STATE CONTROL OF CONSOLIDATION OF PUBLIC UTILITIES

FORD P. HALL †

One of the outstanding developments in the field of public utilities during the past ten or fifteen years is the centralization of utility control. The changes in ownership and control have been rapid and kaleidoscopic. The value of unification to consumers cannot be disputed; provided, of course, their interests are properly protected by public authorities. Undoubtedly the states have had it within their power to safeguard the interests of consumers; to guide concentrations along lines and into channels which are beneficial to the public, without doing any injustice to utilities which are rendering the services. As is too often the case, the legal and political safeguards have lagged far behind the economic phenomena, and have failed to protect adequately the public which has a very vital interest in such proceedings.

This concentration of utilities is still continuing wherever there are units which have escaped the omnivorous appetites of large corporations. Unfortunately, in the case of some kinds of utilities, we are presented with almost *un fait accompli*. In many cases commissions have either been unable through lack of statutory authority, or unwilling to exercise in the interests of the public such authority as they have had over consolidations, sales, or stock transactions. The purpose of this study is to discover to what extent states have attempted and are attempting to control this important development in the field of public utilities.

Despite the importance of the problem, there is a surprising dearth of material.¹ There are a certain number of statutes, but it is astonishing to note the number of states which have no statutory provisions on this subject. There are numerous commission decisions, but almost no court cases. This latter fact may indicate that the subject presents few legal questions. It more probably signifies that, in general, utilities have received what they have desired at the hands of administrative tribunals and have had no need to proceed further by litigation.

In dealing with this subject, no attempt will be made to consider railroad consolidation, as that has been dealt with often and extensively by other writers. No effort will be made to discuss the unification of street

† B. A. in Jurisprudence, 1925; B. C. L., 1926, Oxford University; LL. M., 1927, University of Minnesota. Associate Professor of Constitutional Law, and the Law of Public Utilities in the Department of Political Science, Indiana University. Author of several articles on the Law of Public Utilities.

¹ One article on the subject is, Wherry, *Principles Applicable to Consolidation and Merger of Public Utilities* (1929) 6 N. Y. U. L. Q. Rev. 143-156. There is another article by Fisher, *Commission Regulation of Public Utility Merger and Consolidation in Connecticut*, JOURNAL OF LAND & PUBLIC UTILITY ECONOMICS, Feb. 1932.

railways as it is no longer of great significance. Nor will motor bus or truck companies be discussed, as control over consolidation of such companies is handled largely through control over the transfer of certificates of convenience and necessity.

Questions of merger, consolidation, sale, and stock transfer are closely related to questions of security issues. In fact, when permission is asked to consummate one of the above transactions, there is usually an accompanying petition to issue securities. Many states have statutory provisions requiring consent of the public service commission before securities can be issued. It has sometimes been asserted that such provisions clothe commissions with adequate power to protect the public in unification proceedings. However, it is contended that they do not.

Such provisions do not cover outright sales and purchases for cash of utility property or stock, or exchanges which do not involve the issuance of securities. Nor do these statutory provisions pertaining to security issues give the commission power to do more than prevent over-capitalization and certain other financial abuses which may redound to the detriment of the consuming public, whereas statutes which require that a merger, sale, consolidation, or stock transaction must be approved, give to commissions much broader power to protect the public interest as to rates and services.

Although statutes pertaining to merger, consolidation, sale and stock transfers are designed in part to protect security holders against unscrupulous financial juggling, the primary purpose is to safeguard the interests of the public, by making more effective the control of commissions over rates and services.²

Few, indeed, are the decisions in which the constitutionality of these statutes has been challenged. When the question has been raised, the courts have uniformly upheld their validity. In one case, it was held that a statute which provided that no public utility should contract, purchase, control or lease the property, equipment, franchises or stock of any other public utility without the consent of the commission did not violate the state constitutional provision that the legislature should not pass any local or special law granting to any corporation or individual a special or exclusive privilege. The court pointed out that the constitutional provision was not opposed to the elimination of competition in all cases, but only where competition would be eliminated by conferring the right to exclude all others from engaging in some business in the same field. In this case the company had no right to exclude all others, since the state retained the power to exercise a supervisory control in the matter.³

² See the statement of the court in *Otter Tail Power Co. v. Clark*, 59 N. D. 320, 229 N. W. 915 (1930).

³ *State Public Utilities Comm. v. Romberg*, 275 Ill. 432, 114 N. E. 191 (1916), upholding the constitutionality of Ill. Laws 1921, art. I, § 27, p. 703.

In another decision it was held that a statute giving the commission jurisdiction to determine whether the sale, conveyance or lease of the property or franchise was consistent with public interest was a proper delegation of legislative power, since although the legislature could not delegate legislative power it could delegate the power to determine some fact or state of things upon which the law made its own action depend.⁴

Common Law

What power to sell, lease, merge, consolidate or acquire stock do public utilities have where there are no statutory provisions giving to commissions the power to approve or disapprove such transactions? That such statutory provisions have not merely codified the common law on the subject seems obvious.⁵

If the property which a utility seeks to transfer is not being used or is not useful in rendering its service to the public, the utility can like other individuals or corporations alienate such property. However, if the property is being used or is useful, the situation is different. Therefore where a company holds a franchise, neither the franchise nor the property used in performing its duties can be alienated under the rules of common law, if by such transaction the utility is rendered incapable of performing adequately its service.⁶ At least this is true where a utility has been given the power of eminent domain.⁷ It can, however, transfer its property if it receives legislative permission.⁸

On the other hand, it appears that a public business such as a warehouse which does not enjoy the power of eminent domain, or does not hold a franchise, can sell, lease, or encumber its property without the consent of the state.⁹

Merger, consolidation, or the purchase and holding of stock by corporations present more obvious instances of transactions which cannot take place without legislative consent. Inasmuch as corporations are creatures

⁴ *Ex parte City of Birmingham*, 199 Ala. 9, 74 So. 51 (1917).

⁵ *Alabama Public Service Comm. v. Louisville and N. R. Co.*, 206 Ala. 326 at 327, 89 So. 524 at 525 (1921). "... the act contemplates and authorizes inroads, to a limited extent, upon the common law where the rule that a quasi public corporation may not, in the absence of statutory warrant, make any contract by which its power to perform its public functions will be impaired; . . . but this rule of the common law did never prevent the alienation of such property of a corporation as was not essential to the exercise of its duties."

⁶ See *State ex rel. v. Anderson*, 97 Wis. 114, 72 N. W. 386 (1897); *Attorney Gen. v. Haverhill Gas Light Co.*, 215 Mass. 394, 101 N. E. 1061 (1913); *McCarter v. Vineland Light & Power Co.*, 73 N. J. Eq. 703, 70 Atl. 177 (1908).

⁷ *Brunswick Gas Light Co. v. United Gas Fuel & Light Co.*, 85 Me. 532, 27 Atl. 525 (1893).

⁸ See the statement of the court in *Weld v. Gas & Electric Light Commissioners*, 197 Mass. 556 at 558, 84 N. E. 101 at 102 (1908). "Without legislative authority it cannot sell its property and franchise to another party," in such a way as to take away its power to perform its public duties; see also *State ex rel. v. Anderson*, *supra* note 6.

⁹ See *Webster Mfg. Co. v. Byrnes, et al.*, 207 Cal. 630, 280 Pac. 101 (1929).

of the state, they can do only that which the law designates. Consolidation, merger, and stock purchases are not always sanctioned by the corporation laws of a state. The New Jersey commission summarized the situation well when it said:

"To merge and consolidate corporations there must be statutory authority, otherwise no such authority exists."¹⁰

One finds in the statutes of some states provisions giving to utilities the right to lease or purchase property, or to consolidate without commission consent.¹¹ In other states, they may merge, consolidate or acquire stock to the same extent as other corporations.

Jurisdiction

About half of the states have statutes which require the consent of the public service commission before utilities are permitted to merge or consolidate or dispose of their property, or acquire stock of other utilities. This does not include states which have statutes governing such transactions of railroads or street railways. There is as might be expected much difference in the scope and extent of these statutory provisions. Some are very limited, applying to certain transactions only, or applying to one kind of utility only. Others are comprehensive and require consent before *any* public utility may merge or consolidate with another, purchase, exchange or hold the stock of another, sell, purchase, assign, lease or mortgage the franchise property, assets or business of any other utility.¹²

Examination of these statutes reveals that about half of the states have no provisions expressly conferring upon commissions authority over such transactions. The question naturally arises as to whether, in the absence of express provisions public service commissions have such jurisdiction. The Colorado commission stated that it had no authority over the purchase of the property of public utilities.¹³ And this declaration was

¹⁰ *In re Knickerbocker Ice Co., et al.*, P. U. R. 1915F 5 at 7 (N. J.).

¹¹ See for example KAN. GEN. STAT. (1868) c. 23, § 77; KAN. REV. STAT. ANN. (1923) § 17-1905; N. M. LAWS 1909, c. 141, § 5, and N. M. LAWS 1912, c. 50, § 1.

¹² ALA. ACTS 1915, no. 205, p. 268, §§ 1, 2, ALA. CODE (Michie, 1928) 1766. ARIZ. LAWS 1912, c. 90, § 51 (a). CAL. GEN. LAWS (Deering, 1923) Act 6386, § 51 (a) and (b). CONN. GEN. STAT. (1930) § 3616. FLA. LAWS 1919, c. 7933, §§ 1-3. ILL. LAWS 1921, art. III, §§ 22, 27, p. 703. IND. ANN. STAT. (Burns, 1926) §§ 12767-12768. CONST. OF KY., § 201. See also KY. STAT. (Carroll, 1922) § 4679e-3. ME. REV. STAT. (1930) c. 62, § 44; c. 68, § 18. MD. LAWS 1910, c. 180, § 35. MASS. GEN. LAWS (1921) c. 164, §§ 26 and 96-101. MICH. COMP. LAWS (1929) § 11707. MINN. GEN. STAT. (1923) § 5306. MISS. CODE ANN. (1930) §§ 7067-7068. MO. REV. STAT. (1929) § 5105. NEB. CONST., art. X, § 3. N. H. PUB. LAWS (1926) c. 240, §§ 28, 29, 31. N. J. LAWS 1911, c. 195, § 18-19. N. Y. PUB. SERV. COMM. LAWS (1917) §§ 70, 83, 99 (2), 100. N. D. COMP. LAWS ANN. (Supp. 1925) § 4609 (c) 21-22. OHIO ANN. CODE (Throckmorton, 1930) §§ 614-60, 614-61, 614-62. OKLA. CONST. art. IX, §§ 8 and 9. PA. ACT OF JULY 26, 1913, P. L. 1374, art. V, § 18, and art. III, §§ 3 and 6. Also PA. ACT OF JULY 22, 1919, P. L. 1123; and PA. ACT OF MAY 20, 1921, P. L. 1949. S. D. LAWS 1921, c. 402. TENN. ANN. CODE (Shannon, Supp. 1932) § 5452 (d). VT. GEN. LAWS (1917) § 4982; VT. ACTS 1931, no. 101, §§ 1 and 3. WIS. STAT. (1929) § 196.80.

¹³ *Re Public Service Co. of Colo.*, P. U. R. 1928E 778 (Colo.).

made in face of the express statutory authority of the commission to supervise generally and regulate every public utility, and to do all things whether specified or not which are necessary or convenient in the exercise of this power.¹⁴ The Oregon commission held that its approval was not required for the sale of telephone exchange property when no withdrawal was involved but merely the elimination of duplication.¹⁵ In contrast to this holding, the Nebraska commission, in an early case, stated that it had jurisdiction to approve the consolidation of a telephone plant and the sale and purchase of the telephone property of one company by another. It seemed to think that such authority was derived either from its power to regulate service or from its power to control generally such corporations.¹⁶ It is difficult to see how such authority can consistently be implied from a statute giving a commission power merely to require safe and adequate service; but where a commission is given general power to supervise or control utilities, the implication is logically not difficult.

Interesting questions have arisen concerning the scope and extent of commissions' powers and jurisdiction under the various statutory provisions. Even though a statute provides that no public utility shall merge, consolidate, buy or sell stock or property without commission consent, certain stock transfers do not fall under the supervisory authority of the commission. For example, the commission may not control the acquisition by private persons of the stock of public utilities.¹⁷ Such a literal interpretation makes it possible to evade commission control very easily and effectively. A complete and extensive control of utilities can be secured through the concentration of stock ownership in the hands of individuals.

In general, these statutory provisions do not apply to stock transactions of or with holding companies which do not engage in the actual operation of utilities. Commissions are statutory bodies and have only such jurisdiction as is specifically delegated by statute.¹⁸ Most utility statutes regulate operating companies but make no mention of holding companies. Recently there has been some tendency to confer this jurisdiction.¹⁹

The majority of these statutory provisions do not apply to the acquisition of stock or sale of stock to companies other than utilities. On this point, however, the New York law is somewhat different. In addition to providing that no gas or electric corporation shall acquire directly or in-

¹⁴ Colo. Laws 1921, § 2925.

¹⁵ *Re Union County Tel. Co.*, P. U. R. 1920C 1002 (Ore.).

¹⁶ *Re Lincoln Tel. & Tel. Co.*, P. U. R. 1918C 802 (Neb.). This statement was made before the adoption of the new Nebraska Constitution conferring jurisdiction under Art. X, sec. 3.

¹⁷ *Borough of Brookville v. Solar Electric Co.*, P. U. R. 1928B 621 (Pa.); *Re Highland Telephone Corp.*, P. U. R. 1921C 162 (Mich.); see also *Re Cumberland County Power & Light Co.*, P. U. R. 1916D 911 (Me.).

¹⁸ *Re Madison Light & Power Co.*, P. U. R. 1924C 517 (Ind.).

¹⁹ Wis. Laws 1931, c. 183, § 196.52; Kan. Laws 1931, c. 239, § 2(g).

directly the stock or bonds of any other company in the same or similar business, the statute provides that no stock company other than a gas or electric company may acquire more than 10 per cent. of the capital stock of these utilities except with the consent of the commission.²⁰ This provision which should give to the commission an effective authority over the centralization of utility control has, to a great extent, been rendered ineffective by a court decision. A certain company had acquired 4,600 shares of common stock with unrestricted voting power, and 41,884 shares of preferred stock of a utility. Through the common stock, the holders had acquired actual control of the affairs of the utility. The 4,600 shares of common stock had been transferred without the consent of the commission. Even though the common stock gave actual control, the court held that the law had not been violated as such stock constituted less than 10 per cent. of the total capital stock and the statute referred to the total capital stock issued, and not the total capital voting stock.²¹ This decision, although literally correct, has made it easy for companies, by a bit of stock juggling, to evade the provisions of this statute.

Since these statutes apply to consolidation or sale of *public utilities* they do not apply to transactions of corporations which have not commenced operation or which have discontinued service, as such corporations cannot be classed as utilities.²²

Whether both purchaser and seller must secure the consent of the commission before making a transfer of stock or property depends largely upon the wording of the statute. It has been declared in one case that the North Dakota law does not require a company desiring to purchase a utility plant to secure commission authorization.²³ But even under the North Dakota statute which specifically mentions the *seller* only, it has been held that, on petition of the purchaser, the commission can consider whether or not it is in the public interest to grant a petition to purchase the plant of a utility, when to refuse jurisdiction would be using the statute as a cloak for a fraud.²⁴ If the statute requires approval for both purchase and sale, as is the case in some states, commissions often have rules requiring all

²⁰ N. Y. PUBLIC SERVICE COMMISSION LAW (1917) § 70.

²¹ *New York State Elec. Corp. v. Public Serv. Comm.*, 227 App. Div. 18, 236 N. Y. Supp. 411 (1929), annulling the order of the public service commission in *Re New York Elec. Co.*, P. U. R. 1928D 247 (N. Y.).

²² *Re Fairfield and Shawmut Ry. Co.*, P. U. R. 1928D 385 (Me.). In this case there was a petition to sell the property and franchises of a discontinued street railway to another utility, but it was held that it was not under the jurisdiction of the commission for it was not a public utility within the definition of that term under the statute.

Re New York-New Jersey Super Power Connecting Co., 215 App. Div. 578, 214 N. Y. Supp. 294 (1926). In this case it was held that the petitioner was not an electrical corporation within the meaning of that term as used in the statute, as it did not own, operate or manage an electric plant.

²³ *Purchase v. Farmers Co-operative Milling Co.*, P. U. R. 1920F 906 (N. D.).

²⁴ *Otter Tail Power Co. v. Clark*, *supra* note 2.

parties to the transaction to make joint application.²⁵ Even though a commission has jurisdiction over both purchase and sale, there may be a difference in the extent of its jurisdiction over each. The Maryland Commission has stated that its power to deal with purchasers of stock is much broader than its power to deal with sellers. In the case of a purchaser, the commission is not bound to authorize the purchase unless it thinks the case calls for its approval.²⁶

Another question which has frequently been raised involving jurisdiction under these statutory provisions is that of the power of a commission to *order* a purchase, sale or consolidation. Invariably it has been held that such authority cannot be implied from the ordinary statutory provisions requiring consent to sell, merge, consolidate, or acquire stock.²⁷

As a general rule, the power of a public service commission does not extend to matters which, though somewhat related to sale or consolidation, are properly matters for the courts. Thus it was stated that the California commission had no power to determine the question of the rights of a purchaser or the validity of contracts.²⁸ In New York, the commission held that it was without power to order a dissolution of corporations already consolidated or to decree a restitution of property legally transferred.²⁹

In some states, the commissions have jurisdiction over consolidations and sales only when utilities are parallel or competing. This is the case under the Nebraska constitutional provision which provides that utilities are not to consolidate their stock, property, franchise or earnings with any other utility owning parallel or competing property without the permission of the commission.³⁰ Following the mandate of this constitutional provision, the Nebraska commission decided that it had no jurisdiction over the sale and purchase of public utilities which were not competing.³¹ Under

²⁵ See Rule V, Rules of Procedure of the California Commission; Rule XI Rules of Practice of the Public Service Commission of New York; Rule X, Rules of Practice and Procedure of the Public Service Commission of Maryland; Rule XVI, Rules of Practice and Procedure and Forms Governing Matters Before the Missouri Public Service Commission.

²⁶ *Re Central Public Service Corporation*, P. U. R. 1930A 32 (Md.).

²⁷ The Nebraska Commission had no authority to order a physical consolidation of the properties of two competing companies, *Blackledge v. Farmers Independent Tel. Co.*, P. U. R. 1919D 211 (Neb.).

The Arizona Commission had no power to compel one water company to purchase the system of another, *Re Arizona Corporation Commission*, P. U. R. 1919E 566 (Ariz.).

It was stated that the South Dakota Commission did not possess authority to require consolidation of companies under one ownership notwithstanding the reasonableness and desirability of such an arrangement, *City of Grotan v. Grotan-Ferney Mutual Tel. Co.*, P. U. R. 1919E 894 (S. D.).

It was stated that the New York Commission was without power to compel the merger of utility companies, *Re Ausable Forks Elec. Co.*, P. U. R. 1920B 791 (N. Y.).

The Oklahoma Commission was held to be without power to order the consolidation of telephone exchanges, *Whittenberg, et al. v. Taloga and Dewey County Telephone Co.*, P. U. R. 1916C 104 (Okla.).

²⁸ *Hanlon v. Eshelman*, 169 Cal. 200, 146 Pac. 656 (1915).

²⁹ *Board of Trade v. Mountain Home Tel. Co.*, P. U. R. 1916C 688 (N. Y.).

³⁰ CONST. OF NEB., art. X, § 3.

³¹ *Re Northwestern Bell Co.*, P. U. R. 1927C 81 (Neb.).

this same constitutional provision, two companies were held to be competitors within its meaning where one was wholesale and the other retail but both competed for municipal contracts.³² The Indiana statutes, which are specific on this point, declare that utilities which parallel or intersect, which are in the same locality, and which are giving the same kind of service may merge with the consent of the commission.³³ Despite this exact statement, the Indiana commission took jurisdiction over an application for consolidation by utilities, some of which were primarily traction enterprises, while others were gas and electric; and where the entire group was scattered over a large area in the state.³⁴ The logic of the commission in assuming jurisdiction in this Indiana case was far from convincing. The merger was disapproved. In a subsequent decision, however, a merger of two of the same petitioners was approved, despite the fact that one of the companies was engaged primarily in generating electricity, and the other served customers largely at retail with electricity, gas, water, and heating services. The commission based its jurisdiction upon the somewhat flimsy pretext that the company which operated a generating plant, also served a few places with electricity at retail; and concluded therefore that both corporations were engaged in the same kind of service within the meaning of the statute.³⁵

A series of cases interpreting a rather unusual provision of the constitution of Pennsylvania, are interesting on this question of jurisdiction over merger and consolidation. The Pennsylvania constitution specifically prohibits one telegraph company from consolidating with or holding a controlling interest in the stocks or bonds of any other telegraph company owning a competing line.³⁶ At first it was held that this prohibition applied to telephone companies also, because the legislature up to the date of the decision had treated telephone companies as a species of telegraph company.³⁷ In 1919, however, the legislature passed an act allowing telephone companies to acquire capital stock, franchises, and property including lines and systems of other telephone companies with the consent of the commission. This legislation was upheld.³⁸ The Act of 1919 indicated that the legislature had recognized a difference between telephone and telegraph companies. Later, the legislature went even further and permitted, with the consent of the commission, the acquisition by telephone companies of

³² *Re Continental Gas & Elec. Corporation, et al.*, P. U. R. 1926D 711 (Neb.).

³³ IND. ANN. STAT. (Burns, 1926) § 12768.

³⁴ *Re Central Indiana Power Co. et al.*, P. U. R. 1930D 65 (Ind.).

³⁵ *Re Public Service Co. of Indiana and Indiana Elec. Corp.*, P. U. R. 1932B 534 (Ind.).

³⁶ PA. CONST., art. XVI § 12.

³⁷ *Cochran Telephone Co. v. Public Service Commission*, 263 Pa. 506, 107 Atl. 23 (1919), *aff'd* 70 Pa. Sup. 212 (1918) and P. U. R. 1920C 825 (Pa.).

³⁸ *Shaffer v. Public Service Commission*, 268 Pa. 456, 111 Atl. 877 (1919), upholding the validity of Act of July 22, 1919, P. L. 1123.

the property franchises and capital stock of telegraph companies, and *vice versa*. This latter act was held valid also, as it did not come within the prohibitions of the constitution against unification of telegraph companies.³⁹

Grounds for Approving or Rejecting Applications

Occasionally courts and commissions have attempted to give a detailed enumeration of what must be proved before consent will be given to a proposed combination. A good enumeration is that of the Illinois commission which has said that before approval will be given to an agreement to purchase and sell it must be proved that such arrangement does not violate any rule of law; that the price which is to be paid approximates the true value; and that public convenience will be served thereby.⁴⁰ Under the Maine law the important considerations for approval of consolidation have been declared to be these: the legal right of the purchaser to acquire and hold property, effect on rates, petitioner's capacity to serve its present territory, diminution of costs of management and operation, and petitioner's capacity to meet obligations to existing security holders.⁴¹

In a few states, the provisions of the public utility statutes expressly declare that the commission shall approve if the proposal is for the benefit of the public. Sometimes in lieu of the expression, "for the benefit of the public", the terms, "the public good", or "will serve the convenience and necessity of the public" are used.⁴² In such states it is obvious that a mere finding that the public will be uninjured by the proposed transactions will not satisfy the statutory requirements.⁴³

In most states, however, the statutes merely give to the commission the power to approve or reject an application, and do not specify the grounds upon which such decision must be based.⁴⁴ Where the statutes do not mention that approval shall be based upon a finding of public benefit or good, difficulty has arisen over whether such finding is necessary, or whether it is sufficient to find merely that a proposed transaction will not be injurious

³⁹ *Mitchell v. Public Service Commission*, 276 Pa. 390, 120 Atl. 447 (1923), upholding the validity of the Act of May 20, 1921, P. L. 949.

⁴⁰ *Re Chicago Tunnel Co.*, P. U. R. 1916E 268 (Ill.).

⁴¹ *Re Bethel Light Co.*, P. U. R. 1928B 512 (Me.); *Re Buckfield Water, Power and Electric Light Co.*, P. U. R. 1928C 306 (Me.); *Re Ashland Elec. Light & Power Co.*, P. U. R. 1929B 326 (Me.).

⁴² See for example Pa. Act of July 26, 1913, P. L. 1374, art. V, § 18, and Act of July 26, 1913, P. L. 1388, art. III, § 3.

See also N. H. PUB. LAWS, c. 240, § 28; VT. GEN. LAWS (1917) § 4982.

⁴³ *Re Pennsylvania Water Service Co.*, P. U. R. 1927E 656 (Pa.); see *Grafton County Elec. Light & Power Co. v. State*, 77 N. H. 490, 93 Atl. 1028 (1915). See also *Re Franklin Light & Power Co.*, P. U. R. 1929D 678 (N. H.). Although in this last case a statement by the commission, that "Utilities should not be deprived from doing as they see fit with their properties provided their acts are not illegal or harmful to the public", scarcely seems in harmony with the express statutory requirement.

⁴⁴ See for example, the statutes of New York, Maryland, Indiana, Illinois, Maine and Missouri *supra* note 12.

to the public. In Maryland, the courts have ruled that a finding that a proposed merger is not detrimental to the public is all which is required; and that the commission has no power under the statutory provisions to refuse an application because it finds that the public will not benefit.⁴⁵ Commissions in some other states have, from time to time, enunciated this same rule.⁴⁶ On the other hand, the New York commission has emphatically declared that it will not permit consolidation unless it is affirmatively shown that it will be in the public interest, and has embodied this doctrine in its "Rules of Practice".⁴⁷ Commissions in some other states have followed the lead of the New York commission.⁴⁸ It is difficult to choose between the two rules on the basis of judicial logic. Which one is followed depends largely upon whether one regards utilities as enterprises primarily operated in the interests of the public, and from which private profits may be made; or whether one regards them as private enterprises with which the public has no right to interfere except to demand reasonable service at reasonable rates. Here is an opportunity for commissions to perform an important service to the public. To require that utilities shall make an affirmative showing that their plan will serve the interests of the public does not impose on them any hardship and it serves to strengthen the doctrine that they are primarily public enterprises from which a profit can be made.

Many of the things which commissions regard as tending to show that the public will be benefited are obvious. To show that service will be improved is important in establishing that the proposed union will benefit the public.⁴⁹ And so a transfer was approved when a company, instead of abandoning service which was being offered at a loss, was seeking to reorganize and continue operation.⁵⁰ A merger resulting in the unification

⁴⁵ *Electric Pub. Util. Co. v. Public Service Commission*, 154 Md. 445, 140 Atl. 840 (1928). The case was remanded to the commission which found that the proposed consolidation was "detrimental to the public interest". *Re Electric Public Utilities Co.*, P. U. R. 1931A 557 (Md.).

⁴⁶ The Missouri commission appears to have frequently enunciated and followed this doctrine, in spite of Rule XVI of the commission which requires an applicant to show that the proposed sale, lease, etc., is for the benefit of the public. See *Re North Central Tel. Co.*, P. U. R. 1929B 604 (Mo.); *Re Kansas City Telephone Co.*, P. U. R. 1927C 101 (Mo.); *Re Liberal Light and Power Co.*, P. U. R. 1930B 282 (Mo.); *Re Allegheny Corp.*, P. U. R. 1930D 47 (Mo.).

⁴⁷ *Re Consolidated Gas Co. of New York*, P. U. R. 1928E 19 (N. Y.); *Re Genesee Valley Gas Co. Inc.*, P. U. R. 1927B 600 (N. Y.); *Re New York Power and Light Corp.*, P. U. R. 1928E 781 (N. Y.).

See Rule XI, Rules of Practice of the Public Service Commission of New York.

⁴⁸ See the discussion of the Maine Commission in *Re Eastport Water Co.*, P. U. R. 1929E 136 (Me.).

See Rule V, Rules of Procedure of the Railroad Commission of California; also *Re East Bay Water Co.*, P. U. R. 1929A 620 (Cal.).

Apparently the Indiana Commission follows this rule. See *Re Associated Telephone Co.*, P. U. R. 1927C 577 (Ind.); *Re Associated Telephone Co.*, P. U. R. 1928B 830 (Ind.); *Re Central Indiana Power Co.*, *supra* note 34.

⁴⁹ *Re Citizens Light & Power Co. and Millersburg Electric Light Co.*, P. U. R. 1915A 510 (Ohio); *Re Watts Engineering Co.*, P. U. R. 1923E 459 (Mo.); *Re Raymond & Webb Mills Tel. Co.*, P. U. R. 1916F 749 (Me.).

⁵⁰ *Re Richmond Light & Railroad Co.*, 1923E 803 (N. Y.).

of two street railway systems, was approved because it extended the transfer privileges of patrons.⁵¹ An acquisition of stock was approved in a case where the commission thought that the public would receive a better quality of service from the mixing of natural and artificial gas.⁵² The transfer of a narrow gauge railroad was approved where it was shown that the transfer eliminated needless duplication of facilities in a sparsely settled community, and the standard gauge road with its transcontinental connections could serve the patrons more effectively.⁵³ A sale of telephone property was approved where it would result in rendering more stations available to subscribers.⁵⁴ It was held that the elimination of duplication with resultant benefits to the public, justified commission approval of a telephone unification.⁵⁵ Commissions have sometimes approved applications where the corporations would be placed in a more favorable financial situation, or would be able to borrow money more readily, upon the assumption that this would ultimately improve the facilities and service to the public.⁵⁶ In other cases, commissions in granting petitions have looked forward to possible reductions in rates which can be effected by eliminating duplication.⁵⁷

Sometimes commissions approve a lease, a sale, a merger, a consolidation or a stock transfer because of probable benefits to stockholders and corporations rather than to the public. In one early Maine decision, the commission authorized a lease where there would be some increase in convenience and economy of operation; where the lessee guaranteed a 7 per cent. return to the lessor's stockholders who had never before received a dividend; and where the lessee would give as good service as the lessor.⁵⁸ Likewise, in an early Indiana case, the commission gave as a reason for approving a merger, that needless duplication of books, officers, and reports would be abolished.⁵⁹

The commissions of some states have not looked with favor upon the unification of widely scattered utilities. Thus, a petition to consolidate fifteen widely scattered water companies was refused by the Maine commission where there was no evidence that the service would be improved

⁵¹ *Re Milwaukee Elec. Ry. & Light Co.*, P. U. R. 1928B 345 (Wis.).

⁵² *Re Columbia Gas and Elec. Corp.*, P. U. R. 1930B 472 (N. Y.).

⁵³ *Re Nevada-California-Oregon Ry.*, P. U. R. 1917E 404 (Cal.).

⁵⁴ *Re Philbrick*, P. U. R. 1917C 874 (Me.); *Re Illinois Bell Tel. Co.*, P. U. R. 1926C 1 (Ill.).

⁵⁵ *Re Tri-State Tel. & Tel. Co.*, P. U. R. 1923C 815 (Minn.); *Re Union Home Tel. & Tel. Corp.*, P. U. R. 1918E 608 (Cal.); *Re Application of Murphysboro Tel. Co.*, P. U. R. 1915B 955 (Ill.).

⁵⁶ *Re Kansas City Telephone Co.*, *supra* note 46; *Re Maryland Light & Power Co.*, P. U. R. 1930B 464 (Md.); *Re Turners Falls Power & Elec. Co.*, P. U. R. 1915B 61 (Mass.); *Re Consolidated Gas Co. of N. Y.*, *supra* note 47; *Re Sacramento Northern Railroad*, P. U. R. 1922B 690 (Cal.); *Re Continental Gas & Elec. Co.*, P. U. R. 1925A 448 (Neb.).

⁵⁷ *Re Continental Gas & Elec. Corporation*, *supra* note 56; *Re Consolidated Gas Co. of N. Y.*, *supra* note 47; *Re Continental Gas and Corp.*, *supra* note 32; *Re Tintern Manor Water Co.*, P. U. R. 1926D 717 (N. J.); *Re Illinois Bell Tel. Co.*, *supra* note 54.

⁵⁸ *Re Kittery Elec. Light Co.*, P. U. R. 1917A 12 (Me.).

⁵⁹ *Re Indianapolis Tel. Co.*, P. U. R. 1916D 507 (Ind.).

or rates reduced as the result of quantity purchasing, giving of expert engineering advice, or better facilities for financing.⁶⁰ This decision has been followed by commissions of other states.⁶¹ The Maryland commission, however, in refusing to permit unification of scattered electric utilities found itself reversed by the courts.⁶² The public benefits to be derived from combination of widely scattered utilities are shadowy at best, but this is particularly the case with regard to water utilities. As one commission has stated:

"Water service is not comparable at all with electric service, in that the source of water supply must be reasonably close at hand and serves a local use, while electric current can be exchanged freely over long distances, supplying communities far distant from the power plant."⁶³

The question of whether it is for the public good or in the public interest to allow a transfer of property or stock to, or a consolidation or merger with a *foreign corporation* has been passed upon by commissions with varying results. The Vermont commission has declared that unless there are some marked benefits to be derived from such a transfer, it is better not to allow it, in view of the limited jurisdiction of the commission over the rates and capitalization of such companies.⁶⁴ The California commission has declared that it cannot authorize the transfer of any public utility property to a foreign holding company.⁶⁵ The New York commission has permitted transfers to foreign companies but has scrutinized them more carefully than transfers to domestic utilities or companies, and has required more of a showing that public benefits will result.⁶⁶ The Illinois statutes contain a provision forbidding the grant or transfer to a foreign corporation of a franchise, license, permit, or right to own, control, or operate any Illinois utility. This provision has been rendered largely ineffective by a ruling of the courts that it does not apply to the purchase of stocks and bonds by a foreign corporation.⁶⁷ The transfer of property from a foreign corporation to a state-wide utility, has been held to be in the

⁶⁰ *Re Eastport Gas Co.*, *supra* note 48.

⁶¹ *Re Pennsylvania Water Service Co.*, *supra* note 43; *Re Interstate Utilities Co.*, P. U. R. 1922C 589 (Mich.); *Re Genesee Valley Gas Co.*, *supra* note 47.

⁶² *Re Electric Public Utilities Co.*, P. U. R. 1927E 609 (Md.) reversed and remanded in *Electric Pub. Util. Co. v. Public Service Commission*, *supra* note 45.

⁶³ *Re Eastport Gas Co.*, *supra* note 48.

⁶⁴ *Re Chester Water & Light Co.*, P. U. R. 1929B 316 (Vt.); *Re Public Utilities Consolidated Corp.*, P. U. R. 1929B 492 (Vt.).

⁶⁵ *Re Hollister Water Co.*, P. U. R. 1930A 525 (Cal.).

⁶⁶ *Re Power & Elec. Securities Corporation*, P. U. R. 1926A 855 (N. Y.); *Re Morgan and Wymon Elec. Light & Power Co.*, P. U. R. 1925D 323 (N. Y.); *Re Ridgefield Elec. Co.*, P. U. R. 1925D 317 (N. Y.).

The New York Commission disapproved the sale of the controlling stock of a domestic utility to a foreign holding company largely because of the loss of jurisdiction to supervise intercompany relations. *Re Columbia Gas & Elec. Corp.*, P. U. R. 1931C 247 (N. Y.).

⁶⁷ *State Public Utilities Comm. v. Romberg*, *supra* note 3.

interest of the public, as the transferee is entirely subject to the regulatory power of the commission.⁶⁸

The reasons given by commissions for refusing to allow consolidation, merger, sale or stock transactions are varied. In one case, a petition for consolidation was refused, in part because of a blanket mortgage which was to be placed upon fifteen widely scattered utilities. As this might have hampered and embarrassed the utilities in times of financial stress, it was held not to be in accord with public interest.⁶⁹ In another case, a commission refused an application of a gas company to purchase the property of an electric company even though economies might have resulted because under the laws of Massachusetts a municipality could not acquire gas and electric utilities owned by a single corporation. Therefore, to have placed such a barrier in the way of possible municipal acquisition was regarded as contrary to public interest.⁷⁰ The Indiana commission refused a petition for approval of the sale to a large company of telephone property and other assets of several local exchanges where the local utilities had been operating at a profit, and the large system had suffered a deficit at higher rates than those charged by the local utilities and where such economies as were claimed would be offset by a supervisory charge under an operating contract which would have applied immediately, and which would have required the payment of $4\frac{1}{2}$ per cent. of the gross receipts of subsidiaries to a parent corporation.⁷¹ In another case, because of the high prices and values which prevailed at the time the commission considered that the consolidation of utilities and a transfer of their property would not have been in the interest of the public.⁷² An application to sell and purchase the capital and assets of a telephone utility was refused, partly because certain laws pertaining to intercorporate relationships had been violated, in spirit if not in letter; and partly because a division of stock had been made in an arbitrary fashion for the convenience of the owners only and without consideration for the public.⁷³ In California, a request to transfer property from one utility to another was denied because of the precarious financial condition of the purchaser.⁷⁴ The North Dakota Commission turned down an application to transfer an electric plant because the owner had an apparent desire to continue operation but had made an agreement to sell through fear of competition, and because the community preferred the local owner.⁷⁵ In a Pennsylvania case, the commission refused permission

⁶⁸ *Re* New York Telephone Co., P. U. R. 1927E 732 (N. J.).

⁶⁹ *Re* Eastport Gas Co., *supra* note 48.

⁷⁰ *Re* Cambridge Gas Light Co., P. U. R. 1930D 253 (Mass.).

⁷¹ *Re* Citizens Telephone Co. of Columbus, P. U. R. 1924E 835 (Ind.).

⁷² *Re* Dakota Light, Heat & Power Co., P. U. R. 1920A 884 (N. D.).

⁷³ *Re* Northwestern Ind. Telephone Co., P. U. R. 1928B 717 (Ind.).

⁷⁴ *Re* Washington Water & Light Co., P. U. R. 1930B 249 (Cal.).

⁷⁵ *Re* Erickson, P. U. R. 1927C 861 (N. D.). This was done in spite of the probability that service would be just as good or better if the transfer were approved.

to transfer certain real and personal property where the transferees had no funds or resources with which to operate a utility plant, and the transferors were real estate operators who wished to escape responsibility.⁷⁶ In another Pennsylvania case the applicants were denied permission to consolidate and merge because their statements were too vague and indefinite as to the proposed methods of financing, marketing electricity, and developing water power.⁷⁷ Finally, a gigantic merger of utilities was rejected by the Indiana commission because earnings would not have been sufficient to meet fixed charges, there was no adequate allowance for depreciation, and the only possible advantage, the continued operation of certain interurban lines, was doubtful.⁷⁸

Numerous objections have been raised but have been regarded by commissions as insufficient grounds upon which to base a refusal to permit merger, consolidation, lease, sale or stock transfer.⁷⁹

Valuation

Many questions pertaining to the valuation of public utilities for purposes of consolidation, merger, sale, or stock transactions have arisen. In a few states a valuation is required.⁸⁰ As a rule, commissions are not required by statute to make an appraisal. They often do so, however, and their findings may have some bearing upon rejection or approval. The California court has stated that there is nothing in the statutory provisions of that state which requires a valuation; but there is nothing to prevent the regulatory authorities from making a valuation; and that it is entirely within the discretion of the commission to decide whether or not it is neces-

⁷⁶ *Re Fuller*, P. U. R. 1920C 138 (Pa.).

⁷⁷ *Re Lawrence Hydro-Electric Co.*, P. U. R. 1927C 78 (Pa.).

⁷⁸ *Re Central Indiana Power Co.*, *supra* note 34.

⁷⁹ The following reasons were not regarded by Commissions as sufficient grounds for refusing a permit to lease, sell, or consolidate properties or stock:

The mere size of a utility nor possibility that rates might be increased, as it must be assumed that a proper supervision of rates would exist, *Re Continental Gas & Elec. Corp.*, *supra* note 32.

Because a municipality might wish to acquire the utility at some later date, as the commission felt that this could be done in spite of merger, *Re Tintern Manor Water Works Co.*, *supra* note 57. *Re General Water Works & Elec. Corp.*, P. U. R. 1930A 354 (Ala.).

Because the lessee might make improvident extensions, *Re Kittery Electric Light Co.*, *supra* note 58.

Because a municipal plant was ready and willing to serve in the territory, *Re Los Angeles Water Service Co.*, P. U. R. 1927A 532 (Cal.).

Because plant would not be locally owned, *Re Cumberland County Power & Light Co.*, *supra* note 17.

Because a minority objected in the absence of fraud, *Re United Light & Power Co.*, P. U. R. 1915C 807 (Cal.). In the case of *Re Sacramento Northern Railroad Co.*, *supra* note 56, the commission even went so far as to say that it would not refuse because stockholders intervened alleging fraud; and declared that it was interested in two things only, public interest and excessive price, and that fraud was a question for the courts.

⁸⁰ See IND. ANN. STAT. (Burns, 1926) § 12768, which requires the commission to determine the value of the stock of stockholders who dissent from the agreement to merge or consolidate.

See also WIS. STAT. (1929) § 196.80.

sary.⁸¹ The Maine commission has declared that it does not have to determine what property may be capitalized where the petition does not involve either the fixing of rates or issuing securities.⁸² Under the Illinois statutes, the commission has held that when the proposed capitalization of consolidated companies does not exceed the sum of the capital stock of constituent companies, the commission is not required to determine the value of the properties of utilities.⁸³

Granted that a commission is required or finds it desirable to make a valuation, does it include the same items or use the same basis which it employs in determining the value of utilities for rate-making purposes? Some commissions have stated that there are differences.⁸⁴ The North Dakota commission declared that the valuation for purposes of purchase and sale permits additional items not included in the valuation for rate-making.⁸⁵ The Indiana commission declared that although the valuation should be made in the same way as if it were being done for rate-making purposes, such value might not necessarily be used as a basis for fixing rates.⁸⁶ Although commissions have asserted that such differences exist, they have never enumerated in detail or specified exactly what they are.

As a general rule, commissions use the cost of reproduction less depreciation as the basis of valuation.⁸⁷ Sometimes earning power has been given some weight.⁸⁸ Other bases which have been mentioned occasionally are original cost and sale value. This latter appears to be based upon the possibilities for future development by way of new uses and new customers for the services of a utility.⁸⁹ The California commission has consistently refused to use the cost of reproduction as a basis for valuation in cases of sale of utilities, and has declared that the proper basis is historical cost less depreciation.⁹⁰

⁸¹ *Baldwin v. Railroad Comm.*, 206 Cal. 581, 275 Pac. 425 (1929).

⁸² *Re Pennamauquan Power Co.*, P. U. R. 1927E 147 (Me.).

⁸³ *Re Illinois Northern Utilities Co.*, P. U. R. 1917A 816 (Ill.).

⁸⁴ *Re Southern Ill. Light & Power Co.*, P. U. R. 1919D 489 (Ill.); *Re Stark County Power Co.*, P. U. R. 1918A 224 (Ill.). "In the fixing of a value for rate-making purposes the public is directly and vitally concerned that this value shall rest upon the firm basis of property value However, in a case of purchase and sale the public is not vitally interested, except to make certain that the property is not so crippled by indebtedness and fixed charges that its operation is precarious. The parties who are principally concerned are the purchaser and the seller."

Re Tyrone Electric Co., P. U. R. 1916E 708 at 711 (Ill.). "Regulatory bodies, in general, have recognized a broad distinction between capitalizing intangibles in security-issue cases and in rate cases."

⁸⁵ *Re Dakota Light Heat and Power Co.*, *supra* note 72.

⁸⁶ *Re Princeton Telephone Co.*, P. U. R. 1923A 620 (Ind.).

⁸⁷ *Re Akron Tel. Co.*, P. U. R. 1927A 67 (Ind.); see the statement of the commission in *Re North Central Telephone Co.*, *supra* note 46; *Re City of Chippewa Falls*, P. U. R. 1927A 545 (Wis.).

⁸⁸ *Re Public Service Co.*, P. U. R. 1927A 67 (Mo.).

⁸⁹ *Electric Public Utilities Co. v. Public Service Comm.*, P. U. R. 1928E 854 (Md.).

⁹⁰ *Re Pacific Gas & Electric Co.*, P. U. R. 1923C 535 (Cal.); *Re California Water Service Co.*, P. U. R. 1928D 208 (Cal.); *Re Russian River Water Co.*, P. U. R. 1929A 39 (Cal.); *Re Cady Bros.*, P. U. R. 1929A 15 (Cal.).

A few words should be said concerning special items which commissions allow or do not allow in ascertaining the value of utilities. In the first place, the California commission refused to permit any value for a franchise where there was no evidence that any sum had been spent to obtain it.⁹¹ This, of course, is the general rule followed by commissions in ascertaining value for rate purposes. However, an allowance for a franchise in making a valuation for merger, consolidation or sale might be justified where no such item could fairly be permitted in ascertaining the value for rate purposes. It is obviously unfair to charge the public for something which it has granted to a private corporation, whereas it may not be unfair to require the buyer to pay for a franchise; provided the cost thereof does not ultimately fall on the public.

As a rule, a sum for going value seems to be allowed by commissions.⁹² A few exceptions to this rule can be found. The Wisconsin commission refused to allow a specific amount for going value, alleging that it had given due consideration to this factor in its finding of the total value of the enterprise.⁹³ Likewise, the California commission refused to allow any sum for so-called going value.⁹⁴

A sum for working capital is usually permitted, just as it is in ascertaining a value for rate-making purposes.⁹⁵ It is easy to see how even a greater allowance for such an item can justifiably be made in merger cases than in rate cases. It is obviously unfair to fix rates so as to force consumers to pay for unusually large reserve stocks of working capital; whereas there seems to be no injustice in permitting a purchaser to pay for large stocks of working capital, on the theory that such materials may gradually be consumed in the future.

A commission allowed \$500,000 for an artificial gas plant which was usable but not used, even though the commission admitted that such an item ought not to be allowed in a valuation for rate-making purposes. The reason for this difference is obvious. It is unfair to force the public to pay rates on a large piece of property which is unused for producing service, but it is not unjust to allow a seller to charge a purchaser for property which obviously has considerable value.⁹⁶

In a valuation for capitalization purposes, a commission refused to permit an item for increased efficiency and decreased operating costs which

⁹¹ *Re Star & Crescent Boat Co.*, P. U. R. 1925E 581 (Cal.).

⁹² *Re Associated Telephone Co.*, P. U. R. 1927C 577 (Ind.); *Re Kansas City Gas Co.*, P. U. R. 1926C 41 (Mo.); *Re Central Maine Power Co.*, P. U. R. 1922C 36 (Me.).

⁹³ *Re City of Chippewa Falls*, *supra* note 87.

⁹⁴ *Re Hollister Water Co.*, *supra* note 65.

⁹⁵ *Re Central Maine Power Co.*, P. U. R. 1918C 792 (Me.); *Re City of Chippewa Falls*, *supra* note 93; *Re Jersey Central Power & Light Co.*, P. U. R. 1925D 699 (N. J.).

⁹⁶ *Re Kansas City Gas Co.*, *supra* note 92.

might have resulted from a consolidation, on the grounds that such things were too speculative to warrant inclusion.⁹⁷

In one case, a commission made an addition of 15 per cent. to a value which it had found. This addition was to cover engineering superintendence, fire and liability insurance and contingencies during construction.⁹⁸

In cases of merger, consolidation, sale or stock transfer, commissions are frequently confronted with excessive valuations which in turn may be reflected in the price or the capitalization. The question naturally arises as to how commissions deal with such situations. There are three possible ways of handling the problem. The commission may refuse to allow the application on the grounds that it is not in the interests of the public; or the commission may fix a valuation and grant the application on condition that the price or capitalization is based upon its valuation; or the commission may allow the sale, merger or stock transaction but require that the difference between a fair value and the excessive value be amortized.

As a general rule, commissions have not regarded excessive price or valuation unaccompanied by other objectionable features as sufficient grounds for denying a petition. Apparently, they take the attitude that the price or valuation should be set by the management and should not be arbitrarily interfered with by regulatory authority.⁹⁹ One Maryland court declared that such interference is scarcely warranted where the commission has complete control over rates and service, as the possibility of injury to the public can be guarded against in other ways.¹⁰⁰ The likelihood of a refusal is remote, where the applicants are not seeking to issue securities in connection with purchase, but are expecting to pay the price in cash from their own coffers.¹⁰¹

Occasionally, commissions have not allowed a consolidation where the utility might have been obliged to assume an insurmountable financial burden, or where the price was grossly in excess of a fair value.¹⁰² The reason for refusal in such cases is obvious. If a company has to assume a gigantic financial burden, it will undoubtedly be reflected either in rates or service to the public.¹⁰³

⁹⁷ *Re* Dakota Light, Heat & Power Co., *supra* note 72.

⁹⁸ *Re* Princeton Tel. Co., *supra* note 86.

⁹⁹ *Re* North Missouri Power Co., P. U. R. 1924C 853 (Mo.); *Re* Mountain Grove Creamery Ice & Elec. Co., P. U. R. 1926B 346 (Mo.); *Re* Missouri General Utilities Co., P. U. R. 1926C 393 (Mo.).

¹⁰⁰ *Electric Public Utilities Co. v. Public Service Comm.*, *supra* note 89.

¹⁰¹ *Re* Hooksett Aqueduct Co., P. U. R. 1918C 389 (N. H.); *Re* Bradford Light & Power Co., P. U. R. 1923D 622 (N. H.).

¹⁰² *New York Power & Light Corp.*, *supra* note 49, where it appeared that a price of \$282,000 was to be paid for property valued at \$58,000; *Re* Penn Public Service Corp., P. U. R. 1926B 791 (Pa.); *Re* Southern Ill. Light & Power Co., *supra* note 84; *Re* Genesee Valley Gas Co., Inc., *supra* note 47; *Re* Metropolitan Edison Co., P. U. R., 1927E 639 (Pa.); *Re* Riley, P. U. R. 1923C 302 (Cal.); *Re* California Water Service Co., *supra* note 90; *Re* Cady Brothers, *supra* note 90; *Re* Niagara Hudson Power Corp., P. U. R. 1931B 343 (N. Y.).

¹⁰³ *Re* North Central Telephone Co., *supra* note 46.

When commissions allow a petitioner to consolidate even though the valuation is excessive, they usually attach conditions which are designed to guard against the possibility of the public being compelled to assume the burden of the excessive valuation. It is common, for example, to grant the application but require that the excess shall not be charged to property accounts or capitalization, or come out of operating expenses, but shall be amortized out of net income available for contingencies, dividends or surplus.¹⁰⁴ Sometimes commissions have insisted that the excess be charged to profit and loss.¹⁰⁵ In one case, the board of public utility commissioners required that the difference between what it had found to be fair value and that which had been fixed by the utility engineers, should be transferred from a surplus account to an amortization reserve account.¹⁰⁶ Often commissions have required that a company shall not use the value fixed for consolidation or sale purposes as a basis for rates to be charged to the public.¹⁰⁷

The third alternative, fixing a price or valuation instead of refusing the application altogether or allowing it on condition that the excess be amortized, is possible but seldom used.¹⁰⁸ In fact, commissions have sometimes declared that it was doubtful whether they had jurisdiction to fix prices.¹⁰⁹

Conditions

It is customary for commissions to attach certain conditions to order granting permission to sell, merge, consolidate or acquire stock. The statutes in many states specifically give to commissions this authority.¹¹⁰ There appear to be few limits on the nature of these conditions except that they must not be arbitrary or unreasonable. There is much variation in the nature of these conditions. Among the most common are those which require the amortization of excessive prices.

¹⁰⁴ *Re Illinois Power & Light Corp.*, P. U. R. 1928A 776 (Ill.); *Re San Diego Consol. Gas & Elec. Co.*, P. U. R. 1917E 409 (Cal.); *Re Forgan*, P. U. R. 1918C 803 (Ill.); *Re Watts Engineering Co.*, *supra* note 49; *Re Union Elec. Light & Power Co.*, P. U. R. 1924A 74 (Mo.); *Re Stark County Power Co.*, *supra* note 84; *Re Tyrone Elec. Co.*, *supra* note 84; *Re North Missouri Power Co.*, *supra* note 99; *Re Davis Junction Elec. Co.*, P. U. R. 1930A 468 (Ill.); *Re Hollister*, *supra* note 65.

¹⁰⁵ See *Re Nevada Cal. & Ore. Tel. and Tel. Co.*, P. U. R. 1929D 43 (Cal.); *Re South Coast Gas Co.*, P. U. R. 1929E 476 (Cal.); *Re Forgan*, *supra* note 104; *Re Tyrone Elec. Co.*, *supra* note 84; *Re Tuolumne County Elec. Power & Light Co.*, P. U. R. 1928C 31 (Cal.).

¹⁰⁶ *Re Atlantic City Elec. Co.*, P. U. R. 1925A 352 (N. J.).

¹⁰⁷ *Re Standard Consolidated Mining Co.*, P. U. R. 1915B 23 (Cal.); *Re Willis*, P. U. R. 1915B 24 (Cal.); *Re Missouri General Utilities Co.*, *supra* note 99; *Re Missouri Standard Tel. Co.*, P. U. R. 1928C 695 (Mo); *Re Empire Telephone Co.*, P. U. R. 1920B 664 (Cal.).

¹⁰⁸ See *Re Richland Realty Co.*, P. U. R. 1915C 847 (Cal.).

¹⁰⁹ *Re South Coast Gas Co.*, *supra* note 105; *Re Power & Elec. Securities Corp.*, *supra* note 66. In this last case the commission stated that it had no power to fix prices except as an incident to denying or granting applications, the limit of the discretion is whether the public interest will be harmed or served by granting the application.

¹¹⁰ See for example Ill. Laws 1921, 703, art. I, § 27.

In searching the cases, one finds little uniformity as to the kind of conditions attached to orders approving applications to merge, consolidate, or to sell or acquire stock.¹¹¹ Some of them seem to be attached for the benefit of stockholders, others for protection of the public. Commissions have sometimes used their authority to attach conditions, as means of regulating utilities in a manner which would be impossible under their other powers.

The Effect of Mergers, Sales and Stock Acquisitions Undertaken Without the Consent of Commissions

If the statutes require that the commission must approve consolidations, mergers, sales or stock acquisitions, such transactions consummated without

¹¹¹ *Re Northwestern Redwood Co.*, P. U. R. 1923C 741 (Cal.), application to transfer utility granted subject to a condition that certain records and books which showed costs of properties and results of operation should be transferred.

Re Valley Home Tel. Co., P. U. R. 1915A 55 (Mich.), a consolidation was approved upon condition that a certain connection between consolidated exchanges and another company be restored.

Re Fresno Farms Co., P. U. R. 1915B 324 (Cal.), an application to sell a water system was granted on condition that the land company would guarantee the water company against loss and allow the water company to use certain ditches.

Re Northwestern Telephone Exchange Co., P. U. R. 1916D 534 (Minn.), an application to purchase majority stock was approved upon condition that the right of subscribers of the vendor to certain toll connections with another company should not be impaired and on condition that stock of minority be purchased upon same terms as proposed for purchase of majority stock.

Re Maryland Power & Light Co., et al., *supra* note 56, application to consolidate granted on condition that the consolidated company keep separate accounts for each community so that the commission could determine whether any community was bearing an undue share of the burden of rates.

Re Santa Paula Home Tel. Co., P. U. R. 1916E 259 (Cal.), an application of telephone companies for approval of sale or exchange was granted upon condition that certain rates be equalized for all subscribers of both companies.

Re San Gabriel Valley Water Co., P. U. R. 1917A 655 (Cal.), an application to sell a water plant and system was approved on condition that the purchaser which was a city would stipulate to continue service to consumers outside the city.

Re Riverside Home Tel. & Tel. Co., P. U. R. 1917B 1085 (Cal.), a consolidation of lines of telephone companies authorized on condition that subscribers of both companies would receive either manual or automatic service according to preference of customer.

Re Fresno Canal & Land Co., P. U. R. 1917D 271 (Cal.), the purchaser was required to stipulate that it would undertake all the liabilities and obligations resting upon the vendor.

Re Southern Cal. Tel. Co., P. U. R. 1917A 989 (Cal.), an application for the purchase of property and the consolidation of telephone properties was granted on condition that the consolidated company would not apply for an increase in rates for 5 years, would give to each subscriber a choice of automatic or manual service, would give to each subscriber a choice of telephone toll service rendered by two companies, would not change the principal office from the city where located at the time of the approval, would not claim any franchise value in excess of moneys paid therefor, and would keep certain accounts.

Re Great Lakes Utilities Corporation, P. U. R. 1927E 409 (N. Y.), a petition for consent to acquire stock of a gas utility was granted on condition that the petitioner's offer of \$70 a share be extended to all of the stockholders of the corporation, and that the order should not be construed as a determination of the value of the property.

Re Bethel Light Co., *supra* note 41, a petition to consolidate was approved on condition that the company take proper corporate action to bind itself to assume the duties toward the public of the four companies which were being consolidated.

Re Hihn, P. U. R. 1917B 1084 (Cal.), the order authorized the transfer to the city of a water system on condition that the city file a stipulation that it was willing to serve certain consumers outside the city limits.

commission consent are void.¹¹² The statutes of most states so provide. So strictly do certain commissions adhere to this rule that they will not ratify sales made without their consent.¹¹³ Where there is no way in which they can validate an unauthorized transaction, they require parties to execute a new instrument and make a new application.¹¹⁴ There may be extenuating circumstances which justify a departure from the general rule. For example, in one case, the California Commission, even though its consent had not been obtained, recognized the title in a transferee, where the transfer had been made in good faith and without intention of violating the law, and the whereabouts of the transferor were unknown so that he could not participate in an application.¹¹⁵ Nor will the courts allow the general rule to be used as a cloak to cover fraud or grave injustice.¹¹⁶

Conclusion

As previously stated, the records studied indicate that consolidations, mergers, sales or stock acquisitions have, as a rule, been attained by utilities without great difficulty. That many such unifications have been beneficial to the public cannot be denied. The great pity is that they have not been more beneficial. Had government authorities been more alert, this would have been possible without doing injury to the legitimate interests of utilities.

In part the difficulties have been due to lack of authority by agents responsible for administering regulatory statutes. Not more than half the states have conferred upon their utility commissions express authority to control unifications. Even in those states which have made efforts to control such proceedings, legislatures have usually failed to extend control to cover the most common and important method of unification, that through holding companies. Thus important and gigantic combinations have been built up almost entirely without state control.

Any scheme for controlling combinations should confer upon public service commissions as complete jurisdiction as possible; that is, should give them authority to control consolidations, mergers, leases, sales of franchises or property, stock acquisitions by operating companies, holding companies, or other companies. Persons desiring to bring about unification should be compelled to make a definite showing that the proposed ar-

¹¹² *Re Walapai*, P. U. R. 1917D 271 (Ariz.); *Napa Valley Elec. Co. v. Callistoga Elec. Co.*, 38 Cal. App. 477, 176 Pac. 699 (1918); *Re Otter Tail Power & Light Co.*, *supra* note 2; *Re Purchase & Farmers Co-Operative Milling Co.*, *supra* note 23.

¹¹³ *Re Olive Investment Co.*, P. U. R. 1924E 554 (Cal.) *Contra*: see statement of the New York commission in *Re Cayuga Power Co.*, P. U. R. 1917E 915 (N. Y.).

¹¹⁴ *Re Delta Warehouse Co.*, P. U. R. 1930A 255 (Cal.).

¹¹⁵ *Re Smith*, P. U. R. 1923A 124 (Cal.).

¹¹⁶ *Otter Tail Power Co. v. Clark*, 59 N. D. 320, 229 N. W. 915 (1930).

rangement will be beneficial to the public. It would probably not be amiss to require a valuation, and give to commissions the power to fix a price or valuation at which a transfer may take place. If regulatory authorities had had such powers during the past ten years, and if they had diligently exercised them, utilities would not have been permitted when transferring their property or stock to make the extraordinary writeups in their valuations which have in so many cases proved detrimental not only to consumers but also to investors.