

Summer 2011

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Jonathan Armiger

*Indiana University Maurer School of Law*

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### Recommended Citation

Armiger, Jonathan (2011) "Judicial Review of Public Utility Commissions," *Indiana Law Journal*: Vol. 86 : Iss. 3 , Article 9.

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# Judicial Review of Public Utility Commissions<sup>†</sup>

JONATHAN ARMIGER<sup>\*</sup>

## INTRODUCTION

The Indiana Supreme Court recently resolved a dispute between a manufacturer and an electric utility company concerning rates for electricity usage.<sup>1</sup> Although the dispute involved interpretation of a contract for electricity, the majority of the court's opinion was devoted to an entirely separate issue: the appropriate standard of review<sup>2</sup> to be used by appellate courts in reviewing decisions of the Indiana Utility Regulatory Commission.<sup>3</sup> Finding deferential review appropriate, the Indiana Supreme Court vacated the decision of the Indiana Court of Appeals and affirmed the decision of the Indiana Utility Regulatory Commission.<sup>4</sup> The Indiana Supreme Court—unlike the Indiana Court of Appeals—declined to substitute its judgment for that of the Commission.<sup>5</sup> That determination—the applicable standard of review—cost the electric utility company millions of dollars.<sup>6</sup>

The high stakes involved in standard-of-review determinations concerning decisions by public utility commissions abound in courts across the country.<sup>7</sup> Every state has a public utility commission,<sup>8</sup> and every appellate court in every state uses

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<sup>\*</sup> J.D. Candidate, 2011, Indiana University Maurer School of Law; B.S., 2007, Indiana University Kelley School of Business. I would like to thank Professor Kenneth R. Richards, Todd Dvorak, and Robert White for their guidance in writing this Note.

1. *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012 (Ind. 2009).

2. Standards of review signify the degree of deference to be given by reviewing courts to decisions under review. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 47 (2000). The more deference given, the less likely that decision will be overturned on appeal. *See id.* at 47–48. “Standards of review can be established by constitution, statute, court rule, or judicial decree.” Richard H.W. Maloy, “Standards of Review”—*Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 609 (2000) (footnotes omitted).

3. *See N. Ind. Pub. Serv. Co.*, 907 N.E.2d at 1015–18.

4. *Id.* at 1020.

5. *See id.*; *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 881 N.E.2d 1065, 1071 (Ind. Ct. App. 2008), *vacated*, 907 N.E.2d 1012 (Ind. 2009).

6. *See* LORAIN L. SEYFRIED, IND. UTIL. REGULATORY COMM’N, COMPLAINTS FILED BY INDUSTRIAL CUSTOMERS OF INDIANA UTILITIES: JUPITER ALUMINUM CASE STUDY (2007), *available at* [http://www.narucpartnerships.org/Documents/Indiana\\_utility\\_operations\\_for\\_industrial\\_customers\\_eng\\_Lorraine\\_Seyfried.pdf](http://www.narucpartnerships.org/Documents/Indiana_utility_operations_for_industrial_customers_eng_Lorraine_Seyfried.pdf) (stating that the disputed amount of electrical charges involved millions of dollars); Andy Grimm, *Indiana Supreme Court Rules Against NIPSCO*, POST-TRIB. (Nw. Ind.), June 25, 2009, at A5 (stating that the Indiana Supreme Court’s decision saved U.S. Steel a “bundle” on its electric bill).

7. “Public utility commissions” is a general term meant to encapsulate the variety of labels attached to the state boards or commissions that regulate public utilities in each state. FRED BOSSELMAN, JOEL B. EISEN, JIM ROSSI, DAVID B. SPENCE & JACQUELINE WEAVER, ENERGY, ECONOMICS AND THE ENVIRONMENT: CASES AND MATERIALS 49 (2d ed. 2006).

8. *See State Commissions*, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, <http://www.naruc.org/commissions.cfm>.

standards of review to guide its review of public utility commission decisions.<sup>9</sup> However, notwithstanding the fact that courts have long been employing standards of review in their review of public utility commission decisions—after all, public utility commissions have existed for more than a century<sup>10</sup> and standards of review have been used since the beginning of American jurisprudence<sup>11</sup>—questions still persist concerning the proper interpretation and application of public utility commission reviewing standards.<sup>12</sup> While many of these questions arise from the inherent difficulties involved in interpreting and applying standards of review generally,<sup>13</sup> the problem is especially acute in judicial review of public utility commissions because (1) public utility commissions exercise broad grants of authority and assume various roles in regulating public utilities, thus increasing the difficulty involved in legally characterizing any given decision;<sup>14</sup> and (2) the legal consequences of that characterization—most notably the applicable standard of review—are often unique to public utility commissions as opposed to trial courts or other administrative agencies.<sup>15</sup>

This Note proposes a three-tiered, two-standard reviewing approach for determining the appropriate level of deference to be afforded public utility commissions as they undergo judicial review by appellate courts. The purpose of this 3-2 approach is to simplify and clarify the standard-of-review determinations that state courts continue to grapple with in the context of appeals from public utility commission decisions. The 3-2 approach is both a reflection and a refinement of current public utility commission reviewing standards. The 3-2 approach utilizes three tiers of review to properly characterize the public utility

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9. See, e.g., *In re Waikoloa Sanitary Sewer Co.*, 125 P.3d 484 (Haw. 2005); *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 904 N.E.2d 853 (Ohio 2009).

10. See Robert L. Bradley, *The Origins of Political Electricity: Market Failure or Political Opportunism?*, 17 ENERGY L.J. 59, 65–66 (1996); William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920*, 79 COLUM. L. REV. 426, 431–32 (1979).

11. See Davis, *supra* note 2, at 47.

12. See, for example, *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012 (Ind. 2009), predominately discussing public utility commission reviewing standards, and more recently continuing the discussion, *Dep't of Waterworks for Consol. City of Indianapolis v. Cmty. Sch. Corp. of S. Hancock Cnty.*, 933 N.E. 2d 880 (Ind. Ct. App. 2010).

13. See Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 234–36 (2009) (discussing the notoriously difficult task of interpreting and applying standards of review and their resultant misuse and misunderstanding).

14. See, e.g., *N. Ind. Pub. Serv. Co.*, 907 N.E.2d at 1017–18 (discussing the public utility commission's role in approving a contract between utilities and how it affects the legal characterization of the issue on appeal).

15. See *id.* at 1015 n.1 (comparing the similar, but different, statutory provisions relating to judicial review of public utility commissions with those of other administrative agencies). See generally ALFRED C. AMAN, JR., ADMINISTRATIVE LAW AND PROCESS 1–3 (2d ed. 2006) (discussing the importance of analyzing how the law characterizes agency action and the legal consequences of that characterization).

commission decision and two standards to reflect the legal consequences of that characterization.

In developing the 3-2 approach, this Note begins in Part I by examining the role, origin, and legal authority of public utility commissions. Part II then discusses standards of review, including their common formulations, their importance in appellate decision making, difficulties in their interpretation and application, and their relation to the types of questions presented on appeal. Part III then discusses judicial review of public utility commissions by first highlighting several preliminary considerations relating to the availability of judicial review and then surveying state public utility commission reviewing standards. Finally, Part III concludes with a discussion of the three-tiered, two-standard reviewing approach.

### I. PUBLIC UTILITY COMMISSIONS

This Part briefly looks at the role, origin, and legal authority of public utility commissions. Before one can appreciate why a new reviewing approach is necessary and what that reviewing approach entails and why, one must understand what public utility commissions do, why they do it, and under what authority.

#### A. *The Role of Public Utility Commissions*

Public utility commissions regulate public utilities.<sup>16</sup> Public utilities are privately owned and operated businesses that provide public services (e.g., transportation, communication, power, and sanitary services).<sup>17</sup> To take advantage of the significant economies of scale inherent in public services, public utilities are afforded exclusive franchises to provide particular public services in particular territories, generally free from market competition, in exchange for increased governmental regulation.<sup>18</sup> Public utility commissions are the primary source of state regulation of public utilities.<sup>19</sup> Common regulations exercised by public utility commissions include control over the entry of new companies and the expansion of existing ones, control over service prices, and reliability controls aimed at ensuring services are available and of sufficient quality.<sup>20</sup>

In regulating public utilities, public utility commissions assume various roles, exercising “both legislative and judicial powers.”<sup>21</sup> They exercise their judicial

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16. *See generally* Bradley, *supra* note 10, at 61–67; Jones, *supra* note 10, at 426–27, 431–32.

17. Jones, *supra* note 10, at 426.

18. *See id.* at 426–27; Bradley, *supra* note 10, at 62.

19. *See* Bradley, *supra* note 10, at 61–67; Jones, *supra* note 10, at 426–27, 431–32.

20. Jones, *supra* note 10, at 426–27; *see also* CALIFORNIA STATE AUDITOR, BUREAU OF STATE AUDITS, REP. NO. 2004-118, PUBLIC UTILITIES COMMISSION: SINCE THE JUDICIAL REVIEW ACT OF 1998, THE NUMBER OF PETITIONS SEEKING JUDICIAL REVIEW OF COMMISSION DECISIONS HAS INCREASED 35–38 (2005) [hereinafter CAL. STATE AUDITOR REPORT] (reporting on the self-ascribed purpose and mission of several public utility commissions).

21. *In re* Request for Serv. in Qwest’s Tofte Exch., 666 N.W.2d 391, 395 (Minn. Ct. App. 2003); *see also, e.g.*, IND. CODE § 8-1-1-3(e) (2010) (“On order of the commission any one (1) member of the commission, or an administrative law judge, may conduct a hearing,

power when they “conduct hearings [and] render findings of fact and conclusions of law.”<sup>22</sup> For example, a public utility commission acts in a judicial capacity when it conducts an investigation to determine whether a regulated entity has violated a commission rule.<sup>23</sup> Public utility commissions exercise their legislative powers when they promulgate rules and regulations affecting regulated industries,<sup>24</sup> such as service standards.<sup>25</sup> The various roles assumed by public utility commissions are important because appellate courts often look to the role assumed by a public utility commission to determine the applicable standard of review to be applied to a particular action or decision of that public utility commission.<sup>26</sup>

### *B. The Origin of Public Utility Commissions*

Public utility commissions were not always the source of public-utility regulation. Local municipalities, and to some extent state legislators, were the primary source of public-utility regulation until state public utility commissions were ushered in at the beginning of the twentieth century.<sup>27</sup> Public utility commissions owe their existence in large part to the political reform movements of the early twentieth century.<sup>28</sup> Piecemeal legislation and regulation by state and local governments proved to be inadequate as regulation increased and local political factions vied for control.<sup>29</sup> Public utility commissions were viewed as a solution to the partisan and often corrupt interference of state and local governments and the excesses of public utilities.<sup>30</sup> Public utility commissions were viewed as “incorruptible, enlightened, and non-partisan agencies” exerting “just, impartial, and unprejudiced control of public service corporations and public utilities generally.”<sup>31</sup> During this “honeymoon period of commission regulation,” the question of “who regulates the regulators” was not considered.<sup>32</sup> Today, the question is not so much who regulates the regulators but to what extent the

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or investigation, and take evidence therein, and report the same to the commission for its consideration and action . . . .”); IND. CODE § 8-1-1-3(g) (“The commission shall formulate rules necessary or appropriate to carry out the provisions of this chapter, and shall perform the duties imposed by law upon them.”); *Potomac Edison Co. v. State Corp. Comm’n*, 667 S.E.2d 772, 777 (Va. 2008) (recognizing that the public utility commission is charged with administrative, judicial, and legislative functions).

22. *Simpson Cnty. Water Dist. v. City of Franklin*, 872 S.W.2d 460, 465 (Ky. 1994).

23. CAL. STATE AUDITOR REPORT, *supra* note 20, at 2.

24. *Id.*

25. *See, e.g.*, 170 IND. ADMIN. CODE 4-1-1 to 4-1-30 (2010).

26. *See* CAL. STATE AUDITOR REPORT, *supra* note 20, at 2; *Qwest’s Tofte Exch.*, 666 N.W.2d at 395 (“When the [public utility commission] acts in a legislative capacity, the standard of review is whether it exceeded its statutory authority; when the [public utility commission] acts in a quasi-judicial capacity, the standard of review is the substantial evidence test.”).

27. *See* Bradley, *supra* note 10, at 65–66; Jones, *supra* note 10, at 431–32.

28. *See* Bradley, *supra* note 10, at 64; Jones, *supra* note 10, at 432.

29. *See* Bradley, *supra* note 10, at 64; Jones, *supra* note 10, at 432.

30. *See* Bradley, *supra* note 10, at 64; Jones, *supra* note 10, at 432.

31. Bradley, *supra* note 10, at 64 (quoting GEORGE BROWN, *THE GAS LIGHT COMPANY OF BALTIMORE: A STUDY OF NATURAL MONOPOLY* 104 (1936)).

32. *Id.*

regulators should be regulated. Judicial reviewing standards are a critical component of the answer to that question.

### *C. The Legal Authority of Public Utility Commissions*

Statutes promulgated by state legislatures dictate the legal authority of public utility commissions.<sup>33</sup> The legal authority of public utility commissions can be substantial, at times having the “force and effect of law.”<sup>34</sup> When a public utility commission acts within the scope of its legal authority, its actions are often given a presumption of validity, which makes overcoming a decision by a public utility commission particularly difficult.<sup>35</sup> Although public utility commissions have “sweeping authority to regulate public utilities,” they are nonetheless “creature[s] of statute,” and therefore, have only those powers granted to them by state legislatures.<sup>36</sup> Statutes creating public utility commissions and defining the scope of their authority generally designate which industries are to be regulated and the types of regulations to be exerted over entities in those industries.<sup>37</sup>

## II. STANDARDS OF REVIEW

This Part discusses standards of review, including their common formulations, their importance in appellate decision making, difficulties in their interpretation and application, and their relation to the types of questions presented on appeal.

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33. See, e.g., IND. CODE 8-1-1-1 to -15 (2010); see also *Tenn. Pub. Serv. Comm’n v. S. Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977) (“Any authority exercised by the Public Service Commission must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power.”).

34. *Office of Regulatory Staff v. S.C. Pub. Serv. Comm’n*, 647 S.E.2d 223, 227 (S.C. 2007); see also *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 217 (Tex. 2002).

35. See, e.g., *In re Application of Mich. Consol. Gas Co.*, 761 N.W.2d 482, 484 (Mich. Ct. App. 2008) (discussing a statutorily imposed presumption of validity under MICH. COMP. LAWS § 462.25).

36. *Commonwealth ex rel. Stumbo v. Ky. Pub. Serv. Comm’n*, 243 S.W.3d 374, 378 (Ky. Ct. App. 2007).

37. *BOSSelman ET AL.*, *supra* note 7, at 61. For example, the following statutory provision directs the public utility commission to issue rules and regulations to govern relations between public utilities and customers:

The Commission shall establish reasonable rules and regulations to govern the relations between public utilities and any or all classes of their customers. Those rules and regulations shall cover the following subjects: (1) extension of service; (2) extension of credit; (3) deposits, including interest thereon; (4) billing procedures; (5) termination of service; (6) complaints; and (7) information and notice to customers of their rights under the rules.

IND. CODE § 8-1-2-34.5(a).

*A. Common Standards of Review*

There are at least thirty different standards of review,<sup>38</sup> leading one judge to conclude, “there are more verbal formulas for the scope of appellate review . . . than there are distinctions actually capable of being drawn in the practice of appellate review.”<sup>39</sup> Fortunately, many of these standards are merely variations of the most commonly employed standards.<sup>40</sup> Unfortunately, state courts (as opposed to federal courts) are more likely to employ these variations, making any comparative analysis of state court reviewing standards particularly challenging.<sup>41</sup>

The most commonly employed standards of review are de novo, clearly erroneous, substantial evidence, and abuse of discretion.<sup>42</sup> In the context of appellate review of administrative decisions, another commonly employed standard of review is arbitrary and capricious.<sup>43</sup> The amount of deference given by reviewing courts to the actions or decisions under review corresponds with these standards, with de novo imparting the least deference and abuse of discretion and arbitrary and capricious imparting the most.<sup>44</sup>

Appellate courts reviewing decisions under a de novo standard afford no deference to those decisions.<sup>45</sup> In fact, the Latin term “de novo” translates as “anew.”<sup>46</sup> De novo review is most commonly applied to questions of law.<sup>47</sup>

Substantial evidence review and clearly erroneous review are largely indistinguishable,<sup>48</sup> although commentators have noted that clearly erroneous review is somewhat less deferential than substantial evidence review.<sup>49</sup> Substantial evidence review and clearly erroneous review are most commonly applied to findings of fact.<sup>50</sup> For the most part, a factual determination is supported by substantial evidence if that determination is supported by “relevant evidence that a

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38. Maloy, *supra* note 2, at 610. See *infra* Part III.B for a similar finding concerning the number of public utility commission reviewing standards.

39. United States v. Boyd, 55 F.3d 239, 242 (7th Cir. 1995).

40. Peters, *supra* note 13, at 243.

41. See Maloy, *supra* note 2, at 611.

42. Peters, *supra* note 13, at 243.

43. See Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 287 (2001); Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 687 (2002).

44. Casey et al., *supra* note 43, at 287; Verkuil, *supra* note 43, at 689 (estimating a hypothesized affirmance rate of 40–50% for decisions reviewed de novo).

45. Peters, *supra* note 13, at 246.

46. BLACK’S LAW DICTIONARY 500 (9th ed. 2009).

47. Peters, *supra* note 13, at 246. See *infra* Part II.D for a discussion of the various types of questions presented on appeal.

48. Peters, *supra* note 13, at 245–46.

49. Casey et al., *supra* note 43, at 308 (“Findings can be clearly erroneous even if supported by substantial evidence, but findings unsupported by substantial evidence are clearly erroneous.” (footnote omitted)); Verkuil, *supra* note 43, at 689 (estimating an affirmance rate of 70–80% for clearly erroneous and 75–85% for substantial evidence).

50. Peters, *supra* note 13, at 245.

reasonable person might accept as adequate to support [it].”<sup>51</sup> Generally, a factual determination is clearly erroneous “when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”<sup>52</sup>

Abuse of discretion and arbitrary and capricious reviewing standards are the most deferential.<sup>53</sup> In the context of public utility commission decisions, they are often used interchangeably.<sup>54</sup> Decisions have been termed arbitrary and capricious when they are unreasonable or without foundation in fact,<sup>55</sup> the record does not and could not reasonably support them,<sup>56</sup> they lack substantial and material evidence or are the result of clear error,<sup>57</sup> or they are based on irrelevant factors or are not based on factors that the legislature has required them to be.<sup>58</sup> Similarly, decisions have been termed the result of an abuse of discretion when they fall outside the range of reasonable and principled outcomes,<sup>59</sup> lack adequate explanation, or are based on an error of law or erroneous factual finding.<sup>60</sup> Abuse of discretion and arbitrary and capricious reviewing standards are often used in reviewing procedural matters.<sup>61</sup>

### B. Why Standards of Review Are Important

Standards of review have been termed “the essential language of appeals”<sup>62</sup> and the “keystone to court of appeals decision-making.”<sup>63</sup> They are so important to the

51. *Amerada Hess Pipeline Corp. v. Regulatory Comm’n*, 176 P.3d 667, 673 (Alaska 2008).

52. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

53. *Casey et al.*, *supra* note 43, at 287; *Verkuil*, *supra* note 43, at 689.

54. *See, e.g., Unified Gov’t of Athens-Clarke Cnty. v. Ga. Pub. Serv. Comm’n*, 668 S.E.2d 296, 297 (Ga. Ct. App. 2008) (permitting reversal of a decision if arbitrary or capricious or characterized by an abuse of discretion); *In re Application of Mich. Consol. Gas Co.*, 761 N.W.2d 482, 484 (Mich. Ct. App. 2008) (limiting reversal of rate-design decisions unless shown to be arbitrary, capricious, or an abuse of discretion); *Dunn v. Pub. Util. Comm’n*, 246 S.W.3d 788, 791 (Tex. App. 2008) (characterizing decisions as arbitrary and capricious or an abuse of discretion if unreasonable); *see also Maloy*, *supra* note 2, at 610 n.60 (“Abuse of discretion is also known as deferential review and arbitrary and capricious.” (emphasis omitted) (citations omitted)); *Peters*, *supra* note 13, at 244 (“In some jurisdictions, abuse of discretion is defined so that a reversal is warranted only if the trial court’s decision was arbitrary or irrational.”).

55. *Kan. Indus. Consumers Group, Inc. v. State Corp. Comm’n*, 138 P.3d 338, 344 (Kan. Ct. App. 2006).

56. *Vacuum Truck Carriers of La., Inc. v. La. Pub. Serv. Comm’n*, 12 So.3d 932, 937 (La. 2009).

57. *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm’n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993).

58. *AEP Tex. Cent. Co. v. Pub. Util. Comm’n*, 286 S.W.3d 450, 466 (Tex. Ct. App. 2008).

59. *In re Application of Consumers Energy Co.*, 761 N.W.2d 346, 349 (Mich. Ct. App. 2008).

60. *Casey et al.*, *supra* note 43, at 311.

61. *See Peters*, *supra* note 13, at 243.

62. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW*, at ix (3d ed. 1999).

63. MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, *LEGAL RESEARCH AND WRITING*

appeals process that many (if not most) appellate courts require parties to state the applicable standard in their briefs.<sup>64</sup> In addition, most appellate courts discuss the applicable standard of review before proceeding to the merits.<sup>65</sup> Standards of review enjoy prominence in the appellate review process because they serve many important policy objectives. Among other things, standards of review (1) balance judicial power among multiple decision makers, ensuring, on the one hand, that no single judge has uncontrollable and unreviewable power, and, on the other, that lower court and agency decisions are not meaningless exercises; (2) promote judicial economy by narrowing the scope of appellate review to prevent full-blown relitigation of lower-court or agency decisions; (3) provide consistency in decisions by ensuring that like cases are decided alike (e.g., cases involving questions of law will be decided similarly as will cases involving questions of fact); and (4) give notice to parties of the likelihood of success on appeal by ensuring that their expectations are commensurate with what can be achieved on appeal (e.g., parties contemplating appealing a decision know that they are more likely to succeed in overturning that decision if the decision is given little or no deference).<sup>66</sup> Standards of review are particularly important in appeals from public utility commission decisions because public utility commissions are generally afforded a higher degree of deference than trial courts.<sup>67</sup>

### *C. Difficulties in the Interpretation and Application of Standards of Review*

Despite their importance, standards of review are notoriously difficult to interpret and apply, which often leads to their misuse and misunderstanding.<sup>68</sup> Although standards of review have long been a fixture of American jurisprudence, articulation of them is relatively new.<sup>69</sup> The typical standard-of-review reference, set out briefly at the beginning of an opinion, is of little help,<sup>70</sup> because, for starters,

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493 (2005).

64. Casey et al., *supra* note 43, at 281; *see, e.g.*, FED. R. APP. P. 28(a)(9)(B).

65. *See, e.g.*, Ohio Consumers' Counsel v. Pub. Util. Comm'n, 904 N.E.2d 853, 856–57 (Ohio 2009).

66. Peters, *supra* note 13, at 238–42. As one author put it, “[f]or the attorney contemplating an appeal . . . knowing the applicable standard is crucial.” Aaron J. Lockwood, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707, 709 (2007). Practitioners who do not heed standards of review “undermine their chances of obtaining a favorable judgment on appeal.” Casey et al., *supra* note 43, at 280 (discussing the importance of framing arguments in terms of the applicable standards of review).

67. *See* N. Ind. Pub. Serv. Co. v. U.S. Steel Corp., 907 N.E.2d 1012, 1018 (Ind. 2009); Davis, *supra* note 2, at 48.

68. Peters, *supra* note 13, at 234–36; *see also* Davis, *supra* note 2, at 49 (“The labels identifying the levels or intensity of appellate review sound deceptively simple, but not one of them admits of easy analysis.”); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 12 (1994) (“Some courts invoke [standards of review] talismanically to authenticate the rest of their opinions. . . . Other courts use standards[s] of review to create an illusion of harmony between the appropriate result and the applicable law. . . . Finally, some courts disregard standard[s] of review in their analysis entirely.”).

69. Davis, *supra* note 2, at 47.

70. Lockwood, *supra* note 66, at 709.

there are just too many standards—at some point, distinctions drawn in the abstract cannot be applied in reality (i.e., there is a diminishing marginal return for each additional standard).<sup>71</sup> Another problem is definitional, where, from one court to the next, definitions of particular standards of review—even common ones—vary, albeit subtly.<sup>72</sup> As one author put it, “standard[s] of review [are] far easier to describe than to define,”<sup>73</sup> and as a consequence, lawyers, judges, scholars, and academics construct their own definitions using metaphors and analogies to describe their purpose.<sup>74</sup> Furthermore, it is not uncommon to find multiple standards of review thrown together with no clear indication under what circumstances a particular standard of review applies, or worse yet, what a particular standard of review entails.<sup>75</sup> And lastly, despite the ease with which standards of review may be defined, within the context of complex factual scenarios and complicated legal issues, they are extremely difficult to apply.<sup>76</sup> The 3-2 approach described in this Note attempts to avoid these problems by using only two standards and using them in a framework that makes their interpretation and application as easy as possible.

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71. See *supra* notes 38–39 and accompanying text.

72. Compare Wash. State Attorney Gen.’s Office v. Wash. Utils. & Transp. Comm’n, 116 P.3d 1064, 1067 (Wash. Ct. App. 2005) (defining arbitrary and capricious as “willful and unreasoning [action] taken without regard to the attending facts or circumstances” (quoting *Hillis v. Dep’t of Ecology*, 932 P.2d 139, 144 (1997))), with *Entergy Ark., Inc. v. Ark. Pub. Serv. Comm’n*, 289 S.W.3d 513, 520 (Ark. Ct. App. 2008) (defining arbitrary and capricious as an action “not supportable on any rational basis, and something more than mere error”). See generally Richard M. Markus, *A Better Standard for Reviewing Discretion*, 2004 UTAH L. REV. 1279 (discussing differing views of what constitutes an abuse of discretion).

73. Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 232 (1991).

74. See Peters, *supra* note 13, at 234–35.

75. See, e.g., *GTC, Inc. v. Edgar*, 967 So.2d 781, 790 (Fla. 2007) (quoting *Crist v. Jaber*, 908 So.2d 426, 430 (Fla. 2005), for the proposition that a public utility commission decision will be upheld if supported by competent substantial evidence and if not clearly erroneous); *Montana-Dakota Utils. Co. v. Mont. Dept. of Pub. Serv.*, 725 P.2d 548, 553 (Mont. 1986) (stating that a finding is not clearly erroneous if substantial evidence exists to support the finding); *Jackson Mobilphone Co., Inc. v. Tenn. Pub. Serv. Comm’n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993) (stating that decisions not supported by substantial and material evidence are arbitrary and capricious); *AEP Tex. Cent. Co. v. Pub. Util. Comm’n*, 286 S.W.3d 450, 468 (Tex. Ct. App. 2008) (quoting *State v. Pub. Util. Comm’n*, 246 S.W.3d 324, 332 (Tex. App. 2008), for the proposition that a public utility commission decision will be overturned if not supported by substantial evidence, if arbitrary or capricious, or if characterized by an abuse of discretion); see also Maloy, *supra* note 2, at 606 (“Not only may any standard of review apply to more than one issue in a case, more than one standard of review may be applied to any one issue.”).

76. Verkuil, *supra* note 43, at 681–82.

*D. Categorizing Questions on Appeal*

Categorizing questions on appeal is where many appellate courts begin their reviewing process.<sup>77</sup> This is so because the type of question under review often determines the applicable standard of review.<sup>78</sup> Moreover, courts usually frame the standard of review in terms of the type of question presented on appeal.<sup>79</sup> Questions presented on appeal are most often divided into three categories: questions of law,<sup>80</sup> questions of fact,<sup>81</sup> and mixed questions of law and fact.<sup>82</sup>

Questions of law include the creation, modification, or interpretation of law.<sup>83</sup> The law in question could be derived from constitutions, statutes, case law, administrative rules, or court rules.<sup>84</sup> Questions of law are reviewed with limited deference (or in most cases with no deference).<sup>85</sup> Questions of fact involve determinations of who, what, when, where, and how,<sup>86</sup> and are usually reviewed with deference.<sup>87</sup> Mixed questions of law and fact involve, among other things, application of law to facts.<sup>88</sup> Mixed questions are sometimes reviewed deferentially and sometimes not.<sup>89</sup> As with standards of review generally, the labels that identify the types of questions presented on appeal and their corresponding descriptions

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77. *See, e.g.*, N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n, 168 P.3d 105, 110 (N.M. 2007) (stating that in reviewing public utility commission decisions the court begins by determining "whether the decision presents a question of law, a question of fact, or some combination of the two" (quoting Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n, 904 P.2d 28, 31 (1995))).

78. Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 103 (2005) ("The whole reason for labeling a question 'law,' 'fact,' or 'mixed' is to determine the standard of review on appeal . . .").

79. *See, e.g.*, *In re Otter Tail Power Co.*, 744 N.W.2d 594, 602 (S.D. 2008) ("The [public utility commission's] findings of fact are reviewed under the clearly erroneous standard, while its conclusions of law are reviewed de novo.").

80. *See, e.g.*, *Citizens Action Coal. of Indiana, Inc. v. PSI Energy, Inc.*, 894 N.E.2d 1055, 1063–65 (Ind. Ct. App. 2008) (interpreting applicable statutes to determine whether a public utility can recover construction costs for a facility while that facility is under construction).

81. *See, e.g.*, *Kan. Indus. Consumers Grp. v. State Corp. Comm'n*, 138 P.3d 338, 354–57 (Kan. Ct. App. 2006) (considering whether utility intended to dismantle its retired facilities).

82. Warner, *supra* note 78, at 112; *see, e.g.*, *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1018 (Ind. 2009) (categorizing public utility commission's interpretation of a contract which it approved and subsequently interpreted as a mixed question of law and fact).

83. *See* Warner, *supra* note 78, at 112.

84. *Id.* at 113.

85. *See id.*

86. *Id.* at 115.

87. *Id.* at 116.

88. *Id.* at 129 (noting that mixed questions are commonly defined as application of law to facts even though such terminology is ambiguous); Casey et al., *supra* note 43, at 318–19.

89. *See* Casey et al., *supra* note 43, at 318–19.

mask the difficulties often involved in determining which category a particular question falls into.<sup>90</sup>

### III. JUDICIAL REVIEW OF PUBLIC UTILITY COMMISSIONS

This Part discusses judicial review of public utility commissions: first, by highlighting several preliminary considerations relating to the availability of judicial review, and second, by surveying state public utility commission reviewing standards. It concludes with a discussion of the three-tiered, two-standard reviewing approach.

#### A. The Availability of Judicial Review: Preliminary Considerations

Judicial review of public utility commissions is dependent on statutory and constitutional provisions providing for such review.<sup>91</sup> These provisions may contain conditions precedent to obtaining judicial review, by requiring, for example, that the dispute be ripe for review,<sup>92</sup> that the decision of the public utility commission be final,<sup>93</sup> or that the party seeking appeal has exhausted administrative remedies, such as rehearing.<sup>94</sup> The provisions may dictate where appeals are heard (i.e., which court will entertain the appeal) or whether they are heard at all.<sup>95</sup> The provisions may also delineate the scope of review,<sup>96</sup> set out

90. See generally Warner, *supra* note 78, at 107 (discussing the difficulty courts have with drawing distinctions between questions of fact and questions of law).

91. 73B C.J.S. *Public Utilities* § 246 (2004); see also IND. CODE §§ 8-1-3-1 to -11 (2010). An example of statutory language providing for judicial review of a public utility commission can be found in Indiana Code section 8-1-3-1, which provides:

Any person, firm, association, corporation, limited liability company, city, town, or public utility adversely affected by any final decision, ruling, or order of the commission may . . . appeal to the court of appeals of Indiana . . . with the right in the losing party or parties in the court of appeals to apply to the supreme court for a petition to transfer the cause to said supreme court as in other cases.

IND. CODE § 8-1-3-1 (2010).

92. A dispute is ripe for review, for instance, when it “has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.” BLACK’S LAW DICTIONARY 1442 (9th ed. 2009).

93. See, e.g., MASS. GEN. LAWS ANN. ch. 25, § 5 (West 2009) (permitting appeals “from any final decision, order or ruling” of the public utility commission). A decision is final “if it completely adjudicates the rights of the parties, leaving nothing further to be decided.” *Providence & Worcester R.R. Co. v. Energy Facilities Sitting Bd.*, 899 N.E.2d 829, 834 (Mass. 2009).

94. 73B C.J.S. *Public Utilities* § 247 (2004 & Supp. 2010).

95. For example, in California, appeals are discretionary, not mandatory as in some states, and directed only to intermediate and final appellate courts, whereas in other states, such as New York, appeals are first directed to a trial court. CAL. STATE AUDITOR REPORT, *supra* note 20, at 39 tbl.A.

96. An example of statutory language delineating the scope of review can be found in Indiana Code section 8-1-3-7, which provides:

procedures for filing an appeal,<sup>97</sup> and importantly, establish standards of review to be applied to decisions under review.<sup>98</sup> While this Note focuses on standards of review as reflected in state court opinions, it is important to note that standards of review are just one aspect of judicial review of public utility commissions and are often a reflection of the judicial gloss put on statutory and constitutional provisions.

### *B. State Survey of Public Utility Commission Reviewing Standards*

Standards of review are used in two senses: (1) to legally characterize issues on appeal and (2) to reflect the legal consequences of those characterizations.<sup>99</sup> Standards of review are as much concerned with classifying issues (e.g., as one of law or of fact) as they are with describing and defining the amount of deference to be afforded to lower-court or agency decisions on those issues (e.g., no-deference de novo review or deferential substantial evidence review).<sup>100</sup> The following survey of state public utility commission reviewing standards encompasses both elements; that is, after listing the numerous standards used by state courts, it presents the most common questions or line of questions used by courts in classifying issues, and then the most common standards ascribed to those classifications.

State public utility commission reviewing standards are numerous and vary from state to state. There are at least thirty different standards utilized by state courts in reviewing decisions of public utility commissions.<sup>101</sup> The most common standards include (1) de novo, (2) clearly erroneous, (3) substantial evidence, (4) arbitrary and capricious, and (5) abuse of discretion.<sup>102</sup> Other standards include (6) any evidence, (7) appreciable deference, (8) clear error, (9) clear weight, (10) competent evidence, (11) competent and material substantial evidence, (12) competent substantial evidence, (13) considerable deference, (14) due weight, (15)

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No evidence beyond that contained in the record of the proceedings before the commission shall be considered or received by the court, except that in cases where issues of confiscation or of constitutional right are involved, the court, on its own motion or verified petition of a party, may order such additional evidence as it deems necessary for the determination of such issues to be taken before the commission and to be received at the hearing before the commission in such manner and upon such terms and conditions as the court shall order.

IND. CODE § 8-1-3-7.

97. 73B C.J.S. *Public Utilities* § 250 (2004).

98. *See, e.g.*, IND. CODE § 8-1-3-1 (“An assignment of errors that the decision, ruling, or order of the commission is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the decision, ruling, or order, and the sufficiency of the evidence to sustain the finding of facts upon which it was rendered.”).

99. *See* Hofer, *supra* note 73, at 233.

100. *See id.*

101. *See* Maloy, *supra* note 2, at 610, for a similar finding regarding state reviewing standards generally.

102. *See, e.g.*, *In re Narragansett Bay Comm'n Gen. Rate Filing*, 808 A.2d 631, 635 (R.I. 2002) (de novo); *In re Waikoloa Sanitary Sewer Co.*, 125 P.3d 484, 491 (Haw. 2005) (clearly erroneous); *Dunn v. Pub. Utils. Comm'n*, 890 A.2d 269, 270 (Me. 2006) (substantial evidence); *Providence & Worcester R.R. Co. v. Energy Facilities Siting Bd.*, 899 N.E.2d 829, 834 (Mass. 2009) (arbitrary and capricious); *In re Application of Consumers Energy Co.*, 761 N.W.2d 346, 349 (Mich. Ct. App. 2008) (abuse of discretion). *See generally* Casey et al., *supra* note 43, at 287; Peters, *supra* note 13, at 243; Verkuil, *supra* note 43, at 687.

freely reviewable, (16) great deference, (17) great weight, (18) independent review, (19) manifest weight, (20) plenary, (21) rational basis, (22) reasonable basis, (23) respectful consideration, (24) serious consideration, (25) special deference, (26) substantial deference, (27) substantial weight, (28) sufficient evidence, (29) sufficient probative evidence, and (30) weight of evidence.<sup>103</sup> As with state reviewing standards generally, most of these standards are merely variations or different formulations or expressions of the most commonly employed standards.<sup>104</sup> Nonetheless, the differing terminologies used make any comparative analysis of public utility commission reviewing standards particularly challenging, not to mention the imposition such variety of standards has on reviewing courts interpreting and applying them.

The threshold inquiry in all appeals from public utility commission decisions is whether the public utility commission acted within the scope of its legal authority.<sup>105</sup> This inquiry generally involves a determination of whether the public

103. See, e.g., *Unified Gov't of Athens-Clarke Cnty. v. Ga. Pub. Serv. Comm'n*, 668 S.E.2d 296, 297 (Ga. Ct. App. 2008) (any evidence); *Consol. Tel. Coop. v. W. Wireless Corp.*, 637 N.W.2d 699, 702 (N.D. 2001) (appreciable deference); *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993) (clear error); *McNeal v. Idaho Pub. Utils. Comm'n*, 132 P.3d 442, 445 (Idaho 2006) (clear weight); *Chase 3000, Inc. v. Neb. Pub. Serv. Comm'n*, 728 N.W.2d 560, 566 (Neb. 2007) (competent evidence); *In re Application of Consumers Energy Co.*, 761 N.W.2d at 349 (competent and material substantial evidence); *GTC, Inc. v. Edgar*, 967 So.2d 781, 790 (Fla. 2007) (competent substantial evidence); *In re Pinetree Power, Inc.*, 871 A.2d 78, 80 (N.H. 2005) (considerable deference); *Clean Wis., Inc. v. Pub. Serv. Comm'n*, 700 N.W.2d 768, 796 (Wis. 2005) (due weight); *In re Waikoloa Sanitary Sewer Co.*, 125 P.3d at 491 (freely reviewable); *In re UPC Vt. Wind, LLC*, 969 A.2d 144, 147 (Vt. 2009) (great deference); *Clean Wis., Inc.*, 700 N.W. 2d at 795–96 (great weight); *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 904 N.E.2d 853, 857 (Ohio 2009) (independent review); *id.* (manifest weight); *S. New England Tel. Co. v. Dep't of Pub. Util. Control*, 874 A.2d 776, 781 (Conn. 2005) (plenary); *Popowsky v. Pa. Pub. Util.*, 706 A.2d 1197, 1201 (Pa. 1997) (rational basis); *Dunn v. Pub. Util. Comm'n*, 246 S.W.3d 788, 791 (Tex. App. 2008) (reasonable basis); *In re Application of Consumers Energy Co.*, 761 N.W.2d at 349 (respectful consideration); *AEP Tex. Cent. Co. v. Pub. Util. Comm'n*, 286 S.W.3d 450, 460 (Tex. Ct. App. 2008) (serious consideration); *Equal Access Corp. v. Utils. Bd.*, 510 N.W.2d 147, 151 (Iowa 1993) (special deference); *Providence & Worcester R.R.*, 899 N.E.2d at 835 (substantial deference); *Ala. Pub. Serv. Comm'n v. Gas Utils. of Ala., Inc.*, 678 So.2d 747, 752 (Ala. 1996) (substantial weight); *Constellation New Energy, Inc. v. Pub. Serv. Comm'n*, 825 A.2d 872, 880 (Del. Super. Ct. 2003) (sufficient evidence); *Ohio Consumers' Counsel*, 904 N.E.2d at 856 (sufficient probative evidence); *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 883 N.E.2d 1035, 1039 (Ohio 2008) (weight of evidence).

104. See *supra* notes 40–41 and accompanying text.

105. See, e.g., *State ex rel. Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 289 S.W.3d 240, 246 (Mo. Ct. App. 2009) (stating that review of public utility commission decisions begins with determining whether the decision was lawful which “turns on whether the Commission had the statutory authority to act as it did” (quoting *Union Elec. Co. v. Pub. Serv. Comm'n*, 136 S.W.3d 146, 152 (Mo. Ct. App. 2004))); *Mountain Cmty. for Responsible Energy v. Pub. Serv. Comm'n*, 665 S.E.2d 315, 323 (W. Va. 2008) (stating that review of public utility commission decisions begins with determining “whether the Commission exceeded its statutory jurisdiction and powers” (quoting *Cent. W. Va. Refuse, Inc. v. Pub. Serv. Comm'n*,

utility commission acted within its jurisdiction and whether the public utility commission followed statutorily prescribed procedures.<sup>106</sup> Whether a public utility commission exceeded the scope of its legal authority is reviewed *de novo*.<sup>107</sup> Notably, however, reviewing courts often entertain presumptions that the public utility commissions they are reviewing acted within their legal authority.<sup>108</sup>

After resolving this threshold question, courts generally look to the type of question presented on appeal.<sup>109</sup> The most commonly employed standard of review for questions of law is *de novo* review.<sup>110</sup> However, at the same time, courts often differentiate between questions of law within the expertise of public utility commissions and those in which public utility commissions decide without employing their expertise.<sup>111</sup> For instance, when a public utility commission issues a decision based on an interpretation of a statute that it is responsible for enforcing, courts often afford that decision a greater degree of deference.<sup>112</sup> When public utility commissions employ their expertise in deciding questions of law, some

438 S.E.2d 596 (W. Va. 1993))).

106. *See, e.g.*, *Citizens Action Coal. of Ind., Inc. v. PSI Energy, Inc.*, 894 N.E.2d 1055, 1061 (Ind. Ct. App. 2008); *Kan. Indus. Consumers Grp. v. State Corp. Comm'n*, 138 P.3d 338, 344 (Kan. Ct. App. 2006).

107. *See, e.g.*, *Commonwealth ex rel. Stumbo v. Ky. Pub. Serv. Comm'n*, 243 S.W.3d 374, 378 (Ky. Ct. App. 2007); *In re Application of Consumers Energy Co.*, 761 N.W.2d at 349.

108. *See, e.g.*, *GTC, Inc. v. Garcia*, 791 So.2d 452, 456 (Fla. 2000) (“[O]rders of the Commission come before this Court clothed with the statutory presumption that they have been made within the Commission’s jurisdiction and powers, and that they are reasonable and just and such as ought to have been made.” (quoting *United Tel. Co. v. Pub. Serv. Comm’n*, 496 So.2d 116, 118 (Fla. 1986))); *Clipper Windpower, Inc. v. Sprenger*, 924 A.2d 1160, 1168 (Md. 2007) (stating that decisions of the public utility commission are *prima facie* correct unless clearly shown to be beyond the commission’s statutory authority or jurisdiction).

109. *See supra* notes 77–79 and accompanying text.

110. *See, e.g.*, *Ariz. Water Co. v. Ariz. Corp. Comm’n*, 177 P.3d 1224, 1228 (Ariz. Ct. App. 2008); *Nev. Power Co. v. Pub. Utils. Comm’n*, 138 P.3d 486, 495 (Nev. 2006); *Sinclair Oil Corp. v. Wyo. Pub. Serv. Comm’n*, 63 P.3d 887, 892 (Wyo. 2003).

111. *See, e.g.*, *Amerada Hess Pipeline Corp. v. Regulatory Comm’n*, 176 P.3d 667, 673 (Alaska 2008) (“As to questions of law not implicating [the commission’s] special expertise, this court substitutes its own judgment. If [the commission] employs specialized expertise in a legal determination, the court applies a rational basis standard; [the commission’s] interpretation prevails over the court’s, so long as [it] is reasonable.”). Some courts further differentiate between questions of law that are questions of first impression or involve interpretation of statutes as opposed to administrative rules or regulations. *See, e.g.*, *S. New England Tel. Co. v. Dep’t of Pub. Util. Control*, 874 A.2d 776, 781 (Conn. 2005) (“[W]hen a state agency’s determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference.” (quoting *Sweetman v. State Elections Enforcement Comm’n*, 732 A.2d 144, 153 (Conn. 1999))); *Alma Plantation v. La. Pub. Serv. Comm’n*, 685 So.2d 107, 110 (La. 1997) (“The Commission is entitled to deference in its interpretation of its own rules and regulations, though not in its interpretation of statutes and judicial decisions.”).

112. *See, e.g.*, *Providence & Worcester R.R. v. Energy Facilities Sitting Bd.*, 899 N.E.2d 829, 835 (Mass. 2009); *AEP Tex. Cent. Co. v. Pub. Util. Comm’n*, 286 S.W.3d 450, 460 (Tex. Ct. App. 2008).

courts review under a rational basis standard;<sup>113</sup> others simply give a varying degree of deference, including appreciable deference,<sup>114</sup> great deference,<sup>115</sup> or substantial deference.<sup>116</sup> A small minority of courts review questions of law under entirely different standards, such as any evidence or abuse of discretion.<sup>117</sup>

The most commonly employed standard of review for questions of fact is substantial evidence review.<sup>118</sup> Variations of substantial evidence review are also used, such as competent substantial evidence<sup>119</sup> and competent and material substantial evidence.<sup>120</sup> The second most commonly used standard of review for factual determinations is clearly erroneous review.<sup>121</sup> Seemingly unsure of which of the two most common standards of review to use (noting they are quite similar in any case),<sup>122</sup> some courts employ them both.<sup>123</sup> Other courts employ entirely different standards such as any evidence,<sup>124</sup> clear weight of evidence,<sup>125</sup> manifest

113. See, e.g., *Amerada Hess Pipeline Corp.*, 176 P.3d at 673.

114. See, e.g., *Consol. Tel. Coop. v. W. Wireless Corp.*, 637 N.W.2d 699, 702 (N.D. 2001).

115. See, e.g., *GTC, Inc. v. Edgar*, 967 So.2d 781, 785 (Fla. 2007).

116. See, e.g., *Providence & Worcester R.R.*, 899 N.E.2d at 835.

117. See, e.g., *Unified Gov't of Athens-Clarke Cnty. v. Ga. Pub. Serv. Comm'n*, 668 S.E.2d 296, 297 (Ga. Ct. App. 2008) (“We will affirm ‘if any evidence on the record substantiates the administrative agency’s findings of fact and conclusions of law.’” (quoting *Prof'l Standards Comm. v. Alberson*, 614 S.E.2d 132 (Ga. Ct. App. 2005)) (additional internal quotation marks omitted)); *Montana-Dakota Utils. Co. v. Mont. Dep't of Pub. Serv.*, 725 P.2d 548, 553 (Mont. 1986) (“Conclusions of law are subject to an abuse of discretion review.” (quoting *City of Billings v. Billings Firefighters Local No. 521*, 651 P.2d 627, 632 (Mont. 1982)) (internal quotation marks omitted)); cf. *In re Otter Tail Power Co.*, 744 N.W.2d 594, 602 (S.D. 2008) (“The [public utility commission’s] findings of fact are reviewed under the clearly erroneous standard, while its conclusions of law are reviewed de novo.”).

118. See, e.g., *Dunn v. Pub. Utils. Comm'n*, 890 A.2d 269, 270 (Me. 2006); *Nev. Power Co. v. Pub. Utils. Comm'n*, 138 P.3d 486, 495 (Nev. 2006); *Rohrbaugh v. Pa. Pub. Util. Comm'n*, 727 A.2d 1080, 1084 (Pa. 1999).

119. See, e.g., *GTC, Inc.*, 967 So.2d at 790; *Kan. Indus. Consumers Grp. v. State Corp. Comm'n*, 138 P.3d 338, 344 (Kan. Ct. App. 2006).

120. See, e.g., *In re Application of Consumers Energy Co.*, 761 N.W.2d 346, 349 (Mich. Ct. App. 2008); *State ex rel. Utils. Comm'n v. Town of Kill Devil Hills*, 670 S.E.2d 341, 347 (N.C. Ct. App. 2009).

121. See, e.g., *In re Waikoloa Sanitary Sewer Co.*, 125 P.3d 484, 491 (Haw. 2005); *In re Otter Tail Power Co.*, 744 N.W.2d at 602; *In re UPC Vt. Wind, LLC*, 969 A.2d 144, 147 (Vt. 2009).

122. See *supra* notes 48–52 and accompanying text.

123. See, e.g., *Montana-Dakota Utils. Co. v. Mont. Dep't of Pub. Serv.*, 725 P.2d 548, 553 (Mont. 1986) (upholding a public utility commission decision if supported by substantial evidence while overturning a public utility commission decision if clearly erroneous); *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n*, 593 S.E.2d 148, 151 (S.C. 2004) (upholding a public utility commission decision if not clearly erroneous in view of the substantial evidence on the whole record).

124. See, e.g., *Unified Gov't of Athens-Clarke Cnty. v. Ga. Pub. Serv. Comm'n*, 668 S.E.2d 296, 297 (Ga. Ct. App. 2008).

125. See, e.g., *McNeal v. Idaho Pub. Utils. Comm'n*, 132 P.3d 442, 445 (Idaho 2006).

weight of evidence,<sup>126</sup> and weight of evidence.<sup>127</sup> There is no predominant standard of review for mixed questions of law and fact, though mixed questions will generally be afforded a greater degree of deference than pure questions of law.<sup>128</sup>

In addition to looking to the type of question presented on appeal, courts look to the role assumed by a public utility commission when it made the decision being appealed to determine the applicable standard of review on appeal.<sup>129</sup> For instance, courts apply a different standard of review to decisions by public utility commissions when public utility commissions act in a legislative or administrative capacity as opposed to a judicial or adjudicatory capacity.<sup>130</sup> When public utility commissions act in a legislative capacity, the most commonly employed standard of review is the abuse of discretion or arbitrary and capricious standard of review.<sup>131</sup> Another common (and similar) standard of review is rational basis review.<sup>132</sup> When public

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126. See, e.g., *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 904 N.E.2d 853, 856 (Ohio 2009).

127. See, e.g., *Consol. Tel. Coop. v. W. Wireless Corp.*, 637 N.W.2d 699, 702 (N.D. 2001).

128. See, e.g., *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1018 (Ind. 2009) (“We therefore consider this question as a mixed question of law and fact with a high level of deference, examining the logic of the inferences made and the correctness of legal propositions without replacing our own judgment for that of the Commission.”); *Clean Wis., Inc. v. Pub. Serv. Comm'n*, 700 N.W.2d 768, 796 (Wis. 2005) (“[W]e should defer to an agency interpretation when the ‘legal question is intertwined with factual determinations or with value or policy determinations’ and the agency involved ‘has primary responsibility for determination of fact and policy.’” (quoting *Hutson v. Wis. Pers. Comm'n*, 665 N.W.2d 212, 221 (Wis. 2003)) (additional internal quotation marks omitted)); see also *Casey et al.*, *supra* note 43, at 319.

129. See *supra* Part I.A for a discussion of the various roles assumed by public utility commissions.

130. See, e.g., *In re Request for Serv. in Qwest's Tofte Exch.*, 666 N.W.2d 391, 395 (Minn. Ct. App. 2003) (“When the [public utility commission] acts in a legislative capacity, the standard of review is whether it exceeded its statutory authority; when the [public utility commission] acts in a quasi-judicial capacity, the standard of review is the substantial evidence test.”); see also CAL. STATE AUDITOR REPORT, *supra* note 20, at 2.

131. See, e.g., *Chase 3000, Inc. v. Neb. Pub. Serv. Comm'n*, 728 N.W.2d 560, 569 (Neb. 2007) (“[W]here [an] order [is] administrative or legislative in character, the only issues to be determined by the reviewing court [are] whether the Commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.”); *Potomac Edison Co. v. State Corp. Comm'n*, 667 S.E.2d 772, 777 (Va. 2008) (“When the Commission has acted in [a] legislative capacity and has not based its decision on the resolution of an issue of law, we will set aside the Commission’s decision only if the Commission clearly has abused its legislative discretion.”); see also CAL. STATE AUDITOR REPORT, *supra* note 20, at 2.

132. See, e.g., *N.Y. Tel. Co. v. Pub. Serv. Comm'n*, 731 N.E.2d 1113, 1116 (N.Y. 2000) (“[D]eterminations in setting just and reasonable rates . . . ‘may not be set aside unless they are without rational basis’ . . . because ‘setting utility rates presents problems of a highly technical nature, the solutions to which . . . have been left by the Legislature to the expertise of the [public utility commission].’” (quoting *In re Rochester Tel. Corp. v. Pub. Serv. Comm'n*, 660 N.E.2d 1112, 1116 (N.Y. 1995))); *In re Abrams v. Pub. Serv. Comm'n*, 492 N.E.2d 1193, 1195 (N.Y. 1986) (additional internal quotation marks omitted); *Popowsky v.*

utility commissions act in a judicial capacity, the most commonly employed standard of review is substantial evidence review.<sup>133</sup>

In general, courts use the abuse of discretion and arbitrary and capricious standards of review as catchalls whether or not the particular decisions or actions of a public utility commission fit within one of the other categories defined by a different standard of review.<sup>134</sup>

### *C. A Three-Tiered, Two-Standard Reviewing Approach*

This Note proposes a three-tiered, two-standard reviewing approach for determining the appropriate level of deference to be afforded public utility commissions as they undergo judicial review by appellate courts. The purpose of this 3-2 approach is to simplify and clarify the standard-of-review determinations that state courts continue to grapple with in the context of appeals from public utility commission decisions. The 3-2 approach is both a reflection and a refinement of current public utility commission reviewing standards. The 3-2 approach utilizes three tiers of review to properly characterize the public utility commission decision and two standards of review to reflect the legal consequences of that characterization.

The three tiers of review reflect in large part the most common classifications used by state courts in reviewing public utility commission decisions.<sup>135</sup> First, courts should inquire whether the public utility commission exceeded the scope of its legal authority; second, whether the public utility commission was acting in a legislative, judicial, or otherwise administrative capacity; and third, if the public utility commission was acting in a judicial capacity, whether the issue on appeal is a question of law, a question of fact, or a mixed question of law and fact, according degrees of deference depending on the extent of expertise employed by the commission.

The two standards of review require courts at each level of review to ask one of two questions: was the action or decision of the public utility commission right, or was it reasonable? These “right” and “reasonable” standards replicate the degrees of deference found in the most common standards used by state courts in reviewing public utility commission decisions, although without the many cumbersome distinctions.<sup>136</sup> Although most appellate courts attribute deference on a spectrum

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Pa. Pub. Util., 706 A.2d 1197, 1201 (Pa. 1997) (“As long as there is a rational basis for the [public utility commission’s] methodology [in establishing a rate structure], such decisions are left entirely up to the discretion of the [public utility commission] which, using its expertise, is the only one which can properly determine which method is the most accurate . . . .” (second alteration in original) (quoting *W. Penn Power Co. v. Pa. Pub. Util. Comm’n*, 607 A.2d 1132, 1135 (Pa. 1992))).

133. See, e.g., *In re Request for Serv. in Qwest’s Tofte Exch.*, 666 N.W.2d at 391, 395; CAL. STATE AUDITOR REPORT, *supra* note 20, at 2.

134. See, e.g., *AEP Tex. Cent. Co. v. Pub. Util. Comm’n*, 286 S.W.3d 450, 468 (Tex. App. 2008) (stating that a public utility commission decision will be overturned if not supported by substantial evidence, if arbitrary or capricious, or if characterized by an abuse of discretion).

135. See *supra* Part III.B.

136. Compare *Amerada Hess Pipeline Corp. v. Regulatory Comm’n*, 176 P.3d 667, 673

with three or four points (i.e., three or four standards), exerting, for instance, hard review (*de novo*), medium review (substantial evidence), or low review (arbitrary and capricious),<sup>137</sup> if the distinctions are not carefully drawn and defined then they cannot be applied, and in the context of public utility commissions, where comparative-advantage principles play such a prominent role, such distinctions are probably unnecessary in any case.

No deference should be given to a public utility commission when the question before the reviewing court is whether the public utility commission exceeded the scope of its legal authority.<sup>138</sup> The legal authority of public utility commissions derives from statutes promulgated by state legislatures and must, therefore, be exercised within the confines of those statutes.<sup>139</sup> While a reviewing court may entertain a presumption that the public utility commission acted within its legal authority, it must nonetheless find the public utility commission was right in its exercise of its legal authority, as opposed to merely being reasonable.<sup>140</sup>

If the public utility commission acted within its legal authority, courts should then progress to the second tier of review, which requires a determination of whether the public utility commission was acting in a legislative, judicial, or otherwise administrative capacity.<sup>141</sup> When a public utility commission acts in a legislative capacity, a reviewing court should not substitute its judgment for that of the commission, but uphold its decision so long as it is reasonable, even if in the view of the court it is wrong.<sup>142</sup> When a public utility commission acts in a legislative capacity, it is acting as an extension of the legislature and should, therefore, be accorded a higher degree of deference than when acting in a judicial capacity.<sup>143</sup>

If the public utility commission acted in a judicial capacity in rendering its decision, the reviewing court should then progress to the third and final tier of

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(Alaska 2008) (defining substantial evidence as “relevant evidence that a reasonable person might accept as adequate to support [the decision]”), *with* Kan. Indus. Consumers Grp. v. State Corp. Comm’n, 138 P.3d 338, 344 (Kan. Ct. App. 2006) (describing decisions as arbitrary and capricious when they are unreasonable), and *In re* Application of Consumers Energy Co., 761 N.W.2d 346, 349 (Mich. Ct. App. 2008) (defining abuse of discretion as occurring when decisions fall outside the range of reasonable and principled outcomes).

137. Casey et al., *supra* note 43, at 287 (“[T]he four standards of review, arrayed in order of increasing deference . . . include: *de novo* review (is the decision right?), clearly erroneous review (is the decision wrong?), review for substantial evidence (is the decision unreasonable?), and review for abuse of discretion (is the decision irrational?).”).

138. See *supra* note 107.

139. See *supra* Part I.C for a discussion of the legal authority of public utility commissions.

140. See *supra* notes 107–08.

141. See *supra* Part I.A for a discussion of the various roles assumed by public utility commissions. It may not always be clear whether a public utility commission was acting in a legislative capacity or a judicial capacity when it rendered its decision. See *In re* Request for Serv. in Qwest’s Tofte Exch., 666 N.W.2d 391, 395 (Minn. Ct. App. 2003). When public utility commissions act in both capacities (e.g., when public utility commissions conduct hearings and render findings of fact and conclusions of law in issuing rules or regulations), courts should proceed to the third tier of review.

142. See *supra* notes 130–33.

143. See *supra* notes 130–33.

review, which requires a determination of whether the question presented on appeal is a question of law, question of fact, or mixed question of law and fact.<sup>144</sup> The expertise employed by a public utility commission in making its decision will have the greatest effect at this stage of analysis.<sup>145</sup> In differentiating between the varying levels of deference to be afforded under these “three conventional labels,” it is important to recognize that they are classifications meant to reflect the fact that deference to lower courts and agencies depends on whether “they [are] in a better position to address a question than the appellate court would be.”<sup>146</sup> Questions of law are generally reviewed without deference because appellate courts are in just as good a position to decide them as lower courts or agencies, but where that is not the case, deference may be warranted.<sup>147</sup>

The extent of expertise employed by public utility commissions in rendering decisions is a good proxy for determining whether they are in a better position to resolve the dispute. Public utility commissions are fact-finding bodies with the technical expertise to administer the variety of regulatory schemes devised by state legislatures.<sup>148</sup> When public utility commissions employ their expertise, whether in deciding a question of law, a question of fact, or a mixed question of law and fact, their actions should be reviewed for reasonableness to the extent of their expertise (i.e., to the extent they are better positioned to decide the issue under review). In other words, while questions of law should generally be reviewed for rightness, if the question falls within the public utility commission’s expertise, it should be reviewed only for reasonableness.<sup>149</sup> On the other hand, questions of fact should

144. See *supra* Part II.D for a discussion of the types of questions presented on appeal.

145. See, e.g., *Amerada Hess Pipeline Corp. v. Regulatory Comm’n*, 176 P.3d 667, 673 (Alaska 2008) (“As to questions of law not implicating [the commission’s] special expertise, this court substitutes its own judgment. If [the commission] employs specialized expertise in a legal determination, the court applies a rational basis standard; [the commission’s] interpretation prevails over the court’s, so long as [it] is reasonable.”); *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm’n*, 168 P.3d 105, 110 (N.M. 2007) (“In reviewing the Commission’s decision, we ‘begin by looking at two interconnected factors: whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency’s specialized field of expertise.’” (quoting *Morningstar Water Users Ass’n v. N.M. Pub. Util. Comm’n*, 904 P.2d 28, 31 (N.M. 1995))); *AEP Tex. Cent. Co. v. Pub. Util. Comm’n*, 286 S.W.3d 450, 468 (Tex. App. 2008) (“While presuming that the Commission’s order is valid and that ‘its findings, inferences, conclusions, and decisions are supported by substantial evidence,’ we also ‘give significant deference to the [Commission] in its field of expertise.’” (alteration in original) (quoting *State v. Pub. Util. Comm’n*, 246 S.W.3d 324, 331 (Tex. App. 2008))).

146. Hofer, *supra* note 73, at 231, 241–42; see also *Casey et al.*, *supra* note 43, at 316–17.

147. See *supra* notes 110–11.

148. See *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1015 (Ind. 2009).

149. See, e.g., *GTC, Inc. v. Edgar*, 967 So.2d 781, 785 (Fla. 2007) (“[W]hen a statutory term is subject to varying interpretations and that statute has been interpreted by the executive agency charged with enforcing the statute, this Court follows a deferential principle of statutory construction . . . .”); *Quiland, Inc. v. Pub. Utils. Comm’n*, 956 A.2d 127, 131 (Me. 2008) (“[W]e either review the Commission’s construction of the ambiguous statute for reasonableness or plainly construe the unambiguous statute.” (quoting

almost always be reviewed for reasonableness because public utility commissions almost always employ their expertise in deciding them.<sup>150</sup> Appellate courts can apply the same analysis to mixed questions: after separating the legal and factual elements, they can apply rightness review for the legal elements and reasonableness review for the factual ones.<sup>151</sup> In close cases involving mixed questions of law and fact, it may be beneficial to reject the labels altogether and simply resort to deciding whether the public utility commission is better positioned to decide the question.<sup>152</sup>

The 3-2 approach outlined above helps explain why the applicable standard of review in *Northern Indiana Public Service Co. v. United States Steel Corp.*,<sup>153</sup> referenced in the Introduction to this Note, was so contested. Because the case involved a grant of summary judgment concerning interpretation of a contract for electricity, the Indiana Court of Appeals treated the case as one involving a question of law not within the expertise of the Indiana Utility Regulatory Commission.<sup>154</sup> The Indiana Supreme Court disagreed, reasoning that the Commission “deployed its expertise in the subject matter” by in effect “interpret[ing] its own order,” as the contract had to be and was approved by the Commission when the parties entered into it.<sup>155</sup> Thus, according to the Indiana Supreme Court, in making its decision, the Indiana Utility Regulatory Commission acted within its legal authority (the first tier) in an adjudicatory or quasi-judicial capacity (the second tier) when it decided a mixed question of law and fact while employing its expertise (the third tier).<sup>156</sup>

The outcome of this case may well have been different if the Commission had decided a pure question of law as opposed to a mixed question, or had decided the case without employing its expertise.<sup>157</sup> The Indiana Supreme Court’s determination that the Commission’s decision was a mixed question of law and fact within the expertise of the Commission tipped the level of deference in favor of the Commission,<sup>158</sup> as it would under the 3-2 reviewing approach. After all, the Commission was in a better position to decide the dispute; it had approved the contract in dispute.<sup>159</sup> The Indiana Supreme Court sought to determine whether the Commission’s decision was reasonable while the Indiana Court of Appeals sought

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Competitive Energy Servs., LLC v. Pub. Utils. Comm’n, 818 A.2d 1039, 1046 (Me. 2003)); see also *supra* notes 110–11.

150. See, e.g., *Popowsky v. Pa. Pub. Util.*, 706 A.2d 1197, 1201 (Pa. 1997) (recognizing the public utility commission’s expertise and role as fact finder).

151. See *Casey et al.*, *supra* note 43, at 318–19 (“One approach to mixed questions avoids generalizations about the application of law to facts; it breaks the mixed questions down into unmixed halves of fact and law.”).

152. See generally *Hofer*, *supra* note 73.

153. 907 N.E.2d 1012 (Ind. 2009).

154. *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 881 N.E.2d 1065, 1071 (Ind. Ct. App. 2008), *vacated*, 907 N.E.2d 1012 (Ind. 2009).

155. See *N. Ind. Pub. Serv. Co.*, 907 N.E.2d at 1017–18.

156. See *id.*

157. See *id.* at 1018.

158. See *id.*

159. *Id.* at 1017–18.

to determine whether the Commission's decision was right.<sup>160</sup> The difference between the two made all the difference.

#### CONCLUSION

Public utility commission reviewing standards are being litigated in courts across the country. While standards of review may seem unimportant in the abstract, in reality, they can have a huge effect, especially in the context of judicial review of public utility commissions. The three-tiered, two-standard reviewing approach advocated by this Note reflects on current public utility commission reviewing standards in suggesting a refined reviewing approach for determining the appropriate level of deference to be afforded public utility commissions as they undergo judicial review. Clearly articulated reviewing rationales are a necessity because the policy objectives served by standards of review cannot be achieved without them. Unfortunately, such rationales are all-too-often missing, or if present, simply too confusing.

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160. Compare *id.* at 1018, with *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 881 N.E.2d 1065, 1071 (Ind. Ct. App. 2008).

