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THE IMPACT OF *MOBILE* UPON STATE REGULATION OF UTILITIES

By ROSS L. MALONE*

The opinion of the Supreme Court of the United States in *United Gas Pipe Line Co. v. Mobile Gas Service Corp. and Federal Power Commission*,¹ delivered by the Court on February 27, 1956, opened a Pandora's box, the full effect of which may not yet be apparent. In the light of subsequent developments, perhaps the impact of the decision can best be described as a chain reaction, the explosive force of which is far from spent two years later. One outgrowth of the *Mobile* decision was recently characterized by the Court of Appeals for the Fifth Circuit as "another battle in the ceaseless struggle waged now for five years and on almost as many fronts."²

The basic question decided by *Mobile* was a simple one. It was whether a rate fixed by contract between a gas pipeline and its purchaser could be changed unilaterally by the act of the utility in filing a new rate schedule with the Federal Power Commission, under the provisions of the Natural Gas Act,³ which ostensibly permit a change of rates in this manner.

The question arose out of the following facts: In 1946 the Ideal Cement Company planned, if it could obtain an assured supply of gas at a sufficiently low rate, to build a plant in Mobile. Before *Mobile Gas*

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¹350 U.S. 332, 100 L. Ed. 373 (1956).

²*United Gas Pipe Line Co. v. Tyler Gas Service Co.*, 247 F.2d 681, 20 P.U.R.3d 425 (5th Cir. 1957).

³Natural Gas Act of 1938, § 4, 52 Stat. 822 (1938), as amended, 15 U.S.C. § 717c (1952).

Service, a distributor to domestic and industrial users, concluded an agreement with Ideal to supply gas for ten years at 12 cents per thousand cubic feet, Mobile obtained a contract with United Gas Pipe Line to supply the gas for resale to Ideal for ten years at a price of 10.7 cents per MCF. This contract, after being filed with and approved by the Federal Power Commission, became a part of United's filed schedules. In 1953, without the consent of Mobile, United filed with the Federal Power Commission new schedules, which purported to increase the rate on gas for resale to Ideal to 14.5 cents per MCF, a figure more in line with that charged for other gas furnished by Mobile to United.

As a result of the even more recent decision in *Memphis Light, Gas and Water Division v. Federal Power Commission*,⁴ another outgrowth of *Mobile*,⁵ it is estimated that in excess of 240 millions of dollars in gas rate charges collected by pipeline companies may be subject to refund. In that event, five affected pipelines would have to refund in excess of 191 millions of dollars and the refund in the case of one company alone is estimated to amount to about 75 millions of dollars.⁶ Even though the natural gas industry, of which long-line pipelines are a major segment, is now the sixth largest industry in the country,⁷ its ability to survive the effect of such a blow is questionable. It may be doubted that the Supreme Court envisioned such an outgrowth of its decision in *Mobile*. Certainly, the natural gas companies and the Federal Power Commission were taken completely by surprise by this further extension of the doctrine.

While the Federal Power Commission and pipelines subject to its jurisdiction have been most affected by *Mobile*, there can be no doubt that state agencies and utilities regulated by them likewise will feel

⁴250 F.2d 402 (D.C. Cir. 1957), cert. granted, 26 U.S.L. Week 3227 (U.S. Feb. 3, 1958) (No. 694).

⁵The case involved a situation in other respects similar to *Mobile*, but the contract between the pipeline company and the buyer contained the following provision: "All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule (here is inserted the appropriate rate schedule designation), or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached hereto and filed with the Federal Power Commission which are by reference made a part hereof." The parties thus had sought to make the normal rate filing procedure of the Natural Gas Act applicable, by contract, to their transaction. (Emphasis added.) The Court of Appeals for the District of Columbia applied the *Mobile* doctrine and held changes attempted under this provision to be ineffective.

⁶*Id.*, Petition of Federal Power Comm'n for a writ of certiorari to the United States Court of Appeals for the District of Columbia 28 (Case No. 694, Supreme Court of the United States, October Term, 1957).

⁷*Id.* at 30.

the impact of the decision. In New Mexico this has already occurred.⁸

I. THE LAW BEFORE MOBILE

At first blush it might appear surprising that the gas pipeline companies should have been taken by surprise by this decision of the Supreme Court, but inquiry as to the state of the law prior to the decision in *Mobile* discloses good reason for the confusion which had existed.

Prior to *Mobile*, the Supreme Court of the United States had considered the general question of the effect of a unilateral rate filing by a utility upon an existing contract rate in two cases. Ostensibly contrary results were reached in the two cases. The first case was before the Court in the year 1922. In *Wichita Railroad & Light Co. v. Public Utilities Commission of the State of Kansas*⁹ the Court reviewed the decision of the Circuit Court of Appeals for the Eighth Circuit in a case in which the district court had enjoined the Public Utilities Commission of Kansas from putting in force, on the basis of a unilateral rate filing, a new rate which would change an existing contract rate. The Circuit Court of Appeals reversed and directed dismissal of the bill seeking the injunction.¹⁰ The Supreme Court reversed the circuit court, holding that the attempted change of the contract rate in this manner was ineffectual for the reason that under the Kansas statute an express finding by the commission that the existing rates were unreasonable was a prerequisite for a valid order changing such a rate. The Court summarized its decision with the statement: "We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State,"¹¹ and quoted at length from the decision of the Supreme Court of Kansas in *Kaul v. American Independent Telephone Co.*¹² The *Wichita* doctrine, therefore, was limited to cases in which the state statute affirmatively required a finding, and hence a hearing, before any rate change could be made.

The second case to reach the Supreme Court involving the question was *Midland Realty Co. v. Kansas City Power & Light Co.*¹³ It was decided by the Court approximately fifteen years after the *Wichita*

⁸*Potash Co. of America v. New Mexico Public Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956).

⁹260 U.S. 48, 67 L. Ed. 124 (1922).

¹⁰*Public Utilities Comm'n of Kansas v. Wichita R. & Light Co.*, 268 Fed. 37, P.U.R. 1921A 714 (1920).

¹¹260 U.S. at 59, 67 L. Ed. at 130.

¹²95 Kan. 1, 147 Pac. 1130 (1915).

¹³300 U.S. 109, 81 L. Ed. 540 (1937).

case, upon appeal from a decision of the Supreme Court of Missouri. The case was an action by a public utility to recover the difference between a contract rate, and a higher amount to which the utility claimed it was entitled under a rate increase effected unilaterally by a filing with the regulatory commission of Missouri. Obviously, if the unilaterally filed rate effectively superseded the pre-existing contract rate, the utility was entitled to recover the additional amount sought by its action. If, on the other hand, as held in *Wichita*, the filing of the new rate was not effectual to abrogate the existing rate because no hearing had been held and no finding of unreasonableness had been made by the commission, then the utility should fail in its action. The trial court in Missouri found in favor of the defendant, insofar as this aspect of the case was concerned, holding that the rate filing was ineffective to change the applicable contract service rate. The Supreme Court of Missouri reversed the trial court on this question,¹⁴ holding that the unilateral rate filing by the utility became effective in accordance with the Act, without the necessity of a prior hearing or a finding of unreasonableness as to the existing rate. The final result reached by the Supreme Court of Missouri was obviously at variance with the decision of the Supreme Court of the United States in *Wichita*, unless the two cases could be distinguished on the basis of the statutes of the respective states in which they arose.

The Supreme Court of the United States, which affirmed the Missouri court, must have felt that such a distinction existed. Yet in its opinion, by Mr. Justice Butler, it neither followed *Wichita* nor distinguished it. It was merely ignored. This unfortunate fact no doubt contributed to the uncertainty which existed prior to *Mobile* and substantially increased the impact of that decision. It is apparent that the *Wichita* doctrine was urged in the briefs¹⁵ so that the failure of the Court to either distinguish the case or follow it is difficult to understand. It remained for utility counsel to find their own explanations for this anomaly during the ensuing twenty-year period, no doubt at the expense of their clients in some cases.

It is true that the basis of attack on the new rates differed in the two cases. The attack upon the unilaterally filed rates in the *Midland* case was premised upon constitutional grounds. It was asserted that the challenged construction of the Public Utility Act resulted in an unconstitutional impairment of the obligation of a contract, as well as in the taking of property without due process of law. In the *Wichita*

¹⁴Kansas City Power & Light Co. v. Midland Realty Co., 338 Mo. 1141, 93 S.W.2d 954 (1936).

¹⁵Sec 81 L. Ed. at 541.

case it will be recalled the attack was upon the failure to meet the statutory requirement of a finding of unreasonableness by the regulatory body, and no constitutional question was discussed by the Court.

The challenged rate in *Midland* had been tested by other affected consumers on appeal from the decision of the Missouri commission, and its validity had been upheld by the Supreme Court of Missouri.¹⁶ The Court pointed out in *Midland* that the Supreme Court of Missouri had held the new rate to constitute a valid exercise of that state's police power as applied to existing contract rates. Citing the unquestioned power of the legislature of Missouri to have changed the rate by legislative act, even though fixed by contract, the Supreme Court of the United States said that the Missouri Act "is to be taken as if it declared that rates made in accordance with its provisions shall supersede all existing contract rates."¹⁷ Pointing out that the exercise of such legislative power need not be conditioned upon any hearing or finding of fact by the commission, the Court said:

"It [defendant] does not, and reasonably it could not, contend that immediate exertion by the legislature of the State's power to prescribe and enforce reasonable and nondiscriminatory rates depends upon or is conditioned by specific adjudication in respect of existing contract rates."¹⁸

The Court thus sustained the unilateral action, which resulted in a change in the existing contract rates without hearing, as a valid exercise of the state's police power not subject to attack on the constitutional grounds urged.

It has been asserted that the *Midland* decision is authority only in jurisdictions in which the enactment of a regulatory act ipso facto voided all rate contracts as contrary to public policy, and hence that it would have no application in states which have acts expressly or impliedly recognizing the existence and validity of contract rates after enactment of the regulatory act. Certainly that is a possible distinction insofar as the Natural Gas Act and its construction in *Mobile* is concerned. As the Court pointed out in *Mobile*, "The Natural Gas Act, on the other hand, recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules."¹⁹

If the *Midland* decision can properly be restricted in its application to states in which no valid contract rate can exist after enactment

¹⁶State ex rel. Case v. Public Serv. Comm'n, 298 Mo. 303, 249 S.W. 955 (1923).

¹⁷300 U.S. at 113, 81 L. Ed. at 544.

¹⁸300 U.S. at 114, 81 L. Ed. at 544.

¹⁹350 U.S. at 345, 100 L. Ed. at 387.

of a regulatory act, the question of whether or not a unilateral change of a contract rate is invalid on constitutional grounds in states not so holding has not been decided by the Supreme Court of the United States. The decision in *Mobile* contributed nothing to the resolution of this question, "there being no claim that the statute, if interpreted to permit a natural gas company unilaterally to change its contracts, would be unconstitutional."²⁰

Prior to *Mobile*, state courts and regulatory bodies in states where the question was of first impression had the alternative of following *Wichita* or *Midland*. If the regulatory act expressly recognized the existence of valid rate contracts after its enactment, they had a possible third choice if constitutional questions were raised. The decision in *Mobile*, while it offers a new alternative in the unique "review" concept which it expounds, has done nothing to reduce the existing confusion in the field.

II. POTASH CO. OF AMERICA V. NEW MEXICO PUBLIC SERV. COMM'N

At the time the decision in *Mobile* was delivered by the Supreme Court of the United States, there was pending in the Supreme Court of New Mexico a case involving the change of a contract gas rate by a new rate filing made by the utility.²¹ It was a case of first impression. Briefs of the parties had been completed and filed when the *Mobile* opinion came down. The application to be given the *Mobile* doctrine, of course, became a major issue in the oral argument. The Court permitted the filing of supplemental briefs after oral argument as to the applicability of the *Mobile* decision in New Mexico.

The New Mexico case involved a service contract with a single, large industrial customer of the utility. It had been in effect for several years, during which time the price of gas had increased to the point where the utility was experiencing an out-of-pocket loss on the actual cost to it of purchasing the gas being delivered under its contract. Negotiation between the parties had failed to produce a solution, and the utility thereupon filed a new rate with the New Mexico Public Service Commission to be applicable to this customer, accompanied by a sworn petition setting out the factual situation.

In its petition the utility proposed that the New Mexico Public Service Commission put the new rate into effect at the earliest possible time, and that a hearing be called immediately to determine the just

²⁰350 U.S. at 337, 100 L. Ed. at 383.

²¹Potash Co. of America v. New Mexico Public Serv. Comm'n, 62 N.M. 1, 303 P.2d 908 (1956).

and reasonable rate applicable to the service in question. Pending the determination of such a rate, the utility offered to guarantee by surety bond the repayment to the customer of any amount collected under the new rate which might be in excess of a just and reasonable rate as determined by the commission. The New Mexico commission, acting *ex parte* upon the verified petition of the utility and supporting schedules, entered its interlocutory order putting the rate into effect, calling a hearing upon the rate and requiring the utility to post surety bonds guaranteeing repayment of any excess which might be collected over the rate ultimately fixed by the commission.²²

The customer, having unsuccessfully moved before the commission to dismiss the proceeding, on the ground that its effect had been to change a contract rate by unilateral action of the utility, and without a hearing, went into the state district court. It there sought to enjoin the commission and the utility from giving effect to the newly filed rate or the commission's order which prohibited the furnishing of gas to the customer other than at the new rate specified in the rate schedule. The injunction was sought under the provision of the New Mexico statute which expressly authorized enjoining the commission or its members if it should undertake to act "in excess of its jurisdiction and authority conferred under this act, or without jurisdiction."

The trial court sustained motions to dismiss the complaint on the ground that the administrative remedy afforded to the customer had not been exhausted inasmuch as the proceeding before the commission had not been concluded. It was the appeal from this action of the trial court which was pending before the Supreme Court of New Mexico at the time the *Mobile* decision was announced by the Supreme Court of the United States. Needless to say, the gas customer was overjoyed at the decision and the utility was anything but pleased with it. The customer urged *Mobile* as absolute support for its position that the commission had acted in excess of its jurisdiction in permitting the newly filed rate to go into effect without a hearing.

The majority opinion of the Supreme Court of New Mexico, which affirmed the judgment of the trial court, did not refer to the opinions of the Supreme Court in *Mobile* or *Sierra*.²³ The opinion of the single dissenting justice, however, was predicated almost entirely upon these

²²In the Matter of Fixing Just and Reasonable Gas Rates to Apply to Service Rendered Potash Co. of America Potash Mine and Refinery Near Carlsbad, New Mexico, Southern Union Gas Co., Petitioner, Case No. 418 on the Docket of the New Mexico Public Serv. Comm'n.

²³Federal Power Comm'n v. Sierra Pacific Power Co., 350 U.S. 348, 100 L. Ed. 388 (1956).

decisions and, on the basis of them, would have reversed the trial court.²⁴

The court's opinion found that the commission, in entering its interlocutory order, "was moving strictly in conformity with the act creating it to determine one of the major questions submitted to its jurisdiction—a question of rates."²⁵ In the appeal from the final order of the commission which followed, this statement was cited as authority that the *Wichita* and *Mobile* decisions had no applicability in New Mexico. This was on the premise that if, as contended, a hearing was a necessary prerequisite for the change of a contract rate, the commission would have been acting in excess of its jurisdiction in putting this rate into effect. Having held that the commission was acting within its jurisdiction, the court necessarily had concluded that no prior hearing was required under the New Mexico statute.

The customer urged, with equal vigor, that the decision of the Supreme Court was authority only for the proposition that the administrative remedy of the customer had not been exhausted before the commission and that until exhausted the jurisdictional question could not be raised in a collateral proceeding.

The dissenting justice, after quoting at length from the *Mobile* and *Sierra* opinions, including the statement that a hearing and finding of unreasonableness was a necessary prerequisite to a valid change of an existing contract rate, said:

"I agree with this statement, and would have the Court approve the rule of the *Mobile* and *Sierra* cases made under statutory provisions almost identical with our Public Utility Act, that a contract rate may not be changed by the utility under a mere rate-filing procedure, or by the commission in an ex parte order; but that a contract rate may only be changed, as heretofore indicated, after a hearing and finding a change is required in the public interest—that neither the filing of a new rate nor an order of the commission without notice, hearing and the requisite findings as to the public interest may change a contract rate."²⁶

In view of the heavy reliance in the dissenting opinion upon the *Mobile* and *Sierra* opinions, it appears that the majority of the court concluded that the *Mobile* doctrine had no application in the construction of the New Mexico statute.

²⁴Potash Co. of America v. New Mexico Public Serv. Comm'n, 62 N.M. 1, 303 P.2d 908, 914 (1956) (dissenting opinion).

²⁵Potash Co. of America v. New Mexico Public Serv. Comm'n, 62 N.M. 1, 303 P.2d 908, 912 (1956).

²⁶Potash Co. of America v. New Mexico Public Serv. Comm'n, 62 N.M. 1, 303 P.2d 908, 919 (1956) (dissenting opinion).

III. EFFECT OF MOBILE ON STATE LAW

There are a number of factors which undoubtedly will be considered by state courts in determining the applicability of *Mobile* to the construction of a state regulatory act. Some of them may have influenced the New Mexico court in its decision. These factors include:

A. *The Statutory Scheme.*

The construction of the Natural Gas Act by the Supreme Court relegated it to the status of a review statute, as distinguished from a rate-making statute. Thus, the Court said:

"In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act."²⁷

Referring to Sections 4(e) and 5(a) of the Act, relating to hearings which might be held by the commission upon the filing of a new schedule or upon the complaint of a purchaser, the Court further pointed out:

"This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them."²⁸

In further support of its conclusion that rates are made by the natural gas company through unilateral filings, or by contract between the utility and the customer, and that the function of the commission is merely to review rates so made, the Court further concluded:

"Section 4(d) provides not for the filing of 'proposals' but for notice to the Commission of any 'change . . . made by' a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action."²⁹

Obviously, where it is determined that a state regulatory statute is merely a review statute, and does not provide a rate-making or rate-changing procedure, the decision in *Mobile* will be highly persuasive to state regulatory bodies and state courts considering the applicability of the *Mobile* decision.

²⁷350 U.S. at 343, 100 L. Ed. at 386.

²⁸350 U.S. at 341, 100 L. Ed. at 385.

²⁹350 U.S. at 342, 100 L. Ed. at 385.

Whether a state regulatory act, such as the New Mexico statute, can be properly relegated to that category is questionable. The New Mexico statute,³⁰ in its provision for the filing of new rate schedules by the public utility,³¹ refers not to the filing of rates theretofore fixed by the utility, but rather to the filing of a notice which "shall plainly state the changes *proposed* to be made in the rates then in force. . . ." It requires the utility to give such notice as the commission may direct of the "proposed changes" and specifies that all "proposed changes" shall be shown by filing new schedules, etc. Similar provisions appear in the statutes of many other states.

If the new rate schedule filed by a utility is a "proposal," the proposed rates become existing rates only when they go into effect by operation of the statutory provisions. The New Mexico Act, typical of most state acts, provides that such proposed rates shall not go into effect prior to the expiration of thirty days unless the commission shall order it "for good cause shown." In so ordering the proposed rates into effect, or in permitting them to go into effect at the end of thirty days through abstention from exercise of its power to suspend the rates pending hearing, the commission, through action or inaction, as the case may be, converts the "proposed rates" into effective rates. There is, therefore, good grounds to conclude that state acts of the type of the New Mexico Act are in fact "rate-making" or "rate-changing" procedures and not simply review acts to which the *Mobile* doctrine would be applicable.

It is a necessary corollary of that proposition that if action, or the withholding of action by the commission under the statute, has the effect of making the rate effective, it constitutes an exercise of the police power of the state. As such, it would appear to be valid, as against attack on constitutional grounds, on the basis discussed by the Supreme Court of Missouri and the Supreme Court of the United States in their consideration of the *Midland* case.

B. *Scope of the Regulatory Act.*

In construing the Natural Gas Act, the Supreme Court recognized the fact that Congress, in enacting the statute, was dealing with a situation in which "only a relatively few wholesale transactions are regulated by the Natural Gas Act."³² This is not the case with state regulatory acts which govern the relationship between utilities and hundreds of thousands of consumers within the state.

³⁰N.M. Stat. Ann. c. 68, arts. 3-11 (1953).

³¹N.M. Stat. Ann. § 68-6-7 (1953).

³²350 U.S. at 399, 100 L. Ed. at 384.

It had been urged upon the Supreme Court in *Mobile* that *Armour Packing Co. v. United States*³³ was controlling. That case held that the Interstate Commerce Act precluded private rate agreements by carriers, thus giving rate contracts no standing as against subsequently filed rates. The Court pointed out in *Mobile* that the Interstate Commerce Act dealt with a "vast number of retail transactions of railroads [which] made policing of individual transactions administratively impossible."³⁴ It recognized that where that situation existed, effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers. It would appear that the transactions regulated by the average state utility regulatory act are far more comparable to the "vast number of retail transactions of railroads" than to the "relatively few wholesale transactions" regulated by the Natural Gas Act. On that basis, the decision in *Armour Packing Co.* might be more persuasive to state courts or commissions than *Mobile*.

C. *The Status of Contracts under the Regulatory Act.*

Reference has been made to the contention that the *Midland* doctrine is applicable only in states in which rate contracts are held to be void as contrary to public policy after enactment of a utility regulatory statute. On that premise, it is asserted that since the contract was void, the rate specified by it is in the same category as other non-contract rates of the utility and may be changed unilaterally. The Missouri decisions do not provide a clear answer to this question. Certainly it is a pertinent one in determining the applicability of the *Midland* decision.

There can be no question as to the validity and effect of rate contracts under the Natural Gas Act. In *Mobile* the Supreme Court referred to the fact that the Natural Gas Act recognizes "the need for private contracts of varying terms and expressly provides for the filing of such contracts as part of the rate schedules."³⁵

In *Midland*, on the other hand, the Supreme Court did not expressly premise its decision upon the status of rate contracts in Missouri. It based its opinion on the decision by the Supreme Court of Missouri that a unilateral change in a contract rate, resulting from a rate filing by the utility, constituted a valid exercise of the police power of the state.

³²209 U.S. 56, 52 L. Ed. 681 (1908).

³³350 U.S. at 338, 100 L. Ed. at 383.

³⁴350 U.S. at 345, 100 L. Ed. at 387.

The Supreme Court relied upon *State ex rel. Washington University v. Public Service Comm'n of Missouri*³⁶ as evidencing this determination by the Missouri court. In that opinion the Supreme Court of Missouri, referring to existing rate contracts, said:

"These contracts are of no vitality, in so far as they affect rates. The Public Service Commission, in fixing rates, cannot be clogged or obstructed by contract rates."³⁷

Referring to *State ex rel. City of Sedalia v. Public Service Comm'n of Missouri*³⁸ as the case in which this doctrine was originally announced, it said:

"The effect of this and subsequent holdings is that contract prices count for naught in the fixing of rates by the Public Service Commission."³⁹

In interpreting these statements it must be borne in mind that the Missouri statute expressly provided for the filing of rate contracts in existence at the time of the original enactment of the Missouri statute. It provided:

"Nothing in this chapter shall be construed to prevent any telegraph corporation or telephone corporation from continuing to furnish the use of its lines, equipment or service under any contract or contracts in force at the date this article takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the Commission, as hereinafter provided, at the rate or rates fixed in such contract or contracts."⁴⁰

This statute was subsequently extended to other utilities. Considering the effect of this provision of the statute, the Supreme Court of Missouri, in its opinion in the *Midland* case, said:

"So, in the light of our decisions supra, we have no hesitancy in reaffirming that the statute purporting to preserve existing contracts does not operate to exempt such contracts from the scope of the exercise of the police power of the state to protect or promote the general or public welfare by regulating rates of public utilities so as to raise or lower, as the case may be, previously existing contract rates. We are of the opinion that the commission's findings and order expressly made are in legal effect, since there was no substantial evidence to the contrary,

³⁶308 Mo. 328, 272 S.W. 971 (1925).

³⁷*State ex rel. Washington University v. Public Serv. Comm'n of Missouri*, 308 Mo. 328, 272 S.W. 971, 972 (1925).

³⁸275 Mo. 201, 204 S.W. 497 (1918).

³⁹*State ex rel. Washington University v. Public Serv. Comm'n of Missouri*, 308 Mo. 328, 272 S.W. 971, 972 (1925).

⁴⁰Mo. Rev. Stat. § 5189 (1929).

decisive that said contract rate was unreasonable, and that said rate schedule in question superseded the contract rate and rendered the latter nugatory."⁴¹

The latter part of this quotation hardly seems consistent with the contract rate having been nullified by enactment of the Missouri regulatory act. As the court stated, it was the "rate schedule" which "superseded the contract rate and rendered the latter nugatory." Presumably, until filing of the rate schedule, the contract remained in effect and the rate fixed by it was binding. On that basis it would seem that when the court in the *Washington University* case said, "These contracts are of no vitality, in so far as they affect rates,"⁴² it was saying that as against a valid exercise of the police power contract rates "count for naught," and are in the same category as noncontract rates.

As stated at the outset, the Missouri decisions on this question do not clearly resolve the question. The *Washington University* case is certainly subject to the construction that rate contracts have "no vitality." If that view be accepted, the doctrine of *Midland* is circumscribed and limited to jurisdictions in which, after enactment of the regulatory acts, rate contracts are invalid and unenforceable. States considering the *Mobile* question for the first time undoubtedly will give careful consideration to the law of the state as regards status of rate contracts. In many cases their final conclusion may be determined by their decision on this question of the effect of the act upon rate contracts.

D. *The Limitations Inherent in the Mobile Opinion.*

The opinion of Mr. Justice Harlan, speaking for the Court in *Mobile*, summarily dismissed the numerous state decisions construing state regulatory acts in existence prior to *Mobile* with the statement:

"The parties have also referred us to numerous state court decisions construing state statutes of varying degrees of similarity to the Natural Gas Act, some holding that unilateral contract changes were authorized and others holding that they were not. *Taken as a whole, the State decisions prove little more than that the question is an open one and afford little guidance to the proper interpretation of the Federal Act.*"⁴³

It is interesting to note that in support of the statement that some

⁴¹*Kansas City Power & Light Co. v. Midland Realty Co.*, 338 Mo. 1141, 93 S.W.2d 954, 959 (1936).

⁴²*State ex rel. Washington University v. Public Serv. Comm'n of Missouri*, 308 Mo. 328, 272 S.W. 971, 972 (1925).

⁴³350 U.S. at 346-47, 100 L. Ed. at 388. (Emphasis added.)

states hold that unilateral rate changes are authorized and others hold that they are not, the Supreme Court cited cases from four jurisdictions holding each way. These citations are not exhaustive of the state decisions on the subject. A more comprehensive list of state decisions, generally classified as to result, is appended in the footnote.⁴⁴

If it be true that the state decisions "afford little guidance to the

⁴⁴Decisions holding that a contract rate can be changed only after hearing and order of the regulatory body: *Wichita Railroad & Light Co. v. Public Utilities Comm'n of the State of Kansas*, 260 U.S. 48, 67 L. Ed. 124 (1922); *Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co.*, 64 F.2d 881 (10th Cir. 1933); *Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co.*, 295 Fed. 895 (D. R.I. 1924); *Birmingham Electric Co. v. Alabama Public Serv. Comm'n*, 233 Ala. 675, 173 So. 19 (1937), and see *Alabama Water Co. v. City of Attalla*, 211 Ala. 301, 100 So. 490 (1924); *New Haven v. New Haven Water Co.*, 132 Conn. 496, 45 A.2d 831 (1946); *Smith v. Delaware Coach Co.*, 31 Del. Ch. 256, 70 A.2d 257 (1949); *Jefferson Deposit Co. v. Central Illinois Light Co. of Peoria*, 309 Ill. 262, 140 N.E. 817 (1923); *Winfield v. Public Serv. Comm'n of Indiana*, 137 Ind. 53, 118 N.E. 531 (1918); *Kaul v. American Independent Telephone Co.*, 95 Kan. 1, 147 Pac. 1130 (1915); *Inhabitants of North Berwick v. North Berwick Water Co.*, 125 Me. 446, 134 Atl. 569 (1926); *In re Caribou Water, Light & Power Co.*, 121 Me. 426, 117 Atl. 579 (1922); *In re Searsport Water Co.*, 118 Me. 382, 108 Atl. 452 (1919); *Great Northern Utilities Co. v. Public Serv. Comm'n*, 88 Mont. 180, 293 Pac. 294 (1930); *State ex rel. Hughes v. Milhollan*, 50 N.D. 184, 195 N.W. 292 (1923); *City Comm'n of Bismarck v. Bismarck Water Supply Co.*, 47 N.D. 179, 181 N.W. 596 (1921); *Mountain States Telephone & Telegraph Co. v. Public Serv. Comm'n of Utah*, 105 Utah 266, 145 P.2d 790 (1944); *Rutland Ry., Light & Power Co. v. Burditt Bros.*, 94 Vt. 421, 111 Atl. 582 (1920); *Commonwealth ex rel. Page Milling Co. v. Shenandoah River Light & Power Corp.*, 135 Va. 47, 115 S.E. 695 (1923); *Re Wisconsin-Michigan Power Co.*, 17 P.U.R. (N.S.) 295 (Mich.); *Caple v. Interstate Util. Co.*, P.U.R. 1930A 18 (Idaho).

Decisions holding that a contract rate may be changed by unilateral action of the utility in filing new rate schedules: *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 81 L. Ed. 540 (1937); *United States v. Arkansas Power & Light Co.*, 165 F.2d 354 (8th Cir. 1948); *City of Paragould v. Arkansas Light & Power Co.*, 171 Ark. 86, 284 S.W. 529 (1926); *Harrison Electric Co. v. Citizens' Ice & Storage Co.*, 149 Ark. 502, 232 S.W. 932 (1921); *State ex rel. City of Sedalia v. Public Serv. Comm'n of Missouri*, 275 Mo. 201, 204 S.W. 497 (1918); *New Jersey Suburban Water Co. v. Town of Harrison*, 120 N.J.L. 546, 1 A.2d 61 (1938), *rev'd* on other grounds 122 N.J.L. 189, 3 A.2d 623 (1939); *In re Dry Dock, East Broadway & Battery R. Co.*, 254 N.Y. 305, 172 N.E. 516 (1930); *Public Serv. Comm'n v. Pavilion Natural Gas Co.*, 232 N.Y. 146, 133 N.E. 427 (1921); *Town of North Hempstead v. Public Serv. Corp. of Long Island*, 231 N.Y. 447, 132 N.E. 144 (1921); *Pittsburgh v. Pennsylvania Public Utility Comm'n*, 178 Pa. Super. 368, 115 A.2d 858 (1955); *Duquesne Light Co. v. Public Serv. Comm'n*, 273 Pa. 287, 117 Atl. 63 (1922); *Suburban Water Co. v. Borough of Oakmont*, 268 Pa. 243, 110 Atl. 778 (1920); *Leiper v. Baltimore & P. R. Co.*, 262 Pa. 328, 105 Atl. 551 (1918); *North Coast Power Co. v. Public Serv. Comm'n*, 114 Wash. 102, 194 Pac. 587 (1921); *State ex rel. Ellertsen v. Home Telephone & Telegraph Co. of Spokane*, 102 Wash. 196, 172 Pac. 899 (1919).

The state law in Colorado is uncertain. *Cf. City of Lamar v. Town of Wiley*, 80 Colo. 18, 248 Pac. 1009 (1926); *Ohio & Colorado Smelting & Refining Co. v. Public Utilities Comm'n of Colorado*, 68 Colo. 137, 187 Pac. 1082 (1920); *Denver & S. P. Ry. Co. v. City of Englewood*, 62 Colo. 229, 161 Pac. 151 (1916).

proper interpretation of the Federal Act," the converse would appear to be equally true. Certainly this would be true if any marked difference existed between the statutory scheme of the two acts in the respects referred to above. In any event, the language quoted undoubtedly will receive some consideration from a state court or regulatory body in determining the applicability of the *Mobile* doctrine in the construction of a state regulatory act with reference to the modification of contract rates.

E. *The Procedure Followed Before the Commission.*

Conceivably, the procedure followed before the commission in the increase of a contract rate may have a bearing upon the applicability of the *Mobile* doctrine. The New Mexico case heretofore discussed was instituted before the commission more than a year prior to the decision in *Mobile*. While the new rate filed by the utility was made the effective rate on the basis of an *ex parte* proceeding, without notice to the customer or hearing upon the old rate, the commission adopted a procedure which was well adapted to the protection of the rights of all parties involved. Thus, while the rate was placed in effect immediately, it was placed in effect under bond guaranteeing repayment of any amount which might be collected in excess of the rate finally fixed by the commission upon hearing. The order which put the rate into effect called a hearing to determine a just and reasonable rate to be applicable to this single industrial customer. By this device, the commission avoided the administrative lag in rates otherwise incident to extended administrative hearings. The time which elapsed before entry of the final order of the commission, some twelve months later, was extended by the collateral litigation, but the effect of the bond procedure was to make the rate finally determined by the commission applicable from the effective date of the original order.

The extent to which this procedure may have insulated the New Mexico case from *Mobile*, in which the Federal Power Commission had no power to suspend because it was dealing with an industrial rate, cannot be evaluated. Certainly, the procedure followed protected the rights of all concerned, except to the extent it might be contended that the customer had a constitutional right to retain his contract rate until an affirmative finding of unreasonableness had actually been made by the commission.

IV. CONCLUSION

Before concluding this necessarily limited discussion, some attempt to predict the future perhaps is indicated. After seeing *Memphis* grow

out of *Mobile*, however, it is believed that no one would voluntarily assume this risk.

In states in which the validity of a change of a contract rate by a rate filing of the utility has not been finally determined, it is most unlikely that a utility will, in the future, attempt to change a contract rate by unilateral action in the face of the decision in *Mobile*. Even though counsel might feel that the *Mobile* doctrine could be successfully distinguished by a comparison of the Natural Gas Act with the state regulatory act, the likelihood is that the utility will pursue the safe course of invoking a hearing on the old rate before any change is made.

From the point of view of the regulatory body and the utility, this safe course may leave a great deal to be desired. The administrative lag in rate changes incident to extended hearings before regulatory bodies, whose dockets are badly congested, is becoming a major problem.

In the Government's petition in the *Memphis* case for certiorari to the United States Court of Appeals for the District of Columbia Circuit, it was pointed out that the effect of the *Memphis* decision would be to limit natural gas companies to the hearing and order procedure before any contract rate could be changed, absent the purchaser's assent. This would be true regardless of the provision of the contract with reference to future changes in rate. It was further pointed out that substantially all rates regulated by the Federal Power Commission under the National Gas Act are contract rates because of the necessity for such contracts in obtaining financing for the construction of interstate facilities. At the present time it is not unusual for a contested rate proceeding before the Federal Power Commission to continue for two years or more. Extended hearings before state commissions are becoming more and more common.

Legislative relief may be the ultimate answer to some of the problems growing out of *Mobile*, but it, of course, must stand the test of constitutionality. There is no doubt but that the Natural Gas Act, and state acts which are interpreted to provide a "rate review," can, by amendment, be converted into "rate-fixing" and "rate-changing" acts without encountering any constitutional problem. The only potential problem arises in making provision for the operation of "rate-changing" statutes upon contract rates in a manner which will prevent oppressive administrative lag incident to such changes.

The obvious approach is to follow the trail broken by the decision in *Midland*. This does not provide a complete answer, however, be-

cause of the uncertainty as to whether *Midland* is premised upon the invalidity of rate contracts after enactment of the Missouri statute. Absent that question, a statute patterned after Missouri's, with an express provision for the handling of a change in a contract rate in substantially the manner adopted by the New Mexico Commission, would appear to offer a good possibility.

A statute that authorizes rate contracts, but which expressly makes rates so agreed upon subject to change in the manner provided by the act, would clearly be valid as to all contracts entered into after the effective date of the act. It is the opinion of the author that it also would constitute a valid exercise of the police power as to contracts in existence at the time the act becomes effective.

Whether or not legislation results, it is apparent that the chain reaction set off by *Mobile* is far from exhausted. There is every indication that the courts and regulatory bodies of both federal and state governments will be feeling its impact for many years to come.