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THE WASHINGTON PUBLIC UTILITY LEGISLATION OF 1933 BUDGET ORDERS AS *RES JUDICATA*

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The Washington legislature at its regular 1933 session enacted a series of statutes radically altering the system of public utility regulation in this state both in scope and method.¹ Recent years have witnessed similar developments in several other states.² As is always the case with novel legislation, a number of questions of statutory construction and of constitutional law have arisen. It is the purpose of this paper to discuss one of the basic constitutional problems presented by the Washington legislation. Can preliminary, fact-finding orders of a public service commission which have been affirmed by the state courts be made conclusive as to such facts in subsequent litigation?³

The term "public utility" is applied to common carriers of all kinds, electric light and power, gas, water, telephone and telegraph companies, and similar businesses. These enterprises are subject to public control in respect of service and rates. In all states except Delaware the function of utility regulation has been delegated to state administrative boards,⁴ which are usually authorized to fix the rates which the utility companies may charge for their services in order to protect the public from extortion and discrimination.

However, the interests of the utility companies may not be disregarded. It has been settled law since the case of *Smyth v. Ames* was decided by the United States Supreme Court in 1898 that a public utility company is entitled to a "fair return upon the value of that which it employs for the public convenience."⁵ To require it to accept less than that for its services and goods would

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¹ Laws of 1933, Chaps. 148, 151, 152, 165. A general analysis and discussion of these statutes will appear in an early issue of this Review. For a discussion from the economist's viewpoint see Hall, Recent Developments in the Control of Public Utilities in the State of Washington, 10 Jour. Land & Pub. Utility Econ. 296 (1934).

² For a partial summary of such legislation see Hormell, State Legislation on Public Utilities in 1933, 28 Am. Pol. Sci. Rev. 84 (1934).

³ Although the discussion will be almost entirely limited to the Washington legislation and cases and federal cases, the conclusions are believed to be valid as to similar legislation in other states since the problem is one arising under the United States Constitution.

⁴ These boards are usually called public service commissions. The Washington board is called the Department of Public Works.

⁵ 169 U. S. 466, 547, 18 Sup. Ct. 418 (1898).

be the taking of its property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Here then is a line beyond which the state, acting through its commission, cannot go in seeking to protect its citizens as consumers. But how is the line to be drawn?

Mr. Justice Brandeis in his well-known concurring opinion in the *Southwestern Bell* case has aptly summarized the process which has been sanctioned by the Supreme Court

“To decide whether a proposed rate is confiscatory the tribunal must determine both what sum would be earned under it and whether that sum would be a fair return. The decision involves ordinarily the making of four subsidiary ones

“(1) What the gross earnings from operating the utility under the rate in controversy would be. (A prediction.)

“(2) What the operating expenses and charges, while so operating, would be. (A prediction.)

“(3) The rate base, that is, what the amount is on which a return would be earned. (Under *Smyth v Ames*, an opinion, largely)

“(4) What rate of return should be deemed fair. (An opinion, largely)

“A decision that a rate is confiscatory (or compensatory) is thus the resultant of four subsidiary determinations.”⁶

Ordinarily the utility company can have a commission's rate order set aside as confiscatory by convincing the court that the commission's finding as to *any one* of the four factors is erroneous.⁷ All are vitally important, since all are direct factors in the result.

As may be imagined, the Washington Department of Public Works, in common with other public service commissions, was faced with serious difficulties in attempting to regulate rates effectively. Valuations and investigations were slow and costly, and hence could be conducted only at rare intervals as to any particular utility company. The rate schedule when fixed operated prospectively only, the fruits of excessive charges in the past were

Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, 262 U. S. 276, 291, 43 Sup. Ct. 544 (1923).

⁷ Of course the error must be substantial and prejudicial to the utility company. Recently the Supreme Court has taken the view that an error prejudicial to the company may be compensated by a beneficial error: the net result of all the errors must be confiscatory before the company can prevail. *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U. S. 287, 53 Sup. Ct. 637 (1933).

beyond reach.⁸ Business conditions changed more rapidly than the Department could change rates. Rates which were too low one year might be unreasonably high the next. The expense and delay of litigation⁹ and the danger of judicial nullification tended to discourage the Department from attempting to effect substantial rate reductions.¹⁰

The legislation of 1933 was designed to lessen these difficulties by providing a system of continuous rate regulation. The device employed is termed an "excess earnings reserve." Chap. 165, Sec. 14, Laws of 1933, provides.

"If any public service company earns in any year a net operating income in excess of a reasonable rate of return upon the fair value of its property used and useful in the public service, such excess shall be placed in a reserve fund. Such reserve fund shall from time to time and under rules and regulations prescribed by the department and upon its order, be applied in whole or in part as earnings of such public service company in any subsequent year or years in which it does not earn a reasonable rate of return, or in establishing, replenishing or maintaining amortization, depreciation or other contingent funds, or for any other purpose beneficial to the consumers of such public service company."¹¹

The accumulation of such reserves will decrease materially the likelihood of successful court attacks on future rate reductions by the Department, and will tend to protect the common stockholders against violent fluctuations in the dividend rate. Any injustice to consumers will be slight since they are a relatively stable group who will themselves benefit in the future from any excess in rates they may pay presently. With the acquisition in course of time of a fund of accurate data derived from actual experience, the Department should find itself in a position to stabilize rates at figures fair to all parties.

⁸ "Profits of the past cannot be used to sustain confiscatory rates for the future." *Board of Public Utility Com'rs. v. N. Y. Telephone Co.*, 271 U. S. 23, 32, 46 Sup. Ct. 363 (1926). This statement was made in the absence of a statutory excess earnings reserve. Cf. note 11, *infra*.

⁹ An extreme example of "the law's delay" is the Chicago telephone rate litigation, begun in 1923 and ended, let us hope, with the decision in *Lindheimer v. Illinois Bell Telephone Co.*, 292 U. S. 151, 54 Sup. Ct. 658 (1934), after eleven years of continuous litigation in state and federal courts.

¹⁰ For an exhaustive survey of the difficulties of rate regulation and various suggestions for their elimination see the Report of the New York State Commission on the Revision of the Public Service Commission Laws (1930).

¹¹ Rem. Rev. Stat., 1933 Supp., § 10458-8. The constitutionality of such a reserve seems assured in light of *Dayton-Goose Creek Ry. Co. v. U. S.*, 263 U. S. 456, 44 Sup. Ct. 169 (1924) upholding the "recapture" of excessive railroad earnings by the Interstate Commerce Commission. Cf. note 8, *supra*.

To insure that this earnings reserve shall amount to more than an entry in its own books, the Department has been given control over the payment of dividends by utility operating companies

“No public service company engaged in intrastate business in this state shall pay any dividend upon its common stock until

“1. The public service company’s earnings and earned surplus are sufficient to declare and pay the same after provisions are made for reasonable and proper reserves.

“Before any common stock dividend is paid, the public service company shall make application to the department for approval thereof, and shall furnish to the department such information and data relating thereto as the department shall require.”¹²

By operating on the pocketbooks of the stockholders, this provision enables the Department to put considerable indirect pressure on utility managers to confine the outlays of their companies to such items as have been approved by the Department under the budget control statute described below. Moreover there will be less incentive to resist proposed rate reductions if no change in the existing dividend rate will follow.

The effective use of the earnings reserve device requires that the Department be in a position to determine what amount will represent a fair return to the utility company each year. The gross earnings from operations will of course be readily ascertainable, and the rate of return regarded as “fair” should give little trouble,¹³ but the other two factors, the rate base and proper operating expenses, are much more difficult to determine. Without new machinery for this purpose the entire system would break down due to the time consumed in conducting annual investigations, if for no other reason.

By the Public Service Commission Law of 1911, the Washington Commission (now called the Department of Public Works) was ordered to make valuations of the property of every public utility company used for the convenience of the public within the state, which valuations, subject to adjustment for additions and depreciation, were made “conclusive” in all subsequent proceedings before the commission except insofar as a change in conditions could be shown.¹⁴ Once the laborious task of evaluating a com-

¹² Laws of 1933, Ch. 165, §11, Rem. Rev. Stat., 1933 Supp., §10458-5.

¹³ 6½-7% seems to be the rate of return favored by commissions and courts under present conditions. *Los Angeles Gas & E. Corp. v. Railroad Commission*, supra, note 7. *Dayton Power & L. Co. v. Public Utilities Commission*, 292 U. S. 290, 54 Sup. Ct. 647 (1934).

¹⁴ Rem. Rev. Stat. §10441.

pany's property was completed, the commission was in a position to find the rate base as of any given time by merely making the necessary corrections. Neither the company nor the commission could assail the accuracy of the original valuation at any later time.¹⁵

This statute was repealed in 1933 and replaced by one which permits the Department to make valuations and revaluations at any time on its own motion.¹⁶ Probably the chief purpose of this change was to give the Department a free hand unshackled by old valuations now regarded as too favorable to the utility companies.¹⁷ There is now no provision making the valuation findings conclusive.¹⁸ A utility company can always dispute the Department's findings as to its rate base in any rate or dividend proceeding. Of course this does not mean that a valuation made in the past will be of no value; if it is accurate to begin with and is properly revised, it will withstand the attack of the company

The new statutes provide for a determination of the amounts properly chargeable to operating expense *in advance*. Before November first of each year each utility company is required to submit to the Department its proposed annual budget for the next year. The Department is authorized to reject such items as may, after notice and hearing, be found unfair, unreasonable, or "contrary to public interest." The utility company may make any rejected items of expenditure if it sees fit, but such outlays may not be allowed as charges to operating expense for the purpose of determining the net operating income of the company for that year. Provision is made for adjustments during the year by means of supplemental budgets.¹⁹

Special attention is given to contracts between utility operating companies and so-called "affiliated interests," defined very

¹⁵ *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, 205 Pac. 3 (1922). But obvious errors might be corrected. *State ex rel. Pacific P & L Co. v. Dept. of Public Works*, 143 Wash. 67, 254 Pac. 839 (1927).

¹⁶ Laws of 1933, Ch. 165, §4, Rem. Rev. Stat., 1933 Supp. §10441.

¹⁷ The Department is now in a position to use present cost of reproduction as an index of value, which figure, due to the depression, will frequently be substantially smaller than original cost less depreciation, the index prescribed by the old statute. See cases cited *supra*, note 15.

¹⁸ The general statute, Rem. Rev. Stat. §10448, making all departmental orders conclusive where no review has been sought, or, if sought, no reversal has been secured, probably does not apply. An order which is not conclusive on the Department should not be on the company. Moreover, it is a case of a new special statute replacing an old special statute which had its own provision as to finality.

¹⁹ Laws of 1933, Ch. 165, §15, Rem. Rev. Stat., 1933 Supp. §10458-4. Excessive executive salaries, political advertising, and membership fees in trade associations whose principal functions are lobbying and propagandizing are probably the items aimed at by this section.

broadly by the statute. Each contract of this type must be approved by the Department before expenditures made thereunder may be charged to operating expense.²⁰ The Department is also given express authority to fix the annual depreciation charges and prescribe the method of depreciation accounting of each utility company²¹

By means of these devices the Department is calculated to be in a position to determine the operating expenses and the rate base of a utility company at the end of each year so that a proper adjustment of the earnings reserve can be made. Moreover, past findings and orders as to budget items will prove helpful in estimating future operating expenses when the Department undertakes to adjust rate schedules.

A simple hypothetical example will perhaps best illustrate the new system of regulation. Let us assume that a certain utility operating company has a rate base of \$1,000,000, is capitalized at the same figure,^{21a} and has neither surplus nor deficit. It submits its annual budget for 1935, calling for the expenditure of \$200,000, to the Department in the fall of 1934. The Department disallows items totaling \$50,000, and this order is affirmed by the courts, but the company goes ahead and spends the entire \$200,000 as planned. The gross revenue from operations in 1935 is \$270,000. According to the company's books its net profit will be \$70,000, but the Department's books will show a profit of \$120,000. If we assume that 7% is a fair rate of return, the Department will order the company to set up an excess earnings reserve of \$50,000 at the close of the year 1935.²²

Now suppose the company wishes to declare a dividend and seeks the permission of the Department. The latter will allow a dividend of only \$20,000.²³ To the complaints of the stockholders it could reply, "True, your company actually earned \$120,000 last year, but it must hold \$50,000 in trust for the benefit of its customers whom it overcharged to that extent, and your managers saw fit to spend another \$50,000 of *your* dividend money on advertising that was not needed, on salaries which were not earned, and

²⁰ Laws of 1933, Ch. 152; Rem. Rev. Stat., 1933 Supp. §10440-1—10440-10. The "milking" of operating companies by their holding companies to the detriment of both consumers and minority stockholders by means of service and supply contracts is the evil aimed at here.

²¹ Laws of 1933, Ch. 165, §13; Rem. Rev. Stat., 1933 Supp. §10458-7.

^{21a} For the sake of simplicity it is supposed that all of the capital furnished is represented by common stock. Actually this is rarely if ever, true.

²² The statute, *supra*, note 11, apparently leaves the Department no discretion where excessive earnings are found.

²³ Here again the statute, *supra*, note 12, is mandatory in form.

to the holding company for technical services and expert advice which were never rendered. It is not our fault that your dividends are so small. We did all we could to save your money. Perhaps a new set of managers " And into court they go.

Suppose the same thing happens the next two years. The Department would then be in a position to reduce rates about 25% with little fear of judicial reversal *provided* the findings as to proper operating expenses for the past three years will be accepted by the courts as *the* correct basis for estimating future operating expenses. Furthermore, a rate reduction of 30% might be upheld if the courts agree with the Department that conditions more favorable to the company will obtain in the future. The temporary confiscatory effect of the lower rates could be offset by dipping into the excess earnings reserve *provided* the courts would sustain the Department in its contention that such funds do represent excessive earnings.

In all three of these situations the weight to be accorded the Department's budget orders is of vital importance. If they are deemed conclusive, then, assuming the constitutionality of other features of the new system, the finding as to the rate base will be the only vulnerable point in the Department's case. But if budget orders are to be regarded as only *prima facie* correct,²⁴ the whole scheme of continuous regulation will be jeopardized. Each dividend and rate order will entail the litigation of the issues of past operating expense. The utility companies will ignore the budget proceedings and wait until rate or dividend proceedings are instituted to put in their evidence and arguments. The Department will have nothing certain on which to base future action, and will be in little better position than before 1933 as to the fixing of rates.

The statute clearly contemplates that budget orders which have been affirmed by the courts shall be conclusive in subsequent litigation.

"Any public service company may, at its option make or contract for any rejected item of expenditure, but in such case the same shall not be allowed as an operating expense,

"Any finding and order made and entered by the department as herein provided shall be and remain in full force and effect, unless and until the findings and order of the department with respect thereto have been vacated and set aside in proper proceedings for review thereof."²⁵

²⁴ Rem. Rev. Stat. §10449 makes all findings of fact made by the Department *prima facie* correct and casts the burden of proof on the party disputing such findings in any review proceeding.

²⁵ Laws of 1933, Chap. 165, §10; Rem. Rev. Stat., 1933 Supp. §10458-4.

The review referred to is that provided by a general statute applicable to all orders of the Department. It provides that any person affected by a departmental order may petition the superior court for a writ of review within thirty days of the issuance of the order. The reviewing court is limited to the record made by the Department and can reverse only for error of law.²⁶ Another general statute provides that all orders issued by the Department shall be final and conclusive unless set aside in a review proceeding.²⁷ Thus failure to petition for a writ of review within thirty days from the issuance of an order will preclude a party from ever attacking such order later.²⁸ Since payments under "affiliated" contracts and depreciation charges will appear as items in the general budget, the finality of departmental orders in respect of them involves no different problem.

The question now arises, are these statutes purporting to make budget orders²⁹ conclusive constitutional? The "due process" clause of the Fourteenth Amendment insures to every man his "day in court." The doctrine of *res judicata* limits him to one day, but of course cannot apply until he has had that day. Hence the issue must be of a justiciable nature, that is, of the type customarily decided by courts of justice.³⁰ In other words, if the appropriate court will not take jurisdiction to determine an issue, the doctrine of *res judicata* cannot apply.

A public service commission issues many kinds of orders, some of which are not reviewable.³¹ Others, e.g., rate orders, clearly are. All courts will not draw the line at the same place. The Washington courts have been very liberal in granting reviews. The

²⁶ Rem. Rev. Stat. §10428. See *State ex rel. Oregon R. & Nav. Co. v. Railroad Com.*, 52 Wash. 17, 100 Pac. 179 (1909).

²⁷ Rem. Rev. Stat. §10448.

²⁸ This raises a constitutional problem distinct from the one which is under discussion. Can a quasi-judicial determination of any fact by an administrative body be treated as *res judicata* in the absence of judicial affirmation by a court? This problem is beyond the scope of this paper. Cf. note 47 *infra*. The Washington court has applied the statute with no hesitation. *State ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8 (1912). *State ex rel. Great Northern R. Co. v. Public Service Com.*, 76 Wash. 625, 137 Pac. 132 (1913). *State ex rel. Pacific P & L Co. v. Public Service Com.*, 81 Wash. 24, 142 Pac. 431 (1914).

²⁹ The term "budget order" is used to designate an order disallowing items in a budget submitted by a utility company. Ordinarily it will be made in advance of the proposed expenditures.

³⁰ Mr. Justice Stone's opinion in *Nashville, C. & St. L. Ry. v. Wallace*, 238 U. S. 249, 53 Sup. Ct. 345 (1933) contains an excellent discussion and analysis of this problem.

³¹ Order setting date for hearing, *United States v. Illinois Cent. R. R. Co.*, 244 U. S. 82, 37 Sup. Ct. 584 (1917). Order fixing tentative valuation prior to hearing, *Delaware & Hudson Co. v. United States*, 266 U. S. 438, 45 Sup. Ct. 153 (1925). Order authorizing lease of operating property, *Fishback v. Public Ser. Com.*, 193 Ind. 282, 138 N. E. 346 (1923).

objection that only final orders are judicially reviewable was raised in an early case and was answered by the court as follows.

“Appellants argue that the words ‘any order,’ as used in sec. 86, should be interpreted to mean only final orders. This contention is disposed of in *State ex rel. Railroad Commission v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3, where it was held that the provisions of this section are so plain as to admit of no argument as to their meaning. The legislature has not limited the right of review to final orders, but has conferred that right, and fixed a limit within which it may be exercised, upon any order of the commission which is deemed contrary to law, ‘for the purpose of having its reasonableness and lawfulness inquired into and determined.’ That the legislature has a right to provide for the review of any order must be admitted, and when it has in express terms done so, it is not for the courts to say that such review should be, not from any order as in the language of the act, but only from any final order. This would mean a judicial amendment of the act which, doubting our power, we are not disposed to make.”³²

The cases nearest in point to the problem under discussion arose under the valuation statute of 1911.³³ On at least one occasion a department valuation order standing alone was reviewed by both superior and supreme courts of this state.³⁴ Such an order is similar to a budget order in nature and effect, neither purports to interfere with the utility company presently in any substantial manner. Judging by their action in the above cases, it would seem likely that the courts of Washington will grant immediate reviews of budget orders, so that they can be treated as *res judicata* insofar as the state constitution is concerned, unless the decisions of the United States Supreme Court induce a change in attitude.

That this danger is very real will appear shortly. At this point it might be interesting, by way of contrast, to present the attitude of the United States Supreme Court toward judicial review of valuation orders. By Act of Congress in 1913 the Interstate

³² *State ex rel. Great Northern R. Co. v. Public Ser. Com.*, 76 Wash. 625, 629, 137 Pac. 132 (1913). Cf. *State ex rel. Pacific P. & L. Co. v. Public Ser. Com.*, 81 Wash. 24, 142 Pac. 431 (1914) holding nonreviewable an indefinite preliminary order.

³³ Notes 14 and 15, *supra*, and text thereto.

³⁴ *Columbia River Tel. Co. v. Dept. of Public Works*, 148 Wash. 395, 269 Pac. 6 (1928). See also *City of Everett v. Dept. of Public Works*, 125 Wash. 341, 215 Pac. 1045 (1923), and discussion thereof in *State ex rel. Pacific P. & L. Co. v. Dept. of Public Works*, 143 Wash. 67, 76-8, 254 Pac. 839 (1927).

Commerce Commission was ordered to make valuations of all interstate railroads, which were to be regarded as *prima facie* evidence of value in future rate-fixing proceedings.³⁵ In *United States v. Los Angeles & S. L. R. Co.*³⁶ the Supreme Court held it error for a district court to undertake to review such a valuation order.³⁷ The following remarks are significant, especially so coming from Mr. Justice Brandeis who delivered the opinion

“The so-called order here complained of is one which does not grant or withhold any authority, privilege, or license, which does not extend or abridge any power or facility, which does not subject the carrier to any liability, civil or criminal, which does not change the carrier’s existing or future status or condition, which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare *Smith v Interstate Commerce Commission*, 245 U. S. 33, 38 Sup. Ct. 30, 62 L. Ed. 135. Moreover, the investigation made was not a step in a pending proceeding, in which an order of the character of those held to be judicially reviewable could be entered later. It was merely preparation for possible action in some proceeding which may be instituted in the future—preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action shall arise. The final report may, of course, become a basis for action by the Commission, as it may become a basis for action by Congress or by the Legislature or an administrative board of a state. But so may any report of an investigation, whether made by a committee of Congress or by the Commission pursuant to a resolution of Congress or of either branch thereof.

“And it is at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the matters now complained of will be involved, or in which the errors alleged will be of legal significance.”³⁸

True, this case is readily distinguishable from the Washington cases³⁹ which involved valuation orders that were made final and conclusive in subsequent litigation by express terms of the statute. Here the railroad could attack the valuation fixed at any future

³⁵ 37 Stat. 701, 48 U. S. C. A. §19a.

³⁶ 273 U. S. 299, 47 Sup. Ct. 413 (1927).

³⁷ The statute confers on the District Courts jurisdiction of “cases brought to enjoin, set aside, annul, or suspend in whole or in part any order” of the Commission. 36 Stat. 542, 28 U. S. C. A. §46.

³⁸ 273 U. S. 299, 309-10, 311.

³⁹ Cited *supra*, note 34.

time. Nevertheless, the implications of the opinion are broad enough to justify the assertion that the Supreme Court does not consider preliminary fact-finding orders as fit subjects for adjudication. Such an order does not present a justiciable controversy, the utility company has not been hurt as yet,⁴⁰ and may never be. The Commission may never fix the rates at all, they may be fixed at a figure high enough to provide a fair return on the company's own valuation, or changed conditions may destroy the probative value of the order itself.

There is nothing in the United States Constitution to stop the Washington courts from reviewing preliminary budget orders if they wish to, but the United States Supreme Court may hold that the Fourteenth Amendment prohibits treating such orders, even after they have been affirmed by the state courts, as *res judicata* in subsequent rate or dividend litigation. The Court has more than once stated by way of dictum that the doctrine of *res judicata* cannot apply in similar situations because the court which decided the issue *was not sitting as a court*. Review by a court is not enough. It must be a *judicial* review by a court.

The leading case on this proposition is *Prentis v. Atlantic Coast Line Co.*,⁴¹ decided by the Supreme Court in 1908. The case arose on appeal from the federal circuit court which had enjoined the Virginia Corporation Commission from enforcing its order fixing passenger fares. These rates had been fixed after notice and a full hearing. The state constitution granted the right to appeal directly from the commission to the supreme court of appeals, and authorized that court, should it reverse the order, to substitute the order which should have been issued. The Court held first, that the action was not improper as an attempt to enjoin a legislative or judicial body, since it was brought to enjoin the members of the commission from enforcing a rate already fixed, an executive act, second, that it was improper for the court to act until the legislative process of fixing the rate was completed,⁴² referring to the possibility that the state court might change the rate should the carrier resort to it, and third, that the circuit court should retain jurisdiction to protect the carrier in case the state courts should refuse to grant him any relief. It is the dicta uttered by

⁴⁰ In the *Los Angeles* case the Court held that the carrier could not invoke the general equity jurisdiction of the District Court on the ground that the publication of an unreasonably low valuation finding would injure its credit with the public. *Op. cit.*, *supra*, note 36, 314.

⁴¹ 211 U. S. 210, 29 Sup. Ct. 67 (1908).

⁴² For a discussion of the subsequent history of this doctrine see Merrifield, *The Federal Injunction and State Commissions: The Rule of the Prentis case*, 1 Univ. of Chicago L. Rev. 777 (1934).

Mr. Justice Holmes in the course of his opinion that are of particular significance in connection with our problem.

“A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind.

“The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a state constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding *in rem* and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law *res judicata*, if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the supreme court of appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called. Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation is past.

“If the rate should be affirmed by the supreme court of appeals and the railroads still would regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the circuit court, without fear of being met by a plea of *res judicata*.”⁴³

The rule is simple to state, but very difficult to apply. Regardless of the form of the proceeding, whether before a commission or a court of last resort, no determination of an issue of fact, says Mr. Justice Holmes, made prior to the completion of the legislative process can be *res judicata* in later litigation. The difficulty in application arises in trying to ascertain the precise moment

⁴³ *Op. cit. supra*, note 41, 226, 227-8, 230.

at which legislation ceases.⁴⁴ In fact the *Prentis* case itself is an excellent illustration of this. If "litigation cannot arise until the moment of legislation is past" and the state court of review is a part of the legislative machinery, then a bill brought to enjoin the commission, before the time allowed for an appeal has expired (as this one was), would be premature and could not be entertained. But the Court specifically ordered the bill retained, which indicates that the words quoted were not intended to carry a broad and literal meaning. Suppose the federal court's injunction had issued prior to the expiration of the period allowed for appeal to the state court,⁴⁵ and no appeal had been taken from the federal court. Would not its decree be *res judicata* as to the issue of confiscation? Probably the point is that *as to the commission* the moment of legislation had passed when it issued its final rate-fixing order.

A further complication is introduced by the fact that a public service commission ordinarily performs a judicial function, as well as those of legislation and execution.⁴⁶ The hearing, which chronologically precedes the act of legislation and hence would offhand appear to be a preliminary act of investigation, is treated by the courts as the first step in the process of adjudicating the lawfulness of the rates fixed.⁴⁷ It is regarded as if it took place after, instead of before, the promulgation of the rate order. A similar situation is presented by a "legislating" court like the Virginia court in the *Prentis* case. It conducts a judicial inquiry before acting. Here again it is treated as subsequent. Mr. Justice Holmes intimated in the *Prentis* case that a writ of error to the Virginia Court of Appeals would have been issued by the United States Supreme Court had the carrier pursued his remedy in the state

⁴⁴ "It is difficult, if not impossible, to define at what point in cases like this the reviewing power of an appellate court enters the legislative field." *Aetna Ins. Co. v. Commonwealth*, 168 S. E. 859, 866 (Va., 1933). The court is discussing the *Prentis* case.

⁴⁵ This will be done to prevent "daily confiscation" where the state statutes do not provide for a stay on appeal. *Pacific Telephone & T. Co. v. Kuykendall*, 265 U. S. 196, 204-5, 44 Sup. Ct. 553 (1924).

⁴⁶ See *Arizona Grocery Co. v. Atchison T. & S. F. R. Co.*, 234 U. S. 370, 52 Sup. Ct. 133 (1932) for the distinction between these functions.

⁴⁷ *Cf.* the contention in the *Prentis* case, *supra*, note 41, that the injunction was bad as an attempt to restrain a state court. Thus under the Washington statute, *supra*, note 26, the Department's function is similar to that of a master in chancery, and the reviewing court may constitutionally be limited to the record made by it. *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535 (1912). But a commission cannot take the place of a court. *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462 (1890), holding invalid a statute making final the determination of a commission as to the lawfulness of rates fixed by itself, as depriving the carrier of its day in court. *Cf.* note 28, *supra*.

courts without success.⁴⁸ If so, then the Virginia court would have been acting judicially—because the United States Supreme Court refuses to review the decrees of a court which is not so acting⁴⁹—and it is difficult to understand why its decision should not be regarded as *res judicata*.

It is well settled that a state court which has merely the power to affirm or reverse the decision of a commission is acting judicially when reviewing the latter's orders, and the doctrine of *res judicata* applies.⁵⁰ In *Grubb v. Public Utilities Commission of Ohio*,⁵¹ the decision of the Ohio Supreme Court affirming a commission order denying an application for a permit to operate a bus line was held to be *res judicata* as to all issues which might have been decided, thus abating an action between the same parties which was pending in a federal court, and this despite the fact that the Ohio court was acting under a statute authorizing it to reverse, vacate, or *modify* orders issued by the commission.⁵² The Supreme Court seemed satisfied with the Ohio court's previous assertion that it acted only judicially in such cases.⁵³

In addition to the practical and logical difficulties presented by the dictum in the *Prentiss* case ("Litigation cannot arise until the moment of legislation is past."), its application would be inconsistent with that spirit of comity between state and federal courts so much stressed in the *Prentiss* case itself. To disregard entirely the solemn and careful decision of the highest court in a state on the identical issue would not tend to promote a feeling of mutual goodwill and respect.

For one reason or another the Supreme Court has not seemed eager to apply the dictum of the *Prentiss* case, and were it not for a case decided last term, it might plausibly be contended that it would not be applied to judgments affirming preliminary budget orders. The case referred to, *State Corporation Commission v. Wichita Gas Co.*,⁵⁴ was an appeal from the decree of a federal dis-

⁴⁸ *Op. cit.*, *supra*, note 41, 228. This proposition is the basis of the specially concurring opinions of Fuller, C. J., and Harlan, J., in the *Prentiss* case.

⁴⁹ *Keller v. Potomac Elec. Power Co.*, 261 U. S. 428, 43 Sup. Ct. 445 (1923) *Federal Radio Com. v. General Electric Co.*, 281 U. S. 464, 50 Sup. Ct. 389 (1930).

⁵⁰ *Detroit & Mackinac R. Co v. Michigan R. Co.*, 235 U. S. 402, 35 Sup. Ct. 126 (1914) *Napa Valley Elec. Co. v. Railroad Com.*, 251 U. S. 366, 40 Sup. Ct. 174 (1920).

⁵¹ 281 U. S. 470, 50 Sup. Ct. 374 (1930).

⁵² See incidental mention of this point in opinion, *ibid.*, 477.

⁵³ *Ibid.*, 474.

⁵⁴ 290 U. S. 561, 54 Sup. Ct. 321 (1934). See also *New York Telephone Co. v. Maltrre*, 291 U. S. 645, 54 Sup. Ct. 443 (1934).

strict court⁵⁵ enjoining the Kansas commission from enforcing its order disallowing certain payments under an "affiliated" contract as operating expenses. The Kansas statutes⁵⁶ purporting to make such orders, when not appealed from or when affirmed, final in subsequent rate proceedings are substantially the same as the corresponding statutes in Washington.⁵⁷ The Supreme Court vacated the injunction, reasoning as follows.

"Appellees, in substance, suggest that, unless now adjudged invalid and enjoined, the findings and directions of the commission in respect of their operating expenses and the fixing of rates will be binding upon them in later proceedings for the prescribing of rates to be charged by them for gas furnished to consumers and in suits involving the validity of such rates. But the commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be *res adjudicata* when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. *Prentiss v Atlantic Coast Line*, 211 U. S. 210, 227, 29 Sup. Ct. 67, 53 L. Ed. 150, Chicago, etc., Railway Co. v. Minnesota, 134 U. S. 418, 452 et seq., 10 Sup. Ct. 462, 33 L. Ed. 970. But the decisions of state courts reviewing commission orders making rates are *res adjudicata* and can be so pleaded in suits subsequently brought in federal courts to enjoin their enforcement. *Detroit & Mackinac Ry v. Mich. R. R. Comm.*, 235 U. S. 402, 405, 35 Sup. Ct. 126, 59 L. Ed. 288, *Napa Valley Co. v R. R. Comm.*, 251 U. S. 366, 373, 40 Sup. Ct. 174, 64 L. Ed. 310.

"It results, therefore, that appellees in their complaints failed to state facts sufficient to entitle them to a decree enjoining the appellants from enforcing the first order for, as insisted by appellants in oral argument in this court, the challenged provisions are merely preliminary steps in aid of investigations for the ascertainment of the reasonableness of appellees' rates, and they have no binding force in respect of payments to the pipe line company or rates to be charged consumers and cannot be *res adjudicata*.⁵⁸

The inference seems clear that an affirmance of the commission's order by the Kansas court could not render it *res judicata*, that

⁵⁵ 2 F. Supp. 792 (1933).

⁵⁶ Rev. Stat. Kansas, 1923, §66-113; Rev. Stat. Supp., 1931, §66-113.

⁵⁷ *Supra*, notes 25 and 27 and text thereto.

⁵⁸ *Op. cit.*, *supra*, note 54, 569, 569-70. Note the position taken by the commission. It would seem wiser in the long run to insist on finality even if a few orders were reversed.

too would be but an act of investigation preliminary to legislation. The case raises a very serious doubt as to the constitutionality of those provisions of the Washington statutes making budget orders conclusive in later rate litigation. There are, however, other lines of approach which must be explored before a conclusion can be reached.

There is a clear distinction between the *Wichita* case and cases like *Terrace v. Thompson*,⁵⁹ *Pierce v. Society of the Sisters*,⁶⁰ and *Nashville, Chattanooga & St. L. Ry. v. Wallace*,⁶¹ in which the constitutionality of statutes was adjudicated well in advance of any actual interference with the plaintiffs. In the cases cited the moment of legislation had passed, and the defendants were officers under a mandatory duty to enforce the statutes against the plaintiffs if the latter pursued their intended and usual courses of action. The officers had no discretion, they were performing a purely executive function. In the *Wichita* case no injury would result to the plaintiff until further action of a legislative nature was taken, the fixing of rates. The action of the district court in enjoining the commission restrained the latter in the exercise of its legislative function, something the Supreme Court has never permitted.⁶²

It is more difficult to distinguish *Fidelity Nat. Bank & T Co. v. Swope*.⁶³ A city charter provided that after the city council had passed an ordinance authorizing an extensive street improvement project, it could bring an action to determine the validity of charging the cost to those property-owners alleged to be benefited, and if successful in this action, proceed to let contracts for the completion of the project. The Supreme Court held that a decision in the state court in an action of this type was *res judicata* as to the validity of the charge to the property, and barred a property-owner from resisting the charge in federal court after the improvement had been completed. It seems clear that the

⁵⁹ 263 U. S. 197, 44 Sup. Ct. 15 (1923), suit in federal court to enjoin attorney-general of state from prosecuting plaintiff for executing a proposed lease of land to an alien prohibited by statute, allegedly invalid, from leasing such land.

⁶⁰ 268 U. S. 510, 45 Sup. Ct. 571 (1925), suit in federal court to enjoin state officials from enforcing statute requiring all parents to send children to public schools, which statute was not yet in effect.

⁶¹ 288 U. S. 249, 53 Sup. Ct. 345 (1933), suit in state court under Uniform Declaratory Judgments Act for declaration that gasoline tax statute is invalid as applied to plaintiff.

⁶² *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161 (1896) refusing to enjoin city council from passing unconstitutional ordinance; *McChord v. Louisville & N. R. Co.*, 183 U. S. 483, 22 Sup. Ct. 165 (1902), refusing to enjoin public service commission from fixing rates under statute alleged to be unconstitutional.

⁶³ 274 U. S. 123, 47 Sup. Ct. 511 (1927).

action of the city council in letting the contracts *after* the decision in the state court was purely an act of legislation. Whether the project would be carried out or not was a matter solely within the discretion of the city council, as much so, surely, as the decision by the commission in the *Wichita* case whether to adjust rates or not. Moreover, this case is squarely in point on the problem under discussion whereas the *Wichita* case only *holds* that a federal court should not interfere until the injury becomes more imminent.

It seems impossible to find a valid factual distinction between the two cases.⁶⁴ The likelihood of future legislation based on the preliminary finding is almost as strong in the *Wichita* case as in the *Swope* case. The practical desirability of determining the validity of the proposed assessments before contracts are let, money expended, or bonds issued is obviously great, but the advantages resulting from the continuous and contemporaneous determination of a utility company's operating expenses are by no means inconsiderable. In each case there was an actual controversy between directly interested parties with well-defined issues.

It is submitted that one reason for the apparent inconsistency of attitude on the part of the Supreme Court lies in the fact that that tribunal, like all other courts, tends to divide the law into insulated compartments.⁶⁵ Utility cases are cited and followed as precedents in utility cases, but not in municipal improvement district cases—and vice versa—regardless of the fact that the same fundamental problems may be presented in both types of litigation.⁶⁶ Since the objection to applying the doctrine of *res judicata* to preliminary orders in utility regulation is based on general constitutional principles—separation of powers and due process of law—which are equally applicable in the improvement district cases, the Supreme Court would not depart from the rule of *stare decisis* if it should choose to follow the *holding* of the *Swope* case rather than the *dictum* of the *Prentis* case and the *inference* of the *Wichita* case when the question is squarely presented in a utility case.⁶⁷

⁶⁴ The number of potential litigants is much greater in the *Swope* case, but this is merely a difference in degree, not of kind.

⁶⁵ This is the natural, and on the whole desirable, result of the multiplication of precedents which are closely in point. *Cf.* the infrequent citation of anything except insurance cases in insurance cases.

⁶⁶ The *Prentis* case was not cited in the *Swope* case, nor the *Swope* case in the *Wichita* case.

⁶⁷ This is a situation where the compartments might be broken down—where there are few precedents within the same field of litigation and the doctrines involved are of broad application.

The holding in the *Swope* case is based on the proposition that the property-owners were not denied their day in the United States Supreme Court on the question of due process, since an appeal would have lain from the decision in the state court.⁶⁸ Will the Supreme Court say the same thing where preliminary orders issued by a public service commission are involved? An affirmative answer was predicted, by way of dictum and with some doubt, by a three-judge federal court in *Van Wert Gaslight Co. v. Public Utilities Commission*.⁶⁹ Speaking of a preliminary valuation order the court said, "Had this matter of valuation been the subject of *judicial review* in the Supreme Court of Ohio, and such finding of the Public Utilities Commission upon this question been affirmed, an estoppel by judgment would arise, which would preclude the re-examination of this question in any other tribunal, as between these same parties."⁷⁰ In anticipation of the objection that to hold thus would deprive the utility company of its right to carry all constitutional questions to the United States Supreme Court because, since no question of confiscation could arise until rates were regulated in reliance on the valuation order, no appeal would lie from the decision of the Ohio court, the court intimated that an appeal *would* lie, although expressing some doubt on the point.⁷¹

The court possibly referred to an appeal based on a denial of due process in the procedural sense. It might be contended that a federal question arises at once because the statute by making unreversed valuation orders conclusive prohibits the commission from considering other competent evidence as to value in a rate proceeding and therefore denies to the utility company a "hearing" on that issue, since the state courts are limited to the record made before the commission. This would be a good basis for an appeal from a judgment affirming the validity of rates,⁷² but this very fact undermines the validity of the argument. If the company can raise the question of the nature and sufficiency of

⁶⁸ *Op. cit.*, *supra*, note 63, 130-31.

⁶⁹ 299 Fed. 670 (D. C., S. D., Ohio, 1924).

⁷⁰ *Ibid.*, 675. Italics in original. The court held that the doctrine of *res judicata* would not apply because the Ohio court had not tried the issue of valuation *de novo* as required by *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 237, 40 Sup. Ct. 527 (1920).

⁷¹ *Op. cit.*, *supra*, note 69, 676.

⁷² A rate order based on incompetent evidence is void as a violation of the due process clause in the procedural sense. *Northern Pacific R. Co. v. Dept. of Public Works*, 268 U. S. 39, 45 Sup. Ct. 412 (1925). This holding, of course, would apply only where the reviewing court is limited to the record made by the commission. In such cases the hearing before the commission is an integral part of the judicial review. *Cf.* note 47, *supra*.

the evidence after the "moment of legislation is past", there is no reason why the Supreme Court should pass on it before that time. This line of approach really begs the whole question under discussion.

If the dictum of the *Van Wert* case is to be followed, it must be justified by a direct attack on the proposition that the issue of confiscation is not raised until rates are changed. When a valuation or budget order is issued by a commission which is in fact erroneous to the detriment of the company, the probability of future confiscation due to the fixing of rates at too low a figure is materially increased. When an order is issued reducing rates at some future time the federal question arises at once,⁷³ although there can be no confiscation as yet, and whether there ever will be is a matter of conjecture and opinion. The only difference in the two situations is one of degree, the somewhat greater probability in the second case that confiscation will occur. Therefore, if the Supreme Court were to hold that it had jurisdiction to hear an appeal from a state court's judgment affirming a valuation or budget order, it would be taking but another step along a familiar road. Nor would this step entail a departure from the *holding* in the *Wichita* case.⁷⁴ Obviously the likelihood that lower rates would actually result from the order disallowing certain outlays as operating expense would be substantially greater after that order had been affirmed by the state supreme court than before, and the Court might logically "draw the line" between those points. All in all, the precedents to the contrary are not so compelling as to preclude the Supreme Court from treating as *res judicata* preliminary budget orders which have been judicially affirmed.

Before closing this discussion it should be pointed out that it is very doubtful if the dictum in the *Prentis* case can be applied to budget orders issued under the Washington statute. So far, preliminary fact-finding orders have been considered solely as furnishing a basis for subsequent rate regulation. In Washington such orders may also serve as the basis for dividend control. If Mr. Justice Holmes' test is applied to proceedings looking to control of dividends, a different result is reached than where the regulation of rates is the only objective.

When is the "moment of legislation" past? The act of prohibiting the payment of dividends is not legislative but executive

⁷³ This seems to be taken for granted. *Home Telephone & T. Co. v. Los Angeles*, 227 U. S. 278, 33 Sup. Ct. 312 (1913). Cf. cases cited *supra*, notes 59, 60, 61.

⁷⁴ *Supra*, note 54. The case merely held that the danger of irreparable injury was not sufficiently imminent to warrant an injunction.

in nature. The commission has no discretion under the statute.⁷⁵ It merely finds the facts and applies the law embodied in the statute. If an earnings reserve has been set up it must be protected, that part of the earned surplus cannot be disbursed to stockholders. Nor is the creation of an excess earnings reserve an act of legislation. Once the Department has found as a fact that excessive profit has been realized, it must set up the reserve.⁷⁶ True, the determination of what is a fair rate of return involves the exercise of judgment, but it is not a legislative act under the Holmesian test since it looks only to the past and not to the future.⁷⁷ It is precisely the same kind of decision as that constantly made by the courts at common law in actions brought by shippers to recover overcharges from carriers. It might be described as a quasi-judicial act incident to execution.

The last legislative act then must be the issuance of the order defining *in advance* the outlays which may be charged to operating expense in calculating the net return of the utility company—the budget order itself. By analogy to rate proceedings, the hearing held before the budget order is issued may be regarded as the first step in the judicial review of that order. Under this analysis the immediate review in the state courts provided by the statutes will be a purely judicial proceeding. The court's final decision will be *res judicata*, and an appeal therefrom will lie to the United States Supreme Court.⁷⁸

Should the Supreme Court see fit to take this view of dividend proceedings, it would regard the judicial affirmance of budget orders as *res judicata* in later rate litigation as well. The fact that a budget order may be the basis of future legislative action does not alter the fact that it is itself an act of legislation which, coupled with the pertinent statutes, sanctions and enjoins executive interference with the affairs of the utility company, without the necessity or opportunity for further legislative action by the Department.

No one today seriously contends that some method of regulating the rates charged by public utility companies is not necessary for the protection of the public. If regulation is necessary, a continuous system should be better than a spasmodic, intermittent one. The use of preliminary orders and findings is a vital part of

⁷⁵ Quoted *supra*, above note 12. Cf. note 23, *supra*.

⁷⁶ Quoted *supra*, above note 11. Cf. note 22, *supra*.

⁷⁷ See *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, *supra*, note 46.

⁷⁸ Presumably the appeal could be based on a denial of due process to the stockholder by withholding his dividends arbitrarily.

the new system adopted in Washington. As a practical matter, a device for rendering these orders and findings conclusive once and for all must be available. Otherwise the new system will be little more efficient than the old.

Immediate review of preliminary budget orders will cast no new burden on the courts. The parties, the subject-matter, and the questions of fact and law will be the same as in rate litigation. The differences will be that the issues will be narrower and the evidence fresher. The objection that the courts should not interfere until someone has been hurt runs against the current of modern jurisprudence. More and more the trend is toward the anticipation and prevention of injury⁷⁹

The objection that a court should not entertain proceedings to review preliminary administrative orders because in so doing it would be aiding the administrative body in the performance of a legislative function can be answered by saying that a court is justified in performing any service for which it is fitted if the public needs require it. The objection based on the due process clause is equally untenable. To say that a utility company can secure "justice" from a given group of judges if its rates have been changed, but not otherwise, seems a conclusion of doubtful validity, to say the least. The "tyranny of labels"⁸⁰ should not be allowed to prevent the adaptation of old and well-tried judicial machinery to new uses in an attempt to solve one of the most important and difficult governmental problems of modern times.

⁷⁹ Witness the increasing use of declaratory judgments. On June 14, 1934, Congress passed the Federal Declaratory Judgments Act. 48 Stat. ch. 512.

⁸⁰ "A fertile source of perversion in constitutional theory is the tyranny of labels." Cardozo, J. in *Snyder v. Massachusetts*, 291 U. S. 97, 114, 54 Sup. Ct. 330 (1934).