

## PUBLIC UTILITIES: THE FUEL ADJUSTMENT CLAUSE IN MISSOURI

In light of rapidly rising fuel costs, public utilities<sup>1</sup> have sought financial relief from federal and state regulatory commissions in order to reconcile the demands of a fluctuating economy with fixed-rate schedules.<sup>2</sup> Commission approval of fuel adjustment clauses<sup>3</sup> in re-

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1. Public utilities are industries that possess certain economic characteristics indicating a need for administrative, as opposed to market, regulation. C. PHILLIPS, *THE ECONOMICS OF REGULATION* 78 (rev. ed. 1969). A business connected with transportation or distribution, operating under an obligation to afford its facilities to the public generally, upon demand, or enjoying freedom from competition due to monopoly status or state license exhibits some of the needed characteristics. *Id.*

The term "public utility," when used in this chapter, includes every common carrier, pipeline corporation, gas corporation, electric corporation, telephone corporation, telegraph corporation, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter.

MO. REV. STAT. § 386.020(25) (1978).

The term "electrical corporation," when used in this chapter, includes every corporation, company association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court whatsoever, . . . controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad or street railroad purposes or for its own use or the use of its tenants and not for sale to others.

*Id.* § 386.020(13) (1978).

2. See Trigg, *Escalator Clauses in Public Utility Rate Schedules*, 106 U. PA. L. REV. 964, 964 (1958). Following the oil embargo in 1973 the cost of fuel rose 86.8% in a year, leading to widespread use of fuel adjustment clauses. See HOUSE SUBCOMM. ON OVERSIGHT & INVESTIGATIONS, COMM. ON INTERSTATE & FOREIGN COM., ELECTRIC UTILITY AUTOMATIC FUEL ADJUSTMENT CLAUSES, 94th Cong., 1st Sess. 2 (1975) [hereinafter cited as OVERSIGHT REPORT]. Natural gas prices rose 41%, coal prices 42%, and oil prices 140%. *Id.* at 33.

3. "A fuel adjustment clause is a clause, filed as a part of an electric utility's tariff, which allows it to automatically increase or decrease the charge for power per kilowatt-hour to consumers by the amount of an increase or decrease in the utility's fuel costs, usually on a monthly basis." State *ex rel.* Utility Consumers Council v. Public Serv. Comm'n, 585 S.W.2d 41, 44 (Mo. 1979).

The fuel clause works as follows: When the price of fuel per unit increases or decreases a certain amount above or below the base price, the company passes the

sponse to recent inflation has prompted considerable consumer outrage and increasing litigation<sup>4</sup> on the scope of agency power and discretion. In *State ex rel. Utility Consumers Council v. Public Service Commission*,<sup>5</sup> the Missouri Supreme Court held that authorization of a fuel adjustment clause by the state's public service commission exceeded its statutory authority.

The Missouri Public Service Commission issued a report and order in 1976<sup>6</sup> modifying and extending a 1974<sup>7</sup> electric utility fuel adjust-

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cost on to the consumer. To illustrate: "The energy charge will be increased or decreased at the rate of 0.156 mill per kilowatt-hour for each 25 cent increase or decrease in the price of coal above or below the base price of \$5 per ton." C. PHILLIPS, *supra* note 1, at 352 n.6.

[A]n adjustment clause usually takes the form of a fixed rule, determined to be just and reasonable in the underlying rate proceeding, accompanied, at least by implication, with the finding that it does not become less so by reason of its provision for subsequent changes in rates upward or downward, based on the occurrence of future events. In a word, adjustment clauses are not *per se* illegal. Carver, *Developments in Regulation: Adjustment Clauses*, 53 DEN. L.J. 663, 669, 669-70 nn.34-38 (1976).

4. See *Electric Utility Problems: Fuel Adjustment Clauses, Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 4 (1975) [hereinafter cited as *Oversight Hearings*] (testimony of Ralph H. Wickberg).

One commentator credits the furor over fuel adjustment clauses to the fact they pass on fuel cost increases exactly as intended. The fuel cost increase is a conspicuous addition to the consumer's bill. See Schiffel, *Electric Utility Regulation: An Overview of Fuel Adjustment Clauses*, PUB. UTIL. FORT., June 19, 1975, at 27. But see *The Fuel Adjustment Caper*, 39 CONSUMER REPORTS 836 (1974) for reports of abuse of fuel clauses by utilities.

Utility spokesmen credit fuel adjustment clauses with preserving the industry's financial integrity and preventing bankruptcy during 1973-1974. See *Oversight Hearings*, *supra* at 5 (testimony of Ralph H. Wickberg); *id.* at 718 (statement of Steven C. Griffith).

5. 585 S.W.2d 41 (Mo. 1979), *rehearing denied*, Sept. 11, 1979.

6. *In re Investigation of the Fuel Adjustment Method for the Recovery of Fuel Costs by Elec. Util. Operating in the State of Mo.*, Report and Order, Case No. 17,730 (Mo. Pub. Serv. Comm'n April 14, 1976) [hereinafter cited as 1976 Report & Order]. The commission prescribed a model fuel adjustment clause for all the electrical utilities in Missouri. The order set out fuel costs to use in implementing the formula, the Federal Power Commission expense account to employ, and which energy sales to enter into it. The order also provided for a surcharge to collect revenues still due under a 1974 order; for the inclusion of the incremental increases or decreases since 1974 (a roll-in of fuel costs) in the base rate; for an auditing of the roll-in procedures and subsequent fuel adjustment charges; and for the filing with the commission of all new coal contracts and any renewed or renegotiated coal contracts. The commission based the 1974 clause on the increase or decrease of cost per million BTU's of fossil fuel burned, weighted in relation to kilowatt hours generated or purchased. It in-

ment clause for residential and commercial users.<sup>8</sup> The commission found that delay caused by regulatory lag<sup>9</sup> forced utilities to absorb higher fuel costs without receiving compensating revenues, creating

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cluded a requirement of 30 days' notice to the commission before adjustments. *In re Investigation of the Fuel Adjustment Method for the Recovery of Fuel Costs by Elec. Util. Operating in the State of Mo.*, Report and Order, Case No. 17,730 (Mo. Pub. Serv. Comm'n Feb. 1, 1974) [hereinafter cited as 1974 Report & Order]. The 1976 clause was more specific. The fuel adjustment would be determined through a model formula. The fuel adjustment factor for a month would be determined from the total cost of fuel used in the billing period two months earlier. The commission excluded fuel costs for oil and hydro-electric power purchased from other companies and fuel costs for power sold to other in-state and out-of-state firms. Other fuel costs for purchased power were included. The company would then divide these costs by the total estimated sales in the billing period. A correction factor would compensate consumers for payments made when the estimated sales differed from actual sales. 1976 Report & Order at Appendices A & B.

7. See 1974 Report & Order, *supra* note 6. The order proposes a model fuel adjustment clause and requires a review of its operation after two years.

8. Fuel adjustment clauses have been part of Missouri utilities' rate schedules for industrial and large commercial users since as early as 1918. Union Elec. Light and Power Co., 1918E PUB. U. REP. (PUR) 490 (Mo.). That matter was not before the court in *State ex rel. Utility Consumers Council v. Public Serv. Comm'n*, so there is still a limited fuel adjustment clause in Missouri. 585 S.W.2d 41, 44 (Mo. 1979).

During the hearings, a Public Service Commission official stated that residential users were originally excluded from the fuel adjustment clause because the margin between the cost of producing electricity and the price paid was smaller for industrial users than for residential users. The clause serves to preserve that margin above cost to industry users. *Hearings: In re Investigation of the Fuel Adjustment Method for the Recovery of Fuel Costs by Elec. Util. Operating in the State of Mo.*, Case No. 17,730 at 331 (1973) (prepared testimony of Gordon L. Persinger).

Escalation of industrial rates without escalation of residential rates is not discriminatory; the industrial user pays only the increased cost of fuel burned in generating electricity used by him and not the increased cost attributable to residential use. Utility companies formerly absorbed residential cost increases rather than incurring the expense of billing small surcharges. Increased efficiency in billing, however, led many utilities to include the fuel adjustment in residential rates. Trigg, *supra* note 2, at 976.

9. Rate cases now last an average of ten and a half months from start to finish. See OVERSIGHT REPORT, *supra* note 2, at 12. Such delays, quite common in regulated industries, create difficulty in maintaining just and reasonable rates. *Re Lynchburg Gas Co.*, 6 PUB. U. REP. 3d (PUR) 33 (Va. 1954). During periods of price increases, from the date earnings fall below the desired minimum rate of return until the date the commission enters its order allowing increased rates, the utility earns less than a fair and reasonable rate of return. This delay entitles the utility to legal relief but makes it impossible in some cases for law and equity to do complete justice. One purpose of the fuel clause in electric rate schedules is to keep the mere lapse of time from operating in favor of or against either the stockholders or the consumers. *Id.* at 35-36. See also note 79 and accompanying text *infra*.

an adverse effect on earnings.<sup>10</sup> Both the Utility Consumers Council of Missouri<sup>11</sup> and the Office of the Public Counsel,<sup>12</sup> separate intervenors at the investigatory hearing, moved for a rehearing<sup>13</sup> which the commission denied.<sup>14</sup> On appeal, the Missouri Supreme Court held that neither statutory nor case law authorized the commission to extend the fuel adjustment clause to residential and small commercial users.<sup>15</sup>

Public utilities have the right to collect a reasonable price for their services.<sup>16</sup> The United States Supreme Court, in *Federal Power Commission v. Hope Natural Gas Co.*,<sup>17</sup> held a proposed rate may be col-

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10. 1976 Report & Order, *supra* note 6, at 4.

11. Utility Consumers Council of Missouri, Inc. (UCCM) is a non-profit corporation organized under the laws of the State of Missouri. *State ex rel. Utility Consumers Council v. Public Serv. Comm'n*, 562 S.W.2d 688, 690 n.1 (Mo. App. 1978).

12. The Omnibus State Reorganization Act created the Office of the Public Counsel (OPC). 1973 Mo. Laws, 1st Ex. Sess. OPC is a segment of the Department of Consumer Affairs, Regulation and Licensing. It represents the public before the commission and has power to appeal commission decisions. MO. REV. STAT. § 393.710 (1978). *See also State ex rel. Missouri Power & Light Co. v. Riley*, 546 S.W.2d 792, 796 (Mo. App. 1977); *State ex rel. Utility Consumers Council v. Public Serv. Comm'n*, 562 S.W.2d 688, 691 n.4 (Mo. App. 1978).

13. The motion was made pursuant to MO. REV. STAT. § 386.500 (1978). UCCM moved for the rehearing, alleging the fuel adjustment clause denied consumers their due process rights, delegated the commission's regulatory duty, eliminated incentives for companies to reduce costs, was unfair and confusing to consumers, could not be policed adequately by the commission, did not exactly match the loss of revenues, and would lead to company abuse. Intervenor—Utility Consumers Council of Mo. Motion for Rehearing, *In re Investigation of the Fuel Adjustment Method*, Case No. 17,730 (Mo. Pub. Serv. Comm'n April 26, 1976).

OPC charged that the commission failed to follow procedural requirements, did not specifically instruct the utilities concerning how to implement the roll-in, engaged in an illegal exercise of retroactive rate-making, and violated due process requirements. Intervenor—Office of the Public Counsel Motion for Rehearing, *In re Investigation of the Fuel Adjustment Method*, Case No. 17,730 (Mo. Pub. Serv. Comm'n May 3, 1976).

14. Pursuant to MO. REV. STAT. § 386.510 (1978), separate appeals were taken to the Circuit Court of Cole County, which affirmed the commission. *State ex rel. Utility Consumers Council v. Public Serv. Comm'n*, No. 28594 (Cole County Cir. Ct. May 31, 1977); *Barvick v. Public Serv. Comm'n*, No. 28604 (Cole County Cir. Ct. May 31, 1977). Following appeal to the Kansas City Court of Appeals, the cases were consolidated and transferred to the Missouri Supreme Court before opinion pursuant to Mo. R. CIV. P. 83.06, MO. CONST. art. V, § 10.

15. *State ex rel. Utility Consumers Council v. Public Serv. Comm'n*, 585 S.W.2d 41, 51 (Mo. 1979).

16. *See C. PHILLIPS, supra* note 1, at 80.

17. 320 U.S. 591 (1944).

lected if its effect is not unjust or unreasonable.<sup>18</sup> Similarly, the purpose of the Missouri Public Service Commission Act<sup>19</sup> is to protect consumers against the natural monopoly of a public utility while permitting a just and reasonable return.<sup>20</sup> The Missouri Supreme Court, in *State ex rel. Chicago, Rock Island and Pacific Railroad Co. v. Public Service Commission*,<sup>21</sup> stated the legislature had delegated plenary powers to the state public service commission.<sup>22</sup> The legislative scheme provided that proper charges were those found by the commission to be just and reasonable.<sup>23</sup>

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18. Under the statutory authority of "just and reasonable" it is the result reached and not the method employed which is controlling. . . . It is not theory but the impact of the rate order that counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.

*Id.* at 602.

Rates must be just and reasonable both to investors and to customers. *Id.* at 605. They must also be sufficient for the company to operate successfully, maintain its financial integrity, attract capital, and compensate investors for risks assumed. *Id.* A commission may employ any formula or combination of formulas it wishes and is free to make pragmatic adjustments which may be called for by particular circumstances, so long as they do not produce arbitrary or unreasonable consequences. *Permian Basin Area Rate Cases*, 390 U.S. 747, 800 (1968). It must be free to devise "methods of regulation capable of equitably reconciling diverse and conflicting interests." *Id.* at 767.

19. The Public Service Commission Act governs the regulation of utilities in Missouri. Enacted in 1913, the Act is located in scattered sections of the Missouri Code. MO. REV. STAT. §§ 386.010-710, 387.010, .350, 389.640, .980, 390.020, .170, 391.070, 392.190, .360, 393.110-290 (1978 & Supp. 1980).

20. *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 316, 107 S.W.2d 41, 48 (1937).

21. 312 S.W.2d 791 (Mo. 1958).

22. The commission is "a fact-finding body, exclusively entrusted and charged by the legislature to deal with and determine the specialized problems arising out of the operation of public utilities. It has a staff of technical and professional experts to aid it in the accomplishment of its statutory powers." *Id.* at 796.

The *Rock Island* court found that the commission, a state agency, exercises the police power of the state and the Public Service Commission Act should be liberally construed to effectuate its remedial purposes. *Id.* See also *State ex rel. Kansas City Transit, Inc. v. Public Serv. Comm'n*, 406 S.W.2d 5 (Mo. 1966).

23. MO. REV. STAT. § 386.270 (1978). A company seeking a change in its rates bears the burden of proving, by clear and satisfying evidence, that its present rates are unreasonable. MO. REV. STAT. § 386.430 (1978). The Public Service Commission Act delegates discretion to the commission in determining the reasonableness of present or proposed rates. MO. REV. STAT. § 386.040. Judicial review of an order or decision of the commission must be based on the record before the commission. MO. REV. STAT. § 386.510 (1978). The courts' role in review is limited to determining the

There are two principal methods of determining just and reasonable rates<sup>24</sup> for utility companies: the "rate case" (or "complaint") method<sup>25</sup> and the "file and suspend" method.<sup>26</sup> The statutes require a hearing in the former, but are optional, dependent upon the commission's motion or the complaint of interested parties, in the latter procedure.<sup>27</sup> In addition to the principal methods, interim rate relief is typically available upon a showing of emergency.<sup>28</sup>

The fuel adjustment clause, although used since 1917,<sup>29</sup> was not

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reasonableness and lawfulness of the order, MO. REV. STAT. § 386.510 (1978); it cannot substitute its discretion for that of the commission. *State ex rel. Dyer v. Public Serv. Comm'n*, 341 S.W.2d 795, 802 (Mo. 1960). *Accord*, *State ex rel. Chicago, R. I. & Pac. R.R. Co. v. Public Serv. Comm'n*, 312 S.W.2d 791, 796 (Mo. 1958).

Orders of the commission must be upheld when supported by competent and substantial evidence in the record as a whole. *State ex rel. Kansas City Transit, Inc. v. Public Serv. Comm'n*, 406 S.W.2d 5, 11 (Mo. 1966); *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 114, 220 S.W.2d 61, 64 (Mo. 1949) (defining competent and substantial evidence as "evidence which, if true, would have a probative force upon the issues.").

24. For a brief description of the rate-making process, see *City of Evansville v. Southern Ind. Gas and Elec. Co.*, 167 Ind. App. 472, 339 N.E.2d 562 (1975); Comment, *The Fuel Adjustment Clause and Its Role in the Regulatory Process*, 47 MISS. L.J. 302, 304-05 (1976). See generally C. PHILLIPS, *supra* note 1, at chs. 8-11; A. PRIEST, *PRINCIPLES OF PUBLIC UTILITY REGULATION* chs. 3-5, 8, 11 (1969).

25. MO. REV. STAT. §§ 386.390, 393.260, 393.270 (1978).

26. MO. REV. STAT. § 393.140(11) (1978). For a discussion of the two methods, see *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 23-27 (Mo. 1975), *cert. denied*, 429 U.S. 822 (1976); *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561 (Mo. App. 1976).

27. *State ex rel. Utility Consumers Council v. Public Serv. Comm'n*, 585 S.W.2d at 48.

28. *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561, 568 (Mo. App. 1976). See also *Re Missouri Pub. Serv. Co.*, 28 PUB. U. REP. 4th (PUR) 109 (Mo. 1978), where interim relief was granted and "emergency" defined as a situation in which there exists a need for additional funds immediately, where the need cannot be postponed and no other alternatives exist to meet the need but rate relief. *Id.* at 111-14.

29. For a general history and overview of fuel adjustment clauses, see Foy, *Cost Adjustment in Utility Rate Schedules*, 13 VAND. L. REV. 663 (1960); Trigg, *Escalator Clauses in Public Utility Rate Schedules*, 106 U. PA. L. REV. 964 (1958); Comment, *The Fuel Adjustment Clause and Its Role in the Regulatory Process*, 47 MISS. L.J. 302 (1976). For discussion on regulation during inflationary periods, see ADAPTING REGULATION TO SHORTAGES, CURTAILMENT AND INFLATION (J. O'Donnell ed. 1977).

Currently most states use some form of fuel clauses. See OVERSIGHT REPORT, *supra* note 2, at 1. See also D. JONES & R. PROFOZICH, *ELECTRICAL AND GAS UTILITY RATE AND FUEL ADJUSTMENT CLAUSE INCREASES VIII* (1977), prepared for SUBCOMM. ON INTERGOVERNMENTAL RELATIONS AND SUBCOMM. ON ENERGY, NUCLEAR PROLIFERATION AND FEDERAL SERVICES OF THE SENATE COMM. ON GOV-

extensively litigated until recently. The seminal case, *City of Norfolk v. Virginia Electric and Power Co.*,<sup>30</sup> held that rates are not merely dollars-and-cents lists<sup>31</sup> and that adjustment clauses fix them as firmly as if they were stated in monetary terms.<sup>32</sup> In 1961,<sup>33</sup> the Mis-

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ERNMENTAL AFFAIRS, 95th Cong. 2d Sess. (revised Dec. 21, 1978) [hereinafter cited as INTERGOVERNMENTAL PRINT].

The Federal Power Commission has allowed fuel adjustment clauses since 1975. Comment, *The Fuel Adjustment Clause and Its Role in the Regulatory Process*, 47 Miss. L.J. 302, 302 nn. 4 & 5 (1976). See generally *Re Pennsylvania Power and Light Co.*, 27 PUB. U. REP. 4th (PUR) 609 (FERC 1979) (application of Federal Energy Regulatory Commission (formerly Federal Power Commission) fuel clause); Public Utility Regulatory Policies Act of 1978, § 208, 16 U.S.C. § 824d(f) (Supp. III 1979) (requiring Federal Energy Regulatory Commission to ensure fuel clauses provide incentive for economical purchase and use of fuel); 18 C.F.R. § 35.14 (1979) (Federal Energy Regulatory Commission regulations for fuel adjustment clauses). See also Public Utility Regulatory Policies Act of 1978, §§ 113(b)(2), 115(e), 16 U.S.C. §§ 2623(b)(2), 2625(e) (Supp. III 1979) (requiring state regulatory commissions to consider whether fuel adjustment clauses provide incentive for economical purchase and use of fuels when they approve such clauses).

Between 1970 and 1974, the number of utilities applying fuel adjustment clauses to residential customers rose from 33% to 72%. During that same period, the number of companies applying the clause to industrial customers increased from 72% to 83%. Sarikas, *What is New in Adjustment Clauses*, PUB. UTIL. FORT., June 19, 1975 at 33.

30. 197 Va. 505, 90 S.E.2d 140 (1955). Dealing with statutes substantially similar to those of Missouri, the Virginia court placed the clause among "other schedules, rate, rules or regulations that in any manner affect rates charged, . . ." *Id.* at 516, 90 S.E.2d at 147. The court relied extensively upon the reasoning of Commissioner Catterall one year earlier in the *Lynchburg Gas Co.* case, 6 PUB. U. REP. 3d (PUR) 33 (Va. 1954).

31. "Rate schedules consist not merely of lists of rates in dollars and cents, but . . . include provisions that will in various ways affect the rates charged at the time of the filing or to be charged thereafter." 197 Va. at 516, 90 S.E.2d at 148.

32. *Id.* The court went on to state that an adjustment clause:

is simply an addition of a mathematical formula to the filed schedules of the company under which the rates and charges fluctuate as the wholesale cost of gas to the company fluctuates. Hence, the resulting rates . . . are as firmly fixed under the escalation clause as if they were stated in terms of money.

*Id.* Three years later the Illinois Supreme Court relied heavily on the Virginia opinion in approving an adjustment clause. *City of Chicago v. Illinois Com. Comm'n*, 13 Ill. 2d 607, 150 N.E.2d 776 (1958).

The reasoning set forth in those two state supreme court cases in the 1950's has now been adopted by courts of other states that have passed upon fuel adjustment clauses. See *City of El Dorado v. Public Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Maestas v. Public Serv. Comm'n*, 85 N.M. 571, 514 P.2d 847 (1973); *City of San Antonio v. San Antonio Indep. School Dist.*, 535 S.W.2d 671 (Tex. Civ. App. 1976).

33. Despite gradually rising fuel prices in the 1950's and 1960's, technological advances, increased demand, and economies of scale lowered the price per kilowatt hour of electricity, leading many utilities to file for rate decreases during that period.

Mississippi Supreme Court, in *United Gas Corp. v. Mississippi Public Service Commission*,<sup>34</sup> found the state commission did have the authority to approve an adjustment clause. Since the Federal Power Commission regulated the gas supplier, the Mississippi court found the utility had no control over the fuel price; therefore, the clause would work to equitably protect both consumers and the company's legitimate operating expenses.<sup>35</sup>

The North Carolina Supreme Court, following the *City of Norfolk* analysis, affirmed its commission's authorization of a fuel clause in *State ex rel. Utility Commission v. Edmisten*.<sup>36</sup> The court said the clause recognized the reality of the market place<sup>37</sup> and prevented continual rate cases on the sole issue of fuel increases.<sup>38</sup> Wisconsin's Supreme Court approved the principle of a fuel adjustment clause in *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*.<sup>39</sup> The court stated, however, that limiting the scope of the clause would reduce any threat to the regulatory hearing process.<sup>40</sup>

Only ten states totally or partially reject the use of fuel adjustment clauses.<sup>41</sup> Arizona, a state which specifically authorized the clause,<sup>42</sup>

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Schiffel, *Electric Utility Regulation: An Overview of Fuel Adjustment Clauses*, PUB. UTIL. FORT., June 19, 1975, at 24.

34. 240 Miss. 405, 127 So. 2d 404 (1961).

35. 240 Miss. at 440-41, 127 So. 2d at 421-22. Federal regulation also played a part in the decision in *City of Akron v. Public Util. Comm'n*, 5 Ohio St. 2d 237, 215 N.E.2d 366 (1966), and *Public Serv. Co. v. State*, 113 N.H. 497, 311 A.2d 513 (1973).

36. 291 N.C. 327, 230 S.E.2d 651 (1976). The court rejected an argument that the clause considered one expense item to the exclusion of others because the commission approved the clause in the course of a regular rate case. *Id.* at 340, 230 S.E.2d at 659. The court dismissed an argument of abdication of delegated powers because of the statute authorizing the commission to suspend any rate at any time, the continuing surveillance programs and the two-year limit on the clause. *Id.* at 344, 230 S.E.2d at 662. The Missouri clause contained similar safeguards. See notes 74-75 *infra*.

37. *Id.* at 346-47, 230 S.E.2d at 663. *Accord*, *Montana Consumer Council v. Public Serv. Comm'n*, 168 Mont. 180, 189, 541 P.2d 770, 775 (1975).

38. 291 N.C. at 347-48, 230 S.E.2d at 663. See *Consumer Org. for Fair Energy Equality, Inc. v. Department of Pub. Util.*, 368 Mass. 599, 606, 335 N.E.2d 341, 345 (1975).

39. 81 Wis. 2d 344, 260 N.W.2d 712 (1978).

40. *Id.* at 351-52, 260 N.W.2d at 716.

41. INTERGOVERNMENTAL PRINT, *supra* note 29, at IX. Idaho, Oregon, Nevada, Washington, and Utah are listed as having neither gas nor electric fuel clauses. Colorado and Kansas only have electric utility fuel clauses. *Id.* Montana is listed as having neither, yet the Montana Supreme Court upheld a gas adjustment clause as recently as 1975. See *Montana Consumer Council v. Public Serv. Comm'n*, 168 Mont. 180, 541 P.2d 770 (1975). West Virginia's legislature banned the clause in 1975

repealed the statute to provide an incentive to utilities to seek lower fuel costs.<sup>43</sup> Some Pacific Northwestern states<sup>44</sup> have neither gas nor

and Arizona's legislature repealed the statute relied upon as authority for the clause in mid-August 1978. INTERGOVERNMENTAL PRINT, *supra* note 29, at IX. While the validity of fuel clauses was being litigated in North Carolina, *see State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 327, 230 S.E.2d 651 (1976), the North Carolina legislature passed a statute terminating the use of any clause as of September 1, 1975. *See N.C. GEN. STAT. § 62-134(e)* (Supp. 1977).

Arguments against fuel adjustment clauses can be broken into three major categories: economic, legal and practical. The economic arguments include a universal desire to pay as little as possible for any service; fluctuating prices tend to confuse consumers and the utilities lose incentive to curb energy expenses. The legal argument centers around the regulatory process. Critics charge that fuel adjustment clauses prevent adequate supervision of utility rates or the rate structure (abdication of regulatory duty), permit rate increases without consideration of all relevant rate-making factors, and shift the burden of proof of reasonableness from the utility to the commission. The practical argument urges that utility rates should be stable, published and definite so the typical consumer can understand and react to them. Trigg, *supra* note 2, at 968-72. The author refutes each of these arguments as presented. *Id.*

A number of states have taken pains to ensure against due process problems. *See Re Allied Power and Light Co.*, 132 Vt. 365, 321 A.2d 7 (1974) (commission order as filed violated statute, but capable of remedy by filing rate changes under statute calling for public notice); *Re Public Serv. Co.*, 13 PUB. U. REP. 4th (PUR) 1 (Colo. 1975) (order monthly review of following month's fuel cost adjustment); *Re Sierra Pac. Power Co.*, 2 PUB. U. REP. 4th (PUR) 46 (Nev. 1973) (could increase rates through clause only once every six months and only after hearing).

Missouri has held proper changes in electric rates are not subject to a due process attack. *State ex rel. Jackson County v. Public Serv. Comm'n*, 332 S.W.2d 20 (Mo. 1976). *Accord*, *Consumer's Org. for Fair Energy Equality, Inc. v. Department of Pub. Util.*, 368 Mass. 599, 335 N.E.2d 341 (1975) (fluctuations under the fuel adjustment clause are not changes in the rate schedule which would require a public hearing); *Village of Saugerties v. Central Hudson Gas and Elec. Corp.*, Opinion 75-5, Case No. 26756, N.Y. Pub. Serv. Comm'n (March 21, 1975) (change due to the fuel adjustment clause was not a change in the rates of public utilities subject to hearing requirements).

*See generally* Note, *Due Process Restraints on the Use of Automatic Adjustment Clauses in Electric Rate Schedules*, 11 ARIZ. L. REV. 453 (1976); Note, *Due Process and the Automatic Fuel Adjustment Clause*, 52 IND. L.J. 637 (1977).

Arguments against the clause before the Missouri Public Service Commission fell into the categories Trigg outlined. 1974 Report & Order, *supra* note 6, at 5-6. The report also summarized the arguments in favor of the clause. 1976 Report & Order, *supra* note 6, at 4-5. Arguments specific to Missouri, brought out during the 1976 hearing, included questions as to whether or not fuel costs had stabilized, whether the utilities could foresee and prepare for environmental regulations which would necessitate the use of more expensive fuel and whether the clause would actually reduce the frequency of rate cases. *Id.* at 5-6.

42. Trigg, *supra* note 2, at 968 n.12.

43. *See* INTERGOVERNMENTAL PRINT, *supra* note 29, at X.

44. Idaho, Montana, Oregon and Washington. *Id.* at IX.

electric fuel clauses, as the prevalence of hydroelectric generation greatly reduces the need for fuel.<sup>45</sup>

The Missouri Supreme Court in *State ex rel. Hotel Continental v. Burton*<sup>46</sup> held the commission could authorize a utility's use of a tax adjustment clause<sup>47</sup> to collect locally imposed taxes.<sup>48</sup> The court characterized the clause as a rule or regulation relating to a rate.<sup>49</sup> One item of operating expense, the gross receipts tax, was different in kind<sup>50</sup> and could be treated separately from other expense items.<sup>51</sup> The tax, levied by the city, was not an item within the utility's control, yet payment was required.<sup>52</sup> As the tax was based on the charge to the customer, it was directly assignable to consumers in proportion to their use.<sup>53</sup> Economy of operation and management decisions could not affect tax revenues,<sup>54</sup> nor would tax increases or decreases affect the rate of return.<sup>55</sup>

In *State ex rel. Utility Consumers Council v. Public Service Commission*,<sup>56</sup> the Missouri Supreme Court became the first to reject a fuel adjustment clause on the ground that the public service commission

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45. See Trigg, *supra* note 2, at 968.

46. 334 S.W.2d 75 (Mo. 1960).

47. The company wished to add, as a separate item on each customer's bill, a surcharge "equal to the proportionate part" of a tax based on the gross receipts, net receipts or revenues from service to the customers. *Id.* at 77.

48. All the utility's steam customers were within a seven-block-square area of Kansas City. All customers were thus within the taxing jurisdiction. *Id.* at 80.

49. Missouri law specifically empowered the commission to hold a hearing and determine the propriety of any "new rule, regulation or practice relating to any rate." MO. REV. STAT. § 393.150 (1949). The tax clause was held to be within the provisions of the statute. 334 S.W.2d at 80.

50. 334 S.W.2d at 81-82.

51. The express power to determine just and reasonable rates that protect the public and a utility's rate of return includes the power to "authorize a utility as an integral part of its rate schedule to deal with an item of operating expense in a different manner than other such items as a part of a pattern or design to accomplish a just and reasonable total charge to the public . . ." *Id.* at 79.

52. *Id.* at 82-83. The *Hotel Continental* court dismissed the argument that an automatic adjustment charge was an abdication of the commission's regulatory duties by saying "[t]he city by changing the gross receipts tax no more exercises rate making power than does the supplier of coal who raises the price per ton." *Id.* at 83.

53. *Id.* at 80.

54. *Id.* at 82.

55. *Id.*

56. 585 S.W.2d 41 (Mo. 1979).

did not have the power to add such a clause to rate schedules.<sup>57</sup> The court was satisfied that the factual differences between the tax clause in *Hotel Continental* and the fuel clause at issue in *Utility Consumers Council* sufficiently distinguished the cases. The court found that since the fuel adjustment charge was based on estimated sales it was not directly assignable.<sup>58</sup> The cost of fuel burned depended on management choices as to the fuel and generation facility used and on management's negotiating skills.<sup>59</sup> Savings in other areas of operation coupled with fuel cost recovery affected the rate of return earned.<sup>60</sup> The fuel component, though much larger, was not different in kind from most other operating expenses; the court thus implied that if automatic adjustment were applied to fuel, it could extend equally to labor, supplies and construction.<sup>61</sup> The court therefore refused to extend the *Hotel Continental* rationale to fuel adjustment clauses.<sup>62</sup>

The commission's reliance on a statute authorizing "sliding scales,"<sup>63</sup> while on its face appropriate, proved fatal. Previous construction of the statute<sup>64</sup> defined a sliding scale as a tying of prear-

57. The court in *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 327, 230 S.E.2d 651 (1976), found no cases disapproving the use of the clause in principle. The states that have recently disapproved the clause have done so either through the legislature or commission. See notes 41-45 *supra*.

58. *State ex rel. Utility Consumers Council v. Public Serv. Comm'n*, 585 S.W.2d at 53.

59. *Id.*

60. *Id.* at 54.

61. *Id.*

62. *Id.*

63. Nothing in this section shall be taken to prohibit [an] . . . electrical corporation . . . from establishing a sliding scale for a fixed period for the automatic adjustment of charges for . . . electricity . . . rendered or to be rendered and the dividends to be paid stockholders of such . . . electrical corporation . . . ; provided, that the sliding scale shall first have been filed with and approved by the commission; but nothing in this subdivision shall operate to prevent the commission after the expiration of such fixed period from fixing proper, just and reasonable rates and charges to be made for service authorized in this chapter.

MO. REV. STAT. § 393.130(4) (1978).

The commission buttressed its argument by reliance on the general powers granted in MO. REV. STAT. § 393.130(1) (1978) which states "[a]ll charges made or demanded by any . . . electrical corporation . . . for . . . electricity . . . rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission."

64. *Bertha A. Mining Co. v. Empire Dist. Elec. Co.*, 210 Mo. App. 62, 235 S.W. 508 (1921).

ranged inverse changes in stockholder dividends to a change in rates charged.<sup>65</sup> By permitting<sup>66</sup> and reenacting<sup>67</sup> the one exception to a fixed rate schedule, the legislature was presumed to have intended no other variable rates. Nor did the Missouri statutes, taken as a whole, convince the court that the commission could authorize a fuel adjustment clause.<sup>68</sup> Despite the plenary nature of the powers granted the commission by the legislature, the court found the commission had only explicit or clearly implied discretion.<sup>69</sup>

At its broadest reading, *Utility Consumers Council* prohibits use of a fuel adjustment clause entirely, but the narrower interpretation, that the commission erred in approving this fuel adjustment clause, is preferable.<sup>70</sup> The rate case is the preferred method of adjusting

65. The *Bertha* court quoted with approval from *Re Boston Consol. Gas Co.*, 1919A PUB. U. REP. (PUR) 699 (Mass.):

The essential characteristic of this method of regulating the price of gas is by a prearranged automatic and interdependent adjustment of the price to consumers and the rate of dividends to stockholders, whereby for every decrease or increase in the price the stockholders are permitted an increase or suffer a decrease in the rate of dividend.

210 Mo. App. at 629, 235 S.W. at 511. See also 2 O. POND, LAW OF PUBLIC UTILITIES § 573 (4th ed. 1932).

66. "By permitting an exception to the fixed rate system in the case of the sliding scale, the legislature by implication, intended no other exceptions exist." *State ex rel. Utility Consumers Council v. Public Serv. Comm'n*, 585 S.W.2d at 55, and cases cited therein.

67. "The legislature has reenacted the provision construed in *Bertha A. Mining Co.*, and we must presume it thus concurred in the interpretation of 'sliding scale' set out therein." *Id.*

68. The court said the legislature mandated a fixed rate schedule, with only one exception. *Id.* at 55-56. See note 66 *supra*. Calling the first clause a "rule relating to a rate" would exalt form over substance as the effect of the clause was increased bills. *Id.* at 57. The clause was "effectively" an abdication of the commission's powers, would negate the requirement that rates be printed, and would lead the court down a "slippery slope," with the risk of dismantling the carefully balanced fixed rate system established by the legislature. *Id.* at 24-26.

69. *State ex rel. City of West Plains v. Public Serv. Comm'n*, 310 S.W.2d 925, 928 (Mo. 1958). Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by statute. *State ex rel. Kansas City v. Public Serv. Comm'n*, 301 Mo. 179, 180, 257 S.W. 462, 462 (1923).

70. If a fuel adjustment clause were proposed in the future, it would have to meet certain requirements as to assignability, lack of control, separation from other expense items and retained commission authority to overcome the hurdles of both this case and *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75 (Mo. 1960).

The commission's jurisdiction and rule-making power expires November 30, 1981, MO. REV. STAT. § 386.250 (1978). If the legislature reenacts the act without comment,

rates<sup>71</sup> because all relevant factors are considered.<sup>72</sup> If a utility presented a clause as just another tariff during a rate case,<sup>73</sup> the argument that a hearing is required on all relevant factors would be met.

The commission included safeguards in the clause.<sup>74</sup> So long as

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a future petitioner will need to prove the legislature did not approve of this decision by its action. See note 67 *supra*. In a concurring opinion, one judge felt the decision was proper, but regrettable, and urged the legislature to address the problem. 585 S.W.2d at 60 (Rendlen, J., concurring).

71. See *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561 (Mo. App. 1976). The court emphasized the desirability of leaving the whole question of just and reasonable rates "to the permanent rate proceeding in which all the facts can be developed more deliberately with full opportunity for an auditing of financial figures and a mature consideration by the commission of all factors and all interests." *Id.* at 574. See also *Re Pacific Gas and Elec. Co.*, 23 PUB. U. REP. 4th (PUR) 362 (Cal. 1977) (while desirable to consider major rate change in context of a general rate increase proceeding, nothing precludes a commission from considering a rate design change in an offset matter where there was a serious need for such change).

72. See *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 81 (Mo. 1960) (tax clause would prevent rate cases "for the sole purpose" of reflecting each change); *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 327, 230 S.E.2d 651 (1976) (clause is only a rider to general rate schedule; all elements, including the rider, were considered); *Re Potomac Elec. Power Co.*, 85 PUB. U. REP. 3d (PUR) 119 (Md. 1970) (clause saves cost of rate cases); *Re Burlington Elec. Light Dep't*, 95 PUB. U. REP. 3d (PUR) 273 (Vt. 1972) (approved clause to avoid needless rounds of rate cases). *But see* Note, *Survey of Developments in North Carolina Law, 1977*, 56 N.C. L. REV. 843 (1978). After the North Carolina legislature specifically outlawed fuel adjustment clauses, during the *Edmisten* litigation, it was contemplated that companies would recover for later increases in fuel costs by seeking a general rate case in lieu of separate monthly additional fuel charges. *Id.* at 847.

73. The fuel clause in this case was an industry-wide rule applicable to all electric utilities resulting from an investigation hearing. 1976 Report and Order, *supra* note 6, at 30. Application during a rate case would permit the commission to specifically tailor a model clause to each company. See *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 327, 230 S.E.2d 651 (1976).

74. Ten guidelines for safeguards were presented in Schiffel, *Electric Utility Regulation: An Overview of Fuel Adjustment Clauses*, PUB. UTIL. FORT., June 19, 1975, at 29. He recommends that utility companies be required to document their search for fuel supplied and their negotiations with fuel suppliers and that they certify the quality of delivered fuel. Commissions should compare reported fuel costs to the Federal Power Commission area averages for the relevant area and with other utilities within the jurisdiction. Discrepancies greater than 10% above the average should be justified in writing. Commissions should also monitor utilities to ensure they use their most efficient generating equipment, build new low-cost-fuel generating facilities, and maintain their facilities so they operate at peak efficiency. Random spot audits should be conducted. The clause would only apply to the raw fuel cost and not to transport, storage or handling. The clause should include a two-month lag to keep

the statutes allow the commission to suspend rates at any time<sup>75</sup> and the commission monitors and reviews performance under the clause,<sup>76</sup> abdication is not an issue.<sup>77</sup> A more precise formula<sup>78</sup> would eliminate the problem of assigning costs directly to the consumer whose use required the cost and would stimulate utility efficiency through regulatory lag.<sup>79</sup> If fuel adjustment revenues are

some financial pressure on the utilities. Above all, each safeguard should be known to the public and the verifications open to public inspection.

The Missouri fuel clause included a provision for audits, refunds of 106% of any overcharges, review of fuel contracts and a two-month lag. *See* 1976 Report & Order, *supra* note 6, at 18 and appendices.

75. MO. REV. STAT. §§ 393.140(5), .150, .270(2) (1978).

76. *See* note 74 *supra*.

77. *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 327, 344, 230 S.E.2d 651, 662 (1976). *See also* *Southern Cal. Edison Co. v. Public Util. Comm'n*, 20 Cal.3d 813, 576 P.2d 945, 144 Cal. Rptr. 905 (1978) (commission decision to refund fuel clause overcollections was not retroactive rate-making as the clause was not intended to yield gain to the company); *Application of Kauai Elec. Div. of Citizen's Util. Co.*, 60 Haw. 166, 590 P.2d 524 (1978) (should rate schedule, including "energy" clause, become unjust, consumers have recourse to complain to the commission or consumer advocate); *Capital Improvement Bd. v. Public Serv. Comm'n*, 375 N.E.2d 616 (Ind. App. 1978) (fuel clause not delegation of commission's authority as all procedural requirements for approving a rate change were met).

78. *See, e.g.*, *North Carolina's fuel clause*, 291 N.C. at 331, 230 S.E.2d at 654. With the same lag period as Missouri's clause, North Carolina utilities used actual expenses and actual sales to determine the charge. Simplified, the fuel adjustment factor equaled:

$$\frac{\text{(actual cost of fuel burned two months ago—base price cost of same fuel)}}{\text{total kilowatt hour sales two months ago}}$$

which was then added to the base price for the current month's bill. 291 N.C. at 331-32, 230 S.E.2d at 654.

Greatly simplified, Missouri's fuel adjustment factor equaled:

$$\frac{\text{(actual cost of allowable fuels burned two months ago—base price cost of same fuel)}}{\text{estimated kilowatt hour sales for the billing month}}$$

added to the base price bill. 1976 Report & Order, *supra* note 6, at Appendix A.

Basing the adjustment on actual figures means the utility charged each customer a fuel factor only for his proportion of the costs of fuel burned, coming within the exactness test of *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d at 82. *See also* *Ohio Power Co. v. Public Util. Comm'n*, 54 Ohio St. 2d 342, 376 N.E.2d 1337 (1978) (fuel clause could pass through expenses for fuel costs fairly attributable to the service provided); *Re Kentucky Util. Co.*, 95 PUB. U. REP. 3d (PÜR) 372 (Ky. 1972) (clause allowed where fuel costs certain to occur, product involved would be entirely consumed and increased costs subject to exact determination).

79. *See generally* J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES (1961). Bonbright defined regulatory lag as "the quite usual time delay between the time when reported rates of profit are above or below standard and the time when an offsetting rate decrease or increase may be put into effect by commission order or

restricted to actual costs, then the authorized rate of return is not affected.<sup>80</sup> The commission has long had authority to grant interim test or experimental rates.<sup>81</sup> If the inflation rate were to accelerate again,<sup>82</sup> a fuel adjustment clause, with appropriate safeguards, might be reinstated as an interim rate.<sup>83</sup>

The court stated the legislature, and not the court, should strike an appropriate balance between public participation and simplicity in rate proceedings.<sup>84</sup> The court glossed over the fact that the legisla-

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otherwise." *Id.* at 53. The lag, a commission-fixed "fair rate of return," and no guarantee of the return, combine to promote efficiency in the utility. *Id.* See also Sarikas, *What is New in Adjustment Clauses*, PUB. UTIL. FORT. June 19, 1975 at 34, stating lag provides incentive because the utility must cover the expense, even if it is later reimbursed, and could lose money; *Oversight Hearings*, *supra* note 4, at 5 (testimony of Ralph H. Wickberg).

80. See *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75 (Mo. 1960). The exact increase in revenues equaled the exact tax liability so the utility's rate of return was not affected. *Id.* at 81-82. See also *Southern Cal. Edison Co. v. Public Util. Comm'n*, 20 Cal.3d 813, 576 P.2d 945, 144 Cal. Rptr. 905 (1978) (refund of fuel adjustment clause overcollections approved even though company did not exceed the authorized rate of return because extra profits contradicted the utilities' claims of the clause's neutral effects); *Public Util. Comm'n v. Metropolitan Edison Co.*, 96 PUB. U. REP. 3d (PUR) 113 (Pa. 1973).

Utilities are allowed to retain earnings because of company efficiency in one area of operation when the commission overestimates the base rates. *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 327, 341, 230 S.E.2d 651, 660 (1976), and cases cited therein. Rate-making is prospective and therefore estimated. Utilities are allowed to retain revenues even if they increase the rate of return, but are subject to rate reductions at the next rate case. *Id.* at 341-42, 230 S.E.2d at 660.

Because of its size in the operating budget and its unpredictable future, the fuel component is a proper item to "deregulate." Given the choice of estimating fuel costs for the future without certainty or using a fuel adjustment clause, the North Carolina commissioners opted for the latter, thus preventing another rate case on the same issue almost immediately, yet denying excess profit to the utility. *Id.* at 342, 230 S.E.2d at 661.

81. *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561, 567 n. 1 (Mo. App. 1976) and cases cited therein.

82. At least two commissions have approved fuel adjustment clauses with a "triggering" mechanism. See, e.g., *City of Evansville v. Southern Ind. Gas and Elec. Co.*, 167 Ind. App. 472, 339 N.E.2d 562 (1975) (formula requires demonstration of fixed minimum fluctuation for fixed minimum period prior to revision); *Re Florida Power Corp.*, 73 PUB. U. REP. 3d (PUR) 295 (Fla. 1968) (clause is inactive during normal conditions, but activated when there is a major and sustained change in fuel costs).

83. The two-year limit placed on both the 1974 and the 1976 orders followed by a review period suggests the commission may have been experimenting with the rate. See 1976 Report & Order, *supra* note 6, at 19; 1974 Report & Order, *supra* note 6, at 16.

84. 585 S.W.2d at 54.

ture created an agency to amass the requisite expertise to determine such questions.<sup>85</sup> The legislature vested the commission with the power and discretion to carry out its decisions. In light of there being no positive prohibition against the clause, no abdication of the commission's power to change its policy in the future,<sup>86</sup> and no infringement of citizen's rights<sup>87</sup> the decision to approve the clause should stand.

The era of cheap energy is behind us.<sup>88</sup> Whether the rate hike comes in a rate case, with all its attendant cost<sup>89</sup> and delay, or through a fuel adjustment clause, customers' bills will still reflect higher energy prices.<sup>90</sup> After the court struck the fuel adjustment clause, electric utilities immediately applied for increases.<sup>91</sup> Legislative action or interim rate proceedings may prove too slow to provide future relief<sup>92</sup> since utilities cannot absorb rapid increases in fuel costs without impairing their ability to provide adequate service at

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85. State *ex rel.* Chicago, R. I. and Pac. R.R. Co. v. Public Serv. Comm'n, 312 S.W.2d 791, 796 (Mo. 1958).

86. The statutes for commission review still exist and the commission prescribed a number of monitoring provisions in the 1976 Report & Order. See 1976 Report & Order, *supra* note 6, at 18. See also note 74 *supra*.

87. State *ex rel.* Jackson County v. Public Serv. Comm'n, 532 S.W.2d 20 (Mo. 1976).

88. Cockrell, *Coal Conversion by Electric Utilities: Reconciling Energy Independence and Environmental Protection*, 28 HAST. L.J. 1245, 1269 (1977). See also OVERSIGHT REPORT, *supra* note 2, at 33. "The fact that energy costs have risen and must be paid cannot be wished away." 120 CONG. REC. 40776 (1974) (insertion by Sen. Metcalf).

89. Expenses incurred by the utility company during a rate case are passed on to the consumer. Commissions allow the inclusion of the expense in the rate base and amortization of the expense over a period of time. See, e.g., *Re Gas Serv. Co.*, 6 PUB. U. REP. 4th (PUR) 99 (Mo. 1974) (gas company expenses ordered amortized over three years); *Re Capital City Water Co.*, 100 PUB. U. REP. 3d (PUR) 124 (Mo. 1973) (water company expenses, three years); *Re Valley Sewage Co.*, 89 PUB. U. REP. 3d (PUR) 321 (Mo. 1971) (four years); *Re Kansas City Power & Light Co.*, 84 PUB. U. REP. 3d (PUR) 222 (Mo. 1970) (five years).

90. Residential electrical purchases accounted for only two percent of personal consumption expenses in 1974. See OVERSIGHT REPORT, *supra* note 2, at 35.

91. Intervenor-Appellant's Suggestions in Opposition to Motion for Rehearing Filed by Intervenor-Respondent-Electric Utilities at 15, State *ex rel.* Utility Consumers Council v. Public Serv. Comm'n, 585 S.W.2d 41 (Mo. 1979), *rehearing denied*, Sept. 11, 1979. One application was filed before the motion for rehearing was fully briefed. *Id.*

92. See note 9 *supra*.

reasonable prices.<sup>93</sup> If energy prices were falling, consumers would clamor for immediate relief in the form of decreased rates. In times of rising prices, consumers face the prospect of drastically reduced service or no service at all<sup>94</sup> if utility companies are not provided adequate financial resources. The clause is fair to both consumers and utilities and furthers the intent of the regulatory statutes. The principle of fuel adjustment clauses should be affirmed.

*Douglass W. Dewing*

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93. State *ex rel.* Utilities Comm'n v. Edmisten, 291 N.C. 327, 333, 230 S.E.2d 651, 655 (1978).

94. See *Oversight Hearings*, *supra* note 4, at 347 (testimony of Sylvia Siegel). Ms. Siegel, while not advocating the policy, thought denial of electricity or brownouts on a "selected sequential basis for an hour or two each day" might be preferable to paying "the exorbitant charges" of the electric companies. *Id.*

