Rates: Ratiocination or Roulette?

James B. Smith

University of Kansas School of Law

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The problem of the public utility rate probably is one of the most serious in our scheme of government. Its solution seems to measure whether we can justify to the world the competence and virtue we profess for it. The enormous spendthrift drain on official time and expense is legion. At stake is not only the system of private property in its several significances but also the organization and process of the scheme of government which is involved in the confusion of the judicial and legislative process contrary to the doctrine of departmentalization. These are hazards of maladministration by the engineer and not defects in the engine.

When we reassociate these processes, the machinery of government will be ready to digest the grist of rates.

We are looking only at the list of industries usually captured in common understanding as public utilities. It is not that these are any different than other private properties but only that the condition of compulsory application of the owner's profit to the consumer's relief has been justified by the facts. It is for simplification for discussion here that the easy list of transportation, light, water, etc., is made exclusive so as to escape the companion problem of whether new categories ever can be added, or, once captured, can escape. We need the feel of this accordion pleat folded in the cloth of the Constitution through Block v. Hirsh to Chastleton Corp. v. Sinclair and back again in order to grasp the full teaching of Munn v. Illinois that we cannot enter through government unless we have to do so as disclosed by the jurisdictional facts. That Munn gives jurisdiction only to the extent of the necessity is made clear in the Railroad Comm'n Cases. We may vaccinate but we cannot enslave. When the public servitude of entry is exhausted, confiscation begins.

* Around and around the little ball goes, and where it stops, nobody knows.
** Professor of Law, University of Kansas School of Law; B.S., National University (1924); LL.B., University of Kansas (1926); J.S.D., Yale University (1927); valuation attorney, Interstate Commerce Commission (1931-1932); valuation expert counsel, Public Utilities Commission of the District of Columbia (1932); member, New York, Kansas, American, Federal Bar Associations; life member, American Law Institute.
2 See pending proposed national legislation for a national milk price control.
5 264 U.S. 543 (1924).
6 94 U.S. 113 (1876).
7 116 U.S. 307, 331 (1886).
This is the foundation for any rate making. No one needs to have explained that if the clear-profit top of the income from his business is decreed to his buyer, his business is not worth as much as if it were immune. At the same time, no longer in contest is the recognition that the public utility no longer is free to exploit the market through unlimited profits. The problem of rates is to administer that division. Starkly before us is the question of whether or not this form of government has the competency. If it appears that it does not, the house of government is some kind of a prison and not a cathedral with its heaven-reaching towers of liberty, for it is the security of the individual in his person and his property that has given it the latter characterization. There cannot be an argument that if we cannot do what we must do, it is we who bury ourselves. If it costs *eight years* just to get a rate case ripe for the trial of the federal questions, we are not doing very well. There is no purpose here to speculate on alternates. I do not care what they might be because I am sure that none that has or can be suggested has the merit of the present. To go on, I conclude that we want to keep the private property institution.

This brings us to appraisal of the process of determination of the level above which the income of the public utility is excessive.

**III**

The administrative commission was the consequence of the burden which the complexity of the problem placed upon the primary legislature. It had neither the time nor the organization to administer the program. We may pass the issues of validity of the employment of the commission on the challenge of delegation together with its side issues. The commission, by the time of the Interstate Commerce Act of 1887, was an established institution made necessary by the circumstances.

What probably confounded the development was the failure to appreciate that if I had a constitutionally secure starting point, I was entitled to the due process of law for the determination if my conduct had placed me beyond the line of immunity. Granger legislators supposed that when the utility was given a hearing before their commission, its decree could be declared ultimate. The teaching of *Chicago, M. & St. P. Ry. v. Minnesota* and *ICC v. Brimson* is so great that its significance may not be appreciated. We have noted the recognition in the *Railroad Comm'n Cases* that the floor under rates is constitutionally woven. It therefore followed that, the legislative not being sovereign, the will of the sovereign limiting its action raised a justiciable

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9 134 U.S. 418 (1890).

10 154 U.S. 447 (1894).

11 116 U.S. 307, 331 (1886).
issue. Finality in legislative declaration would be a denial of due process\textsuperscript{12} because the meaning of the Constitution is involved and that is an issue of law for the consideration of the judicial power. \textit{Prentis v. Atlantic Coast Line Co.}\textsuperscript{13} and \textit{Reagan v. Farmers Loan & Trust Co.}\textsuperscript{14} demonstrate that ruses to short-circuit the judicial power to pass finally in independent judgment on questions of law and fact will not satisfy constitutional assurance against arbitrary legislative-executive dooming.

This casts the challenge to our scheme of government. Is the delay inherent to judicial review so great that the cost of security is more than it is worth?

IV

The reason that it is necessary here to identify constitutional limitation through \textit{departmentalisation} is that the what or why or how of rates would be immaterial if some subordinate official has power, in a self-originating imperialism, to say finally what is the property ownership. "Whether their property was taken unconstitutionally depends upon the evaluation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact... [A]ll their constitutional rights, we repeat, depend upon what the facts are found to be."\textsuperscript{15} To stage the drama of rates, we must seek as much identity as possible of whose is stage and theater, and who works the lights. These must be pressed into focus and dwelt with until there is sort of a feeling of tangible realism. This is so important because we shall see that in this nicety of division is found the responsibility of decision, and, somehow in the ways of man, this casts the die. We must not take too long here with the construction of the stage. It already is built. Elsewhere\textsuperscript{16} the political precepts of departmentalization are demonstrated in focus. The evolution of the judicial power as the instrument of preservation of constitutional security is developed to demonstrate that the correlation essential to secured efficiency in the rate-making process also must be incorporated by reference.\textsuperscript{17} What we want to point out is the area of interaction and the independent sufficiency of each, recognizing that both the commission and the court are instruments of the same principal.

What is so important here to visualize and hold in working perspective is that, in this juxtaposition, it is fundamental that the legislative responsibility of decision of the commission does not shift from

\textsuperscript{12} ICC \textit{v. Brimson}, \textit{supra} note 10.
\textsuperscript{13} 211 U.S. 210 (1908).
\textsuperscript{14} 154 U.S. 362 (1894).
\textsuperscript{15} \textit{Prentis v. Atlantic Coast Line Co.}, \textit{supra} note 13, at 228.
\textsuperscript{17} See Smith, \textit{Relief from Ultra Vires Governmental Action}, 42 MARQ. L. REV. 429 (1959).
the legislative to the judicial power in the auditing of the order of the commission. "We do not sit as a general appellate board of revision for all rates in the United States. We stop with considering whether it clearly appears that the Constitution of the United States has been infringed," and, in determining whether it has been infringed, "we do not feel bound to re-examine and weigh all the evidence . . . or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say it was impossible for a fair-minded board to come to the result which was reached." Contentions that more is required by other cases are dissolved by the Court: "They simply reflect a policy[20] . . . that administrative determination of 'jurisdictional facts' should not be final but subject to judicial review." That judicial review is exhausted with a trial (or auditing) of the trial in the commission in accord with the traditional relation. The responsibility of decision does not shift to the judicial as to require a "new" or retrial in the court. "It is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved." We should now concern ourselves with what must be done to meet the adjudicatory function in the commission.

V

The books bulge with all sorts of discussions of the previous points. What concerns us now is missed there and even glossed over by the courts. It is so important to our rate problem because it will disclose the traditional and clear us from an indictment of novelty. I do not seek to invent anything. For one reason, the element of alarm is avoided if we move under the prognosis of tradition; but more importantly, what has been evolved and tested by the practice of experience seems a better plan than any that has been suggested for substitution or that I can conceive. We come to it.

The basic aspects of the rate hearing involve the commission in both judicial and legislative functions. For a while, the zeal of many, transcending the Grangers, was expressed in plans to put the rate process in the judiciary. Muskrat v. United States and Prentis made it clear this was impossible. The Court explains this in Reagan. It is captured in the division of function for the states in Janvier v. Revere Water Co. Whatever invitation there may be to somehow

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18 San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 446 (1903).
19 Id. at 441.
23 219 U.S. 346 (1911).
27 174 Mass. 514, 55 N.E. 381 (1899).
capture the judicial phases into the third article type tribunal, it proves too much. The complexity of the practice and the need for the continuous supervision which require the primary legislature to infundate the rate-making order to the commission would cause the judiciary to lose its tenuous appropriateness of jurisdiction. The gap in the administration of government compelled the employment of the commission and thus expressed the public policy of putting the place of trial in the commission. *Myers v. Bethlehem Shipbuilding Corp.*\(^{28}\) consolidates what was made clear in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*\(^{29}\) and now confirmed in *Arrow Transp. Co. v. Southern Ry.*\(^{30}\) This seems to settle beyond further contention that the primary jurisdiction and responsibility of decision are placed finally and fully in the commission.\(^{31}\)

This brings into perspective the two features of the genesis of the body politic and the finality of the rate order.

**VI**

Equity came to the judicial process largely to escape the rigidity of law that process might have the intelligence to serve the necessities of the situation—an adequate remedy when that was lacking at law. The commission was necessary for the same reason—a more facile process to achieve the requirements of the administration of government. An action before the commission “is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding.”\(^{32}\) It is inherently equitable for full relief. Once the power of the commission is established, “to regulate the relation and to decide the facts affecting it are hardly separable.”\(^{33}\)

This brings us to the problem of ripeness.\(^{34}\)

**VII**

Maitland’s comment on the transition from forms of action never was so apropos to the progressing in government habits as in the evolution of the rate order. The great differential significance is that the analysis here presented is not some nominal reform in a detail but is a basic fundamental of the exercise of a process. The first impression

\(^{28}\) 303 U.S. 41 (1938).

\(^{29}\) 204 U.S. 426 (1907).


\(^{32}\) NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937).

\(^{33}\) “A part of the exigency is to secure a speedy and summary administration of the law and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent.” Block v. Hirsh, 256 U.S. 135, 158 (1921). See also Yakus v. United States, 321 U.S. 414, 447-48 (1944), and Guthrie Nat’l Bank v. Guthrie, 173 U.S. 528, 537 (1899), for authority that the proceeding is “not in the nature of a suit at common law.”

\(^{34}\) Every child knows he can eat green apples, but one bellyfull will teach him to wait the next time until the acid turns to sugar.
gives its image to the change. Everything in this world changes as it matures. Creatures that look like little fishes become frogs. The attention which satisfies the new-born child will not satisfy her as a candidate for motherhood. What is true of the body natural also is true of the body politic. The image of the rate order published by the act of the primary legislature was pressed to the extreme and carried forward to the rate order of the commission. They are very different. "To press a juristic principle designed for practical affairs of government to abstract extremes is neither sound logic nor good sense. And this Court is under no duty to make law less than good logic and good sense." When its practice ceases to achieve that in practice "it is imperative that we consider anew the immunity claimed. . . ." What we must consider anew is the failure of the application of the fundamental principle of the equity jurisdiction to the doctrine of departmentalization.

When the rate order was an enactment of the primary legislature, the situation was ripe for judicial review. The legislation was complete. The legislature had washed its hands of the problem and had cast the matter upon the public trestle board for the parties affected to seek relief in the judicial power just as it did in any other statute; i.e., a tax rate for permanent operation. That it might be the works of a hostile legislature naturally called for the measuring power to say that a railroad "is not placed at the mercy of legislative caprice."

This was the type of provoking action involved in the two-cent rate which induced the enactment of the three-judge court in 1910.

That the source of the rate order was ultra vires the judicial was clear in Reagan. Although the purpose of the analysis was to cast up the "final act," in comparing the two processes the Court is compelled to give some recognition to the adjudicatory function of the commission. The function of hearing and findings is recognized. The commission's rate-making is distinguished from rate-making by the primary legislature. Sterling v. Constantin makes it clear that constitutionally

39 "The establishment of railroad rates is not like a law that affects private persons who may never have heard of it until it was passed. It is a matter of great interest, both to the railroads and to the public, and is watched by both with scrutinizing care." The railroads went into evidence before the Commission, and this because "the question that we are considering may be termed a question of equitable fitness and propriety, and must be answered on the particular facts." Prentis v. Atlantic Coast Line Co., supra note 13, at 229-30.
40 287 U.S. 378 (1932); see ICC v. Brimson, supra note 10.
protected rights are entitled to adjudication in hearing or trial and
cannot be doomed. The trial tribunal only can give equitable apportion-
ment as the facts and the law disclose and limit in an investigation
judicial in nature and adjudicated in a final rate order.

This brings us to the congenital character of equity's decree when
the consequence of the ordered change presently cannot be measured
and must be noosed by the light of time.

VIII

The commission's function in the rate hearing is more equity than
is equity, and this is not lost when review is sought from the chancel-
lor. When equity came into the judicial process, law's judgment had
become so ossified, except for the pre-packaged goods, as to be useless.
Law was helpless to assimilate adjustment subsequent to judgment.
Capacity to finish the business was the great contribution and purpose
of equity; i.e., as Mr. Justice Frankfurter phrased it, the court was
under no duty to make law less than good logic and good sense. Public
policy was served by the ending of the contest and the elimination of
multiple litigation. Accounting was its first-born.

This doctrine of continuing jurisdiction applies to a situation in
which the consequence of the present right to relief can only be learned
in the enforcement of the decree. The chancellor must police his own
squinb. It is a principle. Prior application is no measuring precedent.
It was devised to escape precedent and it is inherent in the process
with a duty on the court, in accomplishing public policy, to apply it
whenever appropriate. Enumeration of examples is as needless as it is
universal. The novelty of the particular was recognized as immaterial
by Judge Hand in drawing the decree in Shredded Wheat Co. v.
Humphrey Cornell Co. 42

42 See notes 33 and 34 supra.

250 Fed. 960, 967 (2d Cir. 1918): "[T]hird, the defendant at the end of six
months may apply to the District Court to be relieved of the second require-
ment, upon showing that after a bona fide trial of all possible expendients it
cannot comply with that provision, except at an expense which would make
it impossible for any continued competition . . . with an assurance of reason-
able profit."

The feature of retention until completion is everywhere: statutes, etc. It
appears in reflection in the general provision of the Judicial Code vesting
equity in the courts. It also has particular enumeration; i.e., 60 Stat. 439

See the policy of the retention as applied in Railroad Comm'n v. Pullman
Co., 312 U.S. 496 (1941), explained in England v. Louisiana State Board
of Medical Examiners, 375 U.S. 411 (1964). See also Lee v. Bickell, 292 U.S.
415, 426 (1934).

The affirmative duty to integrate the final order with trial action to achieve
orderly process also applies even to criminal trials. Benson v. United States,
332 F.2d 288, 291-92 (1964); see Smith, Procedural Judicial Eclecticism, 20
J. KAN. B. A. 21 (1951); cf. Neal & Goldberg, The Electrical Equipment
Indeed, the function of retention until the consequence of the immediate correction or initial relief is disclosed is so much a part of the equity process that one is the condition of the other.

Here, it is congenital, as always the rate operates to the future and at the time of entry only the Good Lord can know that. Man, even judges, must await events of the future to learn and he is obligated to hold the case open to equate them.43

A casual examination of the nature of the commission's rate order would be enough to make it clear, even to a stranger to the process, that equity's doctrine of continuing jurisdiction is galvanic to it.

IX

The governmental growing-pain anchors memory to the swaddling cloth days of this interdepartmental process. When the primary legislature abandoned its off-spring to prey upon the legally protected property of the utility, there was no choice nor corrective means to equity. It had to bar the barn door by invalidating the statute. This was compounded by the over-reach of federal jurisdiction. In 1875, Congress for the first time (barring the abortive act of 1801) opened the federal courts to claims based on a right under the Constitution or laws of the United States. Therefore, such claims had to be pursued in the state courts and brought to the Supreme Court of the United States for review of the federal questions under section 25 of the Judiciary Act of 1789. In Reagan,44 in 1894, the argument was rejected that suit could not be brought in the federal trial court to restrain the enforcement of a state agency order. From then on,45 the injunction was almost automatic upon application, as the act of 1875 was considered as having the purpose of providing a forum sympathetic of federal rights.46 This was tempered by the three-judge court acts in 1910 and 1913 and by the Johnson Act in 1934. This maladjustment was progressive until the Court searched equity's principles in Railroad Comm'n v. Pullman Co.47 When the Court was tussling with Reagan, it saw only the image of a statute of the primary legislature. It could not fix the rate and it could not prevent the commission from trying again. This game of shuttle cock would be a happy solution for unemployed commissioners and judges if it were not that it is the public interest that is made the buffoon. This still might be good fun if the sovereign were assured that eventu-

43 The Dodgers will win the pennant. The stock market will keep on going up. It will rain on Easter. Of course, everyone is familiar with the custodial suit. Likes v. Likes, 191 Kan. 630, 383 P.2d 983 (1963). In it, the initial rate order is adjusted to serve the right of return.
45 The practice resembled the labor injunction described in Frankfurter & Greene, The Labor Injunction (1930).
47 312 U.S. 496 (1941).
ally he would get his crown back for the dunce cap. Under the present practice, the error may be progressive. The squandering of wealth, public respect, and time is certain. None is necessary.

Assimilation of recognized practice is enough. If the doctrine of continuing jurisdiction is allowed to operate, we could give up trying to do the impossible. When it is not necessary to be foolish, why strive for it?

It might be well to take note as we go along that the state owes all its population the equal protection of the law. One of the errors of operation often appears in the methods of the attorney for the commission. Sometimes he imagines he is the prosecutor who, by sending the accused to the penitentiary, will prove that he is such a statesman that he should at least be governor. The commission speaks for the state and represents it. It also represents the consumer. It is the duty of its counsel to build a record fair to all and which contains all the relevant and material evidence, whether one party or another is interested in that feature of proof. The rate hearing is not an adversary proceeding to be fattened by tricks. It is a public proceeding where the purpose is the truth to be arrived at simply, fairly, and promptly by an impartial tribunal upon all the evidence that should be considered.

It is the first rule of all reviewing process that any corrective relief that may be had before the trial tribunal shall first be exhausted in its final judgment. It is emphasized in administrative law under the usual phrasing of exhausting the administrative remedy. It also is disclosed in Pullman as a principle of equity. Jurisdiction to enjoin cannot be more clear in a state court than it was there in federal equity. Although there is nicety of distinction for review, the simple substance is that each is a pendent jurisdiction. Neither court has any business in the case if the trial tribunal has not completed all means available to a just and final disposition. Many orders issued by government agencies of all kinds have a dress of finality but may not, for that reason alone, race off to a court to have it refitted. Isbrandtsen-Moller Co. v. United

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50 San Diego Land & Town Co. v. Jasper, supra note 18.
51 Only the important is the relevant. Cf. "Miami Beach, Fla. (AP): 'I was ¼ inch too short to qualify as a Chaplain in World War I,' Francis Cardinal Spellman, Roman Catholic Archbishop of New York, told the American Legion convention yesterday. . . . Cardinal Spellman said he was informed he was ¼ inch too short for the Navy. 'But they waived that.' Then came an interview with the head chaplain, after which he was rejected 'because I had a bad disposition.' Cardinal Spellman said he told his superior he had been rejected because of his height, but didn't mention the part about the bad disposition." Kansas City Times, Sept. 11, 1963.
52 Railroad Comm'n v. Pullman Co., supra note 47.
States and Myers make this clear and Rochester Telephone Corp. v. United States confirms it.

The importance of Rochester is not that it is running troika as the unhitched third horse. There is no novelty in it any more than the re-evaluation in Graves v. O'Keefe. It does not reverse but only confirms and distinguishes. The process is as new as the concept of a cause of action with its elements of injury, substance, and time. If I have no injury apart from the common, whether you call it public or private nuisance or a rule of administrative law, I have no cause of action. It is one thing to allow the individual to call government to task when he has some good reason of his own to protest the manner of the administration of public affairs and quite another when he undertakes to be his brother's keeper. Rochester allows that part of Reagan which is vital to survive. It clears the stage for the Isbrandtsen play; namely, the rate order. It has present form but future operation. As Judge Hand demonstrated, only observation thereof can disclose whether the pend-ent function of the judicial power has office. Again and again, the judicial has no rate-making process; and no one wants it to have any. All we want is that it exercise the sense that God (or King James) has given it to induce and restore reason in government.

XI

This is not recapture, although that does have apologetic merit, any more than a judgment of remittitur or of increscitur is independent of the verdict of the jury. Both are associated into and absorbed by the original act and explain it, all in the same proceeding. The primary legislature, in granting the charter to the commission, gave it jurisdicti-on to supervise and police the utility's action so as to serve the public interest. For our purpose, that is done when the best service is well

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54 300 U.S. 139 (1937).
55 Myers v. Bethlehem Shipbuilding Corp., supra note 28. A multitude of other cases show this just as well.
56 307 U.S. 125 (1939).
58 Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915); Bowles v. Willingham, 321 U.S. 503 (1944).
59 Compare People v. Calvar Corp., 286 N.Y. 419, 36 N.E. 2d 644 (1946), where there is continuing jurisdiction in the commission, with Town of Greenburgh v. Bobandal Realties, Inc., 10 N.Y. 2d 414, 179 N.E. 2d 702 (1961), Little v. Young, 299 N.Y. 699, 87 N.E. 2d 74 (1949), Long Island Univ. v. Tappan, 305 N.Y. 985, 144 N.E. 2d 432 (1953), and Village of Euclid v. Amber, 212 U.S. 365 (1926), where orders were final at utterance. This is the identification of process contributed by Rochester.
60 What did the group of natural scientists say when a herd of elephants came clumping over the hill? They said, "Oh, see the elephants!" What did they say when a herd of elephants came clumping over the hill wearing dark glasses? They did not say anything. You see, they couldn't recognize the elephants in dark glasses.
61 Differences which may appear which are only of form are immaterial to us as, in any event, the trial of the contested issues is had in equity.
paid. The issue is not rates. The issue is return. Rates, being the medium of return, get the attention. The accounting period is the year. All are articulated in the rate order of the commission over which it exercises continuing jurisdiction.

The time has come, someone advised, to speak of many things. For us, they all relate to the rate order. Expressing it in function and supporting it in supposition cannot be justified in the beauty of the blue in the “blue sky” of its content. Often, it is easier to explain than to justify, but here justification is found in the fable of the old hen who starved to death sitting on the edge of the bushel basket full of wheat waiting for someone to come and feed her. The problem burst suddenly, as innocent as a newly-laid egg, in an era of economic and social evulsion, and the make-shifts of the kind, made precedents of convenience, presently are beginning to feel the compulsion of reevaluation that there may be sense, if not logic, in law. In this fascinating exploration it would seem well, like Mr. Justice Cardozo, to reject the Kantian theory of “purity of will” and follow a more utilitarian approach of the effect, somewhat after the fashion practiced by Lord Mansfield—to go to the market place for values money merchants place on its use.

62 “Things are seldom what they seem. Skim milk masquerades as cream.” GILBERT, H.M.S. PINAFORTE.

63 The caution of Mr. Chief Justice Hughes, speaking before the American Law Institute in 1941, and there repeated by Mr. Chief Justice Vinson in 1951, that we must “strengthen the defenses of democracy by commending to public confidence and esteem the working of institutions of justice in both state and nation” is most timely now as shown by recent bar studies:

“Hang the Lawyers? From the Des Moines Register: ‘The first thing we'll do, we'll hang all the lawyers,' said one of Jack Cade’s rebels in Shakespeare’s play, Henry VI. In spite of many improvements in the law since then, and endless oratory about the perfections of Anglo-American justice, some people still have a somewhat similar, but less extreme, feeling of that kind.

“The Missouri Bar Association has recently published the results of a 2½-year survey of attitudes toward lawyers and courts among Missourians. Lawyers and laymen were sounded out by questionnaire and by interview—and the dismal fact emerged that the more people knew about the system of justice, the lower their opinion of it. They thought wealth, social position and race gave unfair advantage in the law. They thought lawyers charged too much, and many were suspicious of their honesty and dedication. They had poor opinions of juries. They felt no great confidence in the fairness of full-dress trials, and still less confidence in traffic courts.

“All these complaints will be no surprise to alert lawyers. For some time now, most of the effort to raise standards of justice and legal service have come from lawyers—a small group of them to be sure, but one generally able to win the backing of bar associations if they keep at it long enough.

“The standard-raisers have accomplished a good deal, though not nearly enough yet. American law is slow, it is costly, it is uncertain. The “right to counsel” is meaningless for many Americans in the absence of very considerable financial resources. In some places and to some degree, legal aid, court-appointed attorneys, public defenders and volunteer counsel help toward making up the gap.

“But from the power of the sword to the power of the purse expresses a good deal of the progress since Henry VI’s time. American courts are still a sort of trial by combat, but a combat of wits between hired advocates.” Kansas City Times, Aug. 29, 1963; see concluding paragraph of Morgan v. United States, 304 U.S. 1 (1938).
The die was cast by Smyth v. Ames. What was set up as a simple issue of fact finding since has become such a mushroom-cloud that it obscures the light of reason and threatens cancer to the marrow of our government.

It is necessary to see the great importance of the congenital nature of the commission’s continuing jurisdiction against this background. Originally in the legislature’s rate order, that stature was not annealable. Before the judicial power, it stood unbowed or was aborted. No matter how erroneous the prophecy proved to be, the judgment winner held the advantage there obtained.

In Smyth v. Ames, not only were there no facts, but no facts could be learned. Nevertheless, a fact had to be found. The carrier claimed everything it could think of and Sir William replied that it was only what it would cost him to build then, about one-fifth. As investment, the carrier claimed even more than it spent on anything, whether used or never used. The Attorney General’s claims were fictitious. The carrier’s claims were found to be a tissue of “injudicious contracts, poor engineering, unusually high cost of material and rascality on the part of those engaged in the construction and management of the property.” One side said the egg was made of gold, the other said it was only an addition of dross. Our purpose here is to pass on from the base and only to note that the ultimate fact in Smyth v. Ames had to be an estimate or resultant from all the evidentiary facts. The claims of the carrier are explainable as self-serving and there seems to be a mental inclination to assume that all contemporary expenditures are inter-dependent. It is not true that all costs or risks are incident of the present function or end in view.

What was spent was some evidence of what should have been spent, and what it could be built for now was some evidence of what it could have been built for then. Now, we know what it should have cost or

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64 169 U.S. 466 (1898); see discussion in Smith, The Reality of the Public Utility Rate Base, 67 Dick. L. Rev. 83 (1962); Smith, A Constitutional Rate Base, 6 U. Chr. L. Rev. 170 (1939).

65 “Dime Investment Costs Man $600 at Union Station. A pay toilet at the Union Station was occupied yesterday by a Des Moines man who drove into Kansas City to attend a meeting of his union.

“He saw a hand sliding under the door and reaching for his trousers. The hand clutched a billfold which was in the pocket. The man grabbed the hand. He latched onto the wrist, and there was a tussle which lasted just an instant.

“Then the intruding hand wrenched itself free, and when it was withdrawn it carried in it, triumphantly, the man’s billfold.

“Very quickly, the man readjusted his clothing and swung out in pursuit. He was close enough that he even got a departing glimpse of the man with the wallet, whom he described as white and probably in his 20’s. But the thief was fleet and got away, out through the station lobby somewhere.

“And in that wallet, our unfortunate Des Moines visitor told police, was $600. Convention money, trip expenses, incidentals... that sort of thing. A man has to carry money these days.” Kansas City Times, Aug. 2, 1963.
readily can learn it under the continuous policing by the commission of honest companies. Of course, everything is more or less comparative. The Court went on to point out that the carrier should be well paid for the money value it had tied up in the plant—to find what rate, as applied to the base, would do this.

This all seems rather drab in that ordinary men could count generators, add up their cost, and compute a rate return, but here is the source of the mysticism which spored from it.

XIII

It was not to remain for ordinary men; the expert witness becomes the special species of the genus homo. He can prove the base is "original cost" as claimed in Smyth v. Ames and, with equal finesse and majesty of mien, he can prove it is "reproduction new." Oh! That is not confusing! Where he gets his foot on ordinary men is when it comes to finding what the Court said in passing and because there wasn't anything else before it that income should be equal to comparable risks.

Here, to make it easier to prove his point, he boils finance, economics, accounting, and engineering into an argot of insouciance to this cacophony of claims. Anything that is homotonic is golden to them. All I want to do is to get about so that, even if it be difficult to walk down main street with a language that ordinary men can grasp, we still can be confident that commissioners can. That no longer is true. The important thing is that the commission be competent to appraise the relevance and significance of testimony. It would seem that the Court took the syrup off this professional. "It is unnecessary to analyze the testimony of these witnesses, as it is obviously too conjectural to justify us in treating the failure to include their estimates as sufficient basis for a finding of confiscation." Quite the contrary, they seem to be the fact. No one can read the whole record in Southern Bell Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n and State v. Southern Bell Tel. & Tel.

See the testimony on the pending "truth in lending and truth in packaging" legislation in Hearings on S. 1740 Before the Senate Committee on Commerce, 87th Cong., 2d Sess. (1962).

See notes 80 and 81 infra. It would not be so bad to have our barber talk like a brain surgeon if it were not that he practices it.

Los Angeles Gas & Elec. Corp. v. Railroad Comm'n, 289 U.S. 287, 319 (1933). See also Salem v. United States Lines Co., 370 U.S. 31 (1962); United States v. Cooper, 277 F. 2d 857 (5th Cir. 1960). There is recent amplification in Schlagenhauff v. Holder, 85 Sup. Ct. 234, 246 (1964): "The expert witness will naturally be inclined to go on a fishing expedition in search of anything which will tend to prove his retainer's case, and . . . for a fee can easily discover something wrong with any patient—a condition that in prejudiced medical eyes might have caused the accident. Their reports are prepared without supervision and 'may either overawe or confuse the jury and prevent a fair trial.'" It would seem that those who profess the Hippocratic oath would be no less clean-handed than other fee-experts. Cf. testimony in Southern Bell Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n, note 69 infra.

Southern Bell Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n, 239 La. 175, 118 So. 2d 372 (1960).
Co.\textsuperscript{70} and not be certain that it is a package of tissue filled with stuff
and nonsense. It seems to be getting more attention that some com-
missioners have allowed themselves to become dependent on the purpose
of the pointed sophistry.\textsuperscript{71} The practice is as much a perversion of pro-
cess whether it is by one side or the other or both.

XIV

Earlier, much of the time of the expert witness concerned the in-
ventory. Now, the tendency is to confuse income, but whatever the con-
cern, the profession has become sort of a theology and any criticism
is heresy or apostasy. There always was a natural instinct\textsuperscript{72} to advance

\textsuperscript{70}274 Ala. 288, 148 So. 2d 229 (1962).
\textsuperscript{71}Hanson, \textit{Expert Testimony}, 49 A.B.A. J. 254 (1963); Bell, \textit{Utility Appeals—
\textsuperscript{72}See also Long, \textit{Administrative Proceedings: Their Time and Cost Can Be

The practice is not peculiar to public utility claims. It appears in all interests.
See syndicated article of Buchwald, \textit{Playing With Dolls is More Expensive Than It Once Was}, Washington, Sept. 26, 1963: "We have nothing against toy companies. They have a right to live just like everybody else. In their own way they bring happiness to the hearts of our young ones, and they give employment to thousands of people all over the country. It is only when they try to bankrupt us that we feel we should speak out. If our situation is duplicated around the country, every father who has a daughter between the ages of 4 and 12 is going to have to apply for relief.

"This is what happened:

"Our 7 year-old daughter requested, four months ago, a Barbie Doll. Now, as far as we're concerned, one doll is just like another and, since the Barbie Doll cost only $3.00, we were happy to oblige.

"We brought the doll home and thought nothing more of it until a week later our daughter came in and said, 'Barbie needs a negligee.'

"'So does your mother,' we replied.

"'But there is one in the catalog for only $3.00,' she cried.

"'What catalog?'

"'The one that came with the doll.'

"We grabbed the catalog and, much to our horror, discovered what the sellers of Barbie were up to. They'll let you have the doll for $3.00, but you have to buy clothes for her at an average of $3.00 a crack. They have about 200 outfits, from ice-skating skirts to mink jackets, and a girl's status in the community is based on how many Barbie clothes she has for her doll.

"The first time we took our daughter to the store we spent $3.00 on a dress for her and $25 to outfit her Barbie Doll.

"A week later our daughter came in and said, 'Barbie wants to be an airline stewardess.'

"'So let her be an airline stewardess,' we said.

"'She needs a uniform. It's only $3.50.'

"We gave her $3.50.

"'But I need $3.00 more because Barbie needs a dress to go out on a date with the pilot after they're finished flying.'

"'Let her sit on the pilot's lap in her uniform,' we said angrily.

"Our wife gave us a bawling out and we forked over another $3.00.

"Barbie didn't stay a stewardess long. She decided she wanted to be a nurse ($3.00), then a singer in a night club ($3.00), then a professional dancer ($3.00).

"One day our daughter walked in and said, 'Barbie's lonely.'

"'Let her join a sorority,' we said.

"'She wants Ken.'

"'Who is Ken?'
self interest. The court commonly refers to the inventory as the property used and useful in the public service. What is being used and what should be held in readiness for substitution in case of temporary unit failure and what should be allowed in a general reserve does not seem to be so involved that a purpose to bargain in good faith by ordinary, honest men would not determine.

XV

It was the casual expression by the Court in Smyth v. Ames that the income should be equal to comparable risk that allows the possessor entry for the expert. It must be kept in mind that the commission retains continuing policing jurisdiction of the utility, and that is why it was created. It prescribes the manner in which the company records shall be kept. It exercises continuous audit, and can call at any time for an explanation of any conduct. Every entry into the capital account is under supervision. The whole, i.e., all the property and business of the utility, has been developed in this supervision. This is the peculiar jurisdiction or supervision of and the why for commissions which, in reality, means that the utility does not have to "go to court," for the simple reason that it always is "in court" with the commission. There does not have to be a "formal" proceeding to give the commission jurisdiction for a "final" order. In Smyth v. Ames, there was nothing—no records by either side that had any reliability—so that everything had to be adduced at trial, after the manner of an automobile accident litigation.73

The purpose of this paper is to bridge from base74 to return, leaving

73At the time of Smyth v. Ames, there were no automobiles.
the detailed analysis of the latter to another time. Here, inquiry in process and method raises the question whether the present failure of government is caused by its disability or its distraction. It should be borne in mind that general commissions were common only after 1908. *Smyth v. Ames* started in formal judicial chambers and had to wear the vestments of that office. The only record of evidence possible had to be manufactured on the spot and, by the tradition of the court room, evidence was produced through testimony and interrogation. The issue was constitutionality and the stakes were “winner take all,” finally, at the drop of the gavel. This image of grandeur makes it easier for the expert to stage his stuff. Whatever may be said so well against the television camera in the courtroom trial of crime, perhaps if the public could have a glimpse of this seance of experts, it might boil off the clouding vapor in the demonstration of the ridiculous. In comes the entourage of experts, counsel, etc., and the witness “takes the stand” and from that high vantage point gives forth his priestly blessing with pontifical finality of perfection. This liturgy is accomplished by responsive reading through questions and answers prepared by the expert. A little rehearsal allows each to seem both spontaneous and original, always magnificent in learning and wisdom. The other team is not so well positioned at this point. The show must go on and cross-examination starts. There sits the lawyer, day after day after day, with his expert’s mouth glued to his ear giving the lawyer the questions to ask the other expert. You see, expert witnesses cannot practice law so they cannot ask questions, and lawyers should not be expected to understand this stuff well enough to be able to conduct intelligent cross-examination. (Exceptions prove the rule but even he must flatter his expert.) If I can emancipate him, this will be the greatest contribution to the lawyer since the Statute of Uses. Unless the lawyer is the master of his own case, there is no due process of law.

That ought to be enough to call for soul searching.\(^5\) The typical

\(^5\) This will index and briefly review the base. Shortly after the publication of the base in the above article, a prominent authority wrote to me: “And I think you are wrong when you say, ‘the money the owner advanced and not the generator’ is the ‘interest protected.’ I built a house in [C City, State S] for $28,000 in 1936 and sold it for $48,000 when we moved to [State X] in 1953. Do you think that I would have been satisfied with the mere restoration of my $28,000 investment?” The following shows this error: The number of dollars needed to purchase the same amount of goods in 1953 that could be purchased for $28,000 in 1936 may be computed by first converting the 1936 All Commodities Wholesale Price Index to a 1953 base. To do this, divide the 1936 index value, 44.2 (1957-59=100), by the 1953 index value, 92.7. The resulting figure, expressed as an index, is 47.68 (1963=100). Dividing $28,000 by 47.68 and moving the decimal point two places to the right, produces a value of $58,724.83, the 1953 amount needed to equal the purchasing power of $28,000 in 1936 as measured by the Wholesale Price Index. His squib is a boomerang. In reality, he is in support. His error exemplifies the fundamental flaw. The difference is not the cause of prices. It is the consequence of prices. See note 65 supra. When lawyers try cases that they do understand, are not the facts often extremely complicated, but do they not have to settle the
case never escapes this complicity. Remember that the commissioner may never have had any training in the special field before him. However, with the expert witness so graciously summarizing and justifying the testimony of his script, there really is not much need for it, as surely the expert will have used his argot as an ankus with skill of phrasing and tone of learning so that its integration into the opinion must be recognized as wisdom and erudition. There is no question or purpose here to question the integrity, good faith, or ability of the individual commissioner. After appointment, like the judge, other imperious demands of his docket increasingly lessen his time for this massive process. No degree or amount of diligence and good faith can give him more than twenty-four hours in the day. The Morgan cases demonstrate that the constantly multiplying number and variety of official demands upon his time make him increasingly dependent upon his special office staff and briefs of counsel in the case to digest and reduce the tonnage of the record and the mysticism of the expert to some measurable expression for publication as his opinion. Unless a judge or a commissioner is the master of his own record, there can be no due process of law. The reviewing judge has not even seen or heard the proceedings which might have started while he was still in law school. Somehow, the court, being caught at the end of this eight-year rainbow, will do what courts cannot and should not do—give a trial de novo and make the rate. We must save face, and those in authority must impress the hoi polloi that they know of what they are talking.

record for appeal? One must wonder what could not be done in good faith bargaining on a record presented by the commission’s tentative findings and order with equivalent response prepared out of hearing and filed, with conference whether pre-trial or trial on actual differences of importance.


See United States v. El Paso Natural Gas Co., 373 U.S. 930 (1964), for frowning comment on the mechanical adoption. In the present, dispositive order practice, the commissioner acts under the pressure, excitement, and confusion of the moment, guessing the roll into the future. Under continuing jurisdiction, he enjoys the calm of retrospection. Freed from the role of the prophet, he can exercise his own full and deliberate judgment on the truth of history. He can observe how his order worked. Remember, the record still is open, in continuing jurisdiction, for receipt of the relevant and correction of the errors. It will be an accounting of facts as distinguished from a projection of fantasy: a few weeks over the accounting year to eliminate error as distinguished from eight years trying to conceal and defend error.

Ditto. Perhaps, it just got indigestion after chewing on the same inherent, obvious error for eight years and cast up the decision itself: “the most speculative undertaking imposed upon them in the entire history of English jurisprudence.” West v. Chesapeake & Potomac Tel. Co., 295 U.S. 662, 689 (1935)
Self-hypnotism would be uncalled for if there were conscious re-
alization by the commission of its continuing jurisdiction to reaudit for
correction whenever the vapor of confusion should blow away. By the
same token, the inclination to stuff the record would go with it.78

XVI

What will bring rationalization to the computation of rates first
must inquire what elements shall have consideration. Costs to be charged
to rates may be internal or external. Some operating costs, like wages,79
have an overlap. There is no “return” until after outlay is reimbursed
from rates expressed as profit. We are dealing with a going concern.
There is nothing hypothetical in that. The failure of the record in San
Diego Land & Town Co. v. Jasper80 and FPC v. Hope Natural Gas
Co.81 was due largely to the inclusion of so many claims that were not
compensable.82 Comparable risk was used by the Court to assure that
the result would be somewhere within limits of reason. This safety
device is not uncommon in court decision progress. Until we learn more,
we must get along on what we have. In the early infringement cases,
a comparative to patents employed in trade marks trials soon was aban-
donied for greater realism. Dependence upon imitation of others is a
confession of frustration and an act of desperation. Even the value
comparison in taxation is of little value to them and less to us. All
utilities are isomeric. Here, neither term is apropos. There is no risk,
other than just living in this world, and no occasion to prove by com-
parison. The market is exclusive and the rate is adjustable. How much

(dissenting opinion of Stone, J.). Here the apples also were carriers of some
extrinsic evil; i.e., dysentery.

This purpose of atonement in the function of reaudit of the operational
life of the rate order appears as the thesis of the Ambassador of the United
States pleading before the Security Council of the United Nations on the
Cyprus crisis for moratorium during which measures of corrective, healthful
adjustment might be taken in an atmosphere of reason, for otherwise “our
deliberations will not be inquiry. They will be autopsy.” Associated Press, Aug.
8, 1964.

Insull’s wisdom found greatness in his reputation for ability to know that
future utility profits would be favorable to investors. So, he earned their
trust and confidence. They looked back too late and the Depression was on.

78 “Second, and perhaps even more important, with unlimited access to all of
the Company’s records, there is not yet the slightest indication that there
exists any separate records, papers, or documents which reflect the judgment
factors which led representatives of the Employer to put one particular job
in one, rather than in another, classification. True, reference was occasionally
made to it being ‘scientific’ and perhaps too difficult for the Union people to
understand. But it is plain from the whole record that these so-called point
values covering factors such as skill, etc., were just subtle factors of man-
agement judgment.” NLRB v. Tex-Tan, Inc., 318 F.2d 472 (5th Cir. 1963).

79 The parties to the labor dispute in public service relations must find some
way among themselves to avoid disruption of service. See S. Rep. No. 459,
V. 1959-63), resulting from the railroad work rules dispute. Surely, we have
matured enough to know that no one ever wins a fire.

80 189 U. S. 439 (1903).

81 320 U. S. 591 (1944).

82 Cf. notes 65 and 72 supra.
someone else is eating does not prove it a healthy diet for another, even if he is a relative. They are not the same and resemblance of the prescription is pure chance.\textsuperscript{83} The utility gets paid out of rates for all its expenses, even income taxes. There always will be a fringe of limitation of inclusion which may require judicial arbitration as a question of law.\textsuperscript{84} This study bridges between base and rates. It is integral and interstitial. Rates will be analyzed later in terms of composition, construction, and function. We may lay the launching structure here as part of the process. The discussion of computation is the last chapter. Obviously, the rate is expressed in current dollars, as the base is expressed in general dollars. What is important is the money involved. In one sense, one does not own money as such. What he acquires in dollars is power which is found in credit and buying power. In great properties, this is kept functional in the flow of capital and becomes the power of replacement in the market. The base must be the general dollar or rates would be hitched to a dead horse. This means that return is founded, for the utility rate, on the value of the use of money.

The value of that use or the rent, owed by the public, for the money tied up in the going concern in turn goes back to the cost of money. This cost of that money first is expressed in the interest which must be paid for its acquisition. The interest is what it costs to buy money and so equates itself with what it costs to buy the generator. It is not someone else's generator and it is not someone else's cost of money.

This gives us a source and foundation which have the two virtues concerning us. The first is to escape conjury and the second is to find certainty and be ascertainable without much cost to establish or delay in doing. It is current, demonstrative, and reliable.\textsuperscript{85}

\textsuperscript{83} Two professional teams play in New York. What the Yankees do in Los Angeles is little evidence of what the Mets will do there.

The enjoyment of the "comparable sale" to help establish the fair market value in a condemnation suit is not analogous. There, the old generator, in propr\textipa{a} persona, is being sold to a consumer who has free election and choice to satisfy any inducement whim or seek a substitute.


The only relevant comparison is the current competitive price or cost of the use of money. Too much comparison might bring on the collusion involved in the cases discussed by Neal & Goldberg, op. cit. supra note 42.


These will include, \textit{i.e.}, among others, allocation questions on credit to income for plant improvement and working capital.

\textsuperscript{85} See Smith, supra note 74, for awful cost of present method. Yes, this is a land of opportunity, but it also is a land of plenty of poverty with too many homes that omit some or all their food for breakfast on that difference which it takes to "feed the meter."
In all my studies, for examination, no matter which way they started out, they always come to this same harbor.

The simple fact is that interest in America starts with the discount rate expressed by the Federal Reserve System articulated through the Treasury. That expresses the availability and the initial cost of money. The discount rate is what the Federal Reserve charges member banks to borrow funds, and this rate traditionally sets the pace for the banks’ charge to their customers. It moves through the member banks of the Federal Reserve System and finds its departure expression in the prime rate.86

The “discount” rate as applied to Treasury transactions is what the United States pays for the use of money it borrows in the open market from private capital through the sale of its long and short term securities, while the “discount” rate of the Federal Reserve is what it charges its member banks for their use of money borrowed from it. Treasury discount is the index for rates of interest on private long and short term securities. Federal Reserve discount is the basis upon which its member banks determine the price of the use of money they charge private individuals who borrow from them. The prime rate is what the member banks of the Federal Reserve System charge their most credit-worthy customers. Return upon utility shareholders’ equity should start with this minimum. The competition for money is so intense and the subject matter is so fluid that the prime rate set by the great New York banks, subject to some local color, practically establishes the prime rate nation-wide through adoption or imitation.

These are ascertainable by anyone and known to the parties to any valuable proceeding.87 Both the base and this cost are current prices.

86 In the middle of the United States, these now in turn are three and one-half per cent, and four and one-half percent. These rates are the foundation of all financing. The market starts with the market yield on three-month Treasury bills and on U.S. Government long-term bonds as typical of short-term and long-term interest rates. See Money: What It Costs, Time, Sept. 11, 1964; and The Prime Rate, 44 MONTHLY REV., FED. RESERVE BANK OF NEW YORK 54, 70 (1964).

87 Specific data on interest rates may be obtained from the statistical table appearing in the monthly Federal Reserve Bulletin, copies of which generally can be found in public libraries. The Bulletin also may be obtained from the Board or the Government Printing Office at 60 cents per copy or $6.00 for a year’s subscription. General information on the subject of interest rates is included in U.S. Bd. of Governors of the Federal Reserve System,
Now, the compulsion to use the competence found in continuing jurisdiction becomes *res ipsa loquitur*. It also eliminates the trended price of the expert witness testimony, chasing the will of the wisp called reproduction new, because we just do not need a prophet. The reason the prophet fails is that we just cannot know what of the present will prove the future, and so we roll the ball.

All data will become a matter of record within the accounting pe-

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88 Keep in mind that the return includes more than just bare bones cost of the money.

While ours is a captive market and a regulated price, the comparison with the free market profits always should be noticed: "Profit margins for manufacturing corporations in the first quarter of 1963 fell to 4.2 cents per dollar of sales from 4.8 cents in the fourth quarter of 1962 and 4.3 cents in the first quarter of last year. The rate of profit on shareholders' equity was 8.6 percent in the first quarter of 1963 compared with 10.5 percent in the fourth quarter and 9.0 percent in the first quarter of 1962. Companies with assets under $50 million experienced a greater drop in profits than the larger companies." FTC & SEC, QUARTERLY FINANCIAL REPORT FOR U.S. MANUFACTURING CORPORATIONS, RELEASE No. 1909 (1st Quarter 1963). The Quarterly Financial Report for U.S. Manufacturing Corporations, published jointly by the Federal Trade Commission and the Securities and Exchange Commission, is a searching compilation and "income statement and balance sheet for all manufacturing corporations." It is for sale by the Government Printing Office, Washington 25, D.C., by subscription for $1.25 a year (Library of Congress Catalog Card Number 49-45545).

Data pertaining to the return on invested capital can be obtained from the Statistical Abstract of the United States, which shows selected financial items for the largest industrial corporations by industry; *i.e.*, page 493 of the 1963 edition.

89 The first failure of prophets of profits is that no one can know the future—if he could he would own the Earth.
period, and equatable therein under the continuing jurisdiction of the commission.

Nothing is created by an accounting period. It is not time itself but only a cleavage or period of time selected for convenience in counting the eggs; i.e., for accounting. Neither is anything created by the initial rate order other than the fact of its utterance—it will fix the charges to be made at the start of the period. The great right of property is not in the declaration of the order made at the beginning of the accounting period. The great right is the actual receipt of the appropriate return. It is a continuous right and incorporates the whole time continuously while the business of the utility is subjected to rate control under the police power administered by the commission. The accounting period is neither its beginning nor its ending. Obviously, the declaration of the order is only an estimate of income expected of the rate. Like the strapless evening gown, it may be hoped that it will stay up but only the passage of time will disclose what happens (it might need to be adjusted). No one supposes that his "declaration of estimated income" will satisfy the collector of income taxes if his net profits double or that he will be satisfied to let his prophecy stand if they halve.

Two major charges to income are expressed in terms of depreciation and working capital. These also only can be known after occurrence. Both are in current dollars. It seems that the absorption of depreciation must be a function of rates, not a measure of the base. Argument is strongly made with much persuasion that where cash is on hand which has been paid by the consumer and anticipates simple operation costs, it has doubtful place in working capital. It has merit, but only

90 Back-handedly and with its own intrinsic merit, there is being applied a national recognition of this necessity to wait for time in the Renegotiation Act, as amended, 76 Stat. 134 (1962), and in the Procurement Act, 76 Stat. 528 (1962). The committee report on the former says: "The Renegotiation Act of 1951, which authorizes the Government to recapture excessive profits on certain Government contracts...is scheduled to expire..." S. REP. No. 1669, 87th Cong., 2d Sess. (1962). The latter does about the same through the terms of the contract, and speaks of eight per cent, plus incentive, etc., allowances. Both of these are contractual. Our problem is the operation of original equity jurisdiction under the police power. See 76 Stat. 648 (1962), amending INT. REV. CODE OF 1954, §172, to provide a seven-year net operating loss carryover for certain regulated transportation corporations.

Technical accounting analysis will come later. Here, there is no contest with the accountant. Presently, all I ask is the narrative, leaving to the technician the form or device of disclosure. It is enough here to recognize that in doing so the method, form, or practice is not the objective and that the accounting practice is not immutable. Space Controls, Inc. v. Commissioner, 322 F.2d 144, 149 (5th Cir. 1963). Loosely, for example by analogy, I do not care whether the technical form might be debt, detinue, trover, or replevin as the essence is: You have my property. Either give it back or pay me for it. I am asking for only a nominal adjustment of the practice to insure the integrity of the process.

91 The initial charge to capital account of our generator should remain undepreciated until displacement, then withdrawn in whole, substituting the cost of the replacement at that time. The depreciation on separate units would be computed separately but associated to establish a plant mortality experi-
to the amount and not the account. It helps to measure the amount. It does not describe the account. The confusion arises from proximity, but the title is not fungible. Even when he only "loans," the recipient owns. Here, there is sale with payment after performance and consumption. All funds employed in the function of the going concern are a part of the base. The heat of the consumer's hand does not disguise the ownership of the funds by the utility. For the purpose of rates, it is raised capital.

What is essential to these enormous properties is that, despite commission rate-making power, they continue in private ownership and

ence and a charge made to income large enough to retire the separate units at the time of retirement. This charge to income should be held in a retirement reserve fund and in this manner establish a funding of the plant retirement. A relationship with working capital would be for consideration. The salvage value of the old unit at the time of its retirement may be credited to the retirement reserve fund.

The accounting regulations of the Interstate Commerce Commission contain rules providing for establishing estimated salvage values prior to establishing a rate of depreciation, and they also contain provisions for disposing of the gain or loss resulting at time of retirement. The accounting regulations of the Interstate Commerce Commission require that the service value of depreciable property be written-off through equal periodic charges to operating expenses over the service life of the property with current credits to the depreciation reserve account.

The accounting regulations of the Federal Communications Commission stem from the studies of the Interstate Commerce Commission and parallel its regulations. My retirement reserve fund and a funding of plant retirement refer to the provision of depreciation through a reserve or allowance account and relate to an estimate of the average service life of each type of unit or group of units. Thus, my plan outlines, in general overall, the accounting prescribed in their systems of accounts. The purpose is to conform within a working difference of detail to more certainly identify the base. This evolves from the base article, Smith, supra note 74, to allow vital, current dollars rather than moaning, rusty generators to describe the capital account to record empounded money. The service life quarterback the line and calls the shift in entry upon a major unit withdrawal. The salvage value probably is a current price. Under the FCC's accounting regulations, either the amount to be accrued each year as a charge to expense and a credit to the depreciation reserve is computed by subtracting the estimated net salvage (salvage less cost of removal) from the book cost of the unit and dividing the resulting amount by the estimated service life; or, as applied to the large telephone companies, depreciation charges are accrued on the basis of the cost of all property included in each class or subclass of depreciable plant using the average service life thereof properly weighted by the investment in that class. Upon the retirement of any depreciable property, its full service value is charged to the depreciation reserve whether or not the particular item has attained the average service of life. Under the group plan no loss or gain is recognized upon retirement of plant. I have allowed salvage as a credit to the reserve only to associate it with the function of rates to liquidate the accrued debt.

Cash flow, the sum of depreciation charges, and net profits after taxes would not be materially affected. For discussion of the trend to liberalized accounting, see ABA Utility Section Newsletter, Oct. 1, 1963, p. 6. See also American Bar Ass'n, Public Utility Law (1963), reprinting the addresses delivered at the Chicago meeting of August 12-14, 1963. In the argument before the Federal Power Commission on accounting for tax credit, just about every variety of opinion on how investment credit should be accounted for on the books of public utilities was expressed at the FPC hearing on October 7, 1963. Those favoring flow through and those favoring full normalization were about equally divided. The staff of the FPC supported flow through. Cf. Note, Liberalized Depreciation, 50 Va. L. Rev. 298 (1964).
that management must be vital and intelligent. Unless there is enough certainty to not only allow but to invite managerial skill in long-term planning, there can be only an unsatisfactory public service. The two remaining primary factors to be charged to rates are the allowance in addition to the cost of money enough to assure that the best service is well paid for, expressed in terms of incentive or compensation for the value of the managerial skill; and if doubt remains that the investment is attractive, then provision therefore.\textsuperscript{92} The prime rate is the foundation upon which these various additional factors are to be added. This will provide the return upon the unappropriated proprietary proportion or shareholders' equity.

The disclosure of the cost of money by the national discount rate is as sound and constant as the United States. It is common knowledge through frequent official publications of the United States and constitutes the best evidence and the greatest trust and confidence that can be found for us. It is free from partisan preparation. If it does not continue, all this will not make any difference anyhow.\textsuperscript{93}

\textsuperscript{92} See FPC v. Hope Natural Gas Co., \textit{supra} note 81. Mention there of “shareholder's equity” has become a major area of discussion. Fundamentally, it is a proprietary proportion. Contract obligations, such as bonds' interest, state their own claims or charges to rates. It is the unapportioned investment or property that must be hospitable to new money to assure credit.

\textsuperscript{93} See Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), to the effect that even contracts protected by constitutional certainty are no good unless the government continues ready and able to protect their comparative value.
The night before the Argonne, a young man I knew banked a roulette game. It gave him courage, as, by morning, he had nothing left to lose but his life. Having paid it for the preservation of sound governmental practice, it seems to me we should consider anew what we are doing before it is too late—eight years only to get ready a case for the trial of the federal question. I really am not so much concerned about him. Perhaps, he could have kept his head down. What seems important is that our trusteeship should be administered so that “our Posterity” can hold their heads up.

This permits us to close on a happy vein of confidence for both ourselves and our posterity, as the solution is self contained in the vital process we received from the centuries of proofing to accomplish fairness in a complete remedy. The chancellor’s special power to equate and remove inequities surely was not conceived to compound them by its own process. It was for their removal that the power was born to free government. This is why continuing jurisdiction is a part of the principle of and inherent in equity. Even if it were not of itself the congenital character of equity, it is vested there by the legislative grant, admonished in Brimson as a matter involving the public right, presented in such form that the judicial power is capable of acting upon it, and susceptible of judicial determination. For us here, the doctrine of continuing jurisdiction is a built-in security demanding articulation to the prompt solution by abatement of what has been permitted to become distended as a gigantic public nuisance fed by a spurious theory of hypothetical and artificial evidence of the value of the use of money in the market place.

Every major element of the present plant has origin, one way or another, under the vicarious, obstetrical observation of the commission and has known cost on a tested record. The problem of comparison

94 State v. Southern Bell Tel. & Tel. Co., supra note 70.
95 Cf. cases and authorities cited notes 36, 63, and 64 supra. Most cases aspire to and many approach the squander of time and cost of State v. Southern Bell Tel. & Tel. Co., supra note 70. See Long, supra note 71.

The sequence in the case cited in Smith, supra note 74, at 97 n. 29, appears in the decision of the supreme court of the state on November 2, 1963, in which it reversed the district court which had reversed the Commission. The case now is ready to start all over again. The spokesman for the utility is quoted as saying that the utility “hopes to present data for new rates much as if it were a new case. Three years have gone by. There have been many changes including at least three wage increases and greatly increased investment since the rate order. The case will go back to the Commission. They’ll have to determine two things. What rates should be applied to the future (1964) and what the rates should have been in each of those years.” Topeka State Journal, November 2, 1963. The Commission issued the order appealed in May 1959. The case now is reported as Southwestern Bell Co. v. State Corp. Comm’n, 192 Kan. 39, 386 P.2d 515 (1963), and hearing for reconsideration is under way.

With the incentive contract coming forward as the index of low-cost efficiency in the nation’s purchasing, public policy (see Time, Oct. 25, 1963, p. 95) invites appraisal to promote “honest, efficient, and economical” management reward.
is the current one of competition of lenders for the price of the use of their money by the borrowing utility, or of new "proprietors" if the utility seeks additional capital through expanding equity. These are contemporary, ascertainable markets, personal to the utility involved.

We already have within ourselves a simple and effective process which has before it a reliable and demonstrable, stable standard by which to equate the value of the use of captive capital with the competitive market and to retain within itself the magnetism for new money. Herein is the stability which must be found to permit the skill in judgment for the long-range planning essential in these great industries in the public service. The reward for this skill and initiative of management, like the compensation for the use of its capital, likewise must be equated with the competitive market. These are the measure of the highest degree of public service under honest, efficient, and economical management in the public interest in this government-industry complex generalized as public utility regulation.