St. John's Law Review

Volume 63, Fall 1988, Number 1 Article 10

Court of Appeals Applies the Doctrine of Collateral Estoppel to an Administrative Determination

Fara Agrusa

DEVELOPMENTS IN THE LAW

Court of Appeals applies the doctrine of collateral estoppel to an administrative determination

The principle of collateral estoppel, or issue preclusion,[1] has been applied by courts to give preclusive effect to certain determinations made by state administrative bodies.[2] In deciding when to apply the doctrine, a court must focus on whether an earlier proceeding provided a full and fair opportunity to litigate the issue present before the court.[3] Evolving from traditional notions of fair-

---

[1] *See* 5 WK&M ¶ 5011.08 (1988). Issue preclusion, traditionally known as collateral estoppel, is one of the narrower principles incorporated into the doctrine of res judicata. *Id.* Issue preclusion bars subsequent litigation between the same parties, or those in privity with them, of factual matters decided in a prior action by a tribunal of competent jurisdiction. *Id.*; *see also* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500, 467 N.E.2d 487, 490, 478 N.Y.S.2d 823, 826 (1984) (issue preclusion "precludes a party from relitigating . . . an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same"). *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) [hereinafter RESTATEMENT] (discussing issue preclusion); 9 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE § 63:205 (2d ed. 1966 & Supp. 1988) (same).

Res judicata operates to completely bar a second suit based on the same cause of action between the same parties or those in privity with them. *See* 5 WK&M ¶¶ 5011.10-5011.22. *See generally* RESTATEMENT, *supra*, § 19 (discussing res judicata and issue preclusion). The distinction between the two doctrines is that "res judicata precludes relitigation of all issues whereas collateral estoppel precludes relitigation of some but not all issues." Note, *The Expansion of Res Judicata in New York*, 48 ALB. L. REV. 210, 213 n.13 (1983); *see* Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929) (distinguishing between res judicata and issue preclusion); 5 WK&M ¶ 5011.24 (same).

In order for res judicata or issue preclusion to be invoked, there must exist "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action," and the prior proceeding must have provided the litigants with "a full and fair opportunity to contest the decision now said to be controlling." Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969). In order for either doctrine to apply, therefore, there must have been an actual decision on the merits. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 18.08, at 368 (3d ed. 1972) (" 'res judicata' means thing adjudicated"); *see also* 5 WK&M ¶ 5011.11, at 50-107 ("a litigant must be given his day in court—a full opportunity to contest the merits of his cause—before he is barred from bringing a second action"); Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 171-72 (1969) ("irrational and unjust to bind a party by a former finding on an issue unless that very issue had been adjudicated").

[2] *See Ryan*, 62 N.Y.2d at 499, 467 N.E.2d at 489-90, 478 N.Y.S.2d at 825-26; Bernstein v. Birch Wathen School, 71 App. Div. 2d 129, 132, 421 N.Y.S.2d 574, 575 (1st Dep't 1979), *aff'd*, 51 N.Y.2d 932, 415 N.E.2d 982, 434 N.Y.S.2d 994 (1980); *see also* Evans v. Monaghan, 306 N.Y. 312, 323-26, 118 N.E.2d 452, 457-58 (1954) (principle of res judicata applicable to administrative or quasi-judicial proceedings). *See generally* 5 WK&M ¶ 5011.23, at 50-157 n.210 (discussing applicability of collateral estoppel to issues resolved by arbitration).

[3] *See Ryan*, 62 N.Y.2d at 501, 467 N.E.2d at 491, 478 N.Y.S. at 827; *see also* Gilberg v. Barbieri, 53 N.Y.2d 285, 291, 423 N.E.2d 807, 808, 441 N.Y.S.2d 49, 50 (1981) (issue preclu-

ness,[4] the doctrine has been interpreted by both courts and commentators as being applicable to the adjudicatory or "quasi-judicial" determinations of administrative agencies.[5] Consequently, the nature of the proceeding, as opposed to the nature of the forum, is a controlling factor in the decision to apply issue preclusion to an administrative determination.[6] Recently, in *Allied Chemical Co. v.*

---

sion is grounded "on the notion that it is not fair to permit a party to relitigate an issue . . . previously . . . decided against him in a proceeding in which he had a fair opportunity to fully litigate the point"). The forum in which the opportunity to litigate is provided must employ "procedures substantially similar to those used in a court of law." *Ryan*, 62 N.Y.2d at 499, 467 N.E.2d at 490, 478 N.Y.S.2d at 826.

[4] *See* People v. Plevy, 52 N.Y.2d 58, 64-65, 417 N.E.2d 518, 521-22, 436 N.Y.S.2d 224, 227-28 (1980) (issue preclusion must not be automatically applied but must take into consideration principles of fairness); *see also Schwartz*, 24 N.Y.2d at 73, 246 N.E.2d at 730, 298 N.Y.S.2d at 962 (issue preclusion must not be "applied rigidly").

In *Schwartz*, the Court of Appeals set forth several factors which should be considered in determining whether it would be "fair" to apply issue preclusion. *Id.* at 72, 246 N.E.2d at 729, 298 N.Y.S.2d at 961. These include "the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation." *Id. See generally* 5 WK&M ¶ 5011.42, at 50-222 ("The combination of . . . the offensive use of collateral estoppel and the full and fair opportunity test, produces opportunity both for harvesting great benefits in judicial efficiency and for creating situations that smack of fundamental unfairness and abuse."); Herman, *Rulemaking Procedures in New York*, 47 ALB. L. REV. 1051, 1075-80 (1983) (discussing application of due process requirements to agency rulemaking).

[5] *See* Brugman v. City of New York, 102 App. Div. 2d 413, 415, 477 N.Y.S.2d 636, 638 (1st Dep't 1984) (res judicata and issue preclusion are applicable to "determinations of administrative agencies rendered pursuant to their adjudicatory functions"), *aff'd*, 64 N.Y.2d 1011, 489 N.Y.S.2d 54, 478 N.E.2d 195 (1985); *see also* Zanghi v. Old Brookville, 752 F.2d 42, 46 (2d Cir. 1985) (issue preclusion "is applicable 'to the quasi-judicial determinations of administrative agencies' " (quoting *Ryan*, 62 N.Y.2d at 496, 467 N.E.2d at 489-90, 478 N.Y.S.2d at 825-26)); Second Taxing Dist. v. Federal Energy Regulatory Comm'n, 683 F.2d 477, 484 (D.C. Cir. 1982) (same); Taylor v. New York City Transit Auth., 309 F. Supp. 785, 791 (E.D.N.Y.) (same), *aff'd*, 433 F.2d 665 (2d Cir. 1970); RESTATEMENT, *supra* note 1, § 83(2) comment b (supporting application of issue preclusion to administrative determinations in subsequent court proceedings).

[6] *See* Venes v. Community School Bd., 43 N.Y.2d 520, 524, 373 N.E.2d 987, 989, 402 N.Y.S.2d 807, 809 (1978) (doctrine of res judicata applicable to administrative determinations "only if such application is consistent with the nature of the particular administrative adjudication"); *Evans*, 306 N.Y. at 324, 118 N.E.2d at 458 (res judicata applicable to administrative determinations based on "the precise power being exercised, rather than from any general distinction between courts and administrative tribunals").

An agency's quasi-judicial functions should be distinguished from its legislative powers since res judicata does not apply to the latter. *See infra* note 27 and accompanying text. "Quasi-judicial" refers to the power of administrative agencies to determine the rights, duties, and liabilities of particular persons based on transactions that have occurred in the past. *See* Hecht v. Monaghan, 307 N.Y. 461, 469, 121 N.E.2d 421, 424-25 (1954). An agency's legislative power, on the other hand, refers to its capacity to promulgate rules and regulations which operate in the future and apply to the public in general. *See* People v. Cull, 10

Niagara Mohawk Power Corp.,[7] the New York Court of Appeals gave preclusive effect to an agency determination possessing both quasi-judicial and legislative ratemaking attributes, finding that the procedural weaknesses of the administrative process did not mandate the conclusion that a full and fair opportunity was lacking.[8]

In *Allied*, defendant Niagara Mohawk Power Corporation ("NIMO"), a regulated utility,[9] contracted to purchase electricity from plaintiff Allied Chemical Company ("Allied"), an old capacity cogenerator.[10] Pursuant to federal regulations and subject to state regulations, old capacity cogenerators may receive payment at a rate of less than full avoided costs, and such a rate was agreed upon by the parties.[11] Subsequently, however, NIMO was required by the State Public Service Commission ("PSC") to file a tariff specifying its payment for cogenerated electricity at the higher full avoided cost rate.[12] Allied thereafter informed NIMO that the new tariff permitted exercise of a contract provision to charge full avoided costs for the sale of its electricity.[13]

N.Y.2d 123, 126-27, 176 N.E.2d 495, 496-97, 218 N.Y.S.2d 38, 40 (1961).

Ratemaking is one example of an agency's legislative, rather than judicial, power. *See* Northwestern Nat'l Ins. Co. v. Pink, 288 N.Y. 359, 362, 43 N.E.2d 442, 443 (1942); New York Tel. Co. v. Public Serv. Comm'n, 64 App. Div. 2d 232, 238, 410 N.Y.S.2d 124, 127 (3d Dep't 1978).

[7] 72 N.Y.2d 271, 528 N.E.2d 153, 532 N.Y.S.2d 230 (1988).

[8] *Id.* at 277, 528 N.E.2d at 156, 532 N.Y.S.2d at 234.

[9] *See* 16 U.S.C. § 824(b)(1), (d), (e) (1982). Section 824 defines a regulated utility as any person owning or operating a facility for the transmission of electrical energy in interstate commerce or selling electrical energy for resale. *See id.* The rules enacted by the Federal Energy Regulatory Commission, pursuant to the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3(a) (1982) ("PURPA"), require electric utilities to purchase electricity from alternate energy sources known as "qualifying cogenerating facilities." 18 C.F.R. §§ 292.303, 292.304 (1988). Under section 210 of PURPA, state regulatory agencies, such as the New York Public Service Commission ("PSC"), are authorized to implement these rules. 16 U.S.C. § 824a-3(f) (1982).

[10] *Allied*, 72 N.Y.2d at 275, 528 N.E.2d at 154, 532 N.Y.S.2d at 231; *see* 18 C.F.R. § 292.304(b)(2), (3) (1988). Cogenerators whose construction was initiated after November 9, 1978 are classified as "new capacity," and may charge a utility a rate equal to at least full avoided costs for its service; cogenerators whose construction was initiated prior to that date are classified as "old capacity." *Allied*, 72 N.Y.2d at 274, 528 N.E.2d at 154, 532 N.Y.S.2d at 231. Avoided costs are those the utility would have incurred had it produced the energy itself or purchased the energy from a nonqualifying facility. *See* 18 C.F.R. § 292.101(b)(6) (1988).

[11] *Allied*, 72 N.Y.2d. at 275, 528 N.E.2d at 154, 532 N.Y.S.2d at 231; 18 C.F.R. § 292.304(b)(2), (3) (1988).

[12] *Allied*, 72 N.Y.2d at 275, 528 N.E.2d at 154, 532 N.Y.S.2d at 231.

[13] *Id.* Allied contended that this new tariff provided for payment at full avoided costs

Upon petition by NIMO,[14] the PSC issued an opinion that the new tariff did not apply to old capacity cogenerators and that Allied, therefore, could not receive the new tariff rate under the modification agreement in the contract.[15] The PSC, performing a quasi-legislative function, also noted that a new plan would be adopted, which would gradually allow old capacity cogenerators to charge a rate of full avoided costs over a span of ten years.[16] Allied then commenced a contract action against NIMO seeking payment at the full avoided cost rate.[17] The Supreme Court, Onondaga County, granted defendant's motion for summary judgment primarily on the ground of the res judicata effect of the PSC's determination.[18] The Appellate Division, Fourth Department, affirmed the trial court's decision.[19]

The Court of Appeals affirmed the decision of the Appellate Division, holding that the PSC's determination was a "quasi-judicial" adjudication and, as such, must be accorded preclusive effect.[20] Writing for a unanimous court, Chief Judge Wachtler noted that although issue preclusion may be applicable to administrative findings,[21] ascertaining whether a proceeding was "quasi-judicial"

---

as specified by the PSC and was an "applicable rate" within the meaning of the modification provision in the contract. *Id.*

[14] *Id.* NIMO petitioned the PSC under the State Administrative Procedure Act, *see* N.Y.A.P.A. § 204 (McKinney Supp. 1988), to declare that the newly filed tariff did not apply to old capacity cogenerators, such as the one owned by Allied, and as such did not qualify as an "applicable rate" within the meaning of the contract. *Allied*, 72 N.Y.2d at 275, 528 N.E.2d at 154, 532 N.Y.S.2d at 231. Allied filed a counterpetition and complaint with the PSC, claiming that the tariff did apply to old capacity cogenerators and fell directly within the meaning of their contract modification clause, thereby allowing it to elect to receive the full avoided cost rate. *Id.*

[15] *Allied*, 72 N.Y.2d at 275, 528 N.E.2d at 154, 532 N.Y.S.2d at 231.

[16] *Id.* at 275-76, 528 N.E.2d at 154-55, 532 N.Y.S.2d at 231-32. The PSC issued a second statement, almost one year after the first, in order to collect and analyze comments from those concerned with the proposal. *Id.* at 276, 528 N.E.2d at 155, 532 N.Y.S.2d at 232.

[17] *See id.* Allied did not seek review of the PSC determination in a CPLR article 78 proceeding. *Id.*

[18] *See id.*

[19] *See id.*

[20] *Id.*

[21] *Id.* at 276-77, 528 N.E.2d at 155, 532 N.Y.S.2d at 232. The crucial issue was whether the PSC's determination that the new tariff would not apply to old capacity cogenerators should be given preclusive effect. *Id.* The Court of Appeals noted that application of issue preclusion to an administrative determination requires: 1) an identity of issues which actually had been litigated; 2) a full and fair opportunity to litigate had been provided; and 3) the agency had rendered its decision pursuant to its quasi-judicial capacity. *Id.* at 276, 528 N.E.2d at 155, 532 N.Y.S.2d at 232.

involves a "multi-faceted inquiry" into diverse considerations.[22] One such consideration is whether giving preclusive effect to an agency determination would be "unfair" or "unexpected."[23] The court rejected plaintiff's contention that the PSC's decision was legislative "ratemaking" and that applying issue preclusion would, therefore, "be inconsistent with the PSC's scheme of administration."[24] The court instead framed the issue in the case as involving a PSC determination of services rendered and payment due pursuant to a contract.[25]

Although the *Allied* court set forth the proper standard for determining when issue preclusion applies to an administrative de-

---

[22] *Id.* The court focused on whether the PSC's determination was rendered in its quasi-judicial or legislative capacity. The court noted that in order to determine when an administrative proceeding is quasi-judicial in nature, certain factors must be considered, such as whether the agency was authorized by statute to adjudicate, whether the parties had a full and fair opportunity to litigate all the issues, whether the parties expected to be bound by the decision reached by the agency, and finally, whether applying issue preclusion would be consistent with the agency's administrative function. *See id.* at 277, 528 N.E.2d at 155, 532 N.Y.S.2d at 232.

[23] *Id.* at 277, 528 N.E.2d at 156, 532 N.Y.S.2d at 233. The court also noted that administrative determinations prescribing rates are legislative in nature, and in the past have not been accorded preclusive effect. *Id.* at 278, 528 N.E.2d at 156, 532 N.Y.S.2d at 233; *see* Second Taxing Dist. v. Federal Energy Regulatory Comm'n, 683 F.2d 477, 484 (D.C. Cir. 1982); Long Island Lighting Co. v. Transamerica Delaval, Inc., 646 F. Supp. 1442, 1450 (S.D.N.Y. 1986); Venes v. Community School Bd., 43 N.Y.2d 520, 525, 373 N.E.2d 987, 989, 402 N.Y.S.2d 807, 809 (1978); Consumer Protection Bd. v. Public Serv. Comm'n, 97 App. Div. 2d 320, 324, 471 N.Y.S.2d 332, 335 (3d Dep't 1983).

[24] *Allied*, 72 N.Y.2d at 278, 528 N.E.2d at 156, 532 N.Y.S.2d at 233. In reaching its decision, the Court of Appeals observed that the first two requirements for invoking issue preclusion had in fact been met: there was an identity of issues in the past and present proceedings which had been decided conclusively by the PSC, and the prior proceedings had afforded Allied a full and fair opportunity to be heard. *Id.* at 277, 528 N.E.2d at 156, 532 N.Y.S.2d at 233. The plaintiff, Allied, contended that the PSC's determination involved legislative ratemaking since the PSC concluded that the new tariffs, required to be filed by regulated utilities, did not apply to all "old capacity" cogenerators in general. *See id.* at 278, 528 N.E.2d at 156, 532 N.Y.S.2d at 233. Such determinations were not entitled to preclusive effect under the common law. *See id.* The court responded to Allied's contention by examining the policies behind not applying issue preclusion to an agency's legislative ratemaking determination. *Id.* The court noted that a decision not to apply issue preclusion to ratemaking was not based on the informality involved in a ratemaking proceeding, but instead, on the nature of prospective ratemaking itself. *Id.* Moreover, the court stated that economic conditions inevitably change over time and the reasonableness of the rate must be periodically reevaluated. *Id.*

[25] *Id.* at 279, 528 N.E.2d at 156-57, 532 N.Y.S.2d at 233-34. The court concluded that the PSC's determination was a squarely defined controversy over a failure to fully pay for electricity delivered pursuant to a contract; this required a final and conclusive disposition and, therefore, the policy considerations for denying preclusive effect were not implicated. *Id.*

termination, it is submitted that the court applied this standard erroneously since its decision gives preclusive effect to an agency's legislative determination setting rates for cogenerators. Additionally, by applying the doctrine of collateral estoppel too flexibly, the court undermined the very purpose underlying issue preclusion, which is to provide consistency in the law.[26] It is therefore suggested that the distinction between an agency's quasi-judicial and legislative functions be more closely scrutinized by the courts before they grant preclusive effect to an administrative finding.

The court in *Allied* correctly observed that the law will only grant preclusive effect to administrative determinations that are quasi-judicial in nature.[27] It is submitted, however, that the court

---

[26] *See* Gilberg v. Barbieri, 53 N.Y.2d 285, 291, 423 N.E.2d 807, 808, 441 N.Y.S.2d 49, 50 (1981); People v. Plevy, 52 N.Y.2d 58, 64, 417 N.E.2d 518, 521, 436 N.Y.S.2d 224, 227 (1980); *see also* Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 485, 386 N.E.2d 1328, 1331, 414 N.Y.S.2d 308, 311 (1969) (issue preclusion is "necessary to conserve judicial resources by discouraging redundant litigation").

[27] *See supra* notes 2, 5, 6 and accompanying text. Federal courts applying New York law have also applied issue preclusion to adjudicatory administrative determinations. *See* Zanghi v. Old Brookville, 752 F.2d 42, 46 (2d Cir. 1985); Taylor v. New York City Transit Auth., 309 F. Supp. 785, 791 (E.D.N.Y.), *aff'd*, 433 F.2d 665 (2d Cir. 1970).

The Court of Appeals refused to apply issue preclusion in two other cases decided on the same day as *Allied*. *See* Halyalkar v. Board of Regents, 72 N.Y.2d 261, 527 N.E.2d 1222, 532 N.Y.S.2d 85 (1988); Staatsburg Water Co. v. Staatsburg Fire Dist., 72 N.Y.2d 147, 527 N.E.2d 754, 531 N.Y.S.2d 876 (1988). In *Staatsburg*, the court did not grant preclusive effect to a determination by the PSC regarding the adequacy of water service in a contract action; the court regarded the determination as an "unsolicited advisory opinion" issued beyond the scope of the PSC's adjudicatory powers since neither of the parties had filed a formal complaint with the PSC. *See* 72 N.Y.2d at 153-54, 527 N.E.2d at 757, 531 N.Y.S.2d at 879 (citing N.Y.A.P.A. § 102(3) (McKinney 1984)).

In *Halyalkar*, the court refused to apply issue preclusion to an administrative determination because the issue in the prior proceeding was decided pursuant to a consent order entered upon the defendant's plea of guilty to the charge; therefore, the determination was not rendered pursuant to any quasi-judicial functions since the matter was never actually litigated. *See* 72 N.Y.2d at 269-70, 527 N.E.2d at 1226-27, 532 N.Y.S.2d at 90.

An in-depth analysis for denying preclusive effect to an administrative legislative ratemaking proceeding was provided in International Telephone & Telegraph Corp. v. American Telephone & Telegraph Co., 444 F. Supp. 1148 (S.D.N.Y. 1978), where the court reasoned: "The opportunity to present and cross-examine witnesses, a clear allocation of the burden of proof, and a clear standard against which past conduct is being measured . . . are normally either not present or materially different in non-adjudicatory agency proceedings." *Id.* at 1156. The court continued, stating: "A legislative body is not confined to . . . issues of past conduct, but rather, may properly consider a multitude of factors" which is inconsistent with the fact-finding process of adjudication. *Id.* at 1158; *see also* American Tel. & Tel. Co. v. FCC, 449 F.2d 439, 454-55 (2d Cir. 1971) (practice of setting rates is prospective and "no issue of damages for past acts [is] involved"; it requires "matters of statistics, economics, and expert interpretation, rather than questions of whether AT&T had violated some norm and would thus be subject to retrospective sanctions"). *See generally* RESTATEMENT,

erred in its application of the law to the facts presented. The PSC, in *Allied*, was not engaged in a fact-finding process based on the past conduct of the parties,[28] but rather, was ruling whether new tariffs were applicable to old capacity cogenerators, an essentially legislative decision.[29] In this manner, the PSC was prescribing that old capacity cogenerators may not receive a rate equal to full avoided costs, thereby setting a standard price applicable in the future to all old capacity cogenerators.[30] The Court of Appeals not only ignored this legislative aspect of the PSC's ruling, but also disregarded the second statement issued by the PSC in adopting a phase-in plan for all old capacity cogenerators, like Allied, to receive the full avoided cost rate. This second statement was at odds with the PSC's earlier ruling that a full avoided cost rate did not apply.[31]

---

supra note 1, § 83(2) comment b (preclusive effect "is properly applied to administrative adjudications of legal claims").

[28] *See, e.g.*, Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908) ("A judicial inquiry investigates, declares and enforces liabilities [between particular persons] as they stand on present or past facts and under laws supposed already to exist."); Hecht v. Monaghan, 307 N.Y. 461, 469, 121 N.E.2d 421, 425 (1954) (administrative adjudication "depends upon the ascertainment of the existence of certain past or present facts upon which a decision is to be made and rights and liabilities determined"); N.Y.A.P.A. § 102(3) (McKinney 1984) (adjudicatory proceeding is "any activity which is not a rule making proceeding . . . in which a determination of the legal rights, duties or privileges . . . is . . . made only on a record and after an opportunity for a hearing").

[29] *See supra* note 6. The process of ratemaking has been held to be a legislative rather than a quasi-judicial function. *See id.* An agency's legislative power involves the promulgation of rules and regulations enacted for the future guidance of the public in general. *See id.*

[30] *See Allied*, 72 N.Y.2d at 275-76, 528 N.E.2d at 154, 532 N.Y.S.2d at 231-32; *cf.* Consumer Protection Bd. v. Public Serv. Comm'n, 97 App. Div. 2d 320, 471 N.Y.S.2d 332 (3d Dep't 1983). In *Consumer Protection*, the court refused to grant preclusive effect to a determination made by the PSC which authorized the respondent utility companies to recover certain unshared costs from their customers through rate increases. *Id.* at 322, 471 N.Y.S.2d at 335. One of the respondents, Rochester Gas & Electric Corp., argued that the PSC was not prescribing rates but was adjudicating a contract dispute between the utilities based on facts that had occurred in the past. *Id.* at 324, 471 N.Y.S.2d at 335. The court rejected this argument holding that in effect the PSC was setting rates. *Id.*

[31] *See Allied*, 72 N.Y.2d at 275-76, 528 N.E.2d at 154-55, 532 N.Y.S.2d at 231-32; *see also* K. DAVIS, *supra* note 1, § 18.08, at 368. "Administrative action other than adjudication cannot be res judicata. *Even if an exercise of the rulemaking power depends on a finding of facts, neither the rule nor the finding is regarded as res judicata.*" *Id.* (emphasis added). It is suggested that the PSC's determination in *Allied* clearly involved elements of legislative rulemaking. The PSC stated that the new tariffs, required to be filed by regulated utilities, were not applicable to old capacity cogenerators; consequently, old capacity cogenerators could only receive rates at less than avoided costs. *See Allied*, 72 N.Y.2d at 275, 528 N.E.2d at 154, 532 N.Y.S.2d at 231. The PSC then proposed, in the same opinion, a plan which would have allowed old capacity cogenerators to receive the full rate gradually over a period of ten years, a statement that was inconsistent with the determination in the first part of its

It is suggested that the *Allied* court, in its effort to apply the doctrine of issue preclusion to administrative determinations, promoted inconsistency in the law.[32] In essence, the court granted preclusive effect to an administrative legislative ratemaking proceeding, thereby contradicting the very principle it had espoused in earlier cases.[33] The court held that the PSC's determination in the case at bar did not involve "prospective ratemaking" and, consequently, policy issues requiring reevaluation of prescribed rates were not implicated.[34] The court failed to focus, however, on the fact that the PSC's determination involved setting the applicable rate to be applied to old capacity cogenerators. It is submitted that this omission is inconsistent with the common law rule that preclusive effect shall only be granted to an agency's determination if it involves quasi-judicial, as opposed to legislative, rulemaking functions.[35]

The *Allied* court failed to give a clear and rational explanation for its decision to treat the PSC's ratemaking determination as a quasi-judicial function, and thus, invoked issue preclusion in a fashion contrary to established law. It emphasized the need for courts to consider whether issue preclusion is consistent with an agency's "scheme of administration" and the need for "flexibility" in reevaluating prior determinations in light of changing policy concerns,[36] but failed to adhere to this pronouncement, thereby blurring the distinction between what is quasi-judicial and what is legislative in the context of an administrative proceeding. It is suggested that the Court of Appeals reevaluate its position with respect to issue preclusion in administrative law because this kind of "flexibility" undermines the very purpose of the doctrine: stability

---

opinion. *See id.* Apparently, the court considered a host of economic evidence as shown by its solicitation of comments from other sources. *See id.* at 275-76, 528 N.E.2d at 154-55, 532 N.Y.S.2d at 231-32.

[32] By applying issue preclusion to the PSC's determination, the court deviated from the common law rule that administrative ratemaking proceedings should not be accorded preclusive effect, *see supra* notes 6, 23, and it is submitted that this action denied Allied its fundamental right to a "full and fair opportunity" to litigate the issues.

[33] *See Allied*, 72 N.Y.2d at 278, 528 N.E.2d at 156, 532 N.Y.S.2d at 233. The *Allied* court acknowledged that ratemaking proceedings have not been accorded preclusive effect, and noted that "it would be illogical, and inconsistent with the agency's function, to give preclusive effect to a prior ratemaking determination." *Id.*

[34] *Id.* at 278-79, 528 N.E.2d at 156-57, 532 N.Y.S.2d at 233-34.

[35] *See supra* notes 2, 5, 6 and accompanying text.

[36] *See Allied*, 72 N.Y.2d at 277, 528 N.E.2d at 155, 532 N.Y.S.2d at 232.

and consistency in the law.

Fara Agrusa

Criminal defendant is per se entitled to vacatur of his conviction when represented by an attorney whose license is subsequently revoked

Fundamental to the right to a fair trial under the sixth amendment is the right of the accused to the assistance of counsel[1] at all critical stages of a criminal proceeding.[2] This right extends

---

[1] *See* U.S. CONST. amend. VI. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*; *see* Gideon v. Wainwright, 372 U.S. 335, 344 (1963). "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.* The *Gideon* Court recognized the right to counsel as essential to a fair trial and concluded that the states are required by the fourteenth amendment to appoint counsel for indigent defendants to ensure that they receive fair trials. *See id.* at 341-44. The right of indigent defendants to have counsel appointed for them was constitutionally recognized for the first time in Powell v. Alabama, 287 U.S. 45, 71-72 (1932). *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 11.1, at 473 (student ed. 1985). The *Powell* Court did not focus on the right to counsel under the sixth amendment, but instead focused on the due process clause of the fourteenth amendment, stating that under the circumstances . . . the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment." *Powell*, 287 U.S. at 71. In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court recognized the right of a person charged with a crime in federal court to the assistance of counsel under the sixth amendment. *See id.* at 462-63; W. LAFAVE & J. ISRAEL, *supra*, § 11.1, at 475. Twenty-five years later, the right was made obligatory in state criminal prosecutions through operation of the fourteenth amendment. *See Gideon*, 372 U.S. at 342; W. LAFAVE & J. ISRAEL, *supra*, § 11.1, at 476.

[2] *See* Coleman v. Alabama, 399 U.S. 1, 7 (1970). The right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," and is not limited to the time of trial. Kirby v. Illinois, 406 U.S. 682, 688-89 (1972); *see* Brewer v. Williams, 430 U.S. 387, 398-99 (1977); Massiah v. United States, 377 U.S. 201, 205 (1964); *see also* W. LAFAVE & J. ISRAEL, *supra* note 1, § 11.1(b), at 484 ("The Sixth Amendment right to appointed counsel applies only to 'critical stages' in the criminal prosecution . . . [where] the 'substantial rights of the accused may be affected' . . . .").

Where substantial rights of the accused may be affected by a particular state criminal procedure or statute governing criminal procedure, the Supreme Court has looked to the law of that state to determine whether the right to the assistance of counsel has attached under the sixth amendment. *See* Meadows v. Kuhlmann, 812 F.2d 72, 76-77 (2d Cir.), *cert. denied*, 107 S. Ct. 3188 (1987); *see, e.g.*, *Coleman*, 399 U.S. at 9-10 (sixth amendment right to coun-