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PUBLIC UTILITIES — RATES — CONSTITUTIONALITY OF STATUTES PROHIBITING MINIMUM OR SERVICE CHARGES — An Oklahoma statute required that the consumer should be charged only for the gas he used as registered on a meter.¹ The inhabitants of a certain town supplied with gas by petitioner were predominantly small consumers so that on a straight-line meter rate they did not pay for the cost of service. An increase in the rate would not solve the difficulty. The company petitioned the commission for authority to impose either a service charge or a minimum charge. The commission denied the petition. *Held*, that as applied to this particular case, the statute was unconstitutional and the petition should have been granted. *Avant Gas Service Co. v. Corporation Commission*, (Okla. 1939) 89 P. (2d) 291.

It is fundamental that a public utility can charge rates sufficient to make a fair profit.² Although the usual case is one where the rates are too low,³ it is readily possible that the difficulty may be in the rate system itself. It has long been recognized by utility men and by courts that under a straight-line meter charge the small gas consumer does not pay for his fair share of the cost, but instead the larger consumer pays for the greater part of the maintenance and service.⁴ This is so because of the heavy fixed expenses such as the mains.⁵ It is not necessary that *each* consumer pay for himself, but only that the total return be remunerative.⁶ Nevertheless, in a situation like the principal case where there are many small consumers the total return itself becomes too small. It would be unfair merely to increase the rates, thus putting too great a burden on the larger consumers.⁷ Moreover, it has been found in other cases, as well as the principal

¹ Okla. Stat. (1931), § 11620.

² See Hale, "Conflicting Judicial Criteria of Utility Rates—The Need for a Judicial Restatement," 38 COL. L. REV. 959 (1938).

³ *Ibid.*

⁴ NASH, PUBLIC UTILITY RATE STRUCTURES 75 (1933); *United States Light & Heat Corp. v. Niagara Falls Gas & Elec. Co.*, (D. C. N. Y. 1927) 23 F. (2d) 719, reversed on other grounds in (C. C. A. 2d, 1931) 47 F. (2d) 567; McNerny, "Service Charge in Rate Making," 4 NOTRE DAME LAWYER 48 (1928); 8 PROC. AMERICAN GAS ASSN., "Principles of Rate Making for Gas Companies," 92 at 115 (1926). Almost any volume of the American Gas Association Proceedings after the year 1926 will have something to say on this problem. The special master in the Niagara Falls case, *supra*, estimated that 38% of the customers did not pay for the cost of service, 31% did not pay for the cost of service and a fair return, and the rest had to make up the difference. NASH, PUBLIC UTILITY RATE STRUCTURE 75 (1933), estimated that one-third of the customers were a loss, another third did not pay for full service, and the last third made up the deficiency.

⁵ The mains are about one-third of the fixed capital. 8 PROC. AMERICAN GAS ASSN., "Principles of Rate Making for Gas Companies," 92 at 109 (1926). As the Public Service Commission of New York put it, the "readiness to serve at any moment is not only worth something to the customer, but it costs the gas company an appreciable amount to provide." Reported in 13 PROC. AMERICAN GAS ASSN. 147 (1931).

⁶ 30 MICH. L. REV. 619 (1932). See also note 4, *supra*.

⁷ It must be remembered that the utility as a practical matter must not charge more than the customer can or will pay. Updegraff, "Changing Factors of Reasonable Rates," 29 MICH. L. REV. 306 (1931). It is interesting to note here that the small customers are not necessarily the poor, but include tenants in high-priced apartments and offices

case, that the rate increase will not solve the difficulty.⁸ A theoretically correct rate has been calculated in which the factors of production and consumption demand, and customer and commodity cost, are used.⁹ However, the figures show that a straight-line meter rate plus a service charge, besides being easier in application, comes fairly close in results to the theoretical rate.¹⁰ The court in the principal case showed a logical and practical approach to the problem when it took into account the number of small consumers, the burden on the larger consumers, and the nature of the fixed maintenance charges of a gas utility.

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and professionals such as physicians and dentists. 8 PROC. AMERICAN GAS ASSN., "Principles of Rate Making for Gas Companies," 92 at 114 (1926).

⁸ See McNerny, "Service Charge in Rate Making," 4 NOTRE DAME LAWYER 48 (1928). The article deals with the facts of the case of *United States Light & Heat Corp. v. Niagara Falls Gas & Electric Co.*, (D. C. N. Y. 1927) 23 F. (2d) 719, reversed in (C. C. A. 2d, 1931) 47 F. (2d) 567. There may not be enough large consumers to make up the loss even at the increased rates. Or an increase in rates may result in general shrinkage of demand. See note 7, *supra*.

⁹ 8 PROC. AMERICAN GAS ASSN., "Principles of Rate Making for Gas Companies," 92 at 117 (1926).

¹⁰ *Ibid.*