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Extending the Limits of Judicial Review of Regulatory Orders: *Committee of Consumer Services v. Public Service Commission*

The scope of judicial review for regulatory orders issued by the Utah Public Service Commission (commission) is very narrow. Utah statutory and case law direct the state supreme court to reverse a commission order only if it is not supported by evidence and is thus arbitrary and capricious.[1] Moreover, the court should not substitute its judgment for that of the commission even if it considers the commission's action to be unwise.[2] How-

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1. The Utah Code Annotated provides for judicial review of the commission's orders as follows:

> The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of Utah. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review. Such question of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

UTAH CODE ANN. § 54-7-16 (1953). This statute has been extensively interpreted; representative of the case law on the subject is Lewis v. Wycoff Co., 18 Utah 2d 255, 420 P.2d 264 (1966), wherein the court stated:

> Due to the responsibility imposed upon the Commission, and its presumed knowledge and expertise in this field, its findings and order are supported by certain well-recognized rules of review: They are endowed with a presumption of validity and correctness; and the burden is upon the plaintiff to show that they are in error. We survey the evidence in the light most favorable to sustaining them; and we will not reverse unless there is no reasonable basis therein to support them so that it appears that the Commission's action was capricious and arbitrary.

Id. at 259, 420 P.2d at 266 (footnote omitted). *See also* Utah State Bd. of Regents v. Utah Pub. Serv. Comm'n, 583 P.2d 609 (Utah 1978); Greyhound Lines, Inc. v. Public Serv. Comm'n, 547 P.2d 199 (Utah 1976); Williams v. Public Serv. Comm'n, 29 Utah 2d 9, 504 P.2d 34 (1972); Fuller-Toponce Truck Co. v. Public Serv. Comm'n, 99 Utah 28, 96 P.2d 722 (1939). Many other jurisdictions have a similar standard of judicial review for regulatory orders. *See, e.g.*, Northwest Elec. Co. v. Federal Power Comm'n, 321 U.S. 119 (1944); D.C. Transit Sys., Inc. v. Public Util. Comm'n, 292 F.2d 734 (D.C. Cir. 1961); Village of Maywood v. Illinois Commerce Comm'n, 23 Ill. 2d 447, 178 N.E.2d 345 (1961); Almeida Bus Lines, Inc. v. Department of Pub. Util., 348 Mass. 331, 203 N.E.2d 556 (1965); Corporation Comm'n v. Union Oil Co. of Cal., 591 P.2d 711 (Okla. 1979).

2. PBI Freight Serv. v. Public Serv. Comm'n, 598 P.2d 1352 (Utah 1979); Utah Parks Co. v. Kent Frost Canyonland Tours, 19 Utah 2d 252, 430 P.2d 171 (1967); Lewis v. Wycoff Co., 18 Utah 2d 255, 420 P.2d 264 (1966). *See also* American Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936); Giles Lowery Stockyards, Inc. v. Department of

ever, in *Committee of Consumer Services v. Public Service Commission*[3] *(Wexpro)*, the Utah Supreme Court reversed a Utah Public Service Commission order[4] that would have allowed Mountain Fuel Supply Company, a natural gas utility, to transfer its non-utility oil assets to Wexpro Company, a wholly owned subsidiary.[5] This transfer would have placed those assets outside the reach of utility consumers for purposes of determining gas rates.

In 1935, five companies merged to form Mountain Fuel Supply Company. Four of these companies produced gas and one produced oil.[6] From its inception Mountain Fuel maintained its oil properties in a separate, non-utility account.[7] The commission approved this accounting procedure and repeatedly ruled that it did not have jurisdiction over these non-utility accounts.[8] Producing wells were determined to be either utility or non-utility assets through Mountain Fuel's classification system. When a producing well was discovered, this system calculated the market value of both oil and gas at the wellhead to determine whether the well was predominantly gas or predominantly oil. After this determination was made, the well was capitalized as a utility asset if predominantly gas or as a non-utility asset if predominantly oil.[9] If the well turned out to be a dry hole, the

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Agriculture, 565 F.2d 321 (5th Cir. 1977), *cert. denied*, 436 U.S. 957 (1977).

3. 595 P.2d 871 (Utah 1979), *cert. denied*, 444 U.S. 1014 (1980). This case is popularly known as *Wexpro*.

4. Utah P.S.C. Case No. 76-057-14 (April 11, 1978).

5. 595 P.2d at 873.

6. *Id.* at 881 (Wilkins, J., dissenting).

> Essentially gas was categorized as that hydrocarbon product which was capable, after contaminants and liquids were removed, of being placed in a natural gas pipeline for transmission and distribution. Oil was defined as all other hydrocarbon products which before or after treatment were, under industry standards, normally sold and transferred in a container or tank and delivered to a refinery.

Id.

7. *See* Prefiled Testimony and Exhibits of Mountain Fuel Supply Company and Wexpro Company, Testimony of J. Crawford, Jr., Utah P.S.C. Case No. 76-057-14 (April 11, 1978) (on remand before the Utah Public Service Commission). If these assets had been placed in a utility account, they would have been included in the ratebase, thus lowering the consumer's cost of natural gas.

8. Utah P.S.C. Case No. 6369 (Feb. 17, 1972); Utah P.S.C. Case No. 5907 (July 16, 1968); Utah P.S.C. Case No. 4392 (Feb. 21, 1957); Utah P.S.C. Case No. 3972 (Nov. 24, 1953); Utah P.S.C. Case No. 3275 (June 30, 1948). Utility assets are subject to regulations promulgated by the commission. 595 P.2d at 881.

9. Utah P.S.C. Case No. 76-057-14 at 14.

When a well was capitalized, none of the costs associated with its development were

drilling costs were fully expensed in the year incurred.[10] These expenses, along with delay rentals and abandoned leases, were included in the ratebase[11] and thereby charged to gas consumers. The commission, in three separate orders, allowed these expenses to be so included. However, this inclusion was conditional; the commission stated that it would allow the rate payers to be charged these exploration expenses only as long as the cost of gas resulting from Mountain Fuel's exploration program was less expensive than purchases from outside producers.[12]

Before 1972 the non-utility oil revenues were relatively insignificant in comparison to the natural gas revenues.[13] However, major oil discoveries by Mountain Fuel in 1972 coupled with 1973 OPEC price jumps greatly increased the significance of oil revenues.[14] This increase prompted consumer groups to seek the inclusion of non-utility oil revenues in the utility ratemaking process.[15] Such an inclusion would have significantly reduced the price of natural gas for consumers. The commission refused to include the oil revenues in the ratebase until January 14, 1974, when it ordered that the oil properties be "rolled in."[16] Because this order would result in a smaller return on their investments, Mountain Fuel shareholders began a massive dumping of stock,

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charged directly to an expense account. Rather, these costs were applied to an asset account and depreciated over the life of the asset. 595 P.2d at 876.

10. Generally accepted accounting principles in the area of oil and gas exploration require costs associated with unsuccessful wells to be treated as an expense item rather than a capital item.

11. 595 P.2d at 875. Most of the exploration expenses were charged to the ratebase until 1972 when the commission required the non-utility account to contribute $300,000 of the annual exploration expense. Utah P.S.C. Case No. 6369 (Feb. 17, 1972). In 1974 this amount was increased to 32.88% of the total expense. Utah P.S.C. Case No. 6668 (Jan. 21, 1974). In 1975 the non-utility share was increased to 50% of the total. Utah P.S.C. Case No. 7113 (Aug. 15, 1975). No petitions for commission rehearing or judicial review were filed on any of these orders. 595 P.2d at 883 (Wilkins, J., dissenting).

12. Utah P.S.C. Case No. 76-057-14 (April 11, 1978); Utah P.S.C. Case No. 5907 (July 16, 1968); Utah P.S.C. Case No. 4797 (Feb. 17, 1960). In the 1968 case, the commission said that a "vigorous exploration and development program should be continued so long as the costs incurred in developing new supplies of gas are lower than the average cost of purchased gas." Utah P.S.C. Case No. 5907 at 8. These orders were not appealed and therefore became final. UTAH CODE ANN. § 54-7-16 (1953). Final orders are not subject to collateral attack. UTAH CODE ANN. § 54-7-14 (1953).

13. 595 P.2d at 882 (Wilkins J., dissenting).

14. *Id.*

15. For an explanation of the rate-making process, see L. NASH, PUBLIC UTILITIES (1933); R. WHITTEN, PUBLIC UTILITIES (1912); Fenton & Stone, *Cost Allocations and Rate Structure: Concepts and Misconceptions*, 106 PUB. UTIL. FORT. 15 (1980).

16. Utah P.S.C. Case No. 6668 (Jan. 14, 1974).

causing the New York Stock Exchange to suspend trading in the company's stock.[17] On January 21, 1974, the commission held that it would not enforce its January 14 order requiring the "roll in" of oil revenues.[18] However, the commission left its earlier findings intact; thus, the future status of the oil assets remained uncertain.[19] This uncertainty caused considerable insecurity and unrest among shareholders and compelled Mountain Fuel to attempt to transfer its non-utility accounts and assets to a wholly owned subsidiary, Wexpro Company.[20] Consumer groups vigorously opposed this transfer because it would place the oil revenues permanently beyond their grasp. In spite of this opposition, the commission reversed its January 14 order[21] and held that the transfer of non-utility assets to Wexpro was not within its jurisdiction. The crux of the jurisdictional question was Mountain Fuel's oil and gas classification system, which classified Wexpro's assets as non-utility. The commission explicitly upheld this system, and therefore concluded that it did not have jurisdiction.[22]

On appeal the Utah Supreme Court reversed. Writing for the majority, Justice Maughan espoused two theories that granted the commission jurisdiction over Mountain Fuel's oil assets. The first theory rests on a construction of the statute granting the commission jurisdiction to regulate certain activities and industries. Justice Maughan quoted part of a Utah statute which defines a public utility[23] as follows:

> [W]hen any person or corporation performs any such service for or delivers any such commodity to any public utility herein

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17. 595 P.2d at 883 (Wilkins, J., dissenting).

18. Utah P.S.C. Case No. 6668 (Jan. 21, 1974).

19. 595 P.2d at 883 (Wilkins, J., dissenting).

20. Justice Wilkins related the following facts:

> Regulatory jurisdiction over the non-utility operations has continued to be at issue in every Mountain Fuel rate case since 1974. This has resulted in substantial shareholder unrest as well as uncertainty in the capital markets. Early in 1976, some Mountain Fuel shareholders waged a proxy battle for control of the company, the central issue of which was the continued attack on the non-utility properties. The Commission in this case heard testimony that Mountain Fuel was unable to market a $20,000,000 common equity issuance of stock because of this uncertainty, and that Wexpro has also been unable to engage in capital financing.

Id. at 884.

21. Utah P.S.C. Case No. 76-057-14 (April 11, 1978). *See also* 595 P.2d at 883-84 (Wilkins J., dissenting).

22. Utah P.S.C. Case No. 76-057-14 at 78-80. *See also* 595 P.2d at 873.

23. 595 P.2d at 878 n.7.

> defined, such person or corporation, and each thereof, is hereby declared to be a public utility and to be subject to the jurisdiction and regulation of the commission and to the provisions of this title.[24]

Relying on this exception, the majority reasoned that because Wexpro was performing activities facilitating natural gas production, it must be a utility whose oil assets would be subject to the commission's jurisdiction.[25] However, in so holding the majority completely ignored the part of the statute that renders their argument incorrect. The above quoted definition of a public utility is immediately followed by this qualifying language:

> Any corporation or person not engaged in business exclusively as a public utility as hereinbefore defined shall be governed by the provisions of this title in respect only to the public utility or public utilities owned, controlled, operated or managed by it or by him, and not in respect to any other business or pursuit.[26]

The Wexpro functions classified by the commission as non-utility should fall within this qualification and thus be exempt from the commission's jurisdiction.

The second theory relied upon by the majority was that Mountain Fuel's classification system was premised on an erroneous assumption: that there was no connection between exploraton expenses included in the ratebase and the ensuing benefits from the exploration program.[27] Hence, the majority espoused a classification system based upon the theory that capital gain follows capital risk.[28] This theory was set forth in *Democratic Central Committee v. Washington Metropolitan Area Transit Commission (Central).*[29] In essence, the majority in *Wexpro* found that the risk of exploring for oil and gas is the risk of not finding oil and gas, *i.e.*, finding dry holes. Because the ratepayers had paid the expense for all dry holes, they had borne the risk of Mountain Fuel's exploration program. After reaching this conclusion the court applied the theory of gain follows risk, reasoning that because the ratepayers had borne the

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24. UTAH CODE ANN. § 54-2-1(30) (1953).
25. 595 P.2d at 878.
26. UTAH CODE ANN. § 54-2-1(30) (1953).
27. 595 P.2d at 873.
28. *Id.* at 874, 876-80. *See also id.* at 885-87, 893 (Wilkins, J., dissenting).
29. 485 F.2d 786 (D.C. Cir. 1973).

risk, they were entitled to any ensuing benefit.[30] That benefit in this instance was the right to have the oil revenues previously classified as non-utility included in the utility ratebase. The court then remanded the case to the commission with guidelines so explicit that the reclassification of the oil assets as utility property was assured.[31]

Justice Wilkins, in a vigorous dissent, argued that the majority had exceeded its authority to review commission orders.[32] He set forth evidence supporting the order, including evidence that Mountain Fuel's exploration program had produced large quantities of low cost-of-service gas[33] resulting in one of the lowest gas rates in the country.[34] In addition, he showed evidence of shareholder unrest and the need for Mountain Fuel to maintain its ability to effectively raise capital.[35] He then inferred from the evidence that the order was neither arbitrary nor capricious, and that both statute[36] and precedent[37] required its

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30. 595 P.2d at 876-80.

31. The majority held that if any one of the following questions was answered affirmatively, the assets were to be considered utility property:

> (1) Was the property, while undeveloped, held in the utility capital account . . . upon which a rate of return was paid by the ratepayers?
>
> (2) Were any funds from the utility exploration and development expense accounts . . . applied to the development of the acreage?
>
> (3) Has any natural gas or natural gas liquids been produced from the acreage?

Id. at 878. Justice Wilkins, in his dissenting opinion, referred to these three questions as follows:

> What alarms me, inter alia, is that the Court today has actually determined, I believe, that the transferred property is utility property, notwithstanding its decision to remand this case for an evidentiary hearing at which criteria for classification, in the form of three questions are to be employed. Just a facial reading of the majority opinion with these listed criteria and the undisputed evidence in this case convince me that the Court has determined today, without further hearing, that the subject property is utility. Why then, I ask, even though I think the Court is in error, prolong the judicial process by requiring that further hearing.

Id. at 890-91 (Wilkins, J., dissenting).

32. *Id.* at 883-85.

33. *Id.* at 882.

34. *Id.* at 887.

35. *Id.* at 884.

36. Justice Wilkins cited UTAH CODE ANN. § 54-7-16 (1953) as support for his position. *Id.* at 884.

37. Justice Wilkins cited the following cases: Terra Util., Inc. v. Public Serv. Comm'n, 575 P.2d 1029 (Utah 1978); Greyhound Lines, Inc. v. Public Serv. Comm'n, 547 P.2d 199 (Utah 1976); Los Angeles & Salt Lake R.R. Co. v. Public Serv. Comm'n, 121 Utah 209, 240 P.2d 493 (1952); Fuller-Toponce Truck Co. v. Public Serv. Comm'n, 99 Utah 28, 96 P.2d 722 (1939); Salt Lake City v. Utah Light and Traction Co., 52 Utah

affirmance.[38]

The Utah Supreme Court in *Wexpro* erroneously expanded the traditional limits of judicial review of regulatory orders and in the process shifted valuable property rights from owner-investors to consumer-ratepayers.

Regulating public service industries is an extremely complex and technical process. If the rights of both investors and consumers are to be protected, the process must be carried out by persons with proper technical understanding and expertise.[39] For this reason, public service commissions, which theoretically are composed of qualified persons, are given the authority and responsibility to regulate certain public service industries.[40] Because of the technical nature of such regulation, judicial review of commission orders should be carefully limited.[41] The reviewing court should not substitute its findings for those of the commission merely because it deems the commission's findings to be unwise or undesirable.[42]

210, 173 P. 556 (1918). 595 P.2d at 884-85 (Wilkins, J., dissenting).

38. Justice Wilkins stated,

> Evidence was received and reviewed by the Commission on all of the proposals submitted by all of the parties. The Commission substantially ruled in favor of that classification system propounded by Mountain Fuel, and there is evidence, in my judgment, to support that determination. As long as there is evidence to support its decision, the Commission may choose among proposals. Simply because Mountail Fuel's evidence appeared the more convincing is no reason for this Court to now conclude that the Commission abdicated its regulatory responsibility and allowed Mountain Fuel to determine the scope of its jurisdiction.

595 P.2d at 888 (Wilkins, J., dissenting). Justice Wilkins further distinguished *Wexpro* from *Central* by arguing that the majority had failed to recognize the difference between the accounting concepts of expense and capital. He also pointed out that the *Central* court applied the gain follows risk theory to assets that had always been utility property. *Id.* at 894. In addition, Justice Wilkins argued that the majority opinion constituted an unconstitutional taking of private property. This argument rests on the premise that the regulatory effect of the majority's holding is an unreasonable exercise of the state's police power. *Id.* at 895-97.

39. *See* United States v. Public Util. Comm'n, 158 F.2d 533 (D.C. Cir. 1946); Utah-Idaho Sugar Co. v. Intermountain Gas Co., 100 Idaho 368, 597 P.2d 1058 (1979); Almeida Bus Lines, Inc. v. Department of Pub. Util., 348 Mass. 331, 203 N.E.2d 556 (1965).

40. All 50 states have statutory provisions creating public service commissions (sometimes by another name, *e.g.* public utilities commission) and endowing them with regulatory power.

41. *E.g.*, American Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936); Nevada Power Co. v. Federal Power Comm'n, 589 F.2d 1002 (9th Cir. 1979); Southern Cal. Gas. Co. v. Public Util. Comm'n, 23 Cal. 3d 470, 591 P.2d 34, 153 Cal. Rptr. 10 (1979); Colorado Mun. League v. Public Util. Comm'n, 597 P.2d 586 (Colo. 1979); Utah State Bd. of Regents v. Utah Pub. Serv. Comm'n, 583 P.2d 609 (Utah 1978).

42. *E.g.*, American Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936); Giles Low-

The *Wexpro* court's reliance on *Central* is significant because *Central* has also been viewed as erroneously extending the limits of judicial review.[43] In *Central,* machinery and land that had been used as utility property were transferred to non-utility status as part of the plan to upgrade the District of Columbia mass transit system. These properties had appreciated substantially before the transfer.[44] The public service commission ordered that the appreciation on the machinery be applied to a utility account to the extent that depreciation had previously been expensed to that account.[45] The remainder was to be credited to the shareholders.[46] The appreciation on the land was to be credited entirely to the shareholders.[47] The United States Court of Appeals for the District of Columbia Circuit reversed the commission's orders and awarded the ratepayers the in-service appreciation on both the machinery and the land. The court held that since the ratepayers had shouldered the risk of loss they were entitled to benefit from any gain or appreciation.[48] This was the first time that a court had awarded ratepayers in-service appreciation on non-depreciable assets (land).[49] In so holding, the court of appeals substituted its judgment for that of the Metropolitan Area Transit Commission.[50]

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ery Stockyards, Inc. v. Department of Agriculture, 565 F.2d 321 (5th Cir.), *cert. denied,* 436 U.S. 957 (1977); PBI Freight Serv. v. Public Serv. Comm'n, 598 P.2d 1352 (Utah 1979); Utah Parks Co. v. Kent Frost Canyonland Tours, 19 Utah 2d 252, 430 P.2d 171 (1967).

43. *See* Note, *Awarding In-service Appreciation to Public Utility Ratepayers—Windfall or Perdition?,* 11 CALIF. W.L. REV. 160 (1974).

44. 485 F.2d at 829-31.

45. *Id.* at 794. This procedure would reduce the amount that ratepayers would have to contribute to the account.

46. *Id.*

47. *Id.* at 798.

48. The court stated its rationale as follows:

> Since the investors may insist upon preservation of any investment they make in an asset to be used in the utility's operations, it is the ratepayers' burden to compensate them for the loss on their investment in the land. Accordingly, if the land no longer useful in utility operations is sold at a profit, those who shouldered the risk of loss are entitled to benefit from the gain.

Id. at 808 (footnotes omitted). *See* Note, *supra* note 43, at 110, 163.

49. Judge MacKinnon, dissenting in *Central,* wrote:

> Outside the District, there is a paucity of cases and the few that are cited cannot directly support the action taken here. The majority observes the dearth of decided cases and seems to take this as a "license" to deal with the question as if writing on a clean slate.

485 F.2d at 834 (MacKinnon, J., dissenting) (citations omitted).

50. One commentator stated that *Central* "can be read as standing by implication for the proposition that the judiciary need give little weight to past commission practices

Until *Wexpro* came before the Utah Supreme Court, the court had historically avoided substituting its judgment for that of the commission. For example, in *Utah Parks Company v. Kent Frost Canyonland Tours,*[51] the court wrote: "We have often stated that it is not within our province to pass upon the wisdom of the Commission's decision."[52] The United States Court of Appeals for the District of Columbia Circuit stated this principle and its rationale as follows: "The process of public utility regulaton is fraught with sundry technical accounting, engineering, and financial policy considerations, that have been properly entrusted to the regulatory bodies, and if there is produced '. . . no arbitrary result, our inquiry is at an end.' "[53] Thus, the technical nature of the regulatory process has traditionally mandated that it be carried out by persons with technical expertise and understanding.[54]

The *Wexpro* court's erroneous application of the gain follows risk theory suggests why legislatures and courts have deemed it prudent to narrowly restrict the judicial review of regulatory orders. The *Wexpro* majority used the gain follows risk theory to classify assets as being either utility or non-utility. In *Central,* on the other hand, the assets in question were and always had been classified as utility property; the gain follows risk doctrine was merely used as a basis for the allocation of capital gains on operating utility assets.[55] The Utah Supreme Court should not have used the doctrine to transfer property rights from investors to consumers. This use of the doctrine does not reflect the proper relationship between consumers and investors. The United States Supreme Court set forth the correct relation-

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and established procedures when called upon to review commission findings." Note, *supra* note 43, at 160, 172.

51. 19 Utah 2d 252, 430 P.2d 171 (1967).

52. *Id.* at 254, 430 P.2d at 172.

53. United States v. Public Util. Comm'n, 158 F.2d 533, 536 (D.C. Cir. 1946) (footnote omitted). Judge Leventhal and Judge Bazelon, both of the D.C. Circuit, disagree as to the role of the judiciary in reviewing complex administrative agency decisions and the amount of deference that should be allowed the agency. While both agree that the judiciary must not simply substitute its judgment for that of the agency, they do not agree on what scope of the underlying review of the agency's findings should be. For a more detailed discussion, *see* Ethyl Corp. v. EPA, 541 F.2d 1, 66, 68 (D.C. Cir. 1975) (Bazelon, J., concurring at 66; Leventhal, J., concurring at 68), *cert. denied,* 426 U.S. 941 (1976).

54. *See, e.g.,* Iowa-Illinois Gas and Elec. Co. v. Illinois Commerce Comm'n, 19 Ill.2d 436, 167 N.E.2d 414 (1960); Almeida Bus Lines, Inc. v. Department of Pub. Util., 348 Mass. 331, 203 N.E.2d 556 (1965); Public Serv. Comm'n v. Continental Tel. Co., 580 P.2d 467, 470 (Nev. 1978).

55. 485 F.2d at 805-22.

ship in *Board of Public Utility Commissioners v. New York Telephone Co.*:[56]

> Customers pay for service, not for the property used to render it. . . . By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stock.[57]

Even if the gain follows risk doctrine could properly be used to classify assets as utility or non-utility, it could not be accurately applied to *Wexpro*. The theory applies only when the risk is upon the ratepayer. The *Wexpro* court based its decision on the premise that the risk of exploring for oil and gas is the risk of not finding oil and gas. In traditional exploration programs, this premise would be valid since the risk of not finding oil and gas equates with the risk of loss of capital. In *Wexpro,* however, these two risks did not equate. The commission has stated:

> The risks of success of the exploration and development program are burdens which, in the first and last analyses, we place on the Company and its shareholders. If the program is unsuccessful or unproductive and does not yield new low cost natural gas reserves, it is not the utility customers that must account for such, but rather it is the Company, its management and its owners who must shoulder responsibility before this Commission and in the capital markets.[58]

The risk associated with any financial venture is the risk of losing money. The consumers never were exposed to this risk because of the ever-present and watchful eye of the commission; only Mountain Fuel's shareholders bore the ultimate risk of losing money. Economic reality illustrates that the consumers were paying only for a service that they received: low-cost natural gas. They were not paying for the assets of the company, which is essentially what the majority opinion awarded them.

The likely short-term effect of *Wexpro,* if followed by the commission on remand, will be a substantial reduction in Mountain Fuel's natural gas rates.[59] However, because investors will

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56. 271 U.S. 23 (1926).

57. *Id.* at 32.

58. Utah P.S.C. Case No. 76-057-14 at 23.

59. It is clear that rates will be substantially reduced because all of the heretofore non-utility oil profits, less a regulated rate of return on the oil assets, will reduce the

receive only a regulated rate of return on a high-risk venture, the cost of Mountain Fuel's capital undoubtedly will increase and exploration capital may become impossible to obtain.[60] The long-term effect probably will be a depletion of the low-cost gas the current exploration program has generated. Also, because investors are not likely to enter the risky field of oil and gas exploration for only a regulated rate of return, the future of Mountain Fuel's exploration program may be in jeopardy. When current natural gas reserves become exhausted, the company will probably have to purchase its gas at the market price, which in 1977 was approximately 292.5% higher than the internal cost-of-service price.[61] This will cause a substantial and permanent increase in natural gas rates for Mountain Fuel consumers. Therefore, as a result of the Utah Supreme Court substituting its judgment for that of the commission, investors lost their rights to non-utility assets, and consumers may eventually have to pay much higher natural gas rates.

Perhaps even more significant is the effect that *Wexpro* may have as precedent. The *Wexpro* court extended the limits of judicial review of regulatory orders even further than the *Central* court did. This further opening of the door of judicial intervention may apply to all regulated industries; however, it poses a particular danger to natural gas utilities. As artificial pressures drive the cost of hydrocarbons upward, attempts to relieve consumers of this added financial burden will increase both in number and intensity. Courts, anxious to protect consumers, can rely on the latitude provided by *Wexpro* to bypass the

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consumers' contribution on a dollar-for-dollar basis. Unfortunately, lower rates may encourage increased gas consumption, despite the public policy favoring conservation.

60. *Cf.* 595 P.2d at 884 (Wilkins, J., dissenting) (The earlier commission order "rolling in" the oil properties resulted in suspension of trading of Mountain Fuel Stock and threatened Mountain Fuel's capital generally).

61. *Id.* at 882. This figure is obtained by the following formula:

$$\frac{\text{Market Price}}{\text{Cost of Service Price}} \times 100$$

1977 Market price = $1.17 per Mcf (thousand cubit feet)

1977 Cost-of-service price = $.40 per Mcf (approximately)

$$\frac{1.17}{.40} \times 100 = 292.5\%$$

regulatory system. The results of bypassing this system begin as temporary benefits, but eventually become permanent disadvantages.

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