Mercer Law Review

Volume 27
Number 1 *Annual Survey of Georgia Law*

Article 26

12-1975

Public Utilities--Consumers Lack Standing to Obtain Review of Reasonableness of Approved Rates

G. Neil Skene Jr.

PUBLIC UTILITIES—CONSUMERS LACK STANDING TO OBTAIN REVIEW OF REASONABLENESS OF APPROVED RATES

The Georgia Supreme Court, in *Georgia Power Co. v. Allied Chemical Corp.*,[1] held that consumers lack standing to obtain judicial review of a utility rate increase approved by the Georgia Public Service Commission (PSC) when their attack is based on an allegation that the new rates are unreasonably high. Public utilities, of course, still have their traditional equitable challenge of rates that are unreasonably low, but the court said a statutory grant of review is necessary for consumers to challenge rates that are unreasonably high.

The consumers' suit arose in the Fulton County Superior Court after the PSC authorized Georgia Power to raise its electric rates to bring in new revenues of approximately $67.9 million.[2] The plaintiffs, primarily a group of industrial firms,[3] alleged that the increase was unjustly and unreasonably high, in violation of the state and federal constitutions and the statutes of Georgia. Objecting that its customers could not challenge the rates in court, Georgia Power moved to dismiss for failure to state a claim upon which relief could be granted. The trial court denied the motion but certified the issue of standing for immediate interlocutory appeal to the supreme court. Reversing the lower court, the supreme court expressly disapproved a 56-year-old precedent established in *City of Atlanta v. Atlanta Gas-Light Co.*,[4] in which a consumer challenge of gas rates was decided unfavorably on the merits.[5]

1. 233 Ga. 558, 212 S.E.2d 628 (1975).

2. PSC Doc. No. 2536-U (Dec. 13, 1973).

3. Allied Chemical Corp. was first in the alphabetical listing. "Allied Chemical" and "the industrial group" will be used interchangeably in this note to refer to the entire group of plaintiffs-appellees. Both the plaintiffs and defendants were ironically aligned. Intervening as plaintiffs with the industrial firms were an AFL-CIO organization, the Atlanta Labor Council, and an activist consumer group, the Georgia Power Project. None of these were mentioned by the supreme court in its opinion. The defendants were the PSC and Georgia Power Co.—the regulators and the regulated. The PSC, however, did not participate in this appeal.

4. 149 Ga. 405, 100 S.E. 439 (1919).

5. Standing has been linked by the U.S. Supreme Court with the presence of a "legally protected interest." Flast v. Cohen, 392 U.S. 83 (1968). The Georgia Supreme Court used essentially the same meaning, 233 Ga. at 560, 212 S.E.2d at 631, *quoting* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). However, the court stated its holding in terms of "justiciability" normally connected with the "political question" doctrine, related to but distinct from standing: "[W]e rule today that . . . this suit must fail because . . . [it] presents an issue which is non-justiciable because it has been entrusted solely to the legislature, a coordinate branch of government." 233 Ga. at 561-62, 212 S.E.2d at 631-32. Baker v. Carr, 369 U.S. 186, 217 (1962), which gives the best explanation of the "political question" doctrine in federal courts, links a "political question" with, among several possible situations, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 217.

Regulation of public utilities is an exercise of a state's police power.[6] Under common law, enforcement of "reasonable" rates charged by public businesses was left to the courts — a practice that continued in the United States into the 1800's.[7] Direct legislative acts establishing maximum rates and, later, delegation of the rate-making power to commissions gradually took the primary jurisdiction away from the courts.[8] Such statutory regulation was upheld by the United States Supreme Court in 1877 in *Munn v. Illinois*[9] in which the Court said a person whose enterprise was "clothed with a public interest" was subject to control "by the public for the common good, to the extent of the interest he has thus created."[10]

In 1890 the Supreme Court first faced the issue of a utility's right to challenge regulated rates specifically, rather than regulation generally, on the ground that its property was unconstitutionally confiscated. *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*[11] arose after the Minnesota utilities commission set maximum rates for railroad transportation. In this challenge of those rates by the railroad, the Minnesota Supreme Court said the statute establishing the commission had made commission decisions "final and conclusive" and therefore not subject to judicial review. Given that interpretation of the statute, the United States Supreme Court held it was unconstitutional. The Court said a company unable to charge a "reasonable" rate for the use of its property "is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself . . . ."[12] Having joined the majority in establishing utilities' right to seek judicial review of rate decisions, Justice Miller, in a concurring opinion, also expressed his belief that consumers have the same right. Rates, he said, could not be

> so unreasonable as to practically destroy the value of property of [utilities] . . . *nor so exorbitant and extravagant as to be in utter disregard of the rights of the public* for the use of such [utilities] . . . . In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation . . . .[13]

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6. M. FARRIS & R. SAMPSON, PUBLIC UTILITIES: REGULATION, MANAGEMENT, AND OWNERSHIP 6 (1973). Exercise of the police power by a legislative body is subject only to constitutional limitations. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954). So the "legally protected interest" allegedly infringed by an exercise of the police power must be a *constitutionally* protected interest. *See* 233 Ga. at 560-61, 212 S.E.2d at 631.

7. FARRIS & SAMPSON, *supra* note 6 at 60-61.

8. *Id.* at 61. The book has a general discussion of the development of utility regulation at pages 6-17 and 60-66.

9. 94 U.S. 113 (1877).

10. *Id.* at 126. The Court also said regulation normally would not conflict with the relatively new fourteenth amendment.

11. 134 U.S. 418 (1890).

12. *Id.* at 458.

13. *Id.* at 459-60 (Miller, J., concurring) (emphasis added).

The Court has never directly faced the point raised by Justice Miller, although it has demonstrated that it is not inclined to adopt his position.[14]

Not until 1894 did the Court involve itself in the intricacies of rate-making to determine whether a particular rate was confiscatory. Having rejected one case for lack of a "case or controversy,"[15] the Court, in *Reagan v. Farmers' Loan & Trust Co.*,[16] affirmed a Texas court's injunction against the utility commission's enforcing rates the commission had established. In doing so, the Supreme Court examined the financial records of the railroad and found that revenues under the new rates would not permit payment of interest on the railroad's debt — much less provide a return on the stockholders' investment. The Court said the allegation, supported by the evidence available in *Reagan*, that a tariff is "unjust and unreasonable," provides a proper ground for judicial review.[17]

Since the industrial group in *Allied Chemical* alleged that Georgia Power's new rates were "unjust and unreasonable," the use of the words in *Reagan* and *Minnesota* might indicate support for the industrial group's position. However, the Georgia Supreme Court flatly stated in *Southern Bell Telephone & Telegraph Co. v. Georgia Public Service Commission*:[18] "Rates that are unjustly or unreasonably low are confiscatory." Later, in *Georgia Power Co. v. Georgia Public Service Commission*,[19] the court said a PSC standard for determining a "zone of reasonableness" for rates would give the courts a "basis for reviewing a rate authorized by a commission in order to determine whether such rates was constitutionally confiscatory."[20] Thus a rate "unreasonably low" was held to violate a constitutional standard and give utilities standing in equity.

Although Georgia had established its own regulatory system by 1880,[21]

14. *See* Wright v. Cent. Kentucky Natural Gas Co., 297 U.S. 537 (1936), in which the Court held that consumers of natural gas had no vested rights in impounded funds that were a part of a temporary rate set by the regulatory commission and held pending a final determination of whether the rates were excessive. *See also* Munn v. Illinois, 94 U.S. 113, 134 (1877).

15. In 1892 the Court, in Chicago & G.T. Ry. v. Wellman, 143 U.S. 339 (1892), considered a utility challenge of rates alleged to be confiscatory but rejected the contention on the ground that the suit was too "friendly." The customer and the railway apparently had planned the actions that led to the suit and had stipulated so many facts that the Court said there was no real controversy.

16. 154 U.S. 362 (1894). *See also* Wadley S. Ry. v. Georgia, 235 U.S. 651 (1915), a prominent confiscation case from Georgia.

17. 154 U.S. at 412-13.

18. 203 Ga. 832, 872, 49 S.E.2d 38, 63 (1948). The same conclusion was drawn in Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575 (1942) and in St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936), *cited in* Georgia Power Co. v. Allied Chem. Corp., 233 Ga. 558, 559, 566-67, 212 S.E.2d 628, 630, 634 (1975).

19. 231 Ga. 339, 201 S.E.2d 423 (1973).

20. *Id.* at 342, 212 S.E.2d at 426. What undoubtedly is a clerical error confuses the matter somewhat, though. The opinion said the rate order "lies within that 'area of *un*reasonableness' which is barely above the point of being confiscation." *Id.* at 344, 201 S.E.2d at 427 (emphasis added). The court in *Allied Chemical*, however, cited the case to support the synonymous meanings. 233 Ga. at 566, 212 S.E.2d at 634.

21. The state constitution of 1877, art. IV, §2, ¶1, gave the General Assembly the power

the state supreme court did not overturn rates set by the PSC until *Southern Bell* in 1948. However, 29 years earlier in *City of Atlanta v. Atlanta Gas Light Co.*,[22] customers of Atlanta Gas Light had gone to court to seek a reversal of rates they alleged were too high. The issue of standing was never raised, and the court considered the case on its merits. Despite the decision that the consumers had failed to sustain their burden of proof in showing that the rates were invalid,[23] the fact that the merits were reached suggests that consumers were thought to have standing to bring a suit to enjoin rates alleged to be unreasonably high.

It seems unlikely that a review of rates alleged to be unreasonably high would require a trial more complicated than one required in a review of rates alleged to be unreasonably low. Nevertheless, the complexity of a consumer appeal worried the court as it pondered the *Allied Chemical* case in light of its recent decision in *Georgia Public Service Commission v. General Telephone Co. of the Southeast*,[24] which established judicial review of PSC orders as de novo proceedings.[25] Justice Hill, concurring in *Allied Chemical*, said he preferred to overrule *General Telephone* and thereby restrict the trial courts to evidence heard by the PSC.[26]

The majority relied on more than fears of complexity, however. It considered Georgia's Administrative Procedure Act (APA)[27] and the PSC statutes[28] and found that Georgia law does not grant judicial review to consumers.[29] The court also found support for its holding in basic theories of regulation by commission. Public Service Commissioners are elected by the people to prevent excessive rates for utility services;[30] to allow those who elected them to appeal their decisions to the courts would "imply a

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to regulate "railroad freights and passenger tariffs." In 1879 the General Assembly created the Railroad Commission. Ga. Laws, 1878-79, p. 125. In Georgia R.R. v. Smith, 70 Ga. 694 (1883), the court upheld the constitutionality of the commission and its rule-making powers, and in Georgia R.R. & Banking Co. v. Smith, 128 U.S. 174 (1888), the Supreme Court upheld both the system and an order lowering rates.

22. 149 Ga. 405, 100 S.E. 439 (1919).

23. *Id.* at 410, 100 S.E. at 442. *Also see* Louisville & N. R.R. v. Georgia Pub. Serv. Comm'n, 222 Ga. 332, 149 S.E.2d 681 (1966), in which the court reaffirmed the presumption that PSC orders are valid.

24. 227 Ga. 727, 182 S.E.2d 793 (1971). In this case the court allowed the utility, in a suit to enjoin rates, to use data on finances not presented for consideration by the PSC, even on a petition for reconsideration. The PSC argued, and Justice Felton in his dissent agreed, that the utility had failed to exhaust its administrative remedies. Using the new evidence, the superior court declared the rates confiscatory.

25. Essentially the same result had been reached in Georgia Power & Light Co. v. Georgia Pub. Serv. Comm'n, 8 F. Supp. 603 (N.D. Ga. 1934).

26. 233 Ga. at 568, 212 S.E.2d at 635 (Hill, J., concurring).

27. GA. CODE ANN. §3A-101 *et seq.* (Rev. 1975). The APA expressly excludes the PSC from the list of agencies subject to judicial review. GA. CODE ANN. §3A-102(a) (Rev. 1975).

28. GA. CODE ANN. §93-101 *et seq.* (Rev. 1972). "The power to determine what are just and reasonable rates and charges is vested *exclusively* in the Public Service Commission . . . ." GA. CODE ANN. §93-309 (Rev. 1972) (emphasis added).

29. 233 Ga. at 560, 212 S.E.2d at 631.

30. *See* GA. CODE ANN. §§93-201 *and* 93-310 (Rev. 1972).

lack of trust on the part of the Judiciary in the political process."[31] The only other possibility for the consumers, then, would be to challenge the constitutionality of the PSC order. The majority, however, said without much elaboration that the consumers could not have been deprived of property without due process because there was no vested property right of which they could be deprived.[32] The majority also interpreted a constitutional provision requiring the General Assembly to prohibit "other than just and reasonable rates . . ."[33] not to mean "that any utility rate order is subject to generalized grievances . . . ."[34]

Georgia's highest court is by no means the first to reach the conclusion that consumers lack standing to challenge the reasonableness of rates established by utilities commissions. In the leading case of *Brooklyn Union Gas Co. v. City of New York*,[35] the New York court, faced with a consumer attack on rates alleged to be unreasonably high, explained that the right to reasonable rates was both a common law and a statutory right but was not a vested property right. To be vested and thus free from legislative interference, the court said, a right must be "something more than such a mere expectation as may be based upon an anticipated continuation of the present general law."[36] The court also said a consumer, unlike a utility, "has no capital invested which would be destroyed by the exaction of an unreasonable rate"[37] and is under no legal obligation to buy, despite the "pressure of circumstances [which] might operate almost as strongly as a legal obligation . . . ."[38] Other state courts that have considered the issue of standing in the absence of statutes have reached the same result.[39]

There were two dissents in *Allied Chemical*, and each asserted a differ-

31. 233 Ga. at 563, 212 S.E.2d at 632.

32. *Id.* at 561, 212 S.E.2d at 631. This is one of several references, albeit indirect, to the "political question" doctrine. *See* note 5, *supra*. Cases not justiciable under the "political question" doctrine also include those involving "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." Baker v. Carr, 369 U.S. 186, 217 (1962).

33. GA. CONST. art. IV, §1, ¶1; GA. CODE ANN. §2-2401 (Rev. 1973).

34. 233 Ga. at 565, 212 S.E.2d at 633.

35. 50 Misc. 450, 100 N.Y.S. 570 (1906), *aff'd*, 115 App. Div. 69, 100 N.Y.S. 625, *aff'd*, 188 N.Y. 334, 81 N.E. 141 (1907). A later New York case, Lakeland Water Dist. v. Onondaga Co. Water Auth., 24 N.Y.2d 400, 248 N.E.2d 855, 301 N.Y.S.2d 1 (1969), said consumers *could* challenge utility rates, but the court's principal concern was the form of action, and the recognized constitutional ground of discrimination seemed to be a consideration in the appeal.

36. ___ Misc. ___, 100 N.Y.S. at 577.

37. *Id.*

38. *Id.*

39. *See, e.g.*, City of Birmingham v. Southern Bell Tel. & Tel. Co., 234 Ala. 526, 176 So. 301 (1937); St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N.W. 262 (1915); State v. Mountain States Tel. & Tel. Co., 54 N.M. 315, 224 P.2d 155 (1950). In *St. Paul*, cited particularly by the *Allied Chemical* majority, the court was "not strongly impressed" with the idea that consumers could simply do without the utility service but based its decision on the practical effect of removing stability from rate decisions of commissions.

ent ground for providing consumers with the remedy already provided to utilities. Justice Ingram said consumers might show that they have an investment which would be useless if electricity were unavailable and that, because of the utility's monopoly position, they must buy electricity "from the defendant at a rate which is so unreasonably high and unjust that in practical terms it is confiscatory."[40] Justice Gunter pointed to the state's constitutional requirement that the General Assembly see that "just and reasonable rates" prevail[41] and to the vesting of the PSC with duties "not inconsistent with other provisions of this Constitution."[42] Justice Gunter said the provisions, unique to Georgia, established a new class of "constitutional extortion cases" that may be brought by consumers just as utilities may bring "constitutional confiscation" cases.[43] Having taken the position directly contrary to that of Justice Ingram,[44] the majority dismissed Justice Gunter's interpretation of the constitution as a "novel contention."[45]

A different result in *Allied Chemical* would have marked a break from the line of foreign jurisdiction cases dating from 1919. However, Justice Hall's majority opinion did not sufficiently rebut any of the principal arguments raised in the three separate opinions. The majority did not explain why the trial court's "review" must be a de novo proceeding. It avoided explaining why the state constitution requires that rates be "just and reasonable" if that is not a constitutional standard, as Justice Gunter suggested. Furthermore, despite the fact that industrial firms with technologies very reliant on electricity were the principal figures in this suit, the majority did not explain why their investments were not vested property rights that might be injured or destroyed by excessive electric rates, as Justice Ingram suggested. The majority did recite the compelling argument that decisions by elected officials on what is "reasonable" for the public welfare should not be reviewed by the courts.

In *Allied Chemical*, industrial firms, which often limit their rate challenges to an effort to shift the increase to another class of customers, brought their financial resources to the side of consumers, only to be closed out by the courts. As the majority pointed out, voters may be able to change rate decisions by throwing out PSC incumbents. But the solution to the unfairness and frustration that results from this decision on standing is now in the hands of the General Assembly.

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40. 233 Ga. at 572-73, 212 S.E.2d at 637 (Ingram, J., dissenting).
41. GA. CONST. art. IV, §1, ¶1; GA. CODE ANN. §2-2401 (Rev. 1973).
42. GA. CONST. art. IV, §4, ¶3; GA. CODE ANN. §2-2703 (Rev. 1973).
43. 233 Ga. at 571, 212 S.E.2d at 637 (Gunter, J., dissenting).
44. *Id.* at 561, 212 S.E.2d at 631.
45. *Id.* at 565, 212 S.E.2d at 633. The majority also argued that some rather inconclusive statements from legislative history supported its view that regulation is a policy matter.