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## Judicial Review under Public Utility Regulatory Act Will Be by Substantial Evidence.

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## CASE NOTES

### ADMINISTRATIVE LAW—Public Utility Regulation— Judicial Review Under Public Utility Regulatory Act Will Be by Substantial Evidence

*Southwestern Bell Telephone Co. v. Public Utility Commission*,  
571 S.W.2d 503 (Tex. 1978).

In December 1976, the Public Utility Commission entered an order fixing new service rates below those requested by Southwestern Bell in its application and notice for increased rates. Southwestern Bell filed an appeal in the district court of Travis County alleging that the rates set by the Utility Commission were inadequate to provide a fair return on invested capital, and thus were confiscatory as a matter of law. Relying on section 69 of the Public Utility Regulatory Act<sup>1</sup> Southwestern Bell requested that the issue of confiscation be determined by a preponderance of the evidence in a trial de novo. Additionally, Southwestern Bell applied to the district court for a suspension of the Commission rate order, relying on section 19(b)(3) of the Administrative Procedure and Texas Register Act<sup>2</sup> which provides for vacation of an agency's order when trial de novo is authorized by law.<sup>3</sup> The trial court denied the telephone company relief, concluding that the judicial review authorized by the Public Utility Regulatory Act was limited to a substantial evidence review of the record compiled before the Commission. The Austin Court of Civil Appeals reversed and held that the legislature had intended to provide for the de novo review accorded by preexisting law in rate appeals, but declined to suspend the Public Utility Commission rate order.<sup>4</sup> Both Southwestern Bell and the Commission filed writs of error with the Texas Supreme Court for determination of the character of judicial review intended by section 69 of the Public Utility Regulatory Act. Held—*Reversed*. Judicial review of Public Utility Commission rate decisions is to be conducted under the substantial evidence rule and is limited to the record made before the agency.<sup>5</sup>

Judicial scrutiny of both state and federal administrative agency actions has generally been characterized as falling within either the substantial

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1. TEX. REV. CIV. STAT. ANN. art. 1446c (Vernon Supp. 1963-1978). Section 69 provides: "Any party to a proceeding before the commission is entitled to judicial review under the substantial evidence rule. The issue of confiscation shall be determined by a preponderance of the evidence." *Id.* § 69.

2. *Id.* art. 6252-13a, § 19(b)(3) (Vernon Supp. 1978-1979).

3. *Id.*

4. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 560 S.W.2d 157, 160 (Tex. Civ. App.—Austin 1977), *rev'd*, 571 S.W.2d 503, 512 (1978).

5. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 512 (Tex. 1978).

evidence rule or trial de novo form of review.<sup>6</sup> One commentator has noted that three aspects of judicial review exist as elements of either trial de novo or the substantial evidence rule.<sup>7</sup> First, the court must address the question whether an order is automatically vacated pending appeal, or continues in effect unless otherwise vacated.<sup>8</sup> Next, the court must ascertain if the reviewing court is restricted to an examination of the agency record, or permitted to receive anew all pertinent evidence presented on appeal.<sup>9</sup> Finally, depending upon the provisions of the appeal statute, the court must either affirm the administrative agency determination if supported by substantial evidence on the record, or alternatively, conduct an independent finding of fact superseding the legislatively delegated agency discretion.<sup>10</sup> Judicial review by means of trial de novo generally requires the court to vacate the agency order and proceed with an independent finding of fact in which all evidence is received anew.<sup>11</sup> Under the prevailing form of the substantial evidence rule, the court does not disturb the administrative finding, but rather undertakes an examination confined to the record compiled before the agency to determine if the order is supported by substantial evidence.<sup>12</sup>

The scope and method of judicial review accorded administrative orders in Texas has been a source of considerable controversy between the legislature and the judiciary,<sup>13</sup> as demonstrated by numerous decisions<sup>14</sup> prior to the enactment of the new Administrative Procedure and Texas Register Act (APTRA).<sup>15</sup> A survey of pre-APTRA decisions indicates that the con-

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6. See 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29.07, at 152-53 (1958).

7. See McCalla, *The Administrative Procedure and Texas Register Act*, 28 *BAYLOR L. REV.* 445, 467 (1976).

8. See *id.* at 467.

9. See *id.* at 467.

10. See *id.* at 468.

11. See Finrock, *Trial De Novo—Panacea?*, 24 *BAYLOR L. REV.* 135, 142 (1962).

12. See *Jones v. Marsh*, 148 Tex. 362, 369, 224 S.W.2d 198, 202 (1949).

13. See Guinn, *Judicial Review of Administrative Orders in Texas: A Comparative Analysis: The Board of Medical Examiners, Texas, California and Arkansas*, 23 *BAYLOR L. REV.* 34, 40-41 (1971). There is an apparent legislative distrust of the substantial evidence form of review. Since 1950, the legislature has shown a marked inclination toward enacting administrative appeal provisions that specify true trial de novo, which provide for a full trial on the issues and vacation of the agency order. This strong legislative preference for pure trial de novo was openly manifested in 1961 in an unsuccessful proposal for a constitutional amendment which would have permitted all administrative agency appeals to be de novo. Despite the obvious legislative predilection for trial de novo, the courts have indicated their disagreement by repeatedly construing de novo appeal provisions as requiring application of a hybrid form of substantial evidence review. In cases in which the judicial review provision called upon the court to exercise broad discretion in public policy matters, the supreme court has struck down the provision as an unconstitutional attempt to confer nonjudicial functions on the courts in violation of the separation of powers doctrine. *Id.* at 40-41.

14. See, e.g., *Chemical Bank & Trust Co. v. Falkner*, 369 S.W.2d 427, 431-32 (Tex. 1963); *Davis v. City of Lubbock*, 160 Tex. 38, 60, 326 S.W.2d 699, 714 (1959); *Southern Canal Co. v. State Bd. of Water Eng'rs*, 159 Tex. 227, 233, 318 S.W.2d 619, 624 (1958).

15. *TEX. REV. CIV. STAT. ANN.* art. 6252-13a (Vernon Supp. 1978-1979).

troverly has arisen as the result of two main problem areas.<sup>16</sup> Initially, the courts experienced difficulties in reconciling the broad scope of powers legislatively delegated to administrative agencies with the provision for strict separation of powers among the three branches of state government contained in the Texas Constitution.<sup>17</sup> Further, the courts have been faced with the interpretation of a diverse variety of judicial review statutes.<sup>18</sup> The result of this controversy has been the evolution of "substantial evidence de novo review" or the "Texas substantial evidence rule"<sup>19</sup>—a form of judicial examination of administrative action which was announced in *Trapp v. Shell Oil Co.*<sup>20</sup> and which is peculiar to Texas jurisprudence.<sup>21</sup>

16. See McCalla, *The Administrative Procedure and Texas Register Act*, 28 BAYLOR L. REV. 445, 466 (1976).

17. See *id.* at 466. Texas adopted a system of government very similar to that provided in the United States Constitution. One major difference, however, is that article II, section 1 of the Texas Constitution contains an express provision providing for the complete separation of power between the legislative, executive, and judicial branches. See TEX. CONST. art. II, § 1, interpretive commentary (Vernon 1955); Walker, *The Application of the Substantial Evidence Rule in Appeals From Orders of the Railroad Commission*, 32 TEXAS L. REV. 639, 639-40 (1954). See also *Gerst v. Nixon*, 411 S.W.2d 350, 353-54 (Tex. 1966); *Davis v. City of Lubbock*, 160 Tex. 38, 59-60, 326 S.W.2d 699, 714 (1959); *Fire Dep't v. City of Ft. Worth*, 147 Tex. 505, 509-10, 217 S.W. 2d 664, 666 (1949). The de novo review of administrative orders requires the examining court to adjudicate essentially the same issues already resolved at the agency hearing. In some situations in which the legislature provides for trial de novo of certain administrative decisions, the trial court in reviewing the administrative action is required to perform a legislative function by the very nature of the discretion delegated to the agency by statute. Thus, in *Davis v. City of Lubbock*, the supreme court held unconstitutional a de novo review provision which would have required the examining court to redetermine whether an urban slum area existed. In matters of public policy on which the legislature had delegated its discretion to an administrative agency, the judiciary could overturn the agency order only after a substantial evidence review which revealed arbitrary, capricious, or unreasonable action. *Davis v. City of Lubbock*, 160 Tex. 38, 60, 326 S.W.2d 699, 714 (1959). The supreme court clarified its position on the constitutional application of de novo review in *Key Western Life Ins. Co. v. State Bd. of Ins.* which held that the validity of a de novo review provision was to be determined by whether the examining court was called upon to exercise nonjudicial functions. *Key Western Life Ins. Co. v. State Bd. of Ins.*, 163 Tex. 11, 22-23, 350 S.W.2d 839, 847 (1961). Unfortunately, the supreme court has never satisfactorily articulated the determinative characteristics of judicial and nonjudicial functions. See 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.10, at 180-85 (1958).

18. McCalla, *The Administrative Procedure and Texas Register Act*, 28 BAYLOR L. REV. 445, 466-67 (1976); see, e.g., TEX. INS. CODE ANN. art. 21.44, Sub-ch. F (Vernon 1963) (review of Insurance Board actions); TEX. REV. CIV. STAT. ANN. art. 852a, § 11.12 (Vernon 1964) (review of Savings & Loan Commission actions); *id.* art. 1446c, § 69 (Vernon Supp. 1963-1978) (review of Public Utility Commission actions).

19. Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 SW. L.J. 239, 239-42 (1969). The concept of substantial evidence de novo originated in *Shupee v. Railroad Comm'n*, in which the Texas Supreme Court held that the Commission order must be sustained if it could be supported by any reasonable basis in fact and was not shown to be arbitrary and unreasonable. The reviewing court was not to substitute its discretion for that of the Railroad Commission in examining the administrative action. *Shupee v. Railroad Comm'n*, 123 Tex. 521, 527, 73 S.W.2d 505, 508 (1934).

20. 145 Tex. 323, 198 S.W.2d. 424 (1946). The development of Texas substantial evidence

Prior to the enactment of APTRA, most administrative appeal statutes were interpreted by the courts as requiring the application of substantial evidence de novo review.<sup>22</sup> Two exceptions to this trend were those cases concerning judicial review of appeals from workers' compensation awards and administrative rate determinations, which have been held to require pure trial de novo.<sup>23</sup> A special provision for judicial review accorded administrative rate determinations from which confiscation was alleged to occur was first approved by the United States Supreme Court in *Ohio Valley Water Co. v. Ben Avon Borough*.<sup>24</sup> Holding that the denial of a fair rate to

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de novo review was finalized in *Trapp v. Shell Oil Co.* Upon appeal of an administrative order, the supreme court held that the review was not limited solely to evidence presented before the Commission; rather, the district court was to examine all evidence anew to determine if necessary support existed for the order at the time it was made. *Id.* at 349-50, 198 S.W.2d at 440-41. If the prevailing party could present substantial evidence in support of the order, the court would be required to sustain the agency determination. *Id.* at 350, 198 S.W.2d at 441. Furthermore, the order was presumed to be valid and reasonably supported by substantial evidence, with the burden on the complaining party to prove the contrary. *See id.* at 349-50, 198 S.W.2d at 440-41.

21. *See* Hamilton & Jewett, *The Administrative Procedure and Texas Register Act: Contested Cases and Judicial Review*, 54 TEXAS L. REV. 285, 296 (1976); Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 SW. L.J. 239, 239-42 (1969). Substantial evidence de novo review contains elements of both trial de novo and the substantial evidence rule. As in trial de novo, the reviewing court receives and examines all evidence anew, without being restricted to the agency record. The court, however, is not to substitute its discretion for that of the agency on disputed questions of fact, but must sustain the agency action if reasonably supported by the evidence. This latter element is derived from the substantial evidence rule. Furthermore, as in substantial evidence review, the agency action is not affected by an appeal to the courts. *Id.* at 241.

22. *See* *Southern Canal Co. v. State Bd. of Water Eng'rs*, 159 Tex. 227, 233, 318 S.W.2d 619, 623-24 (1958). Purely a judicial creation, the Texas substantial evidence rule has been construed as applying to a variety of different appeals statutes. Guinn, *Judicial Review of Administrative Orders in Texas: A Comparative Analysis: The Board of Medical Examiners, Texas, California and Arkansas*, 23 BAYLOR L. REV. 34, 37 (1971); *see, e.g.,* *Davis v. City of Lubbock*, 160 Tex. 38, 60-61, 326 S.W.2d 699, 715 (1959) (applied when statute providing for de novo review held unconstitutional); *Cooper v. Texas Bd. of Medical Examiners*, 489 S.W.2d 129, 132 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.) (required when statute expressly provides for substantial evidence rule), *cert. denied*, 414 U.S. 1072 (1973); *Huguley v. Board of Adjustment*, 341 S.W.2d 212, 218 (Tex. Civ. App.—Dallas 1960, no writ) (applicable when statute does not specify form of review); *White v. Bolner*, 223 S.W.2d 686, 689 (Tex. Civ. App.—San Antonio 1949, writ ref'd) (no statutory review, but court ascertained that review was constitutionally required); *Department of Pub. Safety v. Robertson*, 203 S.W.2d 950, 953 (Tex. Civ. App.—Eastland 1947, no writ) (appeal statute provides for trial de novo).

23. *See, e.g.,* *Texas & N.O.R.R. v. Railroad Comm'n*, 155 Tex. 323, 338-39, 286 S.W.2d 112, 123 (1955) (rate determination); *Lone Star Gas Co. v. State*, 137 Tex. 279, 309, 153 S.W.2d 681, 697 (1941) (rate determination); *Booth v. Texas Employers' Ins. Ass'n*, 132 Tex. 237, 246-47, 123 S.W.2d 322, 328 (1938) (workers' compensation award).

24. 253 U.S. 287 (1920). *Ben Avon* resulted from a ratemaking decision of the Pennsylvania Public Service Commission alleged by the water company to be so low that the rate confiscated its property without just compensation. The Pennsylvania Supreme Court held that the rate decision of the Commission was to be reviewed by the substantial evidence test. *Id.* at 289. The Supreme Court reversed, finding that confiscation was a constitutional issue

a public utility amounts to the confiscation of property without due process, the opinion concluded that the utility was entitled to an independent judicial determination of the issue of confiscation.<sup>25</sup> Confiscation is said to occur when a public utility is deprived of just compensation or fair return on the value of its property used and useful in public service.<sup>26</sup> The Texas Supreme Court has recognized that the owner of property dedicated to a public service is entitled by law to a reasonable return on invested capital.<sup>27</sup> A rate which yields an income substantially below the market average for property of a similar nature is said to be confiscatory.<sup>28</sup>

Section 19 of APTRA indicates a present legislative desire to group all administrative appeal proceedings into two distinct categories, requiring the application of either substantial evidence review or trial de novo.<sup>29</sup> While these two types of review are delineated in their traditional forms, no provision exists for substantial evidence de novo review.<sup>30</sup> Recognizing

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which required full de novo review. *Id.* at 291. Although never expressly overruled by the Court, on the federal level the *Ben Avon* doctrine has been all but ignored since 1936. See B. SCHWARTZ, ADMINISTRATIVE LAW § 223, at 621 (1976). For a collection of cases from states still adhering to the *Ben Avon* doctrine, see Glick, *Independent Judicial Review of Administrative Rate-Making: The Rise and Demise of the Ben Avon Doctrine*, 40 FORDHAM L. REV. 305, 313 n.34 (1971).

25. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 291 (1920). *Ben Avon* required the complete judicial reexamination of all factual issues resolved by the administrative agency in drafting its rate order when confiscation is alleged by the utility. *Id.* at 291.

26. See, e.g., *American Toll Bridge Co. v. Railroad Comm'n*, 307 U.S. 486, 494-95 (1939); *General Tel. Co. v. City of Wellington*, 156 Tex. 238, 244, 294 S.W.2d 385, 389 (1956); *United Gas Pub. Serv. Co. v. State*, 89 S.W.2d 1094, 1102 (Tex. Civ. App.—Austin 1935, writ ref'd), *aff'd*, 303 U.S. 123 (1938). The fifth and fourteenth amendments of the United States Constitution protect private property against a taking for public use without adequate compensation. Neither the nation nor the state may take the property of a public utility by fixing rates that do not allow the utility a reasonable rate of return upon the value of that property. See *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 671 (1935).

27. See *General Tel. Co. v. City of Wellington*, 156 Tex. 238, 244, 294 S.W.2d 385, 389 (1956); *Railroad Comm'n v. Houston Natural Gas Corp.*, 155 Tex. 502, 509, 289 S.W.2d 559, 563 (1956). See also *City of Baytown v. General Tel. Co.*, 256 S.W.2d 187, 191 (Tex. Civ. App.—Galveston 1953, writ ref'd n.r.e.).

28. See *Railroad Comm'n v. Houston Natural Gas Corp.*, 155 Tex. 502, 509, 289 S.W.2d 559, 563 (1956).

29. See TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(c), (d), (e) (Vernon Supp. 1978-1979). Section 19(e) draws a clear distinction between these two forms of review. The substantial evidence rule is to be applied when authorized by statute and in all cases in which the scope of review is undefined by law. *Id.* § 19(e). Under the substantial evidence rule the reviewing court is restricted to examination of the agency record. *Id.* § 19(d)(3). The court may not substitute its discretion for that of the agency on questions of fact committed to the determination of the agency by the legislature. *Id.* § 19(e). Trial de novo is the appropriate form of judicial review only when expressly authorized by the particular statute. *Id.* § 19(e). Under pure de novo review, the administrative order is vacated, and the trial court examines all evidence anew, making independent findings of fact and conclusions of law as if no administrative order had intervened. *Id.* § 19(b)(3), (c), (e).

30. See *id.* § 19.

this, the Texas Supreme Court indicated in *Imperial American Resources Fund v. Railroad Commission*<sup>31</sup> that the substantial evidence de novo form of review previously applied by Texas courts was no longer the law.<sup>32</sup> Although the statute in question in the *Imperial* decision was the same one that was previously in issue in *Trapp v. Shell Oil Co.*,<sup>33</sup> the court held that review of this type of Railroad Commission action would henceforth be limited to the agency record under the substantial evidence rule of APTRA section 19(d).<sup>34</sup>

Prior to 1975, telephone rates were regulated by the incorporated cities and towns of the state of Texas.<sup>35</sup> In response to public demand for uniform utility regulation created by the rapidly increasing cost of utility services,<sup>36</sup> the 64th session of the Texas Legislature enacted the Public Utility Regulatory Act (PURA). The Act provides for a three-member Public Utility Commission (PUC) with authority to promulgate its own procedures and policies, while undertaking to regulate the rates and operation of the state's utility suppliers.<sup>38</sup> The administration of the Commission is governed by APTRA<sup>39</sup> when this act is not inconsistent with the statutory directives of PURA.<sup>40</sup> Although the PUC has the authority to investigate and determine utility rates in accordance with the guidelines of PURA, experience with appeals from pre-PURA administrative rate orders has demonstrated that the final decision on contested utility rate orders has often been made by the courts on appeal.<sup>41</sup> In section 69 of PURA, the legislature provided for the right of a dissatisfied party to appeal PUC actions to the courts.<sup>42</sup> According to section 69, a party alleging a PUC rate determination to be confiscatory is entitled to judicial review based on a preponderance of the evidence standard, while review of all other Commission orders is to be under the substantial evidence rule.<sup>43</sup>

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31. 557 S.W.2d 280 (Tex. 1977).

32. *See id.* at 285.

33. 145 Tex. 323, 198 S.W.2d 424 (1946).

34. *Imperial Am. Resources Fund, Inc. v. Railroad Comm'n*, 557 S.W.2d 280, 284-85 (Tex. 1977).

35. *See* 1905 Tex. Gen. Laws, ch. 145, at 348. *See generally* Newcomb, *Some Aspects of Regulation of Public Utilities Operating in the State of Texas*, 5 BAYLOR L. REV. 335, 338-40 (1953).

36. *See* Hopper, *A Legislative History of the Texas Public Utility Regulatory Act of 1975*, 28 BAYLOR L. REV. 777, 778-80 (1976).

37. TEX. REV. CIV. STAT. ANN. art. 1446c (Vernon Supp. 1963-1978).

38. *Id.* §§ 5, 16.

39. *Id.* art. 6252-13a (Vernon Supp. 1978-1979).

40. *Id.* art. 1446c, § 4 (Vernon Supp. 1963-1978).

41. *See, e.g.*, *Trapp v. Shell Oil Co.*, 145 Tex. 323, 333, 198 S.W.2d 424, 433 (1946); *Lone Star Gas Co. v. State*, 137 Tex. 279, 299, 153 S.W.2d 681, 692 (1941); *Railroad Comm'n v. Shell Oil Co.*, 154 S.W.2d 507, 513 (Tex. Civ. App.—Austin 1941), *aff'd*, 139 Tex. 66, 79-80, 161 S.W.2d 1022, 1030 (1942).

42. TEX. REV. CIV. STAT. ANN. art. 1446c, § 69 (Vernon Supp. 1963-1978).

43. *Id.* The cumulative provisions of APTRA including section 19, which prescribes the

In *Southwestern Bell Telephone Co. v. Public Utility Commission*<sup>44</sup> the Texas Supreme Court construed for the first time the manner of judicial review to be accorded a PUC rate order under PURA.<sup>45</sup> A concurrent interpretation of section 19 of APTRA was required, as PURA provided that APTRA was applicable to PUC proceedings as long as such proceedings were consistent with PURA.<sup>46</sup> Recognizing that the legislature intended APTRA to affect significant and far-reaching changes of judicial review in Texas,<sup>47</sup> the court held that in contested cases only two types of review are now available: pure trial de novo and substantial evidence review confined to the agency record.<sup>48</sup> Section 69 of PURA required that PUC actions were to be reviewed under the substantial evidence rule but that the issue of confiscation was to be determined by a preponderance of the evidence.<sup>49</sup> The court interpreted section 69 to provide that the manner of review authorized by law was "other than by trial de novo" and that section 19(d) of APTRA applied.<sup>50</sup> The second sentence of section 69 requiring the issue of confiscation to be determined by a preponderance of the evidence was declared void.<sup>51</sup> The preponderance of the evidence test was held to be a fact finding test and a feature of a de novo review.<sup>52</sup> To allow the issue of confiscation to be determined under the preponderance test would require two types of trial in the same suit.<sup>53</sup> The court, pointing out apparent inconsistencies involved in the attempt to mix the two types of review, held that in such a case the execution of the statute was rendered impossible.<sup>54</sup>

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nature of judicial examination for contested administrative orders, are applicable to appeals from PUC actions if found to be consistent with the directives of PURA. *See id.* § 4.

44. 571 S.W.2d 503 (Tex. 1978).

45. *Id.* at 503.

46. *See* TEX. REV. CIV. STAT. ANN. art. 1446c, § 4 (Vernon Supp. 1963-1978).

47. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 508 (Tex. 1978).

48. *Id.* at 508. Ratemaking cases are "contested cases" under APTRA by definition. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 3 (2) (Vernon Supp. 1978-1979). *See also* Imperial Am. Resources Fund v. Railroad Comm'n, 557 S.W.2d 280, 285 (Tex. 1977) (legislature accomplished significant change of judicial review).

49. TEX. REV. CIV. STAT. ANN. art. 1446c, § 69 (Vernon Supp. 1963-1978).

50. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 509 (Tex. 1978). The telephone company argued that under prior law, rate cases were reviewed under a form of trial de novo, and therefore, that was the manner authorized by law and applicable under APTRA. *Id.* at 547; *see* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(c) (Vernon Supp. 1978-1979) (if manner of review authorized by law is trial de novo, reviewing court will try all issues of law and fact). The court in rejecting this reasoning stated:

We will not lightly assume that by the simple inclusion of one sentence calling for the determination of the issue of confiscation by the preponderance of the evidence, the Legislature intended to prolong and extend the life of the special rate case category of review and render practically meaningless the volumes of testimony and exhibits developed before the Commission.

*Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 508 (Tex. 1978).

51. *Id.* at 512.

52. *Id.* at 511.

53. *Id.* at 511.

54. *Id.* at 512.



With the second sentence of section 69 eliminated, the court concluded that PURA and APTRA were consistent, and that the manner of review available from an order of the PUC was to be under the substantial evidence rule.<sup>55</sup>

In reaching the same conclusion as that announced in the *Imperial* decision,<sup>56</sup> the court in *Southwestern Bell* construed section 19 of APTRA as providing for only two types of judicial review.<sup>57</sup> A pure trial de novo is held to be available only for review of those administrative decisions for which a de novo appeal was expressly authorized by law.<sup>58</sup> Review of all other administrative decisions will be based on the substantial evidence rule limiting the court to examination of the agency record.<sup>59</sup> Adoption and application of the pure substantial evidence test represents a definite improvement over the tedious substantial evidence de novo form of judicial review previously used by the courts. While the trial court still applies the same basic standard of review in examining the administrative order as under substantial evidence de novo, the court is not required to grant the complainant a new trial.<sup>60</sup> The administrative agency hearing will no longer be a mere rehearsal for an anticipated appeal to the courts following an adverse decision. The effect is to eliminate the unavoidably time consuming task of reexamining the same mass of evidence presented at the agency hearing, while recognizing the ability of Texas administrative agencies to conduct procedurally fair and effective hearings.<sup>61</sup>

The supreme court may have reached the best result at the expense of ignoring relatively clear expressions of legislative intent in the drafting of PURA. In determining that section 69 of PURA requires the application of the pure substantial evidence test, the court declared the second sentence of that section, providing for a preponderance of the evidence test on the issue of confiscation, to be void and of no effect.<sup>62</sup> Section 69 of PURA was enacted as the result of legislative compromise.<sup>63</sup> The original proposal for judicial review under PURA provided only for review under the substantial evidence rule.<sup>64</sup> The second sentence of section 69 was considered

55. *Id.* at 512.

56. Compare *Imperial Am. Resources Fund v. Railroad Comm'n*, 557 S.W.2d 280, 285 (Tex. 1977) with *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 512 (Tex. 1978).

57. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 509 (Tex. 1978).

58. *Id.* at 509.

59. *Id.* at 510.

60. See *Imperial Am. Resources Fund v. Railroad Comm'n*, 557 S.W.2d 280, 285 (Tex. 1977).

61. See *id.* at 285; Comment, *Judicial Review of Administrative Agency Action—A Need for Texas Reform?*, 40 TEXAS L. REV. 992, 1012 (1962).

62. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 512 (Tex. 1978).

63. See Hopper, *A Legislative History of the Texas Public Utility Regulatory Act of 1975*, 28 BAYLOR L. REV. 777, 813-14 (1976).

64. *Id.* at 813-14.

a necessary addition to ensure legislative approval of the Act.<sup>65</sup> This can fairly be interpreted as indicating a legislative intent to distinguish the problem of confiscation, and to provide for review other than by the substantial evidence rule when confiscation is at issue.<sup>66</sup>

Although the court recognized the legislative prerogative to specify the form of review to be accorded administrative actions within the purview of constitutional limitations,<sup>67</sup> these limitations were held to have been transgressed by requiring what purported to be two diametrically opposed standards of judicial review to be mixed in the same proceeding.<sup>68</sup> This conclusion represents a complete reversal of precedent developed over the past quarter century.<sup>69</sup> As Justice Reavley has commented, the line of supreme court decisions applying substantial evidence de novo review represented a peculiar Texas tradition of mixing elements of both substantial evidence and pure de novo review in the same judicial proceeding.<sup>70</sup> Furthermore, it must be questioned whether the legislature ever intended that such a mixed form of review should occur as a result of the construction of section 69 of PURA. As the majority noted, a preponderance of the evidence standard is "ordinarily a feature of a trial de novo."<sup>71</sup> Thus, when section 69 is interpreted in conjunction with section 19 of APTRA, it seems quite logical to conclude that the legislative intent underlying section 69 was for judicial review on the issue of confiscation to be conducted by trial de novo.<sup>72</sup> The court, however, went out of its way to avoid such an interpretation by apparently inventing obstacles to defeat relatively clear legislative intent.<sup>73</sup> "[T]he plain, obvious, and rational meaning of a statute

65. *Id.* at 814.

66. See Hamilton & Jewett, *The Administrative Procedure and Texas Register Act: Contested Cases and Judicial Review*, 54 TEXAS L. REV. 285, 310 (1976); Hopper, *A Legislative History of the Texas Public Utility Regulatory Act of 1975*, 28 BAYLOR L. REV. 777, 813-14 (1976).

67. See *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 511 (Tex. 1978).

68. *Id.* at 512.

69. Compare *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 512 (Tex. 1978) with *Texas & N.O.R.R. v. Railroad Comm'n*, 155 Tex. 323, 338, 286 S.W.2d 112, 123 (1955) and *Trapp v. Shell Oil Co.*, 145 Tex. 323, 349-50, 198 S.W.2d 424, 441 (1946).

70. See Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 SW. L.J. 239, 240-41 (1969).

71. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 511 (Tex. 1978).

72. Compare TEX. REV. CIV. STAT. ANN. art. 1446c, § 69 (Vernon Supp. 1963-1978) with *id.* art. 6252-13a, § 19 (Vernon Supp. 1978-1979).

73. See *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 508-512 (Tex. 1978). The opinion apparently finds "confiscation" to be a term capable of too many meanings to permit its useful application to judicial review. *Id.* at 511. In fact the term "confiscation" has been of central importance in a number of the court's own decisions, which afford reasonably consistent definitions of the concept. See, e.g., *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 530 (Tex. 1975); *General Tel. Co. v. City of Wellington*, 156 Tex. 238, 245, 294 S.W.2d 385, 389 (1956); *Railroad Comm'n v. Houston Natural Gas Corp.*, 155 Tex. 502, 509, 289 S.W.2d 559, 563 (1956). Another example of these alleged problems is found

is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."<sup>74</sup>

The dissenting opinions of Justice Chadick point out additional uncertainty of the substantive reasoning upon which the majority decision rests.<sup>75</sup> Justice Chadick contended that the majority's action is correct if the determination of the reasonableness of Southwestern Bell's compensation for the public use of its property is an administrative and not a judicial function.<sup>76</sup> The Texas Supreme Court has clearly indicated, however, that a determination on the confiscatory nature of public utility rates is a judicial function<sup>77</sup> while recognizing that the prescription of rates is solely within the realm of the legislative process under the Texas system of separation of powers.<sup>78</sup> The court in *State v. Southwestern Bell Telephone Co.*<sup>79</sup> held that a district court in reviewing the issue of confiscation does not ultimately fix the rate, but merely determines whether the rate fixed is lawful.<sup>80</sup> The foregoing distinction is in keeping with article I, section 17 of the Texas Constitution which provides: "No person's property shall be . . . applied to public use without adequate compensation . . ."<sup>81</sup> The determination of confiscation, therefore, involves a property right guaranteed to the utility by the Texas Constitution. In addition to the guarantee of adequate compensation, Justice Chadick noted that the Texas Constitution provides for the right of trial by jury in all causes in the district court.<sup>82</sup> The supreme court has indicated that a "cause" for purposes of determin-

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in the court's statement that no cases have permitted the use of both substantial evidence and de novo review in the same proceeding, with *Southern Canal Co. v. State Board of Water Engineers* cited as authority. See *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 512 (Tex. 1978). *Southern Canal* did strike down a provision for review of actions by the State Board of Water Engineers as requiring the combination of de novo and substantial evidence review in the same appeal, but the decision goes on to reaffirm such a combination review for rate cases. See *Southern Canal Co. v. State Bd. of Water Eng'rs*, 159 Tex. 227, 232-34, 318 S.W.2d 619, 623-24 (1958). See also *Texas & N.O.R.R. v. Railroad Comm'n*, 155 Tex. 323, 328, 286 S.W.2d 112, 123 (1955).

74. *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925).

75. See *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 516-19 (Tex. 1978) (dissenting opinions to majority decision and to denial of rehearing).

76. *Id.* at 517 (dissenting opinion).

77. See *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 530-31 (Tex. 1975). See generally *Key Western Life Ins. Co. v. State Bd. of Ins.*, 163 Tex. 11, 19, 350 S.W.2d 839, 847 (1961).

78. See *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 529 (Tex. 1975).

79. 526 S.W.2d 526 (Tex. 1975).

80. *Id.* at 529.

81. TEX. CONST. art. I, § 17.

82. See *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 517 (Tex. 1978) (dissenting opinion). TEX. CONST. art. V, § 10, provides in pertinent part: "In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case . . . ."

ing the right to trial by jury is defined as "any legal process which a party institutes to obtain his demand or by which he seeks his right."<sup>83</sup> Although exceptions to the right to a trial by jury have been recognized in appeals from administrative proceedings,<sup>84</sup> the exception is inapplicable when a property right is involved.<sup>85</sup> Thus, unless the majority opinion was intended by the court to impliedly constrict the right to trial by jury, which seems constitutionally untenable, the result of the decision is to create an apparent conflict with specific constitutional guarantees.<sup>86</sup>

The supreme court should have recognized the pitfalls of attempting to relate the issue of review under section 69 of PURA to the background of prior divergent and inconsistent decisions concerning judicial review.<sup>87</sup> Nevertheless, in holding that utilities under PURA are entitled to a substantial evidence review, Texas has adopted the modern view with respect to judicial review of rate cases.<sup>88</sup> The redundancy and waste recognized and attacked by the critics of Texas administrative review<sup>89</sup> apparently have been eliminated by APTRA. Now factual determination will properly be the responsibility of the agencies, and the reasonableness of the determination will be reviewed by the courts based on the agency record. It is to

83. *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 292 (Tex. 1975).

84. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 517 (Tex. 1978)(dissenting opinion) (quoting *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 293 (Tex. 1975)).

85. Texas has recognized the inapplicability of the administrative proceeding exception in rate cases, based on the realization that these cases deal with vested property rights. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 518 (Tex. 1978) (dissenting opinion) (citing *General Telephone Co. v. City of Wellington*, 156 Tex. 238, 243-45, 294 S.W.2d 385, 388-89 (1956); *Lone Star Gas Co. v. State*, 137 Tex. 279, 306-07, 153 S.W.2d 681, 696 (1941)). Contrary to the expressions of the majority, the legislature appears to have continued the long established exceptional treatment afforded rate appeals by the statutory designation of such appeals as "contested cases" under APTRA. *See TEX. REV. CIV. STAT. ANN.* art. 6252-13a, § 3(2) (Vernon Supp. 1978-1979). This conclusion is further supported by the proposition that de novo review is constitutional when an administrative agency has exercised a judicial function. *See Key Western Life Ins. Co. v. State Bd. of Ins.*, 163 Tex. 11, 27, 350 S.W.2d 839, 850 (1961); K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 29.10, at 543 (3d ed. 1972). It could be argued that when the PUC sets a rate, whether confiscatory or not, the Commission has performed a judicial function in that it has exercised quasi-judicial discretion to authorize a taking of private property for public use. *See Key Western Life Ins. Co. v. State Bd. of Ins.*, 163 Tex. 11, 22-25 350 S.W.2d 839, 847-49 (1961).

86. *See Southwestern Bell. Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 517-19 (Tex. 1978) (dissenting opinion).

87. *See, e.g., Chemical Bank & Trust Co. v. Falkner*, 369 S.W.2d 427, 431-32 (Tex. 1963); *Davis v. City of Lubbock*, 160 Tex. 38, 60, 326 S.W.2d 699, 714 (1959); *Southern Canal Co. v. State Bd. of Water Eng'rs*, 159 Tex. 227, 233, 318 S.W.2d 619, 624 (1958).

88. *See B. SCHWARTZ, ADMINISTRATIVE LAW* § 223, at 621 (1976).

89. *See Hamilton & Jewett, The Administrative Procedure and Texas Register Act: Contested Cases and Judicial Review*, 54 TEXAS L. REV. 285, 298 at n.56 (1976); Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 Sw. L.J. 239, 250-55 (1969); Walker, *The Application of the Substantial Evidence Rule in Appeals From Orders of the Railroad Commission*, 32 TEXAS L. REV. 639, 659 (1954).