INDEX.

AUTHORITIES CITED.

Cases.

Texts and Articles.

Constitution.

Statutes.

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 35.

CITY OF CLEVELAND,
Petitioner,

v.

HOPE NATURAL GAS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

STATEMENT.

This brief is filed by petitioner, City of Cleveland, in reply to the brief filed herein on behalf of respondent, Hope Natural Gas Company.

The first question, says respondent, is whether the Commission's "Order Reducing Rates" is confiscatory? (Brief on Behalf of Hope Natural Gas Company, October Term 1943, Nos. 34 and 35, p. 2.) The Federal Power Commission's wartime rate order is just, reasonable and compensatory and is not repugnant to the due process clause of the Fifth Amendment. The Commission's wartime rate order permits respondent to earn in wartime the same profit and rate of profit which respondent was able to earn when it fixed its own interstate rates in the normal peacetime base period selected by respondent as fair, namely, 1937-1939, inclusive. When the great bulk of the nation's business is operating in a strictly controlled economy under a statutory renegotiation scheme which holds out to in-

dustry no promise of war profits materially greater than normal peacetime profits, in spite of vastly increased volume, it requires considerable temerity for the Standard Oil Company (New Jersey) to claim through this wholly owned subsidiary, Hope Natural Gas Company, that Hope's property is confiscated—that is, stolen—by a wartime order of the Federal Government which permits the Company to earn under wartime conditions the same profit and rate of profit after all taxes which it earned in its own selected peacetime base period when it fixed its own interstate rates free of any Government regulation. If temporary use of respondent's property had been requisitioned by the Government during this war, it does not appear that the just compensation or rental to which respondent would be entitled by statute or under the Fifth Amendment would exceed the same profit and rate of profit which respondent was able to earn when it fixed its own rates in the normal peacetime base period selected by respondent as fair, namely 1937-1939, inclusive. Respondent's gas is destined for the Cleveland-Akron-Pittsburgh triangle and the price of it enters directly or indirectly into the cost of planes, tanks, ships, and guns for which the American people as a whole must pay. Since it does not appear that respondent would have been entitled to more if the possession of its property had been requisitioned, the Commission's order deprives respondent of only the opportunity to charge more than the use of its property is reasonably worth at the expense of the public in wartime. The Federal Power Commission's wartime rate order is just, reasonable, and compensatory and is not repugnant to the due process clause of the Fifth Amendment.

The second question, says respondent, is whether the court below properly set aside the Federal Power Commission's "Findings as to Lawfulness of Past Rates" as an "order"? (Brief on Behalf of Hope Natural Gas Com-

pany, October Term 1943, Nos. 34 and 35, pp. 2, 128.) The Circuit Court of Appeals had no jurisdiction to review the Federal Power Commission's "Findings as to Lawfulness of Past Rates" and no jurisdiction to decide in this case whether the Federal Power Commission had authority to make such findings. The Federal Power Commission's "Findings as to Lawfulness of Past Rates" are not an "order." These "Findings" do not have the same effect upon Hope's affiliate in a proceeding before a State commission as a Federal Power Commission order fixing rates for the future. An order fixing rates for the future, so long as it remains in effect, is absolutely binding upon the affiliate in a proceeding before a State commission. The Federal Power Commission's "Findings as to Lawfulness of Past Rates," on the contrary, are subject to challenge by Hope's affiliate in the proceeding before the State commission upon the grounds that they are unsupported by substantial evidence, outside the jurisdiction of the Federal commission, or otherwise unlawful. And any order of the State commission adopting such findings is subject to judicial review upon all these grounds, as well as upon Constitutional grounds. The Federal Power Commission's "Findings as to Lawfulness of Past Rates" were not reviewable in the Circuit Court because they are not an "order."

ARGUMENT.

I.

THE FEDERAL POWER COMMISSION'S WARTIME "ORDER REDUCING RATES" IS JUST, REASONABLE AND COMPENSATORY AND IS NOT REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Commission's wartime rate order permits respondent to earn in wartime the same profit and rate of profit which respondent was able to earn when it fixed its own rates in the normal peacetime base period selected by respondent as fair, namely 1937-1939, inclusive.

1. The Hope company proves by its conduct, experience and claims in the 1937-1939 period of Company-fixed rates that the claimed return which the Commission allowed on the Company's claimed interstate present value rate base is not confiscatory.

The Company's claimed interstate net operating income at Company-fixed rates for the years 1937-1939, inclusive, was $1,885,000. (I R. 481.) The Company's claimed interstate rate base during the same period of Company-fixed rates was $66,360,000. (I R. 481.) The Company's claimed per cent return earned on the Company's claimed interstate rate base during the same period of Company-fixed rates averaged 2.84 per cent.

The following table shows (1) the Company's claimed interstate net operating income during the 1937-1939 period of Company-fixed rates; (2) the Company's claimed interstate present value rate base during the 1937-1939 period of Company-fixed rates; (3) the Company's claimed per cent return earned on the Company's claimed interstate present value rate base during the 1937-1939 period of Company-fixed rates (I R. 481):

Years 1937-1939	Company's claimed interstate net operating income during period of Company-fixed rates 1937-1939	Company's claimed interstate present value rate base during period of Company-fixed rates 1937-1939	Company's claimed per cent return earned on company's claimed interstate present value rate base during period of Company-fixed rates 1937-1939
1937	$ 2,642,452	$66,360,837	3.98%
1938	785,080	66,360,837	1.18%
1939	2,228,912	66,360,837	3.36%
Average	$ 1,885,481	$66,360,837	2.84%

It will be noted that in the 1937-1939 period of Company-fixed rates, the Company's claimed interstate net income falls short of the $4,313,454 which would be necessary to yield a 6½ per cent return on the Company's claimed interstate present value rate base by an average of $2,427,773 per year, and never in any one year even remotely approaches a 6½ per cent return.

Of course, the Company's claim, coupled with the fact that it was satisfied with its 1937-1939 Company-fixed interstate net earnings, as appears below, suggests the inference that either the Company's net income for these years is understated, or that its rate base is inflated, or both. *Dayton Power and Light Company v. Public Utilities Commission of Ohio,* 292 U. S. 290, 311-312 (1934) (Mr. Justice Cardozo); *Lindheimer v. Illinois Bell Telephone Company,* 292 U. S. 151, 163-164 (1934) (Mr. Chief Justice Hughes).

But laying that question to one side, and accepting the Company's claims at face value, the conclusion is inevitable that when the Company fixed its own rates in what it calls the normal period 1937-1939, inclusive (Petition for Review, IV R. 30-31), (1) either Hope was voluntarily confiscating its own property; or (2) Hope is able to live and meet its capital requirements with a 2.84 per cent return upon the claimed $66,000,000 present value of its physical property.

Hope's conduct repels any inference that it was voluntarily confiscating its own property when it fixed its own rates in what it calls the three average normal years 1937-1939, inclusive. Hope denied in the pleadings in this case that the rates to East Ohio, Peoples, Fayette County, and Manufacturers Light and Heat, which produced the aforesaid results, were unjust or unreasonable, or had been unjust or unreasonable. (II R. 3, 12, 16, 25, 27.) Prior to the passage of the Natural Gas Act, when Hope was free to fix its own interstate rates without any public regulation, it did not exercise its power to increase the rates which it claimed produced an annual return of $1,885,000 per year, or less than 2.9 per cent on the claimed present value of Hope's physical property. When the Natural Gas Act was passed, Hope voluntarily filed the rates which produced this return with the Federal Power Commission as rate schedules. Hope never sought to file higher rate schedules with the Federal Power Commission. Both before the Federal Power Commission and in its Petition for Review in the United States Circuit Court of Appeals, Hope claimed that its average operating experience for the years 1937 to 1939, inclusive, is the proper basis for testing the reasonableness of its rates. (IV R. 30-31.) Upon these undisputed facts, there is only one possible inference—that Hope was satisfied with and able to live under an annual return of less than 2.9 per cent per annum on a claimed interstate present value rate base of approximately $66,000,000.

If we accept arguendo the Company's claims that in the years when it fixed its own rates, 1937-1939, inclusive, it earned a return from its interstate business of $1,885,000 per year, that the present value of its interstate property in those years was not less than $66,000,000, and that the return earned was less than 2.9 per cent on the Company's claimed interstate present value rate base, the conclusion follows inevitably that in the absence of any substantial change in the Company's claimed $66,000,000 present value

rate base, or in the cost of money, an annual return of $1,885,000 per year is not confiscatory for this Company, whether the rate producing that return be fixed by the Company or whether it be fixed by a regulatory commission.

2. The Commission's ordered rates, had they been in effect in the test year 1940, would have permitted Hope to earn the same annual return on Hope's claimed interstate present value rate base with which Hope was satisfied and under which Hope lived during the 1937-1939 period of Company-fixed rates.

Had the Commission's order reducing rates been effective in the test year 1940, the Hope company would have earned the same net return on its claimed present value interstate rate base which the Company had established by experience it was able to live on.

The court below recognized that 1940 is a proper test year, and said (IV R. 197):

> "* * * The increased demand for gas resulting from war conditions, made the experience of 1940 a safer guide for the future than that of prior years. Hope makes much of the fact that the winter of that year was more than ordinarily severe and that the increased demand for gas resulted in a large percentage of sales representing gas from its own wells, which did not involve payment of the charge required by its contracts on gas purchased from others. The increased demand due to war conditions, however, must necessarily have the same effect, so far as this matter is concerned. The experience of 1940 was the only experience properly comparable. * * *"

The Company's claimed net operating income from its interstate business for the test year 1940 was $4,629,355. (I R. 481.) The Commission ordered a reduction in interstate gross revenues on the basis of 1940 experience of $3,609,857. (I R. 6.) The federal income tax saving at the 1940 tax rate, had this reduction become effective in

1940, would have been 24 per cent of the ordered reduction in revenue or $866,366. The reduction in the Company's claimed 1940 net operating income had the Commission's order been effective in 1940 would thus have been $2,743,-491. ($3,609,857 minus $866,366.) Subtracting the reduction in net income due to the Commission's order from the Company's claimed net operating income for the year 1940, it is thus a simple matter of arithmetic that on the Company's own figures the Commission's ordered rate, had it been in effect in the test year 1940, would likewise have permitted the Company to earn a net return from its interstate business of $1,885,000, the identical figure which the Company claimed it earned in the 1937-1939 period of Company-fixed rates.

Expressed in tabular form, this works out as follows:

Company's claimed net operating income—year 1940 (I R. 481)		$4,629,355
Reduction in Revenues Ordered (I R. 6)	$3,609,857	
Less Federal Income Tax Saving at 1940 tax rate—24% of Reduction in Revenue	$ 866,366	
Reduction in net income due to Commission order		$2,743,491
Company's claimed net operating income adjusted to rates ordered for the future —Year 1940		$1,885,864

The Company's claimed interstate rate base for 1940 was $66,360,000, the same as for the years 1937-1939, inclusive. (I R. 481.)

There was no substantial change in the cost of money bearing on the fair rate of return between the years 1937-1939 and the year 1940, and to the extent that there was any change, the cost of money was lower in 1940 than in the period 1937-1939. (III R. 400, *et seq.*)

In short, if the Company's net operating income and rate base figures be accepted, it is manifest that the Commission's rate, had it been in effect in the test year 1940, would have yielded the Company the same 2.84 per cent

net return on the Company's claimed interstate present value rate base, after all taxes and in spite of increased war taxes, which the Company had established by its own experience and claims was nonconfiscatory and sufficient to enable the Company to live.

3. In fixing rates for the future, the Commission actually allowed the Company the same annual return on the Company's claimed interstate present value rate base which the Company had proved by its experience, conduct, and claims to be nonconfiscatory.

Company counsel will be obliged to concede upon the oral argument of this case that had the Commission's rates been in effect in the test year 1940, the Company would have earned at the Commission's rates the same annual return on the Company's claimed interstate present value rate base with which the Company was satisfied and under which it lived in the 1937-1939 period of Company-fixed rates. However, the Company may assert that the earnings for years after 1940 at the Commission's rate would not be as large as for 1940 and hence not equivalent to the annual net return which the Company had itself proved to be nonconfiscatory. But we can find nothing in the record which compels this conclusion for which the Company may contend.

On the contrary, the Commission found in the opinion which it incorporated in its findings (I R. 2) that "It seems certain that 1940 will be the lowest year, on an earnings basis, of the 1940-1944 period." (I R. 70.) And this finding was supported by substantial evidence. For, as the Commission further found, the first quarter of 1941 showed an increase in net operating income over the first quarter of 1940 of about 20 per cent. (I. R. 70; III R. 361-365.) Indeed, the respondent did not seek to challenge by evidence the Commission's finding that 1940 would be the lowest year on an earnings basis for the five year period 1940-1944, in-

clusive. Respondent did not seek in the lower court to adduce additional evidence showing the operating experience of the Company for the full year 1941, as it had a right to do. (Natural Gas Act, Sec. 19(b).) Nor did respondent seek to adduce additional evidence as to the actual experience in 1942, which was available to it before the lower court rendered its decision on February 16, 1943. (IV R. 207.)

In fixing rates for the future, the Commission actually allowed the Company the same annual return on the Company's claimed interstate present value rate base which the Company had proved by its experience, conduct, and claims to be nonconfiscatory.

Of course, in the legislative process of fixing rates for the future, the Commission conservatively used 1940 as a test year to forecast future revenues, although the Commission knew and found that the president of the Hope Company had admitted in July of 1941 a great increase in sales and hence in revenues for 1941 over 1940, and liberally forecast future expenses at the 1940 figure plus $421,160. (I R. 70, 504.) (I R. 62, 70, 72.) This was simply the Commission's way of saying that it was allowing the Company at least $421,000 more than a 6½% per cent return on net investment. Referring to its rate order of May 26, 1942, the Commission says in its brief that "even under the prescribed rate reduction, Hope is earning $1,091,790 annually in excess of a 6½ per cent rate of return, if the 1942 level is taken as the criterion." (*Federal Power Commission, et al. v. Hope Natural Gas Company,* October Term, 1943, No. 34, Brief for Petitioners, p. 28.)

The Company's brief denies the assertion of the Commission's brief, but submits an alternative calculation which shows, when accepted as an admission, that had the Commission's rate been in effect in 1942, it would have produced substantially the same net profit from the Company's interstate business that it would have produced had it been

in effect in 1940, the test year. The following table compares the 1942 and 1940 net profit at the Commission's rate on the basis of the Commission's findings and the Hope brief, Appendix E:

Comparison of 1942 and 1940 Interstate Net Profit at Commission's Rate based on Commission's Findings and Hope Brief

	1940 per Commission findings (I R. 12)	1942 per Hope Br. App. E. p. 185
Net operating income at Company-fixed rates	$5,386,597	$4,816,284
Reduction in net income due to Commission order	2,743,491[1]	2,165,915[2]
Net operating income had rates ordered been in effect for full yetar	$2,643,106	$2,640,369

[1] Ordered reduction in gross revenues (I R. 6) $3,609,857
Less Federal Income Tax saving at 1940 corporate income tax rate—24% of ordered reduction in gross revenues 866,366

Reduction in net income..... $2,743,491

[2] Ordered reduction in gross revenues (I R. 6) $3,609,857
Less Federal Income Tax saving at 1942 corporate income tax rate—40% of reduction in gross revenue 1,443,943

Reduction in net income—1942 ..... $2,165,915

But the Commission's legislative method of fixing future rates must not be confused with the question whether the rate which the Commission fixed is confiscatory. As this Court has said in a case where the question of confiscation was involved; *Pacific Gas Company v. San Francisco,* 265 U. S. 403, 406 (1924) (Mr. Justice McReynolds):

> "The problem was to ascertain the probable result of the specified rate if applied under well known past conditions, not to forecast the probable outcome of a proposed rate under unknown future conditions."

And it is respectfully submitted that in this case the result of the Commission's rate if applied to the known operating experience of the test year was clearly not con-

fiscatory, even if we accept the Company's own claims as to net operating income and present value rate base.

For the future, if conditions should change, the door of the Commission is always open to the respondent.

The Company's case analyzes down to the proposition that a claimed interstate net return of $1,885,000 per year on the Company's claimed $66,000,000 interstate present value rate base is just, reasonable, and nonconfiscatory if fixed by the Hope Natural Gas Company, but becomes unjust, unreasonable and grossly confiscatory if fixed by the Federal Power Commission.

The Commission's wartime rate order permits respondent to earn in wartime the same profit and rate of profit which respondent was able to earn when it fixed its own rates in the normal peacetime base period selected by respondent as fair, namely 1937-1939, inclusive.

B. If temporary use of respondent's property had been requisitioned by the Government, it does not appear that the just compensation to which respondent would be entitled, during this war, either by statute or under the Fifth Amendment would exceed the same profit and rate of profit which respondent was able to earn when it fixed its own rates in the normal peacetime base period selected by respondent as fair, namely 1937-1939, inclusive.

If the President had commandeered temporary use of Hope's property for war purposes under his Constitutional war powers or under the Second War Powers Act the Government would not be required to pay Hope as compensation more than a just and fair rental for the use. 50 U. S. C. A. App. Sec. 632; Const. Amend. 5; See Note, *Executive Commandeering of Strike Bound Plants,* 51 Yale L. J. 282, 290 (1941); *Marcus, The Taking and Destruction of Property Under a Defense and War Program,* 27 Cornell L. Q. 476, 521 (1942); Cf. 50 U. S. C. A. App. Sec. 309.

The most wholesale attempt of the Federal Government to take possession of public utility property in wartime is the seizure of the railroads during World War I.

When President Wilson addressed the Congress on January 4, 1918 in explanation of his assumption of control of the railroads, he said (H. R. Document No. 764, 65th Congress, Second Session, 1918, p. 4):

> "While the present authority of the Executive suffices for all purposes of administration, and while of course all private interests must for the present give way to the public necessity, it is, I am sure you will agree with me, right and necessary that the owners and creditors of the railways, the holders of their stocks and bonds, should receive from the Government an unqualified guarantee that their properties will be maintained throughout the period of federal control in as good repair and as complete equipment as at present, and *that the several roads will receive under federal management such compensation as is equitable and just alike to their owners and to the general public. I would suggest the average net railway operating income of the three years ending June 30, 1917.* I earnestly recommend that these guarantees be given by appropriate legislation, and given as promptly as circumstances permit." (Italics ours.)

In accordance with President Wilson's recommendation, Congress adopted in the Federal Control Act of March 21, 1918 as the basis of compensation for the use of the railway property thus taken over during the war the normal peacetime base period net railway operating income of the three years ending June 30, 1917, as follows (40 Stat. 451) (1918):

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President, having in time of war taken over the possession, use, control and operation (called herein Federal Control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to

guarantee to any such carrier making operating returns to the Interstate Commerce Commission, *that during the period of such Federal Control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal Control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.*

*"That any railway operating income accruing during the period of Federal Control in excess of such just compensation shall remain the property of the United States * * *."* (Italics ours.)

No railroad ever brought a test of the constitutionality of the Federal Control Act of March 21, 1918 to this Court. See *Hines, War History of American Railroads* (1928), pp. 94-95; *Aitchison, War Time Control of American Railways,* 26 Va. L. R. 847, 870, *et seq.* (1940); *American Economic Mobilization,* 55 Harvard L. R. 427, 533-534 (1942). But the opinion of President Wilson, the opinion of the Congress of the United States, and the conduct of hundreds of railroads affected by the legislation, constitute persuasive proof that the allowance as just compensation in time of war for even an actual taking of the use of private property of the average earnings of a normal peacetime base period satisfies the requirements of the Fifth Amendment.

The Federal Government is now the sole purchaser for the bulk of the nation's production in the controlled war economy which has replaced the normal free market. Under the Renegotiation Act, as amended, industries selling to the Government may retain after renegotiation only what a renegotiation board thinks is a fair profit. There is no formula for determining a fair profit under the Renegotiation Act. But if the contractor's operations in relation to his renegotiable business are the same or similar to those of his peacetime business, the board will look to the

contractor's base period of peacetime earnings as a measure of his allowable war profits. The renegotiation boards consider the contractor's earnings *before taxes, not after taxes. Steadman, Renegotiation of War Contracts,* 42 Mich. L. R. 1, 14, 17, 19 (August, 1943). When the great bulk of the nation's business is operating under a statutory renegotiation scheme which holds out to industry no promise of war profits materially greater than normal peacetime profits in spite of vastly increased volume, it requires considerable temerity for the Standard Oil Company (New Jersey) to claim through this wholly owned subsidiary, Hope Natural Gas Company, that Hope's property is confiscated—that is, stolen—by a wartime order of the Federal Government which permits the Company to earn under wartime conditions the same profit and rate of profit *after all taxes* which it earned in its own selected peacetime base period when it fixed its own interstate rates free of any Government regulation.

It is respectfully submitted that if the use of respondent's property had been requisitioned by the Government during the present war, the just compensation to which respondent would have been entitled under the Fifth Amendment would not exceed the same profit and rate of profit which respondent was able to earn when it fixed its own rates in the normal peacetime base period selected by respondent as fair, namely 1937-1939, inclusive.

C. Since it does not appear that respondent would have been entitled to more if the temporary use of its property had been requisitioned, the Commission's order deprives respondent of only the opportunity to charge more than the use of its property is reasonably worth at the expense of the public in wartime.

To find a helpful precedent it is necessary to go back to a case which arose out of the first world war.

In *Highland v. Russell Car Company,* 279 U. S. 253 (1929) (Mr. Justice Butler), this Court said at page 262:

> "* * * The principal purpose of the Lever Act was to enable the President to provide food, fuel and other things necessary to prosecute the war without exposing the government to unreasonable exactions. The authorization of the President to prescribe prices and also to requisition mines and their output made it manifest that, if adequate supplies of coal at just prices could not be obtained by negotiation and price regulation, expropriation would follow. Plaintiff was free to keep his coal, but it would have been liable to seizure by the government. The fixing of just prices was calculated to serve the convenience of producers and dealers as well as of consumers of coal needed to carry on the war. As it does not appear that plaintiff would have been entitled to more if his coal had been requisitioned, the Act and orders will be deemed to have deprived him only of the right or opportunity by negotiation to obtain more than his coal was worth. Such an exaction would have increased the cost of the snowplows and other railroad equipment being manufactured by the defendant and therefore would have been directly opposed to the interest of the government. As applied to the coal in question, the statute and executive orders were not so clearly unreasonable and arbitrary as to require them to be held repugnant to the due process clause of the Fifth Amendment."

In the case at bar, the Commission's wartime rate order permits respondent to earn in wartime the same profit and rate of profit which respondent was able to earn

when it fixed its own interstate rates in the normal peacetime base period selected by respondent as fair, namely 1937-1939, inclusive. If the use of respondent's property had been requisitioned by the Government during this war, it does not appear that the just compensation to which respondent would be entitled by statute or under the Fifth Amendment would exceed the same profit and rate of profit which respondent was able to earn when it fixed its own rates in the normal peacetime base period selected by respondent as fair, namely 1937-1939, inclusive. Respondent's gas is destined for the Cleveland-Akron-Pittsburgh triangle and the price of it enters directly or indirectly into the cost of planes, tanks, ships, and guns for which the American people as a whole must pay. Since it does not appear that respondent would have been entitled to more if the possession of its property had been requisitioned, the Commission's order deprives respondent of only the opportunity to charge more than the use of its property is reasonably worth at the expense of the public in wartime.

It is respectfully submitted that the Federal Power Commission's wartime rate order is just, reasonable, and compensatory and is not repugnant to the due process clause of the Fifth Amendment.

II.

THE CIRCUIT COURT OF APPEALS WAS WITHOUT JURISDICTION IN THIS CASE TO REVIEW THE FEDERAL POWER COMMISSION'S "FINDINGS AS TO LAWFULNESS OF PAST RATES" OR DECIDE THE QUESTION OF THE COMMISSION'S AUTHORITY TO MAKE SAID FINDINGS.

On May 26, 1942, the Federal Power Commission, acting upon complaint of the City of Cleveland, and after investigation and hearing, made what the Commission called "Findings as to Lawfulness of Past Rates." (I R. 8-13.)

Hope erroneously dubs the Federal Power Commission's "Findings as to Lawfulness of Past Rates" an "Or-

der'' (Petition for Review, IV R. 3, 4, 10), incorrectly asserts that the Commission attempted to ''fix'' past rates (Petition for Review, IV R. 37, point 23); and devotes six points and five pages of its Petition for Review under the caption ''Part B—As To The Commission's 'Findings as to Lawfulness of Past Rates' '' to a purported appeal from these findings. (Petition for Review, IV R. 37-41, inclusive; points 22-27, inclusive.)

On September 12, 1942, the City of Cleveland filed with the Circuit Court a timely motion to dismiss Part B of the Petition for Review (IV R. 43, 53) and on September 21, 1942, the City of Akron filed a similar motion with the Circuit Court. (IV R. 155, 161.)

The Court of Appeals nevertheless held the Commission's ''Findings as to Lawfulness of Past Rates'' were an order, that they were reviewable, and in its judgment set these findings aside as an order. (IV R. 207.)

But the Solicitor General, representing the Federal Power Commission, has suggested in this Court that the Commission's ''Findings as to Lawfulness of Past Rates'' were not reviewable by the lower court and counsel for the Pennsylvania Public Utility Commission and the City of Akron have joined in raising the issue of the jurisdiction of the lower court. (*Federal Power Commission, et al. v. Hope Natural Gas Company,* October Term, 1943, No. 34, pp. 112-115.)

As a matter of fact, the issue was first raised by counsel for the Hope Natural Gas Company.

At the oral argument before the Federal Power Commission, counsel for Hope conceded that such findings as to lawfulness of past rates are nonappealable, as follows (Milde, C. C. A. 4, Typewritten Record 14,179):

> ''We cannot appeal from any recital you make that the rates *were* unreasonable and unlawful in 1916 or 1928 or 1938, or any other time.''

This concession was not one improvidently made in the heat of argument. Prior to the oral argument before

the Commission, counsel for Hope filed a printed memorandum with the Federal Power Commission, wherein they said ("Memorandum on Behalf of Hope Natural Gas Company as to the Commission's Jurisdiction in these Proceedings to Adjudge that the Company has in the past Violated the Natural Gas Act," p. 6n):

> "Section 19(b) of the Act does not authorize review of determinations by the Commission even as important as a determination that a company is a natural-gas company under the Act. This Commission has so argued before all courts in which this matter has come up and it has been sustained in this construction. *Canadian River Gas Co. v. Federal Power Commission,* 110 F. (2d) 350, 113 F. (2d) 1010 (C. C. A. 10th, 1940); *New York State Natural Gas Corporation v. Federal Power Commission* (C. C. A. 2d, October 26, 1939, not reported); Cf. *East Ohio Gas Company v. Federal Power Commission,* 115 F. (2d) 385 (C. C. A. 6th, 1940)."

The upshot is that all counsel in this case have at one time or another taken the position that the Circuit Court was without jurisdiction to review mere findings such as the Federal Power Commission's "Findings as to Lawfulness of Past Rates."

The only applicable statute is the Natural Gas Act, Section 19(b), which provides (52 Stat. 831; 15 U. S. C. Sec. 717r(b)):

> "(b) Any party to a proceeding under this chapter aggrieved by an *order* issued by the Commission in such proceeding may obtain a review of such *order* in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the *order* relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the *order* of the Commission upon the application for rehearing, a written petition praying that the *order* of the Commission be modified or set aside in whole or in part.

A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the *order* complained of was entered. 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. No objection to the *order* of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original *order*. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such *order* of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28, as amended." (Italics ours.)

Under the Natural Gas Act Section 19(b), the Circuit Court has jurisdiction to review only "orders" of the Federal Power Commission. It has no jurisdiction to review mere findings.

The "Findings as to Lawfulness of Past Rates" from which petitioner attempts to appeal in Part B of the Petition for Review are not an order. They are findings.

These "findings" are not the basis of the Commission's order fixing rates for the future. That order is based on other findings which are attacked in Part A of the Petition for Review. Under the Natural Gas Act, the only finding that is necessary to a rate reduction order is the finding that the existing rate "*is* unjust, unreasonable, unduly discriminatory, or preferential" or that the "existing rates * * * are not the lowest reasonable rates." (Natural Gas Act, Sec. 5(a); 15 U. S. C. A. Sec. 717d; 52 Stat. 823.) In this case, the Federal Power Commission's rate reduction order, fixing future rates, is based solely upon the findings incorporated therewith. These "Findings as to Lawfulness of Past Rates" could have been made on May 26, 1942, even if the Hope company had voluntarily reduced its interstate rates on May 25, 1942, and even if the Commission had never made an "Order Reducing Rates." The Commission expressly made these findings as an aid to state regulation and properly made them in a paper and under a caption separate and apart and different from the findings incident to the "Order Reducing Rates." (I R. 8.) The Federal Power Commission's order fixing rates for the future which is attacked in Part A of the Petition for Review is not based upon the Federal Power Commission's "Findings as to Lawfulness of Past Rates."

The Federal Power Commission's "Findings as to Lawfulness of Past Rates" neither direct nor restrain any action on the part of Hope. They neither command nor direct anything to be done. They carry no direction of obedience to any previously formulated order of the Commission. Cf. *Rochester Telephone Corporation v. United States,* 307 U. S. 125, 129 (1939) (Mr. Justice Frankfurter).

These "findings" are determinations of fact. They are not in substance an order. They are not even in form an order. They have no characteristic of an order, either affirmative or negative. They do not have the effect of an order. Cf. *Columbia Broadcasting System v. United*

States, 316 U. S. 407 (1942) (Mr. Chief Justice Stone). They are only a decision on a controverted matter. These findings are a report—an opinion as distinguished from a mandate.

These findings may be evidence in another proceeding of a breach of statutory duty on the part of petitioner. But the Act imposed the duty. The "findings" do not.

The mere fact that these "findings" may be used as evidence against petitioner or its affiliate in another proceeding does not make them reviewable in this one.

Assuming arguendo that they are binding in another proceeding as between parties to the case before the Commission and their privies, unless unsupported by substantial evidence, outside the jurisdiction of the Commission, or otherwise unlawful, the "findings" are subject to challenge in such other proceeding on all these grounds, and petitioner or its privies will have their day in court when and if the findings are offered in evidence against them.

In the Natural Gas Act, Congress has distinguished carefully between orders, which it makes reviewable, and mere determinations, findings, and reports, which it does not make reviewable.

In the body of the statute, for example, Congress specifically mentions "orders" fixing future rates (Natural Gas Act, Sec. 5(a)); "orders" determining accounts in which particular outlays shall be entered, charged, or credited (Natural Gas Act, Sec. 8(a)); "orders" authorizing exporting or importing natural gas to or from a foreign country (Natural Gas Act, Sec. 3); "orders" requiring refund of proposed increased rates collected under bond (Natural Gas Act, Sec. 4(e)); "orders" directing a natural gas company to extend or improve its transportation facilities (Natural Gas Act, Sec. 7(a)); "orders" directing a natural gas company to establish physical connection of its transportation facilities with the facilities of, and to sell natural gas to, any person or muncipality engaged or legally authorized to engage in the local distri-

bution of natural gas or artificial gas to the public. (Natural Gas Act, Sec. 7(a)) Congress has authorized the Court of Appeals to review such orders. (Natural Gas Act, Sec. 19(b).)

On the other hand, in the body of the Natural Gas Act, Congress has referred to many determinations, reports, and findings, which it purposefully does not call "orders." For example, there is the determination of cost of production or transportation of natural gas by a natural gas company in cases where the Federal Power Commission has no authority to establish a rate governing the transportation or sale of such natural gas. (Natural Gas Act, Sec. 5(b).) There are reports to Congress on information assembled relative to proposed interstate compacts dealing with the conservation, production, transportation, or distribution of natural gas (Natural Gas Act, Sec. 11(a)) and reports to Congress relative to operation of a compact between two or more states approved by Congress. (Natural Gas Act, Sec. 11(b).) And there is the determination whether any person has violated or is about to violate any provision of the Act or any rule, regulation or order thereunder. (Natural Gas Act, Sec. 14(a).) These findings, determinations, and reports Congress did not authorize the Circuit Court of Appeals to review. (Natural Gas Act, Sec. 19(b).)

The Petition for Review filed by Hope in the Circuit Court of Appeals set forth two separate and distinct causes of action, one arising under a law of the United States, and the other not arising under a law of the United States. For reasons that have already been made manifest, the latter is entirely outside the federal jurisdiction and subject to dismissal at any stage of the case. It is hardly necessary to say that a federal court is without the jurisdictional power to entertain a cause of action not within its jurisdiction, merely because that cause of action has mistakenly been joined in the complaint with another which

is within its jurisdiction. *Hurn v. Oursler,* 289 U. S. 238, 245-246 (1933) (Mr. Justice Sutherland).

Part B of the Petition for Review should be dismissed because it seeks review of mere "findings." Under Section 19(b) of the Natural Gas Act, it is only an order of the Federal Power Commission and not a finding that the Circuit Court is authorized to review.

The Circuit Court of Appeals was without jurisdiction in this case to review the Federal Power Commission's "Findings as to Lawfulness of Past Rates" or decide the question of the Commission's authority to make said findings. *Shannahan v. United States,* 303 U. S. 596, 599, 601 (1938) (Mr. Justice Brandeis); *Shields v. Utah Idaho Central Railroad,* 305 U. S. 177, 179, 182-183 (1938) (Mr. Chief Justice Hughes); *Federal Power Commission v. Metropolitan Edison Company,* 304 U. S. 375, 385 (1938) (Mr. Chief Justice Hughes); *United States v. Los Angeles and Salt Lake Railroad,* 273 U. S. 299, 309-312 (1927) (Mr. Justice Brandeis); *American Federation of Labor v. National Labor Relations Board,* 308 U. S. 401, 408-412 (1940) (Mr. Chief Justice Stone); *United States v. Atlanta, Birmingham and Coast Railroad Company,* 282 U. S. 522, 527-528 (1931) (Mr. Justice Brandeis).

SUMMARY OF ARGUMENT.

1. The Federal Power Commission's wartime rate order is just, reasonable and compensatory and is not repugnant to the due process clause of the Fifth Amendment.

The Commission's wartime rate order permits Hope to earn in wartime the same profit and rate of profit which Hope was able to earn when it fixed its own rates in the normal peacetime base period selected by Hope as fair, namely 1937-1939, inclusive.

When the great bulk of the nation's business is operating in a strictly controlled economy under a statutory renegotiation scheme which holds out to industry no promise of war profits materially greater than normal peacetime

profits, in spite of vastly increased volume, it requires considerable temerity for the Standard Oil Company (New Jersey) to claim through this wholly owned subsidiary, Hope Natural Gas Company, that Hope's property is confiscated—that is, stolen—by a wartime order of the Federal Government which permits the Company to earn under wartime conditions the same profit and rate of profit *after all taxes* which it earned in its own selected peacetime base period when it fixed its own interstate rates free of any Government regulation.

If temporary use of Hope's property had been requisitioned by the Government, it does not appear that the just compensation or rental to which Hope would be entitled during this war either by statute or under the Fifth Amendment would exceed the same profit and rate of profit which Hope was able to earn when it fixed its own rates in the normal peacetime base period selected by Hope as fair, namely 1937-1939, inclusive.

Hope's gas is destined for the Cleveland-Akron-Pittsburgh triangle and the price of it enters directly or indirectly into the cost of planes, tanks, ships, and guns for which the American people as a whole must pay.

Since it does not appear that Hope would have been entitled to more if the temporary use of its property had been requisitioned, the Commission's order deprives Hope of only the opportunity to charge more than the use of its property is reasonably worth at the expense of the public in wartime.

It is respectfully submitted that the Federal Power Commission's wartime rate order is just, reasonable and compensatory and is not repugnant to the due process clause of the Fifth Amendment.

2. The Circuit Court of Appeals was without jurisdiction in this case to review the Federal Power Commission's "Findings as to Lawfulness of Past Rates" or decide the question of the Commission's authority to make said findings.

These findings are not an order.

These "Findings" do not have the same effect upon Hope's affiliate in a proceeding before a State commission as a Federal Power Commission order fixing rates for the future. An order fixing rates for the future as long as it remains in effect is absolutely binding upon the affiliate in a proceeding before a State commission. The Federal Power Commission's "Findings as to Lawfulness of Past Rates" are subject to challenge by Hope's affiliate in the proceeding before the State commission upon the grounds that they are unsupported by substantial evidence, outside the jurisdiction of the Federal Commission, or otherwise unlawful, and any order of the State commission adopting such findings is subject to judicial review upon all these grounds as well as upon Constitutional grounds.

It is respectfully submitted that the Federal Power Commission's "Findings as to Lawfulness of Past Rates" were not reviewable in the Circuit Court because they are not an "order."

CONCLUSION.

Therefore, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit should be reversed, and that the Federal Power Commission's wartime rate order herein should be affirmed.

Respectfully submitted,

SPENCER W. REEDER,
Special Assistant Director of Law,
Cleveland, Ohio,
Counsel for Petitioner.

THOMAS A. BURKE, JR.,
Director of Law,
Cleveland, Ohio.

JAMES M. MCSWEENEY,
Assistant Director of Law,
Cleveland, Ohio.

ROBERT M. MORGAN,
Assistant Director of Law,
Cleveland, Ohio.

ROBERT E. MAY,
Shoreham Building,
Washington, D. C.
Of Counsel.