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COMMENT

BEN AVON SOUTH OF THE BORDER*

WILLIAM ANDREW KERR**

Ben Avon was "born" just north of the West Virginia-Pennsylvania border in the famous *Ben Avon Borough* controversy of 1920.¹ When he was summoned south of the border the following year to assist the *Bluefield Water Works & Improvement Company* in its dispute with the *West Virginia Public Service Commission*,² the *United Fuel Gas* case³ was thrown up as a stumbling block in his path. That case, decided by the West Virginia supreme court six years earlier, had held that a court could not substitute its opinion for that of the public service commission. To do so would be to act legislatively in violation of the separation of powers clause of the state constitution. However, *Ben Avon* came armed with the knowledge that the due process clause of the Federal Constitution requires a court to exercise an independent judgment as to the facts when confiscation is claimed in rate cases. As a result, a "perfect dilemma" was presented. "If, then, the proper interpretation of the opinion in the *United Fuel Gas* case is that the separation of powers clause forbids the court from exercising an independent judgment as to both law and facts, the separation of powers clause, as interpreted, violates the Fourteenth Amendment. From the standpoint of the legislature, a perfect dilemma is presented . . . Separation of powers, the cardinal principle upon which the federal and all the state governments are founded, a great American contribution to the science of government, violates the due process clause! Such an absurd result surely proves the unsoundness of either the *United Fuel Gas* case or the *Ben Avon* case, or both."⁴ Needless to say, *Ben Avon*, with the backing of

* Many writers state that the *Ben Avon* rule no longer exists. If this is true, then the question discussed in the instant article, *i.e.*, whether the West Virginia cases comply with the *Ben Avon* requirements, is rendered purely academic. However, the opinion is not unanimous. In *Opinion of the Justices*, 328 Mass. 679, 106 N.E.2d 259 (1952), the justices state that they prefer to see the death certificate before being convinced that the rule is dead.

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¹ *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

² *Bluefield Water Works & Improvement Co. v. Public Service Comm'n*, 89 W. Va. 736, 110 S.E. 205 (1921).

³ *United Fuel Gas Co. v. Public Service Comm'n*, 73 W. Va. 571, 80 S.E. 931 (1914).

⁴ Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers*, 44 W. VA. L.Q. 270, 292 (1938).

the United States Supreme Court,⁵ won the case for the *Bluefield Company*.

The *United Fuel Gas* case⁶ is universally cited for the proposition that a court cannot substitute its opinion for that of a commission. If the court did lay this down as an inflexible and absolute rule, then the dilemma is perfect. But it seems that the court's opinion can be construed to the effect that this was laid down only as a general rule, subject to certain exceptions. This case was the first rate confiscation case and the first case to come before the court after the creation of the public service commission. As a result the court was called upon for the first time to construe the validity and effect of the legislative act. It first held that its power was original rather than appellate; then it proceeded to discuss its reviewing power. Because of the separation of powers clause in the state constitution, a court cannot substitute its opinion for that of the commission. Otherwise, the actions of the commission would be worthless; the salaries paid the commissioners would be money wasted. After indulging in these generalities, the court cited *Interstate Commerce Comm'n v. Union Pacific R.R.*,⁷ and stated that orders of the commission "are final and not subject to judicial interference unless '(1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law.' But it is there said, that questions of fact may be so involved in the determination of questions of law, that an order regular on its face may be set aside if it appears that, '(4) the rate is so low as to be confiscatory . . .; or (5) if the commission acted so arbitrarily and unjustly as to fix rates contrary to the evidence . . .; or (6) if authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that substance and not the shadow determines the validity of the exercise of the power.'"⁸ After thus discussing its reviewing power, the court turns to the facts of the particular case before it. First it finds that the act is valid and concludes that the first four assignments of error must be dismissed. These four assignments cover the first three exceptions listed above, constitutional authority, statutory authority, and mistake of law. Thus, the court exer-

⁵ *Bluefield Water Works & Improvement Co. v. Public Service Comm'n*, 262 U.S. 679 (1923).

⁶ Note 3 *supra*.

⁷ 222 U.S. 541, 547 (1912).

⁸ *United Fuel Gas Co. v. Public Service Comm'n*, 73 W. Va. 571, 583, 80 S.E. 931, 936 (1914).

cised an independent judgment as to these exceptions. Then it says, "[A]nd we may say *en passant*, and apropos to the suggestion that said order is based on a mistake of law involving questions of fact, that there is not presented any controverted fact justifying a holding that the rate . . . is so low as to be confiscatory, or is the result of arbitrary and unjust action"⁹ It then proceeds to the issue in the case which is whether discrimination between the customers of the utility was justified. What did the court mean by the above quoted language? As to the latter three exceptions listed where questions of fact are mixed with questions of law, would the court have exercised an independent judgment as to both the law and the facts involved had some "controverted fact justifying a holding" been presented? *Controverted* means *disputed*, so would the court have exercised its own independent judgment on such a fact in determining confiscation? Is the stating that there is no basis for a holding of confiscation alone the exercise of an independent judgment? If so, then the *United Fuel Gas* case could be considered as a forerunner of the *Ben Avon* case.

The second rate confiscation case in West Virginia also preceded the *Ben Avon* case, *Clarksburg Light & Heat Co. v. Public Service Comm'n.*¹⁰ There the court exercised an independent judgment as to the issue of confiscation, but based its decision solely upon the question of a mistake of law. It is interesting to note that the court expressed an independent opinion as to the facts involved, although this was not used as the basis of its decision.

In that case, the company requested an increase in rates and the commission granted only a partial increase. An appeal was taken on the basis "that the rates allowed by the commission upon any theory of the case are confiscatory of the petitioner's property, not yielding to it a reasonable return upon the value of the property devoted to the public service."¹¹ The utility contended that \$300,000 instead of \$150,000 should have been allowed for amortization in establishing the rate base. The court found that amortization was proper since the gas would be exhausted in five years and that then the plant would be worth only salvage. "In order to determine whether or not the Public Service Commission has adequately allowed for this purpose, it is necessary to review the fiscal

⁹ *Id.* at 585, 80 S.E. at 937.

¹⁰ 84 W. Va. 638, 100 S.E. 551 (1919).

¹¹ *Id.* at 642, 100 S.E. at 552.

history of the petitioner.”¹² It found that during the first eleven years, the company had allowed only \$300,000 total for depreciation, approximately \$30,000 a year. Said the court, “. . . [D]uring these eleven years the petitioner itself allowed less than \$30,000.00 a year to accomplish a purpose for which it now claims \$150,000.00 a year is entirely inadequate [I]t would be manifestly unjust to charge those who consume the gas during that last five years with practically the entire cost of the plant, in addition to a reasonable return upon the entire investment therein.”¹³ Thus the court concluded that the company should have been amortizing its plant during its entire existence. It proceeded to calculate a reasonable sum for amortization assuming that the valuation was \$2,000,000 rather than the \$1,500,000 set by the commission, and found that \$100,000 would have been reasonable. “It will thus be seen that instead of the Public Service Commission fixing too small an amount for the proper amortization of the investment, they have fixed it larger than might be justified”¹⁴ Had the court stopped here, *Ben Avon* would have been completely satisfied, but it went on to base its decision upon a question of a mistake of law. “It is quite true that rate making is the exercise of legislative power, and where it depends upon the ascertainment of results from disputed facts, the determination of the legislature or, in this case, the Public Service Commission in lieu thereof, will not be reviewed, but where such determination is reached by a misapplication of legal principles to the state of facts disclosed, this Court will make a correct application of such principles in determining whether or not the rate fixed by the legislative authority is confiscatory.”¹⁵ It stated that the utility should have been amortizing during its entire life, a principle of law. “. . . [H]ad the commission applied a proper proportion of the petitioner’s receipts for the years 1904-1914 to the reduction of its investment instead of treating practically the whole thereof as earnings, the value of this plant at this time would have been found to be less than it was by the Commission. In other words, by the application of the legal principles we have above laid down, to the state of facts which it is conceded exists here, the investment of the stockholders in the petitioner had been more than fifty per cent returned to them by the year 1914, and the investment in the plant should

¹² *Id.* at 650, 100 S.E. at 555.

¹³ *Id.* at 651, 100 S.E. at 556.

¹⁴ *Id.* at 652, 100 S.E. at 556.

¹⁵ *Id.* at 653, 100 S.E. at 557.

have been reduced to that extent. We think the Commission has dealt as liberally with the petitioner . . . as could reasonably be expected."¹⁶ This case may be an indication by the court that the *United Fuel Gas* case is to be interpreted to the effect that the court would not have exercised an independent judgment as to the facts had a controverted fact been presented. However, it is not necessarily authority for that point since a clear mistake of law actually was involved here.

The first case to follow the *Ben Avon* case was the *Bluefield* case referred to earlier.¹⁷ In that case the commission adopted a rate base from the investment cost and the utility claimed that the reproduction new cost less depreciation should be the basis. The court began its opinion by stating that the commission reached its decision after "maturely and carefully considering"¹⁸ the evidence. After restating the evidence, the court said, "In our opinion the commission was justified by the law and by the facts in finding as a basis for ratemaking the sum of \$460,000.00."¹⁹ It went on to hold that as a matter of law the actual fair value of the investment is the true basis for ratemaking. The utility alleged that an eight per cent return was grossly inadequate. Said the court, "It is probably unnecessary to consider this question. Assuming that the correct amount is the present actual value of the property devoted to the public use, the commission appears to have reached its conclusion by considering, not only the cost of reproduction new less depreciation, but all other proper elements throwing light upon the subject"²⁰ This is not an independent opinion, but the court added, "Is not 6% net, clear of taxes and all operating expenses, including a sum equal to 2% for depreciation, as good or better than returns from most enterprises of a similar character? Legislatures and public service commissions . . . are not to be tied down to fixed rates of income. Every case must be controlled by its own facts, and in no case will the courts interfere unless the rate allowed is unreasonably low or unreasonably high."²¹ Did the court or did it not give an independent judgment? It did give an independent opinion as to the question of law involved, and it may have given an opinion that eight per cent return is reasonable but without going into the facts and circumstances.

¹⁶ *Id.* at 653, 100 S.E. at 557.

¹⁷ Note 2 *supra*.

¹⁸ 89 W. Va. 736, 738, 110 S.E. 205, 206 (1921).

¹⁹ *Id.* at 739, 110 S.E. at 206.

²⁰ *Id.* at 742, 110 S.E. at 208.

²¹ *Id.* at 743, 110 S.E. at 208.

On appeal to the United States Supreme Court, the case was reversed. There the Supreme Court said that reproduction cost new less depreciation should be the basis for ratemaking and that it felt that eight per cent was not a sufficient return. Thus it would seem that the West Virginia court was reversed because of a mistake of law and not because it had failed to give an independent judgment. However, the Supreme Court adverted to the method used by the West Virginia court and cautioned that an independent judgment was necessary. It referred to the statements throughout the lower court's opinion (the commission reached its decision after maturely considering the evidence, the commission was justified in finding, etc.) and to earlier West Virginia cases (which were not confiscation cases) where the court had said that it could not substitute its opinion for that of the commission, and cited the *Ben Avon* case for authority that the court must exercise an independent judgment in confiscation cases. But the question still remains as to whether the West Virginia court did exercise an independent judgment. What did the court mean when it said, "In our opinion the commission was justified by the law and by the facts in finding . . ."?²² It could mean that the court had exercised an independent judgment and agreed with the commission or that the court had found that there was substantial evidence to support the commission. In the instant case, it seems that the former was meant. It may be that the Supreme Court itself was not sure, but merely wanted to warn the West Virginia court in case that the latter interpretation was correct.

Whatever may have been the purpose of the Supreme Court's dicta, the West Virginia court seems to have listened to the advice because in the next case it clearly stated that it had a duty to exercise an independent judgment and it proceeded to do so. In *Natural Gas Co. v. Public Service Comm'n*,²³ the commission refused a rate increase. One commissioner wrote an opinion stating that the rate base was \$1,500,000 and concluding that the utility was receiving a fair return. Two commissioners dissented from the rate base as determined, but, without attempting to fix a proper base, agreed that a fair return was being realized. The utility contended that the commission failed to ascertain the facts, no rate base having been found. The court said that it would have to determine the rate base in order to prevent confiscation. It then

²² Note 19 *supra*.

²³ 95 W. Va. 557, 121 S.E. 716 (1924).

proceeds to review the individual items set forth by the utility's witnesses and expressly states its own opinion as to the correctness of each item with no reference to the commission's action. Then it said, "We are asked by the company to exercise our independent judgment upon the evidence and determine the rate base. This we would do if we had sufficient facts before us. We are not disposed at any time to shirk our duty; but to determine the value upon the basis of reproduction new, less depreciation, we must know how much that depreciation is."²⁴ The court then proceeds to determine the depreciation and a rate base, \$2,603,765, which it termed the "reconstructed rate base."²⁵ It then reviewed the present rates to see what the present rate of return was. "So while Chairman Divine ascertains the rate base to be but \$1,564,121.03, the actual earnings at present rates produce a net income of 26% on that base instead of 16%. It is quite apparent on this data that we could not reverse the order of the commission; we cannot find from it as a matter of fact that the company's property is being confiscated by a too low rate. It is not our duty to fix rates; that is not a judicial function. It is the business of the commission to do that, and for the court to determine judicially whether the rate is so low as to confiscate the utility's property, or so high as to confiscate the customer's property."²⁶ It concluded, "However, it appears that during the years 1917 to 1921 the company has been earning 8% for return and 8% for depreciation on a valuation of more than \$2,500,000, or about 26% on a rate base of over \$1,564,121.03 as found by Chairman Divine."²⁷ The order was reversed, though, because, "We are, however, of opinion that the reproduction new value, less depreciation would be properly increased by a proper charge for overhead costs . . ."²⁸ Since there was no evidence on this matter, the court could not include this item in its calculations as to the reconstructed rate base. Thus it wanted to give the company an opportunity to present proper proof of this item. From this discussion, it appears that *Ben Avon* was completely satisfied with the action of the West Virginia court in this case.

²⁴ *Id.* at 576, 121 S.E. at 723.

²⁵ *Id.* at 577, 121 S.E. at 723.

²⁶ *Ibid.*

²⁷ *Id.* at 580, 121 S.E. at 724.

²⁸ *Ibid.*

There has been a wide divergence of opinion as to the interpretation of the next confiscation case.²⁹ The utility alleged confiscation and challenged the commission's action on several grounds. It first contended that the rate base was too low. The court seemed to by-pass this contention on a ground somewhat similar to estoppel. The company, when before the commission, had agreed to accept the book value as the actual value rather than to take the time and expense for an appraisal. "If it had appeared to the Commission that the utility was contending for a rate base different from the book value, evidence no doubt would have been taken Expense and delay would have followed. The utility desired to avoid such delay and expense and by counsel so announced."³⁰ It then turned to the big item which was the refusal of the commission to accept the company's evidence that its earnings would be one million dollars less than that of the current year. Here the court pointed out that this was mere speculation and not sufficient to overcome the evidence afforded by the history of the company. The final ground was that the allocation of rates between wholesale and domestic customers was improper because the rates to the domestic customers was confiscatory, the cost of delivery being higher than the rate charged. The court reviewed the facts and found that a 16.72% profit was realized on the entire property. It concluded, "The rates now fixed bring in a fair return upon the entire property and are not confiscatory."³¹ It then reviewed the evidence as to the rate base allocated to the domestic customers and found a 17.60% return. "So, we cannot say the Commission erred We cannot substitute our judgment for that of the Commission" ³² Again we are faced with the question of what is meant by the court. However, the court goes on, ". . . [T]he evidence of a greater rate base . . . is not sufficient for us to say that the Commission erred in adopting that base; . . . and that upon the rate base fixed the utility has received a net income sufficient to refute the claim of confiscation. Confiscation is the basis of the application for reversal . . . , and we have examined the evidence . . . to ascertain if there has been a misinterpreta-

²⁹ *Pittsburgh & W. Va. Gas Co. v. Public Service Comm'n*, 101 W. Va. 63, 132 S.E. 497 (1926). In Buchanan, *The Ohio Valley Water Company Case and the Valuation of Railroads*, 40 HARV. L. REV. 1083, 1076 (1927), the case is interpreted as following the *Ben Avon* case. Davis, *supra* note 4, at 299, interprets the case as being contra to the *Ben Avon* case.

³⁰ 101 W. Va. 63, 66, 132 S.E. 497, 498 (1926).

³¹ *Id.* at 69, 132 S.E. at 499.

³² *Id.* at 71, 132 S.E. at 500.

tion of legal principles or a mistake as to the evidence, or no evidence on which to base the findings; all for the purpose of ascertaining if the rates prescribed are so inadequate as to amount to confiscation"³³ It concludes, "In determining whether rates are confiscatory the courts will review the evidence to see if the commission has based its finding of fact upon a mistake of the evidence or without evidence."³⁴ Thus it appears that the *Ben Avon* rule has again been applied. Does the syllabus conform to this analysis? Syllabus one reads, "An order of the Public Service Commission fixing rates . . . will not be disturbed unless it appears that the finding of fact on which the order is based is contrary to evidence, or without evidence, or there has been a misapplication of legal principles; and where there is a substantial conflict of evidence on any question of fact, the probative value accorded by the Commission to such evidence will not be disturbed."³⁵ Standing alone, this does not seem to include the *Ben Avon* rule. However, syllabus two says, "When a rate fixed by the Commission is attacked as confiscatory, the burden of proving it to be so is upon the public utility, and unless the evidence is clear that the rate is too low to afford a reasonable return on the value of the property used and useful in the service of the public the order fixing the rate will not be disturbed."³⁶ This clearly contemplates the *Ben Avon* rule, and gives added weight to the opinion that this case follows the *Ben Avon* case.

During the same term at which the preceding case was determined, the court decided the sixth confiscation case.³⁷ In some way, it was able to cite the *Pittsburgh* case and yet reach the opposite result. The commission granted an increase in certain proposed rates and refused others. The city of Huntington and other patrons protested and the utility cross-assigned error on the ground of confiscation. First the utility claimed that the rate base or fair value of its property was set too low because the amount was determined without proper consideration of the evidence relating to reproduction cost. It had two estimates by engineers based on the cost of reproduction new, less depreciation. The commission had set as the value the actual cost shown on the company's books

³³ *Id.* at 72, 132 S.E. at 500.

³⁴ *Id.* at 73, 132 S.E. at 501.

³⁵ *Id.* at 63, 132 S.E. at 497.

³⁶ *Ibid.*

³⁷ *City of Huntington v. Public Service Comm'n*, 101 W. Va. 378, 133 S.E. 144 (1926).

without deduction for depreciation. Said the court, "These figures, adopted by the Commission . . . not only accord with the evidence . . . but also find support in the fact that the greater portion of the equipment was installed during a period of high prices. Besides, the cost of reproduction new, less depreciation, is to be accepted merely as an element and not as the standard of value."³⁸ By stretching this statement, we might interpret it as an independent judgment, but this would be questionable. To make this conclusion more probable, the court added, "We cannot say . . . that the finding of the Commission was either against the weight of the evidence or without evidence to support it. Findings of fact by the Public Service Commission will not be reviewed unless it has acted arbitrarily and unjustly as to fix rates contrary to the evidence, or without evidence to support them."³⁹ The *Pittsburgh* case is cited. The court must have been referring to the first syllabus of the *Pittsburgh* case as set forth above. This stated the general rule to be followed in reviewing rate cases. The court may have overlooked the second syllabus. However, a more reasonable hypothesis is that the court acted in this case upon the assumption that confiscation was not involved. It may have thought that *Ben Avon* applied only where the utility claimed confiscation and that this case was one in which the patrons were appealing, overlooking the cross-assignment of error on the ground of confiscation.

The last confiscation case to be reviewed by the court was *Bluefield Telephone Co. v. Public Service Comm'n.*⁴⁰ The commission had refused an increase in rates. An appeal was taken because of (1) the valuation fixed as the rate base, (2) the rate of depreciation allowed and (3) the conclusion that the present return was an ample return of the company's investment.

The court divided the first ground into three parts:

(a) The company claimed a higher physical property valuation. This was due to a single item which was valued according to a 1913 book value. An appraisal in 1913 had valued the property higher than the book value, so the company asserted that the book value was too low and that the appraisal was correct. Said the court, "It is a fair assumption that a corporation will ordinarily record the correct value of its property on its own books. The books should therefore be considered as offering more dependable

³⁸ *Id.* at 380, 133 S.E. at 145.

³⁹ *Id.* at 382, 133 S.E. at 146.

⁴⁰ 102 W. Va. 296, 135 S.E. 833 (1926).

evidence of value, than the higher estimates of appraisers or witnesses, unless some plausible reason is advanced why the book value is too low. *Davis v. Gas Co.* P.U.R. 1921 B, 342. In this case the appraisers were not called as witnesses. The personnel of the appraisers is not disclosed. The manner in which the appraisal was conducted does not appear. No witness testified that the appraisal value was correct or explains why the book value was inaccurate. We therefore cannot disapprove the action of the Commission in adopting the utility's 1913 book value."⁴¹ This presents the problem of interpretation as discussed previously, but it seems reasonable to assume that the court gave an independent judgment.

(b) The company claimed a higher working capital. This was justified because the company was doing a large amount of construction work and thus, to obtain good prices on its purchases, it bought in large quantities. The commission found a \$40,000 stock of supplies too large because the gross operating costs were only \$17,500 per month. It allowed \$22,500 for such stock of supplies. The court stated that some cases allow 1/12 of the annual operating expenses as working capital and others allow the working capital to be the value of 1/12 of the annual expenses plus an allowance for materials and supplies. It then concluded, ". . . [T]he commission being apprised that the monthly operating expenses approximate \$17,500.00 has allowed for supplies \$22,500.00. We cannot say from the evidence that this sum is inadequate."⁴² Again this seems to be an independent opinion.

(c) The company asserted a higher going concern value solely on the opinion of its accountant who said 15% of the value should be allowed. The commission said that percentage rules could not be used, but that the history of the corporation should be considered. The court reviewed various cases and held that no hard and fast rule could be followed. "In determining the going concern value of the utility in this case, the Commission has but followed the course supported by reason and the highest precedent."⁴³ Thus the court treated this as a question of law.

The company's second ground was that it had the right to depreciate the property at 5.97 per cent. The commission said 4%

⁴¹ *Id.* at 298, 135 S.E. at 834.

⁴² *Id.* at 300, 135 S.E. at 835.

⁴³ *Id.* at 301, 135 S.E. at 836.

was sufficient. The court looked to the record and found that a rate of 5.97% had been charged annually but that 2.21% was actually used during the past years. A reserve of \$300,000 thus remained. The court then proceeded to rule that, "A depreciation rate which accumulates and retains a surplus 'beyond the reasonable requirements of the company,' should not be foisted upon the patrons of a utility In the present case the depreciation reserve amounts to practically 30% of the value of the Company's property. The decisions oppose the accumulation of such a large reserve [W]e thoroughly approve of the reduction in the rate made by the Commission."⁴⁴ Again this appears to be an independent judgment.

The company's last contention was that the rate of return was not reasonable. The court reviewed the figures showing expenses and income and found that an 8% return existed. It then said, ". . . 8% is ordinarily considered a sufficient return for telephone companies, and nothing appears in this record to show that it is not ample in this case."⁴⁵ Had the court stopped here, it would seem to be clear that an independent judgment was given. But it went on to say that the petitioner's case was based solely upon its accountant's opinion and that this was not sufficient to overthrow the commission's opinion based on the company's history. "The reasons advanced by the Commission for its several rulings show careful consideration of the claims of the applicant, and are therefore entitled to the utmost respect. The solution of problems such as these is peculiarly within the province of the Commission. In this case the Commission has exercised its judgment in good faith. We find no reason to question the result."⁴⁶ The *United Fuel Gas* case is cited. This paragraph of the opinion again must be interpreted. The court says that the commission has used careful consideration and has acted in good faith. But the final statement seems to indicate an independent judgment, the court finding nothing upon which to question the commission's result. The preceding analysis of the court's discussion of the evidence seems to add weight to this interpretation, as does

⁴⁴ *Id.* at 303, 135 S.E. at 836.

⁴⁵ *Id.* at 304, 135 S.E. at 836.

⁴⁶ *Id.* at 304, 135 S.E. at 837.

the syllabus. Syllabus one reads, "An order of the Public Service Commission will not be annulled by this court unless the order manifests unlawful, arbitrary, or capricious exercise of power. Judicial review should extend no further than is necessary to keep the Commission within the law, and protect the Constitutional rights of the corporation which it controls."⁴⁷ The due process clause embodies one of the constitutional rights of the corporation. Thus the court will review to prevent confiscation. If this interpretation of the case is correct, *Ben Avon* again is satisfied in the most recent of the West Virginia confiscation cases.

Since 1911 when the public service commission first began to regulate public utility rates, there have been seven confiscation cases in West Virginia.⁴⁸ Two preceded the *Ben Avon* case; five followed it. Of these latter five, all but one seem to satisfy the *Ben Avon* requirements. However, all of them have been interpreted as being contra to the *Ben Avon* case.⁴⁹ The difference seems

⁴⁷ *Id.* at 296, 135 S.E. at 833.

⁴⁸ Eight other rate cases involving a consideration of the rate base have been reviewed by the court: *City of Charleston v. Public Service Comm'n*, 83 W. Va. 718, 99 S.E. 63 (1919); *City of Charleston v. Public Service Comm'n*, 86 W. Va. 536, 103 S.E. 673 (1920); *City of Charleston v. Public Service Comm'n*, 95 W. Va. 91, 120 S.E. 398 (1923); *Baltimore & Ohio R.R. v. Public Service Comm'n*, 99 W. Va. 670, 130 S.E. 131 (1925); *City of Elkins v. Public Service Comm'n*, 102 W. Va. 450, 136 S.E. 397 (1926); *Town of Harrisville v. Public Service Comm'n*, 103 W. Va. 526, 138 S.E. 99 (1927); *City of Charleston v. Public Service Comm'n*, 110 W. Va. 245, 159 S.E. 38 (1931); and *City of Wheeling v. Natural Gas Co.*, 115 W. Va. 149, 175 S.E. 339 (1934).

Seven of these are, for the lack of a better term, confiscation cases in reverse. The patrons rather than the utilities appeal on the ground that the rate base is too high. In such cases the general rule as to substantial evidence applies since the *Ben Avon* case requires an independent judgment only where the utility claims confiscation.

In the *Baltimore & Ohio* case, rates prescribed by the commission were attacked as being unreasonable and unjust to the protesting carriers and as being prejudicial. Evidence was presented as to cost and comparative rates. The court said at page 672, "The consideration of this proof and the testimony of the carriers . . . involved a substantial question of fact peculiarly within the province of the Commission. We cannot substitute our judgment for that of the commission on the weight of the evidence. Its findings are presumed to be reasonable, lawful, and correct; and will therefore not be set aside on appeal to this Court unless clearly against the weight of the evidence." The *United Fuel Gas* case is cited. The question here is what is meant by "unreasonable and unjust." Does the utility mean that the rates are confiscatory? There may be a difference between unreasonable and unjust and confiscatory. If the utility meant the latter (and this cannot be determined from the court's reported opinion) then this case clearly violates the *Ben Avon* rule. But if the court assumed that confiscation was not involved, the case is correctly decided.

⁴⁹ Davis, *supra* note 4, at 284 *et seq.*

to be in the interpretation of the words and sentences extracted and discussed above. It may well be that the interpretation adopted by the reader will depend upon his regard for the *Ben Avon* case or his need for cases to support or disprove the *Ben Avon* rule.⁵⁰

⁵⁰ *United Fuel Gas Co. v. Public Service Comm'n*, 99 S.E.2d 1, was decided July 5, 1957, shortly after the completion of this paper. In it the appellant company contended that the order setting rates was (1) not supported by the evidence and (2) confiscatory. The court reversed first because the evidence did not support one finding of fact and secondly because of two mistakes of law, the use of the allocation method instead of the segregation method and the use of the peak month method instead of the peak day method by the commission in its determinations. The issue of confiscation thus was not reached. The question then still remains. Will the court, after finding that a finding of fact is supported by substantial evidence, proceed to state its own independent opinion as to the weight of the evidence after a claim of confiscation is raised?