42 S.W.2d 349
**(Cite as: 42 S.W.2d 349)**

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Supreme Court of Missouri, Division No. 2.
STATE ex rel. KENNEDY et al.
v.
PUBLIC SERVICE COMMISSION.

No. 30971.
Oct. 1, 1931.

Appeal from Circuit Court, Cole County; Henry J. Westhues, Judge.

Petition by the State, on the relation of R. O. Kennedy and others, against the Public Service Commission of Missouri. From judgment affirming an order of the Public Service Commission, petitioners appeal.

Affirmed.

West Headnotes

**[1] Water Law 405 1965**

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)7 Supply and Distribution Works and Appliances
405k1965 k. Mains, pipes, and appliances for distribution. Most Cited Cases
(Formerly 405k194)

Persons attacking rule of water company governing extensions of water mains had burden to show rule unreasonable or unlawful (Rev.St.1929, §§ 5246, 5247, V.A.M.S. §§ 386.270, 386.430).

**[2] Water Law 405 1965**

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)7 Supply and Distribution Works and Appliances
405k1965 k. Mains, pipes, and appliances for distribution. Most Cited Cases
(Formerly 405k194)

Evidence held not to show that water company's rule governing extensions of water mains was unreasonable or unlawful.

**[3] Public Utilities 317A 187**

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(C) Judicial Review or Intervention
317Ak187 k. Actions to set aside orders of commissions. Most Cited Cases
(Formerly 317Ak25)

Court's province is not to make rules for public service utilities, but only to determine whether assailed rule approved by public service commission is reasonable and lawful.

**[4] Water Law 405 1965**

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)7 Supply and Distribution Works and Appliances
405k1965 k. Mains, pipes, and appliances for distribution. Most Cited Cases
(Formerly 405k194)

Water company is not under absolute and unconditional duty to extend mains to any territory whenever requested irrespective of circumstances or conditions.

**[5] Water Law 405 1965**

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)7 Supply and Distribution Works and Appliances

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405k1965 k. Mains, pipes, and appliances for distribution. Most Cited Cases
(Formerly 405k194)

Water company's rule requiring applicants for extensions to deposit cost in advance with refund of $50 for each consumer connected on extension held not unreasonable.

**[6] Water Law 405 1965**

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)7 Supply and Distribution Works and Appliances
405k1965 k. Mains, pipes, and appliances for distribution. Most Cited Cases
(Formerly 405k194)

In rule governing extension of water mains, discrimination is not unlawful unless arbitrary or unjust.

**[7] Water Law 405 1965**

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)7 Supply and Distribution Works and Appliances
405k1965 k. Mains, pipes, and appliances for distribution. Most Cited Cases
(Formerly 405k194)

In water company's rule respecting extensions of mains, provision for exceptional cases held not to result in unjust discrimination.

***349** Glen Mohler, of St. Louis, for appellants.

D. D. McDonald, Gen. Counsel, and J. P. Painter, both of Jefferson City, for respondent Public Service Commission.

Polk, Williams & Campbell, of St. Louis, for respondent St. Louis County Water Co.

COOLEY, C.

Appeal from a judgment of the circuit court of Cole county affirming an order of the public service commission (called hereinafter the commission), which order denied appellants' petition for modification or disapproval of a rule of the St. Louis Water Company governing extensions of water mains. Petitioners (appellants), about twenty-five in number, reside or own property along Coles avenue in what is known as Orchard Hill subdivision in St. Louis county. The St. Charles rock road forms the northern, and Breckinridge road the southern, boundary of the subdivision; Coles avenue extending north and south from one road to the other. The St. Louis Water Company is a public service corporation engaged in furnishing water in parts of St. Louis county. It has a water main in St. Charles rock road where said road is intersected by Coles avenue. There is no water main in Coles avenue, and petitioners desire the installation of such main so that they may be supplied with water therefrom.

The water company has in force a rule approved by the commission by which it may and must extend mains from its present distribution system to furnish water service to new consumers who desire same and who comply with the rule, as follows:

"The entire cost of making such extension, which shall be in cast-iron pipe, the size of which shall be determined by the company, shall be paid to the Water Company before the extension is made, with the provision that the cost of making such extension will be refunded to the party paying for such extension at the rate of $50.00 for each consumer connected through a separate tap on the extension, when the consumer is taking service through the connection under a regular yearly contract, until the entire cost of such extension***350** paid by said party, less depreciation thereof at the rate of 1 per cent. per year, is refunded.

"The Water Company shall have the privilege of further extending the main, or connecting mains on intersecting streets, and consumers connected to such further extensions will not entitle the party paying for the original extension to a refund for the attaching of such extensions.

"In case the company shall determine to make such extension with pipe of a larger size than six inches in diameter, the company shall pay the excess cost over what an extension with six-inch pipe would cost, unless the water requirements of the community

to which such extension is sought would reasonably require in the judgment of the Water Company a larger size of pipe than six inches, in which event the party asking for such extension shall pay the entire cost thereof in the size of pipe reasonably required, the company to pay any additional cost if it determines on a larger size of pipe.

"In exceptional cases, where extensions are requested under conditions which may appear to warrant departure from the above rules, the cost of such extensions, if requested and desired by the company, shall be borne as may be approved by the Public Service Commission of Missouri."

For some years prior to July 1, 1927, the effective date of the present rule, the water company had in force an extension rule substantially the same as the present one, except that it did not contain the last paragraph, or exception clause, permitting extensions in exceptional cases to be made at the expense of the company by permission of the commission.

By this proceeding petitioners sought to have the commission disapprove and abrogate the above-quoted rule and require the water company to file a new rule under which the water company would be required to make at its own expense all extensions that would not become a burden upon the company and its consumers. Under a rule such as petitioners desire, as we understand their position, any person or group of persons requesting water service might in each case invoke action of the commission if their request were denied by the company.

Petitioners' present source of water is wells and cisterns located on their properties along Coles avenue. At the time of the hearing before the commission a number of these wells and cisterns had failed, compelling petitioners to carry water considerable distances. Reports of the board of health of St. Louis county were introduced showing that the water of the wells is contaminated and not suitable for human consumption. The evidence shows that petitioners need a more suitable supply of water. Prior to July 1, 1927, petitions for similar extensions of mains in Calvert and Marvin avenues, four and five blocks east of Coles avenue, had been denied because the rule then in force did not permit the company to make the extensions at its own expense. After such denial the present rule was adopted and approved, following which action the extensions were made "as a health measure" under the present rule, and one other extension was made to avoid a threatened danger of typhoid fever in a section occupied by colored people, which latter extension cost the water company $14,000 and brought it one customer. Those three are the only extensions shown to have been made at the expense of the water company since the adoption of the original rule. The number of residents on Calvert and Marvin avenues each is about the same as on Coles avenue, and the general situation and conditions are similar, except that the greater weight of the evidence, we think, shows that, owing to the topography and elevation of the land in the subdivision and a ditch near Calvert avenue which prior to the extensions in that and Marvin avenue collected foul water and sewage, conditions on those streets were more unsanitary and dangerous to public health than on Coles avenue.

It is clear from the evidence that the extension would not yield to the water company a reasonable return on the investment if all of the twenty-eight residents on Coles avenue should connect and take water, and from the company's experience, particularly on Calvert and Marvin avenues, it can hardly be expected that all would so connect. They did not do so on Calvert, where some who had previously signed contracts failed to connect.

The company's evidence shows that, based upon a valuation made by the commission as of December 31, 1927, and adding betterments and extensions since made, its investment per consumer is approximately $180; that on Calvert and Marvin avenues the annual payments from consumers have averaged $13.35 and $13.60, respectively, per consumer; that on Coles avenue the amount per consumer to be expected would be about the same as on Calvert; that half or more of the gross receipts is required for operating expenses, leaving an estimated $6.68 per customer for return to the company on its investment; that the commission has by order allowed 7 per cent. as a reasonable return. On the basis of average investment per customer, the service sought by petitioners, even if all on the street became consumers, would yield the company only about half the return allowed by the commission as reasonable.

By an inventory of the company's property made by the commission January 1, 1926, the commission found that the company had invested in distribution

mains as of that date ***351** $68.75 per account or customer. The commission's findings and conclusions on that subject can best be stated in its own language. We quote from its report:

"However, there must not be overlooked the fact that a large part of defendant's distribution system is used to furnish fire protection service and that revenues from that class of business should be taken into account when determining the amount of investment necessary to serve the individual customers. Various investigations and findings on the part of this Commission, as well as other Commissions, indicate that the investment that should be allocated to fire-protection service varies anywhere from 30 to 40 per cent. of the entire distribution mains. Using an average of 35 per cent., it would appear that the defendant company now has invested $44.69 in distribution mains per customer that should be allocated to its metered customers. This does not include meters, meter boxes and vaults which are necessary for properly furnishing water service. It appears, therefore, that the company's present rule, which provides that the company shall spend at least fifty dollars per customer, meets with any rule that might be based upon its present investment per customer.

"The figures used above are dated as of January 1, 1926, and are used because the relations since that date have not been disturbed seriously. The use of the investment brought up to date and the present number of customers doubtlessly would not change that relation sufficiently to justify a different finding in this cause.

"The complainants submitted evidence for the purpose of showing that the cost of this extension would not be burdensome upon the Water Company should it be required to bear the cost of the entire extension. The defendant states that the length of the main required to furnish the service desired by the complainants is 1,727 feet, which will cost $2,300.00. The testimony shows that the present number of houses located along Coles avenue is twenty-eight, and on the basis of $50.00 per consumer to be borne by the defendant the complainants would be required under the present rule to deposit the total of $2,300.00, $1,400.00 of which would be refunded upon taking the water service. The evidence shows that the defendant would not have in its possession the amount to be refunded, $50.00 per consumer, more than thirty days, and that the other $900.00 would be refunded at the rate of $50.00 per customer as new consumers are taken on this extension. The showing made by the complainants applies only to the investment that the defendant would have on Coles avenue and does not take into consideration that other parts of the system should be chargeable to this extension. As new consumers are continually taken on, the investment in the distribution system and other parts of the defendant's system must necessarily be reallocated to all consumers served, but the magnitude of the system does not justify a change in the rule for each customer, because the charges are so infinitesimal for each consumer that readjustments would not materially change the rule. So we believe that the premises upon which the present rule is justified, as set out herein, are more equitable than that upon which the complainats propose to disapprove it."

There was no evidence tending to show that petitioners are unable to make the deposit required by the rule. The only evidence on that subject was the testimony of one of their witnesses that: "The financial condition of the people who live on Coles avenue is good. Most everybody owns their own home; some are already paid for and they've got steady positions."

The company's evidence, practically undisputed, tended to show that it makes, under the rule, sixty to seventy-five extensions per year; that probably several times that number are applied for; that if the rule were modified as requested there would be, during the greater part of the year, probably fifteen to twenty cases a week which the commission would have to hear; that the company is not able financially to make at its own cost all the extensions applied for, and while it would not be a great burden to make this particular extension, yet to meet all such demands would make the burden so great that the company could not operate and serve its present customers. It was further shown that many applications for extensions are made by promoters desiring to establish new additions and sell lots; that about 1924 the investment company which laid out this subdivision, then unimproved, procured from the water company a proposition to extend water mains into it, for a sum stated, which offer was not accepted, and the sale of lots proceeded without provision for water mains; that people frequently buy lots and build, as in this instance, when no provision has been made for water, and then make complaint that conditions are unsanitary and ask for extensions of the

company's mains, this case being "a typical case that is brought to us all the time."

[1][2] The burden of proof rested upon petitioners to show that the rule in question is unreasonable or unlawful. Sections 5246, 5247, Rev. St. 1929; State ex rel. City of St. Joseph v. Busby (Mo. Sup.) 274 S. W. 1067. We agree with the commission that the evidence did not so show. It does not appear over what area the company's distribution system extends, but it seems clear that the company has not undertaken to serve every part of St. Louis county. To cover every part ***352** of that large territory with water mains would be beyond its ability. Moreover, to make generally extensions that would not be remunerative presently or in the reasonably near future would not only overtax its resources, but would mean that it must operate without a fair return on its investment, perhaps even at a loss, or else that rates must be increased, throwing the additional burden on all consumers. The company must conserve its ability to serve present consumers and to make reasonable and necessary expansion and extensions which the evidence indicates are being made and planned for the future to meet the growing needs of communities which it has already undertaken to serve. It is clear that there is need of uniform rules governing extensions such as the one requested in this instance.

[3] Petitioners contend that the rule should be modified or framed so as to require extensions to be made by the company at its own cost when they probably would not "result in an undue burden upon the company and its consumers," and if they would so result to require a deposit covering the cost to be made by the persons interested. If such a rule would be practical it might be better. But in its application it might and probably would result in countless disagreements between the company and applicants for extensions as to whether or not the requested extensions would be unduly burdensome, resulting in a multiplicity of applications to the commission for settlement of such controversies, burdening both the company and the commission. However, it is not our province to make rules for public service utilities. We have only to determine whether or not the assailed rule, which has the approval of the commission, is reasonable and lawful.

[4][5] It may be conceded that it is not always necessary that a particular extension shall be immediately remunerative or that there shall be no unprofitable extensions. See note, page 540, to Arkansas-Missouri Power Co. v. Brown (Ark.) 58 A. L. R. 534. But the company is not under the absolute and unconditional duty to extend its mains to any territory whenever requested irrespective of circumstances or conditions. Regard should be had to the reasonableness of the demand. McQuillin on Munic. Corp. (2d Ed.) vol. 4, p. 831. See, also, 27 R. C. L. p. 1410; Lukrawka v. Spring Valley Water Co., 169 Cal. 318, 146 P. 640, Ann. Cas. 1916D, 277; Lawrence v. Richards, 111 Me. 95, 101, 88 A. 92, 47 L. R. A. (N. S.) 654. The evidence indicates that in this instance, and many like it, the extension could not be expected to make a fair return to the company presently or within any reasonable time in the future. Neither the utility nor its other consumers should be required to bear the burden that such extensions would entail if the company were forced to make them at its own expense. The rule in question may in some instances work hardship where applicants are financially unable to make the deposit, though that is not petitioners' situation in this case. But any general rule may occasionally work some hardship to individuals. The requirement that applicants for extensions deposit the cost in advance, to be refunded as provided in the rule, has been in force for a considerable number of years, and the commission's experience is that it has operated reasonably satisfactorily. We are not persuaded that it is unreasonable.

Speaking of the necessity of rules in carrying on public utility business, it is said in Wyman on Public Service Corporations, vol. 2, § 860: "Public businesses are usually carried on upon a large scale, and for their proper conduct established regulations are plainly necessary. In recognition of this fact great scope is given to regulations by the law large discretion being given to those who are confronted with the problem of reducing to order a complicated business. As a result the rule generally followed by the courts is to hold justifiable a regulation which is made by the company in good faith, and enforced by it without discrimination, unless it is plainly outrageous in its general operation. Whether the Court might have done differently, or even if its sees hardship in particular cases, is not, as will be seen, enough to induce it to set the regulation aside, or hold it (has) no justification." See, also, Residents of Royalton v. Central Vermont Ry. Co., 100 Vt. 443, 138 A. 782.

[6][7] It is urged that the last paragraph of the rule, whereby it is provided that, in exceptional cases where conditions may appear to warrant departures from the rule, the cost of the extension, if so requested by the company, shall be borne as may be approved by the commission, makes the rule discriminatory, or at least makes it possible for the company under the rule to discriminate between proposed consumers. Discrimination is not unlawful unless arbitrary or unjust. State v. M., K. & T. Ry. Co., 262 Mo. 507, 524, 525, 172 S. W. 35, L. R. A. 1915C, 778, Ann. Cas. 1916E, 949: State ex rel. and to Use of Pugh et al. v. Pub. Serv. Comm., 321 Mo. 297, 10 S.W.(2d) 946, 951, and cases cited. The rule does not permit the company at its own will to extend to one applicant for service treatment different from that accorded to others. It is only in exceptional cases where conditions may appear to warrant departure from the rule that the deposit requirement may be waived, and then only by permission of the commission, which body is to determiner whether or not the exceptional conditions exist and, if so, how the cost shall be borne. Under a rule such as petitioners say ought to be adopted, the question of who should bear the cost would have ***353** to be determined by the commission in each case unless the parties agreed. True, under such rule an applicant for service could invoke action by the commission, while under the exception clause of the present rule only the company can do so. But that provision was designed only to afford the possiblity of granting relief where, because of exceptional conditions, there may be urgent need for such relief and it may justly be granted. Without some such provision in the rule the commission could not authorize the company to make an exception in the application of its approved rule. State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm., 315 Mo. 312, 286 S. W. 84. If rightly observed, as we must assume it will be, we think that provision of the rule will not result in unjust discrimination. The evidence indicates that there has been no attempt or disposition so far on the part of the company to do other than comply with the rule according to its spirit and purpose.

The judgment of the circuit court is affirmed.

WESTHUES, C., not sitting.
FITZSIMMONS, C., concurs.
PER CURIAM.

The foregoing opinion by COOLEY, C., is adopted as the opinion of the court.

All of the Judges concur.

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