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Charitable Contributions of Public Utilities: Who Should Bear the Cost?

Peter M. Sikora

CHARITABLE CONTRIBUTIONS OF PUBLIC UTILITIES: WHO SHOULD BEAR THE COST?

*Considerable controversy surrounds the budgetary treatment which public utilities give their charitable contributions. If such contributions are regarded as operating expenses, ratepayers bear the cost; if they are otherwise treated, the burden shifts to the shareholders of the utility. The author surveys the arguments concerning the proper treatment of a public utility's charitable contributions and concludes that the most equitable rationale is one that seeks to allocate the burden of cost to those who benefit from the contributions. The Note's analysis continues further and demonstrates that because the benefits of a utility's charitable contributions flow to both ratepayer and shareholder alike, the "all or nothing" approach employed by many courts and commissions stultifies an equitable distribution of costs. Consequently, the author proposes an alternative approach which approximates the costs of the resultant benefits of charitable contributions and allocates the costs to both the ratepayers and shareholders accordingly.**

INTRODUCTION

RECENTLY, MANY STATE public utilities commissions and reviewing courts have had to decide whether a public utility should be allowed to include its charitable contributions in its operating expenses.[1] When contributions are treated as operating expenses, they become part of the cost passed on to the utility's ratepayers in the form of higher rates.[2] When operating expense treatment is not afforded the contributions, they must be borne, in the form of lower earnings and dividends, by the shareholders of the utility.[3]

Although this issue has not been extensively discussed by commentators, those who have addressed the question have generally determined that charitable contributions of public utilities should be treated as operating expenses.[4] However, the commissions and

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* The author wishes to express his appreciation to his parents.

1. Blumberg, *Corporate Responsibility and the Social Crisis*, 50 B.U. L. REV. 157, 181 (1970).

2. A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 86 (1969).

3. *Id.*

4. *See, e.g.*, A. PRIEST, *supra* note 2, at 83–87; Blumberg, *supra* note 1, at 181 (discussing contributions with respect to long and short-term profitability); Carpenter, *The Problem of Utility Donations*, 65 PUB. UTIL. FORT. 289 (1960) (discussing the functions of donations and their compatibility with other expenses); *Contributions in Operating Expenses*, 81 PUB. UTIL. FORT. 51 (1968) (discussing the policies behind allowing operating expense treatment of charitable contributions); *Contributions as an Operating Expense*, 73 PUB. UTIL. FORT. 69 (1964) (discussing the necessary nature of charitable contributions);

courts which have dealt with the issue have been unable to agree on the proper treatment to be accorded charitable contributions. Although a sizeable majority of the commissions has disallowed operating expense treatment,[5] a slight majority of the courts (which review commission rulings)[6] has allowed it.[7]

There are three primary arguments that have been raised concerning this issue. One argument, which favors treating charitable contributions as utility operating expenses, is based on the idea that such contributions are necessary expenses of doing business in the community in which the utility is located.[8] Following this rationale leads to the conclusion that the contributions should be given treatment similar to other necessary expenses and thus be included in the rates charged to customers. A second, contrary argument focuses on the monopolistic nature of utilities and on an assumption that any charitable contribution which is borne in any way by an individual should be a matter of personal choice to that individual. This argument contends that contributions made by utilities and treated as operating expenses would be an involuntary levy on the ratepayers since the element of personal choice is absent.[9]

A third argument, which may support either position, posits that the party that receives the benefit of the charitable contribution should bear the expense of the contribution.[10] Those favoring operating expense treatment contend that since ratepayers benefit through increased charitable services in the community, the ratepayers should bear the cost.[11] In contrast, those arguing against such treatment reason that utility shareholders should bear the cost of contributions since they benefit from an enriched commu-

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Contributions by Public Utility Corporations to Charitable Enterprises, 65 PUB. UTIL. FORT. 873 (1960) (discussing the merit of utility contributions in terms of community well-being); *Regulatory Trends*, 56 PUB. UTIL. FORT. 830 (1955) (a compilation of cases which address the treatment of utility charitable contributions).

5. Blumberg, *supra* note 1, at 181–82.

6. The procedure for review of a commission decision is determined by the relevant state statute. Provisions vary substantially from state to state, differing as to which parties may appeal, when an appeal may be undertaken, and whether the posting of a bond is necessary. *See* A. PRIEST, *supra* note 2, at 429–30.

In Ohio, the standard of review is set forth in OHIO REV. CODE ANN. § 4903.13 (Page 1976). According to this provision, only those orders of the Public Utilities Commission of Ohio which are unlawful or unreasonable may be reversed. *Id.*

7. Blumberg, *supra* note 1, at 181–82.

8. *See* notes 21–40 *infra* and accompanying text.

9. *See* notes 41–71 *infra* and accompanying text.

10. *See* notes 72–105 *infra* and accompanying text.

11. *See* notes 93–100 *infra* and accompanying text.

nity and enhanced good will which spawn more customers and thus greater revenues.[12]

This controversy is particularly relevant to Ohio where the Ohio Supreme Court, in *City of Cincinnati v. Public Utilities Commission of Ohio*,[13] held that the Public Utilities Commission of Ohio (PUCO) "operates reasonably and lawfully when it includes a utility's reasonable charitable contributions which benefit the communities in which they are made in its calculation of the utility's operating expenses."[14] Perhaps in response to this decision, the Ohio legislature is considering a bill which would preclude a public utility from including all such contributions as operating expenses.[15]

This Note examines the arguments outlined above,[16] particularly in light of *City of Cincinnati* and its dissent.[17] It concludes that arguments relating to the necessity of contributions or contributions as an involuntary levy are inconclusive and proposes that the third argument—allocating cost to the party that benefits—is the most equitable solution.[18] The Note then proposes that since neither party benefits to the exclusion of the other, the "all or nothing" approach taken by courts and commissions to date is unsound.[19] Finally, the Note presents a solution which attempts to correlate the benefits gained with the costs to be shared.[20]

I. CHARITABLE CONTRIBUTIONS AS NECESSARY EXPENSES

In *City of Cincinnati*, decisions rendered by PUCO with respect to an application by the Cincinnati Gas & Electric Company for a rate increase were challenged by the city.[21] In particular, the Ohio Supreme Court reviewed the commission's decision to include charitable contributions and other expenditures in its ratemaking formula.[22] As the majority framed the issue, it was

12. *See* notes 101–04 *infra* and accompanying text.

13. 55 Ohio St. 2d 168, 378 N.E.2d 729 (1978).

14. *Id.* at 173, 378 N.E.2d at 733.

15. H.B. 163, 113th General Assembly, § 4909.15 (A)(4) (1979).

16. *See* text accompanying notes 1–12 *supra* and notes 21–104 *infra* and accompanying text.

17. *See* notes 21–24, 27–29, 40–41, 102 *infra* and accompanying text.

18. *See* notes 37–39, 63–105 *infra* and accompanying text.

19. *See* note 105 *infra* and accompanying text.

20. *See* notes 106–20 *infra* and accompanying text.

21. 55 Ohio St. 2d at 169, 378 N.E.2d at 731. *See* note 6 *supra*.

22. *Id.* at 171, 378 N.E.2d at 732. The other challenged expenses involved portions of the company's federal income tax and test-year operating expenses. *Id.* at 174–75, 378 N.E.2d at 733–34.

"the city's contention that the commission's inclusion of charitable contributions in its calculation of operating expenses was unreasonable and unlawful."[23]

In affirming the PUCO decision to include charitable contributions as operating expenses, the court relied in part on the argument that since "[c]orporations have an obligation to the communities in which they are located and they are expected to recognize this obligation . . . , [it follows] that these contributions have an important relationship to the necessary costs of doing business."[24] Notably, this position has considerable support. Other courts and commissions have spoken of the fact that "utilities are fair game for those who solicit contributions on behalf of a community's charities,"[25] and that "public utilities must be good citizens and the public expects contributions."[26]

The Ohio court also emphasized the "less than voluntary" nature of utility charitable contributions.[27] Specifically, the court noted that since many charitable organizations depend on corporate donations,[28] and since many charity fundraising activities may be particularly vigorous, the element of choice normally associated with individual charitable donations was removed.[29]

Commentators have generally given approval to operating expense treatment of charitable contributions for such reasons.[30] In addition, some commentators have found contributions to be necessary by reasoning that if operating expense treatment was disallowed, utilities would be put at a disadvantage with other industries since participation by utilities in good will building activities would be relatively restricted.[31] Following this reasoning, a Kansas court concluded that contributions were necessary expenditures because they were essential to maintain the standing and good will of the utility in the community.[32] The court stated, "it has not been the policy of this state to penalize any individual

23. *Id.* at 172, 378 N.E.2d at 732.

24. *Id.* (quoting *In re* United Gas Pipe Line Co., 31 F.P.C. 1180, 1189, 54 P.U.R.3d 275, 295 (1964).

25. City of Miami v. Florida Pub. Serv. Comm'n, 208 So. 2d 249, 258 (Fla. 1968). *See also* Southern Bell Tel. & Tel. Co., 66 P.U.R.3d 1, 6 (Fla. Pub. Serv. Comm'n 1966).

26. 208 So. 2d at 259.

27. 55 Ohio St. 2d at 172, 378 N.E.2d at 732.

28. *Id.*

29. *Id.*

30. *E.g.*, A. PRIEST, *supra* note 2, at 83, 87; Carpenter, *supra* note 4, at 290. *See* note 4 *supra*.

31. *See* note 30 *supra*.

32. Southwestern Bell Tel. Co. v. State Corp. Comm'n, 192 Kan. 39, 73, 386 P.2d 515,

or corporation for assuming reasonable charitable and civic responsibilities."[33]

Facially, these arguments have merit. If contributions are made to fulfill some obligation, or made without choice, they are necessary expenses and as such should be treated as operating expenses. Yet, this line of reasoning is not necessarily compelling. For example, one state court[34] concluded that contributions "are expenditures which are entirely optional and not compulsory, and it does not appear that any adverse effect on [the utility's] . . . revenue would ensure if such contributions and donations were not made."[35] Accordingly, the utility's charitable contributions were not allowed as operating expenses.[36]

One commission, which recognized the distinctive nature of utility operating expenses, has indicated that "the only rational justification" for passing the cost of contributions along to the ratepayers "is that they do in fact lead to lower overall costs of doing business and therefore benefit the ratepayers."[37] That commission concluded that mere testimony to the effect "that such contributions are involved in being a good corporate citizen and they must participate in this sort of activity" is not enough to justify passing the expense along to the ratepayers.[38]

This approach seems preferable for two reasons. First, it avoids the conclusory aspect of the necessity arguments. The obligatory or binding nature of utility contributions seems to be illusory and thus an improper basis for forcing ratepayers to bear the costs of such expenses. Second, the approach of forcing ratepayers to pay for only that from which they benefit has a historical basis in corporation law.[39] Although ratepayers could probably be more smoothly analogized to corporation customers than

545 (1963). *See also* United Gas Corp. v. Mississippi Pub. Serv. Comm'n, 127 So. 2d 404 (Miss. 1961).

33. 192 Kan. at 73, 386 P.2d at 545.

34. Solar Elec. Co. v. Pennsylvania Pub. Util. Comm'n, 137 Pa. Super. Ct. 325, 9 A.2d 447 (1939).

35. *Id.* at 379, 9 A.2d at 475.

36. *Id.* at 378–79, 9 A.2d at 475.

37. Southern Union Gas Co., 12 P.U.R.4th 219, 230 (N.M. Pub. Serv. Comm'n 1975). The commission ultimately denied application of any contribution to the consumer rate because the company failed to show that the contributions benefited the utility service community. *Id.* at 229. For a discussion of benefit as a criterion for contribution treatment, see notes 72–105 *infra* and accompanying text.

38. 12 P.U.R.4th at 230.

39. *See* notes 74–92 *infra* and accompanying text.

stockholders, the special nature of utilities as monopolies[40] may more than make up for any such analytical difficulties.

II. CHARITABLE CONTRIBUTIONS AS AN INVOLUNTARY LEVY

The argument which contends that allowing charitable contributions to be operating expenses amounts to an involuntary levy on ratepayers is predicated on two concepts—that utilities are monopolies[41] and that charitable contributions are a matter of per-

40. *See* note 41 *infra*.

41. In a competitive market, whenever firms in an industry begin to show abnormally high returns, new firms naturally enter the industry. T. MORGAN, CASES AND MATERIALS ON ECONOMIC REGULATION OF BUSINESS 213 (1976). The potential entry of new firms tends to prevent the prices in any industry from exceeding average cost. *Id.* This simple rule of economics prevents a firm in a competitive industry from expending more on charity than "the market will bear."

There are, however, some industries—monopolies—in which "competition is inherently unavailable or inadequate" to guarantee that prices approximate average costs. A. PRIEST, *supra* note 2, at 4. Some monopolies are formed by noncompetitive or anticompetitive means, while others are "natural monopolies." As one commentator noted:

> [c]ertain industries are natural monopolies. This means that a single firm is intrinsically capable of capturing an entire market. These industries are characterized by enormous initial capital investment. Once that investment is made, a single firm can service an entire market at an average unit cost which will continuously decrease as the firm grows. An established firm therefore has an advantage which effectively forecloses market entry competitors.

Note, *Advertising by Public Utilities as an Allowable Expense for Ratemaking: Assault on Management Prerogative*, 13 VAL. U. L. REV. 87, 90 (1978).

Public utilities are considered natural monopolies. In order to protect consumers against exploitation, to insure that these industries will serve the public interest, and at the same time to provide public utility companies the necessary assurance of an opportunity to earn a reasonable return on their investment and to attract capital for expansion, public utilities are regulated by the state. A. PRIEST, *supra* note 2, at 1–4.

It has been stated that "[i]t is universally recognized that the goal of ratemaking is to impose controls which will simulate the results which would have occurred if the firm were subject to the pressures of competition." Note, *supra*, at 89. Consequently, regulatory commissions are responsible for setting allowable rates of return for public utilities. They do so by approving both expenses and revenues. *Id.* at 90–91. If the ratesetting is done correctly, the utility will recover a competitively fair rate of return, and the consumer will not be "burdened with unnecessary or extravagant costs." *Id.* at 92.

The typical procedure followed by a regulatory agency when setting rates is explained in C. PHILLIPS, THE ECONOMICS OF REGULATION 136–37 (rev. ed. 1969):

> Company X files for a rate increase. The company, with the concurrence of the commission or its staff, will generally select a "small test period," frequently the latest 12-month period for which complete data are available. The purposes of such a test period are as follows. In the first place, the commission must examine company expenses. Only reasonable expenses are allowed for rate-making purposes. In the second place, the commission must have a basis for estimating future revenue requirements. This estimate is, perhaps, the most difficult problem in a rate case. A commission is setting rates for the future, but it has only past experience (expenses, cost, and demand conditions) to use as a guide. Frequently, future estimates of expenses will be made, thereby resulting in either an increase or decrease of the test period expenses. But the commissions have been hesitant

sonal choice.[42] The argument posits that when utility management makes a contribution, the ratepayer is not free to object by taking his or her business elsewhere. Consequently, without such recourse the ratepayer is forced to bear charitable contributions without exercising personal choice.

This argument has considerable support. Justice Locher of the Ohio Supreme Court cited this reasoning, among others,[43] in his dissent in *City of Cincinnati*.[44] Some commissions relying on that

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to make future forecasts of consumer demand, often preferring instead to assume that the test period demand conditions will hold in the immediate future. For this reason, the actual rate of return earned by a regulated company may turn out to be quite different from the rate allowed by the commission in a particular rate case.

The case will be set down on the commission's docket for public hearings, and due notice will be given. When the case is called, testimony—sometimes oral and sometimes written ("canned")—will be presented by the company, the commission's staff, and interveners (interested parties). Such testimony is usually presented by outside experts, as well as by both company and staff personnel. All witnesses are sworn, the evidence is recorded, and witnesses may be questioned by the examiner or commission and cross-examined by counsel for opposing parties. In some instances, hearings will be held in the community or communities affected. At the federal level, the examiner will then issue his decision (the "initial decision") on the case. The decision must be written and accompanied by formal findings of fact and conclusions of law. It is then subject to review by the full commission, and the commission's decision, in turn, may be appealed to the courts.

Id.

For an explanation of mathematical formulas used in the ratemaking process, see T. MORGAN, *supra* at 219.

42. *See* Southern New England Tel. Co. v. Public Util. Comm'n, 29 Conn. Supp. 253, 274, 282 A.2d 915, 926 (1970); Connecticut Water Co., 41 P.U.R.3d 152 (Conn. Pub. Util. Comm'n 1961); Hartford Elec. Light Co., 35 P.U.R.3d 64 (Conn. Pub. Util. Comm'n 1960).

43. In reaching his conclusion, Justice Locher also took note of the manner in which PUCO had previously handled this issue. Initially, PUCO adamantly refused to allow a utility to treat its charitable contributions as an operating expense. 55 Ohio St. at 180–81, 378 N.E.2d at 737. By 1973, the commission had reversed itself and in some instances allowed the cost of charitable contributions to be passed on to consumers. *Id.* In 1973, the commission, acknowledging that it had not established a clear precedent in this area, allowed a portion of a utility's charitable contributions to be treated as operating expense. Cleveland Elec. Illuminating Co., 3 P.U.R.4th 259, 274 (Ohio Pub. Util. Comm'n 1973). In doing so, however, the commission clearly indicated its intent to disallow such treatment in future rate cases. *Id.* Justice Locher acknowledged that the commission has yet to implement this new rule, but nonetheless felt that "the apt reasoning expressed in other states" for the disallowance of a utility's charitable contributions as an operating expense, the early decisions of Ohio, and the "unjustified oscillation" of PUCO on the issue constrained him to conclude that:

> the charitable contributions of a utility, a monopoly with a guaranteed fair rate of return, should not be involuntarily borne by the consumer, who cannot obtain this service from another source, but should instead be the responsibility of the utility's shareholders, who not only control the company but share in its guaranteed profits.

55 Ohio St. 2d at 182, 378 N.E.2d at 737 (Locher, J., dissenting).

44. *Id.* at 177, 378 N.E.2d at 736. Justice Locher wrote:

rationale have found the following factors to be persuasive: ratepayers get no income tax credit for their contributions;[45] the contributions are authorized by the managers and directors of the company, not the ratepayers, and thus the burden of the costs should be borne by those for whom the managers work, the shareholders;[46] it is a misrepresentation to the customers, the public, and the charitable organizations for the utility to contend it has made charitable contributions when in fact all it has done is to serve as a funnel through which forced contributions have been passed from the ratepayer to the charitable organizations.[47]

Many courts similarly have maintained that charitable contributions of a utility, when allowed as an operating expense, amount to an involuntary levy[48] or assessment on the ratepayer,[49] and should not be passed on to him in the form of higher rates. For example, in *Pacific Telephone & Telegraph Co. v. Public Utilities Commission*,[50] the Public Utilities Commission of California, which had previously allowed public utilities to treat charitable contributions as operating expenses, reversed itself and announced a new policy to exclude contributions from operating expense for ratemaking purposes.[51] The California Supreme Court affirmed the commission's new policy.[52] The court conceded the worthiness of the donees and the benefits in good will accruing to the corporation,[53] but found other factors more persuasive.[54] It noted that because of the monopolistic nature of the utility, ratepayers who disapproved of various donations and who might have

> 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 service, are unable to obtain service from another source and thereby avoid such a levy. Ratepayers should be encouraged to contribute directly to worthy causes and not involuntarily through an allowance in utility rates. [The utility] . . . should not be permitted to be generous with ratepayers' money but may use its own funds in any lawful manner.

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

45. Michigan Bell Tel. Co., 20 P.U.R.3d 397, 406 (Mich. Pub. Serv. Comm'n 1957).

46. General Tel. Co. of Mich., 41 P.U.R.3d 469, 472 (Mich. Pub. Serv. Comm'n 1961).

47. United Fuel Gas Co., 35 P.U.R.3d 353, 364–65 (W. Va. Pub. Serv. Comm'n 1960).

48. *See* Davenport Water Co. v. Iowa St. Comm'n, 190 N.W.2d 583, 608 (Iowa 1971); Chesapeake & Potomac Tel. Co. of Md. v. Public Serv. Comm'n of Md., 230 Md. 395, 414, 187 A.2d 475, 485 (1963).

49. *See* Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 55 Ill. 2d 461, 481, 303 N.E.2d 364, 375 (1973).

50. 62 Cal. 2d 634, 44 Cal. Rptr. 1, 401 P.2d 353 (1965).

51. *Id.* at 668, 44 Cal. Rptr. at 22, 401 P.2d at 374.

52. *Id.*

53. *Id.*

54. *Id.*

wanted to obtain service from another source could not do so.[55] Therefore, contributions which should have been a matter of free choice became an involuntary levy.[56] The majority also rejected the argument that if corporations, including public utilities, did not contribute to charities, many of the donees might otherwise require and receive support from government and thus necessitate increased taxes.[57] The majority simply stated that the public utility "is not authorized to exact from its customers payments in lieu of taxes."[58]

In 1934, the Supreme Court of Oklahoma denied operating expense treatment for a utility's charitable contributions in *Carey v. Corporation Commission of Oklahoma*.[59] The court acknowledged that donations are a matter for the discretion of corporate management,[60] and analogized a public corporation to an individual who, once he has made a decision to support a public charity, should not expect his employer to increase his compensation accordingly.[61] A corporation, like an individual, should be allowed to contribute to charity, but then should not "be allowed to increase its earnings to take care thereof."[62]

Although these arguments also have facial validity, an examination of the underlying concepts shows serious flaws. While it is true that in the nonregulated, nonmonopolistic industries the consumer generally has a choice of sources from which to purchase his goods and services, it is unlikely that a consideration of a particular firm's choices regarding charitable contributions is consciously a part of a consumer's purchasing decisions. It seems probable that when purchasing goods or services in a nonregu-

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55. *Id.*

56. That theme was enlarged upon by the concurring justice who wrote:

> Corporations are permitted to "make donations . . . ." A dissatisfied stockholder may seek to change the policies of a corporation, defeat the directors, or sell his stock investment. No comparable alternatives are available to a monopoly ratepayer, whose only choice is to pay the full bill sent to him—for services rendered and gifts made in the name of the company—or abandon the use of his telephone. The unfairness is manifest.

Id. at 677, 44 Cal. Rptr. at 27, 401 P.2d at 379 (Mosk, J., concurring).

57. The dissent argued that "as a pure business proposition, it is more economical for a public corporation to support private charities than it would be if the corporation had to pay increased taxes to support government-operated activities." *Id.* at 680, 44 Cal. Rptr. at 29, 401 P.2d at 381 (Peters, J., concurring and dissenting).

58. *Id.* at 669, 44 Cal. Rptr. at 22, 401 P.2d at 374.

59. 168 Okla. 487, 33 P.2d 788 (1934).

60. *Id.* at 492, 33 P.2d at 794.

61. *Id.*

62. *Id.*

lated industry, consumers are not consciously aware of, or even interested in a corporation's record of charitable contributions. A consumer's option to boycott a firm which has made inappropriate charitable contributions seems more theoretical than actual. Therefore, an argument based upon the proposition that the passage of contributions on to the ratepayer amounts to an involuntary levy is not necessarily compelling.

Viewed in another light, the decisions concerning which types of charitable activities the public should be required to support are generally made by elected governmental officials. To allow a utility to make charitable contributions and then pass them on may indeed be viewed as an imposition of an unvoted tax.[63] While it can be argued that most of the donee charities would receive tax support if the contributions were not forthcoming,[64] and that both consumers and utilities would be required to pay more in taxes than they would have in contributions,[65] it is probably also true that, if left to the public through its representatives, some of the charitable organizations and activities might indeed not be funded by tax dollars. Still, it might reasonably be assumed that utility managers and directors are not going to make contributions that would be ill-received by the public. "Improper" contributions would come to the attention of the public, instigate public resentment, and cause the managers, directors, and the utility embarrassment.[66] In addition, the utility's charitable contributions are subject to scrutiny by the ratemaking commission,[67] the members of which are generally either elected or appointed by elected officials.[68] Thus, the public may have some control over the nature and amount of contributions. As a result, the fact that ratepayers are unable to exercise personal choice re-

63. Such a "tax" would quite likely be regressive. *See* Pacific Tel. & Tel. Co. v. Public Util. Comm'n, 62 Cal. 2d 634, 44 Cal. Rptr. 1, 401 P.2d 353 (1965).

64. *See* note 57 *supra* and accompanying text.

65. Carpenter, *supra* note 4, at 290–92. According to Carpenter, nearly one hundred percent of every dollar collected by a utility for charity goes to charity. The government must collect two dollars in taxes to give one dollar to health or educational activity. *Id.* at 300.

Carpenter also contends that corporate giving is much better in general than mass fund raising efforts because the latter involves high fund raising costs and consigns the field to highly professional personnel, public relations, and merchandising techniques, while the former involves low fund raising costs and can be based on real need. *Id.* at 292.

66. *Cf.* The Plain Dealer, August 18, 1978, at 2–A, col. 1.

67. *See* note 6 *supra.*

68. F. WELCH, CASES AND TEXT ON PUBLIC UTILITY REGULATION 578 (rev. ed. 1968).

garding the contributions made by utilities does not seem to be the cause for concern which some courts and commissions suggest.

In addition, while including a utility's contributions as an operating expense would increase the rates, it would probably increase them by only a relatively small amount.[69] For example, in *Vrtjak v. Illinois Bell Telephone Company*,[70] it was calculated that a contribution of $310,000, spread over the utility's approximately two million telephones in the Chicago area, amounted to an annual charge on each telephone of about sixteen cents. Taking into consideration the income tax effect, the charge amounted to about eight cents.[71]

Consequently, since neither arguments based on the necessary nature of charitable contributions nor the arguments concerning the involuntary burden thrust on ratepayers when operating expense charitable contributions are treated as operating expenses may be found to be absolutely compelling, other arguments should be examined.

III. THE BENEFIT CONTROVERSY

A third rationale, based upon the simple notion that he who benefits from an expenditure should bear the cost, may provide a more persuasive approach to the issue of how a utility's charitable contributions should be treated. The idea of justifying charitable contributions through some accrued benefit has a solid basis in corporation law. A discussion of the development of this concept in corporation law[72] and its application to utilities[73] follows.

A. *Charitable Contributions of Nonregulated Corporations*

Philanthropy has not always been considered an appropriate corporate activity. Believing that profit maximization was the only proper motive for most corporations, early judicial decisions regarding the power of corporations to make charitable contribu-

69. Including the cost in the rate calculation ostensibly produces only "a minor change in the second decimal place in the average rate." Carpenter, *supra* note 4, at 298. *See also In re* United Gas Pipe Line Co., 31 F.P.C. 1180, 54 P.U.R.3d 385 (1964).

70. 32 P.U.R.3d 385 (Ill. Commerce Comm'n 1959).

71. Taking the tax effect into account in such a manner seems to offer at least a partial rejoinder to the argument of those who contend that the ratepayer may get no tax advantage. *See* note 45 *supra*. While the individual does not directly get the tax benefit, the tax savings that would be gained by the utility through contribution deductions would conceivably be passed on to the ratepayer.

72. *See* notes 74–92 *infra* and accompanying text.

73. *See* notes 93–105 *infra* and accompanying text.

tions in the absence of express charter authorization were based primarily on a consideration of whether the contribution "was not in fact altruistic but was intended to produce a reasonably direct financial benefit to the corporation, and therefore could be regarded as incidental to the powers contained in the corporate charter."[74]

As early as the 1930's, however, recognition of the responsibilities of corporate directors had changed enough to prompt one commentator to suggest that "a sense of social responsibility toward employees, consumers, and the general public may thus come to be regarded as the appropriate attitude to be adopted by those who are engaged in business."[75] To accommodate that shift in public perception of the role of corporations, the early standard of reasonably direct benefit was eased.[76] Legislatures also began to confirm corporate power to make charitable contributions by passing statutes to accommodate such activity. In 1936, Congress amended the Internal Revenue Code to allow corporations to deduct charitable, scientific, and educational contributions up to five percent of their taxable incomes.[77] By 1948 fifteen states had expressly authorized corporate philanthropic contributions.[78]

In 1953 the Supreme Court of New Jersey decided a landmark case on the issue. In *A.P. Smith Manufacturing Co. v. Barlow*,[79] the court upheld a $1,500 corporate donation to Princeton University, and in so doing significantly altered the earlier "direct benefit" test by considering the corporation's social responsibility to higher education.

The *Smith* court upheld the validity of the contribution on three alternative grounds. First, since the existence of the free enterprise system depends in large part on an educated populace, the

74. Blumberg, *supra* note 1, at 167. A classic statement of the rule was made by the court in Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919). After reaffirming the prevailing view that "a business corporation is organized and carried on primarily for the benefit of the stockholders," *id.* at 507, 170 N.W. at 684, the court declared:

> The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employees, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others is obvious.

Id. at 506–07, 170 N.W. at 684.

75. Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1160 (1932).

76. Blumberg, *supra* note 1, at 167, n.53.

77. Act of June 22, 1936, Pub. L. No. 74–740, 49 Stat. 1661 (1936) (now I.R.C. § 170).

78. Blumberg, *supra* note 1, at 167.

79. 13 N.J. 145, 98 A.2d 581, *appeal dismissed*, 346 U.S. 861 (1953).

expenditures could "readily be justified as being for the benefit of the corporation: indeed, if need be the matter may be viewed strictly in terms of actual survival of the corporation in a free enterprise system."[80] Therefore, even under the old benefit test the contribution could be justified. Second, a New Jersey statute, enacted in 1930 and applicable to corporations formed before then, specifically authorized corporate contributions.[81] Third, the court found that

> modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate. Within this broad concept there is no difficulty in sustaining, as incidental to their proper objects [*sic*] and in aid of the public welfare, the power of corporations to contribute corporate funds within reasonable limits in support of academic institutions.[82]

The *Smith* court apparently did not, however, mean to suggest that it would approve the making of a corporate charitable contribution which could not reasonably be anticipated to benefit the corporation in some manner, for it concluded by finding that the contribution with which it was dealing had been made "voluntarily in the reasonable belief that it would aid the public welfare and advance the interests of the plaintiff corporation as a private corporation and as part of the community in which it operates."[83]

Cases following *Smith* adhere to the requirement that, although the strict direct benefit test need not be met, those seeking to sustain the contribution should show that it will in some way help fulfill corporate objectives.[84] In considering that requirement, one court went so far as to suggest that it was inconceivable that managers would donate if they could not see at least some future benefit.[85]

While the old direct and immediate benefit test is no longer followed, contributions must still promise benefit to the corpora-

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80. *Id.* at 154, 98 A.2d at 586.

81. *Id.* at 155, 98 A.2d at 586–87.

82. *Id.* at 154, 98 A.2d at 586.

83. *Id.* at 161, 98 A.2d at 590.

84. Blumberg, *supra* note 1, at 175, n.109.

85. Union Pac. R.R. v. Trustees, Inc., 8 Utah 2d 101, 106, 329 P.2d 398, 401 (1958). Present business justifications for corporate social involvement generally envision such benefit to the corporation. Some of the justifications advanced are:

1) Involvement in the community will help develop markets and customers, and thus produce both short-term and long-term profits. David Rockefeller has said that "Today there is a growing realization that management is not doing the job it should for the stockholders simply by earning as large a profit as it can this year, unless at the same time it is

tion.[86] As one commentator has said:

> The validity of corporate activity is believed to rest on the business orientation of the program and the existence of a reasonable relation between the program and the long-term objectives of the business, or simply put, whether the activity is being reasonably undertaken as "good business" in the climate of the times.[87]

As long as such a reasonable relationship exists,[88] corporations may make charitable contributions.[89] Almost all public utilities are corporations, and their legal authority to make such contributions is similarly well settled.[90] Therefore, there is little doubt that

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helping to shape an environment in which the business can continue earning a profit four or five or ten years from now." Blumberg, *supra* note 1, at 163–64.

2) Deriving its existence and sustenance from a community, the corporation has a moral obligation to support it. *Id.*

3) Social involvement helps "develop good will, obtain favorable national attention and foster improved investor recognition." *Id.*

4) Business, like other elements of society, must join in the solution of community problems. A response by business may be deemed essential to prevent governmental preemption of further areas in the free enterprise system. *Id.*

5) Business is in large part responsible for community problems and must work to solve them in order to avoid adverse public and governmental reaction. *Id.*

Since 1948, and particularly since *Smith*, almost all of the remaining states have enacted laws expressly empowering corporations to make charitable contributions. The MBCA has served as a model for close to thirty states. Section 4(m), adopted in whole or modified form by those jurisdictions, provides that each corporation shall have power "[t]o make donations for the public welfare or for charitable, scientific or educational purposes." ABA-ALI MODEL BUS. CORP. ACT § 4(m) (1969).

86. Blumberg, *supra* note 1, at 176.

> Even if corporate power exists, it may still only be exercised in the interests of the corporation; there must be a reasonable relationship between the activity and the fulfillment of the objectives of the business. Contributions to a "pet charity" unrelated to the business would be subject to attack by minority shareholders.

Id.

87. *Id.* at 206.

88. *See* note 85 *supra*.

89. There are, however, those who strongly believe corporations should not have that right. For example, Milton Friedman writes:

> Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible. This is a fundamentally subversive doctrine. If businessmen do have a social responsibility other than making maximum profits for stockholders, how are they to know what it is? Can self-selected private individuals decide what the social interest is? Can they decide how great a burden they are justified in placing on themselves or their stockholders to serve that social interest? Is it tolerable that these public functions of taxation, expenditure, and control be exercised by the people who happen at the moment to be in charge of particular enterprises, chosen for their posts by strictly private groups? If businessmen are civil servants rather than the employees of their stockholders then in a democracy they could sooner or later, be chosen by the public techniques of election and appointment.

M. FRIEDMAN, CAPITALISM AND FREEDOM 133–34 (1962).

90. One commentator noted:

public utilities, in their corporate capacity, have the power and the right to make charitable contributions.

The cost of contributions by corporations that are not public utilities is generally passed on to the consumer in the form of higher prices.[91] But, in contrast to the general corporation, the regulated public utility occupies a unique position in the marketplace.[92] That position may or may not make it appropriate for public utility contributions to receive different treatment than that afforded corporate contributions in general.

B. *Charitable Contributions of Regulated Corporations*

The concept of benefit has been employed by many courts, commissions, and commentators in determining the proper treatment of a utility's contributions. A direct benefit test, similar to that used in early judicial decisions regarding the validity of non-public utility corporations' charitable contributions,[93] is applied by many commissions. For example, the Michigan Public Service Commission, which normally refuses to allow the treatment of contributions as operating expenses, has allowed such treatment where it has been shown that the efforts supported by the contributions were extremely beneficial to the utility's entire service area.[94] In two particular cases, the contributions made by public utilities serving Detroit went to programs working to rehabilitate

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> In most states, corporations . . . are now authorized to make donations for the public welfare or for charitable, scientific, or educational purposes. There is, therefore, little question as to the corporate power of a utility to join other business enterprises in what have come to be orthodox contributions to a variety of beneficiaries.

A. PRIEST, *supra* note 2, at 83 (citations omitted).

Only a very few decisions have not assumed the validity of such expenditures as a matter of corporate power. *See, e.g.*, Accounting of the N.Y. Tel. Co., 188 I.C.C. 83, 95 (1932); New Jersey Bell Tel. Co. v. Department of Pub. Util., 12 N.J. 568, 595–97, 97 A.2d 602, 615–16 (1953).

91. One commission stated, "There is no question that unregulated businesses treat these costs as ordinary business expenses which are reflected in the price of goods and services." Kansas City Power & Light Co., 8 P.U.R.3d 490, 500 (Mo. Pub. Serv. Comm'n 1955).

The existence of a perfectly functioning competitive market would probably preclude this from happening, for prices could not be raised above a market equilibrium price to cover the cost. However, few markets function so perfectly, and so the contributions generally do become a part of the price, rather than a deduction from profits. *See generally*, D. VAGTS, BASIC CORPORATION LAW 122 (1979).

92. *See* note 41 *supra*.

93. *See* notes 72–92 *supra* and accompanying text.

94. Michigan Bell Tel. Co., 85 P.U.R.3d 467, 485 (Mich. Pub. Serv. Comm'n 1970); The Detroit Edison Co., 83 P.U.R.3d 463, 488 (Mich. Pub. Serv. Comm'n 1970).

the city after its riots. The commission concluded that, in addition to helping reverse the trend of urban deterioration, the contributions could ultimately lead to "the reduction of threats to employees going to and from the company's headquarters to their residences [which] is essential to continual and efficient high-quality and improved service."[95]

The benefit test has been modified by commissions in some instances. Rather than requiring direct benefit to the contributing corporation, some commissions will accept any benefit to the communities in which the contributions are made.[96]

Similarly, some courts, while allowing a certain charitable contribution to be treated as an operating expense, have required a showing "that it is productive of good community relations which will benefit the utility or its patrons."[97] Many courts will allow as operating expenses only those contributions which are reasonable in amount and given to recognized and "appropriate" charities.[98] Others will allow them only where they have "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."[99]

In addition, some courts have allowed operating expense treatment for charitable contributions on the theory that they are like advertising or development expense because they "foster normal growth" and allow "consumers [to] benefit from increased demand in the form of decreased unit cost of service."[100]

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95. 85 P.U.R.3d at 485. *See also* Vrtjak v. Illinois Bell Tel. Co., 32 P.U.R.3d 385 (Ill. Commerce Comm'n 1959) which held that "there are different benefits of varying character flowing to a utility from proper support of worthy philanthropic objectives" which would meet the test "that donations are not a proper operating expense unless it is shown that they will be of some peculiar benefit to the company or its ratepayers." *Id.* at 388.

96. Ohio Bell Tel. Co., 15 P.U.R.4th 344, 362 (Ohio Pub. Util. Comm'n 1976).

97. United Transit Co. v. Nunes, 99 R.I. 504, 513–14, 209 A.2d 215, 222 (1965).

98. City of Miami v. Florida Pub. Serv. Comm'n, 208 So. 2d 248, 259 (Fla. 1968). The court in Southwestern Bell Tel. Co. v. State Corp. Comm'n, 192 Kan. 39, 386 P.2d 515 (1963), indicated that the contributions must be "subject to strict scrutiny by the Commission as to their reasonableness and propriety." *Id.* at 73, 386 P.2d at 545.

99. New Jersey Bell Tel. Co. v. Department of Pub. Util., 12 N.J. 568, 596, 97 A.2d 602, 616 (1953).

100. Public Serv. Co. of N.J. v. New Hampshire, 102 N.H. 150, 160, 153 A.2d 801, 808 (1959).

One court indicated that it did not feel compelled to consider such things as social responsibility, or the furtherance of the company's own purposes in promotion of public relations, good will, or community acceptance. Rather, it held that charitable "contributions are vital to establish and improve public relations. It is considered much the same as advertising." New England Tel. & Tel. Co. v. Department of Pub. Util., 360 Mass. 443, 489, 275 N.E.2d 493, 521 (1971).

Not all commissions and courts agree that a utility's charitable contributions should be considered operating expenses under the benefit rationale.[101] Justice Locher in his *City of Cincinnati* dissent is typical of those who use the benefit rationale to prohibit operating expense treatment. He reasoned that while charitable contributions made in a local service area benefit the communities served, they nonetheless are made at management discretion, tend to upgrade the utility's public image, and inure more to the benefit of the utility and its stockholders than to the benefit of the ratepayers. Therefore, Justice Locher concluded, the contributions should be borne by the stockholders and not the ratepayers.[102]

Such an argument has merit. If the ratepayers benefit from the contributions in the form of a better place in which to live and work, so too must the corporation and its shareholders benefit. It is quite probable that a community in which efforts succeed in making it more stable and attractive is likely to retain current residents and attract new ones—all of whom represent potential new subscribers to the utility's products and services. A growing customer base is generally a boon to any corporation and helps assure the continued value of the shareholders' investment. Similarly, other benefits, such as lower finance costs and decreased vandalism,[103] would accrue to ratepayers, shareholders, and the company alike. While ratepayers can expect lower costs, shareholders and the company can expect a more valuable and more easily transferable investment.[104]

Clearly, all parties which could ultimately bear the cost of utility contributions benefit by them. Thus, any approach which places the burden on one group to the exclusion of the other ignores the only persuasive rationale for allocating such burdens—those who benefit should bear the burden. The Supreme Court of Ohio and the other jurisdictions adopting reasoning similar to that expressed by the majority in *City of Cincinnati* have

101. *E.g.*, United Gas Pipeline Co., 31 F.P.C. 1180, 54 P.U.R.3d 275, 295 n.10 (1964), where the author of an opinion which ultimately held that charitable contributions were an operating expense, took exception in a footnote stating that charitable contributions "bear no relationship whatsoever to the necessary costs of providing utility service." *Id.*

102. 55 Ohio St. 2d at 183, 378 N.E.2d at 736 (citing Mountain States Tel. & Tel. Co., 96 P.U.R.3d 321 (Colo. Pub. Util. Comm'n 1972) and Chesapeake & Potomac Tel. Co. of W. Va., 22 P.U.R.4th 107 (W. Va. Pub. Serv. Comm'n 1977)). *See* Kansas City Power & Light Co., 8 P.U.R.3d 490, 500 (Mo. Pub. Serv. Comm'n 1955).

103. *See* Detroit Edison Co., 83 P.U.R.3d 463 (Mich. Pub. Serv. Comm'n 1970); Michigan Bell Tel. Co., 85 P.U.R.3d 467 (Mich. Pub. Serv. Comm'n 1970). *See* notes 94-95 *supra* and accompanying text.

104. *See* D. VAGTS, BASIC CORPORATION LAW 122 (1979).

ignored the inequities which result when the ratepayers are forced to shoulder the entire burden of charitable contributions in the form of higher rates. Similarly, the Ohio legislature, in considering statutory provisions which would preclude a utility from passing any such costs on to the ratepayers,[105] ignores the fact that ratepayers, too, are beneficiaries of the contributions.

Thus, in seeking to remain consistent with the benefit rationale, the best approach is to allocate the cost of the contributions among those who benefit from them in proportion to the relative benefit accrued. A discussion of one possible approach that attempts to achieve such an end follows.

IV. An Alternative Approach

Courts and commissions have faced a dilemma similar to the charitable contribution problem in analyzing the treatment of utility advertising expenditures. Using a benefit rationale,[106] expenses for advertising aimed at the promotion or retention of service or the dissemination of information have been allowed to be treated as operating expenses.[107] Other types of advertising, directed at promoting good will (called institutional advertising) have not been accorded unanimous treatment.[108] This controversy closely parallels the issue of the treatment of a utility's charitable contributions.

Those who have favored operating expense treatment of institutional advertising costs have employed many arguments, all of which contend that the ultimate benefit accrues to the ratepayer. For example, some commissions and commentators have reasoned that institutional advertising benefits consumers by helping to attract investment capital and market the utility's securities, thus resulting in savings in the cost of financing which can be passed on to ratepayers. Further, these commissions and commentators contend that advertising, by helping to recruit employ-

105. *See* note 15 *supra.*

106. *See, e.g.*, Arkansas Power & Light Co., 15 P.U.R.4th 153 (Ark. Pub. Serv. Comm'n 1976) (where the commission required that "the ratepayer should only be charged with those expenses which are of direct benefit to the ratepayer." *Id.* at 176.

107. *See, e.g.*, Arkansas Power & Light Co., 15 P.U.R.4th 153, 176 (Ark. Pub. Serv. Comm'n 1976); Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 55 Ill. 2d 461, 479, 303 N.E.2d 364, 374 (1973); Iowa Pub. Serv. Co., 96 P.U.R.3d 1, 20 (Iowa St. Commerce Comm'n 1972); Southern Union Gas Co., 12 P.U.R.4th 219, 232 (N.M. Pub. Serv. Comm'n 1975). *See generally* Note, *Public Utilities: The Allowance of Advertising Expenditures for Ratemaking Purposes—Is This Trip Necessary?*, 29 Okla. L. Rev. 202, 209–10 (1976).

108. *See* notes 109–11 *infra* and accompanying text.

ees and reduce the cost of answering customers' complaints and questions, reduces negative attitudes towards the utility and also leads to fewer losses in areas such as "theft of utility service, bad debts and vandalism."[109] Others have found that such advertising was "not only desirable, but obligatory," based on a belief that a firm should "maintain a contact with the economic and social life of the area it serves."[110]

There have been other courts and commissions, however, which have disallowed institutional advertising as an operating expense "on the basis that it serves only the interests of the stockholders and is of no benefit to the ratepayer."[111]

Yet, as with charitable contributions, it seems clear that both ratepayer and shareholder benefit from good will advertising. Several commissions have noted this phenomenon. For example, the New York Public Service Commission noted that institutional advertising is:

> designed to project a favorable image to customers, shareholders and investors. To the extent such advertising fosters sound consumer relations or encourages people to invest in the company, it seems clear that the consumers, as well as the shareholders, are ultimately benefited through the lessening of the expense of doing business.[112]

In addition, the Iowa Commerce Commission concluded that: "Institutional advertising by its very definition is designed to improve the image of the company. It should be noted, however, that a sizeable amount of those advertisements also provide a beneficial service to the ratepayer."[113] More importantly, however, this commission, while acknowledging a present inability to make an accurate allocation of the advertising expense between good will and consumer benefits, chose to "allow the expense of institutional advertising to be shared equally between the company and the ratepayer."[114]

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109. Note, *supra* note 41, at 116.

110. *Id.* at 114.

111. *Id.* at 115. *Cf.* New England Tel. & Tel. Co. v. Department of Pub. Util., 300 Mass. 443, 275 N.E.2d 493 (1971) where the court held that managers could decide if institutional advertising is helpful to a business, and if so, how much the firm could spend. The court noted that as long as the cost was reasonable, it should be borne by the ratepayers. *Id.* at 518.

112. Consolidated Edison of N.Y., Inc., 41 P.U.R.3d 305, 364 (N.Y. Pub. Serv. Comm'n 1961).

113. Iowa Elec. Light & Power Co., 2 P.U.R.4th 288, 294–95 (Iowa St. Commerce Comm'n 1973).

114. *Id.* at 294.

Perhaps for now, or at least until an advanced econometric model can be devised to allocate the cost more accurately,[115] such a method should be employed regarding charitable contributions. The simplicity and apparent fairness of the plan are appealing.[116] At least one commission has recently employed just such a method.[117]

Along with a cost-splitting method, a legislatively imposed maximum,[118] and legislatively suggested guidelines for the type of charities considered appropriate objects of a public utility's contributions, would settle many of the concerns expressed by both the majority and the minority in *City of Cincinnati*. The concept of a legislative ceiling on contribution costs which may be passed on to ratepayers has three appealing aspects. First, such a maximum might better approximate the benefit of contributions which accrues to the ratepayer. Second, establishing an amount, which the legislature permits the ratepayer to bear, legitimizes the expenses and avoids attack on the ground that such amounts are an involuntary levy. Finally, by setting such a ceiling, the legislature establishes a more efficient tax structure for charitable purposes.[119]

A legislative decision regarding the appropriate types of charities is also meritorious. Such guidelines would serve to limit the type of contributions borne by the ratepayers to those which will likely bestow some benefit upon them. For example, the Cleveland Electric Illuminating Co. has contributed over two million dollars to charitable, civic, and educational institutions in the last

115. Note that this Note merely assumes that no model exists. If one did exist, allocation of costs consistent with the model would be preferable.

116. The benefit to charities is also apparent. If the entire cost of a utility's contributions had to be borne by shareholders, and if those contributions were sufficiently large enough to have a significant effect on the shareholders' effective rate of return, the utility's stock would become less desirable. To counter this, the utility would be forced to reduce or eliminate its contributions. Spreading the cost of the contributions between consumers and shareholders should make the effect on both groups negligible.

117. The Lincoln Tel. & Tel. Co., 12 P.U.R.4th 79, 83 (Neb. Pub. Serv. Comm'n 1975).

118. *See* Re Ohio Bell Tel. Co., 15 P.U.R.4th 344, 362 (1976).

In *City of Cincinnati v. Public Utilities Commission of Ohio*, the Ohio Supreme Court referred to the .10 percent of gross operating revenues apparently adopted as a guideline by the PUCO, and allowed .11 percent. 55 Ohio St. 2d 173 n.3, 378 N.E.2d at 733 n.3 (1978).

As an alternative to the "straight" cost-splitting method, once a utility has determined, through the "legislatively imposed maximum and cost-splitting" method, the maximum amount of contributions which it could pass on to its ratepayers, the utility could be allowed to impose upon its shareholders as much additional "charitable burden" as the shareholders would permit.

Regardless of which variation is used, the tax benefit effect of the contributions should always be considered when rates are being set. *See* note 71 *supra* and accompanying text.

119. *See* note 65 *supra*.

five years. All of these donations came out of revenues collected from the utility's ratepayers. While Greater Cleveland institutions were the recipients of the bulk of the contributions, large sums of money were distributed outside of the service area.[120] Under proper guidelines, the utility would be able to pass onto its ratepayers only the cost of those contributions which were distributed within the service area or which could be shown to have benefited the ratepayers in some way.

Further, lists of "approved charities," along the lines of the tax exempt charities list of the Internal Revenue Code, should be provided by state legislatures to serve as guidelines for utilities and utilities commissions.

V. CONCLUSION

Neither forcing ratepayers to bear the entire cost of contributions, nor precluding a utility from passing such costs on to the ratepayers is an adequate resolution of the problems raised when considering the proper treatment of a utility's charitable contributions.[121] While a sophisticated econometric model which can identify and apportion the costs and benefits of various contributions has yet to be devised,[122] it is not beyond the capabilities of a legislature to establish guidelines which would, at least in part, achieve those objectives.

Clearly there are inequities in allowing a public utility to pass on to its ratepayers the entire cost of its charitable contributions. Similarly, problems would result from passage of the proposed Ohio legislation which would prohibit a utility from passing on any of that cost. The former fails to apportion the true costs and benefits of charitable contributions in an equitable fashion; the latter fails to consider the very real value of charities to a community and its residents, and the need of those charities for contributions.

A serious evaluation of the issue by the Ohio legislature, a reasoned weighing of the relevant policy considerations, and adoption of the recommendations contained in this Note should result in a more equitable and workable solution to the problems raised,

120. The Plain Dealer, August 18, 1978, at 2-A, col. 1.
121. *See* note 105 *supra.*
122. *See* note 115 *supra.*

but not resolved, in *City of Cincinnati v. Public Utilities Commission of Ohio*.

PETER M. SIKORA