

Act of March 3, 1845

2 Stat. 732 (28th Congress, 2d Session)

CHAP. XLIII.—An Act to reduce the rates of postage, to limit the use and correct the abuse of the franking privilege, and for the prevention of frauds on the revenues of the Post Office Department.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, from and after the first day of July next, members of Congress and delegates from Territories, may receive letters, not exceeding two ounces in weight, free of postage, during the recess of Congress, anything to the contrary in this act notwithstanding; and the same franking privilege which is granted by the act to the members of the two Houses of Congress, is hereby extended to the Vice President of the United States; and in lieu of the rates of postage now established by law, there shall be charged the following rates, viz: For every single letter, in manuscript, or paper of any kind by or upon which information shall be asked for or communicated in writing, or by marks and signs, conveyed in the mail, for any distance under 300 miles, five cents; and for any distance over 300 miles, ten cents: and for a double letter there shall be charged double these rates; and for a treble letter, treble these rates; and for a quadruple letter, quadruple these rates; and every letter or parcel not exceeding half an ounce in weight shall be deemed a single letter, and every additional weight of half an ounce, or additional weight of less than half an ounce, shall be charged with an additional single postage. And all drop letters, or letters placed in any post office, not for transmission by mail, but for delivery only, shall be charged with postage at the rate of two cents each. And all letters which shall hereafter be advertised as remaining over in any post office shall, when delivered out, be charged with the costs of advertising the same in addition to the regular postage, both to be accounted for as other postages now are.

SEC 2. *“And be it further enacted,* That all newspapers of no greater size or superficies than nineteen hundred square inches may be transmitted through the mail by the editors or publishers thereof, to all subscribers or other persons within thirty miles of the city, town, or other place in which the paper is or may be printed, free of any charge for postage whatever; and all newspapers of and under the size aforesaid, which shall be conveyed in the mail any distance beyond thirty miles from the place at which the same may be printed, shall be subject to the rates of postage chargeable upon the same under the thirtieth section of the act of Congress approved the third of March, one thousand eight hundred and twenty-five, entitled “An act to reduce into one the several acts for establishing and regulating the Post Office Department;” and upon all newspapers of greater size or superficial extent than nineteen hundred square inches, there shall be charged and collected the same rates of postage as are prescribed by this act to be charged on magazines and pamphlets.

SEC. 3. *And be it further enacted,* That all printed or lithographed circulars and handbills or advertisements, printed or lithographed on quarto post or single cap paper, or paper not larger than single cap, folded, directed, and unsealed, shall be charged with postage at the rate of two cents for each sheet, and no more, whatever be the distance the same may be sent; and all pamphlets, magazines, periodicals, and every other kind and description of printed or other matter, (except newspapers,) which shall be unconnected with any manuscript communication whatever, and which it is or may be lawful to

transmit by the mail of the United States, shall be charged with postage at the rate of two and a half cents for each copy sent, of no greater weight than one ounce, and one cent additional shall be charged for each additional ounce of the weight of every such pamphlet, magazine, matter, or thing, which may be transmitted through the mail, whatever be the distance, the same may be transported; and any fractional excess of not less than one-half of an ounce, in the weight of any such matter or thing, above one or more ounces, shall be charged for as if said excess amounted to a full ounce.

SEC. 4. *And be it further enacted*, That the Postmaster General be and he is hereby, authorized, upon all mail routes over or upon which the amount of matter usually transported, or which may be offered or deposited in the post office or post offices for transportation, is or may become so great as to threaten materially to retard the progress or endanger the security of the letter mail, or to cause any considerable augmentation of the cost of transporting the whole mail at the present rate of speed, to provide for the separate and more secure conveyance of the letter mail, at a speed at least equal to that at which the mail is now transported over such route, taking care to allow in no case of any greater delay, in the transportation of the other matters and things to be transported in the mail on any such route, than may appear to be absolutely necessary, regard being had to the cost of expediting its transportation, and the means at his disposal or under his control for effecting the same.

SEC. 5. *And be it further enacted*, That the twenty-seventh section of the act of Congress entitled "An act to reduce into one the several acts for establishing and regulating the Post Office Department," approved and signed the third day of March, in the year one thousand eight hundred and twenty-five, and all other acts, and parts of acts granting and conferring upon any person whatsoever the right or privilege to receive and transmit through the mail, free of postage, letters, packets, newspapers, periodicals, or other matters, be, and the same are hereby, utterly abrogated, and repealed.

SEC. 6. *And be it further enacted*, That from and after the passage of this act, all officers of the Government of the United States, heretofore having the franking privilege, shall be authorized and required to keep an account of all postage charged to and payable by them, respectively, upon letters, packages, or other matters received through the mail, touching the duties or business of their respective offices; and said accounts for postage, upon being duly verified by said officers, respectively, shall be allowed and paid quarter yearly, out of the contingent fund of the bureau or department to which the officers aforesaid may respectively belong or be attached. And the three Assistant Postmasters General shall be entitled to have remitted by the postmaster in Washington all postage charged upon letters, packages, or other matter, received by them, respectively, through the mail, touching the business of the Post Office Department or the particular branch of that business committed to them, respectively, and each of the said Assistant Postmasters General shall be, and hereby is, authorized to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to his official duties, or to the business of the Post Office Department; but he shall, in every such case, endorse on the back of the letter or package so to be sent free of postage, over his own signature, the words "official business." And for any such endorsement falsely made, the person so offending shall forfeit and pay three hundred dollars. And the several deputy postmasters throughout the United States shall be authorized to charge, and have allowed to them in the settlement of their accounts with the Post Office Department all postage which they may have paid or

had charged to them, respectively, for letters, packages, or other matters, received by them on the business of their respective offices or of the Post Office Department, upon a verification on oath of their accounts for the same, and the transmission of the charged letters as vouchers; and the said several deputy postmasters shall be, and hereby are, authorized to send through the mail, free of postage, all letters, and packages, which it may be their duty, or they may have occasion, to transmit to any person or place, and which shall relate exclusively to the business of their respective offices, or to the business of the Post Office Department, but in every such case, the deputy postmaster sending any such letter or package shall endorse thereon, over his own signature, the words "Post Office business." And for any and every such endorsement falsely made, the person making the same shall forfeit and pay three hundred dollars. And when the commissions of any postmaster amount to less than twenty-five dollars per annum, it shall be lawful for the Postmaster General to increase the rate of his commissions, provided that they do not exceed fifty per cent. On letter postage accruing at such office, and the Postmaster General is hereby required to cause accounts to be kept of the postage that would be chargeable at the rates prescribed in this act upon all matter passing free through the mail according to the provisions of this act; and the sums thus chargeable shall be paid to the Post Office Department from the contingent funds of the two Houses of Congress and of the other Departments of the Government for which such mail service may have been performed, and where there is no such fund, that they be paid out of the Treasury of the United States.

SEC. 7. *And be it further enacted*, That the act of Congress entitled "An act authorizing the Governors of the several States to transmit by mail certain books and documents," approved June the thirtieth, one thousand eight hundred and thirty-four, shall remain and continue in full force, any thing hereinbefore to the contrary notwithstanding; and the Members of Congress, the Delegates from Territories, the Secretary of the Senate, and the Clerk of the House of Representatives, shall be, and they are hereby, authorized to transmit, free of postage, to any post office within the United States, or the Territories thereof, any documents which have been or may be printed by order of either House of Congress, any thing in this law to the contrary notwithstanding.

SEC. 8. *And be it further enacted*, That each member of the Senate, each member of the house of Representatives, and each Delegate from a Territory of the United States, the Secretary of the Senate, and the Clerk of the House of Representatives, may, during each session of Congress, and for a period of thirty days before the commencement and thirty days after the end of each and every session of Congress, send and receive through the mail, free of postage, any letter, newspaper, or packet, not exceeding two ounces in weight; and all postage charged upon any letters, packages, petitions, memorials, or other matters or things, received during any session of Congress, by any Senator, Member or Delegate of the House of Representatives, touching his official or legislative duties, by reason of any excess of weight, above two ounces, of the matter or thing so received, shall be paid out of the contingent fund of the House of which the person receiving the same may be a member. And they shall have the right to frank written letters from themselves during the whole year, as now authorized by law.

SEC. 9. *And be it further enacted*, That it shall not be lawful for any person or persons to establish any private express or expresses for the conveyance, nor in any manner to cause to be conveyed, or provide for the conveyance or transportation by regular trips, or at stated periods or intervals, from one city, town, or other place, to any other city,

town, or place in the United States, between and from and to which cities, towns, or other places the United States mail is regularly transported, under the authority of the Post Office Department, of any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals; and each and every person offending against this provision, or aiding and assisting therein, or acting as such private express, shall, for each time any letter or letters, packet or packages, or other matter properly transmittable by mail, except newspapers, pamphlets, magazines, periodicals, shall or may be, by him, her, or them, or though his, her, or their means or instrumentality, in whole or in part, conveyed or transported, contrary to the true intent, spirit, and meaning of this section, forfeit and pay the sum of one hundred and fifty dollars.

SEC. 10. *And be it further enacted*, That it shall not be lawful for any stage-coach, railroad car, steamboat, packet boat, or other vehicle or vessel, nor any of the owners, managers, servants, or crews of either, which regularly performs trips at stated periods on a post route, or between two or more cities, towns, or other places, from one to the other of which the United States mail is regularly conveyed under the authority of the Post Office Department, to transport or convey, otherwise than in the mail, any letter or letters, packet or packages of letters, or other mailable matter whatsoever, except such as may have relation to some part of the cargo of such steamboat, packet boat, or other vessel, or to some article at the same time conveyed by the same stage-coach, railroad car, or other vehicle, and excepting also, newspapers, pamphlets, magazines, and periodicals; and for every such offence, the owner or owners of the stage-coach, railroad car, steamboat, packet boat, or other vehicle or vessel, shall forfeit and pay the sum of one hundred dollars, and the driver, captain, conductor, or person having charge of any such stage-coach, railroad car, steamboat, packet boat, or other vehicle or vessel, at the time of the commission of any such offence, and who shall not at that time be the owner thereof, in whole nor in part, shall, in like manner, forfeit and pay, in every such case of offence, the sum of fifty dollars.

SEC. 11. *And be it further enacted*, That the owner or owners of every stage-coach, railroad car, steamboat, or other vehicle or vessel, which shall, with the knowledge or connivance of the driver, conductor, captain, or other person having charge of any such stage-coach, railroad car, steamboat, or other vessel or vehicle, convey or transport any person or persons acting or employed as a private express for the conveyance of letters, packets, or packages of letters, or other mailable matter, and actually in possession of such mailable matter, for the purpose of transportation, contrary to the spirit, true intent, and meaning of the preceding sections of this law, shall be subject to the like fines and penalties as are hereinbefore provided and directed in the case of persons acting as such private expresses, and of persons employing the same; but nothing in this act contained shall be construed to prohibit the conveyance or transmission of letters, packets, or packages, or other matter, to any part of the United States, by private hands, no compensation being tendered or received therefor in any way, or by a special messenger employed only for the single particular occasion.

SEC. 12. *And be it further enacted*, That all persons whatsoever who shall, after the passage of this act, transmit by any private express, or other means by this act declared to be unlawful, any letter or letters, package or packages, or other mailable matter, excepting newspapers, pamphlets, magazines, and periodicals, or who shall place or cause to be deposited at any appointed place, for the purpose of being transported by

such unlawful means, any matter or thing properly transmittable, by mail, excepting newspapers, pamphlets, magazines and periodicals, or who shall deliver any such matter, excepting newspapers, pamphlets, magazines and periodicals for transmission to any agent or agents of such unlawful expresses, shall, for each and every offence, forfeit and pay the sum of fifty dollars.

SEC. 13. *And be it further enacted*, That nothing in this act contained shall have the effect, or be construed to prohibit the conveyance or transportation of letters by steamboats, as authorized by the sixth section of the act entitled “An act to reduce into one the several acts for establishing and regulating the Post Office Department, approved the third of March, 1825.” *Provided*, That the requirements of said sixth section of said act be strictly complied with, by the delivery, within the time specified by said act, of all letters so conveyed, not relating to the cargo, or some part thereof, to the postmaster or other authorized agent of the Post Office Department at the port or place to which said letters may be directed, or intended to be delivered over from said boat; and the postmaster or other agent of the Post Office Department shall charge and collect upon all letters or other mailable matter, so delivered to him, except newspapers, pamphlets, magazines, and periodicals, the same rates of postage as would have been charged upon said letters had they been transmitted by mail from the port of place at which they were placed on board the steamboat from which they were received; but it is hereby expressly provided, that all the pains and penalties provided by this act, for any violation of the provisions of the eleventh section of this act, shall attach in every case to any steamboat, or to the owners and persons having charge thereof, the captain or other person having charge of which shall not, as aforesaid, comply with the requirements of the sixth section of the said law of 1825. And no postmaster shall receive, to be conveyed by the mail, any packet which shall weigh more than three pounds.

SEC. 14. *And be it further enacted*, That the Postmaster General shall have power, and he is hereby authorized, to contract with the owners or commanders of any steamboat plying upon the Western or other waters of the United States, for the transportation of the mail for any length of time or number of trips, less than the time for which contracts for transporting the mail of the United States are now usually made under existing laws, and without the previous advertisements now required before entering into such contracts, whenever in his opinion the public interest and convenience will be promoted thereby: *Provided*, That the price to be paid for such service shall in no case be greater than the average rate paid for transporting the mail upon the route he may so for a less time contract for the transportation of the mail upon.

SEC. 15. *And be it further enacted*, That “mailable matter,” and “matter properly transmittable by mail,” shall be deemed and taken to mean, all letters and newspapers, and all magazines and pamphlets periodically published, or which may be published in regular series or in successive numbers, under the same title, though at irregular intervals, and all other written or printed matter whereof each copy or number shall not exceed eight ounces in weight, except bank notes, sent in packages or bundles, without written letters accompanying them; but bound books, of any size, shall not be held to be included within the meaning of these terms. And any packet or packets, of whatever size or weight, being made up of any such mailable matter, shall subject all persons concerned in transporting the same to all the penalties of this law equally as if it or they were not so made up into a packet or packages. But nothing in this act contained shall

be so construed as to prohibit any person whatsoever from transporting, or causing to be transported, over any mail route, or any road or way parallel thereto, any books, magazines, or pamphlets, or newspapers, not marked, directed, or intended for immediate distribution to subscribers or others, but intended for sale as merchandise, and transported in the usual mode of transporting merchandise over the particular route used, and sent or consigned to some bona fide dealer or agent for the sale thereof; nor shall any thing herein be construed to interfere with the right of any traveller to have and take with him or her, for his or her own use, any book, pamphlet, magazine or newspaper.

SEC. 16. *And be it further enacted*, That the term “newspaper,” hereinbefore used, shall be, and the same is hereby defined to be, any printed publication, issued in numbers, consisting of not more than two sheets, and published at short stated intervals of not more than one month, conveying intelligence of passing events, and bona fide extras and supplements of any such publication. And nothing herein contained shall be so construed as to prevent the free exchange of newspapers between the publishers thereof, as provided for under the twenty-ninth section of the act entitled, “An act to reduce into one the several acts for establishing and regulating the Post Office Department, approved the third day of March, 1825.”

SEC. 17. *And be it further enacted*, That all pecuniary penalties and forfeitures, incurred under this act, shall be one half the use of the person or persons informing and prosecuting the same, and the other half to the use of the United States and shall be paid over to the Postmaster General and accounted for by him as other moneys of the department; and all causes of action arising under this act, may be sued, and all offenders against this act may be prosecuted before the justices of the peace, magistrates, or other judicial courts of the several States and of the several Territories of the United States, they having competent jurisdiction, by the laws of such States or Territories, to the trial of claims and demands of as great value, and of the prosecutions, where the punishments are of as great extent; and such justices, magistrates, or judiciary, shall take cognizance thereto and proceed to judgment and execution as in other cases.

SEC. 18. *And be it further enacted*, That it shall be the duty of the Postmaster General in all future lettings of contracts for the transportation of the mail, to let the same, in every case, to the lowest bidder, tendering sufficient guarantees for faithful performance, without other reference to the mode of such transportation than may be necessary to provide for the due celerity, certainty, and security of such transportation; nor shall any new contractor hereafter be required to purchase out, or take at a valuation, the stock or vehicles of any previous contractor for the same route And all advertisements made under the orders of the Postmaster General, in a newspaper or newspapers, of letters uncalled for in any post office, shall be inserted in the paper or papers, of the town or place where the office advertising may be situated, having the largest circulation, provided the editor or editors of such paper or papers shall agree to insert the same for a price not greater than that now fixed by law; and in case of question or dispute as to the amount of the circulation of any papers the editors of which may desire this advertising, it shall be the duty of the postmaster to receive evidence and decide upon the fact.

SEC. 19. *And it shall be further enacted*, That to insure, as far as may be practicable, an equal and just rate of compensation, according to the service performed, among the several railroad companies in the United States, for the transportation of the mail, it

shall be the duty of the Postmaster General to arrange and divide the railroad routes, including those in which the service is partly by railroad and partly by steamboats, into three classes according to the size of the mails the speed with which they are conveyed, and the importance of the service; and it shall be lawful for him to contract for conveying the mail with any such railroad company, either with or without advertising for such contract: *Provided*, That, for the conveyance of the mail on any railroad of the first class, he shall not pay a higher rate of compensation than is now allowed by law; nor for carrying the mail on any railroad of the second class, a greater compensation than one hundred dollars per mile per annum; nor for carrying the mail on any railroad of the third class, a greater compensation than fifty dollars per mile annum. And in case the Postmaster General shall not be able to conclude a contract for carrying the mail on any of such railroad routes at a compensation not exceeding the aforesaid maximum rates, or for what he may deem a reasonable and fair compensation for the service to be performed, it shall be lawful for him to separate the letter mail from the residue of the mail and to contract, either with or without advertising, for conveying the letter mail over such route, by horse express or otherwise, at the greatest speed that can reasonably be obtained; and also to contract for carrying over such route the residue of the mail, in wagons or otherwise, at a slower rate of speed, *Provided*, That if one-half of the service, on any railroad, is required to be performed in the night season, it shall be lawful for the Postmaster General to pay twenty-five per cent in addition to the aforesaid maximum rates of allowance: *And provided further*, That if it shall be found necessary to convey over any railroad route more than two mails daily, it shall be lawful for the Postmaster General to pay such additional compensation as he may think just and reasonable, having reference to the service performed and the maximum rate of allowance established by this act.

SEC. 20. *And be it further enacted*, That all causes of action arising under this act may be sued, and all offenders against this act may be prosecuted, before any circuit or district court of the United States, of the District of Columbia or of the Territories of the United States.

SEC. 21. *And be it further enacted*, That for the purpose of guarding against the possibility of any embarrassment in the operations of the Post Office Department consequent upon any deficiency of the revenues of said department which may be occasioned by the reduction of the rates of postage by this act made, there be, and hereby is, appropriated the sum of seven hundred and fifty thousand dollars, to be paid out of any money in the Treasury not otherwise appropriated, and to be placed to the credit of the Post Office Department in the Treasury of the United States, to be applied, under the direction of the Postmaster General, to supply any deficiency in the regular revenues from postage, in the same manner as the revenues of said department are now by law applied.

SEC. 22. *And be it further enacted*, That in case the amount of postages collected from the rates of postage prescribed by this act, with the annual appropriation from the treasury of seven hundred and fifty thousand dollars herein granted, shall prove insufficient to defray the expense of the mail service throughout the United States to an extent equal to what is now enjoyed by the public, and also the expense of extending and enlarging the same in due proportion with the increase and expansion of the population, particularly in the new States and Territories, the deficiency that may so arise shall be paid out of any moneys in the Treasury not otherwise appropriated: *Provided*,

That the amount of expenditure for the Post Office Department shall not in the entire aggregate, exclusive of salaries of officers, clerks, and messengers, of the General Post Office, and the contingent fund of the same, exceed the annual amount of four million five hundred thousand dollars.

SEC. 23. *And be it further enacted*, That nothing in this act contained shall be construed to repeal the laws heretofore enacted, granting the franking privilege to the President of the United States when in office, and to all ex-Presidents, and to the widows of the former Presidents Madison and Harrison.

APPROVED, March 3, 1845.

U.S. Postal Service v. Council of Greenburgh Civic Associations

453 U.S. 114 (1981)

JUSTICE REHNQUIST delivered the opinion of the Court: We noted probable jurisdiction to decide whether the United States District Court for the Southern District of New York correctly determined that 18 U.S.C. § 1725, which prohibits the deposit of unstamped “mailable matter” in a letterbox approved by the United States Postal Service, unconstitutionally abridges the First Amendment rights of certain civic associations in Westchester County, N.Y., 449 U.S. 1076 (1981). ***

I

Appellee Council of Greenburgh Civic Associations (Council) is an umbrella organization for a number of civic groups in Westchester County, N.Y. Appellee Saw Mill Valley Civic Association is one of the Council’s member groups. In June 1976, the Postmaster in White Plains, N.Y., notified the Chairman of the Saw Mill Valley Civic Association that the association’s practice of delivering messages to local residents by placing unstamped notices and pamphlets in the letterboxes of private homes was in violation of 18 U.S.C. § 1725, which provides:

“Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than \$300.”

Saw Mill Valley Civic Association and other Council members were advised that if they continued their practice of placing unstamped notices in the letterboxes of private homes it could result in a fine not to exceed \$300.

In February 1977, appellees filed this suit in the District Court for declaratory and injunctive relief from the Postal Service’s threatened enforcement of § 1725. Appellees contended that the enforcement of § 1725 would inhibit their communication with residents of the town of Greenburgh and would thereby deny them the freedom of speech and freedom of the press secured by the First Amendment.

*** [T]he Postal Service offered three general justifications for § 1725: (1) that § 1725 protects mail revenues; (2) that it facilitates the efficient and secure delivery of the mails; and (3) that it promotes the privacy of mail patrons. More specifically, the Postal Service argued that elimination of § 1725 could cause the overcrowding of mailboxes

due to the deposit of civic association notices. Such overcrowding would in turn constitute an impediment to the delivery of the mails. Testimony was offered that § 1725 aided the investigation of mail theft by restricting access to letterboxes, thereby enabling postal investigators to assume that anyone other than a postal carrier or a householder who opens a mailbox may be engaged in the violation of the law. On this point, a postal inspector testified that 10% of the arrests made under the external mail theft statute, 18 U.S.C. § 1708, resulted from surveillance-type operations which benefit from enforcement of § 1725. Testimony was also introduced that § 1725 has been particularly helpful in the investigation of thefts of government benefit checks from letterboxes.

The Postal Service introduced testimony that it would incur additional expense if § 1725 were either eliminated or held to be inapplicable to civic association materials. If delivery in mailboxes were expanded to permit civic association circulars—but not other types of nonmailable matter such as commercial materials—mail carriers would be obliged to remove and examine individual unstamped items found in letterboxes to determine if their deposit there was lawful. Carriers would also be confronted with a larger amount of unstamped mailable matter which they would be obliged to separate from outgoing mail. The extra time resulting from these additional activities, when computed on a nationwide basis, would add substantially to the daily cost of mail delivery.

The final justification offered by the Postal Service for § 1725 was that the statute provided significant protection for the privacy interests of postal customers. Section 1725 provides postal customers the means to send and receive mails without fear of their correspondence becoming known to members of the community.

The Postal Service also argued at trial that the enforcement of § 1725 left appellees with ample alternative means of delivering their message. The appellees can deliver their messages either by paying postage, by hanging their notices on doorknobs, by placing their notices under doors or under a doormat, by using newspaper or nonpostal boxes affixed to houses or mailbox posts, by telephoning their constituents, by engaging in person-to-person delivery in public areas, by tacking or taping their notices on a door post or letterbox post, or by placing advertisements in local newspapers. A survey was introduced comparing the effectiveness of certain of these alternatives which arguably demonstrated that between 70-75% of the materials placed under doors or doormats or hung from doorknobs were found by the homeowner whereas approximately 82% of the items placed in letterboxes were found. This incidental difference, it was argued, cannot be of constitutional significance.

The District Court found the above arguments of the Postal Service insufficient to sustain the constitutionality of § 1725 at least as applied to these appellees. ***

II

The present case is a good example of Justice Holmes' aphorism that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, [256 U.S. 345, 349](#) (1921). For only by review of the history of the postal system and its present statutory and regulatory scheme can the constitutional challenge to § 1725 be placed in its proper context.

By the early 18th century, the posts were made a sovereign function in almost all nations because they were considered a sovereign necessity. Government without communication is impossible, and until the invention of the telephone and telegraph,

the mails were the principal means of communication. Kappel Commission, *Toward Postal Excellence, Report of the President's Commission on Postal Organization* 47 (Comm. Print 1968). Little progress was made in developing a postal system in Colonial America until the appointment of Benjamin Franklin, formerly Postmaster at Philadelphia, as Deputy Postmaster General for the American Colonies in 1753. In 1775, Franklin was named the first Postmaster General by the Continental Congress, and, because of the trend toward war, the Continental Congress undertook its first serious effort to establish a secure mail delivery organization in order to maintain communication between the States and to supply revenue for the Army. D. Adie, *An Evaluation of Postal Service Wage Rates 2* (American Enterprise Institute, 1977).

Given the importance of the post to our early Nation, it is not surprising that when the United States Constitution was ratified in 1789, Art. I, § 8, provided Congress the power "To establish Post Offices and post Roads" and "To make all Laws which shall be necessary and proper" for executing this task. The Post Office played a vital yet largely unappreciated role in the development of our new Nation. Stagecoach trails which were improved by the Government to become post roads quickly became arteries of commerce. Mail contracts were of great assistance to the early development of new means of transportation such as canals, railroads, and eventually airlines. During this developing stage, the Post Office was to many citizens situated across the country the most visible symbol of national unity.

The growth of postal service over the past 200 years has been remarkable. Annual revenues increased from less than \$40 million in 1790 to close to \$200 million in 1829 when the Postmaster General first became a member of the Cabinet. However, expenditures began exceeding revenues as early as the 1820's as the postal structure struggled to keep pace with the rapid growth of the country westward. Because of this expansion, delivery costs to the South and West raised average postal costs nationally. To prevent competition from private express services, Congress passed the Postal Act of 1845, which prohibited competition in letter mail and established what is today referred to as the "postal monopoly."

More recently, to deal with the problems of increasing deficits and shortcomings in the overall management and efficiency of the Post Office, Congress passed the Postal Reorganization Act of 1970. This Act transformed the Post Office Department into a Government-owned corporation called the United States Postal Service. The Postal Service today is among the largest employers in the world, with a work force nearing 700,000 processing 106.3 billion pieces of mail each year. The Postal Service is the Nation's largest user of floor space, and the Nation's largest nonmilitary purchaser of transport, operating more than 200,000 vehicles. Its rural carriers alone travel over 21 million miles each day and its city carriers walk or drive another million miles a day. Its operating budget in fiscal 1980 exceeded \$17 billion.

Not surprisingly, Congress has established a detailed statutory and regulatory scheme to govern this country's vast postal system. See 39 U.S.C. § 401 *et seq.* and the Domestic Mail Manual (DMM), which has been incorporated by reference in the Code of Federal Regulations, 39 CFR pt. 3 (1980). Under 39 U.S.C. § 403(a), the Postal Service is directed to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." Section 403(b)(1) similarly directs the Postal Service "to maintain an efficient system of collection, sorting, and delivery of the mail

nationwide,” and under 39 U.S.C. § 401 the Postal Service is broadly empowered to adopt rules and regulations designed to accomplish the above directives.

Acting under this authority, the Postal Service has provided by regulation that both urban and rural postal customers must provide appropriate mail receptacles meeting detailed specifications concerning size, shape, and dimensions. By regulation, the Postal Service has also provided that “[e]very letter box or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, highway contract route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. [§] 1725.” DMM 151.1. A letterbox provided by a postal customer which meets the Postal Service’s specifications not only becomes part of the Postal Service’s nationwide system for the receipt and delivery of mail, but is also afforded the protection of the federal statutes prohibiting the damaging or destruction of mail deposited therein. See 18 U.S.C. §§ 1702, 1705, and 1708.

It is not without irony that this elaborate system of regulation, coupled with the historic dependence of the Nation on the Postal Service, has been the causal factor which led to this litigation. For it is because of the very fact that virtually every householder wishes to have a mailing address and a receptacle in which mail sent to that address will be deposited by the Postal Service that the letterbox or other mail receptacle is attractive to those who wish to convey messages within a locality but do not wish to purchase the stamp or pay such other fee as would permit them to be transmitted by the Postal Service. To the extent that the “alternative means” eschewed by the appellees and found to be inadequate alternatives by the District Court are in fact so, it is in no small part attributable to the fact that the typical mail patron first looks for written communications from the “outside world” not under his doormat, or inside the screen of his front door, but in his letterbox. Notwithstanding the increasing frequency of complaints about the rising cost of using the Postal Service, and the uncertainty of the time which passes between mailing and delivery, written communication making use of the Postal Service is so much a fact of our daily lives that the mail patron watching for the mailtruck, or the jobholder returning from work looking in his letterbox before he enters his house, are commonplaces of our society. Indeed, according to the appellees the receptacles for mailable matter are so superior to alternative efforts to communicate printed matter that all other alternatives for deposit of such matter are inadequate substitutes for postal letterboxes.

Postal Service regulations, however, provide that letterboxes and other receptacles designated for the delivery of mail “shall be used exclusively for matter which bears postage.” DMM 151.2. Section 1725 merely reinforces this regulation by prohibiting, under pain of criminal sanctions, the deposit into a letterbox of any mailable matter on which postage has not been paid. ***

Section 1725 was enacted in 1934 “to curb the practice of depositing statements of accounts, circulars, sale bills, etc., in letter boxes established and approved by the Postmaster General for the receipt or delivery of mail matter without payment of postage thereon by making this a criminal offense.” H.R. Rep. No. 709, 73d Cong., 2d Sess., 1 (1934). Both the Senate and House Committees on Post Offices and Post Roads explained the principal motivation for § 1725 as follows:

“Business concerns, particularly utility companies, have within the last few years adopted the practice of having their circulars, statements of account, etc., delivered by private messenger, and have used as receptacles the letter boxes erected for the

purpose of holding mail matter and approved by the Post Office Department for such purpose. This practice is depriving the Post Office Department of considerable revenue on matter which would otherwise go through the mails, and at the same time is resulting in the stuffing of letter boxes with extraneous matter.” *Ibid.*; S. Rep. No. 742, 73d Cong., 2d Sess., 1 (1934).

Nothing in any of the legislation or regulations recited above requires any person to become a postal customer. Anyone is free to live in any part of the country without having letters or packages delivered or received by the Postal Service by simply failing to provide the receptacle for those letters and packages which the statutes and regulations require. Indeed, the provision for “General Delivery” in most post offices enables a person to take advantage of the facilities of the Postal Service without ever having provided a receptacle at or near his premises conforming to the regulations of the Postal Service. What the legislation and regulations do require is that those persons who *do* wish to receive and deposit their mail at their home or business do so under the direction and control of the Postal Service.

III

As early as the last century, this Court recognized the broad power of Congress to act in matters concerning the posts:

“The power vested in Congress ‘to establish post-offices and post-roads’ has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. The validity of legislation describing what should be carried, and its weight and form, and the charges to which it should be subjected, has never been questioned.... The power possessed by Congress embraces the regulation of the entire Postal System of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.” *Ex parte Jackson*, [96 U.S. 727, 732](#) (1878).

However broad the postal power conferred by Art. I may be, it may not of course be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment to the Constitution. In this case we are confronted with the appellees’ assertion that the First Amendment guarantees them the right to deposit, without payment of postage, their notices, circulars, and flyers in letterboxes which have been accepted as authorized depositories of mail by the Postal Service. ***

What is at issue in this case is solely the constitutionality of an Act of Congress which makes it unlawful for persons to use, without payment of a fee, a letterbox which has been designated an “authorized depository” of the mail by the Postal Service. As has been previously explained, when a letterbox is so designated, it becomes an essential part of the Postal Service’s nationwide system for the delivery and receipt of mail. In effect, the postal customer, although he pays for the physical components of the “authorized depository,” agrees to abide by the Postal Service’s regulations in exchange for the Postal Service agreeing to deliver and pick up his mail.

Appellees' claim is undermined by the fact that a letterbox, once designated an "authorized depository," does not at the same time undergo a transformation into a "public forum" of some limited nature to which the First Amendment guarantees access to all comers. There is neither historical nor constitutional support for the characterization of a letterbox as a public forum. Letterboxes are an essential part of the nationwide system for the delivery and receipt of mail, and since 1934 access to them has been unlawful except under the terms and conditions specified by Congress and the Postal Service. As such, it is difficult to accept appellees' assertion that because it may be somewhat more efficient to place their messages in letterboxes there is a First Amendment right to do so. ***

Indeed, it is difficult to conceive of any reason why this Court should treat a letterbox differently for First Amendment access purposes than it has in the past treated the military base in *Greer v. Spock*, [424 U.S. 828](#) (1976), the jail or prison in *Adderley v. Florida*, [385 U.S. 39](#) (1966), and *Jones v. North Carolina Prisoners' Union*, [433 U.S. 119](#) (1977), or the advertising space made available in city rapid transit cars in *Lehman v. City of Shaker Heights*, [418 U.S. 298](#) (1974). In all these cases, this Court recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In *Greer v. Spock*, *supra*, the Court cited approvingly from its earlier opinion in *Adderley v. Florida*, *supra*, wherein it explained that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." 424 U.S., at 836.

This Court has not hesitated in the past to hold invalid laws which it concluded granted too much discretion to public officials as to who might and who might not solicit individual homeowners, or which too broadly inhibited the access of persons to traditional First Amendment forums such as the public streets and parks. But it is a giant leap from the traditional "soapbox" to the letter-box designated as an authorized depository of the United States mails, and we do not believe the First Amendment requires us to make that leap.

IV

It is thus unnecessary for us to examine § 1725 in the context of a "time, place, and manner" restriction on the use of the traditional "public forums" referred to above. This Court has long recognized the validity of reasonable time, place, and manner regulations on such a forum so long as the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication. But since a letterbox is not traditionally such a "public forum," the elaborate analysis engaged in by the District Court was, we think, unnecessary. ***

V

From the time of the issuance of the first postage stamp in this country at Brattleboro, Vt., in the fifth decade of the last century, through the days of the governmentally subsidized "Pony Express" immediately before the Civil War, and through the less admirable era of the Star Route Mail Frauds in the latter part of that century, Congress has actively exercised the authority conferred upon it by the Constitution "to establish Post Offices and Post Roads" and "to make all laws which shall be necessary and proper" for executing this task. While Congress, no more than a suburban township, may not by its own *ipse dixit* destroy the "public forum" status of streets and parks which have historically been public forums, we think that for the reasons stated a let-

terbox may not properly be analogized to streets and parks. It is enough for our purposes that neither the enactment nor the enforcement of § 1725 was geared in any way to the content of the message sought to be placed in the letterbox. The judgment of the District Court is accordingly

Reversed.

[Omitted opinions: Justice Brennan, concurring in the judgment; Justice White, concurring in the judgment; Justice Marshall, dissenting; and Justice Stevens, dissenting]

The Express Cases

117 U.S. 1 (1886)

WAITE, C.J.: These suits present substantially the same questions, and may properly be considered together. They were each brought by an express company against a railway company to restrain the railway company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company. ***

3. The Missouri, Kansas & Texas Railroad Company. This suit was brought on the twenty-eighth of December, 1880, by or on behalf of Adams Express Company, a joint-stock association of the state of New York, organized in 1854. The Missouri, Kansas & Texas Railroad Company is a Kansas railroad corporation, owning and controlling lines of railroad from Junction City, Kansas, and Sedalia, Missouri, to Parsons, Kansas, thence southerly to a crossing of the Arkansas river; and from Holden, Missouri, on the Missouri Pacific Railroad, westerly to Paoli, on the Missouri River, Fort Scott & Gulf Railroad,—in all a length of, say, 473 miles.

The bill in this case contains, among others, the following averments:

“(10) After the formation of the Adams Express Company various other express companies were formed for the conduct of the same general business, to be operated in like manner over the public thoroughfares of the country. As the principal railway lines known as “Trunk Lines,” and running in a general direction from east to west, ran in courses generally parallel, the principal express companies existing at the early date aforesaid, namely, the “Adams,” the “American,” and the “United States,” agreed among themselves that they would reach the commercial centers of the country by different railway and steam-boat routes, and that they would divide the north and south express business in a manner best calculated for the welfare thereof, and for the best service of the public. This understanding was generally effectuated, but in various instances two express companies have, at the same time, and with permission of the railway company, occupied, for a greater or less distance, the same line of railway, and such occupation has not been found incompatible with the harmonious working of such two express companies, and has resulted in a larger income to the railway company than it would have received had its line been occupied by but one express company only, and has also afforded the public the opportunity, both upon short and long routes, for the most efficient service, and for the competition to which it is lawfully entitled.

(11) Under the mutual understanding aforesaid the Adams Express Company, as soon as the demands of the public warranted the expenditure, extended its business westward to the cities of Wheeling, Columbus, Cincinnati, Indianapolis, Louisville, and St. Louis, by means of the facilities afforded by the Pittsburgh, Cincinnati & St. Louis Railroad, and other companies, and thereby made the routes of the said Adams Express Company continuous from Boston, New York, Philadelphia, and Pittsburgh to the cities last aforesaid, and such continuous routes are now operated by it.

(12) The said Adams Express Company, under the arrangements and understandings aforesaid, extended its business in a southerly direction, and, as the word “express” imports, always by the shortest line of communication, to all the principal cities in the South,—namely, Richmond, Charleston, Savannah, Mobile, Montgomery, New Orle-

ans, Memphis, and other places,—and in so doing was always afforded by those occupying the public office of a common carrier all necessary facilities therefor, and which facilities were by said carriers increased to the said Adams Express Company in proportion with the increase of the demands of the public therefor.

(13) The Adams Express Company has always in the conduct of its business paid, and now pays, to the common carriers whom it employs a just and reasonable compensation, satisfactory to them, for the facilities afforded, and has itself always charged the public only a just and reasonable compensation for the express services performed for it.

(14) In the conduct of its business, as aforesaid, the Adams Express Company has always represented, and now represents, that portion of the public which desires to avail itself, in the transmission of its property and valuables, of the pecuniary responsibility of the express company, and of the safeguards and checks which it has originated, provided, and enforced for the safe custody of the property committed to its care.

(15) The Adams Express Company conducted its business as aforesaid until the commencement of hostilities, in 1861, when, by reason of the derangements of commercial intercourse then ensuing, and for other controlling reasons of a public character then generally known, it was obliged to discontinue its organization and business in the southern states, and it thereupon withdrew from the same, and sold so much of its good-will and its equipment as then there existed to the Southern Express Company, a corporation created, as this plaintiff is informed and believes, under and pursuant to the laws of the state of Georgia; and since then the express business in the principal southern states has been and is now conducted by the said Southern Express Company under said charter, by which it is expressly authorized to conduct the same, and which said charter gives a legislative description of the kind and character of business to be done by said company as an express company, and to a copy of which the plaintiff craves leave to refer.

(16) After the cessation of the hostilities aforesaid an arrangement was made, and which is now in force, between the said Adams Express Company and the said Southern Express Company, for the general regulation of the transportation of property coming from the territory of the one into the territory of the other, and by which property received by the Adams Express Company, destined for points within the territory of the Southern, and property received within the territory of the Southern, destined to points within the territory of the Adams Express Company, or reached by its connections, is interchanged at certain specified points, and upon a basis of charge proportioned to the distance traversed in the territory of either. In case of such interchange of express matter within such territory the express company originally receiving the same remains liable to the public for the value thereof until delivered to the consignee.

(17) Since the said understanding and arrangement, the Adams Express Company has made such interchanges with the said Southern Express Company, and now makes the same, at Richmond, Lynchburgh, and Danville, Virginia; Chattanooga, Tennessee; Cairo, Illinois; and Paducah, Kentucky; and has not itself, since then, either delivered or received express matter directly south of such points, but the territory so directly south thereof has been operated by the said Southern Express Company alone.”

On the twenty-third of November, 1871, the Adams Express Company and the Missouri, Kansas & Texas Company entered into the following contract; "This agreement, made this twenty-third day of November, A.D. 1871, between the Missouri, Kansas & Texas Railway Company, by R. S. Stevens, its general manager, party of the first part, and the Adams Express Company, by _____, party of the second part, witnesseth: * * *

- The Missouri, Kansas & Texas Railway Company will furnish for the use of the Adams Express Company one car each way on its line from Sedalia, Missouri, via Parsons, Kansas, to Junction City, Kansas, to be hauled on a passenger train each day that a passenger train is to run over the line. The car to be used exclusively by the Adams Express Company, but not to carry at any one time an excess of seven tons of freight. The charges by the express company to its patrons to be not less than one and one-half first-class rates of the Missouri, Kansas & Texas Railway Company at the time, as per its freight tariff. The railway company will also furnish from Parsons south to the Arkansas river the necessary accommodations in its baggage car, and also similar accommodations in a baggage car on the Holden line on one train each way. The express car, as well as all express matter carried over the road in any baggage or other car, to be in charge of one agent or messenger of the express company on each train, who is to be carried free.
 - All express matter from points on or north of the Missouri Pacific Railroad, and all that comes from any point beyond or east of St. Louis, via that city, for points on the line of the Missouri, Kansas & Texas Railway, or beyond, is to be brought on the said line at Sedalia, and no business for this road is to be done, or freight of any kind to be received or delivered, at Vinita, except such as originated at or is destined to points on the Atlantic & Pacific Railroad south and west from Franklin, Missouri.
 - As part compensation to the railway company for the privileges furnished by it, as herein provided, the express company will pay to the railway company monthly \$100 per day for each and every day that trains are run over the railway, or any part thereof.
 - As part consideration it is also agreed that the express company shall carry the money and valuable packages belonging to the railway company over the line of the Missouri, Kansas & Texas Railway free of charge, and for all matter going to or coming from points beyond the line of the Missouri, Kansas & Texas Railway the express company will charge not exceeding two-thirds of its regular rate for such business; the superintendents and agents for said express company, whenever it is necessary to supervise the business, to have the privilege of traveling over the line of said road free; passes for such free passage to be furnished on application of the superintendent of the express company for this division.
 - The railway company agree, further, that they will not carry freight or packages for pay in their baggage cars on passenger trains, nor allow their conductors or baggage masters or other employees to do so, during the existence of this agreement, nor will they allow any other company, firm, or person the privilege of carrying freight on their passenger trains at any less rate of payment per day, or any greater weight in a car, or upon any better terms in any way, than is granted to said express company under this agreement.
 - It is understood that as the line of the Missouri, Kansas & Texas Railway is extended south from the Arkansas river similar accommodations will be furnished for an express
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business, as herein above provided, at a reasonably increased cost, to be paid by the express company, as shall hereafter be agreed upon.

- This agreement to take effect on the first day of December, A.D. 1871, and continue in force for one year thereafter, and until thirty days' notice shall have been given to the other by the party desiring to terminate same.'

Under this contract the Adams Company carried on its business over the railroad line, without objection from the railroad company, until December 1, 1880, when the railroad company notified the express company that it would be expected to retire from the operation of its business on that road January 1, 1881, as on and after that date the business would be done by or for the railroad company. This suit was brought after the service of that notice, and the prayer of the bill is substantially like that in the other cases.

The railroad company at first answered the bill, and testimony was taken, but before a final hearing the answer was withdrawn and a demurrer substituted.

In each of the cases a preliminary injunction was granted, and from that time until now the express companies have occupied the roads the same as before the suits, but in connection with the railroad companies, as carriers of express matter, or with some other express company to which the privilege of doing an express business over the line had been granted by the railroad company.

A large amount of testimony was taken, and on the final hearing a decree was entered in each of the cases, one of which is as follows:

“(1) That the express business, as fully described and shown in the record, is a branch of the carrying trade that has by the necessities of commerce and the usages of those engaged in transportation become known and recognized so as to require the court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

“(2) That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

“(3) That to refuse permission to such messengers or agents to accompany such property on the steam-boats or railroads on which it is to be carried, and to deny to them the right to the custody of the property while so carried, would be destructive of the express business, and of the rights which the public have to the use of such steam-boats and railroads for the transportation of such property so under the control of such messengers or agents.

“(4) That the defendant, its officers, agents, and servants, have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof unless such inspection be granted or such knowledge be afforded.

“(5) That it is the duty of the defendant to carry the express matter of the plaintiff's company and the messengers or agents in charge thereof at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

“(6) That on and subsequent to the first day of May, 1877, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant’s lines, and such as are specifically in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn; and that it was the intention and purpose of the defendant to exclude the plaintiff’s company from its lines on and after the twenty-first day of June, 1880; that such intention and purpose were restrained by the preliminary injunction order of the court, which said injunction order was afterwards modified, as appears in the record.

“(7) That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same trains that said defendant may accord to itself, or any other company or corporation engaged in the conduct of an express business on the defendant’s lines, and to afford the same facilities to the plaintiff on all its passenger trains.

“(8) That the plaintiff keep and render monthly a true account of the services performed for it by defendant, and pay therefor at the rate hereinafter specified, on or before the ____ of each month, after the date hereof, for the business of the month preceding; and that the defendant has no right to require prepayment for said express facilities, or payment therefor at the end of every train, or in any other manner than as is herein provided; and that plaintiff execute and deliver to the defendant a bond in the sum of twenty-five thousand dollars, conditioned well and faithfully to make such payments as are herein provided, and with surety to be approved by a judge of the court.

“(9) That it is and was the duty of said defendant to afford, and to have afforded, such facilities to the plaintiff as herein specified, for a just and reasonable compensation.

“(10) Whereas it is alleged by complainant that since the commencement of this suit and the service of the preliminary order of injunction herein the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter; therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon.

“(11) That the defendant, its officers, agents, servants, and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the plaintiff; and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars, or lines of the said defendant, as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff; and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport, for itself or for any other express company, over its lines of railway, the express matter and messengers of

the said plaintiff; and from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever; the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation or for private individuals, reserving to either party the right at any time hereafter to apply to this court according to the rules in equity proceedings for a modification of this decree as to the measure of compensation herein prescribed.

“(12) It is further ordered, adjudged, and decreed that defendant pay the costs to be taxed herein, and that an execution or a fee-bill issue therefor, And the said defendant enters herein its prayer for appeal, which prayer is granted.”

The decrees in the other cases differ from this only in matters of detail. The cases are now here for review on these appeals.

The evidence shows that the express business was first organized in the United States about the year 1839. The case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, grew out of a loss by the burning of the steam-boat *Lexington*, on Long Island sound, in January, 1840, of \$18,000 in gold and silver coin, while in charge of William F. Harnden, an express carrier, for transportation from New York to Boston. In the report of this case is found a copy of one of the earliest advertisements of the express business, as published in two of the Boston newspapers in July, 1839. It is as follows:

BOSTON AND NEW YORK EXPRESS PACKAGE CAR—NOTICE TO MERCHANTS, BROKERS, BOOK-SELLERS, AND ALL BUSINESS MEN.

Wm. F. Harnden, having made arrangements with the New York & Boston Transportation and Stonington & Providence Railroad Companies, will run a car through from Boston to New York, and vice versa, via Stonington, with the mail train, daily, for the purpose of transporting specie, small packages of goods, and bundles of all kinds. Packages sent by this line will be delivered on the following morning, at any part of the city, free of charge. A responsible agent will accompany the car, who will attend to purchasing goods, collecting drafts, notes, and bills, and will transact any other business that may be entrusted to him. Packages for Philadelphia, Baltimore, Washington, New Haven, Hartford, Albany, and Troy will be forwarded immediately on arrival in New York.

N.B. Wm. F. Harnden is alone responsible for any loss or injury of any articles or property committed to his care; nor is any risk assumed by, or can any be attached to, the Boston & New York Transportation Company, in whose steamers his crates are to be transported, in respect to it or its contents at any time.

The report also contains a copy of the contract between Harnden and the New Jersey Steam Navigation Company, the owner of the *Lexington*, dated the first of August, 1839, for the facilities to be afforded Harnden for his business on the steamers of that company. This contract was similar to one made a short time before with the Boston & New York Transportation Company, a company which became merged in the New Jersey Steam Navigation Company, August 1, 1839, and it provided that Harnden, in consideration of \$250 per month, was to have the privilege of transporting in the

steamers of the company between New York and Providence, via Newport and Stonington, not to exceed once each day from New York and from Providence, “one wooden crate of the dimensions of five feet by five feet in width and height, and six feet in length, (contents unknown.)” It was also stipulated and agreed that “the said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the said New Jersey Steam Navigation Company will not, in any event, be responsible either to him or his employers for the loss of any goods, wares, merchandise, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner, in the boats of the said company.” It was also further provided that Harnden should attach to all his advertisements for business, and to his bills of lading, notices in the form of that at the foot of his advertisement, a copy of which is given above, and that he should not violate any of the provisions of the post-office laws, or interfere with the navigation company in its transportation of letters or papers, or carry powder, matches, or other combustible materials of any kind calculated to endanger the safety of the boats or the property or persons on board. At the end was this clause: ‘And that this contract may be at any time terminated by the New Jersey Steam Navigation Company, or by the said Harnden, upon one month’s notice given in writing.’

Such was the beginning of the express business which now has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and with the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long-settled habits of business, and interfering materially with the conveniences of social life. In this connection it is to be kept in mind that neither of the railroad companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The controversy, in each case, is not with the public, but with a single express company. And the real question is not whether the railroad companies are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose; nor whether they shall carry express freights for express companies as they carry like freights for the general public,—but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company.

When the business began railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies; and it is no doubt true; as alleged in each of the bills filed in these cases, that “no railroad company in the United States * * * has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company * * * has recognized the right of the

public to demand transportation by the railway facilities which the public has permitted to be created of that class of matter which is known as “express matter.” Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing, and keeping for themselves, such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income. But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies; that is to say, as a common carrier of common carriers. On the contrary, it has been shown, and in fact it was conceded upon the argument, that down to the time of bringing these suits no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. In some of the states statutes have been passed which either in express terms, or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies, (Gen. Laws N. H. c. 163, § 2; Rev. St. Me. 494, § 134;) but these are of comparatively recent origin, and thus far seem not to have been generally adopted.

In Missouri, by the constitution, railways are “declared public highways and railroad companies common carriers.” The general assembly is also required “to pass laws to correct abuses and to prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in this state,” and “to pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties.” Article 12, § 14. And by section 23 it is provided that “no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad company, or any lessee, manager, or employee thereof, shall make any preference in furnishing cars or motive power.” We have not been referred to any statute of the state which does more than reproduce these constitutional provisions in substantially the same general language. ***

In Kansas the following statute is in force:

“Sec. 55. Every railway corporation in this state which now is, or may hereafter be, engaged in the transportation of persons or property, shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails, and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junction of other roads, and at the several stopping places; and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railways a sufficient length of time to allow the transfer of passengers, personal baggage, mails, and express freight from the trains or railways so connecting or intersecting, or they may mutually arrange for the transportation of such persons and property over both roads

without change of cars; and they shall be compelled to receive all passengers and freight from such connecting and intersecting roads whenever the same shall be delivered to them”

Comp. Laws Kan. 1879, 225, c. 23.

The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at one time. As the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is “express,” it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that because a railroad company can serve one express company in one way it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time was apparently so well understood both by the express companies and the railroad companies that the three principal express companies, the

Adams, the American, and the United States, almost immediately on their organization, now more than 30 years ago, by agreement divided the territory in the United States traversed by railroads among themselves, and since that time each has confined its own operations to the particular roads which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agree directions as circumstances would permit. At the beginning of the late civil war the Adams Company gave up its territory in the southern states to the Southern Company, and since then the Adams and the Southern have occupied, under arrangements between themselves, that part of the ground originally assigned to the Adams alone. In this way these three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying when these suits were brought 155 railroads, with a mileage of 21,216 miles; the American 200 roads, with a mileage of 28,000 miles; and the Southern 95 roads, with a mileage of 10,000 miles. Through their business arrangements with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all who need their services. The good-will of their business is of very great value if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections the greater will be their own profits and the better their means of serving the public. In making their investments and in extending their business they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time.

The territory traversed by the railroads involved in the present suits is part of that allotted in the division between the express companies to the Adams and Southern Companies, and in due time after the roads were built these companies contracted with the railroad companies for the privileges of an express business. The contracts were all in writing, in which the rights of the respective parties were clearly defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the railroad companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because this is not within the scope of judicial power.

The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually

carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask, it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The constitutions and the laws of the states in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas the Missouri, Kansas & Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the states of Missouri, Arkansas, and Kansas railroad companies are probably prohibited from making unreasonable discriminations in their business as carriers; but this is all. Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights.

The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side and fixed the

liability of the express company on the other, the court, in decreeing the carriage, was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner for making the payment for the facilities, and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities, or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way, as it seems to us, "the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought to have made for themselves," and that, we said in *Atchison, T. & S.F.R. Co. v. Denver & N.O.R. Co.*, 110 U.S. 673, followed at this term in *Pullman's Palace Car Co. v. Missouri Pac. Ry. Co.*, [115 U.S. 587](#), could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but unless a duty has been created either by usage or by contract or by statute the courts cannot be called on to give it effect.

The decree in each of the cases is reversed, and the suit is remanded, with directions to dissolve the injunction; and, after adjusting the accounts between the parties for business done while the injunctions were in force, and decreeing the payment of any amounts that may be found to be due, to dismiss the bills.

MILLER, J., (dissenting.): *** I only desire to add one or two observations in regard to matters found in the opinion of this court:

1. The relief sought in these cases is not sought on the ground of usage in the sense that a long course of dealing with the public has established a custom in the nature of law. Usage is only relied on as showing that the business itself has forced its way into general recognition as one of such necessity to the public, and so distinct and marked in its character, that it is entitled to a consideration different from other modes of transportation.

2. It is said that the regulation of the duties of carrying by the railroads, and of the compensation they shall receive, is legislative in its character, and not judicial. As to the duties of the railroad company, if they are not, as common carriers, under legal obligation to carry express matter for any one engaged in that business in the manner appropriate and usual in such business, then there is no case for the relief sought in these bills. But if they are so bound to carry, then, in the absence of any legislative rule fixing their compensation, I maintain that compensation is a judicial question. It is, then, the ordinary and ever-recurring question on a quantum meruit. The railroad company renders the service which by the law of its organization it is bound to render. The

express company refuses to pay for this the price which the railroad company demands because it believes it to be exorbitant. That it is a judicial question to determine what shall be paid for the service rendered, in the absence of an express contract, seems to me beyond doubt. That the legislature may, in proper case, fix the rule or rate of compensation I do not deny. But until this is done the court must decide it when it becomes matter of controversy. The opinion of the court, while showing its growth and importance, places the entire express business of the country wholly at the mercy of the railroad companies, and suggests no means by which they can be compelled to do it. According to the principles there announced no railroad company is bound to receive or carry an express messenger or his packages. If they choose to reject him or his packages, they can throw all the business of the country back to the crude condition in which it was a half century ago, before Harnden established his local express between the large Atlantic cities; for let it be remembered that plaintiffs have never refused to pay the railroad companies reasonable compensation for their services, but those companies refuse to carry for them at any price or under any circumstances. I am very sure such a proposition as this will not long be acquiesced in by the great commercial interests of the country and by the public, whom both railroad companies and the express man are intended to serve. If other courts should follow ours in this doctrine, the evils to ensue will call for other relief. It is in view of amelioration of these great evils that, in dissenting here, I announce the principles which I earnestly believe ought to control the actions and the rights of these two great public services.

FIELD, J.: I agree with Mr. Justice MILLER in the positions he has stated, although in the cases just decided I think the decrees of the courts below require modification in several particulars; they go too far. But I am clear that railroad companies are bound, as common carriers, to accommodate the public in the transportation of goods according to its necessities, and through the instrumentalities or in the mode best adapted to promote its convenience. Among these instrumentalities express companies, by the mode in which their business is conducted, are the most important and useful.

United States v. Terminal Railroad Association of St. Louis

224 U.S. 383 (1912)

MR. JUSTICE LURTON delivered the opinion of the court: The United States filed this bill to enforce the provisions of the Sherman act of July 2, 1890, against thirty-eight corporate and individual defendants * * * as a combination in restraint of interstate commerce and as a monopoly forbidden by that law. The cause was heard by the four circuit judges, who, being equally divided in judgment, dismissed the bill, without filing an opinion. From this decree the United States has appealed.

The principal defendant is the Terminal Railroad Association of St. Louis, hereinafter designated as the terminal company. It is a corporation of the state of Missouri, and was organized under an agreement made in 1889 between Mr. Jay Gould and a number of the defendant railroad companies for the express purpose of acquiring the properties of several independent terminal companies at St. Louis, with a view to combining and operating them as a unitary system.

The terminal properties first acquired and combined into one system by the terminal company comprised the following: The Union Railway & Transit Company of St.

Louis and East St. Louis; the Terminal Railroad of St. Louis and East St. Louis; the Union Depot Company of St. Louis; the St. Louis Bridge Company; and the Tunnel Railroad of St. Louis. These properties included the great union station, the only existing railroad bridge—the Eads or St. Louis bridge—and every connecting or terminal company by means of which that bridge could be used by railroads terminating on either side of the river. For a time this combination was operated in competition with the terminal system of the Wiggins Ferry Company, and upon the completion of the Merchants' bridge, in competition with it, and a system of terminals which were organized in connection with it. The Wiggins Ferry Company had for many years operated car transfer boats by means of which cars were transferred between St. Louis and East St. Louis.

Upon each side of the river it owned extensive railway terminal facilities, with which connection was maintained with the many railroads terminating on the west and east sides of the rivers, which gave such roads connection with each other, as well as access to many of the industrial and business districts on each side. In 1890 a third terminal system was opened up by the completion of a second railroad bridge over the Mississippi river at St. Louis, known as the Merchants' bridge. This was a railroad toll bridge, open to every railroad upon equal terms. That it might forever maintain the potentiality of competition as a railroad bridge, the act of Congress authorizing its construction provided that no stockholders in any other railway bridge company should become a stockholder therein. But as this was a mere bridge company, it was essential that railroad companies desiring to use it should have railway connections with it on each side of the river. For this purpose two or more railway companies were organized and lines of railway were constructed connecting each end of the Merchants' bridge with various railroad systems terminating on either side of the river. The Merchants' bridge and its allied terminals were thereby able to afford many, if not all, of the railroads coming into St. Louis, access to the business districts on both sides of the river, and connection with each other.

Thus, for a time, there existed three independent methods by which connection was maintained between railroads terminating on either side of the river at St. Louis: First, the original Wiggins Ferry Company, and its railway terminal connections; second, the Eads Railroad bridge and the several terminal companies by means of which railroads terminating at St. Louis were able to use that bridge and connect with one another, constituting the system controlled by the terminal company; and, third, the Merchants' bridge and terminal facilities owned and operated by companies in connection therewith.

This resulted in some cases in an unnecessary duplication of facilities, but it at least gave to carriers and shippers some choice, a condition which, if it does not lead to competition in charges, does insure competition in service. Important as were the considerations mentioned, their independence of one another served to keep open the means for the entrance of new lines to the city, and was an obstacle to united opposition from existing lines. The importance of this will be more clearly seen when we come to consider the topographical conditions of the situation.

That the promoters of the terminal company designed to obtain the control of every feasible means of railroad access to St. Louis, or means of connecting the lines of railway entering on opposite sides of the river, is manifested by the declarations of the original agreement, as well as by the successive steps which followed. Thus, the proviso

in the act of Congress authorizing the construction of the Merchants' bridge, which forbade the ownership of its stock by any other bridge company or stockholder in any such company, was eliminated by an act of Congress, and shortly thereafter the terminal company obtained stock control of the Merchants' Bridge Company, and of its related terminal companies, and likewise a lease.

The Wiggins Ferry Company owned the river front on the Illinois shore opposite St. Louis for a distance of several miles. It had on that side and on its own property, switching yards and other terminal facilities. From these yards extended lines of rails which connected with its car transfer boats and with the termini of railroads on the Illinois side. On the St. Louis side of the river it had like facilities by which it was in connection with railway lines terminating on that side. That company was consequently able to interchange traffic between the systems on opposite sides of the river, and to serve many industries. In 1892 the Rock Island Railroad Company endeavored to obtain an independent entrance to the city. For this purpose it sought to acquire the facilities owned by the Wiggins Ferry Company by securing a control of its capital stock. This was not deemed desirable by the railroad companies which jointly owned the terminal company's facilities, and to prevent this acquisition effort was made to secure control of the stock. The competition was fierce and the market price of the shares pushed to an abnormal price. The final result being in debt, an agreement was reached by which the Rock Island Company was admitted to joint ownership with the other proprietary companies in all of the terminal properties which were operated by the terminal company, or which should be acquired by it. The shares in the ferry company bought by the Rock Island were transferred to the terminal company at cost, and were paid for by that company. These shares, united with those which had been acquired by the terminal company, enabled the latter to absorb the properties of the ferry company, and thus the three independent terminal systems were combined into a single system.

We come, then, to the question upon which the case must turn: Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the anti-trust act?

It is not contended that the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of interstate commerce or an unreasonable restraint, forbidden by the act of Congress, as construed and applied by this court in the cases of *Standard Oil Co. v. United States*, [221 U.S. 1](#) and *United States v. American Tobacco Co.*, [221 U.S. 106](#) will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about, and the manner in which that control has been exerted.

The consequences to interstate commerce of this combination cannot be appreciated without a consideration of natural conditions greatly affecting the railroad situation at St. Louis. Though twenty-four lines of railway converge at St. Louis, not one of them passes through. About one half of these lines have their termini on the Illinois side of the river. The others, coming from the west and north, have their termini either in the city or on its northern edge. To the river the city owes its origin, and for a century and more its river commerce was predominant. It is now the great obstacle to

connection between the termini of lines on opposite sides of the river and any entry into the city by eastern lines. The cost of construction and maintenance of railroad bridges over so great a river makes it impracticable for every road desiring to enter or pass through the city to have its own bridge. The obvious solution is the maintenance of toll bridges open to the use of any and all lines, upon identical terms. And so the commercial interests of St. Louis sought to solve the question, the system of carferry transfer being inadequate to the growing demands of an ever-increasing population. The first bridge, called the Eads bridge, was, and is, a toll bridge. Any carrier may use it on equal terms. But to use it there must be access over rails connecting the bridge and the railway. On the St. Louis side the bridge terminates at the foot of the great hills upon which the city is built; on the Illinois side it ends in the low and wide valley of the Mississippi. This condition resulted in the organization of independent companies which undertook to connect the bridge on each side with the various railroad termini. On the Missouri side it was necessary to tunnel the hills, that the valley of Mill creek might be reached, where the roads from the west had their termini. Thus, though the bridge might be used by all upon equal terms, it was accessible only by means of the several terminal companies operating lines connecting it with the railroad termini.

This brought about a condition which led to the construction of the second bridge, the Merchants' bridge. This, too, was, and is, a toll bridge, and may be used by all upon equal terms. To prevent its control by the Eads Bridge Company, it was carefully provided that no stockholder in any other bridge company should own its shares. But this Merchants' bridge, like the Eads bridge, had not rail connections with any of the existing railroad systems, and these facilities, as in the case of the Eads bridge, were supplied by a number of independent railway companies who undertook to fill in the gaps between the bridge ends and the termini of railroads on both sides of the river. It must be also observed that these terminal companies were in many instances so supplied with switch connections as not only to connect with the bridge, but also served to connect such roads with each other and with the industries along their lines. Now, it is evident that these lines connecting railroad termini with the railroad bridges dominated the situation. They stood, as it were, just outside the gateway, and none could enter, though the gate stood open, who did not comply with their terms. The topographical situation making access to the city difficult does not end with the river. The city lies upon a group of great hills which hug the river closely and rapidly recede to the west. These hills are penetrated on the west by the narrow valley of Mill creek, which crosses the city about its center. Railways coming from the west use this valley, but its facilities are very restricted and now quite occupied. North of the city the hills drop back from the river gradually, and there exists a valley formed by the Mississippi and Missouri rivers. Railroads coming from the north on the west side of the river come by this valley. As we have stated before, the valley of the Mississippi at St. Louis is on the Illinois side of the river. Railroads coming from the east, northeast, and southeast have their termini in that valley. As a consequence, there have grown up numerous cities and towns of some consequence as manufacturing places, the chief of which is East St. Louis.

The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company. The averment of the bill that the railroad

companies, here defendants, being the sole stockholders of the terminal company, as we shall later see, compel all other railroad companies converging at St. Louis to use the facilities owned and operated by the terminal company, is therefore borne out by the facts of the situation. Not is this effect denied; for the learned counsel representing the proprietary companies, as well as the terminal company, say in their filed brief: "There indeed is compulsion, but it is inherent in the situation. The other companies use the terminal properties because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive." Obviously, this was not true before the consolidation of the systems of the Wiggins Ferry Company and the Merchants' Bridge Company with the system theretofore controlled by the terminal company. That the nonproprietary companies might have been compelled to use the instrumentalities of one or the other of the three systems then available, and that the advantages secured might not have been so great as those offered by the unified system now operated by the terminal company, must be admitted. But that there existed before the three terminal systems were combined a considerable measure of competition for the business of the other companies, and a larger power of competition, is undeniable. That the fourteen proprietary companies did not then have the power they now have to exclude either existing roads not in the combination, or new companies, from acquiring an independent entrance into the city, is also indisputable. The independent existence of these three terminal systems was therefore a menace to complete domination, as keeping open the way for greater competition. Only by their absorption or some equivalent arrangement was it possible to exclude from independent entrance the Rock Island Company, or any other company which might desire its own terminals. To close the door to competition, large sums were expended to acquire stock control. For this purpose the obligations of the absorbed companies were assumed and new funds obtained by mortgages upon the unified system.

The physical conditions which compel the use of the combined system by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, is the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated. If the terminal company was in law and fact the agent of all, the mere unification which has occurred would take on quite a different aspect. It becomes, therefore, of the utmost importance to know the character and purpose of the corporation which has combined all of the terminal instrumentalities upon which the commerce of a great city and gateway between the East and West must depend. The fact that the terminal company is not an independent corporation at all is of the utmost significance. There are twenty-four railroads converging at St. Louis. The relation of the terminal company is not one of impartiality to each of them. It was organized in 1889, at the instance of six of these railroad companies, for the purpose of acquiring all existing terminal instrumentalities for the benefit of the combination, and such other companies as they might thereafter admit to joint ownership by unanimous consent, and upon a consideration to be agreed upon. From time to time other companies came to an agreement with the original proprietors until, at the time this bill was filed, the properties unified were held for the joint use of the fourteen companies made defendants. In the contract of 1889, above referred to, the purpose of acquiring the first terminals combined is declared to be, "that said properties may be held in perpetuity as a unit, and developed and improved in the interest of the proprietary companies, for the purpose of furnishing

adequate terminal facilities in St. Louis and East St. Louis.” This purpose was carried out by the conveyance to “each of the proprietary companies . . . forever, a right of joint use with each other and such other companies as may be admitted as proprietary lines to joint use thereof, of all said terminal properties . . . now held or that may be hereafter acquired in St. Louis and East St. Louis, . . . it being understood that the right herein granted to each proprietary company is not transferable to any extent whatever, but is to remain as an appurtenant to the railroad now owned by each proprietary company.”

That these facilities were not to be acquired for the benefit of any railroad company which might desire a joint use thereof was made plain by a provision in the contract referred to, which stipulated that other railroad companies not named therein as proprietary companies might only be admitted “to joint use of said terminal system on unanimous consent, but not otherwise, of the directors of the first party, and on payment of such a consideration as they may determine, and on signing this agreement,” etc. Inasmuch as the directors of the terminal company consisted of one representative of each of the proprietary companies, selected by itself, it is plain that each of said companies had and still has a veto upon any joint use or control of terminals by any nonproprietary company.

By that and the supplemental agreement of December, 1902, the ferry company and the Merchants’ Bridge Company having then been absorbed, the proprietary companies prescribe that the charges of the company shall be so adjusted as to produce no more revenue than shall equal the fixed charges, operating and maintenance expenses. Deficiencies for those purposes the proprietary companies guarantee to make good, though such payments are to be reimbursed by an increase in charges, if necessary.

We fail to find in either of the contracts referred to any provision abrogating the requirement of unanimous consent to the admission of other companies to the ownership of the terminal company, though counsel say that no such company will now find itself excluded from joint use or ownership upon application. That other companies are permitted to use the facilities of the terminal company upon paying the same charges paid by the proprietary companies seems to be conceded. But there is no provision by which any such privilege is accorded.

By still another clause in the agreement the proprietary companies obligate themselves to forever use the facilities of the terminal company for all business destined to cross the river. This would seem to guarantee against any competitive system, since the companies to the agreement now control about one third of the railroad mileage of the United States.

In acquiring these properties the terminal company has assumed mortgage and stock dividend obligations of the constituent companies aggregating about twenty-five million dollars. It has executed its own mortgage upon all of its property to secure an issue of fifty million dollars of bonds, of which twenty million dollars worth have been sold, and the proceeds used in construction or in paying for the properties acquired. It has thus about forty-five million dollars of mortgage or fixed charges or liabilities. The company has an authorized capital stock of fifty million dollars. Of this about twenty-eight million dollars have been issued in equal proportions to the several owning railroad companies. No dividends have ever been paid, and the company disclaims any purpose to pay dividends. We fail to find any obligation by which they may be prevented from paying dividends upon the stock held by the proprietary companies,

or that in its treasury, if ever issued. Undoubtedly, the major part of this revenue arises from the business done by the proprietary companies through the terminal company, but that coming from other companies is, however, a large contribution. That no direct profit is derived by the owning companies from the operation of the terminals may be true. But it is not clear that the proprietary companies do not make an indirect profit through ownership of obligations of the absorbed companies.

That through their ownership and exclusive control they are in possession of advantages in respect to the enormous traffic which must use the St. Louis gateway is undeniable. That the proprietary companies have not availed themselves of the full measure of their power to impede free competition of outside companies may be true. Aside from their power under all of the conditions to exclude independent entrance to the city by any outside company, their control has resulted in certain methods which are not consistent with freedom of competition. To these acts we shall refer later.

We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote, commerce. * * *

The argument that the combination of the instrumentalities operated by the terminal company with those of the Merchants' Bridge Company was a combination of two competing lines of railroad, such as was condemned in *Northern Securities Co. v. United States*, [193 U.S. 197](#) is not well founded. This combination, if properly regarded as of parallel and competing lines, would have been obnoxious to the 17th section of the Constitution of Missouri. For the purpose of enforcing this Missouri prohibition, the state instituted a proceeding to dissolve the combination of the properties of the Merchants' Bridge Terminal Railroad Company with the Terminal Railroad Association of St. Louis, upon the ground that the railroads operated by those companies were parallel and competing lines of railroad. Relief was denied. The Missouri court held that the merger of mere railway terminals used to facilitate the public convenience by the transfer of cars from one line of railway to another, and instrumentalities for the distribution or gathering of traffic, freight or passenger, among scattered industries, or to different business centers of a great city, were not properly railroad companies within the reasonable meaning of the statutes forbidding combinations between competing or parallel lines of railroad. Referring to the legitimate use of terminal companies, the Missouri court said:

A more effectual means of keeping competition up to the highest point between parallel or competing lines could not be devised. The destruction of the system would result in compelling the shipper to employ the railroad with which he has switch connection, or else cart his product to a distant part of the city, at a cost possibly as great as the railroad tariff.

"St. Louis is a city of great magnitude in the extent of its area, its population, and its manufacturing and other business. A very large number of trunk-line railroads converge in this city. In the brief of one of the well-informed counsel in this case it is said that St. Louis is one of the largest railroad centers in the world. Suppose it were required of every railroad company to effect its entrance to the city as best it could and establish its own terminal facilities, we would have a large number of

passenger stations, freight depots and switch yards scattered all over the vast area, and innumerable vehicles employed in hauling passengers and freight to and from those stations and depots. Or suppose it became necessary in the exigency of commerce that all in-coming trains should reach a common focus, but every railroad company provide its own track; then not only would the expense of obtaining the necessary rights of way be so enormous as to amount to the exclusion of all but a few of the strongest roads, but, if it could be accomplished, the city would be cut to pieces with the many lines of railroad intersecting it in every direction, and thus the greatest agency of commerce would become the greatest burden.” 81 S.W. 395.

* * *

While, therefore, the mere combining of several independent terminal systems into one may not operate as a restraint upon the interstate commerce which must use them, yet there may be conditions which will bring such a combination under the prohibition of the Sherman act. The one in question, counsel say, is not antagonistic to, but in harmony with, the anti-trust act, “because it expands competition by extending equal conveniences and advantages to all shippers located upon each of the three systems for all traffic to and from St. Louis; expedites and economizes the service.” It is justified, they argue, by: “(1) The physical or topographical conditions peculiar to the locality; by (2) its commercial, industrial, and railroad development and history; by (3) public opinion expressed legislatively and judicially; and (4) by the judgment of experienced railroad engineers and managers.” From which consideration the same counsel say that the issue presented by this record is, “whether the common control or ownership of all the terminal facilities (mechanical devices for the exchange, receipt, and distribution of traffic) of a large commercial and manufacturing center by all of the railroad companies, and for the benefit of all upon equal terms and facilities, without discrimination, is condemned by the Sherman act.”

Let us analyze the proposition included in the issue, as stated by counsel, quoted above: Counsel assume that the combined terminals have come under a “common control or ownership.” But this is not the case. That the instrumentalities so combined are not jointly owned or managed by all of the companies compelled to use them is a significant fact which must be taken into account for the purpose of determining whether there has been a violation of the anti-trust act. The control and ownership is that of the fourteen roads which are defendants. The railroad systems and the coal roads converging at St. Louis, which are not associated with the proprietary companies, are under compulsion to use the terminal system, and yet have no voice in its control.

It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact. The “physical or topographical condition peculiar to the locality,” which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance, and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its

facilities. The witness upon whom the defendants chiefly rely to uphold the advantages of the unified system which has been constructed, Mr. Albert L. Perkins, gives this as his unqualified judgment. He was and is an experienced railroad engineer and manager and is the railway expert of the municipal bridge and terminal board, a commission appointed under a city ordinance, headed by the mayor, to study and report legislation needed to relieve the terminal conditions of St. Louis. From his study of the local situation he expresses the opinion that the terminals of railway lines in any large city should be unified as far as possible, and that such unification may be of the greatest public utility and of immeasurable advantage to commerce, state and interstate. Neither does he find in the conditions at St. Louis any insurmountable objection to such unification. The witness, however, points out that such a terminal company should be the agent of every company, and, furthermore, that its service should not be for profit or gain. In short, that every railroad using the service should be a joint owner and equally interested in the control and management. This, he thinks, will serve the greatest possible economy, and will give the most efficient service without discrimination. When thus jointly owned and controlled, whether through the medium of a mere holding or operating company, such as the terminal company is, or by other means, the facilities would belong to each relatively to its own business, and delivery would be made by each company over its own tracks to connecting lines or places of destination in the city. The charge for the haul thus lengthened would then be properly absorbed by the through rate, leaving nothing to be added to that to be charged the shipper or consignee but switching and storage charges proper.

The terminal properties in question are not so controlled and managed, in view of the inherent local conditions, as to escape condemnation as a restraint upon commerce. They are not under a common control and ownership. Nor can this be brought about unless the prohibition against the admission of other companies to such control is stricken out and provision made for the admission of any company to an equal control and management upon an equal basis with the present proprietary companies.

There are certain practices of this terminal company which operate to the disadvantage of the commerce which must cross the river at St. Louis, and of nonproprietary railroad lines compelled to use its facilities. One of them grows out of the fact that the terminal company is a terminal company and something more. It does not confine itself to supplying and operating mere facilities for the interchange of traffic between railroads, and to assistance in the collecting and distributing of traffic for the carrier companies. It, as well as several of the absorbed terminal companies, was organized under ordinary railroad charters. If the combination which has occurred is to escape condemnation as a combination of parallel and competing railroad companies, it is because of the essential difference between railroad and terminal companies proper—differences pointed out by the Missouri supreme court in the case heretofore referred to. Indeed, the defense to this proceeding is based upon the insistence that the terminal company is solely engaged in operating terminal facilities, defined in the briefs “as mechanical devices for the exchange, receipt, and distribution of traffic.” This terminal company, in addition to its schedule for terminal charges proper, such as switching, warehousing, etc., files its rate-sheets for the transportation of every class of merchandise from the termini of the railroads on the Illinois side of the river to destinations across the river, over its lines. These rates are applied to all traffic destined to cross the river, with certain exceptions to which we shall later refer, which originates within

an irregular area of which St. Louis is the center, and having a diameter of from 1 to 200 miles. This arbitrary operates to cast a burden upon short hauls, which has led to much complaint, as being both discriminatory and extortionate. An exception is made as to traffic originating within so much of this area as constitutes what is called "Green Line territory," or which is destined to points within "Green Line territory." This seems to be based upon competitive conditions caused by the great toll railway bridge at Memphis, Tennessee, the bridge toll being treated by lines using the bridge as a part of the through rate.

Another exception to the rule imposing this arbitrary is that it does not apply to traffic which originates in East St. Louis, whether it is destined to cross the river or not. The reason for this exemption, where such traffic does cross the river, is not apparent. Possibly, it may be said that it is because the traffic of St. Louis and East St. Louis should be treated as arising in the same commercial area. But this reason does not seem to apply to the traffic originating in St. Louis, which is bound east, though that of East St. Louis is altogether free from this arbitrary charge. The effect of this arbitrary discrimination is obviously injurious to the commerce and manufacturers of St. Louis, and is among the chief causes of complaint against the terminal company. Mr. Perkins, to whom we have before referred as a capable and impartial expert, says of the consequence of this curious exception out of the 100-mile area rule, that "the effect of these charges was, of course, to put the man doing business in St. Louis at a disadvantage to that extent with the man doing business at East St. Louis on his eastern business." Again he says, that the practical operation was to give East St. Louis a distinct advantage in the manufacturing lines. Another practice which marks this terminal company as a transportation company which interposed itself between railroads having their termini on opposite sides of the river, and between the city itself and the roads terminating on the east side of the river, is that all traffic destined to cross the river at St. Louis, whether bound east or west, or destined for the city if coming from the east, is billed only to East St. Louis, and there rebilled to destination.

The practice of rebilling and of making a distinct hauling charge is an evident survival of the methods which existed when the eastern lines had no termini in St. Louis. They then billed to East St. Louis, and there turned the traffic over to one of the existing terminal companies, who made their own specific charges for the haul to places of delivery within the city. The practice has been continued after the reason for it has disappeared. The effect of this practice of rebilling at East St. Louis and of imposing this arbitrary upon traffic originating within 100 miles of the city, destined to cross the river, seems to have been also applied to the large coal traffic between the Illinois coal mines, upon which the city is largely dependent.

We come now to the remedy. In determining what this should be, we, as said by this court in *Standard Oil Co. v. United States*, [221 U.S. 1, 78](#) must not overlook the fact that in applying prevention of an undue restraint on or the prevention of an undue restraint on or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest; and, moreover, that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." If, as we have already said, the combination of two or more mere terminal companies into a single system does not violate the prohibition of the statute against contracts and combinations in restraint of interstate commerce, it is because such a combination may be of the greatest public utility. But when, as here, the inherent conditions are such as to prohibit any

other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the act, in that it constitutes a contract or combination in restraint of commerce among the states, and an attempt to monopolize commerce among the states which must pass through the gateway at St. Louis.

The government has urged a dissolution of the combination between the terminal company, the Merchants' Bridge Terminal Company, and the Wiggins Ferry Company. That remedy may be necessary unless one equally adequate can be applied.

But the illegal restraint upon commerce among the states which we here find to exist consists in the possession acquired by the proprietary companies through the means and with the object we have stated, of dominating commerce among the states, carried on by other railroads entering or seeking to enter the city of St. Louis, and by which such railroads are compelled either to desist from carrying on interstate commerce, or to do so upon the terms imposed by the proprietary companies. This control and possession constitute such a grip upon the commerce of St. Louis and commerce which must cross the river there, whether coming from the east or west, as to be both an illegal restraint and an attempt to monopolize.

The power resulting from the combination, even before completed by the acquisition of the Wiggins Ferry Company and its related terminals, was exhibited when the Rock Island sought an independent entrance.

Some of its abuses are shown by the imposition of the arbitrary hauling charge imposed upon the artificially limited trade districts described. It is shown also by the maintenance of the system of billing traffic destined to cross the river at St. Louis, either east or west, or to St. Louis, if from points on the east side of the river,—a practice so galling and universal as to practically “eliminate St. Louis from the railroad map,” to quote the graphic, if extravagant, language of counsel for the United States, as respects the great traffic subject to the regulation.

Plainly the combination which has occurred would not be an illegal restraint under the terms of the state if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the terminal company and the proprietary companies as shall constitute the former the bona fide agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply vindicate the wise purpose of the statute, and will preserve to the public a system of great public advantage.

These considerations lead to a reversal of the decree dismissing the bill. This is accordingly adjudged, and the case is remanded to the district court, with directions that a decree be there entered directing the parties to submit to the court, within ninety days after receipt of mandate, a plan for the reorganization of the contract between the fourteen defendant railroad companies and the terminal company, which we have pointed out as bringing the combination within the inhibition of the statute.

First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Third. By eliminating from the present agreement between the terminal company and the proprietary companies any provision which restricts any such company to the use of the facilities of the terminal company.

Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, or to points beyond.

Fifth. By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

Sixth. By providing that any disagreement between any company applying to become a joint owner or user, as herein provided for, and the terminal or proprietary companies, which shall arise after a final decree in this cause, may be submitted to the district court, upon a petition filed in this cause, subject to review by appeal in the usual manner.

Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect, in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the terminal company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission.

Upon failure of the parties to come to an agreement which is in substantial accord with this opinion and decree, the court will, after hearing the parties upon a plan for the dissolution of the combination between the terminal company, the Wiggins Ferry Company, the Merchants' Bridge Company, and the several terminal companies related to the Ferry and Merchants' Bridge Company, make such order and decree for the complete disjoinder of the three systems, and their future operation as independent systems, as may be necessary, enjoining the defendants, singly and collectively, from any exercise of control or dominion over either of the said terminal systems, or their related constituent companies, through lease, purchase, or stock control, and enjoining the defendants from voting any share in any of said companies or receiving dividends, directly or indirectly, or from any future combination of the said systems, in evasion of such decree or any part thereof.

Federal-Aid Road Act of 1916

39 Stat. 355 (1916)

An Act To provide that the United States shall aid the States in the construction of rural post roads, and for other purposes.

Be it enacted by the the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Agriculture is authorized to cooperate with the States, through their respective State highway departments, in the construction of rural post roads; but no money apportioned under this Act to any State shall be expended therein until its legislature shall have assented to the provisions of this Act, except that, until the final adjournment of the first regular session of the legislature held after the passage of this Act, the ascent of the governor of the State shall be sufficient. The Secretary of Agriculture and the State highway department of each State shall agree upon the roads to be constructed therein and the character and method of construction: Provided, That all roads constructed under the provisions of this Act shall be free from tolls of all kinds.

Sec. 2. That for the purpose of this Act the term "rural post road" shall be construed to mean any public road over which the United States mails now are or may hereafter be transported, excluding every street and road in a place having a population, as shown by the latest available Federal census, of 2500 or more, except that portion of any such street or road along which the houses averaged more than 200 feet apart; the term "State highway department" shall be construed to include any department of another name, or commission, or official or officials, of a State empowered, under its laws, to exercise the functions ordinarily exercised by a State highway department; the term "construction" shall be construed to include reconstruction and improvement of roads; "properly maintain" as used herein shall be construed to mean the making of needed repairs and the preservation of a reasonably smooth surface considering the type of the road; but shall not be held to include extraordinary repairs, nor reconstruction; necessary bridges and culvert shall be deemed parts of the respective roads covered by the provisions of this Act.

Sec. 3. That for the purpose of carrying out the provisions of this Act there is hereby apportioned, out of any money in the treasury not otherwise appropriated, for the fiscal year ending June thirtieth, nineteen hundred and seventeen, the sum of \$5,000,000; for the fiscal year ending June thirtieth, nineteen hundred and eighteen, the sum of \$10,000,000; for the fiscal year ending June thirtieth, nineteen hundred and nineteen, the sum of \$15,000,000; for the fiscal year ending June thirtieth, nineteen hundred and twenty, the sum of \$20,000,000; and for the fiscal year ending June thirtieth, nineteen hundred and twenty-one, the sum of \$25,000,000. So much of the appropriation apportioned to any State for any fiscal year as remains unexpended at the close thereof shall be available for expenditure in that State until the close of the succeeding fiscal year, except that amounts apportioned for any fiscal year to any State which has not a State highway department shall be available for expenditure in that State until the close of the third fiscal year succeeding the close of the fiscal year for which such apportionment was made. Any amount apportioned under the provisions of this Act unexpended at the end of the period during which is available for expenditure under the terms of this section shall be reapportioned, within sixty days thereafter, to all the States in the same manner and on the same basis, and certified to the Secretary of the Treasury and to the State highway departments and to the governors of

States having no State highway departments in the same way as if it were being apportioned under this Act for the first time: Provided, That in States where the Constitution prohibits the State from engaging in any work of internal improvements, then the amount of the appropriation under this Act apportioned to any such State shall be turned over to the highway department of the State or to the governor of said State to be expended under the provisions of this Act and under the rules and regulations of the Department of Agriculture, when any number of counties in any such State shall appropriate or provide the proportion of or share needed to be raised in order to entitle such State to its part of the appropriation apportioned under this Act.

Sec. 4. That so much, not to exceed 3 per centum, of the appropriation for any fiscal year made by or under this Act as the Secretary of Agriculture may estimate to be necessary for administering the provisions of this Act shall be deducted for that purpose, available until expended. Within sixty days after the close of each fiscal year the Secretary of Agriculture shall determine what part, if any, of the sums theretofore deducted for administering the provisions of this Act will not be needed for that purpose and apportion such part, if any, for the fiscal year then-current in the same manner and on the same basis, and certify it to the Secretary of the Treasury and to the State highway departments, and to the governors of States having state highway departments, in the same way as other amounts authorized by this Act to be apportioned among all the States for such current fiscal year. The Secretary of Agriculture, after making the deduction authorized by this section, shall apportion the remainder of the appropriation for each fiscal year among the several States in the following manner: one-third in the ratio which the area of each State bears to the total area of all the States; one-third in the ratio which the population of each State bears to the total population of all the States, as shown by the latest available Federal census; one-third in the ratio which the mileage of rural delivery routes and star routes in each State bears to the total mileage of rural delivery routes and star routes in all the States, at the close of the next preceding fiscal year, as shown by the certificate of the Postmaster General, which he is directed to make and furnish annually to the Secretary of Agriculture.

Sec. 5. That within sixty days after the approval of this Act the Secretary of Agriculture shall certify to the Secretary of the Treasury and to each State highway department and to the governor of each State having no State highway department the sum which is estimated to be deducted for administering the provisions of this Act and the sum which he has apportioned to each State for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and on or before January twentieth next preceding the commencement of each succeeding fiscal year shall make like certificates for each fiscal year.

Sec. 6. That any State desiring to avail itself of the benefits of this Act shall, by its State highway department, submit to the Secretary of Agriculture project statements setting forth proposed construction of any rural post road or roads therein. If the Secretary of Agriculture approve a project, the State highway department shall furnish to him such surveys, plans, specifications, and estimates therefor as he may require: Provided, however, That the Secretary of Agriculture shall approve only such projects as may be substantial in character and the expenditure of funds hereby authorized shall be applied only to such improvements. Items included for engineering, inspection, and unforeseen contingencies shall not exceed ten per centum of the total estimated cost

of the work. If the Secretary of Agriculture approve the plans, specifications, and estimates, he shall notify the State highway department and immediately certify the fact to the Secretary of the Treasury. The Secretary of the Treasury shall thereupon set aside the share of the United States payable under this Act on account of such a project, which shall not exceed fifty per centum of the total estimated cost thereof. No payment of any money apportioned under this Act shall be made on any project until such statement of the project, and the plans, specifications, and estimates therefor, shall have been submitted to and approved by the Secretary of Agriculture.

When the Secretary of Agriculture shall find that any project so approved by him has been constructed in compliance with the plans and specifications he shall cause to be paid to the proper authority of said State the amount set aside for such said project: Provided, That the Secretary of Agriculture may, in his discretion, from time to time make payments on said construction as the same progresses, but these payments including previous payments, if any, shall not be more than the United States' pro rata part of the value of the labor and materials which have actually put into said construction in conformity to said plans and specifications; nor shall any such payment be in excess of \$10,000 per mile, exclusive of the cost of bridges of more than 20 feet clear span. The construction work and labor in each State shall be done in accordance with its laws, and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture in accordance with the rules and regulations made pursuant to this Act.

The Secretary of Agriculture and the State highway department of each State may jointly determine at what times, in what amounts, payments, as work progresses, shall be made under this Act. Such payment shall be made by the Secretary of the Treasury, on warrants drawn by Secretary of Agriculture, to such official, or officials, or depository, as may be designated by the State highway department and authorized under the laws of the State to receive public funds of the State or county.

Sec. 8. That there is hereby appropriated and made available until expended, out of any moneys in the National Treasury not otherwise appropriated, the sum of \$1,000,000 for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and each fiscal year thereafter, up to and including the fiscal year ending June thirtieth, nineteen hundred and twenty-six, in all \$10,000,000, to be available until expended under the supervision of the Secretary of Agriculture, upon request from the proper officers of the State, Territory, or county for the survey, construction, and maintenance of roads and trails within or partly within the national forests, when necessary for the use and development of resources upon which communities within and adjacent to the national forests are dependent: Provided, That the State, Territory, or county shall enter into a cooperative agreement with the Secretary of Agriculture for the survey, construction, and maintenance of such roads or trails upon a basis equitable to both the State, Territory, or county, and the United States: And provided also, That the aggregate expenditures in any State, Territory, or county shall not exceed ten per centum of the value, as determined by the Secretary of Agriculture, of the timber and forage resources which are or will be available for income upon the national forest lands within the respective county or counties where in the roads or trails will be constructed; and the Secretary of Agriculture shall make annual report to Congress of the amounts expended hereunder.

That immediately upon the execution of any cooperative agreement hereunder the Secretary of Agriculture shall notify the Secretary of the Treasury of the amounts to be expended by the United States within or adjacent to any national forest there under, and beginning with the next fiscal year and each fiscal year thereafter the Secretary of the Treasury shall apply from any and all revenues from such forest ten per centum thereof to reimburse the United States for expenditures made under such agreement until the whole amount advanced under such agreement shall have been returned from the receipts from such national forest.

Sec. 9. That out of the appropriations made by or under this Act, the Secretary of Agriculture is authorized to employ such assistants, clerks, and other persons in the city of Washington and elsewhere, to be taken from the eligible list of the Civil Service Commission, to rent buildings outside of the city of Washington, to purchase such supplies, materials, equipment, office fixtures, and apparatus, and to incur such travel and other expenses as he may deem necessary for carrying out the purposes of this Act.

Sec. 10. That the Secretary of Agriculture is authorized to make rules and regulations for carrying out the provisions of this Act.

Sec. 11. That this Act shall be in force from the date of its passage.

Approved, July 11, 1916.

Federal-Aid Highway Act of 1956

70 Stat. 374 (1956)

AN ACT

To amend and supplement the Federal-Aid Road Act approved July 11, 1916, to authorize appropriations for continuing the construction of highways; to amend the Internal Revenue Code of 1954 to provide additional revenue from the taxes on motor fuel, tires, and trucks and buses; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—FEDERAL-AID HIGHWAY ACT OF 1956

SEC. 101. SHORT TITLE FOR TITLE I.

This title may be cited as the “Federal-Aid Highway Act of 1956”.

SEC. 102. FEDERAL-AID HIGHWAYS.

(a) (1) AUTHORIZATION OF APPROPRIATIONS.—For the purpose of carrying out the provisions of the Federal-Aid Road Act approved July 11, 1916 (39 Stat. 355), and all Acts amendatory thereof and supplementary thereto, there is hereby authorized to be appropriated for the fiscal year ending June 30, 1957, \$125,000,000 in addition to any sums heretofore authorized for such fiscal year; the sum of \$850,000,000 for the fiscal year ending June 30, 1958; and the sum of \$875,000,000 for the fiscal year ending June 30, 1959. The sums herein authorized for each fiscal year shall be available for expenditure as follows:

- (A) 45 per centum for projects on the Federal-aid primary high-way system.
- (B) 30 per centum for projects on the Federal-aid secondary high-way system.
- (C) 25 per centum for projects on extensions of these systems within urban areas.

(2) APPORTIONMENTS.—The sums authorized by this section shall be apportioned among the several States in the manner now provided by law and in accordance with the formulas set forth in section 4 of the Federal-Aid Highway Act of 1944; approved December 20, 1944 (58 Stat. 838) : Provided, That the additional amount herein authorized for the fiscal year ending June 30, 1957, shall be apportioned immediately upon enactment of this Act.

(b) AVAILABILITY FOR EXPENDITURE.—Any sums apportioned to any State under this section shall be available for expenditure in that State for two years after the close of the fiscal year for which such sums are authorized, and any amounts so apportioned remaining unexpended at the end of such period shall lapse: Provided, That such funds shall be deemed to have been expended if a sum equal to the total of the sums herein and heretofore apportioned to the State is covered by formal agreements with the Secretary of Commerce for construction, reconstruction, or improvement of specific projects as provided in this title and prior Acts: Provided further, That in the case of those sums heretofore, herein, or hereafter apportioned to any State for projects on the Federal-aid secondary highway system, the Secretary of Commerce may, upon the request of any State, discharge his responsibility relative to the plans, specifications, estimates, surveys, contract awards, design, inspection, and construction of such secondary road projects by his receiving and approving a certified statement by the State highway department setting forth that the plans, design, and construction for such projects are in accord with the standards and procedures of such State applicable...

SEC. 108. NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS.

(a) INTERSTATE SYSTEM. It is hereby declared to be essential to the national interest to provide for the early completion of the “National System of Interstate Highways”, as authorized and designated in accordance with section 7 of the Federal-Aid Highway Act of 1944 (58 Stat. 838). It is the intent of the Congress that the Interstate System be completed as nearly as practicable over a thirteen-year period and that the entire System in all the States be brought to simultaneous completion. Because of its primary importance to the national defense, the name of such system is hereby changed to the “National System of Interstate and Defense Highways”. Such National System of Interstate and Defense Highways is hereinafter in this Act referred to as the “Interstate System”.

(b) AUTHORIZATION OF APPROPRIATIONS. For the purpose of expediting the construction, reconstruction, or improvement, inclusive of necessary bridges and tunnels, of the interstate System, including extensions thereof through urban areas, designated in accordance with the provisions of section 7 of the Federal-Aid Highway Act of 1944 (58 Stat. 838), there is hereby authorized to be appropriated the additional sum of \$1,000,000,000 for, the fiscal year ending June 30, 1957, which sum shall be in addition to the authorization heretofore made for that year, the additional sum of \$1,700,000,000 for the fiscal year ending June 30, 1958, the additional sum of \$2,000,000,000 for the fiscal year ending June 30, 1959, the additional sum of \$2,200,000,000 for the fiscal year ending June 30, 1960, the additional sum of \$2,200,000,000 for the fiscal year ending June 30, 1961, the additional sum of \$2,200,000,000 for the fiscal year ending June 30, 1962, the additional sum of \$2,200,000,000 for the fiscal year ending June 30, 1963, the additional sum of

\$2,200,000,000 for the fiscal year ending June 30, 1964, the additional sum of \$2,200,000,000 for the fiscal year ending June 30, 1965, the additional sum of \$2,200,000,000 for the fiscal year ending June 30, 1966, the additional sum of \$2,200,000,000 for the fiscal year ending June 30, 1967, the additional sum of \$1,500,000,000 for the fiscal year ending June 30, 1968, and the additional sum of \$1,025,000,000 for the fiscal year ending June 30, 1969.

(c) APPORTIONMENTS FOR 1957, 1958 AND 1959. The additional sums herein authorized for the fiscal years ending June 30, 1957, June 30, 1958, and June 30, 1959, shall be apportioned among the several States in the following manner: one-half in the ratio which the population of each State bears to the total population of all the States, as shown by the latest available Federal census: Provided, That no State shall receive less than three-fourths of 1 per centum of the money so apportioned; and one-half in the manner now provided by law for the apportionment of funds for the Federal-aid primary system. The additional sum herein authorized for the fiscal year ending June 30, 1957, shall be apportioned immediately upon enactment of this Act. The additional sums herein authorized for the fiscal years ending June 30, 1958, and June 30, 1959, shall be apportioned on a date not less than six months and not more than twelve months in advance of the beginning of the fiscal year for which authorized.

(d) APPORTIONMENT FOR SUBSEQUENT YEARS BASED UPON REVISED ESTIMATES OF COST. All sums authorized by this section to be appropriated for the fiscal years 1960 through 1969, inclusive, shall be apportioned among the several States in the ratio which the estimated cost of completing the Interstate System in each State, as determined and approved in the manner provided in this subsection, bears to the sum of the estimated cost of completing the Interstate System in all of the States. Each apportionment herein authorized for the fiscal years 1960 through 1969, inclusive, shall be made on a date as far in advance of the beginning of the fiscal year for which authorized as practicable but in no case more than eighteen months prior to the beginning of the fiscal year for which authorized. As soon as the standards provided for in subsection (i) have been adopted, the Secretary of Commerce, in cooperation with the State highway departments, shall make a detailed estimate of the cost of completing the Interstate System as then designated, after taking into account all previous apportionments made under this section, based upon such standards and in accordance with rules and regulations adopted by him and applied uniformly to all of the States. The Secretary of Commerce shall transmit such estimate to the Senate and House of Representatives within ten days subsequent to January 2, 1958. Upon approval of such estimate by the Congress by concurrent resolution, the Secretary of Commerce shall use such approved estimate in making apportionments for the fiscal years ending June 30, 1960, June 30, 1961, and June 30, 1962. The Secretary of Commerce shall make a revised estimate of the cost of completing the then designated Interstate System, after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1962. Upon approval of such estimate by the Congress by concurrent resolution, the Secretary of Commerce shall use such approved estimate in making apportionments for the fiscal years ending June 30, 1963, June 30, 1964, June 30, 1965, and June 30, 1966. The Secretary of Commerce shall make a revised estimate of the cost of completing the then designated Interstate System, after taking into account all previous apportionments made under this section,

in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1966, and annually thereafter through and including January 2, 1968. Upon approval of any such estimate by the Congress by concurrent resolution, the Secretary of Commerce shall use such approved estimate in making apportionments for the fiscal year which begins next following the fiscal year in which such report is transmitted to the Senate and the House of Representatives. Whenever the Secretary of Commerce, pursuant to this subsection, requests and receives estimates of cost from the State highway departments, he shall furnish copies of such estimates at the same time to the Senate and the House of Representatives.

(e) FEDERAL SHARE. The federal share payable on account of any project on the Interstate System provided for by funds made available under the provisions of this section shall be increased to 90 per centum of the total cost thereof, plus a percentage of the remaining 10 per centum of such cost in any State containing unappropriated and unreserved public lands and nontaxable Indian lands, individual and tribal, exceeding 5 per centum of the total area of all lands therein, equal to the percentage that the area of such lands in such State is of its total area: *Provided*, That such Federal share payable on any project in any State shall not exceed 95 per centum of the total cost of such project.

(f) AVAILABILITY FOR EXPENDITURE. Any sums apportioned to any State under the provisions of this section shall be available for expenditure in that State for two years after the close of the fiscal year for which such sums are authorized: *Provided*, That such funds for any fiscal year shall be deemed to be expended if a sum equal to the total of the sums apportioned to the State specifically for the Interstate System for such fiscal year and previous fiscal years is covered by formal agreements with the Secretary of Commerce for the construction, reconstruction, or improvement of specific projects under this section.

(g) LAPSE OF AMOUNTS APPROPRIATED. Any amount apportioned to States under the provisions of this section unexpended at the end of the period during which it is available for expenditure under the terms of subsection (f) of this section shall lapse, and shall immediately be reapportioned among the other States in accordance with the provisions of subsection (d) of this section: *Provided*, That any Interstate System funds released by the payment of the final voucher or by the modification of the formal project agreement shall be credited to the Interstate System funds previously apportioned to the State and be immediately available for expenditure.

(h) CONSTRUCTION BY STATES IN ADVANCE OF APPORTIONMENT. In any case in which a State has obligated all funds apportioned to it under this section and proceeds, subsequent to the date of enactment of this Act, to construct (without the aid of Federal funds) any project (including one or more parts of any project) on the Interstate System as designated at that time in accordance with all procedures and all requirements applicable to projects financed under the provisions of this section (except insofar as such procedures and requirements limit a State to the construction of projects with the aid of Federal funds previously apportioned to it), the Secretary of Commerce, upon application by such State and his approval of such application, is authorized, whenever additional funds are apportioned to such State under this section, to pay to such State from such funds the Federal share of the costs of construction of such

project: Provided, That prior to construction of any such project, the plans and specifications therefor shall have been approved by the Secretary of Commerce in the same manner as other projects on the Interstate System: Provided further, That any such project shall conform to the standards adopted under subsection (i). In determining the apportionment for any fiscal year under the provisions of subsection (d) of this section, any such project constructed by a State without the aid of Federal funds shall not be considered completed until an application under the provisions of this subsection with respect to such project has been approved by the Secretary of Commerce.

(i) **STANDARDS.** The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary of Commerce in cooperation with the State highway departments. Such standards shall be adequate to accommodate the types and volumes of traffic forecast for the year 1975. The right-of-way width of the Interstate System shall be adequate to permit construction of projects on the Interstate System up to such standards. The Secretary of Commerce shall apply such standards uniformly throughout the States. Such standards shall be adopted by the Secretary of Commerce in cooperation with the State highway departments as soon as practicable after the enactment of this Act.

(j) **MAXIMUM WEIGHT AND WIDTH LIMITATIONS.** No funds authorized to be appropriated for any fiscal year by this section shall be apportioned to, any State within the boundaries of which the Interstate System may lawfully be used by vehicles with weight in excess of eighteen thousand pounds carried on any one axle, or with a tandem axle weight in excess of thirty-two thousand pounds, or with an overall gross weight in excess of 78,280 pounds, or with a width in excess of 96 inches, on the corresponding maximum weights or maximum width permitted for vehicles using the public highways of such State under laws or regulations established by appropriate State authority in effect on July 1, 1956, whichever is the greater. Any amount which is withheld from apportionment to any State pursuant to the foregoing provisions shall lapse: *Provided, however,* That nothing herein shall be construed to deny apportionment to any State allowing the operation within such State of any vehicles or combinations thereof that could be lawfully operated within such State on July 1, 1956.

(k) **TESTS TO DETERMINE MAXIMUM DESIRABLE DIMENSIONS AND WEIGHTS.** The Secretary of Commerce is directed to take all action possible to expedite the conduct of a series of tests, now planned or being conducted by the Highway Research Board of the National Academy of Sciences, in cooperation with the Bureau of Public Roads, The several States, and other persons and organizations, for the purpose of determining the maximum desirable dimensions and weights for vehicles operated on the Federal-aid highway systems, including the Interstate System, and, after the conclusion of such tests, but not later than March 1, 1959, to make recommendations to the Congress with respect to such maximum desirable dimensions and weights.

(l) **INCREASE IN MILEAGE.** Section 7 of the Federal-Aid Highway Act of 1944 (58 Stat. 838), relating to the Interstate System, is hereby amended by striking out “forty thousand”, and inserting: in lieu thereof “forty-one thousand”: *Provided,* That the cost of completing any mileage designated from the one thousand additional miles authorized by this subsection shall be excluded in making the estimates of cost for completing the Interstate System as provided in subsection (d) of this section.

Rural Electrification Act of 1936

49 Stat. 1367 (1936)

AN ACT

To provide for rural electrification, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established an agency of the United States to be known as the “Rural Electrification Administration”, all of the powers of which shall be exercised by an Administrator, who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of ten years, and who shall receive a salary of \$10,000 per year. This Act may be cited as the “Rural Electrification Act of 1936”.

Section 2. The Administrator is authorized and empowered to make loans in the several States and Territories of the United States for rural electrification and the furnishing of electric energy to persons in rural areas who are not receiving central station service, as hereinafter provided; to make, or caused to be made, studies, investigations, and reports concerning the condition and progress of the electrification of rural areas in the several States and Territories; and to publish and disseminate information with respect thereto.

Section 3 (a) The Reconstruction finance Corporation is hereby authorized and directed to make loans to the Administrator, upon his request approved by the President, not exceeding in aggregate amount \$50,000,000 for the fiscal year ending June 30, 1937, with interest at 3 per centum per annum upon the security of the obligations of borrowers from the Administrator appointed pursuant to the provisions of this Act or from the Administrator of the Rural Electrification Administration established by Executive Order Numbered 7037: *Provided,* That no such loan shall be in an amount exceeding 85 per centum of the principal amount outstanding of the obligations constituting the security therefor: *And provided further,* That such obligations incurred for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines, or systems shall be fully amortized over a period not to exceed twenty-five years, and that the maturity of such obligations incurred for the purpose of financing the wiring of premises and the acquisition and installation of electrical and plumbing appliances and equipment shall not exceed two-thirds of the assured life thereof not more than five years. The Administrator is hereby authorized to make all such endorsements, to execute all such instruments, and to do all such acts and things as shall be necessary to effect the valid transfer and assignment to the Reconstruction Finance Corporation of all such obligations.

(b) There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending June 30, 1938, and for each the eight years thereafter, the sum of \$40,000,000 for the purposes of this Act as hereinafter provided.

(c) Fifty per centum of the annual sums herein made available or appropriated for the purposes of this Act shall be allotted yearly by the Administrator for loans in the several States in the proportion which the number of their farms not then receiving central station electric service bears to the total number of farms in the United States

not then receiving such service. The Administrator shall, within 90 days after the beginning of each fiscal year, determine for each State and for the United States the number of farms not then receiving such service.

(d) The remaining 50 per centum of such annual sums shall be available for loans in the several States and in the Territories, without allotment as hereinabove provided, in such amounts for each State and Territory as, in the opinion of the Administrator, may be effectively employed for purposes of this Act, and to carry out the provisions of section 7: *Provided, however,* That not more than 10 per centum of said unallotted annual sums may be employed in any one State, or in all of the Territories.

(e) If any part of the annual sums made available for the purposes of this Act shall not be loaned or obligated during the fiscal year for which such sums are made available, such unexpended or unobligated sums shall be available for loans by the Administrator in the following year or years without allotment: *Provided, however,* That not more than 10 per centum of said sums may be employed in any one State or in all of the Territories: *And provided further,* That no loan shall be made by the Reconstruction Finance Corporation to the Administrator after June 30, 1937.

(f) All moneys representing payments of principal and interest on loans made by the Administrator under this Act shall be covered into the Treasury as miscellaneous receipts, except that any such moneys representing payments of principal and interest on obligations constituting the security for loans made by the Reconstruction Finance Corporation to the Administrator shall be paid to the Reconstruction Finance Corporation in payment of such loans.

Sec. 4. The Administrator is authorized and empowered, from the sums herein before authorized, to make loans to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples utility districts and cooperative nonprofit, or limited dividend associations organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service: *Provided, however,* That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof municipalities, peoples utility districts, and cooperative, nonprofit, or limited dividend associations, the projects of which comply with the requirements of this Act. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of income: *Provided, however,* That all such loan shall be self-liquidating within a period of not to exceed twenty-five years, and shall bear interest at a rate equal to the average rate of interest payable by the United States of America on its obligations, having maturity of ten or more years after the dates thereof, issued during the last preceding fiscal year in which any such obligations were issued: *Provided further,* That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of this State authority having jurisdiction of the premises is first obtained. Loans under this section and section 5 shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed.

Section 5. The Administrator is authorized and empowered, from the sums herein before authorized, to make loans for the purpose of financing the wiring of the premises of persons in rural areas and the acquisition and installation of electrical and plumbing appliances and equipment. Such loans may be made to any of the borrowers of funds loaned under the provisions of section 4, or to any person, firm, or corporation supplying or installing the said wiring, appliances or equipment. Such loan shall be for such terms, subject to such conditions, and so security as reasonably to assure repayment thereof, and shall be at a rate of interest equal to the average rate of interest payable to the night by the United States of America on its obligations, having maturity of ten or more years after the dates thereof, issued during the last preceding fiscal year in which any such obligations were issued.

Section 6. For the purposes of administering this Act and for the purpose of making the studies, investigations, publications, and reports herein provided for, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as shall be necessary.

Section 7. The Administrator is authorized and empowered to bid for and purchase at any foreclosure or other sale, or otherwise to acquire, property pledged or mortgaged to secure any loan made pursuant to this Act; to pay the purchase price and any costs and expenses incurred in connection therewith from the sums authorized in section 3 of this Act; to accept title to any property so purchased or acquired in the name of the United States of America; to operate or lease such property for such period as may be deemed necessary or advisable to protect the investment therein, but not to exceed five years after the acquisition thereof; and to sell such property so purchased or acquired, upon such terms and for such consideration as the Administrator shall deem to be reasonable.

No borrower funds under section 4 shall, without the approval of the Administrator, sell or dispose of its property, rights, or franchises, acquired under the provisions of this Act, until any loan obtained from the Rural Electrification Administration, including all interest and charges, shall have been repaid.

Section 8. The administration of loans and contracts entered into by the Rural Electrification Administration established by Executive Order Numbered 7037, dated May 11, 1935, may be vested by the President in the Administrator authorized to be appointed by this Act; and in such event the provisions of this Act shall apply to said loans and contracts to the extent that such provisions are not inconsistent therewith. The President may transfer to the Rural Electrification Administration created by this Act the jurisdiction and control of the records, property (including office equipment), and personnel used or employed in the exercise and performance of the functions of the Rural Electrification Administration established by such Executive order.

Section 9. This Act shall be administered entirely on a nonpartisan basis, and in the appointment of officials, the selection employees, and in the promotion of any such officials or employees, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given in made on the basis of merit and efficiency. If the Administrator herein provided for is found by the President of the United States to be guilty of a violation of this section, he shall be removed from office by the President, and any appointee or selection of officials or employees made by the Administrator who is found guilty of a violation of this Act shall be removed by the Administrator.

Section 10. The Administrator shall present annually to the Congress not later than the 20th day of January in each year of full report of his activities under this Act.

Section 11. In order to carry out the provisions of this Act the Administrator may accept and utilize such voluntary and uncompensated services of Federal, State, and local officers and employees as are available, and he may without regard to the provisions of civil-service laws applicable to officers and employees of the United States appoint and fix the compensation of attorneys, engineers, and experts, and he may, subject to the civil-service laws, point such other officers and employees as he may find necessary and prescribe their duties. The Administrator is authorized, from sums appropriated pursuant to section 6, to make such expenditures (including expenditures for personal services; supplies and equipment; lawbooks and books of reference; directories and periodicals; travel expenses; rental at the seat of government and elsewhere; the purchase, operation or maintenance of passenger-carrying vehicles; and printing and binding) as are appropriate and necessary to carry out the provisions of this Act.

Section 12. The Administrator is authorized and empowered to extend the time of payment of interest or principal of any loans made by the Administrator pursuant to this Act: *Provided, however,* That with respect to any loan made under section 4, the payment of interest or principal shall not be extended more than five years after such payment shall become due, and with respect to any loan made under section 5, the payment of principal or interest shall not be extended more than two years after such payment shall have become due: *And provided further,* That the provisions of this section shall not apply to any obligations or the security therefore which may be held by the Reconstruction Finance Corporation under the provisions of section 3.

Section 13. As used in this Act the term "rural area" shall be deemed to mean any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both farm and nonfarm population thereof; the term "farm" shall be deemed to mean a farm as defined in the publication of the Bureau of the Census; the term "person" shall be deemed to mean any natural person, firm, corporation, or association; the term "Territory" shall be deemed to include any insular possession of the United States.

Section 14. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, May 20, 1936.

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For Immediate Release**FCC LAUNCHES \$20 BILLION RURAL DIGITAL OPPORTUNITY FUND TO EXPAND RURAL BROADBAND DEPLOYMENT*****Represents FCC's Largest Investment Ever to Close Digital Divide***

WASHINGTON, January 30, 2020—The Federal Communications Commission today took its single biggest step to date to close the digital divide by establishing the new Rural Digital Opportunity Fund to efficiently fund the deployment of high-speed broadband networks in rural America. Through a two-phase reverse auction mechanism, the FCC will direct up to \$20.4 billion over ten years to finance up to gigabit speed broadband networks in unserved rural areas, connecting millions more American homes and businesses to digital opportunity.

Without access to broadband, rural Americans cannot participate in the digital economy or take advantage of the opportunities broadband brings for better education, healthcare, and civic and social engagement. In recent years, the Commission has made tremendous strides toward increasing the availability of broadband in rural America. But more work remains to be done, and the Rural Digital Opportunity Fund is a key part of the FCC's continuing efforts.

The first phase of the Rural Digital Opportunity Fund will begin later this year and target census blocks that are wholly unserved with fixed broadband at speeds of at least 25/3 Mbps. This phase would make available up to \$16 billion to census blocks where existing data shows there is no such service available whatsoever. Funds will be allocated through a multi-round reverse auction like that used in 2018's Connect America Fund (CAF) Phase II auction. FCC staff's preliminary estimate is that about six million rural homes and businesses are located in areas initially eligible for bidding in the Phase I auction.

The Rural Digital Opportunity Fund auction will prioritize networks with higher speeds, greater usage allowances, and lower latency. To support the deployment of sustainable networks in this auction, the auction will prioritize bidders committing to provide fast service with low latency. This will encourage the deployment of networks that will meet with needs of tomorrow as well as today. Bidders must also commit to provide a minimum speed more than double than was required in the CAF Phase II auction.

Phase II of the program will make available at least \$4.4 billion to target partially served areas, census blocks where some locations lack access to 25/3 Mbps broadband. Using the granular, precise broadband mapping data being developed in the FCC's Digital Opportunity Data Collection, along with census blocks unawarded in the Phase I auction.

The Connect America Fund has been a success in distributing resources to help bridge the digital divide and that success will be carried forward in the new Rural Digital Opportunity Fund. Both programs, supported by the Universal Service Fund, are part of the Commission's ongoing commitment to provide rural America with the same opportunities available in urban areas.

Action by the Commission January 30, 2020 by Report and Order (FCC 20-5). Chairman Pai, Commissioners O'Rielly and Carr approving. Commissioners Rosenworcel and Starks approving in part and dissenting in part. Chairman Pai, Commissioners O'Rielly, Carr, Rosenworcel, and Starks issuing separate statements.

WC Docket Nos. 19-126, 10-90

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F.2d 385 (D.C. Cir. 1974).

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Rural Digital Opportunity Fund*, WC Docket No. 19-126; *Connect America Fund*, WC Docket No. 10-90.

Last September, I visited the outskirts of Mandan, North Dakota—which is west of Bismarck—where BEK Communications was deploying fiber broadband as part of its Connect America Phase II auction deployment.

That afternoon, I met Jamie Wetsch, Erica Hagar, and Cullen Quill. Jamie and Erica had recently gotten high-speed Internet access; Cullen was getting access to gigabit fiber that very day. Jamie is a software engineer. He told me he's now able to work from home and spend more time with his family. Speaking of, he also said he no longer has to use the phrase “[Get] off the Internet, kids, we’re using it.” Erica is a self-made entrepreneur. She started an online infant-clothing store, Bison Booties, after her daughter was born. Now, she can finish orders and respond to customers more quickly, and otherwise grow her business. I asked Cullen how he was planning on using the new service. He said he'd never had a problem like that, but after thinking about it, he said he and his wife now wouldn't have to drive to Bismarck so their kids could upload their homework using a fast-food restaurant's Wi-Fi connection.

Stories like Jamie's, Erica's, and Cullen's illustrate how broadband access can improve the lives of American families and the strength of America's rural communities. And they explain why closing the digital divide is my top priority as Chairman. Millions of rural Americans like these three North Dakotans want to participate in the digital economy.

Over the last three years, we've done a lot to make that happen, and the evidence is clear that that we're making incredible strides toward that goal. Through 2018's successful Connect America Phase II auction, we are supporting the deployment of broadband networks to more than 713,000 unserved rural homes and businesses. And through other Universal Service Fund reforms, small, rural telephone companies in the rate-of-return program have committed to serving 25/3 Mbps broadband to more than 940,000 locations in their service areas. These steps, together with our efforts over the last three years to remove unnecessary barriers to broadband deployment and modernize our regulations, are helping to rapidly close the digital divide. In the first two years of this Administration, the number of Americans lacking access to 25/3 Mbps broadband fell by 30%, and the number of Americans lacking access to 250/25 Mbps broadband plummeted nearly 75%. Fiber was deployed to a record 7.2 million new homes in 2019, smashing 2018's then-record of 5.9 million homes.

But there's more to do. FCC data show there are still millions of American homes and businesses in rural areas completely lacking broadband at the 25/3 Mbps standard. Many of these locations can't even get a 10/1 Mbps connection, and right now there simply is no business case for deploying broadband there. This means that millions of Americans can't start a business, advance their children's and their own education, use precision agriculture, access telemedicine, or benefit from the digital economy. This demands the Commission take immediate, concrete action.

And today, we proceed to do just that with our boldest step yet to ensure that digital opportunity reaches all Americans, no matter where they live: the Rural Digital Opportunity Fund, a \$20 billion initiative that targets \$16 billion in just the first phase for deploying up to gigabit speed broadband to as many as six million American homes and businesses we already know are unserved.

The Rural Digital Opportunity Fund is building on the success of the Connect America Phase II auction. For instance, we're going to use a reverse auction format that will rely on market forces to direct subsidies to the provider willing to build the fastest network at the lowest cost.

But we're also making some significant changes to our CAF II approach—changes that will mean better networks covering more Americans. We're more than doubling the minimum speeds that the auction will support from 10/1 Mbps in CAF II to 25/3 Mbps. We're increasing the weights on bids to favor higher speeds and lower latency. We'll assign support to the bidder offering the best combination

of speed and latency, once the combined price of bids in each area in the auction falls below the available budget.

We're also making changes that will help ensure maximum participation—and therefore maximum broadband deployment—in the auction. In response to concerns about the financial strain some carriers might face, we're changing the letter of credit requirement to reduce costs to carriers by up to 80% in a given year from those initially proposed—while still protecting these scarce federal funds. At the same time, we're giving bidders an all-new incentive to deploy their networks more quickly than ever. This will ensure that more carriers can participate in the auction while both safeguarding taxpayer funds and getting rural Americans connected as soon as possible.

And those aren't the only improvements. We're including in the auction many areas that were previously excluded from some of our rural broadband programs but where market forces alone still have not brought about broadband deployment. We're increasing support to bidders serving Tribal lands, where deployment is often especially challenging. And we're adding a new, intermediate speed tier of 50/5 Mbps to the auction that will give bidders greater flexibility to design networks and use technologies that make sense for the area where they're bidding.

Together, these changes mean that we're more likely to have greater eligibility for rural areas to get funding through the auction; stronger participation among bidders in the auction; faster, future-proofed networks that will support not only today's Internet applications, but tomorrow's, too; and better (and quicker) bang for the buck. In other words, better, faster, cheaper broadband for more Americans.

Indeed, our approach has won widespread support from those representing rural America, from the National Grange to the Rural & Agricultural Council of America, from the National Association of Wheat Growers to the U.S. Cattlemen's Association, from Republican North Dakota Governor Doug Burgum to Democratic Kansas Governor Laura Kelly, from Congressman Bill Johnson to Congressman Tim Walberg. I could go on, but you get the point. Those who know rural America best support the Rural Digital Opportunity Fund.

We also know there are Americans living in areas where some, but not all, homes have service. How do we determine who those Americans are and where they live? Well, last August, the FCC adopted the Digital Opportunity Data Collection, a fresh new look at broadband mapping that will collect granular, precise, and crowdsourced broadband coverage data so that we can target support to those Americans in partially served areas in Phase II of the Rural Digital Opportunity Fund. Today, we allocate \$4.4 billion to Phase II, plus any of the Phase I budget that remains after competitive bidding drives down costs, to target those additional homes and businesses. Now, we recognize that once we know precisely how large this part of the job is, we may need to revisit the Phase II budget. But none of these questions—who is in Phase II or how much it'll cost to serve them—undercuts our obligation to ensure that the millions of Americans who we *know* are completely unserved have access to broadband as soon as possible through Phase I.

While the details may be complicated, our goal here is pretty simple: We want every rural American who for too long has been on the wrong side of the digital divide to benefit from broadband, as Jamie Wetsch, Erica Hagar, and Cullen Quill have. I believe the Rural Digital Opportunity Fund will permanently change the broadband landscape in America for the better. I can't wait to see the auction begin later this year and see its impact on the digital divide.

I would like to thank the many dedicated staffers who contributed to this item, including Talmage Cox, Ian Forbes, Lauren Garry, Trent Harkrader, Jesse Jachman, Katie King, Heidi Lankau, Sue McNeil, Alex Minard, Kris Monteith, and Ryan Palmer from the Wireline Competition Bureau; Kirk Burgee, Nathan Eagan, Michael Janson, and Jonathan McCormack from the Rural Broadband Auctions Task Force; Valerie Barrish, Jonathan Campbell, Audra Hale-Maddox, Eliot Maenner, Kate Matraves, Giulia McHenry, Murtaza Nasafi, Jeffrey Prince, Kelly Quinn, Steve Rosenberg, Patrick Sun, and Margy Wiener from the Office of Economics and Analytics; and Malena Barzilai, Neil Dellar, Tom Driscoll, Richard Mallen, and Linda Oliver from the Office of General Counsel.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
APPROVING IN PART, DISSENTING IN PART**

Re: *Rural Digital Opportunity Fund*, WC Docket No. 19-126; *Connect America Fund*, WC Docket No. 10-90.

To go to Duanesburg, New York, you head north of Albany and then west on Route 88 by Schenectady. As the crow flies, it is probably less than thirty minutes from the capitol, but the drive will take longer the way the roads are laid out in this picturesque corner of the Empire State. It's a town of roughly 6000 people. There are some old farms and trails through the woods that are popular for snowmobiling during the winter months when the community is blanketed in deep, white snow. If you go, you should check out Johnson's Restaurant. Way back when, Harrison Ford was reported to have been a repeat visitor when he was up in the area some years ago. But history in this place goes back much further, because Duanesburg was founded in the 18th century when a group of English Quakers decided to make it home. These days, however, its residents are worried about its future.

Annabel Felton is a longtime resident. She's making a ruckus because she wants the town to have access to broadband. She can't get high-speed service at home. At first, it was just an inconvenience, she told me when I met her late last year in upstate New York with Congressman Paul Tonko. But when she had children in school, she said it was apparent her household required access to broadband. As she put it: "It gets difficult when their classroom studies are online. We have kids who need to compete in the global economy."

Her children were falling into the homework gap. And her town—the rural community she loves—was falling into the digital divide. She wondered how it would attract businesses, thrive, and compete with so many more connected places across the country. She also wondered about the simple things, like without having online access how would she ever sell her house?

Annabel is a doer, so she got to work. She helped set up the Duanesburg Broadband Committee and took the reins. The mission of the committee was clear: Help get broadband to every resident, farm, and small business.

The first order of business was simple: Create a map. After all, you can't know with precision how to fix a lack of broadband access without knowing in detail where service is and is not. As Annabel said, this was essential because the existing maps from the Federal Communications Commission "are notoriously inaccurate" and "just plain wrong." So the committee did what feels obvious. They used old-fashioned shoe leather and boots on the ground to survey all residents about the state of broadband in town.

What the committee found was not surprising if you've been watching the mess this agency has made with its broadband maps. Right now, if a single subscriber in a census block is identified as having broadband, we conclude broadband is available throughout. That's not right. It masks so many people who are unserved and erroneously suggests our broadband efforts are done. As a result, these are the maps that a Cabinet Secretary pronounced "fake news" and a Senator on our oversight committee said memorably and bluntly, they just "stink."

With a whole lot more precision, Annabel and her team proved they are right. They found that in Duanesburg the FCC maps are wrong as much as half the time. That means there are a lot of people in her town stuck on the wrong side of the digital divide.

And there are a whole lot of communities just like Duanesburg—all across the country. Places where our maps are devastatingly wrong, where it has fallen on folks like Annabel to try and prove to local, state, and federal authorities that they do not have the infrastructure they need to succeed in the digital age. Let's salute them for their grit, their savvy, and their persistence.

But it shouldn't have to be this way.

Instead, the FCC should know in detail where service truly is and is not. It should be that we figure this out before sending federal funds to who knows where to build who knows what. But that is not what we do today. We rush billions of dollars out the door in what feels like a broadband publicity stunt without taking a broad view of what the nation needs.

So while the spirit of this effort is right on—we have a broadband problem—the way we go about addressing it is not right. It will leave so many people, so many communities, and so many places like Duaneburg behind. Let me explain why.

First: We need maps before money and data before deployment. With today's decision we commit the vast majority of universal service funds—\$16 billion!—for the next ten years without first doing anything to improve our maps, survey service accurately, or fix the data disaster we have about the state of service today. That means if your home is marked as served by the FCC's maps today and it is not, then for the next decade you are on your own. Good luck. It means millions of Americans will slip deeper into the digital divide.

Don't take my word for it. Consider that the association representing some of the nation's largest broadband providers did a pilot project and found that 38 percent of the homes and businesses the FCC counted as served had no service at all. When the very providers that seed the data behind the FCC's broadband maps acknowledge just how bad it is, it should set off alarm bells.

It does for me. That's because when I was frustrated with the mess this agency has made of its maps I did something simple. I set up an e-mail inbox: broadbandfail@fcc.gov. I asked people I met to write in and tell me what our maps got wrong. Now that may be the last new e-mail I'll be permitted to set up in my office, but it was worth the effort. That's because I heard from hundreds of people frustrated with the FCC's data and furious that Washington was telling them they had service at home when they knew clear as day they did not.

One individual from Kentucky told me that the provider that offers service according to the FCC map will only do so if he pays a \$46,000 installation charge. He didn't think that meant he was served. He's right. Another individual from Tennessee complained that because his address was misrepresented on our maps he was not able to get broadband at home. In Indiana, someone else told me he has never had service and questioned why the agency's official data suggested otherwise. From Texas I learned that a household stuck on dial-up is reported as served by broadband on our maps. Then there was the resident from the White Mountains of New Hampshire who told me just how wrong our mapping is, because it says she has a choice of six providers at home. She has none.

Despite all of this, we plow ahead today with a big spending plan that is not informed by better data. Remember that last year, the very day the FCC proposed this Rural Digital Opportunity Fund we also kicked off a series of policy changes to fix our maps.

What happened to that? Where did it go? Why are we not doing that now before we spend billions? Because what we are doing today is going to leave people behind. Anyone who our maps erroneously suggest is served by broadband is out of luck for the next decade. Remember that in Annabel's community the maps were wrong as much as half of the time.

I get that in Washington organizations may flatter what we do here, because, let's face it, there's money on the table. But that doesn't make this right. We are spending down three-quarters of our broadband funds for the next decade right here and now without doing any of the hard work necessary to figure out just where those dollars should go. To those who miss this election-year bonanza because our maps are wrong, we say good luck, we'll deal with it later when our funds are already spent and too many communities in too many places have fallen further behind.

Second: We fail to recognize that cost is a barrier to broadband availability. This proceeding is a missed opportunity to honestly acknowledge that there are more than deployment barriers to broadband—there are adoption barriers too. The FCC could have asked funding recipients to offer a

low-cost service for consumers when they are receiving billions in support from the government. But if you comb through the text of this decision, you'll find we took a pass. That's unfortunate. When two in five of us Americans are unable to afford a \$400 emergency, we need to recognize that price is a barrier for many people. We could have fixed this, but we declined.

Third: This broadband fund is backward-looking with stale service speeds and data caps.

It seems crazy that we are going to sit here today and pronounce what service speeds are adequate ten years hence. But we do just that with the baseline speed of 25 megabits per second that we propose. If you want a demonstration of just how ridiculous that is, know that a decade ago this agency called service at 200 kilobits per second broadband. Go ahead and stream a video over that and see how it goes. I don't think we can know exactly how we will use broadband capacity ten years hence. But I do think that right here and now we need to be more ambitious. I think 100 megabits per second is table stakes and we are going to need more symmetrical upload and download speeds as we move from an internet that is about consumption to one that is about creation. This is especially true in rural areas, where we anticipate whole new economies developing based on mass amounts of data from precision agriculture. But we do not plan for this future here.

Likewise, when it comes to data caps the agency's decision misses the mark. This program will set in stone data caps for some services for the next ten years. That's bonkers. Data consumption is growing fast. We should not limit our use cases and creativity by choosing a low-lying number at a fixed point in time.

Fourth: Haste makes waste. This effort has been pushed out so fast I fear we are only starting to understand what is not workable in this framework. We are making so much up as we go along. Late on the night before our vote and then again after our vote, we saw major changes to this decision. As a result, this decision now penalizes states that have taken it upon themselves to do the hard work of expanding broadband on their own. We do so by adopting a policy of exclusion. Instead of partnering with these state efforts, we disqualify them and the areas where they have sought to extend the reach of broadband. But nowhere in this decision do we itemize where those areas are and what state efforts render communities ineligible. Plus, we have changed misguided policies involving letters of credit but made new ones up on the fly. We also are in such a rush that we didn't even try to fix the holes in the FCC's data with a meaningful challenge process. Instead of a robust challenge process where folks like Annabel could come forward and tell the agency we got it wrong, we have come up with one that shuts them out. The only challenges we will accept are from entities seeking to remove areas from the auction.

To make matters worse, we are turning our back on working cooperatively with broadband efforts in the states. Just a few years ago the agency worked with the state of New York to come up with a new way to address broadband challenges in the state. For this effort, it appears that New York is going to pay an unfortunate price by being largely blocked out of participation here. This is disappointing because we could have explored working more closely with states by having them match the federal dollars here. In fact, the California Public Utilities Commission sought to do just that, but our action here will render that impossible.

In the end, this is not the broadband plan we need. It is not guided by maps. It is not guided by data. It is guided by a desire to rush out the door, claim credit and pronounce our nation's broadband problems solved.

I think Americans deserve better. I think we solve problems by rolling up our sleeves, getting the facts we need, and then making things happen. That's how we get audacious things done. I saw this in New York when I visited with Annabel. I've seen it all over the country with people, providers, and communities that are fighting to secure the connectivity they need for a fair shot at 21st century success. I believe my colleagues have seen it, too. It never fails to inspire. So I support the impulse behind this decision, but I believe in too many ways this effort falls short of what we need and therefore dissent in all other respects.

Smyth v. Ames

169 U.S. 466 (1898)

Mr. Justice HARLAN delivered the opinion of the court: *** Each of these suits was brought July 28, 1893, and involves the constitutionality of an act of the legislature of Nebraska approved by the governor April 12, 1893, and which took effect August 1, 1893. It was an act “to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the state of Nebraska, and to provide penalties for the violation of this act.” Acts Neb. 1893, c. 24; Comp. St. Neb. 1893, c. 72, art. 12. The act is referred to in the record as “House Roll 33.”

*** The power to enact the statute whose validity is now assailed—that is, the above statute of August 1, 1893, regulating railroads, classifying freights, fixing reasonable maximum rates, etc., in Nebraska—was referred by counsel to the general legislative power of the state, as well as to the fourth section of article 11 of the state constitution which provides: “Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited.”

*** We are now to inquire whether the Nebraska statute is repugnant to the constitution of the United States. By the fourteenth amendment it is provided that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this amendment is now settled. *** But this court, speaking by Chief Justice Waite, has said that, while the state has power to fix the charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by valid contract, or unless what is done amounts to a regulation of foreign or interstate commerce, such power is not without limit; and that, “under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law.” *Railroad Commission Cases*, [116 U.S. 307, 325, 331](#). ***

In view of the adjudications these principles must be regarded as settled:

1. A railroad corporation is a person within the meaning of the fourteenth amendment declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would, therefore, be repugnant to the fourteenth amendment of the constitution of the United States.

3. While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.

The cases before us directly present the important question last stated.

Before entering upon its examination, it may be observed that the grant to the legislature in the constitution of Nebraska of the power to establish maximum rates for the transportation of passengers and freight on railroads in that state has reference to “reasonable” maximum rates. These words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness. Be this as it may, it cannot be admitted that the power granted may be exerted in derogation of rights secured by the constitution of the United States, or that the judiciary may not, when its jurisdiction is properly invoked, protect those rights.

What are the considerations to which weight must be given when we seek to ascertain the compensation that a railroad company is entitled to receive, and a prohibition upon the receiving of which may be fairly deemed a deprivation by legislative decree of property without due process of law? Undoubtedly, that question could be more easily determined by a commission composed of persons whose special skill, observation, and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. But, despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. * * *

We turn now to the evidence in the voluminous record before us for the purpose of ascertaining whether—looking at the cases in the light of the facts as they existed when the decrees were rendered—the Nebraska statute, if enforced, would, by its necessary operation, have deprived the companies, whose stockholders and bondholders here complain, of the right to obtain just compensation for the services rendered by them.

The first and most important contention of the plaintiffs is that, if the statute had been in force during any one of the three years preceding its passage, the defendant companies would have been compelled to use their property for the public substantially without reward, or without the just compensation to which it was entitled. We think this mode of calculation for ascertaining the probable effect of the Nebraska statute upon the railroad companies in question is one that may be properly used.

*** By like calculations, it will appear that each of the railroad companies would have conducted their local business at a loss during the periods stated, except that in the year ending June 30, 1891, and in the year ending June 30, 1893, the earnings of the Fremont Company, and in the years ending the 30th days of June 1892 and 1893, respectively, the earnings of the Union Pacific Company would have slightly exceeded their operating expenses.

*** It is said by the appellants that the local rates established by the Nebraska statute are much higher than in the state of Iowa, and that fact shows that the Nebraska rates are reasonable. This contention was thus met by the circuit court: “It is, however,

urged by the defendants that in the general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining states; and that the reduction by house roll 33 simply establishes an equality between Nebraska and the other states through which the roads run. The question is asked, are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one state, but they are not necessarily bound to give absolutely the same rates to the people of all the states, for the kind and amount of business and the cost thereof are factors which determine largely the question of rates, and these vary in the several states. The volume of business in one state may be greater per mile, while the cost of construction and of maintenance is less; hence, to enforce the same rates in both states might result in great injustice in one, while it would only be reasonable and fair in another. Comparisons, therefore, between the rates of two states, are of little value, unless all the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent. higher than similar rates in the state of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence a mere difference between the rates in two states is of comparatively little significance." *Ames v. Union Pacific Railway*, 64 Fed. 165. In these views we concur, and it is unnecessary to add anything to what was said by the circuit court on this point.

It is further said, in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company; that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature prescribe rates for domestic business that would bring no reward, and be less than the services rendered are reasonably worth? Or must the rates for such transportation as begins and ends in the state be established with reference solely to the amount of business done by the carrier wholly within such state, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the state of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on

its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to exceeded by the carrier it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the state; can have no application where the state is without authority over rates on the entire line, and can only deal with local rates, and make such regulations as are necessary to give just compensation on local business.

*** It appears, from what has been said, that if the rates prescribed by the act of 1893 had been in force during the years ending June 30, 1891, 1892, and 1893, the Fremont Company, in the years ending June 30, 1891, and June 30, 1893, and the Union Pacific company, in the years ending June 30, 1892, and June 30, 1893, would each have received more than enough to pay operating expenses. Do those facts affect the general conclusion as to the probable effect of the act of 1893? In the discussion of this question the plaintiffs contended that a railroad company is entitled to exact such charges for transportation as will enable it at all times not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to all those ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws.

In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. It is unsound, in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the guaranties for the protection of its property. *Olcott v. Supervisors*, [16 Wall. 678, 694](#); *Sinking Fund Cases*, [99 U.S. 700, 719](#); *Cherokee Nation v. Southern Kan. Ry. Co.*, [135 U.S. 641, 657](#). It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but, in order simply that the

corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

*** What was said in *Covington & Lexington Turnpike Co. v. Sandford*, [164 U.S. 578, 596, 597](#) is pertinent to the question under consideration. It was there observed: “It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. *** The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant’s turnpike upon payment of such tolls as, in view of the nature and value of the services rendered by the company, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable.”

A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may, by legislation, protect the people against unreasonable charges for the services rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights, and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services, and the people financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guaranties for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. As said in the case last cited: “Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interest both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. *** The utmost

that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public.”

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the circuit court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892, and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the constitution. Under the evidence, there is no ground for saying that the operating expenses of any of the companies were greater than necessary. * * *

*** Perceiving no error on the record in the light of the facts presented to the circuit court, the decree in each case must be affirmed.

It is so ordered.

State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri

262 U.S. 276 (1923)

[Mr. Justice McREYNOLDS's opinion for the Court is omitted.]

Mr. Justice BRANDEIS, with whom Mr. Justice HOLMES concurs: I concur in the judgment of reversal. But I do so on the ground that the order of the state commission prevents the utility from earning a fair return on the amount prudently invested¹ in it.

¹ The term “prudent investment” is not used in a critical sense. There should not be excluded, from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful

Thus, I differ fundamentally from my brethren concerning the rule to be applied in determining whether a prescribed rate is confiscatory. The court, adhering to the so-called rule of *Smyth v. Ames*, 169 U.S. 466, and further defining it, declares that what is termed value must be ascertained by giving weight, among other things, to estimates of what it would cost to reproduce the property at the time of the rate hearing.

The so-called rule of *Smyth v. Ames* is, in my opinion, legally and economically unsound. The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the federal Constitution guarantees to the utility the opportunity to earn a fair return. Thus it sets the limit to the power of the state to regulate rates. The Constitution does not guarantee to the utility the opportunity to earn a return on the value of all items of property used by the utility or of any of them. The several items of property constituting the utility, taken singly, and freed from the public use, may conceivably have an aggregate value greater than if the items are used in combination. The owner is at liberty, in the absence of controlling statutory provision, to withdraw his property from the public service, and, if he does so, may obtain for it exchange value. But, so long as the specific items of property are employed by the utility, their exchange value is not of legal significance.

The investor agrees, by embarking capital in a utility, that its charges to the public shall be reasonable. His company is the substitute for the state in the performance of the public service, thus becoming a public servant. The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes, not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor, the allowance for risk incurred, and enough more to attract capital. The reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more. But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the cost of the service as thus defined.

To decide whether a proposed rate is confiscatory the tribunal must determine both what sum would be earned under it and whether that sum would be a fair return. The decision involves ordinarily the making of four subsidiary ones:

1. What the gross earnings from operating the utility under the rate in controversy would be. (A prediction.)
2. What the operating expenses and charges, while so operating, would be. (A prediction.)
3. The rate base; that is, what the amount is on which a return should be earned. (Under *Smyth v. Ames*, an opinion, largely.)
4. What rate of return should be deemed fair. (An opinion, largely.)

*** The experience of the 25 years since [*Smyth v. Ames*] was decided has demonstrated that the rule there enunciated is delusive. In the attempt to apply it insuperable obstacles have been encountered. It has failed to afford adequate protection either to capital or to the public. It leaves open the door to grave injustice. To give to capital

or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.

embarked in public utilities the protection guaranteed by the Constitution, and to secure for the public reasonable rates, it is essential that the rate base be definite, stable, and readily ascertainable, and that the percentage to be earned on the rate base be measured by the cost, or charge, of the capital employed in the enterprise. It is consistent with the federal Constitution for this court now to lay down a rule which will establish such a rate base and such a measure of the rate of return deemed fair. In my opinion, it should do so.

The rule of *Smyth v. Ames* sets the laborious and baffling task of finding the present value of the utility. It is impossible to find an exchange value for a utility, since utilities, unlike merchandise or land, are not commonly bought and sold in the market. Nor can the present value of the utility be determined by capitalizing its net earnings, since the earnings are determined, in large measure, by the rate which the company will be permitted to charge, and thus the vicious circle would be encountered. So, under the rule of *Smyth v. Ames*, it is usually sought to prove the present value of a utility by ascertaining what it actually cost to construct and install it, or by estimating what it should have cost, or by estimating what it would cost to reproduce or to replace it. To this end an enumeration is made of the component elements of the utility, tangible and intangible; then the actual, or the proper, cost of producing, or of reproducing, each part is sought; and finally it is estimated how much less than the new each part, or the whole, is worth. That is, the depreciation is estimated. Obviously each step in the process of estimating the cost of reproduction, or replacement, involves forming an opinion, or exercising judgment, as distinguished from merely ascertaining facts. And this is true, also, of each step in the process of estimating how much less the existing plant is worth than if it were new. There is another potent reason why, under the rule of *Smyth v. Ames*, the room for difference in opinion as to the present value of a utility is so wide. The rule does not measure the present value either by what the utility cost to produce, or by what it should have cost, or by what it would cost to reproduce, or to replace it.⁵ Under that rule the tribunal is directed, in forming its judgment, to take into consideration all those and also other elements, called relevant facts.

Obviously, “value” cannot be a composite of all these elements. Nor can it be arrived at on all these bases. They are very different, and must, when applied in a particular case, lead to widely different results. The rule of *Smyth v. Ames*, as interpreted and applied, means merely that all must be considered. What, if any, weight shall be given to any one, must practically rest in the judicial discretion of the tribunal which makes the determination. Whether a desired result is reached may depend upon how any one of many elements is treated. * * *

The efforts of courts to control commissions’ findings of value have largely failed. The reason lies in the character of the rule declared in *Smyth v. Ames*. The rule there stated was to be applied solely as a means of determining whether rates already prescribed by the Legislature were confiscatory. It was to be applied judicially after the

⁵ This court declared in *Smyth v. Ames*, [169 U.S. 466, 547](#), that “present as compared with the original cost of construction” is to be considered, and in *Minnesota Rate Cases*, [230 U.S. 352, 452](#), that “the cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty.” Reproduction cost was thus held to be evidence of value. But it has never been held to be the measure of value.

rate had been made, and by a court which had had no part in making the rate. When applied under such circumstances, the rule, although cumbersome, may occasionally be effective in destroying an obstruction to justice, as the action of a court is, when it sets aside the verdict of a jury. But the commissions undertook to make the rule their standard for constructive action. They used it as a guide for making or approving rates, and the tendency developed to fix as reasonable the rate which is not so low as to be confiscatory. Thus the rule which assumes that rates of utilities will ordinarily be higher than the minimum required by the Constitution has, by the practice of the commissions, eliminated the margin between a reasonable rate and a merely compensatory rate, and, in the process of rate-making, effective judicial review is very often rendered impossible. The result, inherent in the rule itself, is arbitrary action on the part of the rate-regulating body; for the rule not only fails to furnish any applicable standard of judgment, but directs consideration of so many elements that almost any result may be justified.

The adoption of present value of the utility's property, as the rate base, was urged in 1893 on behalf of the community, and it was adopted by the courts, largely, as a protection against inflated claims, based on what were then deemed inflated prices of the past. Reproduction cost, as the measure, or as evidence, of present value, was also pressed then by representatives of the public, who sought to justify legislative reductions of railroad rates. ***

At first reproduction cost was welcomed by commissions as evidence of present value. Perhaps it was because the estimates then indicated values lower than the actual cost of installation; for, even after the price level had begun to rise, improved machinery and new devices tended for some years to reduce construction costs. Evidence of reproduction costs was certainly welcomed, because it seemed to offer a reliable means for performing the difficult task of fixing, in obedience to *Smyth v. Ames*, the value of a new species of property to which the old tests—selling price or net earnings—were not applicable. The engineer spoke in figures—a language implying certitude. His estimates seemed to be free of the infirmities which had stamped as untrustworthy the opinion evidence of experts common in condemnation cases. Thus, for some time, replacement cost, on the basis of prices prevailing at the date of the valuation, was often adopted by state commissions as the standard for fixing the rate base. But gradually it came to be realized that the definiteness of the engineer's calculations was delusive, that they rested upon shifting theories, and that their estimates varied so widely as to intensify, rather than to allay doubts. *** Then the view that these estimates were not to be trusted as evidence of present value was frequently expressed, and state utility commissions, while admitting the evidence in obedience to *Smyth v. Ames*, failed, in ever-increasing numbers to pay heed to it in fixing the rate base. The conviction is widespread that a sound conclusion as to the actual value of a utility is not to be reached by a meticulous study of conflicting estimates of the cost of reproducing new the congeries of old machinery and equipment, called the plant, and the still more fanciful estimates concerning the value of the intangible elements of an established business. Many commissions, like that of Massachusetts, have declared recently that “capital honestly and prudently invested must, under normal conditions, be taken as the controlling factor in fixing the basis for computing fair and reasonable rates.”

To require that reproduction cost at the date of the rate hearing be given weight in fixing the rate base may subject investors to heavy losses when the high war and post-

war price levels pass and the price trend is again downward. The aggregate of the investments which have already been made at high costs since 1914, and of those which will be made before prices and costs can fall heavily, may soon exceed by far the depreciated value, of all the public utility investments made theretofore at relatively low cost. For it must be borne in mind that depreciation is an annual charge. That accrued on plants constructed in the long years prior to 1914 is much larger than that accruing on the properties installed in the shorter period since.

That part of the rule of *Smyth v. Ames* which fixes the rate of return deemed fair, at the percentage customarily paid on similar investments at the time of the rate hearing also exposes the investor and the public to danger of serious injustice. *** A rule which limits the guaranteed rate of return on utility investments to that which may prevail at the time of the rate hearing may fall far short of the capital charge then resting upon the company.

In essence, there is no difference between the capital charge and operating expenses, depreciation, and taxes. Each is a part of the current cost of supplying the service, and each should be met from current income. When the capital charges are for interest on the floating debt paid at the current rate, this is readily seen. But it is no less true of a legal obligation to pay interest on long-term bonds, entered into years before the rate hearing and to continue for years thereafter; and it is true, also, of the economic obligation to pay dividends on stock, preferred or common. The necessary cost, and hence the capital charge, of the money embarked recently in utilities, and of that which may be invested in the near future, may be more, as it may be less, than the prevailing rate of return required to induce capital to enter upon like enterprises at the time of a rate hearing ten years hence. To fix the return by the rate which happens to prevail at such future day, opens the door to great hardships. Where the financing has been proper, the cost to the utility of the capital, required to construct, equip, and operate its plant, should measure the rate of return which the Constitution guarantees opportunity to earn.

The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. Such measures offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as matter of opinion. It would not fluctuate with the market price of labor, or materials, or money. It would not change with hard times or shifting populations. It would not be distorted by the fickle and varying judgments of appraisers, commissions, or courts. It would, when once made in respect to any utility, be fixed, for all time, subject only to increases to represent additions to plant, after allowance for the depreciation included in the annual operating charges. The wild uncertainties of the present method of fixing the rate base under the so-called rule of *Smyth v. Ames* would be avoided, and likewise the fluctuations which introduce into the enterprise unnecessary elements of speculation, create useless expense, and impose upon the public a heavy, unnecessary burden.

In speculative enterprises the capital cost of money is always high—partly because the risks involved must be covered; partly because speculative enterprises appeal only to the relatively small number of investors who are unwilling to accept a low return on their capital. It is to the interest both of the utility and of the community that the

capital be obtained at as low a cost as possible. About 75 per cent of the capital invested in utilities is represented by bonds. He who buys bonds seeks primarily safety. If he can obtain it, he is content with a low rate of interest. Through a fluctuating rate base the bondholder can only lose. He can receive no benefit from a rule which increases the rate base as the price level rises; for his return, expressed in dollars, would be the same, whatever the income of the company. That the stockholder does not in fact receive an increased return in time of rapidly rising prices under the rule of *Smyth v. Ames*, as applied, the financial record of the last six years demonstrates. But the burden upon the community is heavy, because the risk makes the capital cost high.

The expense and loss now incident to recurrent rate controversies is also very large. The most serious vice of the present rule for fixing the rate base is not the existing uncertainty, but that the method does not lead to certainty. Under it, the value for ratemaking purposes must ever be an unstable factor. Instability is a standing menace of renewed controversy. The direct expense to the utility of maintaining an army of experts and of counsel is appalling. The indirect cost is far greater. The attention of officials high and low is, necessarily, diverted from the constructive tasks of efficient operation and of development. The public relations of the utility to the community are apt to become more and more strained, and a victory for the utility may in the end prove more disastrous than defeat would have been. The community defeated, but unconvinced, remembers, and may refuse aid when the company has occasion later to require its consent or co-operation in the conduct and development of its enterprise. Controversy with utilities is obviously injurious, also, to the public interest. The prime needs of the community are that facilities be ample and that rates be as low and as stable as possible. The community can get cheap service from private companies, only through cheap capital. It can get efficient service only if managers of the utility are free to devote themselves to problems of operation and of development. It can get ample service through private companies only if investors may be assured of receiving continuously a fair return upon the investment.

What is now termed the prudent investment is, in essence, the same thing as that which the court has always sought to protect in using the term present value. Twenty-five years ago, when *Smyth v. Ames* was decided, it was impossible to ascertain with accuracy, in respect to most of the utilities, in most of the states in which rate controversies arose, what it cost in money to establish the utility; or what the money cost with which the utility was established; or what income had been earned by it; or how the income had been expended. It was, therefore, not feasible, then, to adopt, as the rate base, the amount properly invested or, as the rate of fair return, the amount of the capital charge. Now the situation is fundamentally different. These amounts are, now, readily ascertainable in respect to a large, and rapidly increasing, proportion of the utilities. The change in this respect is due to the enlargement, meanwhile, of the powers and functions of state utility commissions. The issue of securities is now, and for many years has been, under the control of commissions, in the leading states. Hence the amount of capital raised (since the conferring of these powers) and its cost are definitely known, through current supervision and prescribed accounts, supplemented by inspection of the commission's engineering force. Like knowledge concerning the investment of that part of the capital raised and expended before these broad functions were exercised by the utility commissions has been secured, in many cases, through investigations undertaken later, in connection with the issue of new securities or the

regulation of rates. The amount and disposition of current earnings of all the companies are also known. It is, therefore, feasible now to adopt as the measure of a compensatory rate—the annual cost, or charge, of the capital prudently invested in the utility. And, hence, it should be done.

Value is a word of many meanings. That with which commissions and courts in these proceedings are concerned, in so-called confiscation cases, is a special value for rate-making purposes, not exchange value. * * * But, obviously, good will and franchise value are important elements when exchange value is involved; and where the community acquires a public utility by purchase or condemnation, compensation must be made for its good will and earning power, at least under some circumstances. Likewise, as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property. These cases would seem to require rejection of a rule which measured the rate base by cost of reproduction or by value in its ordinary sense.

The rule by which the utilities are seeking to measure the return is, in essence, reproduction cost of the utility or prudent investment, whichever is the higher. *** If the aim were to ascertain the value (in its ordinary sense) of the utility property, the inquiry would be, not what it would cost to reproduce the identical property, but what it would cost to establish a plant which could render the service, or in other words, at what cost could an equally efficient substitute be then produced. Surely the cost of an equally efficient substitute must be the maximum of the rate base, if prudent investment be rejected as the measure. The utilities seem to claim that the constitutional protection against confiscation guarantees them a return both upon unearned increment and upon the cost of property rendered valueless by obsolescence.

Federal Power Comm'n v. Hope Natural Gas Co.

320 U.S. 591 (1944)

Mr. Justice DOUGLAS delivered the opinion of the Court: The primary issue in these cases concerns the validity under the Natural Gas Act of 1938, 15 U.S.C. § 717 et seq., of a rate order issued by the Federal Power Commission reducing the rates chargeable by Hope Natural Gas Co. * * *

The Circuit Court of Appeals set aside the order of the Commission for the following reasons. (1) It held that the rate base should reflect the “present fair value” of the property, that the Commission in determining the “value” should have considered reproduction cost and trended original cost, and that “actual legitimate cost” (prudent investment) was not the proper measure of “fair value” where price levels had changed since the investment. (2) It concluded that the well-drilling costs and overhead items in the amount of some \$17,000,000 should have been included in the rate base. (3) It held that accrued depletion and depreciation and the annual allowance for that expense should be computed on the basis of “present fair value” of the property not on the basis of “actual legitimate cost”.

The Circuit Court of Appeals also held that the Commission had no power to make findings as to past rates in aid of state regulation. But it concluded that those findings were proper as a step in the process of fixing future rates. Viewed in that light, however, the findings were deemed to be invalidated by the same errors which vitiated the findings on which the rate order was based.

Congress has provided in § 4(a) of the Natural Gas Act that all natural gas rates subject to the jurisdiction of the Commission “shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.” Sec. 5(a) gives the Commission the power, after hearing, to determine the “just and reasonable rate” to be thereafter observed and to fix the rate by order. Sec. 5(a) also empowers the Commission to order a “decrease where existing rates are unjust * * * unlawful, or are not the lowest reasonable rates.” And Congress has provided in § 19(b) that on review of these rate orders the “finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.” Congress, however, has provided no formula by which the “just and reasonable” rate is to be determined. It has not filled in the details of the general prescription⁸ of § 4(a) and § 5(a). It has not expressed in a specific rule the fixed principle of “just and reasonable”.

When we sustained the constitutionality of the Natural Gas Act in the *Natural Gas Pipeline Co.* case, we stated that the “authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the states under the Fourteenth to regulate the prices of commodities in intrastate commerce.” [315 U.S. at page 582](#). Rate-making is indeed but one species of price-fixing. *Munn v. Illinois*, [94 U.S. 113, 134](#). The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid. It does, however, indicate that “fair value” is the end product of the process of rate-making not the starting point as the Circuit Court of Appeals held. The heart of the matter is that rates cannot be made to depend upon “fair value” when the value of the going enterprise depends on earnings under whatever rates may be anticipated.

We held in *Federal Power Commission v. Natural Gas Pipeline Co.*, *supra*, that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of “pragmatic adjustments.” *Id.*, 315 U.S. at page 586. And when the Commission’s order is challenged in the courts, the question is whether that order “viewed in its entirety” meets the requirements of the Act. Under the statutory standard of “just and reasonable” it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission’s order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.

⁸ Sec. 6 of the Act comes the closest to supplying any definite criteria for rate making. It provides in subsection (a) that, “The Commission may investigate the ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.” Subsection (b) provides that every natural-gas company on request shall file with the Commission a statement of the “original cost” of its property and shall keep the Commission informed regarding the “cost” of all additions, etc.

The rate-making process under the Act, *i.e.*, the fixing of “just and reasonable” rates, involves a balancing of the investor and the consumer interests. Thus we stated in the *Natural Gas Pipeline Co.* case that “regulation does not insure that the business shall produce net revenues.” But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the investor or company viewpoint. ***

In view of these various considerations we cannot say that an annual return of \$2,191,314 is not “just and reasonable” within the meaning of the Act. Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called “fair value” rate base. In that connection it will be recalled that Hope contended for a rate base of \$66,000,000 computed on reproduction cost new. The Commission points out that if that rate base were accepted, Hope’s average rate of return for the four-year period from 1937-1940 would amount to 3.27%. During that period Hope earned an annual average return of about 9% on the average investment. It asked for no rate increases. Its properties were well maintained and operated. As the Commission says such a modest rate of 3.27% suggests an “inflation of the base on which the rate has been computed.” *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U.S. 290, 312. The incongruity between the actual operations and the return computed on the basis of reproduction cost suggests that the Commission was wholly justified in rejecting the latter as the measure of the rate base.

*** Since there are no constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul of the former.
* * *

Reversed.

Duquesne Light Co. v. Barasch

488 U.S. 299 (1989)

Chief Justice REHNQUIST delivered the opinion of the Court: Pennsylvania law required that rates for electricity be fixed without consideration of a utility’s expenditures for electrical generating facilities which were planned but never built, even though the expenditures were prudent and reasonable when made. The Supreme Court of Pennsylvania held that such a law did not take the utilities’ property in violation of the Fifth Amendment to the United States Constitution. We agree with that conclusion, and

hold that a state scheme of utility regulation does not “take” property simply because it disallows recovery of capital investments that are not “used and useful in service to the public.” 66 Pa. Cons. Stat. § 1315.

I

In response to predictions of increased demand for electricity, Duquesne Light Company (Duquesne) and Pennsylvania Power Company (Penn Power) joined a venture in 1967 to build more generating capacity. The project, known as the Central Area Power Coordination Group (CAPCO), involved three other electric utilities and had as its objective the construction of seven large nuclear generating units. In 1980 the participants canceled plans for construction of four of the plants. Intervening events, including the Arab oil embargo and the accident at Three Mile Island, had radically changed the outlook both for growth in the demand for electricity and for nuclear energy as a desirable way of meeting that demand. At the time of the cancellation, Duquesne’s share of the preliminary construction costs associated with the four halted plants was \$34,697,389. Penn Power had invested \$9,569,665.

In 1980, and again in 1981, Duquesne sought permission from the Pennsylvania Public Utility Commission (PUC) to recoup its expenditures for the unbuilt plants over a 10-year period. The Commission deferred ruling on the request until it received the report from its investigation of the CAPCO construction. That report was issued in late 1982. The report found that Duquesne and Penn Power could not be faulted for initiating the construction of more nuclear generating capacity at the time they joined the CAPCO project in 1967. The projections at that time indicated a growing demand for electricity and a cost advantage to nuclear capacity. It also found that the intervening events which ultimately confounded the predictions could not have been predicted, and that work on the four nuclear plants was stopped at the proper time. In summing up, the Administrative Law Judge found “that the CAPCO decisions in regard to the [canceled plants] at every stage to their cancellation, were reasonable and prudent.” He recommended that Duquesne and Penn Power be allowed to amortize their sunk costs in the project over a 10-year period. The PUC adopted the conclusions of the report.

In 1982, Duquesne again came before the PUC to obtain a rate increase. Again, it sought to amortize its expenditures on the canceled plants over 10 years. In January 1983, the PUC issued a final order which granted Duquesne the authority to increase its revenues \$105.8 million to a total yearly revenue in excess of \$800 million. The rate increase included \$3.5 million in revenue representing the first payment of the 10-year amortization of Duquesne’s \$35 million loss in the CAPCO plants.

The Pennsylvania Office of the Consumer Advocate (Consumer Advocate) moved the PUC for reconsideration in light of a state law enacted about a month before the close of the 1982 Duquesne rate proceeding. The Act, No. 335, 1982 Pa. Laws 1473, amended the Pennsylvania Utility Code by limiting “the consideration of certain costs in the rate base.” It provided that “the cost of construction or expansion of a facility undertaken by a public utility producing ... electricity shall not be made a part of the rate base nor otherwise included in the rates charged by the electric utility until such time as the facility is used and useful in service to the public.” 66 Pa. Cons. Stat. § 1315. On reconsideration, the PUC affirmed its original rate order. It read the new law as excluding the costs of canceled plants (obviously not used and useful) from the rate base, but not as preventing their recovery through amortization.

Meanwhile another CAPCO member, Penn Power, also sought to amortize its share of the canceled CAPCO power-plants over a 10-year period. The PUC granted Penn Power authority to increase its revenues by \$15.4 million to a total of \$184.2 million. Part of that revenue increase represented \$956,967 for the first year of the 10-year amortized recovery of Penn Power's costs in the aborted nuclear plants.

The Consumer Advocate appealed both of these decisions to the Commonwealth Court, which by a divided vote held that the Commission had correctly construed § 1315. The Consumer Advocate then appealed to the Supreme Court of Pennsylvania, and that court reversed. That court held that the controlling language of the Act prohibited recovery of the costs in question either by inclusion in the rate base or by amortization. The court rejected appellants' constitutional challenge to the statute thus interpreted, observing that "[t]he 'just compensation' safeguarded to a utility by the fourteenth amendment of the federal constitution is a reasonable return on the fair value of its property at the time it is being used for public service."³ Duquesne and Penn Power appealed to this Court arguing that the effect of Act 335 excluding their prudently incurred costs from the rate violated the Takings Clause of the Fifth Amendment, applicable to the States under the Fourteenth Amendment. * * *

III

As public utilities, both Duquesne and Penn Power are under a state statutory duty to serve the public. A Pennsylvania statute provides that "[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities" and that "[s]uch service also shall be reasonably continuous and without unreasonable interruptions or delay." 66 Pa. Cons. Stat. § 1501. Although their assets are employed in the public interest to provide consumers of the State with electric power, they are owned and operated by private investors. This partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment.

The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments. As has been observed, however, "[h]ow such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question." *Smyth v. Ames*, [169 U.S. 466, 546](#) (1898).

At one time, it was thought that the Constitution required rates to be set according to the actual present value of the assets employed in the public service. This method, known as the "fair value" rule, is exemplified by the decision in *Smyth v. Ames*, *supra*. Under the fair value approach, a "company is entitled to ask ... a fair return upon the value of that which it employs for the public convenience," while on the other hand, "the public is entitled to demand ... that no more be exacted from it for the use of [utility property] than the services rendered by it are reasonably worth." [169 U.S., at 547](#). In theory the *Smyth v. Ames* fair value standard mimics the operation of the competitive market. To the extent utilities' investments in plants are good ones (because

³ On October 10, 1985, too late to affect this case, the Pennsylvania Legislature enacted Act 1985-62 which added 66 Pa. Cons. Stat. § 520 to the state utility code. Under § 520, the PUC is now authorized to permit amortized recovery of prudently incurred investment in canceled generating units.

their benefits exceed their costs) they are rewarded with an opportunity to earn an “above-cost” return, that is, a fair return on the current “market value” of the plant. To the extent utilities’ investments turn out to be bad ones (such as plants that are canceled and so never used and useful to the public), the utilities suffer because the investments have no fair value and so justify no return.

Although the fair value rule gives utilities strong incentive to manage their affairs well and to provide efficient service to the public, it suffered from practical difficulties which ultimately led to its abandonment as a constitutional requirement.⁵ In response to these problems, Justice Brandeis had advocated an alternative approach as the constitutional minimum, what has become known as the “prudent investment” or “historical cost” rule. He accepted the *Smyth v. Ames* eminent domain analogy, but concluded that what was “taken” by public utility regulation is not specific physical assets that are to be individually valued, but the capital prudently devoted to the public utility enterprise by the utilities’ owners. *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm’n*, [262 U.S. 276, 291](#) (1923) (dissenting opinion). Under the prudent investment rule, the utility is compensated for all prudent investments at their actual cost when made (their “historical” cost), irrespective of whether individual investments are deemed necessary or beneficial in hindsight. The utilities incur fewer risks, but are limited to a standard rate of return on the actual amount of money reasonably invested.⁶

Forty-five years ago in the landmark case of *FPC v. Hope Natural Gas Co.*, [320 U.S. 591](#) (1944), this Court abandoned the rule of *Smyth v. Ames*, and held that the “fair value” rule is not the only constitutionally acceptable method of fixing utility rates. In *Hope* we ruled that historical cost was a valid basis on which to calculate utility compensation. [320 U.S., at 605](#) (“Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called ‘fair value’ rate base”). We also acknowledged in that case that all of the subsidiary aspects of valuation for ratemaking purposes could not properly be characterized as having a constitutional dimension, despite the fact that they might affect property rights to some degree. Today we reaffirm these teachings of *Hope Natural Gas*: “[I]t is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.” *Id.*, at 602. This language, of course, does not dispense with all of the constitutional difficulties when a utility raises a claim

⁵ Perhaps the most serious problem associated with the fair value rule was the “laborious and baffling task of finding the present value of the utility.” *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm’n*, [262 U.S. 276, 292-294](#) (1923) (Brandeis, J. dissenting). The exchange value of a utility’s assets, such as powerplants, could not be set by a market price because such assets were rarely bought and sold. Nor could the capital assets be valued by the stream of income they produced because setting that stream of income was the very object of the rate proceeding. According to Brandeis, the *Smyth v. Ames* test usually degenerated to proofs about how much it would cost to reconstruct the asset in question, a hopelessly hypothetical, complex, and inexact process. [262 U.S., at 292-294](#).

⁶ The system avoids the difficult valuation problems encountered under the *Smyth v. Ames* test because it relies on the actual historical cost of investments as the basis for setting the rate. The amount of a utility’s actual outlays for assets in the public service is more easily ascertained by a ratemaking body because less judgment is required than in valuing an asset.

that the rate which it is permitted to charge is so low as to be confiscatory: whether a particular rate is “unjust” or “unreasonable” will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return. At the margins, these questions have constitutional overtones.

Pennsylvania determines rates under a slightly modified form of the historical cost/prudent investment system.⁷ Neither Duquesne nor Penn Power alleges that the total effect of the rate order arrived at within this system is unjust or unreasonable. In fact the overall effect is well within the bounds of *Hope*, even with total exclusion of the CAPCO costs. Duquesne was authorized to earn a 16.14% return on common equity and an 11.64% overall return on a rate base of nearly \$1.8 billion. Its \$35 million investment in the canceled plants comprises roughly 1.9% of its total base. The denial of plant amortization will reduce its annual allowance by 0.4%. Similarly, Penn Power was allowed a charge of 15.72% return on common equity and a 12.02% overall return. Its investment in the CAPCO plants comprises only 2.4% of its \$401.8 million rate base. The denial of amortized recovery of its \$9.6 million investment in CAPCO will reduce its annual revenue allowance by only 0.5%.

Given these numbers, it appears that the PUC would have acted within the constitutional range of reasonableness if it had allowed amortization of the CAPCO costs but set a lower rate of return on equity with the result that Duquesne and Penn Power received the same revenue they will under the instant orders on remand. The overall impact of the rate orders, then, is not constitutionally objectionable. No argument has been made that these slightly reduced rates jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital. Nor has it been demonstrated that these rates are inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme.⁸

It cannot seriously be contended that the Constitution prevents state legislatures from giving specific instructions to their utility commissions. We have never doubted that state legislatures are competent bodies to set utility rates. And the Pennsylvania PUC is essentially an administrative arm of the legislature. * * * This is not to say that

⁷ Pennsylvania values property in the rate base according to its historical cost. * * * Having adjusted the historical cost in various ways to account for such things as depreciation and working capital, the PUC proceeds to set a rate of return based largely on the cost of capital to the enterprise. The cost of each component of the utility’s capital is considered, i.e., “the cost of debt, the cost of preferred stock, and the cost of common stock[,] [t]he latter being determined by the return required to sell such stock upon reasonable terms in the market.” *Pennsylvania PUC v. Duquesne Light Co.*, 57 Pa.P.U.C.1, 42 (1983). It then exercises “informed judgment” to set the total rate of return based on these component costs of capital. The bulk of the rate based on capital, then, represents a return (set by costs of capital) on a rate base (determined by historical cost). These are features of the historical cost/prudent investment system. Pennsylvania has modified the system in several instances, however, when prudent investments will never be used and useful. For such occurrences, it has allowed amortization of the capital lost, but does not allow the utility to earn a return on that investment. The loss to utilities from prudent but ultimately unsuccessful investments under such a system is greater than under a pure prudent investment rule, but less than under a fair value approach. Pennsylvania’s modification slightly increases the overall risk of investments in utilities over the pure prudent investment rule. Presumably the PUC adjusts the risk premium element of the rate of return on equity accordingly

⁸ Duquesne’s embedded cost of debt was 9.42%.

any system of ratemaking applied by a utilities commission, including the specific instructions it has received from its legislature, will necessarily be constitutional. But if the system fails to pass muster, it will not be because the legislature has performed part of the work.

Similarly, an otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it. “It is not theory, but the impact of the rate order which counts.” *Hope*, [320 U.S., at 602](#). The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility’s property if they are compensated by countervailing factors in some other aspect.

Admittedly, the impact of certain rates can only be evaluated in the context of the system under which they are imposed. One of the elements always relevant to setting the rate under *Hope* is the return investors expect given the risk of the enterprise. *Bluefield Water Works & Improvement Co. v. Public Service Comm’n of West Virginia*, [262 U.S. 679, 692-693](#) (1923) (“A public utility is entitled to such rates as will permit it to earn a return ... equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties”). The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State’s decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions. But the instant case does not present this question. At all relevant times, Pennsylvania’s rate system has been predominantly but not entirely based on historical cost and it has not been shown that the rate orders as modified by Act 335 fail to give a reasonable rate of return on equity given the risks under such a regime. We therefore hold that Act 335’s limited effect on the rate order at issue does not result in a constitutionally impermissible rate.

Finally we address the suggestion of the Pennsylvania Electric Association as amicus that the prudent investment rule should be adopted as the constitutional standard. We think that the adoption of any such rule would signal a retreat from 45 years of decisional law in this area which would be as unwarranted as it would be unsettling. *Hope* clearly held that “the Commission was not bound to the use of any single formula or combination of formulae in determining rates.” [320 U.S., at 602](#).***

The adoption of a single theory of valuation as a constitutional requirement would be inconsistent with the view of the Constitution this Court has taken since *Hope Natural Gas*, supra. As demonstrated in *Wisconsin v. FPC*, circumstances may favor the use of one ratemaking procedure over another. The designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors.¹⁰ The Constitution within broad

¹⁰ For example, rigid requirement of the prudent investment rule would foreclose hybrid systems such

limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public.

Affirmed.

as the one Pennsylvania used before the effective date of Act 335 and now uses again. It would also foreclose a return to some form of the fair value rule just as its practical problems may be diminishing. The emergent market for wholesale electric energy could provide a readily available objective basis for determining the value of utility assets.
