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ILLINOIS PUBLIC UTILITY LAW AND THE CONSUMER: A PROPOSAL TO REDRESS THE IMBALANCE

Ellis B. Levin*

The procedural, substantive, and institutional factors involved in a utility request for a rate increase generally assure that the request will be granted. Traditionally, the vast financial and political resources of the utilities, coupled with general consumer apathy, has resulted in the creation of rate proceedings favorable to utility interests. The author offers various proposals that he believes will eliminate most of the imbalance. Though utility consumers have become increasingly involved in rate proceedings in recent years, the author concludes that final resolution of the problem remains with the Illinois legislature.

I. INTRODUCTION

A decade ago, public utility regulation was beyond the comprehension and concern of the average consumer. It was a preserve of the expert. Public exposure was limited to brief announcements in the news media that the telephone, gas, or electric company had filed for a rate increase. Months later, a follow-up announcement would indicate that the utility had obtained all or most of the increase it had requested. Rarely, outside of California, did a consumer seek to involve himself in the process.

Today, public utility regulation is highly visible. At every stage of the process the news media reports the statements of the utility's witnesses, the counterstatements of the utility's critics, and occasionally, undertakes an independent analysis of the merits. Individual consumers, civic organizations, labor unions, and politicians have begun to involve themselves in the hearings. A measure of the dramatic increase in public involvement in public

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1. The California Public Utilities Commission enjoys a reputation for being the most activist commission in the country. Part of the explanation for this may be the traditionally high level of citizen participation in public utility regulatory proceedings. For example, in In re Pacific Tel. & Tel. Co., 63 P.U.R.3d 513 (Cal. Pub. Util. Comm'n 1964), there were over 75 intervenors representing other utilities, private businesses, governmental jurisdictions, citizen organizations and private individuals.
utility regulation is suggested by the number of intervenors in the 1951 and 1972 Illinois Bell Telephone rate hearings. In 1951, five municipalities, the Attorney General of Illinois, the State’s Attorney of Cook County, the Greater Chicago Hotel Association, and one ad hoc consumer group intervened in rate hearings. In contrast, in 1972, 14 municipalities, the State of Illinois, the United States government, one labor union, six citizens’ organizations, eight businesses, and four individual citizens intervened.

A newcomer to public utility regulation finds a field of law long dominated by the regulated. Like landlord and tenant law, public utility law in Illinois is best characterized by its lack of symmetry. While it should theoretically protect both the utility and the consumer, the law, both procedurally and substantively, is designed to provide maximum protection to the utility’s interests. Commensurate protection is not afforded the consumers.

This Article will delineate the basic procedural, substantive, and institutional factors involved in rate proceedings before the Illinois Commerce Commission. An attempt will be made to indicate how these factors have consistently contributed to producing higher rates for Illinois utility consumers. Also, the role of the utility consumer in rate proceedings will be explored. While this Article deals primarily with the Illinois Bell Telephone Company, the principles expressed apply generally to all utilities and in no way limit the proposals offered.

II. PROCEDURAL FACTORS

The general procedure for considering a rate increase appears neutral on its face. The utility files proposed rates with the Illinois Commerce Commission to increase revenues. The Commission holds public hearings on the request and renders a decision based on the evidence. An examination of the specific procedural

4. The typical analysis employed by a state utility commission in determining whether the utility is entitled to an increase is as follows: first, it determines the dollar value of the utility’s assets devoted to providing utility service in the state; second, it determines a reasonable rate of profit for the utility; third, it computes the actual profit to which the
aspects of Illinois public utility law, however, will reveal that it is anything but unbiased.

A. Increases Without Formal Hearings and Commission Findings

In Illinois, once a utility has filed a proposed rate increase or a change in regulations that has the effect of increasing rates, the state regulatory commission has two options. It can suspend the rate proposal and hold formal hearings, or it can allow the proposal to go into effect without any hearings at all.\(^5\) If the Commission decides to hold formal hearings, it must give the utility and other interested parties a reasonable opportunity to present evidence.\(^6\) Thereafter, the Commission must render a decision based on substantial evidence within eleven months from the date the proposal was filed, or the proposal automatically goes into effect.\(^7\) While such an automatic rate increase remains subject to permanent cancellation by the Commission's final order, the order will not affect revenues already collected.\(^8\) In making the determination whether to suspend the proposed increase and hold hearings, the Commission is not required to follow any particular procedure.\(^9\) Furthermore, the decision whether to hold hearings is

utility is entitled by multiplying the dollar value of the utility's assets by the rate of profit; fourth, it subtracts operating revenue from operating expenses for a 12 month period; fifth, it compares the balance with the computed profit figure, and if the latter is greater, calculates the amount of increase necessary to offset the difference. The utility is then entitled to institute rates that will produce the rate of return approved by the Commission.


6. With the exception of those parties that have a statutory right to participate in rate proceedings, the statutes are unclear as to who may otherwise intervene. See ILL. REV. STAT. ch. 111 2/3, §§68-69 (1975).


9. Antioch Milling Co. v. Pub. Serv. Co., 4 Ill.2d 200, 123 N.E.2d 302 (1955). In Antioch, public grist mill operators complained that a rate schedule proposed by an electric power company was unreasonable and discriminatory. The operators also contended that the Commerce Commission had permitted new rates to go into effect without first finding such increase was necessary. The court held that the Public Utilities Act granted the Commission the authority to either suspend the new rate pending a formal hearing regarding its propriety or allow the rate to go into effect without a formal hearing. The court further determined that, in passing upon any proposed rate change, the Commission could exercise its discretion regarding what methods to employ. Any preliminary hearing
not reviewable, regardless of the size of the increase.\textsuperscript{10}

California offers the only significant departure from this pattern. Under the state constitution,\textsuperscript{11} rate decreases proposed by a utility may be put into effect without formal hearings or commission findings. However, increases in utility rates must be based on substantial evidence and formal findings after full hearings, the burden being on the utility to establish that the proposed rates are fair and reasonable. Prior to the 1921 amendments to the Public Utilities Act, a similar procedure was in effect in Illinois.\textsuperscript{12}

In order to protect the consumer from unwarranted rate increases, Illinois should return to this long abandoned procedure.

\textbf{B. Period of Repose}

While the Illinois Commerce Commission enjoys discretionary authority to permit a rate increase to go into effect without full hearings and formal findings, there is no discretion to deny, without hearings, new filings by a utility. The hearing requirement applies even to filings for rate increases that closely follow a prior Commission decision on the same question.\textsuperscript{13} There also is no required period of repose during which a utility is barred from filing for further rate increases.\textsuperscript{14} Consequently, nothing prevents a utility that failed to receive a proposed rate increase from re-

\begin{itemize}
  \item \textsuperscript{10} Conducted by the Commission to gauge the views of interested parties was not required to conform to statutory standards for complaint proceedings.
  \item \textsuperscript{11} \textit{Id.}
  \item \textsuperscript{12} \textit{Cal. Const. art. 12, §20. See also Cal. Pub. Util. Code §454 (1961).}
  \item \textsuperscript{13} The 1921 Act eliminated the following language from Section 36 of the Public Utilities Act:
    \begin{quote}
      No public utility shall increase any rate or other charge or so alter any classification . . . as to result in any increase . . . except upon a showing before the Commission and a finding by the Commission that such increase is justified.
    \end{quote}
    \textit{Ill. Rev. Stat. ch. 111a, §36 (1914). For an interpretation of this language, see Michel v. Illinois Bell Tel. Co., 226 Ill.App. 50 (2d Dist. 1922).}
  \item \textsuperscript{14} There is, however, sound precedent for finding the existence of such discretion vested in the Commission. This view is based upon the last lines of section 67 of the Public Utilities Act, \textit{Ill. Rev. Stat. ch. 111 2/3, §71 (1975)} which states:
    \begin{quote}
      Only one rehearing shall be granted by the Commission, but this shall not be construed to prevent any party from filing a petition setting up a new and different state of facts after 2 years, and invoking the action of the Commission thereon.
    \end{quote}
    \textit{See In re Peoria White Star Bus Co., 2 I.C.C.R. 115 (1923) (Commission relied upon this language to deny a rate increase).}
  \item \textsuperscript{15} Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 414 Ill. 275, 111 N.E.2d 329 (1953).
\end{itemize}
peatedly filing identical proposals until the Commission finally capitulates and grants the increase. Further, nothing prevents a utility that has recently obtained a substantial rate increase from immediately filing for a further increase.

Some utilities traditionally have made repeated filings in Illinois. For example, after Illinois Bell received a rate of return in excess of 9.13 per cent in November 1970, which was the highest rate allowed a major telephone company at that time, Bell filed for an even greater increase the following September. When the Commission granted Bell only an 8.00 per cent effective rate of return, Bell refiled rate increase requests five times within the next five months—requests that sought a rate of return above 9.13 per cent. In December 1973, Bell was granted over sixty-five per cent of the cumulative requests. Seeking a still higher rate of return, in March 1974, Bell filed for a formula that would allow monthly rate increases. In February 1975, one week after that request was denied, Illinois Bell requested still another rate increase.

Unlike Illinois, the State of Washington has a statutory period of repose. When a new filing for an increase is made within two years of the determination of a prior rate proposal, the Washington Commerce Commission has the discretion to dismiss the filing summarily without holding hearings. Such a provision allows some finality to a Commission order denying an increase. It prevents the utility from coming back the very next day to request another increase. Moreover, the repose period permits sufficient time to elapse in order to assess the consequences of a rate increase.

Illinois should adopt a period of repose, possibly eighteen months, during which utilities could not file rate proposals either identical or similar to those previously filed. In this way, some degree of finality would be afforded Commission orders and utilities would be precluded from filing rate increases at their whim.

20. Wash. Rev. Code §80.04.200 (1975). The provision is limited, however, to six months if the utility does not appeal from the Commission’s determination.
C. Temporary Rate Changes

Procedures for temporary rate changes, whether upward or downward, represent another area in which Illinois public utility law favors the utilities. Basically, the procedures are designed to favor rate increases rather than decreases. For example, if a proposed rate increase is suspended by the Commission pending formal hearings and a final order, the utility still may seek a temporary increase during the pendency of the Commission proceeding.\(^2\) The decision whether to grant the temporary increase need not be based upon a full hearing, or even the 30-day notice normally required before a rate change is permitted to go into effect. The criteria is simply "good cause shown."\(^2\) No other more explicit criteria exists to limit the circumstances under which the authority may be exercised. Also, no criteria exists to limit the amount of the temporary increase or the length of time that the increase may remain in effect. The judicial justification for this liberal standard of review is that any excessive increase may be rectified by the Commission in its final order. Erroneous or even clearly illegal determinations in a temporary order are not subject to review until after the Commission’s final order.\(^2\) On the other hand, if the Commission refuses to grant a temporary rate increase, that order is subject to judicial review to determine whether it creates a confiscatory rate situation for the utility.\(^2\)

In contrast to its nearly unlimited authority to increase rates temporarily, the Commission’s authority to decrease rates temporarily is subject to very clear statutory limitations. The Commission must determine that (1) the net income of the utility is in excess of the amount required to provide a reasonable return on the value of the utility’s property, (2) the final determination of the case will require more than 120 days, and (3) the amount of the reduction will not prevent the utility from earning a reasonable rate of return.\(^2\) Additionally, such a reduction is limited to a nine-month period which the Commission can extend to twelve

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months.\textsuperscript{26} If the final order provides for a higher rate of return than the temporary order, the utility is entitled to a temporary increase to compensate it for the amount lost during the period in which the temporary reduction was in effect.\textsuperscript{27} Temporary rate reductions also are subject to judicial review to determine if they are confiscatory.\textsuperscript{28}

\textbf{D. Discovery}

The actions of public utilities cannot be countered successfully without adequate information. Just as a public utility enjoys a monopoly with respect to providing utility service, it exercises exclusive control over documents, information, and witnesses familiar with its operations to a degree which utility consumers cannot share. For this reason, discovery procedures are needed if consumers are to participate effectively in rate proceedings. Unfortunately, the Illinois Commerce Commission does not recognize a statutory right to discovery by consumer intervenors.\textsuperscript{29}

With the Commission asserting that no statutory right to discovery exists, the ability of the consumer intervenor to obtain discovery is dependent on the whim of the hearing officer and Commission. This may be a major obstacle to discovery. For example, in \textit{In re Illinois Bell Telephone Co.},\textsuperscript{30} the hearing officer allowed extensive intervenor discovery with respect to Illinois Bell's advertising and public relations, which later formed the basis for the Commission's finding that forty per cent of the

\textsuperscript{26} \textit{Id.}


\textsuperscript{29} In \textit{In re Illinois Bell. Tel. Co.}, No. 59666, 3-4 (Ill. Commerce Comm' n 1976) the Commission stated:

\textit{The Commission is of the opinion that the rules relating to discovery contained in the Civil Practice Act need not be precisely followed during administrative hearings pending before this Commission. Nonetheless, the Commission has the power to require a public utility under its jurisdiction to furnish such information as may reasonably be required for the determination of issues pending during a proceeding.}

\textsuperscript{30} Nos. 57903-6, 58033 (Ill. Commerce Comm' n 1973).
utility's advertising and public relations expenditures were improper. By contrast, in the Illinois Bell rate case completed in February 1976, the hearing officer refused discovery demands for identical data on advertising and public relations provided in the earlier rate case. The result was that the Commission found all but a token amount of Illinois Bell's advertising to be proper. States like California recognize the right to discovery in administrative proceedings as necessitated by the modern requirements of due process and a fair hearing.

A second procedural obstacle to consumer discovery in public utility rate proceedings is the refusal of the Commission, on several occasions, to rule on appeals from a hearing officer's denial of discovery until the day before the record in the case was to close. This delay severely limited the value of the discovery granted. In contrast, where consumer discovery was permitted by the hearing officer, the Commission has acted with great dispatch on utility appeals for protective orders. This practice reflects the Commission's pro-utility bias.

For discovery purposes in hearings before the Illinois Commerce Commission, Illinois should adopt the procedures of the Illinois Civil Practice Act. This would grant the consumer intervenor a statutory right to discovery and increase the effective level of consumer participation.

32. Id. at 23.
34. See, e.g., In re Illinois Bell Tel. Co., No. 57903-6 & 58033 (Ill. Commerce Comm'n 1973), where the Commission delayed six months in ruling on the Independent Voters of Illinois' motion to compel answers to interrogatories, and finally denied clearly relevant discovery a few days before the expiration of the statutory 11 month period the Commission has to consider rate filings. The Commission also has waited to rule on an appeal of a denial of discovery until after the final order in the case was rendered. In re Illinois Bell Tel. Co., No. 59666 (Ill. Commerce Comm'n 1976).
35. Another procedural obstacle to a fair hearing for the utility consumer occurred in In re Illinois Bell Tel. Co., No. 57903-6 & 58033 (Ill. Commerce Comm'n 1973) (where Commission staff, who had testified as advocates of particular positions on contested issues, engaged in in camera discussions with commissioners regarding the proceedings both before and after the record was closed).
E. Choice of Judicial Forum for Review

Each intervenor and the utility are entitled to judicial review of an unfavorable Commission order. Section 68 of the Illinois Public Utilities Act\(^3\) permits appeals "to the Circuit Court of the county in which the subject matter of the hearing is situated, or if the subject matter of the hearing is situated in more than one county, then to any one of such counties. . . ."\(^3\) Despite the fact that Illinois Bell operates in approximately two-thirds of the 102 counties in Illinois\(^3\) and that the bulk of its subscribers reside in Cook County, Illinois, Bell has never appealed a Commission order to the Circuit Court of Cook County.\(^3\) Although the Commission hearings generally are held in Chicago, Illinois Bell prefers to appeal unfavorable orders to the Circuit Court of Kane County, a more conservative, pro-business area of the state.\(^4\) In December 1970, Illinois Bell appealed a rather favorable Commission decision\(^4\) to the Circuit Court of Du Page County, another somewhat conservative area, in order to prevent any effective appeal by the intervenors, who were required to file in the court where the first appeal was filed.\(^4\) Likewise, in January 1974, Illinois Bell appealed to the Circuit Court of Winnebago County for the same reason.\(^4\) In both cases, they were able effectively to kill the appeals as a result of this tactic.

An additional difficulty created by the present statute is that the appeal is made to courts that rarely hear a public utility case and, as a result, are often without any expertise in public utility.

\(^{36}\). ILL. REV. STAT. ch. 111 2/3, §72 (1975).

\(^{37}\). Id. Prior to the enactment of the Johnson Act, 28 U.S.C. §§1331 et seq. (1934), prohibiting such appeals, a direct appeal of the Commission determination could be brought by a utility in federal court. See 10 J. LAND & PUB. UTIL. ECON. 313 (1934).

\(^{38}\). This fact was determined from viewing a map of the telephone franchises in Illinois published by the Illinois Commerce Commission on file in its Chicago office.

\(^{39}\). The author, in his research in this area, has been unable to find one instance where Illinois Bell has appealed an adverse Commission order to a circuit court of Cook County.


law. The reason the utilities appeal to these courts is obvious: being unfamiliar with the complexity of utility regulation, these courts are more likely to be persuaded by the arguments of the utilities’ experts.

Many states do not allow such forum shopping. In order to avoid this problem, most states require that an appeal be taken to specified county circuit courts, frequently the county where the state capital is located, or else directly to the state supreme court. Another approach is found in Oregon, which permits appeals to the circuit court for the county where the state capital is located, to the circuit court for the county in which any hearing has been held in the proceeding, or to the circuit court for the county in which the principal office of the utility is located. In the interests of justice and fairness to utility consumers, Illinois should eliminate this forum shopping problem by allowing appeals only to the circuit court of the county in which the largest number of its customers reside.

F. No Restitution if Commission Order Granting Rate Increase is Reversed

Should the consumer succeed in having a rate increase order reversed, under Illinois law he cannot expect restitution for that portion of the rate increase found to be excessive. The utility is allowed to keep the proceeds from the rate increase. Any relief the consumer receives is prospective only, supposedly in the form of lower future rates. However, by filing for a continuous series of rate increases, the utility can eliminate even that relief. For example, in In re Illinois Bell Telephone Co., the Commission granted Bell approximately sixty-five per cent of its total request in December 1973. The Independent Voters of Illinois and other

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44. Among those which do are Maryland, Md. Ann. Code art. 78, §91 (1969); and Indiana, Ind. Code Ann. §54-203 (Burns 1965).
45. This was the practice in Illinois prior to 1921. See Ill.Rev. Stat. ch. 111a, §68 (1916).
intervenors appealed from that order to the Circuit Court of Winnebago County. That appeal is still pending. However, in March 1975, Illinois Bell filed for a new rate increase that was only partially granted. If the 1973 appeal by the IVI were to succeed today, Illinois consumers, under the existing interpretation of Illinois law, would not be entitled to a rebate. Also, because a new order is now in effect, future rates would not be affected by the decision. The consumer’s victory would be purely academic. Consequently, utilities are able to protect themselves from adverse reviews of rate increases by filing for future increases.

While the consumer receives no direct financial benefit from a successful appeal, the same cannot be said for an appeal by a utility. A utility can achieve significant financial benefit from winning an appeal of a Commission order that either lowered its rates or failed to increase them sufficiently. Under section 68 of the Illinois Public Utilities Act, a reviewing court is authorized to stay or suspend, in whole or in part, the operation of a Commission order pending appeal, upon the posting of bond. A utility is financially capable of posting such bond, and on occasion that device has been used. In contrast, a consumer intervenor is usually neither financially capable nor strongly motivated to post bond. If the utility subsequently wins the appeal, it retains those rates it was permitted to charge in excess of those authorized by the Commission. Even if the utility loses the appeal, the failure of all potential claimants to apply for refunds may leave the utility ahead. For example, in Illinois Bell Telephone Co. v. Slattery, the utility lost an appeal that lasted seventeen years, but was permitted to claim $1.7 million in both unclaimed principal and interest from refunds. Upholding the company’s claim to the undistributed portion of the refund gives utilities an added incentive to oppose rate reductions and to prolong the litigation which follows an unfavorable Commission order.

52. ILL. REV. STAT. ch. 111, §68 (1975).
53. See, e.g., Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58 (7th Cir. 1939).
54. Id.
55. See Barns, Temporary Rates in Utilities Regulation, 1940 U. ILL. L.F. 929, 933.
An Illinois law should be adopted authorizing the Commission to set temporary rates following the completion of an appeal. This rate could reflect either the amount of underpayment or overpayment of utility rates made during the pendency of an appeal seeking to reverse a Commission rate order. As a result, utilities will receive only those revenues to which they are entitled.

G. Remand Following Reversal

Even if the consumer successfully appeals from a Commission rate increase, and obtains a reversal before new rates are promulgated, the Illinois utility customer still may never see any rebate of the illegally collected rates in the form of lower future rates. This is because of the reluctance of the Commission to rule upon the remand.

In the 1973 decision of Illinois Bell Telephone Co. v. Illinois Commerce Commission, the Illinois Supreme Court reversed and remanded a Commission order allowing a rate increase. However, it was not until March 1975 that the Commission finally held hearings pursuant to the remand. As of December 1976, the date of this writing, a series of Commission hearings on the remand have been scheduled that either have been cancelled without notice or held with no evidence being taken. Thus, more than three years after the supreme court decision, no consumer rebates have been forthcoming.

The California courts have held that rebates should follow directly from the judicial reversal without protracted remand proceedings before the Public Utilities Commission. Unfortunately, it is almost impossible effectively to order a speedy disposition of a remand by the Commission. The only solution is either to adopt a procedure similar to that of California or to change the membership of the Commission.

(1940); Simpson, Two Recent Utility Cases Involving Refunds, 15 J. LAND & PUB. UTIL. ECON. 238 (1963); Note, Use of the Refund Device in Rate Regulation, 63 HARV. L. REV. 1024 (1950).


57. City of Los Angeles v. Public Util. Comm’n, 7 Cal.3d 331, 497 P.2d 785, 102 Cal. Rptr. 313 (1972). The Ohio courts have reached the opposite and rather ridiculous conclusion that after an order is reversed by the courts, the public utilities commission may take as long as it wants to promulgate new rates; amounts collected under the illegal rate after the court decision are not subject to rebate. Cleveland Elec. Illuminating Co. v. Public Util. Comm’n, 46 Ohio 2d 105, 346 N.E.2d 778 (1976).
III. SUBSTANTIVE FACTORS

In addition to the many procedural factors in the rate-making process that work to the disadvantage of utility consumers, there are similar substantive factors as well. Typically, these substantive factors relate to the criteria that the Commission may consider when evaluating a proposed rate increase.

A. Reproduction Cost

One of the most unfavorable substantive factors facing Illinois utility consumers is the judicially imposed requirement that the Commission consider reproduction cost when establishing a utility's profit level. Reproduction cost is the valuation placed on a utility's assets and involves valuing the assets at their cost of replacement. Use of reproduction cost during inflationary periods effectively provides the utility with a "windfall" by causing the calculation of earnings to be based on figures in excess of amounts actually invested. Thus, the utility may make a profit solely because of inflation. Such a procedure is not followed in private industry\(^\text{58}\) and eventually translates into higher rates for utility consumers.\(^\text{59}\)

Because of the extensive efforts necessary to determine reproduction cost valuations, the reproduction cost method has the additional disadvantage of being expensive. The utility consumer eventually will pay for the expenses incurred in administering the reproduction cost method, because expenses incurred in connection with rate proceedings are considered legitimate operating expenses.\(^\text{60}\) Another disadvantage of using the reproduction cost method is that it diverts Commission staff time from other areas, and its highly complex and technical character discourages consumers from becoming involved in the hearing process. Further, in requiring the consideration of reproduction cost, Illinois is in the minority. Currently, less than one-third of the states use the

\(^{58}\) For a critical discussion of reproduction costs, see J. Bonbright, Principles of Public Utility Use (1st ed. 1932).

\(^{59}\) An analysis of comparative profits of utilities in reproduction cost and original cost jurisdictions can be found in In re Illinois Bell Tel. Co., No. 56831 (Ill. Commerce Comm'n 1972) (Administrative record, testimony of Dr. John K. Largum).

reproduction cost method. Prior to 1943, almost every state utilized the method because of the substantive due process mandate of the United States Supreme Court in *Smyth v. Ames*. That mandate was reversed in *Federal Power Commission v. Hope Natural Gas Co.*, wherein the Supreme Court held that due process did not require the use of any particular method of valuation. After *Hope Natural Gas*, most state courts moved to statutory interpretations of their state utilities laws to determine whether a commission should consider reproduction cost when determining rate base value.

The Illinois Supreme Court faced this issue in *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, and steadfastly refused to depart from its practice of considering reproduction cost. With the exception of Illinois, every state court faced with interpreting the word "value," either in the valuation section or the temporary rate reduction section of its public utilities act, has interpreted the language as not requiring consideration of reproduction cost. In some states the legislature has acted to eliminate any consideration of reproduction cost that may have been suggested by statute.

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62. 169 U.S. 466 (1898).

63. 320 U.S. 591 (1944).

64. Hunt & Legg, supra note 61, at 21-23.


66. I11. REV. STAT. ch. 111 2/3, §30 (1975) reads as follows: "The commission shall have power to ascertain the value of the property of every public utility in this state and every fact which in its judgment may or does have any bearing on such value . . . ." (emphasis added). I11. REV. STAT. ch. 111 2/3, §36 (1975) states that the commission may enter a temporary rate reduction order whenever utility income "is in excess of the amount required for a reasonable return upon the value of said public utility's property used and useful in rendering its service to the public . . . . ."


68. See, e.g., ALA. CODE tit. 48, §52 (1971) ("reasonable value of a public utility's property shall be deemed to be the original cost thereof . . . ."); ME. REV. STAT. ANN. tit.
Although neither the courts or legislature has required a change, two years ago the Illinois Commerce Commission announced that henceforth it will not use reproduction cost in rate cases. Whether the Illinois Supreme Court will uphold this change in practice is unclear. Abandoning reproduction cost will require the rejection of seventy years of precedent.

**B. Operating Expenses**

A second substantive factor working to the disadvantage of the Illinois utility consumer is operating expenses that are reflected in utility rates. Some operating expenses are highly visible to the public and are the source of public irritation. These include utility advertising, public relations, charitable contributions made to favored charities of the utility's officers, lobbying expenses, and political contributions. Other operating expenses, such as those categorized as services from Illinois Bell's parent, AT&T, or equipment, purchased from Illinois Bell's affiliate, Western Electric, are less visible, but are even more costly. Extravagant expenditures by the utility can mean higher rates to the consumer. However, with few exceptions, the Illinois Commerce Commission has no authority to prohibit wasteful expenditures. Section 8 of the Public Utilities Act declares that:

The Commission shall have general supervision of all public utilities except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and methods in which the business is conducted. . . .

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35, §52 (1964) (forbids "current value" from being considered); Minn. Stat. Ann. §237.08 (West 1972) ("prudent acquisition cost . . . current value . . ."); N.D. Cent. Code §49-06-02 (1960) (". . . shall be the money honestly and prudently invested therein . . .").


72. The documents acquired in connection with *In re Illinois Bell Tel. Co.,* No. 59666 (Ill. Commerce Comm'n 1975) indicate in 1975 Illinois Bell paid close to $25 million to its parent, American Telephone and Telegraph Co., for management, ownership and other "services." In 1974, it paid almost $2.7 million to Bell Telephone Laboratories, Inc., a wholly-owned subsidiary of AT&T for Business Information Systems and over $275 million to Western Electric Co., another Bell affiliate, for equipment and supplies.

The Illinois Supreme Court has found this delegation of authority to be an insufficient basis for the Commission to prohibit an unnecessary expenditure.\(^4\) The court found that an express delegation of authority was necessary for the Commission to exercise such power.\(^5\) Beyond this a constitutional impediment might also exist with respect to interstate transactions.\(^7\)

The inability of the Illinois Commerce Commission to control public utilities' operating expenditures leaves open the possibility for massive exploitation of the consumer.\(^7\) The Illinois General Assembly has dealt with this problem, but only with regard to a few, specific management functions.\(^7\) Many important areas remain untouched.\(^7\) Even in those areas where the General Assembly clearly has delegated authority to the Commission to control utility expenditures, the Commission has failed to do so.\(^60\)

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75. Id. at 614, 198 N.E. at 720. The court did not deal with §8(a) of the Public Utilities Act, enacted in 1933 and requiring all contracts with affiliates "hereafter made" to be approved by the Commission before going into effect. The contract in question had been entered into in 1913.

77. Comment, The Servicing Function of Public Utility Holding Companies, 49 HARV. L. REV. 957, 981 (1936). The author points out that the exploitation of operating companies hurts the consumer in both direct and indirect ways. High service charges, unless controlled by public utility commissions, could inflate operating expenses by allowing overpayments for management services. Such overpayments could impede a rate reduction or even require a rate increase. The possibility that overpayments could drain funds allocated for maintenance or additional services implies possible cutbacks in service for utility users.
78. These include the marketing of new securities (ILL. REV. STAT. ch. 111 2/3, §21 (1975); mergers (§22); inter-utility agreements (§27); and transfer of franchises (§28).
80. Section 8a(3) of the Public Utilities Act, ILL. REV. STAT. ch. 111 2/3, §8a(3) (1975), prohibits a utility from entering into any contract agreement with an affiliated company without the approval of the Illinois Commerce Commission. Every contract agreement not
The remaining source of Commission influence over operating expenses comes through its decisions whether to consider a particular operating expense for rate-making purposes. If an expenditure is not considered, the utility would be forced to pay the expenditure out of its profits. This should result in the utility making a comparable reduction in the expenditure. However, the utility could simply continue that particular expenditure, while reducing other expenditures necessary to serve the public properly.

The Illinois Commerce Commission unquestionably has authority to eliminate improper operating expenses from consideration in a rate proceeding. With few exceptions, the Illinois Supreme Court has considered the propriety of operating expenses to be a question of fact for the Commission, and has not articulated definite standards by which to determine whether an expenditure is proper. In the small number of cases in which the Illinois Supreme Court has had an opportunity to review Commission determinations regarding operating expenses, the court has found certain categories of expenditures not improper per se. These include municipal franchise payments and the cost of rate consented to is expressly made “void” by the Act. The purpose of this provision is to protect the consumer from charges resulting from transactions that are not negotiated by independent parties, but are orchestrated by the common owner of a utility and its affiliate.

Despite this clear authority, the Commission has never required Illinois Bell to submit its original contract with its parent, American Telephone and Telegraph Co., to the Commission. See Illinois Bell Tel. Co. v. Illinois Commerce Comm’n, 55 Ill.2d 461, 481, 303 N.E.2d 364, 375 (1973). The Commission also considers payments made pursuant to such a contract as a part of operating expenses. See In re Illinois Bell Tel. Co., No. 59666, 24 (Ill. Commerce Comm’n 1976).


Comment, supra note 77, at 986.

82. Smith v. Illinois Bell Tel. Co., 282 U.S. 133 (1930), rev’g City of Houston v. Southwestern Bell Tel. Co., 259 U.S. 318 (1922), and Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm’n, 262 U.S. 276 (1923), on the question of whether management fees may be disallowed in the absence of clear bad faith or proof that the services could have been obtained more cheaply elsewhere.


proceedings. However, in an early case, the court found that charitable contributions were improper unless "it is shown that they will be of some peculiar benefit to the company or its patrons." 87

In Illinois Bell Telephone Co. v. Illinois Commerce Commission, 88 the Illinois Supreme Court lengthened the list of operating expenses that were improper per se. These included (1) payments to Illinois Bell affiliate Western Electric Company that provided Western Electric with a profit level in excess of what Illinois Bell was permitted to earn, 89 (2) payments to Illinois Bell's parent, American Telephone and Telegraph Company for expenses that Illinois Bell could not properly include as operating expenses itself and expenses that provided no direct benefit to Illinois Bell subscribers, 90 (3) charitable contributions, 91 (4) lobbying expenses, 92 and (5) membership fees and dues. 93 The court upheld

86. See note 61 supra. See also Streator Aqueduct Co. v. Smith, 296 F. 385 (S.D. Ill. 1923).


88. 55 Ill.2d 461, 303 N.E.2d 364 (1973).

89. The court's rationale for disallowing this expense is that it "imposes on Bell's patrons the burden of providing to AT&T through the device described, an excessive return on the sales by Western to Bell . . . ." Id. at 483-84, 303 N.E.2d at 376.

90. The court's rationale here was that:

[It] is improper to permit Bell to include in its operating expenses for ratemaking purposes a license fee to AT&T based on a percentage of revenues, and that the amount of the payment of the license fee must be directly related to, and include 1 only, such expenditures as would be permissible if made by Bell . . . . Although not specifically identifiable in the exhibits on file, it is obvious that AT&T incurred expenses occasioned by its holding-company activities and relating directly to its position as an investor in Bell, and Bell's rate payers should not be required to pay any part of this cost until it can be shown to directly benefit them or the services which Bell renders.

Id. at 482-83, 303 N.E.2d at 375-76.

91. The court's rationale was that "the allowance of charitable contributions as operating expenses for purposes of ratemaking constitutes an involuntary assessment on the utility's patrons, and we question the propriety of Bell's being permitted to thus dispense largesse at their expense." Id. at 481, 303 N.E.2d at 375.

92. The court reasoned that since Bell's customers are not given an opportunity either to advocate or decide which legislative proposals should be supported by Bell, they should not bear the cost of Bell's lobbying. Id. at 480, 303 N.E.2d at 374.

93. The Commission noted that, despite the split of authority, it would be better to disallow expenditures for dues to civic, social and athletic clubs. Id. at 481, 303 N.E.2d at 375.
the Commission's allowance of Illinois Bell's advertising and its payments for gasoline that could have been purchased more inexpensively. Immediately after this Illinois Supreme Court decision, Illinois Bell was able to secure enactment, by the General Assembly, of amendments to the Public Utilities Act that nullified the court's decisions with respect to charitable contributions and, ostensibly, with respect to payments to Western Electric.

Prior to this case, there was only one case that reached the Illinois Supreme Court where a party was appealing the Commission's refusal to exclude an amount from operating expenses. This was Villages of Milford v. Illinois Commerce Comm'n, 20 Ill.2d 556, 170 N.E.2d 576 (1960), where the plaintiff appealed from the Commission's refusal to treat executives' salaries as excessive. Examining the executives' background and responsibilities, the court sustained the Commission's refusal.

Still fewer decisions are found where the Commission is reversed for such failure. One case is Smith v. Illinois Bell Tel. Co., 282 U.S. 133 (1930). There, the Supreme Court went as far as any court had gone in requiring judicial examination of an operating expense that the Commission had refused to examine. The Court remanded to the district court, the question of the reasonableness of expenditures for equipment paid by Illinois Bell to its affiliated company, Western Electric. To be determined was the profit rate on these sales to Illinois Bell and also the amount of expenditures for "service" paid by Illinois Bell to its parent company under a 1.5% licensing agreement. Previously, the Commission had found insufficient evidence in the record to find that the charges by Western Electric to AT&T were unreasonable. In re Illinois Bell Tel. Co., 3 I.C.C. 75, 94-97 (1923). See City of Los Angeles v. Public Util. Comm'n, 7 Cal.3d 331, 497 P.2d 785, 102 Cal. Rptr. 313 (1972); Colorado Mun. League v. Public Util. Comm'n, 473 P.2d 960 (Colo. Sup. Ct. 1970). These cases involved Commission failure to utilize accelerated depreciation. The California case also involved Commission failure to exclude charges by Western Electric. A prior California Supreme Court case had approved the elimination of such charges. Pacific Tel. & Tel. Co. v. Public Util. Comm'n, 62 Cal.2d 643, 401 P.2d 353, 44 Cal. Rptr. 1 (1965).

94. In the next Illinois Bell Telephone rate case, the Commission did eliminate 40% of Illinois Bell's advertising and public relations as accomplishing no economic benefit to the telephone customers. In re Illinois Bell Tel. Co., No. 57903-6 & 58033 (Ill. Commerce Comm'n 1973). However, in the most recent Illinois Bell Telephone case, the Commission eliminated only a token amount of Illinois Bell's advertising after denying the discovery of the Cook County State's Attorney relative to Bell's advertising and public relations largely identical to that provided in the earlier docket. See In re Illinois Bell Tel. Co., No. 50666 (Ill. Commerce Comm'n 1976).


96. H.B. 2864 (P.A. 78-1243) adds the following language:

[It] shall be proper for the Commission to consider as an operating expense, for the purpose of determining whether a rate or other charge or classification is sufficient, donations made by a public utility for the public welfare or for charitable, scientific, religious or educational purposes, provided that such donations are reasonable in amount.

97. H.B. 2861 (P.A. 78-1236) adds the following language:

[The] Illinois Commerce Commission shall not require a public utility to make purchases at prices exceeding the prices offered by an affiliated interest, and
The Illinois legislature should adopt legislation that more closely controls utility operating expenditures. Political contributions and other favors extended to candidates for office should be prohibited. Further, all advertising and public relations promotions designed to enhance the utility's image should also be prohibited. In general, any expenditure or part of any expenditure which has no economic benefit to the utility customer, which would not be undertaken by a reasonably prudent business operating under the normal pressures of competition, or which is the result of management decisions to influence public policy of government officials, should not be considered a legitimate operating expense or charged to the consumer. Furthermore, the burden of justifying operating expenses should be upon the utility. Adoption of these proposals would go a long way towards protecting the utility consumer from unnecessary rate increases and also would remove one of the substantive factors in Illinois rate proceedings that favors the utilities.

C. Costs of Service Studies

Utilities do not always allocate rate increases equally among consumers. Quite often, after a utility receives a rate increase, the rates for some communities may increase, remain the same, or even decrease. There appears to be no justification for this variance. It has occurred because the Illinois Commerce Commission does not require utilities to furnish a cost of service study that reflects utility costs in serviced communities. Consequently, some communities may pay utility rates higher than their proportionate share of the cost.

In *In re Illinois Bell Telephone Co.*,\(^8^5\) Illinois Bell proposed to increase the average cost of telephone service twenty per cent. An investigation of the impact on individual rates, however, revealed a wide variance. Rates in some communities, or for some services, were to increase thirty to fifty per cent. Some rates were sched-

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\(^8^5\) No. 56831 (Ill. Commerce Comm'n 1972).
uled to decrease. The witnesses for Bell could provide no rational explanation for this variance, nor was one required under the existing system of setting rates. Despite the statutory prohibition against discriminatory or preferential rates, no requirement exists for the allocation of rate increases to reflect costs. The result is that certain customers are forced to subsidize others.

A growing number of states are requiring cost of service studies in order to eliminate this problem. Attempts to force the Illinois Commerce Commission to require utilities to provide a cost of service study have failed, but such efforts must continue.

IV. INSTITUTIONAL FACTORS

The structure and dynamics of the Illinois Commerce Commission also have a tendency to operate against the interests of utility consumers. While these factors are not as blatantly biased as the procedural and substantive factors, they are equally as real. Basically, the problem arises from the fact that the Commission must render decisions that balance the competing interests of the utility and its customers. Further, the Commission quite often lacks funds to do this effectively.

A. Inability to Balance Competing Interests

Under Illinois law, the Commission has the responsibility of protecting the interests of the utility consumer. At the same time, the Commission also must act as a quasi-legislative forum

99. Id.


102. Similarly, attempts over the last several years to have the Commission restructure Illinois gas and electric rates along the lines of the lifeline rates established in California have failed. See Assembly Bill No. 167 (California 1975-76 session). See also Maine Pub. Util. Comm’n, General Order 40 (1973).

to hear applications for utility rate increases.\textsuperscript{104} Caught in the milieu of new rate filings, the Commission must allocate a disproportionate share of its limited resources to requests by the utilities.\textsuperscript{105}

In the daily operations of the Commission, it is the Commission staff that represents the interests of the utility consumers. For example, the Commission staff intervenes in the proceedings before the Commission hearing officers and cross-examines utility witnesses. The staff also must scrutinize the utility's financial and other records. However, the staff is not free to plot its own course of investigation. It is responsive to the wishes of the commissioners and the hearing officer. Therefore, if either the hearing officer or the commissioners are politically oriented, their influence can prevent the staff from pursuing a potentially valuable course of investigation.\textsuperscript{106}

Finally, there is the additional problem of the limited role of the staff in a rate hearing. While a staff person may testify in favor of the Commission reaching a particular result, he does not file briefs, motions for rehearings, or appeals from adverse Commission decisions.\textsuperscript{107} Therefore, the staff cannot be expected to represent consumer interests as effectively as an attorney. Even if the staff wished to overcome these limitations by hiring an outside attorney to represent consumer interests, permission would have to be obtained from the attorney general,\textsuperscript{108} who would be opposing them on any appeal.\textsuperscript{109}


\textsuperscript{106} During the hearings in \textit{In re} Illinois Bell Tel. Co., No. 56831 (Ill. Commerce Comm'n 1972), a Commission staff person who had uncovered information on the company's free and reduced rate telephone service to employees and pensioners was prevented by the then-Commission chairman from pursuing his inquiry and cross-examining the company's rate expert on the subject.

\textsuperscript{107} Section 72 limits appeals to "any person or corporation affected" by the final order. It would be a close question whether the Commission staff fit this criteria. A particular difficulty is evident with the wording in section 69 of who can intervene. That language permits any "person or corporation as the Commission may allow to intervene . . . ." See also language in Section 71 authorizing "any party to the action or proceeding" to apply for a rehearing. ILL. REV. STAT. ch. 111 2/3, §72 (1975).

\textsuperscript{108} Art. 5, §15 of the 1970 Illinois Constitution makes the attorney general the legal officer of the state. He cannot be deprived or relieved of his common law powers. American Legion Post No. 279 v. Barrett, 371 Ill. 78, 20 N.E.2d 45 (1939).

\textsuperscript{109} ILL. REV. STAT. ch. 111 2/3, §72(a) (1975) requires the attorney general to represent the Commission and defend its orders and decisions.
B. Absence of Financial Resources

The Commission staff lacks the resources to compete effectively with the utilities. In order to gather evidence and present expert witnesses, the staff needs money and manpower, both of which they lack. In contrast, a utility the size of Illinois Bell has eight full-time lawyers, hundreds of engineers, accountants, appraisers, economists, and a billion-dollar budget.

Unfortunately, utility consumers cannot rely upon more powerful institutional intervenors such as the federal government, the State of Illinois, or the Cook County State's Attorney to represent their interests. Each of these governmental entities has limited resources and manpower to devote to rate proceedings. Additionally, the primary interest of these governmental entities is protecting their own utility rates. Therefore, the interests of the government may not coincide fully with the interests of the consumer. Governmental participation may simply be pro forma for local political gain, with little or no serious attempt being made to participate. An additional difficulty in relying on governmental intervenors is that they too are subject to political pressure.

In order to overcome these problems, the utility consumer should have an independent advocate in proceedings before the Commission. This could be accomplished by the establishment of a full-time, consumer attorney position, funded by state revenues. Another approach would be to award consumer intervenors their costs for participating in rate proceedings before the Commission.

V. The Role of The Consumer

In most cases, the utility consumer is unequipped to participate in a utility proceeding at any level. Almost all the legal talent in the field is monopolized by the utilities, as are other

110. The Illinois Commerce Commission has 225 full-time and 7 part-time employees to regulate over 500 public utilities, take responsibility for gas pipeline safety and oversee thousands of motor carriers who operate in the state. During fiscal year 1973, the Commission had $2,616,000 to perform its utilities duties, $1,619,000 to perform its motor carrier responsibilities, and $51,000 to check pipeline safety. Interview with Mrs. Roberta Moye, acting secretary, Illinois Commerce Commission, at the Chicago office of the Illinois Commerce Commission, June 1, 1973.

types of experts and resources necessary in a public utilities rate case.

A typical consumer intervenor is subject to many other factors that frustrate its efforts. The intervenor may be a volunteer organization, relying on persons who can devote only their free time outside of working hours in the campaign against the utility. Equally unfortunate is the fact that the consumer intervenor may be able to recruit only those expert witnesses who are willing to donate their services. Also, because many of the consumer intervenors are volunteers, if they have an attorney involved in the proceedings, he may be a specialist in some area other than public utilities law. Hearings are usually during the day, and this requires volunteers to take time off from work. In addition, the consumer is usually unfamiliar with the operation of a utility, the questions to ask or areas to investigate. Finally, the consumer is at the mercy of the utility in obtaining information. Even when there is a statutory right to subpoena evidence from the utility, the utility may frustrate these efforts. With a statutory eleven-month limit on the length of a proceeding, the utility has time on its side if it wishes to stall in providing the requested information.

VI. Conclusion

The explanation for the current, one-sided nature of public utilities law in Illinois lies in the fact that for the last sixty years, the public utilities have had free rein before the Illinois Commerce Commission, the reviewing courts, and the General Assembly. Where the Commerce Commission is concerned, the utilities and the Commission have developed a close working relationship. This relationship probably has resulted from years of association. Additionally, a problem of cooperation may exist; a commissioner or Commission staff person may have come from a utility and retained his utility orientation. Finally, until recently, the consumers have made few demands on the Commission.112

The utilities also have dominated the courts. During the last

112. Note, Regulation, Competition, and Your Local Power Company, 1974 Utah L. Rev. 785, 786 (1974). An Illinois Commerce Commission staff person dealing with telephone companies is reported to have declared that he had no use for the private interconnect industry, the private competition to Illinois Bell.
sixty years, Illinois Bell Telephone has been the most aggressive of the utilities, and the appeals in which it has been involved have played a disproportionate role in shaping public utility law in Illinois. A measure of the utilities' success before the judiciary is that in fourteen reported decisions before Illinois courts, involving the existing Public Utilities Act, prior to 1973, Illinois Bell had never lost. Illinois Bell has used its persistence to discourage resistance from the Commission. From every major unfavorable decision, Bell has taken an appeal, and in one case, pursued an appeal for seventeen years.

With respect to procedure, substance, and institutional structuring, Illinois public utilities law is currently highly biased in favor of the utilities. Focusing upon the Commerce Commission or indeed, the courts, appears to accomplish little in the way of reform. The Commission, as currently composed, ignores the procedural rights of the consumer and renders major utility rate increases far in excess of legitimate needs. When one successfully appeals to the courts in order to redress the arbitrary results of a Commission decision, the Commission is slow to respond on remand. Unless the composition of the Commission undergoes a radical change, the only forum where meaningful public utility reform can be obtained is the Illinois General Assembly.


115. They have three registered lobbyists plus backup staff in Springfield. Thus, when a suit was filed in the Circuit Court of Cook County in April 1972, challenging the authority of the company or the Commission to allow free and reduced rates telephone service to utility employees and pensioners, on May 4, 1972, Illinois Bell had Senate Bill 1557 introduced to authorize such concessions. Without going to committee, the bill passed the Senate on May 11. On June 28, with only five days in the committee (three of which were days that the legislature was not in session), the House passed the bill. On Sept. 1, it was routinely signed by the governor and went into effect Oct. 1, 1972.