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THE RAILROAD COMMISSION AS REGULATOR OF NATURAL GAS UTILITIES

The Texas Railroad Commission has been described as the most powerful and one of the most extensive administrative authorities in the United States today.³ Pursuant to the direction of the Texas Constitution, the legislature established the first railroad commission in 1891 and vested it with power to regulate the state's railroads at a time when railroad construction had become a national obsession.⁴ Existing statutes proved inadequate, so in 1890, due mostly to the leadership of Governor James Stephen Hogg, the constitution was amended to allow the legislature to "provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable" to control the railroad industry.⁵ An 1894 amendment to the constitution provided that the Railroad Commission should consist of three commissioners, each elected to six-year terms.⁶

While the form of the agency has undergone negligible change, through the years the powers of the commission have expanded vastly.⁷ Following the legislature's desire to regulate industries which, like the railroad industry, are affected with the public interest, the legislature granted the Railroad Commission the statutory authority to regulate gas utilities operating within the State of Texas.⁸ Since the commission was an established agency with

3. Davis & Willbern, *Administrative Control of Oil Production in Texas*, 22 TEXAS L. REV. 149 (1944); Norvell, *The Railroad Commission of Texas: Its Origin and Relation to the Oil and Gas Industry*, 40 TEXAS L. REV. 230 (1961).

4. TEX. CONST. art. X, § 2, comment. The railroads, carefully nourished by governmental favor and subsidy, had become uncontrollable. Norvell, *The Railroad Commission of Texas: Its Origin and Relation to the Oil and Gas Industry*, 40 TEXAS L. REV. 230, 232 (1961).

5. TEX. CONST. art. X, § 2.

6. *Id.* art. XVI, § 30.

7. *Id.* art. X, § 2, comment; Norvell, *The Railroad Commission of Texas: Its Origin and Relation to the Oil and Gas Industry*, 40 TEXAS L. REV. 230 (1961). The Railroad Commission now exercises authority in the following areas: (1) regulation of railroad, express, dock, wharf, and terminal companies, interurban railways which carry freight, and enforcement of all laws pertaining to the operation of railroad and express companies; (2) establishment of rates for freight and passengers; (3) supervision and regulation of motor bus and motor truck transportation for hire over public highways, including the setting of rates and charges; (4) regulation of brokers who sell transportation or arrange for transportation; (5) regulation of gas utilities; (6) control over common carrier oil and gas pipelines and crude petroleum storage tanks; (7) control of oil and gas waste, including regulation of drilling, equipping, locating, spacing, operating and production of oil and gas wells; and (8) regulation of butane and propane gas used for public consumption. *Id.* at 235.

8. Concerning the delegation of regulation of gas utilities to the Railroad Commission, the Texas Supreme Court held in *City of Denison v. Municipal Gas Co.*, 117 Tex. 291, 3 S.W.2d 794 (1928) that nothing in the Texas Constitution could be construed

expert personnel in the regulation of oil and gas production and especially in the intricate and complex field of ratemaking, the delegation of authority to regulate gas utilities to the Railroad Commission was a logical step.

Gas utilities, being in the nature of monopolies, free from the price-moderating effects of competition, require public regulation to protect the consumer from unreasonable rates and inadequate service. The constitutionality of state regulation of private property devoted to public use was first upheld by the United States Supreme Court in *Munn v. Illinois*.⁹ There the Court declared that "when private property is 'affected with a public interest it ceases to be *juris privati* only.'"¹⁰ The Court stated that when one commits his property to a public use, he in effect grants the public a right to control that property for the common good.¹¹ In return, the persons owning such facilities impressed with the public interest are "confined to take reasonable compensation only," as distinguished from an arbitrary or excessive return on their investments.¹²

In *City of Denison v. Municipal Gas Co.*¹³ the statutes conferring authority on the Railroad Commission to prescribe rates and regulations for gas utilities withstood charges of unconstitutionality, when the city sought to prevent the utility from collecting certain commission-approved charges from its citizens. The city contended that the Railroad Commission was a constitutionally created body over which the legislature had no power to confer duties foreign to its constitutionally defined office. The Texas Supreme Court held that the Railroad Commission is not a constitutional body but was created by the legislature under its constitutionally granted authority to establish the agency and invest it with such powers as are deemed to be advisable.¹⁴

STATUTORY DUTIES OF THE RAILROAD COMMISSION

The primary purpose of regulation of gas utilities is to ensure just and reasonable rates for natural gas at the burner tip.¹⁵ It is primarily from the

as forbidding the placing of such a function in the Railroad Commission. *Id.* at 301, 3 S.W.2d at 798.

9. 94 U.S. 113 (1876).

10. *Id.* at 126; accord, Hale, *De Portibus Maris*, 1 HARG. LAW TRACTS 78.

11. *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

12. *Id.* at 128; accord, *Aldnutt v. Inglis*, 12 East 527, 537 (1810).

13. 117 Tex. 291, 3 S.W.2d 794 (1928).

14. *Id.* at 301, 3 S.W.2d at 798.

15. *State v. Public Serv. Corp.*, 88 S.W.2d 627, 629 (Tex. Civ. App.—Austin 1935, writ ref'd). Burner tip rates are those rates at which natural gas is provided to the ultimate consumer for domestic as well as industrial uses. *Id.* at 629. Low rates, however, are not the only consideration in public utility regulation. Service is at least as important. Patrons of a utility do not actually benefit if the utility's return on its investment is set so low that it cannot attract sufficient capital to maintain and expand its services. Rate setting must be accomplished by considering reasonable compensation of the utility for at least two reasons: first, the utility is constitutionally entitled to reasonable and non-confiscatory rates, *Munn v. Illinois*, 94 U.S. 113, 125-26 (1876), and second, it is

Cox Act¹⁶ that the Railroad Commission derives its authority over gas utilities.¹⁷ Under that Act, the commission has original jurisdiction over gas utilities engaged in intrastate transportation and sale of natural gas.¹⁸ Specifically, this includes exclusive original jurisdiction over city gate rates—those rates at which gas is sold by transmission pipeline companies to a city's distribution system. The price at which the city's distribution system then sells the gas to the ultimate consumer is the burner tip rate. The commission also has sole jurisdiction over gas rates and conditions of delivery in Texas cities with less than 2,000 persons.¹⁹ Gas rates within cities of more than 2,000 persons are set by the individual city governments,²⁰ with the Railroad Commission exercising appellate jurisdiction over municipally-ordained gas rates, hearing appeals de novo.²¹

From time to time the courts have been required to determine what is and what is not a gas utility within the meaning of article 6050,²² thereby determining the scope of the Railroad Commission's supervision and control. *Humble Oil & Refining Co. v. Railroad Commission*²³ is illustrative of the problem. That action was brought to set aside and enjoin the enforcement of a commission order fixing the price of petitioner's natural gas sold to a pipeline company, chartered and operating as a gas utility. The petitioner produced all of the gas involved from leased lands, and contended that articles 6050 through 6066 do not attempt to subject to the jurisdiction of the Railroad Commission mere producers of gas who sell their product under contract to a pipeline company, and who do not engage in the transportation or sale of gas to the public. The Texas Supreme Court held that Humble was not a public utility within the jurisdiction of the Railroad Commission by virtue of article 6050, nor was it made a utility by the fact that it contracted with a utility company for the sale of gas.²⁴ The court determined that the

in the consumer's best interest in terms of the quality of service the utility is able to provide.

16. TEX. REV. CIV. STAT. ANN. arts. 6050-66 (1962) [hereinafter referred to as the Texas Natural Gas Act].

17. *Railroad Comm'n v. City of Austin*, 524 S.W.2d 262, 264 (Tex. 1975).

18. TEX. REV. CIV. STAT. ANN. arts. 6050-66 (1962).

19. *State v. Public Serv. Corp.*, 88 S.W.2d 627, 629 (Tex. Civ. App.—Austin 1935, writ ref'd).

20. *E.g.*, Tex. Laws 1907, § 1, at 219; Tex. Laws 1931, ch. 226, § 1, at 380; Tex. Laws 1937, ch. 144, § 1, at 274. These statutes were repealed and replaced by the Public Utility Regulatory Act so that presently each municipality has exclusive original jurisdiction over all gas utilities within its limits. Tex. Laws 1975, ch. 721, § 19(a), at 2335.

21. TEX. REV. CIV. STAT. ANN. art. 6058 (1962).

22. TEX. REV. CIV. STAT. ANN. art. 6050 (1962).

23. 133 Tex. 330, 128 S.W.2d 9 (1939).

24. *Id.* at 338-39, 128 S.W.2d at 13; TEX. REV. CIV. STAT. ANN. art. 6050 (1962).

statutes were not intended to cover mere producers of gas who sell their product at the point of origin.²⁵

The Texas Natural Gas Act is by far the most important source of the Railroad Commission's authority to regulate gas utilities, but it is not the only one.²⁶ The case of *City of Wink v. Wink Gas Co.*²⁷ is an example where several statutes, some within and some apart from the Natural Gas Act, were at issue. There, the gas utility brought suit to enjoin the city from enforcing a rate schedule whereby the utility was required to charge diminished rates as a patron's gas consumption increased. The utility contended that the rate schedule caused it to unlawfully discriminate in its charges for gas in violation of articles 1438, 1505 and 6057 of the Texas Civil Statutes.²⁸ In light of those statutes, the utility asserted, it should not be required to charge different rates to similarly situated customers. The court held that the rates must be equal as to all identical classes of consumers and that it was the city's function, initially, to reasonably define those classes.²⁹ In this instance the rates and the classes prescribed by the city were held to be reasonable. The court stated, however, that the utility's proper recourse when appealing rates set by the city was first to the Railroad Commission and then to a court of competent jurisdiction.³⁰

Rate setting is expressly within the power of the Railroad Commission as stated in article 6053.³¹ The commission,

In article 6050 a gas utility includes generally any person or entity buying, selling, transporting, producing or delivering natural gas intrastate.

25. *Humble Oil & Ref. Co. v. Railroad Comm'n*, 133 Tex. 330, 340-41, 128 S.W.2d 9, 15 (1939).

26. *E.g.*, TEX. REV. CIV. STAT. ANN. art. 1435 (1962) grants gas utilities certain powers; art. 1436 (1962) among other things grants to a utility the power to condemn right-of-ways; art. 1436b (1962) deals with roads and streets in the distribution of gas; art. 1437 (1962) concerns the finances of gas utilities; art. 1438 (1962) prohibits discrimination by the utility in the rendition of its services; art. 1446(a), §§ 1-8 (1962) prohibits interruption or stoppage of services; and arts. 6014(a) (1962) and 6049(c) (1962) concern natural gas conservation.

27. 115 S.W.2d 973 (Tex. Civ. App.—El Paso 1938, writ ref'd).

28. TEX. REV. CIV. STAT. ANN. art. 1438 (1962) reads:

It shall be unlawful for any such corporation to discriminate against any person, corporation, firm, association or place, in the charge for such gas, electric current or power, or in the service rendered under similar and like circumstances.

TEX. REV. CIV. STAT. ANN. art. 6057 (1962) reads in part:

No such pipeline public utility shall discriminate in favor of or against any person, place or corporation, either in apportioning the supply of natural gas or its charges therefor; nor shall any such utility directly or indirectly charge, demand, collect or receive from any one a greater or less compensation for any service rendered than from another for a like and contemporaneous service. . . .

Tex. Laws 1955, ch. 64, art. 9.16, at 239 (former art. 1505) which prohibited discrimination in the storage or transportation of oil or gas has been repealed.

29. *City of Wink v. Wink Gas Co.*, 115 S.W.2d 973, 977 (Tex. Civ. App.—El Paso 1938, writ ref'd).

30. *Id.* at 977.

31. TEX. REV. CIV. STAT. ANN. art. 6053 (1962).

after due notice shall fix and establish and enforce the adequate and reasonable price of gas and . . . shall establish fair and equitable rules and regulations for the full control and supervision . . . of pipelines and all their holdings pertaining to the gas business in all their relations to the public . . .³²

The requisite steps to be taken by the commission in the establishment of gas rates were first stated by the Texas Supreme Court in a landmark case in public utility regulation law, *Railroad Commission v. Houston Natural Gas Co.*³³ That case involved an action by a gas company appealing a commission ruling setting gas rates in the City of Alvin. The court stated that three determinations were essential precedents to the setting of gas rates: (1) a determination of the reasonable operating revenue and expenses of the utility; (2) a determination of the present fair market value of the property owned by the utility used and useful in the public service; (3) a finding of a reasonable rate of return on the utility's investment.³⁴ Consideration of these factors is complex and expensive, obviously requiring the services of persons expert in accounting, economics, engineering and law.³⁵ The legislature has specifically provided for the employment of such specialized personnel in the Natural Gas Act.³⁶

In addition to the statutory authority already set forth, other articles of the Natural Gas Act require utilities to maintain offices and records, refund excessive charges, provide information to the commission on request, and pay taxes on gross receipts.³⁷ The Railroad Commission is required to report annually to the Governor and set penalties for violations of its orders.³⁸ Other articles further provide for the commission to petition a court of competent jurisdiction for a receivership of any gas utility violating any provision of the Act or any order of the commission and for commission expenditures.³⁹

BOUNDARIES OF RAILROAD COMMISSION AUTHORITY

Judicial review is obviously an important aspect of utility regulation and is necessary to prevent abuse of a particular agency's power. Article 6059 generally provides for an appeal of any commission order, rate, classification, rule, charge, act, or regulation by a gas utility to a court of competent jurisdiction in Travis County.⁴⁰ Both the utility and the commission have the

32. *Id.* art. 6053, § 1.

33. 155 Tex. 502, 289 S.W.2d 559 (1956) (the Alvin case).

34. *Id.* at 506-507, 289 S.W.2d at 573.

35. Fowler, *Purchased Gas Adjustment Clauses: An Adjuster's Viewpoint*, 6 ST. MARY'S L.J. 567 (1974).

36. TEX. REV. CIV. STAT. ANN. art. 6065 (1962).

37. TEX. REV. CIV. STAT. ANN. arts. 6052, 6055, 6056, 6060 (1962).

38. TEX. REV. CIV. STAT. ANN. arts. 6061-62 (1962).

39. TEX. REV. CIV. STAT. ANN. arts. 6063, 6066 (1962).

40. TEX. REV. CIV. STAT. ANN. art. 6059 (1962). Usually this is the district

right to appeal the trial court's judgment in the matter, but the burden rests upon the complaining party to show that the commission's actions were unjust or unreasonable as to the complainant.⁴¹ Thus, any order of the Railroad Commission is presumed to be valid, reasonable and just until proven to the contrary.⁴²

As extensive as the Railroad Commission's regulatory authority appears to be, the courts have repeatedly held that its powers must be expressly conferred by statute and cannot be implied.⁴³ Determining the extent of the commission's authority over gas utilities necessitates careful reading of applicable statutes and interpretive cases.

*Railroad Commission v. United Gas Pipe Line Co.*⁴⁴ is an example of judicial line-drawing, past which the Railroad Commission was held to be without statutory authority to venture. The Austin Court of Civil Appeals held that the commission was without jurisdiction to redress a complaint of a pipeline company supplying gas to a certain city in regard to that city's failure to renew its contract with the gas utility.⁴⁵ The court decided that the commission was also without authority to set aside, in the public interest, the city's contract with a competing pipeline company, notwithstanding a showing by the complainant that its competitor may not be able to meet the terms of its agreement with the city at some future date.⁴⁶ Relying on an earlier decision approved by the Texas Supreme Court,⁴⁷ and referring to article 6054,⁴⁸ the court held that the Act does not give the commission power of revision over a pre-existing contract independent of any question of the making or revision of such rates in the public

court, depending on the amount in controversy. Such an action will receive a preferential docket setting over all other causes of a different nature. *Id.*

41. *Id.*

42. *State v. Lone Star Gas Co.*, 86 S.W.2d 484, 500 (Tex. Civ. App.—Austin 1935, writ ref'd), *rev'd on other grounds*, 304 U.S. 224 (1938); *Railroad Comm'n v. Uvalde Const. Co.*, 49 S.W.2d 1113, 1114 (Tex. Civ. App.—Austin 1932, no writ).

43. *E.g.*, *Railroad Comm'n v. City of Austin*, 524 S.W.2d 262, 281 (Tex. 1975); *Humble Oil & Ref. Co. v. Railroad Comm'n*, 133 Tex. 330, 341, 128 S.W.2d 9, 15 (1939); *Railroad Comm'n v. United Gas Pipe Line Co.*, 358 S.W.2d 907, 914 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.).

44. 358 S.W.2d 907 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.).

45. *Id.* at 919-20.

46. *Id.* at 919.

47. *Municipal Gas Co. v. Lone Star Gas Co.*, 259 S.W. 684 (Tex. Civ. App.—Dallas 1924), *aff'd*, 117 Tex. 331, 3 S.W.2d 790 (1928).

48. TEX. REV. CIV. STAT. ANN. art. 6054 (1962) provides:

All orders and agreements of any company or corporation, or any person or persons controlling such pipe lines establishing and prescribing prices, rates, rules and regulations and conditions of service, shall be subject to review, revision and regulation by the Commission on hearing after notice as provided for herein to the person, firm, corporation, partnership or joint stock association owning or controlling or operating the gas pipe line affected.

interest.⁴⁹ The court pointed out that there was no issue in the instant case as to the rates charged the public, nor adequacy of service; in short, nothing which would give the Railroad Commission jurisdiction over the dispute. The mere possibility that the contract may at some later date yield to revision in the public behalf was not considered sufficient reason to disregard contractual obligations entered into in apparent good faith.⁵⁰

In a recent decision, *Railroad Commission v. City of Austin*,⁵¹ the Texas Supreme Court held that the commission has the express authority to allocate, in the public interest, gas owned by a utility among other cities, towns and corporations regardless of whether or not such action is at variance with the utility's contractual obligations.⁵² The court reaffirmed the rule that the Railroad Commission's powers are not to be inferred, and stressed that its authority does not extend to gas owned by an entity other than a gas utility.⁵³ Since statutory authority for the commission to determine title to gas is not expressed and does not arise by *necessary* implication, it does not have such authority.⁵⁴ As this case emphasized, "[t]he fact that gas . . . is being transported in a pipeline owned by a utility does not subject that gas to a disposition by the commission. It may not determine title to gas . . . ,"⁵⁵ for this question is left to the courts.

HEARINGS BEFORE THE COMMISSION

When a gas utility is dissatisfied with a rate decision of a city government, it may petition the commission to review the city's orders;⁵⁶ or, if a utility desiring a rate increase applies for such to the city and the application is not

49. *Railroad Comm'n v. United Gas Pipe Line Co.*, 358 S.W.2d 907, 919 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.); *accord*, *Municipal Gas Co. v. Lone Star Gas Co.*, 259 S.W. 684, 690 (Tex. Civ. App.—Dallas 1924), *aff'd*, 117 Tex. 331, 3 S.W.2d 790 (1928).

50. *Railroad Comm'n v. United Gas Pipe Line Co.*, 358 S.W.2d 907, 919 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.).

51. 524 S.W.2d 262 (Tex. 1975).

52. *Id.* at 281. The statutory authority is provided by TEX. REV. CIV. STAT. ANN. arts. 6053-54 (1962). While the existence of such contracts does not limit the Railroad Commission's power, under article 6054, to review and revise the contracts, the question of whose gas is affected may be a controlling factor since the commission has express authority to regulate only gas owned by utilities.

53. *Railroad Comm'n v. City of Austin*, 524 S.W.2d 262, 280 (Tex. 1975).

54. *Id.* at 280.

55. *Id.* at 280. Only for the last five years it has been the policy of the Gas Utilities Division to hire exclusively lawyers as hearing examiners. Prior to that time, geologists and engineers were also hired as examiners. The wisdom of the legislature by not granting the commission the statutory authority to indulge in purely legal controversies, like determination of title to gas, is manifest in view of the fact that non-lawyers, until only recently, served as examiners and would likely find themselves ill-prepared for such a task.

56. TEX. REV. CIV. STAT. ANN. art. 6058 (1962).

acted upon within 60 days, the utility may take its case to the Railroad Commission.⁵⁷ Certain rules of practice and procedure pertaining to all hearings have been established to protect the public interest as well as the rights of the parties in any given controversy, and to prevent undue delay in the resolution of such controversies.⁵⁸

Upon application for a hearing before the Railroad Commission or upon the commission's own motion,⁵⁹ the action is docketed as a pending proceeding and notice is served personally or by publication.⁶⁰ Published notice of hearings appear in the *Gas Utilities Bulletin*, published twice each month, setting out the name and address of the applicant, docket number, the name and address of the applicant's attorney, and a concise statement of the action sought.⁶¹ Examiners are assigned to hear each case, report their findings to the commissioners and recommend an appropriate order. Prior to the hearing, the examiner may, in his discretion, request that the parties to the contest attend a pre-hearing conference for the purpose of: (1) formulating and simplifying the issues; (2) avoiding unnecessary proof, (3) outlining the procedure to be used at the hearing; (4) limiting the number of witnesses; and (5) determining any matters which may aid in simplifying the proceedings.⁶²

All hearings are open to the public and are generally held in Austin, Texas. The presiding examiner has the authority to administer oaths, examine witnesses, and rule on the admissibility of evidence and amendments to pleadings.⁶³ These pleadings may be amended at any time upon motion, provided that the application, complaint, or petition upon which notice has been issued may not be amended to broaden its scope.⁶⁴ Briefs are filed only upon request or by permission of the examiner.⁶⁵

Any evidence admissible under the general statutes of Texas, or under rules of evidence governing non-jury trials in the courts of the state, is

57. *Id.*

58. Railroad Comm'n, Gas Utilities Docket No. 499, Adopting Rules of Practice and Procedure, March 1, 1973. This order adopted the Rules of Practice and Procedure of the Transportation Division of the Railroad Commission for use before the Gas Utilities Division where applicable.

59. Rule 52, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div. The commission may cite persons to appear to show cause why remedial action should not be taken for failure to comply with rules, rates, regulations or orders of the commission. *Id.*

60. Rule 18, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

61. Rule 19, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

62. Rule 24, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

63. Rule 28, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div. Pleadings are defined for Railroad Commission hearing purposes as applications, protests, petitions, complaints, replies and motions. Rule 12, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

64. Rule 16, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

65. Generally none are filed. Greenhill & McGinnis, *Practice and Procedure in Oil and Gas Hearings in Texas*, 18 Sw. L.J. 406, 427 (1964).

admissible at the hearing.⁶⁶ The rules of evidence are applied so that all relevant and proper evidence is sought to be conveniently, inexpensively and expeditiously heard while preserving the substantial rights of the parties to the proceeding.⁶⁷ When testimony is excluded by the examiner, the party offering the evidence is permitted to enter such proof into the record; this is sufficient to preserve the point for review by the commissioners.⁶⁸

After the hearing the examiner submits his written findings and recommended order to the commission. The examiner's report contains a brief statement of the nature of the case and issues, a discussion of the evidence, his findings of fact, and his ultimate conclusions.⁶⁹ Exceptions to the examiner's report and recommended order may be submitted to the commissioners by any party of record,⁷⁰ and a rehearing may be ordered if the commissioners conclude that substantial errors have been committed so as to make it impracticable to determine the case fairly upon the record.⁷¹

Disposition of causes before the Railroad Commission culminates in a commission order. Orders must be written and must state findings of fact and ultimate conclusions.⁷² They must also be signed by at least two members of the commission and served on all parties to the proceeding.⁷³ Petitions for reconsideration are accepted only where the commission's orders are contrary to the examiner's recommended orders.⁷⁴ The commission must act on a petition within 30 days by installing a new order; if not, the petition for reconsideration is deemed overruled by operation of law.⁷⁵

Perhaps the most outstanding feature of Railroad Commission hearings is their efficiency.⁷⁶ This is due, in part, to the fact that the commissioners are not required to read the record nor hear testimony.⁷⁷ Due process is satisfied if the commissioners view the documentary evidence and discuss the case with the examiner who heard the evidence and conducted the hearing.⁷⁸ As the commissioners are not bound by the examiner's recommended order, this procedure obviously lends itself to potential abuse, illustrating the importance of judicial review to monitor the actions of this agency.

66. Rule 34, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

67. *Id.*

68. Rule 40, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

69. Rule 43, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

70. Rule 44, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

71. Rule 47, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

72. Rule 48, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

73. *Id.*

74. Rule 50, Statewide Rules, Tex. R.R. Comm'n, Gas Utilities Div.

75. *Id.*

76. Greenhill & McGinnis, *Practice and Procedure in Oil and Gas Hearings in Texas*, 18 Sw. L.J. 406, 417 (1964).

77. *Id.* at 430.

78. *Magnolia Petroleum Co. v. Railroad Comm'n*, 127 S.W.2d 230, 234 (Tex. Civ. App.—Austin 1939, writ dism'd).

JUDICIAL REVIEW OF RAILROAD COMMISSION ACTIONS

A major problem posed by modern administrative agencies is that they do not fit easily into any one governmental organization based on a separation of powers. The Texas Railroad Commission is no exception. It possesses legislative, judicial, and executive attributes.⁷⁹ It is fundamental that rate setting for natural gas by the commission is a legislative function of the state government.⁸⁰ The legislature, however, has chosen to delegate its ratemaking power to the Railroad Commission and the municipalities, promulgating certain rules and standards to guide these bodies.⁸¹ On the other hand, orders of the Railroad Commission which do not involve constitutional or property rights, as does ratemaking, have been deemed administrative or executive rather than legislative functions of the agency.⁸²

The dichotomy between administrative and legislative functions of the Railroad Commission has been a significant factor in determining the scope of judicial review of the commission's orders.⁸³ The question, however, is whether the court has the power to review all the evidence, as if no commission proceeding took place; or whether the permissible scope of review should be confined to the correction of impermissible error, that is, determinations by the agency which are not supported by substantial evidence in the record. The view has been expressed that if the courts are to determine the preponderance of the evidence in a trial de novo, administrative tribunals would be little more than conduits for the transmission of evidence to the courts, destroying the value of adjudication of facts by experts in the field.⁸⁴ On the other hand, in light of what has been called the very explicit separation of powers provision of the Texas Constitution,⁸⁵ the

79. Ratemaking is a legislative function. *Railroad Comm'n v. Houston Natural Gas Corp.*, 155 Tex. 502, 506-507, 289 S.W.2d 559, 562-63 (1956); *Lone Star Gas Co. v. State*, 137 Tex. 279, 302, 153 S.W.2d 681, 693 (1941), *writ of mandamus denied sub. nom. Ex parte Texas*, 315 U.S. 8 (1942). The Commission also exercises quasi-judicial powers. *Corzelius v. Harrell*, 143 Tex. 509, 521, 186 S.W.2d 961, 968 (1945) (commission adjustment of correlative rights of owners of gas in a common reservoir); *Gulf Land Oil Co. v. Atlantic Ref. Co.*, 134 Tex. 59, 73, 131 S.W.2d 73, 81 (1939) (exercising statutory duty to make rules and orders to effectuate the purposes of the statutes necessitates the commission's fact finding function). The commission's duties in an executive capacity relate to active participation in control, supervision and management of gas utilities.

80. *Railroad Comm'n v. Houston Natural Gas Co.*, 155 Tex. 502, 506, 289 S.W.2d 559, 562 (1956).

81. *Id.* at 507, 289 S.W.2d at 562.

82. *Railroad Comm'n v. Metro Bus Lines, Inc.*, 144 Tex. 420, 424, 191 S.W.2d 10, 12 (1945); *Shupee v. Railroad Comm'n*, 123 Tex. 521, 527, 73 S.W.2d 505, 508 (1934). Both cases involved denial of a bus license.

83. TEX. REV. CIV. STAT. ANN. art. 6059 (1962) is applicable, providing for judicial review of commission decisions on any matter.

84. Rep. Att'y Gen. Comm. Ad. Proc. 91-92 (1941).

85. TEX. CONST. art. 2, § 1; Walker, *The Application of the Substantial Evidence Rule in Appeals from Orders of the Railroad Commission*, 32 TEXAS L. REV. 639, 650 (1954).

question presented is, should the court limit its inquiry to whether the agency acted properly on the basis of the evidence presented. The basic conflict arises in the need to preserve the benefits and efficiency of administrative regulation, where this type of control is expedient, without sacrificing proper sanctions and safeguards against arbitrary, capricious or discriminatory administrative action.⁸⁶

Article 6059 states that appeals from commission orders "shall be tried and determined as other civil causes in said court."⁸⁷ Article 6453, providing for the right of appeal of railroad companies or other interested parties, essentially follows article 6059.⁸⁸ In the early cases construing article 6453 the Texas Supreme Court held that an independent judicial determination of the facts and issues—a trial de novo—was required.⁸⁹ In applying other similar statutes,⁹⁰ however, the court has held that the agency's findings of fact would not be disturbed if supported by substantial evidence.⁹¹ In 1941 the supreme court stated, in a case involving article 6059, that since ratemaking was a legislative function and the question of confiscation was involved, a trial de novo was required as a matter of due process.⁹² The court made a distinction between such so-called legislative functions and administrative functions of the Railroad Commission. Generally, orders are labeled administrative if they do not involve constitutional or property rights, but merely deny a statutory privilege.⁹³ Ratemaking always involves proper-

86. The substantial evidence rule operates in the following manner: The reviewing court is required to sustain the agency decision if that decision is based on substantial evidence. Requiring more than a scintilla of evidence but less than the weight or preponderance of the evidence, the substantial evidence rule will not let the court substitute its discretion for that committed to the agency by the legislature, but the court must sustain the agency decision if reasonably supported by the evidence. The burden is on the party challenging the agency decision to show there was evidence admissible at the time of the agency hearing, which demonstrates bias, prejudice or capricious conduct by the agency in deciding to the contrary. *Trapp v. Shell Oil Co.*, 145 Tex. 323, 349-50, 198 S.W.2d 424, 436 (1946); *Gulf Land Co. v. Atlantic Ref. Co.*, 134 Tex. 59, 74, 131 S.W.2d 73, 82 (1939); Walker, *The Application of the Substantial Evidence Rule in Appeals from Orders of the Railroad Commission*, 32 TEXAS L. REV. 639, 642-43 (1954).

87. TEX. REV. CIV. STAT. ANN. art. 6059 (1962).

88. TEX. REV. CIV. STAT. ANN. art. 6453 (1926). This article supersedes former articles.

89. *Railroad Comm'n v. Weld & Nelville*, 96 Tex. 394, 404, 73 S.W. 529, 531 (1903); *Railroad Comm'n v. Houston & T.C. Ry.*, 90 Tex. 340, 354, 38 S.W. 750, 756 (1897).

90. TEX. REV. CIV. STAT. ANN. art. 911a, § 17 and art. 911b, § 20 (1964) (Motor Bus Transportation Act and Motor Carrier Act).

91. *Railroad Comm'n v. Metro Bus Lines, Inc.*, 144 Tex. 420, 425, 191 S.W.2d 10, 13 (1945); *Railroad Comm'n v. Shupee*, 57 S.W.2d 295, 302 (Tex. Civ. App.—Austin 1933), *aff'd*, 123 Tex. 521, 73 S.W.2d 505 (1934).

92. *Lone Star Gas Co. v. State*, 137 Tex. 279, 301, 153 S.W.2d 681, 693 (1941), *writ of mandamus denied sub. nom. Ex parte Texas*, 315 U.S. 8 (1942).

93. *See Jones v. Marsh*, 148 Tex. 362, 367, 224 S.W.2d 198, 201 (1949) (denial of a liquor license); *Railroad Comm'n v. Metro Bus Lines, Inc.*, 144 Tex. 420, 424, 191 S.W.2d 10, 12 (1945) (denial of a bus license).

ty rights, the inquiry being whether the nature of the proceedings before the administrative agency accorded the utility due process of law as that term is used in the fifth and fourteenth amendments to the Federal Constitution. Conflict exists, however, where the Texas Supreme Court has held that the substantial evidence rule is applicable in suits involving claims of confiscatory ratemaking,⁹⁴ and in which a trial de novo was deemed necessary to satisfy the requirements of due process.⁹⁵

Since *Trapp v. Shell Oil Co.*,⁹⁶ which applied the substantial evidence rule despite alleged confiscation of property rights, the substantial evidence rule has been consistently applied to determine the scope of review of all administrative decisions except where expressly forbidden by statute, whether legislative or administrative in nature.⁹⁷ Some observers feel that while the cases prescribing trial de novo have not been expressly overruled, they may be doubtful authority.⁹⁸ One commentator has stated that "the practical effect of the rule is to give finality to the administrative decision whenever it is based upon controverted fact issues as to which there is a conflict in the evidence."⁹⁹ It now seems that the substantial evidence rule is applicable to judicial review of the commission's orders and that the preponderance of the evidence test, normally applicable in civil trials, does not apply to fact findings of administrative agencies made within the scope of their statutory powers.¹⁰⁰

Even the new Administrative Procedure and Texas Register Act,¹⁰¹ which becomes effective January 1, 1976, does not appear to change the scope of judicial review of Railroad Commission determinations existing prior to its advent.¹⁰² The express purpose of the Administrative Procedure and Texas Register Act is to afford minimum standards of uniform practice and procedure for state agencies and to restate the law of judicial review of

94. *Trapp v. Shell Oil Co.*, 145 Tex. 323, 329, 198 S.W.2d 424, 433 (1946); *Gulf Land Co. v. Atlantic Ref. Co.*, 134 Tex. 59, 74, 131 S.W.2d 73, 82 (1939); *Consolidated Chem. Indus. Inc. v. Railroad Comm'n*, 201 S.W.2d 124, 128-29 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.).

95. *Marrs v. Railroad Comm'n*, 142 Tex. 293, 307, 177 S.W.2d 941, 950 (1944); *Railroad Comm'n v. Shell Oil Co.*, 139 Tex. 66, 78, 161 S.W.2d 1022, 1029 (1942).

96. 145 Tex. 323, 198 S.W.2d 424 (1946).

97. Walker, *The Application of the Substantial Evidence Rule in Appeals from Orders of the Railroad Commission*, 32 TEXAS L. REV. 639, 656-57 n.71 (1954).

98. Comment, *Some Aspects of the Texas "Substantial Evidence Rule,"* 33 TEXAS L. REV. 717, 718 (1955); see Walker, *The Application of the Substantial Evidence Rule in Appeals from Orders of the Railroad Commission*, 32 TEXAS L. REV. 639, 656-57 (1954).

99. Walker, *The Application of the Substantial Evidence Rule in Appeals from Orders of the Railroad Commission*, 32 TEXAS L. REV. 639, 657 (1954).

100. *High Plains Natural Gas Co. v. Railroad Comm'n*, 467 S.W.2d 532, 538 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.).

101. Tex. Laws 1975, ch. 61, at 136, and ch. 61, § 2, at 148.

102. On its face the provision that appeals from commission orders shall be tried and determined as all other civil causes appears to provide for trial de novo. Tex. Laws

agency actions.¹⁰³ Section 19 of that act states, in essence, that if the prescribed manner of judicial review is other than trial de novo, the agency will transmit to the court a copy of its entire record.¹⁰⁴ If the court is satisfied that material evidence exists outside of that record which was not presented to the agency for good reason, the court may order the agency to reconsider its decision based on the accumulated evidence and submit any new findings, modification or decision to the reviewing court.¹⁰⁵ The court will then review the record, without a jury, and confine its review to the record except in the case of alleged procedural errors not reflected in the record.¹⁰⁶

The Administrative Procedure Act further states that where the law authorizes review under the substantial evidence rule, the court may not substitute its judgment for that of the agency as to the weight of the evidence committed to the agency's discretion.¹⁰⁷ The court may reverse or remand the agency's decision if it is not reasonably supported by substantial evidence or if it appears that the agency acted arbitrarily or abused its discretion.¹⁰⁸

THE PUBLIC UTILITY REGULATORY ACT

Under the new Public Utility Regulatory Act the power of the Railroad Commission to regulate all phases of gas utility activity within the state does not appear to be substantially limited.¹⁰⁹ In fact, the new Act states that all powers delegated to the Railroad Commission in the Act are in addition to all existing laws granting jurisdiction, power or authority to the commission

1975, ch. 61, at 136, and ch. 61, § 2, at 148. It is submitted that this may not be a correct conclusion, particularly in view of the following articles: Walker, *The Application of the Substantial Evidence Rule in Appeals from Orders of the Railroad Commission*, 32 TEXAS L. REV. 639, 656-57 n.71 (1954) and in Comment, *Some Aspects of the Texas "Substantial Evidence Rule,"* 33 TEXAS L. REV. 717, 718 (1955). Judicial interpretation of article 6059 requires review under the substantial evidence rule. Assuming that the substantial evidence rule applies to judicial review of commission determinations prior to the effective date of the new Administrative Procedure Act, this situation will not likely change when that Act becomes effective. This conclusion is derived from the language of § 19(e) of the Administrative Procedure Act which states that the scope of judicial review is as provided by the law under which review is sought. This language certainly invites litigation in that it is not entirely clear whether the legislature intended by § 19(e) to make the scope of judicial review depend on trial de novo or the substantial evidence rule.

103. Tex. Laws 1975, ch. 61, § 1, at 136.

104. *Id.* § 19(d)(1), at 147.

105. *Id.* § 19(d)(2), at 147.

106. *Id.* § 19(d)(3), at 147.

107. *Id.* § 19(e), at 147.

108. *Id.* § 19(e), at 147.

109. Tex. Laws 1975, ch. 721, at 2327. Certain operations are specifically exempted from the Act: (1) production and gathering of natural gas; (2) sale of gas in or within the vicinity of the field where it is produced; (3) the distribution or sale of liquified petroleum gas; (4) the transportation, delivery or sale of natural gas as fuel for irrigation wells or any other direct use in agricultural activities; and (5) all gas subject to the jurisdiction of the Federal Power Commission under the Federal Natural Gas Act, 15 U.S.C. § 717 (1970). Tex. Laws 1975, ch. 721, § 3(c)(3), at 2328.

over gas utilities except where specifically in conflict with the new law.¹¹⁰ There is one area, however, in which the Act appears to limit the jurisdiction of the Railroad Commission. The new statute gives the newly-established Public Utilities Commission original jurisdiction over gas utilities in municipalities where the utility's board of trustees as of May 1, 1975, were not directly appointed by the governing body of the municipality.¹¹¹ All other municipally-owned gas utilities will continue to be controlled, initially, by the municipalities. Prior to the enactment of the new law, each municipality enjoyed original jurisdiction over burner tip rates within its limits, with appellate review available by the Railroad Commission. Now, where municipal gas rates are set by the Public Utility Commission, appeal must be directed to an appropriate court.¹¹² Section 69 of the Act provides that the scope of judicial review will be confined to a determination of whether the Public Utility Commission acted on the basis of substantial evidence.¹¹³

Another new aspect of the Public Utility Regulatory Act is that for the first time citizens of a municipality may, upon filing a petition signed by the lesser of 20,000 persons or 10 percent of the voters of that municipality, appeal the gas rates set by the city government directly to the Railroad Commission.¹¹⁴ A similar provision is included for the benefit of ratepayers of a municipally-owned gas utility outside the city limits, upon filing a petition with the Railroad Commission signed by the lesser of 10,000 persons or five percent of the ratepayers served by the utility outside the city limits.¹¹⁵ These provisions obviously improve the consumer's accessibility to the Railroad Commission. While their practical difference remains to be seen in light of the traditional pressures voters have always brought to bear on city councils for a change in their gas rates, the concept of improved access is meritorious.

It has been observed that some gaps exist in the regulatory powers of the Railroad Commission conferred by the Natural Gas Act. For example, the commission cannot require a gas utility to act as a common carrier, nor regulate the issuance of securities; it cannot control mergers and acquisitions by gas utilities, nor regulate transactions with affiliates, nor require a declaration of dividends.¹¹⁶ Some of these deficiencies have been met by the Public Utility Regulatory Act.¹¹⁷

110. Tex. Laws 1975, ch. 721, § 19(c), at 2335.

111. *Id.* § 3(c)(4), at 2328.

112. *Id.* § 77, at 2350 provides that suits for injunction or penalties under the Act may be brought in Travis County, in the county where the violation allegedly occurred, or in the county of the defendant's residence.

113. *Id.* § 69, at 2349.

114. *Id.* § 26(b), at 2337.

115. *Id.* § 26(c), at 2337.

116. Alsup, *Should the Texas Legislature Calm the Clamor for a State Utility Commission by Establishing One?*, 16 S. TEX. L.J. 127, 135 (1975).

117. Tex. Laws 1975, ch. 721, §§ 63, 64, 67, 68, at 2348. Additional powers granted

CONCLUSION

The Texas Legislature has provided ample legislation for the control of gas utilities in our state. In the absence of the price-moderating effects of competition and without governmental regulation, the consumer in Texas would practically be at the mercy of the gas utilities, which could charge and service customers with impunity.

Critics of the commission who complain of alignment with special utility interests, must find themselves mollified to some extent by the strong provisions for procedural due process before the commission, required by its Rules of Practice and Procedure, adopted March 1, 1973. Although some flaws will inevitably exist, the Railroad Commission's record of efficiency and gas consumer protection evinces its overall success as a regulator of gas utilities.

Judicial review, an important assurance of fairness in utility regulation, closely monitors potential abuse of agency power. While review under the substantial evidence rule may be criticized for the lack of complete review available in a trial de novo, under the procedures provided and outlined in the Administrative Procedure and Texas Register Act, the rule protects all substantial rights of the parties involved. The alternative is to sacrifice adjudication of a controversy by agencies better equipped than the courts to render decisions on such technical matters. Additionally, the parties would bear the expense of two trials on the same matter, with the two records possibly quite different in content because the court did not admit evidence relied upon by the commission in arriving at its decision.

The new Public Utilities Regulatory Act does not appear to change the powers of the Railroad Commission in any substantial or material respect. If anything, the drafters of the new Act appear to have made every effort at circumventing the Railroad Commission's jurisdiction to ensure minimum conflict and overlap of powers. More importantly, the powers vested in the new Public Utilities Commission combined with those of the Railroad Commission are a welcomed addition in the continuing effort to ensure consumers an adequate supply of gas at reasonable prices and under reasonable conditions.

the Railroad Commission with the advent of the Act are: (1) the power to require reports to the commission of mergers, sales, leases, acquisitions or rental of operating plants for a total consideration of more than \$100,000 for the purpose of determining the effect on the public interest; (2) the power to require notice of proposed purchases of voting stock in other utilities; (3) the authority to require reasonable notice of loaning money, stock, bonds, notes or other evidences of indebtedness; and (4) the authority to prohibit the sale, conveyance, banking or assignment or rights to gas reserves or, where not in conflict with federal law, to an interstate pipeline.