South Carolina Law Review

Volume 26 | Issue 3 Article 9

Winter 12-1-1974

Comments

COMMENT

CONSTITUTIONAL LAW—TEMPORARY UTILITY RATE INCREASES—SOUTH CAROLINA STATUTES AUTHORIZING TEMPORARY UTILITY RATE INCREASES UNDER BOND WITHOUT PRIOR HEARING TO DETERMINE RATE REASONABLENESS ARE CONSTITUTIONAL. *Holt v. Yonce*, 370 F. Supp. 374 (D.S.C. 1973), *aff'd mem.*, 415 U.S. 969 (1974).

In *Holt v. Yonce*,[1] three residential customers of South Carolina Electric and Gas Company (S.C.E. & G.) brought an action[2] for injunctive and declaratory relief challenging the constitutionality of certain state statutes[3] that allowed the implementation of temporary utility rate increases without prior hearing to determine rate reasonableness. S.C.E.&G. and the individual mem-

1. 370 F. Supp. 374 (D.S.C. 1973), *aff'd mem.*, 415 U.S. 969 (1974).

2. Plaintiffs brought the action pursuant to 42 U.S.C. § 1983. The *Holt* court found without elaboration that defendants "clearly acted under color of state law." 370 F. Supp. at 376. This comment will not treat the question of whether the color of state law or state action requirement is satisfied. For a discussion of the state action requirement in utility termination cases, see Note, *Fourteenth Amendment Due Process in Termination of Utility Services for Nonpayment*, 86 HARV. L. REV. 1477, 1485-94 (1973).

3. S.C. CODE ANN. §§ 24-38, 58-115 (1962). Section 24-38, applicable to electrical utilities, provides:

> Notwithstanding any such order of suspension the electrical utility may put such suspended rate or rates into effect on the date when it or they would have become effective if not so suspended by filing with the Commission a bond in a reasonable amount approved by the Commission, with sureties approved by the Commission, conditioned upon the refund, in a manner to be prescribed by order of the Commission, to the persons, corporations, or municipalities respectively entitled to the amount of the excess, if the rate or rates so put into effect are finally determined to be excessive; or there may be substituted for such bond other arrangements satisfactory to the Commission for the protection of the parties interested.

Section 58-115, applicable to public utilities (other than electrical utilities), provides:

> To enable it to make such investigations as in its opinion the public interest requires, the Commission may, in its discretion, suspend the operation of the new schedule for a period not exceeding sixty days. Unless as a result of its investigation the Commission otherwise orders before the termination of such period of sixty days, such new schedule or schedules shall thereupon become effective. Should the Commission order the operation of any new schedule or schedules suspended, as herein provided, the public utility may put such new schedule into operation on the date when it would otherwise become effective by filing with the Commission a satisfactory bond or by making other arrangements satisfactory to the Commission for the protection, during such period of suspension, of the parties interested should the Commission, after full hearing, determine and order that such schedule shall not become effective in whole or in part or without change or modification.

bers of the South Carolina Public Service Commission (the Commission) were defendants in the action. Plaintiffs claimed to represent themselves, the class of S.C.E.&G. residential customers, and a sub-class of customers living on fixed low incomes who allegedly would be unable to afford utility service under increased rates. Their primary claim was that the practical effect of the interim rate procedure was to deprive the sub-class of utility services. Thus, plaintiffs contended that they were denied due process of law under the fourteenth amendment by the interim rate procedure because it allowed citizens to be deprived, without a hearing, of essential services to which they were constitutionally entitled. The three-judge federal court,[4] relying on the 1958 Supreme Court decision in *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*,[5] held that the challenged statutes were constitutional and dismissed plaintiffs' complaint.[6] The United States Supreme Court summarily affirmed.[7]

Although the rate-setting functions of public utilities are circumscribed by statute in South Carolina,[8] a utility has the right to set its own rates in the first instance,[9] but that right is subject to Commission authority to find any portion of those rates unreasonable.[10] During the investigatory period, the Commission may suspend operation of the proposed rate schedule.[11] The utility, nevertheless, may implement the proposed rates as interim rates, thirty days after the initial filing of the schedule,[12] by filing with the Commission a bond[13] guaranteeing to repay to all customers

4. The single judge to whom this case was first referred denied plaintiffs' request for a temporary injunction to prevent the implementation of the scheduled temporary rate increase because he found that plaintiffs had failed to prove that there was a reasonable probability they would succeed on the merits. However, at the request of the single judge, a three-judge court was convened in accordance with 28 U.S.C. §§ 2281, 2284. 370 F. Supp. at 376.

5. 358 U.S. 103 (1958).

6. 370 F. Supp. at 379.

7. 415 U.S. 969 (1974), *aff'g mem.* 370 F. Supp. 374 (Douglas, J., dissenting from summary affirmance).

8. S.C. CODE ANN. §§ 24-31 *et seq.*, §§ 58-111 *et seq.*

9. *Id.* § 24-32 (Cum. Supp. 1973), § 58-114 (1962). *But see Id.* § 24-35 which permits the Commission to investigate existing rates on its own motion, and *Id.* § 24-42 which permits the Commission to order new rates into effect without hearing.

10. *Id.* §§ 24-31, 24-35, 24-40, 58-119.

11. *Id.* §§ 24-37, 58-115. Under section 24-37, the suspension period is ninety days, but may be extended for a period not to exceed one year. The suspension period under section 58-115 is sixty days.

12. *Id.* §§ 24-36 to -38, 58-114, 58-115.

13. *Id.* § 24-38. The statute permits either "a bond in a reasonable amount" or as substitution for such bond "other arrangements satisfactory to the Commission for the

any part of the increase not thereafter approved.[14] The interim rates remain in effect until the final Commission determination with respect to reasonableness.[15]

Recently, the extrapolative scope and building-block operation of the due process concept[16] have attracted consumer forces in their efforts to realign the traditional relationship between public utilities and consumers.[17] The conceptual groundwork for the due process extension into public utility consumer law was laid in the *Sniadach-Fuentes* line of cases.[18] These cases injected

protection of the parties interested." Section 58-115 contains similar language. In the 1973 rate application of S.C.E.&G., the bond was "a pledge of its credit, secured by all its assets." Supplemental Answer of Defendant S.C.E.&G. at 1, Holt v. Yonce, 370 F. Supp. 374 (D.S.C. 1973).

14. S.C. CODE ANN. §§ 24-38, 58-115. The bonding feature is a common provision in many state regulatory statutes. *See, e.g.*, CONN. GEN. STAT. REV. § 16-19 (Supp. 1969); GA. CODE ANN. § 93-307.1 (Cum. Supp. 1973); IOWA CODE ANN. § 490A.6 (Cum. Supp. 1974); WYO. STAT. ANN. § 37-56 (Cum. Supp. 1973). Typically, however, interim increase under bond is allowed only after expiration of the statutory suspension period or some significant portion of that period. *See, e.g.*, N.H. REV. STAT. ANN. § 378.6 (1968); N.C. GEN. STAT. §§ 62-134, 62-135 (Cum. Supp. 1971); W. VA. CODE ANN. § 24-2-4 (Cum. Supp. 1974). The unilateral interim increase at any time during the suspension period is allowed in only a few states other than South Carolina. *See, e.g.*, DEL. CODE ANN. tit. 26, § 153 (1953); MISS. CODE ANN. § 77-3-39 (1972).

15. S.C. CODE ANN. §§ 24-38, 58-115. The South Carolina statutory procedure is aptly illustrated by the 1973 rate increase application of S.C.E.&G. which served as the factual basis of plaintiffs' complaint in *Holt*. On May 24, 1973, S.C.E.&G. filed notice with the Commission of a schedule of retail gas and electricity rates to become effective on July 2, 1973. The schedule represented increases of approximately 22% for gas and 13% for electric service. Answer of Defendant S.C.E.&G. at 4. For an elaboration on the increases sought and granted, see note 66 *infra*. The Commission suspended the effective date of the rate increase until January 2, 1974, and ordered public hearings to begin October 3, 1973. On June 11, S.C.E.&G. filed an "undertaking" with the Commission, giving notice of its intent to place the new rates into effect on July 2, 1973, despite the Commission suspension order. Before the increase could be effectuated, utility rates were frozen until August 12, 1973, by the "Phase IV" national economic policy, and the Commission was advised by S.C.E.&G. that the new rates would not go into effect until August 13, 1973. The proposed undertaking by S.C.E.&G., a pledge of credit, was approved by the Commission in executive session, as to form and sufficiency only, on July 24, 1973. On August 1, the *Holt* action was initiated. Public hearings concluded on November 1, 1973. The final order of the Commission was issued on May 30, 1974. Holt v. Yonce, 370 F. Supp. at 375; Order Granting Rates & Charges, Public Service Commission of South Carolina, No. 17,648, Docket No. 16,824 (May 30, 1974) at 1, 2 (hereinafter cited as Order).

16. The scope of due process is determined by a "gradual process of judicial inclusion and exclusion" in which the "doctrine of a particular case is not allowed to end with its enunciation and . . . an expression in an opinion yields later to the impact of facts unforeseen." Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284, 287 (1957).

17. *See* Note, *supra* note 2; Note, *The Emerging Constitutional Issues in Public Utility Consumer Law*, 24 U. FLA. L. REV. 744 (1972).

18. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970); Bell v. Burson, 402 U.S. 535 (1971); Fuentes v. Shevin, 407 U.S. 67 (1972).

the traditional due process requisites of notice and hearing into certain situations in which summary proceedings[19] resulted in the adjudication of broadly-defined individual property rights.[20] Relying on these precedents, a series of recent district court opinions held that, in order to comply with due process, the individual consumer must be provided a hearing prior to termination of utility services for alleged nonpayment of account.[21] The basis for decision in the utility termination cases resided in the property interest doctrine of entitlement developed in the *Sniadach* line of cases.[22] The utility termination cases emphasized electric, gas and water utility services as modern necessities and commented on the hardships caused by deprivation of these services.[23] Comparing the interests delineated in the *Sniadach* cases, the courts in the utility termination cases found that an individual's interest in utility service was sufficiently important to fall within the *Sniadach-Fuentes* due process ambit.[24]

The *Holt* plaintiffs plainly sought to analogize the rationale

19. These proceedings were Wisconsin's pre-judgment wage garnishment procedure (*Sniadach*); New York City's termination of welfare benefits (*Goldberg*); Georgia's suspension of uninsured motorists' drivers' licenses (*Bell*); and Florida's and Pennsylvania's replevin processes (*Fuentes*).

20. The interpretation of property includes "important interests" (*Bell*) and "statutory entitlements" (*Goldberg*) encompassing any significant interest in property, even if disputed (*Fuentes*), regardless of its technical or common law status as "right" or "privilege" (*Goldberg*). *See* Note, *The Emerging Constitutional Issues in Public Utility Consumer Law*, 24 U. FLA. L. REV. 744, 745-47 (1972).

21. Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972); Stanford v. Gas Serv. Co., 346 F. Supp. 717 (D. Kan. 1972); Palmer v. Columbia Gas Co., 342 F. Supp. 241 (N.D. Ohio 1972), *aff'd*, 479 F.2d 153 (6th Cir. 1973); Lamb v. Hamblin, 57 F.R.D. 58 (D. Minn. 1972); Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971) [hereinafter collectively referred to as the utility termination cases]. *Contra*, Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 411 U.S. 965 (1973) (no state action).

22. In Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972), the entitlement doctrine was explained in the following language:

> [O]nce the state has undertaken to provide a service to the public, be it welfare or unemployment benefits, drivers' licenses or tax exemptions, it must then comply with the requirements of due process before it can terminate access to such service or benefits in the case of any given individual. This is the concept of the "entitlement", which provides the individual with his only line of defense against arbitrary withdrawal by the state of his access to what, although initially not his right to demand, he has become dependent upon.

Id. at 447 (footnotes omitted).

23. *E.g.*, Stanford v. Gas Serv. Co., 346 F. Supp. 717, 720 (D. Kan. 1972); Palmer v. Columbia Gas Co., 342 F. Supp. 241, 244 (N.D. Ohio 1972).

24. *E.g.*, Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972), in which the court states: "It is beyond doubt that electric service can become as vital to the existence and livelihood of an individual as a driver's license or welfare check." *Id.* at 447.

of the *Sniadach* line and utility termination cases to the temporary rate increase situation. The plaintiffs argued that the temporary rate increase without prior hearing was an arbitrary deprivation of plaintiffs' property in two ways: (1) for customers who would be able to pay the increased charges, the temporary rates would cause a deprivation of the use of their income to the extent of the increase during the interim period, and (2) for customers who would be unable to pay because of limited income, the increased rates would result in a termination of utility service, or a "taking" of plaintiffs' important interest in and entitlement to gas and electric utility service.[25]

In a per curiam opinion, the three-judge court in *Holt* declined the opportunity to extend the constitutional limits of the due process clause. Noting that the holding sought by the plaintiffs would "necessitate that this court extend *Sniadach* and its progeny to an uncharted point not supported by any cited authority,"[26] the court tersely dispensed with the plaintiffs' claims by stating, "We refuse to sanction such an extension."[27] The court refrained from any further analysis of the due process extension sought or of the issues raised and instead cited *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*[28] as controlling authority:

> In that case, the United States Supreme Court upheld provisions of the Natural Gas Act which allow for temporary rate increases without a prior hearing, and which provisions are substantially similar to the challenged parts of the South Carolina statutes. . . . We feel that this decision of the United States Supreme Court is dispositive of all issues raised by the plaintiffs in the instant action . . . .[29]

The court's choice of authority and its absence of explanation for that choice are interesting; no constitutional issues were raised by the parties or discussed by the Court in *United Gas*. Because of the *Holt* court's approach, one can only speculate about what aspects of *United Gas* actually entered into the court's deliberations. The language quoted above indicates that

25. Brief for Plaintiffs at 2, 7.

26. 370 F. Supp. at 377.

27. *Id.*

28. 358 U.S. 103 (1958) (hereinafter referred to as *United Gas*).

29. 370 F. Supp. at 377-79 (footnote omitted). The Natural Gas Act is codified in 15 U.S.C. § 717c (1970).

the significant factor may have been the Supreme Court's failure to find the "substantially similar" federal statute unconstitutional. If so, such broad reliance on *United Gas* as controlling would be questionable. The court in *Holt* noted a significant difference between the two statutes: the federal statute precludes unilateral increase until expiration of the five month suspension period, while the state statute allows the increase thirty days after the initial schedule filings.[30] Although the *Holt* court labelled this a mere "technical distinction" which had "no legal import,"[31] the difference does have a substantive effect on the utility/consumer relationship; the longer suspension period allows additional time for the regulatory lag between administrative hearing and final order, with the concomitant possibility of eliminating interim rate increases entirely or at least reducing significantly the total impact of those rates on the consumer.[32]

The more probable basis of the *Holt* court's reliance on *United Gas*, however, was a narrower analogy of the statutory provision and factual situation in that case to the *Holt* situation. The issue in *United Gas* was whether a natural gas company could, without agreement by its customers, increase its wholesale rates under tariff-and-service type contracts merely because it had complied with provisions of the Natural Gas Act authorizing rate increases on the filing of timely notice. The agreements in issue contained pricing provisions which incorporated by reference seller's rate schedule, or any effective superseding rate schedule, as filed with the Federal Power Commission. The Court construed this as an agreement to buy at seller's current "going rate,"[33] as distinguished from a contract at a single fixed rate. The Court held that, under such an agreement, seller was contractually free to change its rates subject only to the procedures and limitations of the Natural Gas Act.[34] Emphasizing the common law rights of the utility, the Court said:

> [E]xcept as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will, the rates offered to prospective

30. 370 F. Supp. at 378.

31. *Id.*

32. One year and six days elapsed between S.C.E.&G.'s initial filing on May 24, 1973, and the issuance of the Commission order on May 30, 1974. *See* note 15 *supra*.

33. 358 U.S. at 110.

34. *Id.* at 112-13.

customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer.[35]

Accordingly, *United Gas* can be construed as concluding that the utility customer, absent contract, has no right to utility service at a specific rate.[36] Under this interpretation, the *Holt* adherence to *United Gas* represents a threshold finding which negates plaintiffs' basic premise that there is in fact a property interest involved. This finding distinguishes sub silentio the *Sniadach* line of cases which did find property interests of varying degrees.[37]

In setting out the property interest involved, the *Holt* plaintiffs offered little more than gloss, relying exclusively on the right to utility service developed in the utility termination cases.[38] As applied by the *Holt* court, the *United Gas* rationale adds a limiting caveat to the holdings of the utility termination cases; the protected right to utility service is the right to utility service at those rates established under the applicable statutes. Even if the *Holt* plaintiffs had anticipated this rationale, however, they could not have relied on the statutory "just and reasonable" rate standard[39] to establish a statutory right to a specific rate. The probable judicial interpretation of that statutory provision would have a circular effect; the right to a "just and reasonable" rate is the right to the rate determined by statutory procedure.[40]

Because the court omitted more specific delineation of its reasons for reliance on *United Gas*, the *Holt* method of disposition will be less likely to be followed by other courts. In *Sellers v. Iowa Power and Light Co.*,[41] involving a similar claim[42] under a similar

35. *Id.* at 110, *quoting from* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 343 (1956).

36. This proposition is approved in Sellers v. Iowa Power and Light Co., 372 F. Supp. 1169, 1172 (S.D. Iowa 1974), *citing* Wright v. Central Ky. Natural Gas Co., 297 U.S. 537, 542 (1936); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 318 (1933); San Antonio Util. League v. Southwestern Bell Tel. Co., 86 F.2d 584 (5th Cir. 1936), *cert. denied*, 301 U.S. 682 (1936); United States Light & Heat Corp. v. Niagara Falls Gas & Elec. Light Co., 47 F.2d 567 (2d Cir. 1931), *cert. denied*, 283 U.S. 864 (1931).

37. *See* note 20 *supra*.

38. Brief for Plaintiffs at 8, 10.

39. S.C. CODE ANN. § 24-31 (1962).

40. *See, e.g.*, Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951), in which the Court held that the right to reasonable rates, under the Federal Power Act, is the right to the rate which the Federal Power Commission files or fixes.

41. 372 F. Supp. 1169 (S.D. Iowa 1974).

42. The *Sellers* plaintiffs described the property taken as the money required to pay the rate increases. 372 F. Supp. at 1172. The *Sellers* court found that this claim of property

state regulatory statute,[43] the three-judge court briefly discussed the *Holt* holding. The *Sellers* court, however, rather pointedly avoided summary reliance on *United Gas*:

> While there is much pertinent language in United Gas Co. v. Memphis Gas Div., [*sic*] the [Supreme] Court did not have before it the due process arguments now being raised. It also preceded the Fuentes-Sniadach line of cases. We believe it advisable to set forth in more detail our reasons for agreeing with the result reached by the court in Holt v. Yonce.[44]

In resolving the property interest issue, the *Sellers* court used a syllogistic analysis to state what the *Holt* court merely implied. The *Sellers* court quoted *United Gas* for the proposition that, at common law, a public utility "like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so."[45] As the second step in its analysis, the *Sellers* court relied on cases other than *United Gas* for the proposition that "utility customers have no vested rights in any fixed utility rates."[46] Under these circumstances, the court concluded, plaintiffs had no constitutionally protected property interest in existing rates.[47]

The court in *Holt* considered *United Gas* "dispositive of all issues raised [in *Holt*],"[48] but this characterization is somewhat misleading. *United Gas* is actually "dispositive" in *Holt* only in the sense that the finding of an absence of a property interest precludes the necessity for any further inquiry into the deprivation alleged.[49] Thus, the court's approach in *Holt* avoided consideration of several other elements of plaintiffs' argument which merit examination.

---

interest, absent a showing of deprivation "of the very means by which to live," was "too broadly stated to be within the protection of the Fourteenth Amendment." *Id.* at 1172-73. The *Sellers* plaintiffs did not attempt to frame the "effective termination" argument used by the *Holt* plaintiffs.

43. IOWA CODE ANN. § 490A.6 (Cum. Supp. 1974). Section 490A.6 provides for implementation of the increased interim rate under bond only after ninety days of suspension.

44. 372 F. Supp. at 1171.

45. *Id.* at 1172, *quoting from* United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. at 113. The *Holt* court cited this proposition as well, but as part of a long wholesale quotation of "apposite comments" from *United Gas*. 370 F. Supp. at 378.

46. 372 F. Supp. at 1172. *See* note 36 *supra*.

47. 372 F. Supp. at 1172.

48. 370 F. Supp. at 379.

49. "The right to a prior hearing, of course, attaches only to a deprivation of an interest encompassed within the Fourteenth Amendment's protection." Fuentes v. Shevin, 407 U.S. 67, 84 (1972).

A major flaw in plaintiffs' claim involved the inherent difficulty in framing the alleged deprivation as a direct appropriation of property.[50] In *Brown v. Hausman*,[51] plaintiffs challenged the constitutionality of Connecticut rate procedures[52] which allowed, at the discretion of the state Public Utilities Commission, a temporary bus fare increase pending hearing. In holding that no constitutional right of plaintiffs was denied,[53] the *Brown* court considered the nature of the deprivation alleged:

> In the first place, the "deprivation" of property here [a taking of money] is indirect, at best, and is most likely not a deprivation within the meaning of the Fourteenth Amendment. The extra 15 cents per bus ride has not been taken from these plaintiffs, at least not in the sense that welfare benefits were taken in *Goldberg* or a stove was taken in *Fuentes*. It may be that in plaintiffs' circumstances bus transportation is highly desirable, but no action of the state requires them to use the bus and hence incur the added charge.[54]

The *Holt* plaintiffs sought to distinguish *Brown* by arguing that the state of South Carolina, by granting a monopoly to utilities,[55] required customers to use the electric and gas services of S.C.E.&G. and thus required customers to pay the increased rates.[56] This argument, however, belies the nature of the commodity purchase involved. The purchase of utility service in the *Holt* utility/consumer relationship is based on the payment of a certain charge per unit of consumption. The conceptual nature of that purchase is that the individual consumer determines the extent of his use of the service, and thus he determines the amount of its cost to him. This element of consumer choice and self-regulation undercuts the attempt to characterize the rate increase as a direct appropriation of money.[57] The same conceptual difficulty is compounded in the "effective termination" argument in which plaintiffs sought to equate the rate increase and the termi-

50. The "taking" prohibition of the fifth amendment refers only to direct appropriations of property. Laycock v. Kenney, 270 F.2d 580, 592 (9th Cir. 1959), *cert. denied*, 361 U.S. 933 (1960); California Teachers Ass'n v. Newport-Mesa Unified School Dist., 333 F. Supp. 436, 443 (C.D. Cal. 1971).

51. Brown v. Hausman, Civil No. 15,081 (D. Conn., filed June 21, 1972).

52. CONN. GEN. STAT. REV. § 16-19 (Supp. 1969).

53. Civil No. 15,081 at 6.

54. *Id.* at 3-4.

55. *See* S.C. CODE ANN. §§ 24-13 *et seq.* (Cum. Supp. 1973).

56. Brief for Plaintiffs at 1, 5-6.

57. *See* note 50 *supra*.

nation of utility service. The rate increase may present an economic burden, but the consumer retains the alternatives of an offsetting reduction in utility consumption and a proportionate reduction of income expenditure elsewhere in the budget. Accordingly, any eventual termination of services resulting from the decision by the consumer to forego payment for utility service is only indirectly the demonstrable result of a utility rate increase.[58] Thus, the *Sniadach* line of cases and the utility termination cases, both involving direct appropriations, are clearly distinguishable from the *Holt* situation.

The *Holt* due process claim also raises the issue of whether the adjudicative hearing provided in the *Sniadach* line applied to a legislative or quasi-legislative activity such as rate-making.[59] In *Sniadach* and its progeny, the hearing protection granted was for the purpose of resolving some factual dispute between the parties prior to the temporary deprivation of the property interest involved.[60] Likewise, in the utility termination cases, the requirement that a hearing be held prior to shut-off for alleged nonpayment allowed the adjudication of some factual dispute between the utility and customer; such as, payment not credited on account, computation error in billing, or lack of notice.[61] No disputes grounded on particular facts relating to the individual customer are present in the *Holt* situation. In the pre-increase hearing sought by the *Holt* plaintiffs, the customer complaint would be the inability to afford payment under the increased rates. This type of complaint would not be a factual dispute requiring adju-

58. Plaintiffs' "effective termination" argument lacked any sound evidentiary basis. Relying on 1970 Census figures for the metropolitan Columbia, South Carolina, area, plaintiffs presented the mean annual income from Social Security benefits ($1,435) and the mean annual income from public assistance ($738). Brief for Plaintiffs at 7. Plaintiffs then alleged that they, as individuals, "stand to lose a minimum of $10 per month if able to pay defendants at all under the increased rates," and that those class members financially unable to pay the increased rates "stand to lose utility service altogether." Memorandum for Plaintiffs at 9. No further empirical facts were alleged.

59. For a discussion of rate-making as a legislative or quasi-legislative hearing in the context of the adjudicative or legislative fact distinction, see 1 K. DAVIS, ADMINISTRATIVE LAW §§ 7.01-.06 (1958).

60. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970), in which the Court states:

> These [hearing] rights are important in cases such as those before us, in which recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

Id. at 268.

61. *See, e.g.*, Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 444 (S.D.N.Y. 1972), in which the factual dispute involved is described as an "Orwellian nightmare."

dicatory resolution in the rate hearing; rather, if proved, it would be a legislative fact and would enter into the rate determination only insofar as such evidence would be considered by the Commission.[62]

Given the theoretical failings outlined above, the due process argument posited by the *Holt* plaintiffs appears to have been a tortured effort to trigger the application of constitutional principles. Further, the weaknesses in plaintiffs' argument are weaknesses which would be inherent in any such argument on the *Holt* facts. The temporary utility rate increase, in fact, may be an economic hardship on consumers. Under traditional due process standards, however, it is an economic reality which is not translatable into a constitutional imperative.

Despite the absence of any sound constitutional claims by utility consumers in this area, important practical and policy considerations are present which would seem to warrant a change in the statutory procedure for temporary rate implemention. The regulatory statutes represent the end result of the legislature's efforts to accommodate, in more or less check-and-balance fashion, the varying interests of the state, consumers, and utilities. The rationale ascribed to the interim rate-making procedure, as a part of that balancing process, is founded on what is termed "business reality."[63] Under this view, the utility is allowed to collect additional customer revenues during the interim period of regulatory lag to lessen the difficulties in procuring equity or debt

62. *See, e.g.*, Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970). In *Hahn*, tenants in federally subsidized housing claimed a constitutional right to a formal hearing before the Federal Housing Administration prior to approval of any rent increases. In rejecting the tenants' claim, the *Hahn* court relied on the distinction between adjudicatory and legislative facts. The court determined that the proceeding in which plaintiffs sought to assert their interests was basically a rate-making process. 430 F.2d at 1248. As a result, the court then found that the procedural safeguards plaintiffs sought, while characteristic of adjudicatory proceedings, were not essential in legislative proceedings such as rate-making, in which the administrative decision depended on broad familiarity with economic conditions. *Id.*

The *Hahn* court also concluded that the formal adversary hearing sought by plaintiffs would contribute "little or nothing" to the agency's understanding of the issues:

> The tenants are unlikely to have special familiarity with their landlord's financial condition, the intricacies of project management, or the state of the economy in the surrounding area . . . . Thus the elaborate procedural safeguards which plaintiffs demand are unlikely to elicit essential information in the general run of cases.

Id. *See* 1 K. DAVIS, *supra* note 59, at § 7.02.

63. *See* United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. at 113-14, *quoted in* Holt v. Yonce, *supra* note 1, at 378-79.

financing,[64] while at the same time mitigating any loss to customers under the bonding requirement.[65]

The South Carolina interim rate procedure, however, appears to strike an inequitable accommodation of interests in several respects. From the utility's perspective, the temporary rate increase allows an immediate accession to revenues in the full amount sought. Unencumbered by any lengthy rate suspension pending review, the utility simply has the use of more money for a longer period of time.[66] With interest set at six per cent per annum,[67] the statute also has the effect of allowing the utility to secure financing from its customers at a rate more favorable than financing from conventional marketplace sources.[68] Additionally,

64. *Id.*

65. This accommodation of interests was considered in *Sellers v. Iowa Light & Power Co.* In *Sellers*, the court assumed the existence of a property interest for the purposes of its discussion and weighed the opposing desires involved in the interim increase. The court found that the utility's right to a fair return and the governmental and public interest in the financial stability of the utility outweighed the customers' interest in avoiding interim rates, since the bonding provision mitigates customer loss by guaranteeing a refund. 372 F. Supp. at 1172-73.

66. The financial significance of the interim rate hike is substantial. S.C.E.&G.'s projected figures (based on the year ending December 31, 1972) indicated that the proposed rate increases would provide $18,229,048 in additional yearly revenues, and an increase in rate of return on rate base from 7.02% to 8.61%. Order at 1, 24; Application of S.C.E.&G. for Rate Adjustments (May 23, 1973) at 1, 3. The final Commission order provided for an increase in rate of return on rate base to 8.47%, and additional gross revenues of $16,142,528 for an approved increase in total after-tax income of $7,856,568. Order at 18, 19, 24. Based on these figures, the excess of interim rates over approved rates equalled approximately $1,500,000 over the nine and one-half month interim period from August 13, 1973 to June 1, 1974. At the ordered interest rate of six per cent per annum, the S.C.E.&G. refund, in the form of credits on future utility bills, amounted to approximately $1,570,000.

67. S.C. CODE ANN. §§ 24-38, 58-115 specify no rate of interest on refund. The final Commission order, however, set the interest rate at six per cent per annum. Order at 26. At the time of this writing, the Commission is considering the imposition of higher interest rates.

68. This effect is noted in the regulatory provisions of West Virginia. W. VA. CODE ANN. § 24-2-4 (Cum. Supp. 1974) sets the refund interest rate at "not less than six nor more than ten percent per annum as specified by the commission" and further provides:

> In specifying the applicable interest rate between the aforesaid minimum and maximum, the commission shall be guided by the interest rate which such public utility would in all probability have to agree to pay if such public utility at that time borrowed in the marketplace a sum of money equivalent to the amount of money the commission estimates the increase in rates will produce between the effective date of such increase and the anticipated date the rates will be finally fixed for such public utility, it being intended that a public utility should be discouraged from imposing higher rates than it should reasonably anticipate will be finally fixed as a means in effect of borrowing money at a rate of interest less than such public utility would have to agree to pay if it borrowed

under the present statute, the efficacy of any refund may become quickly illusory. By the legally available expedient of filing another schedule of increased rates, filing a sufficient bond, and waiting thirty days, the utility can effectively nullify any refund relief obtained by Commission order after ultimate review.[69] In addition to this potential for abuse, the present regulatory procedure disregards the consumer interest in providing no more revenue than is necessary for the utility's proper function. The state scheme purports to assess considerations of "business reality," but it makes no provision for evaluating the validity of a utility's alleged need for additional revenues *in the interim period* between request for and approval of higher rates. The more equitable statutory alternative to the automatic unilateral rate increase would be to allow the Commission sole discretion, after reasonable notice and hearing, to fix and determine temporary rates[70] with provision for recoupment of any interim loss to the utility.[71] This kind of interim hearing would provide a forum for consumer

money in the marketplace. No such accrued interest paid on any such refund shall be deemed part of the cost of doing business in a subsequent application for changing rates or any decision thereon.

69. *See* United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. 103, 119-20, 120 n.5 (dissenting opinion of Justice Douglas).

70. Arkansas requires such a hearing prior to implementation of any interim rates during the suspension period. ARK. STAT. ANN. § 73-217 (b) (1957), after setting out the length of the rate suspension period, includes this proviso:

> [I]f the public utility contends that an immediate and impelling necessity exists for the requested rate increase, a petition may be filed with the Commission narrating such alleged circumstances, which petition must be set for hearing within fifteen [15] days from the date of the filing thereof or to such subsequent time as may be mutually agreeable to the Commission and the utility, and if the Commission finds at such hearing that there is substantial merit to the allegation of the utility's claims, said Commission may permit all or a portion of said rates to become effective . . . .

This language was part of a 1955 amendment. It is interesting that, prior to amendment, the wording of subsection (b) was nearly identical to that of South Carolina Code section 24-38. *See* Compiler's Notes to § 73-217.

Pennsylvania also requires a hearing before the imposition of interim rates. PA. STAT. ANN. tit. 66, § 1150 (a) (1959) provides in part:

> The commission may, in any proceeding involving the rates of a public utility brought either upon its own motion or upon complaint, after reasonable notice and hearing, if it be of opinion that the public interest so requires, immediately fix, determine, and prescribe temporary rates to be charged by such public utility, pending the final determination of such rate proceeding.

New Jersey allows rate adjustments during the pendency of hearing only after negotiation and agreement by the utility and the Board of Public Utility Commissioners. N.J. STAT. ANN. § 48:2-21.1 (1969).

71. *See* PA. STAT. ANN. tit. 66, § 1150 (e) (1959).

complaints of the *Holt* type, and, more importantly, it would allow the application of a public interest "check" to the "business reality" balance presently afforded the public utility.