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James W. Craig

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PUBLIC UTILITIES – Charitable Contributions No Longer Chargeable as Operating Expenses in Mississippi – *State ex rel. Allain v. Mississippi Public Service Commission,* 435 So. 2d 608 (Miss. 1983).

INTRODUCTION

Mississippi Power and Light Company filed a Notice of Intention to Change Rates with the Mississippi Public Service Commission on May 28, 1980. The rates, suspended by the commission pending its hearing, but put into effect under bond by Mississippi Power and Light (MP&L) on July 1, 1980,[1] were calculated to raise $68,786,000.00 in new gross annual revenues for the 1980-81 year. On November 24, 1980, the Public Service Commission entered its order allowing a rate increase sufficient to produce $48,277,442.00 for the company.[2] The Public Service Commission's order included a finding that $284,000.00 of charitable contributions was an appropriate operating expense for the year in question.[3]

The Mississippi Legal Services Coalition appealed the commission's order to the Chancery Court of the First Judicial District in Hinds County.[4] The Attorney General filed a separate appeal on behalf of the State of Mississippi and the electric power consumers affected by the order. In addition to these appeals, the Attorney General, the cities of Jackson and Ruleville, the town of Marigold, and Hinds County filed petitions to intervene as parties at the chancery court level.[5] Mississippi Power and Light Company also filed an appeal assigning errors concerning the commission's failure to grant the company's entire request.[6] The chancery court consolidated the appeals and permitted all parties to participate in the suit. However, prior to judgment, the chancellor reversed his decision as to the Attorney General,

1. At the time of the suit, public utilities in Mississippi were allowed to put the rates indicated in their notice into effect by the filing of a bond with the Public Service Commission. MISS. CODE ANN. § 77-3-39 (1972). This provision has been amended to limit collection of rates under bond to cases where the commission has failed to render its decision within 120 days of the filing of the notice of intent. MISS. CODE ANN. § 77-3-39(6) (1972 and Supp. 1983).

2. State *ex rel.* Allain v. Mississippi Pub. Serv. Comm'n, 435 So. 2d 608, 610-11 (Miss. 1983).

3. *Id.* at 617.

4. The provision for appeals from the Public Service Commission to the Chancery Court of the First Judicial District of Hinds County, effective at the time of the instant case, was MISS. CODE ANN. § 77-3-67(1) (1972 and Supp. 1982).

5. The City of Cleveland also sought to intervene but withdrew its petition. *State ex rel. Allain,* 435 So. 2d at 611.

6. *Id.* at 612.

denying his petition to intervene.[7] The chancery court's decree affirmed the commission's order, including the allowance of charitable contributions as a proper operating expense of the Mississippi Power and Light Company.[8]

The Attorney General, the City of Jackson, the Legal Services Coalition, and MP&L appealed the chancery court's decision to the Mississippi Supreme Court. The Attorney General appealed the denial of his petition to intervene and also included an argument on the merits of the appeal in his brief. In response, MP&L filed a motion with the supreme court to strike the Attorney General's assignments of error that referred to the merits of the chancery court's decision. The supreme court denied this motion, ruling that the Attorney General's common-law powers included the right to intervene in appeals affecting the public interest.[9] Thus, the court recognized the standing of the Attorney General as to the merits of the appeal.

Mississippi Power and Light Company's plan to include $284,000.00 of charitable contributions as part of its operating expenses for the 1980-81 "test year," as approved by the Public Service Commission and the chancery court, was contested by the Attorney General and the Legal Services Coalition.[10] The commission and chancery court relied upon the Mississippi Supreme Court's holding in *United Gas Corporation v. Mississippi Public Service Commission,*[11] which allowed contributions in reasonable amounts to be charged as operating expenses of the utility.[12] The supreme court ruled that the commission did not err in applying the principles of *United Gas Corporation v. Mississippi Public Service Commission* in the instant case, but should no longer accept that case's holding as controlling in the area of charitable contributions.[13] In the future, the commission may not, as a matter of law, consider charitable contributions an "essential cost of conducting the business of a public utility."[14]

In *State ex rel. Allain v. Mississippi Public Service Commission,*[15] the Mississippi Supreme Court changed this jurisdiction's position on the treatment of charitable contributions as an operating

7. *Id.* at 611.
8. *Id.*
9. State *ex rel.* Allain v. Mississippi Pub. Serv. Comm'n, 418 So. 2d 779 (Miss. 1982).
10. *State ex rel. Allain*, 435 So. 2d at 611.
11. 240 Miss. 405, 127 So. 2d 404 (1961).
12. *Id.* at 434, 127 So. 2d at 416.
13. *State ex rel. Allain* , 435 So. 2d at 617.
14. *Id.*
15. 435 So. 2d 608.

expense of a public utility corporation. The case illustrates the problems surrounding public regulation of a privately-owned corporation with a monopoly in the delivery of electric power.

BACKGROUND AND HISTORY

I

The question of what is properly charged to the ratepayers as "operating expenses" is a significant part of the rate-making process. The Mississippi Public Service Commission is directed by statute to set "fair, just, and reasonable rates for the services rendered," and yet "yield a fair rate of return to the utility furnishing service, upon the reasonable value of the property of the utility used or useful in furnishing service."[16] As a practical matter, the balance between the interests of ratepayers and those of stockholders is achieved by allowing the utility to raise enough gross revenue to bring a specified "return" in excess of the reasonable expenses of delivering the service.[17] The return, which represents funds available for dividend payment, surplus account, and payment of debt,[18] is determined by the commission by applying a specified percentage ("rate of return") to the property used in delivering service ("rate base").[19] Thus, the sum of the stockholders' return and the operating expenses of the utility is the amount raised by the rates ordered by the commission.

Utility rates are set by the Public Service Commission after a public hearing[20] and are reviewable by the judiciary.[21] The reasonableness of utility rates is a question of fact calling for discretion on the part of the commission.[22] On appeal, the order of the commission is considered *prima facie* correct[23] and will not be set aside unless there exists a lack of substantial supporting evidence, an error of law, an overstepping of the statutory limits of the commission's authority, or a violation of constitutional rights.[24] If the

16. MISS. CODE ANN. § 77-3-33(1) (1972).

17. 1 A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 45 (1969).

18. *Id.*

19. MISS. CODE ANN. §§ 77-3-33(1) to -43 (1972), *amended by* MISS. CODE ANN. §77-3-43 (Supp. 1983).

20. MISS. CODE ANN. § 77-3-39 (1972), *amended by* MISS. CODE ANN. § 77-3-39(1) (Supp. 1983). The amended version limits the commission's discretionary authority to forego such a hearing.

21. MISS. CODE ANN. § 77-3-67 (1972), *amended by* MISS. CODE ANN. § 77-3-67 (Supp. 1983); MISS. CODE ANN. § 77-3-71 (1972), *amended by* MISS. CODE ANN. §§ 77-3-71 to -72 (Supp. 1983).

22. Southern Bell Tel. & Tel. Co. v. Mississippi Pub. Serv. Comm'n, 237 Miss. 157, 238, 113 So. 2d 622, 654 (1959).

23. Loden v. Mississippi Pub. Serv. Comm'n, 279 So. 2d 636, 641 (Miss. 1973); Tri-State Transit Co. v. Dixie Greyhound Lines, Inc., 197 Miss. 37, 39, 19 So. 2d 441, 443 (1944).

24. MISS. CODE ANN. § 77-3-67(4) (1972 and Supp. 1982).

court sets the commission's order aside, it must then remand the factual questions to the commission and may not substitute a rate of its own choosing.[25] The court's role in review is to determine whether the commission may consider certain factors in its rate-making function, such as charitable contributions, the issue faced by the court in *State ex rel. Allain v. Mississippi Public Service Commission.*

Although the charitable contributions issue involved only a fraction of the proposed rate increase, it is significant as a demonstration of an inherent problem in utilities regulation: Need a public utility corporation conform merely to the standards of competitive business enterprises, or does its franchised monopoly necessitate unique standards? Mississippi, like most jurisdictions, has a statute permitting corporations in general "to make gifts, donations, or contributions for the public welfare or for charitable, scientific, religious, or educational purposes, which gifts, donations, or contributions shall be charged by such corporation to operating expenses."[26]

Several jurisdictions in the United States have taken widely varying views on the inclusion of charitable contributions as operating expenses of a public utility. The broadest approach permits utilities to charge donations as expenses so long as the donations do not exceed a "reasonable" amount, and as long as the contributions go to "legitimate" or "recognized" charities.[27] A second approach includes the contributions only upon a showing that the utility's business has been directly benefited by the charity.[28] Other jurisdictions, as a matter of law, exclude charitable contributions from operating expenses altogether on the theory that the ratepayer should not be compelled to contribute to charity through the payment of utility bills.[29] The choice among these theories indicates the degree of similarity with which the court in question characterizes the relationship between public utilities and businesses in general.

II

Those courts that permit "reasonable" contributions to be included as operating expenses emphasize the importance of allowing

25. Mississippi Pub. Serv. Comm'n. v. Hughes Tel. Co., 376 So. 2d 1074 (Miss. 1979); Mississippi Pub. Serv. Comm'n v. Mississippi Power Co., 337 So. 2d 936 (Miss. 1976).

26. MISS. CODE ANN. § 79-1-3 (1972).

27. *See infra* notes 30-54 and accompanying text.

28. *See infra* notes 55-73 and accompanying text.

29. *See infra* notes 74-93 and accompanying text.

the utility corporation the same degree of "managerial discretion" as in the competitive sector of the economy. In *New England Telephone and Telegraph Company v. Department of Public Utilities,*[30] the Supreme Judicial Court of Massachusetts cautioned its regulatory agency against substituting its judgment for that of the managers of the company.[31]

In addressing the question of charitable contributions, the court focused its attention on the broad popularity and general legitimacy of the institutions to which the company contributed.[32] Noting further that the amount of contributions was not found unreasonable by the State Department of Public Utilities, the court held that the Department could not exclude those contributions from the costs of doing business passed on to the ratepayers.[33]

The test for *reasonableness* of contributions is two-fold: the amount itself must be *reasonable,* and the charities must be legitimate.[34] The Mississippi Supreme Court, in *United Gas Corporation v. Mississippi Public Service Commission,* left the question of reasonableness of amount to the commission as a finding of fact, allowing for a finding that the donations were excessive.[35] The New York Public Service Commission determines reasonableness of amount by comparison to similarly situated utilities and to contributions during the period in New York when donations were not chargeable to expenses.[36] The Massachusetts court leaves the initial determination to the directors of the utility in their "managerial discretion"; the Department of Public Utilities may only decide if the amount is unreasonably excessive.[37] Reasonableness of amount has on one occasion stood alone as a criterion for inclusion of donations; in a jurisdiction which otherwise would have excluded the contribution, the minute amount in question was the determining factor.[38]

The legitimacy of the charitable donee as a requirement for inclusion of the contribution is an attempt to prevent "impropriety in the selection of beneficiaries."[39] For this purpose the Federal

30. 360 Mass. 443, 275 N.E.2d 493 (1971).

31. *Id.* at 483-84, 275 N.E.2d at 517.

32. *Id.* at 485, 275 N.E.2d at 518.

33. *Id.* at 489, 275 N.E.2d at 521.

34. *Id.*; City of Miami v. Florida Pub. Serv. Comm'n, 208 So. 2d 249, 259 (Fla. 1968); United Gas Corp. v. Mississippi Pub. Serv. Comm'n, 240 Miss. 405, 434, 127 So. 2d 404, 416 (1961); *Re* United Gas Pipe Line Co., 54 PUB. UTIL. REP. 3rd (PUR) 285, 295 (F.P.C. 1964).

35. 240 Miss. at 434, 127 So. 2d at 416.

36. *Re* New York Tel. Co., 84 PUB. UTIL. REP. 3rd (PUR) 321, 350 (N.Y. Pub. Serv. Comm'n 1970).

37. *New England Tel. and Tel. Co. v. Department of Pub. Util.*, 360 Mass at 489, 275 N.E.2d at 521.

38. Mobile Gas Co. v. Patterson, 293 F. 208, 226 (D. Alaska 1923), *modified on other grounds*, 271 U.S. 131 (1926); New Jersey Bell Tel. Co. v. Department of Pub. Util., 12 N.J. 568, 597, 97 A.2d 602, 616 (1953).

39. *New England Tel. and Tel. Co. v. Department of Pub. Util.*, 360 Mass. at 489, 275 N.E.2d at 521.

Power Commission has suggested the use of the Internal Revenue Code's criteria for charitable organizations as a test of legitimacy.[40] A "legitimate" donee has also been defined as a "local, established charity," contributions to which will build the goodwill of the utility in the community.[41]

The rationale behind the "reasonableness" criteria is based on the similarity of public utility corporations to businesses in the competitive sector. Public utility managers, it is said, should be granted the same degree of "managerial discretion" as is present in other enterprises.[42] Public utilities, like corporations, are authorized by statute to contribute to charities, and it would be incongruous to allow the corporation to pass such donations on to its customers, while requiring the stockholders of the utility to "foot the bill" for their donations.[43] Utilities make contributions for the same reason as private sector corporations – to build goodwill in the community;[44] indeed, utilities are expected to give to charitable organizations and will lose community support if they refuse.

The need for a public utility to build its image in the community by making charitable contributions is comparable to its need to advertise.[45] Four types of advertising by public utilities may be distinguished – institutional, to increase the public opinion of the utility; promotional, to generate new customers; informa-

40. *Re* United Gas Pipe Line Co., 54 PUB. UTIL. REP. 3rd (PUR) 285, 295 (F.P.C. 1964).

41. *In re* Diamond State Tel. Co., 103 A.2d 304, 323 (Del. Super. Ct. 1954), *aff'd in part and rev'd in part on other grounds*, 48 Del. 497, 107 A.2d 786 (1954), *modified on other grounds*, 49 Del. 203, 113 A.2d 437 (1955); City of Cincinnati v. Public Util. Comm'n, 55 Ohio St. 2d 168, 173, 378 N.E.2d 729, 733 (1978), *cert. denied*, 440 U.S. 912 (1979).

42. Denver Union Stock Yard Co. v. United States, 57 F.2d 735, 753 (D. Colo. 1932); *New England Tel. and Tel. Co. v. Department of Pub. Util.*, 360 Mass. at 483, 489, 275 N.E.2d at 517, 521 (1971).

43. *Re* New York Tel. Co., 84 PUB. UTIL. REP. 3d (PUR) 321, 349-50 (N.Y. Pub. Serv. Comm'n 1970); *Accounting Treatment for Donations, Dues, and Lobbying Expenditures*, 7 PUB. UTIL. REP. 3d (PUR) 440, 445 (N.Y. Pub. Serv. Comm'n 1967).

44. Southwestern Bell Tel. Co. v. State Corp. Comm'n, 192 Kan. 39, 73, 386 P.2d 515, 545 (1923). *Accord* Denver Union Stock Yard Co. v. United States, 57 F.2d 735, 753 (D. Colo. 1932); *In re* Diamond State Tel. Co., 51 Del. 525, 536-37, 149 A.2d 324, 331 (1959); City of Miami v. Florida Pub. Serv. Comm'n, 208 So. 2d 249, 259 (Fla. 1968); Gas Serv. Co. v. State Corp. Comm'n, 8 Kan. App. 545, 550-51, 662 P.2d 264, 268 (Kan. Ct. App. 1983); New England Tel. and Tel. Co. v. Department of Pub. Util., 360, Mass. 443, 489, 275 N.E.2d 493, 521 (1971); United Gas Corp. v. Mississippi Pub. Serv. Comm'n, 240 Miss. 405, 434, 127 So. 2d 404, 416 (1961); Public Serv. Co. v. State, 102 N.H. 150, 161, 153 A.2d 801, 809 (1959); City of Cincinnati v. Public Util. Comm'n, 55 Ohio St. 2d 168, 173, 378 N.E.2d 729, 732-33 (1978); United Transit Co. v. Nunes, 99 R.I. 501, 513-14, 209 A.2d 215, 222 (1965); Howell v. Chesapeake and Potomic Tel. Co., 215 Va. 549, 559, 211 S.E.2d 265, 272 (1975); Board of Supervisors v. Virginia Elec. and Power Co., 196 Va. 1102, 1118, 87 S.E.2d 139, 149 (1955). *Contra* Alabama Power Co. v. Alabama Pub. Serv. Comm'n, 359 So. 2d 776, 779 (Ala. 1978); New England Tel. and Tel. Co. v. Public Util. Comm'n, 390 A.2d 8, 55 (Me. 1978).

45. New England Tel. and Tel. Co. v. Department of Pub. Util. 360 Mass. 443, 484, 489, 275 N.E.2d 493, 517, 521 (1971); Public Serv. Corp. v. State, 102 N.H. 150, 161, 153 A.2d 801, 809 (1959). *Contra* Alabama Power Co. v. Alabama Pub. Serv. Comm'n, 359 So. 2d 776, 779 (Ala. 1978); Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 55 Ill. 2d 461, 481, 303 N.E.2d 364, 375 (1973).

tional, to disseminate rate charges and benefits; and conservational, to aid the customer in reducing his energy usage.[46] Donations by utilities fulfill the same function as institutional advertising, and several states that permit institutional advertising to be charged to operating expenses will also allow charitable contributions the same treatment.[47]

The "goodwill" or "public benefit" rationale is often given the status of an element of reasonableness, as in the Mississippi Supreme Court's statement in *United Gas Corporation v. Mississippi Public Service Commission*: "The contributions to charity must be made to a proper object and in reasonable amounts, and be related to the fostering of the goodwill of the company in the localities in which it operates."[48] Other courts state the test only in terms of reasonableness but ground the rationale for that test in the "goodwill" theory.[49] That is to say, public utility corporations may rightfully charge donations to operating expenses, for, as in the case of private sector corporations, they fulfill the business purpose of building goodwill. The commission, however, may disallow the donations if they are unreasonable in amount or given to a sham charity.[50]

Reasonableness, both in amount given and legitimacy of donee, is a question of fact which may be determined by the given regulatory agency.[51] As a result, upon review, state courts tend to affirm decisions by state commissions allowing the inclusion of donations.[52] The purpose of the reasonableness test, whether applied by the regulatory agencies or by the courts, is to carefully

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46. City of Cleveland v. Public Util. Comm'n, 63 Ohio St.2d 62, 70-73, 406 N.E.2d 1370, 1377 (1980); *Promotional Practices of Public Utilities* and *Cooperative Utilities Ass'ns*, 97 PUB. SERV. REP. 3d (PUR) 1, 4 (Okla. Corp. Comm'n 1972).

47. *New England Tel. and Tel. Co. v. Department of Pub. Util.*, 360 Mass. at 484, 489, 275 N.E.2d at 517, 521 (1971); *Public Serv. Corp. v. State*, 102 N.H. at 161, 153 A.2d at 809. *Contra Alabama Power Co. v. Alabama Pub. Serv. Comm'n*, 359 So. 2d at 779; *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 55 Ill.2d at 481, 303 N.E.2d at 375.

48. *United Gas Corp.*, 240 Miss. at 434, 127 So. 2d at 416.

49. *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 192 Kan. at 73, 386 P.2d at 545; *Gas Serv. Co. v. State Corp. Comm'n*, 8 Kan. App. 2d at 551-52, 662 P.2d at 268.

50. *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 192 Kan. at 73, 386 P.2d at 545; *Gas Serv. Co. v. State Corp. Comm'n*, 8 Kan. App. 2d at 551-52, 662 P.2d at 268.

51. *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 240 Miss. at 434, 127 So. 2d at 416.

52. *Denver Union Stock Yard Co. v. United States*, 57 F.2d at 753; *In Re Diamond State Tel. Co.*, 51 Del. at 537, 149 A.2d at 331; *City of Miami v. Florida Pub. Serv. Comm'n*, 208 So. 2d at 258; *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 192 Kan. at 73, 386 P.2d at 545; *New England Tel. and Tel. Co. v. Department of Pub. Util.*, 360 Mass. at 489, 275 N.E.2d at 521; *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 240 Miss. at 434, 127 So. 2d at 416; *Public Serv. Co. v. State*, 102 N.H. at 161, 153 A.2d at 809; *City of Cincinnati v. Public Util. Comm'n*, 55 Ohio St.2d at 173, 378 N.E.2d at 733; *Providence Gas Co. v. Burman*, 119 R.I. at 99-100, 376 A.2d 687, 699 (1977); *United Transit Co. v. Nunes*, 99 R.I. at 513-14, 209 A.2d at 222 (1965); *Howell*, 215 Va. at 559, 211 S.E.2d at 272; *Board of Supervisors v. Virginia Elec. and Power Co.*, 196 Va. at 1118, 87 S.E.2d at 149.

examine the utility managers' decision to donate in order to prevent abusive and excessive contributions which would tend to drive up utility rates. Assuming a basic similarity between public utility corporations and the private sector economy, jurisdictions using this test seek only the assurance that a "market economy" business would grant an equivalent amount of charity to any given donee.[53] However, the scrutiny to be applied at the commission level is not toothless. The Kansas courts allow the State Corporation Commission to apply a "strict scrutiny" test.[54]

III

The foundation for a more narrow view of utility contributions to charity is found in some jurisdictions in statutory authority. The Supreme Court of Washington, in *Jewell v. Washington Utilities and Transportation Commission*,[55] fashioned its test for the inclusion of charitable contributions as operating expenses with a statute which calls on the state commission to set rates which are "fair, just, reasonable, and sufficient to allow the telephone company to render prompt, expeditious and efficient service."[56] The issue was whether charitable contributions were necessary for the company to render such service. The court found that the donations were not necessary and excluded them from the company's operating expenses.[57] The company had argued that it was both socially appropriate and expected that utilities would make contributions to charity and that a separate statute authorized corporate donations.[58] The court set these propositions aside, noting that General Telephone Company, as a publicly-regulated monopoly, is not to be confused with a private corporation but is statutorily limited in its rates to that which is necessary to render service.[59]

The Ohio Supreme Court reached a similar result in *City of Cleveland v. Public Utilities Commission*.[60] Relying on the commission's enabling statute,[61] the court decided that the commission had no authority to include charitable contributions in

53. *Re* New York Tel. Co., 84 PUB. UTIL. REP. 3d (PUR) 321, 350 (N.Y. Pub. Serv. Comm'n 1970).

54. *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 192 Kan. at 73, 386 P.2d at 545.

55. 90 Wash. 2d 775, 585 P.2d 1167 (1978).

56. WASH. REV. CODE § 80.36.080 (1974), *as interpreted in Jewell*, 90 Wash. 2d at 776, 585 P.2d at 1167.

57. *Id.* at 777, 585 P.2d at 1169.

58. *Id.* at 778-79, 585 P.2d at 1169-70.

59. *Id.* at 780, 585 P.2d at 1170. A well reasoned dissent challenged this conclusion on grounds that a public utility corporation is entitled to all the expenses of a private sector corporation but is merely governed by the regulatory process rather than the market. The dissent went on to accept the "reasonable contributions" test. *Id.* at 782, 585 P.2d at 1172 (Dolliver, J., dissenting).

60. 63 Ohio St. 2d 62, 406 N.E.2d 1370 (1980).

61. OHIO REV. CODE ANN. § 4909.15(A) (4) (Baldwin 1978), which provides: "The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals and charges shall determine . . . [t]he cost to the utility of rendering the public utility service . . . ."

operating expenses unless such donations could be related to "the cost of rendering the public utility service."[62] The court formulated a test which requires an expense item to provide a "direct, primary benefit" to consumers,[63] that is, by reducing the cost of service, or providing more efficient service. As to the contributions claimed in the case in question, no direct, primary benefit was found to exist. The contributions were disallowed.[64] This opinion was later interpreted by the Ohio Supreme Court as holding that no contribution to charity can bear a direct, primary relationship to providing service, thus excluding all contributions from operating expenses.[65]

The same result has been reached without reliance on statutes. The Supreme Court of Oklahoma held that charitable contributions were incongruous with the ultimate purpose of the utility and therefore should not be an excuse to increase company funds.[66] The question posed by the Supreme Court of New Jersey was whether the contribution "has an effect upon the creation of the service or product of the corporation and therefore may be considered as reasonably necessary in the rendition of service to the consumer."[67] In the District of Columbia, the criterion established was whether the given expense item (here charitable contributions) more directly benefited the stockholders or the utility's ratepayers.[68]

Whether the "direct benefit" requirement is a test for inclusion, rather than a rationale for exclusion, is open to question. Two states, Ohio and Illinois, which had stated the "direct benefit" requirement, in later cases excluded charitable contributions as a matter of law.[69] Other jurisdictions that have the test in theory seem not to allow contributions in practice.[70] It would appear that

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62. *City of Cleveland v. Public Util. Comm'n*, 63 Ohio St. 2d at 70, 406 N.E.2d at 1377.

63. *Id.* at 73, 406 N.E 2d at 1378.

64. *Id.* at 73-74, 406 N.E.2d at 1379-80.

65. Cleveland Elec. Illuminating Co. v. Public Util. Comm'n, 69 Ohio St. 2d 258, 260-61, 431 N.E.2d 683, 685 (1982).

66. Carey v. Corporation Comm'n, 168 Okla. 487, 492, 33 P.2d 788, 794 (1934).

67. New Jersey Bell Tel. Co. v. Department of Pub. Util., 12 N.J. 568, 596-97, 97 A.2d 602, 616 (1953). *See also* Reno Power, Light & Water Co. v. Public Serv. Comm'n, 298 F. 790, 801 (D. Nev. 1923); Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31, 64, 25 N.E.2d 482, 498 (1939), *appeal denied*, 309 U.S. 634 (1940); Solar Elec. Co. v. Pennsylvania Pub. Util. Comm'n, 137 Pa. Super. 325, 379, 9 A.2d 447, 479 (1939).

68. Washington Gas Light Co. v. Public Serv. Comm'n, 450 A.2d 1187, 1231 (D.C. 1982).

69. Cleveland Elec. Illuminating Co. v. Public Util. Comm'n, 69 Ohio St. 2d 258, 431 N.E.2d 683 (1982) (excluded as a matter of law). *Cf. City of Cleveland v. Public Util. Comm'n*, 63 Ohio St. 2d at 73-74, 406 N.E.2d at 1379 (direct benefit test); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 55 Ill. 2d at 481, 303 N.E.2d at 375 (excluded as a matter of law); *Peoples Gas Light & Coke Co.*, 373 Ill. at 64, 25 N.E.2d at 498 ("peculiar benefit" required). In Illinois, contributors are now included by statute, ILL ANN. STAT. ch. III 2/3, § 41 (Smith-Hurd 1966 and Supp. 1985).

70. Maplewood Disposal Co., 11 PUB. UTIL. REP. 4th (PUR) 373, 377 (N.J. Bd. Pub. Util. Comm'rs 1975); Pennsylvania Pub. Util. Comm'n v. Bell Tel. Co., 2 PUB. UTIL. REP. 4th (PUR) 417, 437 (Penn. Pub. Util. Comm'n 1973).

the test is phrased such that, absent a broad interpretation of "benefit," contributions are more often excluded than included.[71]

To help minimize the monopoly status of a public utility corporation, the "direct benefit" requirement is an attempt to limit the utility's expenses that can be passed on to the ratepayers.[72] This attempt is based on the statutory limits placed on the regulatory agency's authority to include certain items as operating expenses of a public utility.[73] But it does not extend so far as to explicitly exclude charitable contributions as a matter of law. This is left to the approach known as the "involuntary levy" theory.

IV

"If charitable contributions are allowed as an operating expense of a monopoly, its [sic] amounts to an involuntary levy on the ratepayers."[74] With these words, Maryland's highest court, in *Chesapeake and Potomac Telephone Company v. Public Service Commission,*[75] forged from a series of less forthright cases[76] an unequivocal rule: Contributions are to be excluded from operating expenses as a matter of law. This decision was cited by the California Supreme Court in *Pacific Telephone and Telegraph Company v. Public Utilities Commission.*[77] California's Public Utilities Commission had allowed the company to charge the great majority of its donations to operating expenses in its order, but the commission warned the company that it intended to adopt a policy of complete exclusion of charitable contributions in the future.[78] The commission explained the rationale behind its new policy:

> Dues, donations, and contributions, if included as an expense for rate-making purposes, become an involuntary levy on ratepayers who, because of the monopolistic nature of utility

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71. *Reno Power, Light and Water Co. v. Public Serv. Comm'n*, 298 F. at 801 (excluded contributions); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 55 Ill.2d at 481, 303 N.E.2d at 375; *Peoples Gas, Light, & Coke Co. v. Slattery*, 373 Ill. at 64, 25 N.E.2d at 498; *New Jersey Bell Tel. Co. v. Department of Pub. Util.*, 12 N.J. at 596-97, 97 A.2d at 616 (included contribution on basis of test and minuteness of amount); *Solar Elec. Co. v. Pennsylvania Pub. Util. Comm'n*, 137 Pa. Super. at 379, 9 A.2d at 475; *City of Cleveland v. Public Util. Comm'n*, 63 Ohio St. 2d at 73-74, 406 N.E.2d at 1379; *Jewell*, 90 Wash. 2d at 777, 585 P.2d at 1169. *Contra* Vrtjak v. Illinois Bell Tel. Co., 32 PUB. UTIL. REP. 3d (PUR) 385 (Ill. Commerce Comm'n 1959) (included contribution on basis of broad definition of "benefit").

72. *Jewell*, 90 Wash. 2d at 780, 585 P.2d at 1170-71.

73. *Id.* at 776, 585 P.2d at 1169; *City of Cleveland v. Public Util. Comm'n*, 63 Ohio St. 2d at 70, 406 N.E.2d at 1379.

74. Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n, 230 Md. 395, 414, 187 A.2d 475, 485 (1963).

75. 230 Md. 395, 187 A.2d 475.

76. Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31, 64, 25 N.E.2d 482, 498; Central Maine Power Co. v. Public Util. Comm'n, 153 Me. 228, 233, 136 A.2d 726, 731 (1957); Carey v. Corporation Comm'n, 168 Okla. 487, 492, 33 P.2d 788, 794 (1934).

77. 66 Cal.2d 634, 401 P.2d 353, 44 Cal. Rptr. 1 (1965).

78. *Re* Pacific Tel. and Tel. Co., 53 PUB. UTIL. REP. 3d (PUR) 513, 586 (Cal. Pub. Util. Comm'n 1964).

> service, are unable to obtain service from another source and thereby avoid such a levy . . . . Respondent should not be permitted to be generous with ratepayers' money but may use its own funds in any lawful manner.[79]

The California Supreme Court quoted this language with approval,[80] authorizing the commission's exclusionary policy on grounds that a public utility, as a monopoly, cannot be treated similarly to a private sector corporation.[81] Jurisdictions following the involuntary levy theory likewise rely on the monopolistic nature of utilities as the major rationale for exclusion. The Supreme Judicial Court of Maine, in *New England Telephone and Telegraph Company v. Public Utilities Commission,*[82] expanded its prior, more cryptic rationale in *Central Maine Power Company v. Public Utilities Commission,*[83] which granted the commission authority to disallow charitable contributions completely. The court in *New England Telephone and Telegraph,* in adopting the "involuntary levy" rationale, noted that, inasmuch as a utility corporation has a monopoly in its given market, it has no real necessity to build goodwill as argued by proponents of the "reasonable contribution" theory.[84] Thus, according to the Maine court, it was valid for the commission to distinguish between private sector corporations and public utilities in the treatment of charitable contributions.

Similarly, a Missouri appellate court held that the Public Service Commission could exclude both charitable contributions and institutional advertising (advertising calculated to build public relations for the company) from operating expenses.[85] While all donations were to be excluded as a matter of law, the court allowed institutional advertising to be included if such advertising could be used to "benefit all ratepayers."[86] The Alabama Supreme Court, on the other hand, allowed the inclusion of institutional advertising[87] but disallowed charitable contributions as a matter of law.[88] The inherent contradiction between including "goodwill"

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79. *Id.* at 586.

80. Pacific Tel. and Tel. Co. v. Public Util. Comm'n, 62 Cal.2d 634, 668, 401 P.2d 353, 374, 44 Cal. Rptr. 1, 22 (1965).

81. *Accord* Southern New England Tel. and Tel. Co. v. Public Util. Comm'n, 29 Conn. Supp. 253, 274, 282 A.2d 915, 926 (Conn. Super. Ct. 1970); State v. Oklahoma Gas & Elec. Co., 536 P.2d 887, 893 (Okla. 1975).

82. 390 A.2d 8 (Me. 1978).

83. 153 Me. 228, 233, 136 A.2d 726, 731 (1957) ("[c]ontribution to charity come [sic] from the stockholders. . . . The company is not compelled . . . nor need it give its money to charities, no matter how deserving.").

84. *New England Tel. and Tel. Co. v. Public Util. Comm'n*, 390 A.2d at 55. *Contra Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 192 Kan. at 73, 386 P.2d at 545; *New England Tel. and Tel. Co. v. Department of Pub. Util.*, 360 Mass. at 489, 275 N.E.2d at 521.

85. State *ex rel.* Laclede Gas Co. v. Public Serv. Comm'n, 600 S.W.2d 222, 228-29 (Mo. Ct. App. 1980).

86. *Id.* at 228. *Accord* State v. Oklahoma Gas and Elec. Co., 536 P.2d 887, 894-95 (Okla. 1975).

87. *Alabama Power Co. v. Alabama Pub. Serv. Comm'n*, 359 So. 2d at 780.

88. *Id.* at 779-80.

advertising, while excluding contributions presumably calculated to increase public relations in the community, was not lost on the dissent.[89] Ohio more reasonably excludes both institutional advertising and charitable contributions, on the theory that utilities, as monopolies, do not have the same need to build "goodwill" as does a company in the competitive sector.[90]

Upon the foundation of the distinction between public utilities and private sector corporations, the involuntary levy theory has established two principles: first, since ratepayers have only one company to choose from when purchasing a certain service, the inclusion of a contribution in the ratepayer's bill constitutes an involuntary contribution by the ratepayer to the recipients of the company's graciousness;[91] and second, utility companies as monopolies have little need to seek out public "goodwill" and in that sense may rightfully be treated differently from private sector corporations.[92] For these reasons, although public utilities may freely donate to charitable causes, jurisdictions under the "involuntary levy" doctrine do not permit such donations to be charged to operating expenses.[93]

WHERE DOES MISSISSIPPI STAND?

The Mississippi Supreme Court, in *United Gas Corporation v. Mississippi Public Service Commission*,[94] reversed the Public Service Commission's order that excluded charitable contributions from the company's operating expenses.[95] The commission had held that charitable contributions were better charged to the utili-

89. *Id.* at 781 (Jones, J., dissenting).

90. Cleveland Elec. Illuminating Co. v. Public Util. Comm'n, 69 Ohio St. 2d 258, 431 N.E.2d 683 (1982) (charitable contributions excluded from operating expenses as a matter of law); City of Cleveland v. Public Util. Comm'n, 63 Ohio St. 2d 62, 70-73, 406 N.E.2d 1370, 1378-79 (1980) (institutional advertising disallowed, unless unusual necessity shown).

91. Pacific Tel. and Tel. Co. v. Public Util. Comm'n, 62 Cal. 2d 634, 668, 401 P.2d 353, 374, 44 Cal. Rptr. 1, 22 (1965); Southern New England Tel. Co. v. Public Util. Comm'n, 29 Conn. Supp. 253, 274, 282 A.2d 915, 926 (1970); Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 55 Ill. 2d 461, 481, 303 N.E.2d 364, 375 (1973); Davenport Water Co. v. Iowa State Commerce Comm'n, 190 N.W.2d 583, 607-08 (Iowa 1971); New England Tel. and Tel. Co. v. Public Util. Comm'n, 390 A.2d 8, 55 (Me. 1978); Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n, 230 Md. 395, 414, 187 A.2d 475, 485 (1963); State *ex rel.* Laclede Gas. Co. v. Public Serv. Comm'n, 600 S.W.2d 222, 229 (Mo. Ct. App. 1980); State of North Carolina *ex rel.* Util. Comm'n v. Southern Bell Tel. and Tel. Co., 24 N.C. App. 327, 210 S.E.2d. 543, 549 (1975); Cleveland Elec. Illuminating Co. v. Public Util. Comm'n, 69 Ohio St. 2d 258, 261, 431 N.E.2d 683. 685-86 (1982); State v. Oklahoma Gas and Elec. Co., 536 P.2d 887, 891-92 (Okla. 1975).

92. *Alabama Power Co. v. Alabama Pub. Serv. Comm'n*, 359 So. 2d at 779; *New England Tel. and Tel. Co. v. Public Util. Comm'n*, 390 A.2d at 55.

93. *State v. Oklahoma Gas and Elec. Co.*, 536 P.2d at 893.

94. 240 Miss. 405, 127 So. 2d 404.

95. *Id.* at 434, 127 So. 2d at 416.

ty's stockholders than to the ratepayers.[96] The supreme court, in rebuttal, noted the importance of utility contributions in discharging the civic responsibilities of the company.[97]

The court's decision made use of the "reasonable contributions" theory. The commission was given a three-fold test for determining whether a utility's charitable donations may be included as operating expenses: 1) propriety or legitimacy of donee; 2) reasonableness of amount; and 3) relationship to fostering goodwill of the company in its service area.[98] In this case, the legitimacy of the donees was not in question. The court made no finding as to whether these contributions which totaled $2,707.00 in 1957 and $1,136.00 in 1958,[99] were in fact intended to "foster goodwill of the company in the localities in which it operates,"[100] though it would appear that most donations by definition would meet this requirement.[101] In 1961, after the *United Gas Corporation* decision,[102] Mississippi became a bulwark of the "reasonable contributions" theory. Other jurisdictions adopting the test cited *United Gas* for support.[103]

In 1983, however, the court was persuaded that the principles of *United Gas* were no longer applicable to the regulation of public utilities in Mississippi.[104] The *State ex rel. Allain* decision acknowledged both the dependence of charitable organizations on business contributions and the benefit of added "goodwill" the company could receive from the community as a result of the donations.[105] But two factors induced the court to abandon its position in *United Gas*. The first was the spiral of inflation in the area of energy costs, causing a significant increase in the average ratepayer's utility bill.[106] Inflationary pressures were reflected in the donations themselves; the 1980-81 test year donations of

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96. *Id.* at 433, 127 So. 2d at 416; *Cf.* Central Maine Power Co. v. Public Util. Comm'n, 153 Me. 228, 233, 136 A.2d 726, 731 (1957) (precursor to involuntary levy theory, *cited in Chesapeake and Potomac Tel. and Tel. Co. v. Public Serv. Comm'n*, 230 Md. at 414, 187 A.2d at 485).

97. *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 240 Miss. at 434, 127 So. 2d at 416.

98. *Id.* The court cited *In re Diamond State Tel. Co.*, 51 Del. at 536-37, 149 A.2d at 331.

99. *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 240 Miss. at 433, 127 So. 2d at 416.

100. *Id.* at 434, 127 So. 2d at 416.

101. In fact, in those jurisdictions that follow the "reasonable contributions" approach, the donations are uniformly held to have achieved the purpose of "building goodwill." *See, e.g., City of Miami v. Florida Pub. Serv. Comm'n*, 208 So. 2d at 258-59; *Providence Gas Co. v. Buman*, 119 R.I. at 99-100, 376 A.2d at 698-99; *United Transit Co. v. Nunes*, 99 R.I. at 513-14, 709 A.2d at 222; *Howell*, 215 Va. at 559, 211 S.E.2d at 272.

102. 240 Miss. 405, 127 So. 2d 404 (1961).

103. *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 192 Kan. at 60-61, 386 P.2d at 534-35; *New England Tel. and Tel. v. Department of Pub. Util.*, 360 Mass. at 488-89, 275 N.E.2d at 520.

104. *State ex rel. Allain*, 435 So. 2d at 617.

105. *Id.*

106. The court noted that "circumstances have drastically changed since 1961 when the cost of utility service was relatively inexpensive . . . ." *Id.*

MP&L totaled $284,000.00 as compared to the donations of $2,707.00 and $1,136.00 for the two years examined in the *United Gas* case.[107] Given the state of the economy, especially in the energy sector, the court reasoned that no addition to the ratepayers' bills could be justified, regardless of amount: "[I]n the present economy future customers should not be burdened with this cost, however small."[108]

The second factor cited by the court as its reason for changing its position regarding charitable donations was that, in 1961, "the argument was not . . . advanced that the donations of a utility might include charities, or other recipients, not satisfactory to the ratepayers."[109] This language is similar to that used by the California Supreme Court in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*,[110] a leading case for the "involuntary levy" doctrine. It is important to note that the cases developing this theory were decided after the Mississippi court was confronted with the issue in *United Gas Corporation*.[111] In *United Gas*, the Public Service Commission relied on the conclusionary rationale found in *Central Maine Power Company v. Public Utilities Commission*,[112] and did not attack the "involuntary contributions" of the ratepayers specifically.[113] By 1983, the supreme court was amenable to the "involuntary levy" rationale and was willing to review its earlier discussion in that light.[114]

ANALYSIS AND CONCLUSION

It is precisely this dual rationale of the court in *State ex rel. Allain*, however, that leads to confusion as to the actual stance of this jurisdiction with regard to operating expenses of a public utility. The court's affirmation of the "public relations benefits" received by the donor utility[115] is more harmonious with the "reasonable contributions" theory's analogy between private cor-

107. *Id.*; *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 240 Miss. at 433, 127 So. 2d at 416.

108. *State ex rel Allain*, 435 So. 2d at 617.

109. *Id.*

110. 62 Cal. 2d at 668, 401 P.2d at 374, 44 Cal. Rptr. at 22. The California court stated: "[C]onceding worthiness of the donees and benefits in good will reaped by Pacific, many ratepayers may not approve various of the donations made and they should be permitted to exercise their own free choice in such matters."

111. *Pacific Tel. and Tel. Co. v. Public Util. Comm'n*, 62 Cal.2d at 668-69, 401 P.2d at 374-75, 44 Cal. Rptr. at 22; *Davenport Water Co. v. Iowa State Commerce Comm'n*, 190 N.W.2d at 608; *Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n*, 230 Md. at 414, 187 A.2d at 485.

112. 153 Me. 228, 233-34, 136 A.2d 726, 731 (1957).

113. *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 240 Miss. at 433-34, 127 So. 2d at 416.

114. *State ex rel. Allain*, 435 So. 2d at 617.

115. *Id.*

porations and public utilities,[116] than with the "involuntary levy" approach's distinction between the "goodwill" needs of each.[117]

In terms of the first part of the court's rationale, the opinion indicates that the logical basis of the "reasonable contributions" theory is still intact but is no longer applicable because of the "age of soaring costs" in the delivery of electric power.[118] This is tantamount to holding that the "reasonable contributions" theory is still intact in principle but as a matter of law no contribution can be considered reasonable to pass on to an already burdened ratepayer.[119]

Such a conclusion, however, is inimical to the considerable case law in Mississippi deferring questions of fact to the Public Service Commission rather than to the judiciary.[120] The function of rate-making is purely legislative in character,[121] delegated by the legislature to the Public Service Commission.[122] If charitable contributions do indeed benefit public utilities by increasing their good will in the community,[123] then the question of reasonableness of amount, as a factual question, should be determined by the commission. Clearly, the court may set limits beyond which no amount can be reasonable but to set that amount at $0.00, while granting in theory the worthwhile benefits of such donations (and further, the company's need to make them) seems anomalous.

To deny the power of the Public Service Commission to allow charitable contributions as operating expenses as a matter of law, the court could have relied more heavily on its "involuntary levy" language, which formed the second prong of its rationale.[124] The court could have reasoned, as other jurisdictions have, that public utilities have much less need for "goodwill" than does the company in the private, competitive sector of the economy.[125] A statute under consideration by the legislature at the time of the decision,

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116. *City of Miami v. Florida Pub. Serv. Comm'n*, 208 So. 2d at 259; *Gas Serv. Co. v. State Corp. Comm'n*, 8 Kan. App. at 550-51, 662 P.2d at 268; *New England Tel. and Tel. Co. v. Department of Pub. Util.*, 360 Mass. at 489, 275 N.E.2d at 521; *Public Serv. Co. v. State*, 102 N.H. at 160-61, 153 A.2d at 809; *United Transit Co. v. Nunes*, 99 R.I. at 513-14, 209 A.2d. at 222; *Howell*, 215 Va. at 559, 211 S.E.2d at 272; *Board of Supervisors v. Virginia Elec. and Power Co.*, 196 Va. at 1118, 87 S.E.2d at 149.

117. *Alabama Power Co. v. Alabama Pub. Serv. Comm'n*, 359 So. 2d at 779-80; *New England Tel. and Tel. Co. v. Public Util. Comm'n*, 390 A.2d at 55.

118. *State ex rel. Allain*, 435 So. 2d at 617.

119. *Id.*

120. Mississippi Pub. Serv. Comm'n v. Hughes Tel. Co., Inc., 376 So. 2d 1074, 1079 (Miss. 1979); Mississippi Pub. Serv. Comm'n v. Mississippi Power Co., 337 So. 2d 936, 938 (Miss. 1976).

121. Mississippi Pub. Serv. Comm'n v. Home Tel. Co., 236 Miss. 444, 461, 110 So. 2d 618, 626 (1959).

122. MISS. CODE ANN. § 77-3-41 (1972 and Supp. 1982).

123. *State ex rel. Allain*, 435 So. 2d at 617.

124. *Id.*

125. *Alabama Power Co. v. Alabama Pub. Serv. Comm'n*, 359 So. 2d at 779-80; *New England Tel. and Tel. Co. v. Public Util. Comm'n*, 390 A.2d at 55.

and subsequently passed, excluded promotional and institutional advertising from operating expenses.[126] Instead, the opinion relies, rather vaguely, on the fact that some ratepayers might not approve of the donees of the utility.[127] This, without the distinction between public utilities and private corporations, is not relevant—no consumer is asked to approve of the contributions of the latter, which are, by statute, included in operating expenses.[128]

The decisive difference between the "reasonable contributions" theory and the "involuntary levy" approach is the way in which public utility corporations are compared to the private, competitive sector of the economy. The Mississippi court, while excluding charitable contributions as a matter of law, failed to base this holding on the distinction between a utility's need for "goodwill" and that of private sector corporations. Instead, the court founded its decision on the current economic climate in the delivery of electric power. For the supreme court, the mere fact that the service itself was costly was enough to justify the conclusion that a cost of business, conceded to have beneficial results, should not be added to the charge to the consumer.[129]

The charitable contributions discussion in *State ex rel. Allain v. Mississippi Public Service Commission*[130] makes clear the court's intent to disallow such contributions as an item of operating expense in the future.[131] But the court's failure to resolve this issue by reference to the nature of a public utility, in comparison to that of a private corporation, mars its rationale. As a result, *State ex rel. Allain* will likely not endure as long as its predecessor, *United Gas Corporation.*[132] When the economy shifts, the court's position on the validity of a utility's charitable contributions may change yet again.

James W. Craig

126. MISS. CODE ANN. § 77-3-36(2) (Supp. 1984).

127. "[T]he donations of a utility might include charities, or other recipients, not satisfactory to the ratepayers." *State ex rel. Allain*, 435 So. 2d at 617.

128. MISS. CODE ANN. § 79-1-3 (1972).

129. *State ex rel. Allain*, 435 So. 2d at 617.

130. *Id.*

131. *Id.*

132. 240 Miss. 405, 127 So. 2d 404 (1961).