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Needed-Uniform Utility Rate Laws

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As costs continue to climb and the present inflationary trend snowballs, utilities and especially telephone companies must rid themselves of previous levels of curtailed revenues or sink into profitless oblivion. It is not their choice. The telephone companies, Bell and Independent, cannot help themselves. They cannot hold back the inflationary trend. Time and time again, as in the past several years, the telephone companies are going to find it necessary to petition their state regulatory bodies for increased rates. This is not only true for the telephone industry but it is certainly true for all utility companies which wish to survive.

Making ends meet is not the only problem; nor is the starting of a rate application. The real problem lies in the lack of consistent standards as to what are the reasonable revenue requirements of a utility-telephone-company. In the past the companies have petitioned commission after commission for rate relief, only to have their wants cut in half due to a lack of understanding of what is the *reasonable rate.*

A reasonable rate is one which enables the telephone companies to render adequate service to the users and which is sufficiently adequate to attract investment capital to meet future expansion demands. A reasonable rate is not one that permits the companies to make just enough money to continue present services. The American public expects and demands the best of every commodity—just as they do from utility service. Without sufficient profits to permit—expansion, new products and services, and research—development, the utility companies would soon go out of business, or worse yet be taken over by government, which as is commonly known is not to the best interests of a free-enterprise society.

This study consists of an analysis of the statutory standards, court decisions, and utility commission decisions used in fixing telephone or other utility rates, where the same are used regardless of the nature of the utility, in each of fifty-one jurisdictions in the United States.

A review of all jurisdictions indicates that there are at least three telephone rate making standards in existence—"fair value," "permissive value," and "just and reasonable." Iowa[1] does not at

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[1] At this time telephone service is not regulated in the State of Iowa. However, for the purposes of this article, telephone rate making standards have been based on those established for the electric and gas industries under West's Iowa Code Anno. Ch. 397.28.

this time have a statute governing telephone rates. Statutes in four states—Alabama,[2] Missouri,[3] New York,[4] and Ohio[5]—require that in fixing reasonable rates, the commissions must allow or give consideration to "value" or "fair return on value." A "fair value" rate base is used and required in three states—Minnesota,[6] Texas,[7] and Mississippi.[8] For the purposes of this paper six of the above states have been classified as "fair value" jurisdictions. Mississippi, under a recent court decision,[9] contrary to that required by its statute, has been classified as a "just and reasonable" jurisdiction. Iowa, which does not have rate regulation of telephone companies either state-wide or local, has been classified as a "fair value" jurisdiction because of standards used in setting electric and gas rates.

In the District of Columbia,[10] and twenty-nine states, the statutes contain a valuation section but do not expressly require that "value" be used in fixing "just and reasonable" rates. Of these, Arizona,[11] Delaware,[12] Illinois,[13] Indiana,[14] Maryland,[15] Montana,[16] North Carolina,[17] and Pennsylvania,[18] have been

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2 Code of Ala. t. 48, Sec. 52.

3 Vernon's Anno. Mo. Stat. Ch. 392, Sec. 240.

4 N. Y. Consol. L., N. Y. Stat. Ch. 48, Art. 5, Sec. 49.

5 Page's Ohio Rev. Code, Sec. 4905.22, 4909.05.

6 Minn. Stat. Ch. 237.21.

7 Vernon's Civ. Stat. of Tex. t. 28, Ch. 10, Art. 1119.

8 Miss. Code Anno. Sec. 7716-12.

9 Southern Bell Telephone & Telegraph Co. v. Mississippi Public Service Commission (Miss. Ch., June 19, 1958).

10 D. C. Code, t. 43-306.

11 Bonbright v. Geary Corp. Comm. of Ariz., 210 F. 44 (D. C., Ariz., 1913); Arizona Corporation Commission v. Mountain States Tel. & Tel. Co., 71 Ariz. 404, 228 P. 2d 749 (1951).

12 Application of Diamond State Tel. Co., 48 Del. 317, 103 A. 2d 304 (1953); Application of Diamond State Tel. Co., 48 Del. 497, 107 A. 2d 786 (1954); Application of Diamond State Tel. Co., 49 Del. 203, 8 P. U. R. 3d 291, 113 A. 2d 437 (1955); Re Diamond State Tel. Co., 21 P. U. R. 3d 417 (1958).

13 Illinois Bell Tel. Co. v. Illinois Commerce Comm., 414 Ill. 275, 111 N. E. 2d 329 (1953); City of Chicago v. Illinois Commerce Comm., 4 Ill. 2d 554, 123 N. E. 2d 500 (1954).

14 Public Service Comm. v. Indiana Bell Tel, Co., 235 Ind. 1, 130 N. E. 2d 467 (1955).

15 Chesapeake and Potomac Tel. Co. v. Public Service Comm., 201 Md. 170, 97 P. U. R. (NS) 50, 93 A. 2d 249 (1952); Re Chesapeake and Potomac Tel. Co. of Maryland, 22 P. U. R. 3d 321 (1958).

16 Tobacco River Power Co. v. Public Service Comm., 109 Mont. 521, 98 P. 2d 886 (1940); Re Mountain States' Tel. & Tel. Co., 31 P. U. R. 3d 417 (1960).

17 State ex rel. North Carolina Utilities Comm. v. Southern Bell Tel. & Tel. Co., 239 N. C. 333, 80 S. E. 2d 133 (1954).

18 Peoples Natural Gas Co. v. Pennsylvania Public Utilities Comm., 153 Pa. Super. 475, 34 A. 2d 375 (1943); City of Pittsburgh v. Pennsylvania Public Utilities Comm., 171 Pa. Super. 187, 90 A. 2d 607 (1952).

classified as "fair value" states because of court decisions using a "fair value" standard. This accounts for the selected group of fifteen "fair value" states used for this study.

The permissive group of seven states—Colorado,[19] Georgia,[20] Kansas,[21] Nebraska,[22] Oregon,[23] South Dakota,[24] and Wyoming[25] —consists of those with valuation provisions but no decisive post-*Hope*[26] case court decisions interpreting those provisions.

The "just and reasonable" group of twenty-seven jurisdictions includes fourteen states with valuation provisions which the courts or commissions have interpreted not to require "fair value" and to permit use of "net investment" or some other non-value rate base—Arkansas,[27] California,[28] District of Columbia,[29] Idaho,[30] Kentucky,[31] Massachusetts,[32] Nevada,[33] New Jersey,[34] Oklahoma,[35] South Carolina,[36] Tennessee,[37] Utah,[38] Washington,[39] and Wisconsin.[40] As mentioned above, it also in-

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[19] Colo. Rev. St., Sec. 115-4-11.

[20] Ga. Code Anno. t. 93-308.

[21] Kans. Stat. Ch. 66, Art. 1, Sec. 128.

[22] Rev. Stat. Nebr. Sec. 75-208.

[23] Ore. Rev. Stat. Sec. 757.020.

[24] So. Dak. Code, Sec. 52.0208.

[25] Wyo. Stat., Sec. 37-21.

[26] Federal Power Comm., v. Hope Natural Gas Co., 320 U. S. 591, 51 P. U. R. NS 193, 88 L. Ed. 333, 64 S. Ct. 281 (1944).

[27] City of Fort Smith v. Southwestern Bell Tel. Co., 220 Ark. 70, 247 S. W. 2d 474 (1952).

[28] Re General Tel. Co. of California, 25 P. U. R. 3d 129 (1958).

[29] Re Washington Gas Light Co., 24 P. U. R. 3d 417 (1958): Re Potomac Electric Power Co., 28 P. U. R. 3d 206 (1959).

[30] Mountain States Tel. & Tel. Co. v. Jones, 75 Idaho 78, 7 P. U. R. 3d 367, 267 P. 2d 634 (1954).

[31] Citizen's Tel. Co. v. Public Service Comm., 247 S. W. 2d 510 (Ky. App. 1952).

[32] New England Tel. & Tel. Co. v. Dept. of Public Utilities, 331 Mass. 604, 121 N. E. 2d 896 (1954).

[33] Bell Tel. Co. of Nevada v. Public Service Comm., 70 Nev. 25, 253 P. 2d 602 (1953); Re Bell Tel. Co. of Nevada, 15 P. U. R. 3d 22 (1956).

[34] New Jersey Bell Tel. Co. v. Department of Public Utilities, 12 N. J. 568, 100 P. U. R. NS 379, 97 A. 2d 602 (1953).

[35] Southwestern Bell Tel. Co. v. State of Oklahoma, 204 Okla. 225, 230 P. 2d 260 (1951).

[36] Coney v. Broad River Power Co., 171 S. Car. 377, 172 S. E. 437 (1933).

[37] Re Southern Bell Tel. Co., 12 P. U. R. 3d 170 (1956); affd 14 P. U. R. 3d 278 (Tenn. Ch. 1956).

[38] Utah Power & Light Co. v. Utah Public Service Commission, 107 Utah 155, 56 P. U. R. NS 136, 152 P. 2d 542 (1944).

[39] Washington Public Service Commission v. Pacific Tel. & Tel. Co., 25 P. U. R. 3d 18 (1958); Washington Public Service Comm. v. General Telephone Co. of the Northwest, 30 P. U. R. 3d 145 (1959).

[40] Re Wisconsin Telephone Co., 24 P. U. R. 3d 314 (1958).

cludes Mississippi, with a "fair value" statute[41] and a "just and reasonable" court decision.[42] Finally, it includes two states—Maine[43] and North Dakota[44]—in which consideration of current value is prohibited by statute, and ten states in which the only statutory standard for telephone rates is that they shall be "just and reasonable"—Florida,[45] Louisiana,[46] Michigan,[47] New Hampshire,[48] New Mexico,[49] Rhode Island,[50] Vermont,[51] Virginia,[52] West Virginia,[53] and Connecticut.[54]

Thus, to recapitulate, fifteen states have "fair value"; seven states permit but do not require "value"; and the remaining twenty-six specify only that the rates must be "just and reasonable."

These three classifications are based on experience as well as on the wording of the statutes or court decisions. Thus, New Jersey is considered to be merely a "just and reasonable" state because the New Jersey Supreme Court[55] accepts "net investment" as "fair value." The "fair value" group is a varied assortment, including Iowa, where there is actually no regulation of telephone rates; Ohio,[56] with a statutory reconstruction cost rate base; Maryland,[57] which uses net original cost plus a token adjustment for current value; and New York,[58] whose commission recently refused to assign weight to reproduction cost in finding the rate base, in spite of a "fair value" court decision.[59]

There is also a broad range of practice within the group concerning the adjustment of items of operating expense and the inclusion of certain rate base components, such as working

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41 *Supra,* n. 8.

42 *Supra,* n. 9.

43 Maine Laws, Ch. 44, Rev. Sec. 18.

44 No. Dak. Rev. Code, Ch. 49-06, Sec. 49-0603.

45 Fla. Stat. Sec. 364.03.

46 La. Const., Art. 6, Sec. 4; La. Rev. Stat., Sec. 45-1167.

47 Comp. L. Mich., Sec. 460-54.

48 N. H. Rev. Stat. Anno. Ch. 374, Sec. 2.

49 N. Mex. Stat., Sec. 68-6-1.

50 Gen. L. R. I., Sec. 39-2-1.

51 Vt. Stat. Anno., t. 30, Sec. 216.

52 Code of Va., t. 56-235.

53 W. Va. Code, Art. 2, Sec. 2554.

54 Gen. Stat. Conn., t. 16, Ch. 277, Sec. 16-19.

55 *Supra,* n. 34.

56 *Supra,* n. 5.

57 *Supra,* n. 15.

58 In re New York Bell Tel. Co., 286 App. Div. 28, 8 P. U. R. 3d 229, 142 N. Y. S. 2d 68 (1955); Re New York Bell Tel. Co., 20 P. U. R. 3d 129 (1957).

59 New York Bell Tel. Co. v. Public Service Commission, 309 N. Y. 569, 12 P. U. R. 3d 399, 132 N. E. 2d 847 (1956).

capital, plant under construction, and property held for future use. There are also marked differences in economic opportunity among these states and in regulatory climate within them.

The dominant concept in the regulation of utility rates—the heart and core of the regulatory process—is a fair rate of return on a rate base (value ascribed to the utility's property used and useful in furnishing service).

State and Federal statutes and constitutions are completely silent as to a definition of this concept, except in the few states where the composition of a "fair value" rate base is spelled out. Nowhere in statutory law is fair rate of return defined. Only in decisions of courts and commissions have the elements considered in determining rate of return been set forth.

The absence of a definition of rate of return in statutory law may pose a threat to adequate utility earnings in the future, and more seriously, may permit regulatory agencies to abandon the rate base—rate of return concept for any other concept they wish to use. The rapidity with which regulatory agencies subsequent to the *Hope* case [60] abandoned "fair value" as a rate base, even when required by statutory law, offers a lesson in point. There is no reason to believe that a similar abandonment by the United States Supreme Court of its pronouncements on a fair rate of return would not be likewise followed. The time is ripe for such an abandonment by the Supreme Court as the following shows.

In 1876, the time of the Supreme Court's initial holding[61] concerning the authority of a governmental price fixing statute under the 14th Amendment to the United States Constitution, the court not only asserted that governmental regulation of rates was within the States' police power but added that the determination of such rates was conclusive and not subject to judicial review. The following year, 1877, the Court also rejected the contention that regulated businesses were entitled to "just compensation." [62]

Less than a decade was to elapse before the Court, awakening to the consequences of leaving business to the mercy of the State legislatures, began to reverse itself. Thus in 1886, in the *Railroad Commission Cases*[63] the Court warned that a state cannot "do that which in law amounts to a taking of private property for public use without *just* compensation, or without due process of law." By treating "due process of law" and "just compensation" as synonymous, the Court, contrary to the 1877 deci-

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[60] *Supra,* n. 26.

[61] Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1876).

[62] Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616 (1877).

[63] Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334 (1886).

sion,[64] held that the imposition of a rate so low as to damage or diminish private property ceased to be an exercise of a States police power and became one of eminent domain.

Subsequent decisions contributed to this eminent domain concept, culminating in the holding of the 1898 *Ames'* Case,[65] that the requirements of due process are not met unless a court not only reviews the reasonableness of a rate but also determines whether the rate permits the utility to earn a fair rate of return on a fair valuation of its investment.

Thus, the holdings of the Supreme Court continued until the *Hope* Case in 1944.[66] During that interval few lawyers felt it necessary to incorporate bodily into statutory law the "fair value" concept. The statutory standard "just and reasonable" was sufficient because under court decisions it meant a fair rate of return on a fair value rate base, which gave effective weight to current price levels. This ended in 1944. At that time the Supreme Court, as a result of three decisions, arrived at a point not very far removed from its initial holdings in 1876[67] and in 1877.[68]

First in 1934 in the *Nebbia* case,[69] the Court declared, "that prices established for business in general would invite judicial condemnation only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt." The second and third cases came in 1942 and 1944. By holding in 1942[70] that the "constitution does not bind rate-making bodies to the service of any single formula" and in 1944 in the *Hope*[71] Case that "it is the result reached not the method employed which is controlling, (and that) if the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the act is at an end," the Court in effect abdicated from the position that rate fixing is an exercise of the power of eminent domain and reasserted its initial (*Munn*) police power doctrine.

It is true the Court has not specifically surrendered its right to declare that low rates could contravene the due process clause; some of the members of the Court have wanted to do so. In the *Natural Gas Pipeline Case,*[72] Justices Black, Douglas and Murphy proposed to travel the road all the way back to the *Munn Case*[73]

64 *Supra,* n. 62.

65 Smyth v. Ames, 169 U. S. 466, 42 L.Ed. 819, 18 S. Ct. 418 (1898).

66 *Supra,* n. 26.

67 *Supra,* n. 61.

68 *Supra,* n. 62.

69 Nebbia v. New York, 291 U. S. 502, 78 L.Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469 (1934).

70 Federal Power Comm. v. Natural Gas Pipeline Co. of Amer., 315 U. S. 575, 42 P. U. R. NS 129, 89 L.Ed. 1037, 62 S. Ct. 736 (1942).

71 *Supra,* n. 26.

72 *Supra,* n. 70.

73 *Supra,* n. 61.

and deprive all courts of the power to void rates on Federal constitutional grounds. Earlier, in a 1939 case,[74] Justice Frankfurter adopted a similar position, but in his dissent in the *Hope* Case he backed down.

Nevertheless, though the majority of the court have not fully subscribed to a complete return to *Munn*, the majority in *Hope* did concur in Justice Douglas' reliance in that case upon the police power concept in both *Munn* and *Nebia*, when he said, "Rate-making is indeed but one species of price fixing. The fixing of prices, like other applications of the police power, may reduce the value of property which is being regulated. But the fact that value is reduced does not mean that the regulation is invalid."

The few rate-making criteria for adequate earnings in *Hope*, or the right to judicial review, could be dropped at any time for the standard set forth in *Nebbia*: ". . . arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt." The criteria in *Hope*, some experts argue, do not require the rate base-rate of return method, nor are the criteria as likely to insure as adequate a level of earnings as allowed by the Supreme Court in a 1923 decision,[75] a landmark rate of return case, which it is interesting to note has been avoided by the Court in *Hope* and subsequent rate case decisions, though there have been but a few.

Since it is apparent that utilities would secure more equitable and adequate earning under pre-*Hope* standards, and since future Supreme Court decisions might swing further to the *Munn* standards, it is time to statutorily define an equitable and adequate rate of return.

Will utilities in the future regret their failures of the present because nothing was done to bring about standardization of proper criteria for a fair rate of return upon a current property rate base throughout the States and Federal Government? Why should the police power doctrine continue, since it is almost completely void of objective standards in respect to establishing rates of return consistent with current economic conditions.

It is a well known fact that regulated companies, utilities particularly, which have the best earnings, provide for their customers the best product and service. Why not, therefore, establish an act in all states similar in effect to other uniform acts? This uniform act should incorporate standards which provide for the consumer the best product or service, for the investor the best return on his capital, and for the regulatory bodies the best framework within which the preceding may be obtained.

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74 Driscoll, Pennsylvania Public Utilities Comm. v. Edison Light & Power Co., 307 U. S. 104, 83 L.Ed. 1134, 59 S. Ct. 715 (1939).

75 Bluefield Waterworks & Improvement Co. v. Public Service Comm. of State of W. Va., 262 U. S. 679, 67 L.Ed. 1176, 43 S. Ct. 675 (1923).