

**CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC
PUC DOCKET NO. 56211
SOAH DOCKET NO. 473-24-13232**

**HOUSTON COALITION OF CITIES
REQUEST NO.: HCC-RFP02-04**

QUESTION:

Please provide complete copies of all cited sources referenced in Ms. Bulkley's direct testimony.

ANSWER:

Please see attached.

Some of the attachments are confidential and are being provided pursuant to the Protective Order issued in Docket No. 56211.

SPONSOR:

Ann Bulkley

RESPONSIVE DOCUMENTS:

HCC RFP02-04 -- 2,6_Hope.pdf
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HCC RFP02-04 -- 7_Oncor decision.pdf
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15Aug2023.pdf

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64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

Page 1

P

Supreme Court of the United States
FEDERAL POWER COMMISSION et al.

v.

HOPE NATURAL GAS CO.
CITY OF CLEVELAND

v.

SAME.

Nos. 34 and 35.

Argued Oct. 20, 21, 1943.
Decided Jan. 3, 1944.

Separate proceedings before the Federal Power Commission by such Commission, by the City of Cleveland and the City of Akron, and by Pennsylvania Public Utility Commission wherein the State of West Virginia and its Public Service Commission were permitted to intervene concerning rates charged by Hope Natural Gas Company which were consolidated for hearing. An order fixing rates was reversed and remanded with directions by the Circuit Court of Appeals, 134 F.2d 287, and Federal Power Commission, City of Akron and Pennsylvania Public Utility Commission in one case and the City of Cleveland in another bring certiorari.

Reversed.

Mr. Justice REED, Mr. Justice FRANKFURTER and Mr. Justice JACKSON, dissenting.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

West Headnotes

[1] Public Utilities 317A 120

317A Public Utilities

317AII Regulation

317Ak119 Regulation of Charges

317Ak120 k. Nature and Extent in General.

Most Cited Cases

(Formerly 317Ak7.1, 317Ak7)

Rate-making is only one species of price-fixing which, like other applications of the police power, may reduce the value of the property regulated, but that does not render the regulation invalid.

[2] Public Utilities 317A 123

317A Public Utilities

317AII Regulation

317Ak119 Regulation of Charges

317Ak123 k. Reasonableness of Charges in General. Most Cited Cases
(Formerly 317Ak7.4, 317Ak7)

Rates cannot be made to depend upon fair value, which is the end product of the process of rate-making and not the starting point, when the value of the going enterprise depends on earnings under whatever rates may be anticipated.

[3] Gas 190 14.3(2)

190 Gas

190k14 Charges

190k14.3 Administrative Regulation

190k14.3(2) k. Federal Power Commission.

Most Cited Cases

(Formerly 190k14(1))

The rate-making function of the Federal Power Commission under the Natural Gas Act involves the making of pragmatic adjustments, and the Commission is not bound to the use of any single formula or combination of formulae in determining rates. Natural Gas Act, § § 4(a), 5(a), 6, 15 U.S.C.A. § § 717c(a), 717d(a), 717e.

[4] Gas 190 14.5(6)

190 Gas

190k14 Charges

190k14.5 Judicial Review and Enforcement of Regulations

190k14.5(6) k. Scope of Review and Trial De Novo. Most Cited Cases
(Formerly 190k14(1))

When order of Federal Power Commission fixing natural gas rates is challenged in the courts, the question is whether order viewed in its entirety meets the requirements of the Natural Gas Act. Natural Gas Act, § § 4(a), 5(a), 6, 19(b), 15 U.S.C.A. § § 717c(a), 717d(a), 717e, 717r(b).

[5] Gas 190 14.4(1)

190 Gas

190k14 Charges

190k14.4 Reasonableness of Charges

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

190k14.4(1) k. In General. Most Cited Cases

(Formerly 190k14(1))

Under the statutory standard that natural gas rates shall be “just and reasonable” it is the result reached and not the method employed that is controlling. Natural Gas Act § § 4(a), 5(a), 15 U.S.C.A. § § 717c(a), 717d(a).

[6] Gas 190  14.5(6)

190 Gas

190k14 Charges

190k14.5 Judicial Review and Enforcement of Regulations

190k14.5(6) k. Scope of Review and Trial De Novo. Most Cited Cases

(Formerly 190k14(1))

If the total effect of natural gas rates fixed by Federal Power Commission cannot be said to be unjust and unreasonable, judicial inquiry under the Natural Gas Act is at an end. Natural Gas Act, § § 4(a), 5(a), 6, 19(b), 15 U.S.C.A. § § 717c(a), 717d(a), 717e, 717r(b).

[7] Gas 190  14.5(7)

190 Gas

190k14 Charges

190k14.5 Judicial Review and Enforcement of Regulations

190k14.5(7) k. Presumptions. Most Cited Cases

(Formerly 190k14(1))

An order of the Federal Power Commission fixing rates for natural gas is the product of expert judgment, which carries a presumption of validity, and one who would upset the rate must make a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Natural Gas Act, § § 4(a), 5(a), 6, 19(b), 15 U.S.C.A. § § 717c(a), 717d(a), 717e, 717r(b).

[8] Gas 190  14.4(1)

190 Gas

190k14 Charges

190k14.4 Reasonableness of Charges

190k14.4(1) k. In General. Most Cited Cases

(Formerly 190k14(1))

The fixing of just and reasonable rates for natural gas by the Federal Power Commission involves a balancing of the investor and the consumer interests.

Natural Gas Act, § § 4(a), 5(a), 15 U.S.C.A. § § 717c(a), 717d(a).

[9] Gas 190  14.4(9)

190 Gas

190k14 Charges

190k14.4 Reasonableness of Charges

190k14.4(9) k. Depreciation and Depletion. Most Cited Cases

(Formerly 190k14(1))

As respects rates for natural gas, from the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business, which includes service on the debt and dividends on stock, and by such standard the return to the equity owner should be commensurate with the terms on investments in other enterprises having corresponding risks, and such returns should be sufficient to assure confidence in the financial integrity of the enterprise so as to maintain its credit and to attract capital. Natural Gas Act, § § 4(a), 5(a), 15 U.S.C.A. § § 717c(a), 717d(a).

[10] Gas 190  14.4(9)

190 Gas

190k14 Charges

190k14.4 Reasonableness of Charges

190k14.4(9) k. Depreciation and Depletion. Most Cited Cases

(Formerly 190k14(1))

The fixing by the Federal Power Commission of a rate of return that permitted a natural gas company to earn \$2,191,314 annually was supported by substantial evidence. Natural Gas Act, § § 4(a), 5(a), 6, 19(b), 15 U.S.C.A. § § 717c(a), 717d(a), 717e, 717r(b).

[11] Gas 190  14.4(9)

190 Gas

190k14 Charges

190k14.4 Reasonableness of Charges

190k14.4(9) k. Depreciation and Depletion. Most Cited Cases

(Formerly 190k14(1))

Rates which enable a natural gas company to operate successfully, to maintain its financial integrity, to attract capital and to compensate its investors for the risks assumed cannot be condemned as invalid, even though they might produce only a meager return on the so-called “fair value” rate base. Natural Gas Act,

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

§ § 4(a), 5(a), 6, 19(b), 15 U.S.C.A. § § 717c(a), 717d(a), 717e, 717r(b).

[12] Gas 190 14.4(4)

190 Gas
190k14 Charges
190k14.4 Reasonableness of Charges
190k14.4(4) k. Method of Valuation. Most Cited Cases
(Formerly 190k14(1))

A return of only 3 27/100 per cent. on alleged rate base computed on reproduction cost new to natural gas company earning an annual average return of about 9 per cent. on average investment and satisfied with existing gas rates suggests an inflation of the base on which the rate had been computed, and justified Federal Power Commission in rejecting reproduction cost as the measure of the rate base. Natural Gas Act, § § 4(a), 5(a), 15 U.S.C.A. § § 717c(a), 717d(a).

[13] Gas 190 14.4(9)

190 Gas
190k14 Charges
190k14.4 Reasonableness of Charges
190k14.4(9) k. Depreciation and Depletion. Most Cited Cases
(Formerly 190k14(1))

There is no constitutional requirement that owner who engages in a wasting-asset business of limited life shall receive at the end more than he has put into it, and such rule is applicable to a natural gas company since the ultimate exhaustion of its supply of gas is inevitable. Natural Gas Act, § § 4(a), 5(a), 6, 19(b), 15 U.S.C.A. § § 717c(a), 717d(a), 717e, 717r(b).

[14] Gas 190 14.4(9)

190 Gas
190k14 Charges
190k14.4 Reasonableness of Charges
190k14.4(9) k. Depreciation and Depletion. Most Cited Cases
(Formerly 190k14(1))

In fixing natural gas rate the basing of annual depreciation on cost is proper since by such procedure the utility is made whole and the integrity of its investment is maintained, and no more is required. Natural Gas Act, § § 4(a), 5(a), 6, 19(b), 15 U.S.C.A. § § 717c(a), 717d(a), 717e, 717r(b).

[15] Gas 190 14.3(4)

190 Gas
190k14 Charges
190k14.3 Administrative Regulation
190k14.3(4) k. Findings and Orders. Most Cited Cases
(Formerly 190k14(1))

There are no constitutional requirements more exacting than the standards of the Natural Gas Act which are that gas rates shall be just and reasonable, and a rate order which conforms with the act is valid. Natural Gas Act, § § 4(a), 5(a), 6, 19(b), 15 U.S.C.A. § § 717c(a), 717d(a), 717e, 717r(b).

[16] Commerce 83 62.2

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General
83k62.2 k. Gas. Most Cited Cases
(Formerly 83k13)

The purpose of the Natural Gas Act was to provide through the exercise of the national power over interstate commerce an agency for regulating the wholesale distribution to public service companies of natural gas moving in interstate commerce not subject to certain types of state regulation, and the act was not intended to take any authority from state commissions or to usurp state regulatory authority. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.

[17] Mines and Minerals 260 92.5(3)

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.5 Federal Law and Regulations
260k92.5(3) k. Oil and Gas. Most Cited Cases
(Formerly 260k92.7, 260k92)

Under the Natural Gas Act, the Federal Power Commission has no authority over the production or gathering of natural gas. Natural Gas Act, § 1(b), 15 U.S.C.A. § 717(b).

[18] Gas 190 14.1(1)

190 Gas
190k14 Charges
190k14.1 In General
190k14.1(1) k. In General; Amount and

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

Regulation. Most Cited Cases
(Formerly 190k14(1))

The primary aim of the Natural Gas Act was to protect consumers against exploitation at the hands of natural gas companies and holding companies owning a majority of the pipe-line mileage which moved gas in interstate commerce and against which state commissions, independent producers and communities were growing quite helpless. Natural Gas Act, § § 4, 6-10, 14, 15 U.S.C.A. § § 717c, 717e-717i, 717m.

[19] Gas 190 14.1(1)

190 Gas
190k14 Charges
190k14.1 In General
190k14.1(1) k. In General; Amount and Regulation. Most Cited Cases
(Formerly 190k14(1))

Apart from the express exemptions contained in § 7 of the Natural Gas Act considerations of conservation are material where abandonment or extensions of facilities or service by natural gas companies are involved, but exploitation of consumers by private operators through maintenance of high rates cannot be continued because of the indirect benefits derived therefrom by a state containing natural gas deposits. Natural Gas Act, § § 4, 5, and § 7 as amended 15 U.S.C.A. § § 717c, 717d, 717f.

[20] Commerce 83 62.2

83 Commerce
83II Application to Particular Subjects and Methods of Regulation

83II(B) Conduct of Business in General
83k62.2 k. Gas. Most Cited Cases
(Formerly 83k13)

A limitation on the net earnings of a natural gas company from its interstate business is not a limitation on the power of the producing state, either to safeguard its tax revenues from such industry, or to protect the interests of those who sell their gas to the interstate operator, particularly where the return allowed the company by the Federal Power Commission was a net return after all such charges. Natural Gas Act, § § 4, 5, and § 7, as amended, 15 U.S.C.A. § § 717c, 717d, 717f.

[21] Gas 190 14.4(1)

190 Gas
190k14 Charges

190k14.4 Reasonableness of Charges

190k14.4(1) k. In General. Most Cited Cases

(Formerly 190k14(1))

The Natural Gas Act granting Federal Power Commission power to fix “just and reasonable rates” does not include the power to fix rates which will disallow or discourage resales for industrial use. Natural Gas Act, § § 4(a), 5(a), 15 U.S.C.A. § § 717c(a), 717d(a).

[22] Gas 190 14.4(1)

190 Gas
190k14 Charges
190k14.4 Reasonableness of Charges
190k14.4(1) k. In General. Most Cited Cases

(Formerly 190k14(1))

The wasting-asset nature of the natural gas industry does not require the maintenance of the level of rates so that natural gas companies can make a greater profit on each unit of gas sold. Natural Gas Act, § § 4(a), 5(a), 15 U.S.C.A. § § 717c(a), 717d(a).

[23] Federal Courts 170B 452

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk452 k. Certiorari in General. Most Cited Cases

(Formerly 106k383(1))

Where the Federal Power Commission made no findings as to any discrimination or unreasonable differences in rates, and its failure was not challenged in the petition to review, and had not been raised or argued by any party, the problem of discrimination was not open to review by the Supreme Court on certiorari. Natural Gas Act, § 4(b), 15 U.S.C.A. § 717c(b).

[24] Constitutional Law 92 74

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(B) Judicial Powers and Functions
92k71 Encroachment on Executive
92k74 k. Powers, Duties, and Acts Under Legislative Authority. Most Cited Cases
(Formerly 15Ak226)
Congress has entrusted the administration of the

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

Page 5

Natural Gas Act to the Federal Power Commission and not to the courts, and apart from the requirements of judicial review, it is not for the Supreme Court to advise the Commission how to discharge its functions. Natural Gas Act, § 1 et seq., 19(b), 15 U.S.C.A. § 717 et seq., 717r(b).

[25] Gas 190 14.5(3)

190 Gas

190k14 Charges

190k14.5 Judicial Review and Enforcement of Regulations

190k14.5(3) k. Decisions Reviewable. Most Cited Cases

(Formerly 190k14(1))

Under the Natural Gas Act, where order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action, the order is not reviewable, and resort to the courts in such situation is either premature or wholly beyond the province of such courts. Natural Gas Act, § 19(b), 15 U.S.C.A. § 717r(b).

[26] Gas 190 14.5(4)

190 Gas

190k14 Charges

190k14.5 Judicial Review and Enforcement of Regulations

190k14.5(4) k. Persons Entitled to Relief; Parties. Most Cited Cases

(Formerly 190k14(1))

Findings of the Federal Power Commission on lawfulness of past natural gas rates, which the Commission was without power to enforce, were not reviewable under the Natural Gas Act giving any "party aggrieved" by an order of the Commission the right of review. Natural Gas Act, § 19(b), 15 U.S.C.A. § 717r(b).

****283 *592** Mr. Francis M. Shea, Asst. Atty. Gen., for petitioners Federal Power Com'n and others.

***593** Mr. Spencer W. Reeder, of Cleveland, Ohio, for petitioner City of Cleveland.

Mr. William B. Cockley, of Cleveland, Ohio, for respondent.

Mr. M. M. Neeley, of Charleston, W. Va., for State of West Virginia, as amicus curiae by special leave of Court.

Mr. Justice DOUGLAS delivered the opinion of the

Court.

The primary issue in these cases concerns the validity under the Natural Gas Act of 1938, 52 Stat. 821, 15 U.S.C. s 717 et seq., 15 U.S.C.A. s 717 et seq., of a rate order issued by the Federal Power Commission reducing the rates chargeable by Hope Natural Gas Co., 44 P.U.R.,N.S., 1. On a petition for review of the order made pursuant to s 19(b) of the Act, the ***594** Circuit Court of Appeals set it aside, one judge dissenting. 4 Cir., 134 F.2d 287. The cases ****284** are here on petitions for writs of certiorari which we granted because of the public importance of the questions presented. City of Cleveland v. Hope Natural Gas Co., 319 U.S. 735, 63 S.Ct. 1165.

Hope is a West Virginia corporation organized in 1898. It is a wholly owned subsidiary of Standard Oil Co. (N.J.). Since the date of its organization, it has been in the business of producing, purchasing and marketing natural gas in that state. ^{FN1} It sells some of that gas to local consumers in West Virginia. But the great bulk of it goes to five customer companies which receive it at the West Virginia line and distribute it in Ohio and in Pennsylvania. ^{FN2} In July, 1938, the cities of Cleveland and Akron filed complaints with the Commission charging that the rates collected by Hope from East Ohio Gas Co. (an affiliate of Hope which distributes gas in Ohio) were excessive and unreasonable. Later in 1938 the Commission on its own motion instituted an investigation to determine the reasonableness of all of Hope's interstate rates. In March ***595** 1939 the Public Utility Commission of Pennsylvania filed a complaint with the Commission charging that the rates collected by Hope from Peoples Natural Gas Co. (an affiliate of Hope distributing gas in Pennsylvania) and two non-affiliated companies were unreasonable. The City of Cleveland asked that the challenged rates be declared unlawful and that just and reasonable rates be determined from June 30, 1939 to the date of the Commission's order. The latter finding was requested in aid of state regulation and to afford the Public Utilities Commission of Ohio a proper basis for disposition of a fund collected by East Ohio under bond from Ohio consumers since June 30, 1939. The cases were consolidated and hearings were held.

^{FN1} Hope produces about one-third of its annual gas requirements and purchases the rest under some 300 contracts.

^{FN2} These five companies are the East Ohio Gas Co., the Peoples Natural Gas Co., the

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

Page 6

River Gas Co., the Fayette County Gas Co.,
and the Manufacturers Light & Heat Co.
The first three of these companies are, like
Hope, subsidiaries of Standard Oil Co.

(N.J.). East Ohio and River distribute gas in
Ohio, the other three in Pennsylvania.
Hope's approximate sales in m.c.f. for 1940
may be classified as follows:

Local West Virginia.

sales.	11,000,000
East Ohio.	40,000,000
Peoples.	10,000,000
River.	400,000
Fayette.	860,000
Manufacturers.	2,000,000

Local West Virginia

Hope's natural gas is processed by Hope Construction & Refining Co., an affiliate, for the extraction of gasoline and butane. Domestic Coke Corp., another affiliate, sells coke-oven gas to Hope for boiler fuel.

On May 26, 1942, the Commission entered its order and made its findings. Its order required Hope to decrease its future interstate rates so as to reflect a reduction, on an annual basis of not less than \$3,609,857 in operating revenues. And it established 'just and reasonable' average rates per m.c.f. for each of the five customer companies. ^{FN3} In response to the prayer of the City of Cleveland the Commission also made findings as to the lawfulness of past rates, although concededly it had no authority under the Act to fix past rates or to award reparations. 44 P.U.R.,U.S., at page 34. It found that the rates collected by Hope from East Ohio were unjust, unreasonable, excessive and therefore unlawful, by \$830,892 during 1939, \$3,219,551 during 1940, and \$2,815,789 on an annual basis since 1940. It further found that just, reasonable, and lawful rates for gas sold by Hope to East Ohio for resale for ultimate public consumption were those required *596 to produce \$11,528,608 for 1939, \$11,507,185 for 1940 and \$11,910,947 annually since 1940.

FN3 These required minimum reductions of 7¢ per m.c.f. from the 36.5¢ and 35.5¢ rates previously charged East Ohio and Peoples, respectively, and 3¢ per m.c.f. from the 31.5¢ rate previously charged Fayette and Manufacturers.

The Commission established an interstate rate base of \$33,712,526 which, it found, represented the 'actual legitimate cost' of the company's interstate property less depletion and depreciation and plus unoperated acreage, working capital and future net capital additions. The Commission, beginning with book cost, made **285

certain adjustments not necessary to relate here and found the 'actual legitimate cost' of the plant in interstate service to be \$51,957,416, as of December 31, 1940. It deducted accrued depletion and depreciation, which it found to be \$22,328,016 on an 'economic-service-life' basis. And it added \$1,392,021 for future net capital additions, \$566,105 for useful unoperated acreage, and \$2,125,000 for working capital. It used 1940 as a test year to estimate future revenues and expenses. It allowed over \$16,000,000 as annual operating expenses-about \$1,300,000 for taxes, \$1,460,000 for depletion and depreciation, \$600,000 for exploration and development costs, \$8,500,000 for gas purchased. The Commission allowed a net increase of \$421,160 over 1940 operating expenses, which amount was to take care of future increase in wages, in West Virginia property taxes, and in exploration and development costs. The total amount of deductions allowed from interstate revenues was \$13,495,584.

Hope introduced evidence from which it estimated reproduction cost of the property at \$97,000,000. It also presented a so-called trended 'original cost' estimate which exceeded \$105,000,000. The latter was designed 'to indicate what the original cost of the property would have been if 1938 material and labor prices had prevailed throughout the whole period of the piece-meal construction of the company's property since 1898.' 44 P.U.R.,N.S., at pages 8, 9. Hope estimated by the 'percent condition' method accrued depreciation at about 35% of *597 reproduction cost new. On that basis Hope contended for a rate base of \$66,000,000. The Commission refused to place any reliance on reproduction cost new, saying that it was 'not predicated upon facts' and was 'too conjectural and illusory to be given any weight in these proceedings.' Id., 44 P.U.R.,U.S., at page 8. It likewise refused to give any 'probative value' to trended 'original cost' since it was 'not founded in fact' but was 'basically erroneous' and produced 'irrational results.' Id., 44 P.U.R., N.S., at page 9. In determining the amount of accrued depletion and depreciation the Commission, following Lindheimer v. Illinois Bell

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

Telephone Co., 292 U.S. 151, 167-169, 54 S.Ct. 658, 664-666, 78 L.Ed. 1182; Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 592, 593, 62 S.Ct. 736, 745, 746, 86 L.Ed. 1037, based its computation on 'actual legitimate cost'. It found that Hope during the years when its business was not under regulation did not observe 'sound depreciation and depletion practices' but 'actually accumulated an excessive reserve' ^{FN4} of about \$46,000,000. *Id.*, 44 P.U.R.,N.S., at page 18. One member of the Commission thought that the entire amount of the reserve should be deducted from 'actual legitimate cost' in determining the rate base. ^{FN5} The majority of the *598 Commission concluded, however, that where, as here, a business is brought under regulation for the first time and where incorrect depreciation and depletion practices have prevailed, the deduction of the reserve requirement (actual existing depreciation and depletion) rather than the excessive reserve should be made so as to **286 lay 'a sound basis for future regulation and control of rates.' *Id.*, 44 P.U.R.,N.S., at page 18. As we have pointed out, it determined accrued depletion and depreciation to be \$22,328,016; and it allowed approximately \$1,460,000 as the annual operating expense for depletion and depreciation. ^{FN6}

^{FN4} The book reserve for interstate plant amounted at the end of 1938 to about \$18,000,000 more than the amount determined by the Commission as the proper reserve requirement. The Commission also noted that 'twice in the past the company has transferred amounts aggregating \$7,500,000 from the depreciation and depletion reserve to surplus. When these latter adjustments are taken into account, the excess becomes \$25,500,000, which has been exacted from the ratepayers over and above the amount required to cover the consumption of property in the service rendered and thus to keep the investment unimpaired.' 44 P.U.R.,N.S., at page 22.

^{FN5} That contention was based on the fact that 'every single dollar in the depreciation and depletion reserves' was taken 'from gross operating revenues whose only source was the amounts charged customers in the past for natural gas. It is, therefore, a fact that the depreciation and depletion reserves have been contributed by the customers and do not represent any investment by Hope.' *Id.*, 44 P.U.R.,N.S., at page 40. And see Railroad Commission v. Cumberland Tel. & T. Co., 212 U.S. 414, 424, 425, 29 S.Ct. 357, 361, 362, 53 L.Ed. 577; 2 Bonbright, *Valuation of Property*

(1937), p. 1139.

^{FN6} The Commission noted that the case was 'free from the usual complexities involved in the estimate of gas reserves because the geologists for the company and the Commission presented estimates of the remaining recoverable gas reserves which were about one per cent apart.' 44 P.U.R.,N.S., at pages 19, 20.

The Commission utilized the 'straight-line-basis' for determining the depreciation and depletion reserve requirements. It used estimates of the average service lives of the property by classes based in part on an inspection of the physical condition of the property. And studies were made of Hope's retirement experience and maintenance policies over the years. The average service lives of the various classes of property were converted into depreciation rates and then applied to the cost of the property to ascertain the portion of the cost which had expired in rendering the service.

The record in the present case shows that Hope is on the lookout for new sources of supply of natural gas and is contemplating an extension of its pipe line into Louisiana for that purpose. The Commission recognized in fixing the rates of depreciation that much material may be used again when various present sources of gas supply are exhausted, thus giving that property more than scrap value at the end of its present use.

Hope's estimate of original cost was about \$69,735,000-approximately \$17,000,000 more than the amount found by the Commission. The item of \$17,000,000 was made up largely of expenditures which prior to December 31, 1938, were charged to operating expenses. Chief among those expenditures was some \$12,600,000 expended *599 in well-drilling prior to 1923. Most of that sum was expended by Hope for labor, use of drilling-rigs, hauling, and similar costs of well-drilling. Prior to 1923 Hope followed the general practice of the natural gas industry and charged the cost of drilling wells to operating expenses. Hope continued that practice until the Public Service Commission of West Virginia in 1923 required it to capitalize such expenditures, as does the Commission under its present Uniform System of Accounts. ^{FN7} The Commission refused to add such items to the rate base stating that 'No greater injustice to consumers could be done than to allow items as operating expenses and at a later date include them in the rate base, thereby placing multiple charges upon the consumers.' *Id.*, 44 P.U.R.,N.S., at page 12. For the same reason the Commission excluded from the rate base about \$1,600,000 of expenditures on properties which Hope acquired from other utilities, the latter having charged those payments to operating expenses. The Commission disallowed certain other overhead items amounting to

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

over \$3,000,000 which also had been previously charged to operating expenses. And it refused to add some \$632,000 as interest during construction since no interest was in fact paid.

FN7 See Uniform System of Accounts prescribed for Natural Gas Companies effective January 1, 1940, Account No. 332.1.

Hope contended that it should be allowed a return of not less than 8%. The Commission found that an 8% return would be unreasonable but that 6 1/2% was a fair rate of return. That rate of return, applied to the rate base of \$33,712,526, would produce \$2,191,314 annually, as compared with the present income of not less than \$5,801,171.

The Circuit Court of Appeals set aside the order of the Commission for the following reasons. (1) It held that the rate base should reflect the 'present fair value' of the *600 property, that the Commission in determining the 'value' should have considered reproduction cost and trended original cost, and that 'actual legitimate cost' (prudent investment) was not the proper measure of 'fair value' where price levels had changed since the investment. (2) It concluded that the well-drilling costs and overhead items in the amount of some \$17,000,000 should have been included in the rate base. (3) It held that accrued depletion and depreciation and the annual allowance for that expense should be computed on the basis of 'present fair value' of the property not on the basis of 'actual legitimate cost'.

****287** The Circuit Court of Appeals also held that the Commission had no power to make findings as to past rates in aid of state regulation. But it concluded that those findings were proper as a step in the process of fixing future rates. Viewed in that light, however, the findings were deemed to be invalidated by the same errors which vitiated the findings on which the rate order was based.

Order Reducing Rates. Congress has provided in s 4(a) of the Natural Gas Act that all natural gas rates subject to the jurisdiction of the Commission 'shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.' Sec. 5(a) gives the Commission the power, after hearing, to determine the 'just and reasonable rate' to be thereafter observed and to fix the rate by order. Sec. 5(a) also empowers the Commission to order a 'decrease where existing rates are unjust * * * unlawful, or are not the lowest reasonable rates.' And Congress has provided in s 19(b) that on review of these rate orders the 'finding of the Commission as to the facts, if supported by substantial

evidence, shall be conclusive.' Congress, however, has provided no formula by which the 'just and reasonable' rate is to be determined. It has not filled in the *601 details of the general prescription ^{FN8} of s 4(a) and s 5(a). It has not expressed in a specific rule the fixed principle of 'just and reasonable'.

FN8. Sec. 6 of the Act comes the closest to supplying any definite criteria for rate making. It provides in subsection (a) that, 'The Commission may investigate the ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.' Subsection (b) provides that every natural-gas company on request shall file with the Commission a statement of the 'original cost' of its property and shall keep the Commission informed regarding the 'cost' of all additions, etc.

[1] [2] When we sustained the constitutionality of the Natural Gas Act in the Natural Gas Pipeline Co. case, we stated that the 'authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the states under the Fourteenth to regulate the prices of commodities in intrastate commerce.' 315 U.S. at page 582, 62 S.Ct. at page 741, 86 L.Ed. 1037. Rate-making is indeed but one species of price-fixing. Munn v. Illinois, 94 U.S. 113, 134, 24 L.Ed. 77. The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid. Block v. Hirsh, 256 U.S. 135, 155-157, 41 S.Ct. 458, 459, 460, 65 L.Ed. 865, 16 A.L.R. 165; Nebbia v. New York, 291 U.S. 502, 523-539, 54 S.Ct. 505, 509-517, 78 L.Ed. 940, 89 A.L.R. 1469, and cases cited. It does, however, indicate that 'fair value' is the end product of the process of rate-making not the starting point as the Circuit Court of Appeals held. The heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated. ^{FN9}

FN9 We recently stated that the meaning of the word 'value' is to be gathered 'from the purpose for which a valuation is being made. Thus the question in a valuation for rate making is how much a utility will be allowed to earn. The basic

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

question in a valuation for reorganization purposes is how much the enterprise in all probability can earn.’ Institutional Investors v. Chicago, M., St. P. & P.R. Co., 318 U.S. 523, 540, 63 S.Ct. 727, 738.

602** [3] [4] [5] [6] [7] We held in Federal Power Commission v. Natural Gas Pipeline Co., supra, that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of ‘pragmatic adjustments.’ Id., 315 U.S. at page 586, 62 S.Ct. at page 743, 86 L.Ed. 1037. And when the Commission’s order is challenged in the courts, the question is whether that order ‘viewed in its entirety’ meets the requirements of the Act. Id., 315 U.S. at page 586, 62 S.Ct. at page 743, 86 L.Ed. 1037. Under the statutory standard of ‘just and reasonable’ it is the result reached not the method employed which is controlling. Cf. *288** Los Angeles Gas & Electric Corp. v. Railroad Commission, 289 U.S. 287, 304, 305, 314, 53 S.Ct. 637, 643, 644, 647, 77 L.Ed. 1180; West Ohio Gas Co. v. Public Utilities Commission (No. 1), 294 U.S. 63, 70, 55 S.Ct. 316, 320, 79 L.Ed. 761; West v. Chesapeake & Potomac Tel. Co., 295 U.S. 662, 692, 693, 55 S.Ct. 894, 906, 907, 79 L.Ed. 1640 (dissenting opinion). It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission’s order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. Railroad Commission v. Cumberland Tel. & T. Co., 212 U.S. 414, 29 S.Ct. 357, 53 L.Ed. 577; Lindheimer v. Illinois Bell Tel. Co., supra, 292 U.S. at pages 164, 169, 54 S.Ct. at pages 663, 665, 78 L.Ed. 1182; Railroad Commission v. Pacific Gas & E. Co., 302 U.S. 388, 401, 58 S.Ct. 334, 341, 82 L.Ed. 319.

***603** [8] [9] The rate-making process under the Act, i.e., the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and the consumer interests. Thus we stated in the Natural Gas Pipeline Co. case that ‘regulation does not insure that the business shall produce net revenues.’ 315 U.S. at page 590, 62 S.Ct. at page 745, 86 L.Ed. 1037. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it

is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345, 346, 12 S.Ct. 400, 402, 36 L.Ed. 176. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. See State of Missouri ex rel. South-western Bell Tel. Co. v. Public Service Commission, 262 U.S. 276, 291, 43 S.Ct. 544, 547, 67 L.Ed. 981, 31 A.L.R. 807 (Mr. Justice Brandeis concurring). The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the investor or company viewpoint.

We have already noted that Hope is a wholly owned subsidiary of the Standard Oil Co. (N.J.). It has no securities outstanding except stock. All of that stock has been owned by Standard since 1908. The par amount presently outstanding is approximately \$28,000,000 as compared with the rate base of \$33,712,526 established by ***604** the Commission. Of the total outstanding stock \$11,000,000 was issued in stock dividends. The balance, or about \$17,000,000, was issued for cash or other assets. During the four decades of its operations Hope has paid over \$97,000,000 in cash dividends. It had, moreover, accumulated by 1940 an earned surplus of about \$8,000,000. It had thus earned the total investment in the company nearly seven times. Down to 1940 it earned over 20% per year on the average annual amount of its capital stock issued for cash or other assets. On an average invested capital of some \$23,000,000 Hope’s average earnings have been about 12% a year. And during this period it had accumulated in addition reserves for depletion and depreciation of about \$46,000,000. Furthermore, during 1939, 1940 and 1941, Hope paid dividends of 10% on its stock. And in the year 1942, during about half of which the lower rates were in effect, it paid dividends of 7 1/2%. From 1939-1942 its earned surplus increased from \$5,250,000 to about \$13,700,000, i.e., to almost half the par value of its outstanding stock.

As we have noted, the Commission fixed a rate of return which permits Hope to earn \$2,191,314 annually. In determining that amount it stressed the importance of maintaining the financial integrity of the ****289** company. It considered the financial history of Hope and a vast

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

array of data bearing on the natural gas industry, related businesses, and general economic conditions. It noted that the yields on better issues of bonds of natural gas companies sold in the last few years were 'close to 3 per cent', 44 P.U.R.,N.S., at page 33. It stated that the company was a 'seasoned enterprise whose risks have been minimized' by adequate provisions for depletion and depreciation (past and present) with 'concurrent high profits', by 'protected established markets, through affiliated distribution companies, in populous and industrialized areas', and by a supply of gas locally to meet all requirements,*605 'except on certain peak days in the winter, which it is feasible to supplement in the future with gas from other sources.' Id., 44 P.U.R.,N.S., at page 33. The Commission concluded, 'The company's efficient management, established markets, financial record, affiliations, and its prospective business place it in a strong position to attract capital upon favorable terms when it is required.' Id., 44 P.U.R.,N.S., at page 33.

[10] [11] [12] In view of these various considerations we cannot say that an annual return of \$2,191,314 is not 'just and reasonable' within the meaning of the Act. Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called 'fair value' rate base. In that connection it will be recalled that Hope contended for a rate base of \$66,000,000 computed on reproduction cost new. The Commission points out that if that rate base were accepted, Hope's average rate of return for the four-year period from 1937-1940 would amount to 3.27%. During that period Hope earned an annual average return of about 9% on the average investment. It asked for no rate increases. Its properties were well maintained and operated. As the Commission says such a modest rate of 3.27% suggests an 'inflation of the base on which the rate has been computed.' Dayton Power & Light Co. v. Public Utilities Commission, 292 U.S. 290, 312, 54 S.Ct. 647, 657, 78 L.Ed. 1267. Cf. Lindheimer v. Illinois Bell Tel. Co., supra, 292 U.S. at page 164, 54 S.Ct. at page 663, 78 L.Ed. 1182. The incongruity between the actual operations and the return computed on the basis of reproduction cost suggests that the Commission was wholly justified in rejecting the latter as the measure of the rate base.

In view of this disposition of the controversy we need not stop to inquire whether the failure of the Commission to add the \$17,000,000 of well-drilling and other costs to *606 the rate base was consistent with the prudent investment theory as developed and applied in particular cases.

[13] [14] [15] Only a word need be added respecting depletion and depreciation. We held in the Natural Gas Pipeline Co. case that there was no constitutional requirement 'that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it.' 315 U.S. at page 593, 62 S.Ct. at page 746, 86 L.Ed. 1037. The Circuit Court of Appeals did not think that that rule was applicable here because Hope was a utility required to continue its service to the public and not scheduled to end its business on a day certain as was stipulated to be true of the Natural Gas Pipeline Co. But that distinction is quite immaterial. The ultimate exhaustion of the supply is inevitable in the case of all natural gas companies. Moreover, this Court recognized in Lindheimer v. Illinois Bell Tel. Co., supra, the propriety of basing annual depreciation on cost.^{FN10} By such a procedure the **290 utility is made whole and the integrity of its investment maintained.^{FN11} No more is required.^{FN12} We cannot approve the contrary holding *607 of United Railways & Electric Co. v. West, 280 U.S. 234, 253, 254, 50 S.Ct. 123, 126, 127, 74 L.Ed. 390. Since there are no constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul of the former.

FN10 Chief Justice Hughes said in that case (292 U.S. at pages 168, 169, 54 S.Ct. at page 665, 78 L.Ed. 1182): 'If the predictions of service life were entirely accurate and retirements were made when and as these predictions were precisely fulfilled, the depreciation reserve would represent the consumption of capital, on a cost basis, according to the method which spreads that loss over the respective service periods. But if the amounts charged to operating expenses and credited to the account for depreciation reserve are excessive, to that extent subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return.'

FN11 See Mr. Justice Brandeis (dissenting) in United Railways & Electric Co. v. West, 280 U.S. 234, 259-288, 50 S.Ct. 123, 128-138, 74 L.Ed. 390, for an extended analysis of the problem.

FN12 It should be noted that the Act provides no specific rule governing depletion and depreciation. Sec. 9(a) merely states that the

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

Commission 'may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas.'

The Position of West Virginia. The State of West Virginia, as well as its Public Service Commission, intervened in the proceedings before the Commission and participated in the hearings before it. They have also filed a brief amicus curiae here and have participated in the argument at the bar. Their contention is that the result achieved by the rate order 'brings consequences which are unjust to West Virginia and its citizens' and which 'unfairly depress the value of gas, gas lands and gas leaseholds, unduly restrict development of their natural resources, and arbitrarily transfer their properties to the residents of other states without just compensation therefor.'

West Virginia points out that the Hope Natural Gas Co. holds a large number of leases on both producing and unoperated properties. The owner or grantor receives from the operator or grantee delay rentals as compensation for postponed drilling. When a producing well is successfully brought in, the gas lease customarily continues indefinitely for the life of the field. In that case the operator pays a stipulated gas-well rental or in some cases a gas royalty equivalent to one-eighth of the gas marketed. ^{FN13} Both the owner and operator have valuable property interests in the gas which are separately taxable under West Virginia law. The contention is that the reversionary interests in the leaseholds should be represented in the rate proceedings since it is their gas which is being sold in interstate ^{*608} commerce. It is argued, moreover, that the owners of the reversionary interests should have the benefit of the 'discovery value' of the gas leaseholds, not the interstate consumers. Furthermore, West Virginia contends that the Commission in fixing a rate for natural gas produced in that State should consider the effect of the rate order on the economy of West Virginia. It is pointed out that gas is a wasting asset with a rapidly diminishing supply. As a result West Virginia's gas deposits are becoming increasingly valuable. Nevertheless the rate fixed by the Commission reduces that value. And that reduction, it is said, has severe repercussions on the economy of the State. It is argued in the first place that as a result of this rate reduction Hope's West Virginia property taxes may be decreased in view of the relevance which earnings have under West Virginia law in the assessment of property for tax purposes. ^{FN14} Secondly, it is pointed out that West Virginia has a production tax ^{FN15} on the 'value' of the gas exported from the State. And we are told that

for purposes of that tax 'value' becomes under West Virginia law 'practically the substantial equivalent of market value.' Thus West Virginia argues that undervaluation of Hope's gas leaseholds will cost the State many thousands of dollars in taxes. The effect, it is urged, is to impair West Virginia's tax structure for the benefit of Ohio and Pennsylvania consumers. West Virginia emphasizes, moreover, its deep interest in the conservation of its natural resources including its natural gas. It says that a reduction of the value of these leasehold values will jeopardize these conservation policies in three respects: (1) ^{**291} exploratory development of new fields will be discouraged; (2) abandonment of lowyield high-cost marginal wells will be hastened; and (3) secondary recovery of oil will be hampered. ^{*609} Furthermore, West Virginia contends that the reduced valuation will harm one of the great industries of the State and that harm to that industry must inevitably affect the welfare of the citizens of the State. It is also pointed out that West Virginia has a large interest in coal and oil as well as in gas and that these forms of fuel are competitive. When the price of gas is materially cheapened, consumers turn to that fuel in preference to the others. As a result this lowering of the price of natural gas will have the effect of depreciating the price of West Virginia coal and oil.

^{FN13} See Simonton, The Nature of the Interest of the Grantee Under an Oil and Gas Lease (1918), 25 W.Va.L.Quar. 295.

^{FN14} West Penn Power Co. v. Board of Review, 112 W.Va. 442, 164 S.E. 862.

^{FN15} W.Va.Rev.Code of 1943, ch. 11. Art. 13, ss 2a, 3a.

West Virginia insists that in neglecting this aspect of the problem the Commission failed to perform the function which Congress entrusted to it and that the case should be remanded to the Commission for a modification of its order. ^{FN16}

^{FN16} West Virginia suggests as a possible solution (1) that a 'going concern value' of the company's tangible assets be included in the rate base and (2) that the fair market value of gas delivered to customers be added to the outlay for operating expenses and taxes.

We have considered these contentions at length in view of the earnestness with which they have been urged upon us. We have searched the legislative history of the Natural

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

Gas Act for any indication that Congress entrusted to the Commission the various considerations which West Virginia has advanced here. And our conclusion is that Congress did not.

[16] [17] We pointed out in Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 506, 62 S.Ct. 384, 387, 86 L.Ed. 371, that the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' As stated in the House Report the 'basic purpose' of this legislation was 'to occupy' the field in which such cases as *610 State of Missouri v. Kansas Natural Gas Co., 265 U.S. 298, 44 S.Ct. 544, 68 L.Ed. 1027, and Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549, had held the States might not act. H.Rep. No. 709, 75th Cong., 1st Sess., p. 2. In accomplishing that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.' Id., p. 2. And the Federal Power Commission was given no authority over the 'production or gathering of natural gas.' s 1(b).

[18] The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the Kansas Natural Gas Co. case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H.Rep., No. 709, supra, p. 3. Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. ^{FN17} State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations. ^{FN18} These were the types of problems with which those participating in the hearings were pre-occupied. ^{FN19} Congress addressed itself to those specific evils.

^{FN17} S.Doc. 92, Pt. 84-A, ch. XII, Final Report, Federal Trade Commission to the Senate pursuant to S.Res.No. 83, 70th Cong., 1st Sess.

^{FN18} S.Doc. 92, Pt. 84-A, chs. XII, XIII, op.

cit., supra, note 17.

^{FN19} See Hearings on H.R. 11662, Subcommittee of House Committee on Interstate & Foreign Commerce, 74th Cong., 2d Sess.; Hearings on H.R. 4008, House Committee on Interstate & Foreign Commerce, 75th Cong., 1st Sess.

*611 The Federal Power Commission was given**292 broad powers of regulation. The fixing of 'just and reasonable' rates (s 4) with the powers attendant thereto ^{FN20} was the heart of the new regulatory system. Moreover, the Commission was given certain authority by s 7(a), on a finding that the action was necessary or desirable 'in the public interest,' to require natural gas companies to extend or improve their transportation facilities and to sell gas to any authorized local distributor. By s 7(b) it was given control over the abandonment of facilities or of service. And by s 7(c), as originally enacted, no natural gas company could undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas was already being served by another company, or sell any natural gas in such a market, without obtaining a certificate of public convenience and necessity from the Commission. In passing on such applications for certificates of convenience and necessity the Commission was told by s 7(c), as originally enacted, that it was 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.' The latter provision was deleted from s 7(c) when that subsection was amended by the Act of February 7, 1942, 56 Stat. 83. By that amendment limited grandfather rights were granted companies desiring to extend their facilities and services over the routes or within the area which they were already serving. Moreover, s 7(c) was broadened so as to require certificates*612 of public convenience and necessity not only where the extensions were being made to markets in which natural gas was already being sold by another company but in other situations as well.

^{FN20} The power to investigate and ascertain the 'actual legitimate cost' of property (s 6), the requirement as to books and records (s 8), the requirement as to rates of depreciation (s 9), the requirements for periodic and special reports (s 10), the broad powers of investigation (s 14) are among the chief powers supporting the rate making function.

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

[19] These provisions were plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies. When it comes to cases of abandonment or of extensions of facilities or service, we may assume that, apart from the express exemptions ^{FN21} contained in s 7, considerations of conservation are material to the issuance of certificates of public convenience and necessity. But the Commission was not asked here for a certificate of public convenience and necessity under s 7 for any proposed construction or extension. It was faced with a determination of the amount which a private operator should be allowed to earn from the sale of natural gas across state lines through an established distribution system. Secs. 4 and 5, not s 7, provide the standards for that determination. We cannot find in the words of the Act or in its history the slightest intimation or suggestion that the exploitation of consumers by private operators through the maintenance of high rates should be allowed to continue provided the producing states obtain indirect benefits from it. That apparently was the Commission's view of the matter, for the same arguments advanced here were presented to the Commission and not adopted by it.

^{FN21} Apart from the grandfather clause contained in s 7(c), there is the provision of s 7(f) that a natural gas company may enlarge or extend its facilities with the 'service area' determined by the Commission without any further authorization.

We do not mean to suggest that Congress was unmindful of the interests of the producing states in their natural gas supplies when it drafted the Natural Gas Act. As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over*613 'the production or gathering of natural gas.' s 1(b). In addition, Congress recognized the legitimate interests of the States in the conservation of natural gas. By s 11 Congress instructed the Commission to make reports on compacts between two or more States dealing with the conservation, production and transportation of natural gas. ^{FN22} The Commission was also **293 directed to recommend further legislation appropriate or necessary to carry out any proposed compact and 'to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.' s 11(a). Thus Congress was quite aware of the interests of the producing states in their natural gas supplies. ^{FN23} But it left the protection of *614 those interests to measures other than the maintenance of high

rates to private companies. If the Commission is to be compelled to let the stockholders of natural gas companies have a feast so that the producing states may receive crumbs from that table, the present Act must be redesigned. Such a project raises questions of policy which go beyond our province.

^{FN22} See P.L. 117, approved July 7, 1943, 57 Stat. 383 containing an 'Interstate Compact to Conserve Oil and Gas' between Oklahoma, Texas, New Mexico, Illinois, Colorado, and Kansas.

^{FN23} As we have pointed out, s 7(c) was amended by the Act of February 7, 1942, 56 Stat. 83, so as to require certificates of public convenience and necessity not only where the extensions were being made to markets in which natural gas was already being sold by another company but to other situations as well. Considerations of conservation entered into the proposal to give the Act that broader scope. H.Rep.No. 1290, 77th Cong. 1st Sess., pp. 2, 3. And see Annual Report, Federal Power Commission (1940) pp. 79, 80; Baum, The Federal Power Commission and State Utility Regulation (1942), p. 261.

The bill amending s 7(c) originally contained a subsection (h) reading as follows: 'Nothing contained in this section shall be construed to affect the authority of a State within which natural gas is produced to authorize or require the construction or extension of facilities for the transportation and sale of such gas within such State: Provided, however, That the Commission, after a hearing upon complaint or upon its own motion, may by order forbid any intrastate construction or extension by any natural-gas company which it shall find will prevent such company from rendering adequate service to its customers in interstate or foreign commerce in territory already being served.' See Hearings on H.R. 5249, House Committee on Interstate & Foreign Commerce, 77th Cong., 1st Sess., pp. 7, 11, 21, 29, 32, 33. In explanation of its deletion the House Committee Report stated, pp. 4, 5: 'The increasingly important problems raised by the desire of several States to regulate the use of the natural gas produced therein in the interest of consumers within such States, as against the Federal power to regulate interstate commerce in the interest of both interstate and intrastate consumers, are deemed by the committee to warrant further intensive study and probably a more retailed and comprehensive plan for the handling thereof than that which would have been provided by the stricken subsection.'

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

[20] It is hardly necessary to add that a limitation on the net earnings of a natural gas company from its interstate business is not a limitation on the power of the producing state either to safeguard its tax revenues from that industry ^{FN24} or to protect the interests of those who sell their gas to the interstate operator. ^{FN25} The return which ****294** the Commission ***615** allowed was the net return after all such charges.

^{FN24} We have noted that in the annual operating expenses of some \$16,000,000 the Commission included West Virginia and federal taxes. And in the net increase of \$421,160 over 1940 operating expenses allowed by the Commission was some \$80,000 for increased West Virginia property taxes. The adequacy of these amounts has not been challenged here.

^{FN25} The Commission included in the aggregate annual operating expenses which it allowed some \$8,500,000 for gas purchased. It also allowed about \$1,400,000 for natural gas production and about \$600,000 for exploration and development.

It is suggested, however, that the Commission in ascertaining the cost of Hope's natural gas production plant proceeded contrary to s 1(b) which provides that the Act shall not apply to 'the production or gathering of natural gas'. But such valuation, like the provisions for operating expenses, is essential to the rate-making function as customarily performed in this country. Cf. Smith, *The Control of Power Rates in the United States and England* (1932), 159 *The Annals* 101. Indeed s 14(b) of the Act gives the Commission the power to 'determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases.'

It is suggested that the Commission has failed to perform its duty under the Act in that it has not allowed a return for gas production that will be enough to induce private enterprise to perform completely and efficiently its functions for the public. The Commission, however, was not oblivious of those matters. It considered them. It allowed, for example, delay rentals and exploration and development costs in operating expenses. ^{FN26} No serious attempt has been made here to show that they are inadequate. We certainly cannot say that they are, unless we are to substitute our opinions for the expert judgment of the administrators to whom Congress entrusted the decision. Moreover, if in light of experience they turn out to be inadequate for development of new sources of supply, the doors of the Commission are open for

increased allowances. This is not an order for all time. The Act contains machinery for obtaining rate adjustments. s 4.

^{FN26} See note 25, supra.

[21] [22] But it is said that the Commission placed too low a rate on gas for industrial purposes as compared with gas for domestic purposes and that industrial uses should be discouraged. It should be noted in the first place that the rates which the Commission has fixed are Hope's interstate wholesale rates to distributors not interstate rates to industrial users ^{FN27} and domestic consumers. We hardly ***616** can assume, in view of the history of the Act and its provisions, that the resales intrastate by the customer companies which distribute the gas to ultimate consumers in Ohio and Pennsylvania are subject to the rate-making powers of the Commission. ^{FN28} But in any event those rates are not in issue here. Moreover, we fail to find in the power to fix 'just and reasonable' rates the power to fix rates which will disallow or discourage resales for industrial use. The Committee Report stated that the Act provided 'for regulation along recognized and more or less standardized lines' and that there was 'nothing novel in its provisions'. H.Rep.No.709, supra, p. 3. Yet if we are now to tell the Commission to fix the rates so as to discourage particular uses, we would indeed be injecting into a rate case a 'novel' doctrine which has no express statutory sanction. The same would be true if we were to hold that the wasting-asset nature of the industry required the maintenance of the level of rates so that natural gas companies could make a greater profit on each unit of gas sold. Such theories of rate-making for this industry may or may not be desirable. The difficulty is that s 4(a) and s 5(a) contain only the conventional standards of rate-making for natural gas companies. ^{FN29} The ***617** Act of February 7, 1942, by broadening s 7 gave the Commission some additional authority to deal with the conservation aspects of the problem. ^{FN30} But s 4(a) and s 5(a) were not changed. If the standard ****295** of 'just and reasonable' is to sanction the maintenance of high rates by a natural gas company because they restrict the use of natural gas for certain purposes, the Act must be further amended.

^{FN27} The Commission has expressed doubts over its power to fix rates on 'direct sales to industries' from interstate pipelines as distinguished from 'sales for resale to the industrial customers of distributing companies.' Annual Report, Federal Power Commission (1940), p. 11.

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

FN28. Sec. 1(b) of the Act provides: ‘The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.’ And see s 2(6), defining a ‘natural-gas company’, and H.Rep.No. 709, supra, pp. 2, 3.

FN29 The wasting-asset characteristic of the industry was recognized prior to the Act as requiring the inclusion of a depletion allowance among operating expenses. See Columbus Gas & Fuel Co. v. Public Utilities Commission, 292 U.S. 398, 404, 405, 54 S.Ct. 763, 766, 767, 78 L.Ed. 1327, 91 A.L.R. 1403. But no such theory of rate-making for natural gas companies as is now suggested emerged from the cases arising during the earlier period of regulation.

FN30 The Commission has been alert to the problems of conservation in its administration of the Act. It has indeed suggested that it might be wise to restrict the use of natural gas ‘by functions rather than by areas.’ Annual Report (1940) p. 79.

The Commission stated in that connection that natural gas was particularly adapted to certain industrial uses. But it added that the general use of such gas ‘under boilers for the production of steam’ is ‘under most circumstances of very questionable social economy.’ Ibid.

[23] [24] It is finally suggested that the rates charged by Hope are discriminatory as against domestic users and in favor of industrial users. That charge is apparently based on s 4(b) of the Act which forbids natural gas companies from maintaining ‘any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.’ The power of the Commission to eliminate any such unreasonable differences or discriminations is plain. s 5(a). The Commission, however, made no findings under s 4(b). Its failure in that regard was not challenged in the petition to review. And it has not been raised or argued here by any party. Hence the problem of discrimination has no proper place in the present decision. It will be time enough to pass on that issue when it is presented to us. Congress has entrusted the administration of the Act

to the Commission not to the courts. Apart from the requirements of judicial review it is not *618 for us to advise the Commission how to discharge its functions.

Findings as to the Lawfulness of Past Rates. As we have noted, the Commission made certain findings as to the lawfulness of past rates which Hope had charged its interstate customers. Those findings were made on the complaint of the City of Cleveland and in aid of state regulation. It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those ‘to be thereafter observed and in force.’ s 5(a). But the Commission maintains that it has the power to make findings as to the lawfulness of past rates even though it has no power to fix those rates.^{FN31} However that may be, we do not think that these findings were reviewable under s 19(b) of the Act. That section gives any party ‘aggrieved by an order’ of the Commission a review ‘of such order’ in the circuit court of appeals for the circuit where the natural gas company is located or has its principal place of business or in the United States Court of Appeals for the District of Columbia. We do not think that the findings in question fall within that category.

FN31 The argument is that s 4(a) makes ‘unlawful’ the charging of any rate that is not just and reasonable. And s 14(a) gives the Commission power to investigate any matter ‘which it may find necessary or proper in order to determine whether any person has violated’ any provision of the Act. Moreover, s 5(b) gives the Commission power to investigate and determine the cost of production or transportation of natural gas in cases where it has ‘no authority to establish a rate governing the transportation or sale of such natural gas.’ And s 17(c) directs the Commission to ‘make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies.’ For a discussion of these points by the Commission see 44 P.U.R.,N.S., at pages 34, 35.

[25] [26] The Court recently summarized the various types of administrative action or determination reviewable as orders under the Urgent Deficiencies Act of October 22, *619 1913, 28 U.S.C. ss 45, 47a, 28 U.S.C.A. ss 45, 47a, and kindred statutory provisions. Rochester Tel. Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147. It was there pointed out that where ‘the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action’, it is not

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

reviewable. Id., 307 U.S. at page 130, 59 S.Ct. at page 757, 83 L.Ed. 1147. The Court said, 'In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province.' **296Id., 307 U.S. at page 130, 59 S.Ct. at page 757, 83 L.Ed. 1147. And see United States v. Los Angeles S.L.R. Co., 273 U.S. 299, 309, 310, 47 S.Ct. 413, 414, 415, 71 L.Ed. 651; Shannahan v. United States, 303 U.S. 596, 58 S.Ct. 732, 82 L.Ed. 1039. These considerations are apposite here. The Commission has no authority to enforce these findings. They are 'the exercise solely of the function of investigation.' United States v. Los Angeles & S.L.R. Co., *supra*, 273 U.S. at page 310, 47 S.Ct. at page 414, 71 L.Ed. 651. They are only a preliminary, interim step towards possible future action-action not by the Commission but by wholly independent agencies. The outcome of those proceedings may turn on factors other than these findings. These findings may never result in the respondent feeling the pinch of administrative action.

Reversed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

Opinion of Mr. Justice BLACK and Mr. Justice MURPHY.

We agree with the Court's opinion and would add nothing to what has been said but for what is patently a wholly gratuitous assertion as to Constitutional law in the dissent of Mr. Justice FRANKFURTER. We refer to the statement that 'Congressional acquiescence to date in the doctrine of Chicago, etc., R. Co. v. Minnesota, *supra* (134 U.S. 418, 10 S.Ct. 462, 702, 33 L.Ed. 970), may fairly be claimed.' That was the case in which a majority of this Court was finally induced to expand the meaning *620 of 'due process' so as to give courts power to block efforts of the state and national governments to regulate economic affairs. The present case does not afford a proper occasion to discuss the soundness of that doctrine because, as stated in Mr. Justice FRANKFURTER'S dissent, 'That issue is not here in controversy.' The salutary practice whereby courts do not discuss issues in the abstract applies with peculiar force to Constitutional questions. Since, however, the dissent adverts to a highly controversial due process doctrine and implies its acceptance by Congress, we feel compelled to say that we do not understand that Congress voluntarily has acquiesced in a Constitutional principle of government that courts, rather than legislative bodies, possess final authority over regulation of economic affairs. Even this Court has not always fully embraced that principle, and we wish to repeat that we have never acquiesced in it, and do not now. See Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 599-601, 62 S.Ct. 736,

749, 750, 86 L.Ed. 1037.

Mr. Justice REED, dissenting.

This case involves the problem of rate making under the Natural Gas Act. Added importance arises from the obvious fact that the principles stated are generally applicable to all federal agencies which are entrusted with the determination of rates for utilities. Because my views differ somewhat from those of my brethren, it may be of some value to set them out in a summary form.

The Congress may fix utility rates in situations subject to federal control without regard to any standard except the constitutional standards of due process and for taking private property for public use without just compensation. Wilson v. New, 243 U.S. 332, 350, 37 S.Ct. 298, 302, 61 L.Ed. 755, L.R.A.1917E, 938, Ann.Cas.1918A, 1024. A Commission, however, does not have this freedom of action. Its powers are limited not only by the constitutional standards but also by the standards of the delegation. Here the standard added by the Natural Gas Act is that the rate be 'just *621 and reasonable.' FN1 Section 6 FN2 **297 throws additional light on the meaning of these words.

FN1 Natural Gas Act, s 4(a), 52 Stat. 821, 822, 15 U.S.C. s 717c(a), 15 U.S.C.A. s 717c(a).

FN2 52 Stat. 821, 824, 15 U.S.C. s 717e, 15 U.S.C.A. s 717e:

'(a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

'(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.'

When the phrase was used by Congress to describe allowable rates, it had relation to something ascertainable. The rates were not left to the whim of the Commission. The rates fixed would produce an annual return and that annual return was to be compared with a theoretical just and reasonable return, all risks considered, on the fair value of the property used and useful in the public service at the time of the determination.

Such an abstract test is not precise. The agency charged

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

with its determination has a wide range before it could properly be said by a court that the agency had disregarded statutory standards or had confiscated the property of the utility for public use. Cf. Chicago, M. & St. P.R. Co. v. Minnesota, 134 U.S. 418, 461-466, 10 S.Ct. 462, 702, 703-705, 33 L.Ed. 970, dissent. This is as Congress intends. Rates are left to an experienced agency particularly competent by training to appraise the amount required.

The decision as to a reasonable return had not been a source of great difficulty, for borrowers and lenders reached such agreements daily in a multitude of situations; and although the determination of fair value had been troublesome, its essentials had been worked out in fairness to investor and consumer by the time of the enactment*622 of this Act. Cf. Los Angeles G. & E. Corp. v. Railroad Comm., 289 U.S. 287, 304 et seq., 53 S.Ct. 637, 643 et seq., 77 L.Ed. 1180. The results were well known to Congress and had that body desired to depart from the traditional concepts of fair value and earnings, it would have stated its intention plainly. Helvering v. Griffiths, 318 U.S. 371, 63 S.Ct. 636.

It was already clear that when rates are in dispute, 'earnings produced by rates do not afford a standard for decision.' 289 U.S. at page 305, 53 S.Ct. at page 644, 77 L.Ed. 1180. Historical cost, prudent investment and reproduction cost ^{FN3} were all relevant factors in determining fair value. Indeed, disregarding the pioneer investor's risk, if prudent investment and reproduction cost were not distorted by changes in price levels or technology, each of them would produce the same result. The realization from the risk of an investment in a speculative field, such as natural gas utilities, should be reflected in the present fair value. ^{FN4} The amount of evidence to be admitted on any point was of course in the agency's reasonable discretion, and it was free to give its own weight to these or other factors and to determine from all the evidence its own judgment as to the necessary rates.

^{FN3} 'Reproduction cost' has been variously defined, but for rate making purposes the most useful sense seems to be, the minimum amount necessary to create at the time of the inquiry a modern plant capable of rendering equivalent service. See I Bonbright, *Valuation of Property* (1937) 152. Reproduction cost as the cost of building a replica of an obsolescent plant is not of real significance.

'Prudent investment' is not defined by the Court. It may mean the sum originally put in the enterprise, either with or without additional amounts from excess earnings

reinvested in the business.

^{FN4} It is of no more than bookkeeping significance whether the Commission allows a rate of return commensurate with the risk of the original investment or the lower rate based on current risk and a capitalization reflecting the established earning power of a successful company and the probable cost of duplicating its services. Cf. American T. & T. Co. v. United States, 299 U.S. 232, 57 S.Ct. 170, 81 L.Ed. 142. But the latter is the traditional method.

*623 I agree with the Court in not imposing a rule of prudent investment alone in determining the rate base. This leaves the Commission free, as I understand it, to use any available evidence for its finding of fair value, including both prudent investment and the cost of installing at the present time an efficient system for furnishing the needed utility service.

My disagreement with the Court arises primarily from its view that it makes no **298 difference how the Commission reached the rate fixed so long as the result is fair and reasonable. For me the statutory command to the Commission is more explicit. Entirely aside from the constitutional problem of whether the Congress could validly delegate its rate making power to the Commission, in toto and without standards, it did legislate in the light of the relation of fair and reasonable to fair value and reasonable return. The Commission must therefore make its findings in observance of that relationship.

The Federal Power Commission did not, as I construe their action, disregard its statutory duty. They heard the evidence relating to historical and reproduction cost and to the reasonable rate of return and they appraised its weight. The evidence of reproduction cost was rejected as unpersuasive, but from the other evidence they found a rate base, which is to me a determination of fair value. On that base the earnings allowed seem fair and reasonable. So far as the Commission went in appraising the property employed in the service, I find nothing in the result which indicates confiscation, unfairness or unreasonableness. Good administration of rate making agencies under this method would avoid undue delay and render revaluations unnecessary except after violent fluctuations of price levels. Rate making under this method has been subjected to criticism. But until Congress changes the standards for the agencies, these rate making bodies should continue the conventional theory of rate *624 making. It will probably be simpler to improve present methods than to devise new ones.

But a major error, I think was committed in the disregard

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

by the Commission of the investment in exploratory operations and other recognized capital costs. These were not considered by the Commission because they were charged to operating expenses by the company at a time when it was unregulated. Congress did not direct the Commission in rate making to deduct from the rate base capital investment which had been recovered during the unregulated period through excess earnings. In my view this part of the investment should no more have been disregarded in the rate base than any other capital investment which previously had been recovered and paid out in dividends or placed to surplus. Even if prudent investment throughout the life of the property is accepted as the formula for figuring the rate base, it seems to me illogical to throw out the admittedly prudent cost of part of the property because the earnings in the unregulated period had been sufficient to return the prudent cost to the investors over and above a reasonable return. What would the answer be under the theory of the Commission and the Court, if the only prudent investment in this utility had been the seventeen million capital charges which are now disallowed?

For the reasons heretofore stated, I should affirm the action of the Circuit Court of Appeals in returning the proceeding to the Commission for further consideration and should direct the Commission to accept the disallowed capital investment in determining the fair value for rate making purposes.

Mr. Justice FRANKFURTER, dissenting.

My brother JACKSON has analyzed with particularity the economic and social aspects of natural gas as well as *625 the difficulties which led to the enactment of the Natural Gas Act, especially those arising out of the abortive attempts of States to regulate natural gas utilities. The Natural Gas Act of 1938 should receive application in the light of this analysis, and Mr. Justice JACKSON has, I believe, drawn relevant inferences regarding the duty of the Federal Power Commission in fixing natural gas rates. His exposition seems to me unanswered, and I shall say only a few words to emphasize my basic agreement with him.

For our society the needs that are met by public utilities are as truly public services as the traditional governmental functions of police and justice. They are not less so when these services are rendered by private enterprise under governmental regulation. Who ultimately determines the ways of regulation, is the decisive aspect in the public supervision of privately-owned utilities. Foreshadowed nearly sixty years ago, Railroad Commission Cases (Stone v. Farmers' Loan & Trust Co.), 116 U.S. 307, 331, 6 S.Ct. 334, 344, 388, 1191, 29 L.Ed. 636, it was decided more than fifty **299 years ago that the final say under

the Constitution lies with the judiciary and not the legislature. Chicago, etc., R. Co. v. Minnesota, 134 U.S. 418, 10 S.Ct. 462, 702, 33 L.Ed. 970.

While legal issues touching the proper distribution of governmental powers under the Constitution may always be raised, Congressional acquiescence to date in the doctrine of Chicago, etc., R. Co. v. Minnesota, supra, may fairly be claimed. But in any event that issue is not here in controversy. As pointed out in the opinions of my brethren, Congress has given only limited authority to the Federal Power Commission and made the exercise of that authority subject to judicial review. The Commission is authorized to fix rates chargeable for natural gas. But the rates that it can fix must be 'just and reasonable'. s 5 of the Natural Gas Act, 15 U.S.C. s 717d, 15 U.S.C.A. s 717d. Instead of making the Commission's rate determinations final, Congress*626 specifically provided for court review of such orders. To be sure, 'the finding of the Commission as to the facts, if supported by substantial evidence' was made 'conclusive', s 19 of the Act, 15 U.S.C. s 717r; 15 U.S.C.A. s 717r. But obedience of the requirement of Congress that rates be 'just and reasonable' is not an issue of fact of which the Commission's own determination is conclusive. Otherwise, there would be nothing for a court to review except questions of compliance with the procedural provisions of the Natural Gas Act. Congress might have seen fit so to cast its legislation. But it has not done so. It has committed to the administration of the Federal Power Commission the duty of applying standards of fair dealing and of reasonableness relevant to the purposes expressed by the Natural Gas Act. The requirement that rates must be 'just and reasonable' means just and reasonable in relation to appropriate standards. Otherwise Congress would have directed the Commission to fix such rates as in the judgment of the Commission are just and reasonable; it would not have also provided that such determinations by the Commission are subject to court review.

To what sources then are the Commission and the courts to go for ascertaining the standards relevant to the regulation of natural gas rates? It is at this point that Mr. Justice JACKSON'S analysis seems to me pertinent. There appear to be two alternatives. Either the fixing of natural gas rates must be left to the unguided discretion of the Commission so long as the rates it fixes do not reveal a glaringly had prophecy of the ability of a regulated utility to continue its service in the future. Or the Commission's rate orders must be founded on due consideration of all the elements of the public interest which the production and distribution of natural gas involve just because it is natural gas. These elements are reflected in the Natural Gas Act, if that Act be applied as

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

an entirety. See, for *627 instance, ss 4(a)(b)(c)(d), 6, and 11, 15 U.S.C. ss 717c(a)(b)(c)(d), 717e, and 717j, 15 U.S.C.A. ss 717c(a-d), 717e, 717j. Of course the statute is not concerned with abstract theories of ratemaking. But its very foundation is the 'public interest', and the public interest is a texture of multiple strands. It includes more than contemporary investors and contemporary consumers. The needs to be served are not restricted to immediacy, and social as well as economic costs must be counted.

It will not do to say that it must all be left to the skill of experts. Expertise is a rational process and a rational process implies expressed reasons for judgment. It will little advance the public interest to substitute for the hodge-podge of the rule in Smyth v. Ames, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819, an encouragement of conscious obscurity or confusion in reaching a result, on the assumption that so long as the result appears harmless its basis is irrelevant. That may be an appropriate attitude when state action is challenged as unconstitutional. Cf. Driscoll v. Edison Light & Power Co., 307 U.S. 104, 59 S.Ct. 715, 83 L.Ed. 1134. But it is not to be assumed that it was the design of Congress to make the accommodation of the conflicting interests exposed in Mr. Justice JACKSON'S opinion the occasion for a blind clash of forces or a partial assessment of relevant factors, either before the Commission or here.

The objection to the Commission's action is not that the rates it granted were too low but that the range of its vision was too narrow. And since the issues before the Commission involved no less than the **300 total public interest, the proceedings before it should not be judged by narrow conceptions of common law pleading. And so I conclude that the case should be returned to the Commission. In order to enable this Court to discharge its duty of reviewing the Commission's order, the Commission should set forth with explicitness the criteria by which it is guided *628 in determining that rates are 'just and reasonable', and it should determine the public interest that is in its keeping in the perspective of the considerations set forth by Mr. Justice JACKSON.

By Mr. Justice JACKSON.

Certainly the theory of the court below that ties rate-making to the fair-value-reproduction-cost formula should be overruled as in conflict with Federal Power Commission v. Natural Gas Pipeline Co. ^{FN1} But the case should, I think, be the occasion for reconsideration of our rate-making doctrine as applied to natural gas and should be returned to the Commission for further consideration in the light thereof.

FN1 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037.

The Commission appears to have understood the effect of the two opinions in the Pipeline case to be at least authority and perhaps direction to fix natural gas rates by exclusive application of the 'prudent investment' rate base theory. This has no warrant in the opinion of the Chief Justice for the Court, however, which released the Commission from subservience to 'any single formula or combination of formulas' provided its order, 'viewed in its entirety, produces no arbitrary result.' 315 U.S. at page 586, 62 S.Ct. at page 743, 86 L.Ed. 1037. The minority opinion I understood to advocate the 'prudent investment' theory as a sufficient guide in a natural gas case. The view was expressed in the court below that since this opinion was not expressly controverted it must have been approved. ^{FN2} I disclaim this imputed*629 approval with some particularity, because I attach importance at the very beginning of federal regulation of the natural gas industry to approaching it as the performance of economic functions, not as the performance of legalistic rituals.

FN2 Judge Dobie, dissenting below, pointed out that the majority opinion in the Pipeline case 'contains no express discussion of the Prudent Investment Theory' and that the concurring opinion contained a clear one, and said, 'It is difficult for me to believe that the majority of the Supreme Court, believing otherwise, would leave such a statement unchallenged.' (134 F.2d 287, 312.) The fact that two other Justices had as matter of record in our books long opposed the reproduction cost theory of rate bases and had commented favorably on the prudent investment theory may have influenced that conclusion. See opinion of Mr. Justice Frankfurter in Driscoll v. Edison Light & Power Co., 307 U.S. 104, 122, 59 S.Ct. 715, 724, 83 L.Ed. 1134, and my brief as Solicitor General in that case. It should be noted, however, that these statements were made, not in a natural gas case, but in an electric power case-a very important distinction, as I shall try to make plain.

I.

Solutions of these cases must consider eccentricities of the industry which gives rise to them and also to the Act of Congress by which they are governed.

The heart of this problem is the elusive, exhaustible, and irreplaceable nature of natural gas itself. Given sufficient money, we can produce any desired amount of railroad,

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

bus, or steamship transportation, or communications facilities, or capacity for generation of electric energy, or for the manufacture of gas of a kind. In the service of such utilities one customer has little concern with the amount taken by another, one's waste will not deprive another, a volume of service and be created equal to demand, and today's demands will not exhaust or lessen capacity to serve tomorrow. But the wealth of Midas and the wit of man cannot produce or reproduce a natural gas field. We cannot even reproduce the gas, for our manufactured product has only about half the heating value per unit of nature's own. ^{FN3}

^{FN3} Natural gas from the Appalachian field averages about 1050 to 1150 B.T.U. content, while by-product manufactured gas is about 530 to 540. Moody's Manual of Public Utilities (1943) 1350; Youngberg, Natural Gas (1930) 7.

****301** Natural gas in some quantity is produced in twenty-four states. It is consumed in only thirty-five states, and is ***630** available only to about 7,600,000 consumers. ^{FN4} Its availability has been more localized than that of any other utility service because it has depended more on the caprice of nature.

^{FN4} Sen.Rep. No. 1162, 75th Cong., 1st Sess., 2.

The supply of the Hope Company is drawn from that old and rich and vanishing field that flanks the Appalachian mountains. Its center of production is Pennsylvania and West Virginia, with a fringe of lesser production in New York, Ohio, Kentucky, Tennessee, and the north end of Alabama. Oil was discovered in commercial quantities at a depth of only 69 1/2 feet near Titusville, Pennsylvania, in 1859. Its value then was about \$16 per barrel. ^{FN5} The oil branch of the petroleum industry went forward at once, and with unprecedented speed. The area productive of oil and gas was roughed out by the drilling of over 19,000 'wildcat' wells, estimated to have cost over \$222,000,000. Of these, over 18,000 or 94.9 per cent, were 'dry holes.' About five per cent, or 990 wells, made discoveries of commercial importance, 767 of them resulting chiefly in oil and 223 in gas only. ^{FN6} Prospecting for many years was a search for oil, and to strike gas was a misfortune. Waste during this period and even later is appalling. Gas was regarded as having no commercial value until about 1882, in which year the total yield was valued only at about \$75,000. ^{FN7} Since then, contrary to oil, which has become cheaper gas in this field has pretty steadily advanced in price.

^{FN5} Arnold and Kemnitzer, Petroleum in the United States and Possessions (1931) 78.

^{FN6} Id. at 62-63.

^{FN7} Id. at 61.

While for many years natural gas had been distributed on a small scale for lighting, ^{FN8} its acceptance was slow, ***631** facilities for its utilization were primitive, and not until 1885 did it take on the appearance of a substantial industry. ^{FN9} Soon monopoly of production or markets developed. ^{FN10} To get gas from the mountain country, where it was largely found, to centers of population, where it was in demand, required very large investment. By ownership of such facilities a few corporate systems, each including several companies, controlled access to markets. Their purchases became the dominating factor in giving a market value to gas produced by many small operators. Hope is the market for over 300 such operators. By 1928 natural gas in the Appalachian field commanded an average price of 21.1 cents per m.c.f. at points of production and was bringing 45.7 cents at points of consumption. ^{FN11} The companies which controlled markets, however, did not rely on gas purchases alone. They acquired and held in fee or leasehold great acreage in territory proved by 'wildcat' drilling. These large marketing system companies as well as many small independent owners and operators have carried on the commercial development of proved territory. The development risks appear from the estimate that up to 1928, 312,318 proved area wells had been sunk in the Appalachian field of which 48,962, or 15.7 per cent, failed to produce oil or gas in commercial quantity. ^{FN12}

^{FN8} At Fredonia, New York, in 1821, natural gas was conveyed from a shallow well to some thirty people. The lighthouse at Barcelona Harbor, near what is now Westfield, New York, was at about that time and for many years afterward lighted by gas that issued from a crevice. Report on Utility Corporations by Federal Trade Commission, Sen.Doc. 92, Pt. 84-A, 70th Cong., 1st Sess., 8-9.

^{FN9} In that year Pennsylvania enacted 'An Act to provide for the incorporation and regulation of natural gas companies.' Penn.Laws 1885, No. 32, 15 P.S. s 1981 et seq.

^{FN10} See Steptoe and Hoffheimer's Memorandum for Governor Cornwell of West Virginia (1917) 25 West Virginia Law Quarterly 257; see also Report on Utility Corporations by

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

Federal Trade Commission, Sen.Doc. No. 92, Pt. 84-A, 70th Cong., 1st Sess.

[FN11](#) Arnold and Kemnitzer, Petroleum in the United States and Possessions (1931) 73.

[FN12](#). Id. at 63.

*632 With the source of supply thus tapped to serve centers of large demand, like Pittsburgh, Buffalo, Cleveland, Youngstown, Akron, and other industrial communities, the distribution of natural gas fast became big business. Its advantages as a **302 fuel and its price commended it, and the business yielded a handsome return. All was merry and the goose hung high for consumers and gas companies alike until about the time of the first. World War. Almost unnoticed by the consuming public, the whole Appalachian field passed its peak of production and started to decline. Pennsylvania, which to 1928 had given off about 38 per cent of the natural gas from this field, had its peak in 1905; Ohio, which had produced 14 per cent, had its peak in 1915; and West Virginia, greatest producer of all, with 45 per cent to its credit, reached its peak in 1917. [FN13](#)

[FN13](#). Id. at 64.

Western New York and Eastern Ohio, on the fringe of the field, had some production but relied heavily on imports from Pennsylvania and West Virginia. Pennsylvania, a producing and exporting state, was a heavy consumer and supplemented her production with imports from West Virginia. West Virginia was a consuming state, but the lion's share of her production was exported. Thus the interest of the states in the North Appalachian supply was in conflict.

Competition among localities to share in the failing supply and the helplessness of state and local authorities in the presence of state lines and corporate complexities is a part of the background of federal intervention in the industry. [FN14](#) West Virginia took the boldest measure. It legislated a priority in its entire production in favor of its own inhabitants. That was frustrated by an injunction*633 from this Court. [FN15](#) Throughout the region clashes in the courts and conflicting decisions evidenced public anxiety and confusion. It was held that the New York Public Service Commission did not have power to classify consumers and restrict their use of gas. [FN16](#) That Commission held that a company could not abandon a part of its territory and still serve the rest. [FN17](#) Some courts admonished the companies to take action to protect consumers. [FN18](#) Several courts held that companies, regardless of failing supply, must continue to

take on customers, but such compulsory additions were finally held to be within the Public Service Commission's discretion. [FN19](#) There were attempts to throw up franchises and quit the service, and municipalities resorted to the courts with conflicting results. [FN20](#) Public service commissions of consuming states were handicapped, for they had no control of the supply. [FN21](#)

[FN14](#) See Report on Utility Corporations by Federal Trade Commission, Sen.Doc. No. 92, Pt. 84-A, 70th Cong., 1st Sess.

[FN15](#) Commonwealth of Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117, 32 A.L.R. 300. For conditions there which provoked this legislation, see 25 West Virginia Law Quarterly 257.

[FN16](#) People ex rel. Pavilion Natural Gas Co. v. Public Service Commission, 188 App.Div. 36, 176 N.Y.S. 163.

[FN17](#) Village of Falconer v. Pennsylvania Gas Company, 17 State Department Reports, N.Y., 407.

[FN18](#) See, for example, Public Service Commission v. Iroquois Natural Gas Co., 108 Misc. 696, 178 N.Y.S. 24; Park Abbott Realty Co. v. Iroquois Natural Gas Co., 102 Misc. 266, 168 N.Y.S. 673; Public Service Commission v. Iroquois Natural Gas Co., 189 App.Div. 545, 179 N.Y.S. 230.

[FN19](#) People ex rel. Pennsylvania Gas Co. v. Public Service Commission, 196 App.Div. 514, 189 N.Y.S. 478.

[FN20](#) East Ohio Gas Co. v. Akron, 81 Ohio St. 33, 90 N.E. 40, 26 L.R.A., N.S., 92, 18 Ann.Cas. 332; Village of New-camestown v. Consolidated Gas Co., 100 Ohio St. 494, 127 N.E. 414; Gress v. Village of Ft. Laramie, 100 Ohio St. 35, 125 N.E. 112, 8 A.L.R. 242; City of Jamestown v. Pennsylvania Gas Co., D.C., 263 F. 437; Id., D.C., 264 F. 1009. See, also, United Fuel Gas Co. v. Railroad Commission, 278 U.S. 300, 308, 49 S.Ct. 150, 152, 73 L.Ed. 390.

[FN21](#) The New York Public Service Commission said: 'While the transportation of natural gas through pipe lines from one state to another state is interstate commerce * * *, Congress has not taken over the regulation of

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

that particular industry. Indeed, it has expressly excepted it from the operation of the Interstate Commerce Commissions Law (Interstate Commerce Commissions Law, section 1). It is quite clear, therefore, that this Commission can not require a Pennsylvania corporation producing gas in Pennsylvania to transport it and deliver it in the State of New York, and that the Interstate Commerce Commission is likewise powerless. If there exists such a power, and it seems that there does, it is a power vested in Congress and by it not yet exercised. There is no available source of supply for the Crystal City Company at present except through purchasing from the Porter Gas Company. It is possible that this Commission might fix a price at which the Potter Gas Company should sell if it sold at all, but as the Commission can not require it to supply gas in the State of New York, the exercise of such a power to fix the price, if such power exists, would merely say, sell at this price or keep out of the State.' Lane v. Crystal City Gas Co., 8 New York Public Service Comm.Reports, Second District, 210, 212.

****303 *634** Shortages during World War I occasioned the first intervention in the natural gas industry by the Federal Government. Under Proclamation of President Wilson the United States Fuel Administrator took control, stopped extensions, classified consumers and established a priority for domestic over industrial use. ^{FN22} After the war federal control was abandoned. Some cities once served with natural gas became dependent upon mixed gas of reduced heating value and relatively higher price. ^{FN23}

^{FN22} Proclamation by the President of September 16, 1918; Rules and Regulations of H. A. Garfield, Fuel Administrator, September 24, 1918.

^{FN23} For example, the Iroquois Gas Corporation which formerly served Buffalo, New York, with natural gas ranging from 1050 to 1150 b.t.u. per cu. ft., now mixes a by-product gas of between 530 and 540 b.t.u. in proportions to provide a mixed gas of about 900 b.t.u. per cu. ft. For space heating or water heating its charges range from 65 cents for the first m.c.f. per month to 55 cents for all above 25 m.c.f. per month. Moody's Manual of Public Utilities (1943) 1350.

Utilization of natural gas of highest social as well as economic return is domestic use for cooking and water

***635** heating, followed closely by use for space heating in homes. This is the true public utility aspect of the enterprise, and its preservation should be the first concern of regulation. Gas does the family cooking cheaper than any other fuel. ^{FN24} But its advantages do not end with dollars and cents cost. It is delivered without interruption at the meter as needed and is paid for after it is used. No money is tied up in a supply, and no space is used for storage. It requires no handling, creates no dust, and leaves no ash. It responds to thermostatic control. It ignites easily and immediately develops its maximum heating capacity. These incidental advantages make domestic life more liveable.

^{FN24} The United States Fuel Administration made the following cooking value comparisons, based on tests made in the Department of Home Economics of Ohio State University:

Natural gas at 1.12 per M. is equivalent to coal at \$6.50 per ton.

Natural gas at 2.00 per M. is equivalent to gasoline at 27¢ per gal.

Natural gas at 2.20 per M. is equivalent to electricity at 3¢ per k.w.h.

Natural gas at 2.40 per M. is equivalent to coal oil at 15¢ per gal.

Use and Conservation of Natural Gas, issued by U.S. Fuel Administration (1918) 5.

Industrial use is induced less by these qualities than by low cost in competition with other fuels. Of the gas exported from West Virginia by the Hope Company a very substantial part is used by industries. This wholesale use speeds exhaustion of supply and displaces other fuels. Coal miners and the coal industry, a large part of whose costs are wages, have complained of unfair competition from low-priced industrial gas produced with relatively little labor cost. ^{FN25}

^{FN25} See Brief on Behalf of Legislation Imposing an Excise Tax on Natural Gas, submitted to N.R.A. by the United Mine Workers of America and the National Coal Association.

Gas rate structures generally have favored industrial users. In 1932, in Ohio, the average yield on gas for domestic consumption was 62.1 cents per m.c.f. and on industrial, ***636** 38.7. In Pennsylvania, the figures were 62.9 against 31.7. West Virginia showed the least spread, domestic consumers paying 36.6 cents; and industrial, 27.7. ^{FN26} Although this spread is less than ****304** in other parts of the United States, ^{FN27} it can hardly be said to be

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

self-justifying. It certainly is a very great factor in hastening decline of the natural gas supply.

United Mine Workers, supra, note 26, pp. 35, 36, compiled from Bureau of Mines Reports.

FN26 Brief of National Gas Association and

FN27 From the source quoted in the preceding note the spread elsewhere is shown to be:

State.	Industrial	Domestic
Illinois.	29.2	1.678
Louisiana.	10.4	59.7
Oklahoma.	11.2	41.5
Texas.	13.1	59.7
Alabama.	17.8	1.227
Georgia.	22.9	1.043

II.

About the time of World War I there were occasional and short-lived efforts by some hard-pressed companies to reverse this discrimination and adopt graduated rates, giving a low rate to quantities adequate for domestic use and graduating it upward to discourage industrial use. FN28
*637 These rates met opposition from industrial sources, of course, and since diminished revenues from industrial sources tended to increase the domestic price, they met little popular or commission favor. The fact is that neither the gas companies nor the consumers nor local regulatory bodies can be depended upon to conserve gas. Unless federal regulation will take account of conservation, its efforts seem, as in this case, actually to constitute a new threat to the life of the Appalachian supply.

Congress in 1938 decided upon federal regulation of the industry. It did so after an exhaustive investigation of all aspects including failing supply and competition for the use of natural gas intensified by growing scarcity. FN29
Pipelines from the Appalachian area to markets were in the control of a handful of holding company systems. FN30
This created a highly concentrated control of the producers' market and of the consumers' supplies. While holding companies dominated both production and distribution they segregated those activities in separate *638 subsidiaries, FN31 the effect of which, if not the purpose, was to isolate **305 some end of the business from the reach of any one state commission. The cost of natural gas to consumers moved steadily upwards over the years, out of proportion to prices of oil, which, except for the element of competition, is produced under somewhat comparable conditions. The public came to feel that the companies were exploiting the growing scarcity of local gas. The problems of this region had much to do with creating the demand for federal regulation.

FN28 In Corning, New York, rates were initiated by the Crystal City Gas Company as follows: 70¢ for the first 5,000 cu. ft. per month; 80¢ from 5,000 to 12,000; \$1 for all over 12,000. The Public Service Commission rejected these rates and fixed a flat rate of 58¢ per m.c.f. Lane v. Crystal City Gas Co., 8 New York Public Service Comm. Reports, Second District, 210.

FN29 See Report on Utility Corporations by Federal Trade Commission, Sen. Doc. 92, Pt. 84-A, 70th Cong., 1st Sess.

The Pennsylvania Gas Company (National Fuel Gas Company group) also attempted a sliding scale rate for New York consumers, net per month as follows: First 5,000 feet, 35¢ ; second 5,000 feet, 45¢ ; third 5,000 feet, 50¢ ; all above 15,000, 55¢ . This was eventually abandoned, however. The company's present scale in Pennsylvania appears to be reversed to the following net monthly rate; first 3 m.c.f., 75¢ ; next 4 m.c.f., 60¢ ; next 8 m.c.f., 55¢ ; over 15 m.c.f., 50¢ . Moody's Manual of Public Utilities (1943) 1350. In New York it now serves a mixed gas.

FN30 Four holding company systems control over 55 per cent of all natural gas transmission lines in the United States. They are Columbia Gas and Electric Corporation, Cities Service Co., Electric Bond and Share Co., and Standard Oil Co. of New Jersey. Columbia alone controls nearly 25 per cent, and fifteen companies account for over 80 per cent of the total. Report on Utility Corporations by Federal Trade Commission, Sen. Doc. 92, Pt. 84-A, 70th Cong., 1st Sess., 28.

For a study of effect of sliding scale rates in reducing consumption see 11 Proceedings of Natural Gas Association of America (1919) 287.

In 1915, so it was reported to the Governor of West

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

Virginia, 87 per cent of the total gas production of that state was under control of eight companies. Steptoe and Hoffheimer, *Legislative Regulation of Natural Gas Supply in West Virginia*, 17 *West Virginia Law Quarterly* 257, 260. Of these, three were subsidiaries of the Columbia system and others were subsidiaries of larger systems. In view of inter-system sales and interlocking interests it may be doubted whether there is much real competition among these companies.

FN31 This pattern with its effects on local regulatory efforts will be observed in our decisions. See United Fuel Gas Co. v. Railroad Commission, 278 U.S. 300, 49 S.Ct. 150, 73 L.Ed. 390; United Fuel Gas Co. v. Public Service Commission, 278 U.S. 322, 49 S.Ct. 157, 73 L.Ed. 402; Dayton Power & Light v. Public Utilities Commission, 292 U.S. 290, 54 S.Ct. 647, 78 L.Ed. 1267; Columbus Gas & Fuel Co. v. Public Utilities Commission, 292 U.S. 398, 54 S.Ct. 763, 78 L.Ed. 1327, 91 A.L.R. 1403, and the present case.

The Natural Gas Act declared the natural gas business to be 'affected with a public interest,' and its regulation 'necessary in the public interest.' FN32 Originally, and at the time this proceeding was commenced and tried, it also declared 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.' FN33 While this was later dropped, there is nothing to indicate that it was not and is not still an accurate statement of purpose of the Act. Extension or improvement of facilities may be ordered when 'necessary or desirable in the public interest,' abandonment of facilities may be ordered when the supply is 'depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity *639 permit' abandonment and certain extensions can only be made on finding of 'the present or future public convenience and necessity.' FN34 The Commission is required to take account of the ultimate use of the gas. Thus it is given power to suspend new schedules as to rates, charges, and classification of services except where the schedules are for the sale of gas 'for resale for industrial use only,' FN35 which gives the companies greater freedom to increase rates on industrial gas than on domestic gas. More particularly, the Act expressly forbids any undue preference or advantage to any person or 'any unreasonable difference in rates * * * either as between localities or as between classes of service,' FN36 And the power of the Commission expressly includes that to determine the 'just and reasonable rate,

charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force.' FN37

FN32 15 U.S.C. s 717(a), 15 U.S.C.A. s 717(a).
(Italics supplied throughout this paragraph.)

FN33 s 7(c), 52 Stat. 825, 15 U.S.C.A. s 717f(c).

FN34 15 U.S.C. s 717f, 15 U.S.C.A. s 717f.

FN35 Id., s 717c(e).

FN36 Id., s 717c(b).

FN37 Id., s 717d(a).

In view of the Court's opinion that the Commission in administering the Act may ignore discrimination, it is interesting that in reporting this Bill both the Senate and the House Committees on Interstate Commerce pointed out that in 1934, on a nationwide average the price of natural gas per m.c.f. was 74.6 cents for domestic use, 49.6 cents for commercial use, and 16.9 for industrial use. FN38 I am not ready to think that supporters of a bill called attention to the striking fact that householders were being charged five times as much for their gas as industrial users only as a situation which the Bill would do nothing to remedy. On the other hand the Act gave to the Commission what the Court aptly describes as 'broad powers of regulation.'

FN38 Sen. Rep. No. 1162, 75th Cong., 1st Sess. 2.

*640 III.

This proceeding was initiated by the Cities of Cleveland and Akron. They alleged that the price charged by Hope for natural gas 'for resale to domestic, commercial and small industrial consumers in Cleveland and elsewhere is excessive, unjust, unreasonable, greatly in excess of the price charged by Hope to nonaffiliated companies at wholesale for resale to domestic, commercial and small industrial consumers, and greatly in excess of the price charged by Hope to East Ohio for resale to certain favored industrial consumers in Ohio, and therefore is further unduly discriminatory between consumers and between classes of service' (italics supplied). The company answered admitting differences in prices to affiliated and nonaffiliated companies and justifying them by differences in conditions of delivery.**306 As to the allegation that the contract price is 'greatly in excess of the price charged by Hope to East Ohio for resale to

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

certain favored industrial consumers in Ohio,' Hope did not deny a price differential, but alleged that industrial gas was not sold to 'favored consumers' but was sold under contract and schedules filed with and approved by the Public Utilities Commission of Ohio, and that certain conditions of delivery made it not 'unduly discriminatory.'

The record shows that in 1940 Hope delivered for industrial consumption 36,523,792 m.c.f. and for domestic and commercial consumption, 50,343,652 m.c.f. I find no separate figure for domestic consumption. It served 43,767 domestic consumers directly, 511,521 through the East Ohio Gas Company, and 154,043 through the Peoples Natural Gas Company, both affiliates owned by the same parent. Its special contracts for industrial consumption, so far as appear, are confined to about a dozen big industries.

***641** Hope is responsible for discrimination as exists in favor of these few industrial consumers. It controls both the resale price and use of industrial gas by virtue of the very interstate sales contracts over which the Commission is exercising its jurisdiction.

Hope's contract with East Ohio Company is an example. Hope agrees to deliver, and the Ohio Company to take, '(a) all natural gas requisite for the supply of the domestic consumers of the Ohio Company; (b) such amounts of natural gas as may be requisite to fulfill contracts made with the consent and approval of the Hope Company by the Ohio Company, or companies which it supplies with natural gas, for the sale of gas upon special terms and conditions for manufacturing purposes.' The Ohio company is required to read domestic customers' meters once a month and meters of industrial customers daily and to furnish all meter readings to Hope. The Hope Company is to have access to meters of all consumers and to all of the Ohio Company's accounts. The domestic consumers of the Ohio Company are to be fully supplied in preference to consumers purchasing for manufacturing purposes and 'Hope Company can be required to supply gas to be used for manufacturing purposes only where the same is sold under special contracts which have first been submitted to and approved in writing by the Hope Company and which expressly provide that natural gas will be supplied thereunder only in so far as the same is not necessary to meet the requirements of domestic consumers supplied through pipe lines of the Ohio Company.' This basic contract was supplemented from time to time, chiefly as to price. The last amendment was in a letter from Hope to East Ohio in 1937. It contained a special discount on industrial gas and a schedule of special industrial contracts, Hope reserving the right to make eliminations therefrom and agreeing that others might be added from time to time ***642** time with its approval

in writing. It said, 'It is believed that the price concessions contained in this letter, while not based on our costs, are under certain conditions, to our mutual advantage in maintaining and building up the volumes of gas sold by us (*italics supplied*).'^{FN39}

FN39 The list of East Ohio Gas Company's special industrial contracts thus expressly under Hope's control and their demands are as follows:

****307** The Commission took no note of the charges of discrimination and made no disposition of the issue tendered on this point. It ordered a flat reduction in the price per m.c.f. of all gas delivered by Hope in interstate commerce. It made no limitation, condition, or provision as to what classes of consumers should get the benefit of the reduction. While the cities have accepted and are defending the reduction, it is my view that the discrimination of which they have complained is perpetuated and increased by the order of the Commission and that it violates the Act in so doing.

The Commission's opinion aptly characterizes its entire objective by saying that 'bona fide investment figures now become all-important in the regulation of rates.' It should be noted that the all-importance of this theory is not the result of any instruction from Congress. When the Bill to regulate gas was first before Congress it contained ***643** the following: 'In determining just and reasonable rates the Commission shall fix such rate as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question.' H.R. 5423, 74th Cong., 1st Sess. Title III, s 312(c). Congress rejected this language. See H.R. 5423, s 213 (211(c)), and H.R. Rep. No. 1318, 74th Cong., 1st Sess. 30.

The Commission contends nevertheless that the 'all important' formula for finding a rate base is that of prudent investment. But it excluded from the investment base an amount actually and admittedly invested of some \$17,000,000. It did so because it says that the Company recouped these expenditures from customers before the days of regulation from earnings above a fair return. But it would not apply all of such 'excess earnings' to reduce the rate base as one of the Commissioners suggested. The reason for applying excess earnings to reduce the investment base roughly from \$69,000,000 to \$52,000,000 but refusing to apply them to reduce it from that to some \$18,000,000 is not found in a difference in the character of the earnings or in their reinvestment. The reason assigned is a difference in bookkeeping treatment many years before the Company was subject to regulation. The \$17,000,000, reinvested chiefly in well

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

drilling, was treated on the books as expense. (The Commission now requires that drilling costs be carried to capital account.) The allowed rate base thus actually was determined by the Company's bookkeeping, not its investment. This attributes a significance to formal classification in account keeping that seems inconsistent with rational rate regulation.^{FN40} Of *644 course, the **308 Commission would not and should not allow a rate base to be inflated by bookkeeping which had improperly capitalized expenses. I have doubts about resting public regulation upon any rule that is to be used or not depending on which side it favors.

FN40 To make a fetish of mere accounting is to shield from examination the deeper causes, forces, movements, and conditions which should govern rates. Even as a recording of current transactions, bookkeeping is hardly an exact science. As a representation of the condition and trend of a business, it uses symbols of certainty to express values that actually are in constant flux. It may be said that in commercial or investment banking or any business extending credit success depends on knowing what not to believe in accounting. Few concerns go into bankruptcy or reorganization whose books do not show them solvent and often even profitable. If one cannot rely on accountancy accurately to disclose past or current conditions of a business, the fallacy of using it as a sole guide to future price policy ought to be apparent. However, our quest for certitude is so ardent that we pay an irrational reverence to a technique which uses symbols of certainty, even though experience again and again warns us that they are delusive. Few writers have ventured to challenge this American idolatry, but see Hamilton, *Cost as a standard for Price*, 4 *Law and Contemporary Problems* 321, 323-25. He observes that 'As the apostle would put it, accountancy is all things to all men. * * * Its purpose determines the character of a system of accounts.' He analyzes the hypothetical character of accounting and says 'It was no eternal mold for pecuniary verities handed down from on high. It was-like logic or algebra, or the device of analogy in the law-an ingenious contrivance of the human mind to serve a limited and practical purpose.' 'Accountancy is far from being a pecuniary expression of all that is industrial reality. It is an instrument, highly selective in its application, in the service of the institution of money making.' As to capital account he observes 'In an enterprise in lusty competition with others of its

kind, survival is the thing and the system of accounts has its focus in solvency. * * * Accordingly depreciation, obsolescence, and other factors which carry no immediate threat are matters of lesser concern and the capital account is likely to be regarded as a secondary phenomenon. * * * But in an enterprise, such as a public utility, where continued survival seems assured, solvency is likely to be taken for granted. * * * A persistent and ingenious attention is likely to be directed not so much to securing the upkeep of the physical property as to making it certain that capitalization fails in not one whit to give full recognition to every item that should go into the account.'

*645 The Company on the other hand, has not put its gas fields into its calculations on the present-value basis, although that, it contends, is the only lawful rule for finding a rate base. To do so would result in a rate higher than it has charged or proposes as a matter of good business to charge.

The case before us demonstrates the lack of rational relationship between conventional rate-base formulas and natural gas production and the extremities to which regulating bodies are brought by the effort to rationalize them. The Commission and the Company each stands on a different theory, and neither ventures to carry its theory to logical conclusion as applied to gas fields.

IV.

This order is under judicial review not because we interpose constitutional theories between a State and the business it seeks to regulate, but because Congress put upon the federal courts a duty toward administration of a new federal regulatory Act. If we are to hold that a given rate is reasonable just because the Commission has said it was reasonable, review becomes a costly, time-consuming pageant of no practical value to anyone. If on the other hand we are to bring judgment of our own to the task, we should for the guidance of the regulators and the regulated reveal something of the philosophy, be it legal or economic or social, which guides us. We need not be slaves to a formula but unless we can point out a rational way of reaching our conclusions they can only be accepted as resting on intuition or predilection. I must admit that I possess no instinct jby which to know the 'reasonable' from the 'unreasonable' in prices and must seek some conscious design for decision.

The Court sustains this order as reasonable, but what makes it so or what could possibly make it otherwise,

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

*646 I cannot learn. It holds that: 'it is the result reached not the method employed which is controlling'; 'the fact that the method employed to reach that result may contain infirmities is not then important' and it is not 'important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at.' The Court does lean somewhat on considerations of capitalization and dividend history and requirements for dividends on outstanding stock. But I can give no real weight to that for it is generally and I think deservedly in discredit as any guide in rate cases.
FN41

FN41 See 2 Bonbright, Valuation of Property (1937) 1112.

Our books already contain so much talk of methods of rationalizing rates that we must appear ambiguous if we announce results without our working methods. We are confronted with regulation of a unique type of enterprise which I think requires considered rejection of much conventional utility doctrine and adoption of concepts of 'just and reasonable' rates and practices and of the 'public interest' that will take account of the peculiarities of the business.

The Court rejects the suggestions of this opinion. It says that the Committees in reporting the bill which became the Act said it provided 'for regulation along recognized and more or less standardized lines' and that there was 'nothing novel in its provisions.' So saying it sustains a rate calculated on a novel variation of a rate base theory which itself had at the time of enactment of the legislation been recognized only in dissenting opinions. Our difference seems to be between unconscious innovation,
FN42 and the purposeful **309 and deliberate innovation I *647 would make to meet the necessities of regulating the industry before us.

FN42 Bonbright says, '* * * the vice of traditional law lies, not in its adoption of excessively rigid concepts of value and rules of valuation, but rather in its tendency to permit shifts in meaning that are inept, or else that are ill-defined because the judges that make them will not openly admit that they are doing so.' Id., 1170.

Hope's business has two components of quite divergent character. One, while not a conventional common-carrier undertaking, is essentially a transportation enterprise consisting of conveying gas from where it is produced to point of delivery to the buyer. This is a relatively routine

operation not differing substantially from many other utility operations. The service is produced by an investment in compression and transmission facilities. Its risks are those of investing in a tested means of conveying a discovered supply of gas to a known market. A rate base calculated on the prudent investment formula would seem a reasonably satisfactory measure for fixing a return from that branch of the business whose service is roughly proportionate to the capital invested. But it has other consequences which must not be overlooked. It gives marketability and hence 'value' to gas owned by the company and gives the pipeline company a large power over the marketability and hence 'value' of the production of others.

The other part of the business-to reduce to possession an adequate supply of natural gas-is of opposite character, being more erratic and irregular and unpredictable in relation to investment than any phase of any other utility business. A thousand feet of gas captured and severed from real estate for delivery to consumers is recognized under our law as property of much the same nature as a ton of coal, a barrel of oil, or a yard of sand. The value to be allowed for it is the real battleground between the investor and consumer. It is from this part of the business that the chief difference between the parties as to a proper rate base arises.

It is necessary to a 'reasonable' price for gas that it be anchored to a rate base of any kind? Why did courts in the first place begin valuing 'rate bases' in order to 'value' something else? The method came into vogue *648 in fixing rates for transportation service which the public obtained from common carriers. The public received none of the carriers' physical property but did make some use of it. The carriage was often a monopoly so there were no open market criteria as to reasonableness. The 'value' or 'cost' of what was put to use in the service by the carrier was not a remote or irrelevant consideration in making such rates. Moreover the difficulty of appraising an intangible service was thought to be simplified if it could be related to physical property which was visible and measurable and the items of which might have market value. The court hoped to reason from the known to the unknown. But gas fields turn this method topsy turvy. Gas itself is tangible, possessible, and does have a market and a price in the field. The value of the rate base is more elusive than that of gas. It consists of intangibles-leaseholds and freeholds-operated and unoperated-of little use in themselves except as rights to reach and capture gas. Their value lies almost wholly in predictions of discovery, and of price of gas when captured, and bears little relation to cost of tools and supplies and labor to develop it. Gas is what Hope sells and it can be directly priced more reasonably and easily and accurately than the

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

components of a rate base can be valued. Hence the reason for resort to a roundabout way of rate base price fixing does not exist in the case of gas in the field.

But if found, and by whatever method found, a rate base is little help in determining reasonableness of the price of gas. Appraisal of present value of these intangible rights to pursue fugitive gas depends on the value assigned to the gas when captured. The 'present fair value' rate base, generally in ill repute,^{FN43} is not even **310 urged by the gas company for valuing its fields.

FN43 'The attempt to regulate rates by reference to a periodic or occasional reappraisal of the properties has now been tested long enough to confirm the worst fears of its critics. Unless its place is taken by some more promising scheme of rate control, the days of private ownership under government regulation may be numbered.'
2 Bonbright, Valuation of Property (1937) 1190.

*649 The prudent investment theory has relative merits in fixing rates for a utility which creates its service merely by its investment. The amount and quality of service rendered by the usual utility will, at least roughly, be measured by the amount of capital it puts into the enterprise. But it has no rational application where there is no such relationship between investment and capacity to serve. There is no such relationship between investment and amount of gas produced. Let us assume that Doe and Roe each produces in West Virginia for delivery to Cleveland the same quantity of natural gas per day. Doe, however, through luck or foresight or whatever it takes, gets his gas from investing \$50,000 in leases and drilling. Roe drilled poorer territory, got smaller wells, and has invested \$250,000. Does anybody imagine that Roe can get or ought to get for his gas five times as much as Doe because he has spent five times as much? The service one renders to society in the gas business is measured by what he gets out of the ground, not by what he puts into it, and there is little more relation between the investment and the results than in a game of poker.

Two-thirds of the gas Hope handles it buys from about 340 independent producers. It is obvious that the principle of rate-making applied to Hope's own gas cannot be applied, and has not been applied, to the bulk of the gas Hope delivers. It is not probable that the investment of any two of these producers will bear the same ratio to their investments. The gas, however, all goes to the same use, has the same utilization value and the same ultimate price.

To regulate such an enterprise by indiscriminately

transplanting any body of rate doctrine conceived and *650 adapted to the ordinary utility business can serve the 'public interest' as the Natural Gas Act requires, if at all, only by accident. Mr. Justice Brandeis, the pioneer juristic advocate of the prudent investment theory for man-made utilities, never, so far as I am able to discover, proposed its application to a natural gas case. On the other hand, dissenting in *Commonwealth of Pennsylvania v. West Virginia*, he reviewed the problems of gas supply and said, 'In no other field of public service regulation is the controlling body confronted with factors so baffling as in the natural gas industry, and in none is continuous supervision and control required in so high a degree.' 262 U.S. 553, 621, 43 S.Ct. 658, 674, 67 L.Ed. 1117, 32 A.L.R. 300. If natural gas rates are intelligently to be regulated we must fit our legal principles to the economy of the industry and not try to fit the industry to our books.

As our decisions stand the Commission was justified in believing that it was required to proceed by the rate base method even as to gas in the field. For this reason the Court may not merely wash its hands of the method and rationale of rate making. The fact is that this Court, with no discussion of its fitness, simply transferred the rate base method to the natural gas industry. It happened in *Newark Natural Gas & Fuel Co. v. City of Newark, Ohio*, 1917, 242 U.S. 405, 37 S.Ct. 156, 157, 61 L.Ed. 393, Ann.Cas.1917B, 1025, in which the company wanted 25 cents per m.c.f., and under the Fourteenth Amendment challenged the reduction to 18 cents by ordinance. This Court sustained the reduction because the court below 'gave careful consideration to the questions of the value of the property * * * at the time of the inquiry,' and whether the rate 'would be sufficient to provide a fair return on the value of the property.' The Court said this method was 'based upon principles thoroughly established by repeated decisions of this court,' citing many cases, not one of which involved natural gas or a comparable wasting natural resource. Then came issues as to state power to *651 regulate as affected by the commerce clause. *Public Utilities Commission v. Landon*, 1919, 249 U.S. 236, 39 S.Ct. 268, 63 L.Ed. 577; *Pennsylvania Gas Co. v. Public Service Commission*, 1920, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434. These questions settled, the Court again was called upon in natural gas cases to consider state rate-making claimed to be invalid under the Fourteenth Amendment. *United Fuel Gas Co. v. Railroad Commission of Kentucky*, 1929, 278 U.S. 300, 49 S.Ct. 150, 73 L.Ed. 390; *United Fuel Gas Company v. Public Service Commission of West Virginia*, 1929, 278 U.S. 322, 49 S.Ct. 157, 73 L.Ed. 402. Then, as now, the differences were 'due **311 chiefly to the difference in value ascribed by each to the gas rights and leaseholds.' 278 U.S. 300, 311, 49 S.Ct. 150, 153, 73 L.Ed. 390. No one seems to have questioned that the rate

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

base method must be pursued and the controversy was at what rate base must be used. Later the 'value' of gas in the field was questioned in determining the amount a regulated company should be allowed to pay an affiliate therefor-a state determination also reviewed under the Fourteenth Amendment. Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 1934, 292 U.S. 290, 54 S.Ct. 647, 78 L.Ed. 1267; Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 1934, 292 U.S. 398, 54 S.Ct. 763, 78 L.Ed. 1327, 91 A.L.R. 1403. In both cases, one of which sustained, and one of which struck down a fixed rate the Court assumed the rate base method, as the legal way of testing reasonableness of natural gas prices fixed by public authority, without examining its real relevancy to the inquiry.

Under the weight of such precedents we cannot expect the Commission to initiate economically intelligent methods of fixing gas prices. But the Court now faces a new plan of federal regulation based on the power to fix the price at which gas shall be allowed to move in interstate commerce. I should now consider whether these rules devised under the Fourteenth Amendment are the exclusive tests of a just and reasonable rate under the federal statute, inviting reargument directed to that point *652 if necessary. As I see it now I would be prepared to hold that these rules do not apply to a natural gas case arising under the Natural Gas Act.

Such a holding would leave the Commission to fix the price of gas in the field as one would fix maximum prices of oil or milk or coal, or any other commodity. Such a price is not calculated to produce a fair return on the synthetic value of a rate base of any individual producer, and would not undertake to assure a fair return to any producer. The emphasis would shift from the producer to the product, which would be regulated with an eye to average or typical producing conditions in the field.

Such a price fixing process on economic lines would offer little temptation to the judiciary to become back seat drivers of the price fixing machine. The unfortunate effect of judicial intervention in this field is to divert the attention of those engaged in the process from what is economically wise to what is legally permissible. It is probable that price reductions would reach economically unwise and self-defeating limits before they would reach constitutional ones. Any constitutional problems growing out of price fixing are quite different than those that have heretofore been considered to inhere in rate making. A producer would have difficulty showing the invalidity of such a fixed price so long as he voluntarily continued to sell his product in interstate commerce. Should he withdraw and other authority be invoked to compel him to part with his property, a different problem would be

presented.

Allowance in a rate to compensate for gas removed from gas lands, whether fixed as of point of production or as of point of delivery, probably best can be measured by a functional test applied to the whole industry. For good or ill we depend upon private enterprise to exploit these natural resources for public consumption. The function which an allowance for gas in the field should perform *653 for society in such circumstances is to be enough and no more than enough to induce private enterprise completely and efficiently to utilize gas resources, to acquire for public service any available gas or gas rights and to deliver gas at a rate and for uses which will be in the future as well as in the present public interest.

The Court fears that 'if we are now to tell the Commission to fix the rates so as to discourage particular uses, we would indeed be injecting into a rate case a 'novel' doctrine * * *.' With due deference I suggest that there is nothing novel in the idea that any change in price of a service or commodity reacts to encourage or discourage its use. The question is not whether such consequences will or will not follow; the question is whether effects must be suffered blindly or may be intelligently selected, whether price control shall have targets at which it deliberately aims or shall be handled like a gun in the hands of one who does not know it is loaded.

We should recognize 'price' for what it is-a tool, a means, an expedient. In public**312 hands it has much the same economic effects as in private hands. Hope knew that a concession in industrial price would tend to build up its volume of sales. It used price as an expedient to that end. The Commission makes another cut in that same price but the Court thinks we should ignore the effect that it will have on exhaustion of supply. The fact is that in natural gas regulation price must be used to reconcile the private property right society has permitted to vest in an important natural resource with the claims of society upon it-price must draw a balance between wealth and welfare.

To carry this into techniques of inquiry is the task of the Commissioner rather than of the judge, and it certainly is no task to be solved by mere bookkeeping but requires the best economic talent available. There would doubtless be inquiry into the price gas is bringing in the *654 field, how far that price is established by arms' length bargaining and how far it may be influenced by agreements in restraint of trade or monopolistic influences. What must Hope really pay to get and to replace gas it delivers under this order? If it should get more or less than that for its own, how much and why? How far are such prices influenced by pipe line access to

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

markets and if the consumers pay returns on the pipe lines how far should the increment they cause go to gas producers? East Ohio is itself a producer in Ohio. ^{FN44} What do Ohio authorities require Ohio consumers to pay for gas in the field? Perhaps these are reasons why the Federal Government should put West Virginia gas at lower or at higher rates. If so what are they? Should East Ohio be required to exploit its half million acres of unoperated reserve in Ohio before West Virginia resources shall be supplied on a devalued basis of which that State complains and for which she threatens measures of self keep? What is gas worth in terms of other fuels it displaces?

^{FN44} East Ohio itself owns natural gas rights in 550,600 acres, 518,526 of which are reserved and 32,074 operated, by 375 wells. Moody's Manual of Public Utilities (1943) 5.

A price cannot be fixed without considering its effect on the production of gas. Is it an incentive to continue to exploit vast unoperated reserves? Is it conducive to deep drilling tests the result of which we may know only after trial? Will it induce bringing gas from afar to supplement or even to substitute for Appalachian gas? ^{FN45} Can it be had from distant fields as cheap or cheaper? If so, that competitive potentiality is certainly a relevant consideration. Wise regulation must also consider, as a private buyer would, what alternatives the producer has *655 if the price is not acceptable. Hope has intrastate business and domestic and industrial customers. What can it do by way of diverting its supply to intrastate sales? What can it do by way of disposing of its operated or reserve acreage to industrial concerns or other buyers? What can West Virginia do by way of conservation laws, severance or other taxation, if the regulated rate offends? It must be borne in mind that while West Virginia was prohibited from giving her own inhabitants a priority that discriminated against interstate commerce, we have never yet held that a good faith conservation act, applicable to her own, as well as to others, is not valid. In considering alternatives, it must be noted that federal regulation is very incomplete, expressly excluding regulation of 'production or gathering of natural gas,' and that the only present way to get the gas seems to be to call it forth by price inducements. It is plain that there is a downward economic limit on a safe and wise price.

^{FN45} Hope has asked a certificate of convenience and necessity to lay 1140 miles of 22-inch pipeline from Hugoton gas fields in southwest Kansas to West Virginia to carry 285 million cu. ft. of natural gas per day. The cost

was estimated at \$51,000,000. Moody's Manual of Public Utilities (1943) 1760.

But there is nothing in the law which compels a commission to fix a price at that 'value' which a company might give to its product by taking advantage of scarcity, or monopoly of supply. The very purpose of fixing maximum prices is to take away from the seller his opportunity to get all that otherwise the market would award him for his goods. This is a constitutional use of the power to fix maximum prices, **313 Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877; International Harvester Co. v. Kentucky, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284; Highland v. Russell Car & Snow Plow Co., 279 U.S. 253, 49 S.Ct. 314, 73 L.Ed. 688, just as the fixing of minimum prices of goods in interstate commerce is constitutional although it takes away from the buyer the advantage in bargaining which market conditions would give him. United States v. Darby, 312 U.S. 100, 657, 61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430; Mulford v. Smith, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092; United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263. The Commission has power to fix *656 a price that will be both maximum and minimum and it has the incidental right, and I think the duty, to choose the economic consequences it will promote or retard in production and also more importantly in consumption, to which I now turn.

If we assume that the reduction in company revenues is warranted we then come to the question of translating the allowed return into rates for consumers or classes of consumers. Here the Commission fixed a single rate for all gas delivered irrespective of its use despite the fact that Hope has established what amounts to two rates-a high one for domestic use and a lower one for industrial contracts. ^{FN46} The Commission can fix two prices for interstate gas as readily as one-a price for resale to domestic users and another for resale to industrial users. This is the pattern Hope itself has established in the very contracts over which the Commission is expressly given jurisdiction. Certainly the Act is broad enough to permit two prices to be fixed instead of one, if the concept of the 'public interest' is not unduly narrowed.

^{FN46} I find little information as to the rates for industries in the record and none at all in such usual sources as Moody's Manual.

The Commission's concept of the public interest in natural

64 S.Ct. 281

51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

gas cases which is carried today into the Court's opinion was first announced in the opinion of the minority in the Pipeline case. It enumerated only two 'phases of the public interest: (1) the investor interest; (2) the consumer interest,' which it emphasized to the exclusion of all others. 315 U.S. 575, 606, 62 S.Ct. 736, 753, 86 L.Ed. 1037. This will do well enough in dealing with railroads or utilities supplying manufactured gas, electric, power, a communications service or transportation, where utilization of facilities does not impair their future usefulness. Limitation of supply, however, brings into a natural gas case another phase of the public interest that to my mind overrides both the owner *657 and the consumer of that interest. Both producers and industrial consumers have served their immediate private interests at the expense of the long-range public interest. The public interest, of course, requires stopping unjust enrichment of the owner. But it also requires stopping unjust impoverishment of future generations. The public interest in the use by Hope's half million domestic consumers is quite a different one from the public interest in use by a baker's dozen of industries.

Prudent price fixing it seems to me must at the very threshold determine whether any part of an allowed return shall be permitted to be realized from sales of gas for resale for industrial use. Such use does tend to level out daily and seasonal peaks of domestic demand and to some extent permits a lower charge for domestic service. But is that a wise way of making gas cheaper when, in comparison with any substitute, gas is already a cheap fuel? The interstate sales contracts provide that at times when demand is so great that there is not enough gas to go around domestic users shall first be served. Should the operation of this preference await the day of actual shortage? Since the propriety of a preference seems conceded, should it not operate to prevent the coming of a shortage as well as to mitigate its effects? Should industrial use jeopardize tomorrow's service to householders any more than today's? If, however, it is decided to cheapen domestic use by resort to industrial sales, should they be limited to the few uses **314 for which gas has special values or extend also to those who use it only because it is cheaper than competitive fuels? ^{FN47} And how much cheaper should industrial*658 gas sell than domestic gas, and how much advantage should it have over competitive fuels? If industrial gas is to contribute at all to lowering domestic rates, should it not be made to contribute the very maximum of which it is capable, that is, should not its price be the highest at which the desired volume of sales can be realized?

^{FN47} The Federal Power Commission has touched upon the problem of conservation in

connection with an application for a certificate permitting construction of a 1500-mile pipeline from southern Texas to New York City and says: 'The Natural Gas Act as presently drafted does not enable the Commission to treat fully the serious implications of such a problem. The question should be raised as to whether the proposed use of natural gas would not result in displacing a less valuable fuel and create hardships in the industry already supplying the market, while at the same time rapidly depleting the country's natural-gas reserves. Although, for a period of perhaps 20 years, the natural gas could be so priced as to appear to offer an apparent saving in fuel costs, this would mean simply that social costs which must eventually be paid had been ignored.

'Careful study of the entire problem may lead to the conclusion that use of natural gas should be restricted by functions rather than by areas. Thus, it is especially adapted to space and water heating in urban homes and other buildings and to the various industrial heat processes which require concentration of heat, flexibility of control, and uniformity of results. Industrial uses to which it appears particularly adapted include the treating and annealing of metals, the operation of kilns in the ceramic, cement, and lime industries, the manufacture of glass in its various forms, and use as a raw material in the chemical industry. General use of natural gas under boilers for the production of steam is, however, under most circumstances of very questionable social economy.' Twentieth Annual Report of the Federal Power Commission (1940) 79.

If I were to answer I should say that the household rate should be the lowest that can be fixed under commercial conditions that will conserve the supply for that use. The lowest probable rate for that purpose is not likely to speed exhaustion much, for it still will be high enough to induce economy, and use for that purpose has more nearly reached the saturation point. On the other hand the demand for industrial gas at present rates already appears to be increasing. To lower further the industrial rate is merely further to subsidize industrial consumption and speed depletion. The impact of the flat reduction *659 of rates ordered here admittedly will be to increase the industrial advantages of gas over competing fuels and to increase its use. I think this is not, and there is no finding by the Commission that it is, in the public interest.

There is no justification in this record for the present discrimination against domestic users of gas in favor of industrial users. It is one of the evils against which the Natural Gas Act was aimed by Congress and one of the evils complained of here by Cleveland and Akron. If

64 S.Ct. 281
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333
(Cite as: 51 P.U.R.(NS) 193, 64 S.Ct. 281)

Hope's revenues should be cut by some \$3,600,000 the whole reduction is owing to domestic users. If it be considered wise to raise part of Hope's revenues by industrial purpose sales, the utmost possible revenue should be raised from the least consumption of gas. If competitive relationships to other fuels will permit, the industrial price should be substantially advanced, not for the benefit of the Company, but the increased revenues from the advance should be applied to reduce domestic rates. For in my opinion the 'public interest' requires that the great volume of gas now being put to uneconomic industrial use should either be saved for its more important future domestic use or the present domestic user should have the full benefit of its exchange value in reducing his present rates.

Of course the Commission's power directly to regulate does not extend to the fixing of rates at which the local company shall sell to consumers. Nor is such power required to accomplish the purpose. As already pointed out, the very contract the Commission is altering classifies the gas according to the purposes for which it is to be resold and provides differentials between the two classifications. It would only be necessary for the Commission to order ****315** that all gas supplied under paragraph (a) of Hope's contract with the East Ohio Company shall be ***660** at a stated price fixed to give to domestic service the entire reduction herein and any further reductions that may prove possible by increasing industrial rates. It might further provide that gas delivered under paragraph (b) of the contract for industrial purposes to those industrial customers Hope has approved in writing shall be at such other figure as might be found consistent with the public interest as herein defined. It is too late in the day to contend that the authority of a regulatory commission does not extend to a consideration of public interests which it may not directly regulate and a conditioning of its orders for their protection. Interstate Commerce Commission v. Railway Labor Executives Ass'n, 315 U.S. 373, 62 S.Ct. 717, 86 L.Ed. 904; United States v. Lowden, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208.

Whether the Commission will assert its apparently broad statutory authorization over prices and discriminations is, of course, its own affair, not ours. It is entitled to its own notion of the 'public interest' and its judgment of policy must prevail. However, where there is ground for thinking that views of this Court may have constrained the Commission to accept the rate-base method of decision and a particular single formula as 'all important' for a rate base, it is appropriate to make clear the reasons why I, at least, would not be so understood. The Commission is free to face up realistically to the nature and peculiarity of the resources in its control, to foster

their duration in fixing price, and to consider future interests in addition to those of investors and present consumers. If we return this case it may accept or decline the proffered freedom. This problem presents the Commission an unprecedented opportunity if it will boldly make sound economic considerations, instead of legal and accounting theories, the foundation of federal policy. I would return the case to the Commission and thereby be clearly quit of what now may appear to be some responsibility for perpetrating a shortsighted pattern of natural gas regulation.

U.S. 1944.
Federal Power Commission v. Hope Natural Gas Co.
51 P.U.R.(NS) 193, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333

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Westlaw

43 S.Ct. 675

Page 1

P.U.R. 1923D 11, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176
(Cite as: P.U.R. 1923D 11, 43 S.Ct. 675)

▶

Supreme Court of the United States
BLUEFIELD WATERWORKS & IMPROVEMENT
CO.
v.
PUBLIC SERVICE COMMISSION OF WEST
VIRGINIA et al.
No. 256.

Argued January 22, 1923.
Decided June 11, 1923.

In Error to the Supreme Court of Appeals of West Virginia.

Proceedings by the Bluefield Waterworks & Improvement Company against the Public Service Commission of the State of West Virginia and others to suspend and set aside an order of the Commission fixing rates. From a judgment of the Supreme Court of West Virginia, dismissing the petition, and denying the relief (89 W. Va. 736, 110 S. E. 205), the Waterworks Company bring error. Reversed.

West Headnotes

Constitutional Law 92 🔑298(1.5)

92 Constitutional Law

92XII Due Process of Law

92k298 Regulation of Charges and Prices

92k298(1.5) k. Public Utilities in General. Most Cited Cases

Rates which are not sufficient to yield a reasonable return on the value of the property used in public service at the time it is being so used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property, in violation of the Fourteenth Amendment of the Constitution.

Constitutional Law 92 🔑298(3)

92 Constitutional Law

92XII Due Process of Law

92k298 Regulation of Charges and Prices

92k298(3) k. Water and Irrigation Companies. Most Cited Cases

Under the due process clause of the Fourteenth Amendment of the Constitution, U.S.C.A., a

waterworks company is entitled to the independent judgment of the court as to both law and facts, where the question is whether the rates fixed by a public service commission are confiscatory.

Waters and Water Courses 405 🔑203(10)

405 Waters and Water Courses

405IX Public Water Supply

405IX(A) Domestic and Municipal Purposes

405k203 Water Rents and Other Charges

405k203(10) k. Reasonableness of Charges. Most Cited Cases

It was error for a state public service commission, in arriving at the value of the property used in public service, for the purpose of fixing the rates, to fail to give proper weight to the greatly increased cost of construction since the war.

Waters and Water Courses 405 🔑203(10)

405 Waters and Water Courses

405IX Public Water Supply

405IX(A) Domestic and Municipal Purposes

405k203 Water Rents and Other Charges

405k203(10) k. Reasonableness of Charges. Most Cited Cases

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 such profits as are realized or anticipated in highly profitable enterprises or speculative ventures.

Waters and Water Courses 405 🔑203(10)

405 Waters and Water Courses

405IX Public Water Supply

405IX(A) Domestic and Municipal Purposes

405k203 Water Rents and Other Charges

405k203(10) k. Reasonableness

43 S.Ct. 675

Page 2

P.U.R. 1923D 11, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176
(Cite as: P.U.R. 1923D 11, 43 S.Ct. 675)

of Charges. Most Cited Cases

Since the investors take into account the result of past operations as well as present rates in determining whether they will invest, a waterworks company which had been earning a low rate of returns through a long period up to the time of the inquiry is entitled to return of more than 6 per cent. on the value of its property used in the public service, in order to justly compensate it for the use of its property.

Federal Courts 170B 504.1

170B Federal Courts

170BVII Supreme Court

170BVII(E) Review of Decisions of State Courts

170Bk504 Nature of Decisions or Questions Involved

170Bk504.1 k. In General. Most Cited Cases

(Formerly 106k394(6))

A proceeding in a state court attacking an order of a public service commission fixing rates, on the ground that the rates were confiscatory and the order void under the federal Constitution, is one where there is drawn in question the validity of authority exercised under the state, on the ground of repugnancy to the federal Constitution, and therefore is reviewable by writ of error.

****675 *680** Messrs. Alfred G. Fox and Jos. M. Sanders, both of Bluefield, W. Va., for plaintiff in error.
Mr. Russell S. Ritz, of Bluefield, W. Va., for defendants in error.

***683** Mr. Justice BUTLER delivered the opinion of the Court.

Plaintiff in error is a corporation furnishing water to the city of Bluefield, W. Va., ****676** and its inhabitants. September 27, 1920, the Public Service Commission of the state, being authorized by statute to fix just and reasonable rates, made its order prescribing rates. In accordance with the laws of the state (section 16, c. 15-O, Code of West Virginia [sec. 651]), the company instituted proceedings in the Supreme Court of Appeals to suspend and set aside the order. The petition alleges that the order is repugnant to the Fourteenth Amendment, and deprives the company of its property without just

compensation and without due process of law, and denies it equal protection of the laws. A final judgment was entered, denying the company relief and dismissing its petition. The case is here on writ of error.

[1] 1. The city moves to dismiss the writ of error for the reason, as it asserts, that there was not drawn in question the validity of a statute or an authority exercised under the state, on the ground of repugnancy to the federal Constitution.

The validity of the order prescribing the rates was directly challenged on constitutional grounds, and it was held valid by the highest court of the state. The prescribing of rates is a legislative act. The commission is an instrumentality of the state, exercising delegated powers. Its order is of the same force as would be a like enactment by the Legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this court. The motion to dismiss will be denied. See ***684**Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 43 Sup. Ct. 353, 67 L. Ed. 659, decided March 5, 1923, and cases cited; also Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908.

2. The commission fixed \$460,000 as the amount on which the company is entitled to a return. It found that under existing rates, assuming some increase of business, gross earnings for 1921 would be \$80,000 and operating expenses \$53,000 leaving \$27,000, the equivalent of 5.87 per cent., or 3.87 per cent. after deducting 2 per cent. allowed for depreciation. It held existing rates insufficient to the extent of 10,000. Its order allowed the company to add 16 per cent. to all bills, excepting those for public and private fire protection. The total of the bills so to be increased amounted to \$64,000; that is, 80 per cent. of the revenue was authorized to be increased 16 per cent., equal to an increase of 12.8 per cent. on the total, amounting to \$10,240.

As to value: The company claims that the value of the property is greatly in excess of \$460,000. Reference to the evidence is necessary. There was submitted to the commission evidence of value which it summarized substantially as follows:

a. Estimate by company's engineer

43 S.Ct. 675

Page 3

P.U.R. 1923D 11, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176
(Cite as: P.U.R. 1923D 11, 43 S.Ct. 675)

	on.	
	basis of reproduction new, less.	
	depreciation, at prewar prices.	\$ 624,548 00
b.	Estimate by company's engineer	
	on.	
	basis of reproduction new, less.	
	depreciation, at 1920 prices.	1,194,663 00
c.	Testimony of company's engineer.	
	fixing present fair value for rate.	
	making purposes.	900,000 00
d.	Estimate by commissioner's	
	engineer on.	
	basis of reproduction new, less.	
	depreciation at 1915 prices, plus.	
	additions since December 31,	
	1915, at.	
	actual cost, excluding Bluefield.	
	Valley waterworks, water rights,.	
	and going value.	397,964 38
e.	Report of commission's statistician.	
	showing investment cost less.	
	depreciation.	365,445 13
f.	Commission's valuation, as fixed	
	in.	
	case No. 368 (\$360,000), plus	
	gross.	
	additions to capital since made.	
	(\$92,520.53).	452,520 53

*685 It was shown that the prices prevailing in 1920 were nearly double those in 1915 and pre-war time. The company did not claim value as high as its estimate of cost of construction in 1920. Its valuation engineer testified that in his opinion the value of the property was \$900,000-a figure between the cost of construction in 1920, less depreciation, and the cost of construction in 1915 and before the war, less depreciation.

The commission's application of the evidence may be stated briefly as follows:

As to 'a,' supra: The commission deducted \$204,000 from the estimate (details printed in the margin), ^{FN1} leaving approximately \$421,000, which it contrasted with the estimate of its own engineer, \$397,964.38 (see 'd,' supra). It found that there should be included \$25,000 for the Bluefield Valley waterworks plant in Virginia, 10 per cent. for going value, and \$10,000 for working capital. If these be added to \$421,000, there results \$500,600. This may be compared with the commission's final figure, \$460,000.

FN1

Difference in depreciation allowed.	\$ 49,000
Preliminary organization and development.	
cost.	14,500
Bluefield Valley waterworks plant.	25,000
Water rights.	50,000
Excess overhead costs.	39,000
Paving over mains.	28,500
	\$204,000

43 S.Ct. 675

Page 4

P.U.R. 1923D 11, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176
(Cite as: P.U.R. 1923D 11, 43 S.Ct. 675)

***686** As to 'b' and 'c,' supra: These were given no weight by the commission in arriving at its final figure, \$460,000. It said:

'Applicant's plant was originally constructed more than twenty years ago, and has been added to from time to time as the progress and development of the community required. For this reason, it would be unfair to its consumers to use as a basis for present fair value the abnormal prices prevailing during the recent war period; but, when, as in this case, a part of the plant has been constructed or added to during that period, in fairness to the applicant, consideration must be given to the cost of such expenditures made to meet the demands of the public.'

****677** As to 'd,' supra: The commission, taking \$400,000 (round figures), added \$25,000 for Bluefield Valley waterworks plant in Virginia, 10 per cent. for going value, and \$10,000 for working capital, making \$477,500. This may be compared with its final figure, \$460,000.

As to 'e,' supra: The commission, on the report of its statistician, found gross investment to be \$500,402.53. Its engineer, applying the straight line method, found 19 per cent. depreciation. It applied 81 per cent. to gross investment and added 10 per cent. for going value and \$10,000 for working capital, producing \$455,500. ^{FN2} This may be compared with its final figure, \$460,000.

^{FN2} As to 'e': \$365,445.13 represents investment cost less depreciation. The gross investment was found to be \$500,402.53, indicating a deduction on account of depreciation of \$134,957.40, about 27 per cent., as against 19 per cent. found by the commission's engineer.

As to 'f,' supra: It is necessary briefly to explain how this figure, \$452,520.53, was arrived at. Case No. 368 was a proceeding initiated by the application of the company for higher rates, April 24, 1915. The commission made a valuation as of January 1, 1915. There were presented two estimates of reproduction cost less depreciation, one by a valuation engineer engaged by the company, ***687** and the other by a valuation engineer engaged by the city, both 'using the same method.' An inventory made by the company's engineer was accepted as correct by the city and by the commission. The method 'was that generally employed by courts and commissions in arriving at the value of public utility properties under this method.' and in both estimates 'five year average unit prices' were applied. The estimate of the company's engineer was \$540,000 and of the city's engineer, \$392,000. The principal differences as given by the commission are shown in the margin. ^{FN3} The commission disregarded both estimates and arrived at \$360,000. It held that the best basis of valuation was the net investment, i. e., the total cost of the property less depreciation. It said:

FN3

		Company Engineer.	City Engineer.
1.	Preliminary costs.	\$14,455	\$1,000
2.	Water rights.	50,000	Nothing
3.	Cutting pavements over. mains.	27,744	233
4.	Pipe lines from gravity. springs.	22,072	15,442
5.	Laying cast iron street. mains.	19,252	15,212
6.	Reproducing Ada springs.	18,558	13,027
7.	Superintendence and. engineering.	20,515	13,621
8.	General contingent cost.	16,415	5,448
		\$189,011	\$63,983

since its organization, of \$407,882, and that there has been charged off for depreciation from year to year the total sum of \$83,445, leaving a net investment of

'The books of the company show a total gross investment,

43 S.Ct. 675

Page 5

P.U.R. 1923D 11, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176
(Cite as: P.U.R. 1923D 11, 43 S.Ct. 675)

\$324,427. * * * From an examination of the books * * * it appears that the records of the company have been remarkably well kept and preserved. It therefore seems that, when a plant is developed under these conditions, the net investment, which, of course, means the total gross investment less depreciation, is the very best basis of valuation for rate making purposes and that the other methods above referred to should *688 be used only when it is impossible to arrive at the true investment. Therefore, after making due allowance for capital necessary for the conduct of the business and considering the plant as a going concern, it is the opinion of the commission that the fair value for the purpose of determining reasonable and just rates in this case of the property of the applicant company, used by it in the public service of supplying water to the city of Bluefield and its citizens, is the sum of \$360,000, which sum is hereby fixed and determined by the commission to be the fair present value for the said purpose of determining the reasonable and just rates in this case.'

In its report in No. 368, the commission did not indicate the amounts respectively allowed for going value or working capital. If 10 per cent. be added for the former, and \$10,000 for the latter (as fixed by the commission in the present case), there is produced \$366,870, to be compared with \$360,000, found by the commission in its valuation as of January 1, 1915. To this it added \$92,520.53, expended since, producing \$452,520.53. This may be compared with its final figure, \$460,000.

The state Supreme Court of Appeals holds that the valuing of the property of a public utility corporation and prescribing rates are purely legislative acts, not subject to judicial review, except in so far as may be necessary to determine whether such rates are void on constitutional or other grounds, and that findings of fact by the commission based on evidence to support them will not be reviewed by the court. City of Bluefield v. Waterworks, 81 W. Va. 201, 204, 94 S. E. 121; Coal & Coke Co. v. Public Service Commission, 84 W. Va. 662, 678, 100 S. E. 557, 7 A. L. R. 108; Charleston v. Public Service Commission, 86 W. Va. 536, 103 S. E. 673.

In this case (89 W. Va. 736, 738, 110 S. E. 205, 206) it said:

'From the written opinion of the commission we find that it ascertained the value of the petitioner's property for rate making [then quoting the commission] 'after *689 maturely and carefully considering the various methods presented for the ascertainment of fair value and giving such weight as seems proper to every element involved and all the facts and circumstances disclosed by the record.'

[2] [3] The record clearly shows that the commission, in arriving at its final figure, did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontradicted **678 evidence; and the company's detailed estimated cost of reproduction new, less depreciation, at 1920 prices, appears to have been wholly disregarded. This was erroneous. Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, 262 U. S. 276, 43 Sup. Ct. 544, 67 L. Ed. 981, decided May 21, 1923. Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the court as to both law and facts. Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287, 289, 40 Sup. Ct. 527, 64 L. Ed. 908, and cases cited.

We quote further from the court's opinion (89 W. Va. 739, 740, 110 S. E. 206):

'In our opinion the commission was justified by the law and by the facts in finding as a basis for rate making the sum of \$460,000.00. * * * In our case of Coal & Coke Ry. Co. v. Conley, 67 W. Va. 129, it is said: 'It seems to be generally held that, in the absence of peculiar and extraordinary conditions, such as a more costly plant than the public service of the community requires, or the erection of a plant at an actual, though extravagant, cost, or the purchase of one at an exorbitant or inflated price, the actual amount of money invested is to be taken as the basis, and upon this a return must be allowed equivalent to that which is ordinarily received in the locality in which the business is done, upon capital invested in similar enterprises. In addition to this, consideration must be given to the nature of the investment, a higher rate *690 being regarded as justified by the risk incident to a hazardous investment.'

'That the original cost considered in connection with the history and growth of the utility and the value of the services rendered constitute the principal elements to be considered in connection with rate making, seems to be supported by nearly all the authorities.'

[4] The question in the case is whether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power. Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this court that citation of the cases is scarcely necessary:

43 S.Ct. 675

Page 6

P.U.R. 1923D 11, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176
(Cite as: P.U.R. 1923D 11, 43 S.Ct. 675)

'What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.' Smyth v. Ames (1898) 169 U. S. 467, 547, 18 Sup. Ct. 418, 434 (42 L. Ed. 819).

'There must be a fair return upon the reasonable value of the property at the time it is being used for the public. * *

* And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase.' Willcox v. Consolidated Gas Co. (1909) 212 U. S. 19, 41, 52, 29 Sup. Ct. 192, 200 (53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. [N. S.] 1134).

'The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.' Minnesota Rate Cases (1913) 230 U. S. 352, 434, 33 Sup. Ct. 729, 754 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18).

*691 'And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property.' Smyth v. Ames, 169 U. S., 546, 547, 18 Sup. Ct. 434, 42 L. Ed. 819.

* * * The making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law.'

Minnesota Rate Cases, 230 U. S. 454, 33 Sup. Ct. 762, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

In Missouri ex rel. Southwestern Bell Telephone Co., v. Public Service Commission of Missouri, supra, applying the principles of the cases above cited and others, this court said:

'Obviously, the commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914, and 1916. As matter of common knowledge, these increases were large. Competent witnesses estimated them as 45 to 50 per

centum. * * * It is impossible to ascertain what will amount to a fair return upon properties devoted to public service, without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of to-day.'

[5] *692 It is clear that the court also failed to give proper consideration to the higher cost of construction in 1920 over that in 1915 and before the war, and failed to give weight to cost of reproduction less depreciation on the basis of 1920 prices, or to the testimony of the company's valuation engineer, based on present and past costs of construction, that the property in his opinion, was worth \$900,000. The final figure, \$460,000, was arrived *679 at substantially on the basis of actual cost, less depreciation, plus 10 per cent. for going value and \$10,000 for working capital. This resulted in a valuation considerably and materially less than would have been reached by a fair and just consideration of all the facts. The valuation cannot be sustained. Other objections to the valuation need not be considered.

3. Rate of return: The state commission found that the company's net annual income should be approximately \$37,000, in order to enable it to earn 8 per cent. for return and depreciation upon the value of its property as fixed by it. Deducting 2 per cent. for depreciation, there remains 6 per cent. on \$460,000, amounting to \$27,600 for return. This was approved by the state court.

[6] The company contends that the rate of return is too low and confiscatory. 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 *693 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

43 S.Ct. 675

Page 7

P.U.R. 1923D 11, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176
(Cite as: **P.U.R. 1923D 11, 43 S.Ct. 675**)

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.

In 1909, this court, in Willcox v. Consolidated Gas Co., 212 U. S. 19, 48-50, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134, held that the question whether a rate yields such a return as not to be confiscatory depends upon circumstances, locality and risk, and that no proper rate can be established for all cases; and that, under the circumstances of that case, 6 per cent. was a fair return on the value of the property employed in supplying gas to the city of New York, and that a rate yielding that return was not confiscatory. In that case the investment was held to be safe, returns certain and risk reduced almost to a minimum-as nearly a safe and secure investment as could be imagined in regard to any private manufacturing enterprise.

In 1912, in Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 670, 32 Sup. Ct. 389, 56 L. Ed. 594, this court declined to reverse the state court where the value of the plant considerably exceeded its cost, and the estimated return was over 6 per cent.

In 1915, in Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 172, 35 Sup. Ct. 811, 59 L. Ed. 1244, this court declined to reverse the United States District Court in refusing an injunction upon the conclusion reached that a return of 6 per cent. per annum upon the value would not be confiscatory.

In 1919, this court in Lincoln Gas Co. v. Lincoln, 250 U. S. 256, 268, 39 Sup. Ct. 454, 458 (63 L. Ed. 968), declined on the facts of that case to approve a finding that no rate yielding as much as 6 per cent. *694 on the invested capital could be regarded as confiscatory. Speaking for the court, Mr. Justice Pitney said:

'It is a matter of common knowledge that, owing principally to the World War, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future.'

In 1921, in Brush Electric Co. v. Galveston, the United States District Court held 8 per cent. a fair rate of return. ^{FN4}

^{FN4} This case was affirmed by this court June 4, 1923, 262 U. S. 443, 43 Sup. Ct. 606, 67 L. Ed. 1076.

In January, 1923, in City of Minneapolis v. Rand, the Circuit Court of Appeals of the Eighth Circuit (285 Fed. 818, 830) sustained, as against the attack of the city on the ground that it was excessive, 7 1/2 per cent., found by a special master and approved by the District Court as a fair and reasonable return on the capital investment-the value of the property.

[7] Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain, or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it. In *695 this case the record shows that the rate of return has been low through a long period up to the time of the inquiry by the commission here involved. For example, the average rate of return on the total cost of the property from 1895 to 1915, inclusive, was less than 5 per cent.; from 1911 to 1915, inclusive, about 4.4 per cent., without allowance for depreciation. In 1919 the net operating income was approximately \$24,700, leaving \$15,500, approximately, or 3.4 per cent. on \$460,000 fixed by the commission, after deducting 2 per cent. for depreciation. In 1920, the net operating income was approximately \$25,465, leaving \$16,265 for return, after allowing for depreciation. Under the facts and circumstances indicated by the record, we think that a rate of return of 6 per cent. upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service.

The judgment of the Supreme Court of Appeals of West Virginia is reversed.

Mr. Justice BRANDEIS concurs in the judgment of reversal, for the reasons stated by him in Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, supra.

U.S. 1923

Bluefield Waterworks & Imp. Co. v. Public Service Commission of W. Va.

P.U.R. 1923D 11, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176

43 S.Ct. 675

Page 8

P.U.R. 1923D 11, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176
(Cite as: **P.U.R. 1923D 11, 43 S.Ct. 675**)

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Control Number: 53601



Item Number: 938

PUC DOCKET NO. 53601
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PUBLIC UTILITY COMMISSION
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APPLICATION OF ONCOR ELECTRIC § PUBLIC UTILITY COMMISSION
DELIVERY COMPANY LLC FOR §
AUTHORITY TO CHANGE RATES § OF TEXAS

ORDER ON REHEARING

This Order addresses the application of Oncor Electric Delivery Company LLC (Oncor) for authority to change its rates and to consolidate Oncor and Oncor NTU for ratemaking purposes as directed by the Commission in Docket No. 48929.¹ Oncor NTU is a wholly owned subsidiary of Oncor that acquired certificate of convenience and necessity rights previously owned by Sharyland Distribution & Transmission Services, L.L.C. in Docket No. 48929. Oncor seeks a \$5,810,772,332 revenue requirement based on a 7.05% overall rate of return. The requested revenue requirement is \$250,691,114 or 4.51% higher than Oncor's adjusted test-year revenues of \$5,560,081,218.

A hearing on the merits convened from September 26 through October 4, 2022 through videoconferences hosted by the State Office of Administrative Hearings (SOAH). On December 28, 2022, the SOAH administrative law judges (ALJs) filed their proposal for decision. The ALJs recommend the Commission set Oncor's retail revenue requirement at \$5,313,404,970, an amount \$246,676,248 or 4.44% lower than Oncor's adjusted test-year revenues. The ALJs also recommend the Commission adopt an agreement on rate-case expenses filed by Oncor, Commission Staff, the Steering Committee of Cities Served by Oncor (Cities), and the Alliance of Oncor Cities (Alliance of Cities). On February 9, 2023, the ALJs filed a letter that made changes to the proposal for decision in response to the parties that filed exceptions and replies to the proposal for decision.

¹ Joint Report and Application of Oncor Electric Delivery Company LLC, Sharyland Distribution & Transmission Services, L.L.C., Sharyland Utilities, L.P., and Sempra Energy for Regulatory Approvals under PURA §§ 14.101, 37.154, 39.262, and 39.915, Docket No. 48929, Order, Ordering Paragraph No. 16 (May 9, 2019).

938

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 2 of 73

The Commission adopts in part and rejects in part the proposal for decision, including findings of fact and conclusions of law, and authorizes Oncor to change its rates to the extent provided in this order. The Commission makes the following changes to the proposal for decision.

I. Discussion

The Commission's decision results in a \$5,547,515,324 base-rate revenue requirement and an overall 6.65% rate of return. New findings of fact 48A through 48F are added to address the procedural history of this docket after the close of the evidentiary record at SOAH.

A. Rate Base

1. Acquisition Adjustment

The Commission agrees with the ALJs' recommendation to disallow Oncor's requested recovery of \$23.5 million from rate base and to disallow Oncor's requested annual amortization of \$851,000 for costs associated with an acquisition adjustment. However, the Commission clarifies the basis for the disallowance. This acquisition adjustment was first recognized by the Commission in a sale, transfer, merger proceeding between Sharyland and Southwestern Public Service Company (SPS) in 2013.² Oncor later purchased the assets associated with the acquisition adjustment in 2019.³

The Commission has previously determined that acquisition adjustments may be included in rate base if a utility demonstrates that the purchase price of the acquired assets was not excessive and that specific and offsetting benefits have accrued to ratepayers.⁴ The ALJs based their recommendation upon the Office of Public Utility Counsel's (OPUC) arguments. OPUC argued Oncor should not receive the acquisition adjustment because Oncor was not a party to Sharyland's

² *Joint Report and Application of Sharyland Utilities, L.P., Sharyland Distribution & Transmission Services, L.L.C., and Southwestern Public Service Company for Approval of Purchase and Sale of Facilities, for Regulatory Accounting Treatment of Gain on Sale, and for Transfer of Certificate Rights*, Docket No. 41430, Order (Dec. 30, 2013).

³ *Joint Report and Application of Oncor Electric Delivery Company, LLC, Sharyland Distribution & Transmission Services, L.L.C., Sharyland Utilities, L.P., and Sempra Energy for Regulatory Approvals under PURA §§ 14.101, 37.154, 39.262, and 39.915*, Docket No. 48929 (May 9, 2019).

⁴ *Application of Electra Telephone Company, Inc. for Transfer of a Certificate of Public Convenience and Necessity from Electra Telephone Company*, Docket No. 8374, Order at 1 (Aug. 6, 1998); *id.*, Examiner's Report on Remand at 6 (Aug. 1, 1990).

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 3 of 73

acquisition of SPS transmission assets,⁵ which occurred more than 10 years ago; did not invest the capital to generate the acquisition adjustment associated with that acquisition; and did not provide sufficient evidence to show that the benefits of the transaction expected to occur to SPS ratepayers also benefited Oncor's system and ratepayers.⁶

The Commission disagrees with the ALJs that Oncor is not eligible to seek recovery of the acquisition adjustment because it was not a party to Sharyland's acquisition of SPS transmission assets and did not invest the capital to generate the acquisition adjustment. However, the Commission agrees with the ALJs that Oncor failed to demonstrate the Sharyland acquisition resulted in the accrual of specific and offsetting benefits to Oncor ratepayers. The Commission therefore adopts the ALJs' conclusion that Oncor should not recover the acquisition adjustment but modifies the proposal for decision to clarify that the basis for its decision.

To reflect this determination, the Commission modifies proposed finding of fact 57, deletes proposed finding of fact 58, and modifies proposed conclusion of law 21.

2. Mobile Generation

The Commission reverses the ALJs' determination that Oncor should not recover any costs associated with its investments in temporary emergency electric energy facilities under PURA § 39.918. The ALJs concluded Oncor did not comply with the competitive bidding requirements under PURA § 39.918(f) and that Oncor's use of mobile-generation units exceeded the limited purposes permitted under PURA § 39.918(b)(1). The Commission disagrees with both conclusions.

Winter Storm Uri in February 2021 was a devastating storm. Oncor did not lose the functionality of any transmission facilities during the storm.⁷ Nonetheless, approximately 1.34 million Oncor points of delivery were offline at the worst part of the storm for Oncor, primarily due to mandatory load-shed requirements.⁸ Following Winter Storm Uri, the Legislature passed House Bill 2483, which has become PURA § 39.918, to allow transmission and distribution

⁵ See *id.*, Examiner's Report on Remand at 6.

⁶ OPUC Ex. 8, Direct Testimony of Steven Hunt at 27:17–28:8.

⁷ Oncor Ex. 8, Direct Testimony of E. Allen Nye at 14:6-8.

⁸ *Id.*

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 4 of 73

utilities in the Electric Reliability Council of Texas (ERCOT) region to “lease and operate facilities that provide temporary emergency electric energy to aid in restoring power to the utility’s distribution customers during a widespread power outage in which: (A) the independent system operator has ordered the utility to shed load; or (B) the utility’s distribution facilities are not being fully served by the bulk power system under normal operations”⁹

In response to this legislation, Oncor leased mobile-generation units in December 2021 after Winter Storm Uri and in advance of the 2021 through 2022 winter season. Oncor did so to ensure that temporary emergency electric energy was available to its customers. Oncor also did so in furtherance of its obligation under PURA § 37.151 to “serve every customer in [its certificated service area] and provide continuous and adequate service in that area.” Given Oncor’s experience in Winter Storm Uri, Oncor acted reasonably at that time in proactively seeking to lease and operate temporary emergency electric energy facilities under PURA § 39.918 in the form of mobile-generation units for reliability and resiliency. Oncor did so in advance of the upcoming winter season and high demand for, and limited supply of, mobile generation.

PURA § 39.918(f) provides that “[a] transmission and distribution utility shall, when reasonably practicable, use a competitive bidding process to lease [temporary-emergency-electric-energy facilities].” In November 2021, Oncor issued a request for pricing for short-term leases on mobile-generation units. Two bidders were selected based on responses to this request; however, Oncor ultimately executed a seven-year lease with an existing lender on December 10, 2021. The ALJs found Oncor failed to use a competitive bidding process for the lease.

The Commission disagrees and finds that based on the fact-specific circumstances in which Oncor found itself following Winter Storm Uri and with the next winter season approaching, Oncor engaged in a reasonable competitive bidding process. The Commission therefore determines Oncor used a competitive bidding process to the extent reasonably practicable for the lease. To reflect this determination, the Commission modifies proposed findings of fact 68 and 69, adds new findings of fact 68A and 68B, deletes proposed finding of fact 67. The Commission also modifies proposed conclusion of law 22 and adds new conclusion of law 22A.

⁹ PURA § 39.918(b)(1)(A)–(B).

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 5 of 73

The Commission further determines that Oncor's use of a mobile-generation unit at the Faith Community Hospital in Jacksboro, Texas was in compliance with PURA § 39.918(b). To reflect this determination, the Commission deletes proposed findings of fact 70, 71, 72, and 76 and modifies proposed conclusion of law 23.

The ALJs also found that Oncor failed to demonstrate that the costs associated with its leased mobile-generation units were prudently incurred and reasonable and necessary. The Commission though, finds Oncor demonstrated its requested expenses for leasing and operating temporary emergency electric energy facilities were prudently incurred and reasonable and necessary. The Commission considers the facts of the circumstances under which Oncor's decision was made and determines Oncor complied with the requirements of PURA § 39.918. To reflect this determination, the Commission modifies proposed finding of fact 77, adds new findings of fact 75A through 75E, and deletes proposed findings of fact 78 and 79. The Commission also modifies proposed conclusion of law 24 and adds new conclusions of law 23A through 23E.

Although the Commission authorizes the recovery of the costs associated with the leased temporary emergency electric energy facilities sought by Oncor, the Commission does not agree with Oncor's proposed method of recovery for the costs through rate base and operating expenses. The Commission determines these expenses must be removed from Oncor's operating expenses and rate base, booked as a regulatory asset with the applicable return element, and recovered through a rider over a five-year period. To reflect these determinations, the Commission adds new findings of fact 79A and 79B and adds new conclusions of law 3C, 24A, and 24B.

3. Vendor Financing of Materials and Supplies

The Commission reverses the ALJs' determination that Oncor must offset its requested materials and supplies rate-base component by approximately \$8.25 million to account for vendor-financed materials and supplies. The ALJs adopted Cities' argument that Oncor's vendor-financed materials and supplies must be removed from rate base because they are sources of cost-free capital.¹⁰ The Commission agrees sources of cost-free capital must be removed from

¹⁰ Proposal for Decision at 68; Cities Ex. 1, Direct Testimony of Lane Kollen at 12:16–14:13.

rate base,¹¹ but does not agree Oncor's materials and supplies component requires an offset to account for cost-free capital.

Oncor calculated its requested materials and supplies rate-base component using the 13-month averaging method required by the Commission's rate-filing package. The Commission agrees with Oncor that its use of the 13-month average accounts for vendor financing concerns by averaging out the variable levels of costs and timing for accruals and payables.¹² The Commission therefore determines Oncor accounted for cost-free capital in its requested materials and supplies rate-base component in compliance with Commission rules. Accordingly, the Commission reverses the ALJs on this issue and Oncor is not required to exclude approximately \$8.25 million of materials and supplies from its rate base. To reflect this determination, the Commission modifies proposed finding of fact 87 and deletes proposed findings of fact 88 through 90.

4. Accrued Interest

The Commission reverses the ALJs' determination that it was appropriate to deduct long-term debt interest payable from Oncor's rate base. The ALJs were persuaded by Cities' argument that long-term debt interest payable must be removed from rate base because it is a form of zero-cost financing.

The Commission determines that interest accruals on long-term debt are not a form of zero-cost financing—they are non-cash items. Under Commission rules, an investor-owned utility's non-cash items, including interest accruals on long-term debt, are addressed in the rate-base calculation through their exclusion from the lead-lag study used to set cash-working capital.¹³ Oncor complied with the Commission's rules by not considering accrued interest when determining its cash-working capital and by not requesting a return on accrued interest elsewhere in rate base. The Commission therefore determines Oncor's interest accruals are not a source of zero-cost financing and do not need to be deducted from rate base. To reflect this determination,

¹¹ See 16 TAC § 25.231(c)(2)(B)(i).

¹² Oncor Ex. 50, Rebuttal Testimony of Ashely Thenmadathil at 14:8–15:11.

¹³ 16 TAC § 25.231(c)(2)(B)(iii)(IV)(-a-).

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 7 of 73

the Commission modifies proposed finding of fact 130; deletes proposed findings of fact 131, 132, and 133; and deletes proposed conclusion of law 34.

5. Self-Insurance Reserve

Oncor requests \$365.3 million in unreviewed shortfall costs, which when added to the shortfall balance of \$223.3 from its last base rate case, results in a total of \$588.5 million in self-insurance shortfall costs. Oncor proposes to amortize its total self-insurance shortfall balance of \$588.5 million over a five-year amortization period, at a rate of \$117.5 million. Oncor also requests to recover \$122.2 million annually for its self-insurance reserve.

The ALJs recommended that the \$365.3 million in self-insurance shortfall costs accrued since the last rate case are properly included, that Oncor be allowed to amortize the \$588.5 million self-insurance reserve account shortfall over a ten-year period, and to authorize Oncor to increase its annual self-insurance accrual amount from \$75 million to \$90 million, as recommended by TIEC.

The Commission adopts the ALJs' recommendation regarding Oncor's unreviewed accrued shortfall expenses of \$365.3 but modifies the ALJs' recommendations regarding the amortization period and annual accrual amount. The Commission agrees with Oncor that a five-year amortization period and a \$122.2 million annual accrual amount are appropriate.

a. Amortization of Self-Insurance Reserve Account Shortfall

In Oncor's previous base-rate proceeding, the Commission authorized Oncor to amortize its then-\$426.4 million self-insurance reserve account shortfall over a ten-year period for inclusion in rate base.¹⁴ Oncor carries forward \$223.3 million of this previous shortfall to this proceeding. Adding this shortfall to Oncor's \$365.3 million in accrued storm-related costs since its last base rate proceeding results in Oncor's current self-insurance reserve shortfall of \$588.5 million. Oncor proposes to amortize this total shortfall over a five-year period for inclusion in rate base.

The ALJs concluded Oncor's total self-insurance reserve shortfall should be amortized over a ten-year period, as proposed by several parties. The Commission disagrees. Although the Commission approved a ten-year amortization period for Oncor's self-insurance reserve shortfall

¹⁴ *Application of Oncor Electric Delivery Company LLC for Authority to Change Rates*, Docket No. 46957, Order, Finding of Fact No. 49 (Oct. 13, 2017).

in the last base rate proceeding, the base rate proceeding was resolved by agreement and is, therefore, not precedential as to the appropriateness of any principle or methodology underlying the agreement.¹⁵ Continuing to amortize Oncor's self-insurance reserve shortfall over 10-year periods is inconsistent with recent Commission precedent,¹⁶ does not align with Commission rules requiring utilities to file base-rate proceedings every four years,¹⁷ and could result in balances being carried forward year-after-year, resulting in a cumulative snowballing of successive shortfalls. The snowballing of successive shortfalls raises concerns of burdensome and unnecessary carrying costs and generational cost shifting. Accordingly, the Commission determines Oncor's \$588.5 million self-insurance reserve shortfall should be amortized over a five-year period. To reflect this determination, the Commission modifies proposed findings of fact 142 and 143.

b. Recovery of Accrued Expenses

The Commission agrees with the ALJs' recommendation to authorize Oncor to include its accrued expenses in rate base.

c. Annual Accrual Amount

Oncor's current annual self-insurance accrual amount is \$75 million. The Commission disagrees with the ALJs' recommendation to increase the accrual amount to \$90 million, an amount recommended by Texas Industrial Energy Consumers (TIEC), rather than the approximately \$122.2 million amount requested by Oncor. The Commission disagrees with the ALJs' recommendation and finds Oncor's evidence more persuasive on this issue. TIEC utilized an historical analysis of annual self-insurance reserve losses and recommended \$90 million as the annual accrual amount based upon an upward adjustment to the average of \$78.9 million over a

¹⁵ *Id.*, Ordering Paragraph No. 11.

¹⁶ See, e.g., *Application of Southwestern Electric Power Company for Authority to Change Rates*, Docket No. 51415, Order, Finding of Fact No. 64 (Jan. 14, 2022) (amortizing SWEPCO's regulatory assets over a four-year period); *Application of CenterPoint Energy Houston Electric, LLC for Authority to Change Rates*, Docket No. 49421, Order, Finding of Fact No. 97 (Mar. 9, 2020) (amortizing CenterPoint's non-EDIT regulatory assets and liabilities over 5-year amortization periods); *Application of AEP Texas Inc. for Authority to Change Rates*, Docket No. 49494, Order, Finding of Fact No. 132 (Apr. 6, 2020) (adopting the parties' agreed five-year amortization period for regulatory assets); *Application of Oncor Electric Delivery Company, LLC for Authority to Change Rates*, Docket No. 35717, Order on Rehearing, Finding of Fact No. 75 (Nov. 30, 2009) (amortizing Oncor's self-insurance reserve shortfall over a 7-year period).

¹⁷ 16 TAC § 25.247(b)(1).

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 9 of 73

29-year period.¹⁸ Oncor's analysis demonstrated a steadily increasing loss year after year, with an average loss of \$134.8 million in the last ten years which is significantly higher than the average loss of \$78.9 million over the last 29 years.¹⁹ The \$90 million annual accrual amount recommended by TIEC would have been sufficient to cover Oncor's trended losses only once in the last ten years.²⁰

The Commission agrees with Oncor that approving \$90 million for the annual accrual amount would likely result in significant deficits that will be borne by ratepayers for decades to come along with the return on this rate-base item. The Commission, therefore, modifies the PFD to authorize Oncor's requested \$122.2 million annual accrual amount. To reflect this determination, the Commission modifies proposed findings of fact 139, 141, 142, 143, and 149 and deletes proposed findings of fact 147 and 148. The Commission also modifies proposed conclusion of law 43.

6. Unrecovered Expenses Related to COVID-19

Oncor requests to include a regulatory asset in rate base totaling \$34.6 million in deferred expenses related to COVID-19, offset by \$7.3 million in related ADFIT. The Commission disagrees with the ALJs' recommendation to authorize Oncor to recover half of its requested COVID-19 regulatory asset and related amortization expense. The ALJs agreed with Cities, which argued Oncor should receive half its requested costs because it did not offset its deferred COVID-19 expenses by its COVID-19 avoided costs and neither quantified any costs that were eligible for deferral and not deferred nor quantified any lost revenues resulting from lower power consumption during the pandemic. The Commission disagrees.

On March 26, 2020, the Commission filed an accounting order addressing the effects of COVID-19 for services provided by electric, water, and sewer utilities stating the following:

The Commission authorizes each electric, water, and sewer utility to record as a regulatory asset expenses resulting from the effects of COVID-19, including but not limited to non-payment of qualified customer bills as specified by separate order issued on this same date. In future proceedings, the Commission will consider

¹⁸ TIEC Ex. 3, Direct Testimony of Billie S. LaConte at 5:1-17.

¹⁹ Oncor Ex. 23, Direct Testimony of Gregory S. Wilson at 8:27-9:16, GSW-4, GSW-5, GSW-6.

²⁰ *See id.*, GSW-4.

whether each utility's request for recovery of these regulatory assets is reasonable and necessary. The Commission will also consider in the future proceeding other issues, such as the appropriate period of recovery for the approved amount of regulatory assets, any amount of carrying costs thereon, and other related matters.²¹

The Commission's accounting order required utilities to record expenses related to COVID-19.²² The order did not require utilities to record avoided costs related to COVID-19, to quantify any costs that were eligible for deferral and not deferred or quantify any lost revenues resulting from lower power consumption during the pandemic.²³ Oncor recorded its expenses resulting from the effects of COVID-19 as directed by the Commission's order. No parties challenged the reasonableness of any COVID-19 related expenses sought by Oncor. Accordingly, the Commission determines Oncor met its burden to demonstrate it should recover its requested COVID-19 expenses, offset by the applicable, related ADFIT. To reflect this determination, the Commission modifies proposed findings of fact 150, 151, and 157; adds new findings of fact 149A and 149B; and deletes proposed findings of fact 152 through 156.

7. Amortization of Regulatory Assets and Liabilities

The Commission disagrees with the ALJs' recommendation to authorize Oncor to amortize \$382.5 million in regulatory assets and liabilities over a ten-year period except for intangible amortization over-recovery regulatory, for which they recommend a five-year amortization period. Oncor proposed a five-year amortization period, while various parties recommended five-, eight-, or ten-year amortization periods. The Commission modifies the ALJs' recommendation and authorizes Oncor to amortize its regulatory assets and liabilities over a five-year period:

As discussed above, ten-year amortization periods are inconsistent with recent Commission precedent,²⁴ do not align with Commission rules requiring utilities to file base-rate

²¹ *Issues Related to the State of Disaster for Coronavirus Disease 2019*, Docket No. 50664, Order Related to Accrual of Regulatory Assets at 1 (Mar. 26, 2020) (emphasis added).

²² *See id.*

²³ *See id.*

²⁴ *See, e.g., Application of Southwestern Electric Power Company for Authority to Change Rates*, Docket No. 51415, Order, Finding of Fact No. 64 (Jan. 14, 2022) (amortizing SWEPCO's regulatory assets over a four-year period); *Application of CenterPoint Energy Houston Electric, LLC for Authority to Change Rates*, Docket No. 49421, Order, Finding of Fact No. 97 (Mar. 9, 2020) (amortizing CenterPoint's non-EDIT regulatory assets and liabilities over 5-year amortization periods); *Application of AEP Texas Inc. for Authority to Change Rates*, Docket No. 49494, Order, Finding of Fact No. 132 (Apr. 6, 2020) (adopting the parties' agreed five-year amortization period for regulatory assets); *Application of Oncor Electric Delivery Company, LLC for Authority to Change Rates*, Docket

proceedings every four years,²⁵ and could result in asset balances being carried forward year-after-year, resulting in a snowballing of costs. Accordingly, a five-year amortization period is reasonable and appropriate. To reflect the Commission's decision on this issue, the Commission modifies proposed finding of fact 173; adds new finding of fact 167A; and deletes proposed findings of fact 168 through 172, 241, and 242.

B. Rate of Return

The ALJs determined that a reasonable range for Oncor's return on equity would be from 8.9% to 9.7% and recommended the Commission adopt the mid-point of 9.3% as the best approximation of an appropriate return on equity for Oncor. After consideration of the record evidence, the Commission determines that a return on equity of 9.70% is appropriate for Oncor. Electric utilities face increasing inflation and less favorable short- and long-term interest rates than in recent years, which saw steady decreases in utility returns on equity. Furthermore, in establishing a reasonable return on invested capital the Commission has the authority to consider the efforts of the utility in conserving resources; the quality of service; the efficiency of operations; and the quality of management.

The Commission recognizes Oncor's high performance throughout its service territory in minimizing the number and duration of outages, maintaining system frequency, responding to storm damage, and restoring power to customers. The Commission also recognizes, however, that Oncor could improve timing of, and reduce the delays in, its interconnection process. For the reasons discussed above, the Commission determines that 9.7% is the appropriate return on equity for Oncor. To reflect this determination, the Commission modifies proposed findings of fact 184, 185, 186, and 190. The Commission also modifies proposed conclusion of law 11 for completeness and consistency with past Commission orders.

No. 35717, Order on Rehearing, Finding of Fact No. 75 (Nov. 30, 2009) (amortizing Oncor's self-insurance reserve shortfall over a 7-year period).

²⁵ 16 TAC § 25.247(b)(1).

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 12 of 73

C. Operating Expenses

1. Long-term Incentive Compensation Expenses

The Commission does not agree with the ALJs' recommendation to disallow approximately \$14.4 million in expenses associated with its long-term incentive compensation long-term incentive plan. Instead, the Commission modifies the proposal for decision to disallow 10% in long-term incentive compensation expenses, consistent with Commission Staff's recommendation.

The ALJs adopted Alliance of Cities' argument that Oncor ratepayers should not be made to pay long-term incentive plan costs awarded to executives for performance for long-term incentive compensation that is already rewarded through Oncor's short-term incentive compensation plan. Alliance of Cities made this argument because the performance metrics under Oncor's short-term incentive and long-term incentive compensation plans are identical, except that the short-term incentive plan metrics are measured annually and the long-term incentive plan metrics are measured every three years. The ALJs concluded that Oncor's long-term incentive plan's use of duplicate metrics resulted in long-term incentive plan expenses that were not reasonable and necessary.

The Commission disagrees. Similar or duplicate operational metrics for short-term and long-term incentive compensation can provide value in ensuring that operational goals result in the reliable delivery of electricity to customers. Therefore, overlapping or similar short-term and long-term incentive compensation metrics are not, per se, unreasonable or unnecessary. The Commission determines that the preponderance of evidence weighs in favor of allowing Oncor to recover all long-term incentive plan costs except the 10% that were financially based, consistent with Commission Staff's recommendation and Commission precedent. To reflect this determination the Commission modifies proposed finding of fact 209 and adds new finding of fact 207A.

D. Billing Determinants and Cost Allocation

1. Weather Normalization Adjustments

The Commission adopts the ALJs' recommendation to approve Oncor's proposed weather normalization adjustment to the non-coincident peak (NCP) class allocation factors, but reverses the ALJs' recommendation to approve Hunt Energy Network, L.L.C.'s proposed additional

weather-normalization adjustment. Hunt Energy proposed to adjust the NCP allocation factors by excluding class-specific NCP data collected for the month of February 2021, when Winter Storm Uri occurred. The peak demands of the Residential, Secondary < 10 kW, Wholesale XFMR, and Wholesale DLS classes occurred during February 2021. Under Hunt Energy's proposal, the NCP class allocation factors of these classes would be based on their second-highest peak demands, which occurred during June through September.

NCP class allocation factors are used to allocate demand-related distribution costs consistent with cost-causation principles.²⁶ NCP class allocation factors are the appropriate mechanism to allocate these costs because they allocate costs in proportion to the maximum load each rate class places on a distribution system.²⁷ For these reasons, it would be inappropriate to set NCP class allocation factors without considering the effect of February 2021's cold weather on customer demand. Doing so would result in inappropriate cost shifting from certain rate classes to other rate classes.

The Commission modifies the proposal for decision to only adopt Oncor's proposed weather-normalization adjustment to the NCP allocation factors. To reflect this determination, the Commission modifies proposed finding of fact 255 and adds new finding of fact 255A.

2. Process for Updating TCRF Allocation Factors

Oncor proposed to update its transmission-cost-recovery-factor (TCRF) class allocation factors in this base-rate proceeding, as required by 16 Texas Administrative Code (TAC) § 25.193. Commission Staff recommended that Oncor not update its TCRF allocation factors in this proceeding, but instead that the Commission exercise its authority under 16 TAC § 25.193(b), to require that Oncor update its TCRF allocation factors annually instead of the less frequent requirement in the rule to update TCRF allocation factors in base-rate proceedings. Commission Staff raised concerns that significant class subsidization is occurring for Oncor ratepayers. Commission Staff attributed the cause of this to load growth in the Oncor service area that results in TCRF rates moving away from actual cost because class allocation factors are only updated in base-rate proceedings. To address this, Commission Staff recommended that Oncor not be

²⁶ Staff Ex. 7, Cross-Rebuttal Testimony of Adrian Narvaez at 8:10-12.

²⁷ See *id.* at 8:12-14.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 14 of 73

required to update its TCRF allocation factors in this proceeding, but instead be required to update them in annual compliance filings, and the ALJs agreed with this recommendation. The Commission disagrees with this approach.

The Commission rule that requires TCRF class allocation factors to be updated in a base-rate proceeding also requires that TCRF billing determinants be updated biannually between base-rate proceedings.²⁸ Implementing these two processes, which have distinctly different timing requirements, was an intentional decision of the Commission. The Commission agrees with Oncor that, in the past, the Commission has declined proposals to require an annual update of TCRF class allocation factors.²⁹ Commission Staff identified an issue that deserves consideration. However, requiring updates of TCRF allocation factors more often than the current four-year cycle for base rate proceedings would be a significant shift in Commission policy—one more appropriately implemented through a rulemaking project rather than through ad-hoc rulemaking in a base-rate proceeding.

The Commission determines Oncor's proposed TCRF should be updated in this proceeding utilizing Oncor's proposed allocation factors. To reflect the Commission's decision, the Commission modifies proposed findings of fact 269, 272, and 274; adds new finding of fact 269A; and deletes proposed findings of fact 270, 271, and 273. The Commission also deletes conclusion of law 46.

E. Rate Design

1. Facility Extensions and Interconnection Issues

The ALJs recommend the Commission modify section 6.3.1 Facilities Extension Agreement of Oncor's retail delivery tariff as proposed by Targa Pipeline Mid-Continent WestTex LLC. Targa Pipeline proposed to amend Oncor's tariff to add a service request schedule that would establish a uniform timeline with steps and actions for both transmission service interconnection requests and distribution service interconnection requests. The Commission disagrees with the ALJs' recommendation to modify Oncor's tariff to add the schedule proposed by Targa Pipeline.

²⁸ 16 TAC § 25.193(b).

²⁹ Oncor's Initial Brief at 121.

The ALJs stated that there are vast differences between interconnecting distribution service compared to interconnecting transmission voltage service but found that Targa Pipeline's proposed schedule is general enough to comply with both types of interconnection. The Commission does not agree with the ALJs that the proposed schedule is general enough for both types of interconnection. The Commission agrees with Oncor that imposing a uniform timeline for transmission and distribution service requests is not appropriate or effective because the two have distinct, not uniform, requirements and characteristics for service.³⁰ Further, the Commission does not agree that developing timelines or deadlines for interconnection requests is appropriately addressed in Oncor's tariff. This type of substantive policy action applies more broadly than to just Oncor, and should take place in a project or workshop that includes input from all stakeholders.

The Commission, therefore, reverses the ALJs' recommendation to revise Oncor's tariff to add Targa Pipeline's proposed schedule to section 6.3.1 and approves Oncor's proposed amendments to section 6.3.1. To reflect this determination, the Commission adds new finding of fact 321A and deletes proposed findings of fact 322 through 326. In this Order on Rehearing, the Commission modifies finding of fact 321A for clarity.

2. Contributions in Aid of Construction Refunds

The ALJs recommend that the Commission modify section 6.3.1 Facilities Extension Agreement of Oncor's retail delivery tariff to add language proposed by TIEC and Pioneer Natural Resources USA, Inc. TIEC and Pioneer's proposed language would create a compulsory 10-year contributions in aid of construction refund program that would compensate large customers that are the first to request a facility extension for a new development area and make contributions towards the construction of the requested facilities, otherwise known as first movers. TIEC and Pioneer argued their proposed language will protect first movers by entitling customers who paid contributions in aid of construction to a prorated portion of the contributions in aid of construction if other customers interconnect to the facility contributed to within the first ten years it is in service.

The Commission disagrees with the ALJs' recommendation. TIEC and Pioneer did not demonstrate that a 10-year refund program should be implemented. Addressing this type of policy

³⁰ See Oncor Ex. 40, Rebuttal Testimony of Wesley R. Speed at 62:27–63:10; Oncor Ex. 41, Rebuttal Testimony of Keith Hull at 10:26–11:10.

**PUC Docket No. 53601
SOAH Docket No. 473-22-2695**

Order on Rehearing

Page 16 of 73

issue is more appropriate in a rulemaking project rather than in a base-rate proceeding. Accordingly, the Commission reverses the ALJs' recommendation to add TIEC and Pioneer's proposed tariff language. To reflect this determination, the Commission modifies proposed finding of fact 331, adds new finding of fact 330A, and deletes proposed finding of fact 330.

3. Street Lighting Service

The ALJs recommend the Commission modify section 6.1.1.1.8 Lighting Service of Oncor's retail delivery tariff as proposed by Oncor, with the addition of one sentence proposed by Cities. Oncor proposed to revise its tariff to provide it with the sole discretion to determine whether a specific lamp type is long longer commercially available under reasonable terms. Cities, arguing it would be unreasonable to allow Oncor to make this decision unilaterally, proposed the addition of two sentences. The first would require Oncor to provide evidence the lamp type was no longer commercially available. The second would require Oncor to consult with customers to determine the most appropriate alternative lamp type to meet a customer's request. The ALJs recommended that the first sentence be rejected and the second sentence be adopted.

The Commission agrees with the ALJs' recommendation to adopt Oncor's proposed tariff language but disagrees with the recommendation to adopt part of Cities' proposed language. Modifying Oncor's tariff language to allow customers to provide input is unnecessary, as the existing language does not prevent customers from providing input. The Commission therefore determines only Oncor's proposed amendments to section 6.1.1.1.8 Lighting Service should be adopted. To reflect this determination, the Commission modifies proposed finding of fact 352.

F. Additional Changes

The Commission makes the following additional changes to the Order.

The Commission modifies proposed finding of fact 13 to correct an incorrect filing date, modifies proposed finding of fact 55 for clarity and completeness, and modifies proposed findings of fact 93, 96, 99, 127, 130, 143, 183, 245, 246, 248, 367, and 368 for accuracy. The Commission modifies proposed finding of fact 263 and adds new finding of fact 99A for accuracy and completeness. The Commission also modifies proposed finding of fact 165.a. for clarity and completeness, modifies proposed findings of fact 281 and 282 to reflect the Commission's decision

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 17 of 73

to allocate the cost of FERC Account 368 capacitors to all Oncor rate classes, and modifies proposed findings of fact 308 and 321A for clarity.

To identify the parties that filed initial and reply briefs, the Commission modifies proposed finding of fact 27, and adds new finding of fact 27A. To reflect Commission Staff's number run filed on March 28, 2023, the Commission modifies proposed findings of fact 49, 84, 85, 190, 218, and 243. Additionally, the Commission deletes proposed findings of fact 61 and 62 because they are conclusions of law; deletes proposed findings of fact 91, 98, 100, 101, 102, 123, 180, 193, 194, 279, 280, and 388 because they are unnecessary to support this Order; and deletes proposed finding of fact 413 because there is insufficient evidence to support the finding. The Commission also adds new finding of fact 49A for completeness.

The Commission modifies proposed conclusions of law 1, 2, 7, 10, and 53 for consistency with the Commission's past orders. The Commission also modifies proposed conclusion of law 3, in part by incorporating a portion of it into new conclusion of law 3A, for clarity and consistency with past Commission orders. Proposed conclusion of law 26 is modified for clarity and accuracy. In addition, the Commission adds new conclusion of law 3B to clarify the scope of the Commission's ratemaking authority and new conclusion of law 14A to address the requirements of PURA § 36.003(b). Lastly, the Commission deletes proposed conclusion of law 8 because it is not a conclusion of law, deletes proposed conclusion of law 28 because it is duplicative of proposed conclusion of law 29, and adds new conclusion of law 14B for completeness.

G. Minor and Non-Substantive Changes

Lastly, the Commission makes other minor modifications or corrections to the proposed findings of fact and conclusions of law for such matters as capitalization, spelling, punctuation, style, grammar, readability, and conformity with the Commission's order writing format.

II. Findings of Fact

The Commission adopts the following findings of fact.

Applicant

1. Oncor Electric Delivery Company LLC is an investor-owned utility that operates within the ERCOT region.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 18 of 73

2. Oncor provides transmission and distribution service to approximately 13 million customers and interconnects approximately 3.8 million homes and businesses in Texas.
3. Oncor's service area covers more than 54,000 square miles that extends from the Red River to just north of Austin and includes much of east Texas, west Texas (including much of the Permian Basin), and parts of the Panhandle. Oncor owns, operates, and maintains more than 140,000 circuit miles of transmission and distribution lines and more than 1,100 substations and switching stations.
4. Oncor's last base-rate case was filed on March 17, 2017, in Docket No. 46957.³¹

Application

5. On May 13, 2022, Oncor filed an application and statement of intent to change its retail transmission and distribution rates and wholesale transmission rates.
6. Oncor's application used the 12-month period ending December 31, 2021, as its historical test year.
7. Oncor requested approval from the Commission for a total net increase in its base rate revenues of \$251 million, or 4.5%, over Oncor's current annualized revenue of \$5.560 billion.
8. No party challenged the adequacy and completeness of Oncor's application.
9. In SOAH Order No. 2, issued on June 24, 2022, the ALJs found the application sufficient.
10. Oncor complied with the form and instructions for the Commission's rate-filing package, and the application was administratively complete.
11. Oncor revised its request through its 45-day update, filed on June 27, 2022, and its September 9, 2022 supplemental direct testimony filing.
12. Oncor timely filed with the Commission petitions for review of rate ordinances of each municipality exercising original jurisdiction within its service territory. All such appeals were consolidated for determination in this proceeding.

³¹ *Application of Oncor Electric Delivery Company LLC for Authority to Change Rates*, Docket No. 46957, Order (Oct. 13, 2017).

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 19 of 73

Notice

13. On May 13, 2022 (for the original notice) and May 18, 2022 (for the revised notice), Oncor provided a copy of its application and statement of intent to each municipality within Oncor's service area with original jurisdiction.
14. Oncor timely served by mail notice of the application to each of the ERCOT wholesale transmission customers on the service list in Docket No. 52989.³²
15. Oncor timely served notice of the application by mail to each retail electric provider listed on the Commission's website as of the date on which service was sent.
16. Oncor timely provided notice to all parties in Oncor's last base-rate case, Docket No. 46957.
17. On May 18, 2022, a revised notice was mailed to each of the entities referenced in Oncor's application and statement of intent.
18. Notice of Oncor's application was published once each week for four consecutive weeks in a newspaper having general circulation in each county of Oncor's service areas. On July 7, 2022, Oncor filed publisher's affidavits attesting that Oncor provided notice by publication once per week for four consecutive weeks within the periods of May 19 through July 5, 2022.
19. On July 7, 2022, Oncor filed an affidavit attesting to the completion of the publication of notice.
20. No party challenged the adequacy of the notice provided by Oncor, and Commission Staff recommended that the ALJs find that the notice was sufficient.
21. In SOAH Order No. 2, issued on June 24, 2022, the ALJs found Oncor's notice of the application sufficient.

Referral to SOAH

22. On May 16, 2022, the Commission referred this docket to SOAH. On June 30, 2022, the Commission filed its preliminary order identifying 76 issues to be addressed in this docket.

³² *Commission Staff's Application to Set 2022 Wholesale Transmission Service Charges for the Electric Reliability Council of Texas*, Docket No. 52989, Order (Apr. 21, 2022).

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 20 of 73

23. The ALJs suspended Oncor's proposed effective date for the proposed rates for 150 days. To allow for sufficient time for the ALJs and the Commission to process this case, Oncor agreed to further extend the effective date for its proposed rates such that the Commission's deadline to issue a final order is extended to March 3, 2023.
24. The following entities intervened in this case and were admitted as parties: Alliance for Retail Markets (ARM); Alliance of Oncor Cities; Chevron U.S.A., Inc.; East Texas Electric Cooperative, Inc. (ETEC); EVgo Services, LLC; Google LLC; Hunt Energy Network L.L.C.; The Kroger Co.; Nucor Steel – Texas; Office of Public Utility Counsel (OPUC); Pioneer Natural Resources USA, Inc.; Rayburn Country Electric Cooperative, Inc.; Steering Committee of Cities Served by Oncor (Cities); Targa Pipeline Mid-Continent WestTex LLC; Texas Cotton Ginners' Association; Texas Energy Association for Marketers (TEAM); Texas Industrial Energy Consumers (TIEC); University of Texas System and its Agencies (UT System); U.S. Department of Defense and all other Federal Executive Agencies (the Department of Defense), Walmart, Inc. Commission Staff also participated as a party.
25. The UT System agencies participating in this docket are: The University of Texas at Arlington, The University of Texas at Dallas, The University of Texas Health Science Center at Tyler, The University of Texas at Tyler, The University of Texas Permian Basin, and the University of Texas Southwestern Medical Center.
26. The hearing on the merits convened by videoconference on September 26, 2022 and concluded on October 4, 2022.
27. On October 14, 2022, Alliance of Oncor Cities, ARM and TEAM, Cities, Commission Staff, the Department of Defense, ETEC and Rayburn, EVgo, Google, Hunt Energy, Kroger, Nucor Steel, Oncor, OPUC, Pioneer, Targa Pipeline, the Texas Cotton Ginners' Association, TIEC, and UT System filed initial post-hearing briefs.
- 27A. On October 28, 2022, the Alliance of Oncor Cities, Cities, Commission Staff, the Department of Defense, ETEC and Rayburn, Hunt Energy, Oncor, OPUC, Pioneer, Targa Pipeline, the Texas Cotton Ginners' Association, TIEC, and UT System filed reply briefs and proposed findings of fact, conclusions of law, and ordering paragraphs.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 21 of 73

28. The evidentiary record remained open to allow additional time for the parties to submit information to facilitate the number-running process for this proposal for decision. The record closed on November 4, 2022, as to all issues other than rate-case expenses.
29. On November 15, 2022, Oncor notified the ALJs that Oncor and Commission Staff reached an agreement on rate-case expenses, which was unopposed by Cities and Alliance of Oncor Cities. On December 2, 2022, Oncor filed the agreement and an associated agreed motion to admit evidence, and Commission Staff filed a memorandum from Ruth Stark in support of the agreement.

Testimony and Statements of Position

30. On May 13, 2022, Oncor included in its application the direct testimonies of E. Allen Nye, Jr., James A. Greer, Westley R. Speed, Keith Hull, Joseph B. Nichols, Collin M. Martin, Hagen Haentsch, Ellen E. Buck, Daniel E. Hall, W. Alan Ledbetter, Dane A. Watson, Joel S. Austin, Malia A. Hodges, Matthew D. Smith, Michael G. Grable, Gregory S. Wilson, Angela Y. Guillory, Bonne L. Clutter, Ashely Thenmadathil, Keven R. Fease, Ellen Lapson, Dylan W. D'Ascendis, Alan S. Taper, Matthew A. Troxle, Darryl E. Nelson, Robert A. Schmidt, and Andrea A. Stover.
31. On June 27, 2022, Oncor filed its 45-day update to its schedules and workpapers and errata to various schedules, workpapers, and the testimonies or testimony exhibits of Collin M. Martin, W. Alan Ledbetter, Joel S. Austin, Malia A. Hodges, Ashley Thenmadathil, and Matthew A. Troxle.
32. On August 15, 2022, Oncor filed its errata to the direct testimony of Gregory S. Wilson.
33. On August 26, 2022, Walmart filed the direct testimonies of Alex J. Kronauer and Steve W. Chriss; Cities filed the direct testimonies of Karl J. Nalepa and Lane Kollen; UT System filed the direct testimonies of Tony Georgis and Laurie Tomczyk; EVgo filed the direct testimony of R. Thomas Beach; Kroger filed the direct testimony of Justin Bieber; Alliance of Oncor Cities filed the direct testimonies of J. Randall Woolridge, David F. Brown, David J. Garrett, and Mark E. Garrett; the Department of Defense filed the direct testimonies of Keven W. O'Donnell, Lafayette K. Morgan, Jr., Maureen L. Reno, and Jennifer L. Rogers; Targa Pipeline filed the direct testimony of Kit Pevoto; TIEC filed the direct testimonies

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 22 of 73

of Jeffry Pollock, Billie S. Laconte, and Michael P. Gorman; Hunt Energy filed the direct testimonies of Pat Wood, III and Robert R. Stephens; ETEC filed the direct testimonies of George A. Kithas and James Daniel; TEAM and ARM filed the direct testimony of Chris Hendrix; and OPUC filed the direct testimonies of Evan D. Evans and Steven H. Hunt.

34. On August 26, 2022, the Texas Cotton Ginners' Association filed a statement of position.
35. On September 2, 2022, Commission Staff filed the direct testimonies of Adrian Navarez, Mark Filarowicz, John Poole, Jorge Ordonez, and Ruth Stark.
36. On September 9, 2022, Oncor filed the supplemental direct testimonies of Andrea M. Stover, Robert A. Schmidt, and Matthew A. Troxle.
37. On September 12, 2022, Alliance of Oncor Cities filed errata to the direct testimony of J. Randall Woolridge, and Cities filed errata to the direct testimonies of Karl J. Nalepa and Lane Kollen.
38. On September 16, 2022, Oncor filed the rebuttal testimonies of E. Allen Nye, Jr., James A. Greer, Wesley R. Speed, Keith Hull, Collin M. Martin, Ellen E. Buck, Daniel E. Hall, W. Alen Ledbetter, Gregory S. Wilson, Dane A. Watson, Angela Y. Guillory, Bonnie L. Clutter, Ashley Thenmadathil, Keven R. Fease, Ellen Lapson, Dylan W. D'Ascendis, Matthew A. Troxle, J. Michael Sherburne, Darryl E. Nelson, Robert A. Schmidt, and Andrea M. Stover; and Commission Staff filed the supplemental direct testimony of Ruth Stark.
39. On September 16, 2022, the Department of Defense filed the cross-rebuttal testimony of Kevin W. O'Donnell; Cities filed the cross-rebuttal testimony of Karl J. Nalepa; ETEC filed the cross-rebuttal testimony of Laurie Tomczyk; TIEC filed the cross-rebuttal testimonies of Jeffry Pollock and Charles Griffey; Kroger filed the cross-rebuttal testimony of Justin Bieber; OPUC filed the cross-rebuttal testimony of Evan D. Evans; and Commission Staff filed the cross-rebuttal testimonies of Adrian Narvaez and William B. Abbott.
40. On September 19, 2022, Chevron and UT System filed statements of position.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 23 of 73

41. On September 20, 2022, Oncor, Nucor Steel, Hunt Energy, OPUC, Google, Walmart, ETEC and Rayburn, Alliance of Oncor Cities, Kroger, Pioneer, and Google filed statements of position.
42. On September 21, 2022, TIEC filed errata to the direct testimonies of Jeffry Pollock, Billie S. Laconte, and Michael P. Gorman, and Hunt Energy filed errata to the direct testimonies of Pat Wood, III and Robert R. Stephens.
43. On September 22, 2022, Commission Staff filed errata to the direct testimony of John Poole, and Oncor filed errata to the rebuttal testimony of Angela Y. Guillory.
44. On September 27, 2022, Targa Pipeline filed errata to the direct testimony of Kit Pevoto.
45. On September 28, 2022, ETEC filed errata to the direct testimony of James W. Daniel.
46. On November 1, 2022, Oncor filed its final rate-case expenses update. On November 4, 2022, Cities and Alliance of Oncor Cities each filed their final rate-case expenses updates.
47. On November 10, 2022, Commission Staff filed the supplemental testimony of Ruth Stark addressing rate-case expenses.
48. On November 15, 2022, Oncor filed a statement of position regarding Ms. Stark's supplemental testimony, Alliance of Oncor Cities filed an affidavit in rebuttal to Ms. Stark's supplemental testimony.

Proposal for Decision

- 48A. On December 28, 2022, the ALJs filed a proposal for decision.
- 48B. On January 24, 2023, ARM and TEAM, Cities, Commission Staff, the Department of Defense, ETEC and Rayburn, Google, Hunt Energy, Nucor Steel, Oncor, OPUC, Pioneer, Targa Pipeline, TIEC, and UT System filed exceptions to the proposal for decision.
- 48C. On February 1, 2023, Alliance of Oncor Cities, ARM and TEAM, Cities, Commission Staff, the Department of Defense, ETEC and Rayburn, Google, Hunt Energy, Oncor, OPUC, Pioneer, Commission Staff, Targa Pipeline, TIEC, and UT System filed replies to the exceptions to the proposal for decision.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 24 of 73

- 48D. On February 9, 2023, the ALJs filed their response to the exceptions and replies to exceptions and made certain modifications and clarifications to the proposal for decision.
- 48E. On February 9, 2023, Commission Counsel filed a memorandum requesting that Commission Staff file an updated number run to reflect the decisions made by the Commission at the March 9, 2023 open meeting.
- 48F. On March 28, 2023, Commission Staff filed its number run with updated rate schedules for Oncor based on the decisions made by the Commission at the March 9, 2023 open meeting.

Rate Base

49. Oncor's total adjusted rate base is \$18,618,610,013, as set forth in Commission Staff's number run filed on March 28, 2023.
- 49A. Oncor NTU's total rate base is \$101,006,266, for capital investments that are prudent, used and useful, and reasonable and necessary. The rate base for Oncor NTU will be used in the calculation of Rate WDSS that Oncor NTU bills Oncor.

T&D Capital Investment

Sharyland CCN Projects

50. Oncor's requested \$12.1 billion in capital investments not previously reviewed for prudence are prudent investments, used and useful in providing service to the public, and reasonable and necessary. Those investments include:
- a. \$4.13 billion in Oncor's distribution system;
 - b. \$5.37 billion in Oncor's legacy transmission system;
 - c. \$1.62 billion in capital investments Oncor acquired from Sharyland Utilities, L.P. (Sharyland) and Sharyland Distribution and Transmission Services, L.L.C. (SDTS); and
 - d. \$959 million in technology-related capital investments.
51. Oncor's White Deer-to-Silverton Competitive Renewable Energy Zones (CREZ) transmission line and Colorado City-to-Barber Lake transmission line exceeded their original cost estimates by more than 10%.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 25 of 73

52. The \$3,547,074.37 cost variance for the White Deer-to-Silverton CREZ transmission line should be included in rate base as it was prudently incurred, used and useful, and reasonable and necessary.
53. The \$1,470,090.49 cost variance of for the Colorado City-to-Barber Lake transmission line should be included in rate base as it was prudently incurred, used and useful, and reasonable and necessary.

Sharyland's Acquisition of SPS Facilities

54. In 2013, Sharyland acquired utility plant assets from Southwestern Public Service Company (the Sharyland acquisition), and Oncor later acquired those assets from Sharyland in 2019.
55. Oncor seeks to include \$23.5 million in rate base for the Sharyland acquisition adjustment related to the purchase of the transmission facilities and to recover approximately \$851,000 through rates for annual amortization associated with the acquisition adjustment.
56. A utility may recover acquisition adjustments through rates if the purchase price was not excessive and specific and offsetting benefits have accrued to ratepayers.³³
57. Oncor did not demonstrate that the acquisition of the Sharyland facilities resulted in the accrual of specific and offsetting benefits to Oncor ratepayers.
58. DELETED.
59. Oncor's requested \$23.5 million regulatory asset and \$851,000 annual amortization costs should be removed from Oncor's revenue requirement.

Mobile Generation

60. Oncor seeks recovery of approximately \$3.1 million in invested capital for mobile generation units that it leased under PURA³⁴ § 39.918(b).
61. DELETED.

³³ See *Application of Electra Telephone Company, Inc. for Transfer of a Certificate of Public Convenience and Necessity from Electra Telephone Company*, Docket No. 8374, Examiner's Report on Remand at 6 (Aug. 1, 1990).

³⁴ Public Utility Regulatory Act, Tex. Util. Code §§ 11.001–66.016.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 26 of 73

62. DELETED.
63. As of April 14, 2022, Oncor is leasing 15 mobile generation units with a total capacity equivalent to approximately 11 megawatts (MW).
64. Although the Commission has not adopted rules to promulgate how a transmission and distribution utility can lease and operate facilities that provide temporary emergency electric energy to aid in restoring power to the utility's distribution customers during certain widespread power outages under PURA § 39.918(b), it has opened Project No. 53404 requesting input from interested parties on the implementation of that statute.
65. Oncor used a request for pricing process for a one-year lease to secure two different supplies for its leased mobile-generation facilities. Oncor sent a request for pricing to nine suppliers—three were existing suppliers for Oncor and the remaining six were determined, through Oncor's market knowledge and research of suppliers, to have the capability to meet the requirements of the request for pricing. Oncor received eight responses and selected two suppliers for further evaluation—one for larger size mobile-generation facilities (625 kilowatt (kW) capacity and above) and one for smaller size facilities (under 625 kW capacity).
66. Oncor chose to lease its mobile generation units through Citizens Bank, one of its existing fleet lease vendors. Oncor secured a seven-year lease with Citizens Bank.
67. DELETED.
68. Oncor leased mobile-generation units to ensure temporary emergency energy was available to its customers and in furtherance of its obligation to serve every customer in its certificated service area and provide continuous and adequate service in that area.
- 68A. Oncor leased mobile-generation units during December 2021 following Winter Storm Uri and in advance of the 2021 through 2022 winter season.
- 68B. During that time, there was a high demand for, and limited supply of, mobile generation.
69. Under the circumstances, Oncor used a competitive bidding process to the extent reasonably practicable to acquire a lease for its mobile-generation units.
70. DELETED.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 27 of 73

71. DELETED.
72. DELETED.
73. The North American Energy Reliability Corporation (NERC) defines *bulk power system* as:
- a. facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and
 - b. electric energy from generation facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.
74. For 18 hours, Faith Community Hospital in Jacksboro, Texas was without grid power after a tornado damaged Oncor's distribution system.
75. Oncor used a mobile-generation unit to restore power at Jacksboro Hospital when it had not received a load shed order from ERCOT and the tornado had not damaged the transmission system.
- 75A. Oncor will not sell electric energy or ancillary services from its leased mobile-generation facilities.
- 75B. Oncor will ensure its mobile-generation facilities are operated in isolation from the bulk power system.
- 75C. Oncor will not submit any information concerning the cost or usage of mobile-generation facilities to ERCOT to ensure the use of mobile-generation facilities will not be included in ERCOT's locational marginal pricing calculations, pricing, or reliability models.
- 75D. Oncor implemented processes to ensure retail customer usage during the operation of mobile-generation facilities is adjusted out of the usage reported for billing purposes by retail customers' retail electric providers.
- 75E. Oncor addressed its planned use of mobile-generation facilities in its emergency operations plan filed with the Commission.
76. DELETED.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 28 of 73

77. Oncor's \$3.1 million in invested capital to lease mobile generation units were prudently incurred and used and useful in providing service, and are reasonable and necessary.
78. DELETED.
79. DELETED.
- 79A. It is appropriate for Oncor to utilize a regulatory asset to account for costs under PURA § 39.918 and to include a return element.
- 79B. It is appropriate for Oncor to recover its costs under PURA § 39.918 through a tariff rider.

AFUDC

80. Oncor appropriately calculated and transferred to plant in service the allowance for funds used during construction in the amount of \$139,191,762 from 2017 to 2021, and supported the requirements for complete statement of the methods, procedures, and calculations followed in capitalizing allowance for funds used during construction.
81. Oncor's \$139,191,762 of allowance for funds used during construction is properly included in rate base.

Electric Plant Held for Future Use

82. Oncor identified \$26,700,685 million in electric plant held for future use.
83. The properties listed in Exhibit WRS-R-3 represent Oncor-owned assets that are held for future use to provide electric service under a definitive plan for such use and are expected to be used to serve the public in the next 10 years.
84. Oncor included \$23,215,047 of its electric plant held for future use in rate base and provided specific plans to use this property within the next 10 years to construct transmission switching stations and transmission lines.
85. Oncor properly calculated and included \$23,215,047 of electric plant held for future use in rate base.

Working Capital

86. Oncor's requested total working capital allowance is composed of the following rate base items: (i) inventories of materials and supplies; (ii) prepayments for operating expenses; and (iii) an allowance for cash working capital based on a lead-lag study.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 29 of 73

Materials & Supplies

87. Oncor's requested inclusion of \$152,038,741 of materials and supplies inventories based on an adjusted 13-month average is reasonable.
88. DELETED.
89. DELETED.
90. DELETED.
91. DELETED.
92. Oncor's cash working capital calculation improperly recorded certain materials and supplies expenses as cash expenses.
93. It is reasonable for Oncor's materials and supplies inventories to be reduced by the materials and supplies expense, which results in a reduction to the revenue requirement of approximately \$0.038 million.
94. Oncor's transmission revenue requirement should be reduced by approximately \$0.003 million and its distribution revenue requirement should be reduced by approximately \$0.035 million.

Prepayments

95. Oncor's prepayments of \$115,153,396, based on a 13-month average, were reasonable and are properly included in rate base.

Cash Working Capital

96. Oncor requests a negative \$82,162,866 cash working capital allowance based on a lead-lag study for the period of October 1, 2020 to September 30, 2021.
97. On June 27, 2022, Oncor filed an errata that reduced the cash working capital in its transmission and distribution rate base. The errata reduced the transmission cash working capital included in rate base by \$0.754 million and reduced the distribution cash working capital included in rate base by \$7.926 million.
98. DELETED.
99. Oncor's cash working capital amounts were synchronized with its filed errata.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 30 of 73

99A. The cash working capital amounts approved by this Order are just and reasonable.

100. DELETED.

101. DELETED.

102. DELETED.

Additions or Reductions to Rate Base

ADFIT

103. Oncor identified \$2,347,893,771 in accumulated deferred federal income taxes (ADFIT).

104. Oncor properly included \$2,347,893,771 in ADFIT and unbilled revenues to rate base for certain employee compensation and benefits categories (including the performance enhancement plan, the supplemental executive retirement plan, and the long-term incentive plan and certain ADFIT assets (including the pension plan, other postemployment benefits, and FAS 112).

105. Oncor properly included its ADFIT assets for employee compensation, employee benefits, and unbilled revenues in its ADFIT balance.

106. Oncor improperly excluded all taxes related to energy efficiency in this proceeding based on a prior—now expired—agreement in which Oncor agreed that energy efficiency cost recovery factor (EECRF) impacts would be removed from base rates and recovered through the EECRF.

107. Oncor erred by not including the ADFIT asset related to EECRF unbilled revenue in rate base but agreed to do so in its next base-rate case.

108. Oncor should include the ADFIT asset related to EECRF unbilled revenue in rate base in its next base-rate case.

Excess ADFIT

109. The Tax Cuts and Jobs Act created excess ADFIT assets when, upon its passage in December 2017, the ADFIT asset balances were reduced and the differences reclassified to an excess ADFIT regulatory asset account.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 31 of 73

110. Excess ADFIT, which is amortized as a reduction to income tax expense, should be returned to customers because it is no longer a federal tax liability.
111. Excess ADFIT assets represent taxes Oncor has pre-paid to the federal government, which it will not recover unless included in rates.
112. Oncor included \$108,278,694 of excess ADFIT assets in its tax-related regulatory asset balance.
113. When Oncor acquired Oncor NTU's predecessor, Sharyland Distribution & Transmission Services, in May 2019, Oncor NTU had \$56 million of net excess ADFIT liabilities recorded on its books as the result of the Tax Cuts and Jobs Act.
114. Included in the \$56 million balance is an excess ADFIT asset related to a net-operating-loss carryforward that existed upon the enactment of the Tax Cuts and Jobs Act.
115. Under the agreed commitment as identified and ordered by the Commission in Docket No. 48929,³⁵ none of the excess ADFIT recorded for Oncor NTU as a result of the Tax Cuts and Jobs Act has been amortized or otherwise reduced because the then current rates did not reflect any such amortization.
116. Oncor included \$7.539 million in Oncor NTU excess ADFIT for net-operating-loss in rate base, which includes \$1.508 million in related amortization expense as ordered by the Commission in Docket No. 48929.
117. Oncor's requested excess ADFIT for net-operating-loss should be included in rate base because the related amortization is reflected in current rates.
118. In November 2019, Oncor transferred to AEP Texas Inc. (AEP Texas) certain assets, including \$1,116,261 of the non-protected excess ADFIT regulatory liability related to the specific distribution assets transferred.
119. Oncor transferred the unamortized balance of the non-protected excess ADFIT regulatory liability to AEP Texas and ceased amortization.

³⁵ *Joint Report and Application of Oncor Electric Delivery Company LLC, Sharyland Distribution & Transmission Services L.L.C., Sharyland Utilities L.P., and Sempra Energy for Regulatory Approvals under PURA §§ 14.101, 37.154, 39.262 and 39.915, Docket No. 48929, Order (May 9, 2019).*

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 32 of 73

- 120. Oncor appropriately removed \$1,116,261 of non-protected excess ADFIT from its books.
- 121. Oncor properly included \$108,278,694 of excess ADFIT assets in its tax-related regulatory asset balance.
- 122. Oncor's request to amortize its non-protected excess ADFIT balance over five years is appropriate.
- 123. DELETED.

Contributions in Aid of Construction

- 124. Oncor's rate base treatment for contributions in aid of construction were not contested by any party and are reasonable.

Sources of Cost-Free Capital

- 125. Oncor reasonably deducted \$162,100 for distribution rate base for customer deposits arising from joint pole use agreements.
- 126. At the end of the test year ending December 31, 2021, Oncor held \$42.9 million in fully-refundable customer advances for construction activities that are primarily short-lived.
- 127. Customer advances for construction activities are not cost-free capital but may serve as collateral security, which Oncor is obligated to return to its customers with interest when the contractual obligations of the construction agreement have been met or terminated.
- 128. It is reasonable for Oncor to keep its customers' cash construction collateral connected with generation interconnection or facilities extension agreements in a separate restricted cash account such that it must neither deposit those funds in its general corporate bank accounts nor use those funds for other corporate purpose.
- 129. Oncor properly excluded approximately \$42.9 million in transmission customers' cash construction collateral from its calculation of rate base.

Accrued Interest

- 130. Oncor's long-term debt interest payable is not a source of zero-cost financing and does not require any adjustments to rate base.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 33 of 73

131. DELETED.

132. DELETED.

133. DELETED.

Prepaid Pension and Other Postemployment Benefits Assets

134. Oncor capitalized \$13,115,158 in non-qualified pension expenses since its last base-rate case.

135. Oncor's \$2.9 million of supplemental (non-qualified) pension costs are unreasonable and unnecessary to provide utility service to the public and are not in the public interest.

136. Oncor's requested \$13,115,158 in capitalized non-qualified expenses should be removed from rate base.

Non-Tax Regulatory Assets

Self-Insurance Reserve

137. Oncor's self-insurance reserve is designed to provide a reserve account for coverage for property and liability losses of \$500,000 or more for which external commercial insurance, if available, represents a higher-cost alternative.

138. Oncor requests to amortize its self-insurance reserve balance, totaling approximately \$588.5 million, using a five-year amortization period, at a rate of \$117.7 million per year.

139. The \$588.5 million balance is comprised of a portion of unrecovered costs totaling \$223.3 million that were reviewed in prior ratemaking proceedings, and an additional \$365.3 million in unrecovered costs that were incurred since the final order in Oncor's last base-rate case, and that have not yet been reviewed in ratemaking proceedings.

140. The previously reviewed \$223.3 million in Docket No. 46957 is being recovered in current rates based on a 10-year amortization period that began in November 2017.

141. Oncor requests to increase its annual self-insurance reserve accrual from \$75 million to \$122.2 million per year. Combined, Oncor's self-insurance reserve requests would allow it to collect \$239.9 million per year from its customers.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 34 of 73

142. A five-year amortization period for the self-insurance reserve regulatory asset is consistent with recent Commission decisions, more closely aligns with Commission rules requiring utilities to file base-rate proceedings every four years, will limit carrying costs, and mitigate generational cost-shifting for Oncor customers.
143. It is reasonable and appropriate to amortize Oncor's \$588.5 million self-insurance reserve balance over five years.
144. Accrued expenses are properly includable in the self-insurance reserve regulatory asset.
145. Oncor properly excluded at least \$6.2 million of the year-end liability claims from rate base as part of the cash working capital lead-lag study.
146. Oncor's requested \$1.784 million in accrued expenses for insurance recoveries (\$507,066 for Winter Strom Uri-related losses and \$8,728,590 for property loss and liability claims) are properly included in its self-insurance reserve regulatory asset.
147. DELETED.
148. DELETED.
149. An annual accrual recovery amount of \$122.2 million for Oncor's self-insurance reserve is appropriate because it reflects current conditions, recent trended losses, and cost levels.

Unrecovered Expenses Related to COVID-19

- 149A. On March 26, 2020, the Commission filed an accounting order authorizing each electric, water, and sewer utility to record as a regulatory asset expenses resulting from the effects of COVID-19. The order stated the Commission would consider whether each utility's request for recovery of these regulatory assets is reasonable and necessary in a future proceeding.³⁶
- 149B. Oncor recorded its expenses resulting from the effects of COVID-19 in a regulatory asset.
150. Oncor seeks approval of a COVID-19 regulatory asset in rate base totaling approximately \$34.6 million in deferred expenses, offset by approximately \$7.3 million in related ADFIT.

³⁶ *Issues Related to the State of Disaster for Coronavirus Disease 2019*, Docket No. 50664, Order Related to Accrual of Regulatory Assets at 1 (Mar. 26, 2020).

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 35 of 73

In addition, Oncor seeks recovery of \$6.9 million in amortization expense based on a proposed five-year amortization period.

151. Oncor provided evidence of its incremental expenses resulting from the effects of COVID-19.
152. DELETED.
153. DELETED.
154. DELETED.
155. DELETED.
156. DELETED.
157. Oncor's requested COVID-19 regulatory asset (totaling approximately \$34.6 million) and related amortization expense (totaling approximately \$6.9 million), offset by \$7.3 million in related ADFIT, should be approved.

Bad Debt Expense

158. Oncor's proposed rate base in this proceeding reflects an adjusted uncollectible accounts receivable balance of approximately \$8.4 million recoverable over a five-year amortization period.
159. The amount consists of defaulted delivery charge payments by retail electric providers (retail electric providers) due to the extreme weather activity during Winter Storm Uri which occurred in 2021.
160. Oncor's requested recovery of bad-debt expense is reasonable and should be approved.

Rate-Case Expenses

161. On December 12, 2022, Oncor, Commission Staff, Cities, and Alliance of Oncor Cities filed an agreement concerning all but one issue regarding the recovery of rate-case expenses.
162. Oncor, Commission Staff, Cities, and Alliance of Oncor Cities did not reach agreement on Oncor's request to earn a return on the unrecovered balance of rate-case expenses not recovered within the first year.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 36 of 73

163. It is unreasonable for Oncor requested to earn a return on the unrecovered balance of rate-case expenses in instances where recovery will not be completed within a short-term time frame of approximately one year or less.
164. Oncor's request to earn a return on the unrecovered balance of rate-case expenses not recovered within the first year should be denied.
165. The agreement between Oncor, Commission Staff, Cities, and Alliance of Oncor Cities includes the following provisions and should be adopted:
- a. The total reasonable expenses associated with Docket Nos. 53601, 51996,³⁷ 49721,³⁸ 49427,³⁹ 48231,⁴⁰ 48325,⁴¹ and 46957 in the amount of \$10,009,643 should be approved for recovery by Oncor and shall be recovered by Oncor over a 24-month period as a separate surcharge through rider RCE – rate case expense surcharge and rider WRCE – wholesale rate case expenses attached to the agreement regarding rate-case expenses filed on December 2, 2022. This surcharge will become effective when the final rates approved by the Commission in this case become effective.
 - b. Cities and [Alliance of Oncor Cities] should be reimbursed \$469,735.28 and \$482,338.40, respectively, by Oncor for their rate-case expenses associated with this proceeding through October 31, 2022, as well as their deferred rate-case expenses from Docket Nos. 46957, 48325, 48231, 49427, and 51996 totaling \$262,796.55 and \$179,662.00, respectively.
 - c. Any over- or under-collection will be netted against rate-case expenses incurred for this case that are invoiced to Oncor after the cutoff date of October 25, 2022, and the net remaining costs or credit will be captured in a regulatory asset or regulatory liability to be reviewed and recovered in a subsequent Oncor rate proceeding.

³⁷ *Application of Oncor Electric Delivery Company LLC to Amend its Distribution Cost Recovery Factor*, Docket No. 51996, Order (Jul 30, 2021).

³⁸ *Application of Oncor Electric Delivery Company LLC for Reconciliation of 2017 AMS Costs and Final Determination of Net Operating Cost Savings from AMS Deployment*, Docket No. 49721, Order (Dec. 16, 2019).

³⁹ *Application of Oncor Electric Delivery Company LLC to Amend its Distribution Cost Recovery Factor*, Docket No. 49427, Order (Sep. 12, 2019).

⁴⁰ *Application of Oncor Electric Delivery Company LLC for a Distribution Cost Recovery Factor*, Docket No. 48231, Order (Aug. 30, 2018).

⁴¹ *Application of Oncor Electric Delivery Company LLC for Authority to Decrease Rates Based on the Tax Cuts and Jobs Act of 2017*, Docket No. 48235, Order (Apr. 4, 2019).

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 37 of 73

Amortization of Regulatory Assets & Liabilities

166. Oncor proposes to recover its non-tax-related regulatory assets and liabilities over the course of five years.

167. Oncor's amortization recommendation for each of its non-tax-related regulatory assets and liabilities, and those of the contesting parties, is illustrated in the table below:

Non-Tax Regulatory Assets/Liabilities	Proposed Amortization and Recovery/Refund Period					
	Oncor	AOC	Cities	DOD/FEA	OPUC	TIEC
Self-Insurance Reserve Deficit:						
Previously Approved (Docket No. 46957)	5-years	10-years		5-years	5-years	10-years
Post-2016	5-years	10-years		8-years	10-years	10-years
Unrecovered Pension/OPEBs:						
Previously Approved (Docket No.46957)	5-years		10-years			10-years
Post-2016	5-years		10-years			10-years
Under-recovered AMS	5-years		10-years			10-years
Wholesale Distribution Substation Service	5-years		10-years	8-years		10-years
COVID-19 Incremental Costs	5-years		10-years	8-years		10-years
Bad Debt Expenses	5-years			Disallow		10-years
Power Line Safety Act	5-years			8-years		10-years
Intangible Amortization Over-Recovery	5-years					1-year
Acquisition Regulatory Assets	5-years					10-years
Other Non-Tax Regulatory Assets/Liabilities	5-years					

167A. Amortizing regulatory assets and liabilities included in rate base over five years is consistent with recent Commission precedent, aligns with Commission rules requiring utilities to file base-rate proceedings every four years, limits carrying costs, and mitigates generational cost-shifting among Oncor ratepayers.

168. DELETED.

169. DELETED.

170. DELETED.

171. DELETED.

172. DELETED.

173. It is appropriate for Oncor to amortize the regulatory assets and liabilities over a five-year period.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 38 of 73

Capitalized Incentive Compensation

174. Financially-based incentive compensation is unreasonable and not necessary for a transmission and distribution utility to provide utility service to the public.
175. Financially-based incentive compensation is not prudently invested capital that is used by and useful to the electric utility for the provision of electric service.
176. Since 2005, the Commission's policy has been that financially-based incentive compensation benefits shareholders, rather than customers, and, therefore, financially-based incentive compensation should not be recovered from customers.
177. Financially-based incentive compensation, whether capitalized or expensed by an electric utility in Texas, should not be recovered from the utility's customers.
178. Since the end of the test year for Oncor's last base rate case in Docket No. 46957, Oncor estimates that the amount of financially-based incentive compensation capitalized into rate base totals \$34,607,629.
179. Since the end of the test year in Docket No. 46957, Oncor estimates that the amount of non-financially-based incentive compensation capitalized into rate base totals \$33,723,563.
180. DELETED.
181. The financially-based incentive compensation costs totaling \$34,607,629 and \$16,861,781.5 of the non-financially-based incentive compensation, representing one half of the non-financially-based incentive compensation that is predicated on a financial trigger should be disallowed.

Executive Perquisites

182. Oncor requests \$375,717 in capitalized executive perquisites.
183. The requested amount for capitalized executive perquisites should be disallowed because it does not benefit Oncor's customers and it is not prudently invested capital that is used by and useful for the provision of electric service or reasonable and necessary.

Rate of Return

Return on Equity

184. An ROE of 9.7% will allow Oncor a reasonable opportunity to earn a reasonable return on its invested capital.
185. A 9.7% ROE is consistent with Oncor's business and regulatory risk.
186. The results of the discounted cash flow model, the risk premium approach, and capital asset pricing model support an ROE of 9.7%.

Cost of Debt

187. Oncor's proposed 4.39% cost of debt is reasonable.

Capital Structure

188. A capital structure composed of 57.5% long-term debt and 42.5% equity is reasonable in light of Oncor's business and regulatory risks.
189. A capital structure composed of 57.5% long-term debt and 42.5% equity is sufficient to maintain Oncor's credit ratings and attract capital from investors.

Overall Rate of Return

190. Oncor's overall rate of return should be as follows:

Component	Cost	Weighting	Weighted Cost
Debt	4.39%	57.5%	2.525%
Equity	9.7%	42.5%	4.123%
Overall			6.65%

Financial Integrity (Ring-Fencing Protections)

191. Ring-fencing measures have been used to protect utilities from risky parent companies and other affiliates by insulating the utility's financial integrity and ensuring the utility can operate and serve its customers.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 40 of 73

192. Oncor's existing ring-fencing provisions, established in Docket No. 47675,⁴² create an effective degree of financial insulation between Oncor and its parent company and affiliates.
193. DELETED.
194. DELETED.

O&M Expenses

Labor-Related O&M Expenses

195. During the test year, Oncor incurred more than \$925.4 million in expenses associated with salaries, wages, and benefits for its employees. Oncor's payroll adjustments and incentive compensation were contested.

Payroll Expenses

196. Oncor requested a post-test year adjustment to account for a 3% general base salary increase for craft employees; a 3.5% general base increase for employees in the technician and non-exempt supervisor salary plans; and a 3.5% general base salary increase for all other employees.
197. Oncor seeks to include in its revenue requirement pay increases it awarded in March and November 2022, after the end of its test year and adjusted it to reflect non-productive time for the test-year and post-test-year pay increases.
198. In total, Oncor's payroll adjustment increased its O&M expense by \$16,035,964, with approximately \$9.2 million relating to Oncor's post-test-year adjustments for payroll and non-productive time.
199. Oncor's post-test year adjustments were for the effects of known and measurable wage increases occurring prior to the implementation of rates approved in this proceeding.
200. Annualizing the end of test-year payroll and including a non-prospective post-test-year wage increase is consistent with Commission precedent.
201. Oncor's payroll expenses should be allowed.

⁴² *Joint Report and Application of Oncor Electric Delivery Company LLC and Sempra Energy for Regulatory Approvals Pursuant to PURA §§ 14.101, 39.262 and 39.915*, Docket No. 47675, Order (Mar. 8, 2018).

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 41 of 73

Short-Term Incentive Compensation

202. Oncor has two short-term incentive compensation plans: executive annual incentive plan and a performance enhancement plan for non-executives. Oncor requests inclusion of \$5 million for its executive annual incentive plan expense and \$21.5 million for its performance-enhancement-plan expense.
203. Oncor's short-term incentive compensation plan is linked to four metrics, two of which rely on values derived from financial statement data.
204. The Commission has repeatedly ruled that a utility cannot recover the cost of financially based incentive compensation because financial measures are of more immediate benefit to shareholders and are not necessary or reasonable to provide utility services.
205. Financially based incentive compensation expenses should be disallowed from Oncor's short-term incentive compensation expense request because such expenses are unreasonable and unnecessary for the provision of utility services.
206. All of Oncor's financially based short-term incentive compensation and one-half of its non-financially based short-term incentive compensation whose ultimate payment is predicated upon a financial trigger, totaling \$7,953,307, should be disallowed.

Long-Term Incentive Compensation

207. Oncor's long-term incentive compensation plan is a cash-based plan for executives. Oncor requests inclusion in its cost of service \$14,430,262 for its long-term incentive compensation plan.
- 207A. Financially-based compensation, whether capitalized or expensed by an electric utility in Texas, should not be recovered from customers.
208. DELETED.
209. Oncor's requested \$14,430,262 long-term incentive compensation expenses should be allowed except for the 10% that were financially based expenses.

Executive Perquisites

210. Oncor requests \$195,572 in financial planning services expenses and \$41,294 in executive physicals expenses.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 42 of 73

- 211. Executive perquisites, such as financial planning services and physicals for executives, are not reasonable or necessary for Oncor to provide public electric service and are not used and useful in the provision of that service.
- 212. The entire amount of Oncor's requested perquisites should be disallowed because such expenses are unreasonable and unnecessary for the provision of service.

Pension and Other Post-Retirement Benefits

- 213. Oncor requests \$2,938,132 in non-qualified pension expenses.
- 214. Non-qualified pension expenses are amounts paid for an employer-sponsored retirement plan that fall outside the scope of the federal Employee Retirement Income Security Act guidelines. Non-qualified pensions include supplemental executive retirement plans and deferred savings plans.
- 215. The Commission has long-standing precedent that non-qualified pension expenses "are not reasonable or necessary to provide utility service to the public, are not in the public interest, and should be excluded from a utility's revenue requirement."
- 216. The entire amount of Oncor's request should be disallowed because those expenses are unreasonable and unnecessary for the provisions of service.

Depreciation and Amortization Expense

- 217. The depreciation rates approved in this proceeding apply to the combined utility plant assets of Oncor's base, legacy system and Oncor NTU.
- 218. The effect of applying the depreciation rates approved in this proceeding to the December 31, 2021 depreciable plant balances is an annualized depreciation and amortization expense of \$896,984,624 million.
- 219. The annualized depreciation increase includes recovery of the General Plant reserve imbalance of \$12.5 million per year based on an eight-year recovery period.
- 220. In order to properly set depreciation expense, the reserve balance must be allocated. The Company's proposed allocation of the reserve balance is reasonable and should be adopted.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 43 of 73

- 221. Title 16 TAC § 25.231(c)(2)(ii) provides that the reserve for depreciation is the accumulation of recognized allocations of original cost, representing the recovery of initial investment over the estimated useful life of the asset.
- 222. The remaining-life depreciation method to recover differences between theoretical and actual depreciation reserves should continue to be used.
- 223. It is reasonable for Oncor to calculate depreciation-reserve allocations on a straight-line basis over the remaining, expected useful life of the item or facility.

Life/Curve Combinations

- 224. The appropriate service life for Oncor's FERC Account 352, Transmission Structures and Improvements, is 55 years with a dispersion curve of R4.
- 225. The appropriate service life for Oncor's FERC Account 353, Transmission Station Equipment, is 52 years with a dispersion curve of L0.5.
- 226. The appropriate service life for Oncor's FERC Account 354, Transmission Towers, is 72 years with a dispersion curve of R2.5.
- 227. The appropriate service life for Oncor's FERC Account 366, Underground Conduit, is 60 years with a dispersion curve of R3.
- 228. The appropriate service life for Oncor's FERC Account 369, Services, is 37 years with a dispersion curve of S6.
- 229. The appropriate service life for Oncor's FERC Account 373, Street Lighting, is 25 years with a dispersion curve of S6.
- 230. The appropriate service life for Oncor's FERC Account 352, SVC and 352, DC Tie, is 55 years with a dispersion curve of R4.
- 231. The appropriate service life for Oncor's FERC Account 353, SVC and 353, DC Tie, is 30 years with a dispersion curve of R2.
- 232. The appropriate service life for Oncor's FERC Account 356, Overhead Conductor, is 60 years with a dispersion curve of S5.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 44 of 73

233. The appropriate service life for Oncor's FERC Account 362, Station Equipment, is 57 years with a dispersion curve of R1.5.
234. The estimated service lives proposed by Oncor for all other accounts were not contested by any other party. Oncor's proposals for those uncontested accounts are reasonable and should be used to set depreciation rates.

Net Salvage Values

235. The appropriate net salvage value for FERC Account 352, Structures and Improvements, is -50%.
236. The appropriate net salvage value for FERC Account 355, Poles and Fixtures, is -75%.
237. The appropriate net salvage value for FERC Account 356, Overhead Conductor, is -40%.
238. Oncor's proposed salvage values for all other accounts were not contested by any other party. Oncor's proposals for those uncontested accounts are reasonable and should be used to set depreciation rates.

Amortization of Unrecovered AMS Costs

239. No party contested Oncor's: (1) unrecovered asset balance of \$127.3 million for advanced metering service (AMS) costs; (2) unrecovered asset balance of \$584,070 of AMS-related customer education and employee severance costs; or (3) unrecovered AMS-related rate-case expenses of \$80,080 from prior AMS-related cases.
240. Oncor's unrecovered AMS costs are reasonable and should be approved.
241. DELETED.
242. DELETED.

Federal Income Tax Expenses

243. Oncor's federal income tax (FIT) expense of \$138,576,953 is reasonable and necessary.
244. The methodology for calculating FIT should be based on the Tax Method One calculation and incorporating adjustments to return on rate base and, in the calculation of synchronized interest, weighted component of cost of debt.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 45 of 73

Taxes Other Than FIT

Ad Valorem Taxes

245. Oncor's ad valorem (property) tax expense in the amount \$283,681,884 is reasonable and necessary; however, such expense should be adjusted to account for any applicable flow-through adjustments to property, plant, and equipment.

Payroll Tax

246. Oncor's payroll tax expense in the amount of \$17,840,666 is reasonable and necessary; however, such expense should be adjusted to account for any adjustments to payroll expense.
247. Any flow-through adjustment should use the current Federal Insurance Contributions Act rate of 7.65%.

Gross Margin Tax

248. Oncor's gross margin tax expense is reasonable and necessary; however, such expense should be adjusted to account for any applicable adjustments to the revenue requirement.

Wholesale Transmission Cost of Service

249. All flow-through impacts of decisions on other issues that are inputs into wholesale transmission cost of service should be applied in calculating Oncor's wholesale transmission cost of service.

Billing Determinants

250. Oncor adjusted its test-year number of customers, energy sales, kW demands, billing demands, and revenues to account for the growth or decline in the number of customers over the year.
251. The growth rate of the residential customer class declined in June 2021 because Oncor resumed customer disconnections after the Commission lifted its moratorium imposed after Winter Storm Uri on disconnecting customers with unpaid electric bills. Because disconnections will continue for the foreseeable future and are a part of normal business operations, it is appropriate that Oncor's customer growth adjustment reflect this decline.
252. Oncor's customer growth adjustments are known and measurable and should be adopted.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 46 of 73

253. Oncor's application included a weather normalization adjustment to adjust energy sales, class demands, and the associated revenue for those classes whose electricity usage was affected by abnormal weather conditions. Oncor did not make a weather normalization adjustment for its two wholesale rate classes: Wholesale Substation Service and Wholesale Distribution Line Service.
254. The non-coincident peak (NCP) for four of Oncor's rate classes—Residential Service, Secondary Service ≤ 10 kW, Wholesale Substation Service, and Wholesale Distribution Line Service—are based on peak loads that occurred during February 2021.
255. Oncor's proposed weather-normalization adjustment to the class NCP allocation factors is appropriate and should be applied.
- 255A. Hunt Energy's proposed weather-normalization adjustment to the class NCP allocation factors to exclude February 2021 as an outlier due to the impact of Winter Storm Uri is inappropriate and should not be applied.
256. Power factor is the ratio between the amount of energy supplied (kVA) and the actual amount of energy used (kW) to measure the amount of wasted energy.
257. Oncor increases billing demands from customers in its Secondary Service > 10 kW, Primary Service > 10 kW Distribution Line, Primary Service > 10 kW Substation, and Transmission rate classes (the Power Factor Classes) when they fail to meet a 95% power factor target in a given month. The resulting revenues are referred to as power factor revenues.
258. Oncor collected \$29.9 million in power factor revenues during the test year.
259. Oncor proposes to reduce the amount of test-year power factor revenues used to set its rates by \$15.6 million. Oncor claims that its customers' power factor performance improved over the course of the test year, such that Oncor anticipates power factor revenues to be lower going forward.
260. Oncor determined the power factor adjustment using a 12-month weighted power factor multiplier for each customer class subject to the tariff's power factor provision and then applying the weighted multiplier to the relevant class. When doing so, the analysis only

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 47 of 73

considered the lower of each customer's power factor multiplier in the month or the lower power factor multiplier achieved in any prior month. This methodology ignores customers' actual power factor performance and necessarily results in the 12-month weighted power factor multipliers falling over the course of the year.

261. Oncor failed to meet its burden of proof to show that its proposed adjustment to test-year power factor revenues is known and measurable.
262. Oncor should recognize the full \$29.9 million in test-year power factor revenues when setting its rates.

Functionalization

263. Oncor has assigned its rate base and cost of service to the transmission function, distribution function, metering system function, and combined billing system and customers service function consistent with the Commission's Transmission & Distribution (TDU) Investor-Owned Utilities Rate Filing Package for Cost-of-Service Determination and has supported that functionalization.

Cost Allocation

264. Oncor proposes to allocate costs to the following 10 rate classes: Residential Service; Secondary Service ≤ 10 kW; Secondary Service > 10 kW; Primary Service ≤ 10 kW; Primary Service > 10 kW Distribution Line; Primary Service > 10 kW Substation; Transmission Service; Lighting Service; Wholesale Substation Service – XFMR; and Wholesale Distribution Line Service – DLS.

Cost Allocation – Transmission Costs

265. Oncor calculates transmission cost allocators by rate class based on the average of ERCOT coincident peak demand for the months of June, July, August, and September (4CP).
266. Oncor's data of its rate classes' total 4CP demand differs from ERCOT's 4CP demand data for the entire Oncor system by an average of 1.9%.
267. The difference in 4CP demand data results primarily because ERCOT's data includes unaccounted for energy (UFE) and line losses back to the generation source, while Oncor's data does not include UFE, and the applied line losses are calculated only to the source at

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 48 of 73

the transmission substation busbar. The difference was not shown to be due to an error or omission.

268. Oncor recovers its wholesale transmission expenses from its retail customers through its transmission cost recovery factor rider, rather than through base rates.
269. The class allocation factors used to set Oncor's transmission cost recovery factor rates are those established in Oncor's most-recent base-rate case, unless otherwise ordered by the Commission.
- 269A. The billing determinants used to set Oncor's transmission cost recovery factor rates are those established in Oncor's last transmission cost recovery factor update proceeding, which are filed every six months.
270. DELETED.
271. DELETED.
272. DELETED.
273. DELETED.
274. The following transmission cost recovery factor allocation factors proposed by Oncor are reasonable and should be adopted:

Customer Class	Allocation Factor
Residential Service	45.88067225%
Secondary Service ≤ 10 kW	1.28244083%
Secondary Service > 10 kW	33.35359266%
Primary Service ≤ 10 kW	0.01326433%
Primary Service > 10 kW Distribution Line	8.38539747%
Primary Service > 10 kW Substation	2.74636637%
Transmission Service	8.33826609%
Lighting Service	0.00000000%

Cost Allocation – Demand-Related Distribution Costs

275. Capacitors are electrical devices that provide reactive power to the loads on an electrical system. They produce capacitive reactive power that offsets the reactive power needs of inductive loads, such as motors, transformers, and lamp ballasts. Capacitors are also needed to offset reactive losses that occur as power travels down feeder lines and through transformers.
276. The incorporation of capacitors into a power distribution system offers economical and operational benefits including increasing system load capacity, reducing losses, and improving power factor.
277. Utilities install capacitors at both transmission and distribution voltage to compensate for reactive power on those systems.
278. The capacitors booked to FERC Account 368 are distribution capacitors installed downstream of a distribution substation and do not supply the reactive power needs of customers that take service at transmission voltage.
279. DELETED.
280. DELETED.
281. The capacitors booked to FERC Account 368 benefit all customers by providing voltage support, improved power factor, and increased efficiency to the transmission system.
282. Oncor's FERC Account 368 capacitor costs should be allocated on the basis of NCP demand to all rate classes.

Cost Allocation – Wholesale Transmission Service at Distribution Voltage

283. There are two acceptable methods for developing rates for wholesale customers: using average system costs, but excluding the costs relating exclusively to retail operations, or using the costs that are directly related to serving those customers.
284. Oncor proposes to set wholesale rates based on the system average cost of service. Under this method, Oncor uses allocation factors to allocate its system costs to each rate class, and each customer in the same class pays the average cost to serve all customers in that class.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 50 of 73

285. ETEC and Rayburn propose using a direct assignment methodology, but their approach is an allocation of a subset of Oncor's system costs, rather than direct assignment.
286. Oncor's wholesale customers take service from Oncor's integrated system, rather than separate substations and radial lines. In only a few instances on Oncor's system does a single facility only serve wholesale customers.
287. Allocating costs to wholesale customers on a system average basis also better reflects cost causation because Rates XFMR and DLS are essentially the wholesale service equivalents of the primary service > 10 kW substation and primary service > 10 kW distribution line rates, respectively.
288. No party demonstrated that Oncor's proposed allocation of system average costs to wholesale customers included any purely retail-related costs.
289. Oncor's proposed allocation of costs to the wholesale classes based on system average cost is reasonable and should be approved.
290. Distribution energy storage resources (DESRs) are ERCOT-registered energy storage resources (such as batteries) that are interconnected to the ERCOT grid at distribution voltage. Energy storage resources do not consume energy (apart from losses); rather, the energy received when a battery is charging is temporarily stored and then that same energy is discharged when needed.
291. A transmission or distribution service provider is allowed to charge an entity engaging in wholesale storage for wholesale transmission service at distribution voltage.
292. Providing delivery service to DESRs imposes costs on Oncor's distribution system and failing to charge DESRs for their use of the system would shift those cost obligations onto other customers who would then be subsidizing the DESRs.
293. DESRs use Oncor's distribution system to acquire energy to charge the resource, unlike other power generation companies and transmission energy storage resources. As a result, it is not unreasonably discriminatory for Oncor's rates for distribution service to apply to DESRs, but not these other entities.
294. Rates XFMR and DLS should be applied to DESRs.

Cost Allocation – Mobile Generation Costs

295. Oncor's mobile generation costs incurred pursuant to PURA § 39.918 should be allocated using the NCP, excluding high voltage & substation allocation factor (factor #30, NCP_XSS), which does not allocate any costs to the primary-substation, transmission, or XFMR rate classes.

Cost Allocation – Power Factor Revenues

296. If power factor revenues were allocated only to the power factor classes, Oncor would essentially be giving the customers that paid power factor charges a refund, canceling out or diluting the incentive to lower their power factors to avoid higher charges under the tariff.

297. Power factor issues impose system-wide costs that affect all customer classes taking service from Oncor's distribution facilities. Oncor's wholesale customers take service from the same distribution system as the retail customers.

298. Oncor's power factor revenues should be allocated to all customer classes, both retail and wholesale.

Revenue Distribution

299. OPUC recommends that a 5% discount be applied to the class revenue requirement for the residential service class and a 25% premium be applied to the transmission class to account for differences in the level of firmness/reliability of service provided to the classes.

300. OPUC's proposal is based on Oncor's protocols for shedding load during an emergency event, which is a rare occurrence and does not alone implicate broader reliability issues.

301. All of Oncor's customers, including transmission-level customers, are subject to interruption under various conditions, including emergency operating conditions.

302. The fact that Oncor did not implement load shedding at the transmission level during Winter Storm Uri is not an indication that customers taking service at that level were unaffected or did not do their part to voluntarily shed load.

303. OPUC's proposal would result in unreasonably discriminatory rates by arbitrarily benefitting the residential service class at the expense of all other classes, including the

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 52 of 73

other classes taking service at the distribution level, which were also subject to involuntary curtailments during Winter Storm Uri.

304. Rate moderation—also referred to as gradualism—is a rate-setting tool or methodology to gradually move a customer class’s revenue levels towards the class’s cost of service when a significant rate increase would otherwise be required to set the class’s revenue level equal to its cost of service.
305. When gradualism is used, the increase to the class is set below its cost of service to minimize the impact. The resulting revenue shortfall is then spread across and recovered from other customer classes.
306. Rates should be set at cost absent compelling reasons for mitigation. The salient issue is whether the utility’s proposed increase is so out of proportion or harsh to a particular class that some form of gradualism should be applied.
307. Setting rates at cost is particularly important for transmission and distribution utilities within ERCOT because they operate in a competitive market.
308. In evaluating whether a proposed rate increase is out of proportion or harsh to a particular class, or constitutes rate shock, one consideration is the effect of the rate change on the customer’s total bill.
309. In its filed case, Oncor requested a system average rate increase of 7.1%. However, the rate impact by rate class varies widely, from a 7.9% decrease for secondary service ≤ 10 kW customers to a 213.3% increase for wholesale DLS customers.
310. The primary driver of the disparate proposed rate increases is the calculation of the TCRF rates since Oncor’s last base-rate case, which updates each retail class’s billing determinants, but not the class allocation factors.
311. Oncor’s revenue requirement for each rate class should be set at cost.

Rate Design

312. Oncor proposed to simplify its rate schedule for the secondary service > 10 kW rate class by eliminating the existing annual load factor groupings and 80% demand ratchet, and instead charging a uniform distribution system charge.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 53 of 73

313. Although Oncor's proposed uniform distribution system charge is simpler, easier for customers to understand, and less burdensome to administer, the existing rate design is more consistent with cost causation and Oncor's proposed change would result in significant shifts in the intra-class allocation of costs.
314. Oncor did not provide sufficient evidence demonstrating a need to change the uniform distribution system charge, and the existing rate design should be retained at this time.
315. Kroger proposed adjusting the rate design for the secondary service > 10 kW class to recover 50% of secondary transformer costs recorded in FERC Account 368 through the customer charge instead of the demand charge.
316. Because the costs in FERC Account 368 are allocated based on class NCP demand, the rate design for the secondary service > 10 kW class should continue to collect these costs through the demand charge.
317. Oncor's distribution costs are allocated to the two wholesale rate classes based on NCP demand. However, Oncor's demand charges for Rates XFMR and DLS are based on the customer's highest peak demand in a month, regardless of whether it coincides with the class NCP.
318. Hunt Energy recommends that the billing units used for charges in the demand rates in Rates XFMR and DLS be based on the individual customer's contribution to its class NCP each month.
319. It is important that the intra-class allocation of costs for Rates XFMR and DLS use maximum customer class demands to design the demand charge because Oncor must design its distribution facilities to meet each customer's maximum demand regardless of when it occurs.
320. Hunt Energy's proposed rate design would create a free rider problem because it is unlikely that any wholesale customer's maximum demand occurs precisely at the time of the customer class's NCP demand.
321. Hunt Energy's rate design proposal for Rates XFMR and DLS should not be adopted.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 54 of 73

Tariff

- 321A. Section 6.3.1 of Oncor's Tariff for Retail Delivery Service should be revised as proposed by Oncor, to the extent provided in this Order.
322. DELETED.
323. DELETED.
324. DELETED.
325. DELETED.
326. DELETED.
327. Section 4.3.1.2 of Oncor's Tariff for Transmission Service should be revised to clarify that 345-kV service is not available at all locations and is available *when appropriate given safety and reliability concerns*.
328. Section 6.2.2 of Oncor's Tariff for Retail Delivery Service should be revised to contain a notation for 345-kV service that it *requires approval from Company*.
329. The non-utilization clause of Oncor's standard facilities extension agreement (facilities extension agreement) should be revised as Oncor proposes to allow it sole discretion to determine whether a customer's contributions in aid of construction should be recalculated after four years, but the following sentence should also be added: *Company will work with Customer to determine whether recalculating CIAC is appropriate*.
330. DELETED.
- 330A. TIEC and Pioneer did not demonstrate that a 10-year contribution-in-aid-of-construction refund program should be implemented.
331. TIEC's and Pioneer's proposal to amend subsection (a) of the facilities extension agreement's non-utilization clause to create a contributions in aid of construction refund mechanism should not be adopted.
332. Oncor's proposal to add a new subsection (c) to the facilities extension agreement's non-utilization clause should be adopted in part solely to add the following sentence: *Customer will, prior to or contemporaneous with signing this Agreement, or as soon*

thereafter as reasonably possible, supply a load profile or load ramp document in support of the Contract kW set out above.

333. TIEC's proposed Facilities Charge tariff, which would give a customer the ability to purchase or lease facilities from Oncor that are dedicated exclusively to serving that customer, should not be adopted, as it would force Oncor to sell or lease its facilities and would be an impermissible provision of competitive energy services.
334. Hunt Energy requests that Rate XFMR be revised to apply to DESRs that either (1) are within one-half mile of Oncor's substation, or (2) pay the interconnection costs associated with facilities outside the substation. Oncor opposes both proposals.
335. Allowing DESRs to connect as far away from the substation as one-half mile and still qualify for Rate XFMR would implicate the cost-causation justification for the distinction between Rates XFMR and DLS, i.e., that customers connecting at the substation are not responsible for distribution line costs.
336. While including a defined distance in the tariff would provide more certainty, it is not practical given Oncor's goal of connecting the customer as close to the substation as possible while also recognizing that the distance will vary based on the configuration of facilities surrounding any particular substation.
337. Even though a customer may pay the upfront cost of certain distribution-line facilities, that payment does not fully recover the cost of service, which also includes the cost to operate, maintain, and ultimately replace the facilities. If the DESR customer avoids paying those costs by paying Rate XFMR rather than Rate DLS, then those costs would be shifted to other customers.
338. Hunt Energy's proposed changes to the applicability of Rate XFMR should not be adopted.
339. Oncor's tariff outlines a myriad of items in calculating contributions in aid of construction and sufficient detail should be included in an invoice to allow a customer to determine if invoiced costs are accurate.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 56 of 73

340. Hunt Energy's request that Section 4.4.6 of Oncor's proposed Tariff for Transmission Service be amended to require Oncor to provide a line-item invoice with supporting documentation for contributions in aid of construction charges should be approved.
341. Costs associated with customers moving or reducing their load are generally part of a utility's normal operating risk.
342. Oncor proposed to revise Sections 6.1.2.2.9, 6.1.3.2.9, and 6.1.4.2.9 of its retail tariff regarding the "Removal or Relocation of Customer Facilities" that would require a customer to reimburse Oncor for the removal cost, less any salvage value, of any facilities that the customer causes to become idled or stranded.
343. Oncor's proposed tariff revision does not establish a time frame within which Oncor must determine whether facilities have become idled or stranded; does not limit the age of the facilities for which reimbursement is sought; and does not require that the facility was installed to serve a particular customer.
344. Oncor's proposed tariff does not contemplate truing up a customer's reimbursement where the reimbursement was sought prior to actual removal or relocation, and therefore based on estimated costs, and the estimated cost exceeded the actual removal costs for the applicable facilities.
345. Oncor's proposed revisions to Sections 6.1.2.2.9, 6.1.3.2.9, and 6.1.4.2.9 of its retail tariff could be expansively interpreted to provide Oncor with opportunities for double-recovery that do not currently exist and could unreasonably shift normal operating costs to customers.
346. Oncor's proposed revisions to Sections 6.1.2.2.9, 6.1.3.2.9, and 6.1.4.2.9 of its retail tariff should not be adopted.
347. Oncor proposed to revise Section 4.8.1 of its wholesale transmission service tariff that would require a customer to reimburse Oncor for the removal cost, less any salvage value, of any facilities that the customer causes to become stranded.

PUC Docket No. 53601
SOAH Docket No. 473-22-2695

Order on Rehearing

Page 57 of 73

348. Oncor's proposed revisions to Section 4.8.1 of its wholesale transmission service tariff should not be adopted for the same reasons addressed above regarding Oncor's proposed revisions to Sections 6.1.2.2.9, 6.1.3.2.9, and 6.1.4.2.9 of its retail tariff.
349. Totalization combines multiple points of delivery so that the usage and demand from the meters associated with those points of delivery are treated as if they resulted from a single meter for billing purposes.
350. Oncor's current policy and process regarding customer request for totalization is reasonable.
351. The recommendations presented by Targa Pipeline, Google, and Pioneer, to revise Oncor's tariff to revise Oncor's handling and approval process of customers' totalization requests are unreasonable and should not be adopted.
352. Oncor proposes to revise Section 6.1.1.1.8 of its retail tariff regarding Lighting Service to address the decreasing availability of non-LED lighting options (e.g., mercury vapor, metal halide, and sodium vapor lights) as the industry moves to more LED lighting. The Company's proposed language, which gives it the sole discretion to determine whether a specific lamp type is no longer commercially available under reasonable terms, should be adopted.
353. Oncor's discretionary services charges include Charge No. DD24 – Inadvertent Gain Charge, which applies when a retail electric provider selects an incorrect premise from the ERCOT portal for a switch or move-in (thereby inadvertently gaining a customer), and Oncor is required to correct the inadvertent gain charge.
354. While the gaining retail electric provider may not be the initial source of the erroneous information, it is ultimately responsible for submitting the error to the ERCOT portal. As such, it is not unreasonably discriminatory for the gaining retail electric provider to be responsible for the cost.
355. Oncor's proposal to continue collecting its inadvertent-gain-charge processing costs through the inadvertent gain charge should be adopted. However, Oncor did not provide