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STATE REGULATION OF THE SECURITIES OF RAILROADS AND PUBLIC SERVICE COMPANIES

BY
MARY L. BARRON

A THESIS

PRESENTED TO THE FACULTY OF THE GRADUATE SCHOOL IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

Reprinted from Vol. LXXVI of The Annals of the
American Academy of Political and Social Science
Philadelphia, March, 1918

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STATE REGULATION OF THE SECURITIES OF RAILROADS AND PUBLIC SERVICE COMPANIES[1]

I

Powers and Procedure of Public Service Commissions in Relation to Security Issues of Public Service Corporations

State control of the security issues of public service corporations has grown by slow stages from an almost complete absence of any checks in the era of special charters to the recent concentration, in a few states, of absolute power in the hands of a commission. The present state laws governing a public utility's security issues are to be found in a few special charter acts, in general statutes, and in special public service commission acts. As the latter represents the most complete method of supervision, particular emphasis is placed on the analysis of this group.

In answer to a deeply felt need of an administrative body to enforce the general laws in regard to railroads and public utility corporations, public service commissions have become so widely established that in 1917 there is only one state which has no kind of public utility commission—Delaware. Twenty-four states, however, have failed to confer on their commissions power to regulate the issuance of securities.[2] Commission control of securities is, therefore, absent from twenty-five states.

All degrees of power from publicity to absolute control have

[1] No secondary material has been used in the preparation of this article. The Public Service Commission Act (summarized in Table I) and the codified laws (Table II) of each state have been analyzed to discover in what manner the security issues of railroads and of public service companies have been subjected to regulation. Since the tables have been arranged so that the exact citation for any subject is easily found, footnote references have been omitted when a statute is analyzed in the text.

[2] Alabama, Arkansas, Colorado, Connecticut, Florida, Idaho, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Washington, Wyoming.

been conferred over securities on the remaining commissions. Rhode Island's one-paragraph provision covers only the stock, and not the bond, issues of street railways. The powers and the work of this commission in the matter of securities are so slight as to amount to non-regulation. The Pennsylvania and Virginia commissions are of the pure publicity type, their work consisting of the filing of notices of increases of securities. There are ten commissions that are limited to inquiring into the truth of the statements in the corporation's application for approval.[3] Texas has a very stringent law, but one that is enforced not so much through the powers conferred directly on the commission as through the severity of the penalties imposed upon the corporation for any infringement.

Some initiative is permitted all the other commissions by statute. Besides determining the truth of the statements in the application, the commissions of Massachusetts, New Hampshire and New York have power to specify the purposes and to determine the amount of securities reasonably necessary. The commissions of Ohio and Wisconsin have the additional power to decide the character of the securities and to define the terms of issue.

Four commissions have complete and unrestricted power over security issues, that of Vermont deriving its authority from a general provision to prevent overcapitalization, and those of Arizona, California and Illinois from detailed provisions in special public service commission acts.

Less than 20 per cent of the public service commissions have any discretionary powers on questions of capitalization. So incomplete are most of the laws that many commissions, though not permitted by law, have imposed conditions in order to make their control effective in any degree. Commission control over the capitalization of public service corporations, and particularly of railroads, is neither universal nor uniform.

The public commission acts provide for the enforcement of commission control over the security issues of public service corporations and of railroads by prescribing the proceedings necessary to validate an issue.

Previous permission of the commission, evidenced by a certificate of authority, must be had in eighteen states for all securities

[3] District of Columbia, Georgia, Indiana, Kansas, Maine, Maryland, Michigan, Missouri, Nebraska, New Jersey.

TABLE I.—ANALYSIS OF THE PROVISIONS OF STATE LAWS RELATIVE TO THE REGULATION OF SECURITY ISSUES BY PUBLIC SERVICE COMMISSIONS

State	Statute conferring power over security issues	Power to issue securities a special privilege	Previous permission required	Previous application necessary	Previous investigation	Recording the certificate required	Accounting for the proceeds required	Penalties	Approval as a guarantee
Arizona	1912, c. 90, sec. 52	52a	52b	..	52b	..	52c	52 d, e, f	52g
California	1911, c. 14, sec. 52	52a	52b	..	52b	..	52c	52 d, e, f	52g
District of Columbia[1]	1913, sec. 8	72	72	..	..	74	..	78–80	..
Georgia	1911, 8	..	8	8	8	..	..	12	..
Illinois	1913, 20–31	20	21	..	21	..	21	23, 24, 25	26
Indiana[1]	1913, 88–93	..	92	91	92	..	..	..	93
Kansas	1911, 24–27, 34–38	24a	25	25	..	34	..	26	..
Maine	1914, 35–38	..	35	35	35	36	..	..	..
Maryland	1910, 180, sec. 27	..	27	..	27	..	..	28	..
Massachusetts	1913, c. 784, secs. 15, 16	..	16	16	..	..	..	16	..
Michigan	1911, 1	..	1	1	1	..	..	2, 3	..
Missouri	1913, 54–58	54	57	..	..	58.1	59.1	59.2–4	59.5
Nebraska	1909, 1–3	..	1	..	1	..	..	2, 3	..
New Hampshire	1911, 14	..	14a	14a	..	..	..	..	..
New Jersey	1911, 18–19	..	18e	..	..	..	..	..	..
New York	1912, 55, 56	..	55	..	55	..	..	56	..
Ohio	1911, 56–63	..	56	57	58	..	..	60	..
Pennsylvania	1913, 4	..	..	4a, b	..	..	..	..	4d
Rhode Island[2]	1909, c. 216, 4	..	4	..	..	..	..	..	..
Texas	1895, a 4584, a–m	4584, a	4584, f–h	4584, f, g	..	..	..	4584 j, k, l	4584 m
Vermont	1908, sec. 16	..	16	16	16	..	..	..	..
Virginia	Constitution 1902, 167	..	..	167	..	..	..	..	..
Wisconsin	1913, 1753, 1–22	1753, 2	1753, 9.1	1753, 9.4, 6, 8	1753, 9.2	..	1753, 13	1753, 17, 18, 19	..

All references are to the public utility act of the respective states, passed in the year indicated.
[1] Does not apply to steam railroads.
[2] Applies only to street railroads.

issued by a railroad company.[4] The public utility corporations of the same states, with the exception of Texas, are subject to the same provision, and also those of the District of Columbia and Indiana. Rhode Island requires such authority for the stock issues of street railways. The Pennsylvania commission has no power on its own initiative to certify to an issue, but must do so if the corporation applies for a certificate of valuation. In Texas, the certificate is in the form of a notice to the Secretary of State that the law has been complied with, especially that the particular issue does not exceed the value of the property covered by it. The certificate of the other commissions states the amount, purposes and character of the issue; that the amount is not in excess of the amount required for the specified purposes; and that no part of the amount, except when permitted in reference to bonds, is chargeable to operating expense or income. When the commission has power to impose conditions, these are also set forth in the certificate.

A necessary prerequisite to the issue of a certificate is an application by the corporation for approval. The Texas law does not require a previous application, but the rules of the commission call for it in all cases. The laws of several states contain only a very general clause, demanding a written application to be made,[5] while others prescribe the contents of the application.[6] The application contains information on the same subjects to which the commissions must certify in their certificate of authority, namely, the amount, character and purposes of the issue, the terms of the issue, and a description and estimated value of any property or services that are made a basis of the issues.

In two states, Pennsylvania and Virginia, the filing of a similar statement, called a Certificate of Notification in Pennsylvania, meets all the requirements of the law, and the corporation is subject to no further control in matters of capitalization. The duty of the commissions of these states is fulfilled by placing this statement on public file.

Previous investigation of the statements in the application is definitely provided for in the statutes of many states, and in the

[4] Arizona, California, Georgia, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Texas, Vermont, Wisconsin.

[5] Georgia, Maine, Massachusetts, Michigan, New Hampshire, Vermont.

[6] Indiana, Kansas, Ohio, Wisconsin.

case of almost every application the commission conducts an investigation.[7] The commission must hold a public hearing, and is empowered to make additional inquiry, to make a valuation of the property of the corporation, and to examine such witnesses, books, documents and contracts, and to require the filing of such data as it may deem of assistance in reaching a determination.

If the commission decides to permit an issue of securities, its certificate must, in several states[8] be recorded on the books of the company before securities may be issued. In other states, the certificate must be filed with the Secretary of State.[9]

To insure the proper disposition of the proceeds of authorized issues, various provisions are found in the state statutes. Wisconsin may require the utility to perform any act necessary to carry out the provisions of the law. Some states permit their commissions to establish any rules or regulations in their judgment reasonable and necessary to prevent the disposition of the proceeds for any purposes except those designated in the order.[10] A detailed accounting of the proceeds is called for by some laws,[11] and, in practice, by all commissions.

Failure to observe any of the provisions in the act is punishable by *penalties* that operate against the security issued, the corporation, and the officers and employes. The laws of nine states declare all securities void, which do not conform to the law.[12] There is a conflict of opinion as to the power of the commission to validate such illegal issues. Texas,[13] California[14] and New Hampshire[15] require new applications, but Nebraska[16] and Indiana[17] validate the issue.

[7] Arizona, California, Georgia, Illinois, Maine, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New York, Ohio, Vermont, Wisconsin, and Pennsylvania in case of a Certificate of Valuation.

[8] District of Columbia, Kansas, Missouri, Wisconsin.

[9] Texas, New Hampshire, Massachusetts.

[10] Arizona, California, Illinois, Missouri, Wisconsin.

[11] Arizona, California, Illinois, Missouri.

[12] Arizona, California, District of Columbia, Illinois, Kansas, Maine, Ohio, Texas and Wisconsin.

[13] Public Utility Reports Annotated (hereafter referred to as P. U. R.), 1915, E531.

[14] *Id.* A643, 1071.

[15] *Id.* E931.

[16] *Id.* C24.

[17] *Id.* B55.

If there is no need to change the terms of the issue, a validating order would seem sufficient, without compelling the corporation to recall the unauthorized securities and issue an identical new series, with only the authority of the commission added. The penalty imposed on the utility is usually a fine, ranging from $500 to $20,000. The agent may be fined $500 to $10,000 or imprisoned on a misdemeanor charge in some states, on a felony charge in others, for a term of one to fifteen years, and, in Texas, is personally responsible to the creditors for the full amount of any damage sustained.

The administrative control of security issues is provided for in state statutes by requiring previous permission of a public service commission, which is granted upon application and after investigation. This permission must be recorded in some states upon the books of the corporation or with the Secretary of State. The proceeds from authorized issues must be strictly accounted for. For any failure to obey the law severe penalties are imposed, the least of which is sufficient impetus to a close observance of the provisions of the statutes.

Compelled in twenty-three states to submit to some measure of supervision by a public commission, the public service corporations and railroads are served with a notice in almost all states that the approval of the commission carries no guarantee.[18] The orders of the commission often contain the further condition that such authority shall not be binding upon the commission or any other tribunal as a finding of the value of the applicant's property[19] in any rate or other proceeding. These emphatic declarations that the commission's approval carries no guarantee of value or dividends would seem to uphold the frequently repeated assertion that securities have no relation to rates. In practice, however, the same commissions have considered the return on investment which a particular rate will yield before making any change.[20] Inversely the ability of a company to meet interest charges has been the justification for authority to issue securities.[21]

In rate valuation proceedings, the security issues almost invariably have weight, even in states where there is no power granted

[18] Arizona, California, Illinois, Indiana, Missouri, Pennsylvania, Texas.
[19] P. U. R. 1915, B1072, A557, F795; *id.* 1916, B583, A514.
[20] P. U. R. 1916, A227, A594, C281, C1020, D25
[21] *Id.* 1915, A744, 749

to a commission over securities.[22] The general assurances that securities will be considered have been translated into positive action by many commissions, rates being maintained or even raised in order to give a favorable return on the securities.[23] The Massachusetts Public Service Commission has taken the most definite stand in this matter, holding that capital honestly and prudently invested must be taken as a controlling factor in fixing a basis for fair rates,[24] and that the approval of the commission is conclusive evidence that the issue represents legitimate investment.[25]

The consequence of a change of rates upon the market value of securities should be carefully considered by all commissions. If strict observance is required of the provisions that securities are to be issued only in amounts necessary for proper purposes, and that full value in assets is turned into the corporation, the commissions will best guard the public's interests by being generous and fair in rate questions. The ordinary risks of business, however, should not be insured against because of commission approval of securities except that rates should always be sufficient to provide for obsolescence as well as depreciation. The best relationship between the corporation and the public is maintained when a fair return is permitted upon a fair investment, without removing the spur of responsibility for conservative management from the officers of the corporation.

II

STATE STATUTORY LIMITATIONS ON THE ISSUE OF SECURITIES

The *security issues* of public service corporations that are subject to control are *defined* to be stocks, stock certificates, bonds, notes, trust certificates, or other evidences of indebtedness, payable at more than twelve months after date. No one of the public service acts enters into more detail. The lack of exact definition has been a marked deficiency of all the laws. What constitutes an issuance of such securities was also left for the commissions to determine. As interpreted in the various states, control has been extended far beyond the original issue to bona fide purchasers, or

[22] P. U. R. 1916, D976, 1915, A618.
[23] *Id.* 1916, A349, 276, 506; 1917, A255.
[24] *Id.* 1915, B362; 1917, A331.
[25] *Id.* 1915, E370, F264.

TABLE II.—ANALYSIS OF PROVISIONS OF STATE STATUTES CONCERNING REGULATION OF THE ISSUE OF RAILROAD SECURITIES

State	Code[1]	Purposes of issue defined[2]	Payment required to be in money, property, labor, or services	Par of stocks defined	Selling price defined	Provisions concerning scrip dividends	Ratio of bonds to stocks	Liability of stockholders	Corporate power to increase or decrease stock defined	Right granted to issue	
										Preferred stock	Bonds
Alabama	1907	..	3467	....	....	....	....	3468	3480	3479	....
Alaska	1913	..	811	....	....	810	814	811	815	....	....
Arizona	1913	52b	....	2133	52b[2]	....	52b[2]	2109	2102	....	2159
Arkansas	1904	..	....	6721	....	....	6686	....	6686	1905, a. 330	6686
California	1915	52b	359	....	52b[2]	....	52b[2]	322	322	290.6	456
Colorado	1911	..	863	850	....	....	....	900	883	....	5415
Delaware	....	..	C. ix, 3	....	....	1915, 35	1915, 115	1915, 20	1915, 26	1915, 13	1915, 115
Florida	1914	..	2653	2802	....	....	....	2681	2673	....	2803
Georgia	1911	8	....	....	....	....	....	2583	....	....	2585
Idaho	....	..	1913, S. 100	....	id.	....	1909, S100	id.	id.	id.	1911, c. 11g
Illinois	1913	21	8756	....	....	8756	....	8751	8749	....	8754
Indiana	1914	..	....	5084	....	....	....	5322	5319	5182	5245
Iowa	1913	..	1641b	....	1641b	....	....	1641b	....	2044	2328
Kansas	1915	25	....	....	....	....	2153	....	2111	2129	....
Kentucky	1915	..	568	....	....	....	....	547	553	564	771
Louisiana	1897	..	C. 266	....	....	....	....	143	C. 267	....	....
Maine	1903	35	c. 47, 87	c. 47, 33	c. 51, 32	37[2]	c. 55, 9	c. 47, 86	c. 51, 5, 19	c. 47	c. 52, 32
Maryland	1910	27	a. 23, 35	a. 23, 264	....	....	a. 23, 276	....	a. 23, 267	a. 23, 34	a. 23, 267
Massachusetts	1908	15	....	....	....	....	c. 620, 1	....	....	1915, c. 299	....
Michigan	1913	1	6691	6576	6687	6691	....	C. xii, 4	6616	6687	6893
Minnesota	1913	..	....	6181	6193	....	6223, 21	C. x, 3	....	6229	6223
Mississippi	1906	..	4102	4076	....	58.2[2]	....	4083	4083	4084	4084
Missouri	1906	57	962	....	....	....	1909, 2981	985	962, 1049	1050	1035
Montana	1907	..	3894	....	....	....	3894	3853	3828	3889	....
Nebraska	1913	1	....	....	....	68	569	C. ix, 4	551	....	572
Nevada	1912	..	1155, 6	3512	....	....	3526	1135	1142—	1114	3526
New Hampshire	1901	14a	....	c. 156, 4	c. 149, 9	....	c. 150, 4	c. 150, 8	c. 156, 17	....	....
New Jersey	1910	..	1913, c. 15	....	....	....	....	p. 4221, 5	p. 1610, 21	p. 4221, 5	p. 4221, 6
New Mexico	1915	..	940	....	....	....	4697	....	697	914	4697
New York	1913	55	....	....	....	....	....	....	....	....	1910, c. 481
North Carolina	1905	..	1159	....	....	....	....	2556	2555	1159	2567
North Dakota	1913	..	4528	....	....	61[2]	4543	4554	4557	4558	4613
Ohio	1910	56	....	....	....	....	8793–4	8686	8815	8667	8793
Oklahoma	1910	..	....	....	....	....	1266	1263	1381	....	1383
Oregon	1910	..	6696	....	....	....	338	6696	6701	....	....
Pennsylvania	....	..	1887, 94	1849, 82	1887, 94	....	1887, 94	1814, 80	1868, 64	1887, 94	1887, 94
Rhode Island	1909	..	....	....	....	....	c. 214, 12	c. 214, 1, 11	c. 212, 7–8	....	....
South Carolina	1912	..	2889	....	2887	....	....	3110	2883	....	....
South Dakota	1913	..	443	....	....	....	436	441	486	....	489
Tennessee	1896	..	....	2052	....	....	....	....	1915, c. 108	....	2049, 2054
Texas	1911	..	6469	....	6469	....	1198	6458	....	....	6544
Utah	1908	..	316	....	....	....	....	331	338	....	434
Vermont	1906	..	1910, 143	4335	4376	....	4313	4308	4348	4371	4382
Virginia	1916	..	1108	1106	1124	....	....	....	1105b	....	1105
Washington	1910	..	....	....	....	3697	3698	3698	3704	....	3699
West Virginia	1906	..	2857	2848	2958	2958	....	2946	2944	2849	2949, 2989
Wisconsin	1911	1753–5	1753	....	....	....	....	....	....	....	....
Wyoming	1910	..	3989	....	....	....	3992	3988	3997	3984	4194

[1] All references are to sections in the codes, revised statutes, or compiled laws of each state of the date given in this column, unless otherwise indicated by: 1. A different date, when the reference is to the general statutes for that year. 2. "C" refers to the constitution. 3. "c" refers to the chapter, and "a" to the article in the law.

[2] References are to sections in the Public Service Act, see Table I.

for retention in the treasury to pledged[26] and reissued[27] securities and to issues to effect a reorganization[28] or consolidation.[29]

All *securities* issued for periods of less than twelve months are *exempt from regulation.* The Pennsylvania commission may, in its discretion, extend to such securities the provisions that require a certificate of notification to be filed. Wisconsin limits such issues to those that are made for money, requiring the consent of the commission if issued for property or services. Michigan permits an original issue for twenty-four months without consent of the commission. The other states place no restraints upon the issue of such securities. In some states the refunding of such securities, if in the form of an issue running for more than twelve months, must not be carried out without the consent of the commission.[30] In other states, the refunding in whole or in part by any issue of securities of whatever term or character requires the consent of the commission.[31] Illinois further forbids their renewal from time to time, without consent, for an aggregate period of longer than two years. All other states require consent for any refunding issue that is to run for longer than twelve months.

The interstate character of the corporation or of a particular issue may also have the effect of a partial exemption. Some state laws confine supervision to domestic corporations,[32] in which case no part of the securities of a foreign corporation need to be approved. Other states apply the law to all corporations transacting business within the state.[33] The Georgia act could receive the last interpretation, but the commission has refused to take jurisdiction over the stock issues of foreign corporations, or over the bond issues of a corporation engaged in interstate commerce.[34]

The location of the property that is the basis for the issue is

[26] P. U. R. 1916, A42.

[27] *Id.* 1916, C1178.

[28] District of Columbia, New York, Ohio, Wisconsin, Illinois, Texas.

[29] All Public Service Acts, except those of Georgia, Michigan, Texas and Vermont, specifically provide for control over consolidations of railroads or utilities

[30] Georgia, Indiana, Maryland, Michigan, Missouri, Nebraska, New York, Ohio.

[31] Arizona, California, Illinois.

[32] Maine, Maryland, Nebraska, New York, Vermont.

[33] District of Columbia, Kansas, Michigan, New Hampshire, Ohio, Wisconsin.

[34] National Association of Railroad Commissioners, Proceedings, v. 25, p. 172.

more commonly made the measure for jurisdiction. The acts of Arizona, California and Missouri and the commission ruling of Illinois apply the act to all issues that are based upon property within the state. The Arizona commission interpreted this provision so broadly that it claimed jurisdiction over the bond issue of a foreign corporation, although there was no lien on any property within the state and none of the proceeds were to be spent within the state, because it was not clear that in the event of a foreclosure a deficiency judgment might not be taken against Arizona property.[35]

If the proceeds are to be spent without the state, many commissions lose control. The acts of Massachusetts and of New Hampshire exempt such part of an issue as represents expenditures outside the state. The Massachusetts commission, however, does pass upon all issues by domestic corporations and must be notified of the details of the entire issue by a foreign corporation, if any part of the proceeds are to be spent in Massachusetts. The Ohio commission grants, but does not require, its approval if expenditures are to be made without the state. The Maryland commission claimed full jurisdiction over all issues of securities by domestic corporations, but the courts held that it had no control over securities the proceeds of which were to be spent outside the state.[36] With these exceptions, the laws governing the issuance of securities apply to every form of issue, including pledge, whether by a new, existing, reorganized, or consolidated company, and whether for property, privileges, or services.

There are various limitations as to the kind of security that may be issued under certain circumstances. Those states which permit the issue of securities for operating expenses and replacement require them to be in the form of bonds or notes. Refunding issues must be in the same form as the securities they are retiring, unless a special order is obtained permitting a change.

The most widespread limitation on the class of security to be issued is that which defines the proper *proportion* to be maintained *between bonds and stocks*. There is no limit to bond issues in Mississippi, and several other states give the directors full power to determine the amount. Arizona, California and Illinois permit their commissions to authorize issues of bonds in an amount equal to,

[35] P. U. R. 1916, B8.
[36] 88 Atl. 348.

less than, or greater than the capital stock. The Arizona commission has favored the restriction of bonds to the amount of stock, while that of California has declared that 70 per cent of the capital in the form of bonds is the maximum to be authorized.[37] Bonds were limited to 50 per cent of the capital in the case of a California water company owning wells that might not be permanent.[38] A Connecticut law prevents the issue of bonds in excess of one-half the amount actually expended on the railroad.[39] The Texas law makes the value of the property the limit for bonds. The laws of Indiana and Wisconsin declare in general terms that the indebtedness of the corporation shall bear a reasonable proportion to the stocks issued by the corporation.[40]

The definite proportion that must be maintained between stocks and bonds is prescribed in many states.[40] The most common requirement is that the bonds[41] or total indebtedness[42] shall not exceed the capital stock, modified in Montana and New Mexico by the amount subscribed. Connecticut[43] and New Jersey limit the total indebtedness to the stock paid in, but bonds to twice this amount may be issued in other states.[44] The maximum amount of bonds is limited to two-thirds of the capital stock in Iowa, Nebraska and Utah. In Minnesota, the indebtedness exclusive of mortgage bonds must not exceed two-thirds of the capital stock, but the total indebtedness may be three times the capital stock. An interstate corporation may find itself conforming to the laws of one state only to defy those of another. An established proportion between stocks and bonds is necessary to compel the owners to put into the business enough to make it to their interest to maintain the property in an efficient condition, rather than to exploit it to secure dividends. Merely to condition the amount of bonds on the total securities does not meet the situation, especially if the stock is not fully paid. The bonds should be in proportion to the total value of the assets and not to any quality of the capital stock. In quantity, there is

[37] P. U. R. 1915, A787, D347.
[38] *Id.* 1915, B38.
[39] Code 1902, sec. 3804.
[40] For exact reference *see* Table II.
[41] Arkansas, Idaho, Maryland, Missouri, Nevada, Ohio.
[42] Idaho, North Dakota, Oklahoma, South Dakota, Washington, Wyoming.
[43] Code 1902, sec. 3804.
[44] Delaware, Massachusetts, Pennsylvania, Washington.

already an overabundance of legislation, but there is need of the adoption of a basis that will give greater definiteness.

Securities of whatever character must be issued only for *legitimate purposes*. The chief duty of the commissions is to see to this requirement. To leave no doubt that the commission's decision is final, many states forbid the utility or railroad to apply the proceeds of securities to any purposes not specified in the commission's certificate,[45] nor in excess of the amount authorized.[46] The majority of commissions are limited at the outset to inquiring whether the issue under consideration is for purposes in accord with the nature of the business carried on by the particular corporation. The unnecessary duplication of facilities by competing companies may continue unchecked.[47] The commissions of Ohio and Vermont have been given the right to reject the applications if not convinced that the proceeds will be spent for the general good of the public, and the acts of California, Arizona and Illinois permit of the same broad interpretation. A few other commissions, as Maine,[48] by a liberal interpretation of their power in regard to certificates of convenience and necessity, may prevent duplication of plants in the interest of the public. Every unnecessary duplication of any part of a public service corporation's plant, used solely for competitive purposes, results in reducing to scrap value that much of the property of one or both companies. Where the evils of competition and its wasteful extravagances are not prevented by public control, the burdens of the utility are unjustly increased and the public in no manner benefited. Every commission should have the power, and it should be its duty, to coördinate the corporate with the public needs, by preventing the issue of securities for unnecessary construction.

The purpose for which securities may be authorized, as set forth in the laws, fall into five general classes:

1. The acquisition of property.
2. The construction, completion, extension, or improvement of its facilities or properties.

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[45] Arizona, California, Illinois, Kansas, Massachusetts, Missouri, New Hampshire, New York, Ohio, Wisconsin.

[46] Arizona, California, Illinois. *See* Table II.

[47] P. U. R. 1915, B55, D160; 1916, C42.

[48] *Id.* 1916, A418.

3. The improvement of maintenance of its service.
4. The discharge or lawful refunding of its obligations.
5. The reimbursement of the treasury[49] for moneys actually expended from income, or from any other moneys in the treasury not secured by the issue of stocks or bonds.

The first group, the acquisition of property, includes the purchase of rights of way and of other necessary real estate, and the acquisition of the property or securities of related systems. The securities must represent a permanent addition to the facilities of the railroad or utility. The public service acts of ten states forbid the capitalization of the right to be a corporation, or the capitalization of any contract for consolidation or lease.[50] If issues were allowed for such purposes, they would rest upon anticipated earnings and not on present assets, always a doubtful proceeding, particularly unjustifiable in the case of railroads and public utilities.

The second group covers all the basic equipment that directly furthers the company's business, including the cost of welfare buildings, when not directed beyond suitable provision for the health and safety of employes.[51] What proportion, if any, of the securities authorized for construction costs should be credited to promotion fees has not been decided uniformly by the state commissions. In recognition of the value of the services of the promoter, Iowa passed a law in 1911 requiring the labor performed in effecting the promotion of steam and electric railways to be taken into account in fixing the amount of capital stock. The Maine commission authorized the issue of stock to the promoter of a railroad, although only preliminary organization work had been done.[52] The California commission authorized stock to the par of $75,000 for promoter's services in projecting a railroad that could be financed at a sum not to exceed $750,000.[53] These rulings partake of extremes in expressing appreciation of the work of the promoter, but are based on a correct principle, for the work of the promoter in the field of modern

[49] Arizona, California, Illinois, Indiana, Missouri, New York, Ohio, Wisconsin. The other four groups are mentioned in the laws of these states and of Georgia, Kansas, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire.

[50] Arizona, California, Illinois, Indiana, Maryland, Missouri, Nebraska, New York, Ohio, Wisconsin.

[51] P. U. R. 1915, B582.

[52] P. U. R. 1916, D260.

[53] *Id.* 1915, F311.

industry is co-important with the work of the engineer, and a condition precedent to the latter's employment. Less favorable consideration has been accorded the promoter in Arizona,[54] Massachusetts,[55] New Jersey[56] and Ohio. The Maryland commission has declared that the cost of financing through promotion agents is a proper operating expense.[57] There are few commissions that do not take this factor into account, although they may refuse an award under that name. All states permit of the issue of securities to meet engineering costs. The large engineering firms are taking a lead in the promotion field. Their work of organizing and financing the project is distinct from the work of actual construction, but a single fee may be received for the completed project, the promotion costs being absorbed in the engineering costs.

The third group, improvement or maintenance of service, places a heavy burden of interpretation upon the commissions, in determining what may properly be included under this classification. Working capital falls under this division. The Massachusetts Railroad Commission refused to authorize securities for this purpose. To meet the special need of street railways, a law was passed permitting the issue of stock to provide working capital, not to exceed 5 per cent of outstanding stock, or an issue of bonds to an amount determined by the commission.[58] In general, the commissions authorize securities to provide working capital, in an amount varying with the nature and extent of the business.[59] Operating expenses and replacements also belong in the third group. They may not be capitalized in the form of stocks in any part of the Union It lies, however, within the discretion of several commissions to concur in the issue of bonds or notes for these purposes.[60] In every state, permission is withheld unless the corporation proves its ability and willingness to make

[54] P. U. R. 1915, B1043.

[55] *Id.* 1915, A15.

[56] *Id.* 1916, D77.

[57] *Id.* 1916, B925.

[58] Acts of 1909, C. 485.

[59] California, P. U. R. 1915, E834; Illinois, *id.* 1915, F235, 1916, C281, 704; Indiana, 1915, C561; Missouri, *id.* 1916, F49; Nebraska, *id.* 1915, B416, D160, 1917, A907; New Jersey, *id.* 1915, B601; New York, Public Service Commission Reports, Hearings and Decisions, I, 166.

[60] Arizona, California, Illinois, Missouri, New York, Ohio, Wisconsin; *see* Table II under "Purposes" for references. Massachusetts, Acts 1914, ch. 671 (street railways).

good out of earnings the amount, either by direct payments to a sinking fund, or by investments in capital assets.[61] The New York Second District Commission has well summarized the advantages accruing from permitting issues for operating expenses, declaring that:

> this policy enables the companies to absorb early losses . . . . to continue to serve the public without interruptions uniformly attendant upon receiverships . . . . and makes them comparable to industrials and other unregulated fields for investment, so far as the possibilities attendant upon external development are concerned.[62]

Where the power to authorize issues for replacements and operating expenses is conservatively exercised, it may prove of public benefit in those cases where an insufficient depreciation fund has been carried, and an inefficient service will result from a continued use of obsolete or worn out equipment. The requirement of a restoration to the capital account of an equal amount reduces the measure to a purely temporary expedient. The railroads, as a whole, have no need of availing themselves of this privilege. The enforcement of present day stringent accountancy rules will soon obviate the need of any utility resorting to this method, by compelling the maintenance of adequate depreciation funds.

The fourth group, the discharge or lawful refunding of the company's obligations, presents no particular problem of interpretation.

The fifth group, reimbursement of the treasury for funds employed in the extension, improvement and betterment of the properties of the utility corporation or railroad receives unanimous approval by all commissions, when the securities are to be sold and the funds turned into the treasury.[63]

When such securities are in the form of stocks to be distributed in lieu of a cash dividend, there is a decided divergence of opinion as to the propriety of consenting to their issuance. The act creating a commission for the District of Columbia, and the laws of Massachusetts, New Hampshire and South Carolina forbid scrip dividends. The courts of South Carolina, however, have held that the capitalization of a new company formed to purchase the property of two exist-

[61] P. U. R. 1916, C769, D551; *id.* 1917, A889.

[62] New York, Public Service Commission, Second District Ninth Annual Report, v. I, p. 7.

[63] 94 Atl. 193.

ing companies at full value, though in excess of the capitalization of the existing companies is not in violation of this statute, even if the securities are to be taken by the stockholders of the old corporations.[63] According to this decision, the law may be circumvented without very great inconvenience and is practically nullified. Some commissions, as Ohio, favor the sale of such securities, in place of a direct issue to the stockholders, and the distribution of the funds as a cash dividend.[64]

Many state laws permit stock dividends in an amount represented by actual investment in the corporation of net earnings.[65] The commissions of California,[66] Illinois,[67] Indiana[68] and New Jersey[69] have rendered decisions to the same effect. The advantages of permitting stock dividends are several. Some surplus is essential to every corporation to provide for emergencies and to stabilize dividends. To keep this in the form of idle cash is an economic waste. To put it entirely into outside investments, which the management cannot control, is a risk, to lessen which unusually small returns must be accepted by investing in preferred securities. By the employment of the surplus in its own business, a corporation is enabled to make improvements when needed acting independent of conditions in the money market, and to do so without the payment of interest. The public is saved this interest charge, since the corporation may not exact interest on its own funds, but may only issue securities to the amount of the net property addition. With the present powers of investigation possessed by commissions, there is no danger in permitting the investment of a corporation's surplus in its own property, and the distribution of a stock dividend when the improvements are completed. This is particularly just when the owners have refrained from all dividends in order to build up the credit of the corporation.

The legitimate purposes as defined in the laws are sufficiently broad not to check the healthy expansion of public service corporations entirely intrastate, but the conflicting interpretations by the

[64] P. U. R. 1915, A483.
[65] Kansas, Maine, Missouri, Ohio, Wisconsin, West Virginia (*see* Table II).
[66] P. U. R. 1915, C324.
[67] *Id.* 1915, A205.
[68] *Id.* 1915, A540.
[69] *Id.* 1915, E72.

different state commissions retard the fullest development of interstate corporations.

Railroads and public utilities are limited not only as to the character of the securities and the purposes for which they may be issued, but also as to what may be received in *payment for securities.* Many states have constitutional provisions to the effect that stocks or bonds may not be issued except for an equivalent in money paid, labor done or property actually received and applied to the purposes for which the corporation was created; that all fictitious increase of stock or indebtedness is void; and that neither labor nor property may be received in payment at a greater value than the market price at the time such labor was done or property received.[70] The same provision is incorporated in the statutes of many states.[71] The purpose of such statutes is to restrict issues to actual investment, and they are therefore constitutional.[72]

The enforcement of these provisions is left entirely to the directors in several states, and their judgment may be reversed only in fraud proceedings.[73] If the issue is for other than money, Iowa requires the consent of the Executive Council of State, which, if necessary, may make an investigation and ascertain the real value of the property to be transferred.[74] In Vermont the issue of shares of stock for property is subject to special approval by the shareholders, to whom all particulars must be submitted.[75] Other states have made it the duty of their commissions to enforce the provisions as to the form of payment. In Virginia, if the securities are issued for property or services already received, the commission may investigate the value of the property. Texas requires special approval of the commission if bonds are to be issued in advance of the completion of a railroad. In Wisconsin, a railroad or utility is restricted in the issue of securities for services or property to the true money value, as determined by the commission, in an amount equal to the

[70] Alabama, sec. 234; Arizona XV, 4; Arkansas XII, 4; California XII, 11; Delaware IX, 3; Idaho XI, 9; Illinois XI, 13; Kentucky, sec. 193; Louisiana, sec. 266; Mississippi, sec. 196; Missouri XII, 8; Nebraska XI, 5; South Carolina IX, 10; South Dakota XVII, 8; Utah XII, 5; Virginia, sec. 167.

[71] *See* Table II under payment.

[72] P. U. R. 1915, A618 (Massachusetts).

[73] Delaware, Pennsylvania, South Dakota, West Virginia.

[74] Code 1913, sec. 1641b.

[75] Laws of 1910, 143, sec. 6.

face value of the stocks and not less than 75 per cent of the face value of the bonds.

The decisions of the commissions conflict as to the proper measure of the value of the property, whether actual cost, reproduction new, or present value. The Maryland commission refused to authorize the issuance of securities beyond the value of a public service company's property, although the company had actually expended in the plant a larger sum than it sought to capitalize.[76] In contrast, New Hampshire granted authority to issue securities to cover the actual cost of construction, although a valuation showed a present cost of reproduction new somewhat less than the actual cost.[77] The Texas law permits the purchasers of a railroad to issue securities to the full value of the property, irrespective of the purchase price. The California commission gave consent to a reorganization plan that involved the issue of securities beyond the value set by the company.[78] In Maine, a company was denied the right to capitalize more than the purchase price.[79] Extreme liberality was displayed by the Maine commission in another case, when it authorized the issue of bonds, although the company had no physical property.[80] Such inharmonious decisions introduce a measure of uncertainty that is particularly disturbing in the case of railroads that are national in scope, whatever the length of line in any one state.

These same principles apply to reorganizations and consolidations. Georgia and Wisconsin limit issues of securities in such cases to the fair value of the property. The California commission has not been strict in valuations for this purpose, in one case making no effort to eliminate undue expense in connection with the property.[81] Several states provide that the stock of consolidated corporations must not exceed the aggregate capital stock of the corporations consolidated at the par value and any additional sum paid in cash.[82] The total amount of securities that may be issued upon the re-

[76] P. U. R. 1915, A812.
[77] P. U. R. 1915, E931.
[78] *Id.* C807.
[79] *Id.* E109.
[80] *Id.* 1916, D260.
[81] *Id.* 1915, F569.
[82] District of Columbia, Illinois, Maryland, Missouri, Nebraska, New York, Ohio.

organization of a corporation is limited to the fair value of the property in Pennsylvania, as determined by the commission in Illinois, New York and Texas. Ohio permits an issue to the full value of the old securities. When the amount of securities is conditioned on the sum of the securities of the separate companies the new issues partake of all the evils of the old. If the par of such securities is more than the real value of the properties, the "water" is not eliminated. If the par represents less than the real value, the owners are penalized to the extent of the difference, when they should be rewarded for their thrift in increasing the assets of the corporation out of savings. The issue of securities to the fair value of the property, as determined by the commission, whether greater or less than the par of the old securities, is the most just method, and the only one really ensuring value received.

PAR VALUE AND SELLING PRICE

If the many state laws which limit securities to a reasonable amount for lawful purposes and require the corporation to receive value in full, were universally executed, no stock would sell for less than par and bonds would sell for their exact value, a condition only approximated in a few states.

The par itself, as prescribed in the statutes, is far from uniform. Some states leave the decision to the board of directors. In Tennessee, railroad stocks may be issued with a par of $100 or less. In Colorado, the par may vary from $1 to $100, in Maryland and Pennsylvania it must be $50, in the majority of states it is placed at $100.[83] Railroad bonds may have a par of $50 in Iowa, $100 in Massachusetts and Vermont, $500 in Nebraska, and $1,000 in Wyoming. The maximum interest on bonds, which partly determines market price, is fixed at 6 per cent in Texas, 7 per cent in Arkansas, Massachusetts and Ohio, at 8 per cent in Iowa, and at 10 per cent in Michigan, Nebraska and Wyoming.

The par of the securities of many corporations has no relation to the value of the property, and consequently the selling price and the par value are rarely equivalent terms. The states which have not conferred on their commissions power to regulate securities give

[83] Arizona, Connecticut, Florida, Georgia, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, Vermont, Virginia (See Table I, "Par").

the directors full power to set the price. Virginia also leaves the price to be determined by the directors. Some commissions have unlimited power to fix prices.[84] Ohio has agreed to a price as low as 80 for stocks, the policy of the California commission is not to allow a price less than 80–85 as a minimum,[85] and Illinois requires par to be received. The sale of stock at less than par is permitted in Indiana and Georgia if agreed to by the commission, which, except in such a case, does not have power to fix the price. Railroad stocks may not be sold for less than par in Maine. In the case of other utilities, the commission will not authorize the sale of a stock at less than par by a new corporation, but holds itself free to do so in the case of an existing corporation.[86] Other commissions require all stock to be paid in full.[87]

An exception to the requirement of all sales at par is made in New York in the case of convertible railroad bonds. The New York law authorizes the conversion of railroad bonds into stock at less than its par value, but not less than the market price at the time of the stockholders' consent to the bond issue.[88] In Maine, Massachusetts and New Hampshire railroad stocks must be sold neither for less than par nor less than the market price.[89] The same law holds for public utilities, except in Maine where the commission may permit the sale of such stock for less than par, but has refused to do so in the case of any new company.[90] In these states the stock must first be offered to the stockholders, and all shares not so disposed of must be offered at public auction under the same restrictions as to par and market price. With the exception of the New England states, it is not customary for the commission to set the price, if above par, but the rule is that the sale be made at the highest price obtainable, not less than par.

To require bonds to be sold at par is the exception. The Massachusetts commission discourages the sale at less than par. The Maine commission, however, holds that it is not its policy to refuse

[84] Arizona, California, Illinois, Ohio.

[85] P. U. R. 1916, C779.

[86] *Id.* 1915, C361.

[87] Michigan, Missouri, New Jersey, New York, Texas, Wisconsin.

[88] Railroad Law, sec. 8, sub. 10.

[89] *See* Table II under Selling Price.

[90] P. U. R. 1915, C361; also Maine, Public Utility Commission Report, v. II, p. 298.

to authorize issues of bonds for less than par.[89] The minimum price in Indiana and Wisconsin is 75 per cent of par.[90] Texas requires that full value be received for bonds, preventing a sale for less than par.[89] Some states permit the sale of bonds at the price determined by the board of directors.[91] Missouri has allowed bonds to be sold as low as 70, and Illinois for 73. New Jersey and Michigan favor a minimum of 80. The price of bonds is determined by such factors as the rate of interest, the life of the bond, the degree of security, the method of payment and any privileges, such as the right to convert into stock. The price is determined by the current rate for money for similar investments, and a uniform price is neither possible nor desirable.

The difference between the face value of the bonds and the selling price measures the cost to the corporation of obtaining money at a given rate of interest. The Iowa law is based on a false foundation, which authorizes the bond discount to be taken into account as an element of value in fixing the amount of capital stock that may be issued.[92] Bond discount is an expense, which the state commissions, in all valuation proceedings, require to be amortized out of income.[93]

III

SUMMARY AND CONCLUSION

The charges of incompleteness or inadequacy or both may be placed against many of the laws controlling the security issues of railroads. Where no special administrative body is entrusted with their enforcement, they remain inoperative, unless some noteworthy misapplication of power by the directors arouses public opinion. The pure publicity provisions in the public utility acts of Pennsylvania and Virginia are no improvement over all absence of commission control. Filing as a public document is not synonymous with making public. More complete information is more readily obtained from banker or stockbroker. The expenses of management of railroads and public service corporations are increased without any benefit to the public, the investor or the corporation.

[91] Delaware, Iowa, Louisiana, Nebraska, Utah and Wyoming, see Table II, final column.

[92] Code 1913, sec. 1641b.

[93] California P. U. R. 1915, E197; District of Columbia *id.* 1915, B546; Illinois *id.* 1915, A804; Massachusetts *id.* E370, Missouri *id.* 1916, E544; Ohio *id.* 1916, E670.

Slightly more justifiable are the statutes which require the commission to investigate the statements made in the application. The mandate resting on these commissions, however, either to accept or reject the application in the form submitted, has caused them to exercise extra-legal powers by imposing conditions. Such action is proof of the inadequacy of the law. It is the law as it stands, and not as enlarged by the dangerous practice of reading into it increased powers, that is to be criticised. Judged on its own merits this type of control is highly deficient, for it imposes more burdens than pure publicity, while the gains are only problematical, certainly not proportionately greater.

Some power should be granted the commission to modify the application, with due recognition that the danger from extremes is not less in granting too much than in granting too little discretion. So long as salaries are low, qualifications for public office less, and the power of appointment exercised to distribute political plums rather than to reward ability, it is inviting disaster to substitute unconditionally the judgment of public officials for that of persons of long special training. The value of commission control rests upon the ability of the commissioners to act as detached, impartial observers, checking but not replacing the decisions of corporate officials, whose judgment may be warped by too narrow attention to a single interest.

Present legislation is, as a whole, unsatisfactory, protecting neither the public nor the corporation and its investors. Despite its imperfection, this legislation has been in response to a rapidly growing realization that the physical plant of a railroad or public utility is not a gift out of the clouds; that regulation of rates and services is only partial regulation, necessitating the inclusion of securities to round out the circle.

Control of securities is necessary to protect the corporation against itself. In fact, "Chapters in Erie," the Chicago and Alton deal and similar abuses of corporate powers gave rise to the agitation for the control of securities. The recent financial troubles of the Rock Island, the Frisco and other railroads are modern evidences that the corporation might profit from a review of the directors' decisions by an impartial tribunal.

Protection of the investor is also of vital interest. Until recently his claims were disregarded. Existing investments could be

submitted to any number of burdens without the possibility of escape. The holder of free funds, however, notes all such tendencies and is quick to divert his money into more promising channels. With a dull market for railroad or other public utility offerings, the public fails to acquire needed facilities, and is thus impressed with the justness of the investors' claims.

The public itself is most directly benefited by security control. It is often asserted that securities have no bearing upon rates, and commissions declare that they do not take them into account. But a careful investigation of the proceedings of any commission will reveal instances in which the rate was based upon the condition of the corporation's securities. Always a return is insisted upon. "It is the setting in which the problem (of rates) is most frequently submitted for judicial consideration," the Interstate Commerce Commission has declared.[94] Aside from rates, every reorganization, the direct product of unwise security issues, upsets the business equilibrium of the entire country. Unwise security issues also react to the detriment of the public by poorer service, inadequate maintenance and depreciated equipment.

Present regulation does not solve the problem of proper security control, yet some regulation is expedient. The first step needed to clarify the situation is to distinguish between corporations that are interstate and those which are intrastate or local in character. Railroads and corporations controlling facilities essential to the efficient operation of the railroads are of chief interest in the first class, but whatever corporations are placed under the control of the Interstate Commerce Commission should be included. A railroad's securities are the *sine qua non* of its establishment and extension, are co-existent with each foot of its line, and cry out for uniform treatment, possible solely through national control. More detailed consideration of federal control is not required here, except to remark that the securities of interstate corporations should be placed under the sole and exclusive control of a central federal body, an adjunct of the Interstate Commerce Commission, and forming a part of a rational scheme of complete federal regulation.

Federal regulation of only interstate corporations leaves a very wide field to the states. Light, heat and water companies and street railways are a few of the corporations whose securities should

[94] Interstate Commerce Commission, 22d Annual Report, p. 86.

be regulated by state commissions. Appointment to such commissions should have some more efficient base than political prestige. Commission control should be positive, for there is no need to regulate the well managed corporation, and the fear of publicity will prove inadequate to prevent the unscrupulous from enriching themselves.

The bread pill stage of regulation must be put behind, whether the regulation is to be by state or federal commissions. Thorough investigation and valuation should be made before approval is granted. Restrictions should be placed upon the power of the commission as well as upon the corporation. It should be unlawful for the commission to authorize issues far in excess of the value of the property. There is no reason for the commission to decide the kind of security, except to prevent an unsafe proportion of debts to ownership shares. Supervisory power over prices is sufficient, although a minimum price for bonds and no par for stock might add efficiency to the legislation. The duty of the commission to follow up the disposition of the proceeds from the sale of securities is no less important than the approval itself. Finally, uniformity is desirable for all security legislation, since the investment market is national.

The beneficial results of the right kind of legislation are incalculable. No legislation causes a haphazard, mushroom growth. Irrational legislation destroys the fine network of confidence without which the inflow of funds will soon cease and development come to a standstill. Rational legislation instills confidence, so that the full complement of needed funds is secured quickly and cheaply.