

by public service corporations other than in the legitimate conduct of business. Adopting the language of the Court of Appeals, he says: "This law does not make the Commissioners the financial managers of a corporation, nor does it empower them to substitute their judgment for that of the board of directors or the stockholders of a corporation as to the wisdom of a transaction." He then goes on to add: "The management of corporate affairs has not been delegated. The power of the Commission is limited to withholding consent to the issue of stocks and bonds for other than statutory purposes. It is not obliged to consent or refuse consent to an entire issue applied for, but may limit the issue to an amount which the Commission may determine to be reasonably required for the enumerated statutory purposes set forth in the application. The Commission may not refuse approval because the proceeds of such securities are not to be used in the way the Commission thinks wise, provided such proceeds are to be used in the legitimate conduct of the corporate business; the scope and advisability of the business is to be determined by the directors and stockholders."

The Long Acre Electric Light and Power Company was incorporated on April 24th, 1903, and by its charter, as amended June 7th, 1907, it was authorized to generate and distribute electricity for light, heat, power and other purposes in the boroughs of Manhattan and the Bronx. On March 22nd, 1906, it also acquired the franchise or consent granted in May, 1887, to a corporation known as the American Electric Manufacturing Company. Being legally entitled to pursue the business for which the company was incorporated, it applied to the Public Service Commission, under the provisions of Section 69 of the 1907 law, for leave to issue stock and bonds for the purposes named in its application.

The Commission denied the application in toto for ten reasons. The first five reasons dealt entirely with matters of a technical character or having no general application or bearing. The sixth reason for refusal given by the Commission declared that "the construction contract does not adequately protect the interests of the Long Acre Company or of the public." The assignment of this reason, says Justice Scott, indicates a disposition on the part of the Commission to do precisely what the Court of Appeals has said that they are not authorized to do, namely, "to substitute their judgment for that of the board of directors or stockholders of a corporation as to the wisdom of a transaction." The Court does not wish to be understood as saying that a case might not occur wherein a proposed contract by a corporation was so obviously objectionable that the Commission would be justified in refusing its assent to an issue of securities to carry it out. But no such case was presented in this instance. The Commission's objection to it seemed to be wholly arbitrary, and was unsupported by any argument in its report or in the brief of its counsel. The Court's own examination disclosed nothing apparently so objectionable as to warrant condemnation.

As to the last four reasons for refusing consent, these were summarized as follows by the Commission: (7) The applicant has not proved that the existing companies are not properly conserving the public interests and convenience, and that it would be to the advantage of the community to have a new company authorized to enter the field. (8) If a competing company were allowed to begin operations, it is not likely that it would continue to operate independently for any considerable period. (9) Competition would cause inconvenience and expense to the public, would cause duplications of plant, would lead to waste, and ultimately be urged as a reason why rates should not be reduced to consumers. (10) Practically all of the advantages claimed by the applicant as to the probable results of competition can be secured through the powers of this Commission, and until it has been demonstrated that these are ineffective it would be unwise to adopt a method which has proved to be ineffective in the past.

These reasons for refusing consent to the issue of stock and bonds, it is pointed out in the opinion of the Appellate Division, are fundamental. They go to the extent of holding that the Long Acre Electric Light and Power Company, although authorized by its charter and franchise to manufacture and distribute electricity, should not be permitted to do so. This follows from the fact that if the company may not issue any stock and bonds at all, it cannot exercise its corporate rights and franchises. The reasons given are all based upon the underlying proposition that there should be no competition in the business of electrical lighting, providing that there is found one company already performing the service acceptably. It had been urged that it was the general policy of the State to prevent such competition and to encourage in such matters beneficent monopoly, the rights of the public and the consumers being protected by the reserved right of the Legislature to regulate charges and methods of operation. That such has been the general policy of the State, the Court grants. However, the right to determine whether, and when, such competition should be permitted rests with the Legislature and has not been delegated to the Public Service Commission. The Long Acre Company had acquired legislative authority to transact its business before the Public Service Commission was created, and the Court could find nothing in the Act which permits the Commission to say upon its own mere ipse dixit that a duly chartered and authorized corporation may not transact business merely because it may compete with another corporation engaged in the same business.

The Court takes occasion to point out, too, that the powers granted to the Commission respecting railroad corporations and those respecting gas and electrical corporations are quite different. By Section 53 of the Act, railroad corporations, street railroad corporations and common carriers who had not before the creation of the Public Service Commission obtained a consent from the Board of Railroad Commissioners, or who had not then become entitled to begin construction by virtue of compliance with the Railroad Law, are forbidden to begin the construction of a railroad, or an extension thereof, without first having obtained the permission and approval of the proper Public Service Commission, and such permission is to be given only after the Commission has determined "that such construction, or such exercise of the franchise, is necessary or convenient for the public service." Under this provision the Commission could properly withhold its permission if a proposed railroad appeared to be unnecessary because the territory to be served was already sufficiently served by an existing line of railway.

On the other hand, the provisions regarding gas and electrical companies are quite different, and provide for no certificate of necessity or convenience. Section 68, which calls for the approval of the Commission before gas and electrical corporations may begin construction or exercise rights and franchises, merely requires that before such certificate of approval is issued, a certified copy of the charter of the corporation shall be filed in the office of the Commission, together with proof that it has obtained the required consent of the proper municipal authorities. Similarly Section 69, calling for the consent of the Commission to an issue of stock or bonds of a gas or electrical corporation, merely requires that the Commission shall be satisfied that the money to be derived from such issue is reasonably required for the enumerated purposes of the corporation. The conclusion, therefore, is that the specific requirement of a certificate of "necessity and convenience" in the case of a railroad company, and the omission of any such requirement in the case of a gas and electrical corporation, indicates that as to the latter it was not the intention of the Legislature to delegate to the Commission the power to prevent the exercise of corporate rights merely because such exercise would involve competition.