STATE PUBLIC UTILITY LABOR RELATIONS

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INTRODUCTION

The state level public utility commission or comparable regulatory agency (hereinafter referred to as commission) is largely responsible for setting the rates consumers must pay for regulated goods and services and is responsible for monitoring the quality of those goods and services. Labor and labor-related costs may be a significant portion of the rates. In the exercise of its rate and service jurisdiction, the commissions make decisions which will have direct or indirect effects on labor relations. It is the purpose of this paper to examine those effects by reviewing how the commissions treat issues involving labor relations. The emphasis will be upon the decisions of the various state-level commissions. A few references will reflect federal commission decisions, as well as state and federal judicial decisions.

The definition of the phrase "public utility" can raise many serious questions, but for present purposes, a public utility simply means a company subject to the regulation of a state-level public utility commission or equivalent state-level agency. In the majority of cases cited here, a public utility will be an investor-owned enterprise, although some utilities may be publicly owned and still be subject to commission regulation.

The primary responsibility for the management of a public utility lies with the directors and executives. They make the decisions affecting the labor relations of the utility either unilaterally, or after bilateral bargaining with a union. The commission is neither a financial "super-executive" nor a "super board" of directors.

The commissions are under two major constraints which restrict their authority to make decisions directly affecting labor relations. The commis-

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1 For discussions written prior to the major decisions of the United States Supreme Court on preemption, see Updegraft, Public Utility Labor Problems, 33 IOWA L. REV. 609 (1948); Note, Jurisdiction of Rate Regulatory Commissions Over Utility Wages, 36 VA. L. REV. 372 (1950).


sions generally lack authorization to formulate labor policies, fix wages, arbitrate labor disputes, or regulate employment practices. The statutory authority given to the commissions encompasses such matters as rates, management efficiency, safety, and quality of service. Despite the lack of statutory authorization, clear lines of separation cannot be drawn between rates, on the one hand, and such aspects of labor relations as wages, on the other. For example, as wages increase, rates may also have to increase to cover the wage payments. It is the burden of the commission to exercise their limited statutory authority without unduly intruding into areas beyond that authorization.

The second major restriction on commission regulation of labor relations is federal legislation, specifically the National Labor Relations Act, preempting those aspects of labor relations which would otherwise fall under commission control. Specifically, in the utilities field, the United States Supreme Court has noted that Congress has closed to state regulation the field of peaceful strikes for higher wages from public utilities.

No distinction between public utilities and national manufacturing organizations has been drawn in the administration of the Federal Act, and when separate treatment for public utilities was urged upon Congress in 1947, the suggested differential was expressly rejected.

In that case, the state had enacted legislation which would have had the effect of limiting or precluding the use of strikes against public utilities. The legislation was struck down. In a related case, the United States Supreme Court said:

Collective bargaining, with its right to strike at its core, is the essence of the federal scheme. . . . [A] state law which denies that right cannot stand under the Supremacy Clause of the Constitution.

Thus, the Court has enunciated a broad doctrine of preemption affecting state efforts to control labor relations in public utilities. State legislation and the exercise of commission authority are precluded from operating in a

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7 See A. PRIEST, 1 PRINCIPLES OF PUBLIC UTILITY REGULATION 25-33 (1969) [hereinafter cited as PRIEST].
11 Id. at 82.
manner so as to infringe upon national labor policies.\textsuperscript{12} Privately-owned public utilities, although subject to rate and service regulation, are to be treated in the field of labor relations in the same manner as any other privately-owned business under the NLRA. State legislation and commission action are limited largely to public ownership and dealing with "emergency conditions of public danger, violence, or disaster."\textsuperscript{13}

In carrying out its rate and service duties, the commission may also be charged to advance the public interest.\textsuperscript{14} A number of different interests can be identified: the consumer, the worker, the stockholder, the expressed national labor policy, to name a few. The various interests may, at times, complement one another and, at other times, conflict. Reference to the public interest in such legislation however "is not a mere general reference to public welfare," but must be the interests "shown by the context and purpose" of the legislation.\textsuperscript{15} The focus in regulatory matters must be upon the careful definition of statutory purpose and agency action. It may be useful however, to look also to a broader public interest. Labor relations in both the private and public sector give rise to many important public concerns. It may be useful to consider whether any lessons for these concerns can be learned from the manner in which the commissions operate. Labor relations in the public utility area may be viewed as an example of the interface of public and private sector relations, with the interplay between free enterprise and free collective bargaining on the one side, and regulation on the other side.

I. SUMMARY OF THE COMMISSION PROCESSES

Two types of commission activity are of primary concern. One is the review of rates and the other is the review of service. Focusing on the first, it is obvious that rate determination is a complex process involving difficult questions of law and fact. It is also as much an art as a science, although the emphasis is upon objective rate determination. The simplicity of the rate formula\textsuperscript{16} belies the difficulties that may arise.\textsuperscript{17} For present purposes, however, the full complexity of the matter need not be examined. The primary rate concepts involved here are the test year and the consideration of wages.

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  \item \textsuperscript{13}374 U.S. at 83.
  \item \textsuperscript{14}PRIEST, supra note 7, at 32.
  \item \textsuperscript{16}See W. JONES, REGULATED INDUSTRIES, CASES AND MATERIALS 128-29 (1976).
  \item \textsuperscript{17}See generally PRIEST, supra note 7; F. WELCH, PREPARING FOR THE UTILITY RATE CASE (1954).
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salaries and fringe benefits as operating expenses. Utility rates are set prospectively, not retroactively.\footnote{E.g., Pacific Tel. & Tel. Co., 90 P.U.R.3d 172, 182 (Cal. Pub. Util. Comm'n 1971).}

Rate-making for a particular utility is in essence making a forecast of its future financial status upon the basis of its known performance during a span of time in the immediate past, viz, a “test period”.\footnote{Telephone Users Ass'n v. Public Service Comm'n, 304 A.2d 293, 297 (D.C. Ct. App. 1973), cert. denied, 415 U.S. 933 (1974).}

The value of the test period or test year is that

The actual experience of the company during the test period, both as to revenues produced by the previously established rates and as to operating expenses, is the basis for a reasonably accurate estimate of what may be anticipated in the near future if, \textit{but only if}, appropriate pro forma adjustments are made for abnormalities which existed in the test period and for changes occurring during the test period and therefore, not in operation throughout its entirety. (emphasis added.)\footnote{Utilities Comm'n v. Virginia Elec. & Power Co., 285 N.C. 398, 417, 206 S.E.2d 283, 297 (1974), quoting Utilities Comm'n v. Durham, 282 N.C. 308, 320, 193 S.E.2d 95, 104 (1972).}

It can reasonably be assumed that certain operating expenses, such as wages, salaries, and fringe benefits, which actually occurred during the test year, will be paid during the future time for which the rates will be set. The past test year\footnote{While not relevant for this purpose, the test year may be a future year. \textit{See} Downs, \textit{The Use of the Future Test Year in Utility Rate-Making}, 52 B. U. L. REV. 791 (1972); Gibbons, \textit{Some Legal Aspects of the Future Test Period in Utility Rate Regulation}, 16 ARIZ. L. REV. 947 (1974).} does not fully represent the future operating expenses, since wages, salaries and fringe benefits may increase during the time the new rates will be in effect. The issue then is raised as to whether the increase in these operating expenses should be allowed or disallowed.

Known changes during and beyond the test year . . . normally are “rolled back” into the test year so that the end results reasonably reflect the operating conditions which will prevail during the period when the new rates will first be in effect.\footnote{Pacific Tel. & Tel. Co., 95 P.U.R.3d 1, 12 (Cal. Pub. Util. Comm'n 1972).}

The emphasis here is upon the decision to allow or disallow increases in wages, salaries, and fringe benefits for the future period for which the new rates are being set. Obviously, not all expense increases will be automatically translated into increased rates. For example, not all increases can be proved with evidence satisfactory to the commission. Not all expenses will be included in the test if they are not typical of the test year. Unusual or nonrecurring
expenses may be disallowed. The expenses allowed during the test year should also be those common to a typical or average year.23

Disallowance of increases in wages, salaries, or fringe benefits as operating expenses must be viewed in its rate context. Disallowance does not necessarily connote disapproval of the expense or the contract. It means only that the rate payers will not be charged for the expense.24 The disallowed expense will then be paid from monies which might have been used for other purposes, such as the payment of dividends to the stockholders.

In addition to setting rates, the second concern here will be with the commission's responsibility for monitoring the quality of service rendered by a utility.25 Rates and service may be related. A degraded level of service at the same rate level as a previous higher level of service may be tantamount to a rate increase. More importantly for these purposes, however, is the point that the quality of service may be directly related to what the employees do and how the employees do it. Since this may be subject to regulation, it can be seen that the commission may have some direct or indirect authority over working conditions. These same working conditions may also be an important aspect of labor relations.

The decisions can be divided into three major categories: (1) those having a primary emphasis on monetary considerations; (2) those having a primary emphasis on personnel and working conditions; and (3) those having a primary emphasis on negotiations and impasse. The categories are, of course, not mutually exclusive, as can readily be seen. After a consideration of the cases, the implications of the cases will be considered, and finally, attention will be given to whether some larger issues relevant to the public interest in labor relations are raised.

II. Monetary Aspects

The cases cited26 as involving monetary aspects will be divided into three subcategories: (A) wages; (B) salaries; (C) fringe benefits. Once again, the three categories are not mutually exclusive, but they aid in the analysis. The comparatively large number of cases in the category of wages allows it to be further subdivided into subcategories: (1) those in which the wages as an operating expense were generally allowed, and (2) those in which they were generally disallowed. In each situation, the important elements upon which attention will be focused are those which the commission considered as having an impact on labor relations.

25 See generally Priest, supra note 7, at 227-83.
26 Generally, the cases cited cover the period in time from the mid-1950's to the present.
It is important to keep in mind that the issue for the commission is the allowance or disallowance of the expense. Although the language of the decision may not always be clear, the approval or disapproval per se of the wage clause in the contract is not particularly at issue. The basic issue is whether to charge the expense to the ratepayers.

A-1 Wages: Factors When Expense Was Allowed

As might be expected, many of the cases merely pass on the operating expenses of wages to the ratepayers with little or no discussion of the factors used in the decision. Some cases simply note that the wages are in fact an expense to be borne by the utility and must be paid. These decisions do not discuss the fact that not all expenses automatically are passed to ratepayers, but practically speaking, it is true that most expenses are passed directly to ratepayers. Uncertainty abounds where the burden of proof is placed in the decisions. Some cases in this group appear to put the burden of proof on those who seek to disallow the expense, and then find the burden not carried. The approach seems to be that whatever is not disproved must be deemed proved. One commission went so far as to say that "any payment or benefit given labor, in the absence of proof of bad faith, is presumptively a proper expenditure for fixing rates." Some cases emphasize the fact of the newness of the contract, and new contracts usually involve higher wages. The emphasis suggests that newness is treated as a reason for passing on an expense. One point that this type of decision does reflect is that the rate making process requires the exercise of a large element of judgment. The summary conclusions often found in the decisions do not, however, reflect what specific elements make up the judgmental decision. While no listing of elements could turn the exercise of judgment into a scientific one, no party is helped in succeeding cases where the basis of judgment is undisclosed.

Another group of decisions tend toward identifying a special factor that is suggested as the basis of the decision. A reference to an undefined

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public interest consideration may be used. The decision may look to traditional problems, such as regulatory lag and attrition, as part of the reason to allow the expense. Other actions unrelated to the wage increase, but related to the general economic health of the utility, may play a role, such as a large construction project, or the recessed state of the economy.

Another special factor which may be given weight is the implicit or explicit approval under the periodic wage and price control legislation enacted by the federal government. If the federal criteria are met, then the state commission may be more inclined to allow the expense. At times the commission may approve the expense subject to a detailed review at a later date. One clearly special factor may be that the utility, due to future shortages of gas, could not hope to recoup the expense through greater future revenues because there was a clear limit on the amount of the product. The same rationale may be applied where the company’s revenues are dropping because of consumer conservation. An unusual situation involved a utility which calculated the cost of the contract and apparently expected to lose. In rebuttal, the company re-evaluated the effects of the contract, and the new figures were approved. The foregoing is not intended to suggest that the existence of a single special factor may suffice, but in the typically brief commission decision, mention of special factors appears to play an important role.

A great many cases are concerned with the issue of whether the increased wage package is sufficiently proximate to the test year to be considered. Wage increases that are close in time to the test year can be balanced against anticipated increases in revenues or other operating savings. Income and expense can be reasonably related to determine whether they will offset each other or whether the wage increase results in increased expenses over revenues that should be passed on to the ratepayer. As the effect of the wage increase becomes increasingly distant from the test year, it becomes more difficult to make the expense-revenue formula balance. When the wage expense is too

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far from the test year, the commission may disallow the expense for the present time, and require the company to pursue it at some future point when the expense-revenue balance can be more realistically made. As one commissioner has said:

[W]here wage increases occur during a test period, all of the resultant effects of it are known, and where there has been no increase in revenues or decrease in operating expenses sufficient to offset this effect, an adjustment should be made to normalize the relationship between investment, revenues and expenses. . . .

The effect of a wage increase which will occur subsequent to the test year . . . cannot be determined with any degree of accuracy in the absence of corresponding evidence relating to revenues and expenses . . . It may well be that changes in the number employed, growth in revenues, and decreases in other operating expenses will tend to offset, in whole or in part, the effect of the wage increase.40

The decisions look to several different factors to determine whether the increased costs should be included in the test year expenses. One factor is whether the costs become known as opposed to being speculative prior to commission action. Where the costs would have a substantial impact and are reduced to a certainty, the expense will be included.41 Known changes occurring within specified periods of time of the rate increase, such as six months42 or nine months,43 may be allowed. The greater the impact on the expense picture, the more likely will be the inclusion of the out-of-period but known increase, such as where the increases were the "largest" known and the utility was the type where wages constitute a major portion of the total operating expenses.44 Another factor to be considered is the effect of the newly established return allowed the utility. Where the effect of exclusion of the wage package expense might be to prevent the company from earning the appropriate return, the commission may allow inclusion of the out of period expense.45 An important practical consideration is the effect of disallowing the expense. If the effect of not allowing the expense would be that the utility would be making an immediate new application for a new hearing because of increased expenses, the commission may allow the expense.46

On the other side of the coin, the expenses may be beyond the test year and disallowed or not passed on to the ratepayers. The increased expense may be simply too remote for proper calculation, such as where it was 16 months in the future. Where a multi-year labor agreement is signed, the wage increases for the first year may be included, but the expenses for the second or third years excluded, so far as the present rate hearing is concerned. When the offsetting revenues cannot be known or the expenses are not representative of the future level of expenses, they may be disallowed.

A-2 Wages: Factors When Expense Was Disallowed

A number of specific factors were used when the commissions disallowed the wage expense, in addition to those mentioned above. The paramount point to keep in mind is that the commission attempts to measure increases in expenses against increases in revenues or against a reduction of expenses in other categories. If the result is an even balance, the rates may not increase because of the wage factor. If the anticipated revenues or other operating efficiencies do not balance the increased expenses, an increase in rates to cover the expenses can be anticipated. The decisions reflect rate making considerations, as the commission does not fix wages as such.

The decisions in cases disallowing the additional expense will be divided into two categories. One category relates to personnel and management decisions, encompassing such things as worker productivity or overtime. The second category relates primarily to procedural considerations, such as where speculative or contingency requests are involved.

In the first category of cases, increases in productivity play an important role.

The amount of allowable expense for increased wages should be reduced by that amount which the company's experience shows to be the increase in the level of labor's productivity.

Where a productivity gain can be shown, the rate effect of the wage increase should be reduced accordingly. The Federal Power Commission has stated that merit increases, for example, may be designed to reduce labor costs.

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52 See, e.g., Skeedee Independent Tel. Co., v. Farm Bureau, 166 Neb. 49, 87 N.W.2d 715 (1958).
and cost-control programs are an example of good management.\textsuperscript{55} Productivity increases may be difficult to demonstrate, and other factors may overshadow this factor. Economic need\textsuperscript{56} or "galloping" inflation\textsuperscript{57} may mean wage payments are greater than productivity gains. Specific evidence of productivity increases or reasonable estimations thereof will be required.\textsuperscript{58} The commission at the state level may decline to impute, for example, productivity gains from the entire, nationwide Bell System.\textsuperscript{59} The evidence itself may show an actual decline in productivity,\textsuperscript{60} leading to a rate increase. The issue of productivity may be a particularly difficult one for a state level commission when it attempts to rule on intra-state rates while dealing with a contract that was negotiated at the national level, as is the case in the Bell System. One commissioner stated, on a related matter:

The commissioner is concerned about this type of negotiations as it may affect Oregon ratepayers. Pacific Northwest Bell Telephone Company's pay scale for comparable jobs compared to pay scales of other local area telephone companies are higher ... Pacific Northwest Bell Telephone Company's customers should not be bearing wage expenses which are above the level of local area wages adjusted for local conditions and consumer cost levels.\textsuperscript{61}

In addition to a productivity offset,\textsuperscript{62} other personnel and management activities may be used to demonstrate that the wage increase does not amount to an overall increase which should be passed on to the ratepayers. A wage agreement sets an hourly rate or whatever, but it does not usually represent a predetermined total economic package. One of the variables which can increase or decrease the total amount of wage cost is the amount of overtime. A commission may regard with skepticism a utility's claim for undiminished overtime expenses in a new contract where the total workforce is also increasing.\textsuperscript{63} Excessive amounts of overtime may be rejected.\textsuperscript{64} The commission may restrict the amount of overtime which it will allow for rate purposes,


\textsuperscript{62} But see Rhode Island Consumers' Council v. Archie Smith 113 R.I. 232, 236, 319 A.2d 643, 645 (1974), where the court stated:

[While a utility rate increase may be permitted only if it reflects productivity gains, it is not mandated with respect to wage and fringe benefit increases.]


such as limiting it to a four year average rather than the actual amount shown in the test year. In other cases, the commission may admonish management that the excesses of the past will not be tolerated in the future.

The character of the payroll personnel becomes an important item. While increases in salary may be occurring, the overall salary expense may be declining. Where there is a declining number of employees under an employee reduction program, a wage increase may not result in total labor cost or rate increase. Labor turnover is also a factor. Where the labor force is made up of a large percentage of newly hired employees, their total salaries will be proportionally less than the salaries of employees with more seniority. Wage increases of the low seniority or skills levels will have less rate impact. A significant number of retirements of higher paid senior employees may reduce the overall payroll despite a wage increase. Where the actual employment figure from the test year represents a higher than average figure, substitution of the lesser average and more accurate figure may reduce the claimed operating wage expense. Where the claim for the wage is for an employee not yet hired, and where there are no definite plans to hire, but only speculation on the actual hiring, the claim may be disallowed. If the unfilled position is an essential one, however, the wage or salary may be allowed.

In one of the peculiarities of utility regulation, certain kinds of rate discrimination between ratepayers are prohibited. Where the payment of a higher wage in one part of a system results in increased costs for all ratepayers of the company, such an unlawfully discriminatory wage will be disallowed.

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In a unique case, the question of the need for as large a workforce as was used was raised. In its original decision, the commission found that the workforce was greatly in excess of the need, largely because of a collective bargaining dispute over transfers. The commission disallowed the expense for non-productive labor in its first opinion, but on rehearing, without discussion, the expense was allowed.76

The second major category of cases involves procedural considerations which may lead to a disallowance of the wage as an operating expense. A maintenance wage expense will not be included in the test year where the maintenance was not normally done in that year but should have been done at an earlier time.77 Where a company has not adequately explained or supported its request, obviously the expense cannot be allowed.78 Where the relationship between wage benefits and revenues has been constant despite annual wage increases, the utility may have a more difficult task getting approval of the expense.79 Commissions will refuse to allow an operating expense where the wage increase is contingent upon the commission's approval of the expense for rate purposes.80 Commissions have not allowed speculative wage expenses which may be anticipated, but which have not yet been realized, such as where the only evidence is that large wage increases have frequently occurred in the past,81 or where forecasts of settlements are speculative,82 or where there are projections of the impact of inflation.83 Similarly, where the utility proposed increasing administrative overhead and payroll expenses one hundred per cent because they were "extremely low", the expense was rejected.84 Expenses for deferred wage increases dependent upon an improved financial condition are also subject to rejection.85 Where

a federal wage control guideline is exceeded, the commission may disapprove wages in excess of the guideline.\textsuperscript{88}

The regulatory process is a slow process, with many potential delays. At times a proposed wage adjustment will be made at the rebuttal stage of the case, late in the proceedings. Unless the expense is simply accepted, review and the consideration of offsetting revenue adjustment could greatly prolong already protracted hearings. For reason of this lateness, the commission may reject the proposal.\textsuperscript{87} Occasionally, a commission will approve an increase, but with the admonition that future wage increases should be carefully scrutinized.\textsuperscript{88} The procedural admonition may serve its function, but no recent case has reported details of such a follow-up.

On review of these cases which either allowed or disallowed the wage expense for rate purposes, several points may be considered. The initial premise is that the commission has no authority to approve or disapprove the wage settlement, and no authority to interfere in the bargaining process. The National Labor Relations Act has preempted the area.\textsuperscript{89} It seems, in many cases, however, that the line between the lack of commission jurisdiction over this aspect of labor relations and the common authority to allow or disallow the wage expense is a very narrow line. In several cases, it was seen that the commission was expressly asked by the parties to approve or disapprove the wage proposal. The decisions reviewed indicate many problems with the evidence. It may be too speculative, too late, too little, or otherwise difficult to understand. The placing of the evidentiary burden seems unclear at times. It would seem desirable to have a higher level of justification for the wage increases in at least some of the cases. The commissions might more often request testimony from both management and unions on the matter, as has been done.\textsuperscript{90} The authority of the commissions to seek this justification appears unquestioned. Certainly the commissions are to be commended for balancing revenues and expenses, properly measuring productivity, and also for their analyses of the character of seniority and composition of the workforce. The rejection of speculative estimates, the rejection of the attempted use of undefined general economic conditions such as con-


\textsuperscript{89} See cases cited notes 9 & 10 supra.

tinuing inflation, and the careful scrutiny of the test year\textsuperscript{91} are also commendable. While the United States Supreme Court has broadly construed the area of preemption, the commissions properly look at many of the same economic factors which concern utilities and labor in negotiating their contract.\textsuperscript{92} Preemption does not preclude a sharing of areas of common and immediate concern, it would appear. The distinction must be found in the difference between approving or disapproving a wage agreement and approving or disapproving an operating expense for rate purposes.

B. Salaries

A review of the separate category of salaries, as opposed to wages, is useful to demonstrate the degree of detailed review which the commissions may exercise. While wages may be reviewed on the basis of productivity and other factors, salaries may be measured by what the individual actually does, including hours spent on the job. There are certain problems with the creation of the category of decisions on salaries. The major problem is one of definition. While the cases treat salaries differently than wages, the definitions of the two classes is not made clear. Many of the cases obviously involve the salaries of executive personnel who are probably excluded from the coverage of the NLRA.\textsuperscript{93} Not all of the cases are, however, completely clear. Many of the decisions mention no obvious distinction between salaried supervisors excluded from NLRA coverage and those salaried, but non-organized employees, who might be covered by Section Seven of the NLRA.\textsuperscript{94} The question which is raised, but which cannot be answered on the basis of reported decisions, is whether the commissions subject non-organized employees' salaries to greater scrutiny than union-organized employees' wages. It is clear that the analysis of salaries, however defined, is far greater in detail, than the analysis of wages.

As in the wage area, the commissions have no authority to actually limit the amount paid to an individual. The commission can only disallow excess payments as an operating expense for rate making purposes.\textsuperscript{95} In this regard, the investor-acting-as-manager utility may present a particular


\textsuperscript{92} It is acknowledged that the decisions are not always definitive as to when a collective bargaining agreement is involved and when a nonunion wage is involved, but many do speak of the agreement.


question. Where major shareholders are also the executive officers, all of the earnings could be paid as salary, with the effect that the utility would never show a return on investment. Close attention should be given to the salary question in those unique cases.

A variety of factors will be looked at in determining the propriety of the salary payment. Among the factors are the time which the individual devotes to the business of the particular utility, the nature and extent of administrative and general functions, whether “arms-length” bargaining is involved, and the scope of the utility’s business. The salaries of executives in other utilities may be used as a comparison, but the particular salary must be also viewed in the light of the ability of the particular utility itself to pay. Unique methods of payment not common in the industry, such as the payment of salary and income taxes, are frowned upon. Wage increases to employees may be a partial justification for salary increases to executives, but an eight per cent wage increase does not justify a 38 percent management salary increase.

As is true in many other types of cases, a failure to meet the burden of proof may result in a denial of a portion of the operating expense. The burden of proof appears to lie upon the company, at least once the question of propriety is raised. Speculative estimates of future needs will be rejected here as in the wage area.

One difficult area is the payment of incentive bonuses to management as a reward for efficient performance. An analogous issue is raised when rate of return is sought to be used as an incentive or punishment technique. One commission has stated: “Aside from the fact that management is being

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paid to perform efficiently, and the cost thereof is included in allowable operating expenses, the superior court ruled . . . that any allowance above cost of capital must be supported by substantial evidence."108

The salary cases indicate no hesitancy to explore in detail the work actually done by the individuals. One conclusion that may be drawn is that it cannot be assumed that the commissions are poorly equipped to examine the relationship between the work done and the payments made for the work. By analogy, one could argue that but for the preemption doctrine in the collective bargaining area, the commissions, practically speaking, have the tools to decide whether the collective bargaining agreement represented an appropriate settlement for the job to be done. A comparable result may be approximated in some cases where the review of productivity and work-force composition is sufficiently detailed.

C. Fringe Benefits

Where a collective bargaining contract exists, fringe benefits today are almost as important a part of the contract as wages. It might be expected that they would then be treated more like wages than salaries. That is to say, it might be expected that commission review would be more general, and less concerned with specific detail. Indeed, it might be questioned why they would not come under the same review given productivity and other factors. Whatever the reasons, the decisions appear to treat them in a distinct manner, with a detailed type of review. The reasons are not clear, in part because the decisions are not numerous. One factor may be that the employer-paid pension type of fringe benefit, one of the items receiving considerable attention, is comparatively recent. In the context of employer-paid medical insurance, one commission generalized the matter in this fashion:

Fringe benefits, such as the ones noted above, are more and more an integral part of union contracts, with the requirement that the employer pay all the costs. These costs become part of the costs of doing business and must be recovered by respondent.109

The relatively recent origin may account for a greater degree of review than is true of the more traditional wage factor.

In one decision a commission rejected any ratepayer expense associated with a profit sharing plan, stating that it was not adaptable to a public utility with a regulated rate of return.110 Expenses associated with the operation of

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an athletic field and association which at least some employees used was rejected, in part, as being nonessential. The labor relations impact, if any, was not mentioned. Recognizing the labor relations problem however, another commission permitted reduced telephone rates for employees as a fringe benefit. The commission equATED rejection of the benefit with the commission improperly deciding the number of paid holidays. In other cases, utilities' contributions to pension plans were reduced by one-third or one-half, in part because they were overly generous. Language cutting specific amounts of the utilities' contribution or language phrased in terms of generosity is not common in the wage area. In another case, the special justification of meeting “competition in the labor market for qualified engineers” was required. Management's decisions on fringe benefits seem more subject to question than in the wage area.

In some other respects, the treatment given fringe benefits is quite comparable to that covered in the discussion of wages and salaries. Where a utility conditions the implementation of the plan on the commission's approval, the commission will not act in management's stead. Where the expense is still hypothetical, rather than actual, it will be disallowed. A pension plan patterned after others found in the industry is likely to meet with approval.

D. Summary

Despite the broad language of preemption, the commissions do look in detail at many aspects of utility operating expenses which are also at the heart of the utility's labor relations. Generalizations must be limited by the fact that the commissions do not clearly distinguish collective bargaining situations from non-collective bargaining situations. Fringe benefits and

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salaries are scrutinized in considerable detail, with specific allowances and
disallowances of expense, or even of programs, in some cases. Wages are
scrutinized in detail, but by using general criteria, such as productivity and
composition of the labor force. In all situations, speculative and hypothetical
expenses are disallowed. Expenses are also disallowed where the burden of
proof is not met, but the burden of proof is not always clearly established.
Disallowance of an expense must be understood as a disallowance in the rate
context, not as an order to deny a wage or salary payment, although in the
fringe benefit area, a few cases have gone beyond an evaluation of rates
and have questioned entire programs.

III. PERSONNEL AND WORKING CONDITIONS

Leaving consideration of primarily monetary questions, a second area
of commission impact on labor relations is its impact on personnel and work-
ing conditions. These discussions will be divided into three major topics: (A)
personnel, (B) equal employment opportunity, and (C) employee protec-
tive conditions. The point of focus remains on how the state utility regulation
relates to labor relations, keeping in mind the general preemption considera-
tions stated by the United States Supreme Court.

A. Personnel

Commissions commonly have jurisdiction to require extension of utility
service or to approve or disapprove abandonment of service. The required
extension of service or the approved abandonment of service will have an
obvious effect on labor relations, as more or less employees will be required
to meet the order. It is also arguable that such significant changes in the
operation may be outside of the area of mandatory topics of bargaining.
If these topics are outside of the requirement for good faith bargaining, they
would not be particularly relevant to issues at hand. Rather than attempt to
analyse this issue in depth, it seems more useful to move into more specific
areas of regulation, with the exception noted below.

The commissions normally have jurisdiction over service requirements
and safety considerations. It is primarily through these requirements that
the decisions of the commissions may have an influence on matters which are
also important in labor relations. In the particular context noted, one com-
mission described the matter as follows:

This commission has no jurisdiction over purely labor disputes and
employee-management relations. . . . [I]n the area of railroad labor,
it would appear that Congress has preempted the field. . . . This com-

119 PRIEST, supra note 7, at 234, 379.
120 See MORRIS, supra note 12, at 410-22.
121 See PRIEST, supra note 7, at 227-83.
mission does have jurisdiction over issues pertaining to the safety of a utility’s plant and equipment. … 122

Deficiencies in service may require specific corrective action affecting personnel or working conditions. The commission may order that personnel be acquired to correct the deficiencies. Such an order would leave less room for bargaining, and leave the utility in a difficult situation if impasse on certain questions appeared likely. The commission might order the employment, for example, of a full-time service representative, 123 three additional supervisory personnel, 124 or a complaint hearings officer may be required under commission rules. 125 In other situations, a general requirement to raise service levels may be imposed. 126 In one case, the commission noted deficiencies in the number of transit bus drivers and in the force of traffic checkers. No specific number of new personnel were ordered, but the commission said:

We have provided, in this order, sufficient funds to allow Transit to solve the problems of personnel and equipment shortage, and having provided the wherewithal, we expect to see the intended result. 127

A contrary result was reached in a California decision. 128 The dilemma between commission action, on the one hand, and preemption and limited commission jurisdiction on the other, is apparent in the conclusions of the commission, which were as follows:

4. This commission does not have jurisdiction over labor-management relations of Pacific which would include employment practices.

5. This commission does not have jurisdiction to require Pacific to hire “bilingual personnel at all job levels.” 129

Without resolving the conflict in the examples, it is sufficient to note that other commissions have not found their jurisdiction to be so limited, although they may not choose to exercise it in such a manner as to require the hiring of new employees.

In addition to requiring new employees in some cases, commissions may specifically approve the elimination of certain jobs. Where the safety and welfare of the consumer were not adversely affected, commissions have approved the elimination of the position of an on-duty troubleman at certain

129 Id. at 409.
hours" or the change in rank of the class of employee required to be in charge of a railroad sleeping car. Commissions have also ordered review of the cycle of trimming and line maintenance, alteration of the change in taxi driver shift time, and review of engineering and maintenance of utility properties. One commission notes that it "has never hesitated in the acceptance of responsibility for employees' welfare and has granted relief to employees of a public utility whose personal safety is jeopardized. . . ." Safety in working conditions is a subject of bargaining, but with the passage of the Occupational Safety and Health Act, the area cannot claim to fall under the scope of preemption.

When the quality of service or the immediate safety or welfare of the consumer is at issue, the commissions do not usually feel restrained in making general or specific recommendations or requirements on day-to-day operations. The effect, in part, of such orders is to determine at least some aspects of the utility's labor relations and minimize some potential areas of bargaining.

B. Equal Employment Opportunity

The question of the jurisdiction of the commissions over the equal employment practices of the utilities is one of the most recent developments. The statutes governing commission action are largely silent on the subject, so that the power must be implied, if found at all.

The question may be raised in two ways. One way is in the context of a rate case; the other way is in the context of the commission's general authority over service and other matters. In the context of a rate case, the request may be made that an increase should not be granted if a utility is found to be practicing employment discrimination. At least two decisions indicate that rate context is an improper time to raise the issue. Discrimina-

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136 See generally CCH Guidebook to Occupational Safety and Health (1974).
137 It is possible to raise the issue in other contexts which are relevant to present purposes. One of the obvious times to raise the issue is when an applicant seeks original issuance or renewal of license. See, e.g., Stone v. Federal Communications Comm'n, 466 F.2d 316 (D.C. Cir. 1972).
tory practices, however, may have some impact on a utility's rates. While the main focus of this paper is on state commissions, a U. S. Supreme Court decision involving the Federal Power Commission is instructive.\textsuperscript{139}

The NAACP had requested that the Federal Power Commission adopt rules concerning employment discrimination practices and complaints. The FPC refused, citing a lack of jurisdiction. The Supreme Court ruled that the inclusion of the phrase “public interest” in the Commission’s legislation did not constitute a directive to eradicate discrimination in general. However, the Supreme Court also ruled that the Commission should consider the effect of discriminatory practices on the rate processes. The Court suggested the following potential rate concerns:

(1) Duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion.\textsuperscript{140}

There were no dissents, but one of the two concurring opinions warned of the speculative nature of items 4, 5 and 6 on the list.\textsuperscript{141} Items lacking a proper evidentiary basis cannot be made the basis of a rate decision.

The decision has many interesting facets. As the concurring opinion states, the majority makes at least the initial assumption of a prima facie case for Commission jurisdiction over the variety of expenses mentioned, such as inefficiency or speculative loss of contract. Such detail in expense analysis is not common in the decisions reviewed here, but it does suggest the scope of the matters potentially covered by a logical extension of currently-accepted expense analysis. Another intriguing facet is the manner in which the Court resolves the issue. The technique is one commonly used in this area, but one which is incapable of precise application and limitation on Commission authority. The Court said that the Commission

is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees only insofar as such conse-

\textsuperscript{140} Id. at 1810.
\textsuperscript{141} Id. 1812.
quences are directly related to the . . . establishment of just and reasonable rates. . . .\textsuperscript{142}

This gives the Commission potentially broad authority, as many other cases suggest in this paper. When an employment practice has a rate impact, the Commission can control its effect on the rate processes. The potentially broad approach makes the distinction between wages and salaries in the cases mentioned above even more tenuous. The third facet of the case is primarily one of caution. While the Court speaks as though rates were the key point throughout most of the opinion, it also states "in the case of the Power and Gas Acts, it is clear that the principal purpose . . . was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices."\textsuperscript{143} The Commission would thus have more than rates as a basis upon which to promulgate rules concerning employment discrimination. State legislation usually covers quality of service, so it is arguable, by analogy, that state commissions would have yet another basis for rules on employment discrimination.

Two state decisions have rejected the claim that they have jurisdiction over such employment practices, while the District of Columbia has found such jurisdiction. One state rejected jurisdiction on the grounds, in part, that the commission is not enforcing general concepts of the public interest and that jurisdiction was placed by the legislature in the human relations agency.\textsuperscript{144} Another rejected jurisdiction, in part, because other agencies had been granted such jurisdiction and because no effect on operating efficiencies was demonstrated in the evidence.\textsuperscript{145} The District of Columbia Commission accepted jurisdiction, in part because of their statutory authority to promote the public interest. As part of the remedy, an affirmative action plan was devised to be administered by the commission.\textsuperscript{146}

The issue is an intriguing one, for if a commission is found to have jurisdiction, the impact on labor relations could be quite large in some situations. Among the issues which are related would be promotion, discharge and discipline, seniority systems, and, of course, wages. With the passage of the 1964 Civil Rights legislation, the matter is clearly not preempted by the NLRA.\textsuperscript{147} States were authorized to create their own agencies. With the preemption question removed, the issue must turn on the particular organic

\textsuperscript{142} Id.
\textsuperscript{143} Id. at 1811 (Emphasis added.)
legislation of the agency. To the extent that operating expenses or service efficiencies of the type already mentioned here could be demonstrated, it would be difficult to find that the commissions do not have at least some jurisdiction. The difficulty of meeting whatever burden of proof was mandated might mean that the jurisdiction was one that was only occasionally exercised. However, jurisdiction over rates, with the resultant investigations that are made, is not a very narrow jurisdiction.

The problem here is one that is common to most of the questions considered. If one can demonstrate a rate or service impact, then it should be presumed that the commission has that particular jurisdiction. Normally, the showing of a rate or service impact may not go to the heart of all of the other issues sought to be raised. For example, showing the wage impact on operating expenses allows the commission to rule on the expense issue, but not on the contract that created the wages. The converse may also be true. If one can show a rate or service impact, the commission may be the only agency with jurisdiction on that issue since the legislature presumably gave the commission exclusive jurisdiction. On matters such as discrimination, in the absence of general statutory authorization, the commissions may not be able to promote a general public interest, but only that specific public interest which gave rise to their original creation.

C. Employee Protective Clauses

The final topic in this section concerns the state cases involving protections given employees in the event of mergers or divestiture. At the federal level, special clauses ordered by the commissions or courts are common, under Interstate Commerce Commission legislation, for example. The California commission cases appear to be the leading ones at the state level. In those cases, the commission has conditioned permission to abandon a service on the requirement that adversely affected employees would receive employment protection and benefits, and has approved specific clauses to that effect. The commission sought to distinguish the requirement from any concern with wage negotiations or conflict with the NLRA. The purported distinctions are not altogether clear. The cases are important, despite their uniqueness, to demonstrate the potential scope of jurisdiction that can be arguably distinguished from the preempted areas covered by the NLRA. Abandonments go to the service questions, and the effect, absent a protective clause, may be to threaten other utility services. The commission may exercise jurisdiction to approve or disapprove a particular clause.

D. Summary

The cases in this section emphasize the important areas of non-monetary commission jurisdiction. The commissions can deal with discharges and new hires, and approve or disapprove certain job responsibilities and other working conditions. The subjects of these decisions relate directly to important aspects of the utility's labor relations. Employment discrimination questions have recently been raised. At least a partial resolution of the question of jurisdiction could be resolved by relating sufficient evidence of discrimination to either operating expenses or to its impact on service efficiencies. Employee protective clauses are a limited example of yet another area of possible jurisdiction that relates directly to labor relations. The rate cases emphasize the most prominent activities of the commission which cannot be completely divorced from an impact on labor relations. Review of the service related cases provides another vivid example that labor relations cannot remain totally encapsulated in the preemption box when the impact of a decision may affect the commission's primary obligations.

IV. NEGOTIATIONS AND IMPASSE

The third major section of discussion covers those commission decisions which relate directly to collective bargaining negotiations and impasse. Many of the decisions in this section obviously relate to cases in the preceding sections. They are specifically collected in this section because they are distinguished by the fact that the commission must acknowledge the particular labor relations context in which the issues are raised. For example, the commission may be faced with a strike. The decisions in this section will be divided into two major categories: (A) collective bargaining and impasse, and (B) adjustment clauses.

A. Bargaining and Impasse

The cases in this section are distinguished by proximity to, and discussion of, specific aspects of collective bargaining. While the preceding decisions may have an indirect impact on these aspects of labor relations, the cases here talk directly about the issues. The NLRA may preempt the area, but it does not mean that the commissions can ignore the problems.

Preliminarily, it is worth noting that the impact of collective bargaining contracts reaches beyond the persons covered by the agreements. A common practice is for a utility to grant its non-union employees a wage increase comparable to that given union employees, and commissions seem to approve of the practice. The pattern setting nature of the union contract is not

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uncommon, and it is certainly a practical response on the part of the utility management. The rarely questioned passthrough does, however, raise questions concerning the productivity and composition of the non-union workforce which may go unanswered by the uncritical acceptance of this practice.

Attention has already been directed to the problems of commissions when hypothetical or speculative operating expense figures are proposed. Bargaining prior to settlement is one context in which that type of case may easily arise. The commissions will not approve an estimated settlement to a contract that is yet to be resolved. Even where the estimate is based upon the experience of the percent of settlement in prior years, it may be too speculative. In addition to the speculation question, the commission may not want to prejudice a future wage settlement prior to negotiations by stating a figure. One commission stated the matter in this fashion:

"To permit an offset of (yet to be negotiated) wages would be in effect to give a blank check to Edison and its employees' union, signed by the commission, to be filled out in any amount that Edison and the unions agree upon. We do... concur in the staff's concern that an allowance for increased wages for rate-making purposes not be interpreted as a "floor" from which negotiations might commence."

When an offer has been made to a union and the offer is communicated to the commission, the fact that the offer was later rejected and a higher offer was accepted does not apparently prejudice the matter before the commission. Additional explanation of why the higher operating expense was needed, that is, why the union rejected the earlier offer, is apparently not commonly required. The commission will not find a lack of good faith merely because the utility did not go to impasse and strike. Indeed, rejection by the union of a lower offer may be used to show the propriety of the utility's wage expense in some cases. An obvious bargaining strategy is suggested. Settlement of negotiations during the rate hearing is a common example of an allowed, out-of-test-year adjustment to expenses.

In a few circumstances, a figure will be accepted which does not

constitute the final settlement figure. An example of such a circumstance is where several unions are involved, and some of them have settled. For example, a provable pattern may have been established that where settlement with, for example, the driver employees has shaped the settlement with the mechanics, a proposed figure for the mechanics may be allowed after the drivers have finally settled. Similarly, where a settlement with six unions has occurred, it may be clear that the yet to be reached settlement with the seventh union will be at no less a figure than with the first six.

The crunch-point in collective bargaining is the strike resulting from impasse, a matter clearly within the NLRA preemption, but equally within the commission’s concerns over service. The problem is well-stated by one federal court:

The parties to a labor dispute have right, indeed a duty, to engage in collective bargaining under the federal statutes. . . . Essential to the right to free and unfettered collective bargaining in this case is an injunction against further proceedings before the Delaware Public Service Commission.

The threatened interference with collective bargaining must be enjoined to preserve the integrity of the federal statutory scheme for the resolution of labor disputes. Informed citizens may well decry this result which leaves municipalities at the mercy of industrial strife. But, that is a necessary consequence of a legislative enactment which contains provisions for a cooling-off period in the case of a national emergency but contains no similar remedy for a local emergency. Commissions’ responses to the strike or its threat have been varied, and have met with mixed success in the federal courts. One response has been to investigate or monitor the bargaining. A commission has conducted an inquiry into the good faith of the utility in its bargaining. The allegation was made that the transit company was not interested in settling the labor dispute, but was using the impasse as a means of prompting the purchase of the utility by the city. Clearly, a service related issue was raised. In a related matter, a federal court enjoined the specific action proposed by the commission, but stated: “Undeniably, the commission should be kept informed of the progress of the negotiations; similarly the commission should be told if collective bargaining ceases.”

Investigations by other types of panels

of impasse situations have been frowned upon by some federal courts. Where the investigation and report is aimed at bringing public opinion to bear to force settlement, such action was found to be coercive and interference was prohibited.\footnote{Oil, Chemical, and Atomic Workers, Local 5-283 v. Arkansas Louisiana Gas Co., 332 F.2d 64 (10th Cir. 1964).} In another case, the court decided that a fact-finding panel would be tantamount to requiring settlement on the basis of the findings, except to the extent that public pressure could not be resisted. A public utility could not resist.\footnote{Grand Rapids City Coach Line v. Howlett, 137 F. Supp. 667, 673 (W.D. Mich. 1955).} Another court stated “mere” participation in the investigation would have a tendency to solidify positions making ultimate decisions more difficult, and hence it would be coercive.\footnote{General Elec. Co. v. Callahan, 294 F.2d 60, 67 (5th Cir. 1961).}

Other techniques have been tried, some of which involve the certification given to a public utility. A federal case involving the Interstate Commerce Commission is instructive. A trucker could no longer perform because of a union boycott, and the shippers sought to get certification of a new company to replace the struck company. The United States Supreme Court struck down the additional certification,\footnote{Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962).} largely because of a lack of findings and analysis to justify the choice of remedy of certification over the alternative remedy of a cease and desist order. However, the Court noted:

We do not imply that service deficiencies of the kind found in this record could never justify the issuance of permanent operating authority. A totally different case might be presented if other remedial action by the commission and the board proved fruitless, hopelessly time-consuming, or otherwise inadequate to terminate the interruptions in service. Nor do we intend to pass upon the commission’s discretion under Section 210a to provide temporary authority, pending determination of an application for authority or cease and desist order, or as an alternative to permanent authority to remedy service deficiencies of the kind present here.\footnote{Id. at 171 n. 20.}

The Court noted also that the Commission should be particularly careful in its choice of remedy “because of the possible effects of its decisions on the functioning of the national labor policy.”\footnote{Id. at 172.} When a state commission sought to review the certification of a struck utility, a federal court enjoined the review.\footnote{Delaware Coach Co. v. Delaware Pub. Serv. Comm’n, 265 F. Supp. 648 (D. Del. 1967).} One commission denied it had legislative authority to approve
additional certification in this context, because of the impact on collective bargaining.\textsuperscript{171}

One commission went to the heart of its dispute and actively worked with both union and utility to help resolve it, and then ordered the remedy. The problem involved the bus drivers' refusal to drive with money for change at night for fear of being robbed, and the utility refusal to let them go without change. The interim solution was to use scrip instead of money.\textsuperscript{172} The order of the commission ran to the use of scrip, but it did not contain an order to the drivers to resume work, in part, perhaps because the commission does not have clear jurisdiction directly over employees per se.\textsuperscript{173} The commission grounded its jurisdiction partly on the problem of fare or revenue collection, relating to rates, and the robbery problem, relating to safety.

Some suggested solutions to impasse have been rejected by the commissions. One case considered a range of possibilities. It was suggested that a court appoint a receiver for a struck utility, but the commission stated it would not recognize such an appointment.\textsuperscript{174} In the same case, where it was suggested that the commission agree to underwrite a rate increase so as to allow easier agreement on wages, the commission also refused. Finally, that commission also denied authority to order the utility to submit to arbitration or to perform any act which would involve or invite strikebreakers.

An aspect of the strike question concerns the duty of the utility to perform services despite the labor dispute. The position of a utility in a strike situation is not the same as the position of an unregulated private company which can abandon business at will. Permission to abandon is required, but a struck utility need not seek a temporary suspension of its certificate prior to its cessation of service because of a strike. Such a requirement would result in additional lost time and service while the temporary order was being vacated.\textsuperscript{175} The utility is required to render service so long as it is reasonably able to, and cannot voluntarily and

\textsuperscript{173}See Wilmington v. Delaware Coach Co., 67 P.U.R.3d 412, 416 (Del. Pub. Serv. Comm'n 1967), where the commission stated:
We realize that our decision to inquire into the good faith of Delaware Coach (in bargaining) presents a piecemeal approach since we have no authority to inquire into the conduct of the other party to the labor dispute.
unilaterally cease service.\textsuperscript{176} A strike is not considered to be a voluntary suspension, particularly where the utility has taken all reasonable and lawful means to resume service,\textsuperscript{177} where the utility has acted in good faith,\textsuperscript{178} or where the termination of services results from risk of injury or harm to the employees who would be willing to work.\textsuperscript{179} The good faith prerequisite, however, does not seem to be one that is commonly investigated. At least in theory, the utility can be ordered to resume services despite the strike situation.\textsuperscript{180} In the federal context, a utility's right to resort to self-help to continue services despite a strike was described by the United States Supreme Court in this manner:

While a carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored. The Court of Appeals used the words "reasonably necessary." We do not disagree, provided that "reasonably necessary" is construed strictly. The carrier must respect the continuing status of the collective agreement and make only such changes as are truly necessary in light of the inexperience and lack of training of the new labor force of the lesser number of employees available for the continued operation. The collective bargaining agreement remains the norm; the burden is on the carrier to show the need for any alteration of it, as respects the new and different class of employees that it is required to employ in order to maintain that continuity of operation that the law requires of it.\textsuperscript{181}

The case can be read, in part, as authorizing the use of what unions would call "strikebreakers." Assuming the state level commissions have comparable authority and responsibility, the inroads on the preemption doctrine are obvious.

Another aspect of the strike situation is the commissions' treatment, for rate purposes, of the various costs involved in the labor dispute. If the utility is allowed to recover, it should be done, as one federal court said, without favoring one side or the other in the labor controversy,\textsuperscript{182} although

\textsuperscript{179} Meier & Pohlman Furniture Co. v. Gibbons, 223 F.2d 296 (8th Cir. 1956).
\textsuperscript{182} American Overseas Airlines v. Civil Aeronautics Bd., 254 F.2d 744, 751 (D.C. Cir. 1958).
the statement seems to be more hopeful than practical. The federal court did illustrate the problem. If the utility suffers a loss in revenue due to the strike, it may not be able to render its statutorily-required service unless the loss is made up by the rate payers. However, not all losses will be of that magnitude and perhaps they should not be recoverable. If the strike "would not have occurred under honest, economical, and efficient management," perhaps recovery should be denied. One state court remanded a question of whether maintenance which was normally done in an earlier year, but which was neglected because of a strike, could be included in the subsequent test year expenses. Recovery of strike costs is not a developed doctrine.

Several attempts have been made to persuade a commission to include an allowance for future expenses arising from prospective labor problems. The attempts commonly cite the cyclical nature of the utility's labor problems and their apparent desire to be prepared for any recurrence. Such requests may be rejected because of the speculative nature of the request or because of the unreliability of evidence that an actual cycle is at work. The dilemma involved appears to be obvious. If future strike expenses are allowable, the utility may have little to lose by being adamant; if the costs are not reimbursable, the utility may have to accept union demands or the public will lose a vital service. The lack of cases and discussion does not reflect the significance of the issues involved.

A different aspect of the strike situation is the subsequent effects of the strike on the quality of service even after the strike has been resolved. One commission ordered a utility to resume full service, the strike having been over for 10 months, though the utility blamed the strike for the poor service. A similar order in another case arising six months after the strike was reversed for want of evidence is in the record.

It is clear that, preemption notwithstanding, the commissions cannot simply ignore the collective bargaining and impasse issues. The responses

to the problems are varied and not particularly conclusive. Analogous
federal cases exist in some areas, but they do not appear to have had a great
deal of effect on the actions of the commissions. The commissions appear,
in many cases, to act more on their conceptions of the proper policy than
on federal mandates. The problem is obviously unresolved. The risks of
allowing commission action in this area are several. One author notes that
"it is often feared that a change . . . extending greater authority to state
governments to deal with local disputes would result in widespread abuse."\(^{191}\)
In a different, but related context, former Justice Douglas described the
potential problems if commissions were empowered to approve or disapprove
bargaining agreements. His conclusion, in part, was: "Meanwhile years
might pass as the contest wound its way slowly through various tribunals
and the labor problems continued to fester."\(^{192}\) A want of better policy,
however, leads to the type of ad hoc decisions illustrated above.

B. Adjustment Clauses

Related to some aspects of the collective bargaining situation is the
question of the automatic adjustment clause for wages. Under such a clause,
wage changes would be passed on the ratepayers directly without the
intervening rate hearing. A fuel adjustment clause is commonly used today,
primarily to pass on the increased cost of oil which is subject to great price
fluctuation.\(^{193}\) It will be recalled that a number of commissions have refused
to guarantee to pass on a rate increase during bargaining\(^{194}\) or refused to
approve contingent wage increases.\(^{195}\)

There appears to be little question but that such a clause for wages is
permissible. The question appears to go primarily to the wisdom of granting
such permission. New Jersey adopted an adjustment clause which includes
wages.\(^{196}\) The primary concern appeared to be in the adequacy of the
monitoring devices used in the administration and review of the clause.\(^{197}\)
Several other commission decisions of varying age have rejected the use of
a wage adjustment clause. The grounds for refusal included reduced man-
agement incentives for efficient operations,\(^{198}\) inability to offset other financial

\(^{191}\) B. TAYLOR & F. WHITNEY, LABOR RELATIONS LAW 496 (2d ed. 1975).
\(^{192}\) Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 312
\(^{193}\) See generally Arnold, Reining in Utilities, Power Companies Face Curb on Fast Recovery
\(^{194}\) See notes 151-154 and accompanying text supra.
\(^{195}\) See cases cited note 80 supra.
\(^{196}\) Rate Counsel v. New Jersey Bell Tel. Co., 66 N.J. 476, 333 A.2d 4 (1975); Re Adjust-
\(^{197}\) For the various requirements in an FPC approved fuel adjustment clause, see Part 35,
Filing of Rate Schedules, CCH UTIL. L. REP. FED. §35.14, para. 3644 (1975).
entries, 199 or a history indicating the ability to absorb labor costs. 200 The labor relations impact of such a clause apparently has not been a major factor. While the adoption of such a clause would have a direct impact on labor relations, it would arguably not fall within the prohibited area of preemption because the approval is for rate purposes, and does not represent direct approval of the contract per se. In light of some of the decisions covered in the preceding section on collective bargaining, the adoption of a wage adjustment clause would represent the rejection of a moderately large amount of policy precedent. Unions and utilities might relish the thought of bargaining in an automatic adjustment clause environment.

C. Summary

When collective bargaining and impasse issues are directly faced by commissions, the reported decisions seem to emphasize practical necessity over procedural theorizing. The commissions seem reluctant to attempt to force a settlement or an end to impasse in most cases, but leverage, largely unused, appears to exist. Competing certifications and monitoring of bargaining progress appear to be possible areas of activity, although the decisions in the latter area are mixed. On the other hand, the wholesale adoption of an automatic wage adjustment clause, unless very specific protections are included, would appear to forfeit much of the ability of the commissions to review this area. The adjustment clause raises its own problems. While automatic approval for rate purposes might not infringe too deeply into national labor policies, it is arguable that retroactive rejection, at the time of review of clause operations, of some aspects of wages already paid, might cause sufficient uncertainty to upset the application of the national labor policy. Utility recovery of strike expenses, where permitted, might easily have an unbalancing effect, particularly in light of the recent concern expressed over strikers receiving governmental benefits. Considerably more commission inquiry, in appropriate cases, into the bargaining process seems warranted and reasonable, although the state commission could do little about the contract negotiated at the national level. A number of the matters that are important at the bargaining table are equally important and appropriate in the administration of the rate and service function. Among these are questions of productivity, good faith efforts to reach agreement so services continue, managerial efficiency, and commission avoidance of rubber stamping agreements by design or necessity. The commission can conduct an inquiry subsequent to the


bargaining, and nothing but commission choice appears to prohibit the commission from giving its prior approval to a wage expense. Inquiry at the time of bargaining does not seem inconsistent with this policy.

V. DISCUSSION

A major question in this area is obviously the scope of federal pre-emption. With utility rates rising rapidly, and the most immediate consumer pressures being felt by state commissions, the commissions may be impelled to view all operating costs and service requirements more carefully, including those affecting labor relations. One restriction in this area is the preemption doctrine. A recent federal case suggests the near ultimate in the exercise of the preemption doctrine. In that case, the Federal Power Commission was permitted to sue to enjoin the operation of the rules of a state commission which were in violation of the Federal National Gas Act. One marvels at the prospect of a harried state commission attempting to defend against a suit brought by the National Labor Relations Board!

The difficulties and frustrations faced by the state commissions were poignantly expressed by the Oregon commissioner when he stated:

Before indicating the selection of an alternative, it should be observed that wage negotiations between utilities and labor unions take place in an atmosphere of mutual recognition that all of the increased wages will be passed back directly to the consumers in the form of increased rates. Indeed, it is doubtful that the consumer, as the real party in interest, is ever independently represented at the bargaining table whenever regulated industries are involved. The time may fast be approaching when regulatory agencies such as the Federal Communications Commission or the various state regulatory commissions or any organization such as the National Association of Regulatory Utility Commissioners should sit in as a formal participant in wage negotiations involving the entire regulated telephone industry, such as is realistically the case whenever the Bell System and the Communications Workers of America renew contract discussions. In any event, the record is devoid of evidence that the Oregon consumer, at least, was effectively represented in the settlement before us....

One way around the preemption doctrine is clear, but has highly charged political overtones. Without attempting to revive battles long since fought and still smoldering in the utility field, it is clear that the NLRA does not cover publicly-owned utilities. Public ownership is not entirely free from federal concern, however, as federal law determines whether an entity

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201 Corporation Comm'n v. FPC, 415 U.S. 961 (1974) (mem.).
qualifies as a "political subdivision" not subject to the NLRA. In addition, a new preemption might arise if federal legislation governing labor relations in the public sector is passed. The cases reviewed here do not indicate any different treatment for publicly-owned utilities which come under commission jurisdiction. It seems clear, however, that if the state so desired, it could enact legislation treating those publicly-owned utilities differently for these purposes. At present, however, there does not seem to be a practical difference.

Another obvious solution to the dilemma would be the passage of appropriate federal legislation to clarify the role of states' jurisdiction over the labor relations of public utilities and then for the states to express their own legislative policies. A part of the legislation that would be useful might be to authorize the commissions to explicitly recognize a role for the unions when dealing with these questions. Unions would be able to provide information on a number of important issues, such as productivity. Particularly when dealing with safety and other matters relating to working conditions, and when impasse is near, the union's presence would seem to be essential to a satisfactory solution. When the commission orders can run only to one party in the dispute, the commission can be limited to a less constructive role. It is apparent that the unions are directly affected by many matters which fall within commission jurisdiction. As heretical as it may seem in some quarters, perhaps the unions ought to be directly involved, if they are going to be directly affected.

Commission actions may affect different types of utilities in different ways. For example, monitoring of quality of service, with the resultant impact on personnel and working conditions, may be more important where the utility receives a high portion of its income from fixed minimum charges, such as in telephones. Personnel disputes may have a more immediate impact in transit operations than in some utilities. Where there is the possibility of immediate substitutions for utility services with the concomitant total loss of revenue, labor problems may take on a greater immediacy. The point is that greater study of the problems of particular classes of utilities may result in identifying the most significant problems faced by that utility and hence by the commissions. Based on this type of information, it may be possible through legislation to give the commissions

the most immediately-needed type of clear authorization even though it is felt that, in general, commission authority ought to remain limited in other areas, or that the preemption doctrine ought not to be basically altered.

The preemption issue is being indirectly affected in a piecemeal fashion. Legislation such as the Civil Rights Act and the Occupational Safety and Health Act have taken mandatory subjects of bargaining out of the exclusive realm of collective bargaining. Federal and state agencies now share in the resolution of these issues. If the state commissions need further authority to act in these areas, the problem appears to lie mainly with the state legislatures. New types of energy, communications, or transportation legislation could be drafted to similar effect. Careful study of some of the new legislation may show that the area of preemption has already been narrowed in areas outside of these obvious ones.

By analogy, the U. S. Supreme Court decision in *NAACP v. Federal Power Commission*, discussed above, appears to cast light on the preemption issue. The case would seem to indicate that so long as a state commission casts its employment practices actions in terms of the impact on rates or service, not subjects of preemption, it should be able to avoid the preemption trap. Without deciding the matter clearly, the Court did indicate that the scope of subjects which affect rates is extremely broad. There would seem to be many avenues by which to avoid preemption limitations.

The commissions currently employ a number of useful tools in their analysis. Paramount among these are productivity, general rejection of speculative or hypothetical expenses, analysis of the composition of the workforce, the test year balance of revenue and expenses, and specific review of matters such as overtime. The specific review of salary against job is particularly intriguing, but the failure of the decisions to define the parameters of the term salary, as contrasted with wages, reduce its overall importance. To the extent that these analytical tools are not institutionalized through rulemaking, their usefulness in a given case will be diminished. As suggested above, institutionalizing a role for unions could be particularly useful. One area needing particular attention, at least in the decisions, is a clear placing of the burden of proof.

Among the various expenses, salaries receive the most detailed attention, and wages receive less. Assuming away all definitional problems, the difference may lie in the preemption doctrine. What is unexplained, however, is the common pass-through of nonunion wages which may be accompany-

\[208 \text{See text accompanying notes 139-43 supra.}\]
ing a claim for union wage expense. They would seem to require the same productivity, workforce, and other analysis, but the decisions do not reflect this. While the number of decisions raises questions itself, what decisions are available suggest that fringe benefits receive closer scrutiny than wages. Scrutiny in those instances appears to go as far as the desirability or wisdom of the benefit. The reason for the distinction, to the extent it exists, is unclear. If an athletic association is not needed, perhaps an extra two cents per hour is also unnecessary.

Adoption of an automatic wage adjustment clause would seem to frustrate much of what the commissions presently do. As the many cases suggest, utilities and unions often want commission approval of increases before they make them effective, and the commissions generally refuse. The adjustment clause would appear to be one way around the major impact of the past refusals. The apparent desirability to the parties of this type of commission action suggests its importance in collective bargaining. If it is all that important, it would require scrutiny under the preemption doctrine. Where a wage adjustment clause is adopted, very careful monitoring and review devices would be needed. Once again, input by unions would appear even more essential. Commission legislative authority and choice seem to be more important than the preemption doctrine.

A major question requiring more explanation is the propriety of commission monitoring of the bargaining process for rate purposes. The commissions seem, at this point, to have the following general authority: to require a struck utility to render service in some circumstances, to impliedly authorize the use of strikebreakers, to order filling of specific jobs, to reject specific fringe benefits, to give approval to a yet undetermined wage increase by means of an automatic adjustment clause, and to reject for rate purposes a known wage increase. In the light of this range of authority, subject to exercise both prior to and after bargaining, it would seem that the exercise of monitoring authority for rate purposes during bargaining would be useful. One problem is, however, that the unions have no direct responsibilities to the commission, limiting the effects of a commission order.

Utility rates are rapidly increasing and, in many respects, the increases appear to be inevitable. The utilities and commissions are subject to forces not of their making. As control over these forces diminishes, it seems inevitable that increased attention will be given to service questions, as contrasted with expense questions. The cases reviewed here do not reveal doctrines for the review of services in the labor relations context as well developed as those used in review of labor expenses. The authority of the commission to order improved or increased service seems clear, but there
is no clear test to measure the level of service, nor any consistent effort made to conduct the review. Service is in a large measure a function of machines, labor, and organization. Labor relations is the subject here. Consistent and systematic review of service would have a great impact on labor relations. Expansion of the use of the productivity measure already suggests possibilities, including efficiency, which could include review of quality of the job done, training, the balance of workforce skills, and wage-benefits attraction of the necessary skilled employees. As the decisions indicate, commissions have already approached these topics, although not in a systematic and direct fashion. Commission decisions on the propriety of an overtime expense or on the specification of a position that must be filled are indicative of the types of issues which can only be expected to increase. An increased concern with service questions might put the currently broad review of wages on a par with the more intensive exercise of review of salaries and, in the few cases, fringe benefits.

CONCLUSION

The state public utility commissions operate within the limitations of their own statute and the preemption doctrine. Their statutory authority does not generally extend specifically to labor relations, and their actions must conform to the bounds of the federal national labor policy. In their exercise of authority over rates and service, the commissions may have a significant impact on labor relations. Wages, salaries, and fringe benefits are subject to varying degrees of review for the purpose of establishing rates. As operating expenses, they may be allowed or disallowed for rate purposes. Review of service may lead commission orders affecting personnel and working conditions. Enforcement of the statutory obligation to provide service, review of strike costs as operating expenses, and techniques such as automatic expense adjustment clauses may have a direct impact on collective bargaining negotiations and impasse. While the direct authority of the commission over labor relations is minimal, the exercise of its clearly granted authority may greatly affect the conduct of labor relations.