shopping center landlord is not a gas or electric company subject to regulation under a statute subjecting to regulation "all . . . corporations which . . . operate works . . . for the manufacture and sale or distribution and sale of gas . . . or of electricity" where the landlord, using gas either directly or converting it, proposed to provide total energy service—heating, electric current, domestic hot water, and chilled water for air conditioning—for which each tenant initially will pay 55 cents per annum per square foot as an additional component of the rental, and where the landlord will make meter readings of such service to tenants for two years, on which to establish charges for the remainder of 10-year leases without regard to the quantity of energy consumed by the tenants during such period; the commission found that the arrangement was "rent inclusion," p. 308.

By the DEPARTMENT: On July 10, 1967, Frank Properties, Inc., a Delaware corporation engaged in the business of owning and operating shopping centers, having entered into leases with tenants under which it proposes to supply tenants with various energy requirements, commonly known as "total energy" plan, filed a request for an advisory ruling, pursuant to § 8 of

Chap 30A of the General Laws, "as to the legality of the proposed plan in the light of the regulations and statutes administered . . ." by the department of public utilities, if it conducted activities described herein. Documents and written representations as to the operations of Frank Properties, Inc., have been received by the department. The Massachusetts Electric Company was given an opportunity to be heard in this matter and declined this opportunity.

[1] The promulgation of advisory rulings is discretionary with the department. Since Frank Properties, Inc., proposes to make a substantial investment, the advisability of which may depend in large part on the legal effect of the proposed operation and since the total energy concept is one that is receiving wide attention,[1] the department believes that this is an appropriate matter for an advisory ruling. It must be emphasized that the ruling relates to the specific facts set forth in this opinion, and any variation from these facts in this or any other case might require a different ruling.

In addition, it is important that the issue we are ruling on be precisely defined. The request for the ruling states the issue in terms of "legality" which is too general. The arrangement might or might not be legal for a company subject to Chap 164. There is a threshold question, however; namely, whether this arrangement would constitute Frank Properties, Inc., a "gas company" or an "electric company" under the provisions of §§ 1 and 2 of Chap 164 of the General Laws. In this opinion we address ourselves to that question alone and we note no determination as to the propriety of this arrangement for a company which is subject to regulation under Chap 164.

Frank Properties, Inc., has entered into leases with various tenants for a shopping center in Worcester, Massachusetts. It will purchase gas from the Worcester Gas Company and will use the gas directly, or by converting it, for all the energy requirements of the tenants. Under its lease arrangement the landlord will supply heating and chilling water for air conditioning and heating, electric current, and domestic hot water. Each tenant will pay 55 cents per annum, per square foot as an additional component of this rental.

Each lease will be for a minimum period of ten years. During the first two years meters will be installed to measure the tenant's consumption of electricity, heating, cooling, and domestic hot water. The meters will be read each month and the tenant will be furnished a copy of the reading. At the end of two years a new charge for the services will be fixed, determined on the basis of the following: (a) Average cost of filters used, (b) meter readings based on the unit cost for electricity at the rate of .0131 cents per kilowatt-hour, heating .0183 cents per unit of 10,000 Btu, cooling .0272 cents per unit of 10,000 Btu, domestic hot water .125 cents per 100 gallons exclusive of normal water charges.

The amount previously paid by the tenant during the 2-year period will be adjusted and the tenant will pay the new fixed charge during the remainder of the lease term without regard to the

[1] See, e.g., address of Ernest W. Gibson, Chairman, Public Service Board of Vermont, New England Public Utility Commissioners Conference, June 26–28, 1967.

quantity of energy he consumes during this period.

[2] Our determination is governed by the provisions of §§ 1 and 2 of Chap 164, which delineate the entities that are subject to regulation by this department and have the duties and obligations of public utilities (although that term is not used in the chapter). Section 1 determines which domestic corporations are subject to Chap 164, and is not therefore applicable to Frank Properties, Inc. Section 2, however, contains substantially identical definitions applicable to foreign corporations. The difference between the two sections is that foreign corporations are not subject to certain types of regulation, principally control of security issues.

Section 2 provides that substantially all the other regulatory provisions shall apply to "all . . . corporations which . . . operate works . . . for the manufacture and sale or distribution and sale of gas . . . or of electricity . . . ."

Because of this special language defining the jurisdiction of this department, decisions in other states relating to similar arrangements between landlord and tenants are not appropriate. In Drexelbrook Associates v Pennsylvania Pub. Utility Commission (1965) 418 Pa 430, 60 PUR3d 175, 212 A2d 237, the landlord proposed to acquire certain equipment from the electric and water company serving it. It would then buy gas, water, and electricity at certain metering points and distribute the gas, water, and electricity to tenants who would be separately metered and charged by the landlord. The commission denied the application of the companies to sell the equipment because the consummation of the transaction would make the landlord a "public utility" for which a separate authorization of the commission was required. The Pennsylvania supreme court reversed. The applicable statute defined a "public utility" as one furnishing gas or electricity "to . . . the public," and, the court held, service limited to tenants only was not service to the "public."

Similarly, in Freehold Water & Utility Co. v Silver Mobile Home Park (NJ 1967) 68 PUR3d 523, a mobile home park owner which supplied water to its tenants was held not to be a public utility under a statute which defined utility as a company which supplied water for "public use." Among the reasons cited by the commission were the absence of metering, the limitation of service to tenants, and the incidental nature of the operation of the water supply as compared to the main business of the trailer park.

The Wisconsin Public Service Commission dealt with a "total energy" arrangement in Re City of Sun Prairie (Wis 1965) 57 PUR3d 525, and held that the landlord was not a "public utility" because the use of energy, being limited to tenants was not being supplied to the "public," as provided in the statute. It was pointed out that there would be no submetering though apparently no reliance was placed on this fact. See also General Split Corp. v P.&V. Atlas Industrial Center, Inc. (Wis 1962) 44 PUR3d 334.

It is the *public* nature of the activity which controls regulatory jurisdiction in these states. Whether gas or electricity is being sold is only incidentally

relevant if at all. The cases are therefore not persuasive in construing our statute which makes no reference to the "public," but makes regulation depend on the existence of a "sale."

On the other hand, our decisions (and those of the supreme judicial court) relating to "resale" of electricity, though not directly related to possible regulatory jurisdiction over landlords, furnish useful clues as to the meaning of our statute as applied to total energy arrangements. In Re Boston Edison Co. (Mass 1953) 98 PUR NS 427, affd sub nom. Boston Real Estate Board v Massachusetts Dept. of Pub. Utilities (1956) 334 Mass 477, 15 PUR3d 47, 136 NE2d 243, we held that Boston Edison Company was justified in filing a tariff under which no power would be sold within the territory in which it sold electricity to any person purchasing the power for resale. By this tariff amendment the company brought an end to the practice of landlords purchasing power at wholesale rates and submetering it to their tenants. There was no occasion to decide whether such landlords were themselves subject to regulation, but it is clear from the language that this department and the supreme judicial court considered that the practice constituted a "resale." Compare A. W. Perry, Inc. v Boston Edison Co. (Mass 1947) 70 PUR NS 161; Re Boston Edison Co. (Mass 1949) D.P.U. 8228.

[3] If Frank Properties, Inc., proposed to meter the electricity or gas consumed by each tenant and charge on the basis of the meter reading, we would be constrained to hold that this constituted a "sale" of gas or electricity, subjecting Frank Properties, Inc., to regulation under Chap 164. Re Lowell (Mass 1957) D.P.U. 11694. This is not such a case, however. The charge which the landlord proposes to make covers far more than the use of electricity or gas. It includes, for example, heating and cooling. Although the fuel cost may be a component to his charge to the tenant, it cannot be separately stated apart from the cost of equipment and labor necessary to provide the tenant with heat. The use of meters described herein does not make the arrangement a sale of gas or electricity. At most, only the electricity portion of the charge could be said to be directly measured. The use of gas for heating and air conditioning is only indirectly measured through the measurement of heat.

The controlling fact is that over the entire course of the lease the charge will not be based on measured consumption, even of the electric portion of the charge. Because the total energy concept is new, it is difficult to estimate the portion of the rent that the landlord must charge for heat, hot water, air conditioning, and electricity. The metering for the 2-year period merely provides a basis for estimating a fair rental of the premises. The situation is not significantly different from that of an apartment building landlord who supplies heat and hot water and electricity to the tenants without metering. The difference is that this landlord through the accumulated experience of apartment house owners is able to estimate with reasonable certainty the cost to him of supplying these services over the long run. The metering in this case provides for a new arrangement on the same basis as exists for the long-standing practice with respect to apartment houses.

Accordingly, we believe that the arrangement described herein is rent inclusion as that term was used in D.P.U. 8862, and we rule that on these facts the landlord Frank Properties, Inc., would not be a gas company or an electric company.

SUN PRAIRIE v PUBLIC SERVICE COMMISSION

WISCONSIN SUPREME COURT

City of Sun Prairie

v

Wisconsin Public Service Commission

Additional respondents: Lewis P. Brooks, Brooks Equipment Leasing, Inc., and Wisconsin Gas Company

— Wis 2d —, 154 NW2d 360
November 28, 1967

APPEAL *from judgment affirming commission decision that landlord providing services to tenants was not public utility; affirmed. For commission decision, see (1965) 57 PUR3d 525*

Statutes, § 11 — Judicial construction.

1. A construction given to a statute by the court becomes a part thereof unless the legislature subsequently amends the statute to effect a change, p. 418.

Public utilities, § 41 — Services by apartment complex to tenants.

2. A landlord of a large apartment complex furnishing heat, water, light, and power to all tenants, but not serving any adjoining landowners or the public generally, is not a public utility and therefore not subject to commission jurisdiction, p. 418.

Proceeding by plaintiff city of Sun Prairie to review a declaratory ruling of the Public Service Commission of Wisconsin that the project of defendant Brooks Equipment Leasing, Inc. (hereinafter "Brooks"), in furnishing heat, power, light, and water to its tenants in its multiple apartment complex does not bring Brooks within the definition of a "public utility" as defined by § 196.01(1), Statutes. Lewis P. Brooks, its president, was also joined as a party defendant. Because Brooks was not a public utility, the commission determined Brooks was not within its jurisdiction and did not require a certificate of convenience and necessity.

The city of Sun Prairie, which is a public utility operating under an indeterminate permit to furnish electric heat, light, and power to the public within its boundaries, made application to the commission for such declaratory ruling on July 23, 1964. Brooks was then the owner of a 15-acre parcel of land in the city of Sun Prairie on which it proposed to construct a 240-unit apartment project housed in 15 buildings that will house up to 1,000 people. Heat, light, water, and power will be supplied by Brooks

to all tenants in the project. Natural gas will be purchased by it to operate engines which will drive four electrical generators with a total capacity of 500 kw. Heat-recovery equipment will utilize waste heat from the engines to furnish low-pressure steam to heat and air condition all 240 apartment units. No water, electricity, or heat will be supplied to adjoining landowners or to the public generally. The rents paid by the tenants will cover the expense of the utility services, so that they will not be separately billed for same. Brooks will rent an apartment "to any responsible person" who is able to pay the rent.

After the commission made its declaratory ruling, the city of Sun Prairie petitioned the commission for a rehearing. Upon the denial of such petition, the city then instituted the instant review proceeding in circuit court.

By judgment entered February 13, 1967, the circuit court affirmed the declaratory ruling of the commission, and the city has appealed.

The Wisconsin Gas Company, which sells gas to Brooks for use in its project, appeared in the proceedings before the commission and in the review before the circuit court, and opposed the city's petition.

APPEARANCES: Petersen, Sutherland, Axley & Brynelson, Madison, Wilmer E. Trodahl, City Attorney, Sun Prairie, for appellant; Bronson C. La Follette, Attorney General, William E. Torkelson and Clarence B. Sorenson, Madison, for Public Service Commission; Stafford, Rosenbaum, Rieser & Hansen, Madison, for Lewis P. Brooks and Brooks Equipment Leasing, Inc.; Foley, Sammond & Lardner, Vernon A. Swanson, and N. J. Lesselyoung, Milwaukee, for respondent Wisconsin Gas Company.

CURRIE, Ch. J.:

[1, 2] The issue on this appeal is whether the landlord of a large complex which furnishes heat, light, water, and power to its tenants is a public utility within the definition of § 196.01 (1), Stats, so as to be under the jurisdiction of the public service commission. This statute defines a public utility as follows:

"'Public utility' means and embraces every corporation, company, individual, . . . town, village, or city that may own, operate, manage, or control . . . any part of a plant or equipment, within the state . . . for the production, transmission, delivery, or furnishing of heat, light, water, or power either directly or indirectly to or for the public. . . ."

We deem Cawker v Meyer[1] to be determinative of the result. In that case the landlord constructed a building in the city of Milwaukee to be rented for stores, offices, and light manufacturing purposes. A steam plant was installed therein to generate heat, electric light, and power to be furnished to the tenants and occupants of the building who desired such utility service. Since the landlord was unable to dispose of all the heat and electricity to his tenants, he entered into contracts with three adjoining property owners to furnish them heat and power.

The Wisconsin Railroad Commis-

[1] (1911) 147 Wis 320, 133 NW 157, 37 LRA NS 510.

sion, which had jurisdiction over public utilities at that time, contended that the landlord was a "public utility" as defined in § 1797m–1, Stats (now § 196.01(1), Stats). The commission argued that the furnishing of heat, light, and power "to anyone else than to one's self is furnishing it to the public within the meaning of the statute."[2] This court stated:

". . . It was not the furnishing of heat, light, or power to tenants, or, incidentally, to a few neighbors, that the legislature sought to regulate, but the furnishing of those commodities to the public; that is, to whoever might require the same. Wisconsin River Improv. Co. v Pier (1908) 137 Wis 325, 118 NW 857, 21 LRA NS 538. The use to which the plant, equipment, or some portion thereof is put must be for the public, in order to constitute it a public utility. But whether or not the use is for the public does not necessarily depend upon the number of consumers; for there may be only one. . . . On the other hand, a landlord may furnish it to a hundred tenants, or, incidentally, to a few neighbors, without coming under the letter or the intent of the law. In the instant case, the purpose of the plant was to serve the tenants of the owners, a restricted class, standing in a certain contract relation with them, and not the public. . . .

. . . . . .

". . . The tenants of a landlord are not the public; neither are a few of his neighbors, or a few isolated individuals with whom he may choose to deal, though they are a part of the public. The word 'public' must be construed to mean more than a limited class defined by the relation of landlord and tenant, or by nearness of location, as neighbors, or more than a few who, by reason of any peculiar relation to the owner of the plant, can be served by him.

". . . [The statute] was not intended to affect the relation of landlord and tenant, or to abridge the right to contract with a few neighbors for a strictly incidental purpose, though relating to a service covered by it."[3]

Chapter 499, Laws of 1907, which provided for the regulation of public utilities and contained the definition of "public utility" found in § 1797m–1 (now § 196.01(1), Stats) had become generally known as the Public Utilities Law.[4] The commission to which this regulation had been entrusted was the then recently created Wisconsin Railroad Commission. John Barnes was the first chairman of this regulatory commission. It is noteworthy that when the Cawker case reached the court in 1911, Barnes was then a member of this tribunal and concurred in the decision.

The statutory definition of "public utility" in § 1797m–1 has not been amended in any relevant portion since this court's decision in Cawker, and the same definition may be found today in § 196.01(1), Stats. This court has long been committed to the principle that a construction given to a statute by the court becomes a part thereof, unless the legislature sub-

[2] Id, 147 Wis at p. 324, 133 NW at p. 158.
[3] Id. 147 Wis at pp. 324–326, 133 NW at p. 158.
[4] See Crow, Legislative Control of Public Utilities in Wisconsin (1933) 18 Marquette LR 80.

sequently amends the statute to effect a change.[5]

The courts of California,[6] Missouri,[7] Ohio,[8] and Pennsylvania[9] have similarly held that a landlord who furnishes utility service to his tenants is not a public utility within the definition thereof contained in the applicable state law. Appellant has been unable to cite a single authority to the contrary.

We consider the Pennsylvania court's recent decision in Drexelbrook Associates v Pennsylvania Public Utility Commission[10] to be highly significant in view of appellant's argument that the rule announced in Cawker should not be extended to a large apartment complex such as the instant one. Drexelbrook Associates is the owner of a real-estate development known as Drexelbrook. It is a garden-type apartment village with 90 buildings containing 1,223 residential units, 9 retail stores, and a club with a dining room, swimming pool, skating rink, and tennis courts. The Pennsylvania supreme court held that the tenants of a landlord, although many in number, do not constitute "the public" within the meaning of Pennsylvania's Public Utility Law, but constitute rather a defined, privileged, and limited group. The court held that the proposed service of electricity to them thus would be private in nature.

As in the instant appeal, it was argued in the Drexelbrook Associates case that regulation was desirable to protect the interest of the tenants in so large an apartment complex. In disposing of this argument the Pennsylvania court stated:

"The controlling consideration is not whether regulation is desirable, but whether appellant [Drexelbrook Associates] is subject to regulation under the Public Utility Law."[11]

Judgment affirmed.

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[5] Moran v Quality Aluminum Casting Co. (1967) 34 Wis 2d 542, 556, 150 NW2d 137; Mednis v Industrial Commission (1965) 27 Wis 2d 439, 444, 134 NW2d 416; Hahn v Walworth County (1961) 14 Wis 2d 147, 154, 109 NW2d 653, 94 ALR2d 618; Meyer v Industrial Commission (1961) 13 Wis 2d 377, 382, 108 NW2d 556; Thomas v Industrial Commission (1943) 243 Wis 231, 240, 10 NW2d 206, 147 ALR 103; Milwaukee County v City of Milwaukee (1933) 210 Wis 336, 341, 246 NW 447; Eau Claire National Bank v Benson (1900) 106 Wis 624, 627, 628, 82 NW 604.

[6] Story v Richardson (1921) 186 Cal 162, 198 Pac 1057, 18 ALR 750.

[7] Missouri ex rel. and to use of Cirese v Missouri Pub. Service Commission (1944) — Mo App —, 54 PUR NS 169, 178 SW2d 788.

[8] Jonas v Swetland Co. 119 Ohio St 12, PUR1928D 825, 162 NE 45.

[9] Drexelbrook Associates v Pennsylvania Pub. Utility Commission (1965) 418 Pa 430, 60 PUR3d 175, 212 A2d 237.

[10] *Supra*, footnote 9.

[11] Id. 418 Pa at pp. 441, 442, 60 PUR3d at p. 181, 212 A2d at p. 242.

DREXELBROOK ASSOCIATES v P. U. C.

PENNSYLVANIA SUPREME COURT

Drexelbrook Associates

v

Pennsylvania Public Utility Commission

— Pa —, 212 A2d 237
June 30, 1965

APPEAL from judgment affirming commission decision which disapproved proposed sale and transfer of utility facilities to apartment complex; reversed and remanded with instructions to grant approval.

Public utilities, § 41 — Private service — Landlord service to tenants.

1. An apartment complex proposing to render service to its tenants only, and at a profit, serves a defined, privileged, and limited group, and the proposed service to them is private in nature and not a public utility service since it would not be furnished "to or for the public," as provided by Public Utility Law, p. 175.

Consolidation, merger, and sale, § 35 — Grounds for approval or disapproval — Loss of jurisdiction over service.

2. It was error for the commission to disallow the sale and transfer of utility distribution and metering facilities to an apartment complex on the ground that the transfer would remove from commission supervision service presently subject to its jurisdiction, for the commission did not have jurisdiction with respect to public policy in this matter since the service was not rendered "to or for the public," as provided by the Public Utility Law; the controlling consideration was not whether regulation was desirable but whether the transferee of the facilities was subject to regulation under the law, p. 180.

(COHEN, J., with whom EAGEN, J., joins, dissents, p. 182.)

APPEARANCES: Irving R. Segal, Philadelphia, for appellant; Daniel F. Joella, Harrisburg, for appellee.

Before Bell, CJ., and Musmanno, Jones, Cohen, Eagen, O'Brien, and Roberts, JJ.

ROBERTS, J.:

[1] Applications to the public utility commission were filed by the Philadelphia Electric Company and the Philadelphia Suburban Water Company seeking approval of the transfer by sale of certain equipment.[1] Commission approval would enable the applicants to transfer distribution, service-supply, and metering equip-

[1] The approval was sought under § 202(e) of the Public Utility Law, Act of May 28, 1937, PL 1053, 66 PS § 1122(e), as amended by Act of August 24, 1963, PL 1225, § 2, 66 PS § 1122 (Supp 1964).

ment to Drexelbrook Associates, a registered limited partnership which owns and manages a real-estate development known as "Drexelbrook." Drexelbrook, located in Drexel Hill, Delaware county, is a garden-type apartment village with 90 buildings, containing 1,223 residential units, 9 retail stores, various public areas, and a club with a dining room, swimming pool, skating rink, and tennis courts.

The equipment involved in the proposed transfer was installed originally by the applicants in the buildings and stores of the development and is presently used by the applicants to furnish gas, water, and electric service directly to Drexelbrook tenants. Upon conclusion of the transfers, water service would be supplied by the water company directly to Drexelbrook Associates at four metering points, and gas and electric service would be supplied by the electric company to Drexelbrook Associates at a single metering location.[2] Drexelbrook Associates would purchase gas, electricity, and water from the applicants at the proposed metering points. In turn, it would assume the obligation and sole responsibility for furnishing and distributing gas, electricity, and water to its tenants and for servicing and maintaining the transferred facilities.

With respect to electricity and gas, Drexelbrook Associates assumes that it would qualify for wholesale tariff rates at such single metering points,[3] and proposes to retain the transferred meters in order to measure each of its tenant's individual consumption. It has agreed to bill each tenant on the basis of such consumption at the same rate which the tenant would pay if he received service individually and directly from the electric company, thereby enabling it to make a profit. In like manner, Drexelbrook Associates assumes that, with respect to water, it would also qualify for the applicable wholesale tariff rates based on single point water metering service.[4] It proposes to continue to furnish water to apartment tenants on the existing basis by including the charges for water services within the rent. Evidently, remetering of water at a profit is contemplated only with respect to the swim club and store tenants.

The commission dismissed the applications without hearing on August 19, 1963. Drexelbrook Associates then asked the commission to reopen the matter and to grant it leave to intervene and offer evidence in support of the applications. The request was granted but after a subsequent hearing the commission by a vote of 3–2, dismissed the applications on June 8, 1964. Thereafter, Drexelbrook Associates appealed to the superior court[5] which divided equally, thereby affirming the commission's order. A majority of the superior court then certified

[2] Presently, water service is supplied at 106 metering points, electric service is supplied at 1,335 metering locations, and gas service is supplied at 1,283 existing locations.

[3] Although the commission itself seems to have assumed previously that Drexelbrook would qualify for the wholesale rates, it now questions for the first time in its brief before this court whether Drexelbrook is so qualified. Even assuming the relevance of this factor in the present proceeding, we will not now indulge in a fact-finding process which the commission itself did not see fit to undertake.

[4] See footnote 3, *supra*.

[5] Neither the Philadelphia Electric Company nor the Philadelphia Suburban Water Company, applicants before the commission, took an appeal from the commission's determination.

the case to this court for consideration and decision.[6]

In dismissing the applications, the commission held that upon consummation of the proposed transfers of the designated service and metering equipment, appellant would become subject to the provisions of the Public Utility Law.[7] For that reason, the commission concluded that it would be necessary for appellant to seek commission authorization to furnish the public utility services now rendered by the applicants.

The term "public utility" is defined in § 2 of the Public Utility Law as including "persons or corporations . . . owning or operating in this commonwealth equipment, or facilities for: (a) [P]roducing, generating, transmitting, distributing, or furnishing natural or artificial gas, electricity, . . . *to or for the public* for compensation; (b) [d]iverting, developing, pumping, impounding, distributing, or furnishing water *to or for the public* for compensation . . . ."[8] (Emphasis supplied.) The question presented is whether the service which appellant proposes to furnish to its tenants would be service *to or for the public* within the meaning of the statute.

A number of decisions prove helpful in deciding the question in this case. In Borough of Ambridge v Pennsylvania Pub. Service Commission, 108 Pa Super Ct 298, PUR1933 D 298, 165 Atl 47, allocatur den 108 Pa Super Ct xxiii, where a manufacturer who furnished water to another manufacturer was held not to be rendering a public service, the court said that "'[t]he public or private character of the enterprise does not depend . . . upon the number of persons by whom it is used, but upon whether or not it is open to the use and service *of all members of the public* who may require it . . . .'" (Emphasis supplied.) 108 Pa Super Ct at p. 304, PUR1933 D at p 301, 165 Atl at p. 49. Aronimink Transp. Co. v Pennsylvania Pub. Service Commission (1934) 111 Pa Super Ct 414, 5 PUR NS 279, 170 Atl 375, was a case where a corporation operated apartment houses and furnished bus transportation to its tenants. Because the corporation served only those who were selected as tenants —a special class of persons not open to the indefinite public—the court held the service to be private in nature.[9] The court concluded that the service rendered was merely incidental to the business of maintaining the apartment house, and the fact that the transportation was furnished to hundreds of individuals residing in the 288 apartments did not transform the private nature of the service into a "public service."

Overlook Develop. Co. v Pennsylvania Pub. Service Commission, 101 Pa Super Ct 217, PUR1931E 68, affd per curiam (1932) 306 Pa 43, 158 Atl 869, involved a land development company which distributed water not only to vendees situated on its previously owned tract of land, but also to owners of adjacent land. The court held the service was not open

[6] See Act of June 24, 1895, PL 212, § 10, 17 PS § 197.

[7] Act of May 28, 1937, PL 1053, §§ 1 et seq., as amended, 66 PS §§ 1101 et seq.

[8] Act of May 28, 1937, PL 1053, § 2(17) (a) & (b), 66 PS § 1102(17) (a) & (b).

[9] The court cited with approval the quotation from Borough of Ambridge, *supra*, in text.

to the indefinite public but, being confined to privileged individuals, was private in nature. Significantly, the commission itself, in Camp Wohelo v Novitiate of St. Isaac Jogues (1958), 36 Pa PUC 377, adhered to the doctrine expressed in Overlook, stating that "a public use . . . 'is not confined to privileged individuals, but is open to the indefinite public' " and that " 'it is this indefinite or unrestricted quality that gives it its public character.' " PUR1931E at p. 73.)

Although the present case involves the owner of an apartment complex which proposes to render service to its tenants and to no one else, the commission held that the contemplated service would not be merely incidental to the operation of Drexelbrook, but would be a separate and distinct enterprise for profit, subject to the Public Utility Law. In part, the commission based its conclusion on the fact that appellant does not propose to reserve the right to select its customers, but would obligate itself under separate and uniform contracts to furnish service to all tenants, present and future, in its development. The fallacy of this reasoning is shown in the dissenting opinion of the commission chairman which stated that the test "is not [whether] all tenants . . . are being furnished [service,] but whether anybody among the public outside of the Drexelbrook group is privileged to demand service."[10] In the present case the only persons who would be entitled to and who would receive service are those who have entered into or will enter into a landlord-tenant relationship with appellant. Here, as in Aronimink, those to be serviced consist only of a special class of persons—those to be selected as tenants—and not a class open to the indefinite public. Such persons clearly constitute a defined, privileged, and limited group and the proposed service to them would be private in nature.[11]

The commission concedes that a landlord would not be a public utility if its charge for utility service is included, unitemized, in a flat rental. The commission contends, however, that appellant's intention to remeter the service, charge separately for it, and make a profit presents a "different situation" and results in the proposed service being public in nature.[12] However, it is apparent that whether or not the utility charge is included in a flat rental or determined through submetering, it still constitutes compensation to the landlord. We fail to see how the method of computing the charge for the utility service is in any sense determinative of or relevant to the issue of whether the service is "to

[10] (1964) 41 Pa PUC 505, 515.

[11] The record shows many instances where landlords and owners of large apartments and office buildings purchase utility service on a wholesale basis and furnish such service to their office and apartment tenants. Included among these are the Presidential Apartments, Rittenhouse Claridge, Rittenhouse Savoy (all in Philadelphia), and Lynnewood Gardens (in Montgomery county), the latter containing 1,796 apartment units.

[12] In its brief, the commission says: "Appellant would have this Honorable Court believe that there is considerable submetering by landlords without certificates of public convenience from the commission. . . . Obviously the minority opinion [apparently of the commission] and appellant confuse those situations where a landlord receives wholesale rates *and includes the cost of these services in the rent*, with the obviously different situation involved in the instant appeals. Admittedly the Pennsylvania Utility Commission is not a rent control commission and has asserted no jurisdiction over rents." (Emphasis in original.)

or for the public." "[T]he charge to the tenant based upon the amount which the particular tenant actually uses (as proposed in this application) is far more equitable to the tenant than imposing a hidden and unidentified item in the rental charge without any showing by the landlord of the basis on which the utility charge is calculated."[13]

Even the members of the superior court who voted to uphold the commission's order stated "that the distinction made by the commission between including the cost of utility service in a flat rental charge and submetering is a distinction without a difference and the question in this appeal does not turn on that fact."[14] These judges also said with respect to situations where the charge is included in the rent: "We are not so naive as to believe that the cost of utilities are supplied free to the tenants; nor so naive as to believe that the landlord does not make a profit under such circumstances."[15]

However, we cannot agree with the view, expressed by the three affirming judges of the superior court, that the present case may be distinguished from Overlook and Aronimink on the basis of the sequence of ownership of the equipment involved. In the view of those judges, the cases are distinguishable on the theory that apartment owners or landowners initially owned the equipment in Overlook and Aronimink, while in the present case the equipment, from the time of installation to the application for transfer, has been owned by public utilities subject to commission jurisdiction.

The determination of whether appellant would be serving the public after the transfers are completed is unrelated to the identity of the transferor of the designated assets or to the fact that the equipment previously had "been dedicated to a public use and impressed with a public interest."[16] The equipment possesses no mystical qualities or characteristics which render the service for which it is utilized a public service irrespective of the private or public nature of the services or the definite (tenants) or indefinite (public) identification of the persons served. The determination as to whether appellant would be engaged in a public utility service cannot be predicated upon whether it originally

[13] From the dissenting opinion of the commission chairman. 41 Pa PUC at p. 519.

[14] (1965) 206 Pa Super Ct at 135, 212 A2d 229, 233.

Thus, in this regard, the commission dissenters and both the three affirming and two of the dissenting judges of the superior court were in agreement.

[15] 206 Pa Super Ct at p. 135, 212 A2d at p. 233.

A significant decision, not discussed by the majority of the commission in the present case, is Pennsylvania Pub. Utility Commission v Philadelphia Electric Co. (1942) 23 Pa PUC 320. In that decision the commission determined that it would not prohibit the remetering or resale of current by the owner of an office building to his tenants. For a further discussion of the case, see footnote 20, *infra*.

[16] 206 Pa Super Ct at p. 136, 212 A2d at p. 234. This concept, taken from *rate-making decisions* (e.g., City of Pittsburgh v Pennsylvania Pub. Service Commission [1949] 165 Pa Super Ct 519, 528, 82 PUR NS 572, 69 A2d 844, 849, allocatur den 165 Pa Super Ct xxv), is here misapplied when utilized as a consideration in determining whether the service which appellant seeks to render to its tenants constitutes public service under the Public Utility Law. Such application, if correct, would, for all practical purposes, always preclude a transfer of utility equipment to a nonutility because, once included in the rate structure of a public utility, that equipment would be immutably stamped with public use and interest characteristics.

installed the necessary equipment at the time of construction, later installed it itself, or purchased it from a utility which had originally installed it.[17]

We hold, therefore, that the proposed service which appellant would render in the present case would not constitute it a public utility within the meaning of § 2 of the Public Utility Law since such service would not be furnished "to or for the public."

[2] In the alternative, the commission held that the transfers could not be approved even if appellant would not be rendering a public utility service upon consummation of the proposed transfers because the commission could not "disregard the public interest and abandon the public and the consumers who would become affected by the approval of the applications, to uncertain but definitely less desirable prospects."[18] The members of the superior court who voted to affirm the commission agreed with its position, stating that "the commission, in exercising its administrative discretion, not only may but should deny the transfer of patrons out from under regulation, even where their consent has been obtained, in circumstances such as this case presents, in the public interest and as a matter of public policy."[19]

In support of this alternative holding, the commission engaged in much speculation as to possible evils which would flow from consummation of the proposed transfer.[20] In substance,

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[17] The dissenting opinion in the superior court quite aptly stated:

"If the facilities here involved had been originally installed by the landlord under single metering and wholesale rates granted to the landlord by the utilities, there would be no doubt of the validity of the transaction. As the record in this case shows, such operations exist . . . in Pennsylvania. The circumstances that the landlord now seeks single meter and wholesale rates should make no difference in the result. What is legal in one case does not thereby become invalid in the other. The sequence of events should not be controlling." 206 Pa Super at p. 125, 212 A2d at p. 235.

[18] 41 Pa PUC at p. 512.

Presumably, the commission acted under § 202 of the Public Utility Law. Act of May 28, 1937, PL 1053, as amended, 66 PS § 1122. That section requires the commission's approval, evidenced by a certificate of public convenience, prior to the transfer of assets by a public utility to any person and prior to any abandonment of any service to patrons. The issuance of such a certificate is based upon the commission's determination that it is necessary or proper for the service, accommodation, convenience, or safety of the public. Although factual and legal questions have been raised which cast doubt on the applicability of that portion of § 202 which involves abandonment of service, the commission has made no specific findings with respect to such questions and our disposition of this appeal makes it unnecessary for us to express our views respecting them.

[19] 206 Pa Super Ct at p. 134, 135, 212 A2d at p. 233.

[20] For example, the commission suggested that, without its supervision, Drexelbrook tenants might eventually be subject to discrimination in rates as compared to other tenants who are protected by commission jurisdiction; that the practice of submetering and resale might adversely affect the revenue return of the public utility companies involved and cause increases in rates to the remaining customers of such utilities; and, in the alternative, that a change in rate structure increasing wholesale prices might make the landlord's utility service unprofitable. The commission also voiced concern over possible inaccuracies in meters.

It is appropriate to recall the words of the commission in Pennsylvania Pub. Utility Commission v Philadelphia Electric Co. (1942) 23 Pa PUC 320, 42 PUR NS 126, when it expressly refused to prohibit remetering by a landlord:

"[W]e deem it appropriate to state that we have considered the advisability of a rule absolutely prohibiting remetering or resale of current. The so-called 'practical' difficulties envisaged by respondent as resulting from such a rule do not require detailed comment, but it may be observed that some predictions could not reasonably be expected to eventuate and the fulfillment of others might well produce compensating benefits. Also, we have no doubt of our jurisdiction to consider the reasonableness and justness of any tariff rule and the practice thereunder, and to take appropriate corrective action if the rule appears unreasonable or its application unjust: Hickey v Phila-

however, the position of both the commission majority and the affirming members of the superior court can be reduced to the proposition that it is against public policy to approve the transfer since it would remove from commission supervision service now subject to its jurisdiction. Such reasoning disregards the express formulation of public policy by the legislature embodied in the statutory definition of the term "public utility." That provision confers jurisdiction on the commission *only* where the service involved is rendered "to or for the public." The controlling consideration is not whether regulation is desirable, but whether appellant is subject to regulation under the Public Utility Law. Klawansky v Pennsylvania Pub. Service Commission (1936) 123 Pa Super Ct 375, 382, 17 PUR NS 401, 187 Atl 248, 251. If the legislature did not deem it necessary to confer jurisdiction on the commission with respect to the service proposed by appellant (as the commission conceded for purposes of its alternative holding), then the absence of such jurisdiction as a result of the consummation of the proposed transfer would not and could not contravene public policy. Furthermore, the possible evils which the commission envisaged as a result of the absence of its supervision could come to fruition irrespective of whether a landlord originally installs facilities or later purchases them from a public utility, or whether the charge for service is on a metered basis or included in a flat rental without itemization. It seems obvious that the same projected evils which the commission majority envisaged as possibilities in the present case may be equally posited in other instances and cases previously approved by the commission and the superior court.[21]

We hold, therefore, that the commission erred as a matter of law in holding that Drexelbrook Associates would become a public utility upon consummation of the proposed transfers, and that the commission also erred in alternatively holding that the allowance of the transfers would contravene public policy if the commission thereby lost its jurisdiction over the service involved.

The order is reversed. The record is remanded and the commission is directed to approve the applications and to issue the appropriate certificates.

delphia Electric Co. (1936) 122 Pa Super Ct 213, 220, 14 PUR NS 349, 184 Atl 553. Aside from 'practical' considerations and technical objections to jurisdiction and procedure, our decision not to require prohibition of remetering or resale turns upon our conclusion that the record does not show such a requirement to be necessary at this time for public protection; . . . . ." 23 Pa PUC at p. 322, 42 PUR NS at p. 127.

This language of the commission is especially notable and meaningful because it was directly at odds with the opinion of a dissenting member of the commission. The dissenting commissioner contended that "the prohibition of resales of electric current involving a profit to landlords is a requirement that is necessary for public protection." 23 Pa PUC at p. 324, 42 PUR NS at p. 128. The dissent also stated: "When the Philadelphia Electric Company sells to a landlord and the landlord resells to a tenant at a profit to the landlord, the landlord in my opinion becomes a public utility and has no right to extort a profit for such sale." 23 Pa PUC at p. 323, 42 PUR NS at p. 128.

It is significant that, in the face of this dissent, the majority of the commission held otherwise.

[21] See Pennsylvania Pub. Utility Commission v Philadelphia Electric Co. (1942) 23 Pa PUC 320, 42 PUR NS 126, *supra*, footnote 20; Aronimink Transp. Co. v Pennsylvania Pub. Service Commission (1934) 111 Pa Super Ct 414, 5 PUR NS 279, 170 Atl 375, *supra*, text at p. 177; Borough of Ambridge v Pennsylvania Pub. Service Commission, 108 Pa Super Ct 298, PUR1933D 298, 165 Atl 47, *supra*, text at p. 177; Overlook Develop. Co. v Pennsylvania Pub. Service Commission, 101 Pa Super Ct 217, PUR1931E 68, affd per curiam (1932) 306 Pa 43, 158 Atl 869, *supra*, text at p. 177. See also footnote 11, *supra*.

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS
(cont.)

CASES CITED
(cont.)