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DISCONTENT WITH PUBLIC UTILITY RATE REGULATION

TAYLOR E. GRONINGER*

Despite the propaganda of certain "hired" lecturers, professors, educators, newspapers and educational agencies, there is throughout our country widespread discontent with the rate regulation of public utilities.

This discontent is chiefly traceable in its final analysis to four items in the bill of complaint, namely: (1) Politics, (2) Avarice on the part of owners, managers and operators, (3) Incapability of Regulatory bodies and Municipalities to protect the public's interest in the property devoted to public service and (4) The ease of Judicial Interference with Rate Orders.

With respect to politics: Without being told by chemist or ambulance driver, the rate paying public know that politics and public regulation of utilities mix with the same adhesiveness as water and oil, and with the same harmony as gasoline and white mule. Some examples of such admixture are fresh in mind.

In an adjoining State, a few months ago, utility regulation was given an overdose of politics. The whole country was shocked, though the wire through which the dose was administered was heavily INSULATED.

The adjoining State is overwhelmingly Republican. A large utility operator's contribution in a political campaign was \$237,925. Of this amount, \$125,000 was given to the campaign fund of the Republican candidate for United States Senator. Now for the shock—the candidate at the time was the chairman of the rate making body of the state!

In this same campaign, this same utility operator gave to the Democratic Senatorship candidate's campaign fund \$15,000. Being interested in selecting a "vigorous" prosecutor he contributed \$5,000 to the campaign fund of a candidate for State's Attorney; in order that an "upright" tax commissioner might be chosen, he contributed \$20,000 for that purpose; believing in the protection of the "infant" industries of this country, he contributed \$10,000 to the secretary of the G. O. P. National Committee; and because of his "abhorrence" for a league of nations

*See p. 270 for biographical note.

or a world court, he gave \$32,925 for spreading anti-world-court propaganda. For other political purposes, he contributed until the total amount so used by this political-utility-philanthropist from his "cash drawer" was \$237,925.

Shock number two—The contributions to the successful United States Senator's primary contest totaled \$458,782 of which sum \$203,000 was given by public utilities' officials!

Such political condition is a breeder of discontent and causes even the man of but little gray matter to think with Shakespeare "there's something rotten in the state of Denmark."

Such a condition should cause the whole nation to remember the old railway danger signal of "Stop, look and listen"; while these lines by Goldsmith become very appropos:

"Ill fares the land, to hastening ills a prey,
Where wealth accumulates, and men decay."

In another adjoining state, in September, 1928, two prominent politicians—one a Democrat, the other a Republican,—entered pleas of guilty in a circuit court to the charge of violating the state's lobbying law and paid fines of \$250 with costs. These eminent gentlemen had engaged in public-utility lobbying in the Kentucky legislature.

In our own state, where you may find everything on the calendar that is both good and bad in politics, it is a matter not of slander but of shamefully common knowledge that Public Utilities have exercised a bi-partisan lobby control of legislative action during the past two sessions of our law makers. It is but mild exaggeration to say that the "Third house" had a larger membership than either the house or senate; and it is certainly no exaggeration to say that the "variety" of the third house equalled that of both the house and senate.

We all know of the evils of certain kinds of lobbying; that it costs money to maintain the "third house"; and we further know that all "operating" expenses are finally paid by the rate payer, whether they be of the usual or unusual kind.

Will not some fair minded utility owner or operator of Indiana start a movement to cut the representation in the "third house" of the 1929 legislature?

The second item in the bill of discontent named above it avarice on the part of owners, managers, and operators. And in fairness to the business, the writer does not mean to say that all those who conduct public utility business are looking for the lion's share. Such is not the case.

But there are many owners and managers who fail to appreciate that public service corporations are created for public purposes; that they derive their existence and powers from the state; that they perform a function of the state; and that they are permitted to be organized for the public good, as well as for the pecuniary profit of stockholders.

Such owners and managers stop at nothing to take advantage of the rate payers. Through the use of "high powered" appraisal engineers, "nationally known" economists, "skilled" forecasters and accounting analysts and "able" lawyers they lay claim to inflated values for their properties; and with the further aid of "conservative" bankers they ask for the highest return obtainable.

Such owners seem to forget that all they have a right to ask under the law is only a fair return on the fair value of the property used in the service of the public.

A fair return is a reasonable return and not a speculative profit; and the fair value of the property is not an inflated value but that value, which under all the facts and circumstances surrounding the utility is reasonable and equitable, having regard for the special rights, privileges and advantages which the public through regulatory laws confer upon public service property and public service business.

The third item which causes discontent with regulation is the incapability of public officials to safeguard the public's right in regulation.

The large public utilities believe in preparedness. They have their attorneys, appraisal engineers, accountants and other experts, who are schooled and qualified in their respective lines. When needed before commission or court they are prepared to present their side of the case and to furnish the kind of proof that wins favorable orders and decisions.

On the other hand, it frequently happens that members of our regulatory bodies are appointed as reward for political services rendered without regard to their qualifications or fitness and such bodies often lack efficient appraisal engineers and accountants; while of municipalities it may be said their city attorneys are not familiar with utility law decisions and are without engineering or accounting assistance.

In brief, those who are representing the public utility regulation are not as a rule trained and equipped as are those who represent the utility. The result is that the utility wins its contention in most every important contest; especially in court

where cases are decided according to the evidence in the record as well as the established rules of law.

The fourth item of discontent is judicial interference with rate regulation.

Within the past few years so many rate orders have been overthrown by the courts, particularly by the Federal courts, that there has arisen throughout the country much antagonism to court review of regulatory orders.

In defense of most courts' action in this matter it should be said that courts decide cases in the light of the evidence in the records before them; and it is a matter of common knowledge that in most regulatory cases only the utility's side is presented with any degree of proficiency.

But on the other hand, within the past five or six years, there seems to be a tendency on the part of the Federal Statutory courts in many Districts, and of the United States Supreme Court, also, to lessen the range of legislative discretion in rate making and to give dominance to but one of the so-called "relevant" facts named in *Smyth v. Ames* in determining the rate base, namely, Reproduction cost.

Furthermore, it seems so easy for many courts to hold that any rate of return, on property clothed with a monopoly privilege and other valuable rights, under 7 or 8% is confiscatory.

What is the remedy for this situation? We suggest the following:

(1) There should be an absolute divorcement of politics from utility regulation. This may be had by an aroused electorate electing honest and capable public officials.

(2) The avarice of greedy owners, managers and operators should be curbed. This may be done through commission orders and court decisions, provided Regulatory bodies and municipalities meet the evidence offered by the utilities and furnish evidence of equal probative value as that produced by the utilities at commission hearings and trials before courts.

(3) Incapable Regulatory officials should be supplanted by capable ones. At least half or three-fourths of the members of regulatory bodies should be lawyers or men specially schooled in public utility law since practically every commission order of any consequence involves many law questions. Furthermore, a first class appraisal engineer who is able to meet the "high powered" utility engineer and a competent accountant should be connected with every commission.

(4) A lawyer, specially qualified in utility law, should represent the public before the regulatory body. Such lawyer should be elected or appointed by the Attorney General of the State in order to assure his independence of action.

(5) The municipalities of our country should be aroused to the importance of looking after their own and the interests of their inhabitants in all utility matters affecting them. Generally speaking, at the present time, no one is chargeable with the care of utility matters in our municipalities and no one is prepared for action.

Yet there is no single matter in which our municipalities and their inhabitants are more vitally interested than that of utility regulation.

For example—During the year 1927, the civil City of Indianapolis, including the Park Department, paid for water services \$422,200.00, for electric services \$394,926.00, and for gas service \$14,235.00—a total of \$831,361.00.

The aggregate amount of these utility service bills to the city alone—better than three quarters of a million dollars annually, must impress one with the importance of utility rate regulation to the City. And yet the City of Indianapolis has no public utilities department.

The City has its Board of Works, its Zoning Board, its Sanitary Board, its Board of Health, its Board of Safety, its Building Inspector, its City Engineer with a large corps of assistants to care for the streets and alleys, but so far as utility services are concerned, just one of all the city officials gives any particular attention to them—the City Controller—he pays the bills. This is a fine tribute to the intelligence of the City's citizenry and a glowing testimonial to the advancement in municipal government.

What is true of Indianapolis respecting the City's preparedness to care for its own interests and its inhabitants' interests in rate making is true of most of the cities of America.

(6) The courts of our country should exercise their power to overthrow rate orders only in the clearest of cases; they should more closely scrutinize appraisal engineers' "shadows" and accountants' "foliage" in making their estimates of values; and should consider the large advantages enjoyed by public utility business, with its protected monopoly, in passing on the reasonable rate of return.

While the courts should not hesitate to overthrow regulatory orders, on constitutional grounds, when such orders clearly vio-

late constitutional guaranties, they should not forget that rate making is purely a legislative function and is no function of the courts.

The respect due to legislative authority from the judicial is well expressed in *San Diego Land & T. Co. v. National City*,¹ wherein the court said:

“Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.”

In addition to the foregoing, the writer is of the opinion that we shall continue to have discontent with utility regulation throughout the country, particularly with rate making, until some more definite method of determining the rate base is established than that now prevailing.

As things now are, the rate base is the present “fair value” of the property used in the public service and the rate of return is a “fair return.” Both fair value and fair return are matters of dispute and will continue to be so long as human opinions and judgments vary.

Could we not more closely approach that which is economically and legally sound in rate making if the United States Supreme Court would discard the old uncertain and indefinite fair value rule of *Smyth v. Ames* and in its stead hold that what a public service corporation under legislative sanction is entitled to ask is a fair return on the bona fide cost of the property or the “Prudent Investment”?

The Prudent Investment is easily determined and would give a rate base that is stable; while if the purchasing power of the dollar fluctuates, it would be a simple matter to increase or decrease the rate of return to take care of such fluctuation.

With a stable rate base method, such as prudent investment would afford and the only variable the rate of return, rate making by public authority would become a comparatively easy matter; millions of dollars in rate case expenditures would be saved annually to the rate payers; long delays in rate case investigations and court trials would be avoided; confusion in commission orders and court decisions would disappear; and the discontent on the part of the public in general which now exists would give way to confidence in public regulation.

¹ 174 U. S. 739, 754.