It might be urged that a demand upon the body of shareholders is desirable as a means of giving the shareholders notice of the suit and an opportunity to join. Under such a view, however, it would be difficult to explain why demand should ever be excused, as is frequently the case.[39] While notice of the pendency of such suits would seem desirable, other means are available, and the cost should probably not be borne by the plaintiff.

It may be that the demand on the shareholders is insisted upon as a purely formal requirement in the perfection of the plaintiff's derivative cause of action, imposed by statute or precedent. Some state statutes specifically so provide[40] and Federal Rule 23[41] is perhaps susceptible of such an interpretation. But in this rule the qualifying words "if necessary" may be interpreted to make the demand unnecessary in cases where the shareholders have no power to "ratify."[42] In the absence of persuasive reasons for a requirement of demand in such cases, it is to be anticipated that in federal and state courts alike the rule of the *Belmont* case will be followed with increasing frequency.

JUDICIAL REVIEW OF NEGATIVE ORDERS OF THE FEDERAL COMMISSIONS

The Federal Power Act[1] and the Public Utility Holding Company Act of 1935[2] require, in general, the approval of the proper commission[3] before a corporation subject to either act may sell or otherwise dispose of any part of its facilities valued in excess of $50,000, merge with any other unit, issue any security, alter the rights of security holders, or service any affiliate or subsidiary. If, after due hearing, one of the commissions unreasonably refuses to approve some proposed action, the problem arises as to what relief the aggrieved party may obtain in the federal courts.

[39] See notes 4, 29, 30, and 31 *supra*. What will constitute an excusing circumstance is within the discretion of the court. An inference that the wrongdoers dominated the shareholders because the latter were blood relatives was refused to be drawn in Caldwell v. Eubanks, 326 Mo. 185, 30 S.W. (2d) 976 (1930) and Hagood v. Smith, 162 Ala. 512, 50 So. 374 (1909). The practical difficulty of convening the stockholders was deemed sufficient to excuse a demand in Shoening v. Schwenk, 112 Iowa 733, 84 N.W. 916 (1901). The necessity of haste may often excuse the demand. See Passmore v. Allentown & Reading Traction Co., 267 Pa. 356, 110 Atl. 240 (1920).

[40] See Ga. Civil Code tit. 22, c.711, § 2224 (1933); Smith v. Coolidge Banking Co., 147 Ga. 7, 92 S.E. 519 (1917); Alexander v. Searcy, 81 Ga. 536, 8 S.E. 630 (1888).

[41] Note 7 *supra*.

[42] See opinion of Justice Stone in Rogers v. Guaranty Trust Co. of New York, 288 U.S. 123, 133 (1933).

[1] 49 Stat. 847 (1935), 16 U.S.C.A. § 824 (Supp. 1938), amending Federal Water Power Act, 41 Stat. 1077 (1920), 16 U.S.C.A. 791 (1927).

[2] 49 Stat. 803 (1935), 15 U.S.C.A. 79 (Supp. 1938).

[3] The Public Utility Holding Company Act of 1935 is administered by the Securities and Exchange Commission, and the Federal Power Act by the Federal Power Commission.

An order of a commission refusing to take some requested action is commonly referred to as a "negative order." The review of such orders of the Interstate Commerce Commission have been held beyond the jurisdiction of the federal courts.[4] There has, however, been some confusion as to what constituted a negative order. In the first case ennunciating the Negative Order Doctrine, *Proctor and Gamble Co. v. United States*,[5] the Supreme Court used the expression to mean an order which does not require any judicial action for its enforcement, or, in other words, does not raise a duty on the part of any person to act in obedience to it.

The Supreme Court, however, in two later cases laid down another requirement; it must also be an order which does not alter the status quo. In *United States v. New River Co.*,[6] the Interstate Commerce Commission decided that the prevailing rule as to distribution of coal cars among mines was unfair, and by an informal announcement caused the carriers to apply a new rule. Later the case was reopened, the commission changed its mind and dismissed the complaints against the old rule, thereby, in effect, re-establishing it. The Supreme Court said the order dismissing the complaint was not negative because it "permits and authorizes the carriers to apply rule four" (the old rule) and that "the effect of the order is to grant the relief sought by the operators of local mines." The same result was reached in *Powell v. United States*,[7] where the order in question was one striking from the commission's files a tariff of rates then in effect as to a six mile piece of track. The court said that "overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect. By it the commission meant to put an end to the tariff in question. . . . . The order would eliminate that rule and substitute for it terms of the tariffs applicable prior to its effective date."[8]

The problem of the extent and effect of the Negative Order Doctrine has be-

[4] Proctor and Gamble Co. v. United States, 225 U.S. 282 (1912); Manufacturers Railway Co. v. United States, 246 U.S. 457 (1918); Lehigh Valley Ry. Co. v. United States, 243 U.S. 412 (1917); Piedmont and Northern Ry. Co. v. United States, 280 U.S. 469 (1930); Standard Oil Co. v. United States, 283 U.S. 235 (1931); United States v. Corrick, 298 U.S. 435 (1936); United States v. Griffin, 303 U.S. 226 (1938); Shanahan v. United States, 303 U.S. 596 (1938). For general discussion of the Negative Order Doctrine see note, 47 Yale L.J. 766 (1937); note, 34 Col. L. Rev. 908 (1934).

[5] 225 U.S. 282 (1912).

[6] 265 U.S. 533 (1924).

[7] 300 U.S. 276 (1937). See also American Sumatra Tobacco Corp. v. Securities and Exchange Commission, 93 F. (2d) 236 (App. D.C. 1937).

[8] Powell v. United States, 300 U.S. 276 (1937). The one irreconcilable Supreme Court case is Atchison, Topeka and Santa Fe Ry. Co. v. United States, 234 U.S. 476 (1913), where the railroad sued to enjoin an order of the Interstate Commerce Commission refusing to give the petitioner authority to change the relative rates on long and short hauls. The Supreme Court upheld the assumption of jurisdiction by the district court, and in rejecting the contention that the order was negative, said that "the proposition disregards the fact that the right to petition the Commission conferred by the statute is positive and while refusal to grant it may be in one sense negative, in another and broader view it is affirmative since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist," thus in terms limiting negative orders to "justifiable" orders.

come increasingly important under the Federal Power Act[9] and Public Utility Holding Company Act[10] which provide that "Any party .... aggrieved by an order issued by the commission .... may obtain a review of such order in the circuit court of appeals of the United States .... by filing in such court .... a written petition praying that the order of the commission be modified or set aside in whole or in part." The applicability of the Negative Order Doctrine to this clause has been considered in three recent circuit court of appeals decisions.[11] In *Houston Natural Gas Corp. v. Securities and Exchange Commission*[12] the fourth circuit dismissed for want of jurisdiction an appeal from a negative order of the Securities and Exchange Commission. The appeal was brought under the authority of the above quoted clause of the Public Utility Holding Company Act. The court cited as authority the Supreme Court decisions,[13] establishing the Negative Order Doctrine, where orders of the Interstate Commerce Commission were considered. In these cases the pertinent statute[14] gave the Commerce Court[15] jurisdiction of: "First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money. Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Supreme Court reasoned that the first section providing for the enforcement of orders could only mean affirmative orders, and since the second section dealt with the "same subject from a reverse point of view," the word "order" must have the same limited meaning in the second

Admitting that this case conflicts with the definition of a negative order as a not-needing-enforcement and not-altering-status quo one, the definition still embraces nine subsequent Supreme Court cases which can only be regarded as in effect overruling this case.

[9] 49 Stat. 860 (1930), 16 U.S.C.A. 825l (Supp. 1938).

[10] 49 Stat. 834 (1935), 15 U.S.C.A. 79x (Supp. 1938). The National Labor Relations Act, 49 Stat. 453 (1935), 29 U.S.C.A. 160 (f) (Supp. 1938) has a similar review provision. Under that act, however, negative orders will be relatively rare.

[11] Houston Natural Gas Corp. v. Securities and Exchange Commission, 100 F.(2d) 5 (C.C.A. 4th 1938); Newport Electric Corp. v. Federal Power Commission, 97 F.(2d) 580 (C.C.A. 2d 1938); Pacific Power and Light Co. v. Federal Power Commission, 98 F.(2d) 835 (C.C.A. 9th 1938). The Newport case was not appealed, but application for a writ of *certiorari* has been made in the Pacific Power and Light case.

[12] 100 F. (2d) 5 (C.C.A. 4th 1938).

[13] *Supra*, note 4. It is interesting to note that in the Houston case Judge Healy, one of the commissioners of the Securities & Exchange Commission, filed a statement opposing the contention of the commission's counsel that the Negative Order Doctrine was applicable to the case, and requesting a decision upon the merits of the controversy.

[14] Commerce Court Act, 36 Stat. 539 (1910), 28 U.S.C.A. § 41 (27), (28) (1927). See note 15 *infra*.

[15] This court, created in 1910 by the Commerce Court Act, was abolished in 1913 and its jurisdiction transferred to the federal district courts by the Urgent Deficiencies Act, 38 Stat. 219 (1913). See note 14 *supra*.

section.[16] A similar argument was made as to the section providing that the pendency of a suit to enjoin or set aside an order of the Interstate Commerce Commission should not suspend the operation of such an order.

The Supreme Court has suggested as another ground[17] for the Negative Order Doctrine that negative orders are unimportant. Therefore, since the Urgent Deficiencies Act[18] which gave the district courts jurisdiction to review orders of the Interstate Commerce Commission, also provided for a three judge court, priority over other cases, and direct appeal to the Supreme Court, the court argued that this exceptional type of review should not be construed to extend to such negative (and therefore unimportant) orders.

In the cases where the petitioner claimed to be outside the jurisdiction of the Interstate Commerce Commission,[19] the Supreme Court further suggested that the negative order had no *res judicata* effect as to the issue of the railroad's immunity from the operation of the statute, and suggested that "what plaintiffs are seeking is, therefore, in substance, a declaratory judgment that the Railway is within the exemption,"[20] and that the court had no jurisdiction to give such a remedy. The Supreme Court has also thrown in the argument that a review of negative orders of the Interstate Commerce Commission would result in the usurpation by the courts of technical questions more properly handled by the commission.[21]

Whatever the validity of these reasons where orders of the Interstate Commerce Commission were involved, it is apparent that they have but little application to the cases arising under the Federal Power Act and the Public Utility Holding Company Act. The word "order" in these acts does not have any preceding section where the word is used in the affirmative sense as in the Urgent Deficiencies Act which provided for a review of orders of the Interstate Commerce Commission. The review by the circuit court of appeals provided by the two recent acts is not an exceptional one such as is provided under the Urgent Deficiencies Act. Even if a review by the circuit court of appeals would require in effect a declaratory judgment, such a result would not seem objectionable now that the Federal Declaratory Judgment Act[22] has been held constitutional.[23] Finally, whether the order needs enforcement or alters the status quo has little relevance to the problem of what highly technical problems

[16] See Procter and Gamble Co. v. United States, 225 U.S. 282 (1912).

[17] See United States v. Griffin, 303 U.S. 226 (1938).

[18] 38 Stat. 219 (1913), 28 U.S.C.A. § 47 (1927).

[19] See Piedmont and Northern Ry. Co. v. United States, 280 U.S. 469 (1930); Lehigh Valley Ry. Co. v. United States, 243 U.S. 412 (1917).

[20] Piedmont and Northern Ry. Co. v. United States, 280 U.S. 469, 477 (1930).

[21] See Procter and Gamble Co. v. United States, 225 U.S. 282, 287 (1912); Manufacturers Ry. Co. v. United States, 246 U.S. 457, 483 (1918).

[22] 48 Stat (1934), as amended by 49 Stat. 1014, 1027 (1935), 28 U.S.C.A. 400 (Supp. 1938).

[23] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), rehearing denied, 300 U.S. 687 (1937).

should be left to the commission for determination, since negative and affirmative orders generally involve the same questions.

In *Newport Electric Corp. v. Federal Power Commission*,[24] the second circuit dismissed for want of jurisdiction an appeal under the Federal Power Act from a negative order of the Federal Power Commission. In adopting the Negative Order Doctrine, the court further suggested that "the reason lying behind the distinction between affirmative and negative orders in cases reviewing orders of the Interstate Commerce Commission is that a judgment to set aside a negative order would be ineffective, and that therefore a more narrow interpretation of the jurisdictional statute was preferred."[25] Until the Federal Power Commission or Securities and Exchange Commission issues an order of approval, a merger would be unlawful. Thus, the petitioner would receive no practical relief unless the court issued a mandatory injunction commanding the commission to approve the proposed merger, and this the court said was beyond its power under the appeal provisions of the Federal Power Act. Since the many opinions of the Supreme Court upon this problem fail to state this argument of the ineffectiveness of the court's judgment, it is doubtful whether it had any influence upon that court's decisions. Since the Urgent Deficiencies Act, unlike the Federal Power Act, specifically gave the court jurisdiction to "enjoin" the Interstate Commerce Commission,[26] the Supreme Court in the Interstate Commerce cases perhaps assumed that if jurisdiction was obtained, a mandatory injunction could issue as easily as a judgment setting aside the order.

Let us, however, evaluate the argument solely in terms of its validity as regards the *Newport* case itself. Even assuming for the moment that no other form of relief is within the power of the court to issue, it may still be argued that a judgment setting aside the negative order would not be completely valueless. After such a judgment, it is highly probable that the Federal Power Commission would hold another hearing,[27] at which time the petitioner despite previous failures might be able to persuade the commission of the soundness of its views. It is even possible that the commission, without any other proceedings, might voluntarily accede to the court's views as shown by the judgment setting aside the negative order, and enter an order of approval.

In *Pacific Power and Light Co. v. Federal Power Commission*[28] the ninth circuit overruled a motion to dismiss for want of jurisdiction an appeal under the Federal Power Act from a negative order of the Federal Power Commission. Rejecting the second circuit's position, the court suggested that the set-

[24] 97 F. (2d) 580 (C.C.A. 2d 1938). [25] *Id.* at 582. [26] *Supra*, note 18.

[27] In United States v. Griffin, 303 U.S. 226 (1938) the district court set aside the negative order of the Interstate Commerce Commission and directed it to take further action. The commission thereupon held another hearing and again declined to permit an increase of the rate in question. A second action in the district court, after appeal to the Supreme Court, was dismissed for want of jurisdiction under the Negative Order Doctrine.

[28] 98 F. (2d) 835 (C.C.A. 9th 1938).

ting aside of the commission's order is analogous to a reversal of judgment and remanding for a new trial, and that "it will not be presumed that the Board, any more than a court, will repeat in its proceedings an error of law so determined by the judicial tribunal reviewing the order."[29] The analogy, though interesting, seems of questionable strength, for a commission tends to have a rather different attitude toward an appellate court than does a lower court, and violates no express order or direction of the court if it chooses to remain inactive after a decision setting aside its negative order. Moreover, a lower court upon the remanding of a case with directions may be compelled by mandamus to comply with those directions,[30] while, as shown hereafter, the commission quite possibly cannot be so compelled.

The ninth circuit, moreover, in assuming jurisdiction distinguishes the cases brought under the Federal Power Act from those under the Urgent Deficiencies Act on the ground that, by providing that "if the commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same,"[31] the Federal Power Act conferred upon the petitioner a "substantive right" in contradistinction to the more discretionary language of the Interstate Commerce Acts which provide, for example, that "whenever .... the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever .... is or will be unjust or unreasonable .... the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge .... and to make an order that the carrier or carriers shall cease and desist from such violation."[32] By saying that the petitioner has a "substantive right," the court evidently meant that he has a legally enforceable right, and thus assumed that the negative order in the case before it was reviewable. By its emphasis upon the word "shall" in the Federal Power Act section just quoted, however, the court implies that this result follows from the lesser degree of discretion conferred upon the Federal Power Commission by this act. The validity of such an interpretation is, indeed, questionable. The wording of the Federal Power Act to many might seem to confer more rather than less discretion upon the Federal Power Commission than the Interstate Commerce Acts do upon the Interstate Commerce Commission. Moreover, if either commission's negative orders are so discretionary as to be not reviewable, the same should hold true of its affirmative orders, but no one contends that they are not reviewable. The absence of discretionary language in the Supreme Court negative order decisions suggests that that court has not been greatly influenced by this contention, nor, for the considerations just outlined, does it seem likely that it will be in the future.

[29] *Id.* at 838.

[30] *In re* Potts, 166 U.S. 263 (1897); Goldwyn Pictures Corp. v. Howells Sales Co., 287 Fed. 100 (C.C.A. 2d 1923).

[31] 49 Stat. 849 (1935), 16 U.S.C.A. § 824 b (Supp. 1938).

[32] 36 Stat. 551 (1910), 49 U.S.C.A. § 15(1) (1927).

Assuming that the court has jurisdiction to review the negative orders of the Federal Power Commission or Securities and Exchange Commission, the question arises as to what form of relief the circuit court of appeals can give the petitioner. The Federal Power Act and Public Utility Holding Company Act each provide that the circuit court of appeals "shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part."[33] Clearly the court can set aside the negative order. It is suggested, moreover, that jurisdiction to "modify" an order gives the circuit court of appeals power to decree that the order refusing to grant approval of the proposed action is thereby modified so as to approve the proposed action. The dictionary definition, "to change somewhat the form or qualities of; to alter somewhat"[34] suggests that changing an order of disapproval to one of approval is changing the order so much as to not "modify" it, but substitute a new order of the court in place of the old one. In one sense, however, any modification of an order of a commission by the court will result in the substitution of a new order in that it is a different order from the one preceding it. The issue, therefore, is not whether the new order as decreed by the court has all of the characteristics of the old but whether it has enough as to be considered only modified. The language refusing to approve the proposed action might be considered the essential part of the order, modification of which could be accomplished only by a change of parties or extent of subject matter affected. On the other hand, it is suggested that in view of the general language used, the fact that the new order decreed by the court concerns the same parties and subject matter as the old one make it merely a modification of the old negative order.

Such a decree modifying a negative order should not be confused with a mandatory injunction to the commission. The decree modifying the commission's order would make that order, as modified, immediately effective. On the other hand, a mandatory injunction designed to modify an order of the commission would require action by the commission before effectively causing the modification of that order. Since a decree affirming or setting aside an order in whole or in part would immediately affect the commission's order, it would seem that the word modify was, also, used in the more direct sense, *i.e.*, that a decree of the court would immediately and without any action by the commission affect the order. Despite the greater attractiveness, however, of the arguments for a modifying decree rather than a mandatory injunction, the two decisions[35]

[33] *Supra*, note 3. Because of the word "modify," the provision may be unconstitutional as requiring administrative action by a constitutional court. See *Ex parte* Bakelite Corp., 279 U.S. 438 (1929); note, 34 Col. L. Rev. 352 (1934). The Radio Act of 1927, 44 Stat. 1162 (1927), 47 U.S.C.A. § 81 (1927) gave the court of appeals of the District of Columbia jurisdiction to "alter or revise the decision appealed from and enter such judgment as to it may seem just." The Supreme Court in Federal Radio Commission v. General Electric Co., 281 U.S. 464 (1930), held the proceedings under the act were administrative, and, therefore, not reviewable by it.

[34] Webster's New International Dictionary 1389 (8th ed. 1933).

[35] Newport Electric Corp. v. Federal Power Commission, 97 F. (2d) 580 (C.C.A. 2d 1938); Houston Natural Gas Corp. v. Securities and Exchange Commission, 100 F. (2d) 5 (C.C.A. 4th 1938).

under the Federal Power Act, which mention the possibility of a mandatory injunction, completely ignore the possibility of this other type of decree.

It would seem that the petitioner stands a poor chance of getting relief outside the direct statutory review provided in the Federal Power Act and Public Utility Holding Company Act. If he seeks a mandatory injunction in a federal district court before attempting to gain a review in the circuit court of appeals, his bill would probably be dismissed on the ground that he had not first exhausted his statutory legal remedies,[36] even though the circuit courts of appeals disagree as to their jurisdiction over such a review. If the circuit court of appeals dismissed his petition for review of the negative order for want of jurisdiction, or else ineffectively set aside the negative order, and he then sued in a federal district court for a mandatory injunction, he might have to overcome the objection that such an injunction is beyond the jurisdiction of the court.[37]

More important would be the objection that Congress by providing that the circuit court of appeals should have "exclusive jurisdiction" to affirm, modify, or set aside the commissions' orders[38] meant not only that no other action could be sustained while this one was pending, but, also, that no action could be brought at any other time. In a number of cases under similar review provisions, the federal courts in dicta have seemed to adopt the latter interpretation.[39] Such a position seems well justified if the circuit court of appeals had assumed jurisdiction in the first action and had simply rendered an ineffective decree, for a second action in a district court to secure a mandatory injunction would seem an unnecessarily tedious and wasteful way to settle the controversy. If the first action, however, was dismissed on the ground that the circuit court of appeals had no jurisdiction to review negative orders under the two acts, the statutory provision providing for "exclusive jurisdiction" of that court should not bar an action in the district court. Even so, the existence of an exclusive review by the circuit court of appeals of affirmative orders might well lead the district court to conclude that negative orders, not being reviewable under the provisions of the two acts, are also not review-

[36] Sykes v. Jenny Wren Co., 78 F. (2d) 729 (App. D.C. 1935); Elliott v. El Paso Electric Co., 88 F. (2d) 505 (C.C.A. 5th 1937), *cert. denied*, 301 U.S. 710 (1938); Clark v. Lindermann and Hoverson Co., 88 F. (2d) 59 (C.C.A. 7th 1937), *cert. denied*, 301 U.S. 707 (1938).

[37] As the federal district courts have no jurisdiction to entertain an original action of mandamus, McIntire v. Woods, 7 Cranch (U.S.) 504 (1813); Covington & Cincinnati Bridge Co. v. Hager, 203 U.S. 109 (1906), it has, occasionally, been held that a mandatory injunction to accomplish the same end was also not available. Fineran v. Bailey, 2 F. (2d) 363 (C.C.A. 5th 1924); Stevenson v. Holstein-Friesian Ass'n of America, 30 F. (2d) 625 (C.C.A. 2d 1929). The weight of authority, however, seems to be the other way. Chicago v. Fox Film Corp., 251 Fed. 883 (C.C.A. 7th 1918); Bulger v. Benson, 262 Fed. 929 (C.C.A. 9th 1920). See note, 38 Col. L. Rev. 903 (1938). In contrast to the district courts, the courts of the District of Columbia have the power to issue mandamus, Kendall v. United States, 12 Pet. (U.S.) 522 (1838); Freund, Administrative Powers over Persons and Property 246 (1st ed. 1928).

[38] *Supra*, note 3.

[39] American Sumatra Tobacco Corp. v. Securities and Exchange Commission, 93 F. (2d) 236, 239 (App. D.C. 1937); Sykes v. Jenny Wren Co., 78 F. (2d) 729, 732 (App. D.C. 1935).

able in an independent action, for there is no apparent reason why the procedure should differ between the review of a negative and an affirmative order.

The Negative Order Doctrine seems essentially an arbitrary one, whose application should be closely limited for that reason. Whether an order is negative, *i.e.*, is a not-needing-enforcement and not-altering-status quo order, seems to have little bearing upon the question of what orders of commissions theoretically should be reviewable by the courts.[40] Negative orders are almost without exception handled like affirmative ones in the state courts[41] which confine their attention in the main to the more practical problems of whether an order is final rather than interlocutory,[42] purely discretionary or legislative.[43]

If the petitioner is unable to get relief in the federal courts from a negative order, the Federal Power Commission and Securities and Exchange Commission have, in effect, an absolute power to cause great loss to a utility coming under their jurisdiction through their refusal to approve necessary measures. Such a power might conceivably produce an unofficial yet, in effect, absolute power over rates through the threat of an unfair use of the admittedly absolute power over other aspects of the business. Whether or not these two commissions and those which Congress will see fit to provide with similar review provisions, would always use their power impartially and intelligently, and whether or not the public would gain by the commissions' exercise of that power, unhampered by judicial review, it is, indeed, debatable whether the courts should by the use of a technical doctrine give them such great power without the express authority of Congress.

[40] Until 1938, with the exception of the Interstate Commerce Commission, the federal courts had never declined to issue a mandatory injunction against any federal administrative body solely because the order in question was negative. See Wilson v. Bowers, 14 F. (2d) 976 (D.C.N.Y. 1924) and Casper v. Doran, 30 F. (2d) 400 (D.C. Pa. 1929) (authorization of withdrawal of alcohol); Jacob Hoffman Brewing Co. v. McElligott, 259 Fed. 321 (D.C.N.Y. 1919), order modified, 259 Fed. 525 (C.C.A. 2d 1919) (delivery of beer revenue stamps). Moreover, the Radio Act of 1927, 44 Stat. 1162 (1927), 47 U.S.C.A. § 81 (1927) expressly allows an appeal from many types of negative orders.

[41] Italia America Shipping Corp. v. Nelson, 323 Ill. 427, 154 N.E. 198 (1926) (mandamus lies to compel issuance of a license); Jackman v. Public Service Commission of Kansas, 121 Kan. 141, 245 Pac. 1047 (1926) (approval of plans for a dam compelled by mandamus); Perkins Mfg. Co. v. Jordan, 200 Cal. 667, 254 Pac. 551 (1927) (issuance of certificate to foreign corporation compelled); State *ex rel.* Blank v. Gramling, 219 Wis. 196, 262 N.W. 614 (1935) (mandamus lies to compel issuance of doctor's license). However, in Seaberg v. Raton Public Service Co., 16 N.M. 59, 8 P. (2d) 100 (1932), the court dismissed a removal proceedings on the ground that under the statute it could only enforce or refuse to enforce the commission's order, and, since neither action would have any effect, it therefore did not have jurisdiction to review a negative order.

[42] See Capital Water Co. v. Public Utilities Commission, 41 Idaho 19, 237 Pac. 423 (1925); Philadelphia City Passenger Ry. Co. v. Public Service Comm'n of Pennsylvania, 211 Pa. 31, 114 Atl. 642 (1921); State Public Utilities Comm'n v. Chicago Telephone Co., 287 Ill. 447, 122 N.E. 850 (1919).

[43] See Comley v. Boyle, 115 Conn. 406, 162 Atl. 26 (1932); Bernstein v. City of Marshalltown, 215 Iowa 1168, 248 N.W. 26 (1933); Royal Glen Land and Lumber Co. v. Public Service Comm'n, 91 W.Va. 446, 113 S.E. 749 (1922); Fishback v. Public Service Comm'n of Indiana, 193 Ind. 282, 138 N.E. 346 (1923).