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# Negative Order Doctrine

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## RECENT CASE NOTES

ADMINISTRATIVE LAW—NEGATIVE ORDER DOCTRINE.—The Federal Communications Commission issued an order declaring the Rochester Telephone Corporation to be in the class of telephone carriers subject to the Communications Act of 1934.<sup>1</sup> The corporation filed a bill in equity in the district court to have the Commission's order set aside. The court dismissed the bill on the merits,<sup>2</sup> no question of jurisdiction being introduced.<sup>3</sup> On appeal to the Supreme Court, the Government challenged the jurisdiction of both the district court and the Supreme Court on the grounds that the order was negative in character and therefore not reviewable. Held, both courts had jurisdiction: the order dismissing the bill on the merits was affirmed. *Rochester Telephone Corporation v. United States* (1939), 307 U. S. 125, 59 S. Ct. 754.

The principal case classified negative orders into three general types:

1. Negative orders of the first type include cases wherein the administrative body merely assumes jurisdiction of a party, or issues a finding of fact. This type of order does not compel or forbid any certain conduct, but may be used as a basis for future actions by the administrative body.<sup>4</sup>

2. Negative orders of the second type include cases wherein the administrative body refuses to grant relief from a statutory command forbidding or compelling conduct on the part of the complainant.<sup>5</sup>

3. Negative orders of the third type include cases wherein the administrative body refuses to forbid or compel conduct by a third person in respect to the complainant.<sup>6</sup>

The principles of reviewability of orders of a Commission in cases falling in the second and third groups have been in much confusion, and conflict in

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<sup>1</sup> 47 U. S. C. A., sec. 151 et seq.

<sup>2</sup> *Rochester Telephone Corp. v. United States* (1938), 23 Fed. Supp. 634.

<sup>3</sup> But in *United States v. Corrick* (1936), 298 U. S. 435, 56 S. Ct. 829, and *United States v. Griffin* (1938), 303 U. S. 226, 58 S. Ct. 601, the court maintains that "the doctrine of negative orders implies a jurisdictional defect which courts must consider *sua sponte*."

<sup>4</sup> Examples of this type are: *United States v. Illinois Central Ry.* (1917), 244 U. S. 32, 37 S. Ct. 584 (The Interstate Commerce Commission set a case for hearing despite a challenge to its jurisdiction); *Delaware and Hudson Co. v. United States* (1925), 266 U. S. 438, 45 S. Ct. 153 (tentative valuation); *United States v. Los Angeles Ry.* (1927), 273 U. S. 299, 47 S. Ct. 413 (final valuation).

<sup>5</sup> *Lehigh Valley Ry. v. United States* (1917), 243 U. S. 412, 37 S. Ct. 397, apparently originated the statement often made in "negative order" cases in this group: "The risk results from the statute, not from the order." See also *Piedmont & Northern Ry. v. United States* (1930), 280 U. S. 469, 50 S. Ct. 192. The Rochester case falls in this group, having been denied relief from statutory compliance. It expressly overrules these cases and their reasoning, and approves the *Inter-Mountain Rate Case* (1914), 234 U. S. 476, 34 S. Ct. 986. The latter case held reviewable the action of the commission in refusing to grant requested consent to depart from the Long-Short Haul clause.

<sup>6</sup> *Proctor & Gamble Co. v. United States* (1912), 225 U. S. 282, 32 S. Ct. 761, which originally gave rise to the specialized jurisdictional doctrine pertaining to "negative orders," is representative of the third group and was expressly overruled by the Rochester case. See also *Illinois Central Ry. v. Interstate Commerce Commission* (1907), 206 U. S. 441, 445, 27 S. Ct. 700, 704.

decisions has resulted.<sup>7</sup> The tendency to review negative orders, however, has been steadily growing and may be said to have attained complete success in the principal case.<sup>8</sup> As if to extinguish any doubt pertaining to the complete annihilation of the "negative order" doctrine in these two groups, the issue was again raised and fatally defeated in two similar cases decided with the Rochester case.<sup>9</sup>

It is in the first group set out above that judicial review has been denied.<sup>10</sup> But with the "negative order" doctrine dead, and no one to mourn its passing, just what legal criteria may be employed to restrict the judiciary? It cannot be said that the principal case created or discovered any very definite rules to guide the courts in the future.<sup>11</sup> The only standards advanced were the primary jurisdiction doctrine, established in *Texas and Pacific Ry. v. Abilene Cotton Oil Company*,<sup>12</sup> relating to matters which call for technical knowledge, and the doctrine of administrative finality,<sup>13</sup> the latter of which is merely a repetition of Group One. The efficacy of these restrictions, however, was greatly impaired if not entirely lost because of recent decisions pretending an unwonted development in the availability and scope of judicial review. Despite previous decisions declaring statutory appeals the only available

<sup>7</sup> The leading cases applying the "negative order" doctrine to defeat judicial review are: *Proctor & Gamble v. United States* (1912), 225 U. S. 282, 32 S. Ct. 761; *Piedmont & Northern Ry. v. United States* (1930), 280 U. S. 469, 50 S. Ct. 192; *Standard Oil Co. (Ind.) v. United States* (1932), 283 U. S. 235, 51 S. Ct. 429; *Lehigh Valley Ry. v. Interstate Commerce Commission and United States* (1917), 243 U. S. 412, 37 S. Ct. 397. *Contra*: *Intermountain Rate Cases* (1914), 234 U. S. 476, 34 S. Ct. 986; *Chicago Junction Case* (1924), 264 U. S. 258, 44 S. Ct. 317; *Alton Ry. v. United States* (1932), 287 U. S. 229, 53 S. Ct. 124; *Powell v. United States* (1937), 300 U. S. 276, 57 S. Ct. 470; *United States v. Idaho* (1936), 298 U. S. 105, 56 S. Ct. 690. The latter cases held that the negative form of the order would not defeat judicial review.

<sup>8</sup> "Any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding." *Rochester Telephone Corporation v. United States* (1939), 307 U. S. 125, 143, 59 S. Ct. 755.

<sup>9</sup> *United States and Interstate Commerce Commission v. Maher* (1939), 307 U. S. 148, 59 S. Ct. 768. *Federal Power Commission v. Pacific Power & Light Company* (1939), 307 U. S. 156, 59 S. Ct. 766.

<sup>10</sup> Review was not barred because order was negative, however. *Rochester Telephone Corporation v. United States* (1939), 307 U. S. 125, 59 S. Ct. 754.

<sup>11</sup> As Justice Butler in his concurring opinion states: "The court's (speaking of Justice Frankfurter's opinion) discussion, extraneous to the issue involved, confuses rather than clarifies."

<sup>12</sup> (1906), 204 U. S. 426, 27 S. Ct. 350.

<sup>13</sup> Cooper, *Administrative Justice and the Role of Discretion*. "On an earlier occasion that Court had indicated that the orders of the Interstate Commerce Commission would be reviewed only for the purpose of determining whether or not (a) they were repugnant to the Constitution, (b) they were within the scope of the authority conferred by statute, and (c) the agency had acted in an arbitrary or unreasonable manner. And this same doctrine was restated in later cases relating to the determinations of various other administrative agencies. Commencing with these fundamentally sound principles, the courts have gradually developed a confusing mass of technical distinctions which have seriously reduced the area of administrative autonomy and enabled them to extend their power of review almost without practical limitation." (1938) 47 *Yale L. Rev.* 577, 589.

method,<sup>14</sup> the Supreme Court twice conceded the district courts equitable jurisdiction to determine the validity of administrative orders thought not to be reviewable by appeal.<sup>15</sup> And the circuit court of appeals for the District of Columbia, in holding that they had no jurisdiction on appeal, specifically suggested the possibility of equitable jurisdiction.<sup>16</sup> These cases seem to ignore the congressional intent expressed in the statutes,<sup>17</sup> to review administrative orders only under statutory provisions. *Shields v. Utah Idaho Central Ry.*<sup>18</sup> and *Utah Fuel Co. v. National Bituminous Coal Commission*<sup>19</sup> come under Group One established by the Rochester case. Although not reviewable by statutory appeal, they were held reviewable in the District Court in an equity proceeding. A proceeding in Equity destroys the administrative body's finding of fact and grants a trial *de novo*.<sup>20</sup> Consequently an equitable proceeding upon an administrative order is as effective a review as statutory appeal.<sup>21</sup> This is a staggering blow to the doctrine of administrative finality. There seems to be but the one standard left, and that is the one established by the late Chief Justice White<sup>22</sup> in the *Texas and Pacific Ry. v. Abilene Cotton Oil Company* case relating to technical knowledge.<sup>23</sup> It is self-evident that a standard such as this is easily subjected to abuse, and reviewability will lie largely within the discretion of the court.

The principal case destroys the artificial barriers set up in *Proctor & Gamble v. United States*.<sup>24</sup> Considering this in light of the *Shields*,<sup>25</sup> *Utah Fuel*,<sup>26</sup> and *American Federation of Labor* cases,<sup>27</sup> it would seem that judicial action

<sup>14</sup> *Southern Transport Co. v. Interstate Commerce Commission* (1932), 61 F. (2d) 925 (certiorari); *Interstate Commerce Commission v. Campbell* (1933), 289 U. S. 385, 53 S. Ct. 607 (mandamus); *White v. Johnson* (1931), 282 U. S. 367, 51 S. Ct. 115 (quaitimet); *Piedmont & Northern Ry. v. United States* (1930), 280 U. S. 469, 50 S. Ct. 192 (declaratory judgment); *Sykes v. Jenny Wren Co.* (1935), 78 F. (2d) 729; *Resources Corporation International v. Securities & Exchange Commission* (1938), 24 F. Supp. 580 (injunction).

<sup>15</sup> *Shields v. Utah Idaho Central Ry.* (1938), 305 U. S. 177, 59 S. Ct. 160; *Utah Fuel Co. v. National Bituminous Coal Commission* (1939), 306 U. S. 56, 59 S. Ct. 409.

<sup>16</sup> *American Federation of Labor v. National Labor Relations Board* (1939), 103 F. (2d) 933.

<sup>17</sup> 52 Stat. 112 U. S. C. A. sec. 45 (c); 48 Stat. 901, 15 U. S. C., sec. 78aa; 50 Stat. 85, 15 U. S. C. A., sec. 836 (b); 49 Stat. 860, 16 U. S. C., sec. 8251; 38 Stat. 219, 220, 28 U. S. C., secs. 41 (26), 46, 47; 49 Stat. 455, 29 U. S. C., Supp. 1938, sec. 160 (f); 48 Stat. 1093, 47 U. S. C., sec. 402.

<sup>18</sup> (1938), 305 U. S. 177, 59 S. Ct. 160.

<sup>19</sup> (1939), 306 U. S. 56, 59 S. Ct. 409.

<sup>20</sup> *Crowell v. Benson* (1932), 285 U. S. 22, 94, 52 S. Ct. 285; *Ohio Valley Water Co. v. Ben Avon Borough* (1920), 253 U. S. 287, 40 S. Ct. 527.

<sup>21</sup> There is some question as to the advisability of this result. Landis, *Administrative Policies and the Courts* (1938), 47 Yale L. Rev. 519.

<sup>22</sup> See Chief Justice Taft's estimate of the services of Chief Justice White's in "a new field of Administrative Law," 257 U. S. V, XXV.

<sup>23</sup> *Texas & Pacific Ry. v. Abilene Cotton Oil Company* (1906), 204 U. S. 426, 27 S. Ct. 350.

<sup>24</sup> (1912), 225 U. S. 282, 32 S. Ct. 761.

<sup>25</sup> *Shields v. Utah Idaho Central Ry.* (1938), 305 U. S. 177, 59 S. Ct. 160.

<sup>26</sup> *Utah Fuel Co. v. National Bituminous Coal Commission* (1939), 306 U. S. 56, 59 S. Ct. 409.

<sup>27</sup> *American Federation of Labor v. National Labor Relations Board* (1939), 103 F. (2d) 933.

can now be secured in any administrative order:—The discretion of the court is again controlling.

P. T. M.