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DUE PROCESS APPLIED TO UTILITY RATE INCREASES:

State ex rel. Knight v. PSC

On January 30, 1975, Monongahela Power Company moved to increase rates and charges by filing with the Public Service Commission a petition for rate increase amounting to some $30.9 million. Pursuant to the provisions of W. Va. Code § 24-2-4, the Commission deferred implementation of the rate increase until June 28, 1975, and required Monongahela Power to post bond. The new rates went into effect on June 28, 1975. Monongahela Power filed another petition for rate increase on November 30, 1976. The

1 W. Va. Code § 24-2-4 (1976 Replacement Vol.) provides in pertinent part:

No public utility subject to this chapter shall change, suspend or annul any rate, joint rate, charge, rental or classification except after thirty days' notice to the commission and the public . . . [T]he commission may, in its discretion, and for good cause shown, allow changes upon less time than the notice herein specified . . . .

Whenever there shall be filed with the commission any schedule stating a change in the rates or charges, . . . the commission shall have authority, either upon complaint or upon its own initiative without complaint, to enter upon a hearing concerning the propriety of such rate [or] charge . . . and, if the commission so orders, it may proceed without answer or other form of pleading by the interested parties, but upon reasonable notice, and, pending such hearing and the decision thereon, the commission, upon filing with such schedule and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate [or] charge . . . but not for a longer period than one hundred and twenty days beyond the time when such rate [or] charge . . . would otherwise go into effect; and after full hearing, whether completed before or after the rate [or] charge . . . goes into effect, the commission may make such order in reference to such rate [or] charge . . . as would be proper in a proceeding initiated after the rate [or] charge . . . had become effective: Provided, however, that if any such hearing and decision thereon cannot be concluded within the period of suspension, . . . such rate [or] charge . . . shall go into effect at the end of such period. In such case the commission may require such public utility to enter into a bond in an amount deemed by the commission to be reasonable and conditioned for the refund to the persons or parties entitled thereto of the amount of the excess, plus interest at the rate of not less than six nor more than ten percent per annum as specified by the commission, if such rates so put into effect are subsequently determined to be higher than those finally fixed for such utility . . . . No such accrued interest paid on any such refund shall be deemed part of the cost of doing business in a subsequent application for changing rates or any decision thereon.
second rate increase went into effect on April 28, 1977, and continued under bond at the time of the decision here discussed. The Commission subsequently determined that the initial rate increase, in effect since June 28, 1975, was excessive and reduced the increase to $9,037,286. After numerous unsuccessful attempts to appeal the reduction to the West Virginia Supreme Court of Appeals and the federal courts, Monongahela Power refunded with interest the excess amount charged its customers. Refunds were issued beginning in August 1977.

Relator, Thomas Knight, brought an action petitioning for a writ of prohibition, alleging that the Public Service Commission exercised quasi-judicial powers when setting rates, that the Commission's rate-setting procedure was unconstitutional as it violated the guarantee of due process found in the United States and West Virginia Constitutions, that he had been irreparably harmed as a result of the Commission's action, and that, consequently, the Commission was exceeding its authority.

Held: the procedures by which public utilities file for and obtain rate increases are constitutional from the perspective of both substantive due process and procedural due process. Writ of prohibition denied.

The procedures outlined in W. Va. Code § 24-2-4 provide, in essence, that utilities may file for rate increases with the Public Service Commission. After a thirty-day notice period plus, at the Commission's option, an additional 120-day suspension period, the rate increase goes into effect conditioned upon a bond being posted by the utility to guarantee a refund with interest of any overcharges to customers resulting from a subsequent disapproval or reduction of the rate increase. The provisions of this code section and the corresponding United States Code section are practically identical. The procedures prescribed represent a majority standard since most states have patterned their corresponding statutes after the United States Code model.

The initial finding of a property interest in the relator was essential to providing a basis for the due process arguments. Consequently, the first major point noted was the "common law right

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2 W. VA. CODE § 24-2-4 (1976 Replacement Vol.).
5 See 245 S.E.2d at 151 n.7.
in the consumer to just and reasonable rates from a government created monopoly." Knight relied primarily upon Allnutt v. Inglis, which states that a publicly bonded monopoly can take only a reasonable rate for its services.

The court, through Justice Neely, elaborated upon not only the discussion in Allnutt but the historical developments leading to the decision and its legal precedents. The court concluded that the English people had a general abhorrence for monopolies. This abhorrence was expressed in a statute that simultaneously noted many instances when the royal prerogative could be exercised to charter monopolies. The people had a right to reasonable regulation of these monopolies, implied in the statute. The court stated that: "It is this reasonable regulation to which the Allnutt case, supra, speaks in 1810. . . ." It was then noted that there is no difference between the royal chartered monopolies of 1810 and public utilities authorized by Chapter 24 of the West Virginia Code. Consequently, the court agreed with Knight that there was a common law right to reasonable regulation of government-created monopolies, and that since this right existed before the adoption of the West Virginia Constitution, it was a property right protected by the constitution. The basis for due process had been laid.

The second major point raised by Knight was that the statutory scheme for utility rate increases violated the guarantee of substantive due process. The court noted that the constitution's guarantee of due process included the concept of substantive due process. The standard for evaluating whether a statute meets the standard of substantive due process had been set forth in Harris v. Calendine as: Does the statute "bear a reasonable relationship to a proper legislative purpose." The court noted the need to provide for an adequate return for the utilities while preventing the charging of exorbitant rates. It was also noted that any delay in a rate increase, if the new rate is ultimately approved, works to shift

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8 Id. at 148.
9 21 Jac. 1, c. 3 (1623).
10 245 S.E.2d at 149.
11 W. VA. CONST. art. III § 10; art. VIII § 13; W. VA. CODE § 2-1-1 (1971 Replacement Vol.).
12 245 S.E.2d at 150.
14 245 S.E.2d at 150, citing 233 S.E.2d at 324 n.4.
the cost of current utility service from present to future customers. The court determined that there had been an effective balancing of the competing interests of customers and utility companies, obviously being swayed by decisions from other jurisdictions upholding the constitutionality of statutes paralleling West Virginia's.

The court's substantive due process analysis appears to miss the mark. As is correctly stated by Justice Miller in his concurring opinion, the United States Supreme Court distinguishes between cases in which a substantive due process attack is made on a statute of primarily economic significance and a statute that directly violates sensitive personal rights. In the former case the Court does not act unless the legislative action is wholly arbitrary and irrational. When sensitive personal rights are in danger, the Court's examination of legislative action is particularly close. The concurring opinion noted that "[t]he legislative purpose of the statutes is primarily economic and they evidence a reasonable attempt to balance the competing economic interests." Therefore, the statutory provisions in question are not in violation of the precepts of substantive due process.

When dealing with questions of substantive due process, the United States Supreme Court is always hesitant to overturn legislative enactments. The Court attempted to impose its own view as to what is "reasonable" in the economic arena in _Lochner v. New York_.

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14 Id. at 152.
15 Id.
18 245 S.E.2d at 154.
19 The point made by the concurring justice is particularly applicable to this decision. The majority cited _Harris v. Calendine_ for the proposition that the court will intervene in acts of the legislature that "do not bear a reasonable relationship to a proper legislative purpose." 245 S.E.2d at 150, citing 233 S.E.2d at 324 n.4. _Calendine_ concerned a juvenile who was adjudged delinquent after missing fifty days of school and sent to a forestry camp where he was confined with juveniles guilty of criminal acts. The court determined that the statute in question was constitutional but had been applied in an arbitrary, unconstitutional fashion. _Calendine_ involved precisely the type of sensitive rights reviewable under the stricter Supreme Court standard noted in the text. The majority in _Knight_ appears to have applied the easier standard utilized in sensitive rights cases to a statutory scheme concerned with economic regulation.
York and its progeny. This attempt was a dismal failure and the Court abandoned substantive due process as a basis for review of legislative action in *Nebbia v. New York.* The Court remained so hesitant about imposing its own view over that of legislative bodies that substantive due process remained dormant until the privacy decisions. Ever today, when there is a more activist judiciary and a rebirth of substantive due process, the Court rarely closely examines statutes with essentially economic impact. No economic legislation has been overturned by the Court on substantive due process grounds since the era of the New Deal.

The West Virginia Supreme Court of Appeals, while determining that the statute attacked did not violate substantive due process, has perhaps set the stage for future examinations of economic

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20 198 U.S. 45 (1905).
22 291 U.S. 502 (1934). The Court's attempt to impose its wisdom on the Congress was greeted with singular unpopularity. It resulted in President Franklin D. Roosevelt's attempt to "pack" the Court with justices more amenable to leaving intact his New Deal legislation. The paramount problem faced by the Court was the absolute lack of standards in evaluating economic legislation. There was also an almost total lack of competence in the area. As was noted by Learned Hand, "the legislature, with its paraphernalia of committee and commission, is the only public representative really fitted to experiment [with economic legislation]." Hand, *Due Process of Law and the Eight Hour Day,* 21 HARV. L. RSV. 495, 508 (1908). As has also been noted, *Lochner* was "the focal point in a judicial move to fasten on the country by constitutional exegesis unsanctioned by the Constitution, a pattern of economic organization believed by the Court to be essential to fullest development of the nation's economy." Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure, and Emasculation,* 15 AIZ. L. RSV. 419, 419 (1973).

The retreat from *Lochner* has been complete. In *Ferguson v. Skrupa* the Court stated:

Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . The doctrine . . . has long since been discarded.

regulatory statutes from this standpoint. Such a course of action by the court would be dangerous as it could ultimately lead to the same types of problems encountered by the Nebbia era Supreme Court. This danger is particularly acute with the present West Virginia Supreme Court of Appeals, which appears to have a certain proclivity for judicial legislation.

The procedural due process question in Knight hinged upon the provisions of W. Va. Code § 24-2-4. It was argued that these provisions violated the guarantee of procedural due process in that the procedure specified in the statute was inadequate to protect Knight's common-law property right to a reasonable utility rate.\(^5\)

The court relied for authority upon the second syllabus point of North v. West Virginia Board of Regents:\(^26\)

First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.\(^27\)

This syllabus point proved fatal to Knight's argument. The court recognized that even a temporary deprivation of money with a subsequent refund with interest worsened Knight's already precarious financial condition, but the court also recognized that the deprivation was admittedly temporary and consisted of a relatively small sum. Contrasting Knight's predicament to cases in which severe deprivation had occurred due to violations of procedural due process,\(^28\) the court determined that Knight had little about which to complain. The court also noted the compelling public policy against requiring pre-hearings, and accurately observed that the result of delaying a rate increase would be to shift the increase to later customers.\(^29\) The court then summarily concluded that the procedural safeguards were adequate to protect relator's property right.\(^30\)

The majority's opinion was cursory at best. There seemingly

\(^5\) 245 S.E.2d at 153.
\(^7\) 245 S.E.2d at 153.
\(^9\) 245 S.E.2d at 153.
\(^10\) Id.
was an abrupt conclusion that the statutory procedure did not violate procedural due process, and that this fact should be self-evident to the reader. Fortunately, the concurring opinion provided a more comprehensive analysis of the procedural due process question. Justice Miller noted that the majority did not follow the procedural due process analysis in *Waite v. Civil Service Commission*. This point shows a major flaw in the majority opinion. Justice Miller authored both *Waite* and *North v. West Virginia Board of Regents*. In *Waite*, Miller expanded upon the opinion and analysis in *North*. Of particular interest is the following: "Further refinement of these principles [the *North* test] was not necessary to the resolution of *North* because of the serious deprivation that had occurred. Here, we have a temporary deprivation and a more selective test is appropriate." The majority in *Knight* offered no reason for ignoring the later test set forth in *Waite* designed specifically for cases of temporary deprivation of a property right. The *Waite* analysis required the initial finding of a property interest, as did the test applied by the majority in *Knight*. The concurring opinion differed by questioning the existence of a common law right to reasonable utility rates. The difference became irrelevant, however, because there undoubtedly was a statutory entitlement under W. Va. Code § 24-2-4, which suffices for the *Waite* analysis. Once the property interest is identified, three standards set forth in the fifth syllabus point of *Waite* must be met:

The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In applying the *Waite* analysis to the facts of *Knight*, it becomes obvious that the customer not only will pay a higher rate during the period that the rate increase is in effect under bond, but also that he will automatically receive a refund of any amount overcharged. Also of significance is that the utility is forbidden

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23 241 S.E.2d at 169.
24 Id. at 165.
from charging customers for any interest it may be forced to pay on refunds. Second, while the risk of erroneous deprivation is not totally impossible, this risk is balanced against the fact that the amount in question would not be large and that there would be the often-mentioned refund with interest. Finally, the increased burden on the state to comply with the procedural safeguards requested by Knight would be considerable.\textsuperscript{35}

A significant additional consideration supporting Justice Miller's conclusion that Knight could not be afforded additional procedural safeguards concerned the particular nature of his complaint. It was noted that property deprivation cases fall into two general categories. First are cases in which a statute authorizes a possessory action by the state with no opportunity on the part of the citizen to be heard prior to the action.\textsuperscript{38} A second type of case involves situations in which a property right has been granted by statute or regulatory procedure, and it has been held that its subsequent removal by state action must be in accordance with due process standards.\textsuperscript{39} Both types of cases fit within the scope of matters reviewable by the judiciary because the right to be deprived is a personal possessory interest which the individual can identify and the court can protect. Just and reasonable utility rates do not favorably compare with the interests protected in the cases noted above. The individual's deprivation is caused by economic forces beyond his comprehension or control, not state action alone. Further, the interest is not a personalized right of the customer, as would be, for example, the right to a government job. Rate increases are, consequently, not the type of matter that should be resolved by the courts. "The whole fabric of the proceeding is peculiarly suited to the administrative forum, such that engrafting the adversary legal system into it seems ill advised."\textsuperscript{38}

The majority opinion noted the legislative history of the West
Virginia statute and its federal counterpart, as well as attempts to overturn as unconstitutional like statutes in other jurisdictions. Clearly, the type of regulatory scheme utilized by West Virginia has passed the test of constitutionality more than once. Further, rate increases do seem to be the type of matter best left to the legislative and administrative bodies unless there is the evidence of wholly arbitrary action required for intervention by the United States Supreme Court. The scheme in question does demonstrate a reasonable attempt to balance the competing interests of the consumer and the utility. While it is difficult for anyone to sympathize with an electric company that complains of a shortage of capital, it is at least arguable that unless rate increases take effect as soon as requested, later customers will pay for present service. Balanced against a temporary deprivation of money which is returned with interest, the procedures in effect are surely adequate to protect the citizen’s right to reasonable utility rates. Thus, the decision in Knight is correct, although better reasoning is found in the concurring opinion; it comports with current judicial thinking on due process on the federal and state levels in all regards, and in regard to fixing utility rates in particular.

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Id. at 151.
Id. at 152.