June 1941

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THE WEST VIRGINIA PUBLIC SERVICE COMMISSION*

C. A. Pears, Jr.**

IV. RATE REGULATION.

1. General Principles. Rate regulation is perhaps the most important single item of governmental control of public utilities. Serious disputes arise in connection with the enforcement of public utility duties to serve all, to render adequate service, and to serve without discrimination; utilities often contest the power of governing authorities to regulate their accounts, corporate structures, and other business affairs; but none of those matters touches so nearly as rate control the vital spot of the enterprise. The power to regulate rates strikes directly at the pocketbooks of those engaged in the enterprise, and an improper exercise of that power violates the canons of due process more clearly than in the case of any of the other powers so far discussed. A great portion of the litigation is on the subject of procedure and judicial review; but those matters are not quite so close to the life line, analytically, as this. The existence of the power of the state or its agencies must be established before the manner of exercise can become important. The limits and descriptions of the power are of primary concern; the method of its exercise may be found only later, and may depend to a degree on its nature.

The quantity of litigation in the field of rate regulation has earned a great deal of legal publicity, and within the last fifty or sixty years there has grown up a sort of common law on the subject. There are few West Virginia cases on the subject worthy of detailed comment, but there are many leading cases in other jurisdictions which are undoubtedly worth careful consideration in a study of the West Virginia law on the subject. Many of them are leading cases in other divisions of the law applicable to this commission and their discussion here may to a degree supplement that of West Virginia cases, to which previous chapters have been almost exclusively confined.

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* The first and second installments of this article appeared in (1940) 46 W. Va. L. Q. 201 and 292; the third installment appeared in (1941) 47 W. Va. L. Q. 192.

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The rate cases of foreign jurisdictions discussed here have been largely taken from the materials collected in Barnes, Cases on Public Utility Regulation (1933) 264-663, and Robinson, Cases on Public Utilities (1933) 219-502. It was felt unnecessary to make a more exhaustive search than in the materials referred to in these sources, for a general survey such as is contained here. This survey is intended not as an authoritative treatise on the
The first inquiry in this topic must be as to the source of the legislative power to regulate rates. While this is by no means clear on a basis of pure logic and public utility law as of 1880, it is well settled by authority. The case of Munn v. Illinois,183 involving legislative regulation of grain elevators, is the leading case on the subject. Added to by the holdings of the Railroad Commission Cases184 and Chicago, Milwaukee & St. Paul R. R. v. Minnesota,185 the rule was fairly well settled by 1900 and by 1930 was thoroughly imbedded in the law, so that today the existence of this legislative power is taken for granted. By this time legislatures had advanced to new fields in their exercise of this power, such as the establishment of minimum rates, and such extraordinary measures had even been upheld by the Supreme Court.186 The study of such legislation does not, however, yet belong to this field of the law.

As for the regulatory commissions, by 1930 their opinions rarely left anything to be desired, and often compared favorably with those of the appellate courts of their jurisdictions. Some of these opinions are noteworthy technical documents, reflecting the calibre and training of their membership.

The objective of commission regulation of rates is not only to protect consumers from unreasonably high rates, but also—equally important—to prevent price discrimination between consumers. Various factors enter into a determination of a "reasonable" rate under this dual definition: the value of the service to consumers, the volume of utility earnings, general economic conditions, those prevailing in the particular region, the character and adequacy of the service rendered, and the history of the particular company, all have some bearing on the question, and have been considered to varying degrees in the cases.

Assuming for argument that the Nebbia case is sui generis and not a binding authority in public utility cases generally (although it probably is, under present trends), the problem of minimum rates may be dealt with quite apart from that of maximum rates. The reason behind a maximum rate order is generally to prevent a utility which has a monopoly from taking advantage of it by charging exorbitantly, while that behind a minimum rate order is

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183 94 U. S. 113, 25 L. Ed. 77 (1876).
185 134 U. S. 418, 10 S. Ct. 462, 33 L. Ed. 970 (1890).
probably usually to prevent competing utilities from staging a price war which will affect the service rendered by either of them. The question of commission power to set minimum rates was raised in Public Service Comm. v. Great Northern Utilities Co., 167 involving specific rate orders as to natural gas. There it appeared that the market was not big enough to support both utilities, and that the company protesting would not be able under the order to earn a reasonable return, due to the competition. A unanimous court held the order proper, saying that the order must be shown to be confiscatory, causing the loss of property, to upset it. It seems an unfair result to subject a company to competition and to prevent it from competing, and it seems also that the reason advanced for the result, that the commission was acting in the interests of the public, to prevent rates so low as to cause service standards to decline, is not a valid one, because the conditions of competition existing were calculated to cause such a decline anyway. However, such considerations are probably insufficient to raise serious constitutional issues, and the decision of the court is proper as to the result reached.

An example of the method of treating an individual rate order is seen in Northern Pacific R. R. v. North Dakota. 168 There the rate set failed to cover the total costs attributable to the particular traffic for which the rate was set. The state court held that in order to show confiscation it must appear that a net loss was suffered on all rates, or that a fair return on the carrier's property was not earned, due to the rate. The Supreme Court, in reversing, said (per Mr. Justice Hughes): "... it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low." 169 This idea of robbing Peter to pay Paul was the only possible alternative to a generally confiscatory rate, and was advanced under some notion of fostering local industries. The local policy, however, proved insufficient to combat the constitutional objection. The result seems eminently fair: certainly if the state wished to subsidize an industry it should do it in a way that would affect all alike, instead of doing it at the expense of certain classes only.

The problem of discrimination by commission orders is one of several indirectly raised by the central issue of commission regula-

168 236 U. S. 595, 35 S. Ct. 429, 59 L. Ed. 735 (1915).
169 At p. 598.
tory authority. Others are the effect of local franchises or contracts, whether of prior existence or supervening; the factors which must be considered in determining the appropriate unit for rate-making; the prescription of temporary rates; and the assessment of the costs of rate-making proceedings against utilities affected. The first of these questions has been considered in connection with a West Virginia case, in an earlier chapter, where it was held that in the absence of a clear showing of relinquishment of legislative authority over utilities to the municipality, it might be exercised in spite of a municipal contract or franchise. Other courts have made the same decision on similar facts. In South Glens Falls v. Public Service Comm., the New York Court of Appeals sustained the action of the commission in abrogating a municipal rate contract, saying, "every doubt must be resolved in favor of the continuance of the power in the state... rate regulation is a matter of the police power of the state, and... a franchise to a service corporation may be modified without impairing the obligation of contract..."

The question of the proper unit for rate regulation becomes difficult where there are many cities or suburban districts in a heavily populated area, so that boundaries are merely arbitrary lines, or where large companies undertake to serve several towns in a given geographical district. As has been seen above, such situations raise nice problems as to the extent of holding out to serve and as to extensions of service. The problems of units for rate-setting is seen in such cases as Wabash Valley Electric Co. v. Young. There the utility served approximately fifty cities. The commission ordered a rate reduction in one town, treating it as a unit for purposes of determining the proper rate. The company contended that its entire operating property should be taken as a unit in fixing the rate base. The Supreme Court unanimously decided that the commission’s action was proper, because of the fact that the utility’s property was employed in serving entirely unrelated cities, and other utilities, none of which should be compelled to pay on the basis of the expense of serving others. This seems to be but slightly different from the disinclination to make one person pay the freight of another, expressed in the North Dakota case just noted. There are of course many more complicated problems, in-

170 Charleston v. Public Service Comm., 95 W. Va. 91, 120 S. E. 398 (1923).
171 225 N. Y. 216, 121 N. E. 777 (1919).
volving greater difficulty of determining just what is the fairest boundary for a rate unit; in such cases greater latitude would undoubtedly be given to the commission in making the decision; the principle, however, is clear, that the normal rate base may be split in the interest of fairness to classes of consumers served by the utility.

The prescription of temporary rates arises in this way: the commission proposes to establish a new rate for a utility, but the inquiry will be lengthy; so to avoid delay, a temporary rate is established effective until the commission can determine properly what the final rate should be. This practice was condemned in Prendergast v. New York Telephone Co.,173 where the temporary rate was held confiscatory. The temporary rates were final legislative acts as to the period during which they should remain in effect, and if the rates were confiscatory there was as much reason for relief as if it had been proposed to continue them in effect. This decision established the necessity of a fair return on the proper rate base for a temporary rate, and thus practically outlawed temporary rates; for if all the elements necessary for a final rate are present, it might as well be set finally. However, in the case of Bronx Gas & Electric Co. v. Malitie,174 decided in 1936, the New York Court of Appeals literally refused to follow the Prendergast case, first analyzing it and demonstrating its effect, then pointing out that temporary rates are proper and necessary in spite of the decision, and reaching the conclusion that the temporary rate before the court was quite proper. It was pointed out that if the temporary rate were too low, it could be balanced by a higher rate later, although that practice was disapproved in the Prendergast case, and seems inconsistent with the Wabash Valley Electric Company and North Dakota doctrines. The New York court treated the consumer class as a unit, but that seems to rest on a not entirely justifiable assumption of constant use by each consumer over a considerable period of time, whereas in the case of electric companies amounts of service will fluctuate from one month to another.

A slightly different angle of the temporary rate question was presented in a West Virginia case, where a temporary rate was prescribed as an investigatory measure in order to aid in determining what the rate should be thereafter. This was held proper by

the state court, and the supreme court on review tacitly approved the practice. The case was decided before the Pendergast decision, however, and it may be necessary to consider it overruled by the later decision, especially as the precise point of temporary rates was not decided by the court in the West Virginia case.

An earlier phase of the same litigation, as the New York case discussed, brought up the last problem to be discussed here—that of assessing utilities with the cost of rate regulation proceedings. It has always been held proper for such costs to be borne by the public; it has also been regarded as constitutional for commission expenses to be charged to public utilities as a class, by a special tax or otherwise. West Virginia meets most commission expenses with a special, flexible, license fee for all public service companies. In the Bronx Gas & Electric Company case, however, it was sought to make a utility which was the object of an investigation pay the expenses of such investigation. The court rejected the utility's contention that the expenses should be spread among all utilities, saying that there was no reason for charging those which did not need investigating with the expenses of investigating one whose rates had been questioned. This reasoning, of course, begs the question of the fault of the investigated utility and of the purity of the others, but there seems to be no due process objection to such a practice, if a state wishes to follow it.

It would be impossible to cover adequately in a single section all the matters arising under the general head of rate regulation as such. All that has been done is to indicate a few of the problems peculiar to the subject, which have been raised in one form or another in the history of the West Virginia commission, with an indication of their treatment in the leading cases in other jurisdictions, especially where no final decision has been rendered in West Virginia. No exhaustive analysis of those cases has been undertaken; it has been deemed sufficient for the purposes of this study to describe them briefly and to indicate their status as leading authorities in this field. It may be necessary to go into the rate-base cases somewhat more fully in order to give a fair picture of that subject.

2. The Rate Base. A rate set by a commission must, in order not to be confiscatory, allow the utility a fair return on the value

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of its "property," in the sense of the Fourteenth Amendment. Three questions arise under this general principle. The first is, what property shall be taken as the rate base; the second is, how shall it be valued for rate purposes; and the third is, what is a fair return on that value under existing circumstances? On the first question there has never been a definite, positive, specific statement, which has been judicially supported, as to just what factors must be considered, and in what proportions the factors considered will be controlling, in determining the rate base. Implicit in the precedents established by the Supreme Court decisions dealing with the constitutional validity of commission-fixed rates, however, is the "fair value" doctrine. This doctrine is a mixture of two different rules as to the essential factor in the rate base: the reproduction cost rule and the present value rule. These two things are different, but they are confused in the decisions, especially as the court has avoided an explicit statement as to what will be considered a satisfactory practice by a commission, but has in general confined itself to condemning or approving the processes in specific cases. A further complication has been the persistent disagreement of some members of the court with the present fair value doctrine and their dissenting or specially concurring opinions in many of the cases.

The parent case on the point of the rate base is Smyth v. Ames,178 decided in 1898. During the nineties price levels had reached low ebb, falling steadily from the panic of 1893 until the decision in Smyth v. Ames. Utility property was not worth nearly so much as had been paid for it, in most cases. The utility interests, therefore, wished to capitalize original cost for their rate bases, while the state argued on two grounds: that the state could regulate rates, even if such rates left nothing above operating expenses, without violating the Fourteenth Amendment; and secondly that the reasonableness of the railroads' profit in this case should be computed upon the present value of the roads. The court, however, affirmed an injunction against the rates, saying, per Mr. Justice Harlan:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original

178 169 U. S. 466, 18 S. Ct. 418, 43 L. Ed. 819 (1898).
cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

On this statement rests most of the law as to the proper rate base, and the seven factors named in it have all had their day in rate cases. Several possibilities of interpretation of the rule appear: it might mean that all the elements of value named must be given equal weight, or that a single element may be considered controlling, if all are considered, or that some elements are more important than others, depending on the facts of the particular case, and that the judgment of the commission is conclusive in a given case as to the proportionate weight to be given the different elements, or that question is always reviewable by the courts; or it might be merely an evidentiary rule, requiring reversal only where there has been refusal to hear testimony bearing on the various elements of value.

The case of Knoxville v. Knoxville Water Co., indicated a limit beyond which the doctrine of Smyth v. Ames would not be carried. In that case the circuit court disapproved a rate because the return yielded by it would be less than six per cent on the valuation of the utility's property made by a special master. In reversing, largely on the valuation point, the court said:

"The city authorities acted in good faith, and they tried . . . to obtain from the company a statement of its property, capitalization and earnings . . . the power of refusing to enforce legislation . . . ought to be exercised only in the clearest cases . . . it is not tolerable that its exercise should rest securely upon the findings of a master . . . It is enough that the whole case leaves us in grave doubt."

This seems to put the onus on the company to prove a definite fault in the rate, and to that extent to modify the duty of the rate-setting body to consider the proper elements in determining the base.

In San Diego Land Co. v. National City, the court affirmed

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179 At p. 546.
181 At pp. 3 and 18.
182 174 U. S. 729, 19 Ct. 804, 43 L. Ed. 1154 (1898).
a decision that the actual value of the property at the time the rates were to be fixed, and not its original cost, was the proper base on which to compute the rates. And in *San Diego Land Co. v. Jasper* the commission fixed the value at $350,000, on the basis of the replacement cost. The utility presented evidence of original cost by which it claimed a valuation of $1,000,000, but the commission gave controlling weight to the lower reproduction cost factor, and the Supreme Court held the rate fixed not confiscatory, saying, "No doubt original cost may be considered . . . . In the present case . . . it has very little importance indeed." Mr. Justice Holmes wrote the opinion and seemed to regard the fair value as the settled rate base:

"It no longer is open to dispute that under the Constitution 'what the company is entitled to . . . is a fair return upon the reasonable value of the property at the time it is being used for the public' . . . . That is decided . . . . against the contention that you are to take the actual cost of the plant . . . ."

The modern issue was joined under different circumstances. The fair value doctrine was evolved by those who wished to keep utility rates down in time of depression and to make them suffer as well as the rest of the business world when prices were abnormally low. During and after the war, however, prices skyrocketed, and by the twenties a fair return on the fair value rate base yielded a tremendous rate on the original cost of the plant. Those who wished to keep utility operators from getting rich now shifted ground in order to prevent utilities from benefiting from the general wave of prosperity. The new plan for a rate base was known as the prudent investment base: the amount originally, prudently, invested in the utility property. Of course this new scheme worked in only one direction; for if the conditions of 1898 should be repeated, the utilities would have a difficult time showing the prudence of an investment which had declined fifty per cent in value, if the commission wished to reduce rates for public convenience; and under this theory the commission's action would be upheld over the utility's protest in each case, thus satisfying the proponents of the theory, who wished to provide a method for making the commission's action watertight.

The prudent investment forces because a factor to be seriously

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183 189 U. S. 439, 23 S. Ct. 571, 47 L. Ed. 892 (1902).
184 At p. 442.
considered after the case of *Southwestern Bell Telephone Co. v. Public Service Comm.*, 186 in which it was the subject of a lengthy and carefully written dissent by Mr. Justice Brandeis, who seems to have adopted the theory shortly before this case. That case involved rates which had been set by the Postmaster-General while telephones were under federal control during the war, and continued by Southwestern Bell when it took its plant over again in 1919. The Missouri commission ordered the rates to be lowered, after a hearing, and the circuit court of appeals sustained the order, refusing to enjoin.

The Supreme Court reversed, Mr. Justice McReynolds writing the majority opinion. The company had in the commission hearing produced a great deal of evidence as to the value of its property; the total cost, reproduction cost, and existing values, allowing for depreciation, were shown. The commission concluded that the estimates of the company’s witnesses, engineers, accountants, and other experts, were excessive, on the basis of appraisals of three of the company’s exchanges, made in 1913, 1914, and 1916. This was held improper, the court saying:

"Obviously, the Commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc. . . ."

"It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of to-day." 187

Mr. Justice Brandeis in his dissent attacked the whole present value theory of arriving at the rate base, saying that the rule of *Smyth v. Ames* was legally and economically unsound. It rested, he said, on a vicious logical circle, since value is calculated largely from the return the property will produce, while the purpose of rate investigation is to determine what return it shall be permitted to produce. He also pointed out various difficulties from the strictly scientific viewpoint of determining value—an obviously unsound argument if it stood alone, because value must be determined

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187 At pp. 287-288.
in many cases, including damage suits, and the mere difficulty of sustaining the pure economic theory of such determinations should not affect their legality, if men of business and legal experience have approved them, as they have, in rate cases as in others.

Brandeis also objected to the present fair value rate base because of its instability, due to fluctuations in price levels, pointing out that it is undesirable to have rates set for the future on an unstable rate base. To this it must be answered that it is also undesirable to have a rate base which will, though stable for a long period of time, operate unfairly for a considerable part of that period.

Brandeis' last point in favor of the prudent investment theory was that it is definitely determinable, while there is no one definite criterion which is always controlling, if ascertainable, in fixing the present value rate base. This seems to be a telling point, and a valid ground of criticism of the fair value theory, as developed by the court. Obviously there should be a single standard which could be relied on in all cases by commissions and utilities alike, and which if faithfully observed would obviate the necessity for review in each case.

In any case, irrespective of the merits of the present value prudent investment issue, the new scheme announced by Mr. Justice Brandeis (not an entirely new idea, but novel in this case) became tremendously popular among those interested in curbing utility earnings, and was widely cited by commissions in rate-cutting orders to justify their decisions. It was not adopted by the Supreme Court; subsequent decisions seem to have raised the problem of analysis, whether the court in each case, though adhering to the language of the "present value" doctrine, was not in reality adopting to a degree the prudent investment rate base as the proper standard. (It is worthy of note that many early cases might be cited in support of the prudent investment theory, even though they followed Smyth v. Ames.) A half-dozen recent decisions will serve to illustrate this problem as to the court's trend.

In the case of Los Angeles Gas & Electric Co. v. Railroad Comm.,188 the commission had ordered a rate reduction, after finding that the rates established in 1928 were actually affording a much higher return than the seven and one-half per cent which they had been calculated to yield. The Supreme Court in refusing

to order an injunction against the rate order said, "we do not sit as a board of revision, but to enforce constitutional rights." The commission had played fast and loose with the various elements which must be considered under former decisions of the Court. The Court in its opinion pointed out that such items as reproduction cost are relevant factors which should have appropriate consideration, but said that such items had not been decided to furnish exclusive tests. The Court proceeded to examine the figures offered by the company and to reject them as unsound because of depression conditions, refused to upset the commission's findings or to hold them to any single standard, and finally approved the order as issued, a result which could have been reached properly by a short cut without so much laborious lip-service to the Southwestern Bell rule.

Mr. Chief Justice Hughes delivered the opinion in Clark's Ferry Bridge Co. v. Public Service Comm.,\(^{189}\) where an order refusing to consider franchise value as a part of the rate base was affirmed. The court refused to admit the validity of the company's testimony or to support the criticisms of the commission's findings. The chief ground of attack on franchise and similar values in the rate base seems to be that they are donations, not contributed by the utilities themselves, and that the public should not have to pay a return on property so acquired. Such items, however, are often included.\(^{190}\) It seems that the company should not be prevented from realizing a return on all its property, no matter what the source, and that the mere fact that the property was acquired by gift should not make any difference in the rate base. However, such special values are normally not included in the definition of "present value" for rate purposes.

The case of Lindheimer v. Illinois Bell Telephone Co.,\(^ {101}\) marks a decided step toward the prudent investment theory. There the commission had ordered rate reduction, and the district court had issued an injunction against the enforcement of the order. Both sides appealed, the company claiming that existing rates were too low, and the commission contending for a reduction according to its order. It was clear that the existing rates, and a fortiori the proposed rates, were confiscatory if the base were calculated ac-


\(^{190}\) Wisconsin Hydro-Electric Co. v. Railroad Comm., 208 Wis. 348, 243 N. W. 322 (1933) held that the present value of the utility's property included such items.

\(^{101}\) 292 U. S. 151, 54 S. Ct. 658, 78 L. Ed. 1182 (1934).
ccording to the usual technique. However, it appeared that the company had been thriving, even under the supposedly confiscatory rates, and had said that they were fair when the commission first attacked them. The Court therefore refused to support the company’s contentions, saying that by proving too much it had failed altogether and that if the rates were confiscatory before, and the company realized a profit on its investment, there was no reason to believe that under changed conditions it might not do as well under the decreased rates. The substance of the decision was that the company might not claim the increment due to an improvement in the general business level, and that if it was realizing a profit according to the prudent investment rate base, the commission’s order would not be disturbed. The case is clearly wrong, so far as the law of the Southwestern Bell case is concerned; it remains to be determined whether it has to the extent that it is inconsistent with that case overruled it as to the proper rate base theory.

A return to the orthodox view occurred in West v. Chesapeake & Potomac Tel. Co.\textsuperscript{102} There the district court had pronounced the commission’s order confiscatory, after an independent calculation of the value of the utility’s property. The Supreme Court held that the district court had erred in its determination of the fair value of the property, and, consequently, that its conclusion that the commission’s order was confiscatory must be rejected. The decree of the district court was affirmed, however, on another ground: that regardless of whether the commission’s order was confiscatory as a matter of substance, they had not used the proper method of calculating the rate base. Not only is substantive due process necessary in these cases, but the procedure of the commission must conform to approved methods also, or the order will be held unconstitutional.

This case, in rejecting “translators” of dollar value obtained from price trend indices, as not a constitutional method of calculating utility rate bases, seems a far cry from some of the earlier cases which permitted extraordinarily sloppy commission procedure in such cases and from the latitude which Mr. Justice Brandeis and his adherents would permit commissions in these cases. However, the case makes a desirable advance in this one respect: it affords a definite unchanging, reliable standard of commission procedure, which may be followed in future cases, and thus provides a much-

\textsuperscript{102} 295 U. S. 662, 55 S. Ct. 894, 79 L. Ed. 1640 (1935).
needed measure of certainty and predictability in this field of the law.

That measure of predictability went through the window soon afterwards, however, when the case of Railroad Comm. v. Pacific Gas & Electric Co.\textsuperscript{193} was decided, in January, 1938. The commission there used the historical cost method of determining the rate base, approximating the prudent investment base in its result. It was held that the finding was proper; the court merely rules on the question as to whether the rate set was confiscatory, and not as to whether procedural due process has been followed. The opinion clearly disregards the West case; by implication it approves the prudent investment rate base; and if it does these two things, it renders a great deal of the law discussed in this section as well as that to be covered in the next section, on valuation, academic; because if the court will refuse to set aside a commission order improperly arrived at, because it feels that no one has been seriously injured, the rules for ascertaining rate bases are reduced to persuasiveness in their effect on rate-setting procedure. However, there is yet time for another reversal of field by the court, and the Pacific Gas & Electric case does not put a stop to discussion until it has been sanctified by subsequent decisions. Therefore it may be well to examine a few more cases before leaving the subject.

The case of Willcox v. Consolidated Gas Co.,\textsuperscript{194} decided in 1909, represents the view that replacement cost is the determining factor in the value of the property. The case involves the New York eighty-cent gas law of 1906, and the issue of original cost versus replacement cost was not directly argued, but was in the background. Mr. Justice Peckham in the opinion said: "... this increase in value was part of the sum on which complainant was entitled to a return ... except where the property may have increased so enormously in value as to render a rate permitting a reasonable return on such increased value unjust to the public." On the paradoxical language of this last exception may be rested all the "straddle" cases which are about to be considered.

The first of these was Galveston Electric Co. v. Galveston,\textsuperscript{195} in 1921. There the method of ascertainment of "present value" was not reproduction cost at present prices, but estimated original cost plus a percentage increase in recognition of the higher price level.

\textsuperscript{193} 302 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319 (1938).
\textsuperscript{194} 212 U. S. 19, 29 S. Ct. 192, 53 L. Ed. 282 (1909).
\textsuperscript{195} 258 U. S. 388, 42 S. Ct. 351, 66 L. Ed. 678 (1922).
(or a percentage of the difference between the historical reproduction as of 1913, and a prophesied "future plateau" price level). The value reached was two-thirds what it would have been had present reproduction cost been used, but the court held that the valuation was proper, since the increase in price level was recognized and some weight was given to replacement cost, and that the proportion in which various factors were used lay within the discretion of the rate-setting body.

Two years later, just after the Southwestern Bell case, came Georgia R. R. & Power Co. v. Railroad Comm. There the commission took, as its measure of ascertaining present value, reproduction cost as of 1914, instead of present reproduction cost, which was seventy per cent higher. The only concession allowed the present value theory was an addition of $125,000, to represent the appreciation in land values. The discrepancy between the value as found and the one which would have been found under proper technique (according to the orthodox rule) was over four million dollars. Mr. Justice Brandeis, who was almost always on the side of the commission when the court divided, wrote the opinion, saying: "The refusal of the commission to hold that, for rate making purposes, the physical properties of a utility must be valued at the replacement cost less depreciation was clearly correct." This flies in the face of the orthodox doctrine, and makes it clear that there was still no one method by which the rate base had to be ascertained.

The last of the great "straddle cases" was McCardle v. Indianapolis Water Co., decided in 1926. There the replacement cost was over $21,000,000; the original cost was $13,000,000; the commission found a valuation of $15,000,000; and the Court enjoined enforcement of the commission order, saying the value was $19,000,000. The case, therefore, stands not for approval of either the reproduction cost or the original cost theory, but merely for disapproval of the proportion in which they were applied in the case. The Court emphasized reproduction cost, evidently not

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197 Mr. Justice McKenna wrote a telling dissent in this case, on the authority of the Southwestern Bell case, decided less than a month prior to this decision, and of the Bluefield Water Works case, decided the same day. (The Bluefield case will be dealt with later on a valuation point which was the main issue involved. It adopted reproduction cost as the only proper rate base.) McKenna pointed out that there was no possible ground of distinction between this case and the earlier ones, and challenged the majority to reconcile them—which they had not done.
198 272 U. S. 400, 47 S. Ct. 144, 71 L. Ed. 316 (1925).
because it should be the only basis, but because in the case the historical cost bases were so far off the proper basis as to be practically worthless for calculation purposes. Mr. Justice Brandeis wrote a strong dissent, feeling that the Georgia Railroad case should have been followed; and indeed, Mr. Justice Butler's statement that "the commission, where price level is stabilized, may hold that reproduction cost is a fair measure of present value for rate making purposes," is an almost direct contradiction of Brandeis' statement on the point in the Georgia Railroad case, if the word "may" is read, as it seems it should be, to mean "must."

In summary, it may be said that the authorities have carried the "doctrine of Smyth v. Ames" a great deal further than would have been necessary if the case had been read differently. It was simply an authority for reducing utility price levels in accordance with general business losses, and was not a holding that due process required reproduction cost or present value to be used as the controlling factor in determining the base for rate making purposes. The subsequent cases on present value have wavered a good deal as to what is constitutionally required to be included in a consideration by a commission of the value of the utility's property for rate purposes. Some, like the Southwestern Bell and Bluefield Water Works cases, hold the commission pretty definitely to reproduction cost; others permit more or less laxity in decision where reproduction cost is given some weight; some permit almost any valuation where it appears that consideration was given to the proper elements; and some of the seven factors mentioned by Mr. Justice Harlan have been almost entirely ignored in subsequent rate cases, at least since 1920. The sum total of the present value cases would seem to indicate an unwillingness on the part of the court to lay down a definite rule for future application, and a desire to review each case on its particular facts and to use the language of earlier cases to substantiate the current decision. The West case might be considered a final settlement of the question were it not for the subsequent Pacific Gas & Electric case; the West case is probably now of no greater significance than any other in this field, and must be considered primarily an authority on procedural due process, and secondarily, as to the absolute necessity of this particular procedure in these cases, a final thundering of the old court before Gotterdammerung.

The status of the prudent investment theory is not yet sure; it is certainly not yet the required method of determining the rate
base, although it is today almost certain to be approved if applied. It is used on occasion by state commissions, but state courts will not permit it in all cases. In 1930, the Minority Report of the New York Commission for Revision of the Public Service Commission Laws contained a “Bill to Enact the Prudent Basis of Rate Regulation,” which would have destroyed every vestige of the reproduction cost basis in commission calculations. Many legal writers advocate the general adoption of the system, and it may become the general practice in a few years, without serious objection by the Supreme Court.

It is submitted here that the issue between prudent investment and present value should be subdivided. First, as a practical matter, it may be admitted that the prudent investment basis is the simplest to calculate and the easiest to administer, that it requires the fewest adjustments and mathematical and economic analyses of any of the bases suggested, and that from the standpoint of simplicity, predictability, and enforceability of the law, it may be the most desirable. Second, from the constitutional standpoint, it is probable that the injustice of the prudent investment basis may well be considered insufficient to constitute confiscation, or a taking of property without due process in the sense of the Fourteenth Amendment. The question seems to boil down to the feeling of the individual judge as to the degree of fairness required in these cases by the Constitution. Cases have been decided on both sides of the question, and nothing closer to a logical issue than that has appeared. Today, since the Pacific Gas & Electric case, and probably until conditions such as those existing in 1898 are repeated, the prudent investment basis will likely be upheld wherever applied. Third, the moral question of fairness to the utility investor is clearly answered in the negative by this basis of calculation. Whether it is unconstitutional or not to do so, it is clearly and indisputably unfair to the investor in utility property to penalize him by saying that because of the nature of the business in which he is engaged he may not grow prosperous with the rest of the

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200 See NEW YORK LEGISLATIVE COMMITTEE REPORTS (1930).
201 It should be remembered that the term “prudent investment” is not properly used in a critical sense, according to Mr. Justice Brandeis, in the Southwestern Bell dissent. However, in times of depression, when values decline greatly, it is doubtful if utility owners may rely on the “presumption that their investment was made in the exercise of sound business judgment.” It is probable that the knife is single-bladed.
world; that he may not partake of benefits arising from the general rise in price levels, but must still value his property as of the time he bought it, perhaps a quarter of a century ago, irrespective of the inflation that may have occurred in all other walks of life. This penalty, if generally enforced, will tend to kill utility business in times of expansion and will ultimately redound to the injury of the public as well.\footnote{The problem which properly follows that of determining the rate base, and precedes that of deciding the proper rate of return on it, is that of valuation of the base. This at first blush would seem to be merely a question of accounting methods, but there are really included two questions: the inclusion of doubtful items in the value to be measured by the accountant, and the propriety of the accounting method to be used. Most of the difficulties arise in connection with the calculation of operating expenses, and the inclusion of various items such as bad debts and cost of rate proceedings in them (the question being whether these costs should be borne by the utility investor or the public receiving the service). See, in connection with this problem, Chicago, M. & St. P. R. R. v. Tompkins, 176 U. S. 167, 20 S. Ct. 336, 44 L. Ed. 417 (1900) (constitutionally necessary to determine operating expenses—gross receipts a bad measure); Chicago & G. T. R. R. v. Wellman, 148 U. S. 329, 12 S. Ct. 400, 36 L. Ed. 176 (1892); Reno P. L. & W. Co. v. Public Service Comm., 285 Fed. 790 (D. C. Nev. 1923) (bad debts not deductible except where company clearly not at fault); Mobile Gas Co. v. Patterson, 265 U. S. 47, 44 S. Ct. 444, 68 L. Ed. 895 (1924); West Ohio Gas Co. v. Public Utilis. Comm., 294 U. S. 63, 55 S. Ct. 316, 79 L. Ed. 761 (1935) (questions as to treatment of expenses of rate litigation); Newton v. Consolidated Gas Co., 259 U. S. 101, 42 S. Ct. 438, 66 L. Ed. 844 (1921) (Court cut allowance for master’s fees from $118,000 to $49,000, taking their own salaries as a standard); Brymer v. Butler Water Co., 179 Pa. St. 231, 36 Atl. 249 (1897) (sinking funds, like interest on indebtedness, allowable only if indebtedness incurred as approved operating expense). As to difficulties of mechanics of valuation, see 75 L. C. C. 1 (1918) (efforts of the L. C. C. to value United States railroads under the act of 1913); Ex Michigan Bell Telephone Co., 10 P. U. R. (N. S.) 149 (1935) (extensive study of proposed methods of calculating depreciation, pointing out distortion caused by straight-line method, usually used, and adopting a cumbersome substitute which seems not to obviate difficulties, but merely to shift risk to company or errors inevitable without an annual inventory and service analysis, practically impossible); Lindheimer v. Bell Telephone Co., 292 U. S. 151, 54 S. Ct. 655, 78 L. Ed. 1182 (1934) (straight-line method of calculating depreciation); Dayton P. L. Co. v. Public Utilities Comm., 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267 (1934) (necessity of allowing reserve for depreciation where company is consuming a corpus such as a natural gas well); United Fuel Gas Co. v. Railroad Comm., 275 U. S. 300, 49 S. Ct. 159, 73 L. Ed. 390 (1929) (valuation by estoppel; company may not alter book value, which is held a public representation of proper value); Interstate Commerce Comm. v. New York, N. H. & H. R. R., 237 U. S. 175, 35 S. Ct. 106, 77 L. Ed. 248 (1915) (going value, with other intangibles, need not necessarily be awarded a separate valuation by commission). See also, on going value, Hardman, \textit{Going Value As Value for Purposes of Rate Regulation} (1918); 55 W. Va. L. Q. 89, and Hardman, \textit{Recent Developments in Regard to Rate Regulation} (1924) 30 W. Va. L. Q. 70, severely criticizing the inclusion of going value in rate cases. Space prevents a more detailed discussion of the materials here referred to, which might otherwise be proper to give a complete picture of the subject.)}

3. \textit{The Rate of Return.} The rate of return is the last element necessary to be considered by the rate-fixing agency. It, multiplied
by the rate base, produces the "fair return" guaranteed by the Constitution. The rate of return, of course, varies with the feelings of the commission or court which is the final arbiter of its reasonableness. The commissions are charged by the legislature with the duty to establish rates fair both to the consumer and to the utility, considering all economic factors relative to the investment of the utility owner and to the needs of the consuming public, and the approach of the commission is naturally colored by this background. The court, on the other hand, is primarily concerned with the legality of the commission's action, and does not need to consider many of the factors important in the commission's determination. In the cases, however, the reasonable return of the commissions and the legal or nonconfiscatory return of the courts have become somewhat confused, and for the purposes of an empirical study they may be treated together.

The topic deserves little more than the comment that returns of from four per cent or a little less to eleven per cent or a little more have been held proper, on the one hand, in affirming lower tribunals, and necessary, on the other hand, in cases reversing the inferior tribunals. The variation in amounts seems to spring from changing business levels and different business enterprises affected, rather than from any formula of universal applicability. A few cases will be presented here in addition to the foregoing summary, chiefly because two West Virginia authorities are among the leading cases in the field.

The case of Duluth Street Ry. v. Railroad Comm.,203 presents a caveat as to the powers of the particular commission involved. In that case it was empowered to reduce rates which were unreasonably high; it undertook to reduce those of the street car company here, because they yielded a return of more than seven and a half per cent, which was considered an unreasonably high rate of return. It was contended, however, that the action was not justified unless the rates charged the public were unreasonably high, irrespective of the profits the company might receive from them—an ingenious argument of statutory construction which failed, however, in the court, which advised a compromise by the company toward a rate of seven and one-half per cent, according to the commission's order, which was sustained.

In Huntington v. Public Service Comm.,204 the West Virginia

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203 161 Wis. 245, 152 N. W. 887 (1915).
204 89 W. Va. 703, 110 S. E. 192 (1921).
commission established a rate which would yield nine per cent on the value of the utility's property—two per cent for depreciation and seven per cent for a fair return on the investment. The court held that due to general rates of interest, business conditions, and the relative degree of risk incurred by the utility investor, compared to those of other enterprises, seven per cent was an unreasonably high yield on the rate base, and the increase granted by the commission was consequently disallowed. The court was divided three to two, and one of the majority wrote a special concurring opinion. The decision of the commission was unanimous. This case was continued before the commission for several years after the decision by the court, and three supplemental orders were entered—all over a difference of one per cent more or less on the utility's investment.

In *Bluefield Water Works & Imp. Co. v. Public Service Comm.*, the commission entered a rate order which was carried to the Supreme Court. The order was reversed on several points, including valuation methods and rate base questions (the commission had failed to give sufficient weight to reproduction cost in calculating the rate base). As to the rate of return, the Court after reviewing Supreme Court cases on the point decided between 1906 and 1923, holding returns of from five to eight per cent proper, decided that under the facts of the case a return of six per cent was substantially too low to constitute just compensation. This decision was contemporary with that above, holding seven per cent too much, in the state court.

Contrasts with this 1923 case may be found in earlier and later times; in 1903 a return of four per cent was held by the Supreme Court not to be confiscatory, while in 1930 rates even below four per cent have been tacitly approved. The temper of the times and the complexion of the court make a tremendous difference in the way they look at a balance sheet and a business index chart to approve or disapprove a utility rate of charges.

4. *West Virginia Rate Practices*. It would not be profitable to review here the many dicta in West Virginia rate cases citing with approval Supreme Court authorities on the point. It may be fairly assumed that West Virginia law is not peculiar with respect to rate regulation, and that authorities generally respected elsewhere are valid in West Virginia. There are four or five cases

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which represent the bulk of the West Virginia court's original work on the subject, and these cases will be brought together here.

The present value rate base has long been accepted as proper in West Virginia. In *Huntington v. Public Service Comm.* the question of the proper rate base for a telephone company was involved. The present value theory was enunciated by the court, which said that the utility was entitled to a reasonable return on the full fair value of its property in public use. The opposing considerations—that the rate must not be so low as to be confiscatory, nor so high as to be greater than the value of the service to the consumer—were both set out by the court, which recognized the necessity of a compromise by the commission. Some of the company's property was subject to a mortgage securing a debt incurred in organizing the business. It was held that such property should be included, and that a bonded lien on the property afforded no reason for excluding it from the rate base, since in any case the public was using property in which the utility had the beneficial interest, and even the bondholders would prefer the property to be productive. The utility had bought up the entire property of a competing company shortly before this litigation. It was held proper to include such property at the cost to the utility, even though it had paid more than the property was actually worth. The fact that the property was bought from a competing utility probably made the result different from that which would have followed a holding company transaction. Another question raised in the case was as to the allowance for interest on outstanding securities of the company. It was held that the exact amount payable on such bonds should be considered, and that an arbitrary allowance of seven per cent would be improper, if the obligations were actually at five or six per cent. A similar question was raised with regard to the reasonableness of the rate of return; the commission had arbitrarily considered six per cent, the legal rate of interest, a fair return. It was held that general business conditions and the situation of the utility might be such that a proper return would be either greater or less than the legal rate of interest. The commission had calculated the difference between the value of the utility's property and its outstanding debts, and allowed a return of six per cent on that difference, plus an arbitrary amount to take care of interest on the

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206 89 W. Va. 703, 110 S. E. 192 (1921), aff'd, 91 W. Va. 346, 112 S. E. 571 (1922); the same litigation went back up in 101 W. Va. 378, 133 S. E. 144 (1926) where the decision was finally rendered. (See note 204 supra.)
utility's bonds, which were assumed to be at seven per cent. The order was upset for the several reasons noted above.

The case of Bluefield Water Works & Imp. Co. v. Public Service Comm.,\(^{207}\) went to the United States Supreme Court, and both the final decision and the unreversed portions of the West Virginia court's opinion are important legal sources in this study. The Supreme Court decision, condemning the rate set because it did not conform to approved valuation methods of the present value theory is, as has been seen, a leading case on fair value. A return of six per cent was there held too low a rate for a utility in West Virginia in 1923, but the decision on that point did not purport to go further than the facts of the case. The lower court had approved the establishment of a temporary rate for the purpose of ascertaining what the proper rate should be, as a means of calculation. However, one factor entering into the court's approval of that rate, as distinct from the ground noted above in section 3, may have been the fact that the guinea-pig rate was an eminently fair one, so far as the utility was concerned—eight per cent. The Bluefield case attempted to limit the value of the utility's water rights to the amount paid for them, saying that where there was a natural source of supply anyway, such extra value claims were extremely tenuous. The strength of the holding is somewhat limited by the Supreme Court's reversal of the valuation, since it was placed in original-cost language; it seems, however, to be merely a refinement of the present value doctrine, and proper under the Supreme Court's ruling. The case is also authority for consideration of such a factor as the current high cost of living in calculating rates.

The case of Coal & Coke Ry. Co. v. Conley,\(^{208}\) a pre-commission decision, is widely cited by West Virginia lawyers in rate cases, and appears in many commission opinions. In that case the railroad had been built without any expectation of profit, merely to break even on coal traffic. It was held in that case that the lack of expectation of profit was no reason to deny one to the railroad if it later proved possible to make one without charging unreasonable rates. On the other point raised in the case, as to the treatment of earnings applied to the purchase of new equipment, it was held that for rate purposes they should be considered as net earnings.

\(^{208}\) 67 W. Va. 129, 67 S. E. 613 (1910).
In the case of Charleston v. Public Service Comm.,\textsuperscript{209} the company attempted to include in the rate base the amount of a discount at which its bonds \textsuperscript{7} had been issued. It was held that such a discount was merely an adjustment of the interest rate, and should be amortized over the life of the securities. Judge Meredith, who wrote the opinion, expressed regret at being unable to throw the entire present value doctrine overboard and follow the prudent investment theory, but the court regarded itself as bound by the Southwestern Bell and Bluefield decisions. It was also held in the case that income taxes might be charged up as operating expenses by the company, but that excess profits taxes could not—a reasonable distinction, since the latter tax does not arise from work done for the public.\textsuperscript{210}

In integrating the West Virginia commission practices with those of similar agencies in other jurisdictions over the country, it should be remembered that such practices exhibit appreciable variety, although almost all have borrowed from one another. Of the three type leaders in this field, Wisconsin may be said to represent more nearly than either New York or California\textsuperscript{211} the West Virginia practices. Of course, West Virginia has attempted no such active regulation of such items as operating expenses as may be found in Ohio, Wisconsin, or Oregon (which has all utilities on budgets). Although detailed reports are required of all utilities, the active utilization of such regulatory powers as the commission may have is rarely pointed toward rate regulation. Rate proceedings in West Virginia are almost always on complaint by a municipality or other consumer group served by the utility, or by the utility itself.\textsuperscript{212}

In concluding the discussion of rate regulation, it may be pointed out that the cases noted from other jurisdictions, and in the Supreme Court, should be considered of as much value in pre-

\textsuperscript{209} 95 W. Va. 91, 120 S. E. 398 (1924).

\textsuperscript{210} See Natural Gas Co. v. Public Service Comm., 95 W. Va. 557, 121 S. E. 716 (1924); Chesapeake & O. R. R. v. Public Service Comm., 75 W. Va. 100, 83 S. E. 256 (1915); and Clarksburg Light & Heat Co. v. Public Service Comm., 84 W. Va. 638, 100 S. E. 551 (1919), for other points raised in the West Virginia cases dealing with this topic.


\textsuperscript{212} Fewer than twenty investigations have been initiated by the commission on its own motion, in rate cases, which have resulted in affirmative orders for rate changes, in over a quarter of a century.
dicting the course which the West Virginia court will follow as the West Virginia cases themselves. The law on the subject is in many respects not settled, but it is sufficiently generalized so that the same doubtful points may be found in other jurisdictions, and what is settled in Wisconsin is probably settled in West Virginia.

V. PROCEDURE AND REVIEW.

1. Procedure and Sanctions. The West Virginia Public Service Commission statute contains three provisions relating to procedure. The first grants to the commission power to prescribe rules of procedure and evidence, and provides that the commission "shall not be bound by the technical rules of pleading and evidence, but in that respect may exercise such discretion as will facilitate its efforts to understand and learn all the facts bearing on the right and justice of the matter before it." 213

The second provision concerns procedure for changing rates. The restrictions as to notice, filing schedules, and clear statements as to the rates to be charged apply to utilities and not to the commission, which is authorized to suspend and to change rates on less notice than that provided for in the statute. The commission has power to suspend rates pending hearings for periods of up to eight months; the burden of proof in all rate cases is placed on the utility, and the commission has discretionary power to require or to dispense with pleadings. Notice to the public by publication is permitted where more than twenty persons are affected by a rate change. 214

Where a utility has violated the provisions of the act, procedure by any person aggrieved is by petition to the commission, which thereupon investigates and takes proper action in the courts, after a warning to the utility analogous to the common-law rule to show cause. If the utility makes reparation to private persons injured by any violation of the act, and otherwise purges itself and promises to behave, court remedies are cut off. 215

Pursuant to the first provision cited above, the commission prescribed a set of rules for practice and procedure before it in

213 W. Va. Acts 1913, c. 9, § 2; W. Va. Rev. Code (1931) c. 24, art. 1, § 7. The definition of the word "technical" in the statute, of course, is at the root of all the problems arising under it, whether constructional or constitutional.


1915; substantially the same rules are in effect today, since the last revision in 1931.\textsuperscript{216} Of the twenty-two rules in force today, eight are purely formal, relating to office hours, records, witness fees, certified copies, and similar matters. The important rules provide for the style, joinder and intervention of parties, the form and service of complaints, the form and contents of answers, and amendments, covering matters of pleading. Ancillary rules deal with interrogatories accompanying pleadings, with admission of cases on complaint only, and with special requirements for applications to change rates. Other provisions deal with procedure on hearings, testimony, stipulation of facts, depositions, briefs, and rehearing and reopening cases. There has been no litigation questioning the propriety of any of these rules; no one has claimed lack of due process because of the nature of the procedure afforded thereby.

Many of the leading cases decided under the Public Service Commission Act have involved points of procedure, raised incidentally, to pad the grounds for appeal, and decided in almost the same spirit, but none have been fought on the sole issue that the procedure was improper under the constitution or statute.

The case of Randall Gas Co. v. Star Glass Co.,\textsuperscript{217} raised a few procedural points. There it was held that the provision in the statute requiring notice to the utility and to the public of any order of the commission changing rates did not require individual notice to the patrons of the gas company, and that the order was not invalid because of the lack of such notice. However, the order, even if valid, did not operate \textit{per se} to change existing rates, but rather as a permission to the utility to do so, and in that case, where the utility had failed to file a new schedule of rates with the commission, the new rates were adjudged not to have been in effect.

\textsuperscript{216} Rules of Practice and Procedure, Public Service Commission of West Virginia (Charleston, 1931). As to the right to raise federal constitutional issues in general, see Norfolk & W. R. R. v. Public Service Comm., 91 W. Va. 414, 113 S. E. 247 (1922), holding the process before the commission, with the accompanying right to review in the Supreme Court of Appeals, sufficient under the fourteenth amendment.

\textsuperscript{217} 73 W. Va. 252, 83 S. E. 840 (1915). See Wheeling v. Benwood-McMenemy Water Co., 115 W. Va. 363, 176 S. E. 294 (1934), decided under the section cited supra n. 214, requiring such notice by a company before a rate change.

\textsuperscript{218} 90 W. Va. 1, 110 S. E. 475 (1922). In an earlier case under the same style [81 W. Va. 457, 94 S. E. 545 (1917)], the commission ordered the railroad to furnish cars on X’s siding for X’s use, with X’s consent. X and the railroad had a contract in force at the time of the order providing that such service would not be rendered to others without the consent of both parties. The order was upheld over the railroad’s claim that it impaired the obligation of contract, the court saying that in order successfully to contest the validity...
In *Baltimore & Ohio R. R. v. Public Service Comm.*\(^{218}\) a private manufacturer entered a complaint and obtained an order requiring the railroad to provide additional facilities (siding and switch). Both sides filed pleadings and took evidence before the commission. It was held that the utility company might not later complain of lack of opportunity to be heard or of lack of notice. Attacks on the proceedings because of the commission’s act in examining matters beyond the issues raised by the parties also failed, because the commission is not bound by ‘‘technical rules of pleading and evidence.’’

In *Weil v. Black*,\(^{219}\) it was held that the commission must enforce a proper rate order by going to court and seeking the statutory remedies, and that if it is sued to enjoin enforcement, it must defend such suit diligently. The commissioners’ acts are official, not private, and they have no choice in the matter.

In addition to the imposition of this duty on the commission, the court will permit a private individual to sue to enforce a commission order,\(^{220}\) although this remedy is infrequently sought, the commoner method being to apply for a writ of mandamus to the commission.

The statute provides severe penalties for violations of the Public Service Commission Act: for the first offense, the offender is fined up to a maximum of a thousand dollars, and may be imprisoned for a maximum of one year; for the second offense, and for subsequent offenses, the maximum fines are greatly increased (the highest being five thousand dollars) and minimum fines and imprisonments are provided for. That this section could be interpreted to make noncompliance with the act a serious matter is indicated by the fact that each day of noncompliance constitutes a separate offense. Separate penalties are provided for falsifying, destroying, or altering entries in books, or other statements, and for violating certain important commission orders, and blanket penalties cover offenses against the commission not otherwise provided for. The Public Service Commission is also given the right to punish for contempt, just as the circuit courts. Full damages

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\(^{218}\) 76 W. Va. 685, 86 S. E. 666 (1916).

\(^{219}\) 90 W. Va. 74, 110 S. E. 489 (1922).
are recoverable in civil actions by private parties injured by any violation of the act.\(^{221}\)

The article of the statute providing for penalties has been invoked in only a few cases, and the severity of the penalties, and the nature thereof, have never been questioned. It is sufficient, therefore, to indicate their nature, without dwelling further on them. The provisions of this article are substantially similar to those in other states, and were taken from those in force under the Wisconsin and Virginia acts.\(^{222}\)

2. Review of the Commission's Action. The subject of judicial review of administrative action is too large for adequate discussion here of the whole field. Even the particular phase of the subject concerning public utility commissions is beyond the scope of this section, and would probably be a fit subject in itself for an administrative study. For our purposes the subject may be treated from the standpoint of the following three items, especially important in the West Virginia law.

a. The act provides for review of final orders of the commission as follows: Any party feeling aggrieved by any final order may within thirty days petition to the Supreme Court of Appeals, praying for the suspension of the order. After a hearing by the court, it shall decide the matter in controversy as seems to be just and right.\(^{223}\) There are various minor provisions in the statute as to form, procedure, and limitations, but the essence is the final determination by the court upon petition of the correctness of a commission order.


\(^{222}\) Several Supreme Court cases establishing what may be termed the "law of the land" on the subject of procedure may be indicated here, although they raise questions which cannot be given thorough consideration in this article: Southern R. R. v. Virginia, 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 186 (1933); Baltimore & Ohio R. R. v. United States, 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 637 (1924) (note the interesting division of the Court in this case); Ohio Bell Telephone Co. v. Public Utilities Comm., 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937); Morgan v. United States, 8 F. Supp. 766, 398 U. S. 468, 56 S. Ct. 908, 80 L. Ed. 1288 (1936); 23 F. Supp. 380, 304 U. S. 1, 58 S. Ct. 773, 82 L. Ed. 1129 (1938), 24 F. Supp. 214, 304 U. S. 590, 58 S. Ct. 999 (1938) (this much-trampled controversy demonstrates several possible new departures in this field, on the general question of "a reasonably fair hearing", the standard limited by earlier courts. Its chief purpose is to stir up the field, and it may be said that in spite of early decisions almost anything in the nature of hearing may now be approved on the one hand or required on the other, until the Court crystallizes its position on the point.)

b. The case of *Ohio Valley Water Co. v. Ben Avon Borough*, 224 decided in 1920, involved an appeal by the utility from a commission ruling on the ground that the valuation by the commission of the company's property made rates based on it in effect confiscatory. The superior court, reviewing, substituted its own valuation. The Pennsylvania Supreme Court held that the reviewing court in exercising an independent judgment upon the proper valuation to be placed on various property items had exceeded its jurisdiction, because there was some evidence to support the commission's finding. The supreme court held that such an independent judgment by the reviewing court must be afforded, under the due process clause. The holding in the case, which has since come to be known as the *Ben Avon Borough* doctrine, has become crystallized in the law; reviewing courts in utility rate cases, at least, must exercise an independent judgment as to both matters of law and of fact, if a question of confiscation is involved, under the Fourteenth Amendment.

c. The Constitution of the State of West Virginia provides that "the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time ...."225 This clause has been held to prevent the exercise by any court of any power of a legislative nature. The court refused to assume the power to determine whether the qualifications established by the legislature to practice medicine existed in any given case,226 saying that such determinations were legislative in nature and not exercisable by the judicial branch. Such decisions illustrate the very strict interpretation of the clause given it by the West Virginia court.

The history of the right to judicial review of administrative decisions goes back to the heyday of the Railroad Commissions, after *Munn v. Illinois*, and may be traced to the *Ben Avon Borough* case, and since that leading decision through several qualifications and attempted qualifications, and much criticism. It is best, for purposes of this study, to treat the doctrine of the *Ben Avon Borough* case as settled, that the parties may not constitutionally be deprived of the right to a complete judicial review of law and

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224 253 U. S. 257, 40 S. Ct. 527, 64 L. Ed. 908 (1920).
225 W. Va. Const. (1872) art. V.
facts. The case has been much discussed elsewhere, to an extent which would render it useless duplication to trace in detail the course of decisions indicated above. It seems that considerations of fundamental fairness would compel the result of the Ben Avon Borough case, but the question, as will be seen, has been rendered largely academic in this jurisdiction. It may be indicated in passing that the recent course of Supreme Court cases may indicate that the rule is on its way out.\footnote{The conflict raised by the Ben Avon Borough case is discussed in Hardman, Extent of the Finality of Commission’s Rate Regulations (1922) 28 W. Va. L. Q. 111, taking the point of view, contemporary, that the Ben Avon Borough case was a mistaken decision.}

The first judicial review case decided after the Public Service Commission Act, in 1914, indicated the problem which has since existed, of a conflict between the Ben Avon rule and the West Virginia separation of powers clause, which had previously been interpreted to be a rigid restriction on the functioning of the courts.\footnote{For a thorough review of cases of review in West Virginia, see Davis, Judicial Review in West Virginia—A Study in Separation of Powers (1938) 44 W. Va. L. Q. 270, discussing the problem in detail, from the standpoint not only of public service law, but also of review of the decisions in the fields of taxation, workmen’s compensation, and various other administrative tasks. This article is cited for its review of the materials; the opinions expressed therein are the author’s own.} In United Fuel Gas Co. v. Public Service Comm.,\footnote{73 W. Va. 571, 80 S. E. 931 (1914).} the company sought review under the act, a commission order concerning rates and discrimination in service, claiming a violation of the due process clause, among other grounds. It was held that the separation of powers clause prevented consideration by the Supreme Court of Appeals of any matter legislative, executive, or merely administrative in nature, on appeal from any inferior tribunal, unless power to consider such matters had been expressly conferred by the constitution. Since the rate making power is legislative, the court refused to substitute its judgment for that of the commission as to reasonableness, although the review provision of the statute was not entirely nullified. It was held to give the court jurisdiction akin to mandamus or prohibition, and hence to grant relief against commission orders based on mistakes of law. This seems to extend review to about the extent of that defined by the Illinois Central and Union Pacific cases, but it is in definite conflict with the Ben Avon case, decided six years later. It is possible that had the Supreme Court enunciated the requirement of an independent judgment as to both law and fact, before this decision,
the West Virginia leading case would have been worked out otherwise. What is important is that it did not and that the West Virginia court seems to have elected to follow its own rule rather than that of the Supreme Court. The West Virginia Constitution, as interpreted by the United Fuel Gas case, and the Federal Constitution, as interpreted by the Ben Avon case, are in direct conflict, and the West Virginia court, constituted under the West Virginia Constitution, logically follows it—raising an interesting problem of state's rights, the power of the Supreme Court to force a state to follow the Federal Constitution.

A recent decision on the problem, Hodges v. Public Service Comm., settled what had been in doubt, whether the West Virginia court would actually follow the United Fuel Gas case where the issue between it and the Ben Avon doctrine was clearly presented. The case involved a license granted by the commission to build a dam on Cheat River, in a proceeding in which the application was resisted by various interested citizens of the state. The license was granted under the Water Power Act of 1929, and an appeal was taken to the Supreme Court of Appeals under the provision of that act for “appeal to the circuit court with trial de novo in that court.” The Kanawha County Circuit Court had reversed the commission order. The court, reversing both the commission order and the circuit court decision, held the provision for appeal was a violation of the separation of powers provision and unconstitutional. The case is a landmark in this subject, and seems to settle the law in West Virginia, even though public utility lawyers have been greatly shocked by it and have protested it as an impossible case under the Federal Constitution.

The Hodges case rests on a sufficiently firm foundation of West Virginia cases so that it seems to have at least as good a chance of remaining law as the Ben Avon case does, and it would be idle to speculate as to which will fall first. It is submitted that there is no valid ground of criticism of the opinion, except that it ignores the Ben Avon case and that, so far as the face of the opinion is concerned, the Supreme Court rule has not been cast aside but merely has not been considered by a court not primarily concerned with it.

The Hodges case is in line with earlier cases involving licenses

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231 See Davis, supra n. 228, at pp. 352-360. See Donley, The Hodges Case and Beyond—(1939) 45 W. Va. L. Q. 291, for a telling criticism of the position taken by Mr. Davis in this article, and a reiteration by the latter of his views in A Final Word on the Hodges Case (1939) 45 W. Va. L. Q. 316.
to build dams under the Hydro-Electric Power Act of 1915. In *Howell v. Public Service Comm.*\(^{232}\) the court refused to review an order of the Public Service Commission granting permission to build a dam, saying that the granting of such permission was a "purely legislative function" and that, since no review of such orders was specifically provided for in the Hydro-Electric Power Act, the general provisions of the Public Service Commission Act would not be extended to authorize such review. The court seemed to feel that review of any sort over a commission exercising legislative functions would be such an extraordinary practice that it would not be presumed that the legislature had intended it, in the absence of a specific provision. The decision was, of course, one of statutory interpretation, refusing under the statute to exercise even the mandamus-prohibition review it permits itself, while the *Hodges* case was a constitutional decision, refusing to exercise review of factual matters where the power is conferred by statute.

The decision in the *Howell* case was reiterated in *Royal Glen Land & Lumber Co. v. Public Service Comm.*\(^{233}\) although even there the decision was based on the statute, and the rule was not made a matter of constitutional law, as it was in the *Hodges* case. In the *Royal Glen Lumber* case the commission had awarded permission to a power company to build a dam across the South Branch of the Potomac. The lumber company petitioned for review, contesting the order. In refusing the petition, the court said: "The power so delegated . . . is legislative in its character, and amounts to nothing more than a grant of a legislative permit or charter . . . . instead of granting a permit or franchise direct by legislative enactment, the lawmaking body has seen fit to delegate this function to a state agency peculiarly fitted for that purpose . . . . whether the act of the Commission in granting the permit is legislative, judicial, or administrative, or whether it is a mixture of these governmental functions, it is unnecessary to determine . . . . the statute provides for no appeal . . . ."\(^{234}\)

The only direct issue ever joined on this point and carried

\(^{232}\) 78 W. Va. 664, 90 S. E. 105 (1916).

\(^{233}\) 91 W. Va. 446, 113 S. E. 749 (1922).

\(^{234}\) Cases involving other administrative bodies and stating the same rule as to the constitutional necessity of commission finality as the Hodges doctrine are: *Danielly v. Princeton*, 113 W. Va. 252, 167 S. E. 620 (1933) (State Water Commission—act held unconstitutional because of review provision), and *Staud v. Sill*, 114 W. Va. 208, 171 S. E. 428 (1933) (foreclosure sales reviewable by circuit court under statute, held bad under the constitution).
to the highest court was in the *Bluefield Water Works* case, where the Supreme Court held that the water company could carry the case to that tribunal if the rate was challenged as confiscatory and had been upheld by the state court. One of the grounds for reversal in the case was the refusal of the court below to exercise an independent judgment on questions of fact as well as on legal questions. The question involved, as to the rate base and proper rate of return, was a legal one, but the Supreme Court went slightly out of its way to disapprove the West Virginia rule of administrative finality on questions of fact.

In *Charleston v. Public Service Comm.*, the constitutional issue was not raised, but the court held that the "jury rule" would be applied, and the scope of review exercised was restricted to an ascertainment of the existence of competent evidence upon which to rest the commission order. There, as in *Weil v. Black*, *State v. Baltimore & Ohio R. R.*, and the *Royal Glen Lumber* case, the court seems to have had some difficulty in keeping the nature of commission action straight under definitions. The struggle to keep their activities properly classified, noted in these opinions, is a strong argument for those who claim that the whole doctrine of separation of powers is an unsatisfactory one and should be thrown overboard in favor of a more realistic rule.

The leading cases thus far discussed are by no means the only holdings of the West Virginia court on the point. In *Bluefield Telephone Co. v. Public Service Comm.*, it was held that review would be granted only to keep the commission within the law and to protect constitutional rights, and that a commission order would not be annulled unless it was an unlawful, arbitrary, or capricious exercise of power. In effect, of course, the determination of this question would necessitate a judicial review of the proceedings of the commission, but the rule as stated is quite consistent with the court's refusal to review questions of fact. In *Huntington v. Public Service Comm.*, the rule was stated that there would be no interference with a rate order, unless

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235 86 W. Va. 536, 103 S. E. 673 (1918).
236 76 W. Va. 685, 86 S. E. 666 (1916).
237 76 W. Va. 399, 85 S. E. 714 (1915) ("the powers exercised are quasi-legislative, quasi-judicial, and administrative").
238 See, on this subject, Hardman, supra n. 227, criticizing the Ben Avon doctrine.
239 102 W. Va. 296, 135 S. E. 833 (1926) (type of evidence on which commission based order—history of the utility, not expert witnesses' testimony—held not disturbable).
240 101 W. Va. 378, 133 S. E. 144 (1926).
it appeared that there was (1) an unconstitutional exercise of power by the commission, (2) an exercise of power not conferred by the statute, (3) a mistake of law by the commission, (4) a rate so low as to be confiscatory, and to deny due process, or (5) an order arbitrarily contrary to the evidence, or without evidence to support it. Other statements of the rule have been: that while a rate order will be reviewed where there has been a misapplication of law, findings of fact will not be disturbed on appeal; 241 that findings of fact will not be disturbed unless contrary to the evidence, or there was no evidence to support them; 242 and that where there is a substantial conflict of evidence on any question of fact, the commission’s action in determining the probative value to be accorded it will not be disturbed. 243

The reluctance of the West Virginia court to determine questions of fact may be due to an unwillingness to apply to fact situations the criterion set up by the word “reasonable,” in rate cases any more than in tort cases, where that is ordinarily left to the jury. This is expressed in opinions stating that the court will not review “questions of policy,” or in the more recent statements that “the court will not determine the reasonableness of rates.” 244

This interpretation of the motivation of the rule, which may help to delimit it, is supported by contrast in Natural Gas Co. v. Sommerville, 245 where the rate had been set by the commission, and consumers went into court to claim that the utility was overcharging. It was held that the court would decide the issue as a judicial question and that there was no need for the plaintiff first to exhaust his administrative remedy. These cases, of course, do

241 Harrisville v. Public Service Comm., 103 W. Va. 526, 138 S. E. 69 (1927). See also Pittsburgh & W. Va. Gas Co. v. Public Service Comm., 101 W. Va. 63, 132 S. E. 497 (1926), where it seems that administrative finality as to a rate order was held proper, although the constitutional necessity of such a holding was not mentioned.

242 Baltimore & Ohio R. R. v. Public Service Comm., 90 W. Va. 1, 110 S. E. 475 (1922); MacKubin v. Public Service Comm., 95 W. Va. 546, 121 S. E. 731 (1924), where a commission order refusing to stop trains at a certain station was upheld.

243 See Pittsburgh Gas Co. v. Public Service Comm., and Harrisville v. Public Service Comm., both supra n. 241. United Fuel Gas Co. v. Public Service Comm., 103 W. Va. 306, 138 S. E. 388 (1927), is an example of an “arbitrary” order of the commission, “contrary to the evidence,” where the order would have duplicated service, and forced one utility out of business; it is one of the few reversals of the commission by the court in this sort of case. The rule stated, however, is the same; the court will not interfere with commission orders in matters of policy.


245 113 W. Va. 100, 165 S. E. 352 (1933).
not definitely point the reason for the rule of administrative self-sufficiency where the commission decides questions of fact; they merely delimit the rule and show that it is restricted to cases where the commission has acted or where the court may not act initially.  

The Virginia cases have exhibited the same slowness on the part of the court to reverse the Corporation Commission, when matters of fact are appealed. There, however, the rule of commission finality rests not on the constitutional separation of powers provision, but on the provision for review, which is included in the Virginia Constitution, which is merely their parallel to the West Virginia review statute in the act. The provision reads that "the action of the commission appealed from shall be taken as prima facie just, reasonable, and correct." This undoubtedly governs in such cases as the determination of reasonable rates, but does not afford a satisfactory explanation of such a case as Carroll v. Commonwealth, where the reviewing court refused to consider evidence as to whether an applicant for a license was operating a motor vehicle on February 28, 1923, treating the commission finding as conclusive and refusing the certificate. There appear to be no cases in which the corporation commission has been reversed on questions of fact, although some of the rate cases involved what have been called mixed questions, under the Virginia statute. The Virginia rule cannot be said to be the same as that in force in West Virginia, resting as it does on a different legal foundation, but the results reached in that court seem to be the same as those reached under the West Virginia rule, without the direct defy to the Ben Avon rule.  

The objection of the West Virginia court to the idea of a full judicial review of matters of fact has been urged on other courts, most of which refuse to give it controlling weight. A leading case on the question is Duluth v. Railroad & Warehouse Comm. of Minnesota. There the statute provided for a hearing de novo on review by the court of a commission order revaluing a street-car company's property. It was contended that to do this the court

247 Va. Const. § 156 (f).  
248 140 Va. 305, 125 S. E. 433 (1924).  
249 See Powell, The Relation between the Virginia Court of Appeals and the State Corporation Commission (1933) 19 Va. L. Rev. 433, dealing with some of the Virginia cases on judicial review in a general fashion.  
250 167 Minn. 311, 209 N. W. 10 (1926).
must exercise legislative power, but the court held that the statute did not make that requirement, since the court under it had neither the power to fix a new rate nor to modify the one under review, but merely to "affirm, modify, or reverse the finding of the commission according to law." Were it not for the last three words, begging the question, it would seem clear that the power to modify a commission order included the power to modify the rate set by that agency; it is not entirely clear even under the statute as it stands that such is not the case. However, under other Minnesota decisions it is clear that the power of review exercised in that state is judicial, not legislative, and such appears to be the general rule.

In concluding the subject of judicial review not much can be said to clarify the West Virginia law, beyond what has already been noted in the course of the discussion. The authority of that jurisdiction is settled, so far as present precedents are concerned, by the United Fuel Gas case and the Hodges case. The conflict between the West Virginia rule and the Ben Avon Borough doctrine also seems clear. The reason for the West Virginia rule is clearly stated in the cases; the motive behind the decisions is not so clear. To attempt to ascertain that motive involves a teleological surmise that perhaps should not be made in a study of this sort. It seems, however, that the rule is merely a manifestation of the reluctance of the court, observed elsewhere, to reverse the commission on any decision, where it seems that the commission is just as well qualified to pass on the matter in issue as the court. It is submitted that this rule is, from the standpoint of practical statesmanship, much more workable than the Ben Avon rule, and at least as likely to achieve a desirable result, given, what we must assume, an honest and able commission.

It is interesting to note that the West Virginia court, which is a conservative court, by a very strict and conservative interpretation of the separation of powers clause and of the public service commission law, reaches the result advocated by the element of the Supreme Court generally regarded as the liberal faction, on the due process question, which is directly contrary to the Ben

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251 The rate set by the commission was enjoined by the federal court, in spite of this decision; the street car company was held not bound by the statutory method of obtaining relief from the commission order. Railroad & Warehouse Comm. v. Duluth St. Ry., 4 F. (2d) 543 (D. C. Minn. 1924), aff'd 273 U. S. 625, 47 S. Ct. 489, 71 L. Ed. 807 (1927).

Avon rule, generally considered a conservative rule. A moral philosopher might point out a generalization on the subject of liberalism and conservatism to be drawn from this anomaly; it is perhaps sufficient here to note it as an example of a result affected by the point of view of the court reaching it, as well as by the point of departure of that court. The West Virginia court may have failed to see the forest for the trees, or it may be that the result reached by it is more truly consistent with its general legal philosophy than the Ben Avon rule would be.263

As the end of this study is approached, it may be said by way of conclusion that it is felt that the chief purpose served by it has been to give a general, if not a comprehensive, picture of the workings of a typical administrative body. No striking peculiarities of law or of practice have been noted. The most extraordinary rule noted, that as to judicial review of fact findings, may be classified as constitutional, rather than administrative, law, although the general practice is to consider problems of procedure, notice and hearing, review of administrative action, and commission finality, as the purest administrative law. These questions, in so far as they deal with constitutional requirements of certain practices, rather than with the practices themselves are classifiable as constitutional law. The purely legal questions as to the extent of a public service commission’s jurisdiction, and as to rate regulation and other controls exercisable over utilities, may be termed parts of public utility law. So it seems that if labels are carefully chosen, the field of administrative law will be narrowed to a few questions of political science, as to governmental and commission practices in administrative regulation. If the labels are chosen a little differently, all legal matters affecting primarily the functioning of an administrative agency are included in administrative law. To avoid the necessity of choosing the label which will make the boundaries of administrative law and those of this work identical, it is perhaps better to hurdle the difficulty and call this work, including matters of administrative practice, the agency’s statutory authority, and legal rules affecting its operation, an administrative study—not quite coinciding with the accepted administrative law concept.

263 See, for a quo vadis study of the subject, Guthrie, Public Service Commissions (1928) 14 A. B. A. J. 358.