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COMMONWEALTH OF VIRGINIA
DEPARTMENT OF THE STATE CORPORATION COMMISSION

AT RICHMOND,
CASE NO. 5271

BEFORE THE STATE CORPORATION COMMISSION

In the Matter

of the

JOINT APPLICATION OF THE CHESAPEAKE AND OHIO RAILWAY
COMPANY AND APPALACHIAN ELECTRIC POWER COMPANY FOR LEAVE

- (1) To absolve and release the Lynchburg Dam across the James River and associated properties from any public obligation relating to the James River and Kanawha Canal; and
- (2) To discontinue as a canal the said Lynchburg Level of the James River and Kanawha Canal, and associated properties, and to abandon their use as a public way.

OPINION: Ozlin, Commissioner.

In 1830, the city of Lynchburg constructed a dam across James River to provide a water supply for the city. In 1835, this dam was sold by the city to the James River and Kanawha Company. This company had been incorporated by the General Assembly of Virginia in 1832 to construct a canal as a public highway, and the canal was required to be kept for public use. At the time of the conveyance of the dam, the James River and Kanawha Company was engaged in constructing its canal, and about 1840 completed it to the Lynchburg Dam. The canal was not financially successful, and passed through several financial crises, until in 1879 the General Assembly authorized an abandonment of the undertaking and a sale of its property to the Richmond and Alleghany Railroad Company, another Virginia corporation incorporated by several special acts of the General Assembly. The State of Virginia owned a large majority of the stock of the James River and Kanawha Company. The sale was consummated by deed in 1880. Shortly thereafter, the Richmond and Alleghany Railroad Company was placed in receivership, and in 1889 all of its properties were conveyed to the Richmond and Alleghany Railway Company. One year later, in 1890, all of said properties were conveyed to the Chesapeake and Ohio Railway Company

pursuant to an act of the General Assembly of Virginia. The said Lynchburg Dam and the section of the canal about two miles in length, and known as the Lynchburg Level, involved in this proceeding, are still owned by the Chesapeake and Ohio Railway Company.

The Lynchburg Dam was, pursuant to act of the General Assembly of Virginia, reconstructed in 1881-2. Before beginning the work of reconstruction, the Richmond and Alleghany Railroad Company entered into a contract with the city of Lynchburg, determining the rights of the respective parties in and to the flow of water in the James River at the dam. By this agreement, it was determined that the city of Lynchburg should be entitled to draw, for certain purposes, as much as one-fifth part of the entire flow of water in the river at said point. It is not sought to disturb or violate this agreement, in this proceeding, but on the contrary to fully respect it.

The Chesapeake and Ohio Railway Company has entered into an agreement with the Appalachian Electric Power Company, under date of December 22, 1932, to sell to the electric company the said Lynchburg Dam and certain associate properties, provided that there can first be obtained legal authority to abandon and terminate the public use impressed upon said properties in connection with the canal.

There is no claim that the Lynchburg Level of the canal has been used for purposes of navigation or water-borne traffic for many years past, nor that there is any prospect of such use in the future. The only use now being made of the canal is to furnish water to a small number of lessees from the railway company, and to provide an outlet for certain sewers of the city of Lynchburg which empty into the canal. The city claims a prescriptive right, through long user, to continue to use the canal as a sewer outlet. There was testimony, also, that the city, on occasions of fires adjacent to the canal, takes water therefrom for fire-fighting purposes.

The expense to the Chesapeake and Ohio Railway Company of maintaining the canal is considerably in excess of the revenue received from the small number of lessees who use water therefrom.

There is also evidence that the space occupied by the

canal is needed by the railway company for expanding its facilities at Lynchburg, and enabling it to render better service to the public, and that the acquisition by the Appalachian Electric Company of the dam and being relieved from diverting water through the Lynchburg Level of the canal, would add to the facilities of this company for rendering better service to the public now and in the future.

There is no attempt on the part of the petitioners to violate any contract rights of the city of Lynchburg, or of any of the lessees of water rights in the canal, but only to absolve the dam and Lynchburg Level of the canal, between the points from the water-works' canal above the city to the first locks below the city from any public use or duty which may at any time have been impressed upon them.

Motions to dismiss were filed by the City of Lynchburg, G. Bruning Tobacco Extract Company, Incorporated, John H. Heald Company, Lynchburg Milling Company, Piedmont Mills, Incorporated, and Lynchburg Diamond Ice Factory. All of these motions to dismiss were practically identical, and made on the grounds that the predecessor in title of the Chesapeake and Ohio Railway Company acquired the property of the canal company under and by virtue of the terms of an act of the General Assembly, approved February 27, 1879; that the acceptance of the terms of the act by said predecessor in title constituted a binding and valid contract between the railway company and the State for the benefit of all parties interested in maintaining the canal at Lynchburg; that the deed conveying the property from the canal company to the railroad company recited the terms of the act of 1879, and binds the parties to this deed and their successors and assigns to the faithful performance and fulfillment of all requirements imposed by the said act; that the provisions of the said act were for the protection of the intervenors and others who might use water from the canal; that the Commission has no power or authority to cancel or annul the perpetual contract created by the acceptance of the terms of the act of 1879.

All of said intervenors also filed answers, which are similar in form and content, and raise practically the same ques-

tions and allege the same grounds of opposition as set forth in the motions to dismiss, except that the city of Lynchburg alleged a public interest in the preservation of the Lynchburg Level of the canal, and a right by prescription, or long user, to empty its sewers into the canal, and also except that the Piedmont Mills, Incorporated, alleged a perpetual right to use a certain amount of water from the canal, which perpetual right was admitted by the petitioners, and is not denied or sought to be abrogated in this proceeding. True, the answers are different in alleging the reasons peculiar to each intervenor in respect to their needs for the continuance of the canal, and the peculiar damage that each would suffer by its discontinuance.

The petitioners filed motions to dismiss and strike out the answers filed by the intervenors, on the ground that the rights, duties, and interests set up in said answers are only such as arise out of leases of water power between the intervenors and the railway company, which are exclusively private rights, duties and interests, over which the Commission has no jurisdiction,

A determination of the issues of this case largely involves a proper conclusion as to the effect of the act of February 27, 1879, as since amended. The part of the act with which we are most concerned is the sixth clause of section one, reading as follows:

"It is hereby provided that the rate of dockage at Richmond shall not exceed the rate at present established by the James River and Kanawha Company, and all existing contracts for water privileges along the entire line shall be respected and maintained at rates not exceeding the present rates, except in those cases in which they may be cancelled or altered by agreement, or extinguished by condemnation. It shall be the duty of the Richmond and Alleghany Railroad Company to maintain the present water supply of the docks, and of the canal, along its line, between Boshers' Dam and Tide-Water, and along the Lynchburg Level between the water-works' dam (which shall be preserved) above Lynchburg, and the first lock below Lynchburg, and in the construction of its railroad it shall not so destroy or obstruct the present canal between Boshers' Dam and Tide-Water, or between the water-works' dam above Lynchburg and the first lock below Lynchburg, as to lessen the present water supply."

The official code of 1887 provided in section 1327 that so much of the act of February 27, 1879, "as has not been carried into effect, shall continue in force."

By act of April 15, 1903, the foregoing section of the Code was:

"amended and re-enacted so as to provide that so much of the act of February 27, 1879, as has not been carried into effect shall continue in force, and the Commission shall exercise all the powers and perform all the duties conferred and imposed upon the Board of Public Works by the said Act."

The Commission referred to was the State Corporation Commission, then newly created.

A final amendment was made by act of February 29, 1908, by which the statute last above mentioned was amended and re-enacted so as to provide that so much of the act of February 27, 1879:

"as has not been carried into effect shall continue in force, and the Commission shall exercise all the powers and perform all the duties conferred and imposed upon the Board of Public Works by the said act, which shall further include authority, upon application of any parties interested, after due notice to parties in interest, to judicially hear and to determine whether or not any obligation or duty imposed by the said act upon the purchaser thereunder, or its successor in title, has been sufficiently complied with, or otherwise discharged, and what constitutes such compliance or discharge."

The act of 1908, unchanged, is carried in the official code of 1919 as section 3772, and it is so found in the current code of 1930. The intervenors in their oral arguments before the Commission, and in their briefs filed, are not clear in their contentions as to whether or not the act of 1879 imposed duties and rights on the railway company for the benefit of private interests, or if there were duties and rights imposed for the benefit of the general public, or both. Their position is that the Commission has no authority to absolve the railway company from the performance of the contract imposed by the State whether for the benefit of private interests, or for the benefit of the public; that the rights and duties imposed were of a perpetual nature, im-

posed by statute, with which the Commission has no authority or jurisdiction to interfere.

We shall have very little to say in this opinion regarding any private rights of the lessees of water power, or otherwise. Nothing is better settled than that this Commission does not have jurisdiction to adjudicate and determine private rights or private contracts between public service corporations and individuals. Authorities are abundant, but a few will suffice. See Newport News Light and Water Co. v. Peninsula Pure Water Co. (1908), 107 Va. 695, 59 S. E. 1099; N. & W. Ry. Co. v. Commonwealth (1925), 143 Va. 106, 129 S. E. 324. Also, see Portsmouth v. Va. Ry. & Power Co. (1925), 141 Va. 54; Hampton v. Newport News & Hampton Ry. etc. Co. (1926), 144 Va. 24. These last two cases dispose adversely of the contention of the city of Lynchburg that a property right in favor of a municipal corporation is affected with a public interest to such a degree as to constitute it a public duty properly cognizable by the Commission.

The Commission has not in this case undertaken to deal with any private rights of any parties who have or may have any interest in the Lynchburg Dam or the Lynchburg Level of the canal. All such rights are expressly preserved in the order entered by the Commission, wherein it is stated:

"Provided, however, that nothing in this order contained shall disturb or affect any rights which the city of Lynchburg may have to one-fifth of the flow of the James River at the said dams, or any rights which John H. Heald Company, Lynchburg Milling Company, Piedmont Mills, Incorporated, G. Bruning Tobacco Extract Company, Incorporated, or Lynchburg Diamond Ice Factory, or any other person, firm, or corporation, may have to water or water power from the said Lynchburg Level under the respective leases, or otherwise, from the Chesapeake and Ohio Railway Company, or its predecessors in title, or any rights, if any, which the city of Lynchburg may have in, to, or over the said properties for the purposes of its existing sewer system."

Surely, every right of the intervenors, or of any other person, firm, or corporation, is amply protected under the foregoing language. The Commission fully realizes that it has no

jurisdiction or authority to interfere in any respect with any such rights. When we come to the contention of the intervenors that this Commission is without authority or jurisdiction to deal with all public uses, duties, and obligations attached or relating to the said properties, the Commission has no doubt of its authority and jurisdiction in the premises, whether those uses, duties, or obligations are imposed by private contract, by franchise, or by statute.

We think there is no doubt that there was a public duty imposed by the act of 1879, and with which this Commission has full authority to deal. This was the view of our Supreme Court of Appeals in the case of Hurt and Son v. Myers & Axtell, 83 Va. 167, where the court was dealing with the identical act of February 27, 1879.

The Richmond and Alleghany Railroad Company had passed into receivership, and the above case arose on the petition of the receivers filed in the receivership proceedings before the Circuit Court of the City of Richmond. Certain leases of water power to various persons in the city of Lynchburg had recently expired. The receivers sought to increase the rent and modify the leases in other particulars, but the lessees resisted, claiming an indefinite extension of their leases by virtue of the act of 1879. The petition accordingly prayed a rule to show cause why the lessees should not either cease using water or execute new contracts.

The various lessees appeared and filed answers to this rule. S. C. Hurt and Son set up in their answer that their plant had been in existence for a long time, that a large investment had been made upon it upon the faith of a continuous supply of water, and that they were entitled to water upon reasonable terms, regardless of the wishes of the receivers.

The holding of that case is that no rights were given under the act to individuals other than what they had acquired through their leases, which rights were given by the first sentence of the above quoted sixth clause. The order of the Circuit Court of the City of Richmond expressly holds that the said lessees;

" . . . are not entitled by reason of the act of Assembly of 27th February, 1879, or by any provision of the deed of conveyance from the James River and Kanawha Company to the Richmond and Alleghany Railroad Company, dated the 4th of March, 1880, to a continuance or renewal of their respective leases beyond the term prescribed and contracted for in said leases respectively."

The Supreme Court of Appeals held that this order was clearly right. The order also states:

" . . . it is adjudged, ordered, and decreed that no one of said lessees has the right to further use of said water privileges under his lease, without a new contract therefor . . . And it is further ordered that the receivers have the right in the exercise of their discretion . . . to shut off the water from each of the premises now supplied therewith, if no contract be made for the continued use thereof."

The second sentence of that clause seems clearly to have an entirely separate purpose in view. Condensed, the second sentence provides:

"It shall be the duty of the . . . railroad company to maintain the present water supply . . . of the canal . . . along the Lynchburg Level . . ."

Under the holding in the Hurt case, the railroad company did not have to maintain the water supply of the canal for the benefit of the lessees of water rights or water power,

Since no rights were reserved in the last sentence of the sixth clause of the act to individuals, it seems to follow that the requirement for the maintenance of the water level was a general requirement for the benefit of the public. Any other view would make that language meaningless, and of no purpose.

The intervenors throughout their argument insist that the duty created by the act of 1879 is a perpetual one, and that the Commission is without jurisdiction to terminate such a duty. This argument is not tenable if we are right in our view that the duty imposed in connection with these properties is a public duty. The State may consent to the termination of a perpetual duty owed to it as well as any other kind of duty. We do not think that the duty imposed was a perpetual one, but that it was left indefinite to be performed so long as the State saw fit to require its per-

formance. To say that this is a perpetual duty would be equivalent to saying that the State has disabled itself from the exercise of its police power, and this the State cannot do. The statute contains no such words as "permanently" or "forever", but the duration of the duty is left entirely indefinite. In all such cases, the State enacts a statute to continue in effect so long as the public interest shall require, and the duty ceases when the State, acting through its duly constituted agencies, determines that the public interest no longer calls for its continuance. Johnson v. Lake Drummond Co., 125 Va. 139, is a case in point, as is the case of Harry J. Kirk v. Maumee Valley Elec. Co., 279 U. S. 797, 73 L. ed. 963.

On this phase of the case we, therefore, conclude that the effect of the act of 1879 was to create a public duty to maintain the water supply, that it was not a perpetual duty, and that the State, acting through its duly constituted agencies, can consent to the termination of this duty at any time.

This brings us to the jurisdiction of the Commission as the agency created by the State to deal with this subject. There seems to be no doubt that this Commission does have jurisdiction to grant the prayer of the petition, (1) under general constitutional and statutory provisions, and (2) specifically, under the act of 1908, above referred to, now section 3772 of the Code.

General Jurisdiction

The State Corporation Commission was created in 1903 and given exclusive control over the formation, regulation, and dissolution of corporations and the enforcement of their obligations to the public and to the State. The creation of this Commission marked a milestone in the administrative history of the State, and had the effect of a revolution in the method of administering justice in Virginia. The primary source of the jurisdiction of this Commission, in a case of this kind, is section 156-b of the Constitution, the first paragraph of which provides:

"The Commission shall have the power and be charged with the duty of supervising, regulating, and controlling all transportation

and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies . . . "

The same principle is carried in section 3716 of the Code, which was one of the sections of the original act of 1903, creating the Commission. The first part of this section provides:

"The Commission shall have power and authority to require, by its rules, regulations, and requirements, all corporations chartered under the laws of this State . . . and all persons, partnerships and associations exercising and performing the functions of public service corporations as defined in section 3881 of the Code of Virginia, to perform and discharge any public duty or requirement imposed upon such corporations, persons, partnerships, and associations by the constitution, or by law."

We think there is no doubt that the fundamental purpose of this legislation of 1903 was to extend the jurisdiction of the Commission to all public duties of all corporations, and only to their public duties.

In Commonwealth v. Atlantic Coast Line Ry. Co. (1906), 106 Va. 61, the following language is used:

"By that statute the Commission is authorized to compel all corporations to perform any public duty or requirement, and to impose fines upon them for failing to do so. This brings within the judicial jurisdiction of the Commission the enforcement of all statutes imposing public duties upon public service corporations."

Also, see Commonwealth v. Norfolk & Western Ry. Co. (1910), 111 Va. 59. The key to the principle which is embodied in these statutes conferring jurisdiction upon the Commission was stated as follows, in Norfolk and Portsmouth etc. Co. v. Commonwealth, 103 Va. 294:

"In this Commonwealth, the State Corporation Commission, created by constitutional authority, is the instrumentality through which the State exercises its governmental powers for the regulation and control of public service corporations. For that purpose it has been clothed with legislative, judicial, and executive powers."

The language used in the foregoing section of the Constitution, in the statutes, and also in the language used by the court in construing them, is of broad application. It seems clear that under the Constitution and statutes the Commission clearly

has jurisdiction, sitting as a court, to proceed against any successor in title to the Richmond and Alleghany Railroad Company for the enforcement of the public duty created in 1879 for the maintenance of the water level. Should such a case be brought before the Commission, and an inquiry is instituted to determine whether the corporation should be compelled to perform the duty, and if it should appear from the evidence that there is no reasonable public need for the continued performance of the duty, but that on the contrary a continued performance would deplete the revenues of the corporation, it would clearly be the duty of the Commission to enter an order refusing to enforce the duty. The result of this would be that the duty comes to an end. The effect of this is to say that the power of the Commission to enforce the performance of a public duty, coupled with its powers of regulation and supervision, includes the power to authorize a termination or abandonment of that duty. This principle was clearly recognized and adopted by the Supreme Court of Appeals in the case of Portsmouth v. Va. Ry. & Power Co. (1925), 141 Va. 44. In that case, the power company was obligated by its franchise granted by the city of Portsmouth to maintain certain tracks in the city. The operation over these tracks proved to be unprofitable, and the power company filed a petition before the Commission, asking authority to discontinue their use. The city denied the jurisdiction of the Commission, but the Commission sustained its jurisdiction, and entered an order allowing the abandonment of the tracks in question, and from this order the city appealed. The order of the Commission was affirmed. The court founded its decision on the exercise by the State of its police power, and recognized the principle that the State might, under proper conditions, decline to require the continued performance, and permitted the abandonment. The court then said that the only question which could properly be raised was whether or not the State had provided a proper agency for the exercise of this power, to permit abandonment, and, on this question, the court said that it "had no doubt whatever", and said further

that the purpose of these provisions in the statutes "is to vest the Commission with all the powers of the State which are necessary to regulate and control such corporations in so far as their duties to serve the public are concerned." The court then came to the specific question as to whether the authority of the Commission to supervise and enforce a duty included also the authority to declare a termination of the duty, and the court held that it did, in the following language:

"While we have never before had occasion to consider the authority of the Commission to permit the discontinuance of facilities theretofore devoted by transportation companies to the public service, its jurisdiction to grant such permission is based upon the same reasons, and supported by the same authorities, as the power which is as plainly vested in it to prescribe rates and require facilities to be maintained. It, therefore, seems unnecessary further to repeat these reasons or to cite any more cases than those to which we have already referred in this opinion."

The Portsmouth case was approved and followed in Hampton v. Newport News & Hampton Ry. etc. Co., 144 Va. 29.

The Commission has consistently recognized its authority and jurisdiction to relieve a public service corporation: (1) from the obligation of a contract between it and some private interest; (2) from the obligation of a franchise granted to it by a municipal corporation; and (3) where the direct command of a statute was involved.

An illustration under the first class is the case of Commonwealth v. Shenandoah River Light & Power Corp. (1923), 135 Va. 47, where an electric power company, as a part of the purchase price of certain property, had contracted to furnish power at designated rates for twenty years. Subsequently, the power company attempted to increase those rates, filing schedules with the Commission, and the Commission held that these schedules superseded the contract rates. This decision was over the objection of the promisee, to the effect that the Commission was without jurisdiction. On appeal, the ruling of the Commission was affirmed, and the Supreme Court said, quoting from the Supreme Court of the United States:

"The right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State."

An illustration under the second class is, of course, the Portsmouth case, which has already been mentioned. Also, the case of City of Richmond v. Chesapeake & Potomac Telephone Co., 127 Va. 612, where the court held that the Commission had power to increase the rates of a telephone company over those specified in its franchise, and Richmond v. Va. Ry. & Power Co., 141 Va. 69, where the same decision was reached with respect to the rates of a traction company.

So far as the principle here involved is concerned, there can be no difference between a duty created by a franchise established by an ordinance of a municipal corporation, on the one hand, and a duty created by statute, on the other. A municipal corporation acts under delegated power from the State, and to the extent that it speaks within the scope of that power, its command has the force of an act of the legislature.

As an illustration of the third class, viz., relieving from the obligation created by statute, the case of Va. Ry. & Power Co. v. City of Portsmouth, State Corporation Commission Case No. 1295, Report of State Corporation Commission 1921, 152, is in point. In this case, the power company applied to authorize an increase of rates above 5¢ per passenger on certain lines in the city of Portsmouth. The franchise applicable to certain of these lines provided that the rate should never exceed 5¢. Also, the charter of the city granted by the legislature provided that:

"there should not be charged for a single passenger fare more than 5¢ for a single trip within the city of Portsmouth, without the consent of the council of the city of Portsmouth."

The council had not consented in this case, and denied the jurisdiction of the Commission to relieve the company from the command of the statute. The Commission heard the question of jurisdiction separately, and handed down an opinion sustaining its jurisdiction. In this opinion, the unanimous Commission said (pp. 6-7):

"Counsel for the city contended, however, that even though we should determine (as we have) that the city possessed no power to contract as to rates, yet the Commission has no jurisdiction to alter or change the limitations upon such rates established by the legislature in the enactment of section 3 of the company charter . . .

"The answer is obvious. The authority to prescribe rates on the lines in question does not rest in the State, but the authority formerly exercised in that behalf by the legislature is now confided to the State Corporation Commission . . .

"That the legislature, prior to 1902, with the assent of the charter grantee could have changed the provisions of section 3 of the charter does not admit of doubt . . . Even without such assent on the part of the railway company, the legislature might have repealed or amended the charter of the company . . .

"We entertain no doubt of the Commission's right to fix reasonable rates other than those mentioned in the charter, upon the application of the charter grantee, as is here the case."

A case directly in point is State ex rel Caster v.

Kansas Postal-Telegraph-Cable Co., 1915, Kansas, 150 Pac, 544,

P.U.R. 1915 E 222. This was a proceeding for mandamus to compel the respondent company to re-establish its telegraph station at a certain county seat, which it had abandoned without the consent of the Commission. The court held that the Commission had jurisdiction in the premises, and that mandamus would be refused, in order to afford the company an opportunity to go before the Commission for leave to abandon. The legislature of Kansas by act of 1893, had provided that:

"Every telegraph company or other corporation operating a telegraph line through the corporate limits of any county seat in Kansas, is hereby required to establish and maintain a telegraph station at such county seat with the usual facilities and appointments . . ."

Subsequently, a State Public Utilities Commission was established, and by an act of 1911, it was:

". . . given full power, authority, and jurisdiction to supervise and control the public utilities, and all common carriers . . . doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction."

The Supreme Court of Kansas held that, under this act, the Commission was empowered to permit the abandonment, notwithstanding the prior statute, and said:

"We hold, therefore, that the act of 1893 will be no obstacle to the abandonment of the telegraph company's office at Syracuse, if the Public Utilities Commission shall see fit, in the exercise of its sound discretion, and with due regard to the rights of the public and of the telegraph company, to sanction it. The powers of the Commission are no less comprehensive in dealing with telegraph service at county seats than elsewhere."

There seems little doubt that it is and has been since 1902 the policy of this Commonwealth to invest the State Corporation Commission with full power over the supervision, regulation, enforcement, and termination of all public duties of public service corporations. There is everywhere a strong public policy against the imposition on public service corporations of any absolute public duties, not subject to the power of the Commission. In this State, the Corporation Commission has, in most matters relating to the public duties of public service corporations, been the legislative agency of the State.

In the recent case of Norfolk & Western Ry. Co. et al, Commonwealth ex rel Mathieson Alkali Works, Inc., decided April 11, 1934, our Supreme Court said:

"Section 156-b of the Constitution of Virginia provides that 'the authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications of traffic for transportation and transmission companies, shall be paramount.' That is, in these matters it, and not the General Assembly, is the legislative branch of the government."

True, that was a case dealing with rates, but can it be said that the Commission, having the authority to prescribe rates, is without authority to say what burdens a public service corporation shall bear, when those burdens have a direct bearing on what rates should be prescribed?

We now come to consider the act of 1908, which was the last amendment to the act of February 27, 1879, now section 3772 of the Code, hereinabove quoted.

The intervenors take the position that the language of

That amendment merely authorizes the Commission to determine when a violation of the act of 1879 has taken place. We do not think that this position is tenable. If such had been the purpose, it could have been declared in more apt language. A new thought was here injected into the act for the first time, and authority was more expressly given the Commission to judicially hear and determine whether or not any obligation or duty imposed by the said act . . . has been sufficiently complied with, or otherwise discharged. It seems clear that this language means that the Commission is authorized to ascertain and declare that the duties created by the act have been performed for a sufficient length of time, and that they should no longer be obligatory upon the railway company. This view seems the more persuasive, when we consider that twenty-eight years had elapsed between the act of 1879 and the amendment of 1908, during all of which time the railway company had performed the duties required of it, and all for the benefit of a few lessees of water -- the general public deriving no benefits. Also, the tremendous changes which had taken place in transportation, in the development of power from other sources than water, and the revolution which had taken place in the whole economic life of our people, must have been in the minds of the legislators in framing the amendment of 1908. To give the language of the 1908 amendment the meaning contended for by the intervenors would be to give it no practical operation whatsoever, and we think it clear that by the language quoted the Commission is given the authority expressly to do what the petitioners request.

In conclusion, we think it clear that the public interest requires that the prayer of the petition be granted. We are led to this conclusion by a consideration of all the facts and circumstances surrounding the properties involved, as disclosed by the evidence, the uses being made of them under present conditions, the expense to the railway company in maintaining them, the need of the two petitioners for the added facilities which would be afforded them by an abandonment of the Lynchburg Level of the canal and the sale to the electric company of the dam. From the whole evidence,

It appears that no public interest will suffer by the granting of the petition, but that, on the contrary, the public interest will be promoted.

Chairman Hooker and Commissioner Fletcher concur.