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DISMISSAL OF ACTIONS BEFORE THE ILLINOIS COMMERCE COMMISSION

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Motions to dismiss seemingly are innocuous. Most administrative agencies, such as the Illinois Commerce Commission, hear matters on complaint.[1] For example, one party may complain of another as to some violation of a rule or statute administered by the agency which adversely affects the complainant.[2] Motions to dismiss such complaints, therefore, as in general civil practice, might be expected to be relatively common and routine.

Nevertheless, the statutory authority as to such motions may be unclear. For example, the Illinois Public Utilities Act treats the whole subject of dismissal in a matter of fact manner which can be characterized as "broadly obscure." Section 2 provides in relevant parts:

> The Commission may adopt reasonable and proper rules and regulations relative to the exercise of its powers, and proper rules to govern its proceedings, and to regulate the mode and manner of all investigations and hearings, and alter and amend the same.[3]

The only relevant rule adopted by the Commission relating to motions is rule VII, which merely states that:

> Motions may be presented requesting . . . the dismissal of improper parties, the dismissal of the proceeding for want of jurisdiction or want of prosecution, . . . or such other relief or order as may be appropriate.[4]

Indeed, about all that is fairly certain is that the Commission does have the power to dismiss complaints filed with it.[5]

In adjudicatory-type administrative proceedings, under both case law and statute, certain formal requirements traditionally have structured the respective roles of agency and court: gen-

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[1] The Illinois Commerce Commission administers the Public Utilities Act, ILL. REV. STAT. ch. 111⅔, §§1-10.19 (1967), under which it exercises broad jurisdiction over public utilities. It also administers other provisions, including the Electric Supplier Act, ILL. REV. STAT. ch. 111⅔, §§401-16 (1967), and the Motor Carrier of Property Act, ILL. REV. STAT. ch. 95½, §§282.1-30 (1967).

[2] The Illinois Public Utilities Act states that "Complaint may be made by the commission, of its own motion or by any person or corporation, chamber of commerce, board of trade, or any industrial, commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation by petition or complaint in writing, setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the commission." ILL. REV. STAT. ch. 111⅔, §68 (1967).

[3] ILL. REV. STAT. ch. 111⅔, §8 (1967).

[4] Rule VII, Rules of Practice, First Amended General Order 154, Illinois Commerce Comm'n (1960).

[5] Illini Coach Co. v. Commerce Comm'n, 408 Ill. 104, 114, 96 N.E.2d 518, 523 (1951).

erally, the agency must hold a hearing and make findings of fact, while the court exercises a limited scope of review. Such requirements have been established in recognition of the administrative agencies' "expertise" and purposes.

Dismissal of agency proceedings could arise at preliminary stages, such as before any hearing is held or before hearings are completed; or it could arise at the conclusion of full evidentiary hearings. Because of its statutory indefiniteness, the motion to dismiss may be susceptible to a relaxation of these formal requirements and the respective agency and court boundaries which they help to define, particularly in the situation where a motion to dismiss a complaint has been filed before completion of hearings.

Such "prehearing" dismissal can be viewed with respect to three of these formal requirements and traditional problem areas in such function allocation — hearing, findings, and judicial review. The primary questions which arise are:

1. Can the Commission dismiss a complaint without holding a hearing?
2. Can the Commission grant a motion to dismiss without making findings?
3. When the Commission dismisses a complaint, without holding a hearing, or without making findings, can the reviewing court hold its own *de novo* hearing or make its own independent findings?

MOTIONS TO DISMISS AND THE RIGHT TO A HEARING

The constitutional right to a fair hearing, as a fundamental requirement of due process, is generally recognized where an administrative agency exercises its adjudicatory powers.[6] This principle has been reiterated by the Illinois Supreme Court in numerous cases.[7]

A corollary is also recognized. In the quasi-judicial decision-making process, an agency must base its findings only upon evidence in the record and nothing can be treated as evidence unless introduced as such at a hearing.[8]

However, aside from any constitutional imperative, the Illinois Commerce Commission is required, under the Public Utilities Act of Illinois, to hold formal hearings in a variety of circumstances. Thus, the Commission may allow new rates filed

[6] Morgan v. United States, 304 U.S. 1, 14-15 (1938). *See also* Railroad Comm'n v. Pacific Gas & Elec. Co., 302 U.S. 388, 393-94 (1938); West Ohio Gas Co. v. Public Util. Comm'n, 294 U.S. 63, 70 (1935).

[7] *E.g.*, Smith v. Dept. of Registration & Educ., 412 Ill. 332, 344, 106 N.E.2d 722, 728 (1952).

[8] Rockwell Lime Co. v. Commerce Comm'n, 373 Ill. 309, 26 N.E.2d 99 (1940), *cert. denied*, 311 U.S. 660.

by a utility to go into effect without suspension. However, if it suspends the rates, it must hold a formal hearing before it may exercise its power to fix just and reasonable rates.[9] Similarly, only after a formal hearing may the Commission find existing rates to be unjust, unreasonable, or discriminatory, and exercise its power to fix reasonable and proper rates.[10] Under section 42, only after a formal hearing may the Commission fix reasonable joint rates or the division of revenues from joint rates.[11] Again, the Commission's power to issue certificates of convenience and necessity is based upon an express hearing requirement.[12] In addition, section 69 of the Act provides for general hearing and findings requirements in complaint cases:

> At the time fixed for any hearing upon a complaint, the complainant and the person or corporation complained of, and such persons or corporations as the Commission may allow to intervene, shall be entitled to be heard and to introduce evidence. . . . At the conclusion of such hearing the Commission shall make and render findings concerning the subject-matter and facts inquired into and enter its order based thereon. . . .[13]

The necessity for a hearing prior to rulings on the merits in adjudicatory-type proceedings is understandable. Few applicants, for example, could tolerate the denial of rates or certificates of convenience and necessity without an opportunity to be heard. Do these constitutional and statutory requirements apply, however, when an agency merely dismisses a complaint or petition, without allowing or denying the relief sought?

Commonly, as in civil actions generally, dismissal may be granted for a variety of reasons, such as lack of jurisdiction and failure to state a cause of action or claim for which relief can be granted.[14] Where a complaint fails to allege matters showing proper jurisdiction in the Commission over the subject matter or the parties, neither the Commission nor the parties should be troubled by time-consuming, expensive hearings. For example, should an individual file with the Commission a personal injury action against a utility, the agency should be able to dismiss it without conducting hearings. Thus, evidentiary hearings obviously should not be necessary upon the filing of every complaint, where on the face of the complaint, jurisdiction is lacking.

On the other hand, defects sufficient to justify dismissal frequently are not "apparent" on the face of the complaint and the basis or lack of basis for dismissal can be determined only

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[9] ILL. REV. STAT. ch. 111⅔, §36 (1967).
[10] ILL. REV. STAT. ch. 111⅔, §41 (1967).
[11] ILL. REV. STAT. ch. 111⅔, §42 (1967).
[12] ILL. REV. STAT. ch. 111⅔, §56 (1967).
[13] ILL. REV. STAT. ch. 111⅔, §69 (1967).
[14] *See, e.g.*, §§45 and 48 of the Illinois Civil Practice Act, ILL. REV. STAT. ch. 110, §§45, 48 (1967).

upon a hearing and taking of evidence on at least the possible grounds raised for dismissal.

Perhaps the first important case involving a dismissal order by the Illinois Commerce Commission was *Rockwell Lime Company* v. *Commerce Commission.*[15] The Rockwell Lime Company and seven other companies filed a complaint with the Commission seeking a refund of freight overcharges from numerous carriers, including two railroads. The railroads filed a motion to dismiss the complaint on the ground that the Commission lacked jurisdiction because the Interstate Commerce Commission had already issued an order covering the rates in question and "the complaint asked the State Commission to transcend its jurisdiction by nullifying an order of the Federal commission in contravention of the commerce clause of the Federal constitution and the Interstate Commerce act."[16]

The Commission granted the railroads' motion to dismiss, making findings that it lacked jurisdiction to grant the relief sought, and making findings, also, as to why it lacked such jurisdiction.[17] The supreme court applied the standards of section 65 of the Public Utilities Act[18] and reversed the Commission's order, holding that:

> [T]he findings of the Illinois Commission are wholly inadequate to support its conclusion that it lacked jurisdiction to grant the relief sought. The Commission's action in entering an order unsupported by competent evidence was arbitrary, and unreasonable in the extreme and is void.[19]

The court found that the relevant federal commission order had not been offered or received in evidence before the Illinois Commission. "The Illinois Commission could not, therefore, consider it, as its order must be based on evidence presented at the hearing."[20] Therefore, the Commission's findings as to lack of jurisdiction were insufficient because there was no evidence *in the record* as to such lack of jurisdiction.

The court relied on *Atchison, Topeka and Santa Fe Railway Company* v. *Commerce Commission,*[21] which had held that the Commission cannot act on its own information. That is:

> [Its] findings must be based on evidence presented in the case,

[15] 373 Ill. 309, 26 N.E.2d 99 (1940).

[16] *Id.* at 314, 26 N.E.2d at 103.

[17] Specifically finding that the Interstate Commerce Commission had jurisdiction of the rates attacked by complainants, and that it, the Illinois Commerce Commission, did not have jurisdiction to award reparation in this proceeding and thereby override the order of the Federal commission, our commission denied the relief sought, dismissed the cause and ordered it stricken from the docket.

Id. at 317, 26 N.E.2d at 104.

[18] *Id.* at 322, 26 N.E.2d at 106.

[19] *Id.* at 323, 26 N.E.2d at 106-07.

[20] *Id.* at 320, 26 N.E.2d at 105.

[21] 335 Ill. 624, 167 N.E. 831 (1929).

> with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such.[22]

Consistent with *Rockwell Lime,* the court in *Pullman Company* v. *Illinois Commerce Commission,*[23] held that the Commission's failure to hold a hearing on the decisive issue in a case made its order unreasonable and unlawful. Although the case did not involve a dismissal, the Commission's order was predicated upon a jurisdictional point. At the conclusion of an evidentiary hearing the Commission denied rate increases filed by a group of railroads based upon its finding that the carriers had failed to give 30 days advance notice of the proposed filings to the Federal Office of Price Administration. The Commission made no findings of fact as to the reasonableness of the rates, resting its decision solely on the ground that the rates were illegal for failure to give notice.

The supreme court affirmed the lower court's reversal of the Commission's order, finding that there was no evidence in the record whatsoever on the question of notice.[24] Relying on *Rockwell Lime,* the court stated that:

> The Commission's order must be based upon evidence presented at the hearing. Facts conceivably known to the commission but not put in evidence will not support an order.[25]

Therefore, since the Commission based its final order on a matter upon which no evidence was presented — notice to a federal agency — and raised for the first time in the order, its action was "arbitrary and capricious in the extreme."[26]

Both *Rockwell Lime* and *Pullman* follow a procedural due process approach. The Commission's order must be based upon evidence in the record presented at a hearing. A substantive due process approach appears in *Chicago, Burlington and Quincy Railroad Co.* v. *Illinois Commerce Commission.*[27] The railroad had filed an application with the Commission seeking authority to discontinue and abandon operation of two trains. The application was set for hearing. However, on the day of the hearing, when the railroad appeared and attempted to offer proof,

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[22] *Id.* at 638-39, 167 N.E. at 837.

[23] 390 Ill. 40, 60 N.E.2d 232 (1945).

[24] The situation presented by the record is, in short, that the commission entered an order invalidating the proposed rates, charges and tariffs, upon a ground beyond its delegated powers, *without a hearing* upon the question it deemed decisive in the disposition of the application for increased rates, and without notice to the parties involved that it proposed to dispose of the application on a matter not argued and concerning which no evidence was introduced. (emphasis added). *Id.* at 45, 60 N.E.2d at 235.

[25] *Id.* at 46, 60 N.E.2d at 235.

[26] *Id.* at 46, 60 N.E.2d at 235.

[27] 82 F. Supp. 368 (N.D. Ill. 1949).

the Commission "summarily dismissed said application in response to an oral motion by a representative of the Order of Railway Conductors, and without affording to plaintiff a hearing of any kind or character."[28] The court held that dismissal without a hearing was illegal because the railroad would incur a large annual loss from operations of the trains.[29]

Shortly after *Chicago, Burlington and Quincy*, the Illinois Supreme Court gave its first important affirmance of a Commission dismissal order. In *Illini Coach Company* v. *Commerce Commission*,[30] the complaints, filed in 1949, sought vacation of orders of the Commission entered in 1942, by which complainant had been denied a certificate of convenience and necessity for a motor bus carrier route. On respondents' motions, the complaints were dismissed. The 1942 orders were challenged on the ground that the full Commission had not received or read the evidence taken before the hearing examiner, did not hear argument or receive briefs, and could not delegate this duty to an examiner.

The court held that the complaints amounted to a collateral attack on the 1942 orders. Such an attack was improper because it was contrary to the rehearing and appeal procedure prescribed in the Public Utilities Act.

One of the complainant's arguments was that the Commission was without power to strike and dismiss complaints filed with it and has no powers except to grant a hearing and require an answer. The court disagreed, stating:

> This contention, if followed to its logical conclusion, would mean that the commission must hear every complaint filed with it, whether or not it had jurisdiction over the matters alleged.[31]

The court then cited section 8 of the Act, giving the Commission power to make procedural rules, and Commission rule VII which simply allows presentation of motions for the dismissal of the action for want of jurisdiction. It concluded that the complaints "were beyond the jurisdiction of the commission to hear and thus it properly refused to hear them."[32]

On the face of the complaint, the Commission had no jurisdiction because in reality the complaint was against the Commission itself, and no matter was alleged which would require an answer by the nominal parties respondent. "The appellant having failed to exercise its right to review under the statute

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[28] *Id.* at 371.

[29] *Id.* at 376. *See also* Philco Corp. v. F.C.C., 293 F.2d 864 (D.C. Cir. 1961); Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31, 25 N.E.2d 482 (1940); City of Edwardsville v. Illinois Bell Tel. Co., 310 Ill. 618, 142 N.E. 197 (1924).

[30] 408 Ill. 104, 96 N.E.2d 518 (1951).

[31] *Id.* at 114, 96 N.E.2d at 523.

[32] *Id.* at 114, 96 N.E.2d at 523. *See* authority cited notes 3, 4 *supra*.

in apt time, the collateral attack was properly dismissed by the commission. . . ."[33]

Thus, from the broad sweep of *Rockwell Lime,* there is carved in *Illini Coach* an exception to a pre-dismissal hearing requirement. No hearing is necessary where the complaint is actually an improper collateral attack upon an order of the Commission. The principal contention in *Illini Coach* was that the Commission had no power *whatsoever* to dismiss a complaint without a hearing on the merits. This the court rejected because the Commission could not conduct a hearing on a complaint beyond its jurisdiction. On the other hand, while the Commission may have the *power* to dismiss prior to a hearing on the merits, the court did not rule out at least a hearing on the jurisdiction question, where that issue is in doubt.

Asche v. *Rosenfield,*[34] cited in *Illini Coach,* was similar, in that complaints challenging certain orders of the Department of Public Works and Buildings under the Illinois Truck Act were found to be really directed against the Department rather than a carrier. Moreover, it was also found that the Department should have dismissed the complaint for failure of proof by complainants that they were affected by the challenged orders, rather than hearing the case on the merits as it did.

The more recent case of *Antioch Milling Co.* v. *Public Service Co.*[35] is not particularly helpful because it presents a situation entirely different from a motion to dismiss. The court there held that the Commission did not err in permitting proposed rates, filed by the Public Service Company of Northern Illinois under section 36,[36] to go into effect without a formal hearing and without formal findings and order. Under section 36, the Commission may either suspend newly filed rates or allow them to go into effect. Appellants argued that the Commission had to hold a hearing before deciding whether to suspend the rates, *i.e.,* to hold a hearing on whether it should hold a hearing. The Commission had, in fact, held a preliminary hearing to receive views of interested persons, but not a full-scale section 65 hearing. The court held that section 36 referred to a hearing only in the event of suspension and that any hearing on the decision to suspend was within the Commission's own discretion.[37] The two situations, of course, are not comparable because the decision not to suspend does not foreclose rights and remedies of any interested parties. Under other provisions of

[33] 408 Ill. at 114, 96 N.E.2d at 523-24.
[34] 405 Ill. 108, 89 N.E.2d 885 (1950).
[35] 4 Ill. 2d 200, 123 N.E.2d 302 (1954).
[36] ILL. REV. STAT. ch. 111⅔, §36 (1967.)
[37] 4 Ill.2d at 206, 123 N.E.2d at 305.

the Act, for example, they may file complaints as to rates.[38] But a motion to dismiss, if granted, probably forecloses any immediate relief or remedy for the complainant. Likewise, *Antioch Milling* did not involve a complaint at all but was a non-adversary proceeding pertaining to rate schedules filed by a utility wherein the Commission exercised its discretionary powers to let them go into effect without suspension. Thus the court in *Antioch Milling* said that section 65 did not apply and the kind of decision involved did not even require a formal order.

A recent case involving the right to a hearing, but, in fact, irrelevant to the question of the right to a hearing on a motion to dismiss, is *City of Alton* v. *Alton Water Company.*[39] On remand from the Illinois Supreme Court, the Commission reconsidered the issues and entered a new rate order without holding any new hearings. Appellants argued that on remand the Commission was required to hold additional hearings and to receive additional evidence with respect to the various issues, and failure to do so deprived them of due process.

The court rejected the proposition, stating that a remand to the Commission "does not automatically require additional hearings or evidence."[40] The court pointed out that prior to the original order, the Commission had conducted lengthy hearings and appellants had participated fully. "The question in each case is whether additional hearings or evidence are necessary to enable the Commission to comply with the rulings of this court . . . ."[41] The court found that evidence in the record sustained the new order.

The latest case is *Chesterfield-Medora Telephone Co.* v. *Illinois Commerce Commission,*[42] which involved the prehearing dismissal of a complaint before the Commission. A group of small independent telephone utilities filed a complaint against General Telephone Company of Illinois (General) and Illinois Bell Telephone Company (Illinois Bell). They sought to have the Commission determine a fair division of all intrastate toll revenues arising from intrastate toll business interchanged among or jointly handled by the complainants, General and Illinois Bell. In the alternative, the complaint asked the Commission to fix reasonable joint rates which would produce sufficient revenues under the existing basis of division to provide a fair return on the toll departments of all the parties.

Illinois Bell filed a motion to dismiss the complaint as against it, stating six grounds for dismissal, including lack of

[38] ILL. REV. STAT. ch. 111⅔, §§41, 42 (1967).
[39] 25 Ill.2d 112, 182 N.E.2d 665 (1962).
[40] *Id.* at 115, 182 N.E.2d at 667.
[41] *Id.* at 115, 182 N.E.2d at 667.
[42] 37 Ill.2d 324, 226 N.E.2d 855 (1967).

jurisdiction. Thereafter, before holding any hearing on the complaint, the Commission entered a minute order granting Illinois Bell's motion to dismiss. The order did not make any findings, but stated only: "The Commission took the following action: . . . Motion to dismiss as to Illinois Bell GRANTED."[43]

The Illinois Supreme Court held that the Commission properly dismissed the complaint without holding a hearing. The court found that it was apparent from the face of the complaint that the ultimate relief sought by complainants was a larger share of revenues from intrastate toll business handled jointly only with General. It further noted that the Commission was without statutory authority to direct relief against Illinois Bell because it did not participate in the toll business really in question. Accordingly, the court concluded, dismissal of Illinois Bell without a hearing was proper.

> It is apparent from the face of the complaint that Illinois Bell should not be compelled to participate in a hearing in which it had no interest since the controversy concerned the division of revenues from traffic handled by others. Under such circumstances the Commission lacked jurisdiction of Illinois Bell and it properly dismissed without a hearing on the merits. . . . To hold that evidentiary hearings are necessary upon the filing of every complaint and that any company made a party, even though wrongfully, must respond and defend is compelled by neither the statute nor common sense.[44]

Similarly, the court stated, Illinois Bell was not a proper party with respect to the alternative prayer for relief.

A subsequent case, *People ex rel. Pennsylvania Railroad Company* v. *Illinois Commerce Commission*,[45] did not involve dismissal by the Commission, but is relevant to the necessity for a hearing at preliminary stages of the administrative process. Various railroads had modified their operating rule 99 by eliminating a requirement as to certain manual flag protection for the rear of a train. Representatives of the brotherhoods filed joint complaints with the Commission seeking restoration of original rule 99. A series of hearings were held, during which the railroads cross-examined witnesses for the brotherhoods and presented arguments. However, before the railroads had been given an opportunity to present direct evidence, the Commission entered interim orders requiring each railroad to restore original rule 99, pending conclusion of the proceedings.

The court held that the entry of such interim orders without the railroads having an opportunity to present evidence did not violate due process. The court cited the general rule with

[43] Abstract for Plaintiff at 11, Chesterfield-Medora Tel. Co. v. Commerce Comm'n, 37 Ill.2d 324, 226 N.E.2d 855 (1967).
[44] 37 Ill.2d at 327-28, 226 N.E.2d at 857-58.
[45] 237 N.E.2d 514 (1968).

respect to hearings and non-final orders stated in *Lichter* v. *United States*:[46]

> 'The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.' [citation omitted][47]

Consistent with the *Chicago, Burlington and Quincy* case,[48] as well as the dismissal cases, however, the court noted that:

> It may well be that an interim order of the Commission under circumstances differing in material respects from the interim order in this case would require a different holding. For example, an interim order requiring substantial capital expenditure for changes in facilities, or one which would render substantially meaningless a subsequent final order, might require constitutional safeguards preceding the interim order.[49]

MOTIONS TO DISMISS AND THE NEED FOR FINDINGS

Traditionally, the requirement that administrative agencies make findings of fact in adjudicatory or quasi-judicial type proceedings has been an important feature in the allocation of functions as between court and agency. Although it may impose a greater burden upon agencies than upon trial courts, the findings requirement is generally justified on the ground that judicial review of agency action is more limited. That is, findings have their principal utility as an aid to judicial review, and their necessity is inversely correlated with the scope of review.

Findings enable a court to determine whether an agency's decision follows as a matter of law from the facts stated as the decisional basis, and in turn, whether those facts have any substantial support in the evidence in the record. In cases where the doctrine of primary jurisdiction is applicable, findings may give the court assistance by way of expert judgment upon matters entrusted for initial administrative decision or which are in the agency's special expertise. Of particular importance are findings of basic jurisdictional facts which condition proper exercise of agency power. Review of general evidentiary findings would be irrelevant if a court could not determine whether conditions existed for the exercise of agency power, or in some cases, the refusal to exercise such power.

Illinois is emphatic as to the need and purpose of findings. Section 65 of the Public Utilities Act sets forth the legislative command to the Commerce Commission as to findings:

> At the conclusion of such hearing the Commission shall make and render findings concerning the subject-matter and facts inquired into and enter its order based thereon.[50]

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[46] 334 U.S. 742 (1948).
[47] *Id.* at 791-92.
[48] *See* authority cited at note 27 *supra*.
[49] 237 N.E.2d at 516-17.
[50] ILL. REV. STAT. ch. 111⅔, §69 (1967).

Such findings must be based upon the evidence in the record[51] and must be sufficiently specific to enable a court to review the Commission's order intelligently and to determine whether the facts found afford a reasonable basis for the order.[52]

> Orders made by the commission must be based upon findings; and these findings, in turn, must be based upon substantial evidence.[53]

Further, section 65 requires that the Commission make findings of fact upon the principal issues of the case.[54] Included in these are findings as to jurisdictional facts or facts showing the necessary conditions for exercise of agency power.[55] If the Commission fails to make findings of fact,[56] the findings are not sufficiently specific,[57] the findings are conclusionary,[58] or the findings are not based upon evidence in the record,[59] then the order is void.

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[51] Atchison, T. & S. F. Ry. v. Commerce Comm'n, 335 Ill. 624, 167 N.E. 831 (1929). As the court in Rockwell Lime Co. v. Commerce Comm'n, 373 Ill. 309, 26 N.E.2d 99 (1940), stated:

> The decisive question is not whether an order was entered by the Interstate Commerce Commission but is, instead, whether the order of the Illinois Commerce Commission shows that such order was introduced in evidence at the hearing in the present proceeding and afforded a basis for its decision. To hold that the findings in the order of the Illinois Commission need not be based on evidence presented at the hearing 'would mean that,' as the United States Supreme Court well said, . . . 'where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat.'

373 Ill. at 323-24, 26 N.E.2d at 107.

[52] Brinker Trucking Co. v. Commerce Comm'n, 19 Ill.2d 354, 166 N.E.2d 18 (1960). *See also*, Illinois Bell Tel. Co. v. Commerce Comm'n, 414 Ill. 275, 103 N.E.2d 479 (1953); Illinois Cent. R.R. v. Commerce Comm'n, 411 Ill. 526, 104 N.E.2d 796 (1952); Atchison, T. & S. F. Ry. v. Commerce Comm'n, 397 Ill. 406, 74 N.E.2d 885 (1947).

[53] Illinois Commerce Comm'n v. New York Cent. R.R., 398 Ill. 11, 15, 75 N.E.2d 411, 414 (1947).

> [I]nasmuch as the Public Utilities Act has made it mandatory for the commission to embody findings of fact in its orders, it certainly is beyond the range of judicial authority to delve into the record and make a finding of fact in order to support a ruling of the commission.

Peoples Fruit & Vegetable Shippers Ass'n. v. Commerce Comm'n, 351 Ill. 329, 333, 184 N.E. 615, 616 (1933).

[54] Brinker Trucking Co. v. Commerce Comm'n, 19 Ill.2d 354, 166 N.E.2d 18 (1960).

[55] *See, e.g.*, Utilities Comm'n, v. Toledo, St. L. & W. R.R., 286 Ill. 582, 122 N.E. 158 (1919); Commerce Comm'n v. New York Cent. R.R., 398 Ill. 11, 75 N.E.2d 411 (1947).

[56] "When an administrative agency is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed findings. Where lacking, the order, it follows, necessarily, is ineffective." Rockwell Lime Co. v. Commerce Comm'n, 373 Ill. 309, 322-323, 26 N.E.2d 99, 106 (1940). *See also* Chicago & W. T. Ry. v. Commerce Comm'n, 397 Ill. 460, 74 N.E.2d 804 (1947); Peoples Fruit & Vegetable Shippers Ass'n v. Commerce Comm'n, 351 Ill. 329, 184 N.E. 615 (1933).

[57] Brinker Trucking Co. v. Commerce Comm'n, 19 Ill.2d 354, 166 N.E.2d 18 (1960); Kewanee & G. Ry. v. Commerce Comm'n, 340 Ill. 266, 172 N.E. 706 (1930).

[58] Kewanee & G. Ry. v. Commerce Comm'n, 340 Ill. 266, 172 N.E. 706 (1930); Louisville & N. R.R. v. Commerce Comm'n, 353 Ill. 375, 187 N.E. 449 (1933).

[59] Utilities Comm'n v. Toledo St. L. & W. R.R., 286 Ill. 582, 122 N.E. 158 (1919); Illinois Cent. R.R. v. Commerce Comm'n, 411 Ill. 526, 104 N.E.2d 796 (1952).

Generally, cases where the courts have reversed the Commission because of some deficiency in meeting the findings requirement involved action on the merits. And under these circumstances, the apparent absolute necessity for sufficient findings has been stated repeatedly. However, the law may be less certain as to whether the same requirement applies to adjudicatory proceedings where the Commission may act before any hearing on the merits, or a full evidentiary hearing. Of particular relevance in the case of pre-hearing dismissal would be the necessity for findings on the grounds for dismissal, especially those relating to jurisdiction, the existence of a claim for which relief can be granted, and so forth.

An early case was *Utilities Commission* v. *Toledo, St. Louis and Western Railroad Company.*[60] The Board of Trade filed a complaint charging that the railroad company's rates for transportation of grain between two outlying points on its line were unreasonable, and that it had no through route between either point and Chicago, nor any joint through rates with intermediary companies. The Commission, after taking evidence, ordered the railroad, together with others, to establish joint rates to Chicago from its line. The court reversed on the ground that there was no finding nor evidence showing the jurisdictional fact that public convenience and necessity demanded such through routes and joint rates. Thus, the Commission was without power to act.

Similar reversals due to defective findings on "jurisdictional facts" occurred subsequently. In *Kewanee & Galva Railway Company* v. *Commerce Commission,*[61] the court held that the findings in an order granting a certificate of convenience and necessity expressed only a mere conclusion that present service was inadequate and were therefore not sufficiently specific. In *Louisville & Nashville Railroad Company* v. *Commerce Commission,*[62] the finding that the railroad should operate a station as an agency station was not a sufficient finding, but a mere conclusion, because nowhere in its findings did the Commission state any facts which would show why an agency station was required in order to serve the public convenience and necessity.[63]

In another case, the Commission's order contained statements and broad generalizations of the evidence, but it made no findings of fact from the evidence.[64] In reversing, the court noted that the ultimate facts must be found by the Commission

[60] 286 Ill. 582, 122 N.E. 158 (1919).
[61] 340 Ill. 266, 172 N.E. 706 (1930).
[62] 353 Ill. 375, 187 N.E. 449 (1933).
[63] *Id.* at 377, 187 N.E. at 450.
[64] Peoples Fruit & Vegetable Shippers Ass'n. v. Commerce Comm'n, 351 Ill. 329, 184 N.E. 615 (1933).

or otherwise courts will be helpless in determining whether the order is based on the findings.

> Now, inasmuch as the Public Utilities Act has made it mandatory for the commission to embody findings of fact in its orders, it certainly is beyond the range of judicial authority to delve into the record and make a finding of fact in order to support a ruling of the commission.[65]

On the other hand, if the agency makes findings, but they have no relation to the evidence, the order is equally improper. In *Lowden* v. *Illinois Commerce Commission,*[66] the court reversed an order denying parity of rates because the order was in reality not based upon a finding of fact, but constituted a commission-made rule that a joint line rate between the same points must always be higher than a single line rate. "It is plain that the commission did not base its order and findings upon the facts, but predicated them upon a supposed principle of rate-making which disregards parity or equality in fact . . ."[67]

In 1944, the Illinois Supreme Court set aside Commission orders denying railroad rate increases for suburban service in the Chicago area. In sweeping language, the court held that the orders contained no proper and essential findings, which are mandatory under section 65. Besides not containing any findings, the orders were also held to be void because they were not based upon the evidence, but predicated upon matters wholly outside of the evidence in the record. The orders "are in form merely arguments and conclusions based upon assumptions and speculations. . . ."[68]

A similar lack of findings was found in more recent cases. In *Chicago & West Towns Railways, Inc.* v. *Commerce Commission,*[69] the court reversed an order granting a certificate of convenience and necessity to a bus line to invade the field of an existing carrier because the findings necessary to authorize such invasion, such as the ability to serve, of the present carrier, were absent.[70] In *Illinois Commerce Commission* v. *New York Central Railroad Co.,*[71] the court reversed an order requiring installation of protective devices at certain grade crossings. The court held that the Commission wholly failed to state any facts showing the need for such protection, and that the order was void for lack of sufficient findings of fact. For example, there was no finding that public safety, convenience or necessity required it,

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[65] *Id.* at 333, 184 N.E. at 617.
[66] 376 Ill. 225, 33 N.E.2d 430 (1941).
[67] *Id.* at 235, 33 N.E.2d at 436.
[68] Fleming v. Commerce Comm'n, 388 Ill. 138, 156, 57 N.E.2d 384, 393 (1944).
[69] 397 Ill. 460, 74 N.E.2d 804 (1947).
[70] *Id.* at 468, 74 N.E.2d at 808.
[71] 398 Ill. 11, 75 N.E.2d 411 (1947).

or that present protection was inadequate, or that the crossings were extrahazardous. The court stated that the failure to make such "jurisdictional" findings deprived the Commission of power to act.[72] In *Brinker Trucking Company* v. *Commerce Commission,*[73] the Commission granted an application for extension of operating authority as a common carrier. The court reversed on the ground that the order failed to show that the Commission, from the evidence, made specific findings of fact. "This court from such broad generalizations cannot intelligently review the decision of the commission, nor can it ascertain whether the facts on which the order was based provide a reasonable basis for it."[74]

Generally, these cases involved situations where evidentiary hearings were held, but adequate findings were not made. To what extent do these findings requirements apply to dismissal orders? Again, the first important dismissal case is *Rockwell Lime Company* v. *Commerce Commission.*[75] The Commission stated the ground for dismissal — lack of jurisdiction — and made findings as to why it lacked jurisdiction. Nevertheless, the court reversed because the findings in the order were inadequate to support the ground for dismissal and were not supported by competent evidence.[76]

In reaching its conclusion, the court specifically applied section 65 to the dismissal situation.[77] The findings were wholly inadequate because the order of the federal agency relied upon had not been introduced into evidence. Thus, there was no evidence in the record of lack of jurisdiction.[78]

The court rejected the argument that the required findings may be implied from the pleadings. It was urged that the proceedings before the Interstate Commerce Commission were dis-

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[72] *Id.* at 18, 75 N.E.2d at 415.

[73] 19 Ill.2d 354, 166 N.E.2d 18 (1960).

[74] *Id.* at 358, 166 N.E.2d at 20.

[75] 373 Ill. 309, 26 N.E.2d 99 (1940). The subsequent case of Illini Coach Co. v. Commerce Comm'n, 408 Ill. 104, 96 N.E.2d 518 (1951) also involved dismissal, but it did not specifically focus upon the findings requirement and there is no indication that the point was raised.

[76] 373 Ill. 309, 323, 26 N.E.2d 99, 106-07 (1940).

[77] When an administrative agency is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. Where lacking, the order, it follows necessarily, is ineffective.
Id. at 322, 26 N.E.2d at 106.

[78] Competent evidence showing that the Interstate Commerce Commission, in the Chicago Producers case, prescribed and ordered intrastate rates from complainants' plants to destinations in the inner zone is wanting, and, in consequence, the findings of the Illinois Commission are wholly inadequate to support its conclusion that it lacked jurisdiction to grant the relief sought. The Commission's action in entering an order unsupported by competent evidence was arbitrary and unreasonable in the extreme and is void.
Id. at 323, 26 N.E.2d at 106-07.

closed in the amended answer and the motion to dismiss. The court replied that "[t]his cannot be done. An express finding was indispensable."[79]

It was also urged that entry of the order of the Interstate Commerce Commission must be considered admitted because complainants did not deny its issuance in their replication. Again, the court rejected findings by implication, stating that Commission jurisdiction could not be defeated "either by assertions of the defendants or by the failure of complainants to deny such assertions."[80] There being no evidence in the record, the finding as to lack of jurisdiction was insufficient and the order could not be sustained.[81]

Chesterfield-Medora Telephone Co. v. *Illinois Commerce Commission*[82] is the most recent case involving dismissal. The court held that the Commission properly dismissed a complaint, although it held no hearing nor made any findings of fact. Because a hearing was not necessary, the court indicated that findings were not required. "Obviously, findings of fact from a non-existent hearing were not required."[83]

MOTIONS TO DISMISS AND SCOPE OF JUDICIAL REVIEW

By statute, a circuit court reviewing an order of the Illinois Commerce Commission does not exercise general appellate jurisdiction, but rather, a restricted scope of review.[84] Basically, re-

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[79] *Id.*

[80] *Id.*

[81] *Id.* at 323-24, 26 N.E.2d at 107.

[82] *See* authority cited at note 42 *supra.*

[83] 37 Ill.2d at 327-28, 226 N.E.2d at 858.

[84] ILL. REV. STAT. ch. 111⅔, §72 (1967) states in part:

A circuit court to which any such appeal is taken shall have the power, and it shall be its duty, to hear and determine such appeal with all convenient speed. No new or additional evidence may be introduced in any proceeding upon appeal from a rule, regulation, order or decision of the Commission, issued or confirmed after a hearing, but the appeal shall be heard on the record of the Commission as certified by it. The findings and conclusions of the Commission on questions of fact shall be held prima facie to be true and as found by the Commission; and a rule, regulation, order or decision of the Commission shall not be set aside unless it clearly appears that the finding of the Commission was against the manifest weight of the evidence presented to or before the Commission for and against such rule, regulation, order or decision, or that the same was without the jurisdiction of the Commission. If it appears that the Commission failed to receive evidence properly proffered, on a hearing or a rehearing, or an application therefor, the court shall remand the case to the Commission with instructions to receive the testimony so proffered and rejected, and to enter a new order based upon the evidence theretofore taken, and such new evidence as it is directed to receive, unless it shall appear that such new evidence would not be controlling, in which case the court shall so find in its order. Rules, regulations, orders or decisions of the Commission shall be held to be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be upon the person or corporation appealing from such rules, regulations, orders or decisions.

view is confined to the eternal triangle of jurisdiction, sufficiency of evidence and constitutionality.[85]

Similar standards defining a limited scope of judicial review apply, in turn, to the Supreme Court of Illinois on appeals from the circuit court.[86] A classic general statement would be:

> In reviewing an order of the commission, the court is limited to a consideration of the questions whether the commission acted within the scope of its authority, whether it made findings to support its decision, whether the findings and the decision have a substantial foundation in the evidence, and whether constitutional rights have been infringed by the decision.[87]

Therefore, "The act does not authorize this court to put itself in the place of the commission, to determine independently the issues presented, and to substitute its judgment for that of the commission."[88]

Put in another way, the Public Utilities Act requires the Commission to make findings of fact based upon the evidence, and in turn, to make orders based upon the findings.[89] An order cannot be upheld on appeal unless the Commission states its findings or conclusions, drawn from consideration of the evidence in the record, as to the existence of facts upon which the power exercised by the Commission in entering the order is conditioned.

> If the findings support the order, then the court examines the evidence to ascertain if the facts found are supported by the evidence; but if the findings do not support the order, then the order is void and the court is not called upon to examine the evidence to ascertain whether it discloses facts, which, if they had been found

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[85] The only issue presented for its consideration is the reasonableness and lawfulness of the commission's order, upon which issue the court's inquiry is confined to the jurisdiction of the commission, the sufficiency of the evidence, and the preservation of constitutional rights. . . . Additional evidence may not be considered, and the court is without authority to try the case anew upon the record, to substitute its judgment for that of the commission, or in any manner to modify or revise the commission's order. . . . Unless the case is remanded as provided by the statute, namely, if it appears that the commission failed to receive evidence properly proffered, the court is permitted to follow but one of two authorized courses. If the order of the commission is lawful and reasonable, it must be confirmed, if it is not, it must be set aside.

Railroad Trainmen v. Elgin, J. & E. Ry., 374 Ill. 60, 63, 28 N.E.2d 97, 99 (1940).

[86] The Public Utilities Act provides for direct appeals to the supreme court from final orders and judgments of the circuit which reviewed the Commission's order. ILL. REV. STAT. ch. 111⅔, §73 (1967) states:

> Appeals from all final orders and judgments entered by the said circuit court, in review of rules, regulations, orders or decisions of the Commission, may be taken directly to the Supreme Court by either party to the action, within 60 days after the entry of the order or judgment of said circuit court, and shall be governed by the rules applying to other civil cases appealed to said Supreme Court, except that formal pleadings shall not be required.

[87] City of Chicago v. Commerce Comm'n, 356 Ill. 501, 511-12, 190 N.E. 896, 901 (1934).

[88] *Id.* at 512, 190 N.E. at 901.

[89] ILL. REV. STAT. ch. 111⅔, §69 (1967). *See* discussion in text at note 11 *supra.*

> by the commission, would sustain its decision. . . . The commission and not the court is the fact-finding body. The court examines the evidence not to make findings for the commission but to ascertain whether its findings are properly supported.[90]

Where the record before the court does not contain the proper and necessary facts, it is impossible for the court to determine whether the Commission's order is sustained by the evidence.[91]

In summary, it has been established in Illinois, by both statute and case law, that a reviewing court exercises a narrow scope of review on appeals from orders of the Illinois Commerce Commission. Basically, it is restricted to ascertaining (1) whether the Commission acted within the scope of its authority — a jurisdiction question; (2) whether the order is supported by findings having substantial foundation in evidence; and (3) whether any constitutional rights have been infringed by the order. Thus, the court does not conduct a new hearing, or hear evidence, or make its own findings of fact, or substitute its judgment for that of the Commission.[92]

Under the Public Utilities Act, it is obvious that a court reviewing orders appealed from the Commission should not engage in any sort of evidence-taking or fact-finding activity. This prohibition certainly applies to the second of the three areas of review listed above, that is, to the question whether the order is supported by findings having substantial foundation in

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[90] Commerce Comm'n v. New York Cent. R.R., 398 Ill. 11, 15-16, 75 N.E.2d 411, 414 (1947).

[91] Northern Illinois Light & Traction Co. v. Commerce Comm'n, 302 Ill. 11, 20, 22, 134 N.E. 142, 145, 146 (1922).

[92] A very similar scope of review is prescribed with respect to administrative agencies governed by the Administrative Review Act of Illinois. Section 11 provides in part:

> No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.

ILL. REV. STAT. ch. 110, 274 (1967). The leading case of Harrison v. Civil Service Comm'n, 1 Ill.2d 137, 115 N.E.2d 521 (1953), states that the Act does not contemplate broad powers of review. The court cannot weigh evidence, hear new evidence, or make its own independent determination of the facts. It must regard the agency's findings as prima facie correct and can set them aside only if contrary to the manifest weight of the evidence. Subsequent cases have reaffirmed this narrow scope of review and the prohibition against a judicial hearing *de novo*. *See* Pipe Trades, Inc. v. Rauch, 2 Ill.2d 278, 118 N.E.2d 319 (1954); Adamek v. Civil Service Comm'n, 17 Ill. App. 2d 11, 149 N.E.2d 466 (1958). Indeed, apparently the only situations authorizing *de novo* judicial hearings are those in which the statute granting appeal does not limit the scope of review or specifically requires a *de novo* court trial. *See* Bankers Life & Cas. Co. v. McCarthy, 11 Ill. App. 2d 334, 137 N.E.2d 398 (1955); Investors Syndicate of America, Inc. v. Hughes, 378 Ill. 413, 38 N.E.2d 754 (1941). However, in West End Sav. & Loan Ass'n v. Smith, 16 Ill.2d 523, 158 N.E.2d 608 (1959), the court held that a statute purporting to grant a *de novo* judicial trial on appeal from an administrative determination was unconstitutional, violating the separation of powers principle. *See also*, Bruce v. Department of Registration and Educ., 26 Ill.2d 612, 18 N.E.2d 711 (1963).

the evidence. On the other hand, is the court similarly limited in determining whether the Commission acted within its jurisdiction or whether constitutional rights have been infringed? In other words, does the same rule against "trying the question anew" or substituting the court's judgment for that of the Commission apply to jurisdictional and constitutional questions? Or, is the court allowed to conduct, in effect, a hearing *de novo* on these issues? The obvious answer under the statute is no. The prohibition against evidence-taking or substitution of judgment is applicable regardless of the issues raised on review.

However, consideration must be given to the familiar case of *Ohio Valley Water Company* v. *Ben Avon Borough*,[93] and the so-called doctrines of jurisdictional fact and of constitutional fact. According to this principle, a reviewing court may conduct its own *de novo* hearing and may exercise its own independent judgment on certain jurisdictional or constitutional issues. When a fact is the asserted constitutional basis for exercise of the particular power in question, the court will itself weigh the evidence and make a finding of the fact, and may at its discretion take evidence as to that fact.[94] In other words, where the jurisdiction of the administrative agency is questioned or where the issue of unconstitutional deprivation is raised, agency findings, even though supported by evidence, are not conclusive, and the court may hear evidence and make its independent findings of fact and conclusions of law *de novo*.[95]

The evolution of the constitutional-jurisdictional fact doctrine in the United States Supreme Court has followed an uncertain path and its vitality today, on the federal level, is doubt-

[93] 253 U.S. 287 (1920). A water utility charged that the Pennsylvania Public Service Commission's finding of fair value rate base was too low and that rates allowed by the Commission would deprive the utility of a reasonable return and thereby result in confiscation of its property. The Pennsylvania Supreme Court affirmed the Commission's order, finding sufficient evidence to sustain the fair value conclusions of the Commission. The United States Supreme Court decided that the state supreme court had improperly declined the power to determine the issue of confiscation according to its own independent judgment. In other words, the court may properly substitute its judgment for that of the Commission when the question is confiscation. The due process clause of the fourteenth amendment requires that in rate cases, "if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts . . . ." *Id.* at 289. Judicial review limited to whether there was substantial evidence to support the Commission's findings was insufficient to protect the complainant's constitutional rights. Otherwise, the judicial power and function could be circumscribed by an agency defining the constitutional limits of its own power. Thus, the Court held that the utility did not have proper opportunity for an adequate judicial hearing as to confiscation.

[94] For a fine discussion of the doctrine, *see* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965), (hereinafter referred to as *Jaffe*), beginning at 624.

[95] Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 389 (1920).

ful.[96] It is maintained by some that even the principle of independent judicial judgment on fact issues involving constitutional

[96] In the case of Ng Fung Ho v. White, 259 U.S. 276 (1922), the Department of Labor, after hearing, ordered two Chinese residents to be deported. They claimed United States citizenship as foreign-born sons of native citizens. The Court held that they were entitled to a judicial determination of this claim.

> Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. . . . Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.

Id. at 284-85.

In Crowell v. Benson, 285 U.S. 22 (1931), an employer sought to enjoin enforcement of an award under the Longshoreman's and Harbor Workers' Compensation Act, the award being based on the finding that the employee was injured while performing service upon the navigable waters of the United States. The particular jurisdictional facts were that the injury occurred upon navigable waters of the United States and that the relation of master and servant existed. Although the court did not object to administrative determination of claims of employees within the purview of the Act, "[a] different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme." *Id.* at 54. That is, "[i]n relation to administrative agencies, the question in a given case is whether it falls within the scope of the authority validly conferred." *Id.* at 54, n. 17.

Accordingly, even though Congress had created an administrative fact-finding tribunal, the reviewing court could not be deprived of its judicial power to make independent determinations of all fact and law questions where enforcement of constitutional rights was involved. *Id.* at 58-61. Moreover, a *de novo* hearing by the reviewing court on the jurisdictional issue was proper.

> Assuming that the Federal court may determine for itself the existence of these fundamental or jurisdictional facts . . . . We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.

Id. at 63-64.

(It must be pointed out that the particular remedy on review was through injunction proceedings and the Court found no statutory provision confining review to the administrative record.)

Subsequently, in St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936), the court affirmed the dismissal of a suit brought by the stockyards to restrain enforcement of an order of the Secretary of Agriculture setting maximum rates for the Company's services. The stockyards attacked the order as being confiscatory and lacking the support of necessary findings, among other grounds. The Court again reasserted Ben Avon as well as Crowell, and stated that in a rate case, the reviewing court should exercise an independent judgment on the issue of confiscation. *Id.* at 49-52.

On the other hand, the Court was not as dogmatic on the requirement of a *de novo* hearing.

> But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. *Id.* at 53.

Thus, it would appear that St. Joseph Stock Yards modified Ben Avon by emphasizing the presumption of validity which attaches to the expert judgment of the agency. *See Jaffe* at 648. Today it is not altogether certain whether the court may hear new evidence or is limited to the record made before the agency. Some cases suggest that the court is not limited to the record, but may hear new evidence and make its own findings based upon its

rights has gradually evaporated.[97] Others conclude that the practical impact of *Ben Avon* has been reduced, largely by operation of the *Hope Natural Gas* case which eliminates many of the issues on which independent judicial judgment otherwise would be critical.[98]

On the other hand, erosion of the rule in federal cases apparently has not precluded state courts from embracing it. Indeed, most probably consider it to be still alive.[99]

In theory, the jurisdictional fact doctrine is applicable to preserve proper judicial functions in the area of constitutional rights. An agency cannot define its own constitutional limits: this has been and is the court's job. Accordingly, two of the three issues ordinarily within the court's limited scope of review of administrative action lend themselves to the doctrine, that is, whether the Commission acted within the scope of its authority and whether any constitutional rights have been infringed by its decision.

In practice, the dismissal situation conceivably could be conducive to the broader scope of review associated with the *Ben Avon* doctrine, particularly because dismissal may take place at various preliminary or intermediary stages in the administrative process.

Accordingly, attention must now be directed to two questions: (1) has the jurisdictional fact doctrine been embraced in Illinois Commerce Commission cases notwithstanding the limited statutory scope of review; and (2) is the doctrine relevant in the dismissal situation.

A logical starting point is judicial review of Commission orders in rate cases. Inherent in rate-making is the constitutional right to a reasonable return upon present fair value of utility plant used and useful in providing service, and the corollary prohibition against confiscation.[100] Consequently, rate cases,

own record. Other cases suggest the contrary. Actually, the court probably has a choice: it may hear new evidence or remand to the agency. *See Jaffe* at 653.

[97] *Jaffe* at 648. *See* Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940).

[98] F.P.C. v. Hope Natural Gas Co., 320 U.S. 591 (1944), held that on the federal level of rate-making, the particular methods and formula used to fix rates are unimportant as long as the result is just and reasonable.

[99] *See Jaffe* at 648.

[100] The long-established standard in Illinois is that a utility is entitled to charge just and reasonable rates for its public service sufficient to yield a fair return on the present fair value of its property.

Rates are not reasonable when they are so low as to be confiscatory; that is, when they prevent any net operating income. City of Edwardsville v. Bell Tel. Co., 310 Ill. 618, 621, 142 N.E. 197, 199 (1923). On the other hand, a reasonable return is something greater than one not strictly confiscatory. Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31, 57, 68, 25 N.E.2d 482, 495, 500 (1939); Illinois Cent. R.R. v. Commerce Comm'n, 387 Ill. 256, 56 N.E.2d 432, 440 (1944). "Ultimately in every case of this character the question to be determined is: What is a fair and rea-

like *Ben Avon*, are fertile ground for seeds of the jurisdictional-constitutional fact doctrine. Moreover, *Hope Natural Gas* did not change Illinois' status as a "fair value" state or affect the Commission's rate-making formulas previously approved by the courts.[101]

Beginning with the classic *Springfield Gas* decision,[102] however, the cases do not suggest an expansion-minded judiciary. While the focus upon review generally has been upon the constitutional issues, the courts have adhered to the substitution of judgment prohibition. They early decided that fixing of rates was not a judicial function; the courts can only affirm the Commission's order or reverse, but they cannot set any rates.[103]

On the other hand, the courts have not limited review solely to the final order — the allowance or disallowance of particular rates — but have considered the propriety of intermediate findings made by the Commission. For example, in *City of Alton* v. *Commerce Commission*,[104] the lower court set aside the Commission's rate order in part on the ground that the rate base determination was against the weight of the evidence because: (1) the reproduction cost new estimate included an item for general construction overheads; (2) an insufficient rate of depreciation was deducted from reproduction cost new; and (3) the rate base included a cash working capital allowance.

Appellants argued that the circuit court exceeded the proper scope of judicial review. They disputed reversal for errors in computing reproduction cost new less depreciation, when the final fair value finding was not challenged as unreasonable. Thus, "if the final determination is reasonable the courts should not inquire into the separate elements of value which are considered in reaching that finding."[105] The supreme court rejected this objection:

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sonable return upon the present value of the property employed in rendering the service to the public?" Public Util. Comm'n v. Springfield Gas Co., 291 Ill. 209, 234, 125 N.E. 891, 901 (1919).

[101] Illinois Bell Tel. Co. v. Commerce Comm'n, 414 Ill. 275, 287, 111 N.E.2d 329, 336 (1953). *Jaffe* acknowledges that most state court reaffirmations of Ben Avon were subsequent to the Hope Natural Gas case. *See Jaffe* at 651.

[102] Public Util. Comm'n v. Springfield Gas Co., 291 Ill. 209, 125 N.E. 891 (1919).

[103] The court in the *Springfield Gas* decision stated:

> The fixing of rates is not a judicial function, and the right to review the conclusion of the legislature or of an administrative body, acting under authority delegated by the legislature, is limited to determining whether or not the legislature or the administrative body acted within the scope of its authority, or the order is without substantial foundation in the evidence, or a constitutional right of the utility has been infringed upon by fixing rates which are confiscatory or insufficient to pay the cost of operating expenses and give the utility a reasonable return on the present value of its property.

Id. at 213, 125 N.E. at 894.

[104] 19 Ill.2d 76, 165 N.E.2d 513 (1960).

[105] *Id.* at 80, 165 N.E.2d at 516.

> Without power to review the intermediate steps in the administrative decision-making process, effective judicial review would be extremely difficult if not impossible. Neither the statute nor this court's decisions in the rate regulation field indicate that such a result is intended. This court has not confined its review to the Commission's final order but rather, when called upon to do so and with respect for the Commission's expert judgment, it has reviewed the elements of value considered by the Commission in computing present fair value.[106]

Generally, the courts have limited their review of rate base determination to the following questions: (1) what elements are considered by the Commission in fixing fair value rate base; (2) what methods are used to determine the value of these elements; and (3) were the various elements properly weighed in calculating the final product — present fair value.[107] The courts have never "found" what the particular fair value was, or the value of any element such as original cost or reproduction cost new. They have merely reversed. In reviewing the reasonableness of return, the courts have also considered the intermediate administrative steps in measuring return as well as rate base. These include the propriety of various elements of operating expense and revenue as well as the actual percentage return.[108] Here again, the courts have merely reversed.

On the other hand, while the courts do not in form substitute their judgment for that of the Commission in the various fact and value determinations, in actuality they do so to some degree. To the extent that the courts reject intermediate factors considered by the Commission, the courts are substituting their judgment for that of the Commission. For example, if the Commission did not determine a value for reproduction cost new in finding fair value, the court probably would reverse for such failure.[109] The Commission may not have thought that element relevant, yet the court does. These intermediate judgments involve both findings of fact and steps in the exercise of the Commission's expertise.

However, such scope of review, strictly, is not the jurisdictional-constitutional fact doctrine. The courts determine not the finding, but *what* to find. There is some logic for this within the framework of a statutorily limited review. The factors that should be considered in valuing rate base or calculating operat-

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[106] *Id.* at 80-81, 165 N.E.2d at 516.

[107] *See, e.g.*, Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31, 25 N.E.2d 482 (1939); Public Util. Comm'n v. Springfield Gas Co., 291 Ill. 209, 219, 125 N.E. 891 (1919).

[108] *See* City of Alton v. Commerce Comm'n, 19 Ill.2d 76, 165 N.E.2d 513 (1960); Public Util. Comm'n v. Springfield Gas Co., 291 Ill. 209, 125 N.E. 891 (1919).

[109] Public Util. Comm'n v. Springfield Gas Co., 291 Ill. 209, 125 N.E. 891 (1919); Illinois Bell Tel. Co. v. Commerce Comm'n, 414 Ill. 275, 103 N.E.2d 479 (1953).

ing revenues and expenses — the standards to apply — are essentially law questions relating to the ultimate constitutional issue of reasonable return on present fair value. Review of the ultimate issue is practically meaningless without judicial control over the intermediary determinations. There is no doubt that this reasoning allows a relatively broad judicial control over areas of agency expertise and applicable decision-making standards. However, strictly speaking, the courts are not substituting their judgment for that of the Commission in the findings.[110]

Acknowledging that a complete survey of all Commission appeals, in quest of seeds of jurisdictional fact, is beyond this discussion, attention can be directed to another illustrative area conducive to application of the doctrine. Among cases where the court has reversed the Commission for lack of jurisdiction, has the court in any way embraced the *de novo* hearing technique or substituted its judgment for that of the Commission? A general idea of the answer to this question may be gained from the following cases.

In *Mississippi River Fuel Corporation* v. *Commerce Commission*,[111] the Commission sought to regulate a natural gas pipeline company on the theory that its action in selling gas directly to a group of industrial users in Illinois made it a "public utility" within the meaning of the Act,[112] so as to make it subject to the jurisdiction of the Commission. The Illinois Supreme Court held that the company was not a public utility and therefore not within the Commission's jurisdiction. In affirming the circuit court, which had reversed the Commission, it is apparent that the court made its own findings from the record before the Commission, that the company's articles of incorporation expressly provided that it should not be a public utility, and that the company never intended to be a public utility or acted like one.[113]

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[110] A court of equity has jurisdiction in an independent equity proceeding, as distinguished from review on appeal from the Commission, to grant relief against confiscatory rates, for example, when a rate already in force and not in any manner under review becomes confiscatory, Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31, 25 N.E.2d 482 (1939; or when the legislative process of rate-making may not have ended, but the Commission improperly delays action, Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926); Iowa-Illinois Gas & Elec. Co. v. Perrine, 351 Ill. App. 195, 115 N.E.2d 572 (1953). A broader scope of judicial hearing would be expected under these circumstances.

[111] 1 Ill.2d 509, 116 N.E.2d 394 (1953).

[112] ILL. REV. STAT. ch. 111⅔, §10 (1967).

[113] The court in the *Mississippi River Fuel* case stated:

> Apart from this, we think that it is entirely clear from the record that Mississippi has never intended to assume the status of a public utility or professed to devote its property to 'public use.' The record shows that it did not exercise the right of eminent domain in laying its pipelines in this State, and that it has never taken any municipal or other public franchise to sell its gas. It has not established uniform rates for the industries which buy gas from it.
>
> It seems clear to us that Mississippi has consistently and with great

Two observations can be made, however. First, it is important to note that the court's findings were apparently based upon the record before the Commission; thus, the court stated, "[w]e think that it is entirely clear from the record."[114] It is apparent that the court examined the evidence and made its own independent findings on the record before it. Second, the case contains overtones of *Ng Fung Ho*. There, the central issue was the fact of citizenship, whereas here it is the fact of public utility — both matters of status.[115]

In *Commerce Commission* v. *East St. Louis, Columbia & Waterloo Railway Company*,[116] the court held that the Commission had no jurisdiction to annul or modify a contract between railroad companies which apportioned the expense of operation and maintenance of an interlocking plant. The court first noted that, since the Commission derives its power solely from the statute, "all facts necessary to the exercise of such jurisdiction must affirmatively appear from the record."[117] The court acknowledged that under some sections of the statute, the Commission could modify contracts, for example, contracts with respect to rates under section 41.[118] But, the court stated, there was no specific provision with respect to managerial functions or contracts as to operation costs between utilities where rates are not directly involved.

Appellant then argued that the Commission, by reason of its general supervision and plenary jurisdiction over the whole field of service of all utilities, could properly modify an agreement to preserve the adequacy of public service. The court acknowledged this, but stated that although railroads are subject to public control in matters affecting public rights, they are still private corporations. They may contract among themselves and manage their own business, where the public interest or safety and adequacy of service is not affected.[119] Here again, while the court understandably examined the jurisdiction question, it apparently did not engage in any independent fact-finding activity such as possibly was done in *Mississippi River Fuel*. It is interesting to note, however, that the court probably would have acknowledged jurisdiction in the Commission if the contract were alleged to have affected safety or adequacy of public service.

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care confined its industrial gas sales to specific and selected customers, and has done no act by which it has given the reasonable impression that it was holding itself out to serve gas to the public, or to any class of the public, generally.

Id. at 515-18, 116 N.E.2d at 398-99.

[114] *Id.* at 515, 116 N.E.2d at 398.

[115] *See* note 86 *supra* and *Jaffe* at 647.

[116] 361 Ill. 606, 198 N.E. 716 (1935).

[117] *Id.* at 611, 198 N.E. at 718.

[118] ILL. REV. STAT. ch. 111⅔, §41 (1967).

[119] 361 Ill. at 616, 198 N.E. at 720-21.

In two cases, *People ex rel. The Board of Administration* v. *Peoria & Pekin, Union Railway Company*[120] and *Midland Trail Bus Line Company* v. *Staunton-Livingston Motor Transportation Company,*[121] the court held that the Commission had no jurisdiction over issues involving contract rights which were already before the circuit court. It would seem that the jurisdictional fact doctrine was not important here. The actual result was determined by a "race to the controversy," in which the court got there first. Thus, the Commission could not upset a prior judicial determination. Moreover, a contractual right is a judicial-type question in the primary sense, and the Commission really has no primary jurisdiction over it, according to the court. In other words, at best, there was a jurisdictional fact which was immediately apparent without a *de novo* hearing on that issue alone.

In *Brotherhood of Railroad Trainmen* v. *Terminal Railroad Association,*[122] the court held that the Commission had jurisdiction to require a terminal railroad company to use cabooses on cuts of freight cars transported to and from its yards in Illinois, even though the cars involved interstate shipments and even though, since the railroad had yards on both sides of the state line, such cabooses would have to be carried across the line. The court held that this was not a burden on interstate commerce, but a proper exercise of state police power as delegated to the Commission. Obviously, the issues of burden on interstate commerce and state police power were constitutional facts within the realm of the judiciary and the Commission could not purport to make a final determination as to them. Indeed, these are questions where the Supreme Court of the United States is the "final arbiter."[123]

Another case involving essentially a "constitutional fact" is *Illinois Central Railroad Company* v. *Commerce Commission.*[124] A Negro passenger filed a complaint with the Commission charging that she was segregated and discriminated against in one of the railroad's interstate trains. The railroad filed a motion to dismiss after complainant's direct evidence, on the ground of exclusive jurisdiction in the ICC, but the motion was taken with the case. The Commission concluded that the railroad's seating practice was contrary to section 38 of the Public Utilities Act,[125] and the policy of the Illinois Civil Rights Act.[126] It entered a

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[120] 273 Ill. 440, 113 N.E. 68 (1916).
[121] 336 Ill. 616, 168 N.E. 634 (1929).
[122] 379 Ill. 403, 41 N.E.2d 481 (1942), *aff'd,* 318 U.S. 1 (1942).
[123] *Id.* at 408, 41 N.E.2d at 485.
[124] 2 Ill.2d 382, 118 N.E.2d 435 (1954), *cert. denied,* 348 U.S. 823 (1954).
[125] ILL. REV. STAT. ch. 111⅔, §38 (1967).
[126] ILL. REV. STAT. ch. 111⅔, §125 (1967).

cease and desist order. The court held that the Commission could not order an interstate railroad to cease discriminatory seating of passengers because jurisdiction of the issue is exclusively in the Interstate Commerce Commission.[127]

And in the recent case of *United Air Lines, Inc.* v. *Commerce Commission,*[128] the court held that the Commission had no jurisdiction over issuance of securities of an interstate carrier having minimal intrastate service because Commission jurisdiction would result in an undue burden on interstate commerce and an intrusion into an area of overwhelmingly predominant national, not local, interest. The controlling issues here appear to be more appropriate for the court and ultimately for the United States Supreme Court, in that they are constitutional in nature. For example, a weighing of the evidence by the court could be expected on the issue whether local interest outweighs national interest in determining the propriety of state regulation over interstate commerce.

People ex rel. Illinois Highway Transportation Company v. *Biggs*[129] essentially concerned procedural aspects of jurisdiction. It was claimed that the Commission, in 1948, improperly granted a petition for rehearing of certificate orders entered in 1942, contrary to section 67[130] requiring such petitions within a 30-day period after the 1942 orders. The court held that the 1948 order could not be sustained as an order granting rehearing. However, it found that since its real object was to initiate review of the certificates granted in 1942, such action was within section 55[131] which gives the Commission power to alter or modify a certificate. "Its powers under sections 55 and 67 are continuing ones and it may at any time again examine the subject matter and by appropriate procedure take action with respect to it."[132]

A later case, involving the same litigants, was *Illini Coach.*[133] As already discussed,[134] the court there upheld the Commission's dismissal order on the procedural point that the complaint was really a collateral attack upon the Commission's prior order. Since the appeal period had expired, the Commission had no jurisdiction over the collateral attack.

All of the above cases, it would seem, are mere variations of one common theme: that a reviewing court may properly examine the jurisdictional issue. Generally, however, the cases *do*

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[127] 2 Ill.2d at 391, 118 N.E.2d at 439.
[128] 32 Ill.2d 516, 207 N.E.2d 433 (1965).
[129] 402 Ill. 401, 84 N.E.2d 372 (1949).
[130] ILL. REV. STAT. ch. 111⅔, §71 (1967).
[131] ILL. REV. STAT. ch. 111⅔, §56 (1967).
[132] 402 Ill. at 410, 84 N.E.2d at 377.
[133] 408 Ill. 104, 96 N.E.2d 518 (1951).
[134] *See* text at notes 30-33 *supra.*

correlate with the statutory and case law disclaimer of any independent judicial evidence taking or fact finding. In short, a *de novo* hearing is out of the question. Admittedly, there is some hint of judicial fact finding in *Mississippi River Fuel;* but there, the court confined itself to the administrative record and the particular jurisdictional issue arguably was more appropriate to judicial than to administrative determination.[135]

By and large, therefore, it can be concluded that the courts do confine their reviewing function in accordance with the principle that:

> Additional evidence may not be considered, and the court is without authority to try the case anew upon the record, to substitute its judgment for that of the commission, or in any manner to modify or revise the commission's order.[136]

This conclusion is confirmed by the few cases involving dismissal action by the Commission. In *Rockwell Lime,* it will be recalled, the court reversed because the Commission's finding of lack of jurisdiction was not supported by the evidence. It stated that:

> [T]he decisive question is not whether an order was entered by the Interstate Commerce Commission but is, instead, whether the order of the Illinois Commerce Commission shows that such order was introduced in evidence at the hearing in the present proceeding and afforded a basis for its decision.[137]

Accordingly, *Rockwell Lime* would seem to represent a strict adherence to the concept of a narrow scope of judicial review, with the court declining to make *de novo* findings as to the jurisdiction question.

Although the court in *Illini Coach* affirmed dismissal after a thorough analysis of the record, the ground for dismissal essentially was an improper collateral attack upon a prior Commission order.[138] The court necessarily made a detailed analysis in order to determine that the complaints in essence were collateral attacks, but the court did not really embrace the jurisdictional fact doctrine. The complaints themselves alleged certain defects in the prior orders under attack. Thus, the court was faced with a relatively straightforward question which ulti-

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[135] It should be noted, however, that in some circumstances, equitable relief from Commission orders may be available where irreparable harm is sustained or a constitutional right infringed and the statutory remedy of appeal is inadequate to offer protection. A good example is where rates fixed by the Commission are so low as to be confiscatory. *See* Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31, 25 N.E.2d 482 (1939). Although such equity action will be a trial *de novo,* the scope is more narrow than statutory review on appeal, really does not constitute review as such, and is generally limited to the constitutional issue involved, *e.g.,* confiscation.

[136] Railroad Trainmen v. Elgin, J. & E. Ry., 374 Ill. 60, 63, 28 N.E.2d 97, 99 (1940).

[137] 373 Ill. at 323, 26 N.E.2d at 107.

[138] *See* 408 Ill. at 114, 96 N.E.2d at 523-24.

mately was a judicial issue: whether the validity of a Commission order may be challenged by complaint when there is a failure to follow the statutory procedure for attacking such order by filing a petition for rehearing within 30 days and appealing, if it is denied.

Similarly, in *Chesterfield-Medora Telephone Co.* v. *Illinois Commerce Commission,*[139] where the Commission granted a prehearing dismissal and made no findings, the court did not receive evidence and did not conduct a *de novo* hearing. The lack of jurisdiction over Illinois Bell was apparent, the court held, from the face of the complaint. The situation is analogous with *Illini Coach,* to which the court referred.

CONCLUSION

The development of law in the area of dismissal indicates that evidentiary hearings are not required every time a complaint is filed before the Illinois Commerce Commission.

> To hold that evidentiary hearings are necessary upon the filing of every complaint and that any company made a party, even though wrongfully, must respond and defend is compelled by neither the statute or common sense.[140]

Thus, the recent *Chesterfield-Medora* may help to fill an uncertain gap which has existed between the earlier cases of *Rockwell Lime*[141] and *Illini Coach.*[142] In the former, the order of the federal commission which was essential to the Illinois Commerce Commission's finding as to no jurisdiction was not in the record at all. On the other hand, *Illini Coach* indicated that the Commission had the *power* to dismiss cases without a hearing on the merits. The ground for dismissal, however, was basically a question of law, rather than fact. In contrast to *Rockwell Lime,* it was apparent from the face of the complaint in *Chesterfield-Medora,* the court said, that the Commission lacked jurisdiction over Illinois Bell. The controversy concerned division of revenues from business handled by others, and Illinois Bell should not be compelled to participate in a hearing in which it had no interest. Under such circumstances, the Commission "properly dismissed without a hearing on the merits."

Each dismissal situation arises from a different set of circumstances, and it is apparent from the court's language that the hearing requirement in the dismissal case must be a variable. Thus, evidentiary hearings are not essential upon the filing of every complaint and prehearing dismissal will be upheld where

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[139] *See* authority cited at note 42 *supra.*

[140] Chesterfield-Medora Tel. Co. v. Commerce Comm'n, 37 Ill.2d 324, 328, 226 N.E.2d 855, 858 (1967).

[141] *See* authority cited at note 15 *supra.*

[142] *See* authority cited at note 30 *supra.*

the basis is apparent in the pleadings, such as in *Chesterfield-Medora* and *Illini Coach*. On the other hand, where the issue is not clear, the implication from *Rockwell Lime* as well as *Chesterfield-Medora* is that the Commission should hold at least enough of a hearing prior to acting on a motion to dismiss to enable the Commission to make substantiated findings upon the grounds for dismissal.

The cases also show that findings of fact are not required every time a complaint is dismissed. This result follows because without a hearing to receive evidence, no findings of fact properly can be made. Accordingly, the necessity for findings of fact will vary proportionately with the necessity for a hearing. Thus, in a case where the ground for dismissal is apparent on the face of the complaint, there is neither the need for formal findings nor, without a hearing, the evidentiary prerequisite for findings.

Finally, in passing upon Commission decisions the courts have demonstrated their adherence to a narrow scope of judicial review and the prohibition against *de novo* evidentiary hearings even in the dismissal situation. With proper grounds for dismissal apparent in the record, the court will uphold the Commission. But, where the record is bare, as in *Rockwell Lime*, the court will reverse.

Administrative agencies such as the Commission often encounter cases and issues of a highly complex and technical nature. It would seem, therefore, that prehearing dismissal or dismissal at an early stage in the hearing process could impose serious burdens on a court confined to the boundaries of narrow judicial review. Perhaps if the Commission were to follow the practice of conducting, at the minimum, at least enough of a hearing to take evidence on the issues raised in a motion to dismiss, and in turn, make findings based on such evidence sufficient to support the stated grounds for dismissal, these burdens could be alleviated. Such practice would be consistent with both *Rockwell Lime* and *Chesterfield-Medora*.

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