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Utilities Commissions As Expert Courts

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SPECIALIZED COURTS

The swarming increase of administrative tribunals within the last generation caused much excitement and not a little dismay, principally among lawyers. However, these tribunals which were new, or at least unprecedented in numbers, already are growing familiar, and therefore they look less dangerous. They are still denounced, but not many people expect them to disappear. They are a *fait accompli* of modern conditions.

There are two features of these bodies which are of importance to this discussion. First is the fact that many of them have authority to, and do, decide disputes which would otherwise be decided by courts. In the rise of these tribunals which have taken over much of the work of deciding cases Dean Pound sees a repetition of a process already familiar in the history of the law, namely, the injection into the legal order of a larger measure of discretion in the making of decisions; a return for the time being in some fields to justice without law, or with a minimum of law.[1] He compares the growth of administrative bodies with the rise of equity.[2] Doubtless Pound, with his ability to see in the large the panorama of developing legal institutions, has caught one of the larger aspects of this new phenomenon. There is, however, another characteristic of these administrative bodies which distinguishes their advent from past large scale developments in the jural order; which marks them as the peculiar product of our own day, and links them with our modern civilization. Their work is highly specialized. The Interstate Commerce Commission regulates certain public utilities; the Securities and Exchange Commission handles problems concerning securities; state industrial commissions have jurisdiction over workmen's compensation.[3] Specialization is one of the most impressive features of our present day civilization. As far back as knowledge of human accomplishment goes, there has never been a civilization even remotely approaching ours in the magnitude of its material achievements. The rapid progress we have made on innumerable fronts, ranging from the

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[1] Pound, *Justice According to Law* (1914) 14 COL. L. REV. 1, 18. See also DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 36.

[2] Pound, *op. cit. supra* note 1 at 19.

[3] For an enumeration of the federal administrative tribunals see Report of the Special Committee on Administrative Law (1934) 59 A. B. A. Rep. 539, 556. The titles of the tribunals suggest, to some extent, their specialized jurisdiction.

control of disease to the building of ocean liners, has been made possible by specialization. Its mark is on our era. Is it strange, then, that the administration of justice should become specialized? Rather, it would have been strange if the decision of controversies arising in large and highly specialized fields of human activity had been left forever to decision by tribunals of general jurisdiction. The world has become specialized; administration of the law is merely feeling the effect of the times.

What place the present day administrative tribunals will take in the legal system of the future is a matter of prophecy. There is a strong possibility that they will develop into specialized courts. Already there is evidence that some of these bodies are in the process of becoming courts. From the beginning many of them have had, among other functions, the duty of deciding cases between opposing parties; that is to say, they have done the work of courts. Many of them are manned by lawyers; specialists, perhaps, but still lawyers; and lawyers represent the litigants before them. By reason of this fact they are likely to pattern their conduct after that of courts. The same tendency is promoted by the fact that court litigation affords them a familiar system after which to model their own.[4] Some of the older administrative tribunals, such as those having jurisdiction over public utilities, are building a body of precedents, and they follow them. By this process the wide discretion which is supposed to distinguish administrative from judicial decisions[5] tends to become reduced to rule, just as the originally wide discretion of tribunals administering equity tended to become reduced to rule. Such bodies as utilities commissions render written opinions. Save for such words as "this commission" here and there in the opinions, it would in many instances be hard to tell from the text whether a court or a commission were deciding the cases.[6] Further, these commissions as part of their usual daily business decide disputed questions of law, just as courts do.[7]

[4] In North Carolina by statute in cases before the Utilities Commission the rules of evidence shall be the same as in civil actions, unless otherwise provided. N. C. CODE ANN. (Michie, 1935) §1093. Here the legislature used the court model. Report, Committee on Ministers' Powers (1932) 83-85, treats bodies analogous to our utilities commissions as specialized courts.

[5] See note 1.

[6] For example see Certified Highway Carriers Inc. v. Kemp, 8 P. U. R. (n.s.) 52 (Cal. R. R. Comm. 1935).

[7] In Carriers' Protective Committee v. Leonard, 8 P. U. R. (n.s.) 51 (Pa. Pub. Serv. Comm. 1935) the sole question before the commission was whether a motor vehicle carrier operating as a common carrier in interstate commerce, but carrying in intrastate commerce for only four shippers and for those by special contract was conducting business as a common carrier in intrastate commerce, so as to make the operation without a certificate from the state commission illegal. The commission held the operation illegal, citing a Pennsylvania court decision. In Certified Highway Carriers Inc. v. Kemp, *supra* note 6, the commission decided

There is, then, reason to believe that we may be witnessing the beginning of one of those great changes in the legal system which have been landmarks in its development from primitive origins. The gripping story of the growth of law from the rude creeds and customs of barbaric peoples to a highly perfected instrument of civilization, rich in history and philosophy, may be in process of having added another chapter. Perhaps that chapter will be entitled by the jurists of the future, "The Development of Specialized Courts."

There are, it is true, many differences between courts and administrative commissions. Utilities commissions, for example, may initiate as well as try cases; may gather as well as pass upon evidence. They have powers of continuous control over the utilities which occasionally appear as litigants before them, and they are thereby enabled to understand the litigation by reason of long familiarity with the problems out of which it grew. These dissimilarities between the old courts and the new commissions must not be mistaken for evidence that the commissions never can become courts. When tribunals for the administration of equity first appeared they were vastly different from the common law courts. Nevertheless these tribunals developed into courts, and brought with them into the court system powers which enriched the system and enabled it to keep up with the needs of advancing civilization. Similarly the administrative commissions of our own time may become courts, and may bring into the court system the specialization, expert knowledge, and expanded powers necessary to enable that system to meet the needs of the civilization of the future.[8]

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that a common carrier of packages by motorcycle side car was included in the Auto Truck Transportation Act of California as a carrier by "auto truck," and that therefore a certificate from the commission was necessary. The commission determined this matter of interpretation of a statute by reasoning as to intent of the legislature, and searching related statutes, just as a court would have done. In *Re* Everett Water Co., 8 P. U. R. (n.s.) 335 (Pa. Pub. Serv. Comm. 1935) the commission denied approval of a loan from a holding company to an operating company on the ground that the loan called for interest in excess of the legal rate.

Additional examples of cases wherein commissions decided "questions of law" are City of Fort Collins v. Pub. Serv. Co., 8 P. U. R. (n.s.) 361 (Colo. P. Us. Comm. 1935) (a utility can be obliged to sell current to a city for redistribution); *Re* Pointe Aux Barques Land Co., 10 P. U. R. (n.s.) 365 (Mich. P. Us. Comm. 1935) (statutory jurisdiction of commission); Town of Irvington v. Commonwealth Water Co., 10 P. U. R. (n.s.) 329 (N. J. Bd. of P. U. Commrs. 1935) (application of statute).

[8] It is the possibility of immense gain for the future from the evolution of specialized administrative commissions which leads the writer to regard as particularly unhappy the recommendation of the Special Committee on Administrative Law (1934) 59 A. B. A. Rep. 539 that the federal administrative tribunals be replaced by an administrative court shorn of the legislative and executive functions of the present tribunals. Thereby we would return so far as possible to the model of the existing courts. The English Committee on Ministers' Powers advised against the adoption of a regularized system of administrative courts. See Phillips, *An American View of Administrative Law* (1936) 52 L. Q. Rev. 25.

USE BY UTILITIES COMMISSIONS OF THEIR OWN KNOWLEDGE

Specialization, then, lends both present importance and future promise to administrative commissions as a creation of the modern legal system. One of the principal advantages flowing from specialization is that it produces expert tribunals. It does so in two ways. If a commission handles nothing except public utilities, then persons expert in public utility affairs may properly be placed on the commission; and men on the commission tend to become expert in public utility affairs. If the benefit of having specialized commissions is to be reaped to the full, then the fullest advantage must be taken of the expert character of these commissions; and if the future development of these specialized tribunals is not to be hampered, we must not generate obstructing legal difficulties in the way of the use of the expert knowledge and skill of the tribunals. The concern of this article will be to inquire into the use of this expert knowledge at present possible under the law; and, in the light of the above discussion of the place in the legal system which these tribunals may come to fill, to suggest the course which the law should take with reference to the use of such expert knowledge. A closely related problem, which will be considered in conjunction with the one just stated, is that of the use by commissions of data obtained by them in the course of their duties. In order to bring the materials within the bounds of an article, the discussion will center almost exclusively on utilities commissions.

The right of commissions to resort in deciding cases to their own knowledge and experience, and to data accumulated by them in the course of their duties, was early asserted and vigorously defended. The Interstate Commerce Commission in 1909 boldly declared: "When considering a complaint involving the rates or practices of a carrier, the Commission, being an administrative body performing its functions in the interest of the general public rather than in the interest of particular litigants, is entitled to bring to its aid all the information that can be drawn either from the records in other complaints before it or from its general experience and knowledge of transportation matters. The right which courts have to take judicial notice of certain classes of facts is extended in the case of the Commission to the entire range of its experience with transportation problems and embraces all the knowledge that it has gathered from any source."[9]

An equally positive statement of the right of a commission to resort to its own expert knowledge in fixing rates was made by the Minnesota supreme court in 1897.[10] The court in supporting its position pointed

[9] Joynes v. Pa. R. R., 17 I. C. C. 361, 366 (1909).

[10] Steenerson v. Gt. No. Ry., 69 Minn. 353, 72 N. W. 713 (1897). See also Chic. & N. W. Ry. v. R. R. Comm., 156 Wis. 47, 145 N. W. 216 (1914), approved (1914) 27 HARV. L. REV. 683.

not only to the expert nature of the commission, but to the fact that it exercised legislative functions. The court said, "It (the commission) is not a judicial tribunal, but an administrative body, whose powers are somewhat legislative in character; and, like other administrative or legislative bodies, it acquires a knowledge of the facts, circumstances, and conditions in its own way."[11]

Additional cases supporting the right of commissions to take into account their own knowledge or specific data accumulated by them will be treated hereinafter in connection with judicial notice.

The use by the newly developing specialized commissions of their own expert knowledge was predestined to collide with a doctrine built up by the older courts of general jurisdiction having no expert knowledge; a doctrine perfectly applicable to such courts, and so familiar to them as to appear to be an inevitable requirement of any real trial at all; namely, that decisions must be made in accord with evidence duly introduced. The United States Supreme Court announced that the findings of the Interstate Commerce Commission upon evidence will be ascribed "the strength due to the judgments of a tribunal appointed by law and informed by experience."[12] However, the commission must decide in accord with the evidence,[13] and may not reach a decision unsupported by evidence.[14] In other words, the experience of the commission will give weight to its view of the evidence, but that experience must not be resorted to in lieu of evidence. Neither may the Commission rely on data accumulated by it but not introduced in evidence.[15] "Facts conceivably known to the Commission but not put in evidence will not support an order."[16] Many courts took a similar view with regard to state

[11] 72 N W. at 716.

[12] See Ill. Cent. R. R. v. I. C. C., 206 U. S. 441, 454, 27 Sup. Ct. 700, 704, 51 L. ed. 1128, 1133 (1907); I. C. C. v. Union Pac. R. R., 222 U. S. 541, 547, 32 Sup. Ct. 108, 111, 56 L. ed. 308, 311 (1912).

[13] I. C. C. v. L. & N. R. R., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431 (1913).

[14] See The New England Divisions Case, 261 U. S. 184, 203, 43 Sup. Ct. 270, 278, 67 L. ed. 605, 615 (1923); I. C. C. v. Union Pac. R. R., 222 U. S. 541, 547, 32 Sup. Ct. 108, 111, 56 L. ed. 308, 311 (1912). In Fla. E. C. Ry. v. U. S., 234 U. S. 167, 34 Sup. Ct. 867, 58 L. ed. 1267 (1914) the court held that an injunction should issue against an order of the commission reducing rates on citrus fruit and vegetables. The court said that the order of the commission was without evidence to support it; but an analysis of the opinion shows that the court reversed the commission because the court did not believe the evidence was strong enough to support the order. For example, there was testimony that there had been a considerable increase in volume of the traffic affected by the lower rates. This the court called "a vague intimation." See also West v. Chesapeake & P. Tel. Co., 295 U. S. 662, 676, 55 Sup. Ct. 894, 900, 79 L. ed. 1640, 1650 (1935) approving the doctrine that an order of a commission made upon evidence which clearly does not support it is an arbitrary act against which courts will afford relief.

[15] U. S. v. Abilene & So. Ry., 265 U. S. 274, 44 Sup. Ct. 565, 68 L. ed. 1016 (1924).

[16] The Chic. Junction Case, 264 U. S. 258, 263, 44 Sup. Ct. 317, 319, 68 L. ed. 667, 673 (1924). This was an action to set aside an order of the Interstate Commerce Commission authorizing the New York Central to obtain control of certain

utilities commissions. They must decide in accord with the evidence.[17] They may not reach a decision without evidence to support it.[18] Neither may they resort to data accumulated by them but not put in evidence,[19] nor to any other matter not in the record.[20]

The reasons set forward for requiring commissions, like courts, to confine themselves to the evidence in deciding cases, are many. We have seen that in supporting the right of commissions to resort to their own expert knowledge the legislative character of the commissions was pointed to. In confining the commissions to the evidence before them the judicial or quasi judicial character of the commissions may be mentioned.[21] Here the stronger position would seem to be the first one; for granting that the commissions are designed to be judicial bodies, they are designed to be something more than the kind of judicial bodies the regular courts are; therefore they may be expected to exercise more than ordinary judicial powers.

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terminal railroads. It was alleged that the finding by the commission that the acquisition of control would be in the public interest was without evidence to support it. The lower court dismissed the bill on motion of the defendants. The Supreme Court said that therefore the allegation above must be taken as true, and reversed the lower court.

[17] Los Angeles & S. L. R. R. v. P. Us. Comm., 81 Utah 286, 17 P. (2d) 287 (1932); *cf.* West v. Chesapeake & P. Tel. Co., 295 U. S. 662, 55 Sup. Ct. 894, 79 L. ed. 1640 (1935).

[18] West Ohio Gas Co. v. P. Us. Comm., 294 U. S. 63, 55 Sup. Ct. 316, 79 L. ed. 761 (1935); Wheat, *Practice and Procedure before the Railroad Commission of California* (1927) 15 CALIF. L. REV. 445, 466; see L. & N. R. R. v. Finn, 235 U. S. 601, 606, 35 Sup. Ct. 146, 149, 59 L. ed. 379, 383 (1915) (The Kentucky statute, said the court, contemplates that the state commission base its findings on the evidence, and it could be assumed that the order fixing certain freight rates would be invalid unless supported by evidence. The court found the order to be so supported.)

[19] Ill. Cent. R. R. v. R. R. Comm. of Ky., 1 F. (2d) 805 (E. D. Ky. 1923); West Ohio Gas Co. v. P. Us. Comm. of Ohio, 42 F. (2d) 899 (N. D. Ohio, 1928); (1931) 29 MICH L. REV. 765. But *cf.* Ga. C. Tel. Co. v. Ga. Pub. Serv. Comm., 8 F. Supp. 434 (N. D. Ga. 1934). The Johnson Act, 48 STAT. 775 (1934), 28 U. S. C. Ann. §41 (1), excepts from its prohibition against Federal court injunctions against utility rate orders of state commissions orders not made after "reasonable notice and hearing." The question arose whether there had been a "reasonable hearing" when the state commission had considered evidence in its files not a part of the record in the proceeding. The court said the hearing is not reasonable where the affected parties are not allowed to know what evidence is being considered against them. But the court said that since the evidence here considered was annual reports of the utility itself, and its answers to a questionnaire, which documents were referred to at the hearing although not introduced, and since the facts therein are not claimed to be erroneous, the hearing was not rendered unreasonable.

[20] People v. Pub. Serv. Comm., 192 App. Div. 837, 183 N. Y. Supp. 283 (1920); Appalachian Power Co. v. Commonwealth, 132 Va. 1, 110 S. E. 360 (1922) (Due process is denied where the commission bases its decision fixing an electric rate on an engineer's report submitted after the hearing and without an opportunity for the utility to question it. This was especially true where the engineer recommended a flat rate, whereas the hearing had centered about a primary and secondary power rate.)

[21] See Stone, dissenting in West v. Chesapeake & P. Tel. Co., 295 U. S. 662, 688, 55 Sup. Ct. 894, 905, 79 L. ed. 1640, 1656 (1935).

Some courts have deduced an obligation on the commissions to look exclusively to the evidence from a statutory provision for a hearing;[22] the theory being that since the hearing is obviously for the purpose of presenting evidence, it is implied that the commission will decide the matter on the evidence. This looks like bad logic. The hearing is intended to enable interested parties to present their evidence, but it does not necessarily follow that this evidence shall be the sole source of the commission's action.

The substantial reasons for confining commissions to evidence before them are that evidence duly presented can be attacked by the other side, and shown to be untrue, unreliable, incomplete, inapplicable, not controlling, or offset by other evidence; but if the commission draws from its own experience or data it has accumulated in its files, without putting its opinion or data in evidence, there is no opportunity for attack.[23] It is not any lack of trustworthiness of the experience or data which excludes their use, but rather lack of notice to the adverse parties of the evidence against them.[24] There is weight in this reasoning. Not only does injustice to a litigant result where he is not presented with the case against him, but the success of the legal system is impaired by failure to reach the truth which the litigant might make known if he were aware of all that was being considered against him.

True, once evidence is in making possible a certain decision, the commission may reach the decision, not because it is persuaded by the evidence, but because its own experience or data persuade it that the decision should be made. Nevertheless the necessity of justifying results by evidence sufficient to sustain them produced under the fire of the utility is some guaranty against decisions founded on inadequate experience or data.

Commissions are required to look to the evidence before them for the further reason that if judicial review of commission decisions is to be had on the record, it is necessary that the record contain all the facts considered by the commission.[25] Moreover, if a commission were to be allowed to resort to its own experience, or other matter outside the record, then the commission's decision on the facts could never be called into question on appeal, however arbitrary the commission might have

[22] The Chicago Junction Case, 264 U. S. 258, 44 Sup. Ct. 317, 68 L. ed. 667 (1924); People v. Pub. Serv. Comm., *supra* note 20; see I. C. C. v. L. & N. R. R., 227 U. S. 88, 91, 33 Sup. Ct. 185, 186, 57 L. ed. 431, 433 (1912).

[23] A. T. & S. F. Ry. v. Commerce Comm., 335 Ill. 624, 167 N. E. 831, 837 (1929); West Ohio Gas Co. v. P. Us. Comm. of Ohio, *supra* note 19; Atl. Coast L. R. R. v. I. C. C., 194 Fed. 449 (Commerce Ct. 1911); (1931) 29 MICH L. REV. 765; see I. C. C. v. L. & N. R. R., 227 U. S. 88, 93, 33 Sup. Ct. 185, 187, 57 L. ed. 431, 434 (1912).

[24] U. S. v. Abilene & So. Ry., 265 U. S. 274, 289, 44 Sup. Ct. 565, 570, 68 L. ed. 1016, 1023 (1924).

[25] Note (1934) 44 YALE L. J. 355.

been, for the commission could always take the position that its experience and other information not before the court on appeal justified the decision.[26] Indeed, the Interstate Commerce Commission did take exactly that position. The answer of the commission in a case involving the validity of an order of the commission concerning a reshipping privilege stated, "that in forming its opinion . . . this respondent, exercising its administrative functions and powers, considered all pertinent facts and matters set forth in many reports and statistics on file with said respondent, together with other facts coming to the knowledge of this respondent in the performance of its duties . . . it is therefore not competent, nor is it relevant, for said petitioners to allege that any particular fact or facts before this respondent in said proceeding were uncontradicted or conclusive in favor of petitioners' contention; nor can the petitioners by judicial proceedings ascertain each and all the facts, circumstances, and conditions in regard to said transportation that were necessarily and properly considered by and which aided this respondent in arriving at its conclusion. . . .

"This respondent denies that there is, or can be, under the law, any complete record of all the evidence . . . before the Commission,"[27] etc.

The court indicated serious doubt as to whether the method of the commission was in accordance with due process, but did not find it necessary to decide the point.

The Minnesota court, however, took a view similar to that for which the Interstate Commerce Commission had contended.[28]

Of course, confining the commissions to the evidence before them does not necessarily exclude use by them of their experience and accumulated data. Rather, that experience and data must be put in evidence. How serious an obstacle this may prove to successful use of such experience and data we shall see presently.

NON-JUDICIAL FUNCTIONS OF COMMISSIONS

There is, then, a rule which prohibits commissions from drawing on their own knowledge as experts in lieu of looking to the evidence. But

[26] See I. C. C. v. L. & N. R. R., *227* U. S. 88, 93, 33 Sup. Ct. 185, 187, 57 L. ed. 431, 434 (1912). In West Ohio Gas Co. v. P. Us. Comm., 294 U. S. 63, 69, 55 Sup. Ct. 316, 319, 79 L. ed. 761, 768 (1935) the court said that to make review adequate "the record must exhibit in some way the facts relied upon by the court to repel unimpeached evidence submitted for the company. If that were not so, a complainant would be helpless, for the inference would always be possible that the court and the commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."

[27] U. S. v. L. & N. R. R., 235 U. S. 314, 321 n., 35 Sup. Ct. 113, 115 n., 59 L. ed. 245, 251 n. (1914).

[28] Steenerson v. Gt. No. Ry., *supra* note 10. However, the Minnesota position precludes reliance by the commission on non-existent data by prescribing that the court take judicial notice of such knowledge as the commission should possess.

there is also a wide field wherein the use by the commissions of their own knowledge is not only permitted but expected. A survey of this field will be made in order to find the border between the area of the proper use of the commission's knowledge, and the area covered by the rule confining them to the evidence introduced.

In general it may be said that there are many duties performed by utilities commissions without a trial or hearing requiring the formal presentation of evidence.[29] Controversies over rates and service which could be settled in cases tried before the commissions are instead settled by negotiation with the utilities.[30] In the course of such negotiation there is full opportunity for the commissions to make use of their own experience and information. Sometimes recommendations, founded on the commission's experience, are made to the utility.[31] Negotiation and recommendation may approach the border of adverse decision which could be made only on evidence. The Maryland commission, after stating that there should be a time limit on the special charges provided by contract for rural extensions of electric lines, directed that the utility furnish a plan for financing such extensions, with payments limited as to the time they were to run. The commission added that if this were not done within a reasonable time, or if the plan submitted by the utility were unsatisfactory, the commission would consider preparing a plan itself, and requiring that extensions be made under that plan and no other.[32] If as a result of such a direction by a commission a company were to submit a plan acceptable to the commission, the result would be the fruit of negotiation subsequent to the order above; but if the company were to fail to submit a plan, and the commission were to impose one of its own, a hearing might be required and the question might arise whether the commission, under some of the authority already referred to, would be limited in its results to those warranted by the evidence.

Some of the functions of utilities commissions are legislative in na-

[29] See Chic. & N. W. Ry. v. R. R. Comm., *supra* note 10, 145 N. W. at 218.

[30] In North Carolina since 1930 far more rate reductions have been accomplished by negotiation than as a result of litigation. See In the Matter of the Rates of the Carolina Power & Lt. Co., N. C. Corp. Comm. Rep. 1933-34, 20; In the Matter of the Rates of the Duke Power Co., N. C. Corp. Comm. Rep. 1933-34, 33. Adjustments through negotiation are part of the usual routine of utilities commissions.

[31] *Re* Nekoosa Edwards L. & P. Co., 11 P. U. R. (n.s.) 50, 54 (Wis. Pub. Serv. Comm. 1935). Here the commission disapproved of a rate of 2 cents per k. w. h. for energy purchased by the utility for resale, and recommended that a demand and energy type of rate be worked out and adopted by the utility. The commission required that suitable equipment be installed to measure the kilowatt demands of the utility so that this information would be available for use in determining a proper wholesale rate.

[32] *Re* Conowingo Power Co., 10 P. U. R. (n.s.) 353 (Md. Pub. Serv. Comm. 1935).

ture, and in the performance of duties of this kind, the commissions resort to legislative methods. For example the Wisconsin commission, after a hearing at which a very large number of utility companies were represented, laid down rules for requiring deposits or guaranties from gas and electricity customers, and rules for making disconnections. The commission stated that a conference committee of the Wisconsin Utilities Association met with the commission or its staff on several occasions to discuss phases of the proposed rules.[33]

Commissions likewise resort to their own experience and information in deciding whether to make investigations,[34] and in the conduct of the investigations. Also in the course of their duties many decisions of a supervisory or semi-legislative character are made by the exercise of the judgment of the commissions as informed by experience, rather than made as the product of evidence. To illustrate: a New Jersey statute required that all books and records of a utility be kept in the state and not removed without the consent of the commission. The commission could grant consent under such conditions as it might see fit. The commission granted a telephone company permission to keep its books at a central office in Pennsylvania provided: (1) The company file a description of the books kept at the central office. (2) The books be not destroyed, discontinued or supplemented without the written consent of the commission. (3) The books be produced promptly on notice to the company's agent. (4) The company pay any reasonable expense in any investigation incurred by the commission as a result of the permission granted. (5) The company file a written acceptance of the conditions.[35]

Enough has been said to show that there are a variety of duties performed by utilities commissions outside of the decision of formally contested cases, and that in performing these duties commissions resort to their own knowledge and experience. Even in the decision of contested cases, where commissions perform work of the type done by courts, there is still a well recognized field for the use of the commissions' own expert knowledge. Commissions in weighing evidence may

[33] *Re* Guarantee & Deposit Rules & Disconnect Procedure, 11 P. U. R. (n.s.) 439 (Wis. Pub. Serv. Comm. 1935). See also *Re* Consumers Power Co., 11 P. U. R. (n.s.) 362 (Mich. P. Us. Comm. 1935); *Re* Issuance & Sale of Securities, 12 P. U. R. (n.s.) 9 (Dist. of Col. Us. Comm. 1935).

[34] *Re* Bronx Gas & E. Co., P. U. R. 1917 D 777 (N. Y. Pub. Serv. Comm., 1st Dist. 1917). Where a statute assesses costs of investigation against the utility investigated, the commission has sole discretion to decide whether an investigation should be made. Bronx Gas & E. Co. v. Maltbie, 268 N. Y. 278, 197 N. E. 281 (1935).

[35] *Re* N. J. Tel. Co., 11 P. U. R. (n.s.) 231 (N. J. Bd. of P. U. Commrs. 1935). In *Re* Wash. Gas. Lt. Co., 11 P. U. R. (n.s.) 469 (Dist. of Col. P. Us. Comm. 1935) the commission pursuant to a statute approved a sliding scale arrangement for rate fixing.

value it in the light of their own experience. For example, in an action by a railroad for an injunction against class rates fixed by the Interstate Commerce Commission the carrier complained that part of the evidence considered by the commission was a comparison with other rates to the same destination from other points. These other rates, the railroad contended, were compelled by competition and therefore not comparable. But the United States Supreme Court said, in supporting the commission, "The value of such evidence necessarily varies according to circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate making in each section of the country."[36] The fact that commissions may weigh the evidence in the exercise of their expert judgment does not mean that the inexpert courts will never step in and in substance reweigh the evidence for themselves.[37] But at all events they recognize that here is a proper use of the expert judgment of the commissions, although the courts may reject the fruits.

Weighing evidence is, in part at least, a process of checking the evidence against the experience accumulated in the mind of the commission. The Interstate Commerce Commission has gone farther, and checked conflicting evidence in a rate case against its own official files. The commission stoutly contended that in doing this it did not go beyond the record, but "merely checked and verified statements and exhibits appearing in the record."[38] Thus may weighing evidence approach the line of taking into account evidence not introduced. Nevertheless, the commission's position is logical, and similar conduct has received judicial approval.[39] If in weighing evidence a commission may bring to bear its own experience, which is in effect drawing on something outside the record, why may it not in weighing evidence resort to specific data not in the record? On the other hand, what the commission did could be called flatly considering matter not in evidence. The procedure can be made to look either valid or invalid by the language used to describe it, without departing from accuracy.

An example or two of the weighing process as commonly performed by commissions may be useful to illustrate the application of their expert knowledge. In an Oregon rate case[40] the public utilities commissioner pointed out that an item of $35,000 for law expenditures in the

[36] I. C. C. v. L. & N. R. R., 227 U. S. 88, 98, 33 Sup. Ct. 185, 189, 57 L. ed. 431, 436 (1913).

[37] A. T. & S. F. Ry. v. Commerce Comm., *supra* note 23.

[38] Okla., etc. Ass'n v. Mo., K. & T. Ry., 39 I. C. C. 497, 500 (1916).

[39] City of Elizabeth v. Bd. of P. U. Commrs., 99 N. J. L. 496, 123 Atl. 358 (1924).

[40] *Re* Pac. T. & T. Co., 8 P. U. R. (n.s.) 61, 76 (Ore. P. Us. Commr. 1934).

utility's evidence of expense during construction was to that amount in excess of the actual experience of the company, because all law expenditures during construction were distributed to the various accounts already considered. The company claimed $150,000 miscellaneous construction expenditures, but the commissioner pointed to an item for contingencies and omissions, and stated that the record did not show how the other miscellaneous construction expenditures accrued.

In a case before the Missouri commission its own engineers in arriving at reproduction cost had made an allowance for taxes during reproduction. The commission, in correcting the result, said,[41] "The taxes allowed in the reproduction cost basis were based on the actual taxes paid by the company on this property. A comparison was made of the assessed value and the original cost and that ratio was applied to reproduction cost to determine the theoretical assessment. The actual tax rate was then applied to this theoretical assessment to determine the taxes paid.

"In our opinion this method of figuring taxes is erroneous. There is no relation between the assessed value for taxation purposes and the original cost of the property. If any relation does exist it is between the assessed value and the reproduction cost less depreciation on the date of the assessment. To determine the theoretical assessment on the property when new, the ratio between the assessed value and the reproduction cost new less depreciation should be applied to the cost of reproduction new. The tax rate should then be applied to this theoretical assessment to determine the amount of taxes that would be levied."

Here is a plain case for the use of the commission's own expert knowledge. There is an error in the evidence visible to this body expert in these matters, and of course the error should be corrected in weighing the evidence.[42] The difference in result between the two methods was said by the commission to be inconsequential; but the weighing process is well illustrated.

Sometimes evidence is discarded altogether after having been weighed and found wanting. A commission is not obliged to accept evidence which happens to be uncontradicted, however fantastic it may

[41] Pub. Serv. Comm. of Mo. v. Ark.-Mo. Power Co., 8 P. U. R. (n.s.) 113, 118 (Mo. Pub. Serv. Comm. 1935).

[42] The method suggested by the commission may itself be subject to objection; but at any rate its criticism of the method followed by the engineers is well taken.

For another example of the use of expert knowledge in weighing evidence see Bohannon v. Mt. States Power Co., 8 P. U. R. (n.s.) 173, 175 (Mont. Pub. Serv. Comm. 1934). The commission approved of calculating the operating expense on a certain rural line by taking the percentage of gross revenues going to operating expenses on the whole system, and using that percentage of the gross revenues on the rural line. The commission said the percentage did not "appear to be out of line with the experience of like utilities."

look in the light of the commission's experience.[43] Conversely, the expert nature of commissions has been utilized by some legislatures to make available evidence which a court would reject. Thus some commissions may entertain hearsay evidence, and give it such weight as the commission, expert in the field, deems it to deserve.[44]

Commissions also use their expert knowledge in drawing conclusions from evidence.[45] What constitutes drawing a conclusion, as distinguished from taking into account additional evidence supplied by the commission's own knowledge, is not always easy to say. The Wisconsin court took an advanced view in this matter when it said, in supporting a commission order establishing a freight rate on ice, "There is also a vast amount of acquired expert knowledge which the commission may apply to facts in evidence, as, for illustration, when the number of tons hauled and the distance hauled and the whole cost is given, what part of it usually and ordinarily represents terminal expenses; the usual proportion of terminal expenses to miles hauled; the usual and ordinary ratio of distribution of freight charges according to the value of the product carried; what allowance or increase is usually and ordinarily made for size or bulk proportionate to weight; the average number of tons carried in a car; the ordinary proportion of empty to loaded cars; the ordinary consumption of fuel per train mile or per ton mile or per passenger, and many other items of information which, while more difficult and complicated, are yet of the same nature as the expert knowledge of a farmer with reference to the number of acres which should constitute a day's plowing; . . . a sailor with reference to the usual number of miles which should be made in a given time and in a given direction with a given direction and velocity of wind. None of these esti-

[43] See Ill. Commerce Comm. v. Pub. Serv. Co., 4 P. U. R. (n.s.) 1, 20 (Ill. Commerce Comm. 1934); Steenerson v. Gt. No. Ry., *supra* note 10, 72 N. W. at 718. In the latter case evidence in favor of a charge for interest, discounts and commissions of 10% on the cost of construction of a railroad was uncontradicted, but the supreme court itself pointed out that 10% was reasonable interest for more than two years, that the railroad ran through fertile and populous territory, and would not all lie unproductive for two years. If the court may use its general knowledge to attack evidence all one way, may not the commission use its expert knowledge to the same end?

[44] Wheat, *loc. cit. supra* note 18.

[45] See Customers v. Lowell Gas Lt. Co., 10 P. U. R. (n.s.) 111 (Mass. Dep't of P. Us. 1935). A gas company had applied for increased rates. It showed increases in certain items of expense amounting to $7,310. The commission countered in its opinion, page 114, "It is probable that a substantial amount of these increases are due to the increased activity in the sale of appliances. If we assume that two thirds of the total of the increases mentioned were due to activities in the promotion of sales of appliances, which seems reasonable," then that sum should be deducted from operating expenses. The commission mentioned no evidence that any part of the increased expenses were incurred in sale of appliances; that was a conclusion deduced by the commission from the fact that there was increased activity in the sale of appliances.

mates are mathematically accurate, but long practice in making estimates of that kind makes one an expert."[46]

Not infrequently what might appear as a finding without evidence to support it turns out to be a finding supported by a deduction from evidence. The number of subscribers of a small telephone system decreased from 187 to 98. The Wisconsin commission deduced that there was property no longer useful in serving the public, and accordingly pared the rate base.[47] Can it be said that the commission here acted without evidence that there was excess plant because so far as appears no engineering witness said so? Hardly. From the dwindling number of subscribers it is plain that the plant has become excessive for those left.

It is apparent that conclusions drawn by expert commissions from evidence may be used where direct evidence could have been used instead.

Sometimes commissions draw conclusions from evidence which are different from those which the evidence was introduced to support. A telephone company put in evidence the actual cost of its properties as they were accumulated. The commission, independently, calculated from the company's evidence the amount of its property acquired between 1916 and 1930, and reduced the original cost figures by reason of the fall in the price level after 1930. The company's own evidence was thus made the basis for deducing a value considerably less than the company's evidence purported to show. In the same case the company's figures as to cost of reproduction were used to arrive at a lower figure because the commission believed the company's calculations gave too much weight to actual costs of construction during recent years. The actual construction consisted of small jobs, whereas the commission thought that on reproduction of the properties the economies of large scale construction would result.[48]

[46] Chic. & N. W. Ry. v. R. R. Comm., *supra* note 10, 145 N. W. at 218.

[47] Fink v. Fremont Tel. Co., 10 P. U. R. (n.s.) 142 (Wis. Pub. Serv. Comm. 1935).

[48] *Re* So. Bell T. & T. Co., 7 P. U. R. (n.s.) 21 (N. C. Us. Comm. 1934). See City of Grand Forks v. Red River Power Co., 8 P. U. R. (n.s.) 225, 245 (N. D. Bd. of R. R. Commrs. 1935) (rejecting a charge of 2½% for management and supervision). In the case of *Re* N. W. Bell Tel. Co., 11 P. U. R. (n.s.) 337 (Neb. State Ry. Comm. 1935) the company's evidence supported a composite depreciation rate of 4.41%. According to the dissent, the commission's own engineering staff set the figure at 4.15%. The commission, after calculations of its own, arrived at a rate of 3.82%.

In examining commission decisions it is not always easy to tell whether a commission, in drawing from evidence a conclusion different from that intended by the party introducing it, is resorting to its own expert knowledge, or whether it is relying on other evidence in the record but not mentioned. A typical instance is to be found in Town of Springfield v. Highland Us. Co., 10 P. U. R. (n.s.) 381, 386 (Colo. P. Us. Comm. 1935), where the commission said, "No allowance is made for 'engineering and supervision' as in our opinion this item was amply taken

Even where all the evidence there is in a case is presented by a utility to support its position, the commission may decide against the utility by drawing from its evidence a conclusion opposite to that which the evidence was introduced to further.[49] Such a result is perfectly defensible. If the experienced judgment of the commission applied to evidence leads to a certain conclusion, then that conclusion is justified by evidence, and it is immaterial who introduced the evidence or for what purpose. There is a difference between evidence all one way, and evidence all presented by one side.

There is, then, considerable latitude for the expert knowledge of commissions in weighing evidence and drawing conclusions from it. In practice the official evidence will not only be weighed and made to yield conclusions, but will be supplemented and contradicted by other evidence, not in the record, drawn from the experience of the commission. The commission may not recite this truth in its opinion; may not even be conscious that there is any such truth. There may be evidence in the record both ways; the evidence one way may look good to the commission because it is supported by a number of reports and data which have left their effect on the commission's mind. If, then, the real basis for a commission's conclusion even in the presence of evidence is what the commission already knows, why not let the commission make decisions solely on what it knows, that is, decisions without any record evidence at all? The effect of the rule requiring the support of record evidence, it may be argued, is merely to force the commission to make a window display of evidence in the record. The answer has already been suggested. By requiring the window display there will be secured verification of the commission's impressions from its experience.

Another fashion in which the expert nature of commissions may

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care of in the appraisal figures of defendant's inventory." No testimony supporting any such conclusion is referred to. This is natural. The commission sees what it believes to be a double charge, and promptly strikes it out. The commission simply has in mind no such problem as whether it can decide contrary to the sole evidence on the point. Some cases where commissions appear to draw on their own judgment, experience or knowledge may be nothing more than instances where the commissions had, but did not mention, record evidence to support their views. However, the fact that in such cases as the one above the commissions feel no need to refer to any record evidence is significant.

[49] Eager v. P. Us. Comm., 113 Ohio St. 604, 149 N. E. 865 (1925); *Re* O. B. McCoy, 8 P. U. R. (n.s.) 322 (Mo. Pub. Serv. Comm. 1934) (Application for authority to transfer a telephone system to a purchaser, most of the price to be paid monthly and to be secured by a mortgage on the property. The Commission looked into the revenue of the company, intimated that the proceeds might be insufficient to enable the purchaser to meet the payments called for, and denied authority to transfer the property when so large a mortgage would be incurred. So far as appears there was no evidence introduced against the application; the commission reached its conclusion solely by analysis of evidence presented for a contrary result.)

be put to use in deciding cases is in the resort to principle or policy, as seen by expert eyes. Such principle or policy may be brought into the balance to outweigh evidence. Application was made for approval of loans by an operating to a holding company, which loans paid the operating company only one and one-fourth per cent in 1934. The commission refused approval partly on the ground that the excess cash of the operating company might better be used to retire its preferred stock on which it had to pay five per cent. No reference was made to any testimony against that of the petitioner.[50]

Not only may commissions resort to policy in the sense of sound principle, but they may likewise establish policies in the sense of rules. An application by a Pennsylvania gas company to issue stock to its holding company in order to acquire from the holding company stock in a Virginia gas company was denied by the Pennsylvania commission. The commission stated and applied its policy of approving security issues by a utility only for purposes related to the rendition of its public service.[51] Certainly in the decision of many cases the commissions should be permitted to establish doctrines or policies which can be applied in like cases without going into the same old lines of evidence which were already considered in the cases wherein the policies were formulated. The policies established by commissions may amount in effect to rules of law for their own guidance, and the guidance of the utilities within their jurisdiction. The question arose whether a considerable variety of contributions by an electric company were allowable operating expenses. One class of contributions was to organizations designed to stimulate trade and increase population in the company's territory. The commission, without mentioning any decision or statute, stated the test to be whether the beneficiary is principally devoted to

[50] *Re* The Peoples Nat. Gas Co., 11 P. U. R. (n.s.) 20 (Pa. Pub. Serv. Comm. 1935). In the case of *Re* Nekoosa Edwards L. & P. Co., *supra* note 31, a flat rate for energy purchased wholesale was disapproved, and a demand and energy type of rate recommended. Conversely in *Re* Conowingo Power Co., *supra* note 32 at 364, the commission disapproved a demand and energy charge for small users. No evidence was cited, but rather reasons of policy. Additional cases where commissions resorted to policy to arrive at decisions are *Re* Consolidated Water Power Co., 11 P. U. R. (n.s.) 448, 457 (Wis. Pub. Serv. Comm. 1935) (fixed charge rate approved); *Re* M & M Pipe Line Co., 11 P. U. R. (n.s.) 234, 254 (Tex. R. R. Comm. 1935) (Donations to worthy causes disallowed as an operating expense. They should come out of profits.); *Re* N. W. Elec. Co., 11 P. U. R. (n.s.) 227 (Ore. P. Us. Commr. 1935) (Salary allowed retired president who had no substantial duties was a pension, which could not be charged as an operating expense.).

For cases in which commissions resorted to policy in the performance of legislative or supervisory functions see *Re* Uniform Classification of Accounts, 8 P. U. R. (n.s.) 349, 358 (N. H. Pub. Serv. Comm. 1934) (The commission required certain separate accounts relating to sales of appliances, contrary to the position taken by all the companies involved.); *Re* Cal. Ore. Power Co., 8 P. U. R. (n.s.) 412 (Ore. P. Us. Commr. 1934).

[51] *Re* Pa. Gas & E. Co., 10 P. U. R. (n.s.) 236 (Pa. Pub. Serv. Comm. 1935).

effort reasonably tending to stimulate sale of the company's products. On this basis a contribution by a company operating in Oregon to the Portland Chamber of Commerce was approved, but a contribution to the United States Chamber of Commerce rejected.[52]

JUDICIAL NOTICE BY UTILITIES COMMISSIONS

One of the most promising fields for the wider use by commissions of their own expert knowledge and accumulated data lies in the expansion taking place in the scope of the doctrine of judicial notice as applied by administrative tribunals.[53] Judicial notice is a device much used by courts. It is said to be taken where propositions in a party's case are accepted as true without the need of evidence.[54] Judicial notice may be taken by courts of

"(1) Matters which are so notorious to all that the production of evidence would be unnecessary;

"(2) Matters which the judicial function supposes the judge to be acquainted with, either actually or in theory."[55]

If courts may accept as true without evidence matters with which judges are supposed to be acquainted, certainly commissions should have authority to accept as true without evidence matters with which expert tribunals are supposed to be acquainted. Since a commission is an expert body the scope of what it judicially knows should be broader in its own sphere than what a non-expert court judicially knows in that sphere.[56] An examination will be made at this point to determine the extent to which the doctrine has been used by commissions, and that use approved by the courts.[57]

It is said that commissions may take judicial notice of the same

[52] *Re* N. W. Electric Co., *supra* note 50. In Pub. Serv. Comm. of Mo. v. Mo. Power & Lt. Co., 10 P. U. R. (n.s.) 8 (Mo. Pub. Serv. Comm. 1935) the commission laid down the principle that making the rural rates for customers on one inter-connected company system depend to any great extent on the rate in the nearest town was discrimination; all rural subscribers should be served on the same terms as nearly as possible. Additional instances where commissions have in effect laid down rules of law or policies in their decisions are City of Grand Forks v. Red River Power Co., *supra* note 48 at 246 (If rates are unreasonable, the company's expense in defending those rates will not be allowed as an operating expense); *Re* Markesan Tel. Co., 11 P. U. R. (n.s.) 280 (Wis. Pub. Serv. Comm. 1935) (Toll calls moving from A to B should pay the same amount as identical calls moving from B to A.)

[53] (1931) 29 MICH. L. REV. 765.

[54] 5 WIGMORE, EVIDENCE (1923) §2565.

[55] *Id.*, §2571.

[56] *Cf.* (1914) 27 HARV. L. REV. 683.

[57] In examination of commission decisions it is frequently difficult to tell whether the commission is resorting to judicial notice or merely to evidence introduced but not mentioned. A utility presents data in evidence. The commission in its opinion counters with other data. The commission often does not say where it found the other data, whether in the evidence or elsewhere. An attempt has been made to select for use herein only cases where it appeared likely that the other data was judicially noticed by the commission, rather than taken from the record evidence.

facts as may a court.[58] Both commissions and courts take notice of facts in the utility field "so notorious to all that the production of evidence would be unnecessary."[59]

Whether a commission may take judicial notice of data contained in its files is the subject of a split of authority. The Federal rule is that a utilities commission may not found a decision in litigation before it on information in its files without putting in evidence the matter relied on.[60] This rule is peculiar, in view of Federal[61] as well as state decisions[62] holding that other types of administrative tribunals may take judicial notice of matter contained in their files and records. However, this is not the only instance in which a more stringent rule has been laid down for utility commissions than for other administrative bodies. The holding that where the question of confiscation is raised a court on reviewing a commission decision prescribing rates for a utility must have the privilege of forming an independent judgment on both law and facts[63] is a familiar example. It has been held contrary to the Federal position, that a utilities commission may take judicial notice of material in its files, since the latter are public records.[64] Further, one state court said that the court itself would take judicial cognizance of the classifica-

[58] See Los Angeles & S. L. R. R. v. P. Us. Comm., 81 Utah 286, 17 P. (2d) 287, 290 (1932).

[59] Chambersburg Gas Co. v. Pub. Serv. Comm., 116 Pa. Super. Ct. 196, 176 Atl. 794, 804 (1935) (rapid changes in manufacturing processes of all kinds, necessitating the junking of machinery and the replacing of it with more efficient equipment); Hammond Lbr. Co. v. So. Pac. Co., 156 I. C. C. 731, 734 (1929) (certain traffic to reach Denver must encounter heavy grades and curves in the Rocky Mountains); *Re* Passenger Fares, (P. U. R. 1916 E. 719, 745 (N. Y. Pub. Serv. Comm., 2nd Dist., 1916) (In recent years all railroads have been subjected to increased operating costs, due to installation of heavier rails, increased cost of labor, etc. But increased rates could not be granted on this ground alone, since the commission did not know what the additional burden on this railroad was.). In the case of *Re* The Peoples Nat. Gas. Co., *supra* note 50, at 23, the commission referred to the fact that the present rate of interest on time deposits was 2½%, the lowest figure in many years, but referred to no evidence of the fact. In City of Memphis v. So. Bell T. & T. Co., 6 P. U. R. (n.s.) 464 (P. Us. Comm. of Tenn. 1934) the commission in considering the bearing of value for tax purposes on value for rate making purposes said that the commission would take into account its judicial knowledge of how the value for tax purposes was arrived at. The commission under the laws of Tennessee had the duty of fixing values of utility properties for tax purposes.

[60] Notes 15, 19 *supra*.

[61] Halpern v. Andrews, 21 F. (2d) 969 (E. D. Pa. 1927); Tang Tun v. Edsell, 223 U. S. 673, 681, 32 Sup. Ct. 359, 363, 56 L. ed. 606, 610 (1912). In this latter type of case (Chinese exclusion case) the administrative decision is final unless the officers acted unlawfully, etc. Use of material from the official files, which occurred here, is therefore not unlawful in view of the decision upholding the administrative action.

[62] Anderson v. Bd. of Dental Examiners, 27 Cal. App. 336, 149 Pac. 1006 (1915); Homan v. Bd. of Dental Examiners, 202 Cal. 593, 262 Pac. 324 (1927).

[63] Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. ed. 908 (1920).

[64] Chic. & N. W. Ry. v. R. R. Comm., *supra* note 10.

tions and rates of the railroad commission.[65] If the court will take judicial notice of this data on file with the commission, then since commissions may take judicial notice of the same facts as courts, the commission also may take judicial notice of this data.

When the data in the commission files consists of reports of the very utility now a party in the case before the commission, taking judicial notice of the data[66] seems clearly proper. The contrary view[67] has little to recommend it. True, the reports made to the commission over the years may be voluminous, and the utility may not know just what portion of this data will be used against it, but the answer is that all the reports should be true; there is no occasion for the utility to refute them, and the utility should expect the commission to act on the utility's own reports or any portion of them. A rule allowing the company's reports to be judicially noticed against it might stimulate care in making them. The merits of the matter may be illustrated by a case before the Illinois commission wherein an application was made for increased gas rates. The evidence showed that for the first eight months of 1921 the company suffered a deficit of $440. The commission took judicial notice of the quarterly accounting reports filed by the utility with the commission showing that for the whole year the company earned net $2,104.[68] It would be a plain miscarriage of justice if the commission were obliged to assume the company lost money in 1921 when the commission knew better. Further, it is hard to see anything but an absurd legal formality in requiring a reopening of the case in order to introduce against the company its own official report that it had made a net earning in 1921.

The position of the Illinois commission in the above case is rendered of doubtful legality by a decision of the Illinois court on a related point, namely, whether a commission may take judicial notice of its own decisions and orders. The Illinois commission in reducing railroad rates on coal made a comparison of the rates in question with other rates, which other rates it ascertained from its own past order prescribing

[65] See Central of Ga. Ry. Co. v. Butler Marble & Granite Co., 8 Ga. App. 1, 68 S. E. 775, 778 (1910). *Contra,* Reinschmidt v. L. & N. Ry., 112 Fla. 267, 150 So. 266 (1933).

[66] Chic. & N. W. Ry. v. R. R. Comm., *supra* note 10; Pub. Serv. Comm. of Mo. v. Empire Dist. Elec. Co., 10 P. U. R. (n.s.) 302, 308 (Mo. Pub. Serv. Comm. 1935); Customers v. Rockland Light & P. Co., P. U. R. 1920 A 754, 755 (N. Y. Pub. Serv. Comm., 2nd Dist., 1919). In each of these commission cases judicial notice was taken of the company's reports. The decision was favorable to the company. See Duluth St. Ry. v. R. R. Comm., 161 Wis. 245, 152 N. W. 887, 891 (1915).

[67] U. S. v. Abilene & So. Ry., 265 U. S. 274, 44 Sup. Ct. 565, 68 L. ed. 1016 (1924); see Campbell v. Hood River Gas & E. Co., P. U. R. 1915 D 855, 862 (Ore. Pub. Serv. Comm. 1915).

[68] *Re* Central Ill. Lt. Co., P. U. R. 1923 A 445 (Ill. Commerce Comm. 1922).

them. The court held that this was improper since the order was not introduced in evidence.[69] The court fell back on the familiar doctrine, already referred to at length herein, that nothing can be treated as evidence which is not introduced as such. It may be said in defense of the court's position that the railroad could not dispute before the commission the comparability of the rates in the past order unless it was advised that they would be considered. It will be shown hereinafter that an opportunity to dispute the comparability can be provided without the necessity for formal presentation in evidence. There is authority opposed to the Illinois view on judicial notice by a commission of its own decisions and orders.[70]

Commissions not infrequently consider records from previous hearings without having them introduced in evidence.[71] Some of the instances in which it has been done illustrate the good sense of so doing. In an electric rate case the commission had before it no evidence on what constituted a fair rate of return on the value of the company's property. The commission on the basis of evidence submitted in other recent cases before it fixed the return at six and one-half per cent.[72] Why not? Why should the commission in every new case before it be obliged to have put in the record the same old evidence as to what constitutes a fair return in that locality at the time? There may be reason in obliging the commission to hear and consider any new evidence on the familiar subject the utility may have to offer. Beyond that the doctrine that commissions may act only on evidence introduced becomes an obstructive legal formality in deciding such a point as this.[73]

The Interstate Commerce Commission had before it the question as to the reasonableness of 15,000 pounds as a minimum carload of dresesd poultry for which defendant railroad would furnish free icing. The commission said that it had had occasion in many cases to consider the reasonableness of icing charges, and in accord with the conclusions reached in those cases it could not now find the 15,000 pound minimum requirement unreasonable.[74] The commission's course in considering what it had done in past cases was essential unless the commission were

[69] Atchison T. & S. F. Ry. v. Commerce Comm., *supra* note 23, 167 N. E. at 836. The court likewise held it improper to take into account facts found by the I. C. C. in a case before it.

[70] Wheat, *op. cit. supra* note 18, at 467; Chic. & N. W. Ry. v. R. R. Comm., *supra* note 10, 145 N. W. at 220. In Central of Ga. Ry. v. Cook & Lockett, 4 Ga. App. 701, 62 S. E. 464 (1908) the court itself took judicial notice of a commission rule exempting railroads from accepting goods not in a safe condition for shipment. See also note 65.

[71] Customers v. Rockland Light & P. Co., *supra* note 66.

[72] Pub. Serv. Comm. of Mo. v. Ark.-Mo. Power Co., *supra* note 41.

[73] See also Faris, *Judicial Notice by Administrative Bodies* (1928) 4 Ind. L. J. 167, 178-80.

[74] Swift & Co. v. Chic. & A. R. R., 16 I. C. C. 426, 429 (1909).

to change its ruling on the reasonableness of the minimum requirement with each new case, according to what evidence was introduced therein. Of course, the commission could put all the past records and decisions in evidence, but would any essential purpose be served by doing so?

In a recent Utah case the court held that the commission could not consider the evidence received in a comparable case but not made a part of the record. The action was brought by a railroad before the commission to discontinue an agency station at a place called Faust. The question arose whether the commission could consider evidence in a case involving the St. John station, 12.8 miles east of Faust. The court said,[75] "The physical conditions at both stations are practically the same. It is semi-desert country. . . . Can the commission take into consideration the knowledge that it received at the hearing in the St. John Station Case as to the methods, practices, and incidents attendant to the shipping of live stock to and from St. John and apply it to this case because the two stations exist under essentially similar physical conditions and serve communities engaged in similar pursuits and living under similar conditions? Naturally, if shippers of live stock to and from St. John would have certain difficulties or inconveniences regarding the forwarding or receiving of carload lots of sheep, it would not take a very great imagination to conceive that shippers of sheep patronizing a station 12.8 miles west situated under essentially the same conditions would have the same difficulties. But can the commission consider such fact without specific evidence introduced in this case? If the two hearings had been consolidated, there would have been no question. But there were separate applications to the commission, separate hearings were had, so consequently they constitute separate cases. The evidence adduced in the St. John Station Case in this regard can not be considered as evidence adduced in this case."

The court is obviously the prey of an uneasy feeling that good sense is here sacrificed by importing into commission hearings the standards applicable to courts, but the weight of the familiar is too strong for the court. From the first portion of the quoted language we might have expected the court to strike out boldly into new territory, to declare that commissions are not courts, and that in order to utilize their unique functions and capacities to the full, a different technique must be worked out for them. The departure could have been reconciled with existing concepts by expanding the idea of judicial notice.

In contrast with the Utah decision is the long forward step taken by the New Jersey court[76] when it decided that the commission in a rate

[75] Los Angeles & S. L. R. R. v. P. Us. Comm., *supra* note 58, 17 P. (2d) at 290.
[76] City of Elizabeth v. Bd. of P. U. Commrs. *supra* note 39; see *Re* Mo. Standard Tel. Co., P. U. R. 1928 C 695, 700 (Mo. Pub. Serv. Comm. 1928).

case might use the knowledge of unit prices it had obtained in other proceedings. The value of such a rule to commissions in rate case valuations can scarcely be overestimated. If a utility, for example, puts in evidence that the reasonable cost of a certain type of pole installed is fifteen dollars, and the commission knows from its experience in other cases that the cost to other comparable companies averages ten dollars, the commission is in a position to cut the utility's figure.

An application of the doctrine of judicial notice has been made which may prove a growing point for the use of the doctrine by commissions. Judicial notice of the depression was taken by courts generally, together with notice of such consequences as the difficulty experienced by railroads in carrying their financial burdens,[77] the fact that few companies have been able to earn 4.98% on the value of their property,[78] and that profound changes in values, cost of service, volume of consumption, and reasonable return on investments have taken place.[79] Judicial notice of the price level and its changes or failure to change has also been commonly taken.[80] Logical extension of the doctrine that consequences of depressed conditions, and changes in the price level, may be judicially noticed should prove of value in enabling commissions to bring into use their own knowledge, particularly in the important and constant work of valuation attendant on rate regulation. Much of the detail of rate fixing depends on fluctuations in the price level, affecting the fair value of utility property and fair return thereon.

While commissions and courts have been feeling their way in developing the doctrine of judicial notice by commissions as applied to specific matters such as those above mentioned, they have also been searching for some general principle ruling use of judicial notice by commissions. The Interstate Commerce Commission early put forward a view which would have reached the end at the very beginning. As

[77] Central R. R. v. Bd. of P. U. Commrs., 112 N. J. L. 215, 170 Atl. 246 (1934).

[78] The court therefore held a return of 4.98% to be not confiscatory. Alexandria Water Co. v. City Council of Alexandria, 163 Va. 512, 177 S. E. 454, 495 (1934). The I. C. C. noticed that credit conditions were unfavorable, and that demand for all commodities had slackened. Cal. Growers', etc. League v. So. Pac. Co., 185 I. C. C. 299, 322 (1932). The Minnesota court long before this had taken judicial notice of a general drop in interest rates and income on capital. Steenerson v. Gt. No. Ry., *supra* note 10, 72 N. W. at 719.

[79] Central Ky. Nat. Gas Co. v. R. R. Comm. of Ky., 290 U. S. 264, 274, 54 Sup. Ct. 154, 158, 78 L. ed. 307 (1933).

[80] McCardle v. Indianapolis Water Co., 272 U. S. 400, 412, 47 Sup. Ct. 144, 149, 71 L. ed. 316, 325 (1926); A. T. & S. F. Ry. v. U. S., 284 U. S. 248, 52 Sup. Ct. 146, 76 L. ed. 273 (1932); Alexandria Water Co. v. City Council of Alexandria, *supra* note 78, 177 S. E. at 494; La. Pub. Serv. Comm. v. La. P. Us. Co., P. U. R. 1931 C 170, 173 (La. Pub. Serv. Comm. 1931); Roessler & H. Chem. Co. v. Chic. & N. W. Ry., 183 I. C. C. 496, 497 (1932); *Re* Central Ill. Lt. Co., *supra* note 68 at 447; *Re* Leadville Water Co., P. U. R. 1931 D 366, 378 (Colo. P. Us. Comm. 1931); Ill. Commerce Comm. v. Pub. Serv. Co., *supra* note 43. *Contra*, Pa. R. R. v. Bd. of P. U. Commrs., 13 N. J. Misc. 766, 180 Atl. 551 (1935).

already pointed out herein, the commission said that judicial notice "is extended in the case of the Commission to the entire range of its experience with transportation problems and embraces all the knowledge that it has gathered from any source."[81] The Utah court cautiously asserted a more limited scope for judicial notice by commissions when it said, "The commission may also, perhaps, take judicial notice of such facts and practices as are generally known throughout the whole field of railroad transportation; that is, such facts which are practically universal among operatives in the field to which the jurisdiction of the commission extends, although they may not be known to the world generally, but it can not take its special knowledge which it may have gained from experience or from other hearings and base any findings or conclusions upon such knowledge."[82]

Commissions in practice not only take notice of specific information such as reports, but likewise draw on the fruits of their own general experience. It might be said that they take notice of their own experience, although they commonly do not bother to justify themselves by asserting any such legal explanation.[83]

Effect of Federal Rule on State Rule as to Judicial Notice

It has already been suggested that the doctrine of judicial notice should be expanded in the case of commissions by reason of their more extended knowledge in their own fields. The question arises whether, if a state court or statute lays down a broad rule as to the scope of judicial notice by a state commission, that rule may be overturned by the United States Supreme Court pursuant to its doctrine, already discussed, that a commission must decide cases before it on the evidence presented. The writer has found no Supreme Court case on this pre-

[81] Joynes v. Pa. R. R., *supra* note 9. See also Halpern v. Andrews, *supra* note 61 at 971, concerning use of his own knowledge by a prohibition commissioner.

[82] Los Angeles & S. L. R. R. v. P. Us. Comm., *supra* note 58, 17 P. (2d) at 291.

[83] *Re* So. Bell T. & T. Co., *supra* note 48, at 28 (commission drew on its whole experience in arriving at value); Dep't of Pub. Wks. v. Ore.-Wash. Water Service Co., 8 P. U. R. (n.s.) 293, 313 (Wash. Dep't of Pub. Wks. 1934); *Re* Nekoosa Edwards L. & P. Co., *supra* note 31 at 53 (The commission apparently drew on its experience as to usual salaries for utilities of this size.); Beckley v. Otter Tail Pow. Co., 10 P. U. R. (n.s.) 105, 107 (N. D. Bd. of R. R. Commrs. 1935) (The commission probably drew on its experience for the conclusion that a construction cost of a short electric line at a rate of $3200 per mile was excessive.); Customers v. Lowell Gas Lt. Co., *supra* note 45 at 113 (experience of commission apparently used in concluding that management services furnished a utility could have been supplied by itself at a lower cost); *Re* M & M Pipe Line Co., *supra* note 50 at 249 (Gasoline consumed by ditching machines, since not consumed by a motor vehicle using the highways, would be subject to a refund of 4 cents per gallon. The commission corrected the evidence of the engineers as to cost of gasoline.); *Re* Wis. Central Utilities Co., 12 P. U. R. (n.s.) 4, 8 (Wis. Pub. Serv. Comm. 1935) (5% a reasonable interest rate on notes); *Re* Gravity Water Co., 10 P. U. R. (n.s.) 38, 41 (Mont. Pub. Serv. Comm. 1935) (Salary of $1,753 unreasonable for the manager of a water company of this size).

cise point.[84] The scope of judicial notice should be a question for the determination of the states as a matter of the rules of evidence in their own tribunals. Any judicial notice at all would be precluded by a literal enforcement of the doctrine that decisions must be supported by record evidence. It is already settled beyond cavil that this doctrine is modified by the other doctrine that both commissions and courts may resort to judicial notice. The reasonable scope of the latter doctrine should be a matter for the state tribunals, to be interfered with in the name of due process only when the bounds of reasonableness have been passed.

SOLUTIONS

Superficially it would appear to be an easy matter for commissions to introduce in evidence any accumulated data from their files on which they may rely, thus avoiding the whole problem above discussed so far as it relates to such data. The practical difficulty is that it is not known until the company's case is in which data will prove most applicable to the problem in hand. The company's evidence may be replete with figures inconsistent with its own previous reports; that can be known only on examination after the company's evidence is before the commission. This difficulty could be met by setting a time between the presentation of the company's case, and the presentation of the adverse case, to enable the commission to search its files. This remedy has the drawback that it would result in delay where too much delay exists already, and that pressure of other business is sometimes too great to enable the commission to make the search in any set time. Moreover, the remedy would not touch the situation where the commission proposes to bring into play its own expert knowledge. A simpler and more workable solution would be to enable the commisson, after the case has been tried, to make its decision, using its own data and expert knowledge, specifying the data and knowledge relied on in its opinion, and then to give the utility or other party a suitable time within which to bring on a further hearing for the purpose of questioning the data or knowledge relied on by the commission. This simple device, which could be estab-

[84] In Ill. Cent. R. R. v. R. R. Comm. of Ky., *supra* note 19, the Federal district court held that a state commission could be restrained from enforcing rates arrived at by comparison with other rates filed with the commission by the very railroad now before the commission, the other rates not being in evidence. But it did not appear that the commission relied on judicial notice sanctioned by the state law. L. & N. R. R. v. Finn, 235 U. S. 601, 606, 35 Sup. Ct. 146, 149, 59 L. ed. 379, 383 (1915) expressly leaves undecided whether the rule confining the I. C. C. to the evidence in hand is applicable under the due process clause to state commissions at all or not. Later cases indicate that it is. See notes 17 and 18. But even though state commissions by virtue of the due process clause must act upon the evidence, the question still remains as to the proper scope of judicial notice since courts, which likewise act on the evidence, nevertheless take judicial notice in proper cases.

lished by statute, would meet the substantial objection already expounded herein to the use of matter outside the record by commissions, namely that the utility or other party affected has no opportunity to know and meet the case against it.[85] The device would probably forestall the danger of overturn of the commission decisions by the United States Supreme Court.[86] Utilities which had genuine reason to call into question the data and information used by the commission could do so, thus protecting themselves from data which they could disprove or offset. At the same time they could not, as now, use the pretext of lack of opportunity to meet the case against them as a means of keeping from consideration important information which is the fruit of the close contact the commissions have with utility operations.

Either an expanded doctrine of judicial notice,[87] or a statute as above suggested, would offer means whereby commissions could use their own data and knowledge. When the commission's decision then came to a court for review in a situation where the court merely looks to see if there is evidence sufficient to support the commission,[88] obviously

[85] Where the requirements of notice of the matter to be considered, and an opportunity to make a showing against it, are met, the matter may properly be taken into account. Steamboat Canal Co. v. Garson, 43 Nev. 298, 185 Pac. 801 (1919) (evidence at former hearings); *cf.* I. C. C. v. L. & N. R. R., 227 U. S. 88, 93, 33 Sup. Ct. 185, 187, 57 L. ed. 431, 434 (1913); U. S. v. Abilene & So. Ry., 265 U. S. 274, 44 Sup. Ct. 565, 68 L. ed. 1016 (1924); Wichita R. & Lt. Co. v. Ct. of Indus. Relations, 113 Kan. 297, 214 Pac. 797, 807 (1923); Appalachian Power Co. v. Commonwealth, *supra* note 20; Duluth St. Ry. v. R. R. Comm. of Wis., 161 Wis. 245, 152 N. W. 887 (1915); Hoffman v. Pub. Serv. Comm., 99 Pa. Super. 417 (1930); Report, Committee on Ministers' Powers (1932) 79(ii), 99(13b), 106 (2nd paragraph).

[86] In U. S. v. Abilene & So. Ry. Co., 265 U. S. 274, 289 n., 44 Sup. Ct. 565, 570 n., 68 L. ed. 1016, 1023 n. (1924) the court suggested a reopening in order to permit the commission to introduce in the record data from the commission's files. It is hard to see any purpose which such a procedure would serve that would not be better served by the statute suggested. The latter would have the advantage that only in case the utility seriously contested the data used by the commission would a hearing on the data be brought on by the utility.

[87] Faris, *op. cit. supra* note 73 at 181 argues for the widest latitude for commissions in taking judicial notice, especially of subject matter within their special fields. He suggests that where a fact judicially noticed by a commission is called into question, the contestant should be required to prove the truth, rather than the commission reversed for not confining itself to the record. Note (1934) 44 YALE L. J. 355 also argues for broad application of the doctrine of judicial notice by administrative bodies.

[88] I. C. C. v. Union Pac. R. R., 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308 (1912); I. C. C. v. L. & N. R. R., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431 (1913); Los Angeles & S. L. Ry. v. P. Us. Comm., *supra* note 58; City of Elizabeth v. Bd. of P. U. Commrs., *supra* note 39; N. W. Bell Tel. Co. v. Neb. State Ry. Comm., 128 Neb. 447, 259 N. W. 362 (1935); State v. Pub. Serv. Comm. of Mo., 335 Mo. 1248, 76 S. W. (2d) 343 (1934); (1927) 21 ILL. L. REV. 624; DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 190; *cf.* Fla. E. C. Ry. v. U. S., 234 U. S. 167, 34 Sup. Ct. 867, 58 L. ed. 1267 (1914). In Atchison T. & S. F. Ry. v. Commerce Comm., *supra* note 23, the court itself weighed the value of certain rate comparisons made by the commission; in I. C. C. v. L. & N. R. R., 227 U. S. at 98 the court said the weight to be given such evi-

the court should take judicial notice of what the commission judicially noticed;[89] or, under the proposed statute, the court should take into account the matter introduced in the commission's decision, together with any matter introduced by the utility or other parties at the later hearing. Even where the court exercises an independent judgment on the facts,[90] the court should consider the facts judicially noticed by the commission, or the facts set out in its opinion. More than that, the commission's decision itself is a fact,[91] entitled to at least as much weight as the opinion of an expert witness.

Statutes making findings of commissions prima facie true, or clothing them with a presumption of correctness[92] do not meet the needs cared for by the suggestions above, for even where by statute the findings of a commission are prima facie true they must be supported by evidence.[93]

Rule Formation by Commissions Instead of Courts

The fact that commissions make rules of law in much the same fashion as courts make them has already been mentioned. If the expert nature of commissions is to be put to its fullest use, the courts should leave the widest possible room for this process on the part of commis-

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dence was for the commission. Both courts started with the rule that the commission would be sustained if there was substantial evidence to support its order.

[89] See Steenerson v. Gt. No. Ry., *supra* note 10, 72 N. W. at 716.

[90] Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. ed. 908 (1920); St. Joseph Stock Yards Co. v. U. S., 56 Sup. Ct. 720, 80 L. ed. 679 (1936). See the Report of the Special Committee on Administrative Law (1934) 59 A. B. A. Rep. 539, 546, advocating judicial determination of issues of fact on review of all administrative decisions. *Cf.* Report, Committee on Ministers' Powers (1932) 108. In some jurisdictions on appeal from the commission a trial is had de novo. Duluth St. Ry. v. R. R. Comm. of Wis., *supra* note 85, 152 N. W. at 891. The suggestions made in the text above would be equally applicable to this type of review.

[91] *Cf.* St. Joseph Stock Yards Co. v. U. S., 56 Sup. Ct. 720, 726, 80 L. ed. 679 (1936). Findings of commissions should themselves be treated as evidence in their own support in cases where the court is forming an independent judgment on the law and facts, but not in cases where the court is looking to see if the commission was supported by substantial evidence, otherwise the commission always would be so supported. In Ill. Cent. R. R. v. I. C. C., 206 U. S. 441, 454, 27 Sup. Ct. 700, 704, 51 L. ed. 1128, 1134 (1907) the court said that in cases of conflicting evidence a probative force would be attributed to the findings of the commission. There is not much nourishment in this remark if it was intended to be applicable only to the case in hand for the case was one of the type where the orders of the commission if supported by evidence are final. I. C. C. v. Union Pac. R. R., 222 U. S. 541, 547, 32 Sup. Ct. 108, 111, 56 L. ed. 308, 311 (1912). Hence if there was conflicting evidence the commission's decision was already final and needed no probative force. The court's point that probative force should be given the findings of the commission has weight if applied to cases where the court is forming an independent judgment on the facts.

[92] A constitutional provision raising a presumption that the order of the commission is just, reasonable and correct was applied in City of Tulsa v. State Corp. Comm., 169 Okla. 455, 37 P. (2d) 619 (1934).

[93] I. C. C. v. Union Pac. R. R., 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308 (1912).

sions. Mr. Dickinson[94] suggests that administrative bodies may do some of the rule formulating in their fields, but he thinks their knowledge is too specialized to enable them to be successful at formulating general rules, which must "take into account the habits and attitude of mind of the whole community as gleaned from the sum-total of its transactions."[95] There is force in this argument. It might be added that rules must be fitted into the wider scheme of law as a body, and courts are more familiar with the whole body of the law than are commissions. But courts should not use these truths as pretexts for laying down rules which are nothing more than substitutions of their judgment for that of the more expert commissions, and which rules are not made necessary by community habits and attitudes, nor by the wider scheme of the law as a body. To take what is perhaps the most important of all examples in the utility field: if commissions had been left to themselves they might have worked out as a measure of the value of a utility's property for rate purposes the amount prudently invested in it. The United States Supreme Court laid down the rule that the cost of reproduction must be taken into account in arriving at value.[96] Whether this rule was made necessary by the habits and attitude of mind of the community is at least debatable, as witness the host of critics of the rule, which critics perhaps represent the mind of the community.[97] Certainly the rule was distinctly not necessary to fit the test of value for rate purposes into the general pattern of the law, for it is recognized that value for rate purposes is a peculiar thing,[98] different from value for the other purposes of the law, such as value for tax purposes, condemnation purposes, and the like.[99] Moreover, the Supreme Court laid down its rule in the name of due process, which prevents change.[100] Perhaps the rule of the Supreme Court is better than the rule the commissions might have worked out; great numbers of economists, lawyers, and commissions think otherwise;[101] but the important point is that the rule laid down by the court prevented the shaping of any other rule from the long experience of expert bodies in this constantly developing field. Rules shaped by commissions themselves have capacity for constant growth and change produced by close contact with the problems out of which the rules grew; rules laid down by courts, especially when done in the name of due process, are rigid. It is to be remembered that com-

[94] DICKINSON, *op. cit. supra* note 88, at 233.
[95] *Id.* at 234.
[96] Hanft, *Control of Electric Rates in North Carolina* (1934) 12 N. C. L. REV. 289, 302.
[97] *Ibid.* One of the critics is President Franklin D. Roosevelt. *Id.* at 303, n. 67.
[98] *Id.* at 302. [99] *Id.* at 301.
[100] Bluefield Waterworks & I. Co. v. Pub. Serv. Comm., 262 U. S. 679, 43 Sup. Ct. 675, 67 L. ed. 1176 (1923).
[101] Hanft, *op. cit. supra* note 96, at 302.

missions not only specialize in utility cases, but have a constant contact with utility problems through their regulatory powers, which contact courts do not have.

Although it is necessary that the commissions be given freedom to exercise their capacities as experts if they are to grow to their maximum usefulness, it is also true that for the time being a court check on their activities is desirable. Sometimes commissions make decisions for which there can be no defense; the decisions are just downright wrong. One reason for this lies in the fact that some commissions are expert only in theory, and are in fact chosen for political reasons. So long as such conditions are present it will be necessary to have a resort to courts unless utilities are to be the victims of politicians on commissions to make a name for themselves, or the victims of commissioners unskilled in the highly complicated matters with which they must deal. When a commission makes a decision which contains a downright error in reasoning,[102] or is contrary to the first elements of fair play,[103] the commission should be corrected.

In this article there have been discussed legal means of securing to commissions freedom to use their own expert judgment and information. The means are at hand; what is lacking is a general desire to

[102] In West Ohio Gas Co. v. P. Us. Comm., 294 U. S. 63, 67, 55 Sup. Ct. 316, 319, 79 L. ed. 761, 767 (1935) the court pointed out that the commission had made mathematical errors in fixing rates. In City of Memphis v. So. Bell T. & T. Co., *supra* note 59, at 482 the commission required that income on amounts credited to depreciation reserve be added to the depreciation reserve. But it is universally conceded, indeed conceded in this very opinion, that the object of a depreciation reserve is to keep the company's property intact. If the property is depreciated 20%, then the depreciation reserve should be 20%. If the income on that 20% is denied to the company, it will be receiving an income on only 80% of its property.

An amazing decision is to be found in *Re* Butte Water Co., 10 P. U. R. (n.s.) 26 (Mont. Pub. Serv. Comm. 1935). Among the extraordinary propositions laid down by the commission was the statement that since the depreciation reserve equalled the present value of the company's properties, no present value would have to be allowed. Decisions such as this should be corrected.

[103] In West Ohio Gas Co. v. P. Us. Comm., 294 U. S. 63, 55 Sup. Ct. 316, 79 L. ed. 761 (1935) the validity of rates for gas fixed by a state commission was in question. The court, reversing the commission, pointed out that in fixing the company's rates for the city of Lima the commission had applied the average distribution costs in all the utility's territory; but in fixing rates for the city of Kenton on the same day, the commission used the distribution costs for Kenton only. If the average distribution costs for the whole territory had been used in the Kenton case it would have been to the company's advantage. On the showing made by the court there is no doubt that the commission decision was indefensible. The court was requiring merely elementary fair play when it is said that the commission must use consistently whatever territorial unit it adopts. In Morris Water Co. v. Pub. Serv. Comm., 118 Pa. Super. Ct. 416, 180 Atl. 72 (1935) the court held unreasonable an order of the commission requiring a small water company, with a capital stock of $10,000 and a mortgage debt of $12,000, to enlarge its mains and extend them 3½ miles at a cost of $50,000. See also State *ex rel.* Ore.-Wash. Water Serv. Co. v. Dep't of Pub. Works, 184 Wash. 451, 51 P. (2d) 610 (1935); Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court* (1921) 35 HARV. L. REV. 127, 151.

make use of them. More important than any legal device for preventing further hampering restrictions by courts, and for freeing commissions to operate and develop as future needs require, is the attitude with which the whole problem is approached.[104] Many courts would gain in modesty by reflecting upon the fact that it was their own deficiencies which led the whole country in one sweeping emphatic movement to set up specialized administrtaive tribunals to handle the complex problem of administering justice in great specialized branches of human activity. In correcting the abuses of commission regulation the courts should be careful not to attempt to enter into its room, bringing with them their own limitations in knowledge and technique which made necessary the founding of the administrative tribunals in the first place. If courts, and lawyers, become too sure that they themselves are the bulwarks of justice in this field, they may prove to be the insurers of futility. They may prevent from being done the task they can not do.

What is needed is a recognition that society has made a change in the technique of administering justice; that the change was made necessary by the crowding problems of a civilization so complex as to demand specialization; and that the new type of tribunals must be left free to develop into something different from, and perhaps better than, anything yet perfected by civilization for the handling of its legal problems. The product of that development may be a system of specialized courts, with expanded powers refined by experience from the present powers of administrative bodies.

[104] The court in Steenerson v. Gt. No. Ry., *supra* note 10, 72 N. W. at 716, said, "The members of such a commission should be men of great financial ability, who have had a large amount of training and experience to fit them for their responsible and difficult duties, and they should be thoroughly familiar with the many financial and economic problems which enter into the business of constructing and operating railroads. How is a judge, who is not supposed to have any of this special learning or experience, and could not take judicial notice of it if he had it, to review the decision of the commissioners, who should have it and should act upon it? It seems to us that such a judge is not fit to act in such a matter. . . . Before a judge can act intelligently in such a matter, he must have an amount of this special knowledge and experience which it will take him years to acquire."