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PUBLIC SERVICE COMMISSION PROCEDURE— A PROBLEM AND A SUGGESTION

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The study of administrative law is undoubtedly entering upon a new phase. The right of administrative boards or commissions, exercising legislative and judicial as well as executive powers, to exist and function in spite of the constitutional doctrines requiring the separation and forbidding the delegation of governmental powers is now well established. The extent to which the determinations of such bodies are subject to review in the ordinary courts of justice has been extensively considered in court decisions and in the writings of the commentators. However, concerning the administrative method itself—both in theory and in actual practice—we are relatively uninformed.¹

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1. The literature on this subject is, however, growing. See BROWN, *ADMINISTRATION OF WORKMEN'S COMPENSATION IN WISCONSIN* (1933); COOKE, *PUBLIC UTILITY REGULATION* (1924) c. XII; DODD, *ADMINISTRATION OF WORKMEN'S COMPENSATION* (1936); HARTMAN, *PROCEDURE AND PROOF BEFORE THE INTERSTATE COMMERCE COMMISSION IN RATE AND ALLIED CASES* (1925); HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924); 4 SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* (1937); VAN VLECK, *THE ADMINISTRATIVE CONTROL OF ALIENS* (1932); Bevis, *Procedure in the Interstate Commerce Commission* (1927) 1 U. OF CIN. L. REV. 241; Pittman, *The Doctrine of Precedents and the Interstate Commerce Commission* (1937) 5 GEO. WASH. L. REV. 543; Smith, *Practice and Procedure before the Interstate Commerce Commission* (1937) 5 GEO. WASH. L. REV. 404; Thelen, *Practice and Procedure before Administrative Tribunals* (1928) 16 CALIF. L. REV. 208; Wheat, *Practice and Procedure before the Railroad Commission of California* (1927) 15 CALIF. L. REV. 445; Wheat, *Report of Cincinnati Conference on Functions and Procedure of Administrative Tribunals* (1938) 12 U. OF CIN. L. REV. 117.

See also the remarks of Chief Justice Hughes at the Sixteenth Annual Meeting of the American Law Institute, (1938) 24 A. B. A. J. 431.

The National Association of Railroad and Utility Commissions is at present engaged in a thorough study of public utility commission procedure, upon which a report has been made at its annual convention in November, 1938.

The two *Morgan* decisions, *Morgan v. United States*, 298 U. S. 468 (1936), and 304 U. S. 1 (1938), indicate on the part of the United States Supreme Court a growing interest in the fundamental requirements of administrative procedure.

This is most unfortunate. Considering the vast amount of legal business now being transacted before administrative tribunals,² the practitioner has a lively interest in ascertaining the rules and principles, if any, which govern the practice before such tribunals. The general public has an even more important interest in seeing that these new governmental agencies employ a procedure which will enable them efficiently to perform the task of governmental regulation placed upon them and which, at the same time, will afford due protection to the rights of the individual parties affected by their determinations and orders.³

There is evidence that the legal profession, having passed through the stage of futile protest against administrative government, is now turning its attention to the matter of administrative method. The Committee on Administrative Law of the American Bar Association once proposed, although without success, a super-administrative court modeled on judicial lines. In other quarters, courts of administrative appeal have been suggested. The various schemes for governmental reorganization stress the desirability for a sharper separation in the administrative organization between the purely executive, the policy-making, and the quasi-judicial functions.⁴ One hears now and then of the desirability of some uniform code of administrative procedure. It is highly probable that the present policy of drifting will not long continue and that steps will be taken to systematize and regulate the procedure of our administrative bodies. The important thing is that such action rest, not on a priori theories and prejudices, but on a clear understanding of what the commissions are chartered by the state to do and of what in practice have been found to be safe and efficient methods. There is a crying need for a Joseph Story or a Greenleaf to do for administrative law what those masters did for the law of equity and evidence in their formative stages. The task is, however, a monumental and extremely difficult one. The number of commissions is legion, and each commission is more or less a unique phenomenon. Separate legislative acts create each separate commission, and each commission has its own peculiar duties to perform. The procedure which it follows is not prescribed by any general law; and

2. It was reported that in 1935 there were seventy-three federal administrative boards alone with jurisdiction over two hundred sixty-seven types of proceedings. *Report of Special Committee on Administrative Law* (1936) 61 A. B. A. REP. 723. Further statistics are given in McGuire, *Reforms Needed in the Teaching of Administrative Law* (1938) 6 GEO. WASH. L. REV. 171, 173.

3. See particularly Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938) 47 YALE L. J. 647.

4. REPORT OF THE COMMITTEE ON MINISTERS' POWERS (1932); CUSHMAN, THE PROBLEM OF INDEPENDENT REGULATORY COMMISSIONS (1937), being a part of the report of the President's Committee on Administrative Management; and the several reports of the Special Committee on Administrative Law of the American Bar Association.

usually the statute, which is its charter of creation, mentions the matter in only the barest outline, if at all. Therefore, each commission has been more or less a law unto itself. The importance of first-hand studies of commission action, though expensive and laborious, cannot be overestimated. On the other hand, we do find in the published opinions of the courts, in the statutes, and in commission regulations and orders much that is of value. Until the more conclusive findings of first-hand studies are available, use should be made of the above material, scattered and disorganized though it be.

In the early case of *Chicago, M. & St. P. R. R. v. Minnesota*⁵ a Minnesota statute authorized the Railroad Commission conclusively to fix railroad rates without a hearing. In holding the statute unconstitutional, the Supreme Court of the United States said:

"[The order of the commission] deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice. . . . No hearing is provided for; no summons or notice to the company before the commission has found what it is to find, and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission, in fact nothing which has the semblance of due process of law. . . . The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States."⁶

The corollary to this case is the opinion of the Court in *Interstate Commerce Comm. v. Louisville & Nashville R. R.*⁷ In that case the Inter-

5. 134 U. S. 418 (1890). Accord: *Southern Ry. v. Virginia*, 290 U. S. 190 (1933); *Georgia Cont. Tel. Co. v. Public Serv. Comm.*, 8 F. Supp. 434 (N. D. Ga. 1934); *Chicago, M. & St. P. Ry. v. Board of R. R. Comm'rs*, 76 Mont. 305, 247 Pac. 162 (1926); *Atchison, T. & S. F. Ry. v. Public Serv. Comm.*, 192 S. W. 460 (Sup. Ct. Mo. 1917); *State ex rel. Mo. Pac. R. R. v. Garesche*, 274 Mo. 74, 202 S. W. 400 (1918); *Silberberg v. Citizens Water Supply Co.*, 116 Misc. 595, 190 N. Y. Supp. 349 (Sup. Ct. 1921); *H. F. Wilcox Oil & Gas Co. v. Oklahoma*, 162 Okla. 89, 19 P. (2d) 347 (1933).

6. 134 U. S. at 457.

7. 227 U. S. 88 (1913).

state Commerce Commission, at the instance of the New Orleans Board of Trade, set aside certain rates between New Orleans and points in Alabama and Florida, and prescribed a new set of rates. On an appeal from this decision, the commission contended that it was not required to base its order on evidence formally introduced at the hearing, but that it might obtain the information to support its order from such outside sources as were available to it. The Supreme Court, however, unanimously held that the commission possessed no such power.

"Such a construction would nullify the right to a hearing,—for manifestly, there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute. . . . The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. . . . But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding."⁸

8. *Id.* at 93. The requirement that public service commission orders affecting the property interests of the utilities must rest upon evidence in the record applies through the force of due process of law to the state commissions as well as to the Interstate Commerce Commission. *State ex rel. Oregon R. R. & Nav. Co. v. Fairchild*, 224 U. S. 510 (1912); *Northern Pac. Ry. v. Department of Pub. Works*, 268 U. S. 39 (1925).

See further to effect that orders of public utility commissions must be based on evidence in the record: *Florida East Coast Ry. v. United States*, 234 U. S. 167 (1914); *Ohio Util. Co. v. Public Util. Comm.*, 267 U. S. 359 (1925); *Florida v. United States*, 282 U. S. 194 (1931); *Ohio Bell Tel. Co. v. Public Util. Comm.*, 301 U. S. 292 (1937); *Chestnut Ridge Ry. v. United States*, 248 Fed. 791 (D. N. J. 1917); *Monroe Gaslight Co. v. Public Util. Comm.*, 292 Fed. 139 (E. D. Mich. 1923); *Streator Aqueduct Co. v. Smith*, 295 Fed. 385 (S. D. Ill. 1923); *Montrose Oil Refining Co. v. St. Louis & S. F. Ry.*, 25 F. (2d) 80 (C. C. A. 9th, 1928); *Beaumont, S. L. & W. Ry. v. United States*, 36 F. (2d) 789 (W. D. Mo. 1929); *Saltzman v. Stromberg-Carlson Tel. Mfg. Co.*, 46 F. (2d) 612 (App. D. C. 1931); *Baltimore & Ohio R. R. v. United States*, 5 F. Supp. 929 (N. D. Ohio, 1933), *aff'd*, 293 U. S. 454 (1935); *State Pub. Util. Comm. v. Toledo, St. L. & W. R. R.*, 286 Ill. 582, 122 N. E. 158 (1919); *State Pub. Util. Comm. v. Springfield G. & E. Co.*, 281 Ill. 209, 125 N. E. 891 (1920); *Choate v. Commerce Comm.*, 309 Ill. 248, 141 N. E. 12 (1923); *Atchison, T. & S. F. Ry. v. Commerce Comm.*, 335 Ill. 624, 167 N. E. 831 (1929); *Chicago Rys. v. Commerce Comm.*, 336 Ill. 51, 167 N. E. 840 (1929); *State ex rel. Wabash R. R. v. Public Serv. Comm.*, 271 Mo. 155, 196 S. W. 369 (1917); *People ex rel. N. Y. & Queens Gas Co. v. McCall*, 219 N. Y. 84, 113 N. E. 795 (1916); *People ex rel. Judge v. Public Serv. Comm.*, 192 App. Div. 837, 183 N. Y. Supp. 283 (3d Dep't, 1920); *Erie v. Public Serv. Comm.*, 278 Pa. 512, 123 Atl. 471 (1924).

Where the order of the commission, instead of applying to a single utility, is general in operation, it has been characterized as legislative, and the requirements of this

How does the rule and principle thus enunciated comport with the theory of administrative action in general, and with public service company regulation in particular? Beyond doubt our public service commissions have been charged with the positive and affirmative duty of regulating, in behalf of the public, the public service corporations. In the earlier years the predominance in our economic and political thinking of the laissez faire doctrine left the railroads and the water, gas, light and power companies of the nation comparatively free from governmental control and restraint. Abuses, however, sprang up. Public resentment, culminating in the Granger movement of the seventies, peremptorily demanded governmental regulation; and many statutes were passed regulating utility rates and practices. The public utility commissions were established with the positive duty of seeing that these laws were obeyed.⁹ This view of the positive character of the public service commissions' duties persists in full vigor today and is clearly represented in the statutes which create them. The following excerpt is from the Pennsylvania statute: "For the purpose of regulating public service companies and of carrying out the provisions of this act an administrative body or commission is hereby established to be known as the Public Service Commission of the Commonwealth of Pennsylvania. . . . The Commission shall have full power and authority and it shall be its duty to enforce, execute, and carry out, by its orders, rulings, and regulations and otherwise . . . the provisions of . . . this act relating, respectively, to the duties and limitations, and to the creation and the powers, and limitations of the powers, of public service companies."¹⁰ To enable the commissions properly to

rule are somewhat relaxed. The Assigned Car Cases, 274 U. S. 564 (1926). But even in this type of matter it is doubtful if the commission can refuse to consider relevant evidence, or act contrary to it. *Atchison, T. & S. F. Ry. v. United States*, 284 U. S. 248 (1932) (general decrease in grain rates); *Baltimore & Ohio R. R. v. United States*, *supra* (general order in *re* locomotive equipment).

A few cases hold that the commission need not depend solely on evidence in the record to sustain its holdings. *Louisiana R. R. Comm. v. Cumberland Tel. Co.*, 212 U. S. 414 (1909); *Atlanta v. Atlanta Gas-Light Co.*, 149 Ga. 405, 100 S. E. 439 (1919); *Chesapeake & Potomac Tel. Co. v. Virginia*, 147 Va. 43, 136 S. E. 575 (1927); *State ex rel. N. P. Ry. v. Public Serv. Comm.*, 95 Wash. 376, 163 Pac. 1143 (1917). In the United States and Virginia decisions it appeared, however, that there was a complete review of the commission decisions in the courts.

9. See 4 SHARFMAN, *op. cit. supra* note 1, at 14; VANDERBLUE AND BURGESS, *RAILROADS, RATES, SERVICE, MANAGEMENT* (1923) 3. "The object of law as administered by the courts is to protect persons in the enjoyment of their rights, and to penalize others who interfere with these rights. . . . The functions of the regulatory commission differ in this respect—that the rights and duties which it determines and enforces are nearly always clothed with a public interest. The original concept of railroad regulation sought the general protection of the public against abuses thought to have been brought about by the large organizations of capital which represented railroad investment. . . . It is, of course, true that many controversies of a private nature are adjudicated by railroad regulatory commissions. Yet in their final analysis, nearly all of these controversies have an element of public interest." *Id.* at 28.

10. P. A. STAT. ANN. (Purdon, 1930) tit. 66, §§ 331, 691. The powers granted to the old Commission have been expressly vested in the new Public Utility Commis-

perform their duty of affirmative regulation and control of the utilities, the statutes uniformly require the latter to report annually, or as demanded, to the commissions detailed information concerning the manner in which their business is conducted; and they also confer upon the commissions the power of independently investigating the utilities' books, accounts, premises, equipment, and manner of operation.¹¹

The commissions have not always taken this view of the positive nature of their duties. Rather, they have often been inclined to consider themselves courts, acting only when their jurisdiction is invoked by individual consumers or the utilities themselves. Such an attitude, however, sooner or later results in sharp criticism. In the monumental investigation in 1930 of the New York Commission on Revision of the Public Service Law, the so-called "judicial attitude" of the commission towards its duties was one of the chief points of complaint.¹² Back in 1905 Judge Peter Grosscup of the United States District Court said of the then Interstate Commerce Commission:

"My own judgment is that the Interstate Commerce Commission . . . has failed in its part of the administrative work of putting into execution the Interstate Commerce Act. . . . I think it has deserted the inquisition, which is the commission's part of the

sion. PA. STAT. ANN. (Purdon, Supp. 1937) tit. 66, § 461. Compare the following from the Wisconsin statute: "The Commission is vested with power and jurisdiction to supervise and regulate every public utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction. . . . The commission shall have authority to inquire into the management of the business of all public utilities, and shall keep itself informed as to the manner and method in which the same is conducted, and may obtain from any public utility all necessary information to enable the Commission to perform its duties. . . . The commission shall inquire into the neglect or violation of the laws of this state by railroads and public utilities . . . and shall have the power, and it shall be its duty to enforce all laws relating to railroads or public utilities and report all violations thereof to the attorney general." WIS. STAT. (1931) §§ 196.02, 195.07. See also INTERSTATE COMMERCE ACT, 24 STAT. 383, 384, 386 (1887), 49 U. S. C. A. §§ 12, 15, 20 (1926); CAL. GEN. LAWS (Deering, 1931) Act 6386, §§ 28, 29, 31, 58, 72; ILL. REV. STAT. (Cahill, 1933) c. 111a, § 23; 2 MASS. GEN. LAWS (1932) c. 159, § 12, c. 164, § 76; 1 MO. REV. STAT. (1929) §§ 5163, 5164, 5165, 5166, 5188, 5190, 5213, 5232; N. Y. CONSOL. LAWS (Cahill, 1930) c. 49, §§ 45, 46, 48, 66, 80, 94; WIS. STAT. (1931) §§ 192.26, 195.26, 196.24; WIS. LAWS (1933) c. 317, § 1.

11. See *supra* note 10.

12. Colonel W. J. Donovan, counsel for the commission, in his report to the legislature said, "Under the series of questions aiming to ascertain the attitude of the Commission in its initiative and alertness to discover conditions unfavorable to the public, the answer frequently came that dissatisfaction will assert itself. That attitude is difficult to understand. It would seem that any knowledge of human nature would make clear that dissatisfaction in such matters asserts itself only when a 'boiling point' has been reached. Such an attitude would indicate a misconception of the original purpose of the creation of the Public Service Commission which was to safeguard public rights and interests. . . . This expressed attitude, however, may be due to the so-called judicial attitude of the Commission, which was subjected to so much criticism." See 1 REPORT AND HEARINGS, N. Y. COMMISSION ON REVISION OF PUBLIC SERVICE COMMISSIONS LAW (1930) 73. The dissenting members of the legislative commission were particularly sharp in criticism of the commission on this point: *id.* at 302. At page 320 of vol. I appears the testimony of Chairman Prendergast of the commission in this matter. After the commission personnel was changed, a much more aggressive attitude was displayed. See N. Y. P. S. C. R. (1932).

work, and has been trying to climb upon the tribune, which is another part of the work. I think it has put on the robes, when perhaps it ought to have put on the overalls." ¹³

Public service commissions are indeed hybrids. Insofar as their activities affect the property interests of the utilities they regulate, they are required by constitutional doctrine to be quasi-courts. Insofar as they are invested by statute with the affirmative duty of securing in behalf of the public fair rates, adequate service, and freedom from unnecessary danger, they are of the executive. Constantly do these functions intermingle. Although in a case before the commission the formal parties may be the utility and a private consumer, always in the background stands an invisible party, the general public, whose interests the commission must watch and protect. A rate, although fixed in proceedings initiated by a single consumer or group of consumers, affects untold numbers of other patrons who have not formally appeared before the commission. Although in deciding the case between the individual parties to the formal record the commission may be required to adopt a quasi-judicial procedure, it cannot allow the chance course of the proceedings before it to injure the interest of the general public. To be both valid and effective, public service commission procedure must not only afford due protection to private property interests, but must also be sufficiently flexible and dynamic to enable the commission to guard and advance the public interest in utility charges and practices. This is indeed our major problem. The rule of the *Louisville & Nashville R. R.* case, requiring the determinations of a commission to be based solely on evidence presented at an open hearing corresponds perfectly with the judicial ideal. To limit a body performing the executive function to such data is not only anomalous, but may be highly inconvenient.

This rule requiring the commissions to base their determinations only on the evidence introduced at open hearing presents the basic problem of this article. The discussion may conveniently be divided into four sub-heads: (1) the possibility of a liberalization of the rule by applying to public service commissions the doctrine of "judicial notice", already long employed by the courts; (2) the somewhat similar question of the power of the commissions to use their own official records in arriving at their determinations; (3) the power of the commissions, through their own employees—engineers, accountants, and other experts—to make independent investigations of the utilities'

13. Quoted in NEWCOMB, *FEDERAL COURTS AND THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION* (1905). See also, BAUER, *EFFECTIVE REGULATION OF PUBLIC UTILITIES* (1925) c. 14; MOSHER AND CRAWFORD, *PUBLIC UTILITY REGULATION* (1933) c. 3; COOKE, *loc. cit. supra* note 1.

accounts, books, premises, and equipment, and to use the results obtained thereby in deciding cases; (4) the question of what constitutes adequate evidence on which to base a commission finding and order. Finally, some suggestions will be made concerning a possible procedure which will, it is hoped, reconcile the commissions' judicial and executive duties in a way that will secure both efficiency and the due protection of private rights.

I

JUDICIAL NOTICE BY PUBLIC SERVICE COMMISSIONS

It is sometimes contended that the doctrine of "judicial notice" should operate to relieve public service commissions of the necessity of deciding cases according to the evidence presented and to enable them to make a determination on the basis of knowledge acquired in the course of their experience in regulating utilities. Judicial notice in its more precise sense is the rule which excuses a party to an action from the necessity of proving by evidence matters which, though essential to his case, are of such common knowledge or are of such irrefutable nature that evidentiary proof thereof is redundant and unnecessary. The corollary to this proposition is that the court, jury or other trier of the fact may determine the truth of certain matters on the basis of its own knowledge without the necessity of hearing evidence. Thus a court may examine public records, geographies, almanacs, and similar irrefutable data, to determine facts of history, geography and natural science. The fact that a matter may be judicially noticed does not, however, preclude a party from disputing it by evidence if he is bold enough to believe that it can be done.¹⁴

In applying the doctrine of judicial notice to public service and other commissions, the following argument is made. Since courts and juries may take judicial notice of matters lying within their customary knowledge, the commissions, "appointed by law and informed by experience",¹⁵ may, in deciding matters before them, dispense with the necessity of evidence and utilize the knowledge acquired by them in the course of their official experience.¹⁶

14. See *State v. Kincaid*, 133 Ore. 95, 103, 285 Pac. 1105, 1108 (1930); 1 WIGMORE, EVIDENCE (2d ed. 1923) 567 *et seq.*; Strahorn, *The Process of Judicial Notice* (1928) 14 VA. L. REV. 544.

15. *Illinois Central R. R. v. Interstate Commerce Comm.*, 206 U. S. 441 (1907); *State Pub. Util. Comm. v. Springfield G. & E. Co.*, 291 Ill. 209, 125 N. E. 891 (1920). In this latter case, although the court delivered a peculiarly flattering encomium of the State Public Utility Commission, it nevertheless refused to sustain the Commission's findings of fact as being against the manifest weight of the evidence.

16. See the careful discussion of this matter by Hanft, *Utilities Commissions as Expert Courts* (1936) 15 N. C. L. REV. 12; Note (1934) 44 YALE L. J. 355.

Public service commissions may undoubtedly take judicial notice of the same matters of which the regular courts may take notice,¹⁷ and perhaps also of material in the public utility field so notorious to those informed thereof that production of evidence is unnecessary.¹⁸ The attempt to extend the doctrine of judicial notice beyond these limits to include so-called matters of expert knowledge has not, however, been successful. *Ohio Bell Telephone Co. v. Public Util. Comm.*¹⁹ involved proceedings before the Public Utilities Commission of Ohio to obtain refunds for alleged excessive charges collected by the telephone company under rates which the company had filed but which were protested by the consumers. The Ohio commission, after extensive hearings, fixed a valuation of the company's property in the state as of June 30, 1925. After the hearing was closed, the commission undertook to adjust downward this valuation for the years 1926-1933 by taking "judicial notice" of certain price indices obtained from technical engineering magazines and from the real estate valuations disclosed in the tax records of the various localities where the company property was located. The commission also relied on findings in a federal court decision in another state concerning the value of equipment furnished the telephone company by one of its affiliates. The data thus relied upon by the commission was not introduced in evidence, yet the commission refused the telephone company a rehearing for the purpose of explaining or rebutting it. The Supreme Court of the United States, in a unanimous opinion delivered by Mr. Justice Cardozo, held that these proceedings were contrary to due process of law. Concerning the matter of judicial notice, the Court said:

"Courts take judicial notice of matters of common knowledge. . . . They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants. . . . How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves. . . . Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. . . . 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' . . . Here the contention would be futile that the precise amount of the decline in values was so determinate or notorious in each and every year

17. The Public Service Commission of Wisconsin thus takes judicial notice of a period of depression and its effects on the purchasing power of consumers. *Mergen v. Farmers Tel. Co.*, 2 Wis. P. S. C. R. 350 (1932); *Russel v. Commonwealth Tel. Co.*, 3 Wis. P. S. C. R. 366 (1933).

18. See Hanft, *supra* note 16, at 29, for citation of cases.

19. 301 U. S. 292 (1937).

between 1925 and 1933 as to be beyond the range of question. . . . No rational concept of notoriety will include these variable elements. . . .

"What was done by the Commission is subject, however, to an objection even deeper. . . . There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. . . . The opportunity [of controverting the evidence] is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."²⁰

The reasonableness of the Court's holding in the case immediately above seems to this author apparent. Judicial notice, when applied to matters known to the parties just as well as the court, or to matters incapable of refutation, does not impair the substantial rights of the parties. To permit a tribunal, expert though it may be, to resort without notice to the parties to data of a disputable nature for the purpose of securing the evidence necessary to sustain its decision, clearly de-

20. *Id.* at 301. In the following cases the court also refused to sustain findings dependent on matters of which the commission attempted to take judicial notice: *Southern Pac. v. Bartine*, 1 F. (2d) 323 (D. Nev. 1913) (reliance on data gathered from statistics published by the Interstate Commerce Commission, but not placed in evidence); *Denver & S. L. R. R. v. Chicago, B. & Q. R. R.*, 64 Colo. 229, 171 Pac. 74 (1918) (reliance on other rates for the purpose of comparison which were not put in evidence); *Atchison, T. & S. F. Ry. v. Commerce Comm.*, 335 Ill. 624, 167 N. E. 831 (1929) (reliance on a finding by the Interstate Commerce Commission that 35 tons constituted the usual load per car, the court saying: "The commissioners cannot act on their own information. Their findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such." *Id.* at 638, 167 N. E. at 837); *People ex rel. Judge v. Public Serv. Comm.*, 192 App. Div. 837, 183 N. Y. Supp. 283 (3d Dep't, 1920) (reliance by commission on cost of maintenance and labor in cities of a comparable size to that of the city in which the public utility involved operated, the court saying: "Clearly it was the right of the relators to have an opportunity to explain the conditions pertaining to such other cities, or to show that those cities were not typical or representative instances, or to introduce such evidence as they might desire to refute or overcome the inferences which not only might be drawn, but which were actually drawn by the commission and which entered into and became an integral part of the order reducing the rates." *Id.* at 840, 183 N. Y. Supp. at 285); *Oklahoma Natural Gas Co. v. Corporations Comm.*, 90 Okla. 84, 216 Pac. 917 (1923) (cost of natural gas at the mouth of the well contrary to the figure testified to by the utility); *Los Angeles & S. L. R. R. v. Public Util. Comm.*, 81 Utah 286, 17 P. (2d) 287 (1932) (petition to abandon an agency station. Commission could not rely on facts disclosed in another hearing concerning a station twelve miles away serving a similar territory).

prives a party of his fundamental right to know the case against him and to rebut it if he can.

II

USE OF COMMISSION'S OWN RECORDS

A special application of the judicial notice concept to permit administrative agents to take notice of their own records and base decisions upon data therein contained has at times been asserted. In the leading case supporting this view, *Chicago & N. W. Ry. v. Railroad Comm.*,²¹ the commission asserted its right to rely on its records to show the cost of the service rendered by the railroad. The Supreme Court of the state affirmed the right of the commission to do this, saying:

"We do not think it necessary that these public documents be formally offered in evidence before the *Railroad Commission* or certified up to the circuit court in every action brought to review an order of the *Commission*. All parties know of their existence, the appellant itself furnished a report covering the period in question, the cost of the services in question was a fact peculiarly within the knowledge of the appellant if within the knowledge of any person, and the statute justly throws the burden of proof upon the appellant in the matter of showing that the rate fixed by the *Commission* is unreasonable. The *Commission* and the court may take judicial notice of the contents of these public records, and both parties are at liberty to present computations therefrom in argument at any stage of the litigation, even in this court." ²²

This decision is, however, contrary to the federal rule, laid down in *United States v. Abilene & Southern Ry.*²³ The Interstate Commerce Commission issued an order for the division of joint interstate rates between the Kansas City, Mexico and Orient Railroad and thirteen other carriers. No evidence was offered by the carriers in the proceedings. It was admitted that the order of the commission rested in part on data taken from the annual reports of the carriers involved relating to such matters as the amount of traffic carried, the total operating revenues, the total operating expenses, and the net revenue. The commission rested its authority to do this on Rule XIII ²⁴ of its

21. 156 Wis. 47, 145 N. W. 216 (1915).

22. *Id.* at 62, 145 N. W. at 220; see *Duluth Street Ry. v. Railroad Comm.*, 161 Wis. 245, 256, 152 N. W. 887, 891 (1915); *Mergen v. Farmers Tel. Co.*, 2 Wis. P. S. C. R. 350 (1932); *Miller v. Midway Tel. Co.*, 3 Wis. P. S. C. R. 63 (1932); *Russell v. Commonwealth Tel. Co.*, 3 Wis. P. S. C. R. 366 (1933); Note (1914) 27 HARV. L. REV. 683.

23. 265 U. S. 274 (1924).

24. This rule required the parties to the proceedings in offering documentary evidence, including reports on file with the commission, to specify the particular portions thereof which were offered in evidence and to furnish copies to the opposing counsel.

rules of practice and on notice by the examiner to the carriers that reference would be made to these filed annual reports. The Supreme Court, however, in an unanimous opinion, reversed the commission under the authority of *Interstate Commerce Comm. v. Louisville & Nashville R. R.*

"If the proceeding had been, in form, an adversary one commenced by the Orient system, that carrier could not, under rule XIII, have introduced the annual reports as a whole. For they contain much that is not relevant to the matter in issue. By the terms of the rule, it would have been obliged to submit copies of such portions as it deemed material; or to make specific reference to the exact portion to be used. The fact that the proceeding was technically an investigation instituted by the Commission would not relieve the Orient, if a party to it, from this requirement. . . . The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made is essential to the preservation of the substantial rights of the parties."²⁵

Where the records relied upon by the commission are not the reports of the particular carriers involved in the proceedings before it, but are records in other proceedings, it follows a fortiori that they cannot be resorted to without notice.²⁶ In this respect the courts apply to the commissions the same rule they apply to their own records.²⁷

In spite of worthy opinion to the contrary,²⁸ the writer believes the rule of the Supreme Court on this question the more reasonable and just. While by common law or by statute, official reports may be admissible in evidence,²⁹ they are not incontestable by the party who has filed them.³⁰ More important, in commission proceedings

25. 265 U. S. 274, 288 (1924). Accord: *Louisville & Nashville R. R. v. Bosworth*, 209 Fed. 380 (E. D. Ky. 1913); *Monroe Gaslight Co. v. Michigan Pub. Util. Comm.*, 292 Fed. 139 (E. D. Mich. 1923); *Illinois Cent. R. R. v. Railroad Comm.*, 1 F. (2d) 805 (E. D. Ky. 1924).

26. *Denver & S. L. R. R. v. Chicago, B. & Q. R. R.*, 64 Colo. 229, 171 Pac. 74 (1918); *Atchison, T. & S. F. Ry. v. Commerce Comm.*, 335 Ill. 70, 167 N. E. 831 (1929). In the *Monroe* case the court said, "If perchance the Commission had in mind evidence or papers in other cases, or general documents in its files, which showed that 14% was too high, it had no right to base its findings on such documents or evidence without calling them to the attention of the Utility and giving it a chance to be heard." *Monroe Gaslight Co. v. Michigan Pub. Util. Comm.*, 292 Fed. 139, 148 (E. D. Mich. 1923).

27. *Mathews v. Mathews*, 112 Md. 582, 77 Atl. 249 (1910), and Note (1911) 29 L. R. A. (N. S.) 905; *Divide Creek Irr. Dist. v. Hollingsworth*, 72 F. (2d) 859 (C. C. A. 10th, 1934), and Note (1935) 96 A. L. R. 937; cf. *Amos v. Mosely*, 74 Fla. 555, 77 So. 619 (1917) (where the court took judicial notice of legislative journals).

28. Hanft, *supra* note 16, at 30.

29. 3 WIGMORE, EVIDENCE, §§ 1633a, 1672.

30. 2 *id.* § 1059.

the record is customarily resorted to not merely to obtain evidence of a single indisputable relevant fact—for example, that a certain public utility had received on a certain date a certificate of convenience and necessity.³¹ On the contrary, the record is usually referred to for the purpose of selecting from the great mass of data in the public utilities' reports such individual items as may be useful to the commission's purpose. While the utility may not in reason deny the truth of the single statements of fact contained in its voluminous reports, it should have the opportunity to know which of these items the commission is relying upon and to argue their relevancy or irrelevancy as to the ultimate conclusion the commission is called upon to make.

The courts and commissions are inclined, however, to restrict, rather than to extend, the prohibitions on judicial notice declared by the Supreme Court in the *Abilene and Southern* case. The technical requirements of judicial proof are not insisted upon. If the data is made part of the record,³² it may, of course, be relied upon; and even if it is not formally introduced in evidence, no valid objection can be made if the parties involved know what is to be used and enter no objection at the time of the hearing.³³

Another doctrine akin to judicial notice, but formally at least distinguishable from it, operates also to liberalize the rule of the *Abilene and Southern* case. While the commissions may not employ their undisclosed knowledge and records as a substitute for necessary evidence, they may nevertheless use such material in accepting and weighing the evidence that is offered by the parties.³⁴ The difference be-

31. See *People ex rel. N. Y. Edison Co. v. Willcox*, 207 N. Y. 86, 95, 100 N. E. 705, 707 (1912); *Wisconsin P. & L. Co. v. Beloit*, 215 Wis. 439, 444, 254 N. W. 119, 122 (1934).

32. *United States v. Los Angeles & S. L. R. R.*, 273 U. S. 299 (1927). "Data collected by the Commission as a part of its function of investigation, constitute ordinarily evidence sufficient to support an order, if the data are duly made part of the record in the case in which the order is entered." *Id.* at 312.

33. *Georgia Cont. Tel. Co. v. Georgia Pub. Serv. Comm.*, 8 F. Supp. 434 (N. D. Ga. 1934); *Hoffman v. Public Serv. Comm.*, 99 Pa. Super. 417 (1930); *Gillis v. Public Serv. Comm.*, 105 Pa. Super. 389, 161 Atl. 563 (1932); *Duluth St. Ry. v. Railroad Comm.*, 161 Wis. 245, 152 N. W. 887 (1915).

"All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and offer evidence in explanation or rebuttal. . . . But an administrative tribunal may take notice of results reached by it in other cases, when its doing so is made to appear on the record and the facts thus noted are specified so that matters of law are saved." *Hoffman v. Public Serv. Comm.*, *supra*, at 428.

"Of course, common fairness would dictate that the plaintiff be advised of the appraisal made by the employees of the Commission, if the Commission intended to use such figures as a basis for decision. We do not understand it to be claimed that there was any intentional suppression by the Commission of evidentiary matters of this kind." *Duluth St. Ry. v. Railroad Comm.*, *supra*, at 257, 152 N. W. at 891.

34. The Interstate Commerce Commission has reserved to itself the right to use the Commission's files for the purpose of checking the accuracy or inaccuracy of testimonial and other evidence offered at the hearing. *Wickwire Steel Co. v. New York Cent. & H. R. R.*, 30 I. C. C. 415 (1914); *Oklahoma Cottonseed Crushers Ass'n v. Missouri, K. & T. Ry.*, 39 I. C. C. 497 (1916).

tween this and judicial notice proper is slight. What a trier of fact does when he checks, rejects or weighs evidence introduced by the parties against his own official knowledge or records is really to use this latter data as evidence to rebut or explain that which is introduced by the parties. In other words, while such knowledge and records may not be used as primary evidence, they may nevertheless be employed as rebutting or contradictory evidence. It must be admitted that this is a considerable qualification to the rules declared in *Ohio Bell Telephone Co. v. Public Utilities Commission* and *United States v. Abilene and Southern Ry.*³⁵

III

EX PARTE INVESTIGATIONS

The public service commission statutes uniformly not only confer the power, but also impose the duty, upon the regulating commission to investigate independently all matters relating to public utilities.³⁶ A survey of the commission statutes will show the very important part that the ex parte investigation by the commission plays in public service commission procedure.³⁷ The decisions with respect to judicial notice,

Neither is a commission as an expert body bound to accept opinion evidence as to value, etc., of the experts testifying before it. *McGregor-Noe v. Springfield G. & E. Co.*, 1 Mo. P. S. C. R. 468 (1914); *Borough of Kane v. Spring Water Co.*, 4 Pa. P. S. C. R. 628 (1920). "But we cannot accept the respondent's contention that the Commission in weighing the evidence and reaching its conclusions must adopt as its judgment the opinion of experts called by the parties to express their views on these matters. These questions may be helpful in reaching a conclusion, but they are not obligatory on the Commission whose right and duty is to apply to all the facts and circumstances in evidence, including the opinions of these experts, its own knowledge acquired by observation and experience in arriving at what it deems a fair and just allowance for these elements of value." *Id.* at 630.

It also seems that even as to specific facts testified to, the commission may use its own acquired knowledge in accepting and weighing them. *Elizabeth v. Board of Pub. Util. Comm'rs*, 99 N. J. L. 496, 123 Atl. 358 (1924); *Chicago & N. W. R. R. v. Railroad Comm.*, 156 Wis. 47, 145 N. W. 216 (1915); *Williams v. Farmers Tel. Co.*, 4 Wis. P. S. C. R. 32 (1933).

35. See Hanft, *supra* note 16, at 22.

36. See *supra* pp. 143, 144.

37. INTERSTATE COMMERCE ACT, 24 STAT. 383 (1887), 49 U. S. C. A. § 13 (1929), after providing that any person may complain to the commission of any act or omission by a carrier contrary to the terms of the statute, and providing for a service of such complaint upon the carrier involved, continues, "if . . . such carrier shall not satisfy the complaint within the time specified, or there shall appear to be reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." 1 MO. REV. STAT. (1929) § 5166 (2, 3); N. Y. CONSOL. LAWS (Cahill, 1930) c. 49, § 48; WIS. STAT. (1931) § 196.26 (1) are substantially the same.

ILL. REV. STAT. (Cahill, 1933) c. 111a, § 55, prohibits the carrier from charging less for a long than for a short haul, but provides, "Upon application to the Commission, any common carrier may, in special cases, after investigation, be authorized by the Commission to charge less for a longer than for a shorter distance."

PA. STAT. ANN. (Purdon, Supp. 1937) tit. 66, § 1123b, relates to applications for permission to engage in the public utility business, make extensions, etc., and provides, "for the purpose of enabling the commission to make such finding or determination, it shall hold such hearings . . . and . . . it may make such inquiries, physical examinations, valuations, and investigations . . . as it may deem necessary. . . ." WIS. STAT. (1931) § 196.28, "Whenever the commission shall believe that any rate or charge

however, make it apparent that this investigatory power is not unlimited. In spite of the duty to investigate, commissions may not use the results of such investigations as a basis for their decisions without introducing the same in evidence if a hearing is demanded and a matter of right as distinguished from a mere privilege is involved.³⁸ A customary method is to introduce at the hearing the written report of the investigation made by commission employees.³⁹ Such reports are then usually considered merely as evidence in the case, and not, because of their official source, as representing the final and conclusive determination of the commission. In case of conflict between experts, however, there is a natural inclination to give somewhat greater weight to the findings of the commission's own presumably unbiased experts.⁴⁰ Whether the parties to the proceedings have the constitutional right to cross-examine the experts and other employees of the commission who have investigated and submitted their reports raises an important and difficult question. Most court decisions declare as a matter of course

may be unreasonable or unjustly discriminatory or that any service is inadequate or cannot be obtained or that an investigation of any matter relating to any railroad or public utility should for any reason be made, it may on its own motion summarily investigate the same with or without notice."

38. *United States, C. & C. T. Co. v. Baltimore & Ohio S. W. R. R.*, 226 U. S. 14, 20 (1912); *Crowell v. Benson*, 285 U. S. 22 (1932); *Saltzman v. Stromberg-Carlson Tel. Mfg. Co.*, 46 F. (2d) 612 (App. D. C. 1931); *Farmers Elev. Co. v. Chicago, R. I. & Pac. Ry.*, 266 Ill. 567, 107 N. E. 841 (1915); *Wichita R. & L. Co. v. Court of Ind. Rel.*, 113 Kan. 217, 214 Pac. 797 (1923); *Saratoga Springs v. Saratoga G. & E. Co.*, 191 N. Y. 123, 147, 83 N. E. 693, 700 (1908); *State ex rel. Hughes v. Milhollan*, 50 N. D. 184, 195 N. W. 292 (1923); *Pennsylvania R. R. v. Public Serv. Comm.*, 69 Pa. Super. 404 (1918); *Sabre v. Rutland R. R.*, 86 Vt. 347, 354, 85 Atl. 693, 696 (1913). See also *Errington v. Minister of Health*, [1924] 1 K. B. 249. In *St. Louis, S. W. Ry. v. Stewart*, 50 Ark. 586, 235 S. W. 1003 (1921), however, the commission entered an order for the erection of a new railroad station at a certain town. The commission's order recited that the conditions in the town had been inspected by the engineers of the commission and by the members of the commission. The Arkansas court sustained the commission's order. It held that while the commission could not enter an order in the absence of evidence in the record, that they might make an *ex parte* investigation for the purpose merely of better understanding the evidence in the record. The report of the commission's engineer was merely advisory and not evidentiary. That seems an unjustifiable rule. Even though there be evidence in the record to sustain the order, the parties should have the right to know all matters which might influence the commission in arriving at its determination.

39. *People v. Delaware & Hudson Canal Co.*, 165 N. Y. 362, 59 N. E. 138 (1901); *In re Crystal City Gas Co.*, N. Y. P. S. C. R. 125 (1925); *In re Mo. Southern R. R.*, 3 Mo. P. S. C. R. 1 (1915). In an address before the Wisconsin Bar Association, Commissioner Kannenberg of the Wisconsin Railroad Commission said, "Even after the hearing is closed, if the Commission is not satisfied as to the facts, it frequently sends out its own engineers, accountants or other investigators to determine and report what the facts are. Such reports are submitted to the interested parties, and the decision is frequently based entirely thereon." (1929) 19 Wis. B. A. REP. 118, 122.

40. *Palo Alto v. Palo Alto Gas Co.*, 2 Cal. R. R. Comm. 300, 312 (1913); *In re Murray*, 2 Cal. R. R. Comm., 464, 518 (1913); *In re Marin Municipal Water Dist.*, 6 Cal. R. R. Comm. 507, 514 (1915); *West End Business Men's Ass'n v. United Ry.*, 2 Mo. P. S. C. R. 357, 362 (1915); *In re Atchison, T. & S. F. Ry.*, 3 Mo. P. S. C. R. 75, 100 (1915).

In absence of other testimony, a commission is not justified in making a decision contrary to the reports of its own experts. *Ohio Util. Co. v. Public Util. Comm.*, 267 U. S. 359 (1925); *Monroe Gaslight Co. v. Michigan Pub. Util. Comm.*, 292 Fed. 139, 148 (E. D. Mich. 1923).

and without serious consideration that the right to a hearing includes the right to cross-examine the witnesses.⁴¹ From the standpoint of the commissions, however, this claim to the right of cross-examination causes difficulty. An investigation in an important utility case may consume many months, and many different employees may partake in it. At the time the matter comes up for hearing, these employees may be scattered over the state busily engaged in other duties. To compel them to be present at every hearing where their reports are involved, to testify in person, and to insist on the technicality of judicial procedure and rules of evidence would seriously hamper commissions in the performance of their public duties. Because of these considerations the Wisconsin Public Service Commission, in a fairly recent decision, denied that the right of cross-examination existed in such a case.⁴²

IV

WHAT CONSTITUTES EVIDENCE TO SUSTAIN A COMMISSION'S ORDER

The rule which requires public utility commissions to base their orders on evidence introduced at the hearing necessarily raises the question of what constitutes sufficient and competent evidence to justify an order. The movement to substitute commissions for the regularly constituted courts was undoubtedly partially based on a desire to avoid the technicality of common-law rules of procedure and evidence. Indeed the statutes quite often provide that the commissions shall not be bound by the technical rules of evidence.⁴³ This general statement is frequently echoed by the commissions, courts and text writers.⁴⁴

41. *Washington ex rel. Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510 (1912); *Interstate Commerce Comm. v. Louisville & N. R. R.*, 227 U. S. 88 (1913); *Atchison, T. & S. F. Ry. v. Commerce Comm.*, 335 Ill. 624, 167 N. E. 831 (1929); *Casebolt v. Sligo & E. Ry.*, 1 Mo. P. S. C. R. 416 (1914); *People ex rel. Binghamton L. H. & P. Co. v. Stevens*, 203 N. Y. 7, 96 N. E. 114 (1911); *Lindsey v. Public Util. Comm.*, 111 Ohio St. 6, 144 N. E. 729 (1924); *Philadelphia Rapid Transit Co. v. Public Serv. Comm.*, 78 Pa. Super. 593 (1922); *Philadelphia v. Public Serv. Comm.*, 84 Pa. Super. 135 (1924); and see also cases cited *supra* note 38. In *Philadelphia Rapid Transit Co. v. Public Serv. Comm.*, *supra*, in a proceeding relating to the rerouting of a certain trolley line, the commission asked for a report by the engineer of the city of Philadelphia, but refused the parties the right to cross-examine the engineer, claiming that his report should not be treated as a part of the record or as evidence, since it was merely helpful in securing some independent man to give to the commission his views on the subject. The court held this to be error.

42. *Miller v. Midway Tel. Co.*, 3 Wis. P. S. C. R. 63, 71 (1932).

43. N. Y. CONSOL. LAWS (Cahill, 1930) c. 49, § 20, "And in all investigations, inquiries or hearings the commission . . . shall not be bound by the technical rules of evidence." To similar effect see CAL. GEN. LAWS (Deering, 1931) Act 6386, § 53; ILL. REV. STAT. (Cahill, 1933) c. 111a, § 79; 1 MO. REV. STAT. (1929) § 5144.

44. *Spiller v. Atchison, T. & S. F. Ry.*, 253 U. S. 117 (1920); *Western Paper Makers Chem. Co. v. United States*, 271 U. S. 268 (1926); *Schuylkill Ry. v. Public Serv. Comm.*, 71 Pa. Super. 204 (1919); *Logan v. Utah P. & L. Co.*, P. U. R. 1928B 410 (Pub. Serv. Comm. Utah). See also 4 SHARFMAN, *op. cit. supra* note 1, at 201, 206-220; STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE (1933) 20-31, 32-46; Wheat, *supra* note 1, 15 CALIF. L. REV. at 445; Kannenberg, *Practice Before the Railroad Commission* (1929) 19 WIS. B. A. REP. 118, 122, "At the hearings the

It is a mistake, however, to assume that the general principles regarding proof in judicial proceedings are entirely disregarded. In some of the leading cases it appears either that the incompetent evidence was admitted without objection or that there was sufficient competent evidence in the record to sustain the commission's order.⁴⁵ In one competent author's careful study of the procedure of the Interstate Commerce Commission appears the following:

"It is ordinarily said that rules of evidence are not strictly applied, and it is true that considerable leeway is allowed, although there is a noticeable tendency to adhere more closely to the fundamental rules. All of the applicable rules are recognized and should be observed by counsel.

"Hearsay evidence should not be submitted. It may be admitted without objection if offered, but it is always of little probative value. . . . The rules for qualifying an opinion witness are the same before the commission as in a court of law. . . . The true test is not its admission with or without objection but the weight that can be given the testimony once it is upon the record. Parties seem to overlook the fact that the commission must base its findings upon the relevant, admissible, probative evidence and that when a charge is made that it has not done so, the rules by which the evidence will be determined are the rules of evidence as applied by a court."⁴⁶

The exact extent to which the common law rules of evidence are applied undoubtedly varies considerably. The precise situation can be determined only by careful study of the stenographic records made in individual cases by each commission.⁴⁷ Probably the only general principle that can be enunciated in absence of such extensive studies is that a commission exercises considerable discretion in admitting evidence. If it believes that the adverse party is not seriously harmed or inconvenienced by the admission of the questioned evidence, having reasonable opportunity to check the proffered proof, objections based on technical grounds will be overruled.⁴⁸ However, if the evidence

commission is not bound or restricted by the ordinary rules of law and technical rules of evidence. Hearsay testimony is often received and considered, according to the weight which it seems to deserve."

On the general subject, see Stephan, *Extent to Which Fact Finding Boards Should Be Bound by Rules of Evidence* (1938) 24 A. B. A. J. 630.

45. *Spiller v. Atchison, T. & S. F. Ry.*, 253 U. S. 117 (1920); *Western Paper Makers Chem. Co. v. United States*, 271 U. S. 268 (1926).

46. HARTMAN, *op. cit. supra* note 1, at 72.

47. See Brown, *The Administration of Workmen's Compensation in Wisconsin* (1935) 10 Wis. L. REV. 431, 440.

48. Copies of records have been admitted in violation of the best evidence rule when the adverse party has easy access to the originals. *Schuylkill Ry. Co. v. Public Serv. Comm.*, 268 Pa. 430, 112 Atl. 5 (1920). In *Chicago, B. & Q. R. R. v. Commerce Comm.*, 345 Ill. 576, 178 N. E. 157 (1931), involving an application for a certificate of

submitted is deemed to be of little probative value, or if the adverse party is deprived of an opportunity to ascertain the true state of the primary evidence through cross-examination or otherwise, the evidence is apt to be excluded.⁴⁹ The commissions perhaps are coming to realize that, in confining the evidence to matters actually at issue

convenience and necessity, the court held that the commission did not err in receiving after the hearing a certified copy of a necessary consent order of the Highway Commission. Since the order spoke for itself the parties were not prejudiced by its admission. See also *Florida v. United States*, 4 F. Supp. 477 (N. D. Ga. 1933), upholding a commission order where evidence was admitted in claimed violation of the best evidence rule. The New York court has sustained the admission of affidavits as to specific facts. *People ex rel. Terminal Ry. v. Board of R. R. Comm.*, 53 App. Div. 61, 65 N. Y. Supp. 597 (3d Dep't, 1900), *aff'd*, 164 N. Y. 572, 58 N. E. 1091 (1900); and Pennsylvania has sustained the use by the commission of records in other cases before the commission, to disclose the general facts relating to the business regulated, when the parties were notified that such use would be made. *Hoffman v. Public Serv. Comm.*, 99 Pa. Super. 417 (1930).

49. As a general rule, records in other proceedings before the commission are not regarded as admissible evidence of the facts disclosed in such records. *Williamson v. Railroad Comm.*, 193 Cal. 22, 222 Pac. 803 (1924); *Atchison, T. & S. F. Ry. v. Commerce Comm.*, 335 Ill. 624, 167 N. E. 831 (1929); *Moline Consumers Co. v. Commerce Comm.*, 353 Ill. 119, 187 N. E. 161 (1933); *Application of the Borough of Conneautville*, 6 Pa. P. S. C. R. 95 (1922). Mere opinion evidence is also not regarded as competent unless the facts on which the opinion is based are properly introduced. In *Atchison, T. & S. F. Ry. v. Commerce Comm.*, *supra*, the Supreme Court of Illinois rejected evidence of a witness testifying from blueprints as to the grades and curves on the lines of other railroads because they said blueprints were not properly verified and introduced. In *In re Wisconsin Tel. Co.*, P. U. R. 1931E 97 (Wis. Pub. Serv. Comm., 1931), the question was raised as to the reasonableness of prices paid for equipment by the Wisconsin Telephone Co. to the Western Electric Co., an affiliate of the Wisconsin Co. The comptroller of the Western Electric Co., in testifying before the commission, submitted a summary of sales and net earnings of his company drawn from a large amount of data. The commission refused to accept such testimony unless the data on which it was based was also introduced in evidence. While the commission stated that it was not bound by the common law rules of evidence, it regarded its holding as involving a principle of fair proceedings which it was not at liberty to disregard. See also *Ashton v. Potter Gas Co.*, 6 Pa. P. S. C. R. 286 (1923); *People ex rel. Terminal Ry. v. Board of R. R. Comm.*, 53 App. Div. 61, 65 N. Y. Supp. 597 (3d Dep't, 1900), *aff'd*, 164 N. Y. 572, 58 N. E. 1091 (1900); *Hempstead v. Nassau & Suffolk Lighting Co.*, N. Y. P. S. C. R. 138 (1921). The Supreme Court of Vermont in *In re Trustees of Village of Westminster*, 108 Vt. 352, 187 Atl. 519 (1936), refused to accept an order for a certificate of convenience and necessity when several witnesses before the commission testified as to what they had heard other people say as to the need for the service applied for. Such a violation of the hearsay rule was regarded as prejudicial. The court distinguished the prior case of *Squires v. O'Connell*, 91 Vt. 35, 99 Atl. 268 (1916), which admitted a survey and valuation of a utility through the testimony of the individual in charge of said survey, without requiring the testimony of all his assistants who had assisted him in the work.

Cases before the Interstate Commerce Commission on claims of shippers for refunds for excess charges are illuminating. After a decision that a protested rate is excessive the practice is for the shippers who have been affected by the previous excess rate to assign their claims to one individual for prosecution. In such cases the commission demands that there be testimony by one who knows of his own knowledge that the original claimants actually paid the excess charges for which return is demanded, and they will not accept affidavits if objected to as proof. *Griffing v. Chicago & N. W. Ry.*, 32 I. C. C. 283 (1914); *Fairmont Creamery Co. v. Director Gen.*, 89 I. C. C. 359 (1924); *Globe Cotton Oil Mills v. Arizona E. R. R.*, 148 I. C. C. 695 (1928). Rule V of the commission's *Rules of Practice* adapts the commission procedure to the practical exigencies of the situation presented. By this rule the shippers, on a form prescribed by the commission, present the details of their claim. These are then submitted to the various carriers for verification, and when so verified constitute sufficient evidence on which to base an order. This procedure has been approved by the courts. *World Pub. Co. v. Davis*, 16 F. (2d) 130 (N. D. Okla. 1926).

and in excluding that which is of doubtful probative value the common-law rules of evidence have some virtue.⁵⁰

Of greater practical moment than the competency of evidence under common law rules is the question of what evidence shall be regarded as relevant and probative. This may be illustrated by the problem arising in connection with commission orders fixing rates on specific commodities between specific points of origin and destination. In regard to such rates it is practically impossible to determine on the basis of actual cost of service and overhead what is an intrinsically just and reasonable rate. Reliance must be placed upon comparative rates charged by the carrier and accepted by shippers and the regulating authorities without protest.⁵¹ It is apparent, however, that comparative rates may be relied upon only when the conditions surrounding the comparable rate and the contested rate are substantially the same. In *Northern Pac. Ry. v. Department of Public Works*,⁵² the Supreme Court of the United States unanimously overruled an order of the regulating commission of the state of Washington fixing specific rates

50. *In re Burlington Transportation Co.*, P. U. R. 1930C 380 (Mo. Pub. Serv. Comm. 1930), which involved an application for a certificate of convenience and necessity, the Missouri Public Service Commission had the following to say at 383 concerning the evidence submitted to it:

"The Commission has heretofore made reference to the great amount of incompetent, irrelevant, immaterial, and hearsay testimony in this case, but in many cases it is like hunting for the proverbial needle in a haystack to find in the mass of evidence offered, the character of testimony the Commission should have in order to enable it to reach a conclusion. There is no reason why the same character of evidence should not be produced in a hearing before the Public Service Commission that is required to establish a fact in any other forum. The fact that the Public Service Commission Law provides that 'no formality in any proceeding nor in the manner of taking testimony before the Commission or any Commissioner shall invalidate any order, decision, rule, or regulation made, approved, or confirmed by the Commission,' does not justify the Commission in accepting testimony that is neither competent, relevant, nor material.

"In determining whether public convenience and necessity will be promoted by the creation of the proposed motor carrier service, the Commission should base its judgment on testimony showing the conditions with reference to the existing facilities for motor carrier service, and the ability and willingness of the applicant to furnish the proposed service, together with other competent and material evidence that may be offered, but not upon the conclusions of witnesses, upon hearsay testimony nor upon affidavits, resolutions and petitions. The maker of an affidavit and the signer of a petition or resolution is not present at the hearing to be cross-examined. The Commission should not be expected to base its findings of fact and conclusions upon statements found in petitions, resolutions, or affidavits.

"Petitions and resolutions, and verified and unverified letters are often valuable and always welcomed by the Commission when they can be used as a basis for an investigation or inquiry as to the rates or service of a public utility. They are also valuable to the extent that they may show the relations that exist between the public utility and its patrons and the general public. The rules of evidence, however, cannot be changed by the Public Service Commission. Its liberality in accepting pleadings that are not formal and its method of hearing matters before it in an informal way does not justify the introduction of incompetent, irrelevant, immaterial, and hearsay testimony. No testimony should come before the Public Service Commission in any proceeding that will not aid it in making its finding of fact and conclusions on the issues, and it should not consider any other testimony."

51. *Moline Consumers Co. v. Ill. Commerce Comm.*, 353 Ill. 119, 187 N. E. 161 (1933). See in general 3 SHARFMAN, *op. cit. supra* note 1, at 10-11, 473-74, 521-25, 569-70.

52. 268 U. S. 39 (1925).

on logs. The commission relied solely on the average cost of hauling all traffic in the state by its four railroad systems and neglected the testimony of the respondent road as to the cost of hauling the commodity in question for the short average distance of 30 miles.⁵³ The Illinois courts have been particularly strict in this matter. *Atchison & S. F. Ry. v. Commerce Comm.*⁵⁴ involved an order of the state commerce commission reducing rates on coal from points near Springfield to Peoria and Pekin, Illinois. The commission had relied in part on the fact that, whereas the average increase of freight rates from 1910 to 1924 was 65%, the rates in question had been increased from 110% to 125%. The order was reversed on the ground that the test was the reasonableness of the rates in force at the time of the hearing, and a mere percentage increase over the average rates was not proof of present unreasonableness. The commission had also relied on rates on coal in other localities and, to show that the conditions were the same, referred to findings of fact in proceedings before the Interstate Commerce Commission and in other cases before the Illinois Commission. Again this was held improper since the evidence of the comparable conditions was not within the record and involved testimony and findings in other cases between different parties. This decision is typical of the strict attitude taken by the Illinois court,⁵⁵ though the federal courts apparently give to the Interstate Commerce Commission a greater leeway in applying judicial knowledge as to the similarity of conditions between the compared rates and the rate in controversy.⁵⁶ The Illinois rulings place a practically impossible burden upon a party protesting a rate. All the facts relating to the cost of service and other conditions of traffic are in the possession of the carrier. To require the protester to show that the conditions between the protested rate and comparable rates are similar before being allowed to introduce in evidence the comparable rate bars him from effective progress in the proceedings.

53. To similar effect see *Florida Ry. v. United States*, 234 U. S. 167 (1914) (reversing an order of the Interstate Commerce Commission reducing rates on fruit hauled by the Florida East Coast Company when the commission relied on the increased traffic carried by other lines where conditions were not the same); *Florida v. United States*, 282 U. S. 194 (1931) (reversing an order increasing state rates on lumber because of a claimed discrimination as to interstate commerce. The evidence was insufficient to show such discrimination to exist. After a new hearing, however, in which further evidence was obtained, the commission was affirmed. 4 F. Supp. 477 (N. D. Ga. 1933), *aff'd*, 292 U. S. 1 (1934)); *West v. Chesapeake & Potomac Tel. Co.*, 295 U. S. 662 (1935) (overruling the state commission for use of commodity price indices to show that the commission's property had decreased in value).

54. 335 Ill. 624, 167 N. E. 831 (1929).

55. *Alton & So. R. R. v. Illinois Commerce Comm.*, 316 Ill. 625, 147 N. E. 417 (1925); *Illinois Commerce Comm. v. Illinois Traction Co.*, 335 Ill. 247, 167 N. E. 38 (1929); *Chicago & Eastern Ill. Ry. v. Illinois Commerce Comm.*, 341 Ill. 277, 173 N. E. 380 (1930).

56. *Western Paper Makers Chem. Co. v. United States*, 271 U. S. 268 (1926);

CONCLUSION

The essential problem of public service commission procedure is, as previously stated,⁵⁷ a satisfactory reconciliation between the commission's undoubted duty to guard and advance the public interest in utility services and charges, and at the same time to preserve the constitutional right of the utilities to a procedure that accords with due process of law. The utilities and the private parties affected have a constitutional right to an open hearing whenever their private interests are affected.⁵⁸ The usual procedure provides for such a hearing at which the contesting parties present their testimonial and documentary evidence. In this situation, the requirement that the commissions must base their decision solely on the evidence presented at such hearings⁵⁹ and the prohibition of reliance upon knowledge acquired by experience or independent investigation⁶⁰ or on evidentiary material contained in their own files⁶¹ clearly hamper the commissions in their duty affirmatively to protect at all times the public interests in adequate service and fair tariffs. After the hearing is closed the commission may, of course, reopen the matter for the presentation of such further evidence it has obtained bearing on the issues at hand, but this would cause delay in an already protracted proceeding. Is there not another possible procedure that would more satisfactorily advance the public interest and at the same time amply protect the private rights of the utilities?

It is believed that it is a mistake and an undesirable departure from the essential principles of administrative regulation and adjudication to pattern public service commission procedure too closely on the judicial model. These regulatory commissions differ from the ordinary courts of justice: first, in the specialized and technical character of the problems which the great majority of cases involve; second, in the existence of a positive duty to represent the public by protecting the interests of the thousands of consumers, who naturally cannot be personally represented at the hearing; and third, in the capacity with which the commissions are endowed by law and experience to bring to

Montrose Oil Ref. Co. v. St. Louis-S. F. Ry., 25 F. (2d) 750 (N. D. Tex. 1927). See also *Wickwire Steel Co. v. New York C. & H. R. R.*, 30 I. C. C. 415 (1914); *Atchison, T. & S. F. Ry. v. Public Util. Comm.*, 68 Colo. 92, 188 Pac. 747 (1920).

The federal courts have also been liberal in cases involving a number of carriers in permitting the commission to rely upon evidence typical of all carriers in the group. *New England Divisions Case*, 261 U. S. 184 (1923); *Assigned Car Cases*, 274 U. S. 564 (1927); *Beaumont, St. L. & W. Ry. v. United States*, 36 F. (2d) 789 (W. D. Mo. 1929), *aff'd*, 282 U. S. 74 (1930).

57. See *supra* p. 145.

58. *Chicago, M. & St. P. R. R. v. Minnesota*, 134 U. S. 418 (1890).

59. *Interstate Commerce Comm. v. Louisville & N. R. R.*, 227 U. S. 88 (1913).

60. *Ohio Bell Tel. Co. v. Public Util. Comm.*, 301 U. S. 292 (1937), and see cases cited *supra* note 38.

61. *United States v. Abilene & So. Ry.*, 265 U. S. 274 (1924).

the solution of these problems their own inherent and acquired knowledge. The essential and underlying principle of the leading cases, *Interstate Commerce Comm. v. Louisville & Nashville R. R.*, *Ohio Bell Telephone Co. v. Public Util. Comm.*, and *United States v. Abilene & Southern Ry.* is that the parties to the proceeding are not to be adjudged on evidence undisclosed to them, but that they are entitled to hear such evidence so that they may rebut or explain it. It does not follow, however, that to safeguard these rights such evidence must necessarily be presented at open hearing by the usual method of oral testimony and by tedious and often futile cross-examination of the witnesses. In criminal actions and in civil damage suits before a jury, there is often sharp conflict as to fact occurrences lying within the customary experience of ordinary men. There is also an undoubted advantage in having the witnesses personally present before the triers of the fact in order that the truth of the story which they are telling may be determined from their conduct and demeanor. Such situations are not, however, customarily presented to the public service commissions. On the contrary, the usual primary evidence is documentary in character, contained in the records of the utilities, in accounts of receipts and expenditures, in records of goods and passengers carried, in inventories, and in valuations based thereon. The usual conflict arises from the proper deductions which accountants, engineers, and rate experts attempt to draw therefrom.⁶² Material of this character is best presented, not by the transitory oral utterances of witnesses, but in the form of written documents and reports, which the adjudicating tribunal should be given ample opportunity to analyze and appraise for relevance and cogency. It is desirable that a procedure be devised which will meet the exigencies of this situation.

The present author will not offer a complete working model of public service commission procedure. That should be done only after careful and extensive study by those who, through daily experience, have first hand knowledge of the actual conduct of the commission's business. Many controversies are now settled through correspondence and informal discussion between the commission and the utilities involved.⁶³ This method has proved efficacious, should be retained, and perhaps more widely used.⁶⁴ Such procedure can, however, be adopted

62. Smith, *supra* note 1, at 431.

63. See *Rules of Practice* III a-g, 8 INTERSTATE COMMERCE ACTS ANN. (1934) 6230; 4 SHARFMAN, *op. cit. supra* note 1, at 170; Smith, *supra* note 1, at 417; Wheat, *supra* note 1, 15 CALIF. L. REV. at 452.

64. The section on public utility law of the American Bar Association has recommended informal conferences between the commission, the utilities and the public as a means of solving without the expense and delay of protracted hearings many controverted questions. (1932) 57 A. B. A. REP. 752; Guernsey, *Regulation by Conference* (1933) 58 A. B. A. REP. 650; PROCEEDINGS OF NATIONAL ASSOCIATION RAILROAD AND

only when all the parties are in a compromising mood and expressly consent thereto. For the actually litigated case, would not the issues be more sharply defined, the orderly offer of proof be secured, unnecessary time consuming examination of witnesses be eliminated, a more thorough and scientific investigation of the fundamental issues of a controversy be made possible, and at the same time the fundamental right of the parties to a fair hearing be preserved by a procedure patterned on the following lines? At a stated time fixed by the commission after the issues have been formally joined by complaint, answer and replication, let the party bearing the burden of proof submit to the commission and his adversary in written form: (a) the necessary primary evidence taken from accounts, inventories and other records; (b) the affidavits of witnesses when oral testimony is necessary to present matters not of record; and (c) most important, the analyses, summaries and conclusions drawn by the experts from the primary evidence so submitted. After a reasonable time allowed for the examination and investigation of such evidence, the adversary, who in the meantime has been preparing his own case, should then submit his evidence in a similar form and manner. Rebutting evidence by the first party could also be offered if deemed necessary. Where oral cross-examination of the individuals submitting the reports is thought necessary, it should be allowed in proceedings conducted, not before the commission (unless specially ordered), but before an examiner, court commissioner, or other official appointed by the commission for the purpose. After the evidence has thus been submitted, the commission is then ready to exercise its adjudicating function. In so doing, however, it should not be restricted to the evidence submitted by the parties. It should have the opportunity and indeed be invested as a representative of the people with the duty of applying to the solution of the problem all the information it can obtain. It should be permitted to resort to its own records and to the results of its own *ex parte* investigations, and the doctrine of judicial notice should be liberally applied. Of course the fundamental right of the parties to know the evidence against them must be preserved. This can be done by requiring the commission to issue tentative findings of fact and conclusions of law, being careful in so doing to refer specifically to the matters to which it has resorted which are not in the statements submitted by the parties. Again, cross-examination of the individuals who have made reports relied upon by the commission should be allowed. On the tentative report so made the hearing before the com-

UTILITY COMMISSIONERS (1932) 380-420. For a report of proceedings conducted in this manner, see *In re* Revision of Uniform Classifications of Accounts, 1 Wis. P. S. C. R. 257 (1931).

mission should be held, the parties being required to file explicit objections to the specific matters in the tentative decision, whether the same be findings of fact or conclusions of law. On these specific objections the issues would be finally drawn, briefs filed, oral arguments held before the commission, and the case finally drawn to a conclusion.

The proposition so made is not entirely novel. Those familiar with the procedure of the Interstate Commerce Commission will recognize in it the shortened procedure provided by Rule X-a of the *Interstate Commerce Commission Rules of Procedure*⁶⁵ and the proposed report practice of the same Commission wherein the examiner makes a tentative report to which the parties are allowed to make exceptions and on which they file briefs and hold oral arguments before the Commission itself.⁶⁶ It is not an indispensable feature of a hearing that evidence be submitted in person before the adjudicating tribunal. The ancient practice of the court of chancery was to submit evidence in the form of depositions, and the present Court of Claims secures evidence in a like manner.⁶⁷ The requirement of a preliminary report to which specific exceptions may be filed is also not novel and should conserve rather than waste time.⁶⁸ By means of it the actual controverted issues

65. This procedure, in substance, substitutes for the oral presentation of evidence, written memoranda of facts and argument. While it can be applied only with the consent of the parties and is customarily used only in the less difficult and important cases, roughly one-third of the formal complaints to the commission are disposed of in this manner. See 4 SHARFMAN, *op. cit. supra* note 1, at 220; Smith, *supra* note 1, at 419.

66. This procedure has received the *obiter* blessing of the United States Supreme Court. See *Morgan v. United States*, 298 U. S. 468, 478 (1936). See also, 4 SHARFMAN, *op. cit. supra* note 1, at 229; Smith, *supra* note 1, at 440. Concerning this procedure, Professor Sharfman says: "The method of proposed reports, exceptions and argument, as described above, has proved to be of great value to all concerned. Proposed reports focus attention upon the controlling issues and their disposition, and thus subject the essentials of the controversy to the close scrutiny of the parties prior to actual decision. . . . The Commission has said: 'Our practice of requiring the filing of specific exceptions to the report of the examiner is in the interest of fairness to opposing parties and to the Commission, and to prevent that element of surprise which has no place in a proceeding where we are acting legislatively to lay down a rule of conduct for the future. Compliance with the rule is desirable as well for the conservation of the time of the Commission, and permits a more orderly and speedy review of the contentions presented for our decision. . . .' Finally, affording the parties opportunity for oral argument, as a supplement to exceptions rather than as a substitute for them, has been found to be an indispensable aid to just determinations. While applications may be granted or denied in the discretion of the Commission or its divisions, a very liberal policy has been consistently followed in passing upon requests of the parties for oral argument. The Commission recognizes the undoubted advantages which accrue from having the issues and their disposition presented directly to those charged with responsibility for authoritative action."

67. See RULES OF THE COURT OF CLAIMS OF THE UNITED STATES (1927).

68. The usual public service commission statute has liberal provision for rehearing and at times requires an application for rehearing as a prerequisite to review before the regular courts. CAL. GEN. LAWS (Deering, 1931) Act 6386, § 66; ILL. REV. STAT. (Cahill, 1933) c. 111a, § 86; 1 MO. REV. STAT. (1929) § 5233; N. Y. CONSOL. LAWS (McKinney, 1917) c. 480, § 22; PA. STAT. ANN. (Purdon, Supp. 1937) tit. 66, § 1396; WIS. STAT. (1931) § 196.405. See also 8 I. C. C. ACTS ANN. (Supp. 1934) Rule XV.

By Act of Feb. 24, 1925, the Court of Claims is authorized to appoint commissioners to take evidence and submit reports and findings to which the parties file objec-

are segregated, and the time of the parties and of the adjudicating tribunal is devoted to the vital controversy instead of being wasted by obstructive tactics seeking for technical advantages in matters often immaterial and not as a matter of actual fact subject to denial. Moreover, by such procedure the fundamental right of the parties to a hearing is preserved; for it is well settled that due process of law is not infringed if the parties before a final and conclusive determination of the controversy are entitled to a hearing.⁶⁹ Indeed, through the previous disclosure of the precise matters on which the commission relies for its determination, an even greater protection is given to private interests than is the case in ordinary judicial or commission practice.

It may be objected by some that the practical elimination of the oral presentation of evidence is undesirable. In that manner information may be obtained that would otherwise be unavailable; and in case of matters widely affecting many individuals—for example, in proceedings to abandon a line of railroad—there is perhaps a psychological advantage in permitting the individual citizens involved to appear in person and publicly present their case.⁷⁰ However, the consideration that is particularly important is the enabling of the public service commission to perform its duty to the public by utilizing all information it has at its command, and, at the same time, protecting the right of the parties to know the evidence on which the final determination depends. If the suggestions are deemed too drastic, this last objective may be reached simply by providing that the commission in making its determination may use whatever evidence it can obtain provided the parties affected by the commission's order are given an absolute right to a rehearing concerning all evidentiary matter in the order obtained outside of the formal record made at the regular hearing.

The present author firmly believes that the most vital point in administrative law today concerns administrative procedure. While

tions and submit arguments to the court. 43 STAT. 964 (1925), 28 U. S. C. A. § 11 (Supp. 1937).

Under the Wisconsin Unemployment Compensation Insurance Act, WIS. STAT. (1937) § 108.09, claims for benefits under the Act are first decided *ex parte* by a deputy of the commission and copies of the determination mailed to the parties. From such determination the parties have a right to appeal to the commission. See RULES OF WISCONSIN INDUSTRIAL COMMISSION RELATING TO UNEMPLOYMENT RESERVES AND COMPENSATION ACT, Rules 400-420.

In tax matters, the normal procedure is for the assessing officer first to make an *ex parte* determination. From this determination the taxpayer may appeal and he is then entitled to a hearing. See for example, INTERNAL REVENUE ACT OF 1936, § 272, 49 STAT. 1721 (1936), 26 U. S. C. A. § 272 (Supp. 1937).

69. United States v. Illinois Cent. R. R., 291 U. S. 457 (1934); Phillips v. Commissioner, 283 U. S. 589 (1931).

70. See Feller, *supra* note 3, at 660. This last point was made to the writer personally by Mr. Phillip H. Porter, Chief Examiner and former Commissioner of the Wisconsin Public Service Commission.

the matter is discussed in bar association meetings and in legal periodicals, little attempt has been made to grapple with the vital problems that are present. It will not do to declare blithely that commission procedure should be flexible and unbound by legal technicalities—and then stop. Nor will it suffice to model commission procedure on that prevailing in the regular courts of justice. Students must dig into the subject, get a clear idea of the fundamental principles of administrative action, know the actual problems with which the commissions are faced, and recognize clearly the rights of private parties to impartial and informed treatment. As a modest step in that direction, this paper is offered.