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COMMENT

SOCIAL INTEREST IN RATE REGULATION
IN WEST VIRGINIA

KARL P. WARDEN*

THE purpose of this paper is to attempt to throw some small light upon the hitherto relatively unexplored and uncharted field concerning the desire of the State of West Virginia, through its Supreme Court of Appeals and its Public Service Commission, to act as a guardian of the social interests of the state and its people. This discussion will be limited in its scope to the determination of whether these two bodies have ever considered such social interests when determining the reasonableness of the rates to be charged to patrons by the public utilities in this state.

It would be well to say at the beginning that neither our Supreme Court of Appeals nor our Public Service Commission has ever said that they were attempting to apply Dean Roscoe Pound's theories of social interests, nor have they attempted to classify the interests as presented to them. So the conclusions reached by this writer will be his own interpretation of what our Supreme Court of Appeals and our Public Service Commission have done interstitially and very much between the lines of their printed decisions. My chief reliance will, of necessity, have to be on the records available to me and let it be said now that I lay no claims to being a mind reader or a "Bridey Murphy".¹ My approach in this paper will be to see (1) what the commission and the court said they were doing, (2) to see what reasons they set forth for doing these things, (3) to see what they actually did do, and (4) to make an educated guess

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¹ "The factors likely to influence judicial decisions are:

A. Remote and indirect—

1. Education—

(a) General.

(b) Legal.

2. Family and personal associations; wealth and social position.

B. Direct—

1. Legal and political experience.

2. Political affiliations and opinions.

3. Intellectual and temperamental traits." Haines, *General Observations on the Effects of Personal, Political and Economic Influences in the Decisions of Judges*, 17 *ILL. L. REV.* 96 (1922).

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as to what lay in their minds at the time these things were actually done. The chief inspiration for this paper came from the dissenting opinion of Mr. Justice Frankfurter in the famous *Hope* case,² where he says:

"To what sources then are the Commission and the courts to go for ascertaining the standards relevant to the regulation of natural gas rates? . . . There appear to be two alternatives. Either the fixing of natural gas rates must be left to the unguided discretion of the Commission so long as the rates it fixes do not reveal a glaringly bad prophecy of the ability of a regulated utility to continue its service in the future. Or the Commission's rate orders must be founded on due consideration of all the elements of the public interest which the production and distribution of natural gas involve just because it is natural gas. . . . Of course the statute [Natural Gas Act] is not concerned with abstract theories of rate making. But its very foundation is the 'public interest,' and the public interest is a texture of multiple strands. It includes more than contemporary investors and contemporary consumers. The needs to be served are not restricted to immediacy, and social as well as economic costs must be counted. . . .

"The objection to the Commission's action is not that the rates it granted were too low but that the range of its vision was too narrow. And since the issues before the Commission involved no less than the total public interest, the proceedings before it should not be judged by narrow conceptions of common law pleading. And so I conclude that the case should be returned to the Commission. In order to enable this Court to discharge its duty of reviewing the Commission's order, the Commission should set forth with explicitness the criteria by which it is guided in determining that rates are 'just and reasonable', and it should determine the public interest that is in its keeping in the perspective of the considerations set forth by Mr. Justice Jackson."³

There is the real essence of what we will be hunting in the following West Virginia determinations, whether it exists or not remains to be seen.

It now becomes necessary to set forth just what is meant when referring to "social interests" in this paper. The definition of interests and the theory of interests used will be that of Dean Roscoe Pound, and it is, in general, as follows:

"An interest is a demand or desire which human beings either individually or in groups seek to satisfy, of which, there-

² Federal Power Comm'n v. *Hope Natural Gas Co.*, 320 U.S. 591 (1943).

³ *Id.* at 626-28.

fore, the ordering of human relations in civilized society must take account.

"The law does not create interests. It classifies them and recognizes a larger or smaller number; it defines the extent to which it will give effect to those which it recognizes, in view of (a) other interests, (b) the possibilities of effectively securing them through law; it devises means for securing them when recognized and within the determined limits.

"Hence in determining the scope and subject matter of a legal system we have (1) to take an inventory of the interests which press for recognition and generalize and classify them;⁴ (2) to determine the interests which the law should recognize and seek to secure; (3) to determine the principles upon which such interests should be defined and limited for the purpose of securing them; (4) to consider the means by which the law may secure them when recognized and delimited; and (5) to take account of the limitations upon effective

⁴ Pound's outline of interests to be secured:

1. Individual.
 - (a) Personality.
 - (1) The physical person.
 - (2) Freedom of will—free choice of location free determination.
 - (3) Honor—reputation.
 - (4) Privacy and sensibilities.
 - (5) Belief and opinion.
 - (b) Domestic relations.
 - (c) Substance.
 - (1) Property.
 - (2) Freedom of industry and contract.
 - (3) Promised advantages.
 - (4) Advantageous relations with other..
2. Public.
 - (a) Interests of the state as a juristic person.
 - (1) Personality.
 - (2) Substance.
 - (b) Interests of the state as guardian of social interests.

3. Social.

Jhering's classification:

- (a) The physical conditions of life of the society—*i.e.*, the external security of its existence.
- (b) The economic conditions of life of the society—*i.e.*, the security of trade and commerce.
- (c) The ideal conditions of life of the society—those involved in its moral and religious foundations.
 - (1) General security.
 - (2) Security of social institutions.
 - (3) General morals.
 - (4) Conservation of social resources.
 - (5) General progress.
 - (6) The individual life.

POUND, *OUTLINE OF JURISPRUDENCE* 97-112 (5th ed. 1943).

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legal action which may preclude complete recognition or complete securing of interests which otherwise we should seek to secure."⁵

"The interests which the legal order secures may be (1) demands or desires involved in or regarded from the standpoint of the individual life immediately as such (*individual interests*); (2) demands or desires involved in or looked at from the standpoint of life in a politically organized society, asserted in title of political life (*public interests*); or (3) those wider demands or desires involved in or looked at from the standpoint of social life in civilized society and asserted in title of social life (*social interests*)."⁶

The first West Virginia case of any major importance in the rate making field is one which has been largely ignored since the advent of the Public Service Commission in 1913. The oft cited, but rarely considered, case, *Coal & Coke Ry. v. Conley and Avis*,⁷ is, like the first robin, a definite harbinger of the spring of sociological jurisprudence in West Virginia. The case is doubly interesting in that it came at a time in the history of this country when the courts were slowly swinging from a period in the law when the accent was on strict interpretation of the laws and when the emphasis was on the protection of property and rugged individualism to the present period of the law where the emphasis is more on the sociological import of the decisions and the legislative and administrative made laws.

The *Coal & Coke* case contains much that cannot be considered due to the rather limited scope of this paper, however it would be well to see some of the more salient features of the decision that do bear, at least in part, on the point of reasonableness of rates in order that we might catch the frame of mind of the court when rendering the decision. The case concerns a bill in equity by the railroad company against the Attorney General of West Virginia and the Prosecuting Attorney of Kanawha County, to enjoin them from enforcing the two cent passenger rate law passed by our legislature.⁸ The lower court gave judgment for the plaintiff and granted the injunction; the defendants appealed and it was affirmed in part, reversed in part, and modified. ". . . [T]he act involved

⁵ *Id.* at 96.

⁶ *Ibid.*

⁷ 67 W. Va. 129, 67 S.E. 613 (1910).

⁸ W. Va. Acts 1907, c. 41.

limits the charges of railroad companies, fifty miles long and over, for the transportation of passengers, to two cents per mile, and imposes a fine . . . for each violation of any provision thereof."⁹

The first real problem in the case was whether or not the State of West Virginia had such an interest involved in the suit that it, although not named as a defendant, would actually be a party in interest and thus cause the case to be within the constitutional inhibition which prevents the State of West Virginia from being made a party defendant in any court of law or equity.¹⁰ "The criterion, then, is the nature and extent of the State's interest, if any, in the subject matter. . . ."¹¹ The court goes on to say, "Its [the statute's] primary object is not revenue in the form of penalties. On the contrary, it is limitation of transportation charges in favor of the traveling public, and not of the State. . . . these penalties like most others, are really for the benefit of the people and not the State, although, if incurred and enforced, they would come into the State treasury. The receipt thereof would be nevertheless merely incidental to the enforcement of a measure dictated by public policy, just as in the case of penalties arising from violation of other laws, enacted under the police power of the State. . . . it is manifest that the interest¹² of the State in the controversy is indirect and remote. . . ."¹³ The court goes into a long discussion of the necessity of such a circuitous remedy being employed due to the failure of the legislature to provide any direct method of testing the reasonableness and validity of the limitation on rates prescribed by the act. Thus we have a situation arising in which the legislature had determined that two cents per passenger mile was a reasonable rate to be charged by railroads in this state. The case was determined in 1910, several years before the Public Service Commission was created by the legislature, but it involves the same type of thing that we find today when the Public Service Commission, acting as an arm of the legislature, sets a rate as being reasonable and then such rate is appealed to the Supreme Court of Appeals as being confiscatory and unreasonable. Since this is the first case in West Virginia directly involving the problem of reasonableness

⁹ 67 W. Va. at 138, 67 S.E. at 617.

¹⁰ W. VA. CONST. art. VI, § 35.

¹¹ 67 W. Va. at 139, 67 S.E. at 617.

¹² Notice that here the court is really using the word "interest" in a different sense than that in which it is employed in this paper. Here the court is thinking about the question of whether the state is in the real sense the party defendant, thus whether they are a party in "interest".

¹³ 67 W. Va. at 139, 67 S.E. at 618.

of rates it will be important to see whether the court balanced any interests other than those of the railroad and the patrons when determining this question. The court rather clearly distinguished between the "interest" of the state as a party defendant and the "interest" of the state in general welfare of its citizens when it said: "The state, considered in the broad sense of the term, can have no interest in a controversy of this class. The state and the government of the state are two different things, the former being an ideal person, intangible, invisible, immutable; the latter a mere agent, and, within the spirit of the agency, a perfect representative; but outside of that, a lawless usurper. . . . It is to the interest of the state . . . to restrain the conduct of every citizen in the interest of the general welfare."¹⁴ And finally the court gets down to the real meat of the problem so far as this discussion is concerned. "What constitutes a fair and reasonable return for the use of invested capital has never been definitely settled by the adoption of any particular standard for all purposes and to govern under all conditions."¹⁵ The court recites the currently discredited *Smythe v. Ames*¹⁶ rule of actual investment as a rate base. It is the tenor of this discussion and not the rule laid down as to rate base that we are interested in here. "Under exceptional and peculiar circumstances, what would be ordinarily a reasonable rate of profit on the entire investment is disallowed, as being more than the service is worth to the public and therefore unjust to it. . . . Both the public and the public service investor are to be considered, and justice done to each."¹⁷ The few lines wherein the court, for the first time, gives us an actual glimpse of the new weight to be placed on the judicial scales and also shows us into which pan it will be placed are as follows: "In our opinion, the railroad company has the right to earn reasonable compensation for the use of its property now, if it can do so without imposing unreasonable rates on the public, rates disproportionate to the value of the service rendered. [The judicial scale is brought into focus and the pan of the public utility and the pan of the patron are placed in even balance to begin the weighing.] In this connection we deem it just to say that the service of this railroad may be worth more to the traveling public and especially to the people living along its line, under the cir-

¹⁴ *Id.* at 142-43, 67 S.E. at 619.

¹⁵ *Id.* at 189, 67 S.E. at 639.

¹⁶ 169 U.S. 466 (1897).

¹⁷ 67 W. Va. at 190, 67 S.E. at 639-40.

cumstances, than the service of some other railroad, differently situated. [So we see that only one public utility is in the railroad pan, and not all the railroads affected by this rate legislation.] The building thereof enabled them to travel to, from and through, the section of the country, traversed by it, much more cheaply than they could otherwise have done. [And now comes the bright and shining new weight to be deposited in one or the other of the pans. This weight is the "interests of the state as guardian of social interests".] The railroad has displaced the horse, carriage and wagon and greatly reduced the expense of travel and transportation, as well as contributed to the convenience of the people and added value to all the property of that part of the state. This, it seems to us, is a circumstance that ought to weigh heavily on the question, whether a particular rate is just to the public as well as fair to the carrier."¹⁸ Now in a few short sentences the weight is deposited in one of the pans. ". . . [T]he complainant having earned practically nothing on its passenger traffic, above cost of transportation, and less than two and one-half per cent of its investment on its entire traffic, and it further appearing that larger earnings from passenger traffic would have been realized, but for the operation of this statute, we are clearly of the opinion that it is confiscatory in its effect upon this railroad."¹⁹ The weight is deposited in the railroad's pan, the scales swing, and the balance is struck. ". . . [T]he act of 1907, limiting passenger fares on complainant's railroad to two cents a mile, is unconstitutional in its operation and effect upon said company, because it reduces, or compulsorily contributes to the reduction of, the net earnings below the point of reasonable remuneration. . . ."²⁰

The court concludes by saying, in effect, that if the interest of society moves from the pan of the railroad into that of the patron then there can be a reapplication to the court for a new balancing of interests and a possible dropping of the injunction. There is an interesting statement in the dissenting opinion of Judge Williams. He says, desiring to make the injunction absolute, "furthermore, this state is in the process of development. It is necessary for the building of many more miles of railroad before all the natural wealth of the state can be made available, and the policy of the state heretofore has been to encourage railroad building; and cer-

¹⁸ *Id.* at 200-201, 67 S.E. at 644.

¹⁹ *Id.* at 201, 67 S.E. at 644.

²⁰ *Ibid.*

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tainly the legislature could not have had this policy in mind at the time of the passage of this act, because, instead of encouraging development, it operates to discourage and retard it. No railroad corporation owning a line less than fifty miles in length would want to extend its line beyond fifty miles, if its earning capacity is to be reduced by such an extension, thereby subjecting itself to the two-cent rate regulation."²¹ It would seem that Judge Williams preferred that the weight of "social interests" be slightly adhesive, so that once deposited it remains, like the pyramids, immovable.²² This opinion was written and given in March, 1910, slightly over eleven years before Dean Pound wrote his *Theory of Social Interests*²³ and it is not the intent of this writer to suggest that the crystallized image of "social interests" as developed by Dean Pound was, or could have been, in the minds of the judges who wrote the opinion at this time. But I do suggest that the same motivations, the same social and economic forces, and the same general philosophy of the times moved both the pens of our learned judges and the pen of Dean Pound. The claims, wants and demands of the group of human beings which composed the newly developing State of West Virginia, and the desire to satisfy that need for development and industrial and economic expansion motivated the social engineering of our court in giving the railroads a right to a higher return on their investment, and thus our court took into account both the interests of the railroad, the patrons and the whole social group as such.²⁴ In this case the interests and claims of the whole social group as such could best be furthered by holding these legislative made rates to be unreasonable. In other later cases the interests of society, as we shall see, lay with

²¹ *Id.* at 212, 67 S.E. at 648.

²² Such an attitude is more indicative of the period of the maturity of the law which was currently making its last bow, than of the present period in which social interests do not always lay on the side of the rugged individual. However, the influence of a desire to benefit society as well as the exploiter of nature is readily apparent. Dean Pound said, ". . . there is the social interest in general progress; the claim or want or demand of society that the development of human powers and of human control over nature for the satisfaction of human wants go forward; the demand that social engineering be increasingly and continually improved. . . ." Pound, *A Theory of Social Interests*, in 15 PAPERS AND PROCEEDINGS OF THE AMERICAN SOCIOLOGICAL SOCIETY 16, 39 (1921).

²³ *Ibid.*

²⁴ ". . . [L]egal institutions and doctrines almost always have behind them, not one social interest or a simple compromise of two, but a complex harmonizing of many. It is of the first importance to perceive this, to note what these interests are, how they are harmonized or compromised, and why it is done in this way rather than in another." *Id.* at 33.

the patrons and a slowing down of the free rein of industrial growth and expansion. This newly constructed railroad ran through a section of West Virginia which was rich with virgin timber and undeveloped seams of coal. It was to the interest of the people in this state that this coal and timber be carried to the markets of the world. This could not be done unless this railroad became a sound financial proposition, thus the return on the investment had to be attractive to investors and the only way to accomplish this was to permit the rates to exceed the arbitrary two cents per mile established by the legislature. This was done.

In 1913 the West Virginia Public Service Commission was created by our legislature,²⁵ in order to relieve the courts and the legislature of the ever increasing burden of regulation of public utilities. Subsequent to the creation of the commission there was a small flood of attempts by railroads in the state to have the two cents per passenger mile statutory burden removed from their roads. The Baltimore and Ohio Railroad attempted to follow the example set in the *Coal & Coke* case, but the supreme court told them in no uncertain terms that the remedy for their problems now lay in an appeal first to the Public Service Commission to determine whether the rate was reasonable, and that the methods used in the *Coal & Coke* case were no longer available to them.²⁶ The Public Service Commission then took upon themselves the job of regulating railroad rates and interpreting the legislative made rates.²⁷

The first few years of life for the Public Service Commission showed very little in the way of a desire to weigh and balance patron, utility and social interests. The decisions were generally short and the interpretative language of the commission cannot honestly be said to be indicative of what interests were being protected in their rate decisions.²⁸ An interesting case before our

²⁵ W. Va. Acts 1913, c. 9.

²⁶ State *ex rel.* Public Service Comm'n v. Baltimore & Ohio R.R., 76 W. Va. 399, 85 S.E. 714 (1915).

²⁷ Western Maryland Ry., W. Va. P.S.C. Biennial Rep. 128 (1916), where the commission allowed a rate increase to two and one half cents per passenger mile but gave no reasons for their decision.

²⁸ See *City of Benwood v. Public Service Comm'n*, 1 W. Va. P.S.C. Rep. 161 (1914), where the commission cites the Supreme Court of Washington which speaks of the interest of the public utility as an "interest born of necessity." However, the most general problem at this time was not what the Public Service Commission actually did, but rather whether they could constitutionally do anything.

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supreme court along about this time, although not specifically in point so far as reasonableness of rates is concerned, was the *Randall Gas Co. v. Star Glass Co.*²⁹ This was a case in which the Public Service Commission had raised the rates of the gas company but the gas company had failed to have these rates properly filed with the commission prior to collecting them from their patrons. The patron sued for reparation. The case becomes interesting in so far as this discussion is concerned because of one statement made in it and not answered by the court. "Denial of the application of the principles declared in . . . [citations] is supplemented by the assertion that *the legislature has no power to regulate rates against the interests of the people and in favor of a corporation.*" (Emphasis supplied.)³⁰ This would have been the ideal spot for Judge Poffenbarger, who wrote the majority opinion in the *Coal & Coke* case to have explained the theory behind the regulation of rates in this state and also to explain some of the prior holdings of the court on the subject of rate regulation. However, he did not elaborate on this question at all. A possible explanation may have been the sparseness of the facts in the record presented to the court.

The Public Service Commission was beginning to come into its own about 1917 and the opinions in the formal cases during the next few years really give some insight into the minds of the commissioners as to what they were thinking about when they were faced with a rate problem. "It is the duty of the Commission not only to look after the interests of the public and see that this additional burden is not placed upon the citizens, unless authorized to do so by the evidence, but to do justice by the company as well. The investor must be protected in his investment, or capital will seek other localities where investments will be safe. The industrial development and progress of the state depends very largely upon the assurance that the investor in public utilities will be protected in his legitimate investment, and allowed to receive a reasonable return thereon. The public should, at all times, be ready and willing to contribute a reasonable compensation for the service received by it. Having this policy in view, the accountants employed by the Commission were instructed to make a thorough and impartial investigation of the matters arising on the petition

²⁹ 78 W. Va. 252, 88 S.E. 840 (1916).

³⁰ *Randall Gas Co. v. Star Glass Co.*, 78 W. Va. 252, 254, 88 S.E. 840, 841 (1916).

in this case in order that a fair result might be obtained."³¹ Such language could only have flowed from a mind that was concerned with the advancement of the social interests of the state in its people. "The needs to be served are not restricted to immediacy, and social as well as economic costs must be counted."³² The two statements are almost identical in thought, only the words used are different. But this is not an isolated instance, there is a very definite body of principles built up by the commission which are easily seen when reading their formal opinions during this period. Natural gas rates should, "as a matter of public policy and as a proper measure of fairness to those engaged in the natural gas business, be fixed so as not only to secure a liberal return for the capital and enterprise invested therein, but as well to encourage and promote the further development and extension of the business."³³ Why promote and encourage the extension and development of the business? "Vast industrial enterprises are now almost wholly dependent upon the use of gas as a fuel for their continued prosperity, if not actual existence. The use of natural gas as a domestic fuel adds greatly to the comfort and convenience of those so fortunate as to have it available at a reasonable price for their purpose."³⁴ But there is still more of this language. "The utility must be ready upon a moment's notice to supply thousands of gallons of water per minute in order to give adequate fire protection. It should therefore, receive a fair return upon the extra investment in plant capacity needed to meet such an emergency, and be compensated for the additional operating costs incident thereto. Adequate fire protection is a general benefit to the whole community; it reduces insurance rates and property loss. . . ."³⁵ There the commission determines that the property owners should pay for this rate increase through higher taxes to the city and that the city should have to pay more for its water. Nor were the courts completely silent in this field at this time. In *City of Bluefield v. Water Works*³⁶ the Public Service Commission had entered an order allowing the water company to increase its rates according to a schedule of rates fixed by the commission and set out in the order. The case was retained

³¹ *Re Chesapeake & Ohio Ry.*, P.U.R. 1917D 152, 168 (1917).

³² *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 627 (1943).

³³ *Re United Fuel Gas Co.*, P.U.R. 1918C 193, 236 (1918).

³⁴ *Ibid.*

³⁵ *Re Hinton Water, Light & Supply Co.*, P.U.R. 1919D 467, 480 (1919).

³⁶ 81 W. Va. 202, 94 S.E. 121 (1917).

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on the commission's docket so that they could take whatever other action might prove necessary. The water company complained that the rates were confiscatory. The court says, "it is evident that the rates prescribed, though based on that valuation, (an estimate by the commission's chief statistician) were intended to be, and by the order were made experimental only and not final, and it would be impossible for us now to determine what earnings the rates prescribed will actually produce. . . . in advance of the ascertained result of the experiment, we could not say they are confiscatory and void."³⁷ "The valuation of the property of a public service corporation for rate making purposes and the fixing of rates for tolls and charges for the services to be rendered are purely legislative acts and are not the subject of judicial inquiry, except in so far and in so far only as may be necessary to determine whether such rates are void on constitutional or other grounds." (Emphasis added.)³⁸ Is not the court in effect saying "we cannot see what effect these proposed new rates will have on the patron, the utility and the interests of the whole social group as such, and therefore until such time as sufficient evidence is produced for us to use in striking a balance we will leave the situation undisturbed"?³⁹ Of course, this type of case is essentially local in its nature and the broad general impact on society which is present in cases involving large gas companies, railroads, etc., would not be present here. This does not prevent the court from considering the interests of the social group, but only gives to that social group a lesser weight than it would have if a larger segment of society were an interested party. An interesting attempt by a group of patrons to use social interests of a town's population in order to have a temporary rate increase for the water company suspended is found in the case of *City of Charleston v. Public Service Comm'n.*⁴⁰ There, as one of the numerous arguments set forth to have the rate suspended, the city suggested that the water that

³⁷ *Id.* at 203, 94 S.E. at 122.

³⁸ *Id.* at 204, 94 S.E. at 122.

³⁹ ". . . [A]nd there is the interest of the state that one of the state's governmental agencies, viz., the courts, shall not do work already done by another of the state's governmental agencies, that other being an expert commission specially designed and authorized by the state to do that work. And there is the interest of the state that its courts shall not be unduly used for an unreasonably prolonged series of trials of the same cause." Hardman, *The Extent of the Finality of Commission's Rate Regulations*, 28 W. VA. L.Q. 111, 122 (1922).

⁴⁰ 83 W. Va. 718, 99 S.E. 63 (1919).

was being supplied to them by the utility was contaminated and thereby caused great epidemics amongst its citizens. But the court said that the Public Service Commission had taken that fact into consideration and had noted that the condition could only be remedied by allowing the utility such return upon their investment that they could afford to install better equipment. The court agreed with the commission that this could be best accomplished by allowing a rate increase. Thus the argument for the social interests was used by the commission and the court to deny the very thing it was put forth to accomplish. The social interests of the community could best be served by allowing a rate increase to the utility.⁴¹ A West Virginia case which seems most promising when first reading through it, and which is most disappointing when it is finished is *Clarksburg Light & Heat Co. v. Public Service Comm'n.*⁴² Here the court makes broad use of words which indicate a sincere interest in balancing consumer, utility, and social interests when discussing the rate making powers of the commission and also when discussing the discrimination between the general public and the manufacturers using the gas produced. Yet when they come to the main body of the discussion as to the reasonableness of the rates actually charged there is no language present which gives any indication that they had ever considered interests other than those of the patron and the utility. The court goes into some detail concerning the exhaustion of gas fields in the Clarksburg area, and yet they give no indication whatever that the state and its general public could have any interest in this depletion of our natural resources. "It cannot be doubted that in fixing the rate to be charged by a public utility such as the petitioner, there is an element to be considered which does not ordinarily enter into the matter of rate making. Public utilities such as water companies, or light companies are considered upon the theory of perpetual life, and when

⁴¹ Some evidencing of an interest in living and functioning utilities was shown by our Public Service Commission when they said, "to meet the enormous increase in operation costs it has been absolutely necessary, in order to prevent bankruptcies and receiverships, to increase the rates of practically all the utilities throughout the country engaged in the public service." *Re West Virginia Traction & Electric Co.*, P.U.R. 1919E 95, 106 (1919). See also *Appalachian Power Co.*, 6 W. Va. P.S.C. Rep. 170 (1919), where the commission determined that future expansion costs could not be used to their full extent in computing a rate base for the utility. The full rate increase was not allowed and the interest in expansion seemed to be both in the interest of the consumer and the utility. Thus, the social interest could best be served by giving it weight on both sides of the judicial scales.

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

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the proper return is allowed upon the investment and a proper amount for maintaining the physical properties in effective condition, the public utility has no ground for complaint, but where as in this case the life of the utility is determined by the exhaustion of its gas fields there must be in addition to the allowance for interest on the investment, and for the expense of keeping the plant in effective condition, another item sufficient to amortize the plant within the probable life of the field from which the gas is obtained. . . . Assuming that the petitioner's contention is correct, that its plant will become obsolescent in five years, it would be manifestly unjust to charge those who consume the gas during that last five years with practically the entire cost of the plant, in addition to a reasonable return upon the entire investment there."⁴³ So we see that the patron's interest in the exhaustion of the gas fields receives a big boost in the language of the court and that of the utility is accordingly let down. And the interest of the general public?⁴⁴ It has been said that there is a "foreshadowing of the *Hope* rationale" in the case of *City of Huntington v. Public Service Comm'n*.⁴⁵ And to support this proposition the following language from that case is cited: "There is no immutable standard for the measurement of the income a company serving the public is entitled to under all circumstances and conditions, and in the very nature of things there could not be. The facts of each case differ from the facts of every other case. No two of them are any more alike than are two or more faces."⁴⁶ But the remainder of the opinion does not indicate that our court was considering the facet of the *Hope* case which inspired this paper. The concurring opinions of Judges Ritz and Poffenbarger do go into some discussion of the growth of the city of Huntington and its future expansion and needs. This expansion is considered chiefly from the angle of the risk that the water company is running in expanding its facilities and the risk that is run when making its original investment in the particular community. Of course, such statements do indicate that more than mere dry mathematical computation went into the decision as to the rea-

⁴³ *Id.* at 649, 100 S.E. at 555 (1919).

⁴⁴ "The regulation of rates is of growing concern to everyone since, directly or indirectly, the entire population is affected by the cost of water, gas, electricity and public communication and transportation." Wise and Baer, *Some Comments on Rate Making in West Virginia*, 57 W. VA. L. REV. 33 (1955).

⁴⁵ 49 W. Va. 703, 110 S.E. 192 (1921).

⁴⁶ *City of Huntington v. Public Service Comm'n*, 89 W. Va. 703, 718, 110 S.E. 192, 198 (1921).

sonableness of the rates to be charged by the utility. But, as a whole, the opinion and the two concurring opinions shed but feeble light on the question of whether our court balances interests other than those of the patron and the utility when determining the reasonableness of rates for public utilities.⁴⁷

Somewhere along the long line of rate cases both our Supreme Court of Appeals and our Public Service Commission began to forget about the woods and concentrated only on trees. The decisions become hard and mechanical. The cases present a steady flow of figures and percentages and expert opinions.⁴⁸ There are but few decisions of the Public Service Commission, since the early days of the commission, which give any indication of interests, other than that of the consumer and the utility, having any weight at all in their determination.⁴⁹ "Another factor cannot be ignored. The Commission is not oblivious of the 10,000 West Virginians who seek and under the law are entitled to telephone service from this company but cannot get it, . . . nor to the thousands of others who have applied for but cannot obtain from it an upgrading in the service they now receive. . . . In fact, its (the company) stated policy for some time has been not to meet this demand for service, and it shows no disposition to attempt to do so in the future. Such an attitude on the part of the respondent in disregard for its duty to serve the public in the area in which it operates is a matter of deep concern to this commission."⁵⁰ There is similar language to be found in several other of the cases concerning telephone service, but it appears to be nothing but language.⁵¹ The same seems

⁴⁷ A rather interesting twist in the usual pattern of rate inquiries is to be found in *Charleston-Dunbar Natural Gas Co.*, 9 W. Va. P.S.C. Rep. 63 (1921). There the patrons of the utility asked the Public Service Commission to let the gas company increase its rates in order that the gas company might obtain additional capital so that it could remain in business. The rate increase was allowed. The patrons here were industries being served by the gas company and they were dependent on its services in order to remain productive themselves. Could it be that the patrons are more concerned with the general prosperity of the community than the community itself is?

⁴⁸ "It is submitted that as long as the current rate making philosophy of the West Virginia commission is purely a mechanical process, geared solely to a strict bookkeeping basis, an ominous threat exists to realistic regulation which is necessary to sustain the growth of the utility business with fair and equal treatment to both the investor and consumer." Wise and Baer, *supra* note 44, at 51.

⁴⁹ *Re United Fuel Gas Co.*, 1 P.U.R.3d 373 (1953).

⁵⁰ *C. & P. Tel. Co.*, 38 W. Va. P.S.C. Rep. 80, 101 (1950).

⁵¹ *C. & P. Tel. Co.*, 37 W. Va. P.S.C. Rep. 32 (1950); 39 *id.* at 67 (1952); *Bekley Water Co.*, 30 W. Va. P.S.C. Rep. 45 (1943); *Pocahontas Telephone Co.*, 10 W. Va. P.S.C. Rep. 187 (1923).

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to be true in our Supreme Court of Appeals, their language is accounting book mechanical.⁵²

Has West Virginia fallen into a morass of mathematics, or has our Supreme Court of Appeals merely set the pattern to be followed and our Public Service Commission done such an admirable job that the court need not interfere? Following the decision in the *Hope* case these comments appeared in a law review article: "Just what is this balancing of the investor and consumer interests? Is this some new theory of rate making and, if so, what are the methods by which this balancing can be accomplished? The consumer is 'interested' in having rates as low as possible and the investor is 'interested' in having rates which will produce the highest net income, but these are desires, not legal interests which the commissions and courts ordinarily recognize and protect. Most of us have thought that consumers are entitled to rates no higher than necessary to provide a reasonable return to the investor and that the investor is entitled to the same thing. So what is the function of doing any balancing?"⁵³ The author then supplies, what he considers to be, the answer to his own question: "It thus appears that the process of balancing resolves itself into deciding how unjust we may be to the investor, and we are furnished with no standard of injustice other than the subjective reactions of the 'expert administrators charged with the duty of regulation.'⁵⁴ Can this really be the answer to the question of "Why balance interests"? Certainly not.⁵⁵ "Only one third of the present century has elapsed. It is not until the second half of a century that what will prove to be its characteristic modes of thought stand out definitely. . . . Manifestly one cannot speak with assurance as to how we are in the end to value competing and overlapping interests in the present century. But some part of the path of the juristic thought of tomorrow is already apparent. It seems to be a path toward an ideal of co-op-

⁵² *City of Wheeling v. Natural Gas Co.*, 115 W. Va. 149, 175 S.E. 339 (1934); *City of Charleston v. Public Service Comm'n*, 110 W. Va. 245, 159 S.E. 38 (1931); *City of Huntington v. Public Service Comm'n*, 101 W. Va. 378, 133 S.E. 144 (1926).

⁵³ Brown, *Ghosts of the Hope Natural Gas Decision*, 32 CALIF. L. REV. 398, 405 (1944).

⁵⁴ *Id.* at 406.

⁵⁵ It would seem that the smog in California is so bad that Dean Pound's message has not yet been able to penetrate.

eration rather than one of competitive self-assertion. . . . I suspect that the idea will prove to be co-operation toward civilization."⁵⁶

Our Supreme Court of Appeals and our Public Service Commission got off to a good start in their determination of the reasonableness of rates. They balanced the interests of the patron, the investor, and the interests of society. This balancing was evident in their printed decisions. But somewhere this idea got lost in the crowd of mathematics and experts. Occasionally there are fleeting glimpses of it through the throng but generally these are few and far between. As to whether it still plays an important role this author cannot say. But there is no question in his mind that it should be there and that it should be expressed in loud and clear terms so that all may know of its presence. The general public has a very vital interest in what happens to our natural resources and this interest should not be pushed aside and forgotten by those whose purpose it is to protect this interest. "The vicissitudes of phenomena in time and space defy accurate control by human understanding and foresight even though human understanding

⁵⁶ Pound, *How Far Are We Attaining a New Measure of Values in Twentieth-Century Juristic Thought*, 42 W. VA. L.Q. 81 (1936).

See also, Hardman, *The Social Interest in the Aesthetic and the Socialization of the Law*, 29 W. VA. L.Q. 195, 196-198 (1923): "The subject matter that law deals with is interests, that is, human wants, claims, desires. These interests are either individual interests, *i.e.*, interests of individuals, or public interests, *i.e.*, interests of the state as a juristic person or as a guardian of social interests, or social interests, *i.e.*, interests of society. The owner of the property has a want or interest in using his property for anti-aesthetic purposes—an individual interest. Society has a want or interest in having property in its midst so used as not to prevent society or individual members thereof from living a proper life—a social interest. The state as guardian of social interests has an interest of the same sort as the last—in form a public interest but in substance a social interest. Now, here as elsewhere in the law, it is not possible for the law to secure or satisfy all wants or interests since some of them conflict. Therefore the end of law today is to secure or satisfy as many of these wants or interests as possible and sacrifice as few as possible and in so doing to secure the more important interests and sacrifice the less important. If we apply this method of reasoning, which of the above mentioned interests with respect to the anti-aesthetic use of property should, upon a balancing of the conflicting interests, be considered paramount and therefore be secured? . . .

"We are beginning to realize that the central unit of civilization is not the individual but society and therefore social interests are more important than individual interests. Hence, where the two interests conflict, since both can not be secured, the tendency is to sacrifice the individual interest so far as it is necessary in order to secure, to a reasonable extent, the more important interests of society. This salutary change in the law secures to the owner of property his reasonable wants with respect to the use of his property—which is all that the owner can reasonably ask—and secures to society its reasonable wants with respect to aesthetic surroundings, thus socializing the law by reasonably securing the social interest in aesthetic surroundings and harmonizing the law with the preponderant settled opinion of civilized society."

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and foresight were constantly at their greatest. In fact they are rarely at their greatest, and times and places with lesser intellectual equipment must be content with lesser accuracy. But none of these drawbacks justifies a refusal to search for what accuracy is attainable, with the best instruments that can be devised. Pound's criterion of good law is at once a proclamation of faith in such a search, and a courageous plan of the territory to be covered."⁵⁷ The tools are available here in West Virginia, *let the workmen use them.*

⁵⁷ Stone, *A Critique of Pound's Theory of Interests*, 20 IOWA L. REV. 531, 550 (1935).