Kentucky Law Journal

Volume 70 | Issue 2 Article 9

1981

Kentucky Law Survey: Utility Law

Laura L. Murrell

William R. Dexter
University of Kentucky

Utility Law

BY LAURA L. MURRELL* AND WILLIAM R. DEXTER**

INTRODUCTION

Changing economic conditions in the past decade, coupled with rapidly improving technology and an increasing demand for service, have led to a significant increase in the number of utility cases decided by Kentucky courts. Some of these cases have considered such intricate aspects of utility rate law as rate base, rates of return and allowable expenses. Many more cases have involved the standard of review to be applied to decisions made by the Kentucky Public Service Commission (PSC or Commission). Under an old and previously unexplained statute, parties must show that the Commission's order was "unlawful or unreasonable."[1] Kentucky courts, applying this limited standard of review, have concluded that courts must abstain from interfering with the ratemaking process.[2] This Survey will discuss utility cases decided by Kentucky appellate courts through December of 1981 and analyze the scope of judicial review in cases originally heard by the PSC.

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* Sole practitioner, Frankfort, Kentucky. J.D., 1967, University of Kentucky. Formerly Kentucky Assistant Attorney General for Utility Intervention, 1970-1976.

** J.D. 1982, University of Kentucky.

[1] KY. REV. STAT. ANN. § 278.410 (Bobbs-Merrill 1981) [hereinafter cited as KRS].

[2] Commonwealth *ex rel.* Stephens v. South Cent. Bell Tel. Co., 545 S.W.2d 927, 931 (Ky. 1976). The rationale for a limited role for the courts was expressed in Glick, *Independent Judicial Review of Administrative Rate-Making: The Rise and Demise of the* Ben Avon *Doctrine*, 40 FORDHAM L. REV. 305 (1971):

> A rule that permits easy access to the courts undermine[s] the finality and authority of administrative rate-making by permitting utilities to entirely ignore such rates by crying "confiscation" and seeking judicial review. The courts are then faced with the onerous task of sifting through volumes of economic data and generally contradictory expert testimony without the refined expertise of the specialists who sit on public service commissions and attempting to arrive at a more enlightened judgment than the administrative body that has already undertaken the task. Not only does this tend to unnecessarily burden our already overworked trial courts, but it also tends to decrease the quality of the determination by imposing a Herculean task on trial court judges, many of whom are simply not up to it.

I. JURISDICTION AND HISTORY OF THE COMMISSION

The PSC is charged with the regulation of all matters concerning the intrastate operation of utilities subject to its jurisdiction,[3] which extends over all non-municipal electric, gas, telephone, water and sewer companies.[4] It has authority over tariff provisions,[5] certificates of convenience and necessity for major construction[6] and the issuance of securities.[7] It also has jurisdiction over customer service complaints lodged against regulated utilities.[8]

The Commission has undergone some fairly substantial changes in recent years. Until 1972, the Public Service Commission consisted of three part-time commissioners.[9] It had jurisdiction over electric, gas, telephone, and water companies.[10] Legislation in 1972 increased the number of commissioners to five.[11] In 1974, sewer companies were added to the Commission's jurisdiction.[12] Four years later, the Commission was divided into two agencies, the Energy Regulation Commission with three full-time commissioners exercising jurisdiction over electric and gas companies, and the Utility Regulatory Commission with three part-time members exercising jurisdiction over telephone, water and sewer companies.[13] The two Commissions shared a single staff.

In 1980, by executive order, Governor John Y. Brown, Jr. abolished the two Commissions and re-established a single Public

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[3] KRS § 278.040 (1981).

[4] KRS § 278.010 (1981).

[5] KRS § 278.040(2) (1981).

[6] KRS § 278.020 (1981).

[7] KRS § 278.300 (1981).

[8] KRS § 278.260 (1981).

[9] Act of June 14, 1934, ch. 145, § 2(b), 1934 Ky. Acts 580, 583.

[10] Act of June 14, 1934, ch. 145, § 4(a), 1934 Ky. Acts 580, 588.

[11] Act of Mar. 10, 1972, ch. 47, § 1, 1972 Ky. Acts 142, 143 (amending KRS § 278.050 (1972)).

[12] Act of Mar. 22, 1974, ch. 118, § 1, 1974 Ky. Acts 223, 223 (amending KRS § 278.010(3)(f) (1972)).

[13] Act of Mar. 30, 1978, ch. 379, § 1, 1978 Ky. Acts 1026.2, 1026.2-1028 (codified as KRS §§ 278.040, 278.050 (1981)).

Service Commission.[14] The reorganization was approved by the 1982 General Assembly.[15]

This Survey discusses decisions involving the three different agencies, all of which will be referred to as the "Commission" since they are but variations of the same agency. Although the structure and title of the Commission have changed substantially, the basic statutes governing utility regulation have not changed significantly since the Commission was originally established in 1934.[16]

II. REVIEW UNDER KENTUCKY'S STATUTORY SCHEME

Appeals which are taken from orders made by the Commission are governed by Kentucky Revised Statutes (KRS) section 278.410, which provides that appeals are to be taken first to the Franklin Circuit Court.[17] Subsequent appeals are to the Kentucky Court of Appeals and the Kentucky Supreme Court.[18] Given the frequency of rate cases, appeals are often mooted before a decision is reported since the granting of higher rates in a subsequent case usually leaves the appellate court with nothing to decide.

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[14] Exec. Order No. 80-1010 of Governor John Y. Brown, Jr. (Nov. 21, 1980), *annotated in* KY. REV. STAT. ANN. § 278.040 (Banks-Baldwin 1981) (effective Mar. 1, 1981).

[15] Act of Mar. 10, 1982, ch. 82, § 9, 1982 Ky. Acts 143, 148 (codified as KRS § 278.050).

[16] Act of June 14, 1934, ch. 145, § 2(a), 1934 Ky. Acts 580, 583. New York and Wisconsin were the first states to establish full-powered public service commissions. Welch, *Status of Regulatory Commissions Under the Hope Natural Gas Decision*, 32 GEO. L.J. 136 (1944). In 1898, the United States Supreme Court, in a case involving railroad freight rates fixed by a state legislature, recognized the need for regulatory agencies. In Smyth v. Ames, 169 U.S. 466 (1898), the Court stated that questions of compensation and due process could be "more easily determined by a commission composed of persons whose special skill, observation and experience" qualified them to do justice to such complex problems. *Id.* at 527.

[17] KRS § 278.410 (1981).

[18] KRS § 278.450 (1981). For a discussion of alternative procedures for review of state public service commission decisions, see Uthus & McIntire, *Public Utility Rate Regulation and the Iowa Administrative Procedure Act—Extending Maximum Procedural Protection to Public Utilities at Public Expense*, 26 DRAKE L. REV. 483 (1976-77). The authors note that 12 jurisdictions have a two-stage appeal with venue at the first level in a specified court like the Kentucky plan. Fifteen states provide for mandatory direct review of final commission orders in the highest court of the state. *Id.* at 507.

The standard of review set forth in KRS section 278.430 prescribes that "the party seeking to set aside any determination, requirement, direction or order of the commission shall have the burden of proof to show by clear and satisfactory evidence that the determination, requirement, direction or order is unreasonable or unlawful."[19]

III. JUDICIAL REVIEW OF THE RATEMAKING FUNCTION

A. *The Basic Test: "Unlawful or Unreasonable" Strictly Construed*

In 1976, the Supreme Court of Kentucky spoke forcefully regarding the scope of judicial review in *Commonwealth ex rel. Stephens v. South Central Bell Telephone Co.*[20] The case was an appeal by the Attorney General's Division of Consumer Protection from an order of the Franklin Circuit Court that permitted South Central Bell to charge higher interim rates pending final appeal. Pursuant to KRS section 278.180, South Central Bell had filed a notice with the Commission to increase rates. The Commission had suspended these rates for a period of five months,[21] but, when no decision was reached by the Commission within this five month period, Bell put the higher rates into effect, subject to a refund.[22] When the Commission entered an order prescribing substantially lower rates, South Central Bell appealed and kept the higher rates in effect. The Attorney General filed a motion in Franklin Circuit Court that would have required South Central Bell to cease charging the higher rates. The telephone company then filed a motion for a temporary injunction that would have permitted it to collect the higher rates. The circuit court granted the temporary injunction after finding that the telephone company would be permanently deprived of rev-

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[19] KRS § 278.430 (1981).

[20] 545 S.W.2d at 927.

[21] KRS § 278.190(2) (1981) grants to the Commission the authority to suspend a utility's proposed rates for five months to allow the agency to adequately investigate the utility's request.

[22] *Id.* At the conclusion of the statutory five month suspension period, if the Commission has not reached a decision, the utility can put its full rate request into effect, subject to refund upon the Commission's final determination. *Id.*

enues from the rates ultimately established, since such rates could not be retroactively collected. The circuit court's order was appealed to the Kentucky Supreme Court by the Attorney General.

The Supreme Court's decision dealt only with interim relief pending an appeal from the Commission, but the language of the opinion was much broader and addressed the standard of review for appeals from the Commission. On the relief issue, the Court held that under the statutory scheme injunctive relief was not available on the mere basis of a reduction in revenue. The Court concluded:

> If we extend the rationale of the circuit court to its ultimate conclusion, we find that in every case in which a utility is either awarded a rate increase less than it sought or directed to make a rate reduction, it is entitled to charge the higher rate, subject to refund, until all appeals are exhausted.[23]

Based on the assumption that the Commission rates were within a "zone of reasonableness," the Court stated that injunctive relief was available only to prevent confiscation, not to prevent a mere reduction in revenue.[24] Thus, the opinion interpreted Kentucky's statutory term "unreasonable," in the standard of "unreasonable or unlawful," to be equivalent to "confiscatory."[25] This interpretation followed the position of the United States Supreme Court expressed in *Federal Power Commission v. Natural Gas Pipeline Co.*[26] The Kentucky Supreme Court declared in *Commonwealth ex rel. Stephens v. South Central Bell Telephone Co.*:

> By long standing usage in the field of rate regulation the "lowest reasonable rate" is one which is not confiscatory in the constitutional sense. Assuming that there is a zone of reasonableness within which the legislature or its designee is free to fix a

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[23] 545 S.W.2d at 930.

[24] *Id.* (citing South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n, 236 So.2d 813 (La. 1970)).

[25] *Id.* In the landmark United States Supreme Court case, Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1943), the Court stated that rates are nonconfiscatory, just and reasonable so long as they enable the utility to operate successfully, to maintain its financial integrity, to attract capital and to compensate its investors for the risk assumed. *Id.* at 605.

[26] 315 U.S. 575 (1942).

> rate varying in amount and higher than a confiscatory rate it is also free to decrease any rate which is not the "lowest reasonable rate."[27]

The Court also described the proper scope of judicial review, noting that ratemaking is a legislative, rather than a judicial function.[28] This power to set rates may be exercised by the legislature directly or through an appropriate agency. The Court emphasized that KRS chapter 278, which delegates the power to fix rates to the Commission, presented "a unified and symmetrical scheme for the exercise of the legislative power of ratemaking."[29] In colorful language Justice Lukowsky stated the general approach to be taken by courts in reviewing legislative ratemaking: "We read the legislative mandate as directing us to keep our judicial fingers out of the ratemaking pie except to the degree that the constitutions require our intervention."[30] The decision therefore established a narrow approach to the entire question of judicial review.

B. *Newly Discovered Evidence as a Basis for Judicial Remand*

KRS section 278.440 provides that actions brought to gain judicial review of Commission orders must be heard only on the evidence submitted to the Commission as shown by the transcript.[31] In addition, the statute provides that the court may remand the record and proceedings to the Commission to consider evidence discovered after the Commission hearing, if that evi-

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[27] 545 S.W.2d at 931 (citing Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575 (1942)).

[28] *Id.* This is an important distinction because the authority given to the Commission by the legislature is not an authority that could be exercised by a court. In American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n, 379 S.W.2d 450 (Ky. 1964), the Court stated that this legislative function could not be delegated to the courts, either directly or through *de novo* review. There is, therefore, under this line of cases, a Kentucky constitutional limit on the breadth of judicial review of public service commission orders in addition to the statutory limit.

[29] 545 S.W.2d at 931.

[30] *Id.* The late Justice Lukowsky went on to note that "constitutions and statutes, like the Salvation Army, aid the needy not the greedy." *Id.* at 932.
Id. at 932.

[31] KRS § 278.440 (1981).

dence could not have been obtained for use at the hearing and if it materially affects the case. In *Stephens v. Kentucky Utilities Co.*,[32] the electric utility argued that this statute not only provides for remand for "newly-discovered evidence" in the traditional sense, but also authorizes remand by the Court for "new evidence" based on actual operating experience subsequent to the Commission's order.[33] It argued in the alternative that the statute establishes an inherent power in the trial court to have this "new evidence" considered so that a proper determination of the confiscation issue can be insured.[34]

Because the Commission failed to decide on the utility's requested rate change within the five month statutory period,[35] Kentucky Utilities (KU) put its total rate request into effect subject to refund and, as a result, collected funds in excess of the rates ultimately prescribed by the Commission. The higher rates, which were supposed to be subject to refund, were collected during the appeal of the Commission's decision.[36] KU was granted higher rates in a subsequent Commission case. Instead of refunding the excess funds collected during the pendency of the appeal however, KU sought to retain the funds on the theory that its actual experience, subsequent to the data on which the Commission's order was based, showed confiscation. The Franklin Circuit Court agreed with KU and remanded the case to the Commission with directions to consider this "new evidence" pursuant to KRS section 278.440. The Attorney General's attempt to appeal the remand order was dismissed by the Kentucky Court of Appeals on the grounds that a remand order was not an appealable order.

The Kentucky Supreme Court granted discretionary review and declared that under KRS section 278.440 an order of remand by the trial court to consider newly discovered evidence would not be an appealable order.[37] However, the Court distinguished

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[32] 569 S.W.2d 155 (Ky. 1978).

[33] *Id.* at 158.

[34] *Id.*

[35] KRS § 278.190 (1981).

[36] The rates were collected under an injunction comparable to the one issued in *Commonwealth* ex. rel *Stephens v. South Cent. Bell Tel. Co.* See notes 20-30 *supra* and the accompanying text for a discussion of *Bell.*

[37] 569 S.W.2d at 158. The Court noted that such a remand procedure is similar to

the action taken by the Franklin Circuit Court in the instant case, stating that the trial court "in effect dictate[d] a different trial on [totally] new evidence in complete disregard of the legislative mandate for judicial review."[38] The Court characterized the action by the trial court as an attempted "judicial amendment" to KRS section 278.440, and found the order appealable.[39]

The *Kentucky Utilities* Court also rejected the contention that evidence of actual experience under a rate order can be considered upon judicial review in determining confiscation. Justice Stephenson, noting that neither Kentucky's statutory scheme nor public policy would permit such an interpretation, stated:

> If we were to accept the rationale of the order entered by the trial court and the argument of Kentucky Utilities, there would not be much point in the Public Service Commission holding a hearing. In each case, the situation after the hearing would be the determining factor and this would result in complete destruction of an orderly process in the legislative scheme for setting rates for utilities. Public policy dictates that these actions not be unnecessarily prolonged.[40]

The Court specifically overruled *Lexington Telephone Co. v. Public Service Commission*[41] and *City of Lexington v. Public Service Commission*,[42] in which the Court of Appeals, then Kentucky's highest court, had approved remand orders to consider subsequent developments.[43]

C. *Relationship of Revenue Requirements and Rates*

The most significant recent appellate decision discussing the scope of judicial review of ratemaking decisions by the Commission is *Energy Regulatory Commission v. Kentucky Power Co.*[44]

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the concept of a new trial provided in KY. R. CIV. P. 59.01(g), or to relief from judgment under KY. R. CIV. P. 60.02(b).

[38] 569 S.W.2d at 158.

[39] *Id.*

[40] *Id.*

[41] 224 S.W.2d 423 (Ky. 1949).

[42] 249 S.W.2d 760 (Ky. 1952).

[43] 569 S.W.2d at 159.

[44] No. 80-CA-384-MR (Ky. Ct. App. Dec. 31, 1980), *rev'd*, 623 S.W.2d 904 (Ky. 1981).

The procedural history of the case is confusing. Kentucky Power had sought a rate increase that would generate $9,804,000 per year, but the Commission allowed only $7,020,366. The utility did not appeal this portion of the Commission's order, but rather contended that the rates which the Commission had set would not produce the revenue which the Commission had approved. The Franklin Circuit Court remanded the case to the Commission, but set time limits on its consideration. When those time limits had expired, the court ordered the Commission to implement a schedule of rates fixed by the court.[45]

The court of appeals held that the circuit court had committed reversible error and had "effectively prescribed new rates for the Company, thereby usurping the function of the Commission."[46] It further held that the circuit court had abused its discretion when it refused to allow the Commission to complete its consideration of the case on remand and declared that such action "was an unlawful intrusion into the ratemaking authority of the agency."[47] The court concluded that "[w]hen an administrative agency has made an error of law, the obligation of the court is to remand the case to provide an opportunity to examine the evidence and findings of fact as required by law."[48]

The Kentucky Supreme Court reversed the court of appeals and affirmed the decision of the trial court.[49] After reciting the history of the case, the Supreme Court recognized "that it is not a judicial function to fix utility rates,"[50] but nonetheless held that the circuit court had not acted improperly when it had merely

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[45] *Id.*, slip op. at 2-4.

[46] *Id.*, slip op. at 5.

[47] *Id. See also* FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976). There the Court held that a reviewing court may not dictate to the agency the time dimensions of any needed inquiry or order the results to be reported to it without opportunity for further consideration of new evidence by the agency. *Id.* at 333. In Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), the Court stated that reviewing courts cannot dictate the terms and scope of a remand proceeding because the agency must be free to fashion its own rules of procedure.

[48] No. 80-CA-384-MR, slip op. at 7. *See also* K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 16.01-.05 (3d ed. 1972).

[49] Kentucky Power Co. v. Energy Regulatory Comm'n, 623 S.W.2d 904 (1981).

[50] *Id.* at 907. The Court further acknowledged that a public regulatory agency must have broad latitude in the conduct of its proceedings. *Id.*

attempted to implement the Commission's basic findings that additional revenues were required.[51] The Court dwelt at length on the delay in the proceedings before the Commission and the substantial period of time during which the data was available to the Commission and its staff. The Court further held that the remand was proper under KRS section 278.440 since it was "to hear new evidence that could not have been obtained by the Company prior to the original hearing (to wit, that the rates thereafter fixed by the Commission would not in fact achieve its stated purpose of producing an annual increase of $7,020,366)."[52]

The basis of the opinion was seemingly a determination that the Commission did not deal fairly with the company. The Supreme Court noted that the circuit court had declined to "let the Commission staff toy with the case any longer."[53] It further observed that "[e]ven a public utility has some rights, one of which is the right to a final determination of its claim within a reasonable time and in accordance with due process. This Company has been wooled around long enough."[54] Although the case did not seem to change the outline of judicial review, it demonstrated how judicial intervention can provide a remedy when the court perceives that the Commission has not dealt fairly with a utility. Thus, the Supreme Court in *Kentucky Power* held that a court can intervene but admonished that it must not get into the actual process of setting rates.[55] Despite this admonition, the Court required the Commission to accept the method and the figures presented by Kentucky Power which the Commission had failed to rebut.[56] Furthermore, the Court was convinced that the fundamental decision of how much additional revenue a utility should earn was to be made solely by the Commission.[57]

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[51] *Id.* at 908.

[52] *Id.* at 907.

[53] *Id.* at 908.

[54] *Id.*

[55] *Id.*

[56] *Id.* Compare the Kentucky Supreme Court's position with the forceful language used by the court of appeals in refusing to impose an affirmative duty on the Commission to rebut evidence presented before the Energy Regulatory Commission. Energy Regulatory Comm'n v. Kentucky Power Co., 605 S.W.2d 46, 50 (Ky. Ct. App. 1981). See the text accompanying note 78 *infra* for a discussion of the Commission's duty.

[57] 623 S.W.2d at 908. The Court characterized "rates" as "merely the means de-

D. *Adequacy of Service in Ratemaking Case*

A recent court of appeals decision discussed judicial review. In *Beshear v. South Central Bell Telephone Co.*,[58] the Commission found that an overall rate of return of 10.61% was reasonable, but also found that South Central Bell had failed to fulfill its service obligation adequately.[59] Because of this failure, the Commission reduced the rate of return to 10.47% as a penalty intended to induce the company to improve its service.[60]

Upon review the Franklin Circuit Court reversed, stating that inadequate service "was not germane to the rate-making process" and holding that the penalty was unconstitutional and confiscatory.[61] The trial court enjoined the enforcement of the penalty and directed the Commission to implement the higher rate. This judgment was taken to the court of appeals. Noting that the trial court had left no discretion to the Commission, the court of appeals held that the lower court was acting as a "rate maker" whether it set the rates itself or ordered the Commission to set them at some particular level.[62] Such action was considered to be outside the scope of judicial review and specifically prohibited by *Commonwealth ex rel. Stephens v. South Central Bell Telephone Co.*[63]

The relationship between rates and the adequacy of service is set forth in KRS section 278.030, which states that "[e]very utility may demand, collect and receive fair, just and *reasonable rates for the service rendered* or to be rendered by it to any person."[64] Relying on this statute, the court of appeals in *Beshear v. South Central Bell Telephone Co.* held that the Commission was correct in considering inadequacy of service in its ratemaking procedure.[65] The court reviewed the provisions of KRS chapter

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signed for achieving a predetermined objective, which in this instance was how much additional revenue should the Company be allowed to earn." *Id.*

[58] No. 81-CA-530-MR (Ky. Ct. App. Sept. 18, 1981).

[59] *Id.*, slip op. at 2.

[60] *Id.*

[61] *Id.*, slip op. at 3.

[62] *Id.*, slip op. at 4.

[63] 545 S.W.2d at 927. See the text accompanying notes 20-30 *supra* for a more detailed discussion of *Commonwealth* ex rel. *Stephens v. South Cent. Bell Tel. Co.*

[64] KRS § 278.030(1) (1981) (emphasis added).

[65] Beshear v. South Cent. Bell Tel. Co., No. 81-CA-530-MR, slip op. at 6.

278, and concluded that the legislature not only authorized, but also directed the Commission to review the quality of service of a public utility when undertaking to set rates.[66] Although this statutory interpretation allows the Commission to make such an evaluation of service, its decision is still subject to judicial review under the "unlawful or unreasonable" standard.

IV. JUDICIAL REVIEW IN NON-RATEMAKING PROCEEDINGS

While most utility litigation involves rates and ratemaking procedures, a significant number of utility cases deal with other matters. In addition to the important ratemaking function, the Commission is charged under KRS chapter 278 with the regulation of certificates of convenience and necessity for major construction projects,[67] the regulation of a utility's authority to issue securities[68] and jurisdiction over customer service complaints.[69]

A. *Certificates of Public Convenience and Necessity*

In *Energy Regulatory Commission v. Kentucky Power Co.*,[70] the court of appeals considered the scope of judicial review in a proceeding dealing with Kentucky Power's application for a certificate of public convenience and necessity and a grant of authority to borrow funds in order to purchase an interest in an electric generating plant. Kentucky Power wanted to purchase this interest as insurance against any possible shortage of electricity. The Commission denied the certificate, finding that potential shortage could be remedied by buying electricity from an affiliated utility. Franklin Circuit Court reversed this decision be-

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[66] *Id.* at 7.

[67] KRS § 278.020 (1981).

[68] KRS § 278.300 (1981).

[69] KRS § 278.260 (1981).

[70] 605 S.W.2d at 46. The court stated that the Commission was acting in a "quasi-judicial" capacity when it considered a request for a certificate of public convenience and necessity. *Id.* at 50. However, the court noted that the decision should be based on what best serves the public interest. Such a policy decision should be more accurately described as "quasi-legislative."

cause the Commission "failed to rebut certain allegations regarding the need for and the cost of the new generating facility."[71]

The court of appeals reversed the judgment of the circuit court and remanded the matter to the Commission because the Commission "made only conclusions of law" and "failed to make findings of specific evidentiary facts."[72] The court pointed out that findings of such evidentiary facts are required by *Marshall County v. South Central Bell Telephone Co.*[73] and are necessary in order to sustain or reverse an order of the Commission.[74] Despite this resolution of the case, the court went on to emphasize important principles of judicial review.

The court stated that the scope of judicial review in these non-ratemaking administrative actions is also limited.[75] Under KRS section 278.430, a party seeking to set aside a determination of the Commission regarding a certificate of convenience and necessity has the burden of showing by clear and convincing evidence that the determination was unreasonable or unlawful. The court found that no clear and convincing evidence had been presented to show that the Commission's denial was unreasonable or unlawful, and thus held that the circuit court had improperly substituted its judgment for that of the trier of fact.[76] Additionally, the court announced a very strict definition for the "unreasonable" standard, stating that "the term unreasonable can be applied to an administrative agency's decision only when it is determined that the evidence presented leaves no room for difference of opinion among reasonable minds."[77]

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[71] *Id.* at 49.

[72] *Id.*

[73] 519 S.W.2d 616, 619 (Ky. 1975).

[74] 605 S.W.2d at 49.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 50. *See* Thurman v. Meridian Mut. Ins. Co., 345 S.W.2d 635 (Ky. 1961). *Cf.* Kansas-Nebraska Natural Gas Co. v. State Corp. Comm'n of Kansas, 538 P.2d 702, 713 (Kan. 1975) (stating that "only when the commission's determination is so wide of the mark as to be *outside the realm of fair debate* can the court nullify it") (emphasis added). The New Hampshire Supreme Court found "unreasonable" to be confiscation on the low end of the range and "excessive or extortionate" on the high end. Legislative Util. Consumers' Council v. Public Serv. Co., 402 A.2d 626, 632 (N.H. 1979). *See also* Claiborne Elec. Coop. v. Louisiana Pub. Serv. Comm'n, 388 So. 2d 792, 797 (La. 1980) (stating that

Another important issue raised in the case was whether the Commission has a duty to refute evidence submitted to it by an applicant who has the burden of proving a matter. The circuit court had ruled that the Commission is required to come forward with an affirmative case whenever an applicant makes a prima facie case before the Commission. The court of appeals emphatically rejected this requirement which would have essentially shifted the burden of proof from the applicant to the Commission. The court stated: "Standing alone, unimpeached, unexplained and unrebutted evidence may or may not be so persuasive that it would be clearly unreasonable for the board to be convinced by it. . . . There are some questions and circumstances in which no evidence is required to support a negative finding."[78]

This combination of holdings—that the Commission has no duty to refute evidence submitted to it and that the agency decision will be unreasonable only when reasonable minds could not differ—seems to make agency decisions virtually unreviewable.[79]

B. *Rules, Regulations, Practices or Service of a Utility*

KRS section 278.280 empowers the Commission to determine and fix just, reasonable, safe, proper, adequate or sufficient rules and regulations for intrastate utilities.[80] An interpretation of this statute can be found in *Croke v. Public Service Commission*.[81] In 1973, in the face of a natural gas shortage, Louisville Gas & Electric (LG&E) sought, and the Commission granted, restrictions

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judicial review only considers whether commission's decision was arbitrary, capricious or an abuse of authority); Dayton Power & Light Co. v. Public Util. Comm'n of Ohio, 400 N.E.2d 396, 398 (Ohio 1980) (stating that a finding is unreasonable if the record reveals that it is so manifestly against the weight of evidence as to show misapprehension, mistake or willful disregard of duty).

[78] 605 S.W.2d at 50. The court relied on Lee v. International Harvester Co., 373 S.W.2d 418 (Ky. 1963).

[79] On remand, the Commission granted Kentucky Power the authority to purchase the interest in the generating plant by order dated Sept. 28, 1981. The Attorney General has filed suit in Franklin Circuit Court to enjoin this order. Beshear v. Public Serv. Comm'n, No. 81-CI-1349 (Franklin Cir. Ct. filed Oct. 15, 1981).

[80] KRS § 278.280 (1981).

[81] 573 S.W.2d 927 (Ky. Ct. App. 1978).

on new or expanded service.[82] Pursuant to the Commission's order, LG&E adopted a tariff that included rules and regulations prohibiting the transfer of entitlement to gas service unless the entitlement at the old location was terminated. This tariff was properly adopted by LG&E and approved by the Commission. However, the Commission subsequently ordered LG&E to transfer certain gas entitlements in violation of the company's rules and regulations as set forth in the Commission-approved tariff. The Commission's order to transfer the entitlements was affirmed by the Franklin Circuit Court.

In one of the few cases applying the "unlawful" prong of the standard of judicial review, the court of appeals held in *Croke* that the Commission was without authority to order such a transfer in violation of the company's properly adopted tariff.[83] The court noted that the Commission's powers are purely statutory,[84] but nonetheless stated that the Commission clearly had the authority to change LG&E's rule, as long as the agency followed the appropriate statutory procedures.[85]

C. *Hybrid: Consideration of Need for Certificates of Convenience and Necessity in a Rate Hearing*

In *American District Telegraph Co. v. Utility Regulatory Commission*,[86] the Kentucky Court of Appeals seemed tempted to substitute its judgment on review for the decision reached by the PSC. In the final analysis, however, it did not do so because the Commission's order was not shown to be unreasonable or unlawful by clear and satisfactory evidence. In *American District*, the telegraph company (ADT) had intervened in a South Central Bell rate request. ADT claimed that it was improper to consider the telephone company's sizable construction projects in the rate base without first obtaining certificates of public convenience and necessity.[87] The Commission and the Franklin Circuit Court

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[82] *Id.* at 928.
[83] *Id.* at 930.
[84] *Id.* at 929.
[85] *Id.* at 930.
[86] 619 S.W.2d 504 (Ky. Ct. App. 1981).
[87] *Id.* at 505.

each held that South Central Bell's construction and extensions were made in the usual course of business and that any consideration of a need for a certificate of convenience and necessity would be inappropriate in a rate hearing.[88]

The court of appeals acknowledged that "[r]ate hearings and hearings for certificates of convenience and necessity are each very complicated proceedings" and that "[t]o mix the two could present obvious problems for resolving either."[89] However, the court seemed to suggest that joint consideration could be appropriate if "a specific challenge to any project or group of projects, other than to the annual program," were made.[90] Underscoring the importance of the issue raised in the case, the court commented: "the appellants have made a strong case factually, and they have raised some serious points for concern and consideration. They must not be taken lightly by this Court, the Commission, or the legislature."[91] Despite this concern, the court analyzed the Commission's order under the standard of review set forth in KRS section 278.430 and concluded that the appellants had failed to establish that the order was unreasonable or unlawful.[92] Thus, the court once again affirmed the limited scope of judicial review in administrative proceedings.

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[88] *Id.* at 506-07.
[89] *Id.* at 507.
[90] *Id.*
[91] *Id.*
[92] *Id.*