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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 45

FEDERAL POWER COMMISSION, PETITIONER

v.

COLORADO INTERSTATE GAS COMPANY

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

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The original opinion of the Court of Appeals (R. 262-279) is reported at 209 F. 2d 717; its opinion on rehearing (R. 299-302) is reported at 209 F. 2d 732. The opinion and order of the Federal Power Commission directing the rate reduction (R. 47-97) are reported at 95 PUR(NS) 97.[1]

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[1] Also pertinent here are the Commission's opinion and order approving the merger of the properties and facilities of Colorado Interstate Gas Company with those of Canadian River Gas Company (R. 243-261). These are reported at 10 FPC 105, 778.

JURISDICTION

The original judgment of the Court of Appeals was entered on October 29, 1953 (R. 279). Pursuant to the Federal Power Commission's timely petition for rehearing, the Court of Appeals on December 8, 1953, vacated its original judgment and granted rehearing (R. 290). The judgment on rehearing was entered on January 25, 1954 (R. 302). The petition for a writ of certiorari was filed on April 23, 1954, and granted on June 7, 1954 (R. 327). 347 U.S. 1009. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1), and Section 19(b) of the Natural Gas Act (15 U. S. C. 717r (b)).

QUESTION PRESENTED

Whether, in a statutory review proceeding of a rate order of the Federal Power Commission, a court of appeals has jurisdiction, by reason of asserted inherent power and Section 10(e) of the Administrative Procedure Act, to consider and correct *sua sponte* an alleged error—not raised by the company in the administrative proceeding, in its application for rehearing filed with the Commission, or in its petition for review—notwithstanding the provision of Section 19(b) of the Natural Gas Act that:

> * * * 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. * * *

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. 717 *et seq.,* and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.,* are set forth in the Appendix, *infra,* pp. 56-60.

STATEMENT

The Federal Power Commission, on July 31, 1952, adopted an order directing Colorado Interstate Gas Company, a "natural-gas company" under the Natural Gas Act, to reduce its rates for sales for resale in interstate commerce by about $2,730,000 a year (R. 47-97).[2] Following the Commission's denial of Colorado's application for rehearing (R. 118-130), Colorado filed, as authorized by Section 19(b) of the Natural Gas Act, *infra,* pp. 57-58, a petition for review in the Court of Appeals for the Tenth Circuit, which affirmed the Commission's order in all respects except one (R. 262-279). In its original opinion, the court held that the Commission had erred in excluding from cost of service a loss of about $420,000 suffered by Colorado on its gasoline operations and remanded the cause to the

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[2] While the Commission ordered a rate reduction in the gross amount of about $3,100,000 (R. 96), the Commission also found that the revenues received by Colorado from its sale to Natural Gas Pipeline Company did not meet the cost of service by about $380,000 (R. 94). Since the Commission could not make the appropriate rate increase without application therefor by the company, the Commission suggested that Colorado take the initiative (R. 94). With this rate increased, as it was, the net amount of the rate reduction became $2,730,000, as set out in the text.

Commission for further proceedings with respect thereto (R. 279). The facts relevant to this issue may be summarized as follows:

Early in 1950, Colorado, jointly with Canadian River Gas Company, requested the Commission to authorize Colorado to acquire and operate all of Canadian's properties pursuant to Section 7 of the Natural Gas Act, *infra,* pp. 56-57, (R. 243-261). During the Commission's consideration of this application, the question arose as to whether the consumers ultimately receiving gas from Colorado might have to bear an additional expense if, at some future time, the cost of certain gasoline plant operations exceeded the revenues received therefrom by Colorado under the merger plan. "To remove this question", Colorado proposed in a letter to the Commission dated June 8, 1950, that "in order to keep a rate payer from meeting this deficiency the Commission could condition [its authorization] so as in effect to provide that such deficit would not be considered in determining reasonable rates. In other words, the stockholders of Colorado * * * would take the risk as to whether or not gasoline prices will go down." (R. 289). Implementing this proposal, Colorado simultaneously submitted for incorporation into the Commission's order, approving the merger, a draft of condition which, according to Colorado, "would adequately protect ultimate consumers" (R. 289).

Thereafter, the Commission approved the merger on the condition, substantially as suggested to it by Colorado, that (R. 260):

> * * * if, as a result of carrying out the terms and conditions in the transaction proposed as a part of the acquisition and merger of Canadian into Colorado whereby rights to liquid hydrocarbons in place are granted to Southwestern Development Company and whereby Colorado is to receive 50% of the gross proceeds from the sale of certain liquid hydrocarbons and 15% of the net revenues to be received by Colorado from the hydrocarbons resulting from the operation of Fritch Natural Gasoline Plant of Texoma Natural Gas Company, the costs properly allocable to such hydrocarbons exceed the amounts payable to Colorado pursuant to such transaction, then and in that case in any proceeding in which the effective or proposed rates of Colorado are under inquiry such excess shall not be considered as a cost of service to Colorado's natural gas customers and consumers.

No review was sought by Colorado of the Commission's approval or of the condition.

Subsequently, in the rate investigation, the Commission determined that the costs properly allocable to the gasoline operations exceeded the gasoline revenues received by Colorado by about $420,000 (R. 79). In accordance with the terms of the condition, the Commission excluded this amount from Colorado's cost of service (R. 79).

In its original opinion, the Court of Appeals rejected Colorado's attack on various aspects of the order, including the method by which the Commission had determined that the costs of the gasoline operations exceeded the revenues received therefrom (R. 262-279). However, the court, assuming the question to be before it, went on to rule that the exclusion of the excess costs from Colorado's cost of service, in accordance with the terms of the condition, resulted in denying to Colorado the fair rate of return to which it is entitled and, accordingly, remanded the case to the Commission (R. 279).[3]

The Commission petitioned for rehearing, urging that since Colorado had failed to raise the question during the administrative proceeding and particularly in its petition for rehearing before the Commission, Section 19(b) *infra*, p. 58 precluded the court from considering the issue (R. 280-283). The court granted rehearing to the Commission (R. 290) but, after further briefing and argument, the court adhered to its original position and remanded the case to the Commission for further proceedings in accordance with its original opinion (R. 299-302).

SUMMARY OF ARGUMENT

There is no merit to any of the grounds on which the Court of Appeals based its exercise of jurisdic-

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[3] The court's decision, requiring that this amount be included in the cost of service, has the additional effect—since the revenues would thereby be increased—of increasing the federal and state income tax components of the cost of service by $456,665 and $13,700, respectively. This, together with the 420,000 excess costs, would result in an over-all increase in the cost of service of about $892,000, and so would reduce the net rate reduction from about $2,700,000 to about $1,800,000.

tion in this rate case to invalidate the condition of the merger proceeding pursuant to which the Commission excluded Colorado's gasoline losses from the cost of operation.

A.

Colorado did not question the validity of the condition in its application for rehearing before the Commission, as specifically required by Section 19(b) of the Natural Gas Act.[4] The several specifications dealing directly with the gasoline loss were all concerned with the Commission's method of determining the existence and amount of the loss, but not to the exclusion of the loss if properly determined. Indeed, Colorado conceded that the loss, if properly determined, should be excluded as required by the condition, a position from which Colorado did not depart at any time during the rate investigation and in the proceedings in the court below, up to its response to the Commission's petition for rehearing (R. 306). In these circumstances, the assignments of error so addressed were plainly not sufficiently specific to apprize the Commission that the exclusion of the loss was itself at issue (see *e.g., Marshall Field & Co.* v. *National Labor Relations Board,* 318 U.S. 253, 255), particularly since Colorado, in the merger proceeding, had proposed the condition to the Commission in order to over-

[4] "* * * 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. * * *"

come an obstacle to Commission approval of the merger, and expressed confidence in its legality in the teeth of objections by the Commission's staff. Since Colorado more than acquiesced in the condition, the situation here is far stronger for preclusion of the issue from judicial consideration than the mere acquiescence involved in *United States* v. *Hancock Truck Lines,* 324 U.S. 774, 779-780. Nor does the "end-result" test, applicable in review of rate orders, make Section 19(b) inoperative or permit a summary objection to the "end-result" to substitute for specific assignments addressed to specific points; the "end-result" rule merely provides the general test in the light of which to examine the specific assignments.

B.

The court below also erred in holding that it has inherent power *sua sponte* to consider and correct alleged errors lurking in the record. Unlike their relation to District Courts, Courts of Appeals have jurisdiction over administrative action only to the extent provided in the pertinent statutory provision. And here Section 19(b) unequivocally precludes judicial consideration of issues not preserved in an application for rehearing to the Commission, a provision, which it is settled, is to be read in accordance with its plain language. See *e.g., National Labor Relations Board* v. *Cheney Lumber Co.,* 327 U. S. 385, 388-389. The strength of the rule is indicated by this Court's insistence upon compliance with provisions like Section

19(b) even where failure to comply was not pressed by the agency (*e.g., Cheney Lumber case, supra*); the Court has applied the rule even in the absence of a special statutory requirement (*e.g., United States* v. *Tucker Truck Lines,* 344 U.S. 33, 36-37).

The attempted distinction that Section 19(b) applies only to issues of fact, and the question here is one of law, cannot stand. The evalution of the financial data necessary to ascertain the reasonableness of the Commission's rate order—or of the merger condition—can hardly be considered a pure question of law. And even if it were, the settled law requires the raising of such issues, and indeed even of constitutional issues, before the administrative agency, if there is later to be judicial consideration of the question.

To sanction judicial invalidation of the merger condition—after Colorado had affirmatively proposed the condition to obtain Commission approval of the merger and had left it wholly unchallenged during the rate investigation—would be contrary to the considerations underlying the requirement embodied in Section 19(b), as well as the closely related doctrine of exhaustion of administrative remedies. For, by upsetting the condition, the court below made a completely *de novo* examination of the issue, without the benefit of analysis by the experienced agency, without reference to the limitations on review of administrative determinations, and on the basis of a record made in another proceeding and not addressed to this issue. In addition to usurping administrative functions, the court's action thus threatens the orderly functioning of the administrative process.

C.

Section 10 ("Judicial Review") of the Administrative Procedure Act does not do away with the necessity of raising issues before the administrative agency as required by Section 19(b) of the Gas Act. Since the enactment of the Procedure Act in June 1946, this Court has in several decisions recognized the continued vitality of the requirement and reaffirmed the pre-Administrative Procedure Act decisions. See, particularly, *United States* v. *Tucker Truck Lines,* 344 U.S. 33, applying the rule where a motor carrier had failed during the administrative proceedings to raise the agency's omission to comply with the Administrative Procedure Act. The courts of appeals have repeatedly assumed that issues not raised before the administrative agency are still precluded from judicial consideration and this Court has continued to recognize the continued vitality of the closely-related doctrine of exhaustion of administrative remedies.

The provision of Section 10(e) relied on by the court below,[5] when read together with other parts of Section 10, does not have the scope attributed to it. In addition to the overriding clause which makes the Section's provisions inapplicable where

[5] "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. * * *"

"statutes preclude judicial review," other subsections, particularly Section 10(c), indicate no purpose to change the law on this issue, and even the language relied on by the court is subject to the limitation "where presented." In addition, the legislative history on several occasions reveals a general intention not to depart from the past in this type of matter. See, *e.g.,* S. Doc. No. 248, 79th Cong., 2d Sess., p. 289, fn. 21, 311, 369, 374, 229-230.

D.

In invalidating the condition on which the Commission had predicated its approval of the merger, the court below also erred in improperly undertaking to exercise an administrative function. Section 7(e) of the Gas Act authorizes the Commission to approve mergers, and to subject them to such conditions as it finds to be in the public interest. Moreover, it is extremely doubtful whether the Commission would have approved the merger without the condition which Colorado represented would adequately protect ultimate consumers (R. 289). To strike down the condition in these circumstances, while permitting the merger itself to remain in effect, was plainly incorrect under long-established principles most recently reiterated in *Federal Power Commission* v. *Idaho Power Co.,* 344 U. S. 17, 20-21. The condition was an integral element of the Commission's approval of the merger, and, if Colorado were not estopped, immediate and direct review of the condition would have been available in the merger proceeding. If Colorado would have been estopped to challenge the condition on review of the merger order—as we believe it would have been—that is all the more reason for holding the matter likewise foreclosed in the rate proceeding.

ARGUMENT

The Court of Appeals Lacked Authority to Consider the Validity of the Merger Condition

In its original judgment, the Court of Appeals reversed the Commission's order directing Colorado to reduce its rates by at least $2,700,000 on the ground that the condition forming a basis of the Commission's approval, in another proceeding, of the merger of Colorado's properties with those of Canadian River Gas Company was invalid and, consequently, that the Commission erred in excluding, in accordance with this condition, the $420,000 gasoline loss from Colorado's cost of service. On rehearing, the Commission pointed out that under the terms of Section 19(b) of the Natural Gas Act, *infra,* p. 58, the court lacked jurisdiction to pass on the validity of the condition since at no time during the rate proceedings, either before the Commission or the court, had Colorado attacked the validity of the condition—and, indeed, it had suggested and affirmatively pressed adoption of the condition in the merger proceeding.

Nevertheless, the court below reentered its judgment reversing the Commission's order. Its opinion on rehearing based its exercise of jurisdiction on three grounds. First, it held that "it is not correct, as stated by the Commission, to say that

Colorado did not object to the exclusion of this item. It did object thereto both in the original proceeding and in its petition for rehearing. It is true, however, that it did not place its objection on the legal ground upon which we predicated our conclusions" (R. 300). Second, the court ruled that, in any event, it has inherent power in reviewing the Commission's order to consider and correct *sua sponte* manifest and substantial errors; according to the court, Section 19(b) does not deprive it "of its right to consider all relevant matters necessary to determine a just end result" but rather merely means that "one complaining of the order of the Commission will not be heard and has no standing to urge an objection not first submitted to the Commission" (R. 300). The court concluded by reading Section 10(e) of the Administrative Procedure Act, *infra,* pp. 59-60, as containing a clear and positive mandate requiring it *sua sponte* to note basic legal conclusions which were erroneous (R. 301-302).

Each of these grounds, we submit, is devoid of merit. In our view, Section 19(b) completely bars consideration by the reviewing court of the validity of the condition.

A. COLORADO DID NOT QUESTION THE VALIDITY OF THE MERGER CONDITION IN THE RATE PROCEEDINGS OR IN ITS APPLICATION FOR REHEARING BEFORE THE COMMISSION AND THE ISSUE IS THEREFORE PRECLUDED BY SECTION 19(b) OF THE GAS ACT FROM CONSIDERATION IN THE COURT OF APPEALS

1. The record shows that *at no time* during the rate investigation before the Commission—or during the merger proceeding in which Colorado proposed the condition to the Commission—did Colorado raise any question as to the validity of the merger condition which the Court of Appeals struck down. But in view of the express provision of Section 19(b) (*infra,* p. 58) prohibiting courts from considering objections to orders of the Commission "unless such objection shall have been urged before the Commission *in the application for rehearing*" (emphasis added), we first discuss whether Colorado questioned the condition in its application for rehearing before the Commission.

Even a casual reading of that application leaves no doubt that Colorado did not in the document raise any question as to the validity of the condition. Colorado sets out seventeen errors allegedly committed by the Commission in connection with the exclusion of the loss resulting from gasoline operations. The pertinent specifications (Specifications 20 through 36) are reproduced in full at R. 98-103; they are aptly summarized in Specification 20 which reads (R. 98-99):

> The Commission erred in concluding that Colorado would experience a loss in gasoline

> operations since it has presumed to follow a theory which is not based upon the substantial evidence of record, which is based upon data missing from the record, and which is contrary to all of the substantial evidence of this record.

Specifications such as these are plainly directed at the method used by the Commission in ascertaining the existence and amount of the loss and not at the condition under which the Commission excluded the loss thus determined from the cost of service. Colorado was contending only that there was a net profit, not a loss, from these gasoline operations (See R. 269); it did not urge that if the method used by the Commission in ascertaining the loss was proper, that loss should be treated otherwise than as provided in the condition.

That Colorado was attacking the method by which the loss was ascertained and not the validity of the exclusion, once it was determined that the loss was properly ascertained, is further apparent from the argumentative discussion of these specifications in the application for rehearing under the caption "Grounds Relied Upon." (R. 104). The discussion bearing on these specifications opens with the statement (R. 106):

> The Commission in its adoption of one of the two methods of costing gasoline which it held to be unsatisfactory has purported to adopt the relative market value method proposed by the Staff.

Later, in its discussion, Colorado urged (R. 109):

> The Commission here under the justification of the condition in its order in the merger case has assumed to attribute costs to gasoline operations. The merger case condition required Colorado to absorb costs in excess of revenues accruing to it, but as the order in that case expressly recites it is only "the costs properly allocable to such hydrocarbons" which are to be considered in imposing such liability. The Commission cannot determine the costs properly allocable to the hydrocarbons without having before it a thoroughly satisfactory method of cost determination. The Staff, therefore, failed in its burden of proof in this regard and there is no substantial evidence upon which the Commission could act.

And Colorado concluded the discussion with a statement of its affirmative position (R. 112):

> The volumetric method is the only appropriate method here since (i) it accords with the facts—volume determines size of facilities; (ii) it accords with the Commission's method of allocating other costs; and (iii) this is the only method supported by the qualified expert witnesses in this case.

It is thus entirely clear that Colorado's application for rehearing did not question the validity of the merger condition itself. On the contrary, Colorado conceded that the gasoline operation loss, if properly determined, should be excluded from cost of service as required by the condition. Accordingly, when the court below sustained the Commission's method of determining the loss (R. 270), it disposed of the only objections in regard to the gasoline loss which had been raised in Colorado's application for rehearing.[6]

Moreover, the simple fact is that, prior to the original opinion of the court below, Colorado never understood at any time that it had questioned—or even that it was in a position to question—the legality of the merger condition. It had itself proposed the condition to the Commission in the merger proceeding in order to eliminate, if possible, an objection to the merger proposed by it (see *supra,* pp. 4-5; *infra,* pp. 21-23, 51-52). Its petition for review filed in the court below (R. 1-9) in effect admitted that the validity of the condition was not—and had not been—in issue. As summarized in this petition, Colorado visualized its contention as being only that the Commission's method of determining the gasoline operation loss was "contrary to the condition imposed upon [Colorado] in * * * [the] previous order * * *" (R. 7). At the

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[6] Colorado appears to suggest in its brief in opposition to certiorari (see *e.g.,* pp. 6, 7, 10-11 and fn. 6) that the issue was raised by the specifications in regard to the tax adjustment resulting from the exclusion of the loss (see *supra,* p. 6, fn. 3). But the specification of error relating to taxes (Specification 40, R. 103), and the pertinent discussion in the application for rehearing (R. 112), obviously have no bearing on the merger condition's validity. Moreover, the discussion in the Commission's opinion on rehearing on this specification, set out in Colorado's brief in opposition, pp. 10-11, fn. 6 (see also R. 127), clearly reveals that the Commission did not understand the specification in regard to income taxes as in any way reaching the validity of the merger condition itself.

same time that it made this claim, Colorado expressly recognized in its petition for review that "under the terms of a previous order entered by the Commission [Colorado] is to bear [the loss] if such loss is 'properly' allocable to such operations" (R. 7). Even after the court's original opinion, Colorado still conceded in its response to the Commission's petition for rehearing (R. 306):

> * * * While [Colorado] did not argue the very ground pointed out by the Court for reversal, nevertheless, there was before the Court a record for review of the rate proceeding, and in it was the issue of deducting the Commission found loss on gasoline operations. *It can be well understood why Petitioner did not urge as a ground of reversal the ground adopted by the Court. Petitioner having acquiesced in the condition which the Court has struck down could hardly immediately turn its back upon such acquiescence.* * * * (emphasis added.)

2. Although the Court of Appeals admitted that Colorado had not attacked the validity of the condition as such, *i. e.,* "the legal ground upon which we predicated our conclusions" (R. 300), it appears to have regarded Colorado's objection to the method used by the Commission in determining the loss as sufficient to give authority to consider the question (R. 300). But it is established that requirements such as that of Section 19(b) may be satisfied only by an "objection * * * sufficiently specific to apprise the [Commission] of the question now presented" (*May Stores Co.* v. *National Labor Re-*

lations Board, 326 U. S. 376, 386, fn. 5; *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255; *National Labor Relations Board* v. *Seven-Up Co.,* 344 U. S. 344, 350), a requirement expressly incorporated in Section 19(a) of the Gas Act.[7]

Here, the Company's objections plainly did not give the Commission notice that the legality of the condition was in issue. This is not surprising since, as we have pointed out, the Company did not intend to present this issue and did not think that it was doing so. Colorado did not object to the exclusion of the loss if properly determined, but rather directed its numerous assignments on this matter to various specific aspects of the Commission's method of determining the existence of a loss and the amount thereof. Once the loss was properly determined, everybody, including Colorado, accepted during the rate investigation the proposition that the excess costs were to be excluded by virtue of the condition. The assignments of error, addressed as they were to an entirely different problem than the condition's validity, certainly failed to apprise the Commission that the condition itself was under attack. This is especially clear when the assignments are viewed against the condition's prior history—it had originated in another proceeding, proposed to the Commission by Colorado to allay an objection which if not overcome would probably have resulted in the Commission's

[7] Section 19(a) requires that "the application for rehearing shall set forth specifically the ground or grounds upon which such application is based." See *infra,* p. 57.

refusing to give its approval to the merger; and at all times during the rate investigation Colorado itself had accepted the condition's validity without question.

Moreover, even if the assignments had attacked the exclusion of the loss generally, so that they might conceivably be read as encompassing the condition's validity, they still would have been insufficient in this case. Cf. *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255; *National Labor Relations Board* v. *Seven-Up Co.,* 344 U.S. 344, 350. In the latter decision, this Court held that the company's general objection, that the Trial Examiner's recommendations as to the back pay "were contrary to, and unsupported by, the evidence and contrary to law," was "not adequate notice that the Company intends to press the specific issue it now raises" (344 U. S. at 350), *i. e.,* the effect of the seasonal nature of its business on the validity of the Commission's formula computing the back pay due to the employees to be reinstated. And while in *May Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, a general objection, although falling "short of desirable specificity" (see 326 U. S. at 386-387, fn. 5), was accepted by this Court as sufficient to preserve the issue there involved, this acceptance was based, in large measure, upon the peculiar circumstances of the case, particularly the fact that the issue had been a frequent subject of dispute in the Courts of Appeals. 326 U.S. at 386-387, fn. 5. In the instant case, however, the history of the condition, as we have already pointed out, is such that a general objection would plainly fail to advise the Commission of Colorado's intention to press the specific issue of the condition's validity.

Nor was the deficiency cured by the circumstance, pressed by Colorado (Br. in Opp., pp. 5-6, 11), that the condition's validity was raised in the *merger* proceeding and there considered by the Commission. In this connection it should first be recalled that, unlike many of the comparable provisions relating to judicial review of administrative action,[8] the Natural Gas Act (and the Federal Power Act, Section 313 (b), 16 U.S.C. 825*l* (b)) requires not merely that the issue be raised at some point during the administrative proceeding but prescribes a specific stage at which the objection must be made, *i.e.* in an application for rehearing before the Commission. Therefore, even if the question of the condition's legality had been raised during the administrative hearings in connection with the *rate* investigation—let alone the antecedent *merger* proceeding—Colorado's failure to preserve the issue by assigning it as error in its application for rehearing on the Commission's rate order would operate, under the express terms of Section 19(b), to foreclose the courts from considering the question.

[8] See *e.g.,* Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a); Section 322 of the Trust Indenture Act, 15 U.S.C. 77vvv; Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a); Section 24 of the Public Utility Holding Company Act, 15 U.S.C. 79x; Section 10(a) of the Fair Labor Standards Act, 29 U.S.C. 210(a); Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e); Section 1006(e) of the Civil Aeronautics Act, 49 U.S.C. 646(e).

But perhaps the more decisive answer to this point is that while the condition's validity was questioned in the merger proceeding, it was not challenged by Colorado. On the contrary, Colorado vigorously defended the condition which it had itself proposed to the Commission. At that time, Colorado was very anxious that the Commission adopt the condition, for approval of the merger was in substantial measure dependent thereon. Colorado's present position (adopted for the first time after the original opinion of the Court of Appeals in this case), that the condition involved "a plain and fundamental error of law" and that it was "ineffective * * * from the standpoint of substantial justice" (Br. in Opp., p. 9), is a far cry from the view expressed at the merger proceeding where Mr. William A. Dougherty, Colorado's general counsel and one of its directors, stated (R. 323):

> * * * so far as I was concerned as a director of Colorado Interstate and as its counsel * * * I would be perfectly willing to vote for as a director and to recommend to the board as its counsel that some sort of a stipulation or condition to the certificate be accepted by the company which in effect would provide this: * * *[9]

[9] Mr. Dougherty later said (R. 324):

> The treatment that I have in mind, which I say as a director I would vote for and as counsel would recommend, is that whenever these figures indicated that a net loss had occurred, that that would not be charged in effect against the ratepayers but the risk of that taken by the stockholders, but that there likewise should be a corre-

There could hardly be plainer evidence that Colorado's counsel expressed no doubt as to the legality of the condition during the merger proceeding.

In these circumstances, particularly since Colorado proposed the terms of the condition to be incorporated into the order approving the merger (*supra,* pp. 4-5), the situation here is far stronger for preclusion of the issue from judicial consideration than if there were merely involved a failure to raise the point, or even acquiescence. And it is settled that acquiescence or waiver is sufficient to bar court review, without regard to whether the statute requires that the issue be raised before the agency. See *United States* v. *Hancock Truck Lines,* 324 U.S. 774, 779-780; *United States* v. *Tucker Truck Lines,* 344 U.S. 33, 36-7; cf. *Helvering* v. *Wood,* 309 U.S. 344, 348-349.[10] See also *infra,* pp. 53-54.

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sponding credit given to the stockholders whenever the tax benefits were greater.

[10] The same principle of preclusion is reflected in the settled rule that a party who accepts the benefit of an administrative decision and puts it into effect, to his own advantage, cannot thereafter deny the validity of the conditions imposed on him by the decision. See, *e.g., Callanan Road Co.* v. *United States,* 345 U.S. 507, 513; *Fahey* v. *Mallonee,* 332 U.S. 245, 255; *United States* v. *San Francisco,* 310 U.S. 16, 29; *United Fuel Gas Co.* v. *Railroad Commission,* 278 U.S. 300, 307-308; *Booth Fisheries* v. *Industrial Commission,* 271 U.S. 208; *Buck* v. *Kuykendall,* 267 U.S. 307, 316; *St. Louis Malleable Casting Co.* v. *George C. Prendergast Construction Co.,* 260 U.S. 469; *Wall* v. *Parrot Silver & Copper Co.,* 244 U.S. 407, 411-412; *Shepard* v. *Barron,* 194 U.S. 553; *Grand Rapids and Indiana Railway Co.* v. *Osborn,* 193 U.S. 17, 29; *Daniels* v. *Tearney,* 102 U.S. 415, 421.

3. Section 19(b) is as fully effective in rate cases as in others; it does not become inoperative because, as the court below asserted, "the important and deciding factor in rate hearings is the end result" and "a reviewing court is more concerned with the end result than with the multiple detailed mechanics employed in reaching it" (R. 271). But the rule is the same for the "end result" of a rate order; it is not open to court review unless challenged and then only to the extent of the challenge. *Colorado Interstate Gas Company* v. *Federal Power Commission,* 324 U.S. 581, 605-606; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U.S. 635, 649; *United States* v. *Capital Transit Co.,* 338 U.S. 286, 291. Here, while Colorado objected to the "end result" reached by the Commission (R. 103), the objection was summary and general, not directed at the Commission's exclusion of the loss by virtue of the condition. As indicated *supra,* pp. 20-21, such a general objection failed in the circumstances to apprize the Commission that this specific issue was being challenged in any way, even subordinately. The "end result" standard for testing utility rates (*Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 602; *Colorado Interstate Co.* v. *Federal Power Commission,* 324 U.S. 581, 603) does not nullify the requirement of specific assignments of error, or mean that a single objection to the "end result" is sufficient to enable the utility to raise any or all points that may later occur to its counsel. If that were the case, Section

19(b) of the Gas Act (and comparable provisions in other utility legislation) would be rendered meaningless, and the Commission and similar regulatory agencies would find themselves having to guess at, and deal with, all the points the company might subsequently raise. Quite properly, the courts have not interpreted the "end result" standard as doing away with the requirement of specific specifications of error. See, *e.g., Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U.S. 635, 649. The only effect of the "end result" test on the specific assignments is that their validity must be examined in the light of the impact of the alleged error on the "end result", but they must still be stated in order that they may be so examined.

B. THE COURT OF APPEALS HAD NO INHERENT POWER TO CONSIDER THE CONDITION'S VALIDITY IN THE ABSENCE OF COMPLIANCE WITH SECTION 19(b) OF THE GAS ACT

The Court of Appeals also erred when it held that, even if there had not been compliance with Section 19(b), the reviewing court nevertheless has inherent power *sua sponte* to consider and correct errors lurking in the record made before the Commission.

1. In so holding, the court confused its functions *vis a vis* the District Courts with its relationship to administrative agencies. While the Courts of Appeals have such inherent power in reviewing

judgment of District Courts,[11] their jurisdiction over administrative action is narrower, and is defined by the statutory provisions authorizing the review. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 141; *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 300-301; *National Labor Relations Board* v. *Cheney Lumber Co.,* 327 U. S. 385, 388-389; *Unemployment Compensation Commission* v. *Aragon,* 329 U. S. 143, 155; *Federal Power Commission* v. *Pacific Power & Light Co.,* 307 U. S. 156, 159; *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 487 *ff.* As stated by Mr. Justice Frankfurter, dissenting in *Stark* v. *Wickard,* 321 U. S. 288, 312:

> Except in those rare instances, as in a claim of citizenship in deportation proceedings * * *, whether judicial review is available at all, and, if so, who may invoke it, under what circumstances, in what manner, and to what end, are questions that depend for their answer upon the particular enactment under which judicial review is claimed.

Section 19(b) of the Natural Gas Act, which vests in the Courts of Appeals whatever authority

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[11] Although the power exists on review of district court decisions, the usual practice is not to consider such new issues. "This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson,* 297 U.S. 157, 159.

they have to review orders of the Commission under that Act, on its face prohibits *sua sponte* consideration of errors found by the court to be lurking in the record. It provides that "No objection * * * shall be considered *by the court* * * * " (emphasis added), and is not in terms limited to a prohibition directed at the parties. Thus, the normal reading of Section 19(b), as it is phrased, would be that it is not addressed solely to preventing the complaining party from raising new questions, but also precludes *sua sponte* consideration of such an alleged error by the court as well. Cf. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U. S. 635, 649. The reading of Section 19(b) suggested by the court below would go a long way toward defeating the purposes of the requirement. See *infra,* pp. 31-40.

Moreover, it has been established by the decisions of this Court that provisions such as Section 19(b) are to be applied in accordance with their plain language and that there is no such distinction between court and parties as that adopted by the court below. In *National Labor Relations Board* v. *Cheney Lumber Co.,* 327 U.S. 385, where a Court of Appeals had struck out a paragraph of a Labor Board order not objected to by the company in the administrative proceeding, this Court reversed, pointing out that the provision in the National Labor Relations Act, comparable to Section 19(b) (see *supra,* p. 21 fn. 8), constituted "[a] limitation which Congress has placed upon the power of courts to review orders of the Labor Board" (327 U. S. at 388). By this provision "Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested * * * [the provision] 'gives emphasis to the salutary policy * * * of affording the Board opportunity to consider on the merits questions to be urged upon review of its order' " (*id.* at 389). See, also, *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255-256; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U. S. 635, 649, and 650-651 (concurring opinion of Stone, C. J.); *United States* v. *Hancock Truck Lines,* 324 U. S. 774, 779-780; *May Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 386, fn. 5; *Unemployment Compensation Commission* v. *Aragon,* 329 U. S. 143, 155; *United States* v. *Capital Transit Co.,* 338 U. S. 286, 291; *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U.S. 318, 341; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 617; *United States* v. *Tucker Truck Lines,* 344 U. S. 33, 36-37; *National Labor Relations Board* v. *Seven-Up Co.,* 344 U. S. 344, 350; *United States ex rel Vajtauer* v. *Commissioner,* 273 U. S. 103, 113; *United States* v. *Northern Pacific R. Co.,* 288 U. S. 490, 494. In none of these cases has the Court made any distinction between the preclusion of a party from raising an issue and the power of the reviewing court to consider it *sua sponte.*[12]

The circumstances in which the Court has insisted in several of its cases upon compliance with these statutory requirements strongly attests to their importance as conditions precedent, binding on court as well as parties, to consideration of the substantive issues. In *May Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, *supra,* no claim was made by the Board that the company had failed to raise the issue before the administrative agency, yet the Court on its own motion appraised "the record to determine the power of the Circuit Court" to consider the matter, 326 U. S. at 386, fn. 5. In *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U.S. 635, *supra,* the company's failure to raise the substantive issue

[12] *Hormel* v. *Helvering,* 312 U.S. 552, cited by Colorado (Br. in Opp., p. 14), is inapplicable here. The statutory review provision involved in that case contained the phrase, not present here, "as justice may require," a phrase which this Court read as vesting a review authority in the courts somewhat broader than that granted by the more usual statutory review provision. Moreover, and of perhaps greater importance, the error which the Court held could be considered, although not raised before the Board of Tax Appeals, was revealed by circumstances which came into being subsequent to the decision of that Board. See 312 U.S. at 559; cf. *National Labor Relations Board* v. *Jones & Laughlin Co.,* 331 U.S. 416, 427-428. Here, on the other hand, Colorado was aware of the issue at least since the time it was raised by the Commission's staff in the merger proceeding and yet Colorado itself never raised it at any time prior to the decision below. The holding in the instant case that the condition is invalid hardly constitutes such an exceptional circumstance as would justify the invocation of the *Hormel* exception.

properly was mentioned in the Commission's brief only in passing, by way of footnote. See Brief for Respondents in No. 296, Oct. Term, 1944, p. 31, fn. 20. In *National Labor Relations Board* v. *Cheney Lumber Co.,* 327 U. S. 385, *supra,* the Board claimed in its petition for certiorari that the substantive issue had not been raised during the administrative proceeding (see Petition for Writ of Certiorari in No. 319, Oct. Term, 1945, pp. 22-23); however, in its brief on the merits the Board expressed doubt, after further study of the record, as to the soundness of its original position and "[w]hile we still believe that the court below erred in its action * * *, we have decided, under the circumstances, not to press this matter in this case." Brief for National Labor Relations Board in No. 319, Oct. Term, 1945, pp. 13-14. Moreover, in *Cheney,* it was argued that since it was a proceeding to enforce the Board's order, and not a straight review proceeding, the statutory prohibition was inapplicable and the Court should frame its decree according to equitable principles. See 327 U. S. at 389-391 (Stone, C. J., concurring). *In National Labor Relations Board* v. *Seven-Up Co.,* 344 U. S. 344, *supra,* likewise an enforcement case, the failure of the company to raise the substantive issue in the administrative proceeding was not questioned by the Board in its brief. See Brief for National Labor Relations Board in No. 217, Oct. Term, 1952. Notwithstanding these circumstances, this Court held in each of these cases that failure to preserve the substantive question by timely objection before the agency constituted a bar to judicial consideration of the issue.[13]

2. There is likewise no justification for the Court of Appeals' refusal to accept Section 19(b) as controlling on the ground that the question here is one of law and the Section applies only to issues of fact (R. 301).

(a). In the first place, the terms of Section 19(b) (*infra*, p. 58) do not differentiate between issues of fact, issues of law, or mixed questions of fact and law. All are covered under the general rubric of "objection[s] to the order of the Commission". And the important aims of the provision require that it apply to all issues alike. The agency charged with administering the Act should have the opportunity to "consider the matter, make its ruling, and state the reasons for its action" (*Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 155); "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts" (*United States* v.

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[13] An interesting sidelight to the *Cheney* case is the fact that, subsequent to this Court's reversal, the Court of Appeals for the Ninth Circuit reconsidered its judgment in at least two additional Labor Board cases and, in the light of *Cheney*, modified its decree to enforce provisions of the Board's order not questioned before the Board. See *National Labor Relations Board* v. *Van De Kamp's Holland-Dutch Bakeries, Inc.*, 154 F. 2d 828, modifying 152 F. 2d 818; *National Labor Relations Board* v. *Kinner Motors*, 154 F. 2d 1007, modifying 152 F. 2d 816.

Tucker Truck Lines, 344 U.S. 33, 37). See also *infra,* pp. 36-42.

Accordingly, the Court has not made the distinction put forward by the court below. In the *Marshall Field* case, 318 U. S. 253, the question which this Court held could not be considered because not raised before the Labor Board related to the Board's power to grant a back pay order barring the deduction of unemployment compensation from the award. In *Panhandle Eastern Pipe Line,* 324 U.S. 635, the problem was whether the exemption of Section 1(b) of the Natural Gas Act deprived the Commission of authority to include production and gathering facilities at original cost in the rate base for jurisdictional sales. In the *Tucker Truck Lines* case, 344 U.S. 33, the issue concerned the validity of a hearing, subject to the Administrative Procedure Act, held before an examiner not appointed pursuant to Section 11 of that Act (5 U.S.C. 1010). The issue in each of these cases was clearly "legal" in nature, yet the failure to raise it before the administrative agency was held to preclude judicial consideration. Cf. the rule on exhaustion of administrative remedies, as applied in *Macauley* v. *Waterman Steamship Corp.,* 327 U.S. 540, 544; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752; *Federal Power Commission* v. *Arkansas Power & Light Co.,* 330 U.S. 802; see infra, pp. 37-38.[14]

[14] Colorado's contention that the rule is inapplicable since the court below "by granting rehearing has afforded" the Commission an "opportunity to present its side of the case on this

(b). Secondly, the particular issue involved here cannot be viewed in its proper context as purely "legal". The propriety of the exclusion of the loss was to be tested not solely against the infirmities, if any, in the exclusion itself, but rather by the test of whether the consequence of the exclusion was such as to make "the total effect of the rate order * * * unjust and unreasonable." See *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 602. This, in turn, depends on whether the rates fixed by the Commission "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed * * * " (*id.* at 605). The evaluation of the financial data necessary to ascertain the reasonableness *vel non* of the "end result" can hardly be said to present a pure question of law which need not be passed upon in the first instance by the agency experienced in the marshalling and evaluation of such data. Cf. *National Labor Relations Board* v. *Cheney Lumber Co.,* 327 U.S. at 389; *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. at 153-154; *National Labor Relations Board* v. *Seven-Up Co.,* 344 U.S. at 349-350.

In addition, there is more than a conclusion of law involved in deciding even the narrower issue of whether the exclusion of the gasoline loss, pur-

question" (R. 313), does not bear analysis. Similar "opportunities" in the reviewing court would have been afforded the administrative agency in each of the cases referred to in the text; yet in each case this Court held that the courts were barred from considering the alleged error.

suant to the merger condition, was proper (if considered alone). This involves consideration of the facts and circumstances surrounding the imposition of the condition, especially the fact that Colorado's counsel proposed the condition to the Commission.[15] Nor can it be concluded as a matter of law, as the court below said, that "[A] rate based upon the exclusion from the cost of service, *no matter for what reason,* of a substantial amount of admitted operative cost does not and cannot reach a just end result and may, therefore, not stand" (R. 271). The court cannot shut its eyes to the facts, reasons, and circumstances surrounding the exclusion and conclude that there is presented only a bare question of law which can be decided apart from a proper inquiry into the facts and proper administrative findings. Cf. *Federal Power Commission* v. *Natural Gas Pipeline Company,* 315 U.S. 575; *West Ohio Gas Company* v.

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[15] In *United States* v. *Ruzicka,* 329 U. S. 287, 294, the contention was made in an enforcement proceeding under the Agricultural Marketing Agreement Act that the order sought to be enforced was not "in accordance with law." The court disposed of this contention by the statement that:

> The short answer to this rather dialetic point is that whether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry.

Public Utilities Commission, 294 U.S. 63.[16] For this reason (among others), the court erred in concluding that it is no "answer to say that this was a condition of the merger order and that, therefore, Colorado's stockholders are bound and saddled with this loss. We are dealing here with a business affected with a public interest. Parties in such businesses are not free to contract as they choose" (R. 271). If this means that the freedom of choice on the part of natural-gas companies is limited to reasonable and prudent operation, a finding of reasonableness or unreasonableness would necessarily depend on the whole record of the merger proceeding, as well as on findings as to the company's whole business, factors which were not before the Court of Appeals nor are they before this Court. See also *supra,* p. 33; *infra,* pp. 39-40 and fn. 19.

(c). That the precluded issue may be a constitutional one does not affect the application of Section 19(b), which therefore governs even though the Commission's order results in an allegedly confiscatory rate. See Br. in Opp., p. 8. In *United States* v. *Capital Transit Co.,* 338 U.S. 286, this Court brushed such a claim aside as not properly presented (338 U.S. at 291):

> It is also argued here that the orders should be set aside because they are confiscatory. But

[16] Indeed, in the very order under review the Commission disallowed certain director and executive committee payments as being improper charges under the particular facts and circumstances (R. 56-60). Colorado did not seek review of this item of exclusion.

> the record fails to show that this issue was properly presented to the Commission for its determination. Therefore the question of confiscation is not ripe for judicial review.

See, also, *Todd* v. *Securities and Exchange Commission,* 137 F. 2d 475, 478 (C.A. 6), and *National Labor Relations Board* v. *G. W. Thomas Drayage & Rig. Co.,* 206 F. 2d 857, 860-861 (C.A. 9), where courts of appeals declined to consider a constitutional issue not raised before the administrative agency.[17]

3. The strength of the reasons for insisting that courts refrain from considering issues not raised before the administrative agency is shown by the

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[17] While it is not strictly relevant to the issue here presented, it may be noted in passing that the exclusion of the loss in fact reflected an appropriate "balancing of the investor and the consumer interests" by the Commission (*Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. at 603) and so was fully consonant with the "end-result" principle. During the pendency of the rate proceedings, there was a public offering of Colorado's common stock with full disclosure to prospective investors that the loss under the merger condition would not be "considered as a cost of service to Colorado's natural-gas consumers," but would be borne by the investors. (Tr. 2685, 2694). Notwithstanding this, the common stock was promptly over-subscribed. As the Court of Appeals noted in sustaining the Commission's finding that 5¾% is a fair rate of return (R. 277):

> The fact that this offering was promptly oversubscribed is evidence of the standing of Colorado with the investing public and, if we must as urged by Colorado take into account that the eagerness to purchase this stock was induced in the belief of the future development of Colorado's resources, we must on the other hand not be unmindful that that manifested interest was in the face of a rate hearing which might well, as it did, result in a decrease of rates.

decisions following that rule even in the absence of a statutory provision like Section 19(b). For instance, the statute providing for review of Interstate Commerce Commission orders (now 28 U.S.C. 2321-2325) contains no prohibition against judicial consideration of questions not presented to the Commission, but the Court has nevertheless held that failure to apprise the Commission of an issue forecloses judicial review of that point. See *United States* v. *Tucker Truck Lines,* 344 U. S. 33, 36-37; *United States* v. *Capital Transit Co.,* 338 U. S. 286, 291; *United States* v. *Hancock Truck Lines,* 324 U. S. 774, 779-780; *United States* v. *Northern Pacific Ry.,* 288 U. S. 490, 494. The same principle was applied in *Unemployment Compensation Commission* v. *Aragon,* 329 U. S. 143, 155, where the Court said: "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." See also *United States ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103, 113.

The importance of the policy is also suggested by its close relationship to the settled principle that administrative remedies be exhausted before there may be resort to the courts.[18] Insistence on ex-

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[18] Analytically, the two principles are but different facets of the same general rule. While one is applicable before the completion of the administrative proceeding and the other is controlling after completion, both preclude the courts from

haustion of the administrative procedure reduces the judicial burden since in many instances the issues sought to be raised may be disposed of by the agency, rendering resort to the courts unnecessary. Cf. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 772. Also, the administrative proceedings serve to define more precisely the nature of the controversy and provide a more complete context for decision. *Aircraft & Diesel Corp.* v. *Hirsch, supra.* Moreover, where the issue is factual, its resolution is for the agency, whose decision is binding on the courts if supported by substantial evidence; and where a purely legal question is raised, deference is to be accorded to the construction given by the expert agency charged with the statute's administration. See, *e. g., Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *Gray* v. *Powell,* 314 U. S. 402; *Shields* v. *Utah Idaho Central R. R.,* 305 U. S. 177; *Unemployment Compensation Commission* v. *Aragon,* 329 U. S. 143.

To sanction the invalidation of the merger condition by the reviewing court—after Colorado had affirmatively proposed the condition to the Com-

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passing on issues which have not been raised before or considered by the administrative agency. This Court's recognition of the close relationship between these doctrines was manifested in the *Aragon* case, *supra,* where, referring to a statutory provision phrased in terms of exhaustion of administrative remedies (see 329 U. S. at 155, fn. 15), the Court applied the rule prohibiting judicial consideration of issues not raised before the administrative agency. For this reason, among others, the attempted distinction by the court below of the *Aragon* case (R. 301) is without any substance.

mission in order to obtain Commission approval of the merger and had never attacked it in the Commission's rate investigation—would be contrary to the policy considerations on which the requirements of exhaustion and of obtaining an administrative determination are based. If Colorado had joined the Commission staff in attacking the condition in the merger proceeding, it is doubtful whether the Commission would have imposed the condition upon Colorado; and it is also doubtful that it would have been willing to give its approval without such a condition. In either event, the result would have been that there would be no need for judicial consideration of the condition. On the other hand, if the Commission had undertaken to impose the condition over Colorado's objection, it would have done so on the basis of adequate justification in the record, *i.e.,* that the benefits to be derived from the merger outweighed the contingent burden being imposed upon the stockholders.

As it is, the Commission, in linking its approval of the merger to the condition, relied on the fact that the condition was proposed by Colorado which was to be subject to it. The result is that, in upsetting the condition, the court below has made a completely *de novo* examination of the issues without the benefit of an independent analysis by the experienced agency, without regard to the proper scope and method of review of administrative determinations, and on the basis of a record which was made in another proceeding and addressed to other issues.[19] This is precisely the kind of result this Court has long been at pains to avoid in settling the rules for review of administrative orders or actions.

C. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT DO AWAY WITH THE NECESSITY OF COMPLIANCE WITH SECTION 19(b)

Another error of the court below is in reading the Administrative Procedure Act as, in effect, eliminating the necessity for preserving objections before the administrative agency. The court held that the Act contained "clear and positive mandates" to the courts to consider all questions of "legality or constitutionality" inherent in a case.

1. In so holding, the court undertook to distinguish some of the cases relied on by the Commis-

[19] The decision of the court below invalidating the condition caused both the Commission and Colorado to incorporate references from the record in the merger proceedings in their pleadings filed with the court subsequent to the decision. See, *e.g.*, Appendix A to the Commission's Petition for Rehearing (R. 289); footnote 3, and Appendix A to Brief of Petitioner [Colorado] in Response to Respondent's [Commission's] Petition for Rehearing (R. 311, 322). It is fundamentally at odds with the whole design of administrative review that facts outside the record should become part of the record in this fashion, especially where there is no reasonable excuse for the failure to adduce such facts. Such piece-meal and one-sided record-making does not afford an opportunity to introduce all the facts and facets, nor afford opportunity for cross-examination or rebuttal, and entirely by-passes the agency and does not afford it the opportunity to consider the issue, and make its findings, conclusions and rulings. All this is aside from the fact that, if Colorado were dissatisfied with the merger condition, the entire record in that proceeding was available for review in that proceeding, *infra*, pp. 53-54.

sion on the ground that they antedate the Administrative Procedure Act (R. 302). But while some of the decisions cited ***supra,*** p. 28 were decided prior to that Act, this Court in several later decisions has recognized the continued vitality of the requirement and has reaffirmed the earlier rulings. Thus, the principle was applied in *United States* v. *Capital Transit Co.,* 338 U. S. 286, 291, and *National Labor Relations Board* v. *Seven-Up Co.,* 344 U. S. 344, 350, both cases decided several years after the Act's passage.

Of particular relevance on this point is *United States* v. *Tucker Truck Lines,* 344 U. S. 33. The *Tucker* case was decided a number of years after the enactment of the Administrative Procedure Act, and, significantly, the issue sought to be raised revolved about that Act itself, *i.e.,* the failure of the Interstate Commerce Commission to comply in its administrative proceeding with the hearing examiner requirement of Section 11, previously held to be "jurisdictional" (*Riss & Co.* v. *United States,* 341 U. S. 907; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33). In holding that Tucker's failure to complain of the lack of compliance with Section 11 before the Commission precluded judicial consideration of the alleged error, the Court plainly ruled that the Act had not abrogated the well-established principles which we have discussed above (344 U. S. at 36-37):

> We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and

> good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.

See also *supra,* pp. 27-32. The fact that the statutes applying to review of Interstate Commerce Commission orders do not contain an express provision requiring such a result (see *supra,* pp. 36-37) would seem to make the result *a fortiori* where, as here, the statute does embody a specific requirement that the issue be first raised before the agency.

Similarly, the Courts of Appeals have assumed this Court's earlier rulings to be unaffected by the Administrative Procedure Act, and have continued to insist that issues sought to be raised before them must first have been brought to the attention of the administrative agency. See, *e.g., Halsted* v. *Securities Exchange Commission,* 182 F. 2d 660, 669 (C.A. D.C.); *West Texas Utilities Co.* v. *National Labor Relations Board,* 184 F. 2d 233, 239-240 (C.A. D.C.); *National Labor Relations Board* v. *Townsend,* 185 F. 2d 378, 380-381 (C.A. 9), certiorari denied, 341 U. S. 909; *National Labor Relations Board* v. *Noroian,* 193 F. 2d 172, 173 (C.A. 9); *National Labor Relations Board* v. *Auburn Curtain Co.,* 193 F. 2d 826, 827 (C.A. 1); *National Labor Relations Board* v. *Pugh & Barr, Inc.,* 194 F. 2d 217, 220-221 (C.A. 4); *United States ex rel. Beck* v. *Neelly,* 202 F. 2d 221, 224 (C.A. 7); *National Labor Relations Board* v. *Pinkerton's National De-*

tective Agency, 202 F. 2d 230, 233 (C.A. 9); *Democrat Printing Co.* v. *Federal Communications Commission,* 202 F. 2d 298, 305 (C.A. D.C.); *National Labor Relations Board* v. *Pappas & Co.,* 203 F. 2d 569, 571-572 (C.A. 9); *National Labor Relations Board* v. *G. W. Thomas Drayage & Rig. Co.,* 206 F. 2d 857 (C.A. 9). For example, in *Democrat Printing Co.* v. *Federal Communications Commission, supra,* where a radio station sought for the first time on review to invoke Section 5(c) of the Administrative Procedure Act, urging that the Section was mandatory and waiver thereof impossible, the Court of Appeals for the District of Columbia Circuit ruled (202 F. 2d at 305):

> * * * We think this position untenable. The legislative history clearly indicates the possibility of specific waiver:
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> > "No agency action taken or refused would be lawful except as done in full compliance with all applicable provisions of the bill and subject to the judicial review provided. No agreed waiver of its provisions would suffice unless entirely voluntary and without any manner or form of coercion."[20]
>
> And waiver by non-action would reasonably follow where as here, timely objection would have given the agency an opportunity to correct errors at the threshold of the proceedings

[20] The court refers to H. Rep. No. 1980, 79th Cong., 2d Sess., p. 47; see also S. Doc. 248, 79th Cong., 2d Sess. (Legislative History of the Administrative Procedure Act) p. 281.

> which might otherwise require the subsequent invalidation of the entire proceeding.

It is also noteworthy that the Court has given no intimation that the doctrine of exhaustion of administrative remedies has been affected by the enactment of the Administrative Procedure Act. See, *e.g., Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535, 540-541; *Franklin* v. *Jonco Aircraft Corp.,* 346 U.S. 868. In view of the close relationship between the exhaustion doctrine and the principle here involved (see *supra,* pp. 37-38 and fn. 18), the continued vitality of the exhaustion rule serves to buttress further our position that the companion rule precluding courts from considering objections not raised before the administrative agency is likewise unaffected by the Administrative Procedure Act.

2. Moreover the language and the legislative history of the Administrative Procedure Act indicate that that Act did not abrogate the established principle.

(a). The court below predicated its opposite conclusion solely on the bare wording of Section 10(e) that "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions * * *. It shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; * * *" (R. 301). Read in context with the other provisions of the statute, this language does not have the scope attributed to it below.

In the first place, subsection (e), along with the other subsections of Section 10, is subject to an introductory clause (*infra,* p. 58) which expressly makes Section 10 inapplicable where "statutes preclude judicial review." This language precludes judicial review not only where the relevant statute forecloses review entirely, as Colorado suggests (Br. in Opp., p. 14), but also where, as here, the relevant review provision precludes review of specific issues not raised before the administrative agency. Cf. *Heikkila* v. *Barber,* 345 U.S. 229.[21] Moreover, subsection (c), which is captioned "Reviewable Acts" in contrast to subsection (e)'s caption of "Scope of Review," provides at the outset "Every agency action made reviewable by statute * * * shall be subject to judicial review." And the very language relied on by the court below is to the effect that the court's are to "decide all relevant questions of law," but only "where presented," a phrase which might very well have been intended to limit the scope of review to situations where the issues are properly presented by virtue of having been preserved before the administrative agency. See also Sections 7(c), 8(b)(2) and 10(b) of the Act; cf. *National Labor Relations Board* v. *Auburn Cur-*

[21] A detailed argument in support of this proposition is set forth in the Government's briefs in *Blackmar* v. *Guerre,* Oct. Term 1951, No. 361, at pp. 26 *ff,* and *Martinez* v. *Neelly,* Oct. Term 1952, No. 218, at pp. 26 *ff.*

tain Co., 193 F. 2d 826, 827 (C.A. 1); *Johnson* v. *Shaughnessy,* 336 U. S. 806, 819, fn. 5 (dissenting opinion of Reed J.). These provisions, singly or together, indicate that the Administrative Procedure Act was not intended to do away with the rule precluding judicial review of issues not timely raised before the administrative agency.[22]

(b). Far from supporting the construction below, the legislative history of the Act shows that it was not designed to upset requirements such as that embodied in Section 19(b) of the Gas Act. This is apparent from the very excerpts from the legislative history quoted by Colorado (Br. in Opp., p. 14).[23] In addition, Congress's lack of intention to abrogate the principle reflected in Section 19(b) is manifested elsewhere in the legislative history. Thus, the Senate Committee, in changing the lan-

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[22] Quoting from *Pittsburgh Steamship Co.* v. *National Labor Relations Board,* 180 F. 2d 731, 736, 737 (C.A. 6), affirmed, 340 U.S. 498, Colorado relies on "the whole record" provision contained in Section 10(e) as supporting the holding below (Br. in Opp., p. 13). The quoted language relates primarily to the criteria used in reviewing administrative findings of fact, *i.e.,* whether on the whole record there is substantial evidence supporting the agency's finding. Neither the provision nor the decisions concerning it (*e.g., Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474) bear in any way upon the issue here involved.

[23] As there stated, "The Senate Judiciary Committee recognized that: 'The rule of review stated is that which is judicially recognized' (Sen. Com. Rep., Sen. Doc. No. 248, p. 36)" and "In the report of the House Judiciary Committee, it was stated under Section 10: 'This section requires adequate, fair, effective, complete and just determination of the rights of any person in *properly invoked* proceedings.' (*id.*, p. 275)" (emphasis added).

guage of Section 10(c) to its present form, explained the purpose of the change as follows (S. Doc. No. 248, 79th Cong., 2d Sess., p. 289, fn. 21):

> The change is made to clarify the provision by making specifically the language of the bill the explanation given in the Senate Committee report (p. 27). It should be noted that section 8(a) permits agencies to provide by rule for appeals to them from initial decisions of examiners. That provision, as well as this provision of section 10(c), would authorize an agency to adopt rules requiring a party to take a timely appeal to the agency before resorting to the courts. *A party cannot willfully fail to exhaust his administrative remedies and then, after the agency action has become operative, either secure a suspension of the agency action by a belated appeal to the agency, or resort to court without having given the agency an opportunity to determine the questions raised. If he so fails he is precluded from judicial review by the application to the time-honored doctrine of exhaustion of administrative remedies.* * * * [Emphasis added.]

Similarly, Senator McCarran, the principal Senate proponent of the bill, stated in response to a question (S. Doc. 248, 79th Cong., 2d Sess., p. 311):

> * * * in answer to the first part of the Senator's question, namely where a review is precluded by law—we do not interfere with the

> statute, anywhere in this bill. Substantive law, law enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. We were not setting ourselves up to abrogate acts of Congress. [24]

In the same vein are the statements of Congressman Walter, the principal proponent of the bill in the House. In his analysis of the bill in the House, he stated that Section 10(b) "does not disturb special proceedings which Congress has provided" and further that the provision of Section 10(c) "are technical but involve no departure from the usual and well-understood rules of procedure in this field" (*i.d.,* at 369). See also *id.,* at p. 374 (statement of Representative Gwynne); pp. 229-230 (statement of the Attorney General); also *supra,* pp. 43-44.

D. THE COURT OF APPEALS ERRONEOUSLY EXERCISED AN ADMINISTRATIVE FUNCTION IN INVALIDATING THE CONDITION ON WHICH THE COMMISSION HAD PREDICATED ITS APPROVAL OF THE MERGER

Finally, the ruling below is erroneous for the further reason that, since its effect is to leave the merger outstanding without the condition, the Court of Appeals thereby infringed upon the administrative functions of the Commission, in violation of the long-settled principle most recently

[24] See also *id.,* at p. 307.

reiterated in *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 20-21, that it is for the agency, not the reviewing court, to determine whether the agency's approval should stand if a condition of the approval is stricken as unlawful.[25]

In the *Idaho Power* case, the Commission had issued a license for the construction and operation of a hydroelectric project on the condition, among others, that the licensee permit the transmission over its lines of power generated at government-owned power plants. The Court of Appeals, holding that the Commission had no authority to impose the condition, struck out the condition and in effect directed the Commission to grant the license without the condition. This Court reversed, pointing out that the decision by the Court of Appeals that the license should issue without the condition constituted an usurpation of the administrative function (344 U.S. at 20). "The nature of the determination," this Court stated (*id.* at 21), "is emphasized by § 10(a) which specifies that the

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[25] Accord: *Federal Trade Commission* v. *Morton Salt Co.,* 334 U. S. 37, 55; *Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608, 612-614; *Addison* v. *Holly Hill Co.,* 322 U. S. 607, 618-619; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 145; *Tank Car Corporation* v. *El Dorado Terminal Co.,* 308 U. S. 422, 432-433; *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, 373-374; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District,* 304 U. S. 295, 301; *Federal Trade Commission* v. *Royal Milling Co.,* 288 U. S. 212, 218; *Southern Ry. Co.* v. *Tift,* 206 U. S. 428, 437-438; *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 444, 448; cf. *Far East Conference* v. *United States,* 342 U. S. 570, 574-5.

project adopted 'shall be such as in the judgment of the Commission will be best adopted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses.' Whether that objective may be achieved if the contested conditions are stricken from the order is an administrative, not a judicial decision.''

Similarly, in the present case the determination whether to authorize the merger and on what conditions is clearly an administrative function of the Power Commission. Section 7(e) of the Natural Gas Act, *infra,* pp. 56-57, explicitly provides:

> Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or *acquisition* covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or *acquisition,* to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. *The Commission shall have the power*

> *to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require* (emphasis added).

It was therefore for the Commission, not the Court of Appeals, to decide whether the merger should be allowed to stand if the challenged condition were excised.

In addition, the circumstances surrounding the imposition of the condition are, as we have already indicated, very significant. The condition was imposed by the Commission in the prior merger proceeding. During that proceeding the Commission was troubled by the possibility that the merger, if approved, might result in Colorado's gas customers having to bear losses suffered by Colorado in conducting the gasoline operations. Since this possibility raised a substantial obstacle to approval of the merger, Colorado, to obviate the objection, suggested to the Commission that its approval be conditioned on the exclusion of these losses, if any should be incurred, from the costs of service (R. 289-290). Such a condition. Colorado represented, "would adequately protect ultimate consumers" (R. 289). The Commission accordingly approved the merger on this condition (among others) with the condition obviously being an important element relied on by the Commission in concluding that the merger, as so conditioned, would be in the public interest. In these circumstances, it was plain error for the court below to strike down the condition while permitting the merger itself to remain in effect, for here, as in *Idaho Power,* the determination whether the objectives of Section 7 are achieved with the condition stricken is an administrative, not a judicial, matter.

A superficial argument may perhaps be made that the *Idaho Power* line of cases supports the court's ruling rather than the Commission's position. In these cases, this Court has held that, once the error of law has been laid bare, the appropriate procedure is to remand the case to the administrative agency for consideration in the light thereof. This procedure, it may be said, has been followed here, for the Court of Appeals remanded the case to the Commission for consideration in the light of the invalidity of the condition. But such an argument ignores the critical fact that the condition was imposed in another proceeding, not in the rate investigation, and that the remand here was merely to enable the Commission to make the appropriate adjustments in its rate order, not to determine whether to approve the merger without the condition. [26] Since this proceeding is not a re-

[26] Indeed, the merger order had long since become final and the merger there approved has been accomplished. To reconsider the propriety of the merger without the condition would, should the Commission determine that the merger would not be in the public interest without the condition, raise both legal and practical problems relating to the dissolution of the merger.

view of the merger order and the court below was without authority to direct reconsideration of that order, the court below should properly have accepted the merger condition without question, as had Colorado as well as the Commission, and reviewed the Commission's rate order on that basis.[27]

Nor is there merit to Colorado's claim (Br. in Opp., p. 16) that it could not have sought direct review of the merger condition because it first became ripe for judicial consideration in the rate investigation. As shown *supra*, pp. 22-23, 51, Colorado was in no position to seek review of the condition; having suggested the condition to the Commission and thereby having more than acquiesced, Colorado was in effect estopped from challenging the condition. *United States* v. *Hancock Truck Lines,* 324 U. S. 774, 779, 780; *Helvering* v. *Wood,* 309 U. S. 344, 348, 349.[28] And if Colorado were not so estopped, the condition would have been subject to

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[27] It is generally agreed that where there is an exclusive statutory provision for direct review, representing "a distinctive formulation of the conditions under which resort to the courts may be made" (*Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159), collateral attack upon the agency's action is not permitted. See, *e.g.*, *Louisville Gas & Electric Co.* v. *Federal Power Commission,* 129 F. 2d 126 (C.A. 6); *Woods* v. *Kaye,* 175 F. 2d 886 (C.A. 9); *Miles Laboratories* v. *Federal Trade Commission,* 140 F. 2d 683, 684 (C.A. D.C.), certiorari denied, 322 U. S. 752.

[28] It is an established principle of law that a party who has accepted a grant, privilege, or license, including conditions imposed by the administrative agency, cannot attack the conditions after having put into effect and taken the advantages of the grant, privilege, or license. See fn. 10, *supra*, p. 23.

direct review in the merger proceeding for the same reasons that the condition involved in the *Idaho Power* case was ripe for immediate direct review; consequently, Colorado's failure to seek such review resulted in the Commission's action being conclusive and binding in this subsequent rate proceeding.

In *Idaho Power,* as here, the condition was not in a sense immediately operative since the transmission lines which were to carry the government power had not yet been constructed; here, the loss from gasoline operations was not to be excluded until its existence was determined in the rate investigation. Yet the fact that the provisions were tied in with, and imposed as conditions of, the approval of the Commission—the benefits of which were to accrue to the company immediately—made it imperative in *Idaho Power,* as here, that any question as to the validity of the condition (and of the approval based thereon) be raised and passed upon in a direct review. Any other result would place those to whom the Commission has given a conditional approval in the position, which Colorado is seeking to establish for itself here, of being able to reap the full benefits of the approval while reserving the right to attack the condition at some future time when it might no longer be feasible, as a practical matter, for the Commission to withhold its unconditional approval.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed to the extent that it invalidates the condition pursuant to which the Commission excluded from cost of service Colorado's losses from the gasoline operations.

Respectfully submitted,

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OCTOBER, 1954.

APPENDIX

1. The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part:

* * * * * * *

SEC. 7.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *.

* * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the

Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * * * *

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State municipality or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. * * * No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act 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. * * * 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. * * *

2. The Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 *et seq.,* provides in pertinent part:

~~SEC. 10. * * * * * *~~

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion --
* * * *

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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