



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Lon A. Smith, Chairman,
Honorable Jerry Sadler, Commissioner,
Railroad Commission of Texas
Austin, Texas

Gentlemen:

Opinion No. O-2723

Re: Construction of Article
6069 R. C. S., with
respect to the time for
appeal by a gas utility
to the Commission.

We beg to acknowledge receipt of your letter requesting an opinion from this department, which letter is as follows:

*The petition of Houston Natural Gas Corporation, copy of which is appended hereto, has been filed with the Railroad Commission (Gas Utilities Division) and received and docketed subject to the action of this Commission upon the question of its jurisdiction in this particular appeal.

*The question of jurisdiction arises from the fact that the Company did not originally appeal to the Commission from the El Campo rate ordinance, effective September 1, 1939, but instead attacked the validity of the ordinance and the gas utility statutes by an appeal to the District Court in Wharton County, where the ordinance was superseded and litigation initiated.

*The ordinance and the statutes were finally held to be valid and the Company filed its appeal to the Commission on August 9, 1940, after nearly a year had elapsed from the effective date of the ordinance.

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"Two questions are present which affect the jurisdiction of the Commission -

"First: Has the Company lost its right of appeal to the Railroad Commission as provided by Article 6058, R. S., 1925, as amended?

"Second: Is the ordinance rate now the legal rate in El Campo?

"Answers to these two questions will be appreciated."

Article 6058 of the Revised Civil Statutes is as follows:

"When a city government has ordered any existing rate reduced, the gas utility affected by such order may appeal to the Commission by filing with it on such terms and conditions as the Commission may direct, a petition and bond to review the decision, regulation, ordinance, or order of the city, town or municipality. Upon such appeal being taken the Commission shall set a hearing and may make such order or decision in regard to the matter involved therein as it may deem just and reasonable. The Commission shall hear such appeal de novo. Whenever any local distributing company or concern, whose rates have been fixed by any municipal government, desires a change of any of its rates, rentals or charges, it shall make its application to the municipal government where such utility is located and such municipal government shall determine said application within sixty days after presentation unless the determination thereof may be longer deferred by agreement. If the municipal government should reject such application or fail or refuse to act on it within said sixty days, then the utility may appeal to the Commission as herein provided. But said Commission shall determine the matters involved in any such appeal within sixty days after the filing by such utility of such appeal with said Commission or such further time as such utility shall in writing agree to, but the rates fixed by such municipal government shall remain in full force and effect until ordered changed by the Commission."

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It will be seen the statute prescribes no time within which the appeal may be taken to the Commission. Ordinarily, this time element is provided in connection with the authority for the appeal.

An appeal as such is not essential to due process, if the order or decision itself has been made or rendered in a proceeding meeting this fundamental requirement of the Constitution. The express granting of the right to appeal, however, conclusively evidences the legislative intent that such right should exist, so that we must construe the statute with respect to the time within which the right to appeal must be exercised.

The purpose of all litigation is, of course, to put an end to controversy. In turn, it is the purpose of every appeal (where one is permitted) and especially of the time element with respect to the exercising of such appeal, is to put an end to the litigation. That accounts for the almost universal rule that a time within which the appeal is to be taken or perfected is stated in the statute authorizing the appeal.

This statute either gives the right of appeal to the dissatisfied utility without any limit whatsoever as to the time within which the right must be exercised, or it necessarily implies a limit as to such time. It is inconceivable that the Legislature meant to confer the right of appeal without any limitation whatsoever as to the time within which such appeal should be taken. This idea is inconsistent with the conception of expedition of the end to the controversy, and, moreover, would result in a chaotic uncertainty never contemplated by the Legislature.

We are of the opinion there should be read into the statute as a necessary implication the requirement that an appeal from the ordinance of the city to the Commission should be taken within a reasonable time after the right of appeal had accrued.

What is that "reasonable time" -- whether the question be one of fact or of law -- necessarily depends upon the circumstances of the particular fact situation.

In special proceedings, like the present, where an appeal is authorized, the matter of time is not necessarily determined by the general rule of time with respect

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to appeals, but on the contrary, the special statute will control. See 4 C. J. Sec. p. 889, § 431, where the question is discussed. At all events we are of the opinion that where the longest time provided by the general law for appeals in ordinary suits has elapsed, it will mark the expiration of the reasonable time which the special statute has, according to our construction, provided in the present case.

In 4 C. J. Sec. p. 893 it is said/

"Of course, despite the existence of special provisions making the time for action dependent upon any of the matters referred to, if no appeal or proceeding for review is taken until after the expiration of the longest period allowable, whether the nature of the action or proceeding or of the disposition made by the court below, in any aspect in which it might be viewed, such action is thereafter barred without any need for inquiry or decision as to such special matters."

So that, if the matter of reasonable time be tested by analogy to the longest period for which any statute expressly gives time to appeal, the matter has been foreclosed, for the delay shown in this case exceeds any time known to the law for an appeal, or even a writ of error treating that proceeding itself as an appeal.

We therefore answer your first question in the affirmative.

Since the ordinance rate was not affected by the abortive effort to enjoin its enforcement, and since there has been no other step taken, which could result in vacating or suspending it, it fol-

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lows that your second question should likewise be answered in the affirmative.

Our conclusions have support in the court decisions of this State upon analogous situations construing appeals from boards of school trustees, and the State Superintendent of Public Instruction.

"But, while the Act does not expressly fix any time within which the appeal shall be prosecuted, the public interest demands that it shall be taken without unnecessary delay, and we are satisfied from the very nature of the case that such was the intent of the Legislature." -- *Harkness vs. Hutcherson* (Tex.) 38 S. W. 1120.

"A reasonable time without unnecessary delay, is the rule in such cases." -- *Watkins vs. Huff*, 63 S. W. 922, writ of error dismissed written opinion 64 S. W. 682.

"In the absence of any such rule (promulgated by the State Superintendent) the sole inquiry then is; What is a reasonable time under all conditions surrounding the instant case?" -- *Trustees of Chillicothe Ind. School Dist. vs. Dudney*, 142 S. W. 1007. Thirty days was held to be a reasonable time in that case.

"It is true the law does not prescribe the length of time in which an appeal from the action of a Board of Trustees can be taken, but the rules of equity do demand that such diligence must be used as will prevent innocent parties from being injured." -- *Los Angeles Heights Ind. School Dist. vs. Chestnut*, 287 S. W. 693. In that case two weeks was held to have been a reasonable time.

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We trust this will be a sufficient answer
to your inquiries.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By

Ocie Speer

Ocie Speer
Assistant

OS-MR

By

Hugh Q. Buck

Hugh Q. Buck
Assistant

APPROVED NOV 8, 1940

Fred C. Mann

ATTORNEY GENERAL OF TEXAS



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