Oklahoma Law Review

Volume 36 | Number 1

1-1-1983

Public Utilities: The Black Fox Nuclear Project Cancellation Dilemma: Of Judicial Review and Reform of Oklahoma's Administrative Process

David V. Seyer

imprudent investments. Because most utilities function outside the mainstream of market competition and have little incentive to minimize costs, regulatory agencies at the state and federal levels should coordinate their powers to protect the ratepayer, who ultimately bears the burden of high costs and imprudent investments. The most effective ways to protect the ratepayer are (1) to minimize the cost of construction and licensing, and (2) to prevent any expenditures for inappropriate or imprudent construction. Effective prevention will require close supervision of utility expenditures and of the traditional management functions of planning and supervision. Such intervention is necessary to protect ratepayers because utilities are not subject to market pressures.

Susan Marshall Bacon

Editor's Note: The United States Supreme Court has recently recognized that the Atomic Energy Act does not compel the promotion of nuclear power "at all costs." In its opinion on the appeal of *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,[69] the Court upheld the validity of section 25524.2 of the California Public Resources Code. The Court accepted California's avowed economic basis for banning the construction of nuclear generators until such time as adequate waste disposal techniques become available, and noted that the statute expressly maintained the authority of the federal government to approve disposal techniques. In rejecting the petitioners' claim of implied preemption, the Court stated: "[The] legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons."[70]

Public Utilities: The Black Fox Nuclear Project Cancellation Dilemma: Of Judicial Review and Reform of Oklahoma's Administrative Process*

The unexpected cancellation of electrical generating projects has given rise to a number of significant economic and legal issues. This note examines who shall bear the cost of abandoned projects and the subsequent problems created for the administrative agencies engaged in the regulation of utility rates. Until very recently, the subject was of limited interest because the cancellation of generating projects was rare.[1] However, with the unanticipated downturn in

69. 51 U.S.L.W. 4449 (U.S., Apr. 20, 1983).
70. *Id.* at 4457.

* This paper was awarded the Eugune O. Kuntz Scholarship for 1983, presented by H.B. Watson, Jr., Partner, Watson, McKenzie & Moricoli, Oklahoma City.—*Ed.*

1. Bruder, *Recovery of Losses on Cancelled Projects: Basic Issues*, in ELECTRIC POWER:

the demand for electrical energy and the financial and regulatory difficulties that have particularly beset the nuclear industry, many large-scale projects have been abandoned after staggering amounts of capital have been invested in planning, licensing, and acquiring equipment.[2] The subject of cancellation amortization (abandonment write-off) is now of intense interest to public regulatory commissions, public utilities, and consumers. Within the last few years, "the precedent on the subject suddenly has become rich."[3]

Oklahoma came face to face with this modern controversy when the Oklahoma Corporation Commission, the state's principal regulatory agency over rate changes,[4] ruled that Public Service Company of Oklahoma (P.S.O.) could recover more than $158 million in losses from cancellation of the Black Fox nuclear power project. The Commission decided that P.S.O. may include the Black Fox loss in rate charges to their customers over an amortization period of the next ten years. This action is expected to increase the monthly electric bill by $2.28 for a residential customer who consumes 800 kilowatt hours of electricity per month.[5] P.S.O. canceled Black Fox under Commission recommendation,[6] when it was determined the total cost of finishing the project was too excessive.[7]

The regulatory agencies, the utility industry, and the courts must confront the realities, both legal and economic, presented by these unexpected and extraordinary circumstances. The critical question facing the various state regulatory commissions, as well as the Federal Energy Regulatory Commission (FERC), is who is to pay for the costs associated with the abandonment of generating plants before they are operable and before they are of any use to the customer. Should the utilities' shareholders absorb the loss? Should the consumers? Or is there a mechanism by which the expenditures may be equitably apportioned between the parties?

The importance of these proceedings cannot be understated. As the Oklahoma Corporation Commission stated in its order dealing with the Black Fox amortization: "[T]his case may well be one of the most important to come before this Commission in the course of its history to date."[8]

CURRENT ISSUES IN REGULATION AND FINANCING 167, 169 (Practicing Law Institute, 1982) [hereinafter cited as Bruder].

2. A recent Nuclear Regulatory Commission report estimated that electric utilities are likely to cancel another 19 nuclear power reactors in various phases of construction, only four of which are more than 20% complete. Most of the remainder are less than 10% complete. 10 ENERGY USERS REP. (BNA) 271-72 (Mar. 18, 1982). Ninety-one nuclear power plants have been canceled over the past decade. 10 ENERGY USERS REP. (BNA) 900 (Sept. 2, 1982).

3. Bruder, *supra* note 1, at 169.

4. Jurisdiction of the Corporation Commission is based upon its general regulatory power pursuant to article 9, § 18, and related sections of the Oklahoma constitution and the statutory provisions contained in 17 OKLA. STAT. §§ 151-271 (1981).

5. 10 ENERGY USERS REP. (BNA) 564-65 (June 10, 1982).

6. 10 ENERGY USERS REP. (BNA) 99 (Jan. 28, 1982).

7. 10 ENERGY USERS REP. (BNA) 565 (June 10, 1982).

8. Public Service Co. of Oklahoma, Cause No. 27068, Order No. 206560, at 62 (Okla. Corp. Comm'n, Jan. 15, 1982) [hereinafter cited as P.S.O. Order].

I. *The Black Fox Nuclear Project*

Project History

The Black Fox nuclear power station is a 2,206-acre site located 23 miles east of Tulsa, near the city of Inola in Rogers County.[9] The Public Service Company of Oklahoma, a public utility with its principal offices in Tulsa, is primary owner and operator of the project. P.S.O. is a corporation organized and existing under the laws of the state of Oklahoma and is a wholly owned subsidiary of Central and Southwest Corporation, a registered holding company located in Wilmington, Delaware. The company has plant, property, and other assets dedicated to and for the generation, transmission, distribution, and sale of electric power and energy to the public in fifty-one counties in the state of Oklahoma.[10]

Owning approximately a 61% share in the Black Fox project, P.S.O. has operated as project manager since the plan's inception. The company's other partners in the power station are Western Farmers Electric Cooperative of Anadarko, Oklahoma, and Associated Electric Cooperative, Inc., of Springfield, Missouri, both rural electric cooperatives.[11]

P.S.O. has been involved in nuclear research and development since 1957. In 1968, P.S.O. prepared and issued a power-generation expansion study that evaluated the economics of natural gas, coal, and nuclear fuel as potential boiler fuels. The study concluded that because of the uncertainties surrounding the future costs and availability of natural gas, the company's system should be planned to provide for a fully diversified fuel mix by the addition of coal-fired and nuclear-fueled generating stations. In January 1973, P.S.O. announced its intent to construct a nuclear power plant near Inola, Oklahoma, and thereafter filed an application with the Oklahoma Corporation Commission,[12] in which P.S.O. informed the Commission of its intent to build a nuclear-powered generating facility at the Inola site. After hearing evidence, the Commission issued its Order No. 100753 on October 24, 1973, finding that the site was an appropriate location for a generating facility. The Commission further found that it had no authority to approve the type and kind of generating station planned because federal legislation preempted such a decision.[13] The Federal Nuclear Regulatory Commission's (NRC) preemptive

9. 1 Public Service Company of Oklahoma, Black Fox Station Units One and Two (Environmental Report) 2.1-1 (1974).

10. P.S.O. Order, *supra* note 8, at 4.

11. *Id.* at 46. Western Farmers Electric Cooperative owns 17.391% of the Black Fox Station and as of Aug. 31, 1981, had invested $64,618.095.05 in the project. Associated Electric Cooperative, Inc. owns 21.739% of the project and as of Sept. 30, 1981, had invested $84,282,516.69.

12. Public Service Co. of Oklahoma, Cause No. 24893 (Okla. Corp. Comm'n, Jan. 1973). More than fifty prospective sites were originally contemplated by P.S.O. for the location of the Black Fox facility. Daily Oklahoman, Jan. 24, 1983, at 1, col. 1. For an excellent article concerning power plant siting, including a brief discussion on Black Fox, *see* Young, *Power Plant Siting and the Environment*, 26 OKLA. L. REV. 193 (1973).

13. P.S.O. Order, *supra* note 8, at 44.

authority extends to the construction, operation, and decommissioning of nuclear power plants and all safety issues associated therewith.[14] From that point until 1981, all regulatory activity in connection with the Black Fox nuclear power project was restricted to proceedings before the NRC.

From 1973 through early 1979, proceedings were held before the Nuclear Regulatory Commission covering all aspects of the project, including economics, engineering, environmental, and safety considerations.[15] On July 26, 1978, the United States Atomic Safety and Licensing Board issued a limited work authorization for nonsafety-related work, and construction began on the project immediately thereafter. In February 1979, the NRC's safety hearings were completed and P.S.O. had satisfied all requirements for a construction permit.[16] At the close of those hearings, P.S.O. performed a complete cost assessment and scheduling update in anticipation of receiving a construction permit by July 1979.[17]

In March 1979, an accident occurred at the Three Mile Island Unit Two nuclear facility near Harrisburg, Pennsylvania. The impact of this accident was not immediately known, but P.S.O. made efforts to obtain specific information concerning new licensing requirements for the Black Fox station. By the fall of 1979, it became apparent that the NRC had declared a mortorium of uncertain duration on nuclear licensing activities.[18] Faced with uncertainty as to when a construction permit would be received, P.S.O. demobilized its field activities on the Black Fox station and placed the project in what P.S.O. officials termed a "survival mode."[19] Because of the uncertainties with respect to the licensing requirements and procedures, P.S.O. determined that it would be impractical to update the $2.39 billion cost estimate it had made in April of 1979 that was predicated on in-service dates for Black Fox Units One and Two of 1985 and 1988, respectively.[20]

14. *Id.* A decision of immense proportions in the area of federal preemption of nuclear power was handed down by the United States Supreme Court on April 20, 1983. In Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 51 U.S.L.W. 4449 (U.S. Apr. 19, 1983), the Court (in a 9-0 ruling) upheld a California moratorium on nuclear power plants until the federal government devises a safe method for disposing of radioactive waste. The moratorium on construction is aimed not at public safety but at the *economic* problems associated with the lack of federally approved nuclear waste disposal facilities. The decision upheld the prior Ninth Circuit opinion, 659 F.2d 903 (9th Cir. 1981), which read the Atomic Energy Act to evince a clear congressional intent to preempt state regulatory powers in the areas of radiation hazards alone, and to preserve the powers of the states to regulate nuclear plants for any other purpose. The Atomic Energy Act of 1954 regulates safety aspects of nuclear plant construction but leaves to the states their traditional responsibilities of regulating electrical utilities concerning issues of need, reliability, rate-making, and other related state concerns. The Court's opinion did not specify what effect its ruling has on the nuclear power plants now under construction. *See* Oklahoma City Times, Apr. 20, 1983, at 1, col. 1.

15. *Id.*

16. *Id.* at 45.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

On August 27, 1981, the NRC approved new regulations for the licensing of nuclear facilities.[21] As a result of this action by the NRC and in response to an Oklahoma Corporation Commission order, P.S.O. retained professional consulting firms to perform a cost and schedule update and a study of the cost of a comparable coal-fired generating facility.[22]

From September 14 through November 10, 1981, the merits of P.S.O.'s application for a rate adjustment in Oklahoma were heard before the Oklahoma Corporation Commission, en banc.[23] On January 15, 1982, the Commission called Black Fox a "profound risk" and in Order No. 206560 recommended that it be canceled.[24] The Commission suggested instead that P.S.O. build a coal-fired generating station to meet its future power needs.[25] By now P.S.O. had spent approximately $200 million in engineering and site preparation for Black Fox, which was to have a 2,300-megawatt capacity.[26]

On February 16, 1982, P.S.O. announced the withdrawal of its application with the NRC for construction of Black Fox, citing regulatory uncertainties and escalating costs of more than $10 billion.[27]

The Oklahoma Corporation Commission ruled on June 3, 1982, in Order No. 217735, that P.S.O. could begin recovering more than $158 million in losses from the cancellation of the Black Fox project.[28] P.S.O. President Martin E. Fate, Jr., said his company had accepted an option from the Corporation Commission that would permit the company to bill customers for a large portion of the costs to date of the nuclear plant.[29] The Commission actually approved the *concept* of customer payment for the construction cancellation in the January 15 order, in which it also approved a $79.1 million P.S.O. rate increase, the largest ever granted an Oklahoma utility.[30]

21. *Id.*

22. *Id.* at 46.

23. *Id.* at 3.

24. 10 ENERGY USERS REP. (BNA) 211 (Feb. 25, 1982).

25. 10 ENERGY USERS REP. (BNA) 99 (Jan. 28, 1982).

26. *Id.*

27. 10 ENERGY USERS REP. (BNA) 211 (Feb. 25, 1982). On that same date, the Attorney General filed his Petition in Error initiating this appeal. It should be noted that P.S.O. filed a cross-appeal on Feb. 26, 1982, with respect to certain rate provisions of Order No. 206560. The utility urged that the Commission's order acted to deprive P.S.O. of its property without just compensation in violation of the Constitution of the United States and the Oklahoma constitution, by establishing rates and charges inadequate to allow P.S.O. the opportunity to achieve a reasonable rate of return on property devoted to its public service duties.

28. 10 ENERGY USERS REP. (BNA) 564-65 (June 10, 1982).

29. 10 ENERGY USERS REP. (BNA) 211 (Feb. 25, 1982).

30. *Id.* There appears to be some question as to whether Order No. 206560 is a final order under Oklahoma law and therefore not appealable. The appellees could argue that the portions of the order dealing with the Black Fox order are not appealable under OKLA. CONST. art. 9, § 20 because the Commission order does not "set a rate." The appellant may counter by contending that supreme court review is not restricted to a review of only those orders that specifically set out a fixed numerical rate, but includes the power to review orders of the Commission, which, in essence, affect and control rates. Regardless of any "semantic jousting," this writer contends that the approved "concept" of capital recovery is sufficiently ripe for appellate review because

The Commission decided that P.S.O. could include the Black Fox loss in charges to its customers over the next ten years, which is expected to increase a monthly electric bill by $2.28 for a residential customer who consumes 800 kilowatt hours of electricity per month.[31]

On November 26, 1982, P.S.O. officially announced its long-range plans to build and operate several coal-powered units at the site originally planned for the Black Fox nuclear project. Although actual construction is not expected to commence any earlier than 1987, the tentative schedule calls for the first unit of Inola Station to provide commercial service in 1992, followed by a second unit in 1994. Plans call for a total of four units eventually to be built at the site.[32]

The Oklahoma Corporation Commission's Decision

The Commission hearing in September 1981 was divided into three phases.[33] Phase three dealt with the specific issues relating to the Black Fox nuclear project, including whether to continue with the project, the financial impact on customers, and the potential capital recovery methods. Certain participants had considerable input into the proceeding: (1) Public Service Company, its partners in the project, and Oklahoma Industries for Fair Utility Rates; (2) consumer intervenors, such as the Coalition for Fair Utility Rates, Inc., Citizens' Action for Safe Energy, Inc., the Oklahoma Chapter of the Sierra Club; and (3) the Office of the Attorney General for the state of Oklahoma and the staff of the Corporation Commission.[34]

The Corporation Commission considered three principal issues in phase three of the proceeding: an economic analysis of nuclear versus coal construction costs; prudence in retrospect; and the issue of capital recovery and amortization.

(a) *Economic Analysis of Nuclear Versus Coal Construction Costs*

The Corporation Commission heard extensive testimony comparing the relative economic advantages of nuclear- versus coal-fired generating capacity.[35] A private firm, employed by the Commission staff, developed generic construction cost estimates for a nuclear facility equivalent to the Black Fox pro-

---

the subsequent Order No. 217735 only substituted dollar amounts in the forumla set forth in Order No. 206560.

31. 10 ENERGY USERS REP. (BNA) 565 (June 10, 1982).

32. Saturday Oklahoman & Times, Nov. 27, 1982, at 38, col. 1. The total size of the 1992 unit is yet to be determined as the other Black Fox station joint owners have to evaluate their interest in owning capacity. At present P.S.O.'s participation in the 1922 unit is set at 248 megawatts. The other companies own 192 megawatts. *See* 111 PUB. UTIL. FORT. 48, 49 (Jan. 6, 1983).

33. In phases one and two of the hearing, the Commission found P.S.O.'s jurisdictional rate base to be $710,765,828. The net operating income for the test year was determined to be $42,495,212. The Commission also ruled that P.S.O. should be allowed to earn an overall rate of return of 12.313%. P.S.O. Order, *supra* note 8, at 13, 23, 25.

34. *Id.* at 3.

35. *Id.* at 46.

ject and for coal-fired plants with comparable capacity. The firm concluded the nuclear construction project would cost in the range of $8.18 billion to $10.12 billion and that the coal-fired units would cost in the range of $5 billion to $5.8 billion.[36] A delay of one year would escalate the cost estimate for the nuclear facility by $1.06 billion.[37]

The consulting firm representing the consumer intervenors estimated the capital costs for the construction of such a nuclear project would be $15.1 billion, whereas the estimate of equivalent coal-fired capacity was $3.11 billion.[38]

Public Service Company's consulting engineers testified that barring unreasonable delays in construction and assuming licensing would proceed on a straightforward basis, the cost of construction of a coal plant of equivalent capacity to the Black Fox project would be $2.8 billion. However, it was estimated that P.S.O. had a 10% probability of completing the nuclear project in the 1991 to 1993 time frame. It was further projected that the company had a 50% probability of completing the project with Unit One in service in 1993 and Unit Two in service in 1995 at a total cost of $6.62 billion.[39]

After the presentation of evidence, the Commission emphasized that P.S.O.'s customers would experience a substantial increase in their rates, regardless of whether a nuclear or a coal facility were built.[40] However, the Commission determined that the construction of a nuclear plant would have a substantially greater impact on consumers' bills in the short run than would conversion to a coal-fired generating station. The Commission noted a probable greater cost impact with nuclear power over the long run because of particular risks and uncertainties,[41] discussed later in this note. There was, however, evidence indicating the feasibility of bringing a nuclear unit "on line" within twelve years, thereby giving nuclear capacity a slight advantage over coal capacity.[42]

The Commission emphasized two factors in these cost projections. First, any significant increase in the cost of nuclear plant construction, caused by delay or other factors, would shift the equation in favor of coal.[43] Second, probabilistic and comparative analysis research indicated that the Black Fox project had no better than a 50% probability of being completed by the 1993 and 1995 in-service dates. Nevertheless, it was the Commission's opinion that the study disregarded the effects of a significant nuclear incident, such as Three Mile Island, which could cause a substantial delay in the ultimate in-service dates of the two nuclear units. Any delay would give an economic advantage to coal.[44]

36. *Id.* at 47.
37. *Id.*
38. *Id.*
39. *Id.* at 48.
40. *Id.* at 50.
41. *Id.* at 51.
42. *Id.* at 52.
43. *Id.*
44. *Id.*

The Commission took specific notice of the problems of federal preemption in the nuclear energy area: "the entire industry is at the mercy of the attitude of the administration in office."[45] The Commission observed that there would be at least three general elections with three potential changes in nuclear energy policy before the most optimistic in-service dates for the Black Fox units,[46] stating, "We have already experienced the impact of a federal government unwilling or unable to reach timely decisions in the areas of standards and licensing of nuclear generating plants."[47]

The Commission also recognized potential problems with the reliability of fuel supply. Because of exclusive federal regulation of nuclear power plants, the fuel supply would be plagued by additional risks even after a nuclear plant is constructed. A problem at one power plant could cause a shutdown order to be issued to all plants of similar design. Thus, a utility with a nuclear plant may suffer loss of capacity because of another utility's problem.[48]

In concluding that P.S.O., and its co-owners, Western Farmers Electric Cooperative and Associated Electric, should not proceed with the project, the Corporation Commission relied on evidence establishing that Black Fox faced construction, financial, regulatory, and political risks, each of which could adversely impact the capital costs and construction scheduling associated with the project. Taking these risks into consideration, together with the cost projections, the Commission emphasized that the Black Fox nuclear power station project

> is no longer economically viable; that Construction Work in Progress for the project should not be allowed in Applicant's rate base; and that expenditures made from and after the date of this Order in the furtherance of the Black Fox project, will be considered by us to be imprudently undertaken for Oklahoma jurisdiction rate-making purposes.[49]

In summing up its *recommendation*, the Commission stated:

> Applicant and its co-owners should take immediate steps to cancel this project so that losses in connection with this project can be minimized. In reaching this conclusion, *we recognize that the decision to construct or to continue to construct an electric generating station is a decision which under Oklahoma law rests exclusively with management of our electric utilities.* At the same time however, this Commission can and will continue to protect Oklahoma ratepayers from imprudent management decisions.[50]

P.S.O. was given thirty days to consult with its partners and advise the

45. *Id.* at 53.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 54 (emphasis added).

Commission of its intentions.[51] On February 16, 1982, officials for P.S.O. officially canceled the Black Fox project.[52]

(b) *Prudence in Retrospect*

A second issue considered by the Corporation Commission was whether P.S.O. acted imprudently, either in the initial undertaking or in a failure to discontinue the project at any time thereafter until September 1, 1981.[53] The Commission emphasized that such a determination must not be distorted by the fact that "hindsight has 20-20 vision," and that judgment must be made from the perspective of what was known or reasonably should have been known by the management at the time the decisions were made.[54]

The Commission considered several factors determinative. First, at the time P.S.O. decided to construct a nuclear power plant, a shortage of natural gas was perceived to exist in the United States. In addition, the federal government was at that time actively promoting nuclear energy for electric generation. Based upon these perceptions, management concluded it would be necessary to diversify into both coal and nuclear generation in order to maintain reliable service.[55]

The Arab oil embargo of 1973 escalated the price of natural gas and highlighted the need to utilize other sources of fuel. In recognition of this factor, together with the perceived shortage of natural gas, Congress enacted the Power Plant and Industrial Fuel Use Act of 1978.[56] This legislation, as initially enacted, substantially increased the need for Oklahoma utilities to diversify their boiler fuels.[57]

Second, with the accident at Three Mile Island, the entire nuclear industry entered a period of profound uncertainty. Arguments were made that management should have known then that the risks associated with nuclear power

51. *Id.* at 61.

52. 10 ENERGY USERS REP. (BNA) 211 (Feb. 25, 1982).

53. P.S.O. Order, *supra* note 8, at 54.

54. *Id.*

55. *Id.* at 55.

56. Pub. L. No. 95-620, 92 Stat. 3289 (codified in scattered sections of 15, 42, 45 and 49 U.S.C.). The Act is designed to promote coal conversion by prohibiting the use of oil and gas in some existing and in some new boilers. The Act is part of the National Energy Act, signed into law by President Carter in November 1978. In addition to the Powerplant and Industrial Fuel Use Act, the National Energy Act is composed of four other pieces of legislation: the National Engery Conservation Policy Act, 42 U.S.C. § 8201, designed to set standards and provide loans, audits, and grants for conservation in buildings; the Public Utility Regulatory Policies Act (PURPA), in scattered sections of 15, 16, 30, 42, and 43 U.S.C., which encourages, but does not require, states to adopt new rate design standards that promote conservation and that may shift rising energy costs to different classes of consumers; the Natural Gas Policy Act, 15 U.S.C. § 3301, designed to create a unified natural gas market rather than separate ones for interstate and intrastate sales. The Act also provides for the deregulation of certain natural gas, incremental pricing and curtailment procedures; Energy Tax Act, in scattered sections of 23 and 26 U.S.C., which promotes investment and use of conservation and unconventional sources through the use of credits and investment tax credits. *See* J. TOMAIN, ENERGY LAW IN A NUTSHELL (1981).

57. P.S.O. Order, *supra* note 8, at 55.

were so severe as to require the owners to cancel Black Fox immediately. However, the Commission reasoned that the federal government had been actively encouraging the use of nuclear energy and, therefore, it was not unreasonable for management to assume that once the Three Mile Island incident had been investigated, the federal government would return to its previous supportive position. The federal government and the NRC, in fact, were dilatory in their resolution of the issues raised by the incident and have not issued a new construction permit since.[58]

Third, the Commission deduced that P.S.O. did not act imprudently in assuming a "caretaker" status for the project. The federal government, by failing to define its policy in a timely fashion, was, in effect, responsible for a de facto moratorium on new construction. Recognizing this moratorium, P.S.O. management then reverted to a caretaker status to minimize expenses on the project while attempting to preserve its already substantial investment. Without specific direction from the NRC concerning the future of nuclear energy, and the Black Fox project in particular, the Commission concluded that management did not act imprudently.[59]

The Commission summarized its position on the issue of prudence by stating:

> When the decisions of management are viewed as we have done from the perspective of the time in which those decisions were made, we believe that Applicant's decisions concerning this project were appropriate. The fact that different people would have, could have, or did reach differing conclusions does not render the decisions of this company imprudent. Accordingly, we conclude that we should provide this Applicant with our evaluation of the capital recovery treatment which should be given in the event a timely decision is reached to cancel this project.[60]

(c) *The Issue of Capital Recovery and Amortization*

The dominant issue before the Corporation Commission, and soon to be before the Oklahoma Supreme Court, is whether P.S.O. should be allowed to recover its investment in the Black Fox Station project after cancellation. Because of the importance of the Commission's reasoning and for purposes of analysis, much of the actual language used by the Corporation Commission is reprinted below.

The Commission initiated its discussion of the Black Fox capital recovery issue by recognizing the widely divergent positions advocated by the various parties. P.S.O. urged the Commission to grant a full return on write-off of the investment, or at least a return on equity equivalent to its current dividend

58. *Id.* There has not been a domestic order for a nuclear plant since 1978. 10 ENERGY USERS REP. (BNA) 900 (Sept. 2, 1982). Utilities are now committed to 147 nuclear reactors: 83 licensed to operate, 59 with construction permits, and 5 on order. 11 ENERGY USERS REP. (BNA) 91 (Jan. 20, 1983).

59. *Id.* at 56.

60. *Id.*

rate. The Coalition for Fair Utility Rates, a consumer group, advocated there should be no allowance for a write-off of the investment through the rate base, although the Coalition recognized the Commission's duty to ensure the financial soundness of the utilities that fall under Commission jurisdiction. Still, the Oklahoma Chapter of the Sierra Club urged the adoption of a risk-sharing concept proposed by Touche Ross and Company for the Commission staff. The staff's proposal, in essence, was for both the stockholders and the ratepayers to share in the capital loss in such a way that the company would maintain its economic viability while minimizing the impact on P.S.O.'s ratepayers.[61]

Perhaps most noteworthy was the Oklahoma Attorney General's opinion, as cited by the Commission in the Black Fox order: "As for allowing the Applicant to recover roughly $200 million worth of Black Fox investment, this Intervenor feels the recovery at the expense of the ratepayer is unwarranted. . . . It has been P.S.O.'s decision all along and as such, they should bear the losses associated therewith."[62]

In justifying its decision on recovery of capital costs, the Commission applied the following rationale:

> A public utility company is not permitted to enjoy the full fruits of its business successes in as much as regulation prohibits a return higher than that which is required to attract capital and provide service at reasonable rates. As a result, it does not have the resources available to absorb the major adversities which it encounters. In the event that Public Service Company and its co-owners conclude not to proceed with the construction of the Black Fox project, as a nuclear facility, and in view of management's prudence which we have found to exist at this point in the history of the project, we conclude that some mechanism for recovery of the investment in this project which would be written off must be recognized. To do otherwise, that is, to refuse to allow Applicant a mechanism for recovery of the extraordinary loss associated with this project would result in this Company immediately experiencing negative retained earnings for several years. The possibility exists that the Applicant would be placed in receivership. *We take judicial notice of the fact that bankruptcy would result* in the immediate escalation of a utility's embedded cost of debt to current interest rate levels. The evidence establishes Applicant's long term debt at test year end to be approximately $503 million with a cost rate of 9.114%. Assuming a current interest rate of 15%, bankruptcy would require the customers of the company to pay nearly $30 million more per year just to cover the added interest costs. The utility would immediately lose its credit rating and its access to the capital market. In our judgment the quality of service now ex-

61. *Id.* at 57.
62. *Id.* at 56.

perienced by the company's ratepayers would deteriorate rapidly, and the costs to Oklahoma ratepayers of restoring this company to financial health would be substantially greater than the costs associated with a recovery of this investment. In making his recommendation we do not believe the Attorney General intends this result.

Our decision to recommend against proceeding with the Black Fox Nuclear Project was made in large part because we could not subject the customers of P.S.O. to the substantial risks and uncertainties attendant to this project. Similarly, we cannot assign to the Company's ratepayees the profound risks of a bankrupt utility unable to meet its obligations.

Bankruptcy is not a viable option. The evidence in this case establishes and our independent search confirms that there is no standard treatment for abandonment of a plant such as this in the United States. Short of requiring the Company to absorb such a loss below the line, two viable capital recovery alternative scenarios are available to us: full recovery of the loss or some sharing of the costs of the write-off between the stockholders and the customers of the utility.[63]

Although not completely clear from the order, it appears the Commission opted for the latter alternative. The Commission ruled that certain items be excluded from any investments to be amortized and recovered from the Black Fox project. These included Black Fox advertising expenses, public relations, expenses, and any portion of the investment that could be converted for use in conjunction with a coal-fired facility at the Inola site.[64]

The Commission also held that P.S.O. should exercise due diligence in securing the sale of equipment, materials, and supplies charged to the Black Fox work order that could not be utilized elsewhere in P.S.O.'s operations.[65] The proceeds of such sales, as well as all extraordinary gains realized by the company from 1974 to the date of the order, should be credited against the equity portion of the initial balance of the recovery associated with the project.[66]

The Commission concluded:

63. *Id.* at 57, 58 (emphasis added).

64. *Id.* at 59.

65. Almost a year after the official cancellation of Black Fox, an Oklahoma newspaper reported the sale of Black Fox equipment and hardware to be "slow and tedious." One of the reasons reported for the sluggishness in the selling process was the lack of prospective buyers. Because production of nuclear energy is a highly specialized industry, most equipment is custom built for one location. Additionally, most of the equipment cannot be used for any purpose other than the construction and operation of a nuclear power plant. In the meantime, 21 employees are reportedly doing "erosion control work and routine maintenance" while keeping vigilance over millions of dollars worth of unsold equipment at the Black Fox site. Sunday Oklahoman, Jan. 30, 1983, at 12, col. 1.

66. P.S.O. Order, *supra* note 8, at 59.

> After deduction of these items from the Black Fox work order, we believe Applicant should be allowed to amortize the initial balance for recovery on a straight-line basis over a 10 year period, subject to our further findings as stated below.
>
> A substantial amount of testimony was presented to us with respect to whether or not a return on the recovery portion during amortization should be granted and, if so, how much return should be allowed. We conclude, based upon the testimony presented to us, that a full return would reward the equity owner unnecessarily, while no return on this capital investment would tell bondholders and preferred stockholders that they are not protected from risks which are normally attributable to equity holders of a company. *We believe that capital recovery is essential to the financial health of Public Service Company and it is imperative that the investment community retain confidence in this Company.* Accordingly, we find that the debt and preferred portion amortized loss associated with a Black Fox recovery should carry their actual costs as established in this case, but that no return be included in the equity portion. Should it become necessary in subsequent rate cases in order to maintain this Company's financial integrity and its ability to attract capital at reasonable cost for the benefit of Oklahoma ratepayers we will consider among other things a partial return to the equity holder.[67]

As previously stated, P.S.O. accepted the option given it by the Commission and canceled the plans for the Black Fox nuclear project. On June 3, 1982, the Oklahoma Corporation Commission ruled that P.S.O. may begin recovering more than $158 million in losses from the cancellation of the project.[68] The order is designed to allow P.S.O. to recover $22,861,945 of the aggregate amount during the first amortized year.[69]

As expected, this decision has generated great concern and controversy among consumer groups and affected ratepayers. On February 16, 1982, the State Attorney General filed a Petition in Error with the Oklahoma Supreme Court seeking review of the Commission's order.[70]

II. *Rate Treatment of Costs Associated With Canceled Generating Plants*

A Brief Overview of Rate-making

Three major components make up a public regulatory commission's rate-

67. *Id.* at 55, 60 (emphasis added).

68. 10 ENERGY USERS REP. (BNA) 564, 565 (June 10, 1982).

69. *Id.* at 565.

70. State *ex rel.* Cartwright v. Oklahoma Corp. Comm'n & Public Serv. Co. of Oklahoma No. 58,123. The brief for the appellant was filed Jan. 7, 1983. Perhaps as a humorous aside the appellant, requesting an extension of time within which to file his brief, stated as suppor

making decision—rate base, rate of return, and operating expenses.[71] Calculation of rate base is a critical step in establishing maximum rates because it represents the total investment in, or fair value of, the facilities employed in providing a utility's service. That figure is multiplied by a percentage rate of return to arrive at the allowed returns that orthodox regulations give a utility an opportunity to earn.[72] Regulatory commissions must also determine the operating expenses a utility incurs to provide the regulated product, a figure also allowed to be recovered from the ratepayer.

For most legislatures, agencies, and reviewing courts, the choice of method for valuing the rate base is between original cost, reproduction cost, or some combination of the two, referred to as "fair value." Approximately thirty-eight states rely solely upon original cost as the basis for valuing a firm's rate base. The remainder use the "fair value" method in which a balance is struck between original cost and reproduction cost.[73]

Oklahoma is considered a "fair value" jurisdiction. In *Oklahoma Natural Gas Co. v. Corporation Commission*,[74] the Oklahoma Supreme Court approved the following fair value rule for determining a rate base:

> In determining the present fair value of the property of a public utility, neither original cost nor reproduction cost new, considered separately, are determinative, but consideration should be given to both original cost and present reproduction cost, less depreciation, together with all the other facts and circumstances which would have a bearing upon the value of the property, and from a consideration of all of these a fair present value is to be determined.[75]

Regulatory commissions must also determine whether a certain expenditure should be included as an operating expense so that a utility can recoup the expenditure from its customers.[76] This is often a source of considerable con-

---

thereof: "The attorney assigned to write this brief, unexpectedly and with minimal notice, obtained employment and began working elsewhere." Motion of Oct. 12, 1982 (of record).

71. E. GELLHORN & R. PIERCE, JR., REGULATED INDUSTRIES IN A NUTSHELL (1982) [hereinafter cited as GELLHORN & PIERCE].

72. A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 139 (1969) [hereinafter cited as PRIEST]. Confiscatory rates are those which do not afford a fair and reasonable return on the property of the investment at the time it is used in public services. In Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968), the United States Supreme Court established that a return is fair and reasonable if it: covers utility operating expenses; debt service and dividends; compensates investors for the risks of investment and is sufficient to attract capital; assures confidence in the enterprise's financial integrity; and also provides protection to the existing and foreseeable relevant public interests.

73. GELLHORN & PIERCE, *supra* note 71, at 112.

74. 90 Okla. 84, 216 P. 917 (1923).

75. *Id.* at 85, 216 P. at 917. *Accord*: Lone Star Gas Co. v. Corporation Comm'n, 648 P.2d 36 (Okla. 1982); Tecumseh Gas System, Inc. v. State, 565 P.2d 356 (Okla. 1977); General Tel. Co. of Southwest v. State, 484 P.2d 1304 (Okla. 1971); McAlester Gas & Coke Co. v. Corporation Comm'n, 102 Okla. 118, 227 P. 83 (1924).

76. PRIEST, *supra* note 72, at 47.

troversy in economic regulation. Rates are determined prospectively and should reflect the utility's future operating expenses. Because the future is difficult to forecast, operating expenses traditionally have been determined based on actual expenses incurred by the business firm in a recent period, often referred to as the "test year."[77]

The general standard for determining whether to allow an operating expense in the rates charged to consumers was stated in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*.[78] The case held that a public utility commission is not the financial manager of a corporation and is not empowered to substitute its judgment for that of the directors of the corporation. Items charged by a utility as operating expenses are to be recognized in the rate-making process unless there is an abuse of discretion by the corporate officers.[79]

According to Professors Gellhorn and Pierce, the "abuse of discretion" basis for disallowing expenses encompasses two subsidiary standards.[80] First, an expense can be disallowed entirely if it was improperly incurred in the sense that it does not benefit the firm's customers. Second, an expense can be disallowed in part if it is excessive in relation to the resulting benefit to the firm's customers or in relation to the cost of alternative means of providing that benefit.[81] Thus, inefficiency, improvidence, waste, or bad faith on the part of management must be demonstrated or the regulator cannot disregard reasonable and fair operating expenses incurred in the rendition of service.[82]

In sum, the primary role of the regulatory commission is to establish a reasonable rate of return based upon the fair value of the public utility company's property in view of the needs of the company as well as the needs of the consumer.[83] The "reasonableness" of the rates the utility is permitted to charge is a question of law.[84] Therefore, whenever a company or a consumer asserts that the regulator has deviated from this standard, the question involved becomes subject to judicial review.[85]

The Amortization Process

The traditional device for passing the expenses and risk of abandonment losses to the ratepayer is to amortize the losses over a specific number of years and to add the annual amortization amount to the cost of service. The

77. GELLHORN & PIERCE, *supra* note 71, at 99.
78. 262 U.S. 276 (1923).
79. *Id.* at 289.
80. GELLHORN & PIERCE, *supra* note 71, at 144.
81. *Id.*
82. West Ohio Gas Co. v. Public Util. Comm'n, 294 U.S. 63, 72 (1935).
83. M. FARRIS & R. SAMPSON, PUBLIC UTILITIES: REGULATION, MANAGEMENT, AND OWNERSHIP 64 (1973).
84. Note, *Who Shall Bear the Cost of Abandonment*, 11 CAP. U.L. REV. 91, 93 (1981) [hereinafter cited as Note].
85. *Id.*

unamortized balance may also be included in the rate base. If not, this amount will have to be absorbed by the utility stockholders.

If the loss has produced a tax savings, the tax savings must also be amortized over the same period and credited against the loss. To illustrate, suppose that a utility has invested $100 million in a canceled project. As soon as the project is abandoned, the utility experiences a loss of the amount of investment. As a result of that loss, the utility also experiences a tax savings of, say, $50 million. The utility must then employ two accounts that it amortizes over the write-off period (usually five or ten years). From the abandonment loss account, it adds $10 to $20 million a year to the cost of service; from the associated tax savings account, it credits the cost of service with an offsetting $5 to $10 million per year.[86]

An alternative device is the "net-of-tax" accounting method. Using this approach, the tax savings is set off against the abandonment loss at the outset, and the net loss is amortized over five years to the cost of service.[87]

In either the gross-of-tax or the net-of-tax approach, the effect is gradually to transfer from the equity holder to the ratepayer the loss on the project and the associated tax benefit.[88]

Jurisdictional Treatment of Amortization

The overwhelming majority of state commissions that have entertained the question of allocating the costs associated with abandonment of power plant projects have allowed recovery through amortization.[89] Of these, the majority

86. Bruder, *supra* note 1, at 171.

87. *Id.*

88. *Id.*

89. Five of the most recent decisions in which state regulatory commissions have dealt with the cancellation amortization issue are: Commonwealth Elec. Co., 47 PUB. UTIL. REP. 4th (PUR) 229 (1982), where the Massachusetts Department of Public Utilities found a utility's investment in the joint ownership of a nuclear project to be prudent, but the recovery was limited to the point where "uncertainty had become intolerably high"; Boston Edison Co., 46 PUB. UTIL. REP. 4th (PUR) 431 (1982), where the Massachusetts Department of Public Utilities allowed the amortization of costs incurred from the cancellation of a nuclear power plant to be amortized over a 13-year period, with the company earning a 14% carrying charge on the unrecovered balance. The state regulatory commission utilized the following factors when determining the allocation of the loss: (1) the prudence of the company's actions throughout the history of the project; (2) the equity and fairness of any proposed allocation; and (3) the necessity of adjusting the financial impacts of any allocation to ensure the adequacy of future service; Rochester Gas & Elec. Corp., 45 PUB. UTIL. REP. 4th (PUR) 386 (1982), where the New York Public Service Commission allowed rate recovery and amortization for both an abandoned fossil-fueled project and a canceled nuclear project; Jersey Cent. Power Co., 44 PUB. UTIL. REP. 4th (PUR) 54 (1981), where an abandoned nuclear power plant loss was amortized over a 15-year period. The unamortized balance was not included in the rate base; Virginia Elec. & Power Co., 44 PUB. UTIL. REP. 4th (PUR) 46 (1981), where the Virginia State Corporation Commission held that cancellation losses associated with a nuclear power plant that was prudently planned initially, but later abandoned, was a proper "cost of service" item. However, because the property is no longer "used or useful" to the ratepayers, no unamortized losses should be included in the rate base. For a list of thirty-four decisions in which the Federal Energy Regulatory Commission (FERC) and various state public utility commissions have allowed recovery of abandonment losses from ratepayers, *see* Bruder, *supra* note 1, at 185.

have permitted an amortization process that permits the utility investor to recover his investment in the canceled projects, but does not permit the investor to earn a return on his investment.[90] This is considered to be a form of "sharing" the abandonment losses. Therefore, it achieves a "satisfactory" risk distribution between the stockholder and the ratepayer.

Only a few commissions have denied utility companies the right to recover any of their losses incurred as a result of plant termination. In *Arizona Public Service Co.*,[91] the Arizona Corporation Commission denied recovery based on its findings that the company had not adequately justified the expenses claimed; that the expense was unusual and nonrecurring so that it would skew test-year results; and that planning of the units is controlled by shareholders as a function of management, and thus shareholders should appropriately bear any loss.

Several state commissions have disallowed amortization of cancellation costs where the canceled facilities were planned for and the subsequent cancellation was caused by other jurisdictions.[92] A proposed nuclear plant (the Tyrone Energy Park Project), owned by Northern States Power Company and its subsidiary Northern States Power Company of Wisconsin, was terminated in March 1979 pursuant to an order of the Wisconsin Public Service Commission. Northern States Power and its subsidiary are subject to regulation in five jurisdictions,[93] each of which has treated the plant cancellation differently.[94] The Minnesota Public Utilities Commission held that the Minnesota ratepayers should not bear any of the cancellation costs because the Wisconsin Commission had acted erroneously in requiring the project to be terminated.[95] The North Dakota Public Service Commission held that ratepayers should not be required to pay any of the costs of Tyrone. However, in *In re Northern States Power Co.*,[96] the North Dakota Supreme Court reversed the Commission's ruling and held that under the preemption doctrine the Commission was required to accept an FERC determination of rates.

90. There are few state commissions that have allowed utilities to recover cancellation costs through amortization and inclusion of the unamortized balance in the rate base. Among the states that have allowed rate base inclusion are Florida, Louisiana, New York, North Carolina, and Wisconsin. Among those that deny rate base treatment of unamortized balances are California, New Jersey, Texas, and Virginia. Bruder, *supra* note 1, at 175.

91. Docket No. U-1345 (Ariz. Corp. Comm'n 1980).

92. Bruder, *supra* note 1, at 172.

93. The FERC and the states of Wisconsin, North Dakota, South Dakota, and Minnesota all have jurisdictional power over the Tyrone Energy Park Project.

94. Annual Report, 1982 A.B.A. SEC. PUB. UTIL. L. REP. 67 [hereinater cited as ABA, 1982 ANNUAL REPORT].

95. Northern States Power Co., 42 PUB. UTIL. REP. 4th (PUR) 339 (1981). The Minnesota Commission, in rejecting the amortization of the Tyrone loss, concluded that the cancellation was of no benefit to Minnesota ratepayers, and that the owners of the two NSP companies control their operations and assume the risks of ownership by investing. The Commission further found that the expenses of the abandonment were not a reasonable expense to be included in Minnesota retail rates, no matter in what form those expenses were presented.

96. 314 N.W.2d 32 (N.D. 1981). A 1981 FERC decision permitted NSP and its subsidiary to amortize the costs of the Tyrone project over a 10-year period, but denied rate treatment

Very few other state supreme courts have reviewed the cancellation amortization situation, although it is expected that many will soon be faced with this issue. In *Gulf Power Co. v. Cresse*,[97] the Supreme Court of Florida affirmed a decision of the Public Service Commission allowing Gulf Power to amortize the costs of its canceled Caryville generating plant and allowed inclusion of the unamortized balance in the rate base. The opinion did not discuss the issue at length, stating only that the Commission "neither violated the essential requirements of law nor abused its discretion by including the unamortized Caryville cancellation charges as a rate base component."[98]

In *Central Maine Power Co. v. Public Utilities Commission*,[99] the Maine Supreme Judicial Court affirmed a Commission order that allowed the company to amortize the costs of a canceled nuclear plant over a five-year period, but denied a return on the unamortized balance. The court held that this constituted a reasonable balancing of the interests of the ratepayers and the stockholders.[100]

Perhaps the leading decision by a state's highest court on this question is *Office of Consumer's Counsel v. Public Utilities Commission*.[101] The Ohio court's decision was the first dispositive ruling by a state supreme court solely addressing the propriety of allowing the utility to recoup any of the expenditures related to the cancellation of such projects.[102] Four nuclear power plants were being constructed jointly by the Central Area Power Coordination Group, consisting of Cleveland Electric Illuminating Company (C.E.I., the principal litigant), Toledo Edison, Ohio Edison, and two Pennsylvania utilities, Duquesne Light Company and Pennsylvania Power Company.[103] The appeal involved Cleveland Electric's approximately $56 million, which was invested in the four plants as of the date of termination. The Ohio Public Utility Commission had found that the decision to construct the plant in 1973, and the later decision to terminate construction in 1980, were "reasonable and prudent." In line with authority in other states, the Commission allowed a ten-year amortization, noting that C.E.I. had not requested any return on the unamortized investment.[104] In reversing the orders of the Commission, the Ohio Supreme Court held that the Commission was without authority to allow the recovery through rates of any of the investment. The court specifically relied upon an Ohio statute that permitted recognition as operating expenses for rate-making purposes only "the normal recurring expenses incurred by

---

of the unamortized balance. The FERC reasoned that this treatment would allocate the losses equitably between shareholders and stockholders. Federal Energy Regulatory Commission Docket No. ER-79-616, Op. No. 134 (Dec. 1981); UTIL. L. REP. (Federal) (CCH) ¶ 12,516 (Dec. 3, 1981).

97. 410 So. 2d 492 (Fla. 1982).

98. ABA, 1982 ANNUAL REPORT, *supra* note 94, at 68.

99. 433 A.2d 331 (Me. 1981).

100. *Id. See* ABA, 1982 ANNUAL REPORT, *supra* note 94, at 69.

101. 67 Ohio St. 2d 153, 423 N.E.2d 820 (1981), *app. dismissed* 102 S. Ct. 1267 (1982).

102. Note, *supra* note 84, at 94.

103. ABA, 1982 ANNUAL REPORT, *supra* note 94, at 65.

104. *Id.*

utilities in the course of rendering service to the public for the test period."[105] Therefore, the court held that an abandonment loss is not an operating expense, notwithstanding the overwhelming weight of authority from other jurisdictions. With respect to the policy argument that such a decision would seriously disadvantage Ohio utilities in capital markets, the court said this was a legislative matter.[106]

The United States Supreme Court refused to review the Ohio Supreme Court's decision,[107] dismissing C.E.I.'s appeal "for want of a properly presented federal question."[108]

III. *Policy Arguments*

One utility spokesman has recently stated that the situation facing the participating utilities and their ratepayers has the potenial of "a horror story."[109] Few could disagree that it would at first seem only fair that the investor alone should bear the cost of cancellation of a utility facility; common business practice places the risk of loss on the investors. Factors unique to the utility and energy industries, however, require an examination of the propriety of doing so here. Although no current reference dealing exclusively with the policy arguments of the cancellation/capital recovery issue exists, a summary of the competing arguments is illuminating.

The utilities can assert that it is fair and reasonable to recover the cost of investments in canceled power-generation projects through a rate-making scheme because the initial investment was made for the benefit of the customers, as was the decision to cancel.[110]

Another argument for the inclusion of amortization costs in the rates charged to consumers is that the cash return would help restore the financial integrity of the utility industry, enhancing the industry's ability to build additional plants and equipment as it becomes necessary. A 1982 report prepared for the Reagan administration called for major changes in utility regulation and rate-making to put the industry on sound financial footing and encourage investments in long-term capacity.[111] The report blamed adverse economic conditions and

105. 67 Ohio St. 153, 423 N.E.2d 820, 827 (1981). *See* OHIO REV. CODE ANN. § 4909.15(A)(4) (Page 1980).

106. 67 Ohio St. 153, 423 N.E.2d 820, 829 (1981). *See* ABA, 1982 ANNUAL REPORT, *supra* note 94, at 65. On the day following the Ohio Supreme Court decision, Moody's reduced the rating of C.E.I. bonds from Aa to A.

107. 102 S. Ct. 1267 (1982).

108. *Id.* The Supreme Court noted that a state court ruling may be reviewed in the United States Supreme Court only if a question of federal law is involved. In the statement accompanying its appeal, C.E.I. contended the state court's decision amounted to a taking of its property without just compensation in violation of the fifth and fourteenth amendments to the United States Constitution. However, according to the briefs urging dismissal of the appeal, the company waited too long to raise its federal constitutional claims. *See* 10 ENERGY USERS REP. (BNA) 96 (Jan. 28, 1982).

109. 10 ENERGY USERS REP. (BNA) 1043 (Oct. 14, 1982).

110. 9 ENERGY USERS REP. (BNA) 1836 (Dec. 31, 1981).

111. *See* 10 ENERGY USERS REP. (BNA) 1079, 1080 (Oct. 28, 1982).

inadequate rate relief for the deteriorating health of the utility industry. Public utility commissions have provided significantly less rate base relief than utilities have requested, and this has contributed to the industry's failure to earn its allowed return, the report said.[112]

The poor financial posture of utilities is reflected in low interest coverage ratios and return on equity, downgraded bond ratings, and stock selling below book value, the report continued. These financial woes have constrained utilities' access to capital markets, jeopardizing their ability to meet growing capacity requirements.[113]

If utilities cannot cure their financial difficulties, they will continue to scale back construction programs, resulting in less reliable service and long-term increases in electricity rates. The report concluded that nuclear- and coal-powered facilities, which represent more than 90% of the generating plants either planned or under construction, will be deferred or canceled.[114]

Finally, the utilities assert that failure to pass on the costs and expenses of these projects could result in the utilities' bankruptcy (as was noted by the Oklahoma Corporation Commission in the Black Fox order). Inclusion of the abandonment costs is a necessary expense for the maintenance of adequate service at the lowest reasonable cost to the consuming public.

Opponents of the inclusion of these costs could have several counter-arguments. First, the consumers had no real voice in the decision-making process. Although the consumers recognize the utilities' legal duty to provide service and to forecast needs for the future benefit of their customers, the fact remains that the utilities also share in the benefits of their endeavors by the profits they soon realize.

Second, the financial difficulties of the utility industry (which are subject to question in themselves) are not unique. A generally unfavorable economic state is fairly universal. By passing on the losses through a rate-making scheme, the economic burden is merely shifted to members of the lower economic groups, many of whom find it difficult to pay their utility bills at the current rates.

Third, bankruptcy is neither a valid nor a realistic option. The federal government and American society as a whole could not allow the producer of such a valuable commodity as electricity to become insolvent. As an example, General Public Utilities, owners of the Three Mile Island nuclear project, have continued to exist and are presently showing steady improvement after the Three Mile Island accident.[115]

Allowing total or partial recovery may encourage the utility industry to further delay examining least-cost and renewable alternatives such as solar power, wind power, and conservation. This would sink the industry deeper into the

112. *Id.*

113. *Id.*

114. *Id.*

115. This conclusion is based upon information found in the General Public Utilities Corporation's 1980 and 1981 Annual Reports. This is also evidenced by a substantial climb in value in GPU's common stock since the Three Mile Island incident.

same pattern of poor investments that has accounted for the present situation. In addition, if utilities and their investors can feel relatively confident in their ability to recover this type of investment (barring a difficult showing of imprudence or unreasonableness), this would create incentives to build costly and unnecessary projects without fully considering the lower-cost alternatives.

Finally, if the consumers, rather than the shareholders, bear the burden of poor planning or unforseeable circumstances, it would destroy management accountability. The credibility of, and confidence in, the utilities, regulatory agencies, and even the reviewing courts would be substantially diminished.

It is questionable whether any satisfactory alternatives could be developed. Government subsidies in the form of low-interest or no-interest loans may provide an agreeable resolution. However, uncertainty exists as to the likelihood of such action, especially in light of the current administration's budgetary endeavors.

IV. *Legal Issues Before the Supreme Court of Oklahoma*

The Oklahoma Supreme Court is facing a true judicial dilemma in the Black Fox controversy.[116] The court must deal with its traditional policy of deference to the rate-making decisions of the Corporation Commission (absent a clear abuse of its discretionary power), and it must confront a vehement public seeking equitable application of the law. Moreover, the court must adjudicate the extraordinary controversy with little or no precedent.

Oklahoma Corporation Commission's Statutory and Constitutional Powers

Gas, electric, telephone, and water utilities are regulated by the Corporation Commission, as provided by the Oklahoma constitution and the Oklahoma Statutes.[117] The supervision of public utilities includes the power to establish rates.[118] The power of the Commission to promulgate rates has been described as a legislative power,[119] and under such authority the Commission may establish rates that the state otherwise could prescribe had it not delegated that power to the Commission.[120]

Oklahoma's legislature has given the Corporation Commission substantial discretionary powers to be used in the performance of its duties. Title 17, section 152, of the Oklahoma Statutes is the primary statutory source for the Commission's jurisdiction over public utilities:

116. The Oklahoma constitution art. 9, § 20 provides in part: "An appeal from an order of the Corporation Commission affecting the rates, charges, services, practices, rules or regulations of public utilities or public service corporations, shall be to the Supreme Court only. . . ."

117. OKLA. CONST. art. IX; 17 OKLA. STAT. §§ 151-52 (1981). *See also Annual Survey of Oklahoma Law*, 2 OKLA. CITY U.L. REV. 53 (1977).

118. OKLA. CONST. art. 9, § 18; 17 OKLA. STAT. § 152 (1981).

119. Fort Smith & W. Ry. v. State, 25 Okla. 866, 108 P. 407 (1910).

120. Guthrie Gas, Light, Fuel & Improvement Co. v. Board of Educ., 64 Okla. 157, 166 P. 128 (1917).

> The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted. . . .[121]

Thus, there is little specificity in the mandates for rate-making procedures and policies of the Corporation Commission. What has developed from this is a frequently changing "state of the law" based on case law. This process has given liberality to the Commission and, in turn, an important niche for the supreme court to fill in controlling the administrative agency's power.

Scope of Judicial Review

Article IX, section 20, of the Oklahoma constitution provides in pertinent part:

> The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from the orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence. Upon review, the Supreme Court shall enter judgment, either affirming or reversing the order of the Commission appealed from.

A 1982 Oklahoma Supreme Court decision is particularly important in determining the court's current standards of judicial review of the Commission. In *Teleco v. Corporation Commission*,[122] the Corporation Commission authorized a credit rate considerably less than that requested by Southwestern Bell. In affirming, the court found the Commission's order "supported by substantial evidence viewed in its totality."[123] Justice Opala, speaking for the court, set fourth the current standard of review:

> In reviewing Commission orders this court is required to determine if the order is sustained by law and supported by substantial evidence. An appeal here is for judicial review only, and this court is required to exercise its own independent judgment as to both law and facts. The determination of whether there is substantial

121. 1913 Okla. Sess. Laws ch. 93, § 2.
122. 653 P.2d 209 (Okla. 1982).
123. *Id.* at 212.

> evidence in support of the Commission's findings does not require that the evidence be weighed, but only that the totality of the record be examined and proof found to be "more than a mere scintilla". The evidence should be found to possess something of substance and of relevant consequence—something that carries with it fitness to induce conviction. There is a presumption of correctness that accompanies the findings of the Commission in matters it frequently adjudicates and in which it possesses expertise. In the performance of its duties the Commission has wide discretion and this Court may not substitute its judgment on disputed questions of fact unless the findings are contrary to law or unsupported by substantial evidence.[124]

In this same opinion, the court specifically stated: "We adopted in *El Paso Natural Gas v. Corporation Commission*, the so-called totality-of-evidence standard for our review of Corporation Commission decisions. Federal Supreme Court jurisprudence is entirely consistent with our view. *Universal Camera Corporation v. National Labor Relations Board.*" [Citations omitted.][125]

It appears the Oklahoma Supreme Court has recently commenced a more intensive examination of Corporation Commission practices. In *El Paso Natural Gas*, as well as the subsequent decision of *Cartwright v. Oklahoma Natural Gas Co.*,[126] the court alluded to its responsibility to review the Corporation Commission's findings and conclusions by examining the "whole of evidence found in record including such evidence which fairly detracts from the weight thereof."[127]

In determining the appropriate standard of review for the Black Fox decision, one must first look to the basis of the arguments raised on appeal. If the appellant raises a constitutional issue, the supreme court must exercise its own independent judgment as to both the law and the facts. This would seem to be advantageous to the Attorney General's case in that it provides a maximum degree of amenability. By the court's ability to substitute its judgment, the scope of review is, in effect, unlimited.

If the appeal is not based on an asserted constitutional violation, the court uses a three-tiered scope of review. First, the court must determine if the Commission exceeded its authority. Second, the court must adjudge whether the findings and conclusions by the Commission are contrary to the prevailing law. Third, the substantial evidence test is applied to the findings and conclusions of the Commission in reviewing the questions of fact. This includes the application of the newly adopted totality-of-evidence standard. If the supreme

124. *Id.* For recent decisions supporting this interpretation, *see* Lone Star Gas Co. v. Corporation Comm'n, 648 P.2d 36 (Okla. 1982); Tecumseh Gas System, Inc. v. State, 565 P.2d 356 (Okla. 1977); Bishop v. Corporation Comm'n, 394 P.2d 235 (Okla. 1964).

125. 653 P.2d 209, 212 (Okla. 1982).

126. 640 P.2d 1341 (Okla. 1982).

127. *Id.*

court finds that the Commission erred in any of the three tiers, the order must be reversed.

An argument could be made that there be no "presumption of correctness" in the Black Fox case, based on the language of *Teleco*. Because of the extraordinary and unusual nature of power plant cancellations, the Black Fox situation is not a matter the Commission frequently adjudicates. Nevertheless, it appears the court is in a position to defer to the Commission's findings in the Black Fox order, recognizing the Commission's wide discretion in the performance of its duties.

Potential Legal Arguments by Appellant

The appellant (Attorney General of Oklahoma) could have a difficult time combating statutory omissions, the potential deference of the court, and lack of precedent. However, upon closer scrutiny, a successful cause of action may lie. The following is a brief survey of potential legal arguments which could be invoked.

1. *Prudence.* The overriding concern in the majority of previous cases, at both the Commission and the appellate levels, is whether the utility acted reasonably and prudently. This inquiry concerns both the implementation and the termination of the project. As stated previously, the facts pertinent to such an inquiry are those in existence at the time each of the foregoing decisions was made.[128] The Oklahoma Corporation Commission found that P.S.O. did not act imprudently in its actions with the Black Fox project. Considering the ever-increasing costs resulting from delays, the additional regulatory requirements, and the continued uncertainty surrounding nuclear power in general, it would seem improbable for the appellant to meet the stringent burden of proof that would overturn the Commission's judgment. It is, however, a logical point at which to begin. In addition, one might argue that the "reasonable and prudent" standard is not the *sole* criterion for determining whether a utility is entitled to capital recovery of a loss.[129]

2. *Unconstitutional Confiscation.* An unconstitutional confiscation issue might possibly be raised.[130] The fifth amendment to the Constitution of the United States provides that "no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."[131] Together with the fourteenth amendment, these constitutional provisions recognize that there may be confiscation in rate regulation.[132] In the past, the issue has been raised almost exclusively with respect to the taking or deprivation of the *utility's* property.

128. Note, *supra* note 84, at 95.

129. Office of Consumers' Counsel v. Public Util. Comm'n, 67 Ohio St. 2d 153, 423 N.E.2d 820 (1981), *app. dismissed* 102 S. Ct. 1267 (1982).

130. The burden of proving rates fixed by the Corporation Commission to be confiscatory is upon the party complaining. Southwestern Pub. Serv. Co. v. State, 637 P.2d 92 (Okla. 1981).

131. U.S. CONST. amend. V.

132. E. NICHOLS, RULING PRINCIPLES OF UTILITY REGULATION 10 (1955).

By analogy, would not an increase in rates without a concurrent benefit, as a result of an amortization authorized by the public regulatory body, constitute a "taking" of the *consumer's* property? It has interesting due process of law violation possibilities. Although a search through case law, commentaries, and legal journals reveals no discussion on this subject, the appellant could succeed in requiring the Oklahoma Supreme Court to use its own determination of the facts and issues on appeal by challenging on constitutional grounds.[133]

3. "*Used and Useful.*" Not every asset owned by a regulated firm is included in its rate base. Traditionally, there are two tests for including an asset in the rate base. First, was the firm's decision to invest in the asset "prudent"? Second, is the asset "used and useful" to the firm in making available the regulated product? Each test has several applications, and sometimes the two overlap.[134]

The "used and useful" argument has substantial merit in this case. Because the Black Fox nuclear project was terminated in the planning and preconstruction stage, it never has been and never will be operational.[135] If it is not used and useful property, it could be concluded that the expenditures associated with the project should be absorbed by the owners and not by the ratepayers.

The Three Mile Island mishap in March of 1979 provides a strong model for the used and useful rationale. The Pennsylvania Public Utilities Commission held that Unit One (the undamaged and operable reactor) could not be included in the rate base because it was not used or useful.[136] This decision is particularly persuasive in that Unit One was excluded despite the fact it was once "used" and may one day resume "usefulness." The Black Fox nuclear facility has never produced a kilowatt of electricity, and it never will.

There is federal precedent for this contention. In *Denver Stock Yard Co. v. United States*,[137] the United States Supreme Court held the appellant stockyard operator was "not entitled to have included [in the rate base] any property not used and useful." Other cases have similar language.[138]

Oklahoma has also addressed the issue. The supreme court, in *Southwestern Public Service Co. v. State*,[139] has recently held:

> In the case of *Oklahoma Natural Gas Co. v. Corporation Commission*, this court said: "in determining whether the rate is reasonable, it is necessary to ascertain the fair value of the prop-

133. OKLA. CONST. art. 9, § 20.

134. GELLHORN & PIERCE, *supra* note 71, at 116.

135. A more complex question would arise if the abandoned project is converted into a coal-fired generating facility, as discussed previously. However, much of the equipment, supplies, etc., can only be used in the operations of a nuclear facility.

136. Pennsylvania Pub. Util. Comm'n v. Metropolitan Edison Co., UTIL. L. REP. (State) (CCH) ¶ 23,117 (Pa. Pub. Util. Comm'n, May 23, 1980), at pp. 53,318-53,321.

137. 304 U.S. 470, 475 (1938).

138. *See* United Gas Pub. Service Co. v. Texas, 303 U.S. 123 (1937); St. Joseph Stock yards Co. v. United States, 298 U.S. 38 (1936).

139. 637 P.2d 92, 97 (Okla. 1981).

> erty of the appellant used and useful in its public service business at the time the inquiry was made, for appellant is entitled to a rate which will yield a fair return upon the reasonable value of the property at the time it is being used for the public."[140]

The court also noted:

> Only the cost of those capital assets which are in *actual* use during the test year, or whose use is so imminent and certain that they may be said, at least by analogy, to have the quality of working capital may be added to the rate base established by the test year in any event; and then only if appropriate counter-balancing safe guards are applied.[141]

The Oklahoma Supreme Court, if it desires, can justifiably rely on a strict construction of the case law in this area. By so doing, the findings and conclusions of the Commission would not be sustained by the law and the order would be reversed. Despite the reasons for allowing the capital recovery of Black Fox, the result must not be contrary to the law, as required by the constitutionally mandated judicial review. In addition, the court will avoid violating a basic principle of fairness in the regulatory arena: a ratepayer should pay only for facilities used and useful.[142]

4. *Sole Decision of Management.* One can assert that the law requires the owners of the utility to bear the losses from an abandoned plant as a function of management. The Ohio Supreme Court has stated:

> It would be inequitable to prematurely shift the risk of plant failure from the utility investors to the ratepayers. . . . The initial risk of failure is appropriately borne by the investors, who have undertaken the project. . . . It is only proper that their venture be found operational before they commence to recoup their capital outlays from consumers.[143]

When state commissions have considered the abandonment cost issue, the foreseeability of the loss has been a relevant factor. Investors have a right

140. *Id.*, *citing* 90 Okla. 84, 216 P.2d 917 (1923).

141. 637 P.2d 92, 98 (Okla. 1981) (emphasis added).

142. If the Oklahoma Supreme Court should reverse, P.S.O. might argue that the decision deprives the company of *its* property without due process of law, contrary to the fifth and fourteenth amendments. However, in Market St. Ry. v. Railroad Comm'n of California, 324 U.S. 548, 567 (1945), the United States Supreme Court stated:

> [I]t may be safely generalized that the due process clause never has been held by this court to require a commission to fix rates . . . on an investment after it has vanished, even if once prudently made. . . . The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.

143. Consumers' Council v. Public Util. Comm'n, 58 Ohio St. 2d 449, 456, 391 N.E.2d 311, 315 (1979).

to receive compensation for assuming the risks of doing business. The unforeseen cancellation of electric generating plants is undoubtedly a risk of doing business of the utility field. In the event that investors have been remunerated to take such risks (usually through an adequate rate of return), it would only seem appropriate they should bear the loss.[144]

In Oklahoma, there are no direct citations to this point. However, another line of analysis may lead to the same conclusion.

In *Lone Star Gas Co. v. Corporation Commission*,[145] the supreme court specifically held: "[T]he powers of the Commission are to regulate, supervise, and control the public service companies in their services and rates, but *these powers do not extend to an invasion of the discretion vested in the corporate management.*"[146] The court went further and noted: "What the company does with its income is no concern of the ratemaking body . . . ."[147]

In *Fred Harvey v. Corporation Commission*,[148] the court stated:

> It must be remembered that, while much power is given to the Corporation Commission in the regulation of public utilities, yet the utility is not the property of the Commission or the state, but belongs to the company and its stockholders, and the officers and directors by them selected must, under proper regulation, be permitted to manage the property in such proper way as to earn and pay, if they lawfully can, just dividends to the stockholders. *Regulation must not be so far extended as to constitute management or operation.*[149]

Since the administrative agency is precluded from invading the discretionary powers of a utility, it should logically flow that the citizens should not be required to pay for an ill-fated decision over which they had no control.[150] The owners of the Black Fox project are totally free to direct management in the selection of types, sizes and location of the facilities in which those owners have chosen to invest. These same owners solely control their companies and should therefore assume the risks of ownership through investment. Oklahoma ratepayers cannot be asked to insulate the owners from all financial risk.

5. *Absence of Required Findings.* The court may be able to reverse the Commission's decision on procedural grounds. The Corporation Commission's

144. Note, *supra* note 84, at 102. For an excellent discussion on risk of loss, *see* Note, *Allocation of the Risk of Constructing Electric Power Plants*, 1976 WASH. U. L.Q. 517.

145. 170 Okla. 292, 39 P.2d 547, 553 (1934). *Accord*, State v. Oklahoma Gas & Elec. Co., 536 P.2d 887 (Okla. 1975).

146. 170 Okla. 292, 297, 39 P.2d 547, 553 (1934) (emphasis added).

147. *Id.* at 298, 39 P.2d at 554.

148. 102 Okla. 226, 229 P. 428 (1924).

149. *Id.* at 269, 229 P. at 431.

150. Although the Corporation Commission has authority over rate-making, it does *not* have authority to require Oklahoma electric utilities to obtain approval prior to constructing a power plant. Oklahoma Gas & Elec. Co. v. Corporation Comm'n, 542 P.2d 546 (Okla. 1975). This situation is discussed later in this paper.

order on the Black Fox cancellation seemed peculiar in that nowhere in the text of the phase three discussion did the Commission cite to any specific case, statute, or other legal theory as precedent. The Commission also did not present any quantitative evidence of studies to support its lengthy discussion of P.S.O.'s potential bankruptcy, though this was a determinative factor in the Commission's decision. The Oklahoma Corporation Commission thus made it clear that its decision was based upon discretionary risk allocation, not legal principle.

The Oklahoma Supreme Court emphasized the importance of compliance with "fundamental" administrative procedure in *Southwestern Public Service Co. v. State*.[151] Although the court conceded that the Corporation Commission is not subject to the Administrative Procedures Act of 1963,[152] the court emphasized the "illuminating" effect of previous decisions of the court regarding administrative agency procedure. By analogy, the court found persuasive various excerpts from the existing case law. The court took specific notice of the language in *Brown v. Banking Board*,[153] which emphasized the necessity for an administrative agency to make "findings of fact and conclusions of law." This case noted that if the administrative agency failed to supply such findings, its determinations would not be sustained.[154] The court also held that an agency's findings should be sufficient to apprise the parties and, if necessary, the supreme court of the actual basis for the agency's actions. This would allow the reviewing court to apply the substantial evidence test

151. 637 P.2d 92, 101 (Okla. 1981).

152. 75 OKLA. STAT. § 301 (1981). The Commission is, however, subject to § 304(a) of the Act, relative to the filing of Commission rules. Part of the Oklahoma Administrative Procedures Act, 75 OKLA. STAT. § 322 (1981), provides in part:

> **Setting aside, modifying or reversing of orders—Remand—Affirmance**
>
> [1] In any proceeding for the review of an agency order, the Supreme Court or the district court, as the case may be, in the exercise of proper judicial discretion or authority, may set aside or modify the order, or reverse it and remand it to the agency for further proceedings, if it determines that the substantial rights of the appellant or petitioner for review have been prejudiced because the agency findings, inferences, conclusions or decisions, are:
>
> (a) in violation of constitutional provisions; or
>
> (b) in excess of the statutory authority or jurisdiction of the agency; or
>
> (c) made upon unlawful procedure; or
>
> (d) affected by other error of law; or
>
> (e) clearly erroneous in view of the reliable, material, probative and substantial competent evidence, as defined in Section 10 of this act, including matters properly noticed by the agency upon examination and consideration of the entire record as submitted; but without otherwise substituting judgment as to the weight of the evidence for that of the agency on question of fact; or
>
> (f) arbitrary or capricious; or
>
> (g) because findings of fact, upon issues essential to the decision were not made although requested.

153. 512 P.2d 166 (Okla. 1973), *citing* Allied Inv. Co. v. Oklahoma Sec. Comm'n, 451 P.2d 952 (Okla. 1969).

154. 512 P.2d 166, 168 (Okla. 1973). *See also* Lone Star Gas Co. v. Corporation Comm'n, 648 P.2d 36, 39 (Okla. 1982).

as well as to ensure against arbitrariness. Finally, the court stated: *"Findings in general terms are not sufficient."*[155]

It could be argued that the Corporation Commission's findings were too general in the Black Fox order. Though the Commission did make findings, it is questionable whether the Commission's findings were facts or conclusions. Further, it is debatable whether P.S.O.'s inevitable bankruptcy, of which the Commission took judicial notice, would actually result if capital recovery were denied. This is particularly true when considered in conjunction with the appropriate materials in the policy arguments section of this paper.

In *Sinclair Oil & Gas Co. v. Corporation Commission*,[156] the Oklahoma Supreme Court permitted the deletion of many of the considerations supporting the findings announced, when it would have been impracticable and would have added nothing to the order. Although it would be burdensome, additional documentation would have enhanced reconciliation of the Commission's reasoning for the Black Fox order.

Finally, the court in *Southwestern Public Service*[157] repeated the purpose of requiring findings of fact as alluded to in *Brown*[158] and as reiterated frequently.[159]

> Findings of [an] administrative agency acting in a quasi-judicial capacity should be a recitation of basic or underlying facts drawn from the evidence, and must be free from ambiguity which raises doubt as to whether [the] board proceeded upon correct legal theory, and must be sufficiently stated to enable [the] reviewing court to intelligently review [the] order and ascertain if [the] facts upon which [the] order is based afford [a] reasonable basis for [the] order.[160]

The form and content of the Commission's order on Black Fox is not free from ambiguity and there is certainly doubt as to the legal theory (if any) upon which the Commission proceeded. A remand to the Commission for more specific and detailed findings would not be inappropriate.

6. *Precedent Set by the Ohio Supreme Court.* As discussed earlier, the Ohio Supreme Court's review of the abandonment issue in *Office of Consumers' Counsel*[161] was the first supreme court review of any state jurisdiction. A student note in the *Capital University Law Review* perhaps best summarizes this decision's effect:

> *Consumers' Counsel* stands as an important precedent because

155. 512 P.2d 166, 168 (Okla. 1973).

156. 378 P.2d 847 (Okla. 1963).

157. Southwestern Public Serv. Co. v. State, 637 P.2d 92, 101 (Okla. 1981).

158. Brown v. Banking Bd., 512 P.2d 166 (Okla. 1973).

159. *See* State v. Guardian Funeral Home, 429 P.2d 732 (Okla. 1967); Oklahoma Inspection Bureau v. Board of Prop. & Cas. Rates, 406 P.2d 543 (Okla. 1965).

160. Southwestern Public Serv. Co. v. State, 637 P.2d 92, 101 (Okla. 1981).

161. Office of Consumers' Counsel v. Pub. Util. Comm'n, 67 Ohio St.2d 153, 423 N.E.2d 820 (1981).

> it represents the first opinion on the issue by such a high court and because it recognizes that investment risks are inherent in the utility business. . . . Each of the commissions which will confront this problem in the future must carefully consider the entire scope of the issue, inclusive of all possible ramifications. . . . The reasonable and prudent standard is not the end point for utility regulators in all states. In addition, it should not be the sole criterion. As is demonstrated by the *Consumers' Counsel* case, a state may have common law as well as statutory delineations of the proper course of inquiry which its commission has the legal duty to follow. In Ohio, the supreme court's decision has not only clarified the state's public utility statutes and common law but has also set the proper standard for the commission in future abandonment proceedings. Further, the high court's decision has set a national legal precedent.[162]

The Oklahoma Supreme Court should take special cognizance of *Consumer's Counsel* during this period of legal uncertainty. The Ohio Supreme Court prefaced its opinion by referring to several significant factors. The court first noted that the Ohio Commission's decision was in accord with the weight of authority from other jurisdictions, though these decisions were only at the commission level in each jurisdiction. It also emphasized that none of the commissions' decisions cited as support were decided with reference to Ohio law. Finally, the court firmly established that the aforementioned administrative decisions represented "advisory opinions, rather than precedent, which did not bind the court in its role as the ultimate judge of what is the law in Ohio."[163]

The Ohio court's judicial boldness would be welcomed by the utility ratepayer in Oklahoma. In overturning the Ohio Commission's decision to allow amortization of terminated project expenses, the Ohio Supreme Court relied on *its* interpretation of state law. The Oklahoma Supreme Court should do likewise and take full benefit of an opportunity to clarify the state's public utility law. If for no other reason, the citizens of this state could place more confidence in nine justices who base their judgments on equitable and legal principles, than they could on three individuals who are unfamiliar with judicial precedent and perhaps more subject to political influences. The courts are better insulated from lobbying pressures that give strong advantages to industrial concerns when they face administrative review of their operations.

V. *Necessity for Statutory Reform*

The major barrier to applying *Consumers' Counsel* in Oklahoma is the considerable difference between Oklahoma and Ohio law. Specifically, there are

162. Note, *supra* note 84, at 108. This outstanding note was the only previous law review publication dealing exclusively with capital recovery of abandoned power projects.

163. *Id.* at 105.

few similarities between Oklahoma's and Ohio's statutory rate-making schemes. This may not be a result of discordant philosophies of the two respective legislatures. It is more likely the result of Ohio's detailed mandates of Commission power as opposed to Oklahoma's broad and minimal provisions with respect to public utilities. Only a few states delineate with specificity the standards by which their commissions are to fix rates and generally function.[164]

The corresponding Oklahoma provision[165] is *not* a member of this group. In fact, the legislative mandate with respect to the Corporation Commission's supervisory and rate-making powers over public utilities[166] may be as "general" as that of any jurisdiction, if not more. For example, nearly every state's statutory scheme demands that the rates its respective commission determines shall be "just and reasonable."[167] This is a general provision used frequently in rate-making procedures. Oklahoma's statutory scheme does not even include this provision as a basis for Commission authority. Most important, there is a lack of specific guidelines to the Oklahoma Corporation Commission for its determination of rate base, rate of return, and operating expenses, to name a few.

The Black Fox situation has made it strikingly clear: there is a pressing need for statutory reform of Oklahoma's administrative process. If it were possible, the Black Fox controversy might be most appropriately resolved by a "remand" to the *legislature*. The legislature should give the courts, the Commission, the utilities, and the public the benefit of its expressed intent. In so doing, the legislature can help strike a more reasonable balance between allowing the Commission its necessary "administrative expertise" and assuring the citizens of this state that the "voice of the people" is controlling our administrative functions, not a handful of decision-makers.

Exclusion of Property Not "Used or Useful"

The question of who shall pay for the costs of the cancellation of the Black Fox nuclear project has placed the court, the Commission, and the utilities in the public eye. This should be a *legislative* determination, not a judicial one (assuming the legislature does not intend to delegate all of its authority concerning regulatory matters to the Commission). The legislature is the appropriate governmental body to determine who shall bear the costs of abandonment.

The supreme court will be faced with the difficult task of ascertaining legislative intent when it reviews the Black Fox situation. This will be particularly arduous considering that the drafters of the relevant statute probably could not have foreseen the bizarre circumstances and large amounts of money involved in this situation. Did they intend to give "general supervision" to the Commission in a matter such as this?

164. *Id.* at 95 n.24. The footnote lists Illinois, Minnesota, Michigan, North Carolina, and Ohio as states with detailed rate-making statutes. Today, Oregon should be included.

165. 17 OKLA. STAT. §§ 151-61 (1981).

166. 17 OKLA. STAT. § 152 (1981).

167. Note, *supra* note 84, at 96.

The legislature should move quickly to relieve the burden it has placed on the court. As stated in the Oklahoma case of *Johnson v. Ward*: "When the intent of the legislature is plainly expressed, there is no room for construction."[168]

Concerning the specific question raised by the Black Fox crisis, it is submitted that it is inequitable to force the ratepayer to pay for services that were never rendered and over which the public had no decision-making power. A means to reach this objective could be to amend the applicable statute to exclude property "not presently used or useful" from the rate base.

The Oregon legislature has encountered difficulties similar to the one faced in Oklahoma. In Oregon, however, the legislature moved quickly. In 1979 that state legislature provided that:

> No public utility shall, *directly or indirectly*, by any device, charge, demand, collect or receive from any customer rates which are derived from a rate base which includes within it any construction, building, installation or real or personal property *not presently used* for providing utility service to the customer.[169]

Notice especially the provision for prohibition of indirect recovery. This would effectively preclude a utility from increasing rates through alternate mechanisms.

The Oregon statute has been effectively implemented. Even the Oregon Public Utility Commission has had little trouble in ascertaining legislative intent. In *In re Pacific Power & Light Co.*,[170] the Oregon Public Utility Commissioner disposed of the question of capital recovery for the canceled Pebble Springs nuclear project with amazing brevity and clarity.[171]

It is an inaccurate assumption that should the Oklahoma Supreme Court resolve the question of Black Fox, the capital recovery issue will become moot because there are no presently announced plans for nuclear power plants in Oklahoma. Rather, it should be anticipated that many of the same problems that forced the cancellation of Black Fox could also lead to the termination of coal-fired, coal gasification, and other generating facilities.

Suppose the legislature swiftly moved and amended the statutes (as above) *before* the supreme court decided the Black Fox controversy? It has interesting possibilities, especially in light of a situation developing in Massachusetts. The *Energy Users Report* stated that a committee in the Massachusetts House of Representatives may have stymied the Massachusetts Department of Public Utilities' recent decision to allow the Boston Edison Company to recover from its ratepayers its $204 million investment in the now defunct Pilgrim II nuclear power plant.[172] The House Committee on Government Regulations favorably

168. 541 P.2d 182, 185 (Okla. 1975).

169. OR. REV. STAT. § 757.355 (1979) (emphasis added).

170. UTIL. L. REP. (State) (CCH) ¶ 23,743 (Or. Pub. Util. Comm'n Order No. 82-606, Aug. 18, 1982). The court cited to the statute and, in two sentences, ruled.

171. *Id.* at p. 55,272.

172. 10 ENERGY USERS REP. (BNA) 441 (May 6, 1982).

reported legislation that would prohibit Boston Edison from recovering its investment in Pilgrim II from ratepayers. The report noted Governor Edward J. King's support of the legislation, although, at the time of publication, the state senate had not addressed the issue.[173] One must reconcile this, however, with the problem of retrospective application as an *ex post facto* law.

Requiring Electric Utilities to Obtain Certificates of Convenience and Necessity

Unlike other states, Oklahoma does *not* require its electric utilities to obtain a certificate of public convenience and necessity before commencing construction of utility facilities.[174] The legislature has declined to establish specifically a construction certificate procedure for electric utilities as it has for other types of utilities regulated by the Corporation Commission.[175]

This issue has directly come into focus in *Public Service Co. of Oklahoma v. State*.[176] In this case, the Corporation Commission declined approval for issuance of securities for P.S.O.'s Black Fox project until convinced of its need. The court noted:

> The Legislature has provided that certain public utilities acquire certificates of public convenience and necessity, such as telephone companies (17 O.S. 1971, § 131), operators of water transportation lines (17 O.S. 1971, § 159.12), radio common carriers (17 O.S. 1971, § 202), motor carriers (47 O.S. 1980 Supp., § 166.2), and cotton gins (17 O.S. 1971, §§ 42-43). *The conspicuous absence of electric utilities from such a list of statutes giving the Corporation Commission authority to approve new facilities strengthens our conclusion that the Legislature did not intend to require electric power companies to obtain certificates of necessity.*[177]

Although the court's construction of legislative intent was accurate, the rationale for the legislative policy is not. It is absurd to believe the legislature of Oklahoma would delegate no authority to the Commission to prohibit construction of imprudent or unreasonable power-generating projects and yet require intervention for licensing of buses and cotton gins.

There is no better or more timely example of the need for reform in this area than the Black Fox project. Although it could be reasonably presumed that the Commission would have approved the plans of the Black Fox owners, one cannot be certain. At the very least, Commission approval would have

173. *Id.*

174. A certificate of convenience and necessity is defined as a "certificate of administrative agency (e.g., Public Service Commission; I.C.C.) granting operating authority for utilities and transportation companies." BLACK'S LAW DICTIONARY 205 (rev. 5th ed. 1979).

175. Allison, *Judging the Prudence of Constructing Nuclear Power Plants: A Report to the Oklahoma Corporation*, 15 TULSA L.J. 262, 290 (1979).

176. 645 P.2d 465 (Okla. 1982).

177. *Id.* at 467 (emphasis added). *See also* Oklahoma Gas & Elec. Co. v. Corporation Comm'n, 543 P.2d 546, 549-52 (Okla. 1975).

resulted in closer scrutiny as to the project's necessity and somewhat better forecasting. (Had this procedure been implemented at the initiation of Black Fox, P.S.O. could have more easily justified its prudence in proceeding with this project.)

One commentator has written:

> Deferring control over imprudent construction projects until the utility seeks to have them reflected in its allowable revenue may be an illusory mechanism for protecting ratepayers. If the imprudent expenditures are large, as with nuclear plants, imposing the financial burden on the stockholder may simply drive up the utility's cost of capital, which eventually is passed on to the ratepayers. It is desirable, therefore, for the Commission to assert its powers to discourage imprudent utility construction *before* such construction is completed.[178]

Unfortunately, the Commission has no statutory authority for this type of intervention. In light of the *Public Service Co.* and *Oklahoma Gas & Electric* decisions, the Commission will continue to be unable to assert this power. Statutory reform is needed. In the future, this may be of benefit in the prevention of another Black Fox-type predicament.

"Construction Work in Progress" Policy

Another Oklahoma rate-making issue devoid of legislative direction is whether to allow inclusion of construction work in progress (CWIP) in the rate base. This process permits a utility to transfer the construction costs to the ratepayer while a generating facility is in the construction stage.

Consumer interests generally oppose inclusion of CWIP in the rate base.[179] Their reasons for opposition include: (1) a desire to minimize current prices of regulated products; (2) concern that it may be more difficult to exclude all or a portion of an imprudent investment from the rate base after its inclusion during construction; (3) the desire to avoid discrimination against present customers and in favor of future customers;[180] and (4) the creation of incentives to build costly and unnecessary plants without considering lower-cost alternatives.[181]

As of 1976, thirty-five states and at least one major federal agency permitted firms to include some portion of CWIP in the rate base.[182] Proponents for

178. Allison, *supra* note 167, at 291 (emphasis added). In his article, Professor Allison gives considerable attention to a Wisconsin statutory solution. The Wisconsin plan requires utilities desiring to construct power-generating projects to submit periodic reports prior to actual construction. This mechanism is useful in preventing imprudent investments and controlling capital expenditures. It is also another example of the type of statutory amending Oklahoma could implement to meet reform objectives. *See id.* at 286-90.

179. GELLHORN & PIERCE, *supra* note 71, at 125.

180. *Id.* at 126.

181. 10 ENERGY USERS REP. (BNA) 861 (Aug. 19, 1982).

182. GELLHORN & PIERCE, *supra* note 71, at 121. For example, the Supreme Court of Florida

its inclusion cite equally sound reasons. First, the present value of a utility's future costs is reduced because of the reduction in the firm's capital costs and tax payments.[183] Second, customer budgeting is made easier because the firm's rates will go up gradually as a new facility is constructed instead of in one large increment when a plant is completed and placed in service.[184] Third, the increased cash return would help the utility industry build additional plants and equipment.[185]

Spiraling energy costs have brought this issue to the forefront of regulatory disputes, particularly in the electric utility industry.[186] In response to this controversy, the Pennsylvania legislature recently passed a law disallowing rate increases for construction work in progress at electric utility plants.[187] The law, signed December 30, 1982, provides for inclusion of costs of construction in progress that improve environmental or safety conditions. The law also permits CWIP for coal conversion projects that utilize Pennsylvania coal. Ohio Revised Code section 4909.15 provides for the inclusion of CWIP in the rate base.[188] Oregon has utilized a legislative enactment to set construction work in progress policy.[189] However, Oklahoma has not acted legislatively in response to CWIP. The legislature has again left it to the Commission (and subsequently to the supreme court) to determine matters of great consequence.

Exactly what is the Corporation Commission's present-day CWIP policy? It is not readily determinable. In the 1977 order *In re Public Service Co. of Oklahoma*,[190] the Oklahoma Corporation Commission awarded the applicant utility a $13 million CWIP sum. The Commission saw no reason to deviate from its "standard policy" in regard to CWIP. The appropriate amount of

---

recently held that an electric utility can recover from its ratepayers for costs of CWIP. *See* 11 ENERGY USERS REP. (BNA) 83 (Jan. 20, 1983).

183. *Id.* at 126.

184. *Id.*

185. 10 ENERGY USERS REP. (BNA) 861 (Aug. 19, 1982).

186. GELLHORN & PIERCE, *supra* note 71, at 125.

187. 11 ENERGY USERS REP. (BNA) 15 (Jan. 6, 1983). Pennsylvania Governor Richard L. Thornburgh, who signed the bill into immediate effect on Dec. 30, 1982, stated that the law is "a significant step in consumer protection. In this era of spiraling costs, we are committed to do everything possible to protect consumers from unwarranted increases in their electric bill. This legislation helps ensure that consumers only pay for the services that they can use." A bill has been introduced at the federal level which would prevent FERC from expanding its use of CWIP. *See* 10 ENERGY USERS REP. (BNA) 861 (Aug. 19, 1982).

188. Annual Report, 1980 A.B.A. SEC. PUB. UTIL. L. REP. 128.

189. OR. REV. STAT. § 757.355 (1979). The specific language of the Act can be found in the text at note 169 *supra*. Notice that this able statute controls both the CWIP and the "used and useful" property issues.

190. 22 PUB. UTIL. REP. 4th (PUR) 118 (Okla. 1977). This Commission decision is recommended for competent explanatory discussion on CWIP and AFUDC (Allowance for Funds Used During Construction). Other Commission decisions dealing with CWIP and AFUDC include: *In re* Oklahoma Gas & Elec. Co., 21 PUB. UTIL. REP. 4th (PUR) 569 (Okla. 1977); *In re* Southwestern Bell Tel. Co., Cause No. 25917, Order No. 135647 (Okla. Corp. Comm'n, Nov. 21, 1977); *In re* Southwestern States Tel. Co., Cause No. 21584, Order No. 37112-A (Okla. Corp. Comm'n, May 26, 1958); *In re* Lone Star Gas Co., Cause No. 20805, Order No. 29396 (Okla. Corp. Comm'n Nov. 5, 1954).

CWIP to be included in the rate, according to the order, was "that portion to be completed and in service during the twelve-month period immediately succeeding the end of the test period."[191] The Commission concluded that "in the long run, inclusion of CWIP in the rate base results in lower, not higher rates to customers over the life of the property."[192]

The 1980 Annual Report of the American Bar Association Section on Public Utility Law exposes the inconspicuous defect of the Commission's "standard policy": "The Oklahoma Corporation Commission, the regulatory agency for utility operations in the state, has had a change in the majority membership. The Commission has adopted a strong consumer (or voter) preference at the expense of the financial well-being of the utilities in the state."[193] This "change" can best be illustrated by the events that occurred soon after the 1978 election. In December 1978, Oklahoma Gas and Electric Company (OG & E) filed an application for a $93 million rate increase. After a Commission hearing the following July, a November 1979 rate order was issued. The order provided only $38 million in rate increases. The company was not allowed an update of its test year to include a coal-generating plant that was completed after the filing but before the hearing. More noticeably, OG & E was not allowed any construction work in progress.[194]

The demand for energy, regulatory lag, and rising costs have combined to make CWIP a dominant controversy in the public utility arena. Under the present statutory structure, the Oklahoma Corporation Commission is solely responsible for its resolution. If the Commission fails in this duty, the supreme court must "super-legislate."

There are valid arguments for and against the theory of CWIP. The elected lawmakers of Oklahoma are best suited to represent equitably the interests of both utility and ratepayer.

General Reform of Oklahoma's Ratepayer and Utility Protection Mechanisms—Curtailing Commission Discretion

As previously mentioned, Oklahoma does not presently have a specific set of statutory guidelines for Corporation Commission determination of gross revenues, operating expenses, rate base, and rate of return, to name a few. Proper application of these rate mechanisms is essential if an acceptable balancing between the interests of utilities and consumers is to be reached. Although it is "the impact of the rate order which counts,"[195] a distinct and uniform rate-making methodology would help ensure equitable decisions. Unfortunately, a goal of consistent application of the law is difficult to effectuate where a lax statutory framework invites unfettered discretion.

191. 22 PUB. UTIL. REP. 4th (PUR) 118, 122 (Okla. 1977).

192. *Id.*

193. Annual Report, 1980 A.B.A. SEC. PUB. UTIL. L. REP. 128. There has since been another general election in Oklahoma which has resulted in a change in the three-member Commission's membership.

194. *Id.* at 128-29.

195. Southwestern Bell Tel. Co. v. State, 204 Okla. 225, 230 P.2d 260 (1951).

In *Merritt v. Corporation Commission*,[196] the Oklahoma Supreme Court held: "The Corporation Commission is a tribunal of limited jurisdiction and has only such authority as is expressly or by necessary implication conferred upon it by the Constitution and statutes of this state."[197]

Is the Commission truly a tribunal of limited jurisdiction and authority? The extent of the Commission's unfettered discretion has led one legal scholar to inquire cogently whether the Corporation Commission is "the fourth branch of government."[198] It is difficult to argue that the Corporation Commission has exceeded its statutory authority when the applicable statutes do not delineate with much specificity the limitations of Commission power. An administrative agency functioning under such general provisions has an invitation to be liberal in the determination and exercise of its discretionary powers.

In order to protect the utility and the ratepayers alike, the Oklahoma legislature should undertake an exhaustive review of the statutory basis for Commission action. In addition, the legislature should bolster the existing statutory rate-making provisions[199] to provide a framework in which the Corporation Commission could function more effectively.[200]

Through the legislative process, the citizens of Oklahoma are assured greater control in determining important energy and public utility policy. This will help curtail the necessity for discretionary action by administrative agencies. In so doing, the burden placed upon the Commission and the state supreme court will be diminished.

Conclusion

The increasing number of cancellations of partially constructed electrical power-generating facilities exemplifies the current conflict between the demand, the availability, and the cost of energy. This situation has produced a state of disarray for public utilities, but especially for those utilities engaged in nuclear power generation. The industry's predicament is to produce safe elec-

196. 438 P.2d 495 (Okla. 1968).

197. *Id.* at 497.

198. Interview with Professor O.M. Reynolds of the University of Oklahoma College of Law (Sept. 10, 1982).

199. It is worthy to note an unusual provision of the Oklahoma constitution which gives the legislature the power to alter, amend, revise, or repeal sections 18 to 34, inclusive, of article 9 of the constitution. OKLA. CONST. art. IX, § 35.

200. Article IX, section 25 of the Oklahoma constitution, states:

> The Commission shall make annual reports to the Governor of its proceedings, in which reports it shall recommend, from time to time, such new or additional legislation in reference to its powers or duties, or the creation, supervision, regulation or control of corporations, or to the subject of taxation, as it may deem wise or expedient, or as may be required by law.

The Thirty-ninth Oklahoma Legislature is considering HB 1108, which would require the Oklahoma Corporation Commission to prepare a 10-year projection of the electrical power and energy requirements of the state of Oklahoma and assess the need for additional or replacement generating and transmission facilities, as well as associated costs. The bill has passed the house and is under consideration by the senate as this article goes to press.

trical energy, while minimizing costs to ratepayers, ensuring an adequate energy supply for future users, and attempting to realize a profit for its investors. Inflation, erratic growth in the need for electrical energy, and regulatory uncertainties have turned the situation into a veritable quagmire.

The predominant issue facing the state public utility commissions and the FERC is whether to permit the amortization of expenditures attributable to abandoned power-generating projects that will never be functional or of use to consumers. This problem is not limited to nuclear facilities alone. In view of the aforementioned factors, the same plight may befall other future non-nuclear power-generating projects.

The cancellation of the Black Fox nuclear project has recently brought the issue to the forefront in Oklahoma. This situation provides a striking illustration of the uncertainty of the emerging law pertaining to capital recovery of canceled public utility projects.

In response to the Corporation Commission's decision permitting the amortization of Black Fox, the consumers must now turn to the Oklahoma Supreme Court for relief. The court, in an attempt to balance the equities of this dilemma, must apply a basic deferential standard of review to a situation that has minimal precedent. However, from an examination of the record, the court should determine that the Commission based its Black Fox order on discretionary risk allocation, not controlling principles of law. A strict construction of the case law, combined with an absence of statutory direction for such extraordinary circumstances, will provide the court the proper basis to reverse the Commission's order.

The court should exercise judicial boldness because it is the *impact* of the rate-making process, and not the theory, that is the ultimate consideration. Fundamental notions of equity mandate that the Black Fox loss be borne by the stockholders, who provided the capital, took the risk on investing, and controlled the operations of the company. Management, not the consumers, should be responsible for the consequences of its own follies. To shift the loss to the ratepayers who have received no actual benefit would be inequitable. This is particularly true in Oklahoma where the statutes do not require certificates of convenience and necessity before the construction of a public electrical generation facility. This concern for equity should preempt any procedural or semantic arguments raised by the appellees in this case.

The ability of the utilities to pass on the economic consequences of their planning decisions has kept the industry remarkably insulated from the discipline and realities of the marketplace. This process must stop if the costs are ultimately borne by the ratepayer. The utilities cannot be subsidized if the end result is injurious to the public interest. However, in light of the unusual nature of these events, all parties to this issue should proceed from a negotiating—rather than a polarized—position.[201]

Most important, the Black Fox situation has highlighted the necessity for

201. Interview with Professor Harold W. Young, University of Oklahoma College of Law (May 15, 1982).

statutory reform of the laws pertaining to the Corporation Commission and its rate-making duties. Regardless of the supreme court's decision, the Oklahoma legislature must delineate the state's policy regarding rate-making formulas, construction work in progress, requiring certificates of convenience and necessity, and who shall bear the cost of abandonment, to name a few. These are legislative decisions, not administrative, because they concern *public* utilities. The legislature should proceed with diligence and responsibility to clarify the overly broad mandates. In so doing, the opportunity for undesirable discretionary action will be minimized, and the burden placed upon the Commission and the supreme court will be diminished.

David V. Seyer

Author's Note: As this issue went to press, a decision that could have a significant impact on the Black Fox case was handed down. In *Consumers' Counsel v. Public Utilities Commission of Ohio*,[202] (hereinafter referred to as *Consumers' Counsel II*), decided on April 13, 1983, the Ohio Supreme Court upheld the Commission's decision to grant Cleveland Electric Illuminating Company an increased rate of return on equity invested in the same four abandoned nuclear plants that were the subject of a previous 1981 Ohio Supreme Court decision (hereinafter referred to as *Consumers' Counsel I*), which had denied capital recovery amortization into the rate base. The rate of return increase was allowed in *Consumers' Counsel II* on the basis of the increase in the investors' perceived risk following the *Consumers' Counsel I* decision.

This approach by the Commission allows the utility to gain *indirectly*, by means of an increased rate of return, what it was prohibited from recovering directly through amortization. For Ohio, then, the issue is no longer *whether* ratepayers should be required to bear the losses associated with nuclear plant abandonment but *when* they will be required to bear such losses and in what fashion.

In a well-reasoned dissent, Judge Locher noted that what the 1981 decision condemned, the 1983 opinion condones. He stated that if these are "parlous" times for the utilities industry,

> then the commission and the utilities should petition the General Assembly to enact changes in the ratemaking structure so as to provide this extra modicum of protection for the investors. Absent such explicit statutory authorizations, however, the commission may not benefit the investors by guaranteeing the full return of their capital at the expense of the ratepayers.[203]

Judge Locher criticized the majority as "falling prey to a combination of

202. 4 Ohio St. 3d 111, —N.E.2d— (1983). The 1981 case, of the same style, is discussed in various places throughout the text and text at note 101, *supra*.

203. *Id.* at 116.