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Reasonable and Barely Nonconfiscatory Rates

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"REASONABLE" AND "BARELY NONCONFISCATORY" RATES

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Timely employment of an apt name frequently operates to instill perpetuating vitality into a concept destined otherwise to speedy dissolution; occasionally it may serve even to impart life from the outset. Something of the sort, it is suspected, is the situation as respects the rate-making terms "confiscatory", "barely nonconfiscatory" and "reasonable", and the concepts to which they are customarily held to apply; and it is believed that an examination and possible redefinition or realignment of these terms may contribute, however slightly, to clarity of thinking in this field, and, conceivably, to more effective action.[1]

In the opinion offered by the Ohio Supreme Court in the comparatively recent *Portsmouth* case, occurs the following statement: "We think there must be a clear line of demarcation between a rate that is confiscatory in character and one that must be fair and reasonable. It is not sufficient to say that because a rate is not confiscatory in character it must necessarily follow that it is fair and reasonable and just to both parties." And later: "A rate which would not be confiscatory in character, by reason of the amount being somewhat above the point of confiscation, yet might not be a reasonable and just rate as between the public and the owner under all the circumstances of the case."[2] This quotation, removed from the context

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[1]The matter, sparingly discussed in late years, was recently reopened in an excellent article by Professor Maurice H. Merrill. Merrill, *On the Distinction between a Nonconfiscatory Rate and a Just and Reasonable Rate* (1929) 14 CORNELL LAW QUARTERLY 447. Professor Merrill's analysis led to the conclusions that (1) a "just and reasonable" rate, under the statutes, *may* be in excess of a "barely nonconfiscatory" rate; (2) but that it *need not* be so as a matter of law; and (3) that in the normal situation it *should not* be so. These conclusions are in the main quite acceptable to the present writer, and this paper is offered primarily in an attempt to point out the significance of the problem, to alter slightly the emphasis of the earlier treatment, and to discuss aspects of the problem which Professor Merrill dealt with only summarily or left untouched.

[2]*Portsmouth v. Public Utilities Com.*, 108 Ohio St. 272, 275–277, 140 N.E. 604, 605, 606 (1923). The court floundered rather badly in its discussion of terms. At one point it concerned itself with "the basic meaning of the word 'confiscation', as defined by the lexicographers", apparently overlooking the lexicographical function of the United States Supreme Court in this connection. Professor Merrill's treatment of whether, as a matter of statutory construction, a "just and reasonable" rate *may* exceed one that is "barely nonconfiscatory" loses some of its force, although probably the conclusion is not robbed of validity, by

which materially qualifies the apparent meaning, is useful for the purpose in hand as typical of the proposition frequently encountered in authoritative opinions that ordinarily a governmentally sanctioned schedule of public utility rates to be "reasonable as between the public and the owner", must be located above a "barely nonconfiscatory" level. The burden of the present discussion is to point out, if possible, the conditions responsible for the distinction currently drawn between "reasonable" and "barely nonconfiscatory" rates; to establish that the distinction in an overwhelming majority of instances is wholly specious; and to suggest wherein the interests of effective regulation may be served through action based upon a recognition of this fact.

If faith may be placed in the language of the opinions, it may be asserted that in cases arising under the fifth and fourteenth Amendments to the Federal Constitution courts will refrain from disturbing rates fixed by the public agency charged with the primary duty of rate determination unless such rates are not only "unreasonable", but actually "confiscatory".[3] For instance, rates producing a certain return on a given value base might impress the court as unreasonably low in view of circumstances brought to its attention, and yet not so low as to prompt the enjoinment of their enforcement on the ground of confiscation; whereas if the return were extremely low, the rates would clearly be held illegal as "confiscatory", and the additional fact that they were "unreasonable" would be without legal significance. Performance by the courts of their acknowledged function with respect to "confiscatory" rates has, of course, required the enunciation and application of a standard of "nonconfiscation"; and the pronouncements of the early cases, in which this task was first essayed, throw much light on the origin of the distinction here being considered. Casting aside the notion first embraced that the legitimacy of rates was to be judged solely by the "reasonableness" of particular charges in individual dealings, the courts came early to recognize that the question of the fairness of the prices for utility services was inextricably bound up with the total earnings resulting from those prices.

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the fact that in most of the cases cited and discussed the tribunals seem either to have been completely indifferent to the important matter of defining the scope of the terms "just and reasonable" and "confiscatory", or to have used "confiscatory" in a sense quite different from that in which Merrill used the term in developing his thesis. Merrill, *op. cit. supra* note 1, at 450–453.

[3]See the classic discussion of this point by Mr. Justice Brandeis in his separate opinion in Southwestern Bell Tel. Co. v. Public Utilities Com. of Mo., 262 U. S. 276, 43 Sup. Ct. 544 (1923).

The recognition, at first, was a faltering one. In 1888 Justice Brewer said:

> ". . . the rulings of the supreme court imply that the legislature may reduce railroad rates until only a minimum of compensation is secured to the owner. The rule, therefore, to be laid down, is this: That where the proposed rates will give some compensation, however, small, to the owners of the railroad property, the courts have no power to interfere. Appeal must then be made to the legislature and the people. But where the rate prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere, and protect the companies from such rates. Compensation implies three things: Payment of cost of service, interest on bonds, and then some dividend."[4]

"Justice demands", he reiterated in 1894, "that everyone should receive *some* compensation for the use of his money or property, if it be possible without prejudice to the rights of others."[5] With the standard of "bare nonconfiscation" thus adjusted to the mere level of *some compensation* to utility owners, it is patent that rate regulation held a place for a standard of "reasonableness" adjusted to a materially higher level.[6]

With the passage of the years, however, the standard of "bare nonconfiscation" has undergone significant transformation: *some compensation* became, shortly, *fair return on fair value;* and of late the scope of the latter has so expanded as now to include practically every element originally peculiar to any proper standard of "reasonableness". Since *Smyth v. Ames*[7] courts have said that, to be lawful, utility rates established by public authority must be such as to permit an accrual of earnings sufficient to provide for all proper expenses

[4]Chicago & N. W. Ry. v. Dey, 35 Fed. 866, 879 (C. C. S. D. Iowa, 1888).

[5]*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 412, 14 Sup. Ct. 1047, 1059 (1894). Italics are writer's.

[6]Professor Merrill points out that since the doctrine of "confiscation" was late in developing, the original meaning of "just and reasonable" as employed in early statutes could have had no reference to rates "barely clearing a minimum beyond which the state could not go, . . . And the mere fact of the development of the doctrine of confiscation could hardly give to the terms, 'just and reasonable', a narrower significance than that which they had before its rise." Merrill, *op. cit. supra* note 1, at 450. But, might it not be that the term "confiscatory", although arriving on the scene at a later date, was intended to apply to *any* rates lower than those deemed to be "just and reasonable?" As a matter of fact, as developed in the body of this paper, "confiscatory" was not at first so interpreted, and under this initial interpretation there was clearly a margin between "just and reasonable" and "confiscatory" rates. But, just as clearly, modern interpretation has eliminated this margin.

[7]169 U. S. 466, 18 Sup. Ct. 418 (1898).

and to afford the owners a fair rate of return on a fair value of the property devoted to the public service. In giving definite content to the requisite last mentioned, courts have considered various proposals—principally concerning the value base upon which the fair rate of return is to be allowed—, but with respect to all of them there has grown up a well-founded impression that irrespective of whether the adjustment is to be made in the rate of return or in the value base the utility must be permitted to charge prices calculated to produce a total return to its owners approximating that which, under something like "perfect" economic conditions, the owners would stand to receive if they should invest similar amounts in *similar* competitive industries.

The "normal price" of competitive economic theory has become possessed of judicial sanction. Overlooking, for the moment, considerations sounding in equity, the proposition finds its chief support in expediency: opportunity for some such return must be assured not only to keep open the channel for capital flow into the utility industry, but also to check, guide and apportion that flow.[8] Lest doubt remain as to the extent to which the modern standard of "bare nonconfiscation" has supplanted the standard of "reasonableness" of the nineties, attention should be directed to the following excerpts from recent rate-of-return opinions of the United States Supreme Court: In the *Baltimore* railway case, decided in January of this year, the Court, through Mr. Justice Sutherland, said:

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[8]The point is a familiar one; for a recent statement see Bye, *Composite Demand and Joint Supply in Relation to Public Utility Rates* (1929) 44 *Quarterly Journal of Economics*, 40, 42–44.

Professor Merrill refutes effectively the proposition advanced by an earlier writer that "only the monopoly rate is subject to reduction by the state." Updegraff, *Deductions from the Economic Basis of Public Utility Rates* (1927) 12 IOWA L. REV. 249, 268. It is submitted, however, that Professor Merrill himself drifts into difficulties on pages 457 *et seq.*, which he might have avoided had he been willing to define and discuss "competition" as "perfect competition"—the type hypothesized in abstract economic theory. See Merrill, *op. cit. supra* note 1, at 457.

It will be understood that this article proceeds on the assumption that users or consumers constitute the utility's sole source of income; *i. e.*, no question of the desirability of a possible public subsidy in aid of certain classes of consumers is meant to be raised.

Stress should be laid, also, on the fact that the term "rates" is used throughout in the sense of "aggregate rates". The problem of individual rates and their relationship raises considerations not here involved or dealt with. Writers and courts frequently overlook this distinction, speaking indiscriminately of *a* rate, a rate *group*, or *aggregate*, or *level*, and a rate of *compensation*.

"The commission fixed a rate of fare permitting the company to earn a return of 6.26 per cent. on this valuation [undisputed in this case]; and . . . the case resolves itself into the simple question whether that return is so inadequate as to result in a deprivation of property in violation of the due process of law clause of the Fourteenth Amendment. In answering that question, the fundamental principle to be observed is that the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property; and neither the corpus of that property nor the use thereof constitutionally can be taken for a compulsory price which falls below the measure of just compensation. One is confiscation no less than the other.

". . . The problem is one to be tested primarily by present day conditions . . . . Nor can a rule be laid down which will apply uniformly to all sorts of utilities. What may be a fair return for one may be inadequate for another, depending upon circumstances, locality and risk . . . . The general rule recently has been stated in *Bluefield Co. v. Pub. Serv. Comm.*, 262 U. S. 679, 692–695 [43 Sup. Ct. 675, 679 (1923)]:

" 'What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to *that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties;* but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. 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. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally . . . .'

". . . The court in the discharge of its constitutional duty on the issue of confiscation must determine the amount to the best of its ability in the exercise of a fair, enlightened and 'independent judgment as to both law and facts.'. . .

". . . It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account;

> and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties. In this view of the matter, a return of 6.26 per cent. is clearly inadequate. In the light of recent decisions of this court and other Federal decisions, it is not certain that rates securing a return of 7½ per cent or even 8 per cent on the value of the property would not be necessary *to avoid confiscation.*"[9]

Rates fixed below the level dictated by the considerations here recited are legally confiscatory; and even in the absence of judicial intervention to protect the interests of investors, would be recognized and stamped as socially or economically confiscatory by reason of the retardation of capital flow which their enforcement would occasion. Where, under this conception of legal and economic "bare nonconfiscation", is one to find proper elements peculiar to any supportable conception of "reasonableness?" It should be emphasized that "reasonableness *as between the public and the utility*" is here being discussed, rather than some broader conception of the term. Specifically, the proposition defended is that rarely, if ever, does "reasonableness" require that the utility be permitted to receive and retain earnings in excess of those produced by "barely nonconfiscatory" rates, and, conversely, rarely if ever does "reasonableness" dictate that the utility be prevented by public authority from receiving and retaining earnings forthcoming under "barely nonconfiscatory" rates. The Constitutional protection extended to private property renders the latter aspect largely academic; the former is practical in the extreme.

Possibly a brief excursion beyond the now far-extended boundary of "confiscation", across the line of "bare nonconfiscation", and into an hypothetical realm of "reasonableness" will repay the effort. Rates conceivably might be located somewhere within this area under a variety of circumstances, of which the following suggest themselves as outstanding: (a) mistake on the part of the rate-fixing authority; (b) desire of the rate-fixing authority to be doubly certain that the rates authorized are not "confiscatory;" (c) to reimburse investors for past deficiencies in revenues attributable to natural business causes or previously enforced "confiscatory"rates; (d) to curtail consumption in the case of a service based upon resources naturally limited in supply (e.g., natural gas); (e) to encourage or to reward, or to reward and hence encourage the exercise

[9] *United Rys. & Electric Co. v. West*, 280 U. S. 234, 249–252, 50 Sup. Ct. 123, 125, 126 (1930). Italics are writer's.

of foresight and the development of operating efficiency; (f) to make possible and to induce expenditures for research and invention; (g) to permit recoupment for extraordinary capital losses threatening discontinuance of service; (h) to induce extraordinarily rapid investment demanded by special circumstances; (i) as the unavoidable result of public rate control under circumstances necessitating equal rates for competing companies of unequal strength (e.g., the "strong and weak road" situation); and (j) to provide a fund for normal capital expansion. In some or all of these instances, the assertion frequently is made, "reasonable" rates may well be above a "barely nonconfiscatory" level. If, as urged above, the distinction between "reasonable" and "barely nonconfiscatory" be done away with, how are these situations to be handled? It is believed that careful analysis and use of terms will indicate that these cases constitute no substantial bar to an acceptance of the proposition that rates to be "reasonable" need not be hoisted above the plane of "bare nonconfiscation".

Neither "(a)" nor "(b)" requires more than a word: mistaken rates are scarcely a proper objective of rate making; and while the desire to prescribe *obviously* nonconfiscatory rates may be commendable enough in given instances and the practice indicated acceptable for the time being as an inevitable concomitant of our present inexact rate-fixing processes, it is clear that the condition is to be tolerated, not urged. It is manifest that every effort should be bent in the direction of exact and precise rate determination. Concerning "(c)": past losses may or may not be recouped under competitive conditions; whether they will be recovered in any individual case is a matter of mere chance. The *risk* of such losses is balanced in the mind of the investor at the time his capital is committed to the enterprise by the *possibility* of profit—one of the necessary elements in "fair return". The possibility of an increment of profit sufficiently great to induce the desired investment must be allowed for in the rates permitted to be charged for the service—otherwise the rates are "confiscatory". Nothing above the level of "bare nonconfiscation" (properly defined) is demanded by the situation. No convincing reason appears why losses arising out of regulatory mistakes (assuming that they can be so identified) should be treated other than as ordinary hazards of this type of business.

With reference to "(d)"—rates high enough to curtail consumption in the case of services naturally limited in supply—it may be admitted that higher than "barely nonconfiscatory" rates may well be called for. But it does not follow that the surplus earnings—the amount above that produced by "barely nonconfiscatory" rates—

should be retained by the owners; hence, the higher rates are not "reasonable" in the sense in which that term is being employed in the present discussion.

"(e)"—Rates adjusted to encourage or reward foresight and operating efficiency—presents some interesting possibilities. Under a competitive regime, foresight and operating efficiency are rewarded by increased returns, and these rewards serve, presumably to induce the exercise of these economic virtues. And it would seem that cases arising under regulation which called for rewards of this type would be automatically covered by the competitive return which, under both legal and economic dictation, establishes the upper limit of "confiscation". Nothing, then, in addition to "barely nonconfiscatory" rates is required; sufficient reward is, inherently, a component element in the determination of such charges. The confusion frequently in evidence on this point probably arises from the notion that rate regulation necessarily involves a general level in terms of a definite percentage return on a given value base below which the rates charged by *any* concern may not be forced. This notion is unsound. "Confiscation" or "bare nonconfiscation" has definite meaning and real significance only as applied concretely under actually prevailing conditions to particular concerns. Rates which are "confiscatory" for one company may be "nonconfiscatory" for another, or for the same company at another time. It should not be said that rates, assumed to be proper, are "barely nonconfiscatory" as charged by one concern, while as charged by another they are above the level of "bare nonconfiscation" and yet are not unreasonably high since the latter company is unusually efficient; rather it should be said that the rates charged are in both cases "barely nonconfiscatory"—the measure of "bare nonconfiscation" being different in the two instances because of significant differences in the surrounding circumstances. The analysis here is not unlike that employed in competitive economics with reference to "marginal" and "intra-marginal" businesses. The "quasi rent" or "surplus" comes to assume the aspect of an "opportunity cost" which must be recognized in regulation if true "confiscation", as defined above, is to be avoided.

It is believed, as well, that the standard of "bare nonconfiscation" is broad enough to care for "(f)"—expenditures for research, invention, etc. The matter of adjusting rates to provide for these items should turn, presumably, on whether such expenditures form an increment of cost in the case of the marginal producer in a comparable competitive field; if so, no reason appears why they should not

be recognized here; if not, such recognition should be withheld. If these expenditures are undergone only by concerns which qualify as intra-marginal, *i.e.*, if they constitute a drain solely on "surplus" earnings, the analysis to be applied is substantially that which was offered in the paragraph last preceding. These "ifs" reflect human fallibility in the regulation of rates, but the uncertainty arises with respect to the application rather than the formulation of a single adequate standard. These items are debatable, as are other items in the utility's expense account, *e.g.*, advertising, cost of rate proceedings, etc. Rate regulation will never achieve the exactness and precision of a calculating machine. Any controversy over the treatment of the expenditures under discussion would seem to mirror the imperfectness—inherent in some degree, perhaps—of our regulatory processes—the difficulties surrounding regulation "in practice". It is scarcely a manifestation of a fundamental, necessary and persistent distinction between "barely nonconfiscatory" and "reasonable" rates.

"(g)", in form at least, constitutes an obstacle to the thesis here defended. Extraordinary losses threatening discontinuance of service are decidedly out of line with ordinary regulatory experience. Circumstances might call for no public action at all, or for action in the nature of a general public subsidy. Conceivably the matter might be dealt with through the authorization of rates which in part would represent a direct contribution by consumers to the capital of the utility. Since this latter measure is conceivable (although scarcely so), it would seem that the rates involved, above the "barely nonconfiscatory" level, must be termed "reasonable", although it is clear that the bounds of the concepts and terms under discussion would thereby be expanded to an wholly abnormal extent. The situation is so rarely likely to occur, and is so far removed in kind from those customarily advanced as warranting the distinction between "barely nonconfiscatory" and "reasonable" rates, as to provide an exception more nominal than real to the proposition supported in this paper. The situation under "(h)", extraordinary rates to induce extraordinarily rapid investment demanded by special circumstances, belongs in the same category as "(g)" and is properly subject to the same comments and conclusions.

Rates above the point of "bare nonconfiscation", as the unavoidable result of public rate control under circumstances necessitating equal rates for competing companies of unequal strength—"(i)"—have been covered by implication in the preceding analysis. The situation involves either the case of an increment of surplus return not properly

belonging to the owners of the utility and hence rates which are not "reasonable" in the sense in which that term is being employed (*i.e.*, situation "(d)", *supra*); or the normal results of varying degrees of efficiency (*i.e.*, situation "(e)", *supra*). Finally, "(j)", rates sufficiently higher than "barely nonconfiscatory" to provide a fund for normal capital expansion, would not require serious consideration were it not for the fact that the authorization of such rates is so frequently urged. To many persons, rates must be this high to escape the stigma of being labeled "confiscatory". It should be manifest that consumer contributions to utility capital beyond the "surplus" contemplated by the definition of "bare nonconfiscation" in the *Baltimore* case is not to be thought of on grounds either of fairness or expediency. This, perhaps more than any of the other situations presented, affords a clear demonstration of the speciousness of the alleged distinction between "barely nonconfiscatory" and "reasonable" rates.

In the interest of completeness, mention should be made of the possible situation, suggested above, in which public demand for the utility service has so collapsed that any rates set will be incapable of producing other than "confiscatory" earnings, and hence in which "reasonable "rates might seem to be *below* the "barely nonconfiscatory" level. Two comments are warranted. If the level of "bare nonconfiscation" be adjusted (as in the *Baltimore* case) to correspond to the competitive situation, "confiscation" is not here involved, since under competition a similar state of demand would produce like rates and earnings. However, if "perfect" competition, with active demand, be hypothesized in erecting a standard of "bare nonconfiscation", it still is true that while a break in demand might justify the authorization of rates below the level of "bare nonconfiscation" (so established)—as an acceptance of the inevitable—, this action is hardly to be interpreted as an instance of public authority *forcing* "confiscatory" rates on the score of "reasonableness".

The origin of this distinction has already been commented upon; it is to be found in the restricted scope of the concept of "confiscatory" rates entertained by the courts when they first asserted authority to review the rate orders of legislatures and Commissions—a concept which pictured rates as "nonconfiscatory" if they were sufficiently high to preclude actual out-of-pocket losses. And despite the passing of the conditions which gave it birth, the distinction, thus begun, has been perpetuated both through the force of tradition and the sanction attaching to old labels, and by reason of the really valid distinction which is drawn between the rate-regulatory func-

tions of Commissions and of courts. Current belief has it that since the function of these tribunals are not the same, they are in fact searching for different levels of rates, levels which may significantly be designated respectively as "reasonable" and "barely nonconfiscatory". The validity of this belief is not above suspicion. It is the contention of this article that an analysis of the relative functions of Commissions and courts will indicate that while these bodies have unique and distinct rate duties to perform, the difference is not such as to prompt the perpetuation of the alleged distinction between "reasonable" and "barely nonconfiscatory" rates; in fact, the suggestion is ventured that the flat rejection of this distinction might quite conceivably lead to a more exact delimitation of the respective duties of these tribunals and hence to a more effective performance of their tasks.

What, then, constitutes the functions of Commissions and courts in this field; what, in rate proceedings, are they searching for? If Commissions are restricted to the specific rates which courts find are "barely nonconfiscatory" (and hence "reasonable"), what becomes of the position of the Commission in the regulatory scheme? Are its discretionary powers, based on specialized expert analysis, to become atrophied through lack of use? Is the court to supersede the Commission?

No such result need be apprehended; the proposed rejection of the distinction between "reasonable" and "barely nonconfiscatory" rates should serve to distinguish more sharply, rather than to merge the functions of the two agencies. The duty of primary rate determination usually resides, through action of the legislature, in the administrative Commission. This body, working in a relatively uncharted field, needs above all things to exercise the utmost of judgment and discretion. These qualities, however, are to be employed in determining, not which one of a number of "reasonable" levels of rates is to be selected and ordered into effect, but, rather, which level of rates the Commission is willing to single out and sanction as *the* "barely nonconfiscatory" and "reasonable" level. No Commission, of course, can fairly say, "This is the only proper level of rates"; but such a statement preceded by some qualifying phrase as "In our judgment", or "In our discretion", not only *can* but *should* be made in every case. Judgment and discretion are, most certainly, to be employed, but let it be repeated, not in choosing one of several "reasonable "levels, rather in an effort to fix upon the single level which in the mind of the Commission, aided by whatever of pertinent data, scientific method and expert ability it is able to muster, is at once "barely nonconfiscatory" and "reasonable".

As contended above, the standard of "bare nonconfiscation" enunciated in the *Baltimore* case is the standard to be adhered to by the Commission in fixing rates in the first instance. The fact that the Commission may easily be mistaken in its determination, or that the mistake if made may not be serious (thus suggesting several levels of "reasonableness"—a "range of indifference"), or that such mistakes may not even come to be recognized, does not militate against this proposition. A more liberal standard for Commission action is clearly mistaken; and the uninterrupted continuance of any rates based upon a more liberal standard is to be explained largely by the fact that rate orders are not justiciable in the federal courts on allegations by consumers of "confiscation",[10] and are apt not to be too carefully considered in the State courts on allegations by consumers that the State Commissions have acted *ultra vires* in exceeding the statutory direction to fix "reasonable" rates.

Where and how does the court fit into this picture? The court, strangely enough, is seeking amidst the same welter of confused circumstances for exactly the same thing that serves as the goal of the Commission's efforts—the level of "barely nonconfiscatory" rates. The difference in function between the court and Commission lies not in the object of their search, but in the purpose for which the object is sought, the method of search and the intensity with which it is conducted. The court has no duty to establish rates in the first instance; its function is discharged when, rates having been determined by the Commission and a cry of "confiscation" gone up from the ranks of utility owners, it establishes a standard of "bare nonconfiscation", examines the disputed order, and pronounces the rates either "confiscatory" or "nonconfiscatory".

It is not the purpose of this paper to develop as an original proposition any theory as to the proper scope of judicial review. It is to be noted, however, that the duty of the court in the premises is quite distinct from that of the Commission, and further that this distinction equally pertains to the background, the personnel

[10]See 1 SPURR, GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATION (1924) 187 n.

Despite Professor Merrill's discussion (Merrill, *op. cit. supra* note 1, at 451, 452), the present writer must confess to a lingering conviction that the unwillingness of the courts actively to deny the legal existence of a realm of "reasonableness" above the level of "bare nonconfiscation" is largely to be explained by the recognized distinction between the rate-fixing and the order-reviewing bodies, and, more particularly perhaps, by the fact that consumers do not qualify as claimants in the federal courts for the protection of the Fourteenth Amendment against extortionate rates.

and the facilities of the two bodies. Might it not be well to recognize and emphasize the difference in the *intensity* with which they approach their rate-regulatory tasks? On this point it may be said simply that the proper concern of the court would seem to be to scan the evidence and to enjoin the enforcement only of rates so plainly "confiscatory" that reasonable men acting honestly and intelligently in the light of full facts and an understanding of the law of the land could not stamp them otherwise; this certainly need not involve the court intermittently in feverish plunges into the minute technicalities of rate making with which the Commission necessarily has daily to deal. There is *one* correct level of rates; and the standard of "bare nonconfiscation" promulgated in the *Baltimore* case is nicely adapted to its realization. But the court, attempting in its own way to forestall only manifest injustice, should be hesitant to declare that Commission-fixed rates do not in fact measure up to this standard.[11]

How are these matters to be expressed if not in terms of "reasonable", "barely nonconfiscatory", and "confiscatory" rates? It is suggested that a more exact and fruitful terminology would characterize (1) the rate standard laid down in the *Baltimore* case as the standard of "bare nonconfiscation"; (2) the rates sought to be fixed *on this level* by the Commission as either "barely nonconfiscatory" or "reasonable" (the two terms being interchangeable); and (3) rates grossly failing to realize this standard—the only rates with which the court should interfere—as "obviously confiscatory."

The debate is not one of words, merely. An acceptance of exact and defensible terms should exercise some degree of influence in differentiating and emphasizing the precise nature of the respective regulatory tasks of Commissions and courts; it should tend to effect a reduction in the interference by courts in the actual processes of rate making (an administrative task), and a tightening of those processes by the Commissions. The *Baltimore* standard is sound;[12] rates above are "unreasonably high", rates below are "confiscatory". But the difficulty of applying this standard exactly in hundreds of

[11]It is believed that this conception of the duty of the court is quite consistent with that expressed in Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. 527 (1920). The Supreme Court was there concerned with the *scope* rather than the *intensity* of review.

[12]It will be understood, of course, that in characterizing the *Baltimore* standard as "sound" the writer has reference solely to the stress there laid upon *pertinent* "competitive" considerations. There is no thought of supporting the decision of the Supreme Court on the facts of the case, or of approving the particular items which the court felt bound to include under its announced standard.

cases is patent; courts can not and, under the existing regulatory system, need not and should not essay the task. However, if courts are not to mix actively in the fray, if they are to intervene only upon the emergence of grave abuses, then let it be said that Commission-fixed rates will be judicially proscribed only when they are "obviously confiscatory". The statement alone can not but operate to center and to focus the proper activity of the court. Similarly with respect to the Commission. If the term "reasonable rates" be employed solely in referring to rates "barely nonconfiscatory" under the *Baltimore* standard, if the alleged zone of "reasonableness" be recognized as forbidden territory, if Commissions be pointed and restricted to the function of ascertaining *the one correct level* of charges, a forward step will have been taken. The Commission's task, thus named, is difficult; in many cases proved attainment may be impossible. But to name the goal with exactness is the first move toward accomplishment. Narrowing the boundary of Commission activity gives less leeway for dissipation of effort; less room for play; at the very least it closes an alluring avenue for the rationalization of carelessness or incompetency.