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# ADMINISTRATIVE LAW—THE SCOPE OF JUDICIAL REVIEW OF DECISIONS OF ADMINISTRATIVE AGENCIES IN SOUTH CAROLINA\*

## I. INTRODUCTION

Historically, judicial review of decisions of inferior courts has been one of the fundamental facets in the structure of our judicial system. However, such review of administrative agency decisions has not met with such wide acceptance. The nature and procedure of administrative law differs significantly from the other judicial processes, which aids in understanding its aversion to judicial review. Administrative Law, it has been stated, is not one of the traditionally recognized parts of our law, such as the criminal law, the common law and equity. It has its origin in legislation and has grown piecemeal by the enactment, application, and construction of specific statutes in regard to particular agencies.<sup>1</sup> Several factors have combined to make a system of administrative law essential to the expedient functioning of our society. The complexity of our modern social, economic, and industrial system; the inability of the legislature or the courts to perform these functions directly; the necessity for constant supervision of specialists and experts; and the experience acquired by such specialists in difficult and complicated fields have all contributed significantly to the demand for an efficient, but flexible regulation of certain key industries and services.<sup>2</sup>

The nature of these agencies along with their desired flexibility constantly creates differences of opinion as to their function in relation to the function of the courts in the judicial system. At first glance there is an obvious overlapping of functions between the two systems based on their similarity of purpose. The problem of judicial review of decisions of an administrative agency, which is the central problem of Administrative Law, necessarily brings the judicial processes into

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\* *Carolina Pipeline Co. v. The Public Serv. Comm'n*, 178 S.E.2d 669 (S.C. 1971).

1. *Hall v. Geiger Jones Co.*, 242 U.S. 539 (1916).

2. *Securities & Exch. Comm'n v. Chenery Corp.*, 322 U.S. 194 (1947); *American Power & Light Co. v. Securities & Exch. Comm'n*, 329 U.S. 90 (1946); S.C. CODE ANN. § 58-1 (1962). This statute provides that the Public Service Commission shall have the authority to regulate all public utilities.

conflict with the administrative processes and presents vital questions as to the relative roles of administrative agencies and the courts in our system of government.<sup>3</sup> It should be noted that the fundamental features of judicial review of administrative action is that it is a limited review. The extent of such review is a variable rather than a constant, and is affected by many factors which cannot be precisely defined.<sup>4</sup>

In South Carolina, there are generally two requirements for judicial review of a decision of an administrative agency. First, any right to appeal an order of a public service commission must be founded upon constitutional or statutory grounds.<sup>5</sup> Section 58-124 of the South Carolina Code authorizes judicial review of orders of administrative agencies.<sup>6</sup> Second, there must be an exhaustion of administrative remedies before there can be any judicial review in South Carolina.<sup>7</sup> This rule invokes a policy of orderly procedure which favors a preliminary sifting process, particularly with respect to matters peculiarly within the competence of the administrative authority, and serves to prevent attempts to swamp the courts by resort to them in the first instance.<sup>8</sup>

Once the right to judicial review of a decision of an administrative agency has been established, a test must be used to determine the scope of review. The courts have used a variety of theories to determine this. One such approach is the "law-fact"<sup>9</sup> theory which states that operations of law are for the ultimate determination of the court. This of course leads to differences of opinion as to what is law and fact, and consequently to the abandonment of this theory. In its place came a number of theories, one of which was the "substantial evidence rule."<sup>10</sup> This rule provides a standard of review relating to questions concerning whether the act should have been done? Most jurisdictions, however,

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3. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Stark v. Wichard*, 321 U.S. 288 (1944); *United States v. Morgan*, 313 U.S. 409 (1941).

4. *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956); *Witman v. United States*, 348 U.S. 375 (1955).

5. *Southern Ry. v. The Public Serv. Comm'n*, 195 S.C. 247, 10 S.E.2d 769 (1940).

6. S.C. CODE ANN. § 58-124 (1962). Decisions of the Commission may be reviewed by the Court of Common Pleas upon questions of both law and fact.

7. *Stanley v. Gray*, 237 S.C. 237, 116 S.E.2d 843 (1960).

8. *Id.* at 247, 116 S.E.2d at 848.

9. *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951); *John Kelly Co. v. Commissioner*, 326 U.S. 521 (1946).

10. *Federal Communication Comm'n v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955).

have substituted a test such as whether the decision was within the "discretionary" powers of the agency, whether it was "unreasonable", or whether it was "arbitrary" or capricious.<sup>11</sup>

## II. PUBLIC SERVICE COMMISSION V. CAROLINA PIPELINE<sup>12</sup>

The respondent, Carolina Pipeline Co., was granted a certificate of "convenience and necessity"<sup>13</sup> by the Public Service Commission in 1958 and amended in 1959. The certificate authorized it to provide the Georgetown and Myrtle Beach area with natural gas. Subsequently, the Midland-Ross Company<sup>14</sup> expressed an interest in locating in the Georgetown area and indicated that a large supply of natural gas would be needed for its operation. Negotiations between Midland-Ross and respondent for the provision of gas proved futile and were eventually cut off. The obvious desire of the City of Georgetown to have Midland locate there led it to solicit the South Carolina Electric & Gas Company concerning the possibility of its supplying the needed gas. The Electric and Gas Company then applied to the Public Service Commission for a certificate of "convenience and necessity" to supply natural gas to Georgetown. The Commission revoked respondent's certificate<sup>15</sup> and granted the same to the South Carolina Electric and Gas Company in November of 1969.

Respondent subsequently appealed this decision to the Richland County Court of Common Pleas which reversed it on June 11, 1970. This action led to an appeal by the Commission and the South Carolina Electric and Gas Company to the South Carolina Supreme Court. The court reversed the lower court's order saying that, since respondent could not adequately service Georgetown, it was within the Commission's power to grant a new certificate.<sup>17</sup> In an obvious attempt

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11. 2 AM. JUR. 2d *Administrative Law* § 621 (1962).

12. 178 S.E.2d 669 (S.C. 1971).

13. No public utility supplying gas to the public shall hereafter begin the construction or operation of any gas utility system, or any extension thereof, without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction or operation. S.C. CODE ANN. (1962). Public Serv. Comm'n Rules and Regulations, Vol. 19 at 440.

14. 178 S.E.2d 669 (S.C. 1971).

15. S.C. CODE ANN. § 58-122 (1962). This section provides that: The Commission may at any time, upon notice and opportunity to the public utility affected to be heard, rescind, alter or amend any order or decision made by it.

16. 178 S.E.2d 669 (S.C. 1971).

17. *Id.*

to avoid the issues concerning judicial review, the court said it was not necessary to decide this issue, but stated that the respondent's right to judicial review by the court is not synonymous with substitution of a court's judgment for that of an administrative agency.<sup>18</sup> The South Carolina Supreme Court reached the same result on a similar case a few days later.<sup>19</sup> Although there are many decisions dealing with the scope of judicial review of administrative decisions, the actions taken by the court of common pleas and the Supreme Court indicate that the issue may not be completely settled.

The respondent, Carolina Pipeline, attempted to justify the circuit judge's substitution of his judgment for that of the Commission by relying upon certain language contained in the case of *Columbia v. Tatum*.<sup>20</sup> This case dealt with an action commenced by the City of Columbia against the Railroad Commission asking the court to review an order of the Commission allowing the railroad to discontinue service in Columbia. Citing *Ohio Valley Water Company v. Ben Avon Borough*,<sup>21</sup> a territorial confiscation case involving a public utility, the court said that:

In an action to review orders of the Railroad Commission, a court must exercise independent judgment on questions of both law and fact, and as to facts must examine the evidence in the records of the Commission and determine the truth according to the court's best judgment.<sup>22</sup>

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18. *Id.*

19. *Petroleum Transp., Inc. v. The Public Serv. Comm'n*, Smith's Adv. Sht. No. 19172 (Feb. 18, 1971).

20. 174 S.C. 366, 177 S.E. 541 (1934).

21. 253 U.S. 287 (1920). The *Ben Avon* decision, immediately after it was handed down, became the leading case in the area of judicial review of orders of administrative agencies. Involving confiscation of lands of a public utility in Pennsylvania, it permitted the court to substitute its judgment for that of the Commission. Although never overruled, the case has been widely criticized and at most is authority for situations dealing with the same factual situation.

22. 174 S.C. 366, 177 S.E. 541 (1934). It was alleged by appellant in their brief that although the circuit court in *Tatum* did state by way of dictum that Section 58-124 gives the court power to exercise its independent judgment on questions of both law and fact, that actually the issue was never before the court. The case arose out of a desire of the City of Columbia to have certain street car tracks removed, and bus service substituted in its place. The franchise operator and the Public Service Commission both agreed to this. Later, however, the Attorney General ruled that the Commission did not have the power to authorize such substitution, and the Commission reversed its order. Thereafter, the matter was litigated under the caption *Columbia v. Tatum*.

In reversing the second order of the Commission, the circuit judge merely found that

*Blease v. Charleston & W.C. Railway Co.*,<sup>23</sup> relied upon by the respondent, is also authority for the proposition that a court has the power to investigate an order of a Commission and substitute its judgment for that of the Commission. The *Blease* case also relied upon the *Ben Avon* doctrine, and like *Ben Avon*, it too was a confiscation case.<sup>24</sup> The *Tatum* and *Blease* decisions are weakened considerably by relying upon the much criticized *Ben Avon* doctrine. Professor Davis, in his treatise on administrative law, severely criticizes the *Ben Avon* doctrine and cites as its basic weakness its assumption that facts upon which Constitutional rights depend can be found only by the courts.<sup>25</sup> A similar view of the *Ben Avon* doctrine is taken in American Jurisprudence (second) where it is stated that:

It is doubtful how much validity the rule (*Ben Avon*) has in present day law, and even the doctrine of independent judicial judgment on fact issues involving Constitutional guaranties is said to have gradually died.<sup>26</sup>

The respondent's position, in relying on *Tatum* and *Blease*, is, therefore, weakened by the considerable criticism of *Ben Avon*.

Although judicial review is provided by statute in South Carolina, it is clear from cases offered by the appellants, and those others to be cited below, that one seeking to have an order of the Public Service Commission overturned faces a difficult task. In *Atlantic Coast Line v. The Public Service Commission*,<sup>27</sup> a case involving a suit by the railroad to enjoin and set aside an order of the Commission requiring the railroad to enlarge certain station platforms, the court said that:

The decisions and orders of Public Service Commissions with respect to the regulations of public utilities are prima facie or presumptively valid, reasonable and correct.<sup>28</sup>

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the Commission did have authority to authorize the substitution of service. The brief stated that the court's statement that it had made independent findings of fact in the record to justify their ruling was merely gratuitous. At no time did it make findings of fact independent of those made by the Commission. Consequently, the result reached in *Tatum* was done without relying on section 58-124, which respondent contends authorizes the court to make a factual determination, independent of that of the Commission. Brief for Appellant at 2, 178 S.E.2d 669 (S.C. 1971).

23. 146 S.C. 496, 144 S.E. 233 (1928) (dictum).

24. *Id.*

25. 4 K. DAVIS, ADMINISTRATIVE LAW § 29.09 (1958).

26. 2 AM. JUR. 2d ADMINISTRATIVE LAW § 695 (1962).

27. 226 S.C. 136, 84 S.E.2d 132 (1954).

28. *Id.* at 141, 84 S.E.2d at 134; *State v. Broad River Power Co.*, 157 S.C. 1, 153 S.E. 537 (1929).

Therefore, anyone seeking to reverse an order of the Commission must first overcome these presumptions. In the event that these presumptions are rebutted, the appellant must then face another test to determine the scope of review. *E.L. Long Motor Lines, Inc. v. Fuller Motor Lines*<sup>29</sup> is authority for the further test, usually applied in South Carolina, that an order of the Commission will not be set aside unless it is shown to be arbitrary or capricious in the sense that no two reasonable men could differ.<sup>30</sup> An elaboration of the "arbitrary or capricious" theory was made in *Atlantic Coast Line* where it was said that an administrative agency's power shall not be interfered with by the courts unless such exercise is of an arbitrary nature having no reasonable relation to the execution of a lawful purpose.<sup>31</sup> This case states further that a court cannot substitute its judgment for that of a public service commission upon a question as to which there is room for a difference of intelligent opinion, and the court will not set aside an order of the Commission merely upon the conception of the court as to the wisdom or expediency of the order.<sup>32</sup> In summary, it would appear that the mere fact that two reasonable men differ on an issue does not make it arbitrary.<sup>33</sup>

While the "arbitrary or capricious" test is the one generally employed in South Carolina, a more stringent approach was taken by a court in a 1940 case.<sup>34</sup> This case involved an appeal by the Southern Railway Company of an order of the Public Service Commission refusing Southern's request for a discontinuance of service. This decision by way of dictum stated that even where judicial review is provided by statute, the court does not, strictly speaking, exercise appellate jurisdiction, since there can be no appeal in the legal sense from an order of an administrative body.<sup>35</sup> Since the language has never been followed and since it is also contrary to the idea of Section 58-124, it is probably of little significance.

A still different test was applied in *United Merchants and*

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29. *E.L. Long Motor Lines v. The Public Serv. Comm'n*, 233 S.C. 67, 103 S.E.2d 762 (1958).

30. *Id.*

31. *Atlantic Coast Line R.R. v. The Public Serv. Comm'n*, 226 S.C. 136, 84 S.E.2d 132 (1954).

32. *Id.*

33. *Id.*

34. *City of Columbia v. The Public Serv. Comm'n*, 242 S.C. 528, 131 S.E.2d 705 (1962).

35. *Id.*

*Manufacturers v. South Carolina Electric and Gas*<sup>36</sup> involving an action for fraud and deceit. It was stated here that decisions of quasi-judicial tribunals, acting within their jurisdiction, are impervious to collateral attack, and that they are open to avoidance by a court only in a direct attack on the grounds of clear error of law, fraud or mistake.<sup>37</sup> The decision stated further that a court only has the right to affirm the order of a commission or remand the case, and emphasized that there is no authority for the court's substituting its judgment for that of the commission.<sup>38</sup> This is probably the clearest answer to the question of what procedure a court should follow when it disagrees with an order of the Commission.

### III. CONCLUSION

It would seem that the interest of the public and the public utilities would best be served by allowing only limited review by the courts of orders of the Public Service Commission. The judicial system is not so structured that it could effectively substitute its judgment for that of experts serving with the Commission. This expertise coupled with needed flexibility makes a relatively independent Commission essential.

While it is evident, from the cases, that the scope of judicial review of administrative decisions is fairly limited in South Carolina, there still exists some doubt as to the exact scope of the Court's function in this area. This is evident from the lower court's decision in *Carolina Pipeline and The Petroleum Transportation v. The Public Service Commission*.<sup>39</sup> Probably the best approach, to relieve this doubt, would be action by the legislature to clarify Section 58-124 and affirmative steps by the South Carolina Supreme Court to clarify the record.

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36. 113 F. Supp. 257 (1953).

37. *Id.*

38. *Id.*

39. *Petroleum Transp., Inc. v. The Public Serv. Comm'n* Smith's Adv. Sht. No. 19172 (Feb. 18, 1971).