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No. 4979.

United States Circuit Court of Appeals

FOR THE FOURTH CIRCUIT.

HOPE NATURAL GAS COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
CITY OF CLEVELAND,
CITY OF AKRON, and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

BRIEF OF PETITIONER
On Motions of Respondents the Cities of Cleveland and Akron to Dismiss Part B of Petition for Review.

STATEMENT OF THE CASE AND OF THE POINTS INVOLVED.

I. STATEMENT OF THE CASE.

On May 26, 1942 respondent the Federal Power Commission determined that the rates of petitioner, Hope Natural Gas Company, for natural gas sold by it in interstate commerce had been unreasonable and unlawful under the Natural Gas Act since January 1, 1939, determined the reduced rates that would have been lawful for 1939 and each year since and for the future, and ordered petitioner to file new schedules of the reduced rates effective July 15, 1942 and thereafter. After the Commission had overruled an application for a rehearing the petitioner on July 18, 1942 filed its Petition for Review in this Court. In support thereof, on September 15, 1942, it filed its Brief, to which reference is made for a complete statement of the case and of the questions involved on the merits.

Respondents the Cities of Cleveland and Akron have now filed identical motions to dismiss a part of the Petition for Review. These motions expressly admit the jurisdiction of this Court as to all other parts of the Petition (Cleveland Brief, p. 6).

In disposing of this case below the respondent Commission issued two papers dated May 26, 1942, each incorporating by reference its Opinion No. 76 of the same date (see Supp. pp. 1, 8, 14*). Paper No. 1 is entitled "Order Reducing Rates" which, after 23 separate findings as to rate base, rate of return, and operating revenues and expenses, concludes with findings and orders directing the petitioner to reduce its interstate natural gas rates effective July 15, 1942 to certain specified rates (Supp. pp. 1-7). Paper No. 2 is entitled "Findings As To Lawfulness Of Past Rates" which, after 20 separate findings which are practically identical as to subject matter with the 23 findings contained in the first paper, concludes with four findings determining first that all of petitioner's interstate rates as charged and received by it in the past "were unjust, unreasonable and excessive, and therefore unlawful" in designated sums for 1939, for 1940, and since 1940 (Supp. p. 12), and second that as to petitioner's rate to East Ohio (Supp. pp. 12-13):

> "(24) The rates charged and received by the Hope Natural Gas Company for the transportation and sale of natural gas in interstate commerce to The East Ohio Gas Company for resale for ultimate public consumption were unjust, unreasonable, excessive, and therefore unlawful to the extent of $830,892 during 1939, $3,219,551 during 1940, and $2,815,789 on an annual basis since 1940."

The Petition for Review seeks a review in this Court of all action taken by the respondent Commission in both

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* This and similar references herein are to the Supplement to the Brief of Petitioner filed September 15, 1942. Throughout this brief we use the abbreviations used in such brief.

these papers and in its Opinion No. 76 incorporated in both by reference. The motions to dismiss seek to have this Court hold that Paper No. 2 in its entirety is not reviewable, although admitting that Paper No. 1, covering substantially the same subject matter, is reviewable.

Petitioner's interstate rates, which the Commission found were unreasonable and unlawful, both overall and specifically as to East Ohio, in 1939 and since, were those set forth in petitioner's rate schedules filed with the Commission on September 3, 1938, immediately after the passage of the Natural Gas Act, in accordance with its Section 4(c) (15 U. S. C. 717c (c)).

These rates had been in effect by contract between petitioner and its five customer companies since 1937, prior to which the same or slightly higher rates had been in effect (Exs. 5-9). Petitioner's contract rate to East Ohio, so filed, was thoroughly investigated and held reasonable by The Public Utilities Commission of Ohio on January 10, 1939 in extended litigation between East Ohio, an affiliate of the petitioner, and the respondent City of Cleveland. The Ohio Commission's determination on this point was subsequently sustained in full by the Supreme Court of Ohio on July 17, 1940. *Cleveland* case—*East Ohio Gas Company v. City of Cleveland,* 27 P. U. R. (N. S.) 387 (1939); *The East Ohio Gas Co. v. Public Utilities Commission of Ohio, City of Cleveland v. Public Utilities Commission (2 cases),* 137 O. S. 225, 28 N. E. (2d) 599 (1940).

Upon the filing under the Natural Gas Act of petitioner's contract rates to East Ohio and its other interstate customers, these rates became the only legal rates that petitioner was thereafter authorized to collect or its customers to pay until changed for the future by a new filing or by an order of the Commission (Natural Gas Act, Sections 4(d), 4(e), and 5(a), 15 U. S. C. 717c (d), 717c (e),

717d (a); see Brief of Petitioner, pp. 136-142). No change was made in these schedules by petitioner and none was ordered by the Commission until its orders of May 26, 1942, challenged by the Petition for Review in this case.

In the meantime on September 23, 1940 the Cities of Cleveland and Akron had filed a joint motion with the respondent Commission asking it to order an immediate reduction in petitioner's rates to East Ohio on the basis of petitioner's own evidence in chief which had then been submitted to the Commission (Item 44 of Certified Record). This motion was briefed and argued before the Commission, which on December 20, 1940 entered its "Order Denying Motion For An Immediate Order Reducing Rates," thus leaving petitioner's existing filed rates unchanged (Item 49 of Certified Record).

Having thus refused in 1940 to order a reduction in petitioner's filed rates the Commission now in effect determines that the rates it then declined to reduce were excessive, unreasonable and unlawful under the Natural Gas Act by many millions of dollars.

This final action as to the lawfulness of petitioner's past rates (Paper No. 2) was made in response to an amended complaint filed by the City of Cleveland requesting such a finding from the effective date of the Natural Gas Act, June 21, 1938. In Cleveland's Reply Brief before the Commission it requested the Commission to find such rates unlawful from June 30, 1939 to the date of the Commission's order. The selection of this latter date was stated to be based upon the pendency before The Public Utilities Commission of Ohio of rate proceedings between East Ohio and the City of Cleveland for the period since June 30, 1939 (Reeder, R. 6883, 6892; Reply Brief of City of Cleveland, pp. 2-4). The purpose to which the requested action was to be put in this pending Ohio rate litigation was explained by the City of Cleveland to the

respondent Commission as follows (Reply Brief of City of Cleveland, pp. 8-9):

> "In *East Ohio Gas Company v. Cleveland,* P. U. C. O. Nos. 11,001, 11,218 and 11,443, now pending before The Public Utilities Commission of Ohio, East Ohio claims as operating expenses its payments to Hope since June 30, 1939 under a schedule on file with the Federal Power Commission.
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> "Of course, the mere fact that Hope filed an initial schedule with the Federal Power Commission against which Cleveland has complained does not serve as a shield to the affiliate, East Ohio. *Re Home Gas Co.,* 39 P. U. R. (N. S.) 102, 107, 109 (Federal Power Comm.) (June 11, 1941); *Re Interstate Power Co.,* 16 P. U. R. (N. S.) 422 (1936) (Wisconsin Commission).
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> "But, even if that were not so, a determination by the Federal Power Commission that this schedule, though legal, has been at all times unlawful since June 30, 1939 will affirmatively aid the municipal and state authorities in the Ohio case.
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> "The Ohio Commission plainly cannot allow as valid operating expenses payments to an affiliate under a rate which is specifically determined to have been unlawful by the Federal Power Commission from and after June 30, 1939. This is so because neither the Ohio Commission nor any other commission can allow an unlawful expenditure as a valid operating expense. *Re Indianapolis Water Co.,* P. U. R. 1925 C, 431, 441; *Re Mountain States Power Co.,* 3 P. U. R. (N. S.) 29, 39; *Re Edison Electric Illuminating Co.,* P. U. R. 1918 C, 149, 155; Ohio General Code Secs. 614-46 and 544.
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> "On the other hand, a mere finding that the existing Hope-East Ohio rate *is* unreasonable as an incident to fixing rates for the future will not sufficiently aid the City of Cleveland as to payments from East Ohio to Hope made between June 30, 1939 and the date of the finding."

II. THE POINT INVOLVED.

The ultimate question raised by the Cleveland and Akron motions is whether the respondent Commission's action as to petitioner's past rates as expressed in its so-called "Findings As To Lawfulness Of Past Rates" and in its Opinion No. 76 is reviewable in this Court pursuant to Section 19(b) of the Natural Gas Act (15 U. S. C. 717r(b)), quoted at pages 11 and 12 of Cleveland's brief. The answer must be that this action is reviewable if:

1. This Court's exclusive jurisdiction to review actions of the Commission under Section 19(b) of the Natural Gas Act, which has admittedly been properly invoked, extends to all issues adjudicated by the Commission in this case, not merely to a part of those issues; or

2. Considered wholly apart from the Commission's action as to future rates the nature and intended effect of its action as to petitioner's past rates constitute it a reviewable "order" under Section 19(b) of the Natural Gas Act.

ARGUMENT.

I. THE EXCLUSIVE REVIEW JURISDICTION OF THIS COURT HAVING ADMITTEDLY ATTACHED, IT EXTENDS TO ALL ISSUES ADJUDICATED BY THE COMMISSION.

This case differs from every case cited in Cleveland's brief on its motion by reason of the fact that the review jurisdiction of this Court over a large part of this case is admitted. In all the cases cited the question was simply whether the reviewing court had any jurisdiction at all. None of them involved an attempt to split off a part of a case and to have it held that the court had no jurisdiction over that part, as Cleveland and Akron attempt to do here.

If the Commission in this case had written only one paper, as well it might since the second in a large part

merely repeats the first, it would not be suggested that this Court had not complete jurisdiction over every issue decided. The rule cannot be any different where the Commission's final action is embodied in two papers, both of which incorporate and are based on an opinion set forth in a third paper, for the following among other reasons:

1. The uniform rule of jurisdiction in the federal courts has always been that where jurisdiction, either original or on appeal from a District Court, exists even on a limited basis, as for example because of the existence of a constitutional question, the Court will consider and determine every question in the case. *Greene v. Louisville & Interurban Railroad Company*, 244 U. S. 499 (1917); *Chicago Great Western Railway Company v. Kendall*, 266 U. S. 94 (1924); *Rhode Island v. Massachusetts*, 12 Pet. 657 (U. S. 1838), 14 Pet. 210 (U. S. 1840).

2. The Commission's so-called "Findings As To Lawfulness Of Past Rates" (Paper No. 2) were made, it said, as a part of the process of fixing future rates (Paper No. 1), as to which the review jurisdiction of this Court is admitted. As we have already pointed out, the findings in Paper No. 2 were mere repetitions almost verbatim of findings appearing directly in Paper No. 1 dealing with future rates, adding only similar figures for the prior period.

As to this the Commission said (Opinion, p. 59, Supp. p. 68):

> "The Commission does not have the authority to fix rates for the past and to award reparations. But Congress did empower and instruct the Commission in Section 5(a) of the Natural Gas Act to fix future rates, and as a step in that process we must necessarily consider the reasonableness of past and existing rates. When the issue is raised and the public interest will be served, we consider as a necessary part of that duty the power to examine the entire rate

> problem involved and to determine what rates were lawful in the past."

In other words, says the Commission, in order to fix future rates and "as a step in that process" it must consider "the reasonableness of past and existing rates." Thus all the findings in Paper No. 1 and Paper No. 2 are properly made, it claims, as a part of the process of arriving at its order reducing rates. They are thus reviewable to the same extent that any other findings made to arrive at that order are reviewable.

3. The Cleveland and Akron motions postulate a most confusing and anomalous situation. They say that Paper No. 2 is not reviewable but Paper No. 1 is. If then on this review the Court sets aside the Commission's order reducing rates, holds that the order is not supported by proper findings, holds that the findings it has made are not supported by substantial evidence or holds that the whole is otherwise confiscatory and illegal there would still remain, in the Cities' view, untouched by these holdings, Paper No. 2 containing 24 "findings," the substantial basis of which this Court would have completely invalidated. The Cities, or any one else, are then to be free to procure from the respondent Commission a certified copy of Paper No. 2, which has not been reviewed, and to offer this before The Public Utilities Commission of Ohio in the current East Ohio-Cleveland rate litigation, or before the Pennsylvania Public Utility Commission in current rate litigation affecting Hope's Pennsylvania customers, or before some state or federal court in which suit is brought against Hope on the ground that it has unlawfully collected moneys in the past. What effect would be claimed for this Paper No. 2 in such proceedings is not at all certain. The City of Cleveland has at various times claimed varying effects (Cf. *supra,* p. 5 and Cleveland Brief, pp. 7, 13, 25, 27). Whatever the effect, the City

of Cleveland apparently admits that somewhere the petitioner would have to have its day in court and that the Commission's actions as to past rates would be subject to challenge of some kind in these other proceedings (Cleveland Brief, p. 13). Thus on the theory of the Cities, the Ohio Commission or the Pennsylvania Commission or the state or federal court where suit is brought against Hope for collecting unlawful rates in the past, or perhaps all of them, will be required to review and consider these findings. The defendant in such a case will be put to the expense of proving their invalidity. Thus the Cities' theory is that the Ohio or Pennsylvania Commissions or any court of original jurisdiction, either state or federal, is the proper body to review Paper No. 2, and not this Court upon which the Natural Gas Act has conferred exclusive jurisdiction to review orders of the Commission. What will be done if these various tribunals take different views as to the validity and effect of this paper is not explained.

It is to avoid just such results as this that where jurisdiction attaches, whether original or on review, it extends to every litigated issue in the case. Section 19(b) of the Natural Gas Act expresses this general principle by stating that "Upon the filing of such transcript such court shall have *exclusive* jurisdiction to affirm, modify, or set aside such order *in whole or in part*" (Italics ours).

The jurisdiction of this Court over this case on a petition to review is thus not separable. If this Court has jurisdiction, and that is admitted, then it has jurisdiction over everything that the respondent Commission decided and over every action taken by the Commission whether that action is expressed in two or three papers as it is here, or in one.

II. THE COMMISSION'S SO-CALLED "FINDINGS AS TO LAWFULNESS OF PAST RATES" CONSIDERED APART FROM ITS "ORDER REDUCING RATES" ARE REVIEWABLE.

A. The True Nature and Intended Effect and Not the Name Assigned by the Commission to Its Action Is Determinative of Reviewability.

We hardly need point out that the name which the Commission gave to its action on Hope's rates in the past is not significant. Actions by federal commissions have been held not reviewable under statutes similar to Section 19(b) of the Natural Gas Act although called "orders" by the Commission.[1] On the other hand, various federal commission actions have been held reviewable as "orders" although not cast in the form of orders but rather as "determinations" or "certificates."[2]

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[1] Thus "orders" of the Federal Power Commission have been held not reviewable under Section 19(b) of the Natural Gas Act and the substantially identical Section 313(b) of the Federal Power Act where they involve preliminary and procedural matters as in *Federal Power Commission v. Metropolitan Edison Company,* 304 U. S. 375 (1938); *Canadian River Gas Co. v. Federal Power Commission,* 110 F. (2d) 350, 113 F. (2d) 1010 (C. C. A. 10th, 1940); *East Ohio Gas Company v. Federal Power Commission,* 115 F. (2d) 385 (C. C. A. 6th, 1940). Under the similar language of the Urgent Deficiencies Act certain preliminary and procedural "orders" of the Interstate Commerce Commission have been held not reviewable, as in *United States v. Illinois Central Railroad Co.,* 244 U. S. 82 (1917); *Delaware and Hudson Company v. United States,* 266 U. S. 430 (1925); *United States v. Los Angeles & Salt Lake Railroad Co.,* 273 U. S. 299 (1927).

[2] In *Jersey Central Power & Light Co. v. Federal Power Commission,* 129 F. (2d) 183 (C. C. A. 3d, 1942), the court reviewed a so-called "determination" of the Commission under Section 313(b) of the Federal Power Act. In *United States v. Idaho,* 298 U. S. 105 (1936), and other cases courts have reviewed the granting of certificates of convenience and necessity authorizing abandonments, new construction, etc. In *Great Northern Railway Co. v. United States,* 277 U. S. 172 (1928) a suit was brought under the Urgent Deficiencies Act to set aside certificates issued by the Interstate Commerce Commission to the Secretary of the Treasury, and the Supreme Court, while holding the suit improper since the

Here the Commission might have called its action "Order as to Lawfulness of Past Rates," but whether it labeled it that or "Findings," as it did, is not significant. As the Supreme Court said in *Columbia Broadcasting System, Inc. v. United States,* 62 S. Ct. 1194 (1942) at page 1200:

> "The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."

Nor is the fact that the text of the Commission's so-called "Findings" did not command Hope to do something significant.[3] This is nowhere better stated than in the excerpt from Mr. Chief Justice Stone's opinion in *American Federation of Labor vs. National Labor Relations Board,* 308 U. S. 401 (1940), quoted at page 25 of Cleveland's brief (308 U. S., p. 408):

> "In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of 'orders.' See *Rochester Telephone Corp. v. United States,* 307 U. S. 125, 130, 135, *et seq.*; *Federal Power Comm'n. v. Pacific Power & Light Co.,* 307 U. S. 156. * * *"

This case was cited by the Supreme Court in support of its statement in the *Columbia Broadcasting* case, *supra,* that "it is the substance of what the Commission has purported to do and has done which is decisive."

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[3] See cases cited at page 22 below.

Commission's action was not a part of its functions under the Interstate Commerce Act and hence was not covered by the Urgent Deficiencies Act, regarded the certificates as "orders" (see page 182).

B. What the Commission Has Purported to Do.

In analyzing the true nature and the intended effect of the Commission's action as to Hope's past rates in this case there is one very important element not present in any of the jurisdictional cases cited in the Cleveland brief. In the cited cases it was always possible to go to the specific provisions of the Acts governing the regulatory body in order to determine the nature of the proceeding and of the action taken and its intended effect under the applicable statutes.

For example in the *American Federation of Labor* case, *supra,* cited in the Cleveland brief (p. 25), the National Labor Relations Board proceeded as specifically authorized by statute to make a certification as to a bargaining representative and the question was whether Congress intended such a certification to be reviewed under Section 10(f) of the Wagner Act. Upon examination of that Act the Supreme Court found that it was clear that it did not (308 U. S., p. 411).

A similar situation was presented in *Great Northern Railway Company vs. United States,* 277 U. S. 172 (1928), cited in the Cleveland brief (p. 29), where pursuant to the specific provisions of the Transportation Act of 1920 the Interstate Commerce Commission issued certificates to the Secretary of the Treasury certifying the amounts necessary to make good the guaranty of the United States to the railway that its operating income for six months following the termination of federal control should be a certain amount. The Supreme Court analyzed the intended effect of this determination under the applicable statutes and held that a review could not be had under the Urgent Deficiencies Act because this determination was a special function, not a part of its regulatory action subject to the statutory review.

Still another example of resort to the statutes in determining the intended legal effect of specifically au-

thorized commission action, and the function of the courts with respect thereto, is the line of cases typified by *Standard Oil Company vs. United States,* 283 U. S. 235 (1931) and *Brady vs. United States,* 283 U. S. 804 (1931). These cases affirmed the decision of this Court in *Brady vs. Interstate Commerce Commission,* 43 F. (2d) 847 (1930), where it held not reviewable an order of the Interstate Commerce Commission specifically authorized by statute determining the amount of damages suffered by a shipper by reason of discrimination in the furnishing of cars, because the history of the Interstate Commerce Act indicated clearly that reparation orders of this sort were not intended to be reviewed under the Urgent Deficiencies Act (page 850):

> "And when we take into consideration the history of the Interstate Commerce Act and its amendments and the nature of reparation orders, we are certain that it was not intended that they be included among those which the court was given the power in a suit in equity before three judges to enjoin or set aside."

In the present case, however, the respondent Commission has assumed to assert a power which is nowhere mentioned in the Natural Gas Act. The Act not only does not tell us that the Commission may make such a finding as to past rates as it here made, but it contains no provision as to whether such findings, if made, shall be conclusive determinations, evidence, *prima facie* evidence, or nothing at all. It does not tell us whether the Commission will itself take some further action or whether the matter of further action will be left to other commissions or to ordinary courts of law, or whether any further action at all is necessary.

We have previously argued (Brief of Petitioner, pp. 136-142) that the Commission has no power whatever to make these findings. We do not wish to repeat that discussion now except to point out that the Act itself by

being silent on any such unauthorized action gives us no help as to the nature and effect of these so-called "Findings As To Lawfulness Of Past Rates."

We must, therefore, consider the Commission's "Findings," the circumstances under which they were made, and what it has said about them. Finding (21) is that the rates charged by the petitioner for natural gas sold in interstate commerce were "unjust, unreasonable and excessive, and therefore unlawful, to the extent of $920,029 for the year 1939, $4,210,154 for the year 1940, and $3,609,857 since 1940 (on an annual basis)" (Supp. p. 12). Finding (24) states the amount of the unlawful rates collected from East Ohio for the same years and Findings (22) and (23) show just what the "reasonable and lawful" rates were (Supp. pp. 12-13).

In requesting the Commission to make such findings the City of Cleveland said:

> "The Ohio Commission plainly cannot allow as valid operating expenses payments to an affiliate under a rate which is specifically determined to have been unlawful by the Federal Power Commission from and after June 30, 1939." (*Supra,* p. 5.)

Clearly this means that the Ohio Commission cannot allow as a valid operating expense of East Ohio any payment to the petitioner higher than the rate fixed by the Commission in this retroactive finding because the Commission has found any rate higher than that fixed to be unreasonable and unlawful. In other words, the theory upon which the Commission was asked to determine this matter was that its determination would be conclusive inasmuch as it was an exercise of its exclusive jurisdiction under the Natural Gas Act.

That this was also the conception of the Commission of the effect of its determination as to petitioner's past rates is made clear in its Opinion where it said (pp. 59-60, Supp. p. 69):

"Under Section 4(a) of the Act any interstate wholesale rate that is not just and reasonable is unlawful. *Federal Power Commission v. Natural Gas Pipeline Co.,* 315 U. S. ..... Hope's rate collected from East Ohio Gas Company was lawful after June 21, 1938, the effective date of the Act, only to the extent that it was just and reasonable. The City of Cleveland states that the Ohio Commission is investigating the reasonableness of the East Ohio Gas Company's bonded retail rates in Cleveland for the period since June 30, 1939, and that the lawfulness of Hope's rate is an important factor in the case. Since the enactment of the 1938 Natural Gas Act this Commission has had exclusive jurisdiction to determine the lawfulness of the interstate wholesale rates charged by Hope and other natural gas companies."

The Commission thus asserts that it and only it can determine the lawfulness of past rates. If by its present "Findings" it has now determined the amount of charges unlawfully collected in the past after a full hearing with all parties represented, then that determination is much more than a mere report of an investigation made by it, much more than a preliminary and procedural matter. It is in fact an adjudication of rights and obligations which seeks to subject the petitioner and its privies to civil liability. Of its own force it seeks to convert petitioner's theretofore legal and lawful rates as on file with the Commission pursuant to the Natural Gas Act, and its legal and lawful collections thereunder, into illegal and unlawful rates and collections.

If this is an effective determination that the petitioner has illegally collected excessive rates in the past it not only affects the pending East Ohio-Cleveland rate case in Ohio as the Commission clearly intended, but may likewise affect pending rate cases before the Pennsylvania Commission involving both Hope's affiliated and non-affiliated customers in that state. Moreover, it may be urged as the basis for recovery from petitioner in the state or federal

courts of the amounts the Commission purported within its "exclusive jurisdiction" to determine were "unlawfully" charged under the Natural Gas Act.

Such a determination, adjudication or declaration of rights is the kind of action which Mr. Chief Justice Stone in the *Columbia Broadcasting* case, *supra,* and Mr. Justice Brandeis in *United States vs. Los Angeles & Salt Lake Railroad Company,* 273 U. S. 299 (1927), characterized as reviewable in the quotations from these cases appearing at pages 31 and 32 of Cleveland's brief.

Obviously if the Commission's action has the effect plainly intended by it then that retroactive rate action is in substance an order and subject to review. Of course, if it were merely a recital by the Commission not binding upon the parties or their privies, not conclusive or even *prima facie* evidence of the facts found, then it would not partake of the nature of an order and would not be reviewable. But the Commission intended its action to be more than this and said so.

C. Under the Decided Cases What the Commission Purported to Do is Reviewable.

Before discussing the cases we call attention to the fact that the law upon the reviewability of orders of regulatory bodies has had very frequent and thorough consideration by the Supreme Court of the United States in recent years, and to a very considerable extent prior cases have been modified or overruled.

In *Rochester Telephone Corp. v. United States,* 307 U. S. 125 (1939), the whole question of the reviewability of so-called negative orders was re-examined. The old distinction between negative and affirmative orders as the basis for determining reviewability was rejected and many earlier cases overruled. In that case an order of the Federal Communications Commission determining the status of a telephone company as one subject to its jurisdiction

was held to be reviewable although it did not itself command action. However, by fixing status the Telephone Company became bound by prior general orders of the Commission.

In *United States v. Maher,* 307 U. S. 148 (1939), an order of the Interstate Commerce Commission denying an application of a common carrier by motor vehicle for a certificate of convenience and necessity was held reviewable. The Motor Carrier Act forbade such carriers to engage in interstate operations without such a certificate. The Court, on the authority of the *Rochester Telephone* case, held that the refusal of the Interstate Commerce Commission "to free a complainant of restrictions placed upon his conduct by a statutory scheme" was reviewable (p. 152). Thus a refusal to act, in view of the compulsion of the statute, was reviewable.

In *Federal Power Commission v. Pacific Power & Light Co.,* 307 U. S. 156 (1939), the Court held reviewable the Federal Power Commission's refusal to find that the purchase of the property of one public utility company by another was in the public interest. Here again the prohibition of the statute against a purchase without the consent of the Commission made its refusal to consent reviewable.

The most recent expression by the Supreme Court upon this question is in *Columbia Broadcasting System v. United States,* 62 S. Ct. 1194 (June 1, 1942), hereinbefore cited. In that case the Court held reviewable regulations adopted by the Federal Communications Commission which in substance provided that any station which had contracts with a broadcasting system similar to the contracts then in force with Columbia Broadcasting System and National Broadcasting System would be denied a license. The basis for the Court's determination that this was a reviewable order clearly appears in Mr. Chief Justice Stone's opinion, 62 S. Ct. at page 1200:

"The order is thus in its genesis and on its face, and in its practical operation, an order promulgating regulations which operate to control such contractual relationships, and it was adopted by the Commission in the avowed exercise of its rule-making power. Such regulations which affect or determine rights generally even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law and are orders reviewable under the Urgent Deficiencies Act. *Assigned Car Cases,* 274 U. S. 564, 47 S. Ct. 727, 71 L. Ed. 1204; *United States v. Baltimore & O. R. Co.,* 293 U. S. 454, 55 S. Ct. 268, 79 L. Ed. 587. And regulations of like character, by which the Communications Commission has prescribed generally the records and accounts to be kept by telephone companies subject to its jurisdiction, are similarly reviewable under § 402(a). *American T. & T. Co. v. United States,* 299 U. S. 232, 57 S. Ct. 170, 81 L. Ed. 142.

"The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. If the applicant for a license has entered into an affiliation contract, the regulations require the Commission to reject his application. If a licensee renews his contract, the regulations, with the sanction of § 312(a), authorize the Commission to cancel his license. In a proceeding for revocation or cancellation of a license, the decisive question is whether the station, by entering into a contract, has forfeited its right to a license as the regulations prescribe. It is the signing of the contract which, by virtue of the regulations alone, has legal consequences to the stations and to appellant. The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract. If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance. *Assigned Car Cases, supra*; *American T. & T. Co. v. United States, supra.*"

Again, later in his opinion, Mr. Chief Justice Stone made it clear that this was not a case where the action was merely a preliminary to future administrative proceedings, saying, 62 S. Ct. at pages 1201-4:

> "The order here is not one, as the Government argues and as the court below seemed to think, where the complainant's rights are affected only on the contingency of future administrative action as in *United States v. Los Angeles & S. L. R. R.*, 273 U. S. 299, 47 S. Ct. 413, 71 L. Ed. 651; cf. *Rochester Telephone Corp. v. United States, supra,* 307 U. S. 130, 59 S. Ct. 757, 83 L. Ed. 1147. As the Court declared in the *Los Angeles* case, 273 U. S. 309, 310, 47 S. Ct. 414, 71 L. Ed. 651, reviewable orders are 'an exercise either of the quasi judicial function of determining controversies or of the delegated legislative function of rate making and rule making.' * * *."
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> "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead they operate to control such action and to determine in advance the rights of others affected by it. * * *
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> "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked.
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> * * * * *

> "We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not reviewable—either because they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies, or because there is no occasion to resort to equitable remedies. But we should not for that reason fail to discriminate between them and this case in which, because of its peculiar circumstances, all the elements prerequisite to judicial review are present. The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.
>
> "We conclude that the Commission's promulgation of the regulations is an order reviewable under § 402(a) of the Act, and that the bill of complaint states a cause of action in equity."

All of this is clearly applicable to what the respondent Commission has purported to do in this case—determine the lawful rates which petitioner should have charged in the past, which determination is to be binding in further proceedings before another commission or court. Legal consequences are to flow from the Commission's "Findings" in this case just as directly and as certainly as from the regulations reviewed in the *Columbia Broadcasting System* case.

The fact is that there has been no doubt in the minds of the courts that where rights are sought to be permanently determined by action of the respondent commission whether by an "order" or a "determination" or otherwise the commission's action is reviewable. For example, in *Jersey Central Power & Light Co. v. Federal Power Commission,* 129 F. (2d) 183 (1942) the Third Circuit Court of Appeals held that a "Determination of the Commission"

that Jersey Power was subject to the Federal Power Act and that its acquisition of the stock of Jersey Central was in violation of Section 203(a) of the Act was reviewable stating, 129 F. (2d) at page 191:

> "The determination by the Commission that the acquisition of stock of Jersey Central by Jersey Power was in violation of Section 203(a) of the Act is paralleled by the order of the Commission denying the application of the power companies in the *Pacific Power & Light Co.* case. *In the instant case the Commission viewed what had been done in retrospect and in effect forbade it.* In the *Pacific Power & Light Co.* case the Commission viewed what was contemplated and ordered the power companies not to carry out the transfer of assets. In the instant case the Commission found Jersey Central to be a public utility within the meaning of Section 201 and thereby imposed upon Jersey Central the burden of complying with the provisions of the Act.
>
> "We conclude therefore that we have jurisdiction to review the Determination by the Commission. Compare *Canadian River Gas Co. v. Federal Power Commission,* 10 Cir., 110 F. 2d 350; Id., 113 F. 2d 1010, certiorari denied 311 U. S. 693, 61 S. Ct. 76, 85 L. Ed. 449." (Italics ours.)

The Court's statement that "In the instant case the Commission viewed what had been done in restrospect and in effect forbade it" is equally applicable here. The Commission here viewed in restrospect Hope's rate collections under its filed schedules from January 1, 1939 to July 15, 1942 and in effect forbade them.

The courts have always recognized that if the substance of what a commission has purported to do determines rights and obligations, it is reviewable even though no action whatever is commanded. This was the situation in the following cases in addition to those previously discussed:

Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382 (1932) (Granting of certificate of necessity for extension);

United States v. Idaho, 298 U. S. 105 (1936) (Granting of certificate authorizing abandonment of railroad track);

Powell v. United States, 300 U. S. 276 (1937) (Striking tariff from files);

Charles Noeding Trucking Co. v. United States, 29 F. Supp. 537 (D. C. D. N. J. 1939) (Determination of commercial zone exempt from Motor Carrier Act regulation);

American Sumatra Tobacco Corporation v. Securities and Exchange Commission, 93 F. (2d) 236 (App. D. C. 1937) (Refusal of confidential treatment of certain information);

Lawless v. Securities & Exchange Commission, 105 F. (2d) 574 (C. C. A. 1st, 1939) (Granting of exemption from Public Utility Holding Company Act);

The Hartford Gas Company v. Securities and Exchange Commission, C. C. A. 2d, July 16, 1942, C. C. H. Fed. Sec. Law Serv. ¶ 90,167 (Determination as to status as a subsidiary);

Public Service Corporation of New Jersey v. Securities & Exchange Commission, C. C. A. 3d, Aug. 12, 1942, C. C. H. Fed. Sec. Law Serv. ¶ 90,170 (Determination as to status as a subsidiary).

Finally we point out that substantially the situation presented in the present case has at least twice before been before the Supreme Court in cases involving the reviewability of rate division orders of the Interstate Commerce Commission. In *Brimstone Railroad & Canal Co. v. United States,* 276 U. S. 104 (1928), the Commission on March 10, 1924, after hearings, had found that the divisions of joint rates received by the Brimstone Railroad were and had

been unreasonable, and that reasonable divisions from August 1, 1921 to July 1, 1922 would have been certain specified amounts and that on and after July 1, 1922 reasonable divisions would have been certain other specified amounts. The Supreme Court held that this finding, in so far as it affected divisions prior to the date of the Commission's order, should be set aside in a suit brought under the Urgent Deficiencies Act, since the Commission was without statutory authority to make such retroactive findings in the case before it. Again, in *United States v. Baltimore & Ohio Railroad Co.,* 284 U. S. 195 (1931), the Supreme Court affirmed a District Court decree under the Urgent Deficiencies Act setting aside such a retroactive division order of the Commission.

The City in its brief has cited numerous cases which are clearly distinguishable from the present case on one or more of the following grounds:

1. The *Metropolitan Edison Company, Canadian River Gas Company, New York State Natural Gas Company,* and *East Ohio Gas Company* cases discussed (Cleveland Brief, pp. 19-22) involve merely preliminary procedural findings that the companies concerned were subject to the Commission's jurisdiction made as a basis for further proceedings by the Commission. *United States v. Los Angeles & Salt Lake Railroad Co., supra* (Cleveland Brief, pp. 22-24), was a similar case, involving the Interstate Commerce Commission's findings as to the valuation of a railroad property, which under the statute might be *prima facie* evidence in further rate making proceedings by it or in other matters, but which was not in any event to be determinative. *Shannahan v. United States,* 303 U. S. 596 (1938) is quoted from at length at pages 17 to 18 of the Cleveland Brief, but Cleveland omits the intervening portion of Mr. Justice Brandeis' opinion where he points out that not only did the determination there involved have no immediate effect

whatever, but the Mediation Board for whose use it was sought was not empowered to enforce any decision which might be rested on that determination. It should also be pointed out that in that case Mr. Justice Brandeis relied heavily upon *Lehigh Valley Railroad Company v. United States,* 243 U. S. 412 (1917), which was overruled by the Supreme Court in the *Rochester Telephone Corporation* case, *supra,* together with other earlier decisions based on the negative order doctrine.

2. In the *American Federation of Labor* case and the *Great Northern Railway Company* case (Cleveland Brief, pp. 25, 29) the certificates held not reviewable in those proceedings exercised powers of the regulatory bodies which Congress clearly indicated were not intended to be subject to review, as we have pointed out above, page 12.

3. In the *Atlanta, Birmingham & Coast Railroad Company* case (Cleveland Brief, p. 27) review was denied of a mere recital by the Commission, without legal effect. This Court held a somewhat similar finding non-reviewable in the *Carolina Aluminum Company* case (Cleveland Brief, pp. 6, 15)—a finding by the Federal Power Commission that the interests of interstate or foreign commerce would be affected by the proposed construction of a power project. This finding the Court said "embodies no decision which is capable of being enforced by anyone" (p. 437). In a later decision this Court again had occasion to describe the effect of that finding, saying in *United States v. Appalachian Electric Power Co.,* 107 F. (2d) 769 (C. C. A. 4th, 1939, reversed on other grounds, 311 U. S. 377), at page 791:

> "* * * Assuming that the finding of the Commission is a relevant fact for the consideration of the court, and that it is entitled to careful and respectful consideration as the opinion of a body informed by experience, nevertheless it cannot properly be regarded as controlling judicial determination on the record in the case."

III. CONCLUSION.

Unless this Court should determine that the respondent Commission's so-called "Findings As To Lawfulness Of Past Rates" are wholly meaningless and without any effect anywhere, as it held the finding in the *Carolina Aluminum* case to be, it should deny the Cities' motions because:

1. The exclusive review jurisdiction of this Court under Section 19(b) of the Natural Gas Act having admittedly attached in this case, such jurisdiction extends to all matters adjudicated by the Commission, including these so-called "Findings"; and

2. These so-called "Findings" obviously purport permanently to adjudicate petitioner's rights under the Natural Gas Act in respect of its past interstate rates and they are therefore reviewable under Section 19(b) of the Act.

Upon review these so-called "Findings" should be held wholly beyond the Commission's statutory power and invalid and void in other respects as set forth in the Brief of Petitioner (pp. 135-144).

Respectfully submitted,

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