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action, and the Board acts "in good faith," the question of whether the penalty imposed is excessive is not one for judicial review.[17] In both cases the court followed what appears to be the policy of constitutional and statutory provisions guaranteeing to civil service employees on whom disciplinary action has been taken a fair hearing, but leaving the merits of the controversy to the Civil Service Board. The wisdom of this policy appears indisputable; any other would plunge the courts in every case into detailed consideration of the adequacy or inadequacy of the evidence and the appropriateness or excessiveness of the penalty imposed.

PUBLIC UTILITIES

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In *Southern Bell Telephone & Telegraph Company v. Louisiana Public Service Commission*[1] the court upheld a rate order which represented for this Commission a first full application[2] of the principles of rate making expounded by Justice Brandeis in his concurring opinion in *Missouri* ex rel. *Southwestern Bell Telephone Company*[3] and subsequently approved in application by the United States Supreme Court in *Federal Power Commission v. Hope Natural Gas Company*.[4] Excerpts from the *Missouri* concurring opinion state these principles succinctly:

> "I differ fundamentally from my brethren concerning the rule to be applied in determining whether a prescribed rate is confiscatory. . . . The so-called rule of *Smyth vs. Ames* is, in my opinion, legally and economically unsound. The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. . . . The investor agrees, by embarking capital in a

26 (La. 1957). The Municipal Fire & Police Civil Service Law was created by LA. CONST. art. XIV, § 15.1.

17. LA. CONST. art. XIV, § 31: "This hearing shall be confined to the determination of whether the decision made by the board was in good faith for cause under the provisions of this Section."

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1. 232 La. 446, 94 So.2d 431 (1957).

2. For an earlier abortive attempt to apply these principles, see Gulf States Utilities Co. v. Louisiana Public Service Commission, 222 La. 132, 62 So.2d 250 (1952) commented on in 14 LOUISIANA LAW REVIEW 104 (1953).

3. Missouri *ex rel.* Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, 262 U.S. 276 (1923).

4. 320 U.S. 591 (1944).

utility, that its charges to the public shall be reasonable. His company is the substitute for the state in the performance of the public service; thus becoming a public servant. The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issues therefor; the allowance for risk incurred; and enough more to attract capital. The reasonable rate to be prescribed by a Commission may allow an efficiently managed utility much more. But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the cost of the service as thus defined.[5]

"The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. Such measures offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as a matter of opinion. It would not fluctuate with the market price of labor, or materials, or money . . . it would, when once made in respect to any utility, be fixed, for all time, subject only to increase to represent additions to plant, after allowances for the depreciation included in the annual operating charges.[6]

"It was . . . not feasible that [at the time of *Smyth vs. Ames*], to adopt, as the rate base, the amount properly invested, or as the rate of fair return, the amount of the capital charge. Now the situation is fundamentally different. These amounts are now readily ascertainable in respect to a large, and rapidly increasing, proportion of the utilities. The change in this respect is due to the enlargement, meanwhile, of the powers and functions of state Utility Commissions. The issue of securities is now, and for many years has been, under the control of Commissions, in the leading states. Hence the amount of capital raised (since the conferring

5. 262 U.S. at 290, 291.
6. *Id.* at 306, 307.

of these powers) and its cost are definitely known, through current supervision and prescribed accounts supplemented by inspection of the Commission's engineering force. Like knowledge concerning the investment of that part of the capital raised and expended before these broad functions were exercised by the Utility Commissions has been secured, in many cases, through investigations undertaken later, in connection with the issue of new securities or the regulation of rates. The amount and disposition of current earnings of all the companies are also known. It is therefore, feasible now to adopt as the measure of a compensatory rate the annual cost, or charge, of the capital prudently invested in the utility. And, hence, it should be done."[7]

The court did not, in its decision, adopt any theory of rate-making as its own; rather it simply upheld the Commission's order on the ground "that there are no exceptional circumstances in this case authorizing a finding that the action of the . . . Commission is arbitrary, capricious, and confiscatory."[8] The holding is significant, however, in light of the vigor with which it was argued that the rate of return must be on a *property* rate base and that Justice Brandeis actually contemplated such a property base, although at original cost rather than fair market value. The Commission used property figures, not as a rate base, but as a basis for allocating the appropriate portion of the total company capitalization to Louisiana intrastate operations.[9]

The court has thus upheld the Commission in the results of a rate-making method which proceeded on the principle that the cost of servicing the apportioned capital obligations of the utility (brought into adjustment as to percentage of debt and tax burdens with comparable independent utilities) was a proper return.[10] The Commission allowed, as such cost of capital, contract and estimated interest on debt securities adjusted to 45 percent of capital structure and 6.6 percent on the adjusted common stock capital, a rate of earnings found to be commensurate with investor expectations in comparable utility investments.[11]

7. *Id.* at 309, 310.
8. 232 La. 446, 463, 94 So.2d 431, 438 (1957).
9. Louisiana Public Service Commission v. Southern Bell Telephone & Telegraph Company, 14 P.U.R.3d 146, 155, 174 (1956).
10. *Id.* at 174.
11. *Ibid.*