

Summer 1984

Utility Rates Pending Judicial Review: A Riddle Wrapped in a Mystery in Illinois, 17 J. Marshall L. Rev. 743 (1984)

E. King Poor

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Energy and Utilities Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

E. King Poor, Utility Rates Pending Judicial Review: A Riddle Wrapped in a Mystery in Illinois, 17 J. Marshall L. Rev. 743 (1984)

<https://repository.law.uic.edu/lawreview/vol17/iss3/2>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

UTILITY RATES PENDING JUDICIAL REVIEW: A RIDDLE WRAPPED IN A MYSTERY IN ILLINOIS*

E. KING POOR**

INTRODUCTION

I ask you, therefore, to be careful and don't permit a corporation to be created without providing a means for restraining it and regulating it. And, as the people create corporations through government, I suggest that you require by law that every corporation shall put up a motto in its chief place of business, "Remember Now Thy Creator."

The public utility board is one of the means employed for the regulation of corporations, and, so far as I know, no substitute has been found for it. Nothing better has been proposed.¹

William Jennings Bryan, Speech before the Illinois General Assembly, March 18, 1913

In 1913, with sentiments such as these and others perhaps less overtly populist, Illinois joined the growing number of states that had enacted legislation to regulate public utilities.² At the same time that this movement to regulate utilities fermented in state legislatures, the key role to be played by the courts in reviewing the decisions of utility commissions was also recognized. Wisconsin Governor Robert LaFollette noted in 1904: "The work of the commission in fixing rates will stand or fall, as it meets the severe tests to be applied in a review of its

* With apologies to Sir Winston Churchill for borrowing from his observation about Russia: "I cannot forecast to you the action of Russia. It is a riddle wrapped in a mystery inside an enigma."—Radio Broadcast, October 1, 1939. J. BARTLETT, *BARTLETT'S FAMILIAR QUOTATIONS* 743 (rev. ed. 1980).

** A.B., Dartmouth College, 1976; J.D., Emory University Law School 1979; Associate, Winston & Strawn Chicago, Illinois; former Illinois Assistant Attorney General, Illinois Commerce Commission Division. The views expressed in this article are solely the author's and do not necessarily represent the opinions of either the Attorney General or the Illinois Commerce Commission.

1. *Journal of the House of Representatives*, Forty-Seventh General Assembly, 1913 at 596.

2. See 1913 Ill. Laws 460 *et seq.* (Public Utilities Act of 1913).

proceedings by the courts."³

The Illinois Public Utilities Act of 1913 contained a separate section for judicial review of the decisions of the newly created Public Utility Commission.⁴ Yet, oddly enough, during the seventy years that Illinois has regulated utilities, there is today no clear determination, either legislative or judicial, regarding what happens to rates charged by a utility while they are on review in the courts. In particular, it remains an open question as to what rates should be charged if a rate order of the Illinois Commerce Commission, successor to the Public Utilities Commission of 1913, is either stayed or reversed on judicial review.⁵ This article will examine this present state of confusion—first as it relates to a stay of a rate order and second as it relates to a reversal. Also included in this article are recommendations on how this present situation might be clarified by the General Assembly as it prepares to revamp the Public Utilities Act in anticipation of its repeal in 1985 by the Regulatory Agency Sunset Act.⁶

WHAT RATES SHOULD BE CHARGED IF A RATE ORDER IS STAYED?

The Law Governing the Stay of a Rate Order

Appeals from decisions of the Illinois Commerce Commission (Commission) are controlled by a special statutory provision of the Public Utilities Act.⁷ The Act provides that any party aggrieved by an order of the Commission may file an appeal in the circuit court of any county where the subject matter is located.⁸ In addition, the Act also provides that the aggrieved party may seek a stay of the Commission order before the circuit court upon a showing of "great or irreparable damage."⁹

3. Message of Governor Robert LaFollette to the Wisconsin legislature, 1904, *Journal of the House of Representatives*, Forty-Seventh General Assembly, 1913 at 637.

It is interesting to note that during the earliest days of rate regulation the Supreme Court held that there was no right to judicial review of rate orders. *Munn v. Illinois*, 94 U.S. 113, 134 (1870). The rationale for this was that the setting of rates was a legislative function and thus the only recourse was through the ballot-box, not the courts. *Id.* In 1890 the Supreme Court reversed this earlier holding and recognized that judicial review of rate orders was mandated by due process. *Chicago, Milwaukee & St. Paul R.R. Co. v. Minnesota*, 134 U.S. 418, 456-57 (1890).

4. 1913 Ill. Laws 495-96 (Public Utilities Act of 1921, §§ 68, 69).

5. The Illinois Commerce Commission was created by the Public Utilities Act of 1921. ILL. REV. STAT. ch. 111-2/3, §1 (1983). This act, as amended, is the law which governs utilities in Illinois at the present time. *Id.*

6. ILL. REV. STAT. ch. 127, § 1904.3 (1983).

7. ILL. REV. STAT. ch. 111-2/3, §72 (1983).

8. *Id.*

9. ILL. REV. STAT. ch. 111-2/3, §75 (1983).

Thus the first step in discussing the stay of a rate order requires an examination of the term "great or irreparable" harm in the context of utility rates. In making this analysis one must first confront a basic principle of Illinois public utility law known as the "rule against retroactive ratemaking." This rule, not unique to Illinois,¹⁰ states that rates once set by a utility commission can be changed only prospectively, even if the Commission order is reversed on appeal.¹¹ In other words, there can be no refunds to utility customers if a Commission order is overturned as setting rates too high, nor is the utility entitled to a retroactive surcharge if the order is found to be too low. More will be said below about the rationale that underlies this rule.¹² For the time being, however, it is sufficient to note that this is the law of Illinois as it now stands.

Returning to the stay of a rate order, if there are no refunds for a customer nor surcharges for a utility, then everyday spent in litigation is money lost irretrievably. It may appear, therefore, at first blush, that *every* rate order should be stayed because of the inability to obtain a retroactive recovery. Indeed, there is some authority for such a proposition.¹³

Yet a more thoroughgoing consideration of the various implications of staying a rate order leads to the conclusion that any such "automatic stay" based solely upon the inability to get refunds or surcharges is ill-advised. To begin with, orders of the Commerce Commission are deemed by statute to be *prima facie* reasonable.¹⁴ This presumption of validity exists because the Commission is the body appointed by law and equipped with the expertise to pass upon the often complex and technical issues that arise in rate proceedings.¹⁵ Hence, to stay every rate order simply because there can be no retroactive recoupment is contrary to the legislative intent that great weight should be accorded to decisions of the Commission, and would in effect nullify the presumption of reasonableness given to its orders. To attach no significance to an agency's expertise and the countless

10. See, e.g., *New England Tel. Co. v. Public Util. Comm'n*, 116 R.I. 356, 387-89, 358 A.2d 1, 21-2 (1976).

11. See *Mandel Bros., Inc. v. Chicago Tunnel Terminal*, 2 Ill. 2d 205, 208-12, 117 N.E.2d 774, 775-77 (1954).

12. See *infra* text accompanying notes 46-49.

13. See, e.g., *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 226 Kan. 234, 235-37, 597 P.2d 633, 635-36 (1979); *Michigan Consol. Gas Co. v. Public Serv. Comm'n*, 25 Mich. App. 512, 515-16, 181 N.W.2d 596, 598 (1970), *aff'd*, 389 Mich. 624, 209 N.W.2d 210 (1973).

14. ILL. REV. STAT. ch. 111-2/3, §72 (1983).

15. See *Village of Apple River v. Illinois Commerce Comm'n*, 18 Ill. 2d 518, 523, 165 N.E.2d 329, 331-32 (1960); *State Public Util. Comm'n v. Springfield Gas and Elec. Co.*, 291 Ill. 209, 216, 125 N.E. 891, 895 (1920).

hours it has already spent considering a rate case is clearly wasteful and ignores the role of the administrative process.¹⁶

But not only does an automatic stay pay no deference to the agency charged with setting rates, it is also simply unworkable. This is so because such an automatic stay cannot possibly accommodate the interests of both the utility and its customers at the same time. This may be shown by an example of the common situation where the utility appeals a rate order as too low and its customers appeal the same order as too high.¹⁷ In such an instance, since both the utility and its customers are subject to the rule against retroactive ratemaking, both would be entitled to a stay at the same time merely by requesting one.

But if both utility and customer are entitled to a stay at the same time, how would the stay work? The answer is that it could not work, since the effect of the stay for the two parties would be entirely different for each. The utility would seek a stay that would place its proposed higher rates into effect pending appeal.¹⁸ The customer, on the other hand, would seek a stay that would suspend the rate order and place the earlier lower rates into effect.¹⁹ And, just as it is impossible to be at two different places at the same time, so too, would it be impossible for a court to enter a stay that would grant the requests of the utility and customer at the same time. Moreover, there would be no way to determine who would be entitled to a stay since both requests are based merely upon the lack of retroactive re-

16. A number of jurisdictions have refused to stay or issue preliminary injunctions against rate orders because of an allegation that revenues could not later be recouped. *Commonwealth v. South Cent. Bell Tel. Co.*, 545 S.W.2d 927, 930 (Ky. 1976); *Mountain States Tel. Co. v. Public Util. Comm'n*, 176 Colo. 457, 460-64, 491 P.2d 582, 584-86 (1972); *Brewer v. General Tel. Co.*, 283 Ala. 465, 467-69, 218 So.2d 276, 278-79 (1969). See also Note, *Interim Rate Relief for Public Utilities Pending Judicial Appeal of Administrative Rate Orders*, 1977 DUKE L.J. 593, 612-13 (stressing that a liberal enjoining of rate orders endangers the administrative process).

The recent decision in *Citizens Util. Co. v. O'Connor*, 116 Ill. App. 3d 369, 451 N.E.2d 946 (1983) would indicate that the inability to obtain retroactive recoupment does not equal irreparable harm. In *Citizens Utilities*, the company argued that it should be able to invoke the court's equitable jurisdiction since it would suffer irreparable harm inasmuch as its only relief would be prospective. *Id.* at 374, 451 N.E.2d at 949. The court rejected this contention and held that the company had not exhausted its administrative remedies. *Id.* at 379, 451 N.E.2d at 951.

17. The appeal of *Commonwealth Edison Company's* 1982 rate order involved just such a situation. See *City of Chicago v. Illinois Commerce Comm'n*, No. 83 L 50204 (Cir. Ct. Cook County 1983).

18. See, e.g., *Department of Public Util. v. New England Tel. Co.*, 325 Mass. 281, 289-90, 90 N.E.2d 328, 333 (1950); *State v. Northern Pacific Ry. Co.*, 221 Minn. 400, 403-05, 22 N.W.2d 569, 572-73 (1946).

19. See, e.g., *City of Columbus v. Public Util. Comm'n*, 170 Ohio St. 105, 108, 163 N.E.2d 167, 169 (1959) (application for stay of rate increase by consumers).

covery. Therefore, a genuine stalemate would exist which would render the stay provision inoperable.

Finally, it is questionable whether the automatic stay rule is correct as a matter of law in light of the Illinois Supreme Court's summary reversal of the appellate court in *Cerro Copper Products Co. v. Illinois Commerce Commission*.²⁰ In *Cerro Copper* a utility customer sought to stay a rate increase by arguing that the stay was necessary due to its inability to get refunds. The appellate court reversed the circuit court's denial of the stay and held that "payment of a Commission-set rate and the inability to get a refund of any excess payments if the rates are set aside on appeal constitutes great or irreparable injury."²¹ On leave to appeal, the supreme court reversed.²² While the supreme court's reversal was made without an opinion, the only question before the court was the propriety of issuing the stay. Thus while the disposition of *Cerro Copper* is not conclusive on the issue, it does cast a shadow on the proposition that the unavailability of refunds or surcharges equals irreparable harm for the purposes of staying a rate order.

When Should a Stay Be Entered?

If the lack of retroactive recoupment from a rate order does not constitute irreparable harm, when, if ever, should a stay be entered? The answer to this question from the standpoint of the utility is well-established. A utility is threatened with irreparable harm so as to be entitled to injunctive relief when it shows that the rates set by the regulatory body are so low as to be a "confiscation" of its property in violation of due process.²³ Hence, a utility has a constitutional right to a stay or other forms of equitable relief if it can show that the rates it must charge will result in a confiscation of its property.²⁴

But when are rates "confiscatory," that is, when do they become so low that a court must stay or enjoin their effect? There is, of course, no formula to determine confiscatory rates. Nonetheless, the idea of confiscatory rates has generally been held to

20. 65 Ill. App. 3d 764, 767, 382 N.E.2d 143 (1978), *summarily rev'd*, 72 Ill. 2d 581, 401 N.E.2d 1390 (1979).

21. 65 Ill. App. 3d at 767, 382 N.E.2d at 146.

22. 72 Ill. 2d 581, 401 N.E.2d 1390 (1979).

23. See *Peoples Gas Light and Coke Co. v. Slattery*, 373 Ill. 31, 42, 25 N.E. 2d 482, 489 (1939); *Citizens Util. Co. v. O'Connor*, 121 Ill. App. 3d 533, 535, 459 N.E.2d 682, 684 (1984).

24. In *Prendergast v. New York Tel. Co.*, 262 U.S. 43, 49 (1923) the Court recognized the right to enjoin rates which threatened confiscation. The Illinois Supreme Court has also recognized the right of a utility to seek protection against confiscatory rates through an injunction. See also *Peoples Gas Light and Coke Co. v. Slattery*, 373 Ill. 31, 44, 25 N.E.2d 482, 489 (1939).

involve rates that are so low as to imperil a company's finances.²⁵ A classic definition of confiscation may be found in the pronouncement of the United States Supreme Court in *Bluefield Water Works v. Public Service Commission*.²⁶ In examining whether a rate of return of 6% on the utility's property was confiscatory, the Court in *Bluefield Water Works* observed:

The company contends that the rate of return is too low and confiscatory The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.²⁷

Hence, for a utility to prove confiscation it must do more than merely allege that the rates set by a commission are something less than the rates originally sought.²⁸ While the utility may not be required to show that it is on the verge of bankruptcy, it would probably have to show that it could not carry out normal operations under the present rates.²⁹ Confiscation is a serious charge and the courts have required that it be clearly

25. See, e.g., *Mountain States Tel. & Tel. Co. v. Public Util. Comm'n*, 345 F. Supp. 80, 86 (D. Colo. 1972) (for rates to be confiscatory, utility must show that it will suffer "financial disarray"); *Citizens Util. Co. v. O'Connor*, 121 Ill. App. 3d 533, 538, 459 N.E.2d 682, 687 (1984) (confiscatory rates are those which do not cover operating expenses or provide only a narrow margin above those expenses).

In some states the term "confiscation" has a broader meaning in the context of utility rates, that is, it includes not only situations where the utility is in dire financial straits, but also *any* challenge to rates as unreasonably low. See, e.g., *Gay v. Damariscotta-Newcastle Water Co.*, 131 Me. 304, 307, 162 A. 264, 265 (1932); see also *Reassessing "Confiscation" Under Section 305 of Maine's Public Utility Law*, 29 ME. L. REV. 194, 201-02 (1977). This may, perhaps, be a holdover from the early days of regulation when there were no statutory provisions to challenge rate orders and therefore utilities had to use the constitutional argument of confiscation to obtain judicial review. See *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 456-57 (1890) (state law which made no provision for judicial review of rate orders held to violate due process). See also *supra* note 4. Illinois, however, has long recognized a distinction between rates which are merely "unreasonable" and must be reviewed under the Public Utilities Act, ILL. REV. STAT., ch. 111-2/3, §72, (1983), and confiscatory rates which may be attacked in an equity suit. *Peoples Gas Light & Coke Co. v. Slattery*, 373 Ill. 31, 45, 25 N.E.2d 482, 490 (1939); *Sprague v. Biggs*, 390 Ill. 537, 546, 62 N.E.2d 420, 425 (1945).

26. 262 U.S. 680 (1923).

27. 262 U.S. at 692-93; see also *Los Angeles Gas & Elec. Corp. v. Railroad Comm'n*, 289 U.S. 287, 319-20 (1933) (7% return not confiscatory).

28. See, e.g., *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104 (1939). In *Driscoll*, the company determined that it needed a 7.8%-8.0% rate of return and the commission had awarded it a 6% return. The Court held that such a disparity did not constitute confiscation. 307 U.S. at 119, 121.

29. See *Citizens Util. Co. of Illinois v. O'Connor*, 121 Ill. App. 3d 533, 538, 459 N.E.2d 682, 687 (1984) (confiscatory rates are those which do not cover operating expenses).

established before it is used to invoke the extraordinary remedy of staying or enjoining the effect of a rate order.³⁰

If rates must sink to the level of confiscation before a utility can obtain a stay, is there a flip-side to the coin for the customer, that is, can rates *rise* to such a level so as to justify a stay on behalf of the ratepayer? This question must be considered in light of a strong line of authority which has held that a consumer of utility services has no constitutionally protected interest in a certain level of rates.³¹ The Supreme Court of Georgia in *Georgia Power Co. v. Allied Chemical Corp.*³² relied on this principle and went so far as to hold that absent a statutorily created remedy, utility customers have no standing to challenge a rate order as too high.³³ In *Georgia Power* the court held that utility rate setting is a legislative process and as such the only remedy available for unreasonably high rates was at the ballot box.³⁴

Taken literally, the view that consumers have no protectible interest in the rate-setting process creates a rather troubling asymmetry; the utility may seek a court's protection for an infringement of constitutional rights, but the consumer may not.³⁵ But this view need not be read in such absolute terms. Missouri Supreme Court Justice John E. Bardgett, who concurred in *State v. Public Service Comm'n*,³⁶ presented what may be a more balanced approach: "I do not agree that municipalities and consumers have no procedural due process rights with reference to public utility rates. While a consumer may not have a property right to the continuation of a *specific rate*, he does have

30. As the Court stated in *Los Angeles Gas & Elec. Co. v. Railroad Comm'n*, 289 U.S. 287 (1933); "The question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the court may not interfere with the exercise of the states' authority unless confiscation is clearly established." *Id.* at 305. See also *Iowa-Illinois Gas & Elec. Co. v. Perrine*, 351 Ill. App. 195, 214-15, 114 N.E.2d 572, 580 (1953) (court should not interfere with Commission rate order unless flagrant confiscation shown).

31. See *Wright v. Central Ky. Natural Gas*, 297 U.S. 537, 542 (1936); *Holt v. Yonce*, 370 F. Supp. 374, 377-79 (D.S.C. 1974), *summarily aff'd*, 415 U.S. 969 (1974); *Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 31-32 (Mo. 1976), *cert. denied*, 429 U.S. 822 (1975); *Georgia Power v. Georgia Power Co.*, 409 F. Supp. 332, 340 (N.D. Ga. 1975).

32. 233 Ga. 558, 212 S.E.2d 628 (1976).

33. *Id.* at 560-64, 212 S.E.2d at 630-31.

34. *Id.* at 560-64, 212 S.E.2d at 630-32.

35. Justice Ingram stated in dissent in *Georgia Power*; "[w]e have held the courts are available to determine whether a particular order is unreasonably low. [citation] If we presume to make this kind of judgment on a constitutional basis, we ought to be able, without additional difficulty, to decide whether a particular order is unreasonably high." *Id.* at 572, 212 S.E.2d at 637.

36. 532 S.W.2d 20 (Mo. 1976), *cert. denied*, 429 U.S. 822.

a right not to be charged unreasonable rates."³⁷ Other jurisdictions have also recognized a property interest for consumers in paying only reasonable rates.³⁸

But what does this property interest in reasonable rates for a consumer actually mean? It is probably akin to the constitutional protection from extreme variations in reasonable rates that a utility enjoys. Just as a utility may constitutionally challenge only rates that are so low as to be confiscatory, so too, a customer may constitutionally challenge only rates that are so high as to be extortionate. The dissent in *Georgia Power* recognized that rates which are "constitutionally extortionate" for consumers are the mirror image of the "constitutional confiscation" standard that relates to the utility.³⁹

Yet the idea that there is a constitutional protection against extortionate rates has never been expressly recognized.⁴⁰ There remains, nevertheless, a powerful argument that after rates have risen to a certain point consumers should be afforded the protection of a court's equitable powers and a stay in much the same way that a utility receives such protection when it claims confiscation. Just what are extortionate rates is probably every bit as difficult to determine as what is confiscatory. At what

37. 532 S.W.2d at 33 (Bardgett, J., concurring) (emphasis added). See also *id.* at 33-35 (Seiler, J., dissenting) (agreeing with Justice Bardgett's assessment).

38. The Texas Supreme Court reached a result almost completely opposite to that of the court in *Georgia Power*, and held that the state attorney general could bring an action to enjoin rates as unreasonably high where there was no statutory regulation of rates. *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 531 (Tex. 1975). The West Virginia Supreme Court has recognized a property interest in a consumer paying only reasonable rates stemming from the common law as incorporated in the state constitution. *State v. Public Util. Comm'n*, 245 S.E.2d 144, 148-49 (W. Va. 1978).

39. 233 Ga. at 571, 212 S.E.2d at 637 (Gunter, J., dissenting).

40. In *Wright v. Central Kentucky Natural Gas Co.*, 297 U.S. 537 (1936), the Court found that a consumer had no vested right to a particular rate adjustment, but at the same time noted a decision from the lower state court that pointed out that the setting of rates must avoid the extremes which are either extortionate or confiscatory. *Id.* at 541-42.

In *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 (1890), Justice Samuel F. Miller recognized that rates which were egregiously low or high could not be tolerated:

Neither the legislature nor such commission acting under the authority of the legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons carrying on the business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

Id. at 460 (Miller, J., concurring). See also *Southeastern Bell Tel. Co. v. Public Serv. Comm'n*, 262 U.S. 276, 290 n. 2 (1923) (Brandeis, J., dissenting) (rates "may in no event, be prohibitive, exorbitant or unduly burdensome to the public").

point does a rate increase become extortionate—at a 10% increase, a 50% increase, a 100% increase? Like confiscation it is a matter that turns largely on the facts of the individual case. The doctrine of extortionate rates still awaits judicial refinement. The point to be made here, however, is that the stay of a rate order should remain a narrow gate through which pass only the most extraordinary cases, be they confiscatory from the standpoint of the utility or extortionate from the standpoint of the ratepayer.

Making the Stay of a Rate Order Workable: A Proposal for Reform

Even if the stay of a rate order were limited to extreme circumstances, Illinois law, as it presently stands, is ill-equipped to properly implement it. The inadequateness of existing law may be illustrated by some concrete examples of what would happen if a stay were granted to either a utility or a consumer.

First, if a utility can make the requisite showing that it has been subjected to confiscatory rates, it would then be entitled to stay the effect of the lower rates and collect its higher proposed rates during the pendency of the litigation. At the same time, however, a provision must be made to protect the interests of its customers should the utility lose its case on the merits. As it is presently written the Public Utilities Act seeks to do this; however, it also forces the utility to pay into court or to impound the higher non-confiscatory rate during the appeal.⁴¹ Yet this has a decided drawback, since the utility is then deprived of the very funds it needs to avoid financial distress while it contests the commission set rates. Thus, the purpose of avoiding irreparable harm has in effect been defeated. A more rational approach would be for the Act to be rewritten to permit the utility to collect the higher rates subject to refund, with the appropriate bonding provisions. This would require legislative action since it would be an exception to the rule against retroactive ratemaking.

A stay for the ratepayer also poses a problem under existing law. If the consumer were successful in proving extortionate rates, he would be entitled to a stay that would return to the lower rates that were in effect prior to the latest increase. Here the utility would be entitled to a measure of protection if its customer did not prevail on the merits of his claim. A payment of the higher rates subject to refunding or impounding them is not

41. ILL. REV. STAT. ch. 111-2/3, §75 (1983).

provided for under the present Act.⁴² But even if it were, this would be small comfort to the consumer who would have to pay extortionate rates during the pendency of the litigation. The purpose of the stay would again be defeated.

A better approach would be to amend the Act to permit lower rates to be collected, but permit the utility at the same time to collect a retroactive surcharge in the event that the lower rates are not sustained on appeal. Such an alteration would also require legislative action, since it too would be contrary to the prohibition against retroactive recoupment.⁴³

Thus, to make the stay provision of the Public Utilities Act work effectively, it must be changed by the General Assembly. A narrow exception to the rule against retroactive ratemaking needs to be carved out to provide for refunds to a customer and surcharges for a utility if the rates collected during a stay are later found to be unreasonable. Such a change would be fair to both the utility and its customers and it could be accomplished with little disruption. Moreover, both the utility and its customers could rely on the fact that rates once fixed by the Commission would remain so, except in extraordinary circumstances. Yet when such extraordinary circumstances do arise, a judicial stay will be able to protect the interests of the utility or the consumer while the court determines if the rates are in fact just and reasonable.

WHAT HAPPENS WHEN A RATE ORDER IS REVERSED?

The previous section dealt with a preliminary stage of a court's review, a stay prior to a hearing on the merits. This section deals with the end of the case, where the court has found, for one reason or another, that the rate order should be reversed. In particular, the focus here is upon two questions. First, *when* do the new rates that stem from a court's reversal take effect? Second, *what effect* does an appeal to a higher court have on that reversal? As will be shown below, each of these questions is bound up with the rule against retroactive ratemak-

42. *Id.* The Act provides only for an impoundment of amounts paid in excess of the stayed order, i.e. when the utility obtains a stay. There is no provision to impound amounts set by the original order which are higher than the last rates. See *Columbus v. Public Util. Comm'n*, 170 Ohio St. 105, 163 N.E.2d 167 (1959). There, the court examined a statutory stay similar to the one in Illinois and found no provision to impound funds for the benefit of consumers during the pendency of the appeal. *Id.* at 109-10, 163 N.E.2d at 171.

43. See generally *Claridge Apartments Co. v. Commission of Internal Revenue*, 323 U.S. 141, 164 (1944) (to accord retroactive effect to legislation, even if permissible, requires "clearest mandate").

ing. Consequently, a brief detour examining the reasons for the rule and its workings is now in order.

A Digression on the Rule Against Retroactive Ratemaking

Understanding this rule requires a look back to the days before the rates of utilities and their counterparts, common carriers, were regulated by statute. At common law certain enterprises, most notably common carriers, were seen as owing a special duty to serve the public at large and to do so at reasonable rates.⁴⁴ A customer of such a common carrier who believed that the rates charged were not reasonable could institute a private action and recover damages for the amount in excess of reasonable rates.⁴⁵ Reparations would then be awarded to the customer in much the same way as the usual breach of contract action.⁴⁶

The advent of government regulation of rates for common carriers and utilities changed the nature of rate setting altogether. Where formerly the carrier or utility set its own rates subject to a private right of action for excessive rates, now either the legislature itself or an administrative agency assumes the burden of declaring what are reasonable rates.⁴⁷ The government, acting as a disinterested third party, placed its imprima-

44. See *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 383 (1932); see also *W. JONES, CASES AND MATERIALS ON REGULATED INDUSTRIES* 23 (2d ed. 1976).

45. See *Arizona Grocery*, 284 U.S. at 383.

Reparations for unreasonable utility rates may still be had under Illinois law. See ILL. REV. STAT. ch. 111-2/3, §76 (1983). This is because rates may be set in one of two ways. First, a utility may propose rates and the Commission may suspend them. The Commission will then conduct an investigation and after that set new rates. The "Commission-made" rates involve a statutory determination that rates are just and reasonable. See ILL. REV. STAT. ch. 111-2/3, §36 (1983). By setting rates itself the Commission exercises its legislative powers and hence relief from such an order is prospective only. There are no refunds. See text accompanying notes 41-55.

Rates may be also set by the utility or carrier itself. Here the utility proposes its rates, and the Commission rather than suspending them, permits them to go into effect by operation of law. ILL. REV. STAT. ch. 111-2/3, §36 (1983). There is no legal impediment to the Commission letting proposed rates go into effect automatically in this manner. See *Antioch Milling Co. v. Public Serv. Co.*, 4 Ill. 2d 200, 209, 123 N.E.2d 302, 305-06 (1954). These "utility-made" rates may then be challenged as unreasonable when a customer files a complaint with the Commission. The Commission, in passing upon such complaints, then acts in a quasi-judicial capacity and reparations may be had from such a determination. See ILL. REV. STAT. ch. 111-2/3, §76 (1983).

46. *Id.* at 383; see also *JONES, supra* note 4, at 23.

47. See *Arizona Grocery*, 284 U.S. at 386-88; see also *Cummings v. Commonwealth Edison Co.*, 64 Ill. App. 2d 320, 325, 213 N.E.2d 18, 21 (1965) (common law right to recover funds for unreasonable rates superseded by Public Utilities Act).

tur of propriety on the rates to be charged. Because the government acted in its legislative capacity to set rates, the long-standing principle that legislation acts prospectively, not retroactively, was attached to the rate setting function. As stated by Justice Oliver Wendell Holmes, Jr. in *Prentis v. Atlantic Coast Line Co.*:⁴⁸

Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind. . . .⁴⁹

Hence, the idea that rate-making is legislative in nature and thus has only prospective application is the foundation for the prohibition against retroactive rate changes.

The rule against retroactive rate-making was first enunciated in Illinois by the supreme court in *Mandel Bros, Inc. v. Chicago Tunnel Terminal Co.*⁵⁰ In *Mandel Bros.*, a shipper successfully challenged a rate order as being too high. The shipper then sought reparations for the difference between the old rates found excessive and the new lower rates. The court denied the shipper's claim for a retroactive recoupment and held that the rate set by the Commission was in fact the lawful rate until such time as it was overturned upon judicial review.⁵¹ The shipper could therefore look forward only to a prospective change in rates.⁵²

In reaching this conclusion, the court focused on the distinction between rates set by a carrier itself and those set by a regulatory body. The court found that the Commission set rate was legislative in nature and required only a prospective application.⁵³ The Commission set rates were the only lawful rates and remained such until overturned or stayed by a court. Thus, *Mandel Bros.* established the simple, yet sometimes vexing principle that there are no refunds if a rate order is reversed.

A number of states also follow this rule against retrospective rate changes.⁵⁴ Others, however, appear not to. A brief review of the decisions that run counter to the rule deserve some examination. In *Mountain States Telephone and Telegraph Co.*

48. 211 U.S. 210 (1908).

49. *Id.* at 226.

50. 2 Ill. 2d 205, 117 N.E.2d 774 (1954).

51. *Id.* at 211, 117 N.E.2d at 776-77.

52. *Id.* at 208-12, 117 N.E.2d at 775-77.

53. *Id.* at 210, 117 N.E.2d at 776; *see also supra*, note 42.

54. *See, e.g.*, *New England Tel. Co. v. Public Util. Comm'n*, 116 R.I. 356, 387-89, 358 A.2d 1, 21-22 (1976); *Foshee v. General Tel. Co.*, 295 Ala. 70, 72, 322 So.2d 715, 717 (1975); *Straube v. Bowling Green Gas Co.*, 360 Mo. 132, 142, 227 S.W.2d 666, 671 (1950).

*v. Public Utilities Comm'n*⁵⁵ the Supreme Court of Colorado reached a result directly contrary to the rule in *Mandel Bros.* In *Mountain States* a rate order was overturned by a court as excessive.⁵⁶ The state utility commission then ordered a refund of the amounts collected in excess of the unlawful amount for the period during which they were in effect. The utility argued that the commission had no authority to order such refunds. The court rejected this claim and held that while a regulatory commission may not change rates on its own initiative, a judicial determination that rates are improper would require a change of rates retroactively.⁵⁷ Another decision, from the New Hampshire Supreme Court in *Appeal of Granite State Electric*⁵⁸ makes explicit what appears to be implicit in the *Mountain States* case, namely, that rates set by a regulatory body are really only tentative when appealed and can only become final at the end of judicial review.⁵⁹

These decisions, contrary to the rule of *Mandel Bros.*, apparently stem from a notion that for a utility to keep rates later adjudged unlawful constitutes an unjust enrichment which must be disgorged through refunds. This thinking, at first, seems to have a certain appeal. But abrogating the rule against retroactive recovery cuts both ways. Not only does it permit refunds for the consumer, but it also makes way for the utility to recover surcharges when it prevails.

Moreover, the cases that permit retroactive recovery do not fully take account of the unique position that the utility and its customer share in the matter of setting rates. These cases apparently treat the utility's relationship with its customer as a matter of contract. But as mentioned above, this relationship is not a matter of contract at all, but rather involves a statutory obligation to render service to all who seek it in exchange for a legislative determination of "just and reasonable" rates. Therefore, the principles of unjust enrichment and restitution that inhere in contract law simply do not apply to the setting of utility rates.⁶⁰

55. 180 Colo. 76, 502 P.2d 945 (1974).

56. *Id.* at 77, 502 P.2d at 946.

57. *Id.* at 82-83, 502 P.2d at 949.

58. *Appeal of Granite State Elec. Co.*, 120 N.H. 536, 421 A.2d 121 (1980).

59. 120 N.H. at 538-39, 421 A.2d at 122-23. *See also* *Northwestern Bell Tel. Co. v. Minnesota*, 299 Minn. 1, 216 N.W.2d 841 (1974); *Pennwalt Corp. v. Public Serv. Comm'n*, 109 Mich. App. 542, 545-46, 311 N.W.2d 423, 425 (1981).

60. In *Foshee v. General Tel. Co.*, 295 Ala. 70, 322 So.2d 715 (1975), the court explained that the theory of unjust enrichment does not apply to the setting of utility rates:

The essence of the theories of unjust enrichment or money had and received is that facts can be proved which show that defendant holds

Finally, it should be asked whether the rule against retroactive rate changes makes sense from a practical point of view. That is, is it justified aside from the legal principle that ratemaking is legislative? For if it does not serve a purpose apart from this legal justification, then the General Assembly may just as well cut the Gordian Knot of problems associated with it and simply repeal it legislatively.

In response to this question it should be stressed that the rule does indeed serve a purpose; that of stability in the rate-setting process. This stability stems from the fact that the rule mandates that once a rate has been set by the Commission, any interested party, the utility, the consumer and the investor, can rely on this as the lawful charge.⁶¹ They are assured that a certain level of rates will remain constant in the future, without the prospect that they will be jarred by the payment of refunds or surcharges for the many months a rate order was in litigation. And thus, while the rule against retroactive ratemaking prevents the palpable satisfaction of refunds or surcharges, it does nonetheless, yield a dividend of more enduring quality: a more predictable, stable rate-setting process. For this reason the rule is worth keeping.

What Rates Should Be Charged If the Court Reverses?

Assuming the rule against retrospective rate changes remains intact, what is the immediate effect of a court's reversal of a rate order? In other words, should the new rates, either lower

money which in equity and good conscience belongs to plaintiff or was improperly paid to the defendant because of mistake or fraud [citations omitted]

[The statute] establishes that there can be but one lawful rate. Moreover under these statutes a regulated public utility can charge *only* the rate established by the [commission]. Until the [commission] on remand modified their rate schedule pursuant to order of the circuit court, [the utility] could charge and collect no other rate except that established by the [commission] Hence it is clear that [the utility] is under no legal or equitable obligation to refund any money to their subscribers since it did only what it was required to do by statute.

Id. at 72, 322 So.2d at 717.

See *Straube v. Bowling Green Gas Co.*, 360 Mo. 132, 142, 227 S.W.2d 666, 671 (1950).

61. As one commentator has stated:

In situations in which it applies, the doctrine of the retroactive sanctity of a rate approved by a commission or prescribed by a legislature works both ways: it allows both patron and utility to rely upon such a rate without fear that it may be retroactively upset and made the basis of a reparation award. On this point the law seems clear, both under the federal system and under the usual state system.

Hardman, *Administrative Finality in Claims for Overcharges*, 51 W. VA. L.Q. 77, 87 (1948).

or higher, become effective as of the date of the reversal or as of some later date? Here it is best to begin with the restrictions under which the reviewing court must operate. When a rate order is reversed, it must also be remanded to the Commission in order for it to set new rates.⁶² The reason for this arises from the principle that a court reviewing a rate order does not conduct a trial *de novo*, but rather limits itself to an inquiry as to whether the order is supported by the manifest weight of the evidence or is contrary to some rule of law.⁶³ Thus, while a court may decide that based on the evidence or a rule of law that the Commission erred and a rate should be increased or decreased, it is not in a position to pin-point exactly what the new rate should be. This is a task for the expertise of the Commission and hence there has developed the inveterate rule that courts do not make rates.⁶⁴

Since a court cannot set a specific rate, but can only reverse and order the Commission to do so, the question still remains as to *when* this new rate should take effect. Unfortunately, in Illinois there is no definitive answer to this question. A review of other jurisdictions reveals a split of authority. A decision of the California Supreme Court, *City of Los Angeles v. Public Utilities Comm'n*,⁶⁵ indicated that a court's reversal would nullify a rate immediately, and the utility's prior rates would then spring into effect.⁶⁶ On the other hand, in *Cleveland Electric Illuminating Co. v. Public Utilities Comm'n*,⁶⁷ the Ohio Supreme Court took the contrary position that, upon reversal, rates remain in effect until redetermined on remand to the Commission.⁶⁸

A comparison of these two decisions demonstrates that the Ohio court provides the better rule. A concrete illustration shows why. Consider a hypothetical rate case before the Commission. The utility asks to raise its rates on an annual basis by \$200 million and the Commission grants \$100 million of that request. The Commission's decision is then appealed to the circuit court. The court finds an error on an issue that would lower rates by what the Commission would determine on remand to

62. See *Peoples Gas Light & Coke Co. v. City of Chicago*, 309 Ill. 40, 42-43, 309 N.E. 867, 868 (1923).

63. *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 55 Ill. 2d 461, 469, 303 N.E.2d 364, 369 (1973); *Village of Apple River v. Illinois Commerce Comm'n*, 18 Ill. 2d 518, 523, 165 N.E.2d 329, 331 (1960).

64. *Illinois Cent. R.R. Co. v. Illinois Commerce Comm'n*, 387 Ill. 256, 275-76, 56 N.E.2d 432, 441 (1944), *appeal dismissed*, 324 U.S. 823 (1945) (even though court holds that rates are unlawful, it cannot make new rates).

65. 7 Cal. 3d 331, 497 P.2d 785, 102 Cal. Rptr. 313 (1972).

66. *Id.* at 353-54, 497 P.2d at 801-02, 102 Cal. Rptr. 329-30.

67. 46 Ohio St. 2d 105, 346 N.E.2d 778 (1976).

68. *Id.* at 116-18, 346 N.E.2d at 786.

be \$5 million a year. Under the California rule the entire rate award is void at the moment of reversal causing the utility's rates to plunge by \$100 million in the "interim" until the commission sets new permanent rates. The California court suggests that the utility could petition for temporary rates during this interim period,⁶⁹ but this ignores the fact that consideration of such a petition could itself take a good deal of time.

The California rule also does not take into account the opposite situation where the utility prevails. Continuing with this hypothetical rate case, suppose instead that the court finds an error that would *raise* rates by \$5 million a year. Under the California rule the entire rate order is void, but what rates would now go into effect? It would be nonsensical to have still lower rates go into effect when the court has ruled that they should be raised. Probably the only logical solution would be for the company's requested rates to go into effect. Thus, rates would jump to the \$200 million originally requested in the interim period. Here again, it is questionable whether some sort of temporary rates would be a practical way to avoid this result, given the fact that they could not be implemented simultaneously with the court's reversal.

Finally, consider the not unlikely situation where the court reverses on two separate grounds: it finds error on one issue that would raise rates and on another that would lower them. Here the California rule breaks down altogether. The rate order cannot be voided and have both the prior lower rates and the company's requested higher rates placed into effect at the same time. Only a flip of the coin could then decide what rates should be charged during the interim between the reversal and the setting of new rates on remand. Therefore, while the California rule may have a certain appeal, it nevertheless spawns so many problems in its wake as to be unworkable as a general rule.

The Ohio decision in *Cleveland Electric* avoids these problems. Under the Ohio rule, the reversal of a rate order in favor of a utility, its customer, or both, sets aside the order, but keeps the present rates in effect until new rates are set on remand to the Commission.⁷⁰ This provides for an orderly transition from one rate level to another without the difficult or unreasonable problems of what rates should be charged in the interim.⁷¹

69. 7 Cal. 3d at 354, 497 P.2d at 802, 102 Cal. Rptr. at 330.

70. See 46 Ohio St. 2d at 115-18, 346 N.E.2d at 784-86.

71. While there has been no judicial determination in Illinois as to what rule should apply, the Commission itself has adopted the Ohio rule. See Commission Docket No. 56831, Order of November 17, 1982.

A Proposal for Reform: Making the Transition From One Rate to Another More Efficient

The Ohio rule though manageable, is still not ideal. The problem with the rule is the lag between the time the court reverses a rate order and the time a new rate is set on remand. The concurring opinion in *Cleveland Electric* recognized this problem by noting:

In [a prior decision], as heretofore noted, only ten days elapsed between this court's mandate and the responding [utility commission's] order. Eighteen years later [in 1975], as illustrated [in a later case], the period of time between this court's mandate and the agency order had ballooned to 85 days.⁷²

Thus, a degree of uncertainty arises as to when the Commission will set new rates on remand since this remains totally within its discretion.

Fortunately, however, a relatively simple statutory remedy exists. The uncertainty of when new rates will be set could end with legislation that would enact the Ohio rule, and at the same time set a specific time period, say 30 days, in which the Commission would be required to set rates on remand. Such legislation would implement the orderly process of the Ohio rule while also ensuring that new rates would be set with dispatch.

What Happens to the Court's Reversal If Appealed?

The previous section assumed a situation where a rate order was reversed and no appeal was taken. When the lower court's reversal is appealed, yet another layer of puzzling complications is added to the subject of rates pending review. An analysis of this issue may be broken down into three questions: (1) *Can* the lower court's reversal be stayed; (2) *should* it be stayed; and (3) *how* or under what conditions should it be stayed?⁷³

Turning to the first question, *can* the lower court's reversal be stayed, Illinois Appellate Court in *Illinois Consolidated Telephone Co. v. Aircall Communications, Inc.*⁷⁴ answered in the affirmative. In *Illinois Consolidated* the court explained that the stay provision of the Public Utilities Act discussed above,⁷⁵ re-

72. 46 Ohio St. 2d at 122, 346 N.E.2d at 788 (Herbert, J., concurring).

73. After review in the circuit court an appeal may be taken to the appellate court. ILL. REV. STAT. ch. 111-2/3, §73 (1983). From the appellate court leave to appeal may be had to the Supreme Court of Illinois. Thereafter, if a constitutional issue were raised, review could be sought in the United States Supreme Court.

74. 101 Ill. App. 3d 767, 428 N.E.2d 747 (1981).

75. See *supra* text accompanying notes 8-10. The stay provision referred to is at ILL. REV. STAT. ch. 111-2/3, §75 (1983).

lates only to a stay of a commission order pending appeal.⁷⁶ Once the circuit court has entered an order, a stay of this ruling is then possible only under the terms of Supreme Court Rule 305(b).⁷⁷ And, unlike the Public Utilities Act, Rule 305(b) has no requirement that a party seeking a stay must make a showing of great or irreparable injury. Rather, Rule 305(b) provides that the order of the circuit court may be stayed pending appeal in the discretion of either the circuit or appellate courts with the filing of the appropriate bond.⁷⁸ Though not expressly addressed in *Illinois Consolidated*, it would follow from its reasoning that any reversal of a rate order by a higher court could be stayed pursuant to Supreme Court Rule 368, which governs stays when review is sought in the Illinois or United States Supreme Court.⁷⁹

Having established that a lower court's reversal of a rate order may be stayed, the next question is whether it *should* be stayed. In this regard, it is evident that the reversal of a rate order may result in a dramatic change in rates, up or down, involving millions of dollars. Therefore, a sound exercise of the court's discretion would argue in favor of a stay to preserve the status quo pending appeal to a higher court. Yet the issuance of such a stay brings with it a number of problems. Once again, these can best be examined by tracking a hypothetical case.

Consider first the case where a rate order is reversed and that reversal is stayed. No problem would arise if the lower court's reversal is overturned by the court of last resort and the rate order affirmed; the status quo has been preserved and later vindicated.

A problem arises, however, when the circuit court's reversal is stayed, and then later affirmed. In such an instance, because of the rule against retroactive ratemaking, the party who succeeded in reversing the rate order in the circuit court will not have had the benefit of any change in rates from the time of the first reversal until many months or even years later when the judgment is finally affirmed. Moreover, there is a good possibility that in the same interim period, the utility will have been granted another rate increase before the decision from the court of last resort. Such a later rate decision would render the litigation moot and leave those who succeeded in the lower court with nothing to show for their victory.

76. 101 Ill. App. 3d at 769-70, 428 N.E.2d at 750.

77. ILL. REV. STAT. ch. 110A, § 305(b) (1983).

78. *Id.* The filing of a bond is not required of a public agency. ILL. REV. STAT. ch. 110A, § 305(g) (1983).

79. ILL. REV. STAT. ch. 110A, § 368 (1983).

But wait, the reader of the above portions of this article will ask, is not such a result merely part and parcel of the rule against retroactive ratemaking which bars any refunds or surcharges? A closer look reveals the answer is no. This is so because the rule makes sense only from the standpoint of protecting expectations that flow from a legislative (commission-made) determination of rates. These are rates that are set by the expert body and are accorded a presumption of validity by law.⁸⁰

On the other hand, rates determined on remand from a circuit court reversal are set pursuant to a judicial decision. Such a decision may in the final analysis be correct, but it is not the decision of the expert body, and hence is given no presumption of validity. Since the rule against retrospective rate changes grows out of the distinction between legislative and judicial decisions, rates set as a result of a judicial order rather than a legislative one should not be limited by the rule and its requirement that rates be altered only prospectively. If the higher court affirms the lower court's reversal, then rates should be adjusted by either refunds or surcharges.⁸¹

Hence, the lower court's reversal should be stayed, but only if the court makes a provision for retroactive recoupment should its order be overturned by a higher court.⁸² Such a provision for retroactive adjustments may take a variety of forms. The appealing party may be required to post a bond,⁸³ or the court may require that no stay of its reversal will issue unless temporary rates subject to refund or surcharge are set by the

80. See *supra* text accompanying notes 14-15.

81. This distinction between rates set by the Commission's legislative authority and those set pursuant to a judicial order may be viewed as part of a time line:

Legislative (Commission) Determination: No Refunds or Surcharges		Rates Set Pursuant to Judicial Order: Refunds or Surcharges Should Be Permitted	
Commission issues rate order	Appeal of rate order to circuit court	Reversal of rate order	Reversal or affirmance by highest court

82. ILL. REV. STAT. ch. 110A, § 305(b)(3) (1983). The pertinent language provides that the stay of the court's decision "shall be conditioned upon such terms as are just." *Id.*

83. In *Alton Brick Co. v. Alton Water Co.*, 42 Ill. App. 2d 451, 192 N.E.2d 599 (1958) the circuit court reversed the Commission's rate award. An appeal was taken and the utility posted a bond to stay the effect of the reversal. *Id.* at 453-54, 192 N.E.2d at 600.

Commission.⁸⁴

Yet, while the lower court may condition its stay upon the later availability of refunds or surcharges, this is nevertheless, another area where legislative action is needed to add clarity and guidance. At present, there is judicial authority for the Commission to set temporary rates.⁸⁵ But since there is no express statutory authority for this, it has nonetheless been challenged.⁸⁶ The legislature could make such a power to set temporary rates beyond question and thereby provide a clear, simple mechanism to deal with a court reversal of a rate order. Such a statutory authorization to provide for retroactive recoupment after a rate order is set aside would go a long way toward providing rate case litigants an assurance that their interests can be protected during what may be protracted appeals.

Such a statutory authorization would also help strike a balance. This balance would preserve the rule against retroactive ratemaking and the stability it affords for the limited time for which it was intended: from the issuance of the legislative rate order until such time as it is judicially overturned. At the same time, the rule would not be extended to rates that are set in accordance with a judicial decision where its application is more difficult to justify.

CONCLUSION

Rising utility bills have brought a storm of controversy in recent years. This has been reflected in calls for legislative reform in a variety of areas such as the creation of a statewide Citizens Utility Board to represent residential customers in rate

84. Recently, in *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, No. 83 C 4829 (N.D. Ill. 1983), the company obtained a preliminary injunction against the Commission's suspension of proposed higher rates. The Company was then permitted to place its higher rates into effect subject to refund if it did not prevail on the merits. But these rates were set pursuant to a court order, not the Commission's legislative determination that they were just and reasonable. *Id.*

85. *Peoples Gas Light & Coke Co. v. Slattery*, 373 Ill. 31, 42, 25 N.E.2d 482, 489 (1939); *Hoyne v. Chicago & Oak Park Elevated R.R. Co.*, 294 Ill. 413, 423, 128 N.E. 587, 591 (1920); *Chicago Rys. Co. v. City of Chicago*, 292 Ill. 190, 202, 126 N.E. 585, 590 (1920).

86. In the appeal of the 1982 Commonwealth Edison Company rate order, *City of Chicago v. Illinois Commerce Comm'n*, No. 83 L. 50204 (Cir. Ct. Cook County 1983), South Austin Coalition Community Council challenged the Commission's authority to set interim rates. The court, with the Honorable James C. Murray presiding, upheld that authority, but also noted that the authority to fix interim rates ought to be fixed by legislative or administrative rule. *Id.* at 12.

cases⁸⁷ and a phase-out of construction costs for future plants.⁸⁸ While the issue of what rates should be charged pending judicial review has not and is unlikely to ever generate many headlines, it is, nonetheless, an area that cries out for reform.

In the coming years, petitions for rate increases will continue to be a regular part of the Commission's business. These rate cases will undoubtedly result in litigation. The courts will have their hands full merely deciding the merits of these cases without expending time and effort untangling the procedural quandaries produced by rates pending review.

This article has provided several recommendations to clear away the present state of confusion. There may be other approaches which also deserve attention. The critical point is, however, that anything that will help make the process more simple, more stable and more definite would be a constructive change. The courts, the utilities and their customers would all be well served if the legislature would act to resolve the confusing state of utility rates pending judicial review.

87. Public Act 83-945 (*codified at* ILL. REV. STAT. ch. 111-2/3, §§901-21 (1983)) creating a Citizens Utility Board was signed by Governor James R. Thompson on September 20, 1983.

88. P.A. 83-945 (*codified at* ILL. REV. STAT. ch. 111-2/3, §36.3 (1983)) also contains a provision to phase-out construction costs for future plants in current rates.

