The Johnson Act and Utility Rate Making in Ohio

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On May 14, 1934, Congress passed the Johnson Act[1] restricting the jurisdiction of the federal district courts in relation to state utility rate controversies. The paragraph of the Judicial Code conferring jurisdiction in cases of diversity of citizenship or arising under the United States Constitution was amended by insertion of the following sentence:

> Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.

Prior to this amendment the federal district courts had jurisdiction to grant injunctive relief against state administrative boards and municipalities in utility rate cases involving the issue

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[1] 48 Stat. 775; 28 U.S.C.A., Section 41(1), Section 24(1) of the Judicial Code.

On the Johnson Act generally see the following articles and comments: Heinman and Vail, *The Johnson Act: A Return to State Independence* (1935) 30 ILL. L. REV. 215; Cullen, *Legislative Restriction of Federal Jurisdiction Over Local Rate Regulation* (1935) 20 ST. LOUIS L. REV. 308; (1937) 50 HARV. L. REV. 813; (1934) 44 YALE L. J. 119; (1936) 35 MICH. L. REV. 274; (1934) 20 IOWA L. REV. 128; (1936) 34 MICH L. REV. 1257; (1936) 21 ST. LOUIS L. REV. 163; (1935) 35 COL. L. REV. 943; (1936) 14 TEXAS L. REV. REV. 551.

of confiscation, and hence a violation of the Fourteenth Amendment to the United States Constitution.[2] Such jurisdiction has not often been invoked in Ohio,[3] nor indeed in other states,[4] but the magnitude of the interests involved in utility rate cases gives them an importance out of all proportion to their number. The purpose of this article is to consider the Ohio law governing utility rate-making, and the remedies available in the state courts for review of rate-making orders and ordinances, in relation to the conditions laid down in the Johnson Act upon the basis of which federal jurisdiction is denied.

Since its passage in 1934 the Act has been considered by the federal courts in perhaps a score of cases. Its constitutionality was upheld in *Mississippi Power & Light Co.* v. *City of Jackson,*[5] against the argument that jurisdiction once conferred upon the district courts cannot be withdrawn in whole or in part.[6] Certain minor questions of interpretation have been raised and disposed of. The application of the Act to pending cases was considered in *Laclede Gas Light Co.* v. *Public Service Commission.*[7] The argument that when diversity of citizenship[8]

[2] Such jurisdiction was, and of course still is, restricted by Section 266 of the Judicial Code, 28 U.S.C.A., Section 380. An interlocutory injunction could be granted only by a statutory three-judge court, including one judge of the Circuit Court of Appeals or the Supreme Court. Moreover, if an action to enforce the rate-making order were brought in the state court and a stay granted, federal proceedings were suspended, under an amendment to this section adopted in 1913. Only four states (Arizona, Nebraska, New York and Wisconsin) adopted the legislation necessary to take advantage of this provision. See Senate Reports No. 125, pt. 2, 73rd Cong., 1st Session (1933).

[3] See Van Wert Gaslight Co. v. P.U.C., 299 Fed. 670 (S.D. Ohio, 1924); Ohio Bell Tel. Co. v. P.U.C., 3 F. (2d) 701 (S.D. Ohio, 1924); Cols. Gas and Fuel Co. v. Columbus, 17 F. (2d) 630 (S.D. Ohio, 1927); 55 F. (2d) 56 (C.C.A., 6th Circ., 1931). Compare Cols. Gas and Fuel Co. v. Columbus, 42 F. (2d) 379 (C.C.A., 6th Circ., 1930).

[4] See minority report of the Senate Committee on the Judiciary, Senate Reports, No. 125, pt. 2, 73rd Cong., 1st Sess. (1933).

[5] 9 F. Supp. 564 (S.D. Miss., 1935).

[6] The court relied on Kline v. Burke Constr. Co., 260 U.S. 226 (1922), and the historical development of the jurisdiction of the lower federal courts.

[7] 8 F. Supp. 806 (W.D. Mo., 1934).

[8] Although in the majority report in the Senate (Senate Reports No. 125, 73 Cong., 1st Sess.) much space is devoted to this question of diversity of citizenship, it would seem to be of little practical importance. If utility rates

and a constitutional question are both present as jurisdictional grounds the Act does not apply, was rejected in the *Jackson* case. The application of the Act to a municipal ordinance as the "order" of a "rate-making body" was approved in *East Ohio Gas Co.* v. *City of Cleveland.*[9] Otherwise all the questions raised and considered in the federal courts under the Act have involved the application of clause (3) which prescribes as conditions to the denial of federal jurisdiction: (a) that the rate order "has been made after reasonable notice and hearing"; and (b) that "a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

Reasonable Notice and Hearing

In Ohio, utility rates are fixed in the first instance either by municipal ordinance under authority of the General Code[10] or, in the absence of an ordinance, by order of the Public Utilities Commission under authority of General Code, Sections 614-20 *et seq.*, defining the authority of the commission with respect to rate schedules filed with it by utilities.[11]

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are involved, a question of confiscation under the Fourteenth Amendment will almost inevitably be presented. But compare Petroleum Exploration, Inc. v. Public Service Com. of Ky., 304 U.S. 209 (1938), a Johnson Act decision in which jurisdiction was based upon diversity of citizenship; Red Ball Transit Co. v. Marshall, 8 F. (2d) 635, S.D. Ohio, 1925.

Note that Ohio General Code, Sec. 614-73, restricts public utility operation to Ohio corporations.

[9] 94 F. (2d) 443 (C.C.A. 6th Circ., 1938); aff'g 23 F. Supp. 965 (N.D. Ohio, 1938), cert. den. 303 U.S. 657.

[10] Section 3982 authorizes municipal regulation of gas, electric and water rates. Such authority is confirmed by Section 614-44.

Section 3644 authorizes municipal regulation in companies supplying steam and hot water, such power to be reserved in the franchise ordinance.

It appears doubtful whether a municipality may regulate telephone rates, although it may contract with respect thereto when it authorizes the laying of conduits under Sections 9197 and 9198. City of Columbus v. P.U.C., 103 Ohio St. 79 (1921).

Regulation of street railway fares and transportation rates generally are beyond the scope of this article, although such companies are defined as "public utilities" by Sections 614-2 and 614-2a.

See also Ohio Constitution, Article XVIII, Sections 3, 4 and 5.

[11] Section 614-20 provides for applications for rate changes to be filed,

Municipal Rate Ordinances

Can it be said that municipal rate ordinances are enacted after "reasonable notice and hearing" within the meaning of the Act? Congress unquestionably intended to include such rate ordinances among the orders granted immunity from attack in the federal courts. The words "or any rate-making body of any political subdivision thereof" were inserted by amendment from the floor of the House for this very purpose.[12] Yet the statutory provisions governing the passage of ordinances generally are adapted to meet the the requirements of legislative proceedings and contemplate no such notice or hearing as would be required for a judicial or quasi-judicial determination. The "readings" required by General Code, Sections 3515-54 and 4224 may be dispensed with by vote of the council, and the notice required by Section 4239 is to council members only. General Code, Section 3982, authorizing the enactment of rate ordinances, provides for no notice or hearing, although some specific charter provisions applicable to franchise ordinances do make such a requirement.[13]

Two classes of cases have arisen under the "reasonable notice and hearing" clause of the Act as applied to municipal rate ordinances. First are cases in which the utility was not *in fact* given reasonable notice nor an opportunity to be heard. Clearly, under such circumstances, the Act would be no bar to the exercise of jurisdiction by the federal court, and such was the conclusion of the court in *City of El Paso* v. *Texas*

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with accompanying schedules, with the commission, and the procedure with respect thereto.

Section 614-23 permits the commission to substitute its own rate schedule, after hearing and upon certain findings.

Compare Sections 499-8 *et seq.*, providing for valuation proceedings by the commission in connection with rate making. On the question whether the jurisdiction of the federal courts could have been invoked prior to the Johnson Act on the issue of valuation alone, see Van Wert Gaslight Co. v. P. U. C., *supra*, note 3, holding that no justiciable federal question is reached until the rate is actually fixed.

[12] Cong. Rec. Vol. 78 pt. 8, p. 8431.

[13] See Cleveland Charter, Section 186.

Cities Gas Co.,[14] where a rate reduction ordinance was rushed through council on short notice and without formal hearing.

In the second class of cases the utility is in fact given ample notice and an opportunity to be heard, but such notice and hearing are not accorded pursuant to any *statutory requirement.* In *Mississippi Power Co.* v. *City of Aberdeen*,[15] the federal district court for the Northern District of Mississippi held that "the failure of the statute to provide for notice and hearing," despite actual notice and a fair hearing, rendered the Act inapplicable. The court recognized that this holding was contrary to the holding in the *Jackson* case,[16] decided four months previously in the Southern District of Mississippi. The case of *East Ohio Gas Co.* v. *City of Cleveland*[17] appears to settle this question for Ohio and the Sixth Circuit. Following is a quotation from the opinion of the Circuit Court of Appeals:

> Whether the giving of notice and an opportunity for hearing was or was not essential to the validity of the order is immaterial, for adequate notice and hearing were given, as found by the court.

Reasonable notice and hearing, then, are not dependent upon the existence of statutory requirements. What will be held to constitute such notice and hearing, in fact, is still an open question.[18]

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[14] 100 F. (2d) 501 (C.C.A. 5th Circ., 1938); the court refrained from exercising jurisdiction in this case for reasons of "comity." See also Georgia Tel. Co. v. Ga. Public Service Com., 8 F. Supp. 434 (N.D. Ga., 1934).

[15] 11 F. Supp. 951 (1935).

[16] *Supra*, note 5.

[17] *Supra*, note 9. In his discussion of this point the district judge calls attention to the fact that the *Aberdeen* case is probably in conflict with Home Tel. Co. v. Los Angeles, 211 U.S. 265 (1908) on this question of actual as distinguished from statutory notice and hearing.

[18] The district judge in the *East Ohio* case (23 F. Supp. 965, *supra*, note 9) emphasizes the legislative character of the proceedings: "In contrast [to the quasi-judicial proceedings before the Public Utilities Commission], the ordinances involved here were not the final legislative steps in the establishment of the rates, nor subject to judicial review upon any record. They were initial steps in the legislative scheme for establishing rates, were not binding on plaintiff against its objection, but, on complaint to the Commission, were subject either to be ratified or stricken down. The council proceeded legislatively, and, in the absence of any controlling statute, the notice and hearing required before it is controlled by the legislative, as distinguished from the quasi-judicial, character of its act."

Orders of the Public Utilities Commission

The question of "reasonable notice and hearing" is not so likely to arise in connection with rate-fixing orders of the Public Utilities Commission. The statutory requirements appear to be adequate and complete. See General Code, Sections 614-20 *et seq.* and 614-44 *et seq.*[19] But the case of *Petroleum Exploration Inc.* v. *Public Service Commission of Kentucky*[20] decided by the United States Supreme Court in 1938 does indicate a possible point of controversy. The state commission had issued without previous notice a so-called "Notice of Investigation and Order to Show Cause" which in fact included an order to produce certain evidence on a designated date. It was held that the absence of any prior notice rendered the Act inapplicable.[21] The opinion is by Mr. Justice Reed, Mr. Justice Stone concurring, "except that he expresses no opinion on the applicability of the Johnson Act." The company, a foreign corporation, claimed not to be subject to the Kentucky regulatory statutes and contended that the expense to be incurred in complying with the order to produce evidence would involve irreparable injury. This case would seem to be of limited application. Ordinarily, if the company to be investigated is clearly subject to regulation, no justiciable question of confiscation is reached until the commission by final order fixes the rates.[22] Moreover, any question as to the application of the Act probably could be avoided in practice by the commission simply by refraining from coupling any sort of "order" with its original "notice," in initiating the investigation of a company not theretofore regulated.[23]

[19] See also Sections 499-12 *et seq.*, relative to valuations, and Sections 524, 528 and 538, applying to railroads.

[20] *Supra*, note 8.

[21] Note that jurisdiction was actually not exercised in the interest of "preserving the autonomy of the states."

[22] Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); Van Wert Gaslight Co. v. P. U. C., *supra*, note 3.

[23] Compare the kind of citation issued in Cleveland v. P. U. C., 127 Ohio St. 432 (1934).

In two cases, *Montana Power Co.* v. *Public Service Commission of Montana*[24] and *Georgia Continental Tel Co.* v. *Georgia Public Service Commission*,[25] allegations of bias on the part of commissioners, based upon pre-election anti-utility statements, were held insufficient for a finding that the company had not been accorded a "hearing" within the meaning of the Act.

A Plain, Speedy and Efficient Remedy[26]

1. The remedy must be "plain." The condition of the Act is not met when the district court is confronted with a situation of "uncertainty"[27] or "doubt"[28] as to the existence of the required remedy in the state courts, or where "it is impossible to know what position the courts of the State would take."[29] It was upon this ground apparently, the absence of a "plain" remedy, that the district court for the Northern District of Ohio, Western Division, assumed jurisdiction, despite the Act,

[24] 12 F. Supp. 946 (D. Mont., 1935).

[25] *Supra*, note 14.

[26] See comments by Senator Conally relative to this phrase ("Danger lurks in the language, it seems to me.") and by Senator Austin (urging inclusion of the word "adequate"), Cong. Rec. Vol. 78, pt. 2, pp. 1915 *et seq.*

In 1937 this same language was incorporated into a further amendment to the same paragraph of the Judicial Code, 28 U.S.C.A., Section 41 (1), restricting the jurisdiction of federal district courts in relation to state tax controversies. For a discussion of the application of this amendment see Culp, *Powers of a Court of Equity in State Tax Litigation*, (1940) 38 Mich. L. Rev. 610. A few of the cases decided under the tax amendment have referred to the Johnson Act and have relied upon Johnson Act cases. See, for example, Printers and Pub. Co. v. Corbett, 25 F. Supp. 369 (S.D. Cal., 1938); Phipps v. School Dist. of Pittsburgh, 26 F. Supp. 811 (W.D. Pa., 1939); aff'd, 111 F. (2d) 393 (C.C.A., 3d Circ., 1940), *infra*, note 67; Baker v. Atchison T. & S. F. Ry., 106 F. (2d) 525 (C.C.A. 10th Circ., 1939), cert. den. 60 Sup. Ct. 296.

[27] Corp. Com. of Okla. v. Cary, 296 U.S. 452 (1935).

[28] See Okla. Packing Co. v. Okla. G. and E. Co., 60 Sup. Ct. 215 (1939), opinion withdrawn and substitute opinion filed, 309 U.S. 4 (1940); see dissenting opinion in Baker v. Atchison T. & S. F. Ry., *supra*, note 26.

[29] Mountain States Power Co. v. P. U. C. of Mont., 299 U.S. 167 (1936); Printers and Pub. Co. v. Corbett, *supra*, note 26. Compare Mont. Power Co. v. P. U. C. of Mont., *supra*, note 24.

in a recent case,[30] reciting in its order that "it is doubtful whether the cited statutes provide for an appeal in this case."

2. The remedy must be *judicial* in character as distinguished from legislative. It was so held in *Corporation Commission of Oklahoma* v. *Cary*,[31] the first case to come before the United States Supreme Court under the Act. The Oklahoma Supreme Court under its own prior decisions was authorized to act in a legislative capacity, being required, if it disapproved an order of the commission, to substitute its own order therefor. This is a matter of substantial importance inasmuch as the appellate jurisdiction of the United States Supreme Court under Article III of the Constitution may not be invoked to review the legislative action of state tribunals.[32] It appears throughout the Congressional debates on the Act that such review by the Supreme Court was relied upon as the ultimate safeguard against state action in violation of the federal constitution.[33]

3. It is still uncertain whether the remedy must comply with the rule of *Ohio Valley Water Co.* v. *Ben Avon Borough*,[34]

[30] Northwestern Ohio Natural Gas Co. v. City of Toledo, in Equity, No. 1581 (1937), aff'd without opinion, 90 F. (2d) 1003 (C.C.A. 6th Circ., 1937). The case involved a six months ordinance superseding a schedule filed with the commission. Apparently the availability of equitable relief in the state courts was not considered.

[31] *Supra*, note 27.

[32] Prentis v. Atlantic Coast Line Co., *supra*, note 22; Keller v. Potomac Electric Co., 261 U.S. 428 (1923).

[33] Cong. Rec. Vol. 78, pt. 2, pp. 1915 *et seq.*

[34] 253 U.S. 287 (1920). It may be questioned whether the *Ben Avon* rule still retains its full vigor. In United Gas Co. v. Texas, 303 U.S. 123 (1938), it appears in the statement of facts that the burden of proof was there placed upon the company to show by clear and satisfactory evidence that the rates were unreasonable, and the appellate court refers to a presumption in favor of the validity of the commission's order. The Chief Justice, speaking for the majority, does not refer to this point, but Justices McReynolds and Butler emphasize it in their dissent, urging that the state law did not permit an independent judgment on the facts. And in St. Joseph Stockyards Co. v. United States, 298 U.S. 38 (1936), the Chief Justice refers to the weight which may be attached to commission findings, and requires the complainant to maintain the burden of proving confiscation convincingly. See also the concurring opinions in the *St. Joseph Stockyards* case just cited, and Driscoll v. Edison Co., 307 U.S. 104 (1939), urging that Smyth v. Ames, 169 U.S. 466 (1898), be overruled, partly in the interest of the finality of administrative findings. See also the dissenting opinion of Mr. Justice Brandeis in the *Ben Avon* case, concurred in by Justices Holmes and Clark.

requiring, as a condition of due process, that an opportunity be afforded to submit the issue of confiscation "to a judicial tribunal for determination upon its own independent judgment as to both law and facts." In *Munoz* v. *Porto Rico Ry. Light & Power Co.*[35] the Circuit Court of Appeals for the First Circuit held that the Act did not apply to Porto Rico upon the ground, among others, that the statutory review of commission orders failed to comply with the rule of the *Ben Avon* case. In *New York State Electric & Gas Corp.* v. *Public Service Commission of New York*[36] the Circuit Court of Appeals for the Second Circuit upheld the action of the district court in declining to take jurisdiction, pointing out, without mentioning the Act, that the remedy in equity in the state courts was "within the requirements of the *Ben Avon* case." On the other hand, in *New Jersey Suburban Water Co.* v. *Board of Public Utility Commissioners*,[37] the district court applying the Act declined to take jurisdiction although an order of the New Jersey commission could be set aside on appeal only upon a finding that there was "no evidence before the board to support the same reasonably."

4. It has been suggested by some writers[38] that an "efficient remedy" might conceivably be held to require a trial *de novo* with the privilege of introducing new evidence before the reviewing tribunal, thereby practically nullifying the Act in many states, including Ohio,[39] where the reviewing court is restricted to the commission's record. Such an extension would be based upon two assumptions, first, that an "efficient remedy" is one which complies in all respects with the requirements of

[35] 83 F. (2d) 262 (1936), cert. den. 298 U.S. 689.

[36] 102 F. (2d) 453 (1939).

[37] 23 F. Supp. 752 (D.N.J., 1938). The *Ben Avon* case is not mentioned in this opinion.

[38] See 50 HARV. L. REV. 813, 820; 30 ILL. L. REV. 215; 44 YALE L. J. 119; and other law review notes cited *supra*, note 1.

[39] OHIO GENERAL CODE, Section 544 provides for the review of commission orders by the Supreme Court on the record. Section 546 provides for transmission of the record to the Supreme Court.

due process,[40] and second, that due process includes the right to such a trial *de novo*. The principal support for this second assumption would be found in *Crowell* v. *Benson*[41] and a dictum of Mr. Justice Butler in *Baltimore & Ohio R. R.* v. *United States*.[42] It seems most unlikely that the Act will be so construed in view of the well known disinclination of the present United States Supreme Court majority to disturb the rulings of administrative agencies.[43]

Moreover, during the period 1934-1937 on at least four occasions[44] rulings of the Ohio Supreme Court under General Code, Section 544 (restricting the Court to a consideration of the commission's record), were reviewed by the United States Supreme Court; the scope of review under this statute was twice referred to by the court, and, it may perhaps be said, tacitly approved. Following is a quotation from the opinion by Mr. Justice Cardozo in *Ohio Bell Telephone* v. *Public Utilities Commission:*[45]

In Ohio the sole method of review is by petition in error to the

[40] In view of the right of appeal to the United States Supreme Court from the highest court of the state, a right which is unaffected by the Act, this assumption may not be taken for granted.

[41] 285 U.S. 22 (1932). This case involved review in a federal court and may have been based upon Article III of the United States Constitution defining the federal judicial power, rather than upon the due process clause of the Fifth Amendment. See dissenting opinion of Mr. Justice Brandeis, concurred in by Justices Stone and Roberts.

[42] 298 U.S. 349, 368 (1936): "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence . . . and have judicial findings based upon it." See concurring opinion of Mr. Justice Brandeis, criticizing this statement.

[43] See authorities cited *supra*, note 34. And see Washington *ex rel.* Oregon R. R. v. Fairchild, 224 U.S. 510 (1912).

[44] Dayton Power and Light Co. v. P. U. C., 292 U.S. 290 (1934), aff'g 127 Ohio St. 137; Cols. G. and F. Co. v. P. U. C., 292 U.S. 398 (1934), reversing 127 Ohio St. 109; West Ohio Gas Co. v. P. U. C., 294 U.S. 63 (1934), reversing 128 Ohio St. 301; Ohio Bell Tel. Co. v. P. U. C., 301 U.S. 292 (1937), reversing 131 Ohio St. 539. All these cases were commenced before the amendment of 1935 designating the review as an "appeal," in conformity with the new Appellate Procedure Act.

[45] *Supra*, note 44. See also the opinion by Cardozo, J., in West Ohio Gas Co. v. P.U.C., *supra*, note 44.

Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence.

The case resulted in reversal upon the ground that facts relied on by the commission and the court did not appear in the record.

5. Perhaps the most important component of an "efficient remedy" from a practical point of view is the availability of a stay of execution pending final determination of the issue of confiscation. During the Senate debate on the Johnson bill Senator Austin offered an amendment[46] to insert at the end:

which remedy includes the right of such public utility to a stay of such order pending final adjudication as to the repugnance of such order to the Constitution of the United States.

The amendment was rejected, but in 1936 in *Mountain States Power Co.* v. *Public Service Commission*,[47] the United States Supreme Court held the Act inapplicable where a state statute prohibited the issuance of a stay. Again in *Driscoll* v. *Edison Co.*[48] the Supreme Court held the Act inapplicable for want of a stay under the Pennsylvania law. "The remedy at law by appeal is ineffective to protect the utility's position *pendente lite*. The supersedeas does not postpone the application of the temporary rates."[49] It seems clear, therefore, that an "efficient remedy" involves the availability, at least, of a stay of execution. The fact that the stay is discretionary and not granted as of right does not prevent the application of the Act.[50]

Summarizing the above rulings of the federal courts under the Act: the remedy must be free from serious doubt or uncertainty under the state law; it must be judicial in nature, not legislative; in scope of review it must, probably, comply with the rule of the *Ben Avon* case, authorizing an independent judgment on the facts; a stay of execution must be available.

[46] Cong. Rec. Vol. 78, pt. 2, p. 2238.

[47] 299 U.S. 167 (1936).

[48] 307 U.S. 104 (1939).

[49] From the opinion by Mr. Justice Reed at page 110, *id.*

[50] New Jersey Suburban Water Co. v. Board of Public Utility Comm'rs, *supra*, note 37. As to the effect of the denial by the state court of an application for a stay, compare Oklahoma Natural Gas Co. v. Russell, *infra*, note 61.

In applying these criteria to the Ohio law it is necessary at the outset to draw a distinction between orders of the Public Utilities Commission, on the one hand, and municipal rate ordinances before appeal to the commission, on the other hand. With respect to commission orders, the jurisdiction of the Supreme Court is exclusive under General Code, Section 549:

> No court other than the supreme court shall have power to review, suspend or delay any order made by the commission, or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties . . . .

Municipal rate ordinances in the pre-commission stage are not within this statute and the general equity powers of the common pleas courts are not affected thereby.

Orders of the Public Utilities Commission

The review of commission orders by the Supreme Court is governed by General Code, Section 544:

> A final order made by the commission shall be reversed, vacated or modified by the supreme court on appeal, if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable.

Such review is judicial in character. The leading case is *Hocking Valley Ry. Co.* v. *Public Utilities Commission*,[51] the first syllabus reading as follows:

> Section 544 *et seq.*, General Code, enacted pursuant to the provision in the judicial article of the Ohio constitution as amended in 1912, that this court shall have such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law, provide for full judicial review of the proceedings and final orders of the Public Utilities Commission and do not violate the guaranties of the federal or state constitution.

Such review complies with the rule of the *Ben Avon* case.

[51] 100 Ohio St. 321 (1919). See also Van Wert Gaslight Co. v. P. U. C., *supra*, note 3; Grubb v. P. U. C., 281 U.S. 470 (1930); and cases cited *supra*, note 44, wherein decisions of the Ohio Supreme Court under OHIO GENERAL CODE, Section 544 were reviewed by the United States Supreme Court.

Following is a quotation from the opinion by Judge Gorman in *East Ohio Gas Company* v. *Public Utilities Commission:*[52]

It is necessary for this court to review both the law applied and the evidence to ascertain whether the order was 'unlawful or unreasonable.' Section 544, General Code; . . . Generally, through a long line of decisions it has been held that if the legal rule applied by the commission is erroneous or if the facts found are manifestly against the weight of the evidence, the order should be reversed. . . . But in determining whether a rate is confiscatory it is necessary for the court to examine the evidence anew and exercise its independent judgment, *Ohio Valley Water Co.* v. *Ben Avon* . . . . [53]

In determining whether a rate schedule may be stayed, modified or suspended pending final determination of the issue of confiscation, two factual situations must be differentiated. *First,* the utility is contending that a proposed new rate, fixed by the commission originally or on appeal from a municipality, is confiscatory and in violation of the Fourteenth Amendment. The stay in such a case is made available by General Code, Section 548:

No proceeding to reverse, vacate or modify a final order rendered by the commission shall operate to stay execution thereof unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, shall allow such stay . . . .

This statute, however, would furnish no relief in the *second* type of situation in which the utility is objecting to an existing rate schedule as confiscatory in the light of changed economic conditions or other factors not present at the time of its promulgation. Under such circumstances the utility might rely upon General Code, Section 614-32 which provides:

The commission shall have power, when deemed by it necessary to prevent injury to the business or interests of the public or any public utility of this state in case of any emergency to be judged by the commission, to temporarily alter, amend, or with the consent of the public

[52] 133 Ohio St. 212, 217 (1938).

[53] See also Hocking Valley Ry. v. P. U. C., *supra,* note 51; cases cited *supra,* note 44. Compare Ohio Utilities Co. v. P. U. C., 108 Ohio St. 143 (1923), reversed by the United States Supreme Court, 267 U.S. 359 (1925) for failure to follow the *Ben Avon* rule.

utility concerned suspend any existing rates, schedules or order relating to or affecting any public utility or part of any public utility in this state. Such rates so made by the commission . . . shall take effect at such time and remain in force for such length of time as may be prescribed by the commission.

This section, authorizing a temporary modification of rates in an emergency "to prevent injury to the business . . . of any public utility," has been considered by the Ohio Supreme Court and by the commission in several cases, and held not applicable in certain situations.

1. It does not authorize the temporary suspension or modification of the interim rate chargeable during the pendency of an appeal of a municipal rate ordinance under Sections 614-44 *et seq.* Such rate is fixed by Section 614-45:

No such complaint or appeal to the commission shall suspend, vacate, or set aside the rate, price, charge, toll or rental fixed by ordinance unless such public utility shall elect to charge the rate, price, charge, toll or rental in force and affect immediately prior to the taking effect of the regulation complained of and appealed from and shall give an undertaking in such amount as the commission shall determine. . . .

This interim rate, the rate in effect immediately prior to the ordinance complained of, remains in effect during the pendency of the proceedings and is not subject to temporary change under Section 614-32.[54] The question whether a utility, voluntarily

[54] City of Cleveland v. P. U. C., 126 Ohio St. 91 (1932); Re Columbus Gas and Fuel Co., No. 5935, 1930 Ohio P. U. C. R., 188, P. U. R. 1930C, 252; Re Columbus Gas and Fuel Co., No. 5935, 1931 Ohio P. U. C.R. 95, P.U.R. 1931C, 244. These decisions are based upon OHIO GENERAL CODE, Section 614-47, which provides that rates fixed by municipal ordinance under Section 3982 shall be governed only by Section 614-44, -45, and -46 of the act of May 31, 1911, 102 Ohio Laws 549 *et seq.* (thereby excluding Section 614-32).

The application of these rulings is not confined to interim rates pending appeal from a municipal ordinance. By virtue of Section 614-47, municipal rate ordinances are apparently not subject to temporary suspension or modification by the commission under Section 614-32 at any stage, whether or not appealed from. In the absence of an appeal, however, a remedy in equity in the common pleas court would presumably be available, since Section 549 would not apply, assuming, of course, that the ordinance could be shown to have *become* confiscatory by reason of changed conditions. See discussion *infra*, this article, on the availability of the equitable remedy generally.

appealing from a municipal rate ordinance to the commission under Section 614-44 and electing to continue the interim rate specified by Section 614-45, may be heard to contend that the interim rate is confiscatory by reason of economic factors developing after the date of the appeal, is beyond the scope of this article.[54a] If the issue of confiscation could be raised under such circumstances, the Johnson Act probably would not bar proceedings in the federal district court.

2. Section 614-32 does not authorize the alteration of rates fixed by contract,[55] but obviously no issue of confiscation is involved in such cases.[56]

Accordingly the application of Section 614-32 appears to be confined to rates approved or fixed by the commission originally pursuant to Sections 614-20 *et seq.* If such rates become confiscatory relief may no doubt be had under Section 614-32.[57] And if relief is improperly denied by the commission an appeal to the Supreme Court will lie under Section 544.[58]

Municipal Rate Ordinances

Municipal ordinances in Ohio are but the "initial steps in the legislative scheme for establishing rates,"[59] being subject

[54a] This would depend, presumably, upon the significance to be attached to the word "elect" in section 614-45, how far such an election to continue the former existing rate pending appeal may preclude a subsequent claim of confiscation based upon supervening conditions.

[55] City of Columbus v. P. U. C., 103 Ohio St. 79 (1921); City of Akron v. P. U. C., 126 Ohio St. 333 (1933).

[56] Cols. Ry. P. and L. Co. v. City of Columbus, 249 U.S. 399 (1919).

[57] Logan Gas Co. v. P. U. C., 115 Ohio St. 107, 118 (1926): "The utility contends that if it is precluded from claiming an increased rate during the time which is spread over the investigation its property is confiscated. In view of the existence of Section 614-32, this statement may be questioned."

Re Central U. Tel. Co., No. 1900, P.U.R. 1921C, 333 (abstract).

But see dictum by Marshall, C. J., in concurring opinion, City of Columbus v. P. U. C., 103 Ohio St. 79, 113: "Surely, even if the business of the utility is temporarily conducted at a loss, no emergency is presented .... We have no hesitation in holding that such situations are not emergencies."

[58] City of Columbus v. P. U. C., 103 Ohio St. 79, 113: "The commission is to judge the emergency, but its judgment will be reversed on review if 'unreasonable and unlawful.' " (Also from concurring opinion by Marshall, C. J.).

[59] East Ohio Gas Co. v. Cleveland, *supra*, note 9, from the opinion of the district court, 23 F. Supp. 965.

to appeal to the Public Utilities Commission under General Code, Sections 614-44 *et seq.* Under the rule of *Prentis* v. *Atlantic Coast Line Co.*,[60] regardless of the Johnson Act, a federal court will not exercise jurisdiction prior to the exhaustion of the legislative remedy provided by state law, unless the utility is threatened with "daily confiscation" during the pendency of the proceedings.[61] As indicated above the interim rate during the pendency of an appeal to the commission is fixed by General Code, Section 614-45, as the rate in effect immediately prior to the new ordinance which is the subject of the appeal. If the new rate ordinance is objectionable and allegedly confiscatory as involving a substantial reduction in existing rates, then in most cases the interim rate so prescribed, being the existing higher rates, would adequately protect the utility pending appeal, and no case of daily confiscation would be stated. The legislative remedy by appeal being adequate, the federal court would decline to step in, under the rule of the *Prentis* case, requiring the prior exhaustion of such remedy.[62]

On the other hand, if the new ordinance, as often happens, merely continues the existing rate schedule which has allegedly become confiscatory through changed conditions, the protection afforded by Sections 614-45 may not be adequate. Such a case

[60] *Supra*, note 22.

[61] Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923); Pacific Tel. and Tel. Co. v. Kuykendall, 265 U.S. 196 (1924).

[62] In the opinion of Judge Hough in Columbus Gas and Fuel Co. v. City of Columbus, 17 F. (2d) 630 (1927) *supra*, note 3, there is no mention of the *Prentis* case. The bill of complaint alleges that the rates contained in the earlier ordinance (the statutory interim rates pending appeal to the commission), although substantially higher than those in the ordinance complained of, were also confiscatory, thereby stating a case of "daily confiscation." It is also alleged that the commission on appeal would have no authority to alter the period of the ordinance or to modify the provision prescribing the B.T.U. content of the gas—in other words, that the scope of the review provided by statute was too narrow to afford relief as against all the allegedly confiscatory features of the ordinance. Presumably, the court exercised jurisdiction on the basis of these allegations, tending to show the inadequacy of the legislative remedy. This case arose long before the Johnson Act, and the availability of a remedy in equity in the state courts then had no bearing upon the question of federal jurisdiction.

is suggested in the minority report of the Senate Judiciary Committee on the Johnson bill.[63] This is the situation which was presented in *East Ohio Gas Co.* v. *City of Cleveland*, decided by the Circuit Court of Appeals for the Sixth Circuit in 1938 and referred to above.[64] It is recognized in the opinion of the district judge[65] that under such circumstances the appellate procedure prescribed by Sections 614-44 *et seq.* involving as it does the continuance of the prior existing rate during the pendency of the proceedings, would be no protection against daily confiscation, assuming such existing rate to be confiscatory. But the court, applying the Johnson Act, declines to take jurisdiction, finding that a "plain, speedy and efficient remedy" is available in equity in the state courts. Following is a quotation from the opinion of the District Court:

> Ohio has no statute which will prevent its courts from granting plaintiff relief against daily confiscation which it charges, assuming the truth of the charge.

and from the opinion of the Circuit Court of Appeals:

> The court further found that the appellant had a plain, speedy, and efficient remedy in equity in the state courts, and with that finding we also agree.

The Ohio case relied upon was *State ex rel. City of Cleveland* v. *Court of Appeals*,[66] where the action of the Court of Appeals in fixing an interim rate substantially higher than the prior existing ordinance, the difference to be impounded, pending further proceedings, was approved by the Supreme Court.

Accordingly it may be concluded that if, in a particular situation, the appellate procedure applicable to municipal rate ordinances may be regarded as inadequate, a "plain, speedy and efficient remedy" is available in equity in the state courts,[67] and

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[63] Senate Reports, No. 125, pt. 2, 73rd Cong. 1st Sess.

[64] *Supra*, note 9.

[65] 23 F. Supp. 965, *supra*, note 9.

[66] 104 Ohio St. 96 (1922). For further proceedings in the same case see East Ohio Gas Co. v. Cleveland, 106 Ohio St. 489 (1922). See also United Fuel Gas Co. v. Ironton, 107 Ohio St. 173 (1923).

[67] In Phipps v. School District of Pittsburgh, 111 F. (2d) 393 (C.C.A., 3rd Circ., 1940), aff'g 26 F. Supp. 811, *supra*, note 26, the effect of laches,

relief in the federal court will be denied, assuming that the other conditions of the Act have been met.

Summary

1. Whether an order of the commission has been made, or a municipal rate ordinance enacted, after "reasonable notice and hearing," is a question of fact in each case.

2. The Ohio procedure for the review of *commission* orders by the Supreme Court affords a "plain, speedy and efficient remedy," except possibly with respect to an interim rate fixed under General Code, Section 614-45, which has become confiscatory by reason of supervening conditions.

3. The state courts afford a "plain, speedy and efficient remedy" in equity in any case in which the statutory remedy for the review of *municipal* rate ordinances by the commission may be inadequate.

These conclusions appear to the writer to be supported by the rulings of the federal courts down to the present time, points 1 and 3 being based more particularly upon the decision of the Circuit Court of Appeals for the Sixth Circuit in *East Ohio Gas Company* v. *Cleveland*.[68] The ultimate importance of the Johnson Act and its subsequent development will depend in part upon future rulings of the United States Supreme Court on the substantive issues of confiscation, which will determine the desirability from the point of view of the public utility of a resort to the federal, rather than the state courts, and the prospects for obtaining injunctive relief.

barring the complainant from relief in the state court, is considered: "The efficiency of the remedy is not to be measured by the limitations upon the relief allowable to a particular complainant who has been guilty of laches." The court then lays down the following standard for judging the efficiency of the equitable remedy: "The requirement of the amendment to the Judicial Code of August 21, 1937, relates to the remedy generally in the state courts; and, the test of the efficiency of the remedy in equity is whether the state court's jurisdiction is competent for a hearing of the complaint on its merits and the final disposition of the matter by the entry of a decree adequate to the rights of the parties, with power in the court to protect its jurisdiction and to enforce its decrees by writs of injunction or other process." This case was decided under the tax limitation amendment of 1937 which adopted the language of the Johnson Act. See footnote 26, *supra*.

[68] *Supra*, note 9.