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Gas and Electricity in Interstate Commerce - Part II - Regulation of Rates and Service

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GAS AND ELECTRICITY IN INTERSTATE COMMERCE†

PART II*

REGULATION OF RATES AND SERVICE

The control of gas and electric rates and service by state public service commissions has, for many years, been a common phenomenon. In so far as interstate commerce in these commodities is involved, so as to be of special interest for the present discussion, the matter is of much more recent development. That the transmission of gas[1] and electric light and power current[2] from one state to another is a transaction in interstate commerce is now definitely well established, although as to the latter, it is not a determination of very long standing.[3] That the interstate aspects of the gas and electric power enterprises have recently come to assume very considerable proportions has been sufficiently indicated in Part I of this article. That such service presents the same need for regulation and control that is found in the ordinary local enterprise of a similar nature, perhaps no one seriously doubts. The states have not hesitated to impose regulations for the protection of their own inhabitants though the service in question extended across state lines. But with the tremendous growth of the gas and electric industries, the concentration of control in few hands, and the farreaching development of their interstate activities, the necessity for assumption of at least a measure of control by some regulatory authority coextensive in its jurisdiction with the operations of the enterprises to be regulated has come to be widely recognized. The proper adjustment between the respective spheres of state and federal control in this situation is not a matter of easy determination. With respect to hydroelectric current the difficulties involved have been distinctly recognized by the Federal Power Commission. "In very few branches of governmental

† The date appearing on the title page merely represents the postal entry date and not the date of publication. The article herein contained was released to the press in April.

*For the first installment of this article see 49 U. OF MO. BULL., LAW SER. 1.

1. Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229 (1911); Haskell v. Kansas Natural Gas Co., 224 U. S. 217 (1912); Public Utilities Com. v. Landon, 249 U.S. 236 (1919); Pennsylvania Gas Co. v. Public Service Com., 252 U. S. 23 (1920); United Fuel Gas Co. v. Hallanan, 257 U. S. 277 (1921); Pennsylvania v. West Virginia, 262 U. S. 553 (1923); Missouri v. Kansas Natural Gas Co., 265 U. S. 298 (1924).

2. Mill Creek Coal & Coke Co. v. Public Service Com., 84 W. Va. 662, 100 S. E. 557 (1919); Public Utilities Com. of R. I. v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927); Utah Power & Light Co. v. Pfost, 286 U. S. 165 (1932).

3. The first court decision to give definite recognition to electric current as an article of interstate commerce was Mill Creek Coal & Coke Co. v. Public Service Commission, 84 W. Va. 662, 100 S. E. 557, decided by the Supreme Court of Appeals of West Virginia in 1919. It was eight years later in Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co., 273 U. S. 83 (1927) that the United States Supreme Court first had occasion to pass upon the matter.

activity is the legal or economic line of demarcation between state and federal control less clearly drawn than in dealing with the use of water for hydro-electric development. ... The power industry is today neither exclusively local nor exclusively national, and if complete and effective supervision is to be had it must be had through cooperation of both local and national control."[4] Whether such cooperative action between state and federal regulatory agencies is to be the final solution of the problems of both the gas and electric enterprises, or whether present demands for a more or less complete assumption of control by the national government is to prevail, continues a vexed question. Which, if either, suggestion should utilmately be adopted, depends somethat upon the extent to which present state control finds itself unequal to the task.

Due partially, at least, to the fact that the federal government has not in the past attempted to regulate service or fix rates, even when the interstate character of the enterprise has been well recognized,[5] the states have extended their measures of control from time to time as new features have called for

4. ELEVENTH ANN. REP. FEDERAL POWER COMMISSION (1931) 12, 14.

5. The rates of gas companies transmitting gas in interstate commerce have not only not been regulated by Congress heretofore, but the Interstate Commerce Act as amended expressly withholds the subject from control by the Interstate Commerce Commission. c. 3591, s. 1, 34 Stat. 584; c. 309, s. 7, 36 Stat. 539, 544; 49 U. S. C. A. 1 (b).

Section 9a of the National Industrial Recovery Act (15 U. S. C. A. 709) authorizes the President to initiate before the Interstate Commerce Commission proceedings necessary to control the operation of oil pipe lines and fix resonable rates for the transportation of petroleum and its products by pipe lines. The NRA Code for the Petroleum Industry, Article 1, Section 2 provides that the term Petroleum Industry includes the production, transportation and marketing of crude petroleum and its products, including the production of natural gas in conjunction with petroleum.

Other sections of the Code specifically authorize control and regulation of shipment in interstate commerce (Article III, Sections 4 and 7) and wholesale and retail prices (Article III, Section 6a and Article V, Rules 4 and 26), but the regulations thus far imposed do not materially affect the problems being discussed herein. *Registry No. 711-1-21*; PRENTICE-HALL, FEDERAL TRADE AND INDUSTRY SERVICE, 12321.3-18-21-22-30-52-58; 12334.

The Blanket Code for the Natural Gas Industry regulated only hours and wages for employees in the industry. PRENTICE-HALL, *op. cit supra*, 10365.

Neither has the federal government in the past regulated the interstate transmission of electric current. The Federal Water Power Act of 1920, applicable only to licensees under the Act, provided in Section 19 for complete state control where interstate commerce was not involved. It further provided that if a state had no commission or other authority to regulate rates and service, "it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission (Federal Power Commission) ... (under certain circumstances) to so regulate and control until the state has provided a commission or other authority therefor," 16 U. S. C. A. 812.

As to interstate aspects of the power generated by such licensee, control was also left very largely to the states. Section 20, Federal Water Power Act, 1920; 16 U. S. C. A. 813.

More recently, however, provision has been made in the National Industrial Recovery Act (Section 202 of Title II—Public Works and Construction Projects) authorizing the Federal Emergency Administrator of Public Works to "prepare a comprehensive program of public works, which shall include among other things ... (b) conservation and development of natural resources, ... development of water power, transmission of electrical energy, ..." 40 U. S. C. A. 402. In this connection the Federal Power Commission has been regulation. For the most part, however, such measures have been restricted to the control of rates to consumers.

Two theories have been advanced in justification of state control over such services not confined within a single state. In the first place, the position is sometimes taken that interstate commerce is directly involved throughout. It is assumed that the transmission of such commodities as gas and electricity across state lines in one continuous movement from producing wells or generating plants in one state to consumers in another is interstate commerce from beginning to end. But it is asserted that the business of furnishing gas or electric current within a state to local consumers is a matter so far local in character that the state may act to impose regulations so long as Congress has not seen fit to assume control.[6] In the second place, it is asserted that the interstate commerce involved in the transmission of gas or electric current from one state to another has come to an end, and that the commodities which clearly have been a part of interstate commerce have been so mingled with, and so far become a part of, the common mass of property in the state as to be divested of their interstate character before the impingement of the state regulations. On this basis it is held that distribution and sale to consumers is a purely local business, not unlike that of a local gas or electric company supply-

directed to prepare a comprehensive national plan for the development of water power and the transmission of electricity, cooperating with the Public Service Commissions of the states, the Public Works Administration, and Tennessee Valley Authority. PRENTICE-HALL, *op. cit. supra* 28201.

Such a National Power Survey is now in the process of being made. At the request of the Senate the Federal Power Commission is also making a study of the cost of distribution of electrical energy in relation to the costs of generation and transmission. In response to Senate Joint Resolution No. 74, approved April 14, 1934, the Federal Power Commission undertook a comprehensive survey of electric rates throughout the United States. The first preliminary report was submitted February 3, 1935, with others to follow.

How far complete control may ultimately be assumed by the federal government remains to be determined. For the federal government's experiment in production and distribution of electric power both to consumers and distributing companies, with control over resale by the latter, see TENNESSEE VALLEY AUTHORITY ACT, 16 U. S. C. A. 831c (i) and (j), 831i and 831k. For an example of its relation to state commissions, see Re Tennessee Electric Power Company, 2 P. U. R. (N. S.) 4 (Tenn. RR. & P. U. C. 1934).

The Blanket Code for the Electric Light and Power Industry merely regulated hours and wages of employees in the industry. PRENTICE-HALL, *op. cit. supra*. 10072.

6. Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23 (1920); Manufacturers' Light and Heat Co. v. Ott, 215 Fed. 940 (N. D. W. Va. 1914); In re Pennsylvania Gas Co., 225 N. Y. 397, 122 N. E. 260 (1919); Mill Creek Coal & Coke Co. v. Public Service Commission, 84 W. Va. 662, 100 S. E. 557 (1919); Trades & Labor Council v. Fayette County Gas Co., P. U. R. 1918 B, 165 (Pa. P. S. C. 1917); Re Appalachian Power Co., P. U. R. 1919 D, 286 (W. Va. P. S. C. 1919); *cf.* Corporation Commission v. Cannon Mfg. Co., 185N. C. 17, 116 S. E. 178 (1923). These decisions are based, of course, on the line of cases beginning with Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299 (1851), establishing the doctrine that the states may regulate local aspects of interstate commerce until such time as Congress may act to occupy the field.

ing its commodity from sources within the state, and, therefore, completely subject to state regulation and control.[7]

The courts that have had occasion to deal with this problem have divided their allegiance between these two theories,[8] and even the Supreme Court of the United States has vacillated back and forth, now adhering to the one and now to the other. At the present time the latter formula seems to have become the accepted doctrine of the Court.

While the two theories may lead to the same conslusion with respect to the power of a state to act in a particular case, the choice is nevertheless a most important one. If the former, the power is expressly by the Constitution that of the national government and Congress may act at any time to occupy the field and put an end to state control. If the latter, the field of regulation is primarily one for the control of the states and they must be left a free hand, except in so far as the doctrine which permits federal regulation of intrastate commerce incident to the proper regulation of interstate commerce may find application,[9] as it has been attempted to apply it to various matters under the National Recovery program.[10] These two theories are of sufficient importance in the final determination of the present problem to justify individual consideration.

A. Rate Regulation as Local Aspect of Interstate Commerce

The leading case adhering to the doctrine that the whole transaction involved in the transmission of gas or electricity from a source of supply in one state and its distribution to consumers in another is interstate commerce is *Pennsylvania Gas Co. v. Public Service Commission.*[11] The Pennsylvania Gas Company was engaged in transmitting natural gas by its own pipe lines

7. Public Utilities Commission v. Landon, 249 U. S. 236 (1919); East Ohio Gas Co. v. Tax Commission of Ohio, 283 U. S. 465 (1931); South Carolina Power Co. v. South Carolina Tax Commission, 52 F. (2d) 515 (E. D. S. C. 1931); South Carolina Power Co. v. South Carolina Tax Commission, 60 F. (2d) 528 (E. D. S. C. 1932); State v. Flannelly, 96 Kan. 372, 152 Pac. 22 (1915); West Virginia & Maryland Gas Co. v. Towers, 134 Md. 137, 106 Atl. 265 (1919).

8. Sometimes a doubt has existed as to whether interstate commerce had come to an end and both theories have been employed in the disposition of the matter. Washington Water Power Co. v. Montana Power Co., P. U. R. 1916E, 144 (Idaho P. U. C. 1916); *cf.* Manufacturers' Light & Heat Co. v. Ott, Trades & Labor Council v. Fayette County Gas Co., and Re Appalachian Power Co., all *supra* note 6; State v. Flannelly, and West Virginia & Maryland Gas Co. v. Towers, both *supra* note 7.

9. Minnesota Rate Cases, 230 U. S. 352 (1913); Houston, East & West Texas Ry. Co. v. United States (Shreveport Case), 234 U. S. 342 (1914); Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U. S. 563 (1922); United States v. Village of Hubbard, 266 U. S. 474 (1924); Alabama v. United States, 279 U. S. 229 (1929); United States v. State of Louisiana, 290 U. S. 70 (1933).

10. The National Industrial Recovery Act was specifically made applicable to "transactions *in or affecting* interstate or foreign commerce". See ss. 3 (f) and 4 (a) and (b); 15 U. S. C. A. 703 (f), 704 (a) and (b).

11. *Supra* note 6.

from its source of supply in Pennsylvania and selling and delivering it to connsumers in various localities in the state of New York. The public service commission in the latter state asserted its power to reduce the rates to consumers in the City of Jamestown and was met by a contention that this was an attempt to regulate interstate commerce and an invalid encroachment upon the constitutional power granted to Congress over such commerce. While the Court vigorously asserted the continuance of the interstate character of the transaction throughout, apparently little difficulty was experienced in arriving at the conclusion that the regulation of such rates was a matter peculiarly local in its nature and subject to the control of the states in the absence of regulation by Congress. This case had been before the New York Court of Appeals[12] the preceding year and the present Mr. Justice Cardozo had disposed of the issue in a very able opinion with which the Supreme Court agreed. In the same year the case of *Mill Creek Coal & Coke Co. v. Public Service Commission*,[13] involving a similar problem with respect to hydroelectric light and power current, had likewise brought forth a very exhaustive discussion by Judge Lynch of the Supreme Court of Appeals of West Virginia with the same result. In neither of the cases was there any serious contention that such transmission did not involve interstate commerce. While the *Mill Creek* case was substantially one of first impression with respect to the interstate transmission of electricity, it was thought sufficient merely to assert that there could no longer be any doubt that interstate commerce was involved and to cite the oil and gas cases as complete authority.[14] Whether the commodities retained their interstate character until the consumers were reached, and if so, whether the state was excluded thereby from exercising its power of regulation to fix rates, were the issues to be met. In each case the commodity was supplied directly to the consumer by the company engaged in the interstate transportation without the intervention of a local distributing company. The intervention of such local distributing company and the passage of gas into its mains had been held, in *Public Utilities Commission v. Landon*,[15] to break the continuity of the transaction and put an end to its interstate character. In that case the Kansas Natural Gas Company was engaged in transporting natural gas by means of its system of pipe lines from its sources of supply in Kansas and Oklahoma to various points in Missouri and Kansas

12. In re Pennsylvania Gas Co., *supra* 6.
13. *Supra* note 6.
14. The analogy between natural gas and hydroelectric energy was found to be very striking in the problems involved in the first part of this paper, though possibly not so complete as to be fully controlling in all cases. In this part dealing with state regulation of rates and service it is believed that the analogy will be found to be much more complete due to an absence of any consideration of state control over streams and water power sites. A decision as to one is believed to be complete authority for a similar situation with respect to the other, and the courts have so treated them.
15. 249 U. S. 236 (1919).

where it was delivered to local distributing companies for sale to consumers. Permanent physical connections permitted the gas to pass freely from the transportation company's lines into the distribution mains of the local companies. Though not necessary to a decision, sale and delivery to such local companies were treated as parts of interstate commerce and free from state control. But with the passage of the gas into the local mains interstate movement was said to have ended, and on that basis state control of rates to consumers was considered a legitimate regulation of a mere local business.

In distinguishing the *Landon* case and arriving at the conclusion that the interstate character persisted throughout the whole of the transaction, the decisions here under consideration relied heavily upon the case of *Western Union Telegraph Co. v. Foster.*[16] That case involved the transmission of market quotations of the New York Stock Exchange by the Western Union Telegraph Company and its subsidiaries to subscribers in Boston. The local service involved the translation of the quotations from the Morse code into English by a local telegraph operator and their transmission to the tickers in the offices of the subscribing brokers. Mr. Justice Holmes asserted that the "transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers' offices."[17] The facts that there was a break in the continuous transmission of the quotations by receipt and translation in the local telegraph office, and that the transmission from such office to the individual brokers was in a different form, were not thought to destroy the interstate character of the transaction. "If the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it from Exchange to broker's office it does not matter what are the stages. . . ."[18] The interstate character was thought to continue until the point was reached "where the parties originally intended that the movement should finally end,"[19] though the Exchange had no contract with the individual brokers. The doctrine of this case was thought to be entirely applicable to the transmission of gas and electricity. Judge Cardozo asserted as to the gas in *In re Pennsylvania Gas Co.* that there was "no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown," and that "interstate commerce did not end till the gas had reached its goal."[20] Referring to the above quotation from Mr. Justice Holmes in the *Foster* case relative to continuity of transmission, Judge Lynch in the *Mill Creek* case asserted that the "transmission of hydroelectricity generated in Virginia to consumers in West Virginia was as expeditious as science could

16. 247 U. S. 105 (1918).
17. *Ibid.* 112.
18. *Ibid.* 113.
19. Illinois Central Railroad Co. v. Louisiana Railroad Commission, 236 U. S. 157, 163 (1915).
20. In re Pennsylvania Gas Co., *supra* note 6, at 404.

make it"; that it was "a direct transmission from seller to buyer, with an incidental and temporary stop in route for the purpose of transformation into a commercial voltage."[21] In asserting that this reduction in voltage was an immaterial circumstance, he denied the contention of the public service commission that this put an end to the interstate character of the transaction.[22] Mr. Justice Day, speaking for the Supreme Court in the *Pennsylvania Gas Co.* case, followed substantially the other two decisions herein discussed, but emphasized the absence of any intervening distributing company between producer and consumer, and, on that basis, distinguished the *Landon* case. Here the transmission was said to be direct, continuous and single, without intervention of any sort between buyer and seller, and interstate commerce throughout.

Having determined this aspect of the situation, there still remained the primary question of whether or not the state had power to regulate rates charged to consumers. If the interstate commerce thus involved could properly be considered essentially local in its nature, the doctrine of *Cooley v. Board of Wardens of the Port of Philadelphia*[23] might be applied to bring it within the scope of the state's regulatory power, since Congress had not acted to occupy the field. That doctrine, as expounded by the present Mr. Chief Justice Hughes in the *Minnesota Rate Cases*,[24] was thought by all of the courts concerned to be clearly applicable. It was there recognized that there exists within certain limits a rather broad range of authority which the states may exercise, although interstate commerce may be affected. Such authority may be legitimately exercised over all of those matters so far local in their nature that it is impossible to derive from the constitutional grant to Congress of power to regulate interstate commerce "an intention that they should go uncontrolled pending federal intervention."[25]

> "Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unregulated wills of individuals because congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the federal power."[26]

21. Mill Creek Coal & Coke Co. v. Public Service Commission, *supra* note 6, at 671.

22. This contention was based on a decision by the Court of Appeals of Maryland in the same year. The original package doctrine was there applied by analogy. It was held that the reduction in pressure for purposes of distribution to consumers was the equivalent of breaking an original package for the sale of its contents at retail, and that the interstate character of the transaction was thereby brought to an end. West Virginia and Maryland Gas Co. v. Towers, *supra* note 7.

23. 12 How. 299 (1851).

24. *Supra* note 9.

25. *Ibid.* 402.

26 *Ibid.*

By the failure of Congress to assume the function of regulating the distribution and sale of gas and electric light and power current in interstate commerce, such service was left to go entirely unregulated unless the states were permitted to act. Experience seemed to demonstrate, however, that regulation by some authority was essential for the protection of the public interest. "The silence of Congress cannot be interpreted as a declaration that public service corporations, serving the needs of the locality, may charge anything they please."[27]

The services which the state commissions had undertaken to regulate in these cases, while considered part of interstate transmission, were rightly thought not to require a national plan of regulation. They involved in each case the furnishing of natural gas or electric current to consumers in a local community within the state. While the pipes or lines which reached the consumers served were supplied with the gas or electric current directly from the mains or transmission lines of the company bringing the commodity into the state, the nature of the service rendered was quite properly considered essentially local. In such a situation the system of distribution pipes or wires occupy the streets of a city by virtue of its permission and in the same way as those of a local plant rendering a similar service to consumers within the city. The local nature of the service rendered is the same whether the commodity furnished originated within or without the state. Such being the nature of the transactions involved, the exercise of authority by the states in the fixing of rates to consumers, so long as Congress has not acted, would seem to be in no way violative of the commerce clause of the Federal Constitution.

In the cases above discussed the distinction was pointed out between regulating the local sale of the commodity to consumers held to be properly within the competence of the states, and regulating the transportation determined to be interstate or the rates therefor; the latter being a field where regulation, if there is to be any, must be uniform. Especially was this emphasized by Judge Lynch in the *Mill Creek* case.

> "The vital distinction should be noted between regulation of rates of transportation and of the rates at which a commodity shall be sold. Transportation across state lines, involving as it frequently does many or all states, is generally a matter of national importance requiring uniformity of regulation respecting the rates thereof, and hence is usually beyond the regulatory power of the state. Because of the very nature of the subject matter conflicting state regulations respecting rates ordinarily would result in discord and chaos. . . .
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> "In fixing rates of sale, however, as distinguished from rates of transportation, the duty regulated is of an entirely different nature. The duty of the power company to sell at reasonable rates was owed

27. Judge Cardozo in In re Pennsylvania Gas Co., *supra* note 6, at 410.

> both to the citizens of Virginia and to the public of this state (West Virginia). But the two duties do not overlap as they do where rates of transportation are concerned. The price at which a commodity is sold is essentially local, affecting chiefly those in the community where it is made, and only incidentally, if at all, touching those outside."[28]

It is interesting to note a certain contrast in the method of approach employed in the Supreme Court opinion and in those of the other courts, particularly that of Judge Cardozo. Mr. Justice Day, in speaking for the Supreme Court, dealt with the situation as a matter of interstate commerce requiring regulation to which the states were competent, by virtue of its local nature, until Congress should act. Judge Cardozo considered it a matter for the exercise of state police power, which incidentally affected interstate commerce, but which was clearly within the competence of the states until Congress should supersede such measures by an exercise of its commerce power. While the problem is thus approached from slightly different angles, the same result is arrived at in both cases.[29] Regardless of the method of approach employed, the decision reached left the way open for Congress to act at any time it might consider such general regulation to be desirable.

With the conclusion arrived at in these cases, that so long as Congress has not seen fit to act in the exercise of its power over interstate commerce the states may regulate rates to local consumers although the commodity has been brought directly from another state, there would seem to be little reason for disagreement. The theory of all the cases that maintain the proposition of the continuing interstate character of the transaction is that the business of furnishing gas and electricity to consumers, while a part of interstate commerce, is an enterprise characteristically local in its nature, that it does not appropriately admit of a single uniform system of regulation throughout the entire country, and is, therefore, not that type of interstate commerce which requires exclusive legislation by Congress. The fact that such price regulation must of necessity affect somewhat the interstate transportation of these commodities does not, under the circumstances, detract from the soundness of the conclusion with respect to state power. The matter upon which unanimity of opinion is less likely, and with regard to which the decisions have not been in accord, is the preliminary question of whether or not the

28. Mill Creek Coal & Coke Co. v. Public Service Commission, 84 W. Va. at 673, 674.

29. For a discussion of local regulations of interstate commerce by the states, and of police power as affecting interstate commerce, see 2 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) s. 598 *et seq.*; *cf.* REYNOLDS, DISTRIBUTION OF POWER TO REGULATE INTERSTATE CARRIERS BETWEEN THE NATION AND THE STATES (1928) 78, 81. Mr. Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 203, 204 (1824) seems to distinguish the two powers.

interstate character of the transaction may have been brought to an end before the consumer is reached.

B. Rate Control as Regulation of Intrastate Commerce

In applying the second theory set out above and determining that interstate commerce has been brought to an end so that a state may regulate sales to consumers as a purely local enterprise, the courts have frequently made use of the original package analogy, although the same result has been reached in some cases without express application of that doctrine. As ordinarily conceived, the original package doctrine has application, as the term implies, to articles of commerce contained in a conventional package, bundle or crate, convenient for wholesale shipping, which must be opened before sale of its contents at retail. In such a case it was originally set forth, and, no doubt, in most instances has been applied. It is clear, however, both from its first assertion and its later application that it need not be so restricted. It is capable of being applied, at least by analogy, as a general principle, to other situations of a similar nature, and is not a restricted definition of the method by which a single type of transaction may divest itself of its interstate character. Mr. Chief Justice Marshall, in the original promulgation of the doctrine, used the expression "original form or package,"[30] which may indicate that its application was not meant to be restricted to such articles as are capable of being put up in the form of a package in the commonly accepted meaning of that word.[31] At most, of course, it is only a convenient test by means of which the courts may frequently determine whether a commodity brought from outside has taken on a local character. The broader aspect of the doctrine, of which the package idea is really only a part, which asserts that when the thing imported has been so acted upon by the importer as to become incorporated and mixed up with the mass of property in the state, it loses its character as an import, has also been invoked in the gas and electricity cases. While the term import, as used by Mr. Chief Justice Marshall in the promulgation of the doctrine with respect to state taxation of goods from abroad, has no proper application to interstate commerce, the doctrine finds appropriate place in determining whether a commodity such as here involved has been divested of its interstate character so as to be properly subject to the police power in the state of its destination.

The first state court case to involve the regulation of rates for gas, part of which had been brought from without the state, invoked the original package

30. Brown v. Maryland, 12 Wheat. 419, 442 (1827).

31. For the application of the doctrine to oil in tank cars, see Askren v. Continental Oil Co., 252 U. S 444 (1920). While this case has probably been substantially overruled, the inapplicability of the doctrine to oil was not the cause. Sonneborn Brothers v. Cureton, 262 U. S. 506 (1923). See also Texas Co. v. Brown, 258 U. S. 466 (1922); Atlantic Coast Line Railroad Co. v. Standard Oil Co., 275 U. S. 257 (1927).

doctrine to justify the regulation. The position was taken that when the first gas was taken out of the pipe lines and sold within the state the original package was broken and the gas ceased to be an article of interstate commerce. "If the analogy of original packages or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail."[32] The fact that the gas from outside has been mingled in the same pipes with gas produced within the state was also considered a matter of some significance.

In some respects the most important early case applying the original package doctrine to gas or electricity is *West Virginia & Maryland Gas Co. v. Towers*.[33] Natural gas, the regulation of whose rates to consumers was involved, was transmitted in high-pressure pipe lines from West Virginia to the gates of the Maryland communities in which it was to be sold and delivered. There it left the main pipe lines and entered intermediate low-pressure lines for sale and distribution. Its pressure was reduced because that in the main line was too high for service to consumers. In entering the intermediate lines it was so separated from that in the main line that it could not return but awaited consumption as needed. By this process the interstate transmission was thought to be ended and the subsequent sale and delivery to consumers were considered proper subjects for local regulation. "Whether the gas is separated from the general bulk of gas and confined in the intermediate pipe lines. . ., or . . . is separated and stored in tanks awaiting consumption, the effect is the same in determining the question whether the original package has been broken and the gas mixed with the common mass of property in this state."[34] It was contended that since the regulators which reduced the pressure on entrance into the intermediate pipes did not interrupt the continuous flow from producing well to consumer, it must be considered interstate commerce throughout. The court asserted, however, that although "there may be a

32. State v. Flannelly, *supra* note 7, at 383. See also Washington Water Power Co. v. Montana Power Co., P. U. R. 1916E, 144 (Idaho P. U. C. 1916); Manufacturers' Light & Heat Co. v. Ott, and Re Appalachian Power Co., both *supra* note 6.

33. *Supra* note 7. An added significance attaches to this case by virtue of its recent complete approval by the United States Supreme Court in East Ohio Gas Co. v. Tax Commission of Ohio, 283 U. S. 465 (1931).

It is worthy of note that the Supreme Court in 1918 had rejected an attempt to apply the original package analogy to the case of telegraph messages. In Western Union Telegraph Co. v. Foster, *supra* note 16, a case much relied on in the cases discussed above under A, the translation of stock market quotations from code into English at a local telegraph office and their distribution in the form of new messages to individual brokers was held not to be sufficiently analogous to the receiver of a package breaking bulk and selling the contents at retail to put an end to the interstate transaction before delivery to the brokers.

34. West Virginia & Maryland Gas Co. v. Towers, 134 Md. at 145.

constant movement of the molecules of the gas," it did not see how this movement, "because of the peculiar properties of the article, can affect the question to be determined."[35] It thus refused to adopt the view which prevailed in the *Pennsylvania Gas Co.* and *Mill Creek* cases. It should be borne in mind in this connection that prior to the decision of the *Pennsylvania Gas Co.* case the Supreme Court of the United States in *Public Utilities Commission v. Landon*[36] had sustained the power of a state to regulate the sale to consumers of gas brought from another state in an opinion that seemed to indicate substantial agreement with the *West Virginia & Maryland Gas Co.* case. No attempt was made to employ the original package doctrine, but the enterprise was characterized as purely intrastate commerce and subject to complete state control, although it was recognized that interstate transmission would be remotely affected. "In no proper sense," said the Court, "under the facts here disclosed, can it be said that sale and delivery of gas to their customers at burner-tips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their local business. . . . Interstate movement ended when the gas passed into local mains."[37] The fact that permanent physical connections permitted the gas to pass freely from the transporting company's mains into those of the distributing companies was considered immaterial. Nothing was said as to reduction in pressure. A distinguishing feature of this case was the intervention of local distributing companies between the transporting company and the consumers. It is not entirely clear whether the Court considered the interstate character of the transaction to have been destroyed by the sale of the gas to the distributing companies, by its passage into the local distributing mains, or by both.

The intervention of the local distributing companies is the sole distinguishing feature between this case and *Pennsylvania Gas Co. v. Public Service Commission.*[38] In holding the transaction to be interstate throughout in the latter case, the Supreme Court approved the *Landon* case and gave to it an interpretation that made the local or interstate character of the business of selling gas to consumers depend solely on whether or not there had been a sale to a local distributing company. On the basis of these cases, if one gas or electric company brings its own supply from outside the state its business of furnishing the commodity to local consumers will be interstate commerce throughout. If another company does exactly the same business, and its supply

35. *Ibid.*
36. *Supra* note 15.
37. 249 U. S. at 245.
38. The gas was sold by the transporting company toa local distributing company in West Virginia & Maryland Gas Co. v. Towers, but no point was made of that fact in the decision.

comes from the same outside source by permanent physical connections, but is purchased from a transporting company making delivery within the state or at the border line, its business will be solely intrastate. Both, however, by the cases, will be subject to state control. But an important difference arises from the fact that the former clearly would be subject to the superior power of Congress at any time it might determine to impose its control over the matter, and as an ordinary regulation of interstate commerce. As to the latter, state control normally would be complete, unless by virtue of the doctrine with respect to local transactions "affecting" or "related to" interstate commerce, the federal regulatory power might be brought into operation.

Whether the doctrine of the *Pennsylvania Gas Co.* case was weakened by the case of *Missouri v. Kansas Natural Gas Co.*[39] is not entirely clear. The problem was not necessarily before the Court in that case but the facts were the same as in the *Landon* case and its doctrine was expressly approved. The *Pennsylvania Gas Co.* case was not questioned, but, after referring to both decisions, the Court asserted, in what amounted to dictum, that "the business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies."[40] If any inconsistency was thought to exist between the two cases, it was made quite clear that the Court was in full accord with the *Landon* case.

No subsequent case involving state regulation of rates or service has been before the Supreme Court. In a more recent tax case,[41] however, the issue of interstate or local character of service to consumers was dealt with in a unanimous opinion by Mr. Justice Butler. The doctrine of the *Pennsylvania Gas Co.* case was repudiated, and with it its interpretation of the *Landon* case. Delivery of gas was made in this case by the Hope Natural Gas Company of West Virginia at the West Virginia-Ohio State line and carried at high pressure in the transmission lines of the Ohio Company to its pressure reducing stations. From these it was transmitted at a lower pressure to its local supply mains wherein the pressure was further reduced to that necessary for delivery to consumers. The transportation of the gas from the source of supply in West Virginia to the connection with the Ohio Company's local system was all considered part of interstate commerce. The delivery of the gas at the state line to the company that was ultimately to make distribution to consumers, the gas having been neither reduced in pressure nor entered into the system from

39. 265 U. S. 298 (1924). The issue here involved was whether or not a state could regulate the sale to a local distributing company by a company transporting from another state. This feature will be discussed under C, *infra*.

40. *Ibid.* 309.

41. East Ohio Gas Co. v. Tax Commission of Ohio, 283 U. S. 465 (1931).

which distribution was to be made, was held not to end the interstate transaction. "The mere fact that the title or the custody of the gas passes while it is en route from state to state is not determinative of the question where interstate commerce ends."[42] Whether the transmission through the so-called distribution lines between the reducing stations and the local supply mains was a part of the interstate transmission, or a part of the intrastate business, the Court did not expressly state. But it appears to have been more closely identified with the business of local delivery than with interstate transmission and might well have been so characterized. With the passage of the gas from these intermediary distribution lines into the local supply mains, it was relieved of nearly all of its pressure, its volume was greatly expanded, and it was divided into numerous tiny streams by which it passed into the service pipes on the consumers' premises. This process was thought by the Court, not merely to characterize it as interstate commerce of a local nature as in the *Pennsylvania Gas Co.* case, but to completely put an end to the interstate character of the commodity and subject it to complete state control. This was said to be "like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail."[43] The early state cases that had employed the original package doctrine to reach the same result were given approval.[44] "It follows", said the Court, "that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce, but is a business of purely local concern exclusively within the jurisdiction of the state."[45] This was in direct repudiation of the doctrine of *Pennsylvania Gas Co. v. Public Service Commission* and that case was expressly disapproved.[46]

While the *East Ohio Gas Co.* case involved taxation and the *Pennsylvania Gas Co.* case had to do with regulation, and different considerations may control the results in the two types of cases, the same problem as to determination of interstate or intrastate character of the business was presented in both cases. The Ohio tax statute applied in terms only to "intrastate business," and left

42. 283 U. S. at 470.
43. *Ibid.* 471.
44. State v. Flannelly, West Virginia & Maryland Gas Co. v. Towers, both *supra* note 7.
45. 283 U. S. at 471.
46. The Court asserted that the Pennsylvania Gas Co. case had been decided on the basis of a theory not entirely consistent with the views expressed in Public Utilities Commission v. Landon and in Missouri v. Kansas Natural Gas Co., and intimated that, had the same considerations been there presented with respect to the ending of interstate commerce by the passage of the gas into local distribution systems, a different conclusion might have been arrived at. Whether the effect of this case in its repudiation of the Pennsylvania Gas Co. case is to be taken in a restricted sense, because the one case involves regulation and the other taxation, is not entirely clear. This matter is further discussed *infra* in Part III dealing with state taxation.

no room for basing the validity of the tax on an absence of discrimination against transactions held to be interstate. In so far as this decision commits the Court to a repudiation of the earlier case when matters of regulation are involved, it closes the door to control by the federal government of rates to consumers as a part of its ordinary regulation of interstate commerce which had theretofore been left open. That federal regulation of such local rates and service might be attempted as incident to the proper control of that which is interstate in a way analogous to the regulation of intrastate transportation rates by the Interstate Commerce Commission seemed highly improbable at the time this case was decided. The fundamental distinction between the regulation of rates for service and of transportation rates, and the difference in the relation of the two to the interstate business involved, seemed to indicate such a conclusion. But with the far-reaching regulations under the National Industrial Recovery Act of various "transactions . . . affecting interstate . . . commerce," and with the present insistent demands for some type of national control capable of dealing with the widespread interconnected developments of the gas and electric industries, as well as with alleged abuses, beyond the effective competence of the individual states, it is quite possible that federal control on this basis may shortly assume considerable significance.[46a]

There seems to be no conceivable reason why the conclusion arrived at with respect to gas should not be applied in the case of electric current brought from without the state. While we have no Supreme Court opinion on the matter, the doctrine of the *East Ohio Gas Co.*[47] case has been fully applied in recent inferior federal court decisions.[48] As in the Supreme Court decision, the matter under consideration was taxation rather than rates for service, but the question of the interstate or local character of service to consumers was dealt with at considerable length.[49] The reduction of the high-voltage current brought into the state in interstate commerce to many currents of low voltage for sale to consumers was thought to put an end to the interstate character of the transaction. "While electric current can hardly be said to 'come to rest' within a state, its interstate journey ends at the transformer which uses it for

46a. Since this was written the Supreme Court held invalid the National Industrial Recovery Act in a decision calculated to restrict materially the application of the doctrine allowing federal regulation of transactions "affecting" interstate commerce. A. L. A. Schechter Poultry Corporation v. United States, 55 S. Ct. 837 (1935).

47. *Supra* note 41.

48. South Carolina Power Co. v. South Carolina Tax Commission, 52 F. (2d) 515 (E. D. S. C. 1931), affirmed without opinion in Broad River Power Co. v. Query, 286 U. S. 525 (1931); South Carolina Power Co. v. South Carolina Tax Commission, 60 F. (2d) 528 (E. D. S. C. 1932), affirmed in Broad River Power Co. v. Query, 288 U. S. 178 (1933), the commerce clause contention not being presented to the Supreme Court.

49. The statute in question expressly states that its provisions should "not apply to electric power manufactured or generated in another state and brought into this state until such power has lost its interstate character and immunities."

the production of low-voltage currents for use within the state. The situation is the same in principle as the breaking up of an original package. . . ."[50]

The latter of these decisions[51] went somewhat beyond the previous cases and took the position that current not reduced in voltage and not sold to a local distributing company, might nevertheless, lose its interstate character. The broader aspects of the business being carried on were considered and it was found that the company had a great system of lines within the state for the transmission and sale of electric current. Numerous mills, factories and towns were served from this system. In some cases the current was reduced in voltage at the time of its delivery to the purchasers, in other cases it was delivered from the same lines at high voltage. All such lines maintained for the purpose of distribution and sale of electric current throughout the state, whether at reduced or high voltage, were considered parts of the company's local distribution system and not instruments of interstate commerce. "When current brought in from another state is placed on these lines for local distribution and sale, it loses its interstate character. And it makes no difference that delivery is made to the local customer at high voltage."[52] The business was likened to that of a dealer who brings into the state a cargo of fertilizer in bulk and sells it partly at wholesale and partly at retail. In a more or less strained attempt to apply the original package doctrine, the court said that "the quantity of current is measured, not in volts, but in amperes; and, when current is drawn off the lines, the 'original package' is broken and the amperage remaining on the line is reduced."[53] It should be borne in mind that any doctrine or formula for determining when interstate commerce ends and local business begins, such as the original package doctrine, is, after all, merely a convenient test which may be useful to the courts in appropriate cases. But its inapplicability in a particular case is by no means a matter of controlling significance.[54]

The position of the Federal District Court in this case would seem to be out of accord with the attitude of the Supreme Court in *People's Natural Gas Co. v. Public Service Commission of Pennsylvania*.[55] There delivery of gas was received at the state line and carried by the People's Company to various points in Pennsylvania for sale and delivery direct to consumers. At the City of Johnstown delivery was made to a local distributing company, and as to this the Court asserted that it was all a part of interstate commerce. The

50. 52 F. (2d) 515, 525.
51. 60 F. (2d) 528.
52. *Ibid.* 529.
53. *Ibid.* This is quite comparable to the first attempt to apply the doctrine to gas. State v. Flannelly, *supra* note 7.
54. The existence of a distinct original package which has been broken and its contents removed may not control the determination in every case. Baldwin v. Seelig, 55 S. Ct. 497 (1935).
55. 270 U. S. 550 (1926).

language used was sufficiently broad to apply to the deliveries made direct to consumers, however, and the Court may have been merely following the doctrine of the *Pennsylvania Gas Co.* case, since repudiated. Furthermore, it was found that the continuity of service there sought to be compelled could be satisfied out of that portion of the company's supply produced within the state without affecting interstate commerce. Thus the assertion of the Court was not more than dictum. Were it to be considered otherwise, however, there is reason to believe that it may not be followed, unless the repudiation of the *Pennsylvania Gas Co.* case is disavowed. The company was making delivery from its pipe lines to large numbers of consumers in numerous communities before the Johnstown city gates were reached. It was maintaining a large system of lines throughout the state by means of which it was conducting an extensive business, serving innumerable consumers with an essential commodity of everyday use. The business was being conducted in competition with local enterprise, and in exactly the same manner. When the gas entered the company's network of lines maintained as its distribution system within the state, its interstate character would seem to have come to an end.[56] Whether the analogy to the fertilizer dealer referred to above is an apt one or not, it does seem that the business here conducted is more nearly assimilable to that, or even to that of a salesman who carries his goods with him, than to the ordinary case of a wholesale shipment from another state direct to the purchaser. Where new types of commodities and fundamentally different methods of dealing are involved, however, analogies to transactions placed in certain categories in an earlier stage of our development are of necessity incomplete and of very doubtful validity. Instead of analogies, it is rather a matter of judgment from "the established facts and known commercial methods"[57] that enables one to make a satisfactory classification of such transactions. It is upon that basis that the conclusion herein suggested has been arrived at. In any view of the matter, it seems difficult to say that this is interstate commerce national in character and requiring a uniform plan of regulation, to the control of which Congress alone is competent.[58]

Considering this case and the *East Ohio Gas Co.* case together, it becomes clear that no one test is to be applied to determine when interstate commerce

56. For the view that in such a case selling direct to consumers and selling to distributors from the same line are entirely separate and distinct businesses, the former local and subject to state regulation, the latter interstate and beyond the regulatory power of the state, see Erb, *Regulating Wholesale Utility Rates* (1934) 12 N. C. L. REV. 231, 236, 237.

57. Public Utilities Commission v. Landon, *supra* note 7, at 245.

58. Since the South Carolina Power Co. case was one of taxation rather than regulation, and since the scope of state power is wider in that respect, it might be suggested that a differentiation should here be made on that basis and the tax upheld on the theory of such cases as Sonneborn Brothers v. Cureton, 262 U. S. 506 (1923), while regulation would not be permitted. There is nothing in the case to suggest any such distinction, nor in other tax cases to be discussed infra, e. g., East Ohio Gas Co. v. Tax Commission of Ohio, *supra* note 41, and State Tax Commission of Mississippi v. Interstate Natural Gas Co., 284 U. S. 41 (1931).

ends and local business begins. In the one case, sale to the company that is to distribute to consumers is held not to strip the commodity of its interstate character. In the other, delivery by the company that has conducted the transmission from outside the state to a purchaser without reduction of voltage does not make such sale and delivery a part of interstate commerce. In the former situation, however, the method of doing business was to accept delivery at the state line but continue an uninterrupted high-pressure transmission of the gas to the purchasing company's reducing station. It was only after passing these that any deliveries were made, or that the business assumed a local character. In the latter, the company's method of distribution was to tap its high-tension lines and deliver to purchasers, sometimes through transformers at a reduced voltage, sometimes directly at high voltage. But, "applying the cardinal principle that interstate commerce as contemplated by the constitution 'is not a technical legal conception, but a practical one drawn from the course of business' ",[59] it follows that each particular case must be dealt with on the basis of its own peculiar circumstances. On such a basis there would seem to be no reason to quarrel with either decision; and whether the one method or the other be employed, the regulation of rates to consumers, where Congress has not intervened, seems to be a proper matter for state control.

So far as decided cases go, the control of the states over rates and service to consumers of gas and electric light and power current would now appear to be substantially complete, although the commodity being furnished comes from outside the state, and whether furnished to consumers by a local distributing company or by a company transporting it directly from the source of supply in another jurisdiction. Whether the *Pennsylvania Gas Co.* case be regarded as overruled or not, and whatever the ultimate conclusion as to the ending of the interstate character of the enterprise, the results need not be greatly changed. If service to local consumers is held to be a part of interstate commerce, the early determination that it is so far local in its nature as to permit of state regulation until Congress acts to assume complete control can hardly be questioned. But as to the potentiality of complete Congressional control on this basis there can be no room for doubt. If, however, the more recent judicial utterances as to when interstate commerce ends in these enterprises are to prevail, the possibility of Congressional regulation to the extent necessary to supplement inadequate state control and to protecct or foster the interstate aspects of the industries to which the local services are closely related, should not be overlooked.

59. Minnesota v. Blasius, 290 U. S. 1, 7 (1933); Swift and Company v. United States, 196 U. S. 375, 398 (1905).

C. Wholesale Contracts and Intercorporate Relations

Perhaps the most important aspect of the gas and electric industries in which the states have exercised a measure of control in the past, and at the same time the most interesting from the standpoint of the general public because of its direct effect upon all consumers, has been the matter of regulation of rates. Those rates which the consumer pays, it has been noted, the states have been permitted to regulate, even though the commodity comes from a source of supply outside the state. But one of the most important cost bases entering into a determination of the rate to be charged to the consumer is the cost of the commodity to the distributing company which is selling to the consumer. The effectiveness of the state's regulatory power over local rates may thus depend in large measure upon its ability or inability to control that wholesale purchase price of the commodity. What the state's power in this respect may be must depend upon the nature of the transaction from the standpoint of interstate commerce, whether or not a part thereof, and if so, whether predominantly local or national in character. The cases heretofore considered in which a local distributing company intervened have all held that interstate commerce came to an end, by delivery to the local company,[60] by entrance of the commodity into the local distribution system,[61] or by its reduction in pressure or voltage preparatory thereto.[62] In any case it seems to be after the consummation of the wholesale transaction between the transportation company and the distributing company. Whatever test is applied, then, to determine the point of time at which interstate commerce ends and the local business begins, the wholesale transfer would seem to fall within the former category. Such has been the uniform attitude of the courts from the outset. The sole controversy in this respect has been as to whether the transaction, although a part of interstate commerce and clearly within the federal regulatory power, is so far identified with the local service as to be subject to state regulation in the absence of action by Congress, or is a part of that commerce which is national in character and within the exclusive domain of the federal government.

Control of such wholesale rates is likely to be much more frequently of immediate concern to the state into which the commodity is being transmitted and in which it is to be supplied to consumers than to the state of its origin. That both states may feel impelled, under certain circumstances, to undertake such regulation as a means of protecting important local interests is evidenced by Supreme Court decisions. The state of destination not infrequently finds

60. Public Utilities Commission v. Landon, *supra* note 7.

61. South Carolina Power Co. v. South Carolina Tax Commission, 60 F. (2d) 528 (1932); West Virginia & Maryland Gas Co. v. Towers, *supra* note 7.

62. East Ohio Gas Co. v. Tax Commission of Ohio, *supra* note 41; South Carolina Power Co. v. South Carolina Tax Commission, 52 F. (2d) 515 (1931).

this the most important single element of expense to be taken into account in the determination of a rate base for the utility whose service to consumers it seeks to regulate. Where municipalities maintain their own distribution systems and purchase their supplies from transportation companies for delivery at their own city gates, this charge becomes a controlling factor in their ability to furnish their citizens adequate service at reasonable rates.

The leading case from the point of view of the state of destination is *Missouri v. Kansas Natural Gas Co.*[63] The business of the gas company was conceded to be almost wholly interstate commerce, transporting natural gas by pipe lines from the source of supply in Oklahoma into Kansas and Missouri and there selling and delivering it in wholesale quantities to local distributing companies supplying consumers in numerous communities in both states. Contrary to the attitude of the Kansas Supreme Court, the Supreme Court of the United States took the position that such sales were inseparable parts of a transaction in interstate commerce essentially national in character, and that the enforcement by the state of a selling price placed a direct burden upon such commerce "inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve." It was said to be as though the state commission "stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the state and before it had become part of the general mass of property therein."[64] The transportation, sale and delivery were thought to constitute an unbroken chain, fundamentally interstate from beginning to end. By way of contrast with the *Pennsylvania Gas Co.* case where the transporting company sold and delivered directly to consumers, it was asserted that the paramount interest was "not local but national, admitting of and requiring uniformity of regulation. Such uniformity, *even though it be the uniformity of governmental non-action* (italics supplied), may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned."[65] Substantially the same set of facts had been before the Court five years before in the *Landon* case where the question at issue was the state's power to regulate the sale by the local distributing companies to consumers and where it was asserted by way of dictum that such wholesale transactions would be beyond the bounds of state control.[66]

That, in general, the transportation of legitimate articles of interstate commerce across state lines and their sale by previous contract in the state of their destination constitute parts of that type of interstate commerce which is considered to involve interests of a national character and to be beyond the

63. 265 U. S. 298 (1924).
64. *Ibid.* 308.
65. *Ibid.* 309.
66. *Cf.* People's Natural Gas Co. v. Public Service Commission, supra note 55, at 554, 555.

power of such state to control, has long been well established.[67] That the transaction here in question is properly placed within that category seems hardly open to serious doubt. The fact, which all will no doubt concede, that the business is one which, in the interest of the public, should be subjected to regulation by some public authority, does not bestow upon the states a power which otherwise Congress alone is competent to exercise.

That the same doctrine as here asserted with respect to natural gas would be completely applicable to a similar transmission and sale of electric light and power current seems quite obvious. Only three years after the *Kansas Natural Gas Co.* decision the doctrine was given such application from the standpoint of the state of origin in *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co.*[68] The Narragansett Electric Lighting Company of Rhode Island, engaged in generating electric current in that state and selling it to local consumers, was under contract to supply the needs of the Attleboro Company of Massachusetts at a specified rate for a stated period of years. Current was delivered under the contract at the state line and metered at the plant of the Attleboro Company in Massachusetts. After some years of operation the Narragansett Company filed new schedules of rates with the Public Utilities Commission of Rhode Island, increasing the charge to the Attleboro Company and seeking the authority of the commission to put them into effect. An investigation by the commission disclosed that the Narragansett Company had been operating at a loss under the contract rates, and its rates to its local customers in Rhode Island, of which there were more than 70,000 and to whom more than 97 per cent. of its product was sold, yielded a fair return, and that continued operation under the contract rates would be detrimental to the general public welfare by preventing the company from performing its full duty to its local customers. Accordingly, an order was made putting the new rates into operation. Thus was squarely raised the issue whether a state, in the regulation of one of its public utilities, may, for the protection of the interests of its own inhabitants, so regulate the interstate business of the company as to prevent it from disabling itself from furnishing adequate local service at reasonable rates. The issue thus raised is probably quite as important for the state of origin as that in the *Kansas Natural Gas Co.* case for the state of destination. In both cases the effectiveness of the state's power to so control the gas and electric companies operating locally within its borders as to protect the interests of its own inhabitants in fair rates and

67. Bowman v. Chicago & Northwestern Railway Co., 125 U. S. 465 (1888); Leisy v. Hardin, 135 U. S. 100 (1890); Minnesota Rate Cases, 230 U. S. 352 (1913).

68. 273 U. S. 83 (1927). This is the first case in the Supreme Court, or any federal court for that matter, in which it was necessary to decide whether the transmission of electricity across state lines constituted interstate commerce. That was assumed, however, on the basis of Mill Creek Coal & Coke Co. v. Public Service Commission, *supra* note 3, and on what was considered the complete analogy to the gas cases, without discussion.

efficient service is very vitally involved. It was contended in the *Attleboro* case that the Rhode Island Commission could not effectively exercise its function of regulating rates and service by the company to local consumers without also regulating the rates in question; that if the Narragansett Company were permitted to continue to supply the Attleboro Company at a loss it would tend to increase the burden upon local consumers and impair the ability of the company to give them good service at reasonable rates. It was therefore asserted that the order of the commission should be sustained as being essentially a local regulation necessary for the protection of local interests and affecting interstate commerce only indirectly and incidently. Thus considered from the point of view of the state it may well appear to be a matter predominantly of local concern. This was especially emphasized in the *Attleboro* case because the great bulk of the company's business was purely local in character. The principle involved, however, would seem to be the same whether much or little of the company's business were of the interstate variety. Such was the attitude of the Court.

Viewed from the standpoint of the particular transaction itself, rather than from that of its effect upon the local business within the state, it assumes the form of a purely interstate transaction. The order in question fixes the price at which a company in one state may sell and deliver in wholesale quantities a legitimate article of interstate commerce to a purchaser in another state. It is not the sale direct to consumers in the conduct of a local business as in the *Pennsylvania Gas Co.* case, but an interstate wholesale delivery preparatory to such local resale to consumers by the purchaser, substantially as in the *Kansas Natural Gas Co.* case. Referring to the latter case, the Court said it was immaterial that the Narragansett Company was a Rhode Island corporation and subject to regulation by the commission in the conduct of its local business, or that its business was chiefly of that nature. The test of the validity of such state regulations was said to be "not the character of the general business of the company, but whether the particular business which is regulated is local or national in character."[69] It was further assumed that if the state in which the current was generated could place such a direct burden upon the interstate business on the theory that it would result in an indirect benefit to consumers served by the generating company in that state, the state of destination, by parity of reasoning, might reduce the rates on the interstate business in order to benefit local consumers in that state, with, of course, an impossible situation resulting. "Plainly, however," said the Court, "the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character. The rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests; but if legislation is re-

69. *Ibid.* 90

quired it can only be attained by the exercise of the power vested in Congress."[70]

The mere fact that pressure or voltage may have been reduced before delivery to a local distributing company will not necessarily destroy the purely interstate character of such a wholesale transaction, or bestow upon the state of destination any power to regulate the wholesale delivery. This may appear to be inconsistent with those cases discussed above which find in such changes a basis for applying the original package doctrine by analogy.[71] But here again each case must depend upon its own peculiar circumstances. In *State Tax Commission of Mississippi v. Interstate Natural Gas Co.*[72] the gas company bringing its product into the state made no local sales to consumers but was engaged exclusively in transporting and delivering the gas to local distributing companies in wholesale quantities. In some instances delivery was made at reduced pressure for the accommodation of the local distributor. As such, the reduction was quite properly characterized as incidental to the sale and delivery to the wholesale customer in interstate commerce.[73]

Since the determination of the *Attleboro* and *Kansas Natural Gas Co.* cases, the door seems to be completely closed to any regulation by the states of rates in interstate wholesale contracts, even though the effect upon local rates and service may be tremendously important.[74] With the continued absence of any attempt on the part of the federal government to regulate such wholesale contracts, the motto seems to remain, charge what the traffic will bear.

When it is further considered that by various types of intercorporate relationships the same holding company not infrequently dominates both the company transporting the commodity in interstate commerce and the local distributing company which sells to consumers so as to dictate the terms at which the one is willing to sell and the other is willing to buy, the possibilities of abuse and the extreme difficulties of effective state regulation of local rates are readily apparent. It is here that the wholesale price may be manipulated for the purpose of increasing costs upon which the rate to consumers is to be based, and in this way that price becomes a matter of the most vital importance from the standpoint of state control. From the foregoing study it has been found that *bona fide* wholesale contracts for delivery of gas and electricity

70. *Ibid.*

71. See especially South Carolina Power Co. v. South Carolina Tax Commission, 52 F. (2d) 515, discussed more in detail in Part III, *infra.*

72. 284 U. S. 41 (1931).

73. For a further discussion of this problem see Part III, *infra.*

74. For other cases holding or assuming that only Congress is competent to regulate rates in interstate wholesale contracts, see Western Distributing Co. v. Public Service Commission of Kansas, 285 U. S. 119 (1932); State Corporation Commission of Kansas v. Wichita Gas Co., 290 U. S. 561 (1934); Galloway v. Bell, 11 F. (2d) 558 (Ct. App. D. C. 1926); Re Colorado Interstate Gas Co., P. U. R. 1933 E, 349 (Colo. P. U. C. 1933); Re West Ohio Gas Co., 1 P. U. R. (N. S.) 61 (Ohio P. U. C. 1933).

across state lines are beyond state control, although important local interests may be affected. If all arrangements in the form of such wholesale contracts, though made between interrelated corporate entities, were likewise beyond state competence, the efficacy of state regulatory commissions would be largely destroyed. Until very recently considerable doubt surrounded the matter of effective state regulation in this type of situation. The price which a local distributing company paid for its supply of gas or electric current was said to be one of the fixed costs which a state commission must allow in fixing rates to consumers. That ordinarily this is true, there would seem to be no doubt. But where the distributing company is a subsidiary of the transportation company, or by other intercorporate relationship there is an absence of the ordinary elements of free bargain and sale between them, as a result of which the wholesale price may conceivably be pushed up for the sole purpose of justifying a higher rate to consumers, there seems to be ample reason for allowing the state authority to inquire into the reasonableness of that wholesale rate as an element of the cost of rendering the local service. The Supreme Court has said that valuation for rate making purposes is a matter of "reasonable judgment having its basis in a proper consideration of all relevant facts."[75] That statement would seem to be as applicable to costs of service as to property valuation, and the element here under consideration clearly is a "relevant fact". This is not to say that the state may fix the wholesale rate. That is still beyond its power. But it may thus have the way opened by which it may refuse to allow more than a reasonable amount for this element of cost in arriving at the proper rate base for the service to local consumers. Such a point of view was forecast by the decision of the United States Supreme Court in *Smith v. Illinois Bell Telephone Co.*,[76] where Mr. Chief Justice Hughes asserted that the state might inquire into the reasonableness of the price paid by a local telephone company for equipment being furnished by another company from outside the state, both companies being subsidiaries of the same parent corporation, and that a like inquiry might be made with respect to the price being paid as rental for instruments furnished, and as compensation for certain services rendered, by the parent corporation.[77] Neither of the two companies to which the payments were being made were doing business locally within the state.

More recently the Supreme Court has elaborated upon this doctrine and applied it to the case of wholesale contracts for interstate delivery of natural

75. Minnesota Rate Cases, 230 U. S. 352, 434 (1913).

76. 282 U. S. 133 (1930). For discussion of this problem prior to the Illinois Bell Telephone Co. case, see ELSBREE, INTERSTATE TRANSMISSION OF ELECTRIC POWER (1931) 75, *et seq.*; MOSHER, ELECTRICAL UTILITIES (1929) 119 *et seq.* For a more general discussion of this matter see Ballantine, *Separate Entity of Parent and Subsidiary Corporations* (1926) 60 AM. L. REV. 19; Note (1928) 13 CORN. L. Q. 99.

77. For an earlier case in which the Court allowed the state commission to look through the intercorporate set-up in fixing gas rates, see United Fuel Gas Co. v. Railroad Commission of Kentucky, 278 U. S. 300 (1929).

gas to local distributing companies, in *Western Distributing Co. v. Public Service Commission of Kansas.*[78] The Western Distributing Company, operating a distribution system for natural gas in a city in Kansas, sought an increase in rates to local consumers. Its supply of gas was being furnished at the city gates by Cities Service Gas Company, by which it was brought from a source of supply outside the state.

Since the wholesale contract in such a case cannot be controlled by the state, and since the distributing company is entitled to a fair return, the burden of the wholesale rates must ordinarily be borne by the consumer. Upon such a basis, the requested increase in rates appeared to be well founded. Where, however, the intercorporate relationship between the transporting company and the local distributing company is such as to suggest the possibility of arbitrary wholesale rates as an indirect means of evading local regulation, the case for some method of relief becomes a very strong one.

In this case a highly complicated intercorporate set-up was found to exist, by which both the transportation and the distribution companies were subject to control by the same holding company. And while it was admitted that the state commission could exercise no control over the wholesale rate, it was asserted that in order to determine the reasonableness of the requested increase in rates to consumers, inquiry must be permitted into the propriety of the wholesale rate as one of the costs necessarily to be considered in fixing local rates. It was contended on the part of the distributing company that such an investigation by the state commission in the alleged effort to determine whether the price paid for its supply was fair and reasonable, amounted to an indirect attempt at regulation of the wholesale contract and an invalid interference with federal control over interstate commerce. To this contention, Mr. Justice Roberts gave what appears to be a complete answer, and in so doing made possible a measure of control by the states of a difficult problem which has recently come to assume a very considerable importance.

> "Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that, if appellant desired an increase of rates, it was bound to offer satisfactory evidence with respect to all the costs which entered into the ascertainment of a reasonable rate. Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arms' length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market

78. 285 U. S. 119 (1932). This case is followed and the doctrine again applied in Dayton Power and Light Co. v. Public Utilities Commission, 292 U. S. 290 (1934); Columbus Gas and Fuel Co. v. Public Utilities Commission, 292 U. S. 398 (1934).

value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished, and thus to make such unfair charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such a fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction."[79]

The appellant company contended that by its showing of an inability to secure a lower rate for a similar supply from any other source, together with certain other facts, it had made a *prima facie* case for the reasonableness of the rate charged. But the Court thought that the elements of "double profit and the reasonableness of inter-company charges must necessarily be the subject of inquiry and scrutiny" by the state commission before the matter of the lawfulness of the retail rate based thereon could be satisfactorily determined. To the further contention that the requirement of proofs demanded by the commission, making necessary an extensive valuation of the pipe line company's property and an analysis of its business, placed upon the appellant an unjustifiable burden, it was said that, "in view of the relations of the parties and the power implicit therein arbitrarily to fix and maintain costs as respects the distributing company which do not represent the true value of the service rendered, the state authority is entitled to a fair showing of the reasonableness of such costs,"[80] although that might necessitate a presentation of evidence which would not be required where the parties were dealing at arms' length and where the usual safeguards of bargaining and competition were present.[81]

Thus it appears that the state into which gas and electric light and power current are transmitted may partially protect itself against one of the most

79. 285 U. S. at 124, 125.
80. *Ibid.* 127.
81. For other cases applying the doctrine of Smith v. Illinois Bell Telephone Co. and Western Distributing Co. v. Public Service Commission of Kansas, see State Corporation Commission of Kansas v. Wichita Gas Co., *supra* note 73; Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 292 U. S. 398 (1934); Western Canal Co. v. Railroad Commission, 216 Cal. 639, 15 P. (2d) 853 (1932); Re Cities Service Company, Kan. P. S. C. 1932, No. 13,127; City of Fulton v. Panhandle Eastern Pipe Line Co., P. U. R. 1933 A, 256 (Mo. P. S. C. 1932); Re Columbus Gas & Fuel Company, P. U. R. 1933 A, 337 (Ohio P. U. C. 1932); Re Lone Star Gas Company, P. U. R. 1933 C, 1 (Okla. C. C. 1933); *cf.* New York State Electric & Gas Corporation v. Maltbie, 264 N. Y. Supp. 97, P. U. R. 1933 D, 140 (1933); Re Commonwealth ex rel. Rosslyn Gas Co., 3 P. U. R. (N. S.) 61 (Va. St. C. C. 1933); East Ohio Gas Co. v. City of Cleveland, 4 P. U. R. (N. S.) 433 (Ohio P. U. C. 1934); *cf.* Re Alabama Water Service Co., 1 P. U. R. (N. S.) 166 (Ala. P. S. C. 1933). For a

serious difficulties that may arise from the unregulated wholesale interstate transmission of such commodities. The exercise of this power by the state necessarily has an indirect effect upon the wholesale rate and thus upon interstate commerce of a type held to be national in its nature. This effect, however, would seem to be properly classified as only "indirect and incidental," and the imperative necessity from the standpoint of effective regulation by the state of rates properly within its control would appear to be ample justification for the decisions which sustain it.

For the state of origin no such means of control have yet been presented to the courts, but there would appear to be no insuperable obstacle to its inquiry in a proper case into the adequacy of rates for a commodity sent out of the state, in connection with its consideration of whether established intrastate rates are yielding a fair return.[82] The necessity for such action by the state of origin, however, is likely to arise much less frequently than in the case of the state of destination. Interests involved in intercorporate relations are much less likely to dictate an unduly low rate to a subsidiary than an unreasonably high one, the burden of which may be passed on to the consumer.

If the above assumption with respect to the power of the state of origin to look behind the contract price is sound, both states may protect themselves to a limited extent against an unwarranted demand for increased rates. Neither, however, may be able to prevent the standard of service being thereby affected, except in so far as the lowering of intrastate rates or the refusal to allow an increase may result in a modification of the wholesale rate in question.

D. *State Versus Federal Regulation*

The foregoing discussion is not at all concerned with the relative desirability of state and national regulation, but, assuming an absence of the latter, seeks to mark out somewhat the extent to which the states may con-

discussion of the control to be exercised by the Federal Power Commission over intercorporate relations where one party is a federally licensed hydro-power project, see Re Louisville Hydroelectric Co., 1 P. U. R. (N. S.) 457 (F. P. C. 1933). For similar control by the Federal Trade Commission on the basis of relationship of the activities to interstate commerce, see Federal Trade Commission v. Smith, 1 F. Supp. 247 (S. D. N. Y. 1932). For a case dealing with the power of a state regulatory commission to control rates of a utility receiving its supply under contract with the Tennessee Valley Authority, see Re Tennessee Electric Power Co., 2 P. U. R. (N. S.) 4 (Tenn. R. and P. U. C. 1934).

North Carolina has a statute which authorizes the state commission not only to look beyond the price paid by the distributing company to the transporting company, but also to regulate the price which the local distributing company may be permitted to pay to the affiliated transporting company. N. C. CODE ANN. (Michie 1931)s. 1037 (e).

82. For a case in which a state commission disregarded the contract rate at which a power company was delivering current to a subsidiary in another state, and substituted therefor production cost plus certain percentages for losses and a legitimate profit, in determining whether rates were yielding a fair return, see In re Kansas City Light and Power Co., 8 Mo. P. S. C. R. 223, 276 (1918).

stitutionally act in the regulation of rates and service where the commodities in question come from sources of supply outside the state.[83] No decision of any court necessarily bars the possibility of national regulation, whether the local service be considered a part of interstate commerce local in its nature, or an intrastate transaction affecting and closely related to interstate commerce.[83a] The necessity for some form of effective regulation of both local and interstate aspects of the gas and electric industries cannot well be longer disregarded. The inability of the states, acting alone, adequately and effectively to regulate both is sufficiently demonstrated. The close relation between that which is local and that which is interstate, together with the increasing importance of the latter, points strongly toward the desirability, not to say necessity, of some form of unified control. Problems with respect to the proper administrative machinery for the regulation of transactions of this nature arise, due to this peculiar relation between interstate commerce and local service in gas and electricity, which have not been presented by commercial transactions of an earlier period. Their ultimate solution, whether resulting in cooperative endeavor on the part of state commissions and some newly created federal agency, or complete control by the latter, need not necessarily be controlled either in Congress or the courts, by any narrow conception of traditional doctrines, established with respect to fundamentally different conditions, relative to the scope of state and federal power. When new conditions and needs bring forth new problems, the field in which existing governmental powers properly may be exercised is likely to receive new delimitation. The extent to which such developments are in prospect depend upon the extent to which the enterprises in question have outgrown present methods of control. Numerous factors discussed above bear prominently upon this prospect.

With the great expansion of the already successful long-distance transmission of natural gas, and the announcement, heretofore referred to, of the purported successful solution of the problem of long-distance transmission of electric current, has come increased concern with the inability of the states in the regulation of these enterprises properly to protect the various interests

83. What may be accomplished by means of interstate compacts to control regional operation and development in the transmission of gas and electricity, and regulate rates beyond the competence of a single state, it is too early to determine. A few states have recently provided for entrance into such compacts with neighboring states. For example, a Vermont statute authorizes its public service commission "to enter into compacts . . . with the states of New York, Massachusetts, Connecticut, New Jersey and Pennsylvania, or any one or more of such states . . ., for the purpose of establishing joint regulation and control of rates for electricity and gas transmitted between such states." Vt. Laws 1933, Public Acts No. 115.

83a. This article was on the press prior to the decisions of the Supreme Court in A. L. A. Schechter Poultry Corporation v. United States, *supra* note 46a, and Railroad Retirement Board v. Alton R. R. Co. 55 S. Ct. 757 (1935). These decisions indicate a purpose on the part of the Court to limit rather rigidly federal regulations predicated upon this latter basis.

involved. The greatest single factor in making possible reduction of costs and consequent assurance of low rates to consumers in the light and power industry, is the inter-connection, one system with another in utter disregard of state lines, facilitating the use of all properties with the maximum of efficiency. Any really successful long-distance transmission of electric energy will revolutionize possibilities along this line. If, as one commentator has observed, it will make possible one nation-wide hook-up, it will make feasible the development of water-power projects situated at great distances from the markets. This might well put an end, in large measure, to the dependence upon nearby steam plants in time of low water, as power generated in one part of the country might be transmitted across the continent if needed to supplement the output of a plant in some far removed region suffering from shortage of moisture. If such transmission becomes a practical success, it will not only make possible a hitherto undreamed of interstate development, but, with a corresponding unification of the industry throughout the country, will doubtless lend tremendous impetus to existing demands for some type of unified control of both generating and transmitting facilities.[84]

With such significant possibilities on the horizon, together with what may be expected from such government experiments in the development of cheap and abundant power as the Tennessee Valley Authority, judicial decisions as to constitutionality permitting,[85] there is much food for thought in the President's announced "yardstick" policy of rates for electricity based on the actual cost of generation and distribution, as well as the present

84. Reference was made in the preceding installment of this article, 49 U. of Mo. BULL., LAW. SER. at page 10, note 31, to the reported successful solution of the problem of long-distance transmission of electricity. U. S. News, Jan 28, 1935, p. 16, col. 5. See also Willis, Bedford and Elder, *Constant Current D-C Transmission* (1935) 54 ELECTRICAL ENGINEERING 102. It is to be noted that the success of this project as a practical means of economical transmission over long distances is not yet fully demonstrated and a further period of experimentation will be necessary before final results are definitely ascertained. Personal letter from Mr. Willis, May 6, 1935.

Even if successful economic electrical transmission should continue to be restricted to its present radius of approximately 300 miles, which has resulted in extensive inter-connected regional networks, the demand for unified control would continue, lacking only the added impetus growing out of this new development.

84a. The four billion dollar work relief measure allots $100,000,000.00 to the project of rural electrification, and under date of May 11, 1935, there was created by presidential order the Rural Electrification Administration to function as a part of the work relief program, with broad powers in regard to generation, transmission and distribution of electric energy in rural areas.

85. U. S. District Judge Grubb, in Ashwander v. Tennessee Valley Authority (N. D. Ala. Feb. 22, 1935), granted a permanent injunction to restrain the PWA from making loans to municipalities for the purchase of TVA power, on the ground that there was no constitutional power for the TVA to deliberately generate more power than was needed for its immediate use in order to sell such "surplus" to consumers. PRENTICE-HALL, FEDERAL TRADE AND INDUSTRY SERVICE, 29,534. This case is now pending before the Supreme Court. *Cf.* Re Alabama Power Company, 4 P. U. R. (N. S.) 233 (Ala. P. S. C. 1934).

Congressional proposal for the compulsory dissolution of the holding companies, with certain limited exceptions, and for the placing of all of production and transmission of both gas and electricity on an interstate basis under federal control.[86]

Particularly is this true at the present time in view of the widespread popular interest in the matter, coincident with the publication of a report by the Federal Trade Commission,[87] based on a six year period of study and investigation, which report reveals facts indicating various practises calculated to stimulate greatly an already existing demand for government ownership or strict control.

The gas and electric industries have both been moving rapidly toward combinations and centralization of control. The holding companies, of which we have heard so much in recent years and particularly in recent months, have largely concentrated control in a very few hands. Between 1929 and 1932, sixteen large holding companies controlled more than three-fourths of the entire electric industry in the United States. Other smaller holding companies controlled another 2 per cent. The three largest holding companies in 1932 dominated almost 45 per cent. of the entire industry. United Corporation controlled 19.8 per cent., Electric Bond and Share—13.6 per cent., and Insull—11.1 per cent.[88]

When inquiry is made with respect to interstate transmission, which necessarily is carried on primarily by the larger concerns, the story is even more significant. Of some fourteen billion kilowatt hours crossing state lines in interstate commerce in 1930, which was the peak year prior to 1934, for which definite figures are not available, 98.5 per cent. was controlled by the holding companies, and the three large concerns mentioned above controlled

86. Wheeler-Rayburn Bill, Senate Bill No. 1725, House Bill No. 5423, introduced in both houses February 6, 1935. This bill provides for the immediate registration and strict regulation of all holding companies, and their dissolution by 1940 except that where a company has obtained from the Federal Power Commission a certificate that its continuance is necessary, the Securities and Exchange Commission may allow its continuance on such terms and conditions as it may deem necessary or appropriate in the public interest, or for the protection of investors or consumers.

The bill further provides for the control of generation or production, transportation and distribution of electricity and natural gas in interstate commerce by the Federal Power Commission and the Federal Trade Commission respectively, with specific exception for sale at retail to consumers.

Any discussion of constitutional problems involved in this proposed legislation is beyond the scope of this article.

For the prior exercise of control by the Federal Trade Commission over holding companies based on the relation of the latter's operations to interstate commerce, see Federal Trade Commission v. Smith, *supra* note 81; note (1932) 81 U. OF PA. L. REV. 90.

87. FEDERAL TRADE COMMISSION, VOL. 72-A, UTILITY CORPORATIONS (1935).

88. FEDERAL TRADE COMMISSION, PUBLIC UTILITIES RELEASE NO. 246 (January 10, 1935) 6.

69.9 per cent.[89] In the case of natural gas the story is not greatly different, with the added fact that in many instances the same holding company dominates a large portion of both the gas and electric industries, particularly in their interstate aspects.

Perhaps the most arresting feature of this recent report by the Federal Trade Commission is its story of competition among the larger holding companies for domination in this major public utility field, which has become so keen that some concerns are willing to pay fabulous prices to gain control of lesser companies. An extreme example is cited of a successful bidder paying $472.03 per share for the stock of a company which accountants of the Commission computed to have a book value of $2.97 per share.[90] Thus it paid 159 times its value to prevent a competing holding company from getting control. Other less extreme cases are listed, all of which are described in the report as being typical of the competitive situation now existing among the holding companies for control of desirable individual operating properties.

That the situations described above cannot well fail to have substantial effect upon ultimate rates to consumers seems hardly open to question.[91] Fortunately for any discussion of rates, the Federal Power Commission is just now in the process of completing a survey of electric rates covering every community of 1000 or more population in the whole country. The great variation in rates revealed by this report, part of which is now available,[92] is little short of astounding. In the larger cities of 100,000 or more population the charge for 15 KWH varies from 60 cents for Cleveland, Ohio, to $1.71 for Miami, Florida, and for 40 KWH the same cities show a spread from $1.31 to $4.18. For 100 KWH Tacoma, Washington, is low with a charge of $2.40, with Jacksonville, Florida, having a charge of $7.00. For 250 KWH Tacoma charges $3.90 and Yonkers, New York, $15.85, and for 500 KWH the same cities charge $6.40 and $28.35 respectively.[93]

These rates show such extreme variation between high and low, particularly in many instances between communities similarly situated and possessing the same general characteristics, that no doubt something besides the necessary variables in the various cost factors in different localities is responsible. That such is true is strongly indicated by the fact that in the six month period from July 1, 1934, when the survey was started, to January 1, 1935, 60 cities

89. *Ibid.* 7.

90. FEDERAL TRADE COMMISSION, PUBLIC UTILITIES RELEASE NO. 247 (January 12, 1935) 3.

91. The fact that combinations and consolidations have frequently been followed by lowered rates does not belie this suggestion.

92. FEDERAL POWER COMMISSION, ELECTRIC RATE SURVEY, RATE SERIES NO. 1 (1935).

93. *Ibid.* 19. Quite similar variations are found in comparing cities between 50,000 and 100,000 population. Comparative figures for small communities have not yet been made available.

out of the 191 included in this first preliminary report were given substantial rate reductions with an estimated annual saving to consumers of approximately $5,640,000.00. Quite a number of othe rate reductions were put into effect between the passage of the Senate Resolution in April calling for the survey and July 1st, when the work got under way, and are not tabulated in this report.[94] Similar reductions are continuing, many companies suddenly making the discovery that it has now become possible to pass on to their customers certain savings in the costs of their operation, some of which discoveries, one may well believe, might never have been made had it not been for this survey. The coincidence of these widespread reductions with this comparative rate survey can hardly have been entirely accidental.

How much, if any, connection there may be between a possible need for further rate reductions and the domination of the holding companies in this field, it is beyond the scope of this paper to undertake to discuss. That the present demand, both popular and official, for their compulsory dissolution is likely to result, at least, in more or less extensive regulation seems highly probable. Operating in a field in which no sort of regulation has been imposed by the federal government, they have likewise escaped state regulation almost completely, either because of their interstate operation, or because of the particular nature of their activities by which they have been excluded from the classification of public utilities.[95]

If all of the factors herein discussed be considered in retrospect, the probability of important change in the matter of regulation is measurably increased. Noteworthy forces pointing in this direction are the tremendous increase in production and interestate transmission of both natural gas and electric energy; the increasing dependence of all classes of the population upon their use for both domestic and industrial purposes; the recent improvements and perfections in successful long-distance low-cost transmission promising to make available in a practical way the vast hitherto undeveloped water power facilities of the country for the generation of electrical energy; the recent revelation of holding company practices giving rise to and coincident with both a popular and a governmental demand for the compulsory dissolution of such companies; the great rate variations from place to place revealed by the Federal Power Commission's survey of electric rates accompanied by widespread reductions demonstrating that great reductions are possible; the President's announcement of his "yardstick" policy of electric rates based on the actual cost of generation and distribution; the Tennessee Valley Authority experiment in government operated large-scale production, low priced consumption which, constitutional interpretations permitting, is only just well

94. *Ibid.* 7.
95. FEDERAL TRADE COMMISSION, PUBLIC UTILITIES RELEASE NO. 247 (January 12, 1935) 2.

under way; the complete inability of the states to control the important interstate wholesale contracts particularly complicated by extensive interrelations, one corporation with another, part of which are beyond the state's jurisdiction, resulting in what is widely recognized as a breakdown of the always inadequate state control; the widespread demand for government ownership and operation; and finally the greatly increased tendency to expand federal regulation to matters affecting local conditions in the states as manifested by legislation of the past two years. A combination of these many factors, and possibly there are others, indicates that we are probably on the threshhold of important changes by way of governmental relation to operating enterprises in this increasingly important public utility field. Many are now convinced that the only possible way to have effective regulation and adequate protection of the consumer against exhorbitant rates, as well as properly to protect investors and safeguard the development of the natural resources affected, is for an agency of the federal government, similar to the Interstate Commerce Commission, with power to deal with all factors involved, to assume the function of regulation and control. Whether the future may see this demand realized, or whether the earlier suggestion of cooperative endeavor between state commissions and some federal agency may ultimately prevail,[96] one thing does appear to be strongly indicated, and that is that sole reliance upon state regulation is not likely much longer to obtain.

96. It should be noted that legislation now pending expressly excludes from federal control retail sales to consumers. *Supra* note 86.