

INTERIM RATE RELIEF FOR PUBLIC UTILITIES PENDING JUDICIAL APPEAL OF ADMINISTRATIVE RATE ORDERS

For as long as the states have granted monopolies over particular resources to public utilities, there has been a heated debate over the rates that should be charged for utility services. In recent years, particular attention has been focused on the problems which arise as rates are set in an economy where the costs of labor, capital and energy are rapidly increasing. These costs have caused utility companies to seek rate increases with unprecedented frequency.¹ Unfortunately, the rate-making process is both long and complex,² and a utility may lose large sums of money in the interim period between the time it proposes a rate increase and the time that a new rate is established by the appropriate state agency.

In particular, there is a crucial gap between the time when a state agency acts on a proposed rate increase and the time when the judiciary can complete its review of any newly established rate. If a utility is bound by a state commission's rate determination during the period pending appeal, it may lose millions of dollars in revenue before it can convince a court that the rate set by the commission is unreasonably low. An important question arises as to whether a loss of revenue during this period constitutes a constitutional confiscation and as to how courts should react to utility company requests for preliminary injunctions which would allow the

THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

M. FARRIS & R. SAMPSON, *PUBLIC UTILITIES: REGULATION, MANAGEMENT, AND OWNERSHIP* (1973) [hereinafter cited as FARRIS];

L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965) [hereinafter cited as JAFFE];

C. PHILLIPS, *THE ECONOMICS OF REGULATION* (1969) [hereinafter cited as PHILLIPS];

P. PRIEST, I: *PRINCIPLES OF PUBLIC UTILITY REGULATION* (1969) [hereinafter cited as PRIEST].

1. *Compare, e.g.*, [1969-1971] KY. PUB. SERV. COMM'N BIENNIAL REP. *with* [1973-1975] KY. PUB. SERV. COMM'N BIENNIAL REP. While in the earlier period there were 117 requests for rate revisions, in the later period there were 278. *See also* [1970] N.Y. STATE PUB. SERV. COMM'N ANNUAL REP. 5:

In exercising its function of rate regulation, the Commission was confronted, . . . by the effects of economic inflation. Through the year, the Commission had before it . . . an unprecedentedly high number [of rate cases]: with minor exceptions, all involved requests for rate increases. In almost all cases, the utility companies presented evidence of sharply increased costs for operating expenses, for construction and for new capital.

See generally PRIEST 408-09.

2. *See* FARRIS 162-63. Procedural shortcomings include problems with adversary proceedings, an imbalance of resources, problems of partiality, and most importantly, regulatory lag. *See* text accompanying notes 15-22 *infra* for a summary of the rate-making process.

utilities to change their proposed rates, subject to refund, pending judicial review of rates set by the state utilities commission.

The problem can be best understood by reference to the concrete situation presented in the recent case of *Kentucky v. South Central Bell Telephone Co.*³ In 1975, South Central Bell Telephone filed a request with the Kentucky Public Service Commission for a \$33 million annual rate increase.⁴ Following six days of hearings and the submission of 1,746 pages of evidence, the Public Service Commission granted South Central Bell an increase of only \$15 million.⁵ Following statutory procedure, the utility appealed the commission's rate order to the state circuit court and requested a temporary injunction permitting it to charge the entire \$33 million, subject to refund should the company fail to succeed on the merits of its appeal.⁶

The decision whether to grant such an injunction is the subject of this Note. After first reviewing the rate-making process itself, it will examine the extent to which due process requires a state court to grant a temporary injunction pending judicial review of a public utility commission's order. This Note will also attempt to develop a constitutionally valid standard for determining when such injunctions should issue.

THE RATE-MAKING PROCESS

There is no question that rate-making itself is constitutional. This was settled in 1876 by *Munn v. Illinois*,⁷ in which the United States Supreme Court held that rate-making is but one species of price fixing,⁸ a traditional legislative power which has historically been exercised in common law countries.⁹ However, the due process requirements of the Constitution¹⁰ impose an important limitation on this legislative power. Rate legislation cannot deprive a utility of a reasonable return on the fair value of property being used for a public purpose;¹¹ rates which are insufficient to yield a

3. 545 S.W.2d 927 (Ky. 1976).

4. An annual rate increase of \$33 million would allow the utility to adjust its rate structure to provide additional revenues equal to the amount of the increase.

5. Re South Cent. Bell Tel. Co., No. 6232 (Ky. Pub. Serv. Comm'n, Dec. 31, 1975).

6. KY. REV. STAT. ANN § 278.410(1) (Baldwin 1969) provides that "any utility affected by an order of the Commission may bring an action against the Commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable."

For a discussion of the final disposition of *South Central Bell*, see notes 83-101 *infra* and accompanying text.

7. 94 U.S. 113 (1876), cited with approval in, *Permian Basin Area Rate Cases*, 390 U.S. 747, 768 (1968).

8. *Id.* at 134.

9. *Id.* at 133-34.

10. U.S. CONST. amends. V, XIV.

11. This principle was first enunciated in *Smyth v. Ames*, 169 U.S. 466 (1898), where the Supreme Court stated that the railroad company was entitled to ask a "fair return upon the value of that which it employs for the public convenience." *Id.* at 547. However, no attempt

reasonable return are confiscatory and thus unconstitutional.¹²

State Regulatory Schemes

As the nation has grown and as its dependency on public utilities has increased, so has the complexity of efforts to determine fair and reasonable rates. As a consequence, all of the states and the federal government have established regulatory agencies, usually known as public utility or public service commissions, to set rates for public utility services.¹³ In general, these commissions are empowered to require prior authorization of rate changes, to suspend proposed rate changes, to prescribe interim rates, and to initiate rate investigations.¹⁴

While the details of rate-making statutes vary from jurisdiction to jurisdiction, most states follow the same general procedure in the implementation of new rates. In order to begin the procedure, the public utility is normally required to file notice of its proposed new rate schedule with the appropriate state agency or commission.¹⁵ The commission is then given

was made to define a fair return until 1909 in *Willcox v. Consolidated Gas Co.*, 212 U.S. 19 (1909). According to the Court, a fair rate of return involved two elements: a return on invested capital and a return for risk. *Id.* at 45, 48-49. In the *Bluefield* case of 1923, the Court extended and elaborated on these principles and in so doing, presented a summary of factors for determining a fair rate of return. *Bluefield Water Works & Imp. Co. v. Public Serv. Comm.*, 262 U.S. 679, 692-93 (1923). Some of these included (1) comparisons with other companies having corresponding risks, (2) the attraction of capital, (3) current financial and economic conditions, (4) the cost of capital, (5) the risks of the enterprise, (6) the financial policy and capital structure of the firm, (7) the competence of management, and (8) the company's financial history. The Court did not define these factors, nor did it indicate the relative weight that should be assigned to each. Rather, the commissions are to consider "all relevant facts" and to exercise an "enlightened judgment." *Id.* Since the *Bluefield* case, little has been added by Court decisions. These principles were restated in 1944 in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), and they still remain as the judicial guidelines for determining a fair rate of return. For a more detailed discussion of the development of the fair rate of return principles, see PHILLIPS 261-64 and note 37 *infra*. See also LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1342-43 (1972 ed.).

12. This is simply a specific application of the fourteenth amendment's mandate that neither states nor their administrative agencies may deprive a person "of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Substantive due process requires that property cannot be taken without just compensation. In the rate-making context, this means that a public utility cannot be forced to provide services without a reasonable return. The due process question is discussed in detail at notes 26-49 *infra* and accompanying text.

13. PHILLIPS 85-95. Phillips has conducted a comprehensive survey of regulatory agencies in the fifty states. It includes information on the history, jurisdictional limits, powers and composition of the commissions. See also PRIEST 31-33.

14. See PHILLIPS 91.

15. See, e.g., KY. REV. STAT. ANN. § 278.180 (Baldwin 1969); MONT. REV. CODES 70-113 (1971); N.Y. PUB. SERV. LAW § 66(12) (McKinney 1955). Although the procedure is rarely used, most states also permit their rate-making agencies to propose rate increases on their own initiative. E.g., ALASKA STAT. §§ 42.05.411(c), 42.05.431 (1976); KY. REV. STAT. ANN. § 278.260 (Baldwin 1969).

between sixty days and one year, depending on the state,¹⁶ to hold hearings and to undertake an investigation of the proposed increase.¹⁷ During this period, the proposed rates are normally suspended and the old rates remain in effect.¹⁸ In most states, the utility has the option of applying for emergency rates during this suspension period, and such rates may be granted with a bond refund provision at the discretion of the commission.¹⁹ If no order has been granted before the end of the suspension period, the utility may implement its proposed rate schedule, subject to an appropriate refund for any portion of the proposed increase which is ultimately denied by the commission.²⁰ Once the commission finally enters an order, the rates it sets go into effect immediately and are presumptively valid.²¹ If it believes that the commission's order is either unreasonable or unlawful, the utility may then seek judicial review.²²

The Interim Rate Issue

While the utility is unquestionably entitled to judicial review, such review takes time.²³ A difficult question is presented as to the rate the utility should charge during the period pending review. The state courts are divided in their answers to this question. Some take the position that if it is ultimately determined that the rates ordered by a commission are confiscatory, the utility will have irretrievably lost the additional revenue to which it would have been entitled during the period of judicial proceedings.²⁴ In

16. Compare ALA. CODE tit. 48, § 54 (1958) (60 days) with N.H. REV. STAT. ANN. § 378.6 (1955) (12).

17. See, e.g., ALASKA STAT. ANN. §§ 42.05.411, 42.05.421 (1976); KY. REV. STAT. ANN. § 278.260 (Baldwin 1969).

18. See, e.g., KY. REV. STAT. ANN. § 278.180 (Baldwin 1969); MICH. COMP. LAWS ANN. § 460.6a (1967). At the end of the statutory period, the applicant may put the change into effect unless the commission has ruled otherwise. The rationale behind this practice is consideration of procedural due process. Basically, it is a recognition that formal hearings take time, work and money. While it is reasonable for a utility company to anticipate some statutorily determined period of time before it will be able to implement its new rates, it is not reasonable to force a company to wait an indeterminate period. Thus, the suspension period guards against arbitrary postponement of a decision by the commission. See *Suspension of New and Existing Rate Tariff*, 74 PUB. UTIL. FORT. 58 (Dec. 17, 1964); *Variations in Rate Tariff Suspension Periods*, 74 PUB. UTIL. FORT. 83 (Oct. 22, 1964).

19. See, e.g., KY. REV. STAT. ANN. § 278.190 (Baldwin 1969); MONT. REV. CODES ANN. 70-113 (1971); N.Y. PUB. SERV. LAW § 66(12) (McKinney 1955).

20. See, e.g., KY. REV. STAT. ANN. § 278.190 (Baldwin 1969); N.H. REV. STAT. ANN. § 378.6 (1955). See note 18 *supra*.

21. See, e.g., KY. REV. STAT. ANN. §§ 278.390, 278.430 (Baldwin 1969); MONT. REV. CODES ANN. § 70-127 (1971).

22. See, e.g., KY. REV. STAT. ANN. § 278.410 (Baldwin 1969); MONT. REV. CODES ANN. § 70-128 (1971).

23. In the federal courts an appeal may add from two to four years to the decision process. See PHILLIPS 137. The time required for state court appeals will, of course, vary widely with the jurisdiction.

24. E.g., *Michigan Consol. Gas Co. v. Michigan Pub. Serv. Comm'n*, 25 Mich. App. 512, 516, 181 N.W.2d 596, 598 (1970):

those jurisdictions which adhere to this view, the possibility of confiscation is normally deemed sufficient to invoke the general equity powers of the courts and to require a grant of injunctive relief to prevent the commission from interfering with the implementation of the proposed rate increase. Other courts invoke a strict separation of powers argument and refuse to interfere with the legislative framework for regulation without a clear showing of a procedural irregularity or of an error of law.²⁵ Under this approach, the public utility is limited to charging the new rates ordered by the commission during the period of judicial review.

Each of these approaches to the question of interim rates is founded on a different conception of due process in the rate-making context. Those states which favor granting injunctions appear to emphasize the notion of substantive due process; states which allow the rates ordered by the commission to remain in effect pending review seem to rely on procedural safeguards as a sufficient protection of the utility's due process rights. In an effort to reconcile these decisions and to develop a constitutionally valid

Thus, had the preliminary injunction not issued, and had the Company prevailed in the trial of this cause, the latter would have achieved a hollow victory indeed since there would have been no legal avenue open to the Company by which to recoup its financial losses. We think this case represents a classic example of a situation in which a party will suffer "irreparable harm" in the event that a preliminary injunction is not issued.

The Alaska Supreme Court has also taken the view that the issuance of a preliminary injunction is a necessary safeguard against irreparable harm to the party seeking the injunction and has recently explicitly rejected the utility commission's argument for a more restrained application of the court's injunctive powers. *Alaska Pub. Util. Comm'n v. Greater Anchorage Area Borough*, 534 P.2d 549 (Alaska 1975). *See also Brewer v. General Tel. Co.*, 283 Ala. 465, 218 So. 2d 276 (1969); *City of Baytown v. General Tel. Co. of Southwest*, 256 S.W.2d 187 (Tex. Civ. App. 1953).

25. In *New York Tel. Co. v. New York Pub. Serv. Comm'n*, 36 App. Div. 2d 261, 320 N.Y.S.2d 280 (1971), the court distinguished between actual review on the merits and equitable relief pending such review in stating:

Due process requires that a citizen be given access to the courts, but it does not give a vested right to any one form of procedure. "Once a full and sufficient hearing has been held, whether by court or administrative agency, due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. . . ." The company's right of review by certiorari being sufficient to satisfy due process, it has an adequate remedy at law and no right to resort to equity.

36 App. Div. 2d at 266, 320 N.Y.S.2d at 286. The court went on to note that since there was no constitutional basis for temporary injunctive relief, the policy against parallel determination by the courts of disputes already decided by agencies of tested proficiency in the administrative field required that the preliminary injunction order granted by the court below be vacated. *Id.*

A recent Louisiana case was even more emphatic. While recognizing that it might be that the public utility company should receive a higher rate of return, it refused to allow the extraordinary remedy of fixing rates by injunction as an exception to specific state constitutional provisions which granted the public service commission exclusive jurisdiction to fix or change any rate to be charged by a public utility. *See South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 256 La. 497, 236 So.2d 813, 816 (1970).

For other examples of this view, see *Mountain States Tel. & Tel. Co. v. Public Util. Comm'n*, 176 Colo. 457, 491 P.2d 582 (1971); *Farmers' Educ. & Coop. Union v. Circuit Court*, 73 S.D. 203, 40 N.W.2d 402 (1950).

solution for the problem of interim rates, this Note will now turn to an examination of due process in the context of rate regulation.

DUE PROCESS IN RATE-MAKING

The fourteenth amendment to the United States Constitution prohibits the government and its administrative agencies from depriving a person "of life, liberty, or property, without due process of law."²⁶ In applying this mandate to the states, the Supreme Court has incorporated both substantive and procedural requirements into the notion of due process.²⁷ As applied to rate-making, procedural due process requires an opportunity for judicial review of administrative rate orders.²⁸ Rate-making procedures must be procedurally fair and afford utilities a reasonable opportunity to protect their substantive rights.²⁹ Substantive due process prevents the property of a public utility from being taken without just compensation. In the language of rate-making, confiscation is prohibited.

Determination of Reasonable Rates

The controversy over implementation of a commission's rate order pending judicial review derives from the difficulty of determining what constitutes a just and reasonable rate, or, conversely, what constitutes a confiscatory rate. Changing technological, social and economic conditions result in a lack of any fixed principle or formula for constitutionally valid rate-setting. This is because rate determinations do not follow directly from fact-finding. A specific rate is the product of the establishment of a ratio between the utility's net operating revenues and its rate base, the rate base being the value of the property used by the utility to provide services.³⁰ At

26. U.S. CONST. amend. XIV.

27. See generally LIBRARY OF CONGRESS, *supra* note 11, at 1312-16.

28. See notes 44-47 *infra* and accompanying text.

29. See, e.g., Penn-Central Merger & N.&W. Inclusion Cases, 389 U.S. 486, 499, 524 (1968):

The judicial task is to determine whether the Commission has proceeded in accordance with law and whether its findings and conclusions accord with the statutory standards and are supported by substantial evidence . . . We deem it our function, in the complexities of cases such as these, to review the judgment of the District Court with respect to agency actions to make certain that those actions are based upon substantial evidence and to guard against the possibility of gross error or unfairness.

30. Four factors underlie a rate determination: (1) the rate base; (2) gross utility revenues; (3) operating expenses and (4) rate of return.

In arriving at a utility's rate base, two initial determinations are required. The first is the selection of elements to be included in the rate base. Generally, the elements are listed under four headings: (1) tangibles, (2) incidentals during construction, (3) working capital, and (4) good will. The second determination requires valuation of these elements. Two approaches are used, with many variations on each. The first approach, the "original cost" method, takes the dollar figure directly from the utility's plant accounts. The other approach is deemed the "fair value" method and utilizes such criteria as reproduction or replacement and trended original cost in determining the proper dollar amount. Reproduction cost utilizes general price indices to

the most basic level, the rate-making process consists simply of an effort to adjust the utility's rate schedule so that net operating ratios will be sufficiently high to produce a just and reasonable return on the rate base.³¹ Questions of discretion and judgment necessarily arise as a rate-making agency or commission is forced to make a variety of complex assumptions in order to project both operating expenses and reasonable rates of return for future years.³²

The current controversy over the proper basis for evaluating rate proposals is indicative of the complexity of the rate-making process. In recent years, efforts to set reasonable rates have been made considerably more difficult by the rapid growth in the consumption of utility services and the resultant necessity of building new facilities.³³ Expansion of utility properties during periods of increasing building costs and high interest rates can make previously authorized rates of return entirely inadequate.³⁴ In-

translate the original cost of the property into values expressed in current dollars. Trended original cost attempts to do the same thing, but by using construction cost indices. There has been a great deal of controversy over which of these is the proper approach. For a detailed analysis, see J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES ch. XI-XIV (1961). See also notes 36-37 *infra* and accompanying text.

The next step is to project the utility's gross revenues under the rate structure at issue and the operating expenses reasonably to be incurred in producing these gross revenues. Expenses are subtracted from the revenues, and the remainder is the utility's "return."

The last determination involves the percentage figure to be applied to the rate base in order to establish the return to which investors in the utility enterprise are reasonably entitled.

31. Obviously, net revenue, rate base and rate of return are interdependent figures. Consider for example, a utility with a rate base of \$100 million, with annual total operating revenues of \$30 million and with allowable operating revenue deductions of \$24 million. The firm's net return would be \$6 million, or 6 percent. This is the amount the utility has for interest on bonds, debentures, bank loans, and other indebtedness and dividends on preferred and common stock to pay to investors who have supplied the funds contributing to the \$100 million rate base. But if the same utility's rate base should be valued at \$120 million, with the same operating revenues and deductions, its same \$6 million net return would be only 5 percent. Similarly, with the same \$100 million rate base and \$30 million total revenues, but with \$26 million rather than \$24 million allowable operating revenue deductions, the yield would be only 4 percent.

32. One writer has noted that

regulation of public utility earnings is more of an art than a science, more a matter of judgment hopefully directed toward attaining approximate goals than a set of infallible rules leading to determinate results. Honest men, even if not particularly affected by outcomes, can reach quite different judgments from the same set of facts.

FARRIS 133.

33. The spectacular growth of the electric utility industry is illustrative. Between 1950 and 1966, electric generating capacity in the United States increased three and one-half times, or from 69 million to 246 million kilowatts, with 620 million kilowatts expected in 1980. The value of new construction put into service by investor-owned companies was up from \$26.7 billion in 1950 to \$50 billion in 1967. PRIEST 452. For a more complete analysis of this growth see, FARRIS 310-14.

34. This effect is called attrition. To illustrate, assume the utility with a rate base of \$100 million described in note 31 *supra* replaces a plant with a technologically more efficient one at an additional cost of \$10 million. If there is no adjustment for this in its rate base, the utility's rate of return will fall by one percent. In substance, attrition refers to the reduction in the rate

creasing costs of new and replacement plants yield an almost constant decline in a utility's rate of earnings. Energy shortages and the escalating price of fuel have a similar effect.³⁵ The result is that no matter how satisfied a company is with the rates set by a commission at any given time, it is never able consistently to earn the level of return which had previously been contemplated;³⁶ thus, rate cases follow in rapid succession as the utility companies seek to maintain a reasonable rate of return on their capital.

Rate of return as a basis for establishing rates is economically sound when one considers the relative position of a utility company in the securities market. The utility is legally limited in earnings to a supposedly fair return; thus a utility investor cannot expect the high or speculative dividends received by investors in ordinary competitive enterprises. Instead, the utility investor relies on the stable character of a utility company and the relative steadiness of its earnings and dividends through economic peaks and depressions. The best economic indicator of this in the securities market is the rate of return on one's investment.

As inflationary pressures have intensified, historically legitimate methods for keeping rates at an appropriate level have become increasingly incapable of maintaining a reasonable rate of return for utilities.³⁷ From a

of earnings which results when increased plant costs inflate the denominator in the net revenues/rate base ratio. When this occurs, the crucial relationship between rate base and rate of return deteriorates to the detriment of the company's financial position. See PRIEST 203 n.21.

A useful example of the problem is presented in *City of Lynchburg v. Chesapeake & Potomac Tel. Co.*, 200 Va. 706, 107 S.E.2d 462 (1959), where the court upheld a credit of \$466,000 against net operating income to offset attrition caused by the increasing cost of additional telephones. The court reasoned that since each telephone in service earned the same amount as every other telephone in its rate bracket and since the cost of telephones had consistently increased (from plant investment per telephone of \$202 in 1946 to \$319 in 1957), the earnings per telephone had declined from day to day. By multiplying the average annual increase in the investment cost for telephones by the rate of return allowed under former rate schedules the court was able to determine an earnings level sufficient to offset the annual attrition.

35. This results from regulatory lag, which occurs when a rate of return is calculated in a year prior to that for which the return is intended or when there is a "lag" between the time a company files for a rate increase and the date on which the increase, if any, is granted. See PHILLIPS 243.

36. See PRIEST 203.

37. Four methods have traditionally been used. First, commissions may use a year-end rate base, which includes property under construction at the end of the test year, rather than a rate base on the beginning or average of the whole test period. Not only is a year-end rate base inclusive of more property, but it also results in all of the property being valued at a later date so as to offset inflation during the test period. Second, a separate allowance for attrition may be added to the rate base evaluation. Third, the allowance may be made in the allowable rate of return. Finally, the commissions may assert that they take this factor, along with others, into account in determining a fair rate of return. See PHILLIPS 243-44 for a more detailed discussion.

In order to provide for this inflationary factor, a number of states have begun to base rates on a fair value rate base. A fair value rate base is premised on original costs in *current* dollars and/or the amount required to replace the property. PRIEST 140. See *Smyth v. Ames*, 169 U.S.

constitutional point of view, it appears that the best that can be done is to set forth some fundamental criteria for determining when a rate is clearly unreasonable or confiscatory. *FPC v. Hope Natural Gas*³⁸ is generally considered the modern starting point for such a discussion. In that case, the Supreme Court outlined the test for adjudging the reasonableness of utility rates:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. (citations omitted) By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.³⁹

If these factors cannot be met, the rate set is confiscatory and constitutionally invalid.⁴⁰

If the rate established by the state satisfies the basic test set forth by *Hope*, the courts will normally respect the state agency's determination and refuse to scrutinize either the rate-making formula or the actual rate imposed.⁴¹ Under *Hope*, any method may be used to determine a rate unless the end result violates its substantive constitutional test.⁴² That is, the particular method used to determine a rate is not subject to scrutiny as long as it does not result in confiscation.⁴³

Requirement of Judicial Review

While the courts cannot mandate the rate-setting formula, they are required to insure the reasonableness of the rates set. Under *Ohio Valley*

466 (1868). Since the late 1940's, the trend had been to calculate rate bases according to original property costs. See generally Rose, *The Hope Case and Public Utility Evaluation in the States*, 54 COLUM. L. REV. 188 (1954). See also Missouri *ex rel.* Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276 (1923) (Brandeis, J., concurring). But continuing inflation has resulted in a noticeable shift back to fair value valuation. See PHILLIPS 241.

For a detailed analysis of both rate base concepts and the variety of difficult policy issues that they have created, see J. BONBRIGHT, *supra* note 30, ch. XI-XIV (1961). As to whether any adjustment should even be made for the inflation problem, see PHILLIPS 291-96.

38. 320 U.S. 591 (1944).

39. *Id.* at 603.

40. LIBRARY OF CONGRESS, *supra* note 11, at 1342 n.5: "Although [*Hope*] arose out of [a controversy] involving the Natural Gas Act of 1938, the principles laid down therein are believed to be applicable to the review of rate orders of state commissions, except insofar as the latter operate in obedience to laws containing unique standards or procedures."

41. See, e.g., Georgia Power Co. v. Georgia Pub. Serv. Comm'n, 231 Ga. 339, 342, 201 S.E.2d 423, 426 (1973); Davenport Water Co. v. Iowa State Commerce Comm'n, 190 N.W.2d 583, 593-94 (Iowa 1971).

42. *FPC v. Hope Natural Gas*, 320 U.S. at 602.

43. *Id.*

Water Co. v. Ben Avon Borough,⁴⁴ a public utility claiming confiscation by state rate-making agencies is entitled to an independent judicial assessment of the law and the facts as part of due process.⁴⁵ However, in recent years, the broad holding in *Ben Avon* has been progressively whittled away until little more than a substantial evidence test now remains.⁴⁶ Under current case law, due process does not require a court to determine the substantive correctness of an administrative agency's findings of fact; the courts are only required to determine whether there is ample support for the agency's findings in the record.⁴⁷

This approach is consonant with the general trend which currently pervades administrative law.⁴⁸ Since the regulatory agency has both the facilities and expertise which are needed to resolve detailed and complicated factual questions, it seems appropriate that deference be accorded the agency's resolution of rate-making questions. The commission should be the sole finder of fact. The only issues which the court should determine are whether the commission has acted unreasonably, in violation of applicable constitutional standards or statutory authority, and whether the commission's findings are supported by substantial evidence in the record.⁴⁹ Where a rate is constitutionally reasonable under *Hope* and statutory procedures

44. 253 U.S. 287 (1920).

45. *Id.* at 289.

46. See LIBRARY OF CONGRESS, *supra* note 11, at 1341-43; Note, *Independent Judicial Review of Administrative Rate-Making: The Rise and Demise of the Ben Avon Doctrine*, 40 *FORDHAM L. REV.* 305 (1971). *Ben Avon* originally required a de novo court review of both the law and facts of any administrative rate order on the premise that due process required this to prevent a taking of property from the utility. However, the Supreme Court has never specifically followed or reaffirmed this decision without some modification. See, e.g., *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936) (the Court indicated that courts were not required to make a truly independent determination but were to be guided by the "strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing." *Id.* at 53.). This has led many writers to conclude that the case has been silently overruled. See, e.g., 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 29.09 at 174 (1958). It has been proposed that a substantial evidence test review has replaced it, as evidenced by cases such as *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), and *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942).

47. See, e.g., *Illinois Cent. R.R. v. Norfolk & W. Ry.*, 385 U.S. 57 (1966). In reversing a three-judge court's rejection of ICC orders authorizing additional rail service because there was not ample support in the record, the Court stated, "The test on judicial review is, of course, whether the action of the Commission is supported by 'substantial evidence' on the record reviewed as a whole . . ." *Id.* at 66. The Court further noted "the Commission's function is to draw such reasonable conclusions from its findings as in its discretion are appropriate It is not for the court to strike down conclusions that are reasonably drawn from the evidence and findings in the case. Its duty is to determine whether the evidence supporting the Commission's findings is substantial. . . ." *Id.* at 69.

48. See PRIEST 434-38. See generally K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 29.02 at 525, 527 (3d ed. 1972).

49. See *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). See *ICC v. Union Pac. R.R.*, 222 U.S. 541, 547 (1912) for an early statement of this same attitude.

have been followed, the courts need not make any attempt independently to evaluate the appropriate rate.

This analysis of *Hope Natural Gas*, *Ben Avon* and their progeny suggests that if a utility's only constitutional claim is grounded on due process, the Supreme Court is unlikely to offer relief. As long as the company has had a fair hearing before the state utility commission, the courts will rarely disturb the administrative agency's decision on constitutional grounds. The effect is that a utility company needs more than a claim that its profits or rate of return have been reduced before a court will take any injunctive action based on a due process theory. The question then arises whether the attitude should be any different when the courts are confronted with an application for a temporary injunction.

THE TEMPORARY INJUNCTION

The temporary injunction is an emergency equitable remedy which can be granted to prevent the occurrence of irreparable injury during litigation.⁵⁰ Despite the frequent danger of injury,⁵¹ an applicant does not normally have an absolute right to interim relief during rate litigation.⁵² Regardless of the variant wordings of applicable statutes,⁵³ the temporary injunction remains a discretionary remedy which is granted only according to traditional equitable standards.⁵⁴ These standards were integrated into a four-pronged test in *Virginia Petroleum Jobbers Association v. FPC*.⁵⁵ In order to obtain a preliminary injunction against an administrative agency, an applicant must demonstrate:

- (1) that irreparable injury will occur if it should prevail on the merits and its application is not granted;
- (2) that its injury outweighs any injury that will result to other parties if the injunction issues;
- (3) the likelihood of success on the merits; and
- (4) that the public interest will not be harmed.⁵⁶

State courts have also used this "balance of the hardships" approach.⁵⁷

50. See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 106 (1973).

51. See note 59 *infra* and accompanying text.

52. See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968).

53. See, e.g., ALASKA STAT. ANN. §§ 42.05.551, 44.62.570 (1976) (may stay the operation); KY. REV. STAT. ANN. § 278.410(3) (Baldwin 1969) (in the manner and upon the terms provided by law).

54. See JAFFE 689.

55. 259 F.2d 921 (D.C. Cir. 1958).

56. *Id.* at 925.

57. See, e.g., *New England Tel. & Tel. Co. v. State*, 97 N.H. 555, 556, 92 A.2d 408, 409 (1952); *City of Baytown v. General Tel. Co. of Southwest*, 256 S.W.2d 187, 195 (Tex. Civ. App. 1953).

Balancing Hardships

A utility can usually demonstrate the requisite danger of injury. There is virtually no situation in which the company's injury will not be irreparable should it ultimately prevail on the merits. This is necessarily so because the utility has thousands of customers. Even if the proposed rates are finally determined to be proper at a review on the merits, many states will not provide the utility with any form of retroactive legal relief.⁵⁸ In circumstances where some remedy is available, it will usually be of little practical value.⁵⁹ The effects of inflation will decrease the real economic benefit of such later charges,⁶⁰ and the administrative complexity and expense of collecting at a later date may tend to offset the value of back charges. Difficulties may also arise in collection from those customers who have moved and discontinued service or those who wish to contest the utility's right to charge the retroactive rates.⁶¹

This potential loss to the utility must be balanced against the possible injury to the consumer which may result if an injunction is granted and the court later affirms the rates originally established by the commission. During the period between the issuance of the injunction and the decision on the merits, the consumers would be paying higher rates than those the commission would have allowed during this period and would be entitled to a refund.⁶² By requiring a bond, the courts can insure that if the company does ultimately lose on the merits, it will have the resources needed to refund the amounts charged in excess of those legally allowable, usually with interest.⁶³ A refund can be effected through a set-off on a subsequent bill.⁶⁴ In view of its temporary character and relatively insubstantial effects,

58. See, e.g., *Southern Bell Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 239 La. 175, 118 So. 2d 372 (1960); *General Tel. Co. v. Public Serv. Comm'n*, 341 Mich. 620, 67 N.W.2d 882 (1954). These decisions are based on the theory that since the commission is charged by statute with the responsibility for prescribing just and reasonable rates for the future, it has no authority to order retroactive rate increases.

59. See *City of Houston v. Southwestern Bell Tel. Co.*, 263 S.W.2d 169, 173 (Tex. Civ. App. 1953).

60. Cf. JAFFE 701-02, quoted in note 64 *infra*.

61. Cf. *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-55 (1962), discussed in note 63 *infra*.

62. While the rates may be higher than those "legally allowed," they are not illegal, of course, since the temporary injunction makes them legal.

63. See JAFFE 701. The protection of a bond may be more illusory than real, however. As the Supreme Court noted in *FPC v. Tennessee Gas Co.*, 371 U.S. 145, 154-55 n.9 (1962), the cost of refunding is ultimately borne by the consumer, and, in view of the transient nature of our society, the refunds may not reach those to whom they are due.

64. *But see* JAFFE 701-02:

The longer the escrow [bond] remains or can be expected to remain in effect, the less attractive it is. Inexorably accumulating, its very size becomes a problem; changes in the persons entitled to the funds make the records more complex and final distribution more difficult and costly. Furthermore, refunds at a much later date cease to have much significance in forwarding administrative purposes and function largely as a windfall Neither bond nor escrow can. . . rectify inflation.

such injury appears minor in comparison to the irreparable injury which the utility might otherwise suffer.

If the analysis stopped here, then, it would be a rare situation in which a utility company is not granted a temporary injunction. But such a result would also mean that the administrative process could be circumvented, for any utility company unhappy with a commission's decision could postpone its effect until all appeals had been exhausted. To avoid this, two additional criteria are incorporated in the *Virginia Petroleum Jobbers* test: the applicant must demonstrate a likelihood of success on the merits, and that a preliminary injunction will not result in any harm to the public interest. Without such a two-pronged showing, "there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review."⁶⁵

Need for Success on the Merits: Varied Approaches

While the purpose of the *Virginia Petroleum Jobbers* test is clear, there is nevertheless substantial variation among the state courts as to how great a likelihood of success will have to be shown to justify issuance of a preliminary injunction in a rate case. At one extreme, there are cases like *State v. Northern Pacific Railway*,⁶⁶ in which the Minnesota Supreme Court confined itself to an evaluation of the potential effects of a stay on railway tariffs and did not even require evidence as to the unreasonableness of the rates to be offered.⁶⁷ Other courts are satisfied if there are novel or important questions, the outcome of which is in serious doubt and worth litigating.⁶⁸ Under either of these approaches, the utility company does not need to prove that it *is* entitled to its proposed rate, but only that it *may be* entitled to rates which are higher than those set by the commission.⁶⁹ This view eliminates the danger of prejudgment which may result if the court "seeks to make too precise an evaluation" of the merits on the interlocutory appeal;⁷⁰ it also recognizes that a proceeding for a temporary injunction is not a rate hearing, but an emergency proceeding in equity that is designed for the sole purpose of considering the need for temporary relief to prevent a possible confiscation.⁷¹ At the other extreme are cases like *South Central Bell* which

65. 259 F.2d 921, 925 (D.C. Cir. 1958).

66. 221 Minn. 400, 22 N.W.2d 569 (1946).

67. *See id.* at 410, 413, 22 N.W.2d at 574-75.

68. *See, e.g., A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537 (Alaska 1970).

69. *See City of Houston v. Southwestern Bell Tel. Co.*, 263 S.W.2d 169, 172 (Tex. Civ. App. 1953).

70. JAFFE 695.

71. *Id.* 696-97. As one judge noted, there would not be time to deal intelligently in probabilities since the record usually consists of thousands of pages of testimony. He was satisfied that there was a "possibility of success." *Id.* at 697. *See Cincinnati, N.O. & Texas Pac. Ry. v. United States*, 220 F. Supp. 46, 47 (S.D. Ohio 1963).

practically require proof of actual confiscation before granting temporary relief.⁷²

The Public Interest

Unfortunately, while these liberal approaches toward granting injunctive relief eliminate any substantive due process claim, they fail to justify their concomitant intrusion into the administrative processes. In effect, they simply ignore the fourth criterion set forth in *Virginia Petroleum Jobbers*—the public interest.⁷³ When a temporary injunction is requested, an administrative hearing has already been conducted in accordance with a detailed statutory procedure.⁷⁴ Notice has been given and the state agency or commission has already reviewed literally thousands of pages of expert testimony and technical data.⁷⁵ The commissioners who are responsible for rate-setting are often experienced in rate cases and are normally supported by an expert staff.⁷⁶ To set rates, decisions must be made which involve accounting, economics and other areas of specialized knowledge.⁷⁷ Clearly, it is in the public interest to have uniform rates set by this well-defined process and specialized forum. The flexibility and skill inherent in typical rate-making processes find a poor substitute where a single judge with little expertise in rate cases is forced to examine a utility's rate proposal as set forth in the complex and often conflicting affidavits which can be introduced under formal judicial rules of evidence and procedure.⁷⁸

The policy favoring administrative determination of rates is embodied

72. See note 25 *supra* and notes 83-85 *infra* and accompanying text.

73. The court described the public interest as "favoring at once both the rapid expansion of utilities and the prevention of wasteful and repetitive proceedings at the taxpayers' or consumers' expense; both fostering competition and preserving the economic viability of existing public services; both expediting administrative or judicial action and preserving orderly procedure." *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

74. See, e.g., KY. REV. STAT. ANN. § 278.190 (Baldwin 1969). See text accompanying notes 15-22 *supra*.

75. E.g., Brief for Movant at 2, *Kentucky v. South Cent. Bell Tel. Co.*, 545 S.W.2d 927 (Ky. 1976). See text accompanying notes 15-17 *supra*.

76. Qualifications of commissioners and their staffs vary dramatically from state to state. Some state statutes require commissioners to have a background in rate-making. E.g., ALASKA STAT. ANN. § 42.07.041 (1976) (requiring education or experience in engineering, transportation, law, or business administration, finance and accounting). In many states, however, the commissioners are political appointees and may have no expertise whatsoever in rate regulation. See, e.g., KY. REV. STAT. ANN. § 278.050 (Baldwin 1969). There is also a great deal of variance among the qualities of the supporting staffs in different states. For an analysis of the composition of the commissions in the various states, see PHILLIPS 91-101.

77. Most courts at least pay lip service to the expertise required for ratemaking. See, e.g., *Southwest Bell Tel. Co. v. State Corp. Comm'n*, 192 Kan. 39, 48-49, 386 P.2d 515, 525 (1963); *Farmers' Educ. & Coop. Union v. Circuit Court*, 73 S.D. 203, 207, 40 N.W.2d 402, 405 (1950).

78. See, e.g., *New York Tel. Co. v. Public Serv. Comm'n*, 36 App. Div. 2d 261, 264, 320 N.Y.S.2d 280, 283 (1971). As Jaffe explains, the court has no special competence which warrants the redoing of a determination by a specialized tribunal. JAFFE 647.

in the statutory presumptions of lawfulness which most states attach to their administrative rate orders.⁷⁹ Granting a preliminary injunction places the burden of higher public utility rates on the public when such rates have been rejected by an administrative agency which has the presumed expertise and is vested with the authority to fix rates.⁸⁰ The fixing of rates is a legislative function,⁸¹ and statutory procedures should be followed unless there is a substantial basis for believing that a confiscation would otherwise occur. In order to obtain a preliminary injunction, an applicant should have to overcome the legislative mandate that commission orders shall be presumed lawful and valid.

Accommodating Due Process and the Public Interest

While a reviewing court should not indulge in indirect rate-making, it does have a duty to provide relief from confiscatory rates. This duty extends to granting temporary as well as permanent injunctive relief.⁸² An overly

79. See note 21 *supra*.

80. See *Mountain States Tel. & Tel. Co. v. Public Util. Comm'n*, 176 Colo. 457, 491 P.2d 582 (1971); *Mountain States Tel. & Tel. Co. v. Public Util. Comm'n*, 177 Colo. 332, 494 P.2d 76 (1972). See note 78 *supra*.

81. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 50 (1936).

82. The leading cases in this area are *Oklahoma Natural Gas v. Russell*, 261 U.S. 290 (1923), and *Prendergast v. New York Tel. Co.*, 262 U.S. 43 (1923). *Oklahoma Natural Gas* concerned the jurisdiction of a federal court to issue a temporary injunction following the refusal of the Oklahoma Supreme Court to stay the rate order of that State's Corporation Commission pending judicial review. In reversing the court of appeals, the Supreme Court held that federal courts did have such jurisdiction and remanded the case for a determination of whether the facts of the case justified issuance of a preliminary injunction:

[I]f the plaintiffs . . . can make out their case, . . . they are suffering daily from confiscation under the rate to which they are now limited. They have done all that they can under the state law to get relief and cannot get it. If the Supreme Court of the State hereafter shall change the rate, even *nunc pro tunc* [as if regularly made] the plaintiffs will have no adequate remedy for what they may have lost before the court shall have acted . . . Rules of comity or convenience must give way to constitutional rights.

Id. at 293.

In the following term, in *Prendergast v. New York Tel. Co.*, the Supreme Court affirmed a temporary injunction prohibiting enforcement of a rate order set by the New York Public Service Commission. The rate order was to have reduced temporarily, pending final determination by the Commission, the maximum telephone rates to be charged by the utility. The utility alleged that the order was confiscatory, and a three-judge federal district court issued the injunction. In affirming, the Court noted that:

The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process.

262 U.S. at 49.

Following *Oklahoma Natural Gas* and *Prendergast*, the Johnson Act was enacted to limit substantially the federal courts' jurisdiction to enjoin enforcement of state and local administra-

strict construction of the "likely to prevail on the merits" criterion may result in a failure to provide such relief. A classic example of this problem is suggested by the original opinion in *Kentucky v. South Central Bell Telephone Co.*,⁸³ in which the Kentucky Supreme Court stated that a reviewing court could provide preliminary injunctive relief *only* upon a finding that either "an emergency exists or that the company's credit or operations will be materially impaired or damaged by the failure to permit [the utility's original rate proposal] to become effective."⁸⁴ According to the court, this

tive rate orders. 28 U.S.C. § 1342 (1970). Under the Johnson Act, the federal courts are denied jurisdiction when the following four factors are met:

- (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
- (2) The order doesn't interfere with interstate commerce; and,
- (3) The order has been made after reasonable notice and hearing; and,
- (4) A plain, speedy, and efficient remedy may be had in the courts of such state.

Id. § 1342(1)-(4). Thus, it is impossible for a utility to seek an injunction on due process grounds unless it can show that one of the four conditions of the Johnson Act is not satisfied.

Given the approach which has been suggested in this Note, a strong argument may be made for access to the federal courts to seek a preliminary injunction: in many cases, it may legitimately be asserted that no "plain, speedy [or] efficient remedy" is available in the state courts. *See id.* § 1342(4). Indeed, such an approach was actually taken by the Supreme Court in two decisions handed down shortly after passage of the Johnson Act. In *Mountain States Power Co. v. Public Serv. Comm'n*, 299 U.S. 167 (1936), the Court held that the prohibition of temporary injunctive relief prior to judicial evaluation of the merits of a confiscation challenge was inconsistent with the Johnson Act's requirement of a speedy and efficient remedy. *See id.* at 170.

The right of a utility to be protected from daily confiscation pending an appeal was reiterated in *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104 (1938). In that case, it was conceded that the Pennsylvania statute forbidding the enjoining of a rate order "except in a proceeding questioning the jurisdiction of the Commission" left the utility without remedy, since the phrase "questioning the jurisdiction" had not been defined. *Id.* at 109-10. Since it was unclear whether this language meant that actions in excess of the Commission's powers, such as confiscatory rates, would be deemed beyond the Commission's jurisdiction and, therefore, outside the statute forbidding an injunction, the Court held that no plain, speedy and efficient remedy was available and allowed the lower federal court to issue a temporary injunction. *See id.* at 110. The Court viewed temporary injunctive relief as necessary because the remedy at law by appeal would not be effective to protect the utility's position during litigation. *Id.* For a more recent discussion of a similar issue, see *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 331 F. Supp. 1167 (D. Ariz. 1971).

Recent state court decisions also reaffirm the vitality of the due process principles established by *Oklahoma Natural Gas* and *Prendergast*. In *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 534 P.2d 549 (Alaska 1975), the court affirmed a lower court injunction voiding the commission's denial of an interim rate increase. It based its decision on a finding that the three criteria established in *Prendergast* had been met—(1) there was a showing that the reduced rates were confiscatory, (2) there was no indication that a final hearing would take place reasonably soon, and (3) the balance of injury was in favor of the utility. *Id.* at 557-59. For other state court applications of *Prendergast*, see *New Rochelle Water Co. v. Public Serv. Comm'n*, 31 N.Y.2d 397, 405, 292 N.E.2d 767, 772-73 (1972); *City of Tyler v. Television Cable Serv., Inc.*, 481 S.W.2d 166 (Tex. Civ. App. 1972).

83. C.A. No. 86665 (Ky., June 25, 1976). The opinion was subsequently amended prior to publication and is reported, as amended, in 545 S.W.2d 927 (Ky. 1976). The original opinion was never published except in slip form.

84. *Id.* at 7 (quoting KY REV. STAT. ANN. § 278.190(2) (Baldwin 1969)).

stringent test was needed to prevent the kind of frustration of Kentucky's statutory rate-making procedure which might occur if rate orders were vulnerable to discretionary judicial suspension on the basis of comparatively nebulous and unduly generous equitable principles.⁸⁵

While the court subsequently amended its opinion to conform with constitutional standards, the approach originally suggested in *South Central Bell* is inconsistent with basic requirements of constitutional reasonableness. The opinion of the Kentucky court narrowly defined emergency to encompass only the kind of situation in which a utility was actually "incurring a loss" on Kentucky operations or was "unable to pay accruing interest" on the utility bonds allocated to Kentucky property.⁸⁶ No relief is to be granted where the utility is "merely" unable to provide a reasonable return upon the equity value of its common stock.⁸⁷ While the court only intended this definition as an example,⁸⁸ its thrust clearly creates a nearly insurmountable burden for a utility seeking temporary injunctive relief from an alleged confiscation. In failing to recognize that equity capital is an essential part of a utility's rate base and capital structure,⁸⁹ the court created a situation in which a utility would have to be in, or irretrievably destined for, receivership proceedings before it would be entitled to interim relief. Such an approach is clearly at odds with the standards of reasonableness set forth by the Supreme Court in *FPC v. Hope Natural Gas Co.*⁹⁰ A utility is constitutionally entitled to a rate of return that is sufficient to cover not only operating and debt expenses, but also to pay dividends on stock that will allow the company to attract capital investment.⁹¹

As a practical matter, it is imperative that a utility be able to provide a reasonable rate of return for its equity investors. The cost of attracting capital is directly tied to the return expected and achieved on other investments, both debt and equity, in the utility business and other enterprises competing for capital funds. If a utility cannot produce a return on its equity capital which is comparable to that which could be obtained through other investments, the utility's common stock shareholders will sell their holdings to cut their losses, and the value of the utility's stock will decline to reflect its low rate of return and concomitant low demand.⁹² While new investors

85. *Id.*

86. *Id.*

87. *Id.*

88. *See id.* at 7-8.

89. If a utility is to have equity capital as a part of its capital structure, it must be able to provide a reasonable return on the value of that capital. By refusing to consider this need as an element in determining whether temporary relief should be provided, the court has essentially disregarded the importance of capital in the rate base.

90. 320 U.S. 591 (1944). *See* notes 38-40 *supra* and accompanying text.

91. *Id.* at 603, quoted in text accompanying note 39 *supra*.

92. *See* PRIEST 194-96.

may achieve a more reasonable return because of the discounted price, the result is an ever-deteriorating financial condition for the utility. Low earnings may be reflected in higher costs for debt securities.⁹³ Where a utility has issued bonds under an indenture which requires earnings to exceed a certain multiple of its interest on bonded indebtedness, increasing inadequacy of equity earnings may limit the utility in further issuances of debt securities.⁹⁴

Notions of due process demand that equity investors be able to obtain a reasonable rate of return from their investments in a regulated industry.⁹⁵ Yet, by its original opinion in *South Central Bell*, the Kentucky Supreme Court would deny equity owners any return on their investment during an entire rate case and its appellate review, a period that could last months and even years. The approach suggested by the court violates constitutional due process by confiscating the equity owner's property.

A Proposed Test for the Issuance of Temporary Injunctive Relief

What is needed is a standard that falls somewhere between the permissive approaches which give little scrutiny to the likelihood that the utility will succeed in its challenge to the commission's rate order and the rigorous approach originally taken by the Kentucky Court which will allow any but the most blatant confiscation to continue pending review. The amended opinion in *Kentucky v. South Central Bell Telephone Co.*⁹⁶ provides such a standard. Instead of the "incurring a loss" or "unable to pay accruing interest" tests⁹⁷ originally proposed, the amended opinion incorporates the *Hope* "financial integrity" test⁹⁸ as the standard for determining whether temporary relief should be granted.⁹⁹ In vacating the temporary injunction issued by the circuit court, the Kentucky Supreme Court held that:

A utility company is entitled to temporary injunctive relief only if it establishes that there is a reasonable probability that it will succeed on final hearing in proving that the rate set by the Commission in its order is confiscatory in the previously defined constitutional sense.¹⁰⁰

As the court phrased it: "[We should] keep our judicial fingers out of the

93. *See id.*

94. This very situation occurred in Kentucky just two days before the Supreme Court handed down its opinion in *Kentucky v. South Cent. Bell Tel. Co.* An electric company applied for and was granted interim rate relief when its earnings declined to the point where, although it had no difficulty covering interest on its outstanding debt, it could no longer issue bonds in sufficient quantity to acquire essential capital. Re: Kentucky Utilities Company, Public Service Commission Interim Order No. 6236 (June 23, 1975).

95. *See* FPC v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

96. 545 S.W.2d 927 (Ky. 1976).

97. *See* notes 84-87 *supra* and accompanying text.

98. This test is quoted in the text accompanying note 39 *supra*.

99. 545 S.W.2d 927, 930-31 (Ky. 1976).

100. *Id.* at 931.

ratemaking pie except to the degree that the constitutions require our intervention.”¹⁰¹

An early Supreme Court case provides a similar standard. In *City of Knoxville v. Water Co.*,¹⁰² the Court explicitly recognized that it was the right and duty of the judiciary to interfere in the rate-making process in a clear case of confiscation.¹⁰³ The Court also emphasized that the burden of proof was on the complainant: if the question of confiscation remains in doubt, injunctive relief should not be granted.¹⁰⁴ In *Knoxville*, the Court concluded that the local water company would obtain a substantial net revenue under the city's rate ordinance and refused to issue the injunction.¹⁰⁵ Rather than attempting to determine whether a reduction of income to a specified point would or would not amount to confiscation, the Court held that where there was no evidence as to actual operations under the rate order, but there was certain to be substantial return, a reviewing court should not speculate on the precise adequacy of that return.¹⁰⁶

Such approaches are functionally sound. While they recognize that injunctive relief may be necessary to prevent a confiscation, they are also sufficiently limited so that the whole rate-making process cannot be circumvented by the mere allegation of confiscation. The cases are based on an insightful understanding of the concept of confiscation. Due process entitles a public utility to a reasonable rate of return;¹⁰⁷ no particular rate level is specified as necessarily just and reasonable.¹⁰⁸ Under *Hope Natural Gas*, there is a presumption of constitutionality in the field of economic regulation and a rate control is not tested for the existence of any precise fact, but for the “reasonableness” of its factual basis.¹⁰⁹ The “facts” themselves—value of service, rate of return—are conceptually complex. They are derived from a mass of sophisticated statistical data. The result is that valid actions may fall within a “permitted zone,” the limits of which cannot be defined exactly.¹¹⁰

The need for flexibility may be especially great where the enterprise is subject to continuous regulation so that its losses may be recouped at a later stage.¹¹¹ In a later case involving the Hope Natural Gas Company, for

101. *Id.*

102. 212 U.S. 1 (1909).

103. *Id.* at 17.

104. *See id.* at 16.

105. *Id.* at 17.

106. *Id.*

107. See notes 30-39 *supra* and accompanying text.

108. Permian Basin Area Rate Cases, 390 U.S. 747, 767, 770 (1968).

109. *See* 320 U.S. 591, 602-03 (1944).

110. *See* JAFFE at 646.

111. The “recoupment” of losses does not refer to retroactive rate increases but rather to the overall net effect of regulation which may result in gains in some periods and losses in another due simply to the imprecision of regulation itself.

example, the Fourth Circuit held that it was not a violation of due process for the Federal Power Commission to continue lower rates in effect during the suspension period.¹¹² Hope had requested and had been denied the right to put its requested rate into effect during the five-month suspension period during which its proposal was to be reviewed by the Commission. The rate investigation lasted one year and three months longer than the suspension period, and the utility was allowed to charge its higher proposed rates, subject to refund, during this extended investigation period. The final order of the FPC rejected Hope's original rate proposal, but directed the filing of a new rate schedule which was somewhat higher than that previously in force. The new rates were made effective as of the end of the five-month suspension period, and the commission directed Hope, pursuant to its bond, to refund the charges it had collected in excess of the new rate schedule.

Hope responded by requesting that the new rates be made effective for the entire period during which the proposed rates had been suspended. In denying this petition, the Fourth Circuit noted that rate-making is not an exact science and that losses of one period may merely counterbalance gains of another.¹¹³ Rate-making formulas must be changed periodically to reflect changes in economic conditions,¹¹⁴ and the lag which necessarily accompanies these changes may result in benefit as well as detriment to the utility.¹¹⁵ Thus, a loss sustained by a utility while a determination of the reasonableness of rates is being made is not automatically equivalent to a violation of a constitutional right, but may be a necessary and reasonable incident of rate regulation, so long as the period of determination is not so long as to itself be unreasonable.¹¹⁶ While this second *Hope* case concerned the suspension period, the same reasoning is applicable to the interim period pending judicial review.

CONCLUSION

Government may deprive a person of his property so long as it acts pursuant to a legitimate governmental purpose, and adheres to procedures which prevent its actions from becoming arbitrary or capricious.¹¹⁷ In the field of rate regulation, this modern view of due process is expressed

112. *Hope Natural Gas Co. v. FPC*, 196 F.2d 803 (4th Cir. 1952).

113. *Id.* at 809.

114. *Id.* at 808. See notes 34-36 *supra* and accompanying text for a discussion of the effects of inflation on the rate-making process.

115. *Id.* at 808. In its original opinion, the court in *Kentucky v. South Cent. Bell Tel. Co.*, C.A. No. 86665 at 7, n.2 (Ky. 1976), noted that for two years following the effective date of the rates approved in the last complete rate case, South Central Bell had earned in excess of the rate of return allowed in that proceeding.

116. 196 F.2d at 809.

117. The modern construction of this principle was first formulated in *Nebbia v. New York*, 291 U.S. 502 (1934).

through a presumption that rates have been lawfully and correctly established. To hold that due process requires the utility's requested rates to be substituted for the decision of the commission, pending appeal, on anything less than a showing of procedural irregularity or that the rate set by the state agency was clearly confiscatory would be at least partially destructive of the legislative process. In effect, the court would be destroying the statutory presumption of correctness which is accorded the commission's judgment.¹¹⁸ This presumption is not arbitrary or unreasonable. It is based on sound policy considerations, including a need for finality in the rate-making process and the necessity of not overburdening the courts with de novo evaluations of disputes which have already been resolved administratively. The time consumed, the expense involved, the cumbersome procedures and the potential loss of public confidence in administrative agencies all militate against liberal issuance of preliminary injunctions affecting the rate-making process.¹¹⁹ Thus, a workable standard which also satisfies constitutional requirements would allow a reviewing court to grant an injunction in the case of (1) procedural irregularity, including an unreasonably long delay in judicial review on the merits, (2) emergency, or (3) a clear showing by the utility that commission-set rates would not provide a minimal rate of return on capital investment. In these situations, and only in these situations, should an injunction be granted.

118. See note 20 *supra* and accompanying text.

119. See *New York Tel. Co. v. Public Serv. Comm'n*, 36 App. Div. 2d 261, 320 N.Y.S.2d 280 (1971).