Judicial Usurpation of Public Utility Ratemaking - Union Electric Company v. Illinois Commerce Commission

Kathleen Curtin Schneider

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol29/iss4/8

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
Public utility rate regulation in the United States has been subjected to three stages of government control: the legislative phase, the judicial phase, and finally, the administrative phase. In Munn v. Illinois, decided in 1876, the United States Supreme Court recognized the need for and constitutionality of legislative control of public utility rates. The Court held that public service businesses were subject to special statutory price-fixing regulations, and thus marked the beginning of the legislative phase. It soon became apparent, however, that the state legislatures did not have the special competence necessary to make fine economic adjustments in rate regulation, and, thus, the judiciary assumed control over the process. In Smyth v. Ames, a landmark rate case decided in 1898, the United States Supreme Court exercised its newly-recognized control over the ratemaking function when it established a guideline that legislatures must follow in making rate determinations. Smyth indicated that failure to adhere to the guideline would result in a judicial denial of a legislated rate order.

The creation of state regulatory agencies in 1907 facilitated the efficient implementation of the Smyth guideline and marked the beginning of the

---

1. See Welch, Status of Regulatory Commissions Under the Hope Natural Gas Decision, 32 Geo. L.J. 136, 136 (1944) [hereinafter cited as Welch].
2. 94 U.S. 113 (1876). The Munn Court faced the issue of whether the Illinois legislature had the power to limit or fix the price of elevator service in a grain warehouse. The Court affirmed the legislature's power and for the first time recognized the existence of a public utility. Id. at 126. See J. Bauer & N. Gold, Public Utility Valuation 26-29 (1934) [hereinafter cited as Bauer & Gold]; J. Dickinson, Administrative Justice and The Supremacy Of Law 221-22 (1927) [hereinafter cited as Dickinson].
3. 94 U.S. at 126.
4. See Welch, supra note 1, at 136.
5. 169 U.S. 466 (1898). The Smyth Court held that railroad freight rates fixed by the legislature were confiscatory and as such violated the fourteenth amendment of the United States Constitution.
6. See note 35 and accompanying text infra.
7. 169 U.S. at 550.
8. See Welch, supra note 1, at 136. In 1907, New York and Wisconsin became the first states to establish full-powered public service commissions. By 1915, Delaware was the only state that had not established some kind of public utility agency. Id. In Smyth, the Court recognized the need for regulatory agencies when it stated that the questions of compensation and due process "could be more easily determined by a commission composed of persons whose special skill, observation and experience" qualified them to do justice to the complex problem. 169 U.S. at 567.

Regulatory agencies are able to provide prompt and preventative action rather than the merely remedial action attainable through the courts. See Dickinson, supra note 2, at 14-21. See also J. Chamberlain, Judicial Function in Federal Administrative Agencies 224 (1942) [hereinafter cited as Chamberlain]; 2 B. Wyman, The Special Law Governing Public Service Companies § 1402 (1911) [hereinafter cited as Wyman]. Regulatory agencies also employ staffs experienced and knowledgeable in the area of ratemaking. See Chamberlain at 224-34. But see Levin, Illinois Public Utility Law and the Consumer: A Proposal to Redress the
administrative phase. By the nature of their specialized function, regulatory agencies proved to be better able than courts to make the continuous adjustments necessary to conform rates to changing economic conditions.  

It was in 1913 that Illinois entered the administrative phase of public utility regulation with the creation of the Illinois Commerce Commission (Commission) and the enactment of the Public Utilities Act. The Act delineates the powers and responsibilities of the Commission, as well as the scope of judicial review.

The Commission's statutory ratemaking authority was first defined by the Illinois Supreme Court in *State Public Utilities Commission v. Springfield Gas & Electric Co.* Confronted with the utility's complaint that rates established by the Commission were unreasonable, the *Springfield Gas* court looked to the Public Utilities Act to determine the powers and duties of the Commission in regard to ratemaking. In particular, the court focused on the word "value" in section 30 of the Act and construed it to mean "fair value." To implement this construction, the court established what has
been termed a "fair value guideline", similar to that adopted in Smyth, which the Commission was required to follow in computing utility rate bases. Because the court recognized a need for Commission autonomy in the ratemaking process, it did not formulate the guideline in restrictive or inflexible terms. Rather, the court emphasized that while the Commission must consider certain enumerated factors, it did not have to assign these factors a particular weight, or any weight, in the final rate determination.

Subsequent Illinois Supreme Court decisions, while advocating adherence to Springfield Gas, have slowly eroded that decision's foundation so that the fair value guideline has become a strict formula operating to usurp the Commission's role as the ratemaking authority.

In Union Electric Co. v. Illinois Commerce Commission, the most recent Illinois Supreme Court rate base decision, the court continued the erosion of the guideline when it required the Commission to use, not just to consider, particular elements in its rate base determinations. By doing so, the court misapplied Springfield Gas, infringed upon the powers of the Commission, and violated the letter and spirit of the Public Utilities Act.

The purpose of this Note is to demonstrate that the Illinois Supreme Court in Union Electric adversely affected three branches of the state government by exceeding the statutory bounds of judicial review and by engaging in judicial ratemaking. The Note traces the Illinois court's erosion of the Springfield Gas guideline, and the concomitant development of a restrictive formula. It also discusses the negative role that stare decisis has played in giving impetus to and maintaining that erosion. Finally, it analyzes the crippling effects that a strict rate base formula has on the Commission's ability to balance conflicting utility and consumer interests in an inflationary economy.

17. Id. at 219, 125 N.E. at 896. The court stated that in order to ascertain value, the Commission must consider the original cost of construction, the amount spent on permanent improvements, the present cost of construction, the probable earning capacity of the property under the rates prescribed, and the amount needed to meet operating expenses. In its final computation, the Commission must give to each of these factors the particular weight which it feels is just in each case. Id.

18. Id. at 213, 125 N.E. at 894. The court stated: "The law is settled in this State that the matter of rate regulation is essentially that of legislative control. The fixing of rates is not a judicial function . . . ."

19. Id. at 222, 125 N.E. at 897.


21. See note 17 and accompanying text supra.

22. See notes 79-94 and accompanying text infra.

23. See notes 52-56 and accompanying text infra.

24. See note 17 supra.

25. See notes 47-51 and accompanying text infra.
The administrative phase of rate regulation evolved from three major United States Supreme Court decisions: *Munn v. Illinois*, 27 *Smyth v. Ames*, 28 and *Federal Power Commission v. Hope Natural Gas Co.* 29 In *Munn*, the Court recognized the need for legislative rate regulation of businesses that are vested with a special public interest. 30 Consequently, legislatures began to formulate price-fixing statutes and provisions for franchise agreements, and to engage in other similar direct legislative action, none of which was subjected to judicial review. 31 Any relief from unreasonable rates was obtainable solely through the electoral process and not through the courts.

Eventually, claims based upon the alleged imposition of confiscatory rates by utilities invoked judicial review 32 under the constitutional guarantees of due process 33 and compensation for taking of private property. 34 Addressing the issue of confiscation, *Smyth* signaled the end of absolute legislative control over the ratemaking process. The *Smyth* Court held that the fixing of nonconfiscatory rates for utilities required the legislature to consider a number of cost and value factors. 35 In effect, the judiciary established the rate base method by which legislatures were to determine utility rates.

---

27. 94 U.S. 113 (1876). See note 2 and accompanying text supra.
28. 169 U.S. 466 (1898). See note 5 and accompanying text supra.
29. 320 U.S. 591 (1944). At issue in *Hope* was the validity of a rate order issued by the Federal Power Commission which reduced Hope Natural Gas Company's rates. The Court held that it would not disturb rate orders or allow review on constitutional grounds except under very narrow circumstances. The circumstances were enumerated as follows: (1) the burden of proof is on the utility to rebut the very strong presumption that the commission's order is not confiscatory; and (2) the utility must demonstrate that the end result of the order is either unreasonable or unjust because it interferes with the successful operation of the company, or would put the company's continued operation in jeopardy. *Id.* at 602. The *Hope* Court firmly established that no judicial review would be undertaken merely because the Federal Power Commission followed an erroneous method. *Id.* *Hope* did not, however, overrule *Smyth*; rather, it simply nullified *Smyth*'s effect by limiting the Court's review of commission orders to the end result. *Id.*
30. 94 U.S. 113, 134 (1876). The Court defined a utility as property devoted to a public use and operated in the nature of a natural monopoly. *Id.* at 126.
31. See *Welch*, supra note 1, at 136.
32. See *St. Louis & San Francisco R.R. v. Gill*, 156 U.S. 649 (1895) (recognizing right to judicial review of legislation establishing tariff rates which are so unreasonable as to practically destroy the value of the property); *Reagan v. Farmer's Loan & Trust Co.*, 154 U.S. 362 (1893) (the rates fixed by the Railroad Commission of Texas were unjust and unreasonable).
34. U.S. CONST. amend. V.
35. 169 U.S. at 546-47. The basis of all calculations of rates must be the fair value of the property being used by it for public use. To ascertain that value, the legislature should consider the utility's original cost of construction, the amount expended in permanent improvements, the
For over 70 years, the method by which rate bases are determined has been a topic of controversy. Primarily, this controversy revolves around the propriety of three possible methods of rate base measurement: original cost, reproduction cost, and fair value. Favored by commissions for its systematic administration, the original cost method calculates rate of return utilizing the amount initially invested to construct and commence operation of the utility. By contrast, the reproduction cost method is based on the amount required to replace the property as it exists. Finally, the fair value method incorporates considerations of both original cost and reproduction cost, as well as numerous other relevant factors. Computation under this last method requires that the ratemaking body first consider all factors and then delegate to each a particular weight so as to arrive at a return that will be fair to all interested parties.

Although the method of computing utility rate bases remains a topic of controversy at the state court level, it has been resolved at the federal amount and market value of its stocks and bonds and the probable earning capacity of the utility under prescribed rates after deducting operating expenses. Id.

36. See 1 J. Priest, Principles of Public Utility Regulation 139-41, 190 (1969) [hereinafter cited as Priest]. "Rate base" represents the total investment in, or fair value of, the facilities used by a utility in providing its services. That rate base figure is multiplied by a percentage called "rate of return" to arrive at the allowed return which the utility has an opportunity to earn. If, for example, the rate base is $1,000,000 and the rate of return is 6%, the amount which the utility has an opportunity to earn is $60,000 per year. Id. at 139.

37. Id. at 141. Utility company records are concrete evidence of capital interest; they are not based upon speculative physical valuation of the property. A majority of the state regulatory agencies have adopted this method and it has been either expressly or impliedly approved by the reviewing courts in 38 jurisdictions. See Union Elec. Co. v. Commerce Comm'n, 77 Ill. 2d 364, 379, 396 N.E.2d 510, 517 (1979). Opponents of the original cost method point out its unfair results during periods of inflation and its adverse effects upon the return of public utilities, including loss in purchasing power, decreased real value of depreciation allowances, attrition, and regulatory lag. See Note, Original Cost Rate Regulation and Inflation, 66 Harv. L. Rev. 1274 (1953). Attrition or erosion of the rate of return is the tendency of the rate of return to diminish in a period of comparatively high construction costs. See New England Tel. & Tel. Co. v. Department of Pub. Utils., 331 Mass. 604, 121 N.E.2d 896 (1954). Regulatory lag is the loss of proper earnings claimed by the utility between the time when a petition for a rate increase is filed and when the rate actually becomes effective by administrative or judicial determination. See State v. New Jersey Bell Tel. Co., 30 N.J. 16, 152 A.2d 35 (1959).

38. See Priest, supra note 36, at 140. Advocates of the reproduction cost method contend that it best allows utilities to keep up with the effects of inflation and attract investors. See Wyman, supra note 8, § 111. But see Levin, supra note 8, at 271 (the reproduction cost method provides utilities with a windfall during inflationary periods). Adversaries of the method have rejected it as being too theoretical and expensive. See Bauer & Gold, supra note 2, at 109; Priest, supra note 36, at 168; Tarrel, supra note 10, at 788-89.

39. See Tarrel, supra note 10, at 788-89. Relevant factors which the Commission must consider include: current economic conditions, current price levels, operating revenues, operating expenses, working capital requirements, reserves, and reasonable return to the investor. Id.

40. See Priest, supra note 36, at 140; Tarrel, supra note 10, at 788-89. This method is thought to be the most flexible because commissions are able to exercise their expert discretion in arriving at a return that is neither confiscatory to the utility nor extortionate to the consumer. See generally Levin, supra note 8.

41. See notes 45-46 and accompanying text infra.
level by the United States Supreme Court decision, *Federal Power Commission v. Hope Natural Gas Co.* 42 In *Hope*, the Court held that if the total effect of the Federal Power Commission's order was just and reasonable, there was no need for judicial inquiry. 43 Thus, judicial focus shifted from the particular method used to the reasonableness of the resulting rate. 44 Although binding upon federal courts, the *Hope* decision is not binding upon state courts that review their own commissions' intrastate rate orders. 45 Instead, the scope of judicial review at the state level is delineated in state public utility acts. 46

As previously noted, 47 Illinois entered the administrative phase of utility rate regulation in 1913 with the enactment of the Public Utilities Act. 48 The Act contains over thirty provisions that contain the powers and responsibilities of the Commission and the utilities. 49 Among the powers delegated to the Commission is the authority to ascertain the value of the property of every public utility in the state as well as every fact which, in its judgment, has any bearing on that value. 50 Furthermore, the Commission is authorized to establish the rates or other charges, rules, or regulations which it finds just and reasonable. 51

42. 320 U.S. at 602. See note 29 supra.
43. 320 U.S. at 602.
44. *Id.*
46. See, e.g., Public Utilities Act, ILL. REV. STAT. ch. 111 1/2, §§ 1-95 (1979); Public Service Comm'n Act of 1913, IND. CODE ANN. §§ 8-1-2-1 to 120 (1973); Public Utilities Act, KY. REV. STAT. § 278 (1971); Public Utilities Act, ME. REV. STAT. tit. 35, §§ 2301-2341 (1964); Public Utilities Act, MASS. GEN. LAWS ANN. ch. 25, §§ 1-12 (1973); Public Utilities Act, MICH. COMP. LAWS §§ 10.51-.62 (1970). Federal commissions are governed by the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1970). The Administrative Procedure Act applies only to agencies operating under the authority of the federal government; thus, state regulated agencies are excluded. *Id.* at § 701(b)(1).
47. See text accompanying notes 10-11 supra.
49. ILL. REV. STAT. ch. 111 1/2, §§ 32-63 (1979). See Tarrel, *supra* note 10. The author relates the history of utility rate regulation agencies in general and describes the duties of the Illinois Commerce Commission in particular. The author also follows the steps of a rate proceeding from the filing of the utility's rate increase request to the Commission's final rate determination and subsequent judicial appeal. *Id.* at 786-791.
50. ILL. REV. STAT. ch. 111 1/2, § 30 (1979).
51. *Id.* § 36. Section 36 states in pertinent part:

Whenever there shall be filed with the Commission any schedule stating an individual or joint rate or other charge, classification, contract, practice, rule or regulation, the Commission shall have power . . . to enter upon a hearing concerning the propriety of such rate or other charge, classification, contract, practice, rule or regulation, and pending the hearing and decision thereon, such rate or other charge, classification, contract, practice, rule or regulation shall not go into effect. *Id.*

In addition, ILL. REV. STAT. ch. 111 1/2, § 41 (1979) states: "[T]he Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided." *Id.*
Regarding the judicial scope of review, the Act expressly restricts the courts to a determination of reasonableness and lawfulness.\(^5\) Questions of fact are clearly matters for the Commission to decide and its findings are to be held prima facie correct.\(^5\) In addition, a Commission order cannot be set aside unless it is clearly against the manifest weight of the evidence.\(^5\) In effect, the Act foreshadowed the United States Supreme Court's decision in \textit{Hope} \(^5\) which limited judicial review of Commission orders to the reasonableness of the result rather than expanding it to include the factual determinations leading to that result. Despite this substantive similarity, however, the \textit{Union Electric} court purported to adhere to the Act while concurrently dismissing \textit{Hope} as irrelevant precedent.\(^5\)

\textbf{THE \textit{UNION ELECTRIC} DECISION}

\textit{Facts and Proceedings}

\textit{Union Electric} was a consolidated case, originating as two separate actions filed by \textit{Union Electric Company} \(^5\) and \textit{Illinois Bell Telephone Company}.\(^5\) Each utility sought judicial review of rate increase determinations made by the Illinois Commerce Commission.

At its hearings before the Commission, \textit{Union Electric} presented evidence supporting both the net original cost and reproduction cost\(^5\) methods of

\begin{itemize}
  \item \textit{Id. REV. STAT. ch. 111 1/2, § 72 (1979).}
  \item \textit{See notes} 42-46 and accompanying text \textit{supra}.
  \item \textit{Id.} \textit{ILL. REV. STAT. ch. 111 1/2, § 72 (1979).}
  \item \textit{Id. See Brief for Respondents-Appellees, \textit{Cerro Copper Products} at 11, 13, \textit{Union Elec. Co. v. Illinois Commerce Comm’n}, 77 Ill.2d 364, 396 N.E.2d 510 (1979). \textit{Union Electric's} estimate, based on net original cost, recommended a valuation of $204,297,000 on which it sought a 9\% rate of return. \textit{Union Electric} also submitted a reproduction cost valuation of $403,082,000. It then proceeded to weight the original cost rate base at 70\% and the current value or reproduction cost rate base at 30\% to arrive at what it represented as the “fair value.” \textit{Id.} The percentage weightings were based on \textit{Union Electric’s} capitalization ratios on December 31, 1975, of 70\% fixed dollar capital (bonds and preferred stock) and 30\% common equity. \textit{Id.} \textit{Union Electric} asked for an approximate rate of return of 70\% on the fair value figure which would approximate a 9\% return on the lower original cost rate base. \textit{Id.} Interestingly, the utility itself was not particularly concerned with which method was used as long as the result was reasonable. \textit{Id.}
rate determination. The Commission considered the various elements of each method and determined that Union Electric's rate base would be computed on what the utility represented as original cost. In arriving at the final rate, the Commission also considered the fact that Union offered identical service from the same facility to both Illinois and Missouri residents. Thus, to avoid discriminatory ratefixing, the Commission set Illinois rates that were comparable to those charged in Missouri. Union Electric objected to synchronizing the two rates and appealed to the circuit court claiming that section 38 of the Act, governing rate discrimination, had been misapplied.

The circuit court interpreted Illinois law as providing that original cost is only an element, not the single dispositive factor, in determining utility rate bases. Thus, the court held that because the Commission had merely considered, and not used, reproduction cost factors in its final computation, the Commission had improperly ignored essential evidence and had violated the law.

60. 64 Ill. App. 3d at 711, 381 N.E.2d at 1010. In computing Union Electric's rate base, the Commission considered the following: evidence of current value, cost of construction work in progress, Union Electric's capital structure, problems emanating from the downgrading of Union Electric's bond rating and other factors relating to current economic conditions. The appellate court noted that in the companion case, Illinois Bell Tel. Co., the Commission also demonstrated that it had considered current economic conditions in arriving at the final rate. Id.

61. See note 59 supra. The Commission rejected replacement cost evidence in favor of a more realistic, ascertainable measure of value founded upon original cost. 64 Ill. App. 3d at 711, 381 N.E.2d at 1010.

62. Id. at 702-03, 381 N.E.2d at 1004. Union Electric is a Missouri corporation which services Missouri, Iowa and three areas of Illinois. The population of the Illinois service area is about 262,000. The Missouri and Iowa service areas consist of 1,943,000 and 47,000 persons respectively. That a substantial number of Union Electric's 739,000 customers are in Missouri is evidenced by the fact that only 70,000 are in Illinois and only 16,000 are in Iowa. Id.

63. ILL. REV. STAT. ch. 111.1/3, § 38 (1979) governs the responsibility of the Commission to avoid discriminatory rates. Section 38 states in pertinent part: "No public utility shall establish or maintain any unreasonable difference as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service." Id.

In Priest, supra note 36, at 301-02, the author notes that a difference in rates is not undue or unlawful discrimination per se. Discrimination is a regulatory determination of fact which must be made on a case-by-case basis. Id.

64. 64 Ill. App. 3d at 712-13, 381 N.E.2d at 1010-11; Brief for Respondents-Appellees at 12.

65. Brief for Respondents-Appellees at 12.

66. Utilities' right to appeal is provided by ILL. STAT. ch. 111.1/3, § 68 (1979):

Complaint may be made by the commission, of its own motion or by any person or corporation . . . by petition or complaint in writing, setting forth any act or things done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the commission.

67. 64 Ill. App. 3d at 712, 381 N.E.2d at 1010. Union Electric argued that section 38 does not have extraterritorial effect, and thus cannot be used as authority to synchronize rates in different states. Id. See note 63 supra.

Regarding the synchronization of Missouri and Illinois rates, the circuit court held that section 38 of the Act did not require the Illinois Commerce Commission to conform Illinois rates to those charged by utilities in neighboring states. Therefore, the court held, the Commission had erred in substituting the Missouri commission's judgment for its own. The cause was remanded to the Commission and the Commission appealed. Based on similar facts, the circuit court also remanded the Commission's rate increase order for Illinois Bell Telephone Company. The Commission, again, appealed.

Because of the similarity in facts, the appellate court treated Union Electric and Illinois Bell as companion cases. The appellate court reversed the circuit court decisions and held that the Commission is only required to consider reproduction cost; it is not required to rely on that cost. In both cases, the appellate court reasoned that the Commission had properly received and considered evidence relating to the various factors comprising a fair rate base and had applied sound business judgment to arrive at an equitable rate. In addition, the appellate court upheld the Commission's order that Union Electric's Missouri and Illinois rates must be syn-

69. Id.
70. The circuit court noted that the Commission could properly take administrative notice of the rates set up by the Missouri Public Service Commission and introduce those rates as evidence in its own final determination. Id.
72. Illinois Bell Tel. Co. v. Commerce Comm'n, 64 Ill. App. 3d 645, 381 N.E.2d 999 (3d Dist. 1978). Illinois Bell claimed that the rate increase granted by the Commission was insufficient. The Commission's determination allowed a return on Illinois Bell's original cost base. After it had considered evidence of reproduction cost, the Commission dismissed this evidence and the theory upon which it rested as a “complex methodology prepared by parties unknown using data not available for scrutiny...” Brief for Respondents-Appellees at 14 (quoting In re Illinois Bell Tel. Co., No. 59666 (Ill. Commerce Comm'n 1976)). The Commission denied Illinois Bell's request for a rehearing. Illinois Bell then filed an appeal with the Circuit Court of Sangamon County. Id. The circuit court held that the Commission's use of an original cost rate base was contrary to Illinois law and the Commission's order was reversed and remanded. Id.
73. 64 Ill. App. 3d at 648, 381 N.E.2d at 1001.
74. Id. The Illinois Bell court stated:
   In this case, considerable evidence of current economic conditions, including “current value” was considered by the Commerce Commission; in its discretion, a rate base value founded on original cost was chosen. We find the Commission acted within the scope of its statutory authority in determining the value of Illinois Bell's property.
Id. In Union Electric, the court stated: "The cases do not suggest that the Commission must pay slavish obedience to reproduction cost estimates in determining value. Reproduction cost is but one factor of current economic conditions." 64 Ill. App. 3d at 712, 381 N.E.2d at 1011.
75. See note 17 and accompanying text supra.
76. See State Pub. Utils. Comm'n ex rel. City of Springfield v. Springfield Gas & Elec. Co., 291 Ill. 209, 222, 125 N.E. 891, 904 (1919). In this case the Illinois Supreme Court first articulated the concept of sound business judgment. It established a presumption that members of the Commission have acquired special knowledge of the subject matter through experience and study and are the most efficient instrumentality to execute a rate determination. Id.
chronized. In reaching its decision, the court relied upon section 41 of the Public Utilities Act which states that the Commission has the duty to determine just and reasonable rates. This duty, the court reasoned, mandates that all rates charged by the same utility for identical services be comparable, and concluded therefore that a rate disparity based solely on state boundary lines is clearly unjust.

The Illinois Supreme Court's
Union Electric Opinion

Confronted with the lower courts' conflicting interpretations of Illinois law regarding the elements to be used by the Commission in establishing public utility rate bases, the Illinois Supreme Court in Union Electric looked to previous supreme court decisions and found stare decisis conclusive of the issue. Although the Union Electric court relied primarily upon State Public Utilities Commission v. Springfield Gas & Electric Co. for its decision, the court did not analyze that opinion in depth. Instead, the court merely quoted the Springfield Gas holding and relied upon subsequent case law analyses of its scope and impact.

In reconciling its decision with Illinois statutory law, the Union Electric court implied legislative assent to the Springfield Gas construction of the Public Utilities Act from the legislature's failure to enact amendments to abrogate the holding of that case. Furthermore, the court contended that its past interpretations of the Act had, in effect, become a part of the Act, and to change that interpretation would be tantamount to amending the statute.

In addition, the Union Electric court dismissed the Commission's claim that it had followed the fair value guideline articulated in Springfield Gas.

77. ILL. REV. STAT. ch. 111 1/2, § 41 (1979). By contrast, the circuit court, in making its determination, relied upon section 38 of the Act which concerns discriminatory rates. See note 63 and accompanying text supra.
78. 64 Ill. App. 3d at 713-14, 381 N.E.2d at 1015.
80. Id. at 379, 396 N.E.2d at 517.
81. 291 Ill. 209, 125 N.E. 891 (1919).
82. 77 Ill. 2d at 371-80, 396 N.E.2d at 514-17. See notes 155-163 and accompanying text infra.
83. Id. at 364, 380-81, 396 N.E.2d at 515, 517-18. See notes 148-151 and accompanying text infra.
84. See notes 121-122 and accompanying text infra.
85. 77 Ill. 2d at 380-81, 396 N.E.2d at 518.
86. 291 Ill. 209, 125 N.E. 891 (1919). See note 17 supra.
The Commission alleged that it had considered all relevant factors of the guideline and had allocated to each factor the weight which sound business judgment dictated it should have. The court, however, concentrated on the fact that the Commission had not allocated any weight to reproduction cost in its final rate base computation. Therefore, the court reasoned, the Commission had not set a fair value rate base. Rather, it had violated Illinois law by setting an original cost rate base.

In resolving the Missouri-Illinois comparable rate issue, the Union Electric court relied upon section 36 of the Public Utilities Act which requires that the rates set by the Commission provide a reasonable return. In essence, the court reasoned in the negative, stating that because the Act does not authorize the Illinois Commission to defer to another state commission's judgment, the Commission erred in giving too much weight to the Missouri commission's rate determination. For the aforementioned reasons, the case was remanded to the Commission for incorporation of the fair value rate base method as it was interpreted by the Union Electric court.

**ANALYSIS AND IMPACT**

**Judicial Usurpation of Commission Authority**

Under the guise of judicial review, the Union Electric court indulged in judicial ratemaking and regressed to the judicial phase of public utility regulation by mandating the use of specific factors in the Commission's rate base determinations. As a result, the court's decision will have an adverse impact on the functions, power and credibility of three branches of state government. First, it will undermine the legislative branch by having violated the judicial review provision of the Public Utilities Act. Second, it

87. 77 Ill. 2d at 377, 396 N.E.2d at 516. See note 60 supra.
88. 77 Ill. 2d at 377, 396 N.E.2d at 516. See note 17 supra.
89. 77 Ill. 2d at 378, 396 N.E.2d at 517. See notes 38 & 61 supra.
90. 77 Ill. 2d at 379, 396 N.E.2d at 517.
91. ILL. REV. STAT. ch. 111-1/2, § 36 (1979). See note 51 supra. The court dismissed section 38 (discriminatory rates) as being inapplicable to the case. 77 Ill. 2d at 383, 396 N.E.2d at 519. Furthermore, it failed to discuss section 41 (just and reasonable rates), which the appellate court had found conclusive of the issue. See note 77 and accompanying text supra.
92. See Iowa-Illinois Gas & Elec. Co. v. Illinois Commerce Comm'n, 19 Ill. 2d 436, 167 N.E.2d 414 (1960). Iowa-Illinois Gas established a standard for measuring reasonable return; after consideration of all relevant factors, the rates fixed by the Commission should be sufficient to provide for operating expenses, depreciation, necessary reserves, and a reasonable return to investors. Id. at 445, 167 N.E.2d at 418-19.
93. 77 Ill. 2d at 383, 396 N.E.2d at 519.
94. Id.
95. See notes 4-7 and accompanying text supra.
96. 77 Ill. 2d at 378, 396 N.E.2d at 517. The court insisted that a rejection of reproduction cost evidence in the Commission's final determinations was tantamount to a rejection of the fair value method. Id. Thus, the court substituted its own factual determinations for those of the Commission and mandated that reproduction cost be weighted in the final determination. Id.
will adversely affect the administrative branch by defeating the purpose for which the Illinois Commerce Commission was created. Finally, the decision will affect the credibility of the judicial branch by its blind adherence to the stare decisis doctrine that served to perpetuate the erosion of the Springfield Gas fair value guideline into a restrictive legal formula.

The Union Electric court violated the Public Utilities Act when it substituted its own judgment for the Commission's in determining the validity of elements used to compute the fair value rate base. Section 72 of the Act expressly limits judicial review to questions of law such as reasonableness and lawfulness of Commission orders. In addition, section 72 states that an appeal is not to be treated as a trial de novo at which the court reviews the evidence and makes its own factual determinations.

---

98. See Public Utils. Comm'n ex rel. Mitchell v. Chicago & West Towns Ry., 275 Ill. 555, 114 N.E. 325 (1916). The court recognized the need for the Commission to effectuate the purpose of the Public Utilities Act. The court stated that the Commission's first power and duty was to establish just, reasonable and uniform rates and charges. Id. at 563, 114 N.E. at 328. See also note 8 supra.

99. 77 Ill. 2d at 381-82, 396 N.E.2d at 518. The court cited and dismissed as inapplicable cases in which exceptions to the stare decisis doctrine were found. In distinguishing them, the court offered no explanation other than "clearly, none of these exceptions are applicable." Id. The court never explained what these clearly inapplicable exceptions were. Id. In its analysis, the court overlooked Neff v. George, 364 Ill. 306, 122 N.E. 316 (1936). The exception to the stare decisis doctrine noted in Neff is clearly applicable to the Union Electric situation; the rule of stare decisis applies "unless the evils of the principles laid down will be more injurious to the community than can possibly result from a change." Id. at 309, 122 N.E. at 318. In Union Electric, the community will be economically injured by rates established by use of an inflexible formula that does not balance utility and consumer interests. See notes 108-111 & 116 and accompanying text infra.

100. ILL. REV. STAT. ch. 111½, § 72 (1979). See notes 52-54 and accompanying text supra. See generally BAUER & GOLD, supra note 2, at 449-50; DICKINSON, supra note 2, at 17-18 & n.29; WYMAN, supra note 8, § 1233.

101. ILL. REV. STAT. ch. 111½, § 72 (1979).

102. See Bates & Guild Co. v. Payne, 194 U.S. 106 (1904). The Court stated: [W]here the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing. Id. at 109-10.

103. See, e.g., DuPage Util. Co. v. Illinois Commerce Comm'n, 47 Ill. 2d 550, 267 N.E.2d 662 (1971) (although a court may hold that rates authorized by the Commission are inadequate or illegal and may restrain their enforcement, it cannot make new rates); Peoples Gas, Light & Coke Co. v. Slattery, 373 Ill. 31, 25 N.E.2d 482 (1939) (the true inquiry of the court is whether rates are confiscatory); State Pub. Utils. Comm'n ex rel. City of Springfield v. Springfield Gas & Elec. Co., 291 Ill. 209, 125 N.E. 891 (1919) (the fixing of rates is not a judicial function); Monarch Gas Co. v. Commerce Comm'n, 51 Ill. App. 3d 892, 366 N.E.2d 945 (3d Dist. 1977) (the determination of rates is historically a legislative, not a judicial, function).

Instead, questions of fact are solely within the Commission's scope of authority and are prima facie true unless clearly against the manifest weight of the evidence. Furthermore, section 30 of the Act gives the Commission exclusive authority to ascertain the value of utility property. In violation of these express provisions, the Union Electric court imposed its own value determination and mandated that reproduction cost be weighted in the final value computation. As a result, not only is the legislature's authority compromised, but the Commission is restrained from exercising its business judgment and utilities are assured that evidence of reproduction cost, no matter how speculative or contradictory, will be given weight in the final rate base determination. Consequently, consumers may pay increased utility rates as inflation causes reproduction costs to spiral, while utilities continue to reap a high return on an investment that costs only a fraction of its current inflated value. Without question, the utility must earn enough

merce Comm'n ex rel. Dept' of Pub. Works & Bldgs., 354 Ill. 58, 74, 188 N.E. 177, 183 (1933); Sunset Trails Water Co. v. Commerce Comm'n, 7 Ill. App. 3d 449, 456, 287 N.E.2d 736, 742 (3d Dist. 1972)).

105. See note 53 and accompanying text supra.
106. See note 54 and accompanying text supra.
108. See note 96 supra.
109. See BAUER & GOLD, supra note 2, at 168; Tarrel, supra note 10, at 788-89.

[T]he value of the property is to be determined as of the time when the inquiry is made of the rates, and if the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is, as a general rule, entitled to the benefit of such increase. This would not be true, however, where the property had increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public.

Id. at 220, 125 N.E. at 897.
111. See PRIEST, supra note 36, at 169-70. Particularly during an inflationary period, reproduction cost evidence precipitates a "windfall" to the utility and its investors. Priest illustrated such a "windfall" with the following example:

**SIMPLIFIED BALANCE SHEET AS EXAMPLE**

This ultra-simplified balance sheet is offered for illustration's sake:

<table>
<thead>
<tr>
<th>ASSETS</th>
<th>LIABILITIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net Plant Account</td>
<td></td>
</tr>
<tr>
<td>$1,000,000</td>
<td>$500,000 Bonds</td>
</tr>
<tr>
<td></td>
<td>$6 Preferred Stock</td>
</tr>
<tr>
<td></td>
<td>Common Stock</td>
</tr>
<tr>
<td></td>
<td>$1,000,000</td>
</tr>
</tbody>
</table>

If we assume that our company has been allowed, and has earned, a six per cent return on net plant account (original cost rate base), it would have $60,000 with which to pay $25,000 of bond interest and $15,000 of preferred dividends, leaving
money to efficiently run the company, pay investors and expand as necessary. Yet these needs can be satisfied by adjusting the rate of return figure instead of using reproduction cost as the rate base.

The Union Electric decision also will have an adverse impact on the administrative branch of the government. Depriving the Commission of judicial deference to its expert status defeats the very purpose for which the Illinois Commerce Commission was created. In Public Utilities Commission v. Chicago & West Towns Railway, the Illinois Supreme Court recognized that the Commission is necessary to effectuate the policies of the Public Utilities Act. These policies include preventing unjust discrimination, undue preferences, and extortionate rates. The Union Electric court acted contrary to these policies by imposing an inflexible rate formula upon the Commission that required the use, not just the consideration, of reproduction cost. In effect, the court's formula tilted the scales toward the

\[ \text{Id.} \]

112. See B A U E R & G O L D, supra note 2, at 343. Because there is a distinct interdependence between the rate base and the rate of return, the adequacy of one must be considered in relation to the other. Id. Recognizing this interrelationship, the United States Supreme Court has held that if both factors yield a sufficient total amount of return, the rate order will be upheld. See, e.g., Permian Basin Area Rate Cases, 390 U.S. 747 (1968) (the rate of return was sufficient to maintain the producer’s financial integrity, to attract capital, and to compensate their investors for risks assumed); Dayton Power & Light Co. v. Public Utils. Comm’n, 291 U.S. 440 (1934) (to avoid confiscation, an 8%, rather than 6%, rate of return was allowed); United Rys. v. West, 280 U.S. 234 (1930) (a fair return in a given case is not capable of exact mathematical demonstration); Pacific Gas & Elec. Co. v. San Francisco, 265 U.S. 403 (1924) (because of the inadequate rate base, a net return of 7% was necessary to avoid confiscation); Bluefield Water Works v. Public Serv. Comm’n, 262 U.S. 679 (1923) (the rate of return must be such as to assure confidence in the financial soundness of the utility); Lincoln Gas & Elec. Co. v. Lincoln, 250 U.S. 256 (1919) (current interest rates or costs of capital received special consideration in establishing the rate of return); Cedar Rapids Gas & Light Co. v. Cedar Rapids, 223 U.S. 655 (1912) (after consideration of the fact that the rate base was generous, the Court found a 6% rate of return adequate).

113. See note 97 supra. See also D I C K I N S O N, supra note 2, at 71. The author states that the effectiveness of a commission order is directly related to the conclusiveness of its findings. Id. Furthermore, a primary reason for commission control is to eliminate the delay which invariably accompanies judicial review. Id.

114. 275 Ill. 555, 114 N.E. 325 (1916).

115. Id. at 563, 114 N.E. at 328.
utility-desired high rate increase, thereby upsetting the balance between consumer and utility\textsuperscript{116} and infringing upon the Commission’s authority to create and maintain that balance.

Finally, \textit{Union Electric} will have a negative impact on the credibility of the judicial branch of the government. By citing \textit{Springfield Gas} as precedent, yet relying upon subsequent case law for its interpretation,\textsuperscript{117} the \textit{Union Electric} court perpetuated the distortion of the \textit{Springfield Gas} fair value guideline into a restrictive legal formula. The court’s reliance upon precedent also illustrated a negative characteristic of the stare decisis doctrine.\textsuperscript{118} While the doctrine can work in a positive manner, providing uniformity and predictability in the law,\textsuperscript{119} it can also work in a negative manner by perpetuating misinterpreted or bad precedent.\textsuperscript{120} In \textit{Union Electric}, the court relied upon a line of rate base cases each of which had eroded the original fair value concept. The erosion has been subtle, each case adding to the change until \textit{Union Electric} completed the transformation.

As the originator of the fair value guideline, \textit{Springfield Gas}, the landmark Illinois Supreme Court rate base case, construed the term “value” in the Public Utilities Act\textsuperscript{121} to mean “any value . . . which fair and reasonable men would say ought to be attached to the property under all the circumstances of the particular case for the purpose of measuring a return, which the public should pay to the owner.”\textsuperscript{122} To effectuate this construction, the \textit{Springfield Gas} court established the guideline\textsuperscript{123} which outlined factors\textsuperscript{124} that the Commission was to consider in determining a fair value rate base. The guideline neither mandated the use of specific elements in the final computation nor indicated that any particular weight must be given to each element.\textsuperscript{125} Instead, the Commission was required to consider all relevant factors and apply its sound business judgment to determine which of those factors would be given weight in the final computation. The Com-

\textsuperscript{117} See notes 127-140 and accompanying text infra.
\textsuperscript{118} See note 99 supra.
\textsuperscript{119} See generally Neff v. George, 364 Ill. 306, 122 N.E. 316 (1936).
\textsuperscript{121} ILL. REV. STAT. ch. 111%, § 30 (1979).
\textsuperscript{122} 291 Ill. at 222, 125 N.E. at 897.
\textsuperscript{123} See note 17 supra.
\textsuperscript{124} Id.
\textsuperscript{125} See United Cities Gas Co. v. Commerce Comm’n, 48 Ill. 2d 36, 40, 268 N.E.2d 32, 34 (1971) (it is not necessary for the Commission to make a finding as to each evidentiary fact or claim); Peoples Gas, Light & Coke Co. v. Slattery, 373 Ill. 31, 53, 25 N.E.2d 482, 494 (1939) (the elements considered by the Commission were proper elements to be taken into consideration for ratemaking purposes); Tarrel, supra note 10, at 788.
mission's order would stand if, first, consideration had been given to all relevant elements, and, second, the result was reasonable in light of current economic conditions.\textsuperscript{126}

Distortion of the flexible fair value guideline began with the Illinois Supreme Court decision of \textit{Illinois Bell Telephone Co. v. Illinois Commerce Commission}.\textsuperscript{127} The \textit{Illinois Bell} court analyzed the reasonableness of the Commission's order to cancel rate schedules filed by \textit{Illinois Bell}.\textsuperscript{128} After a review of the record, the Supreme Court held that the Commission had failed to consider all relevant factors\textsuperscript{129} and remanded the case.\textsuperscript{130}

Although, on its face, the \textit{Illinois Bell} decision comports with Illinois law,\textsuperscript{131} an analysis of the court's interpretation of the fair value guideline reveals a distinct bias toward the interests of the utility and its investors. This is apparent from the court's emphasis on the importance of using business-oriented reproduction cost and reasonable return factors\textsuperscript{132} in the rate base determination, both of which precipitate increased utility rates. Although the \textit{Illinois Bell} court purported to follow the \textit{Springfield Gas} guideline, in fact, \textit{Illinois Bell}'s distinct subordination of the public interest

\textsuperscript{127} 414 Ill. 275, 111 N.E.2d 329 (1963).
\textsuperscript{128} \textit{Id.} at 283, 111 N.E.2d at 334. \textit{Illinois Bell} was a consolidated case which also involved a jurisdictional question raised by the City of Chicago under § 67 of the Public Utilities Act (currently codified at ILL. REV. STAT. ch. 111\%, § 71 (1979)). Section 67 stated that a utility's request for a rehearing by the Commission regarding application of a modified or rescinded order does not preclude the utility from filing a petition setting up a different set of facts after two years and again invoking Commission action. \textit{Id.} The City interpreted the Act to have created a two-year period of repose during which a utility could not file new rate schedules. 414 Ill. at 278, 111 N.E.2d at 331. Thus, the City claimed that the Commission should have cancelled the rate schedules filed with it by Illinois Bell because less than two years had elapsed since the last rate order had been entered. \textit{Id.} The court relied on 30 years of judicial construction of § 67 to affirm the Commission's jurisdiction. \textit{Id.} at 279, 111 N.E.2d at 332.
\textsuperscript{129} 414 Ill. at 290, 111 N.E.2d at 337. The court stated that the Commission had failed to consider current economic conditions, present price levels and reproduction costs. The court held that the Commission erred in not filing a complete record of the hearing indicating factors it had considered, but had rejected. \textit{Id.} at 288, 111 N.E.2d at 336. The record indicated specific findings only on those factors to which the Commission gave weight in its final computation. \textit{Id.} Thus, the edited record gave the appearance of Commission neglect to consider all relevant factors. See State Pub. Utils. Comm'n \textit{ex rel. City of Springfield v. Springfield Gas & Elec. Co.}, 291 Ill. 209, 233, 236, 125 N.E. 891, 905, 907 (1919).
\textsuperscript{130} 414 Ill. at 291, 111 N.E.2d at 337-38.
\textsuperscript{131} ILL. REV. STAT. ch. 111\%, § 72 (1979). The \textit{Illinois Bell} court acted within the judicial bounds of review when it focused on the reasonableness and the lawfulness of the Commission's order. Illinois case law requires that Illinois courts follow the fair value guideline as formulated in \textit{Springfield Gas}. See note 17 \textsuperscript{ supra}. Because there was no indication in the Commission's record that the guideline had been followed, the Commission appeared to have failed to follow precedent.
\textsuperscript{132} 414 Ill. at 287-89, 111 N.E.2d at 335-37. The \textit{Illinois Bell} court paid lip service to the need to balance consumer and utility interests, but proceeded to emphasize the importance of maintaining the confidence of investors and utility companies in their financial endeavors. \textit{Id.}
distorted the guideline’s basic principles.\footnote{133} Forcing the Commission to use factors which it found not conducive to setting a reasonable rate upset the delicate balance between conflicting utility and consumer interests.

Distortion of the guideline continued with the Illinois Supreme Court decision in \textit{City of Alton v. Commerce Commission}.\footnote{134} In \textit{City of Alton}, the Commission and the utility company claimed that the circuit court had exceeded its proper scope of review by inquiring into the elements of the Commission’s factual determinations rather than confining its review to the reasonableness of the result.\footnote{135} In defense of the circuit court’s approach, the supreme court stated that in order to make a sound and complete analysis of the Commission’s order, the factual determinations made by the Commission must be analyzed.\footnote{136} This manner of review not only violated the Public Utilities Act,\footnote{137} but also contradicted the mandates of \textit{Springfield Gas},\footnote{138} a case which the \textit{City of Alton} court cited as precedent.\footnote{139} The court completely overlooked the facts that the Commission’s function is to make factual determinations regarding the elements of the fair value guideline, and that the court’s function is only to see that these elements were considered.\footnote{140}

With the \textit{City of Alton} decision, the erosion of the fair value guideline was nearly complete. The guideline’s inherent flexibility, integral to maintaining

\begin{itemize}
\item \footnote{133} 291 Ill. 209, 125 N.E. 891 (1919). The \textit{Springfield Gas} court stated: [The Commission] sits to administer justice to individual and corporation, the weak, the strong, the poor, the wealthy, indifferently, fearing none and fawning on none. The notion that Commissions of this kind should be closely restricted by the courts and that justice in our day can only be had in the courts is not conducive to the best results. . . . The necessity of public regulation of rates arises out of the monopoly of the public service company . . . and the [inability of] the individual consumer . . . to contract on equal contract terms. \textit{Id.} at 218, 125 N.E. at 899.
\item \footnote{134} 19 Ill. 2d 76, 165 N.E.2d 513 (1960).
\item \footnote{135} \textit{Id.} at 80, 165 N.E.2d at 516.
\item \footnote{136} \textit{Id.} The \textit{City of Alton} court cited Peoples Gas, Light & Coke Co. v. Slattery, 373 Ill. 31, 25 N.E.2d 482 (1939), as precedent for its decision. \textit{Slattery}, however, is fundamentally distinguishable from \textit{City of Alton}. \textit{Slattery} concerned a charge of confiscatory rates, \textit{id.} at 35, 25 N.E.2d at 486, whereas \textit{City of Alton} concerned a charge of unreasonable rates. 19 Ill. 2d at 78, 165 N.E.2d at 515. This distinction is important because the scope of judicial review differs for each charge. When the charge is confiscatory rates, the utility is entitled to the independent judgment of the court on questions of law and fact. \textit{See} \textit{Bauer} \& \textit{Gold}, supra note 2, at 134. Denial of review is a violation of the guaranty of due process under the fifth and fourteenth amendments. \textit{See} \textit{id.}; \textit{Benjamin, Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals}, 48 COLUM. L. REV. 1, 23 (1948). In comparison, the scope of judicial review for a claim of unreasonable rates is limited to a review of evidence in the record and the findings of the Commission are to be presumed correct. \textit{ILL. REV. STAT.} ch. 111\%/, § 72 (1979).
\item \footnote{137} 19 Ill. 2d 81, 165 N.E.2d at 517.
\item \footnote{138} \textit{See} \textit{notes} 14-19 and accompanying text supra.
\item \footnote{139} 291 Ill. 209, 236, 125 N.E. 891, 902 (1919). \textit{See generally} \textit{Priest}, supra note 36, at 434-37.
a balance between public and utility interests, was eliminated by Illinois Bell's mandate that reproduction cost factors cannot be set aside in rate base determinations.\(^{142}\) City of Alton,\(^{143}\) in turn, broadened the judicial scope of review to allow courts to examine the elements of ratemaking and make their own findings of fact.\(^{144}\) Both Illinois Bell and City of Alton cited Springfield Gas as precedent, yet both distorted its holding to the point of clearly violating its principles. The Union Electric court continued this distortion by claiming adherence to the fair value guideline, while, in fact, advocating a formula that resulted in judicial ratemaking.\(^{145}\)

The Union Electric court would not have reached this result if it had reviewed the actual Springfield Gas opinion and not relied upon distorted interpretations. Unlike its progeny, the Springfield Gas court was firm in its statement that utility ratemaking is a legislative, not a judicial function.\(^{146}\) It was equally firm in holding that the court is not to review the Commission's factual determinations on the separate elements of value. Instead, the court stated, it must limit review to a determination of the reasonableness of the final result.\(^{147}\) In direct violation of these affirmations, the Union Electric court overstepped the bounds of judicial review and stated that the primary issue was the validity of elements used by the Commission in establishing the rate bases for Union Electric and Illinois Bell.

**Legislative Assent Through Inaction**

In addition to stare decisis, the Union Electric court relied upon the presumption of acquiescence doctrine\(^{148}\) in rendering its decision. This doctrine implies passive agreement from a lack of active disagreement.\(^{149}\) In Union Electric, the court reasoned that because the legislature had never amended the Public Utilities Act to contradict the Springfield Gas construction of "value" as the term appears in section 30 of the Act,\(^{150}\) the legislature must therefore approve of the construction and its implementing guideline.\(^{151}\) Considering the court's distortion of the Springfield Gas holding, however, legislative acquiescence to the original fair value guideline does not infer acquiescence to Union Electric's fair value formula. There are, in fact, sev-

---

141. 414 Ill. 2d 76, 111 N.E.2d 329 (1953).
142. See notes 127-133 and accompanying text supra.
143. 19 Ill. 2d 76, 165 N.E.2d 513 (1960).
144. See notes 134-140 and accompanying text supra.
145. See Springfield Gas as precedent.
146. 3d Dist. 1978.
147. Id. at 236, 125 N.E. at 902. This limitation is a reiteration of the scope of judicial review stated in section 30 of the Public Utilities Act, Ill. Rev. Stat. ch. 111 1/2, § 72 (1979).
148. 3d Dist. 1010 at 396 N.E.2d at 518.
151. 77 Ill. 2d at 37-76, 396 N.E.2d at 515-16.
eral plausible explanations for the legislature’s passive attitude other than acquiescence. First, the legislature may be unaware of the conflict between recent court and Commission decisions.152 Second, inaction may be a conscious effort to “leave the problem fluid.”153 Third, the legislature may be assenting to the fair value method by name, unaware of its substantive distortion.

The last explanation brings to light the problems inherent in mislabeling ratemaking methods. In Union Electric, the Commission erred by labeling its rate base method as “original cost.”154 By doing so, it gave the impression of blatantly operating contrary to Illinois law, which mandates the fair value method.155 In fact, the Commission followed the Springfield Gas fair value guideline: it considered all relevant factors and applied to each the weight it judged would result in a fair return.156 Thus, no weight was given to reproduction cost evidence157 and emphasis was shifted to the original cost factors.158 In analyzing the Commission’s rate base method, the supreme court focused narrowly on two aspects. First, weight had been given by the Commission to original cost and not to reproduction cost. Second, the Commission labeled its method as “original cost.” Consequently, without fully appreciating the intricacies of the fair value process, the court held that the Commission’s order was contrary to Illinois law.159 In dismissing the Commission’s claim that by considering relevant elements it had followed the fair value method,160 the Union Electric court gave added momentum to the adoption of a strict rate base formula.

Contrary to the Union Electric court’s rationale, legislative acquiescence to the Springfield Gas construction of “value” supports the Commission’s rate base method and not the method mandated by the Union Electric court. When both methods are stripped of their respective labels and examined substantively, it becomes clear that the Commission adhered to the original fair value guideline while the court imposed a restrictive judicial formula.

**CONCLUSION**

In violation of the express provisions of the Public Utilities Act, Union Electric continues the Illinois Supreme Court’s reversion to the judicial
phase of utility rate regulation. Rather than illustrating any possible merit in such a regression, the Union Electric decision exemplifies why the judiciary should not get involved in the highly technical factual determinations of ratemaking.\(^{161}\)

The decision is a morass of superficial reasoning, with more quotations than substantive analysis. Indicative of this superficiality is the court's perfunctory dismissal of the United States Supreme Court's deferential attitude toward regulatory agencies as being contrary to Illinois precedent.\(^{162}\) The Union Electric court failed to realize that the deferential stance it ignored was expressly advocated by Springfield Gas, the case upon which it most strongly relied.\(^{163}\)

In addition, throughout the opinion, the court presented contradictory interpretations of the term "fair value,"\(^{164}\) indicating an unfamiliarity with the basic terminology of ratemaking. Contrary to the principles upon which the term was originally construed,\(^{165}\) "fair value" has, through the court's analysis, become synonymous with "market value" rather than "reasonable result."

Procedurally, as well as practically, public utility ratemaking is not suited to the judicial process. It is an area that must remain flexible so as to adjust to the changing demands of an unpredictable economy. Stare decisis, which the Union Electric court found conclusive of the issue, is inherently in conflict with this need.\(^{166}\) By contrast, the Commission's ad hoc decision-

---

161. See Steenerson v. Great Northern R.R., 69 Minn. 353, 72 N.W. 713 (1897). In Steenerson, Justice Canty vividly expressed the reason for judicial non-interference in Commission decision-making:

How is a judge who's not supposed to have any of this special learning or experience, and could not take judicial notice of it if he had it, to review the decision of commissions who should have it, and should act upon it? It seems to us that a judge is not fit to act in such a matter.

Id. at 377, 72 N.W. at 716.

162. 77 Ill. 2d at 371-72, 396 N.E.2d at 514. The court offered no explanation for its dismissal of the federal court trend other than an absolute desire to follow stare decisis. The Union Electric court simply stated: "[T]his court has adhered to the fair value approach despite the demise of Symth v. Ames in the Federal Courts." Id.

163. See notes 117-126 and accompanying text supra.

164. 77 Ill. 2d at 370-80, 396 N.E.2d at 513-18. The court demonstrated its confusion as to the substantive meaning of the term "fair value" when it repeatedly changed the context of its reference to the term throughout its opinion. The following examples illustrate the court's inconsistent use of the term: (1) "'fair-value' approach”, id. at 370, 396 N.E.2d at 513; (2) "fair-value rule”, id. at 371, 396 N.E.2d at 513; (3) "fair-value principle”, id.; (4) "fair-value method”, id. at 372, 396 N.E.2d at 514; (5) "present fair value of utility property”, id. at 374, 396 N.E.2d at 515 (quoting Public Utilities Comm'n v. Springfield Gas & Elec. Co., 291 Ill. 209, 213 (1919)); (6) "fair-value rate base”, 77 Ill. 2d at 374, 396 N.E.2d at 515; (7) "fair-value standard”, id. at 377, 396 N.E.2d at 516; and, finally, (8) the term is referred to as a "highly technical term of art”, id. Considering the various uses of the term, the last reference is indeed ironic. A term of art by definition is definitive in its use. The Union Electric court's vacillating use of "fair-value" is clearly not definitive.

165. See notes 121-122 and accompanying text supra.

166. See note 99 supra.
making process\textsuperscript{167} is perfectly attuned to it. Public utility ratemaking is an area in need of prompt and preventive, rather than remedial, action.\textsuperscript{168} A successful consumer appeal of exorbitant rates does not result in retroactive rebate to the consumer.\textsuperscript{169} Consumer protection must come, therefore, before the rates are put into effect. When the Commission's preventive measures infringe upon property rights, or otherwise fail, the injured party has the right to appeal.\textsuperscript{170} This judicial review functions as the check on administrative power. The review, in turn, is expressly limited by statutory provisions. Thus, if a court's check becomes instead a substitution of its own factual determination for that of a commission, it has operated contrary to statutory law and usurped the administrative function. The difference between a check on power and the usurpation of it is the difference between Springfield Gas and Union Electric.

\textit{Kathleen Curtin Schneider}

\textsuperscript{167} See Mississippi River Fuel Corp. v. Commerce Comm'n, 1 Ill. 2d 509, 116 N.E.\textsuperscript{2d} 394 (1953). Commission proceedings have only quasi-judicial effect and may be altered when circumstances require. \textit{Id.} at 513, 116 N.E.\textsuperscript{2d} at 397.
\textsuperscript{168} See generally \textit{Dickinson}, supra note 2, at 12 & n.2.
\textsuperscript{169} See generally Levin, supra note 38, at 261.
\textsuperscript{170} Ill. Rev. Stat. ch. 111\textsuperscript{1/2}, § 72 (1979).