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Administrative Law -- Announcement of Policy as Constituting Order Subject to Judicial Review

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NOTES AND COMMENTS*

Administrative Law—Announcement of Policy as Constituting Order Subject to Judicial Review

Through its contracts with 115 affiliated radio stations, the Columbia Broadcasting System maintains the national network organization necessary to secure advertising revenues. Following a prolonged investigation the Federal Communications Commission concluded that certain provisions of these contracts were unduly restrictive of competition. Accordingly, an order was issued giving expression, in the form of "chain broadcasting regulations," to the general policy which the Commission would follow in future licensing of broadcasting stations. The regulations provided that no license should be granted to a station whose contract with a network system contained any of the prohibited arrangements. Immediately many of the local affiliates announced their intention to cancel, modify, or refuse to renew their existing contracts. CBS brought suit under the Communications Act of 1934 and the Urgent Deficiencies Act[1] to enjoin enforcement of the FCC's order as beyond the Commission's statutory and constitutional authority and contrary to public policy. The special three-judge district court dismissed for want of jurisdiction,[2] but upon direct appeal to the Supreme Court the lower court was reversed and the case remanded for trial on the merits.[3] By a five to three decision the Court held the order reviewable because it promulgated regulations controlling the contractual relationships of the stations and the networks, thereby immediately and adversely affecting the rights of the appellant, and subjecting the stations to a drastic penalty for non-compliance—denial or cancellation of broadcasting licenses.

Several aspects of the broad problem of judicial review of administrative orders are not under consideration here. Under the doctrine of "primary jurisdiction" courts refuse to deal with technical questions

* Footnotes which contain material other than a mere listing of sources and authorities are indicated throughout this REVIEW by an asterisk placed after the footnote number.

[1] §402(a) of the Communications Act of 1934, 48 STAT. 1093 (1934), 47 U. S. C. A. §402(a) (Supp. 1941), makes applicable to "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission" (with the exception of orders granting or denying construction permits and radio station licenses) the provisions of the Urgent Deficiencies Act outlining the procedure for review of ICC orders. 38 STAT. 219 (1913), 28 U. S. C. A. §46 (1934).

[2] National Broadcasting Co. v. United States, 44 F. Supp. 688 (S. D. N. Y. 1942).

[3] Columbia Broadcasting System, Inc. v. United States, — U. S. —, 62 S. Ct. 1194, 86 L. ed. (Adv. Ops.) 1066 (1942). National Broadcasting Company v. United States, — U. S. —, 62 S. Ct. 1214, 86 L. ed. (Adv. Ops.) 1088 (1942), is a companion case.

until they have been submitted to the specialized administrative body designed for expertness in handling such problems.[4] Administrative remedies must be exhausted before the case can be taken to the courts.[5] For example, judicial review has been denied where there was no application for a rehearing before the administrative tribunal,[6] and in some cases where appeal to a higher governmental agency has been provided, such appeal has been held a prerequisite to judicial consideration.[7] Suits to set aside or modify administrative orders may be maintained only by aggrieved or interested parties,[8] and these actions are often limited to definite statutory procedures.[9*] These problems, and the crucial issue of the conclusiveness of administrative determinations (the doctrine of administrative finality), may be differentiated from the first essential of appeal from administrative action, the requirement illustrated in the principal case, namely, that there be an "order" having a degree of finality and determining or affecting the legal rights, duties and responsibilities of the appellant.

"The word 'order' is used for an executive act, for a judicial act,

[4] Texas & P. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. ed. 553 (1907); Miller, *The Necessity for Preliminary Resort to the Interstate Commerce Commission* (1932) 1 GEO. WASH. L. REV. 49; Tollefson, *Judicial Review of the Decisions of the Interstate Commerce Commission* (1937) 5 GEO. WASH. L. REV. 503, 531; Note (1938) 51 HARV. L. REV. 1251.

[5] Berger, *Exhaustion of Administrative Remedies* (1939) 48 YALE L. J. 981; Stason, *Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies* (1930) 28 MICH. L. REV. 637; Notes (1935) 35 COL. L. REV. 230, (1927) 27 COL. L. REV. 450.

[6] Red River Broadcasting Co. v. FCC, 98 F. (2d) 282 (App. D. C. 1938), *cert. denied*, 305 U. S. 625, 59 S. Ct. 86, 83 L. ed. 400 (1938); Note (1939) 27 GEO. L. J. 783.

[7] Porter v. Investor's Syndicate, 286 U. S. 461, 52 S. Ct. 617, 76 L. ed. 1226 (1931); Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 S. Ct. 67, 53 L. ed. 150 (1908); United States v. Sing Tuck, 194 U. S. 161, 24 S. Ct. 621, 48 L. ed. 917 (1904); §313(a) of the Federal Power Act, 49 STAT. 860 (1935), 16 U. S. C. A. §825*l*(a) (1941).

[8] FCC v. Sanders Bros. Radio Station, 309 U. S. 470, 60 S. Ct. 693, 84 L. ed. 869 (1940); Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382, 52 S. Ct. 440, 76 L. ed. 808 (1932); Alexander Sprunt & Son v. United States, 281 U. S. 249, 50 S. Ct. 315, 74 L. ed. 832 (1930); Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317, 68 L. ed. 667 (1924); Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143, 44 S. Ct. 72, 68 L. ed. 216 (1923).

[9*] The two most common methods of review found in Congressional acts are (1) an equitable proceeding to enjoin or set aside the order, brought in a special district court of three judges, with direct appeal as of right to the Supreme Court, and precedence over other cases in both courts (the procedure provided by the Urgent Deficiencies Act); (2) an appeal to a circuit court of appeals by the commission to enforce, or by an interested party to set aside, a cease and desist order of the commission, with review by the Supreme Court on writ of certiorari. McAllister, *Statutory Roads to Review of Federal Administrative Orders* (1940) 28 CALIF. L. REV. 129, 130. For cases denying relief because the wrong procedure was followed, see Venner v. Michigan C. R. R., 271 U. S. 127, 46 St. Ct. 444, 70 L. ed. 868 (1926); Lambert Run Coal Co. v. Baltimore & O. R. R., 258 U. S. 377, 42 S. Ct. 349, 66 L. ed. 671 (1922); United States v. Merchants and Manufacturers' Traffic Ass'n, 242 U. S. 178, 37 S. Ct. 24, 61 L. ed. 233 (1916).

and for a legislative act. . . ."[10] There is nothing in the usage of the term which clarifies the problem of what acts are "orders" and therefore reviewable. Nor have the statutes creating administrative boards and establishing their relationship to the judiciary attempted any more accurate definition or classification.[11] Consequently, courts have been relatively free to block out the kind of determinations properly called "orders" and to place limitations on the appealability of these orders.[12]

An "order" in the form of an unequivocal command is often required as a condition precedent to judicial review. Although this condition has not been universally demanded,[13] it does explain why administrative determinations in the nature of findings of fact embodied in reports and orders are not subject to attack as such.[14*] This is true whether the findings are the last contemplated action in the proceedings or whether they are to be the basis for future administrative adjudication or regulation; standing alone they are not enforceable and seldom have any immediate legal effects. *United States v. Los Angeles & Salt Lake Railroad Company,*[15] relied on by Justice Frankfurter in his

[10] Committee on Ministers' Powers, *Report* (Cmd. 4060, London, 1932) 18.

[11] For a thorough classification, see Blachly and Oatman, *Federal Statutory Administrative Orders* (1940) 25 IOWA L. REV. 582.

[12] Note, *Appealability of Administrative Orders* (1938) 47 YALE L. J. 766, 768. This comment contains an excellent discussion of the general problem under consideration.

[13] Note (1940) 8 U. OF CHI. L. REV. 113, 114.

[14*] United States v. Atlanta, B. & C. R. R., 282 U. S. 522, 51 S. Ct. 237, 75 L. ed. 513 (1931) (in report on carrier's accounts, ICC concluded that investment figure should not exceed stated sum and "expected" company to adjust accounts accordingly; *held,* no "order"); Carolina Aluminum Co. v. Federal Power Comm., 97 F. (2d) 435 (C. C. A. 4th, 1938) (no review of finding that interstate or foreign commerce would be affected by proposed construction of hydro-electric power project, even though after such finding construction of the project would violate the Federal Power Act and could be enjoined at the suit of the Commission); Third Ave. Ry. v. SEC, 85 F. (2d) 914 (C. C. A. 2d, 1936) (carrier asked SEC to amend requirements as to filing financial statements, and was notified by letter that its petition was denied; the court dismissed the statutory appeal); Brady v. ICC, 43 F. (2d) 847 (N. D. W. Va. 1930), *aff'd,* 283 U. S. 804, 51 S. Ct. 559, 75 L. ed. 1424 (1931) (suit to set aside reparation order held not maintainable under Urgent Deficiencies Act because suit was actually one to correct alleged errors in ICC's findings on which the order was based); Brooklyn E. Distr. Terminal v. United States, 28 F. (2d) 634 (S. D. N. Y. 1927) (general order of ICC required common carriers to report excess income and pay half to the Commission; the Commission declared petitioner a common carrier and by letters "requested" payment; *held,* no appealable order); *cf.* Great N. Ry. v. United States, 277 U. S. 172, 48 S. Ct. 466, 72 L. ed. 838 (1928) (no appeal from certification by ICC of amount due carrier under government guaranty). See also Chicago, B. & Q. R. R. v. Merriam & Millard Co., 297 Fed. 1 (C. C. A. 8th, 1924) (ICC report that certain rates would be unreasonable for the future and that reductions by the railroads should be forthcoming was held ineffectual to change existing filed tariffs); American Sugar Refining Co. v. Delaware, L. & W. R. R., 207 Fed. 733 (C. C. A. 3rd, 1913) (without formal order the ICC declared that allowances given by carriers were unlawful rebates and announced that carriers were expected to revise tariffs in conformity with the declaration; *held* ICC's action does not constitute a legally significant order).

[15] 273 U. S. 299, 47 S. Ct. 413, 71 L. ed. 651 (1927). *Accord,* United States

dissenting opinion in the instant case, presents a typical application of this rule. Under the authority of the Valuation Act,[16] the Interstate Commerce Commission established a final value of the railroad's property. This valuation was for possible future use by the Commission in any of a number of regulatory activities, notably rate making. In a suit to set aside the ICC's order fixing the value it was held that the order was not reviewable under the Urgent Deficiencies Act. It did not command, nor did it determine any legal right; and since under the Act it was only prima facie evidence of the legal value, it could be re-examined in any later judicial proceedings involving the valuation.[17*]

Similar to these "non-orders" are jurisdictional findings of boards and commissions. Such agencies must necessarily make the initial determination of whether individuals and corporations are subject to the provisions of the statutes sought to be enforced or whether they fall within exemptions or exceptions. Efforts to attain immediate court review of these decisions have generally been unsuccessful, even though direct and serious injury threatens. This is one aspect of the "final order rule,"[18] the doctrine which denies appeals until the final stage of the administrative process has been reached.[19] A determination that a carrier is not an interurban electric railway within an exception to the Railway Labor Act,[20*] or the Interstate Commerce Act;[21*] that

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v. Kansas City S. Ry., 275 U. S. 500, 48 S. Ct. 140, 72 L. ed. 394 (1927). *Contra:* Potomac Edison Co. v. West, 165 Md. 462, 169 Atl. 480 (1933). In Delaware & Hudson Co. v. United States, 266 U. S. 438, 45 S. Ct. 153, 69 L. ed. 369 (1925), a suit to annul a tentative valuation of railroad property was dismissed because the administrative process had not been completed, the administrative remedy exhausted.

[16] 37 STAT. 701 (1913), 49 U. S. C. A. §19a (1934).

[17*] The following language of Justice Brandeis, distinguishing this order from quasi-judicial and legislative orders of administrative agencies, was quoted in the dissenting opinion of the principal case: "The so-called order . . . is one which does not command the carrier to do, or to refrain from doing anything; which does not grant or withhold any authority, privilege or license; . . . extend or abridge any power or facility; . . . subject the carrier to any liability, civil or criminal; . . . change the carrier's existing or future status or condition; . . . determine any right or obligation. . . . It is the exercise solely of the function of investigation . . . merely preparation for possible action in some proceeding which may be instituted in the future—. . . ." United States v. Los Angeles & S. L. R. R., 273 U. S. 299, 309, 47 S. Ct. 413, 414, 71 L. ed. 651, 655 (1927).

[18] Note (1940) 8 U. OF CHI. L. REV. 113.

[19] Of course, all intermediate determinations may be questioned when the final order is attacked. For example, United States v. Idaho, 298 U. S. 105, 56 S. Ct. 690, 80 L. ed. 1070 (1936). When the ICC, after deciding that a railroad line was not a spur track outside the Commission's statutory jurisdiction, authorized abandonment of the line, the State of Idaho sued under the Urgent Deficiencies Act, contending that the line was a spur and the ICC's authorization of abandonment ineffective. *Held,* the line is a spur track wholly within one state and Commission's order is annulled.

[20*] §1 of the Railway Labor Act, 48 STAT. 1185 (1934), 45 U. S. C. A. §151 (Supp. 1941), authorizes and directs the ICC, upon request of the National Mediation Board or any interested party, to determine whether an electric railway falls

the Public Utility Holding Company Act of 1935[22] applies to a corporation seeking exemption;[23] that a distributor is a "natural gas company" under the Natural Gas Act;[24] or that an employer is engaged in interstate commerce and is therefore within the jurisdiction of the National Labor Relations Board[25]—these are not appealable orders.

But in a recent case the Supreme Court held reviewable an FCC ruling that a telephone company was a common carrier within the Communications Act of 1934,[26] and therefore subject to past orders of the Commission relating to telephone companies.[27] The distinction between this case and others which involve jurisdictional determina-

within the exception. Pursuant to this provision and at the request of the Mediation Board the Commission found that a carrier was not an interurban electric railway. *Held,* the finding is not an order reviewable under the Urgent Deficiencies Act because it is not in the form of an order, it does not command or direct any action but is simply preparation for possible future intervention in case of a labor dispute. Shannahan v. United States, 303 U. S. 596, 58 S. Ct. 732, 82 L. ed. 1039 (1938). The Court expressly declined to consider whether the ICC's determination was reviewable by some procedure other than that of the Urgent Deficiencies Act. In Shields v. Utah Idaho C. R. R., 305 U. S. 177, 59 S. Ct. 160, 83 L. ed. 111 (1938) one method of appeal was approved. After the ICC found the railroad within the scope of the Act and the National Mediation Board ordered the posting of a notice, the carrier brought suit against the federal district attorney to restrain any prosecution for failure to publish the notice or for any other violation of the Act. The Supreme Court upheld the district court's assumption of jurisdiction. Other examples of review by this method: Texas Electric Ry. v. Eastus, 25 F. Supp. 825 (N. D. Tex. 1938), *aff'd,* 308 U. S. 512, 60 S. Ct. 134, 84 L. ed. 437 (1939), and Hudson & Manhattan R. R. v. Hardy, 22 F. Supp. 105 (S. D. N. Y. 1938), *rev'd on merits,* 103 F. (2d) 327 (C. C. A. 2d, 1939).

[21*] Piedmont & N. Ry. v. United States, 280 U. S. 469, 50 S. Ct. 192, 74 L. ed. 551 (1930). The ICC decided that the carrier was not exempt from the Act and that public convenience and necessity did not permit a proposed extension of the railway's lines. The carrier sued to set aside the order denying exemption; the Supreme Court affirmed the lower court's dismissal for want of jurisdiction, saying that the ICC's negative order was not *res judicata* of the company's claim of immunity, and that the risk of loss to the carrier if it constructed the line without a certificate arose from the statute, not from the order. The validity of the ICC's determination of the railway's status was later tested and sustained by a suit to enjoin the construction of the new line until a certificate should be obtained. Piedmont & N. Ry. v. ICC, 286 U. S. 299, 52 S. Ct. 541, 76 L. ed. 1115 (1932). United States v. Chicago, N. S. & M. R. R., 288 U. S. 1, 53 S. Ct. 245, 77 L. ed. 583 (1933) was a proceeding to enjoin the carrier from issuing securities without ICC approval. The district court and the Supreme Court declared the railroad within the exemption to the Act, pointing out that the Commission had for over a decade treated the carrier as an interurban electric railway outside its jurisdiction.

[22] 49 STAT. 838 (1935), 15 U. S. C. A. §79 *et seq.* (Supp. 1941).

[23] Houston Natural Gas Corp. v. SEC, 100 F. (2d) 5 (C. C. A. 4th, 1938).

[24] East Ohio Gas Co. v. Federal Power Comm., 115 F. (2d) 385 (C. C. A. 6th, 1940); Canadian River Gas Co. v. Federal Power Comm., 110 F. (2d) 350 (C. C. A. 10th, 1940).

[25] See Newport News S. & D. D. Co. v. Schauffler, 303 U. S. 54, 57, 58 S. Ct. 466, 467, 82 L. ed. 646, 648, 649 (1938).

[26] §2(b) (2) of the Act, 48 STAT. 1064 (1934), 47 U. S. C. A. 152(b) (2) (Supp. 1941); §3(h), 48 STAT. 1065 (1934), 47 U. S. C. A. §153(h) (Supp. 1941).

[27] Rochester Telephone Corp. v. United States, 307 U. S. 125, 59 S. Ct. 754, 83 L. ed. 1147 (1939).

tions is found in the opinion by Justice Frankfurter: "The order . . . was not a mere abstract declaration regarding the status of the Rochester. . . . [It] necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority."[28*]

There is a stronger reason, however, for the importance of the *Rochester Telephone Corp.* case in the field of administrative law. In it the Supreme Court repudiated the "negative order doctrine." A long line of decisions in suits under the Urgent Deficiencies Act to set aside ICC orders had established the questionable proposition that the federal courts had no jurisdiction to review orders denying the affirmative relief sought.[29] When re-examined by the Court the cases failed to sustain the utility and wisdom of the doctrine and they were over-

[28*] *Id.* at 143, 144, 59 S. Ct. at 764, 83 L. ed. at 1160. A case somewhat resembling the *Rochester Telephone Corp.* case is Charles Noeding Trucking Co. v. United States, 29 F. Supp. 537 (D. N. J. 1939). §203(b) (8) of the Motor Carrier Act, 49 STAT. 544 (1935), 49 U. S. C. A. §303(b) (8) (Supp. 1941), grants to carriers within municipalities, between contiguous municipalities, or within commercial zones adjacent to municipalities a partial exemption from the provisions of the Act, but the ICC may withdraw the exemption and apply the full Act when necessary to carry out the national transportation policy. The Commission defined the New York City commercial zone, excluding and withdrawing from the zone certain contiguous municipalities, thus subjecting carriers in those areas to the regulatory weight of the Act, backed up by penal provisions. On attack by the carriers the ICC's determination was held a "final order" reviewable under the terms of the Act; the order ended the proceeding before the ICC and imposed duties on the plaintiffs which carried sanctions for non-compliance.

[29] Proctor & Gamble Co. v. United States, 225 U. S. 282, 32 S. Ct. 761, 56 L. ed. 1091 (1912) (refusal of relief against demurrage regulations); Hooker v. Knapp, 225 U. S. 302, 32 S. Ct. 769, 56 L. ed. 1099 (1912) (refusal to reduce maximum rates); Lehigh Valley R. R. v. United States, 243 U. S. 412, 37 S. Ct. 397, 61 L. ed. 819 (1917) (denial of relief from Panama Canal Act); Manufacturers Ry. v. United States, 246 U. S. 457, 38 S. Ct. 383, 62 L. ed. 831 (1918) (failure to fix divisions of joint rates); Piedmont & N. Ry. v. United States, 280 U. S. 469, 50 S. Ct. 192, 74 L. ed. 551 (1930) (assumption of jurisdiction and denial of certificate of convenience and necessity); Standard Oil Co. v. United States, 283 U. S. 235, 51 S. Ct. 429, 75 L. ed. 999 (1931) (denial of relief against alleged overcharges); ICC v. United States *ex rel.* Campbell, 289 U. S. 385, 53 S. Ct. 607, 77 L. ed. 1273 (1933) (refusal to award damages in reparations case); United States v. Corrick, 298 U. S. 435, 56 S. Ct. 829, 80 L. ed. 1263 (1936) (refusal to file tariff schedule); United States v. Griffin, 303 U. S. 226, 58 S. Ct. 601, 82 L. ed. 764 (1938) (refusal upon re-examination to increase railroad's compensation for carrying the mail). *But cf.* holding order reviewable: Intermountain Rate Cases, 234 U. S. 476, 34 S. Ct. 986, 58 L. ed. 1408 (1914) (partial denial of permission to depart from the short and long haul clause of the Interstate Commerce Act); United States v. New River Co., 265 U. S. 533, 44 S. Ct. 610, 68 L. ed. 1165 (1924) (dismissal of complaints against rule of coal car distribution); Alton R. R. v. United States, 287 U. S. 229, 53 S. Ct. 124, 77 L. ed. 275 (1932) (refusal to change divisions of joint reshipping rates); Powell v. United States, 300 U. S. 276, 57 S. Ct. 470, 81 L. ed. 643 (1937) (order striking tariff from files). On the negative order doctrine and its abolition in the *Rochester Telephone Corp.* case, see Notes (1934) 34 COL. L. REV. 908, (1939) 15 IND. L. J. 151, (1940) 24 MINN. L. REV. 379, (1939) 6 U. OF CHI. L. REV. 277, (1939) 24 WASH. U. L. Q. 591; (1933) 1 GEO. WASH. L. REV. 276.

ruled. The combined doctrines of "primary jurisdiction" and "administrative finality" were left to effectuate the considerations of policy behind the abandoned negative order rule.[30]

In contrast to administrative determinations which are not enforceable and which do not give rise to a clash of interest between a complainant and a governmental agency are regulations which are the end results of a commission's investigation and which formulate definite rules of conduct, enforceable by the imposition of statutory penalties. Thus a person aggrieved by a rate order,[31] a rule of car distribution in times of shortage,[32] an order promulgating rules governing car-hire settlements,[33] a mandate compelling the adoption of a safety device,[34] or an order prescribing the form and classification of accounts[35] may bring an action to enjoin, set aside, annul or suspend the order. These regulations may adversely affect rights as clearly as the acts of a legislature. Since suits to enjoin the enforcement of statutes have been

[30] Completing the repudiation of the negative order doctrine are two cases decided at the same term. In United States v. Maher, 307 U. S. 148, 59 S. Ct. 768, 83 L. ed. 1162 (1939), the Supreme Court reviewed an order of the ICC denying an application for a certificate of convenience and necessity under the "grandfather clause" of the Motor Carrier Act, 49 STAT. 543 (1935), 49 U. S. C. A. §306(a) (Supp. 1941). In Federal Power Comm. v. Pacific Power & Light Co., 307 U. S. 156, 59 S. Ct. 766, 83 L. ed. 1180 (1939), denial of an application for transfer of a utility's assets was appealed by the procedure outlined in §313(b) of the Federal Power Act, 49 STAT. 860 (1935), 16 U. S. C. A. §825*l*(b) (1941), and the Court sustained the lower court's assumption of jurisdiction. This decision in effect overrules Newport Electric Corp. v. Federal Power Comm., 97 F. (2d) 580 (C. C. A. 2d, 1938).

[31] Acker v. United States, 298 U. S. 426, 56 S. Ct. 824, 80 L. ed. 1257 (1936); Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 S. Ct. 220, 74 L. ed. 524 (1930); United States v. Illinois C. R. R., 263 U. S. 515, 44 S. Ct. 189, 68 L. ed. 417 (1924); Intermountain Rate Cases, 234 U. S. 476, 34 S. Ct. 986, 58 L. ed. 1408 (1914); Atchison, T. & S. F. Ry. v. United States, 232 U. S. 199, 34 S. Ct. 291, 58 L. ed. 568 (1914); ICC v. Union Pacific R. R., 222 U. S. 541, 32 S. Ct. 108, 56 L. ed. 308 (1912); McLean Lumber Co., v. United States, 237 Fed. 460 (E. D. Tenn. 1916). *But cf.* Algoma Coal & Coke Co. v. United States, 11 F. Supp. 487 (E. D. Va. 1935).

[32] Assigned Car Cases, 274 U. S. 564, 47 S. Ct. 727, 71 L. ed. 1204 (1927); ICC v. Illinois C. R. R., 215 U. S. 452, 30 S. Ct. 155, 54 L. ed. 280 (1910); *cf.* United States v. New River Co., 265 U. S. 533, 44 S. Ct. 610, 68 L. ed. 1165 (1924).

[33] Chicago, R. I. & P. Ry. v. United States, 284 U. S. 80, 52 S. Ct. 87, 76 L. ed. 177 (1931).

[34] United States v. Baltimore & O. R. R., 293 U. S. 454, 55 S. Ct. 268, 79 L. ed. 587 (1935).

[35] General order: American Telephone & Telegraph Co. v. United States, 299 U. S. 232, 57 S. Ct. 170, 81 L. ed. 142 (1936); Kansas City S. Ry. v. United States, 231 U. S. 423, 34 S. Ct. 125, 58 L. ed. 296 (1913); New York Edison Co. v. Maltbie, 271 N. Y. 103, 2 N. E. (2d) 277 (1936). Order applicable to particular company: Atlanta, B. & C. R. R. v. United States, 296 U. S. 33, 56 S. Ct. 12, 80 L. ed. 25 (1935); Norfolk & W. Ry. v. United States, 287 U. S. 134, 53 S. Ct. 52, 76 L. ed. 218 (1932), *aff'g* 52 F. (2d) 967 (W. D. Va. 1931); Chesapeake & O. Ry. v. United States, 5 F. Supp. 7 (D. Va. 1933); Atlanta, B. & C. R. R. v. United States, 28 F. (2d) 885 (N. D. Ga. 1928).

allowed[36] it is reasonable that a commission's quasi-legislation should be subject to the same attack in the courts.

There are many orders issued by administrative agencies which, though unequivocal and imperative, are nevertheless non-appealable. Recognizing the integrity, responsibility and necessities of the "fourth branch of Government," courts have been reluctant to interfere with the administrative process by reviewing procedural, interlocutory orders. Thus when a federal commission orders the institution of an investigation,[37] the holding of a hearing,[38] or the production of information and evidence[39] the "final order rule" precludes attack until a later stage in the proceedings has been reached. Similarly, there is no review when the Securities and Exchange Commission refuses permission to withdraw registration statements,[40] nor when the NLRB directs an election to determine labor representation.[41] Apparently, however, an administrative agency's disclosure of confidential information in the initial stages of the price-fixing process may be enjoined in a proper case.[42*]

The final order doctrine has been specifically incorporated into the

[36] Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. ed. 1070 (1925); Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7, 60 L. ed. 131 (1915).

[37] East Ohio Gas Co. v. Federal Power Comm., 115 F. (2d) 385 (C. C. A. 6th, 1940); Canadian River Gas Co. v. Federal Power Comm., 110 F. (2d) 350 (C. C. A. 10th, 1940); SEC v. Andrews, 88 F. (2d) 441 (C. C. A. 2d, 1937); Chamber of Commerce v. Federal Trade Comm., 280 Fed. 45 (C. C. A. 8th, 1922).

[38] Newport News S. & D. D. Co. v. Schauffler, 303 U. S. 54, 58 S. Ct. 466, 82 L. ed. 646 (1938); Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 S. Ct. 459, 82 L. ed. 638 (1938); New York, O. & W. Ry. v. United States, 273 U. S. 652, 47 S. Ct. 334, 71 L. ed. 823 (1927), *aff'g* 14 F. (2d) 850 (S. D. N. Y. 1926); United States v. Illinois C. R. R., 244 U. S. 82, 37 S. Ct. 584, 61 L. ed. 1007 (1917); United States *ex rel.* Delaware & Hudson R. R. v. ICC, 51 F. (2d) 429 (App. D. C. 1931); Pittsburgh & W. Va. Ry. v. ICC, 280 Fed. 1014 (App. D. C. 1922); Philadelphia City Passenger Ry. v. Public Service Comm., 271 Pa. 39, 114 Atl. 642 (1921).

[39] Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 58 S. Ct. 963, 82 L. ed. 1408 (1938); Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160, 47 S. Ct. 553, 71 L. ed. 978 (1927); Federal Trade Comm. v. Maynard Coal Co., 22 F. (2d) 873 (App. D. C. 1927).

[40] Resources Corp. International v. SEC, 97 F. (2d) 788 (C. C. A. 7th, 1938); Jones v. SEC, 79 F. (2d) 617 (C. C. A. 2d, 1935), *cert. denied*, 297 U. S. 705, 56 S. Ct. 497, 80 L. ed. 993 (1936).

[41] NLRB v. Falk Corp., 308 U. S. 453, 60 S. Ct. 307, 84 L. ed. 396 (1940); NLRB v. International Brotherhood of Electrical Workers, 308 U. S. 413, 60 S. Ct. 306, 84 L. ed. 354 (1940); Ames Baldwin Wyoming Co. v. NLRB, 73 F. (2d) 489 (C. C. A. 4th, 1934).

[42*] Review of a general order directing the disclosure of confidential information was denied where the suit was brought under the statutory procedure. Mallory Coal Co. v. National Bituminous Coal Comm., 99 F. (2d) 399 (App. D. C. 1938). But in Utah Fuel Co. v. National Bituminous Coal Comm., 306 U. S. 56, 59 S. Ct. 409, 83 L. ed. 483 (1939), the Supreme Court permitted the order involved in the Mallory case to be tested in a suit to enjoin enforcement; and in American Sumatra Tobacco Corp. v. SEC, 93 F. (2d) 236 (App. D. C. 1937) denial of an application for confidential treatment was held reviewable by the statutory method because the denial was a final order entered in a particular case.

National Labor Relations Act by the provision for review of "final orders" only.[43] A certification by the NLRB determining an appropriate bargaining unit and designating a particular union as exclusive representative of the employees in such unit[44] was held not a final order and therefore not reviewable in *American Federation of Labor v. NLRB.*[45] The holding rests squarely on construction of the Act in the light of its wording and history. The clear Congressional intent to bar appeals at this interlocutory stage controlled the decision.[46]

Obviously, the NLRB's certification may have marked adverse effects upon the rights and duties of the employer and any labor minority. In recognizing this aspect of the Board's action the Court significantly remarked: ". . . we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be re-examined by courts under particular statutes providing for the review of 'orders.' "[47*]

The primary requisites of judicial review are present in the principal case, *Columbia Broadcasting System, Inc. v. United States.*[48] The Supreme Court is not deterred by the FCC's characterization of its order as an announcement of policy.[49] The chain broadcasting regulations, while in form mere rules to guide the Commission in the exercise of its

[43] §10(f): "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals. . . ." 49 STAT. 455 (1935), 29 U. S. C. A. §160(f) (1942).

[44] §9 of the National Labor Relations Act, 49 STAT. 453 (1935), 29 U. S. C. A. §159 (1942), provides for determination of the appropriate unit and selection of representatives.

[45] 308 U. S. 401, 60 S. Ct. 300, 84 L. ed. 347 (1940).

[46] Appeal from a similar certification of a state labor relations board has been denied. Wallach's, Inc. v. Boland, 277 N. Y. 345, 14 N. E. (2d) 381 (1938).

[47*] American Federation of Labor v. NLRB, 308 U. S. 401, 408, 60 S. Ct. 300, 303, 84 L. ed. 347, 352 (1940). The Court declined to decide whether a suit in equity in a district court to set aside the certification was maintainable. Of course, the employer can attack the validity of the Board's determination of the appropriate unit and its designation of the majority union by refusing to bargain; on appeal from the Board's order to bargain collectively the record of the investigation is filed and the certification may be questioned and reviewed. Pittsburgh Plate Glass Co. v. NLRB, 313 U. S. 146, 61 S. Ct. 908, 85 L. ed. 1251 (1941). But if the employer acquiesces in the Board's certification there seems to be no way in which a minority union can contest it. For comment on *American Federation of Labor v. N.L.R.B., supra,* see (1939) 52 HARV. L. REV. 1171, (1940) 24 MINN. L. REV. 856, (1939) 17 N. Y. U. L. Q. REV. 109.

[48] — U. S. —, 62 S. Ct. 1194, 86 L. ed. (Adv. Ops.) 1066 (1942).

[49] Jurisdiction to review orders of administrative tribunals is not dependent on their form. See American Federation of Labor v. NLRB, 308 U. S. 401, 408, 60 S. Ct. 300, 303, 84 L. ed. 347, 352 (1940); Powell v. United States, 300 U. S. 276, 285, 57 S. Ct. 470, 475, 81 L. ed. 643, 650 (1937); Alton R. R. v. United States, 287 U. S. 229, 237, 53 S. Ct. 124, 127, 77 L. ed. 275, 281 (1932); Diamond Tank Transport v. United States, 23 F. Supp. 497, 499 (W. D. Wash. 1938).

licensing power, are in effect and intent regulations of the contractual relations of the national networks and their affiliated stations.[50*] Realistically viewed, the order commands the local stations to abrogate certain provisions of their contracts or else suffer economic death through loss of station licenses. Of course, this severe penalty will not be imposed if the stations can prove that the FCC's expressed concept of the public convenience, interest and necessity in chain broadcasting is an erroneous one and the regulations therefore void. But any interested party would have the same opportunity to avoid the fines levied for disobedience of FCC accounting regulations, or other general orders which are clearly reviewable. There is no essential difference between the order in the principal case and other legislative orders reviewable under the Urgent Deficiencies Act.[51] In all these cases the alternatives are to conform to the regulation, to attack it before its direct application to the particular litigant, or to violate it and then defend in the proceedings brought to attach its sanctions. And there is no question but that the appellant here is an aggrieved party with standing to assail the order as an illegal exercise of the Commission's rule-making power.[52]

Accepting the allegations of the complaint as true, the order adversely affects the substantive rights of CBS, not contingently upon future administrative action as in *United States v. Los Angeles & Salt Lake Railroad Company*,[53] but immediately, as the threatened cancellations of contracts attest. The FCC has decided that the contract provisions are contrary to the public interest. It has issued an order which em-

[50*] This is shown in several ways. In the first place, the FCC's investigation was begun under §303(i) of the Communications Act, 48 STAT. 1082 (1934), 47 U. S. C. A. §303(i) (Supp. 1941), which gives the Commission authority "to make special regulations applicable to radio stations engaged in chain broadcasting." Columbia Broadcasting System, Inc. v. United States, — U. S. —, 62 S. Ct. 1194, 1200, 86 L. ed. (Adv. Ops.) 1066, 1072 (1942). Secondly, the Commission twice provided for postponement of the effective date of the order with respect to existing contracts and station licenses, and in regard to two of the regulations the extension or suspension was "in order to permit the orderly disposition of properties." Columbia Broadcasting System, Inc. v. United States, *supra*, 62 S. Ct. at 1070, 86 L. ed. (Adv. Ops.) at 1198. Is this consistent with a mere announcement of policy? Thirdly, the wording of the FCC's first draft of the proposed regulations is significant. In its notice of November 28, 1940, which ordered argument on the first draft, most of the regulations began, "No licensee of a standard broadcast station shall enter into any contractual relation, express or implied, wtih a network organization which. . . ." The final draft changed the language to, "No license shall be granted to a standard broadcast station having any contract . . . with a network organization which. . . ." Brief for Appellant, pp. 44, 45, Columbia Broadcasting System, Inc. v. United States, *supra*.

[51] See cases cited *supra* notes 30-34.

[52] Powell v. United States, 300 U. S. 276, 57 S. Ct. 470, 81 L. ed. 643 (1937); Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382, 52 S. Ct. 440, 76 L. ed. 808 (1932); Western Pac. Cal. R. R. v. Southern Pacific Co., 284 U. S. 47, 52 S. Ct. 56, 76 L. ed. 160 (1931).

[53] 273 U. S. 299, 47 S. Ct. 413, 71 L. ed. 651 (1927).

bodies this decision and the means of enforcing it. The result is a clash of interest between the network and the Commission which, the principal case holds, may be resolved judicially through the procedure of §402(a) of the Communications Act.

Nor is review barred by the "final order rule" precluding appeals from interlocutory orders. The FCC's investigations, hearings and deliberations have borne fruit in a legislative order which prescribes a standard for future conduct. This integral part of the administrative process has been concluded. What remains to be done is of a different nature, i.e., the application of the standard to the individual cases as they arise. Nothing in the law or the logic of this situation forces CBS to await the second stage of the process before requesting judicial review. Indeed, it seems highly probable that any remedies available at that stage would be most inadequate.[54*]

The Supreme Court has no desire to extend the holding of the principal case to review all announcements of policy,[55] but seeks rather to limit it to cases where by the exercise of rule-making power an administrative agency determines legal rights, and where appeal from later administrative adjudication of those rights would not be efficacious in the prevention of serious injury. In the words of Chief Justice Stone: "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need . . . to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other . . . adjudications that may follow, the results of which the regulations purport to control."[56]

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[54*] Appellant's affadavits state that it knows of no affiliated station which is prepared to contest the order; the stations have seemingly elected to comply with the FCC's regulations even if it means rescinding their contracts with CBS. Brief for Appellant, pp. 27-30, Columbia Broadcasting System, Inc. v. United States, — U. S. —, 62 S. Ct. 1194, 86 L. ed. (Adv. Ops.) 1060 (1942). Even if one or more stations did contest, the issues and effect of such proceedings would not be the same as those in review under §402(a) of the Communications Act, 48 STAT. 1093 (1934), 47 U. S. C. A. §402(a) (Supp. 1941), and the decision would probably come too late to save Columbia from serious injury. Columbia Broadcasting System, Inc. v. United States, *supra*, 62 S. Ct. at 1203, 86 L. ed. (Adv. Ops.) at 1075.

[55] For the various forms which such announcements may take, see Final Report of the Attorney General's Committee on Administrative Procedure (1941) 26, 27.

[56] Columbia Broadcasting System, Inc. v. United States, —U. S.—, 62 S. Ct. 1194, 1204, 86 L. ed. (Adv. Ops.) 1060, 1076 (1942).