In all other respects save this the findings and determinations by the Commission are approved.

The order of the Commission is, therefore, REVERSED and the cause is REMANDED for further proceedings in accordance with the views expressed in this opinion.

NUMBER 4541

BRATTON, Circuit Judge, concurring.

I concur in the reversal of the order of the Commission. But I think the reversal should also rest upon the additional ground that the action of the Commission in omitting the intermediate decision procedure constituted error. Where an examiner is named in a proceeding of this kind and he conducts the hearing, the intermediate decision procedure is the general rule; and its omission is the exception. The omission of the intermediate decision procedure is warranted only where the Commission makes a well founded and sustainable finding that due and timely execution of the functions of the Commission imperatively and unavoidably so requires. 5 U. S. C. A. § 1007(a).

The Commission found that due and timely execution of its functions imperatively and unavoidably required it to omit the intermediate decision procedure in this proceeding. But that primary finding was predicated upon two subsidiary findings. One of such subsidiary findings was that the proceeding had been in progress for a regrettably long period of time. But the Commission expressly stated in connection with such finding that the long delay was not attributable to any one particular party. And the other subsidiary finding was that in view of the fact that the Commission had no power of reparation with respect to past rates, which might or might not prove to be excessive, it appeared that the record in the proceeding presented the kind of situation requiring the omission of the intermediate decision procedure as provided in the Administrative Procedure Act. But in every proceeding of this kind the Commission does not have the power of reparation in respect to past rates which are found to be excessive. Virtually all of the testimony was given by expert witnesses. But their credibility and the weight to be given to their testimony were matters for consideration in resolving conflicts in the testimony respecting basic facts upon which the outcome of the proceeding depended at least in part. The examiner saw the witnesses and observed their demeanor while testifying. He was in the best position to determine their credibility and weigh their testimony. There are no underlying facts apparent upon the face of the record to support the finding that due and timely execution of the functions of the Commission imperatively and unavoidably required the

omission of the intermediate decision procedure. And in the circumstances, the omission of such procedure was prejudicial error.

JUDGMENT

Twenty-Ninth Day, September Term, Thursday, October 29, 1953. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the Federal Power Commission and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the order of the Federal Power Commission in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Federal Power Commission for further proceedings in accordance with the views expressed in the opinion of the court.

Filed. United States Court of Appeals Tenth Circuit. Nov. 25, 1953. ROBERT B. CARTWRIGHT, *Clerk*.

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 4541

COLORADO INTERSTATE GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

AND

CITY AND COUNTY OF DENVER, AND PUBLIC UTILITIES COMMISSION OF COLORADO, INTERVENORS

PETITION FOR REHEARING OF FEDERAL POWER COMMISSION, RESPONDENT

The Federal Power Commission, Respondent, respectfully petitions this Court for rehearing of that part of the Court's opinion and judgment entered pursuant thereto filed October 29, 1953, holding that the Commission's exclusion from the cost of service of the loss on gasoline operations was improper notwithstanding the condition of the merger order that such loss was not to be considered as part of the cost of service to be borne by the consumers in any Commission rate proceeding. The Court said (typewritten opinion, p. 22):

> * * * 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.

GROUNDS FOR REHEARING

The Federal Power Commission seeks rehearing on the following grounds:

1. The Court could not consider the validity of the condition of the merger order providing for the exclusion of any loss on gasoline operations from the cost of service and the exclusion of the loss pursuant to that condition, since objection to such exclusion had not been raised by Petitioner as required by Section 19 (b) of the Natural Gas Act.

2. The validity of the merger condition providing for the exclusion of any loss on gasoline operations and the exclusion of the loss pursuant thereto were not open to collateral attack or to review under the "end result" test as assumed by the Court.

3. Assuming, *arguendo*, that the basis for the exclusion of the loss on gasoline operations was before the Court under the "end result" test, the Court erred in holding that the "end result" of the Commission's rate order was unjust and unreasonable.

ARGUMENT

Before discussing the three grounds set forth above, the Commission respectfully submits that a petition for rehearing is particularly appropriate in this instance because the matter decided adversely to the Commission by the Court was raised by the Court on its own motion. No objection to the exclusion of the loss on gasoline operations from cost of service was raised by Petitioner at any time before the Commission during the administrative rate proceedings or before the Court. Accordingly, the issue was never briefed or argued by any party to the proceeding and was not the subject of inquiry at the oral argument on the part of the Court.

1. *This Court could not, sua sponte, consider the propriety of the exclusion of the loss on gasoline operations from cost of service.* Section 19 (b) of the Natural Gas Act (Act), (52 Stat. 831; 15 U. S. C. 717r (b)), under which the present review proceedings were instituted by Petitioner and which is the sole basis for this Court's jurisdiction provides, in pertinent part, as follows:

> * * * 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 * * *,

There is no question that Petitioner did not object to the condition of the merger order in this case or to the exclusion from the cost of service of the loss, if any, on gasoline operations. Indeed, Respondent stated, without challenge, to this Court, at page 34 of its brief:

> * * * With respect to the computation of the loss on gasoline operations, Petitioner does not challenge the propriety of such deduction if there is a loss on the gasoline operations. (See also: Resp. Br. pp. 54, 55; Pet. Br. p. 29, Eighth Point).[1]

Petitioner objected only to the method of allocation employed by the Commission in determining that there was a loss on the gasoline operations. The Court overruled Petitioner's objections in this respect and, having done so, we respectfully submit that review was at an end so far as the loss on gasoline operations enters into review of the rate order. For the prohibition of Section 19 (b), quoted above, which bars a petitioner from urging an objection in the court not previously raised on application for rehearing before the Commission, also bars consideration of the objection by the Court at the behest of petitioner or on the Court's own motion. In fact, the prohibition of Section 19 (b) is directed to the Court: "No objection * * * shall be considered by the court * * *."

The use of the word "shall" negates any concept of a discretionary power in the Court, on its own motion, to consider an objection not previously raised by the Petitioner. And this is the case even though Section 19 (b) further provides that an objection raised by a petitioner for the first time on review may be considered by a court if there was "reasonable ground for failure so to do." *Section 19 (b)*. Here no finding of "reasonable ground for failure so to do" was made or could be made by the Court. Petitioner accepted the validity of the merger condition and the treatment of the loss on the gasoline operations pursuant thereto.

In these circumstances, the Court had no power to pass on the issue. *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 324 U. S. 635, 649 (1945); concurring opinion, pp. 650-651; *American Power & Light Company* v. *Securities and Exchange Commission,* 141 F. 2d 606, 612-613 (C. A. 1, 1944) *affirmed,* 329

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[1] Pursuant to the stipulation of all parties and approved by the Court, page references herein to the record are to the pages of the record as certified by the Secretary of the Commission to this Court. Citations to the record will be referred to in this petition as "R." followed by the page number. References to Petitioner's Brief to this Court will be referred to as "Pet. Br.", and references to Respondent's Brief will be referred to as "Resp. Br.", followed by the page number in each instance.

U. S. 90 (1946); *National Labor Relations Board* v. *Cheney Calif. Lumber Co.*, 327 U. S. 385 (1946); *United States* v. *Hancock Truck Lines, Inc.*, 324 U. S. 774 (1945); *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 155 (1946).

In the *Panhandle* case, *supra*, the natural-gas company's failure to raise the objection in an application for rehearing before the Commission was held to preclude court review under Section 19 (b), absent a showing of "reasonable ground for failure so to do." The Supreme Court did not consider that the issue nevertheless remained open on its own motion.

The Supreme Court's decision in the *Cheney* case, *supra*, expressly denies authority to consider an issue not raised by the parties. In that case the lower court struck out a paragraph of a Labor Board order to which the company had raised no objection when the proceeding was before the Labor Board. Although the review provisions of the National Labor Relations Act are similar in intent to those involved here, the Labor Board interposed no objection to the lower court's action and made no claim that the failure to make timely objection to the Labor Board barred court consideration of the issue. Notwithstanding this, the Supreme Court raised the point itself, because the failure to make timely objection was basic to the court's jurisdiction to review and therefore "decisive" of the case, saying that the review provisions were a "limitation which Congress has placed upon the power of courts to review orders of the Labor Board" (327 U. S. at 388).

So, also, in the *Hancock* case, *supra*, "despite the fact that, neither on brief nor in oral argument, did the appellants' counsel press for reversal on" the ground that appellee had not objected to the matter on which the lower court's action had been based, the Supreme Court said (324 U. S. at 779):

> * * * we think the district court committed reversible error, *of which we must take note*, in passing on the merits of the case made by the appellee [emphasis supplied].

It "was manifestly improper," the Court held (324 U. S. at 779-780), "to reverse the Commission's order in respect of a provision therein as to which the suitor had advised that body it no longer objected but acquiesced."

These cases emphasize the fact that the objection we raise under this point is not a technical one. They show that the objection is so fundamental that the courts have, *sua sponte*, noticed the prohibition on their jurisdiction to review an issue where the prerequisites for review have not been met.

Indeed, even where the review provisions of the statute did not contain a limitation such as is involved in Section 19 (b) of the Act,

the Supreme Court said in the *Aragon* case, *supra* (329 U. S. at 154-155):

> Nor can we accept the arguments of the majority of the Court of Appeals that since negotiations between the companies and the workers were carried on in San Francisco and Seattle, the dispute could not be said to be "at" the Alaskan establishments as required by the statute. So far as we are able to determine, this issue was injected for the first time by the opinion of the majority of the Court of Appeals. The contention does not seem to have been raised or pressed by respondents up to that point. The responsibility of applying the statutory provisions to the facts of the particular case was given in the first instance to the Commission. 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.

2. *The Court's reversal constitutes a collateral attack and review of the merger condition, since neither the merger condition nor the treatment of the loss on gasoline operations was before the Court under the "end result" test.* Petitioner had ample opportunity to secure judicial review of the order authorizing the merger including the conditions thereto attached. Having failed to seek judicial review of that order, Petitioner itself could not collaterally attack the merger order in this proceeding, particularly where, as here, it was and is retaining the benefits of the merger. 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" (*F. P. C.* v. *Pacific P. & L. Co.*, 307 U. S. 156, 159 (1939)),[2] court decisions have made it abundantly plain that collateral review will not be permitted not only of questions as to the merits of the order (*Louisville Gas & Electric Co.* v. *F. P. C.*, 129 F. 2d 126 (C. A. 6, 1952); *Woods* v. *Kaye*, 175 F. 2d 886 (C. A. 9, 1949); *Miles Laboratories* v. *F. T. C.*, 140 F. 2d 683, 684 (C. A. D. C., 1944), *certiorari denied*, 322 U. S. 752 (1944)), but of constitutional questions (*Yakus* v. *United States*, 321 U .S. 414 (1944); *United States* v. *Ruzicka*, 329 U. S. 287 (1946); *LaVerne Co-op. Citrus Ass'n.* v. *United States*, 143 F. 2d 415 (C. A. 9, 1944)), and of questions of the administrative agency's jurisdiction (*Lichter* v. *United States*, 334 U. S. 742 (1948); *Piuma* v. *United States*, 126

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[2] The Supreme Court was there speaking of Section 313 (b) of the Federal Power Act which is the same as Section 19 (b) of the Natural Gas Act, except for the substitution in the first sentence of "natural-gas company" for "licensee or public utility."

F. 2d 601 (C. A. 9, 1942), *certiorari denied*, 317 U. S. 637 (1942)). See also: *Ewen* v. *Peoria & E. Railway Co.*, 78 F. Supp. 312, 332-333 (D. C. N. Y., 1948), *certiorari denied*, 336 U. S. 919; *United States* v. *Railway Express Agency*, 101 F. Supp. 1008, 1012 (D. C. Del., 1951). By parity of reasoning, the order and conditions therein were also immune from attack and collateral review by the Court.

The force of this argument, and of those presented under point 1, above, is not dissipated by the proposition that the test of a rate order when challenged is its "end result." In the first place, this Court could not conclude that the "end result" is unjust and unreasonable without rejecting the basis for the disallowance—namely, the merger order condition (typewritten opinion, pp. 20-22). So that even under the "end result" test as applied by this Court the conclusion is inescapable that this Court collaterally reviewed and struck down the provisions of an order not before it and not open to collateral review.[3] In the second place, the "end result" of the rate order is not open to court review unless challenged, and then only to the extent that it has been challenged. Therefore, in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 605-606, the Supreme Court said:

> Hence, we cannot say as a matter of law that the Commission erred in including the production properties in the rate base at actual legitimate cost. That could be determined only on consideration of the end result of the rate order, *a question not here under the limited review granted the case.* [Emphasis supplied.]

In the instant case, it is clear that the "end result" of the rate order was not challenged because of the treatment of the loss on gasoline operations. The only "end result" challenge was limited to the proposition that the failure to include gas produced by Colorado in the Panhandle Field at its "value" brings about an unjust and unreasonable "end result" as a matter of law—a contention rejected by the Supreme Court in *Colorado Interestate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 605-606 (1945). This Court, therefore, could not because of the "end result" test, *sua sponte,* hold the "end result" unjust and unreasonable because of the

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[3] We draw the Court's attention to the fact that in a direct review of the merger order this Court could only hold that the merger condition was invalid, but could not direct the Commission to approve the merger without the condition. *F. P. C.* v. *Idaho Power Co.*, 344 U. S. 17 (1952). The Commission then would have to determine whether to authorize the merger at all. The result of the Court's collateral review of the merger condition is, however, to grant approval of the merger without the condition.

treatment of the loss on gasoline operations and thereby avoid the prohibition of Section 19 (b) and the fact that it collaterally reviewed the merger order.

3. *The Court's reversal of the Commission's disallowance of the loss on gasoline operations is not supported by the "end result" test.* We have argued that the Commission's disallowance of the loss on gasoline operations and the basis therefor were not before the Court in this review proceeding notwithstanding the "end result" test. For purposes of this point, we assume, however, that the disallowance of the loss was open to examination by the Court in this review proceeding by reason of the "end result" test.

On that assumption, we agree that "the important and deciding factor in rate hearings is the end result" and that if "* * * 'the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry * * * is at an end' " (typewritten opinion, pp. 20-21). But the Court erroneously concluded 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."

In reaching this conclusion, the Court has disregarded two important qualifications to the general proposition that from the "investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business." *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603 (1944). These are (a) that the "rate-making process under the Act, *i. e.*, the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests," and (b) that there may be conditions under which more or less might be allowed the investor without producing an unjust and unreasonable end result (*Ibid.*).

The record in this case shows that the disallowance of the loss on gasoline operations represents an appropriate "balancing of the investor and consumer interests" and that the disallowance did not impair the investor's confidence in the financial integrity of Colorado.

(a) *Exclusion of the loss on gasoline operations from cost of service represents a proper "balancing of the investor and consumer interests."*

Under the plan for the merger of the properties of Canadian River Gas Company (Canadian River) into Colorado, the liquid hydro-carbons in the gas to be produced by Colorado from the West Panhandle Field were to be transferred to Southwestern Development Company or its nominee. The revenues derived from the sale of natural gasoline were, prior to the merger, applied in reduction of the cost of gas purchased by Colorado from Canadian River and consequently resulted in reduced costs of service to con-

sumers. The record shows (R. 2562) that on Petitioner's own estimate Southwestern's nominee, Westpan Hydrocarbon Company, received $1,428,780 for the test period 1952, and that this entire amount, absent the merger, would redound to the benefit of the rate payers. By the merger, however, more than half of the annual revenues from the sale of natural gasoline was to be diverted to Southwestern's nominee, and Colorado was to be obligated to process the liquid hydro-carbons for Southwestern's nominee. This, it appeared, might require the consumers to bear the full cost of the processing operations without the commensurate benefits of the full revenues derived from such operations.

From the investor point of view, however, advantages appeared to exist in the merger in that, *inter alia*, Colorado would acquire legal title to "very valuable physical assets", the original cost of which, after depreciation, was $10,979,522, and included three trillion cubic feet of natural gas reserves; the corporate structure of the Panhandle-Denver pipeline system would be greatly simplified; and financing of expansions required by Colorado would be facilitated (R. 2738-2740).[4]

Viewing the consumer's interest in the revenues from the gasoline operations and the advantages of the merger from the investor point of view, the Commission found that the merger was in the public interest if the consumers could be protected in some measure against the loss of the benefit of the full revenues derived from the gasoline operations. The Commission thereupon undertook to permit a merger to be effectuated which had advantages while, at the same time, balancing the investor and the consumer interests. The merger condition providing any loss on the gasoline operations should not be considered as a cost of service to be borne by the rate payers was designed to bring about that result and "to avoid any possible doubt as to the full protection to the gas consumers dependent on Colorado" (R. 2740).

Not only was this condition acceptable to Colorado's responsible

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[4] Under a contract between Canadian River and Colorado, Colorado was entitled to receive gas from Canadian River's Panhandle reserves, at cost, so long as there was gas available which Colorado determined as profitable for it to purchase under the cost contract, subject to certain priorities in favor of Texas markets (R. 2727). The bringing of gas to the Denver markets from the Panhandle Field was, in fact, one operation although carried on by two corporations under a "cost" contract whereby Canadian River could not make a profit. Under such an arrangement, however, Colorado could not pledge Canadian River's properties as security for funded debt, although Colorado was required to put up the funds for Canadian River's operations (R. 2726).

officers and accepted in writing by them (R. 4608), but the condition stems from an undertaking proposed by Colorado's counsel during the course of the merger proceedings before the Commission (R. 2772; see Appendix A to this petition).

While this Court, apparently, views Colorado's assent to the merger on this condition as irrelevant because, the Court asserted (typewritten opinion, p. 21), Colorado is conducting a business affected with a public interest and is not free to contract as it chooses, the Supreme Court in *Interstate Railway Company* v. *Massachusetts*, 207 U. S. 79 (1907), held that the acceptance of a charter subject to a statutory condition to transport school children at half price prevented a public utility from complaining that the condition was unconstitutional on the ground that the public utility was required to transport the school children at less than fair compensation. Cf. *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 562-566 (1945). In any event, as we show hereafter, the "end result" was not unjust and unreasonable.

Not to be overlooked in this connection is the effect of the Court's reversal. Colorado has its merger without the condition and consumers have the loss. In short, the Court's reversal, we submit respectfully, brings about an unjust "end result" and one which is inconsistent with a proper balancing of investor and consumer interests, whereas, as we are about to show, the Commission's balancing of investor and consumer interests does not impair the financial integrity of Colorado.

(b) *The exclusion of the loss on the gasoline operations from cost of service does not produce an unjust and unreasonable "end result."*

The evidence establishes that during the dependency of this rate proceeding before the Commission there was a public offering of Colorado's common stock. There was full disclosure to prospective investors, as appears from the record in this case (R. 2685, 2694), that the pending rate proceeding might involve a rate reduction approximating $3,000,000 and that the earnings available to investors, provided by a Commission rate order growing out of that proceeding, by reason of the condition of the merger, which was fully quoted in the prospectus, would bear the loss on the gasoline operations—that such loss would not be "considered as a cost of service to Colorado's natural-gas consumers" (R. 2685). Notwithstanding all this, the common stock was promptly oversubscribed. As this Court said (typewritten opinion, p. 34):

> 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.

And, it should be added, in the face of notice to the investor that the fair return allowed in the rate case would bear the loss on the gasoline operations.

These facts disclose that the investors did not appraise the condition of the merger order respecting treatment of a loss on gasoline operations as liable to impair the financial integrity or credit of Colorado. And that being the case, it cannot be said that the exclusion of the loss on gasoline operations from cost of service brought about an unjust and unreasonable "end result." Thus, while we fully agree that it is the responsibility of a regulatory commission to establish rates that are just and reasonable, the imposition of the condition and the rate order were in full accord with that responsibility.

Therefore, the Court's conclusion that the "end result" of the rate order is unjust and unreasonable is contrary to the evidence.

Conclusion

For each of the reasons assigned, the petition for rehearing should be granted and the opinion and judgment to the extent that the Commission's treatment of the loss on gasoline operations was reversed should be vacated, and the Commission's rate order should be vacated, and the Commission's rate order should be affirmed in all respects.

Respectfully submitted,

Willard W. Gatchell,
General Counsel,
Reuben Goldberg,
Jacob Goldberg,
Attorneys,

Counsel for Respondent Federal Power Commission.

I, Willard W. Gatchell, General Counsel, of the Federal Power Commission and its counsel in this case, do hereby certify that the foregoing petition is presented in good faith and not for purposes of delay.

Willard W. Gatchell,
General Counsel.

November 1953.

APPENDIX A

William A. Dougherty
James Lawrence White

Received Jun 9 1:07 PM '50 Federal Power Commission

Doughterty & White
Room 3020
30 Rockefeller Plaza
New York 20, N. Y.
Columbus 5-5180

JUNE 8, 1950.

Hon. Mon C. WALLGREN,
Chairman, Federal Power Commission,
Washington 25, D. C.

In re: Colorado Interstate Gas Company—Canadian River Gas Company—FPC Docket No. G-1326

MY DEAR CHAIRMAN: At the oral argument in the above matter the question arose as to whether or not rate payers ultimately receiving gas from Colorado Interstate Gas Company might have to bear an additional cost if at some future time the expense of processing liquid hydrocarbons (mainly, natural gasoline) exceeded the proceeds which Colorado Interstate Gas Company would receive under the plan of merger submitted in the application.

In order to remove this question, I was empowered to state to the Commission that in order to keep a rate payer from meeting this deficiency the Commission could condition the certificate of public convenience and necessity so as in effect to provide that such deficit would not be considered in determining reasonable rates. In other words, the stockholders of Colorado Interstate Gas Company would take the risk as to whether or not gasoline prices will go down. I also stated that we would furnish a proposal to meet the proposition. Accordingly, I submit herewith the type of condition which we believe could be incorporated in this Commission's order and would adequately protect ultimate consumers. Our proposed condition is as follows:

> If, as a result of carrying out the terms and conditions in the transaction proposed as a part of the merger of Canadian River into Colorado Interstate whereby rights to liquid hydrocarbons in place are granted to Southwestern Development Company and whereby Colorado Interstate is to receive 50% of the gross proceeds from the sale of certain liquid hydrocarbons and 15% of the net revenue to be received by Colorado Interstate from the operation of the Fritch Natural

Gasoline Plant of Texoma Natural Gas Company, the amounts chargeable as Residuals Operation Expenses (Account 747.2) and Residuals Maintenance Expenses (Account 747.3) exceed the amounts to be paid to Colorado Interstate pursuant to said transaction which is accounted for as Residuals Produced (Account 747.1) and Revenue from Processing Natural Gas (Account 617) then and in that case in any proceeding in which the effective or proposed rates of Colorado Interstate are under inquiry the amount by which said expenses exceed the amount so received and accounted for as Residuals Produced and Revenue from Processing Natural Gas shall not be considered as a cost of service.

Copies of this proposal are being sent to the other Commissioners as well as to Staff Counsel and Counsel for intervenors.

Respectfully yours.

(S.) Wm. A. Dougherty.

WAD-JIM: dl

Order Granting Petition for Rehearing of Federal Power Commission

Twentieth Day, November Term, Tuesday, December 8, 1953. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of the Federal Power Commission for a rehearing.

On consideration whereof, it is now here ordered that said petition for rehearing be and the same is hereby granted, and that the judgment of this court entered on October 29, 1953, be and the same is hereby vacated.

It is further ordered that Colorado Interstate Gas Company file a brief on or before January 4, 1954, responding to the petition for rehearing and brief of the Federal Power Commission.

It is further ordered that this case be set for hearing on January 7, 1954.

Order: Cause Argued and Submitted on Rehearing

Thirty-Ninth Day, November Term, Friday, January 8, 1954. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on for rehearing and was argued by counsel, William A. Dougherty, Esquire, appearing for petitioner, J. Goldberg, Esquire, appearing for respondent.

Thereupon this cause was submitted to the court.

Filed. United States Court of Appeals Tenth Circuit. Nov. 24, 1953. Robert B. Cartwright, Clerk.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 4541

COLORADO INTERSTATE GAS COMPANY, PETITIONER,

vs.

FEDERAL POWER COMMISSION, RESPONDENT,

CITY AND COUNTY OF DENVER, and PUBLIC UTILITIES COMMISSION OF COLORADO, INTERVENORS

CROSS-PETITION FOR REHEARING

Colorado Interstate Gas Company, Petitioner in the above entitled matter, being informed that the Federal Power Commission (hereinafter referred to as "Commission") has or will file a petition for rehearing, by its counsel prays that in the event this Court grants the petition for rehearing filed or to be filed by the Commission, that a cross-order be entered to rehear those portions of this Court's decision and opinion set forth in the grounds and reasons given below.

GROUNDS FOR GRANTING REHEARING

Ground One

The Court erred in determining that the omission of the intermediate decision procedure was justified in the circumstances of this case. In determining the intermediate decision issue the Court should recognize that more is required than merely a determination whether discretion has been abused. The Court also should recognize that credibility was involved in this proceeding and that Petitioner and the Court were deprived of an important part of the record.

The substance of the Court's holding on the intermediate decision point is that the Commission may in its sound discretion omit the intermediate decision, and that such exercise of discretion was justified in the case at bar. Also that there were no issues of credibility, but that rather the question was of the weight to be accorded to the opinions of expert witnesses.

A. More Is Required Than Merely A Determination Whether Discretion Has Been Abused

By the Administrative Procedure Act, Congress demonstrated a purpose to impose upon reviewing Courts a responsibility greater than that which had always theretofore been recognized. (*Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474, 490-491, (1951)). Even in rule making proceedings, the Administrative Procedure Act does not lodge in an administrative agency an unfettered discretion to omit or not to omit the intermediate decision. Rather such omission shall be made only if there is a finding upon the record that (1) the due and (2) timely execution of the agency's functions (3) imperatively and (4) unavoidably requires the omission. Petitioner does not intend at this stage of the case to reargue all of the requirements and conditions precedent to omission. The Court, however, in deciding that the omission was proper, noted that the reasons assigned by the Commission for its action was that first there was good reason to believe that the rates being collected were excessive; that the case had been pending for three years; and that it was to everyone's benefit that the matter be speedily adjudicated. Petitioner respectfully challenges this sufficiency under the Administrative Procedure Act.

In the first place, the Commission had determined that the lapse of four years between the instigation of the proceeding and the conclusion of hearings was the fault of no one. If it takes such a period of time under administrative processes for a case to go through hearing, that is an inherent difficulty of the process and not one which should add to the authority of the agency to dispense with statutory safeguards. To be rid of harassing delay is never an excuse for avoiding procedural requirements (*Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 305 (1937); *Inland Steel Co.* v. *National Labor Relations Board*, 109 F. 2d 9, 21 (C. A. 7, 1940)). As a practical matter, an administrative agency which did not wish to observe the ordinary statutory process of an intermediate decision could avoid such process by deliberate delay and then make a finding such as was made in the case at bar and thus lift itself by its own boot straps above a Congressional mandate. Policywise it is a dangerous doctrine which would permit an avoidance or evasion of that which the law would seem to provide.

Secondly, that the Commission believed petitioner's rates were excessive is not a sufficient ground for the omission. A determination of the excessiveness of petitioner's rates was to be a definitive finding made after all procedural safeguards had been observed. For the Commission to assume to make a finding in such respect

and thus avoid its responsibilities in regard to an intermediate decision, would be an arrogance of rights which finds no justification in law, let alone in the Administrative Procedure Act. It cannot be questioned, as this Court has recognized, that the omission of the intermediate decision is to be an exceptional and indeed perhaps a rare thing. There must be elements of evidence aside from the ultimate finding to be made which show imperativeness and unavoidability. Examples of such imperativeness and unavoidability were given at the oral argument in this matter. They, conceivably, could be instances relating to public safety, to war, or possibly to the unavailability of the examiner. The words used by Congress were strong words indeed, and must have been used with a deliberate intent to see that the broad Congressional purpose of improving the fairness of the administrative process was carried out.

The Court did not deal with the fact that the Commission was required also to have substantial evidence to sustain the findings which it assumed to make (Administrative Procedure Act § 10, (e), 5 U. S. C. § 1009 (e)). The Commission in effect sought to bolster its position by referring to the fact that it did not have reparation authority. Such lack of authority cannot grant additional authority. The remedy for the lack of authority is an address by the Commission to the Congress (*Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 508, 514, 515-516 (1949)). How was it possible for a finding to be made at that stage of the case that there was "an unjust exaction was being demanded from the gas users" as the Court recites in its opinion? Petitioner respectfully states to the Court that if such a finding had been made before the evidence was presented to the Commission, there could be no substantial evidence to support the Commission's conclusion. Also such action by the Commission is analogous to the avoidance of presentment to and indictment by a grand jury before a criminal prosecution because a tribunal which is to be the ultimate trier of facts decides that the culprit is guilty.

As Judge Bratton, in his special concurrence recognized, omission is "warranted only where the Commission makes a well-founded and sustainable finding that due and timely execution of the functions of the Commission imperatively and unavoidably so requires". Judge Bratton's opinion states the problem very well and notes particularly that if a lack of reparation authority is an excuse for omitting the intermediate decision, then such decision could be omitted in every rate proceeding before the Commission, since it has no reparation authority in any instance.

The Court also seeks support in two cases for its decision here. The first is *Kenny* v. *United States*, 103 F. Supp. 971 (D. C. N. J., 1952). In that case the Court noted that no objection had been made to the omission of the intermediate decision and that if there

were error it was merely a procedural one. The Court in the *Kenny* case laid particular stress upon this fact. Of course, a procedural irregularity can be waived (*United States, et al. v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952)).

The Court also cites *Alabama-Tennessee Natural Gas Company* v. *Federal Power Commission*, 203 F. 2d 494 (C. A. 3d, 1953). In that case there appeared to be reasons which were certainly more cogent than the ones in the case at bar for omitting the intermediate decision since irreparable harm could have resulted in certain of the gas company's customers being unable to meet financing commitments (see Petitioner's "Motion for Leave to File Reply to Statement of Respondent and Reply to Statement" filed with this Court, pp. 8-10). Also, in the *Alabama-Tennessee* case there was an implied consent to the omission of the intermediate decision because of the history of the case. Petitioner submits to the Court that these two cases do not support the Court's conclusion.

B. Credibility Was Involved in This Rate Proceeding

The second main ground for the Court's affirmance of the omission of the intermediate decision was its conclusion that credibility was not an issue. The Court does this on the understandable basis that all that is submitted in a case of this type is statistical data from which inferences and conclusions are to be drawn. Petitioner respectfully submits to the Court that such is not the case. One prime example was given to this Court where credibility was involved. The most important Commission Staff witness in this proceeding was determining what were normal expenditures for the Company. He as an expert was drawing the inferences and upon such determinations the Commission was asked to act. During such inquiry this witness was most hesitant and reluctant, even to the point of admonishment from the Trial Examiner (R. 1260-1262, Print 292-294). This is merely one example.

Going to the Commission's opinion and order which was brought here for review, it is evident that the Commission weighs the recommendations of witnesses. For instance, the Commission would not allow a projected 4% wage increase which Company witnesses concluded should be allowed (R. 4577, Print 86). The same is true of employee benefit proposals (R. 4578, Print 86) and other like items. The Commission allowed additional royalties to the Company as recommended by a Company witness though not on the Company's books (R. 4588-4589, Print 91-92). The Commission then went on to take up Staff recommended adjustments and noted that the Staff eliminated certain items of expenses as nonrecurring. In regard to these adjustments the Commission followed its Staff. In following its Staff's recommendations it goes

without saying that the Commission attached considerable importance to them (R. 4590-4591, Print 92-93).

On the all important question of the 5¢ wellhead value for income tax depletion the Commission followed its Staff's recommendation (R. 4593-4598, Print 94-97). In the all important question on the loss on gasoline operations the Commission did not make an independent determination but followed its Staff's recommendations (R. 4608-4619, Print 102-112). These matters occur from perusal of the Commission's opinion and order in this case. The Staff recommendations undoubtedly are of great importance to the Commission. Whether this is right or wrong Petitioner does not argue here. It is proper, however, that such recommendations be subject to the screening of the man who heard the recommendations made from the witness stand. Except in very unusual circumstances, if the recommendations of Staff are not evaluated by observance of the witness' demeanor, their weight and credibility are never thrown into the balance. This Court recognized in its opinion that the weight to be accorded to a witness' opinion is important, although it decided that credibility was not involved. Petitioner submits that the weight to be accorded a witness' opinion may well be affected by evident reluctance to testify and an evident lack of confidence in the recommendations made. As a matter of fact, credibility of a witness and the weight to be accorded to his opinion are practically inseparable labels. This certainly appeared to be recognized by the Supreme Court in the *Universal Camera* case (*supra*) where the Court held (at pp. 496-497) as follows:

> "The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is 'substantial' ".

C. This Petitioner and This Court Were Deprived of an Important Part of the Record by the Omission of the Intermediate Decision

As the Supreme Court recognized in *Universal Camera Corporation* v. *National Labor Relations Board* (340 U. S. 474 (1951)), the report of a trial examiner is an important part of the record from which substantiality of evidence may be gauged. Recently, this was recognized by the Eighth Circuit when it reversed a Federal Power Commission rate determination order on account of the findings and lack of findings on the subject of rate return. In determining that the Commission's findings were inadequate, the

Court matched against the Commission's determination: relevant testimony, the finding of the presiding examiner, the testimony of the Commission's expert witness, and the fact that no witness testified as to a rate of return as low as that which the Commission found (*State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F. 2d 690, 722-723 (C. A. 8th, 1953)). It is apparent that the Eighth Circuit treated the finding of the examiner as a matter of importance commensurate with the evidence of record. Here this Petitioner and this Court would never have such valuable aid in determining reviewability and thus are deprived of a very real "tool of decision".

This fact emphasizes the importance of the intermediate decision and the fact that it should not be dispensed with except for the strongest possible reasons based upon adequate evidence.

Ground Two

The Court erred in not reversing the Commission's determination on rate of return since the Commission did not make adequate factual findings but mechanically followed a mathematical formula without exercising its judgment as required by law, and also since the Commission considered undisclosed facts not in this record.

A. The Commission Must Do More Than Follow a Mathematical Formula in Determining Rate of Return

In the recent decision of the United States Court of Appeals for the Eighth Circuit which reviewed a determination of the Federal Power Commission of the rates of Northern Natural Gas Company (*sub. nom. State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F. 2d 690 (1953)) it was determined that Northern Natural was entitled to a return of 5.5% by following exactly the same method used in the case at bar. The Court held that such bare findings are insufficient and remanded the case on this ground. The Eighth Circuit pointed out numerous cases which disclosed that broader considerations should be given than was the case with the Commission's treatment of Northern Natural and cited at length cases in which consideration was given to practical matters affecting the application of the practical expert judgment of the Commission.

While the Court here states that this Eighth Circuit case is distinguishable, Petitioner respectfully submits that it is not distinguishable in substance or in principle. The fundamental difficulty in the *Northern Natural* case was the fact that the Commission had followed a mathematical formula based upon historical cost of money. The same is true in the case at bar. The Commission subsequent to the holding and remand of the Eighth Circuit used

the historical cost of money but then recognized that it had a responsibility beyond this point. It cited the opinion of the Eighth Circuit and also *Bluefield Waterworks & Improvement Company* v. *Public Service Commission*, 262 U. S. 679, 695 (1923) and attended particularly to the following pronouncements of the Supreme Court:

> "What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of fair and enlightened judgment, having regard for all relevant facts. . . . The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties" (262 U. S. 679 at 692-693 (1923)).

The Commission, therefore, has recognized a responsibility which it did not exercise in the case at bar.

This Court has stated that the Eighth Circuit case is distinguishable from the one at bar. It is interesting to note, however, that the Commission apparently does not share this view. The Commission has filed in the Supreme Court of the United States a cross-petition for a writ of certiorari directed to the Eighth Circuit in the *Northern Natural* case on the rate of return point and in said petition states: "The decision below [Northern Natural] conflicts in principle with decisions of the United States Court of Appeals for the Tenth and District of Columbia Circuits . . ." and cites the holding of this Court in the case at bar. The Commission quotes at length from this Court's holding and states in a footnote near the end of its discussion that: "The Tenth Circuit referred to the opinion below in the instant case as 'distinguishable' but without stating in what respect." *

Petitioner submits that the findings of fact on rate of return in the instant case are not sufficient to sustain the Commission's conclusion. As the Eighth Circuit has pointed out, and as numerous other cases have pointed out, facts beyond the mere makeup of a company's capitalization and "bare bones" cost of money, must be taken into consideration and the Commission must find such additional facts as indicate an exercise of its practical judgment.

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* This cross-petition of the Commission for certiorari is No. 469, October Term 1953, *sub. nom. Federal Power Commission* v. *Northern Natural Gas Company, et al.* The portions referred to above occur at pp. 16-18 of said petition.

B. The Commission Considered Facts Not in This Record

There can be no doubt but that this Court is of the opinion that the Commission gave consideration only to factors of the financial history of nine unspecified natural gas companies subject to the Commission's jurisdiction and seven natural gas companies whose common stock was traded on recognized exchanges in determining the investor's appraisal of common stock requirements. Petitioner desires again to call to the Court's attention that these nine natural gas companies are unknown. These are nine out of one hundred thirty-five natural gas companies which report to the Commission (see Federal Power Commission, *Statistics of Natural Gas Companies*, 1950, p. 1). Petitioner respectfully represents that with this fact in mind the Court should not state the ready ability of Petitioner to ascertain the identity of these companies. Apparently the Court was of the impression that only these nine reported to the Commission since it stated in respect of the fact that their identity was not disclosed in the record that: "They are, however, *the* nine gas companies reporting to the Federal Power Commission . . ." (emphasis added to the definite article "the"). Petitioner submits, therefore, that reliance upon such a volume of 135 companies and extracting therefrom an unknown nine does not accord to Petitioner a fair consideration and a fair hearing.

Conclusion

The grounds put forth by this conditional cross-petition are of substantial importance. Petitioner does not request a grant of rehearing unconditionally, but Petitioner is advised and believes that the Commission is filing a petition for rehearng and upon such belief this cross-petition is filed. Petitioner does not desire that it be awarded rehearing upon the grounds set forth herein unless rehearing is granted to the Commission. Petitioner is doing this on such conditional basis because of the desirability of bringing this litigation to an early conclusion. It is requested, therefore, that this cross-petition for a rehearing be granted if the petition of the Commission is granted.

Respectfully submitted,

James Lawrence White,
William A. Dougherty,
John P. Akolt, Sr.,
John R. Turnquist,
Charles E. McGee,
Lewis M. Poe,
Counsel for Petitioner,
Colorado Interstate Gas Company.

Certificate of Counsel

I hereby certify that the foregoing petition is filed in good faith and not for any purpose of delay.

JAMES LAWRENCE WHITE,
Counsel for Petitioner,
Colorado Interstate Gas Company.

ORDER DENYING PETITIONER'S PETITION FOR REHEARING

Forty-First Day, November Term, Wednesday, January 13, 1954. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of petitioner for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

OPINION ON REHEARING

[January 25, 1954]

William A. Dougherty (James L. White, John P. Akolt, Sr., John R. Turnquist, Charles E. McGee and Lews M. Poe with him on the brief) for Petitioner;

J. Goldberg (Willard W. Gatchell and Reuben Goldberg were with him on the brief) for Respondent.

Before BRATTON, HUXMAN and MURRAH, *United States Circuit Judges.*

HUXMAN, *Circuit Judge.*

We reversed the Commission's order in the above entitled cause on the ground that it erred in excluding from the cost of service base the loss resulting from the gasoline operations as set out in the opinion [1] and remanded the case for further consideration.[2] We granted the Commission's petition for rehearing because of its contention that we were without jurisdiction to consider that question sua sponte since it was not first presented to the Commission by Colorado in its petition for rehearing. In support of its position the Commission relies upon 15 U. S. C. A. § 717r (b) which in part provides as follows: "* * * 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 * * *."

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[1] The loss as found and deducted by the Commission was fixed at $421,537.

[2] See opinion filed October 29, 1953.

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.

But aside from that we think that in reviewing the Commission's order we have inherent power to consider and correct manifest and substantial error appearing in the record which leads to an unjust end result and deprives Colorado of the opportunity of earning that which the laws says is its right, namely, a fair return on its investment.

As pointed out in our original opinion, the test laid down by the Supreme Court in all its decisions in which orders of the Commission are to be gauged is the end result test. The principle laid down in those decisions is that if after a consideration by a reviewing court of the order the end result is just and gives the company a fair return on the investment the order will stand. To hold that a reviewing court is by technical rules of procedure before the Commission deprived of the opportunity to view a case in the light necessary to bring about a just end result is to destroy the rule and such a conclusion should not be reached in the absence of clear express language to that effect.

Neither do we interpret Section 717r (b) to mean that a reviewing court is deprived thereby of its right to consider all relevant matters necessary to determine a just end result. We interpret the pertinent language of the Section to mean 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. We do not interpret *Panhandle* v. *Power Commission,* 324 U. S. 635, to hold that a reviewing court may not of its own volition consider fundamental error preventing a just end result. That was not the theory upon which the case was decided in the Circuit Court. It was decided there upon a consideration of the whole case. The Supreme Court in its opinion did say that the gas company by failing to object in its application before the Commission was precluded from raising the objection in the reviewing court, but it did not expressly hold that the Circuit Court erred in considering the case upon its merits. In fact, the Supreme Court likewise considered the case upon its merits and concluded that the end result was just. It would seem that if the court was without jurisdiction to consider the merits all that was said with respect to the merits was only dicta and should have been omitted from the opinions.

United States v. *Hancock Truck Lines,* 324 U. S. 774, *National Labor Relations Board* v. *Cheney Calif. Lumber Co.,* 347 U. S. 385, and *Unemployment Compensation Commission* v. *Aragon,* 329 U. S. 143, are urged by the Commission in support of its contention

that we lack jurisdiction to consider the question in issue. The *Hancock Truck Line* case arose under the Interstate Commerce Act upon an application for a certificate of convenience to operate truck lines. The Commission granted a limited certificate, limiting it in operation to traffic moving on bills of lading of freight forwarders. The applicant filed an application for reconsideration in which it stated, "we do not challenge, nor do we complain against, the restriction to serve only freight forwarders." The Commission denied the other relief requested. The applicant then brought an action to enjoin only so much of the court's order as restricted its application to traffic moving on bills of lading of freight forwarders. A three-judge court issued a permanent injunction. The Supreme Court held that having expressly waived any objection to this part of the order, the carrier was estopped from urging it and it was improper for the court to reverse the Commission's order in respect to a provision therein as to which the litigant had advised that body that it no longer objected but acquiesced.

The *Cheney Lumber Company* case arose under the National Labor Relations Act. That Act contains a provision similar to Section 717r (b). Proceedings under the National Labor Relations Act involve problems materially different from those that arise under the Natural Gas Act. That Act concerns itself with facts constituting unfair labor practices. When the facts are once established, the remedy flows as a matter of law. What the court there did was to make a finding of fact with respect to an issue not submitted to the Board and that the Supreme Court said it could not do. But we are not considering for the first time an issue of fact. The loss from the gasoline operation is an established fact and we accept it. We only inquire as to the legal consequences flowing therefrom and what was the Commission's legal duty after having found the fact. So also in the *Aragon* case, supra, the reviewing court for the first time made a finding of fact with respect to a fact issue not submitted to the Employment Compensation Commission.

Furthermore we are of the view that our conclusion that we have inherent power to sua sponte note basic erroneous legal conclusions adduced from established facts is strengthened by Section 10 of the Administrative Procedure Act, 5 U. S. C. A. § 1009, which in part provides 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; * * *." To hold that we are precluded from considering the legality or constitutionality of the action of an administrative agency based upon

facts found by it and unchallenged in the reviewing court would seem to make nugatory and meaningless these clear and positive mandates of the Section.

It is also of some significance that of the cases relied upon by the Commission. *Cheney Lumber Company* and *Hancock Truck Lines, Inc.*, were decided prior to the passage of this Act and, while the *Aragon* case was decided approximately three months after the effective date of the statute, it did not center around a provision such as we had under consideration. For these reasons, we adhere to the views expressed in our original opinion.

On the argument on the petition for rehearing it was stressed that prior to the merger order Colorado received all the net revenue from the gasoline operations but that under the merger order it relinquished fifty per cent of such revenues and still bears all the cost thereof and that this is unjust to Colorado's consumers. Our opinion to remand did not indicate the treatment to be accorded to this item of cost of service. All we required was that it be considered as an element of cost of service in light of all the facts of the case.

The order of the Commission is, therefore, REVERSED and the cause is REMANDED for further proceedings in accordance with the views expressed herein.

JUDGMENT

Forty-Ninth Day, November Term, Monday, January 25, 1954. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on rehearing and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the order of the Federal Power Commission in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Federal Power Commission for further proceedings in accordance with the views expressed in the opinion of the court.

On February 3, 1954, an order of the United States Court of Appeals was entered staying the mandate of the said court to April 1, 1954, under provision of paragraph 3 of rule 28 of said court.

ORDER RE DEPOSIT IN ESCROW ACCOUNT

Sixty-Seventh Day, November Term, Friday, February 26, 1954. Before Honorable Sam G. Bratton, Circuit Judge.

This matter coming on for consideration upon the motion of Colorado Interstate Gas Company, Petitioner herein, for a temporary deferment of the payment due to be made by it into the Escrow

Account in the First National Bank of Denver on February 25, 1954, under previous orders entered in this proceeding on September 8, 1952, and October 7, 1952;

It appearing to the Court that the Federal Power Commission, acting through its attorneys, has consented to the allowance of said Motion, and it further appearing that no prejudice will result from the granting thereof, and that there is good cause therefor;

IT IS THEREFORE, ORDERED THAT pending the further order of this Court, Petitioner be and it hereby is granted a deferment from the 25th day of February, 1954, to the 15th day of March, 1954, in which to deposit in the Escrow Account in the First Naitonal Bank of Denver the sum of money which otherwise would have been deposited in such Account on said February 25, 1954, under the provisions of the prior Orders of this Court entered herein on September 8, 1952, and October 7, 1952.

Except to the extent herein modified said Orders of September 8, 1952, and October 7, 1952, shall remain in full force and effect until the further order of this Court.

Entered this 25th day of February, 1954.

STAY ORDER

Seventy-Seventh Day, November Term, Monday, March 15, 1954. Before Honorabe Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause this day coming on for consideration by the Court upon the petition of Colorado Interstate Gas Company for modification of orders of this Court issued September 8, 1952 and October 7, 1952, staying a rate order of the Federal Power Commission issued August 8, 1952, in said Commission's Docket No. G-1115 pending judicial review; and it appearing to the Court that said Petitioner has filed on September 2, 1953 new rates with the Federal Power Commission which were suspended to the extent permitted by the Natural Gas Act, and the suspended rates have been permitted to become effective on January 1, 1954 subject to refund; and it further appearing to the Court that said rates filed on September 2, 1953 are the presently effective rates of Petitioner, subject only to final determination and order of the said Commission; and it further appearing to the Court that Petitioner and the Commission have stipulated and agreed that an undertaking may be filed by Colorado with the said Commission which will obligate Colorado to refund from and after January 1, 1954, any difference between the rates finally effective in Commission Docket No. G-1115 and the rates made effective on January 1, 1954, in Docket No. G-2260; and the Court having otherwise considered the petition and other documents filed herein does find that it is desirable that said Petitioner be relieved from and after January 1, 1954, of

the condition of the stay orders above recited which provided for deposit in escrow of the difference between the reduced rates prescribed by said Commission in its said Docket No. G-1115 and those previously in effect; and it further appearing to the Court that no prejudice will result from such relief petitioned for:

IT IS NOW, THEREFORE, HEREBY ORDERED that the paragraphs of said stay orders which recite the conditions of the stay be amended, and the same hereby are amended by removing therefrom those portions of said paragraphs imposing conditions which are designated in each thereof as (1), (3), (4) and (5), it being understood, however, that such amendment and deletion shall be deemed to be effective only from and after January 1, 1954, and that the provisions of said orders are otherwise to remain in full force and effect.

On March 23, 1954, an order of the United States Court of Appeals was entered staying the mandate of the said court to May 1, 1954, under provisions of paragraph 3 of rule 28 of said court.

CLERK'S CERTIFICATE

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

I, ROBERT B. CARTWRIGHT, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcript of the record from the Federal Power Commission, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinions (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Court of Appeals for the Tenth Circuit in a certain cause in said United States Court of Appeals, No. 4541, wherein Colorado Interstate Gas Company was petitioner, and the Federal Power Commission was respondent, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 31st day of March, A. D. 1954.

ROBERT B. CARTWRIGHT,
Clerk of the United States Court
of Appeals, Tenth Circuit.
By (S.) GEORGE A. PEASE,
Chief Deputy Clerk.

(SEAL)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 295712 1191

ADDITION TO RECORD

Filed. United States Court of Appeals Tenth Circuit. January 4, 1954. Robert B. Cartwright, Clerk.

United States Court of Appeals
Tenth Circuit

No. 4541

COLORADO INTERSTATE GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT, CITY AND COUNTY OF DENVER, AND PUBLIC UTILITIES COMMISSION OF COLORADO, INTERVENORS

BRIEF OF PETITIONER IN RESPONSE TO RESPONDENT'S PETITION FOR REHEARING

Pursuant to the order of the Court entered on rehearing, Petitioner responds to the arguments and grounds set forth by the Federal Power Commission ("Commission") in its petition for rehearing.

Inasmuch as the matter being considered by the Court arises from the Court's action, no statement or counterstatement of the case as such should be necessary.

INTRODUCTION

The perspective of this case is that Petitioner brought here for review the Commission's rate determination. The Commission in its petition for rehearing states that there was "No objection to the exclusion of the loss on gasoline operations from cost of service was raised by Petitioner at any time before the Commission during the administrative rate proceedings or before the court" (p. 3). This is erroneous. This Court, of course, recognizes and dealt with the fact that Petitioner

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claimed that there should be no exclusion from the cost of service of any loss on gasoline operations. While Petitioner 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. The Court struck at the heart of the matter and declared the merger condition invalid. Respondent can now act on the basis of that clear and correct legal pronouncement and in so doing can justify the Court's action.

1. This Court had the power on its own motion to consider the propriety of the condition involved and to reach the result of its judgment

The Commission asserts from the beginning a limitation upon the Court's power arising by virtue of Section 19 (b) of the Natural Gas Act (52 Stat. 831, 15 U. S. C. § 7174 (b)). The Commission cites several cases which it must contend support its view that this Court was limited in its powers of review to the point where it could not strike down the illegal condition. These cases will be dealt with below. It is odd, but understandable, that the Commission has approached this fundamental problem backwards. Petitioner submits that the proper approach is first to determine what a reviewing court's powers really are. This is not difficult since there are many authoritative pronouncements, and in the light of judicial authority it will be seen that even the cases cited by the Commission support this Court rather than negate the power which the Court has exercised.

It is recognized that ordinarily an appellate court does not give consideration to issues which were not raised below, but as the Supreme Court has stated this is subject to exceptions of materiality in the instant case:

> There may always be exceptional cases or particular circumstances which will prompt a reviewing or appel-

> late court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.

and further:

> Decisions not in accordance with law should be modified, reversed or reversed and remanded "as justice may require" (*Hormel* v. *Helvering*, 312 U. S. 552 at 557 and 559 (1941)).

This rule has been recognized by this very circuit when in *Smith* v. *Welch*, 189 F. 2d 832 at 836 (1951) the Court stated:

> While we recognize the power of an appellate court in a proper case to consider on its own motion errors to which no objections were made, it should be exercised sparingly and only in exceptional cases and in the interest of justice.

Indeed, the very Judges of this Court who made the determination in the instant case that the condition was invalid have recognized this authority in *E. I. Du Pont De Nemours & Co.* v. *Cudd*, 176 F. 2d 855 (1949) and stated (per Judge Huxman) at 857 that:

> Appellate courts have inherent power to correct substantial error occurring during a trial even though not directly raised. In referring to the general rule that one who has not appealed may not as a matter of right, question the correctness of the court's judgment, the Supreme Court in Langnes *v.* Green, 282 U. S. 531, 538, 51 S. Ct. 243, 246, 75 L. ed. 520, states "these decisions simply announce a rule of practice which generally has been followed; but none of them deny the power of the court to review objections urged by respondent, although he has not applied for certiorari, if the court deems there is good reason to do so." [1]

[1] To the same effect also are: *Public Service Commission* v. *Havemeyer*, 296 U. S. 506 (1936); *Shaw* v. *Addison*, 236 Iowa 720, 18 N. W. 2d 796, 803; *Clark* v. *Wells-E. Coal Co.*, 215 Ky. 128, 284 S. W. 91, 93; *Curry* v. *Dahlberg*, 341 Mo. 897, 110 S. W. 2d 742.

Illegality of a contract—certainly analogous to the situation here—seems to be a particularly appropriate place for a court to refuse to occupy the anomalous position of giving judicial support to illegality (see note, Raising New Issues on Appeal, 64 *Harv. Law Review*, 652, 661).

Obviously, the Commission has confused (1) what a party on review can insist that the appellate court consider and (2) *what the appellate court itself can consider* and still act within proper bounds of judicial responsibility. This distinction was pointed out in *Calhoun County, Fla.* v. *Roberts,* 137 F. 2d 130 (5th Cir., 1943). In that case the Court stated:

> We acknowledge the general rule that a cross appeal or cross certiorari is necessary to enable an appellee or respondent in certiorari to ask the appellate court to reverse the part of a decree which is unfavorable to him. Morley Construction Co. *v.* Maryland Casualty Co., 300 U. S. 185, 57 S. Ct. 325, 81 L. ed. 593. The rule was applied even to an admiralty decree, the appeal from which is a *de novo* trial, in the Maria Martin (Martin *v.* Northern Transportation Co.) 12 Wall. 31, 20 L. ed. 251. But in another case in admiralty, Langnes *v.* Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. ed. 520 by way of considered dictum, it was declared that the rule is one of the practice generally followed, limiting the rights of litigants, *but not a restriction on the power of the appellate court to see that justice is done.* We are reversing the conclusion of law of the district Judge that the recourse is against the County and we esteem it necessary to justice to reopen his conclusion of law that there was no recourse against any hand proceeds in the balance of the Construction Fund. *We act on our own motion, and not at the instance of appellee.* We have disturbed no fact finding of the district court (as was done in the Morley Construction Company case) but differing only on the law, we propose to apply in all its consequences the law as we see it. We hold we have the power, without cross appeal, to do this (*id.* 132). [Italics added].

The argument of the Commission also overlooks the important remedial legislation of the Administrative Procedure Act. Section 10 (e) of that Act (5 U. S. C. § 1009 (e)) imposes upon the reviewing court a duty to review the whole record. As the Senate Committee in considering that legislation stated:

> The requirement of review upon "the whole record" means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case (Senate Committee Report, 1945, p. 28; Senate Document No. 248, 79th Cong., p. 214).

The Sixth Circuit had occasion to deal with this requirement and to study the legislative history above quoted in *Pittsburgh Steamship Co.* v. *National Labor Relations Board,* 180 F. 2d 731 (1950) and upon a remand undertook to consider a complete Labor Board record. That Court stated:

> The reviewing court is requred to hold unlawful and set aside agency action, findings, and conclusions not in accordance with law and unsupported by substantial evidence, and in making its determination it is also required to review the whole record. These mandatory provisions define and make specific the requirements of judicial review and extend them beyond the requirements of the Wagner Act (*id.* 736).

and further held:

> We therefore proceed to inquire, upon a consideration of the whole record, whether the order sought to be enforced is supported by the reliable, probative, and substantial evidence and *is in accordance with law* (*id.* 737). [Italics supplied.]

As the Court recognized in the instant case, its concern is with the "end result" of the Commission's rate determination. This end result theory certainly reached its strongest position in *Federal Power Commission, et al.* v. *Hope Natural Gas Company,* 320 U. S. 581 (1944). In announcing the doctrine that it is the impact rather than the theory of the rate determination which counts, the Supreme Court stated:

> And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act (*Id.* 602). (See also *Federal Power Commission* v. *Natural Gas Pipeline Company,* 315 U. S. 575, 586 (1942).)

The question of whether or not the Commission under the merger condition was making a deduction from Petitioner's rate of return was fundamental and without possibility of refutation affected the fairness of the end result of the Commission's order. To allow a regulated business less than a fair return has been recognized as confiscation prohibited by the Constitution for so long a time that authority to such effect need not be cited. The Commission under the Natural Gas Act certainly had no greater latitude. The Supreme Court in the *Hope* case (*supra*) at page 607 stated:

> Since there are no Constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul of the former.

With the fundamental nature of the question thus noticed by the Court, the Court quite properly in furtherance of its judicial duty recognized its obligation and acted accordingly. It does no good at this posture of the case to attempt to upset the Court's conclusions on the basis of the fact that the issue was not presented to the Court by any party. If the Court had power to do what it did without argument on the specific point, the matter is at an end.

Petitioner recognizes that in the ordinary review one is limited to those errors which have been presented below. The Supreme Court in dealing with a review provision of the National Labor Relations Act similar to those involved under the Natural Gas Act has stated that this limitation "gives emphasis to the salutary policy adopted by Section 10 (e) [of the National Labor Relations Act] of affording the Board opportunity to consider on the merits questions to be urged upon review of its order" (*National Labor Relations Board* v. *Cheney California Lumber Company,* 327 U. S. 385 (1946) at 389; *Marshall Field & Company* v. *National Labor Relations Board,* 318 U. S.

253, 256 (1943)). To like effect is *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143 (1946).

Both the *Aragon* case and the *Cheney* case are cited by the Commission in support of its contentions. The short answer is that the merger condition had already been considered by the Commission in the merger proceedings: The condition was a subject of the Commission's opinion in such case (R. 2740, p. 561) and was a specific part of the Commission's order (R. 2776, p. 566). Furthermore, a dissenting Commissioner in that case seriously questioned the validity of the condition which the Court has struck down.[2] The merger condition and the consideration of its validity is part of *this* record.

In addition, the Commission's counsel in the merger case in oral argument before the full Commission stated unequivocally that such condition would not be enforceable.[3]

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[2] Commissioner Buchanan in his dissent stated the following:

"These conditions, while devised to afford some protection to consumers against the natural consequences of the majority's action in approving the merger actually, in my opinion, have no such effect under the law. Should Colorado fail to earn a fair return in the future, the natural gasoline revenues given up to Southwestern cannot be treated as revenues of Colorado. They are gone forever. I question seriously whether the stockholders of Colorado can be compelled to accept a confiscatory rate of return simply because of a condition inserted in a certificate by the Federal Power Commission and accepted by their present Board of Directors. The present stockholders of Colorado, with the exception of Public Service, expect to distribute all of their holdings of Colorado's stock to the public as soon as the merger is consummated. The new stockholders will expect to be adequately compensated for their investment" (R. 2771).

[3] Lambert McAllister, Esq., for the Staff of the Commission had the following to say:

"As a matter of corporate law, neither Mr. Daugherty [*sic*] or the Board of Directors can bind the stockholders down through the future so that they would be cut by that agreement to a return of 4 per cent."

Immediately following this statement, there was the following exchange between Commissioner Smith and Mr. McAllister:

"Commissioner SMITH. Mr. McAllister, a moment ago you mentioned Mr. Daugherty's [*sic*] offer of a stipulation or something of the sort and you said it would not be worth anything if the Commission tried to fix a rate as low as 4 per cent and of course that is obviously true. It would be a rate at the point of confiscation.

"You do not contend, do you, that the Company could not be bound by the acceptance of a condition which would preclude it from making a claim in a rate proceeding for a given amount of revenue, do you?

"Mr. MCALLISTER. Yes, I do, Mr. Chairman. I just dont' think that a board of directors—particularly in this case when both Union Security is

The condition, therefore, was considered by the Commission and even if the Court be deemed to lack the fundamental power to review on its own motion the validity of the condition not assigned as error below, the reason for denying this power would be gone since the "salutary" purpose of Section 19 (b) of the Natural Gas Act would be satisfied. The Commission was not denied opportunity to consider validity. Validity was put to it as squarely as possible in the merger case.

The Commission in support of its contentions cites the *Aragon, Cheney* and *American Power & Light* cases. If these cases are appropriate at all, they cannot under the facts support the Commission since the Commission had the opportunity to, did consider, and did act upon the merger condition. Its invalidity was asserted and must per force be considered as having been before the Commission for determination. The Commission also cites on its behalf *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 324 U. S. 635 (1945). That case preceded the Administrative Procedure Act. That case also did not involve the fundamental problem of reducing the Company's return by the simple device of not allowing to it all incurred costs. The Commission also cited *United States* v. *Hancock Truck Lines, Inc.,* 324 U. S. 774 (1945) for the proposition that Petitioner's acquiescence in the condition bound it. The acquiescence in the *Hancock* case was to a restriction of routes of a truck line in a certificate order of the Interstate Commerce Commission. This again was not so fundamental as a reduction of what the Commission otherwise determines is a

owning 42.5 per cent and South-Western has 42.5 per cent. This is 85 per cent of the common stock. The two companies agree there at the stockholder level and then they move up to Colorado Interstate, at the board level, and all the way they agree on an arrangement which might result in 4 per cent in the future to them. Then when that has been done, they scatter the stock to the four winds—85 per cent of Colorado Interstate. I am certain there is no court in the land that would hold those future stockholders or their representatives to a 4 per cent return because of some arrangement that someone speaking on behalf of the company, even with the approval of the board of directors, might undertake to bind that company. It could not be done. Nor could this Commission bind a future Commission to do that thing." (Transcript of Record, FPC Docket No. G-1326, In the Matter of Colorado Interstate Gas Company and Canadian River Gas Company, pp. 1783-1785.)

fair rate of return. Acquiescence in the denial of a fundamental or Constitutional right is without effect (*Southern Pacific Company* v. *Denton,* 146 U. S. 202 (1892)). In the *Denton* case the State of Texas attempted to take away a foreign corporation's right to resort to a Federal court in diversity cases as a condition to doing business in Texas. The Supreme Court would not allow this statutory restriction to deny the foreign corporation its fundamental right.

There is another important factor involved in this regard, *i. e.,* that this previous consideration by the Commission gives reasonable excuse for failure to urge the invalidity of the merger condition before the Commission in the rate proceeding itself (*Cf. American Power & Light Company* v. *Securities & Exchange Commission,* 141 F. 2d 607 (1st Cir. 1947)).

The plain conclusion, therefore, is that the Court had the power and authority and, perhaps, even the positive duty to make its inquiry in the instant case. The Court acquired the jurisdiction judicially to review this rate proceeding. A portion of the Commission's complaint is that it had no opportunity to present its side of the case on this question. The Court by granting rehearing has afforded this opportunity; therefore, no objection in that direction now lies. The contentions in respect of the invalidity of the condition were, as a matter of fact, actually in the record of the case since the opinions in the merger proceeding were made a part of this record (Item A, R. 2722 *et seq.,* p. 549 *et seq.*).

Petitioner assigned as error in its application for rehearing that the end result as proposed by the Staff and as adopted by the Commission was unfair, unjust and amounted to confiscation (R. 4660, pp. 154–155). Petitioner in great detail challenged the Commission's deduction of an alleged loss on natural gasoline operations and, in fact, averred that the Commission's treatment amounted to a reduction in the rate of return (R. 4680–4681, pp. 176–177).

To sustain the Commission would mean that this Court lacks the power which the numerous cases cited above indicate that it has. To sustain the Commission would mean that this very panel of the Court was in error in the *Du Pont* case, *supra.* Petitioner submits that the Court has the power to do what it

did. It has this power as an inherent adjunct of the power to review under existing law. The contentions advanced by the Commission on not raising the problem below are met, even if it be assumed, arguendo, that the Court did not have the power on its own motion since the validity of the merger condition had been previously considered by the Commission and the condition was imposed.

2. There was no collateral attack

The Commission contends that this Court acted in error because on the basis of an unjust end result the Commission's order was reversed. Petitioner has pointed out above that under the "end result" doctrine, in a court of general review (as contrasted with the Supreme Court on limited certiorari) there is a judicial obligation to view the order in its entirety. The Commission does not meet this Court's rationale which clearly announces and follows its important judicial obligation.

As a matter of well recognized legal principles a previous administrative determination is not always embalmed and put beyond judicial scrutiny. As one court has recently held:

> "* * * we do not think the Commission can preserve from judicial examination a possibly erroneous legal ruling by embalming it *in res judicata*. This court, speaking through Chief Justice Groner in Churchill Tabernacle *v.* Federal Communications Commission, 1947, 81 U. S. App. D. C. 411, 160 F. 2d 244, 246, described as well settled the doctrine that '*res judicata* and equitable estoppel do not ordinarily apply to decisions of administrative tribunals.'" *Niagara Mohawk Power Corp.* v. *F. P. C.*, 202 F. 2d 190 (D. C. Cir., 1952).[4]

In addition, it is indeed questionable whether the offending merger condition could have been the subject of previous review or judicial scrutiny. That condition, without possible doubt, is one relating only to rates under Sections 4 and 5 of the National Gas Act (15 U. S. C. §§ 717c, 717d). The merger pro-

[4] The *Niagara Mohawk* case is awaiting determination by the Supreme Court. The above principle, however, or its application are not before that Court.

ceeding was for a certificate of public convenience and necessity under Section 7 of that Act (15 U. S. C. § 717f). As the Supreme Court has held where "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action" it is not reviewable. The Court held that review in such case is premature (*Rochester Telephone Corp* v. *U. S.*, 307 U. S. 125, 130 (1939)). *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 581 (1944) could almost have been dealing with the instant case when it quoted the above doctrine of the *Rochester Telephone* case and stated "these findings may never result in the respondent feeling the pinch of administrative action" (*id*, at 619).

Certainly here, Petitioner may not have felt the pinch until the pinch was applied through the Commission's use of the relative market value method of allocation. Had the Commission used Petitioner's method there would have been no pinch—no aggrievement. Certainly at the time of the merger order, the pinch was only a possibility depending first upon a rate proceeding and, second, upon an allocation resulting in a showing of loss.

The Commission cites many cases in its petition (p. 8) which evidently are supposed to stand for the proposition that this Court is guilty of collateral attack. None of these cases are in point here. The appellate cases cited stand only for the proposition either that where a final order having immediate effect of aggrievement is entered the right to review ripens; [5] or a narrow statutory review under emergency legislation accords with due process or is exclusive and determinations previously made are not reviewable on enforcement; [6] or that a

[5] *Federal Power Commission* v. *Pacific P. & L. Company*, 307 U. S. 156 (1939), where it was determined that denial of a certificate of public convenience and necessity is reviewable.. *Louisville G. & E. Company* v. *Federal Power Commission*, 129 F. 2d 126 (6th Cir., 1942), where orders requiring immediate action were held then reviewable. The Court recognized that preliminary orders are not.

[6] *Woods* v. *Kaye*, 175 F. 2d 886 (9th Cir., 1949); *Yakus* v. *United States*, 321 U. S. 414 (1944); *United States* v. *Ruzicka*, 329 U. S. 287 (1946); *La Verne Co-op.* v. *United States*, 143 F. 2d 415 (9th Cir., 1944); *Lichter* v. *United States*, 334 U. S. 742 (1948).

declaratory judgment cannot be used to review a Federal Trade Commission order; [7] or the appeal was frivolous.[8]

If the Court were to follow the Commission's prayer it could only mean that *for all time* the condition would be effective no matter how vicious its consequences to investors or how prejudicial to the public's interest in having a healthy, well regulated company attend the public convenience and necessity. Conceivably, the continued insulation of the condition from review under a doctrine of not allowing collateral attack could mean no return at all or even the possibility of not recovering otherwise reimbursable operating expenses. For all time, argues the Commission, an improvident, illegal, confiscatory condition shall exist. The Commission's prayer on this point can have no other meaning.

The Commission attempts to bolster its argument by urging that this Court's action is to grant approval of the merger without the condition (p. 9). Of course, that just is not so. The Court has done nothing but strike down the condition as an instrument for reducing the proper cost of service in a rate case. The Court in no wise has attempted to use that discretion of the Commission disclosed in *Federal Power Commission* v. *Idaho Power Company,* 344 U. S. 17 (1952) cited by the Commission.

3. The end result test does support the Court's reversal

The Commission attacks this Court's fundamental approach in reversing by citing (at p. 11) the *Hope* case and by asserting that there are two important qualifications to the proposition that from the "investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business." In the first place, Petitioner fails to discern from the *Hope* case that the qualifications asserted by the Commission were stated as qualifications by the Supreme Court. The qualifications asserted by the Commission are (a) a balancing of investor and consumer interests and (b) that there may be conditions under which more or less might be allowed to an investor without producing an unjust and unreasonable end result. The Supreme Court stated

[7] *Miles Laboratories* v. *Federal Trade Commission,* 140 F. 2d 683 (9th Cir., 1944).

[8] *Piuma* v. *United States,* 126 F. 2d 601 (9th Cir., 1942).

unequivocably: "From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock" (*Federal Power Commission* v. *Hope Natural Gas Company, supra* at p. 603). The Supreme Court obviously was dealing with two portions of the cost of service. The first are the operating expenses and the second is the return or a part of the return. The Court then immediately goes on to discuss what the return must be. The Court nowhere indicates that the cost of service is to be reduced because of the disallowance of legitimate operating expenses. Also, however, because of the effect of merger condition and because of the disallowance of actual legitimate expenses, the investor does not get what he is entitled to. So, therefore, when expenses are not allowed the return is affected. It is inconceivable that the Supreme Court was stating that the rate of return is such a flexible thing that operating expenses may be disallowed and yet the rate be valid because the investor has to absorb the loss. The *Hope* case can stand for nothing if it does not stand for the proposition that proper operating expenses must be allowed.

When the Supreme Court in the *Hope* case spoke of balancing the interests, it was talking about the end results of the rate making process. After stating this proposition the Court went on to state:

> But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business.

The Court was not qualifying the general proposition when it made this pronouncement; in fact, it expressly stated "But such considerations aside * * *". Secondly, the Commission asserts that the Court recognized in the *Hope* case that more or less than reasonable rates might be allowed without producing an unjust end result. The Court does not state such a qualification but merely states: "The conditions under which more or less might be allowed are not important here."

Since it is the impact of a rate determination which is important, the end result of an order which has the impact of allowing less than the actual cost of service—less than all expenses involved—is unreasonable and invalid. As the District of Columbia Circuit has stated:

> Expenses (using that term in its broad sense to include not only operating expenses but depreciation and taxes) are facts. They are to be ascertained, not created by the regulatory authorities. If properly incurred, they must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return upon the investment, being an amount over and above expenses would be a farce (*Mississippi River Fuel Corporation* v. *Federal Power Commission,* 116 F. 2d 433 at 437 (1947)).

If such lesser allowance results from an invalid condition then the evil can be corrected by striking down the condition. The Court took this direct route.

The Commission argues that the exclusion of gasoline losses was a proper balancing of investor and consumer interests. The Commission's argument would indicate to the Court that what was flowing from the merger was solely or at least largely for the benefit of Petitioner's investors. This is just not the case. The record clearly shows the salutary features of the merger on benefits which would accrue to the consumers as well as to Petitioner's investors. The majority of the Commission in approving the merger stated as follows:

> A summary of the salient conclusions justified by the facts appearing on this record will demonstrate succinctly the desirability of the project laid before us for judgment:
>
> (1) The merger can be reasonably expected to cost Colorado no more than $3,762,713 spread over a 23-year period and may result in a cash benefit to it over the same period of $4,376,495.
>
> (2) Colorado will acquire legal title to physical assets, the original cost of which, after depreciation, is $10,979,522. These include natural gas reserves containing some 3 trillion cubic feet of gas which is expected to be adequate to supply the needs of the gas consumers

in the Rocky Mountain area for at least 20 years at a low cost.

(3) Colorado will gain valuable reversionary rights in the physical assets mentioned above which, but for the merger, would have matured to the benefit of Southwestern rather than Colorado, probably by 1972.

(4) The corporate structure of the Texas-to-Denver pipeline will be greatly simplified with resulting savings.

(5) There will be created through the merger a financially sound natural gas company able to finance present and future expansions to meet the needs of the gas consumers dependent upon its system.

(6) The imperative need for large additional deliveries of natural gas to meet the requirements of the Rocky Mountain area, primarily those of domestic customers, will be satisfied without further unnecessary delay without any increase in present rates to the consumer.

These, then, are the principal reasons which led us to issue our certificate order of March 1, 1951. Viewing dispassionately all of the evidence in this case, we think that denial of the application would have been a distinct disservice to the public (R. 2744–2745).

It must be pointed out that the reason for proposing the merger was that Petitioner stood in need of financing in order to construct facilities required for service to the public in the then immediate amount of $13,500,000, and the Company could not finance such project except by the merger (R. 2729–2730, p. 554–555). The Commission previously had authorized this needed construction but had withheld final approval from the merger. The merger case was in progress for almost a year and the Petitioner was met with all sorts of obstacles. Staff objection to the merger was so intense that the majority of the Commission noted it (R. 2723, p. 550). There were many interests involved in the case and the source of the idea that there should be a stipulation by the Company first emanated from a representative of the City of Denver and not from Petitioner's counsel as the Commission indicates. The transcript of testimony from the merger case on this point is included as Appendix A hereto. It will be seen that the merger condition

finally sought to be imposed was different from what was originally proposed by the Company. This point is neither here nor there, however, because as this Court has recognized, this business is affected with a public interest and Petitioner was not free to contract in the unfettered fashion of a private party. The point is enlightening, however, since it shows the genesis of the condition.

The Commission seeks to bolster its position by stating that Petitioner could contract or acquiesce in fixing less than a reasonable rate and cites *Interstate Railway Company* v. *Massachusetts*, 207 U. S. 79 (1907). The Commission asserts that this case stands for the proposition that the acceptance of a charter subject to a statutory condition to transport school children at half fare prevented a utility from complaining that this was less than fair compensation. Examination of the opinion by Justice Holmes will disclose that he hesitatingly agreed with the state court's conclusion to such effect and did so only on the ground that the state was exercising its police power. As Mr. Justice Holmes put it, the question is narrowed to the magnitude of the burden and he concluded that he could not assume that the total effect of the condition would be more serious than a change in the law of nuisance might be. As the Court recognizes, the matter in the case at bar is clearly distinguishable. As this Court has stated:

> 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.

Petitioner submits that the real applicable doctrine is that pronounced in *Augusta-Aiken Railway & Electric Corp.* v. *Railroad Commission*, 281, Fed. 977 (4th Cir., 1922), wherein it was stated:

> The Commission is without power to make rates by contract; its only power, delegated to it by the legislature, is to fix reasonable rates * * *.

Finally, the Commission gives as evidence that no unjust end result comes about the fact that an offering of stock of the Company had been oversubscribed. Suffice it to say that this oversubscription of the Petitioner's stock took place even

before these rate proceedings were concluded before the Commission and before the Commission issued its confiscatory order. Even if this were not so, the fact that the Company's stock has been oversubscribed is not conclusive one way or the other as to whether the Commission has set a just and reasonable rate.

CONCLUSION

Petitioner submits that this Court had the power and properly exercised the power in reversing the Commission, that its action in such regard is in no way a collateral attack, and the obvious unjust end result discerned by the Court justified the reversal.

Respectfully submitted.

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APPENDIX A

(Excerpt, Transcript of Testimony F. P. C. Docket G–1326, pp. 1008–1013)

By Mr. SMITH:

Q. Mr. Dougherty, is it a fact that following some discussions we had in Denver that I sent you a letter dated November 3, 1950 in which I suggested that Colorado Interstate and Canadian River might be able to satisfy the Commission concerning the proposed so-called payments to Southwestern if they would recommend treating these payments as a nonutility expense for rate-making purposes?—A. Yes, you did.

Q. And my suggestion was in effect this: That the Commission might possibly be satisfied if the companies would offer to accept a condition that these so-called payments to Southwestern be classified by the merged company in Account 538, Miscellaneous Income Deductions, for accounting and rate-making purposes, and that the concurrent credit apparently would be to Account 730.1, Residuals Produced—Credit. Was that my suggestion?—A. Yes.

Q. Then I went a head to state in support of that suggestion that it would give the Commission control over the matter for accounting and rate-making purposes and would enable it to determine reasonableness in any future proceeding in the light of known facts at the time, and that thus the balancing of investor and consumer interests could be done as frequently as necessary, perhaps with greater precision, on the basis of known facts, rather than long-range estimates.

I also suggested, I believe, that if it were found in a rate case that Colorado Interstate was actually deriving tax benefits as a result of the merger that in my opinion the Commission could properly associate those benefits with the proposed charges to Account 538.—A. Yes, you did.

Q. Do you have anything to say with respect to that suggestion at this time?—A. Well, you will recall, Mr. Smith, I

replied to your suggestion saying that in the exact manner in which you made it it did not appeal to me as something that I could recommend to Colorado Interstate Gas Company. That is, as I understood your suggestion, the accounts above the line, the operating revenues and expense accounts, would in effect be the same as if this gasoline transaction by which Southwestern would have half of the gross revenues from the gasoline had never taken place, and yet, at the same time, any reduction in income taxes that would accrue to Colorado Interstate as a result of the tax benefits that are anticipated in the event the merger takes place would be reflected in the expense accounts.

I also said, and it is my judgment, that accounting for this 50 per cent of the gross as though it were a deduction below the line—that is, other income deduction—would in the future pretty well bind the company with respect to the results of that accounting procedure.

In other words, that the Commission in the future would say that, having accounted for this gasoline transaction in the way you have suggested, whereby the full credit of the full gasoline revenues are reflected against the operating expenses of Colorado and also the full benefits of these tax reductions are reflected, it would bind Colorado as considering that this was to be treated in that manner, and that the 50 per cent of gross which would be charged to Account 538 would be treated as a non-income item without there being taken into consideration any credit for these tax benefits.

That was my answer to you. I think I either in the letter or orally stated to you that so far as I was concerned as a director of Colorado Interstate and as its counsel that 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:

Referring now to the amounts that are considered as being the gasoline revenues which are taken from the operations and which are reflected in Exhibit 38 as Sub-Exhibit B, and with respect to the tax benefits that are reflected in that same Sub-Exhibit B of Exhibit 38, that whenever those tax benefits would be less than the amount that the merged company had given

up in the way of gasoline receipts after taxes, that such difference would not be treated and should not be treated in any rate proceeding as a cost of operations or, in other words, that that difference would be borne by the stockholders, or you might say that the risk of any deficiency in those tax benefits as estimated would be assumed by the stockholders, so that the ratepayers would in no way be taking any risk, providing, of course, that wherever these tax benefits would exceed whatever had been given up in the way of gasoline revenues it would be kept for the benefit of the stockholders.

My concept of it is that we would keep a memorandum account of the amount of gasoline receipts which Southwestern retained, what the tax rate would be, and also keep a memorandum of account of the tax benefits that could be computed each year as being actually gained by Colorado as a result of this merger, and that you might carry that forward from year to year.

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

It might be done in a different way, namely, just carry a balance forward until we could see which way the trend was going, and whenever it got to the point where things seemed to be about balanced off let it go from that time on. That is my reaction to your accounting suggestion and the reasons why I would not agree to it.

Q. This recommendation which you would be willing to make then, as you have stated, would be that the cost of service would be the same after the merger as it would be before the merger?—A. Well, in effect that. That is, here, for example, take on Subexhibit B in Exhibit 38 for the year 1952, where this statement shows that the gasoline receipts to Southwestern, giving effect to a 45 per cent straight income tax, would be $560,817. Now, that amount would be, assuming that it turned out to be that, or whatever amount it might be, carried

in this memorandum account, and then in that year, 1952, there would be computed these tax benefits that were gained to Colorado as a result of this merger.

Now, if these figures would turn out to be as indicated on this exhibit, those benefits show $372,730. So that as of that year there would be, say, $180,000 or $190,000 that would in effect be not included as the cost of service to the consumers.

Now, then, when you get later years where the figure is the other way, those tax benefits should be taken out as not being something that should be given to the consumers, that credit.

I don't know whether I explained myself or not, but that is the way I see it.

Q. I think I understand what you mean. The record will speak for itself.—A. Well, the result I have in mind is that the rate-payers would not be bearing the risk of any loss to this project that might result from giving over this gasoline revenue after credit had been taken for whatever additional tax benefits resulted from the various things that have been discussed.

[Clerk's certificate omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1954

[fols. 659-660] SUPREME COURT OF THE UNITED STATES

No. 777, OCTOBER TERM, 1953

COLORADO INTERSTATE GAS CO., Petitioner,

vs.

FEDERAL POWER COMMISSION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—Filed March 31, 1954

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 21st, 1954.

Tom C. Clark, Associate Justice of the Supreme Court of the United States.

Dated this 31 day of March, 1954.

[fols. 661-662] (File endorsement omitted.)

[fol. 663] SUPREME COURT OF THE UNITED STATES

No. 710, OCTOBER TERM, 1953

FEDERAL POWER COMMISSION, Petitioner,

vs.

COLORADO INTERSTATE GAS COMPANY

ORDER ALLOWING CERTIORARI—Filed June 7, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.