

No. 576

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1942

SAMUEL OKIN, Petitioner

v.

Securities and Exchange Commission

On Petition For A Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 41-45) is reported in 46 F. Supp. 481.

The per curiam decision of the Circuit Court of Appeals for the Second Circuit, affirming the order of the District Court on the basis of the opinion below (R. 50), is reported in 130 F. (2d) 903.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on October 27, 1942 (IR. 50-51). The petition for a writ of certiorari was filed on December 9, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the district court had jurisdiction over a suit by petitioner, a stockholder of a registered holding company, against the Commission, to enjoin the Commission from enforcing its rule and from preventing the company from purchasing its own stock, and to obtain a declaration that the rule is invalid.

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 (hereinafter referred to as the "Act") are set out in the Appendix.

STATEMENT

The facts in this case, which are not in dispute, may be summarized as follows:

Petitioner, who owns 9,000 shares of common stock of Electric Bond and Share Company (a registered holding company), filed a complaint (R. 3-11) in the District Court for the Southern District of New York, seeking to enjoin the Commission from preventing the company from purchasing its own preferred stock, to enjoin the enforcement of Rule U-42 (see Appendix, *infra*, p. 11) as applied to Electric Bond and Share Company, and to obtain a declaration that Rule U-42 is null and void and beyond the powers of the Commission under the Act.

Rule U-42 was adopted by the Commission pursuant to Section 12 (c) of the Act. The rule provides, in pertinent part, that no registered holding company shall acquire, retire, or redeem any of its own securities except pursuant to a declaration filed with the Commission in accordance with the procedural provisions of Rule U-23 (*infra*, pp. 11-13) and an order of the Commission. Electric Bond and Share Company filed a declaration with the Commission stating its intention to use \$5,000,000 of cash on hand to purchase its outstanding preferred stock. The Commission thereafter issued an order pursuant to Section 12 (c) and Rule U-42 permitting the declaration to become effective in respect of \$2,000,000, reserving jurisdiction in respect of the remaining \$3,000,000 and suggesting that the company formulate an exchange plan or plans for the distribution of its assets to its preferred stockholders (R. 10).

In the district court the Commission moved to dismiss petitioner's action for lack of jurisdiction (R. 24-25). The district judge entered an order (R. 45) denying petitioner's motion for a temporary injunction and granting the Commission's motion to dismiss (R. 41-45). The circuit court of appeals affirmed, without opinion (R.50).

ARGUMENT

The decision of the court below is correct and presents no conflict. Petitioner has mistaken his remedy; his suit against the Commission in the district court was foreclosed by established and fundamental principles of jurisdiction to review administrative action.

1. Section 24 (a) of the Act provides the method for judicial review of the Commission's orders. It prescribes the familiar procedure of a petition by any person or party aggrieved to the appropriate circuit court of appeals. Congress thus has specified an exclusive method for review of the Commission's orders, and petitioner was accordingly foreclosed from obtaining review by a different path.¹ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375.

2. In any event, the actions of the Commission attacked by petitioner have no such impact as entitles him to judicial review. Neither Rule U-42 nor the Commission's order is reviewable at this stage. Rule U-42 neither requires nor finally forbids any action. It merely imposes as a condition precedent to the taking of certain action that Commission approval be obtained. Only if the Commission issued an order pursuant to this rule

denying effectiveness to a declaration could there be any prejudicial effect upon those subject to it. No such order has here been entered. Therefore, in contrast to the situation presented in *Columbia Broadcasting System, Inc., v. United States*, 316 U. S. 407, 420, there is here further administrative action to be taken before the rule has legal impact and the rule does not “determine in advance the rights of others affected by it.”

It follows that the gravamen of petitioner’s complaint is not the existence or enforcement of the procedural Rule U-42. Rather it is the alleged injury to him as a common stockholder resulting from the Commission’s order issued pursuant to Section 12 (c) of the Act and Rule U-42, insofar as it reserved jurisdiction with respect to the use of the remaining \$3,000,000 in the purchase of preferred stock of Electric Bond and Share Company. But this order, in turn, is not final. To the extent that it reserved jurisdiction as to the use of the \$3,000,000, the order was interlocutory in character and hence nonreviewable under Section 24 (a). Congress has provided for review only of final orders in the circuit courts of appeals and any alleged injuries incident to the issuance of interlocutory orders are deemed remediable only on such review. *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375; *Bradley Lumber Co. v. National Labor Relations Board*, 84 F. (2d) 97 (C. C. A. 5), certiorari denied, 299 U.S. 559. Petitioner’s claim of alleged injury creates no jurisdiction outside the statutory scheme and does not justify interference by a district court with the orderly procedure prescribed by Congress, thus forestalling the entry of a final order by the Commission. Cf. *Federal Power Commission v. Metropolitan Edison Co.*, *supra*, at p. 385; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-52; *United States v. Griffin*, 303 U. S. 226, 237; *United States v. Los Angeles & Salt Lake R. R.*, 273 U. S. 299, 314.

3. Petitioner was additionally precluded since his suit was against the Commission itself. The United States and its agencies may be sued only with the consent of Congress. *Nassau Smelting & Refining Works, Ltd., v. United States*, 266 U.S. 101, 106; *Schillinger v. United States*, 155 U. S. 163, 166; *Securities and Exchange Commission v. Andrews*, 88 F. (2d) 441 (C. C. A. 2). Here, Section 24 (a) of the Act, providing for review of orders by the circuit courts of appeals, embodies the only consent given by Congress to a suit against the Commission.²

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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¹ Plainly the provisions of Section 25 of the Act relating to suits to enjoin violations of the Act and referring to costs “against” the Commission do not, as petitioner contends (Pet. 18-19), authorize an alternative method of review by injunction in the district courts. The reference to suits to enjoin violations relates to suits by the Commission; the reference to costs relates to suits brought against the Commission in the circuit courts of appeals under Section 24 (a).

² Congress has expressly consented to actions in district courts to enforce, enjoin, set aside, annul, or suspend orders of the Interstate Commerce Commission and the Federal Communications Commission. Urgent Deficiencies Act, 28 U. S. C. 48; Communications Act of 1934, 47 U. S. C. 402 (a). Petitioner’s reliance, therefore, on such cases as *Interstate Commerce Commission v. United States ex rel. Humbolt Steamship Company*, 224 U. S. 474 (Pet. 15-16) and *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407 (Pet. 19-20) is misplaced. Other cases cited by petitioner involved suits against individuals, not against the United States or an agency. See *Hammond-Knowlton v. United States*, 121 F. (2d) 192, 194 (C. C. A. 2). In *Electric Bond and Share Company et al. v. Securities and Exchange Commission*, 303 U. S. 419, relied upon by petitioner (Pet. 15), the district court granted the Commission’s motion to dismiss, for lack of jurisdiction, the company’s cross-bill to enjoin the Commission itself from enforcing the Public Utility Holding Company Act. The basis of the motion was the contention that the Commission could not be sued because Congress had not consented to such an action against the Commission. This aspect of the district court’s action was not appealed by the company and hence was not before this Court for review. This Court considered the cross-bill only as it applied to individual defendants.

APPENDIX

The sections of the Public Utility Holding Company Act of 1935 (c. 687, 49 Stat. 803, 15 U. S. C. 79a *et seq.*) which are pertinent in the consideration of this case provide as follows:

SEC. 12. * * *

(c) It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or

otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems, to safeguard the working capital of public-utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

SEC. 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty

created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

Rule U-42, promulgated pursuant to Section 12 (c) by the Commission, provides in pertinent part, as follows:

Rule U-42. Acquisition, Retirement, and Redemption of Securities by the Issuer Thereof.

(a) General provisions.--No registered holding company or subsidiary thereof shall acquire, retire or redeem any security of which it is the issuer (or which it has assumed or guaranteed) except pursuant to a declaration notifying the Commission of the proposed transaction, which has become effective in accordance with the procedure specified in rule U-23, and pursuant to the order of the Commission with respect to such declaration under the applicable provisions of the Act.

Rule U-23, referred to in Rule U-42, reads as follows:

Rule U-23. Procedure Applicable to Certain Applications and Declarations.

(a) Scope of rule.--The provisions of this rule apply to applications under sections 6 (b), 9 (c) (3) and 10 of the Act or rule U-50 and declarations pursuant to sections 7, 12 (b), 12 (c), 12 (d) and 12 (f) of the Act and any rule of the Commission thereunder, to declarations under rule U-65, and to declarations regarding proposed accounting entries subject to instruction 8C of the Uniform System of Accounts for Public Utility Holding Companies.

(b) *Designation of filings as applications or declarations.*--Any filing as to any matter specified in paragraph (a) shall be designated an application, if filed pursuant to section 6 (b), 9 (c) (3) or 10 of the Act or rule U-50, and shall be designated a declaration with respect to any other matter specified in paragraph (a).

(c) *Effective date.*--A declaration or application will become effective or be granted respectively by order issuing as of course at 4:30 p. m., E. S. T. (or 1:00 p. m., if a

Saturday) on the thirtieth day after the filing thereof or the fifteenth day after the filing of the last amendment thereto, whichever is later, or if such day be a Sunday or a legal holiday, on the next business day, unless prior thereto the Commission shall have ordered a hearing thereon. The Commission may at the request of the applicant or declarant advance, and the applicant or declarant may by written or telegraphic notice to the Commission postpone, such date.

(d) *Effect of order for hearing.*--If the Commission deems that a hearing is appropriate in the public interest or the interest of investors or consumers, it will issue an order for hearing thereon, and in that event a declaration or application shall not become effective or be granted except pursuant to further order of the Commission.

(e) *Notice of filing.*--The Commission will publish in the Federal Register notice of the filing of a declaration or application, stating the earliest date upon which such declaration or application, as filed or as amended, may be permitted to become effective or be granted. Any interested person may, not later than fifteen days after the publication of such notice or such other date as may be fixed therein, request the Commission in writing that a hearing be held, stating his reasons therefor and the nature of his interest.