LEGISLATION

Temporary Rate Order Statutes and the Due Process Clause

The conditions which courts have imposed as precedent to a valid exercise of the rate making power by public utility commissions have made of rate making a long and drawn out process.[1] Courts demand (1) that the utility be given a fair hearing with an opportunity to present evidence and cross-examine witnesses so that there be procedural due process,[2] (2) that the rate set constitute "fair return on fair value" so as not to be confiscatory,[3] and (3) that the findings on which the rate order is based be placed on record to enable the court to review the commission's findings and to allow the court to determine whether the commission has acted within the scope of its delegated authority.[4] The fair hearing and fact finding requirements are but ancillary to the determination of a "fair return on fair value" and it is the manner in which that concept has been defined by the courts that has contributed most to the tediousness of the rate making process. Since *Smyth v. Ames*,[5] the United States Supreme Court has ordained that the principal factor to be considered in determining valuation is reproduction cost new. The nebulous nature of reproduction cost requires for its reasonable approximation exhaustive examination of utility records and much expert testimony. As a result, rate proceedings have been dragged out for as long a time as ten years.[6]

Obviously, therefore, the "fair return on fair value" concept, as now defined, is unwieldy when there is a demand for quick action. When the economic trend runs up or down, crises develop. If the trend is up, prices of raw materials rise, wages increase, costs of services go up, and it often becomes necessary to adjust rates quickly to save a utility from financial ruin; if, on the other hand, the trend is down there is a fall in consumer purchasing power and it becomes imperative, not only to prevent social repercussions but also to protect industrial consumers who may be near the financial cracking point, that rates be scaled downward. To tide over such emergencies legislatures have passed statutes authorizing commissions to make temporary rate orders,[7] or commissions on their own motion have

1. See *infra* note 6.

2. Chicago, M. & St. P. R. R. v. Minnesota, 134 U. S. 418 (1890); Washington *ex rel.* Oregon R. R. v. Fairchild, 224 U. S. 510 (1912); Georgia Cont. Tel. Co. v. Public Serv. Comm., 8 F. Supp. 434 (N. D. Ga. 1934); Philadelphia v. Public Serv. Comm., 84 Pa. Super. 135 (1924); see Brown, *Public Service Commission Procedure* (1938) 87 U. OF PA. L. REV. 139.

3. Smyth v. Ames, 169 U. S. 466 (1898); Dayton Power & Light Co. v. Public Util. Comm. of Ohio, 292 U. S. 290 (1934); Erie v. Public Serv. Comm., 278 Pa. 512, 123 Atl. 471 (1924); see Goddard, *The Evolution of Cost of Reproduction as the Rate Base* (1928) 41 HARV. L. REV. 564.

4. Edison Light & Power Co. v. Driscoll, 21 F. Supp. 1 (M. D. Pa. 1937); Muskogee Gas & Elec. Co. v. Oklahoma, 81 Okla. 176, 186 Pac. 730 (1920); see Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938) 47 YALE L. J. 647, 666; Gartner, *Is the Rate Making Power of the I. C. C. an Unconstitutional Delegation of Legislative Power?* (1935) 4 GEO. WASH. L. REV. 26.

5. 169 U. S. 466 (1898).

6. Lindheimer v. Illinois Bell Tel. Co., 292 U. S. 151 (1934); see Note (1930) 40 YALE L. J. 81, 87.

7. E. g., ALA. CODE ANN. (1928) § 9670; ILL. REV. STAT. (Cahill, 1933) c. 111a, § 51; IND. STAT. ANN. (Baldwin, 1934) § 14043; N. Y. CONSOL. LAWS (Cahill, Supp. 1935) c. 49, § 114; PA. STAT. ANN. (Purdon, Supp. 1937) tit. 66, § 1150; VA. CODE ANN. (1936) § 4071a; WIS. STAT. (1931) § 196.70.

made temporary orders considering the power to do so within the general tenor of their statutory authority.[8]

Very general statutory provisions authorizing temporary rate alterations in emergencies have been in effect in some of the states for a long time.[9] While the courts have usually sustained the constitutionality of such statutes, they have so conditioned the exercise of power under them, except where employed to increase the utility's return, as to render them practically useless.[10] To avoid these conditions, the states of New York, Pennsylvania, Illinois, and Virginia have enacted laws with specific provisions concerning valuation, hearings, and recoupments.[11] These statutes are now being constitutionally tested. The New York Court of Appeals has held the New York statute constitutional and has sustained an order under it.[12] On the other hand, the Pennsylvania statute has been declared unconstitutional by a federal district court.[13] The case has been appealed to the United States Supreme Court and is to be argued in the near future.[14] This fact plus the wide use that commissions have made of temporary rate orders during the current depression,[15] makes peculiarly pertinent an examination of the development of temporary rate orders, a consideration of their constitutional validity, and an estimate of the effect the power has had and will have on the whole rate making process.

Temporary Rate Increases

The first use of temporary rate orders was made during and immediately following the World War.[16] In that period, costs rose so suddenly that a failure to afford utilities relief through higher rates might have forced many of them to the wall. Commissions, recognizing this, found that an emergency existed and gave utilities ample increases without any determination of valuation. In the few instances where objections to increases found their way into the courts, they were summarily dismissed.[17]

8. Tri-State Tel. & Tel. Co. v. Benson, P. U. R. 1933A, 38 (D. C. Minn. 1932); Omaha & C. B. St. Ry. v. Nebraska State Ry. Comm., 103 Neb. 695, 173 N. W. 690 (1919); O'Brien v. Public Util. Comm., 92 N. J. L. 587, 106 Atl. 414 (1919); Oklahoma Gas & Elec. Co. v. Corporation Comm., 83 Okla. 281, 201 Pac. 505 (1921).

9. E. g., ALA. CODE ANN. (1928) § 9670; IND. STAT. ANN. (Baldwin, 1934) § 14043; N. Y. CONSOL. LAWS (Cahill, 1930) c. 49, § 72; WIS. STAT. (1931) § 196.70.

10. Prendergast v. New York Tel. Co., 262 U. S. 43 (1923); Indiana General Service Co. v. McCardle, 1 F. Supp. 113 (S. D. Ind. 1932); New York Edison Co. v. Maltbie, 244 App. Div. 436, 279 N. Y. Supp. 949 (3d Dep't, 1935); *Re* Wisconsin Tel. Co., 6 P. U. R. (N. S.) 389 (Wis. Pub. Serv. Comm. 1935) (see history of litigation preceding instant order).

11. ILL. REV. STAT. (Cahill, 1933) c. 111a, § 51; N. Y. CONSOL. LAWS (Cahill, Supp. 1935) c. 49, § 114; PA. STAT. ANN. (Purdon, Supp. 1937) tit. 66, § 1150; VA. CODE ANN. (1936) § 4071a.

12. Bronx Gas & Elec. Co. v. Maltbie, 271 N. Y. 364, 3 N. E. (2d) 512 (1936), 31 ILL. L. REV. 404, *rev'g*, 245 App. Div. 419, 283 N. Y. Supp. 839 (3d Dep't, 1935), which had reversed 153 Misc. 589, 276 N. Y. Supp. 485 (Sup. Ct. 1934), which had affirmed the commission order, 6 P. U. R. (N. S.) 132 (1935).

13. Edison Light & Power Co. v. Driscoll, 25 F. Supp. 192 (E. D. Pa. 1938).

14. See New York Times, Dec. 20, 1938, p. 37, col. 6.

15. See Swidler, *The Uncertainties in the Legal Status of Temporary Rates* (1933) 12 P. U. FORT. 136.

16. *Id.* at 137.

17. Northwestern Bell Tel. Co. v. Hilton, 274 Fed. 384 (D. C. Minn. 1921); Chicago Rys. v. Chicago, 292 Ill. 190, 126 N. E. 585 (1920); State *ex rel.* Indianapolis Tractor Co. v. Lewis, 187 Ind. 564, 120 N. E. 129 (1918); Omaha & C. B. St. Ry. v. Nebraska State Ry. Comm., 103 Neb. 695, 173 N. W. 690 (1910); O'Brien v. Public Util. Comm., 92 N. J. L. 587, 106 Atl. 414 (1919); Bartlesville v. Corporation Comm., 82 Okla. 160, 199 Pac. 396 (1921); La Cross v. Railroad Comm., 172 Wis. 233, 178 N. W. 867 (1920).

The usual judicial reasoning was that the commission had properly found that an emergency existed, that under the circumstances the action of the commission was not to be judged on the same ground nor tested by the same conditions as would apply to permanent rate orders, and that only if an unjust or discriminatory burden was put on the people or the utility would the court interfere. The only limitation imposed by the courts on the emergency grants was the requirement of a bond from the utility to insure reimbursement to the subscribers if on the completion of the valuation hearing it was found that the temporary rate was fixed too high.[18]

These cases, developing as they did the principles that emergency rates were not *ipso facto* unconstitutional and that valuation was not necessarily a condition precedent to the validity of an emergency rate, gave birth to the assumption that commissions could resort to proceedings just as summary to force rates down when emergencies so required.[19]

Temporary Decreases Under Old Statutes

Indeed, when the first cases involving temporary decreases arose, one of the major arguments advanced in their favor was based on mutuality, i. e., that since the courts had sustained increases when the utilities were in financial trouble they should validate decreases now that the consumers were feeling financial pangs.[20] For various reasons the argument failed to impress the courts, although, in sustaining a temporary reduction, the Oklahoma Supreme Court upheld the corporate commission which had said: "It has been the policy of this commission during war times and during the times of constantly increasing fuel costs, to properly adjust the rates for utilities . . . so as to keep fuel cost and the rate as near as possible on the same level. It now becomes its duty when fuel costs are shown to have decreased . . ., to be equally prompt in readjusting the rates in conformity to such decrease." [21]

In the first place, the argument that rates are so high as to be confiscatory raises no constitutional issue when advanced by the consumer, but he must rely solely on the legislative or common law requirement that the utility charge reasonable rates.[22] On the other hand, a utility contending that a rate is so low as to be confiscatory raises a constitutional question under the due process clause.[23] In addition, the utility can advance the procedural due process requirement of a fair hearing.[24] Secondly, judicial language to the effect that a public utility's rates are so graduated that it never enjoys the advantage of prosperity to the extent to which other concerns do and that, accordingly, its return in time of business adversity ought not to be reduced to the same extent as that of unregulated business, may also have had weight.[25] Thirdly, while it had been held that the condition of a utility may require emergency action, there was doubt whether the plight of consumers was to be given the same status,[26] although the commissions argued

18. *Ibid.*
19. See Swidler, *op. cit. supra* note 15, at 137.
20. *Ibid.*
21. Oklahoma Gas & Elec. Co. v. Corporate Comm., 83 Okla. 281, 283, 201 Pac. 505, 507 (1921).
22. See Note (1937) 46 YALE L. J. 505, 513.
23. See cases cited *supra* note 3.
24. See cases cited *supra* note 2.
25. See Pacific Tel. & Tel. Co. v. Wallace, 158 Ore. 210, 275, 75 P. (2d) 942, 968 (1938).
26. See Swidler, *op. cit. supra* note 15, at 137.

that it was to be, and it has now been so held.[27] Finally, while on a decrease the utility loses all of the difference between the old rate and the new, the consumer on an increase may be only slightly affected since the increased burden is divided among many people.

Whatever may be the specific reason, the courts generally have looked askance at temporary rate reductions under the older statutes, and, either because the hearing precedent to the order was not such as required by due process[28] or on the ground that the rate fixed was confiscatory,[29] have almost unanimously declared invalid every temporary rate reduction order presented to them.[30]

Prendergast v. New York Telephone Company,[31] the only United States Supreme Court decision on the subject, sounded the death knell of temporary rate decreases under the old acts, although since that case innumerable attempts have been made to sustain such orders.[32] In that case, the commission, after having taken a great amount of evidence, ordered a temporary reduction pending the completion of the hearing. The company sued to restrain enforcement of the order in the federal district court claiming that the rate was confiscatory and, to establish this, relied on evidence showing that the commission had failed to consider reproduction cost. The injunction was granted. The Supreme Court affirmed the decree of the district court, holding that the rates were final legislative acts for the period during which they were to remain in effect and as such had to conform to the due process requirements of a final rate order. In so holding the Court, in effect, decreed that a temporary rate order had to be preceded by all the time consuming investigation necessary to validate a final order, the avoidance of which was the purpose of providing for temporary orders.

It was but natural after the *Prendergast* case that the courts should hit on inadequacy of the hearing as a further reason for voiding temporary orders. As has been indicated, the requirement of a fair hearing follows from the requirement that commissions consider certain valuation criteria before making a rate order. So the courts were quick to grasp language of the Supreme Court under the "fair return on fair value" concept which demanded that, for procedural due process, the utility be allowed to present evidence on all the elements involved in the determination of value and to cross-examine witnesses produced by the commission.[33] In *Indiana General Service Co. v. McCardle*,[34] an injunction against a temporary reduction was granted because the record disclosed that the hearing occupied only one

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27. *Re* Wisconsin Tel. Co., 6 P. U. R. (N. S.) 389 (Wis. Pub. Serv. Comm. 1935); see Indiana General Serv. Co. v. McCardle, 1 F. Supp. 113, 115 (S. D. Ind. 1932).

28. Indiana General Serv. Co. v. McCardle, 1 F. Supp. 113 (S. D. Ind. 1932); Tri-State Tel. & Tel. Co. v. Benson, P. U. R. 1933A, 38 (D. C. Minn. 1932); Rockland Light & Power Co. v. Maltbie, 148 Misc. 22, 266 N. Y. Supp. 377 (Sup. Ct. 1933), *aff'd*, 241 App. Div. 122, 271 N. Y. Supp. 858 (3d Dep't, 1934).

29. Prendergast v. New York Tel. Co., 262 U. S. 43 (1923); Love v. Atchison, T. & S. F. Ry., 185 Fed. 321 (C. C. A. 8th, 1911); Laclede Gas Light Co. v. Public Serv. Comm., 8 F. Supp. 806 (W. D. Mo. 1934); New York Edison Co. v. Maltbie, 244 App. Div. 436, 279 N. Y. Supp. 949 (3d Dep't, 1935); Brooklyn Union Gas Co. v. Maltbie, 242 App. Div. 718, 273 N. Y. Supp. 428 (3d Dep't, 1934); *cf.* King's County Light Co. v. Maltbie, P. U. R. 1933B, 337 (Sup. Ct. N. Y. 1933).

30. See cases cited *supra* notes 28 and 29.

31. 262 U. S. 43 (1923).

32. See *supra* notes 10 and 15.

33. See cases cited *supra* note 2.

34. 1 F. Supp. 113 (S. D. Ind. 1932).

day and consisted of testimony of a commission engineer and accountant; in *Tri-State Tel. & Tel. Co. v. Benson*,[35] an injunction was granted because the company had been given no opportunity to cross-examine witnesses or to produce witnesses on its own behalf or to make argument on the evidence received; and in *Rockland Light & Power Co. v. Maltbie* [36] a temporary order was held invalid because the company was denied an opportunity to present an appraisal and other evidence as to the value of its properties.

The *Prendergast* case, however, did not completely neglect the consumer public. Realizing the necessity for adequate consumer protection, the court required the utility to post a bond in case the decrease on final examination was discovered to have been warranted, and then, by way of dictum, indicated that their decision might have been different had the temporary rate orders been limited in time, and if there was some manner in which the utility could be protected against loss if it was subsequently shown that the temporary orders had provided for inadequate return. The bonding technique as a solution to the problem of protecting consumers may be dismissed as useless. This is evidenced by the fact that the cost of making refunds in the *Chicago Telephone Rate* cases was more than two and a half million dollars.[37] Indeed, it has been shown that, in some situations, accounting and administrative costs would be so high as to absolutely prohibit such a procedure.[38] The hopeful part of the decision was the dictum outlined above indicating, as it did, a possible escape from the difficulty by the adoption of statutes limiting in time the effect of temporary orders and providing methods whereby the utility could recoup losses sustained through inadequate rates.

Temporary Decreases Under Recent Statutes

Four states now have adopted temporary rate statutes designed to remedy the deficiencies pointed out in the *Prendergast* case.[39] In all four of these statutes, the exercise of power thereunder is conditioned on facts showing special need. In Illinois and Virginia, the commission must find that the net income is in excess of a reasonable depression income, while in Pennsylvania and New York the public interest must demand the summary action. In addition, the time during which temporary rate orders may remain in effect is limited. The Virginia and Illinois laws provide that the orders may be set for a period of not more than nine months or a further period of three months; the Pennsylvania and New York statutes provide that the temporary orders are to remain in effect until the final determination of the proceeding. Criteria of value required to be considered by the commissions before making a temporary rate order are set forth. The Virginia and Illinois statutes apparently contemplate an abbreviated form of the traditional investigation used in rate making and direct the commissions to examine the books, reports and property of the utilities. In no case can the amount absorbed by the temporary reduction exceed the net income over and above a reasonable return. The New York and Pennsylvania acts are much more effective in this respect. Under them value is

35. P. U. R. 1933A, 38 (D. C. Minn. 1932).

36. 148 Misc. 22, 266 N. Y. Supp. 377 (Sup. Ct. 1933), *aff'd*, 241 App. Div. 122, 271 N. Y. Supp. 858 (3d Dep't, 1934).

37. See St. Joseph's Stockyards Co. v. United States, 298 U. S. 38, 89 (1936).

38. See Louisville & N. R. R. v. Railroad Comm., 208 Fed. 35, 60 (M. D. Ala. 1913); International Ry. v. Prendergast, 52 F. (2d) 293 (W. D. N. Y. 1930); Note (1937) 46 YALE L. J. 505, 510.

39. See *supra* note 11.

determined from original cost less accrued depreciation.[40] This ordinarily can be quickly ascertained from the records and accounts of the utility and thus is more conducive to a speedy adjustment of rates during depression periods. The statutes of both states provide for a return of not less than 5% of such value.

The statutes of New York, Pennsylvania, and Virginia demand notice to the utility and a hearing, and although no such provision is expressly contained in the Illinois statute the Illinois Commission has construed it as requiring a hearing before temporary rates may be fixed.[41] The right of a utility to a hearing seems thus to have been adequately handled since procedural due process appears only to require that the utility have the opportunity to present evidence and cross-examine witnesses on the criteria of value on which the temporary rates are based.[42] It should be noted that in the cases that have come up under the New York and Pennsylvania statutes the courts have expressed no objection based on procedural due process.[43] Finally, all the statutes contain recoupment clauses requiring reimbursement in the final rates if it is found after complete valuation that the temporary schedules were too low.

As yet, there has been no litigation in the courts under the Virginia and Illinois statutes.[44] The New York statute was held constitutional by the New York Court of Appeals in the case of *Bronx Gas & Electric Co. v. Maltbie,*[45] after the Appellate Division had declared the statute violative of due process in making original cost less accrued depreciation the criterion of value.[46] The court reasoned that the recoupment clause was a sufficient safeguard to the utility to validate a temporary order based on a valuation which, it was admitted, could not constitutionally serve as the basis for a final rate. In so holding, the court sensibly disregarded the language of the *Prendergast* case that a temporary rate was a final rate for the period during which it was to remain in effect and as such had to conform to the *Smyth v. Ames* standard.

40. Under the New York statute, if the records of the utility fail to show original cost less accrued depreciation, the commission may estimate it; under the Pennsylvania statute, if the utility does not have continuing property records, the commission can set a rate which shall provide a return not less than an amount equal to the operating income for the year 1935 or such subsequent year as the commission may deem proper, to be determined on the basis of data appearing in the utility's annual reports.

In *Edison Light & Power Co. v. Driscoll, supra* note 13, the court did not consider the constitutionality of this provision of the Pennsylvania statute. However, it gave as one of the reasons for holding the order invalid the fact that the utility had no continuing property records and that therefore the commission should have proceeded under this section of the Act rather than under the original cost section. It would seem that under ordinary circumstances, there should be no constitutional objection to the section since the utility probably would have applied for an increase if it considered its income in any particular year to have been inadequate. On the other hand, a rise in the cost of supplying the service from one year to another conceivably might make inadequate an income which formerly was sufficient. The existence of such a possibility may result in this part of the Act being declared unconstitutional because providing for arbitrary procedure.

41. Illinois Commerce Comm. v. Public Serv. Comm., 4 P. U. R. (N. S.) 1 (Ill. Commerce Comm. 1934); *Re* Western United Gas & Elec. Co., Docket No. 22357, opinion and order of July 9, 1934.

42. See *supra* note 2.

43. See cases cited *infra* notes 45, 47, 48 and 50.

44. Illinois Commerce Comm. v. Public Serv. Comm., 4 P. U. R. (N. S.) 1 (Ill. Commerce Comm. 1934) (commission order under the new Illinois statute).

45. 271 N. Y. 364, 3 N. E. (2d) 512 (1936), 31 ILL. L. REV. 404.

46. 245 App. Div. 419, 283 N. Y. Supp. 839 (3d Dep't, 1935).

The Pennsylvania statute has come up in three federal district court cases. In *Beaver Valley Water Co. v. Driscoll*[47] a temporary rate was enjoined on the ground that it provided only 4% return to the company instead of the 5% required by the statute. The court refused to consider the constitutionality of the statute because it was able to rest its decision on other grounds.

In *Edison Light & Power Co. v. Driscoll,*[48] the majority of the court, following *Bronx Gas & Electric Co. v. Maltbie,* held the statute constitutional, but declared the order invalid because it failed to set forth the elements considered in fixing fair value. The court, however, refused to grant a permanent injunction but merely stayed the execution of the order for fifteen days in order to give the commission an opportunity to state the elements of fair value on which the temporary rates were based. The dissent[49] cited the *Prendergast* case to the effect that in regard to due process there can be no distinction between temporary and final rate orders, and, therefore, concluded that the statute basing valuation on original cost alone was unconstitutional.

Soon after the above decision, the commission issued another temporary order on the same company, this time setting forth the valuation elements on which the rate was based. The utility sued for an injunction in the federal court for the eastern district of Pennsylvania.[50] The court, adopting the dissenting opinion of the middle district court case, declared the statute unconstitutional, and then declared that even if the statute were constitutional, the order was invalid because the rate of return was only 3.65% while the statute required a return of at least 5%.

Since the *Edison Light & Power Co. v. Driscoll* case has been appealed to the United States Supreme Court,[51] the final fate of temporary orders under the new statutes will soon be known.[52] The Supreme Court must balance in the constitutional scales the two lines of thought that have developed, namely, that of *Bronx Light & Gas Co. v. Maltbie* to the effect that, where an emergency requires constitutional principles applicable to the protection of property from confiscation may be temporarily suspended or modified so long as the utility can be protected by recoupment; and that of the *Edison Light & Power Co.* and *Prendergast* cases to the effect that whether temporary or final the same criteria of value must be considered in making a rate order.

The very fact that under the present valuation formula there is an acknowledged need for temporary rate orders constrains a belief that the Court, as now constituted, will sustain the validity of the statutes. The Court might find ample support in its own decisions to go about so holding in any one of three different ways.

First, the *Prendergast* case dictum presents an easy out. It would be possible for the Court to view that case as holding that a temporary order must be based on the same valuation formula as a final order only where no provision is made for the protection of the utility from possible loss through

47. 23 F. Supp. 795 (W. D. Pa. 1938).
48. 21 F. Supp. 1 (M. D. Pa. 1937), 86 U. OF PA. L. REV. 314 (1938).
49. *Id.* at 6.
50. Edison Light & Power Co. v. Driscoll, 25 F. Supp. 192 (E. D. Pa. 1938).
51. See New York Times, Dec. 20, 1938, p. 37, col. 6.
52. It is unlikely that the Court will avoid the constitutional question by holding that the rates set were less than the required 5 per cent. because of the conflict among the Pennsylvania district courts regarding the statute's constitutionality. For another possibility see the discussion in *supra* note 40.

too low a rate, to point out that the statute effectively protects the utility, and to conclude, therefore, that the valuation language of the *Prendergast* case is inapplicable. As makeweight argument, the Court might point out that, at various times, it has sustained "experimental" rate orders with the observation that the best way to discover whether or not a rate is confiscatory is to test it out.[53] The fact that the Pennsylvania statute indicates that a return as low as 5% may be set will present little difficulty since the Court has indicated that, in determining fair return, business conditions are to be considered.[54]

But a holding like the above would really disregard the fact that the mandate of the *Prendergast* case requiring that, temporary or final, a rate order must be based on traditional valuation concepts, is so broad that it seems to include all temporary rate orders regardless of protection to the utility by way of recoupment. So logic would favor a decision that would in terms overrule the language of the *Prendergast* case. At various times legislation to tide over an emergency has been sustained by the courts, although admittedly such legislation would have been bad if permanent.[55] In *Block v. Hirsh*,[56] speaking with reference to the legislation there involved, the Court said: "The regulation is put and justified only as a temporary measure . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." [57] Therefore, a holding sustaining the statute on the ground that in times of emergency constitutional principles may be temporarily modified or set aside, especially where the utility is protected by a recoupment provision, would be perfectly proper.

Such a decision would still not achieve the best legal result. The basis on which one theory of valuation rather than another prevails should be that that theory most nearly approaches a true estimate of fair value.[58] Yet there is every indication that the adoption of the reproduction cost new theory by our courts was merely arbitrary. At the time *Smyth v. Ames* was decided, the absence of careful recording and accounting systems made a determination of original cost a virtual impossibility. So it was for practicable reasons that the Court chose reproduction cost new as the valuation base rather than original cost.[59] Now that the commissions of most

53. Willcox v. Consolidated Gas Co., 212 U. S. 19 (1909); Northern Pac. Ry. v. N. Dak., 216 U. S. 579 (1910); Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655 (1912); Louisville v. Cumberland Tel. & Tel. Co., 225 U. S. 430 (1912); Brush Electric Co. v. Galveston, 262 U. S. 443 (1923); *cf.* Northern Pac. Ry. v. Department of Pub. Works of Wash., 268 U. S. 39 (1925) (pointing out that test rates are only valid where it is doubtful whether the rate fixed is confiscatory).

54. See Dayton Power & Light Co. v. Public Util. Comm., 292 U. S. 290, 311 (1934). *Cf.* Dayton-Goose Creek Ry. v. United States, 263 U. S. 456 (1924); Illinois Bell Tel. Co. v. Gilbert, 3 F. Supp. 595 (N. D. Ill. 1933); Kankakee Water Co. v. Gilbert, P. U. R. 1933B, 145 (E. D. Ill. 1933).

55. Wilson v. New, 243 U. S. 332 (1917) (railway labor act); Block v. Hirsh, 256 U. S. 135 (1921) (emergency rent statute); Home Building & Loan Assoc. v. Blaisdell, 290 U. S. 398 (1934) (mortgage moratorium); State *ex rel.* State Board of Milk Control v. Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116 (1935) (milk control act); see (1937) 47 YALE L. J. 124.

56. 256 U. S. 135 (1921).

57. *Id.* at 157.

58. The dogma in rate making has been, since *Smyth v. Ames:* "Fair return on fair value". See cases cited *supra* note 3.

59. See Missouri *ex rel.* Southwestern Bell Tel. Co. v. Public Serv. Comm., 262 U. S. 276, 289 (1923).

states and the various federal commissions have imposed and are imposing complete accounting systems on all utilities,[60] and especially since the practicable arguments have shifted in favor of the original cost or prudent investment [61] theories because of the impossibility of obtaining a quick and orderly rate adjustment under the present system, it would seem that the time has come for a reconsideration of the various valuation theories advanced to determine which most nearly estimates fair value.

The obvious falsity of reproduction cost new as the valuation base can be demonstrated by a suppositious case. The Tinker Town Railroad builds a line in 1910 between city A and country village B, ten miles away. Between A and B in 1910 there is nothing but farm land so the railroad acquires a thoroughfare cheaply. In 1939, when a rate proceeding comes up, the land between A and B is highly residential and very costly. The Railroad is allowed to show and the commission is required to consider what it would now cost the Tinker Town Co. to secure the trackage ways through the residential section. If the Railroad were not a public utility, it would seem only just that it should reap the rewards of its own foresight. But fair return to a public utility must be determined with an eye to the fair treatment of the public.[62] Recently the Supreme Court has shown a tendency away from the reproduction cost new theory. In *Southwestern Bell Telephone Company v. Public Service Commission of Missouri*,[63] Justices Brandeis and Holmes dissented strongly from the majority opinion following *Smyth v. Ames;* while, in *Railroad Commission v. Pacific Gas & Electric Co.*,[64] decided last year, the Court sustained a rate based on original cost over the argument of the dissenting Justices Butler and McReynolds that in so doing the Court was acting contrary to *Smyth v. Ames*.[65]

It is, of course, very improbable that the Court will definitely overrule *Smyth v. Ames* and the many cases following it [66] in deciding the Pennsylvania case, but it is not unlikely that the present evidences of dissatisfaction eventually will culminate in such action. The fact remains that the Court could decide the statute was constitutional because the reproduction cost theory had outlived its usefulness and that the real criterion for determining value should be original cost. With such a decision the necessity for temporary rate statutes and temporary rate orders would disappear.

T. J. B.

60. See Note (1937) 46 YALE L. J. 505, 518.

61. Under the prudent investment theory, rates would be based on prudent and legitimate original cost, rather than on a wasteful and imprudent original cost. For an article comparing the original cost and prudent investment theories and showing their similarity in the normal situation see Nichols, *What Is the So-called Prudent Investment Theory?* (1938) 21 P. U. FORT. 463.

62. See Nichols, *op. cit. supra* note 61, at 464. For an effective debunking of the reproduction cost theory see MOSHER AND CRAWFORD, PUBLIC UTILITY REGULATION (1933) c. 14.

63. 262 U. S. 276, 289 (1923).

64. 302 U. S. 388 (1938).

65. *Id.* at 403. See Fraenkel, *Constitutional Issues in the Supreme Court, 1937 Term* (1938) 87 U. OF PA. L. REV. 50, 66.

66. See *supra* note 3.