Hope a Better Rate for Me

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Ratemaking, the dreariest legal expression of the dismal science, is sexy again. Once upon a time, judicially enforced constitutional restraints on the setting of public utility rates strengthened the intellectual backbone of the Lochner era.¹ Contemporary interest in this doctrine stems from the imposition of “the duty to interconnect, to lease unbundled network elements, and to sell services for resale” on incumbent firms in the few remaining “market segments that have natural monopoly characteristics.”² The Federal Communications Commission’s contribution to this great legal transformation, its embattled total element long-run incremental cost rule (TELRIC),³ will in all likelihood be reviewed under some variant of the confiscatory ratemaking doctrine.⁴ So controversial is TELRIC that it has inspired a literature on “deregulatory takings”⁵ and a counter-literature denying the entire phenomenon.⁶

On this occasion, I do not wish so much to re-engage this debate as to entertain the combatants. I therefore offer the following anthem for our deregulatory age, a ballad “dedicated to the [law] I love.”⁷ Sing along, all you who debate the notion of deregulatory takings, “And we’ll have memories for company / Long after the songs are sung.”⁸

† Professor of Law and Vance K. Opperman Research Scholar, University of Minnesota Law School. Gil Grantmore provided helpful comments.
4 See AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 728 n.3 (1999) (upholding the FCC’s authority to issue TELRIC, but declining to address the rule’s merits); id. at 751-53 (Breyer, J., concurring in part and dissenting in part) (questioning the regulatory premises underlying TELRIC).
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Low rates could be a taking;\(^9\) High rates would give the public a raking.\(^11\) Your discretion is as broad as the sea.\(^12\) Hope a better rate for me.\(^13\)

Fair value, Justice Harlan, Don’t confiscate my profits, o darlin’\(^14\).
Southwestern Bell’s original cost\(^15\)
Leaves robber barons in the frost.\(^16\)

One second, this is a gas case.\(^17\)
Depletion’s apace!
Low pricing could hurt the home market.
Rate base talk just misses the target.

Group rates throughout the Basin—
Cut costs and hope production will hasten.\(^18\)
That nuclear station isn’t useful and used;\(^19\)
How could Hope be so abused?\(^20\)

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9 To be sung to the tune of *Dream a Little Dream of Me*, *Sing The MAMAS AND THE PAPAS, Dream a Little Dream of Me*, on *The BEST OF THE MAMAS AND THE PAPAS*, supra note 7.
10 See *SIDAK & SPULBER*, supra note 5.
11 See, e.g., sources cited supra note 6.
13 See FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) (holding that FPC-established rates that cover costs of providing service are not unreasonable, even if the result is a meager return on a rate base computed on the “fair present value” standard).
14 See Smith v. Ames, 169 U.S. 466 (1898) (Harlan, J.) (holding that states may not deny just compensation to railroads by setting rates that do not allow recovery of operating costs).
15 See Missouri *ex rel.* Southwestern Bell Tel. Co. v. Public Serv. Comm’n, 262 U.S. 276, 289-312 (1923) (Brandeis, J., dissenting) (arguing that utility rates are constitutionally compensatory if they allow a utility to recover the cost of the service provided).
17 See Hope, 320 U.S. at 628-60 (opinion of Jackson, J.) (arguing that the special characteristics of the natural gas industry favor ratemaking flexibility over rigid ratemaking formulas).
18 See Permian Basin Area Rate Cases, 390 U.S. 747 (1968) (upholding the FPC’s establishment of general rates for a natural gas-producing area, rather than rates set for individual fields within the production area).