

Recent Tendencies in the Regulation of Public Utility Holding Companies

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ground that control was not sufficient to establish such liability.¹⁷ However, the federal courts seem to disregard the corporate entity and place the liability upon the parent, upon the ground of agency,¹⁸ instrumentality,¹⁹ or identity.²⁰

It cannot be determined upon what ground a court will hold the parent, if at all; that depends upon the jurisdiction, and the degree of identity of the corporations, or of the stockholders and directors in both corporations. But, it can be said, with some degree of certainty, that a court will not allow the creditors of the insolvent member of the unit to be defrauded, nor allow the corporation to evade laws which have been dictated by public policy, nor to escape existing or future obligations, nor even to escape legal liability for tort, by adhering to the doctrine of "corporate entity". The "legal entity" theory will be upheld as long as is possible, but whenever any of the above elements become present, the court will look through to substance, rather than to form.

FRANK J. ANTOINE.

RECENT TENDENCIES IN THE REGULATION OF PUBLIC UTILITY HOLDING COMPANIES.—Seldom in American history has the close relationship between law and economics been as strikingly revealed as in the past three years. With the collapse of a business structure based upon legal principles developed in a laissez-faire agrarian society, there has come to most lawyers the disconcerting realization that law is not

¹⁷ *Berkey v. Third Ave Ry.*, 244 N.Y. 84, 155 N.E. 58 (1926); Plaintiff was injured while leaving a street car. The franchise to operate a street railway along that line belonged to the Forty-Second St. Co. and no one else. However, substantially all the stock of the company was owned by the Third Ave. Ry. Co., which had its own franchise along other streets. The parent company was not held liable; but the court seemed to be protecting the creditors of the controlling company and the interest of the public in cheap and efficient operation of public utilities. *Owl Fumigating Corp. v. California Cyanide Co.*, supra; *Bergenthal v. Boynton Automobile Livery Co. and Green Cab Co.*, 179 Wis. 42, 190 N.W. 901 (1922), where the parent company was not estopped from denying that the subsidiary was its agent or that the two were in fact one; *Atchison, T., and S. F. R. R. v. Cochran*, 43 Kans. 225, 23 Pac. 151 (1890); *Stone v. Cleveland, etc. Ry.*, supra; *Friedman v. Vandalia R. R. Co.*, 254 Fed. 292 (C.C.A. 8th, 1918).

¹⁸ *Lehigh Valley R. R. Co. v. Delachesa*, 145 Fed. 617 (C.C.A. 2d, 1906).

¹⁹ *Joseph Foard Co. v. Maryland*, 219 Fed. 827 (C.C.A. 4th, 1914).

²⁰ *Davis v. Alexander*, 269 U.S. 114, 46 Sup. Ct. 34, 70 L.Ed. 186 (1925); "Where one railroad company actually controls another and operates both as a single system, the dominant company will be liable for injuries due to the negligence of the subsidiary company"; *Ross v. Pennsylvania R. R. Co.*, 148 A. 741 (N.J. 1930); "Where a corporation holds stock of another, not for the purpose of participating in the affairs of the other corporation in the normal and usual manner, but for the purpose of control, so that the subsidiary company may be used as a mere agency or instrumentality for the stockholding company, such company will be liable for injuries due to the negligence of the subsidiary, and the mere fact that an accident is caused by the negligence of persons in the employ of the subsidiary will not relieve the dominant company of responsibility." The question of liability was not determined in this case, the court holding that the evidence should have been submitted to the jury to determine if such control was present.

a cold scientific guide to justice, but rather a human philosophy of civilization—human in that it is subject to all the errors and mistakes of mankind, human in that it must adapt itself to modern conditions, and in so doing build the foundation for a better and a finer society. Perhaps in few legal fields have the current economic adjustments met with greater response than in that of public utilities law. And yet it is only natural that a comparatively new and plastic development of legal theory should lend itself more readily to violent changes than the hardened and crystallized judicial dogmas of seventeenth century England.

In April, 1930, Martin J. Insull, speaking before The Academy of Political Science, made the following statement:

"The holding company or utilities investment company is entitled to the same freedom of action as any other business and it is that freedom that has enabled it to do the great work it has in the development of the electric industry in this country to a pre-eminent position in the whole world. . . .

Regulation of the operating company with freedom of the holding company is to the best interest of the public."¹

While the events of the past two years seem to have cast considerable doubt as to the validity of the above contention,² it is interesting to note what strong approval it met with in the halcyon days preceding the depression. Thus, the Massachusetts Special Commission on Control and Conduct of Public Utilities, reported in March, 1930:

"We do not believe that the time has come when direct regulation of holding companies is necessary. The operating company remains, in our opinion, the proper unit to be regulated."³

Such also was the view of the Investment Bankers' Association which through its Public Service Securities Committee, issued the following statement in May, 1930:

"This Association looks with misgiving on any attempt at regulation of holding companies, believing that full flexibility in the special services they so admirably perform is of the first importance to preserve."⁴

¹ Insull, "Is Control of Operating Companies Sufficient?" Proceedings of the Academy of Political Science, Vol. XIV, No. 1, at pages 87, 88, 89. (April, 1930). Cf. Cassius M. Clay, "Regulation of Public Utilities," 1932, p. 252.

² James C. DeLong, "Holding Company Practices That Invite Regulation," Public Utilities Fortnightly, Dec. 22, 1932, p. 733. "During the interval of readjustment and reappraisal of values which began in the fall of 1929, more than one hundred enterprises, identified in one capacity or another with the public utility industry, have sought the refuge of receivership. * * * According to a recent compilation of Dow, Jones & Co. of the total bond issues in default as of August 1, 1932, aggregating more than two and one-half billion dollars, the public utilities contributed more than any other single industry with seven hundred and seventy-two million dollars, or nearly 30% of the total."

³ Report of Special Commission on Control and Conduct of Public Utilities under Chapter 55 of the Resolves of 1929 (Mass.) taken from United States Daily for March 5, 1930, page 12, Cf. Cassius M. Clay, *op cit.*, p. 253.

⁴ See David E. Lilienthal, "Recent Developments in the Law of Public Utility Holding Companies," 31 Col. Law Rev. 189 (1931).

But in the intervening years, the pendulum of public opinion has swung so far to the opposite side, that statements such as the following win popular acclaim today:

"Indirect regulation of holding companies by the state commissions has . . . proven comparatively ineffective, and cannot well be otherwise. There is need, therefore, of direct regulation."⁵

"That it (the holding company) has the power to do public injury cannot be denied even by the most biased defenders. The theory that state commission control of the operating company is sufficient public protection has been exploded by events of the recent past."⁶

"We propose regulation to the full extent of Federal power of holding companies which sell securities in interstate commerce."⁷

Indeed, so great has been the public reaction against the holding company, that the radicals of 1929 find themselves in the ranks of the conservatives of 1933.⁸ Today, the issue is no longer whether the holding company should be regulated or not, but whether the holding company should be abolished or regulated.⁹ And in view of this great shift of opinion on the part of economists, statesmen, and public utility authorities, it is most interesting to notice in what manner the courts and the commissions have taken cognizance of this turbulent economic upheaval.

A summary of the fundamental theories of holding company regulation is necessary, however, for an understanding of recent decisions and legislation. Generally, there are two theories of holding company regulation: first, direct regulation of the holding company, itself; and second, indirect regulation of the holding company through the regulation of the operating company. The first comprehensive discussion of these theories was presented in 1929 by David E. Lilienthal, now of the Wisconsin Public Service Commission;¹⁰ at that time Mr. Lilienthal pointed out that the direct regulation theory had found little favor with the states, in that few statutes had been enacted for the direct regulation of holding companies,¹¹ in that the court had consistently denied the commissions direct jurisdiction over holding companies,¹²

⁵ Jones & Bigham, "Principles of Public Utilities," 1932, p. 616.

⁶ James C. DeLong, *op. cit.*, p. 733.

⁷ Democratic National Convention 1932 Platform. Also see Report of Federal Power Commission to Congress, September 17, 1932, in which Federal regulation of utility holding companies was recommended as absolutely essential in the public interests.

⁸ Witness the success of the book, "The Holding Company" by Bonright and Means.

⁹ See William A. Pendergast, "The Ordeal By Water of The Holding Co." *Public Utilities Fortnightly*, May 11, 1933, p. 595. "But does not a consideration of the dark side of the holding companies indicate that the trouble is not so much in the idea or principle of the holding company, but rather in the abuses of it? And if that be true, does it not follow that the solution lies in control, in regulation?"

¹⁰ David E. Lilienthal, "The Regulation of Public Utility Holding Companies," 29 *Col. Law Rev.* 408 (1929).

¹¹ In 1929 but four states had statutes providing for the direct regulation of holding companies: New York, N. Y. Pub. Service Comm. Law (1910) Sec. 5 (7); Massachusetts, Gen. Laws (1921) c. 181, sec. 3, 4, 8, c. 155, sec. 4; Alabama, Civ. Code (1923) sec. 9792; New Jersey, N. J. P.L. (1923) 288.

¹² See *In re Golden Gate Ferry Co.*, 28 Cal. R.C.R. 268 (1927); *Federation of Citizens' Ass'n. v. Chesapeake & P. Tel. Co.*, P.U.R. 1923D, 152, D. of C.P.S.C.

and in that the courts had repeatedly refused to recognize the holding company as a public utility.¹³ On the other hand, he showed that indirect regulation of the holding company through the regulation of the operating company was the more widespread practice.¹⁴

The purpose of the indirect regulation of the holding company through the regulation of the operating company is the protection of the rate-payers of the public utilities. Inasmuch as the holding company generally controls the service, engineering, and supply contracts of the operating company, inasmuch as it controls the financial operations of the operating company, it can be readily seen that by profit-making negotiations between the operating and holding companies, the cost of the service rendered to the consuming public can be greatly boosted.¹⁵ The state commissions have in the past tried to prevent these secret deals by the regulation of fees and charges paid by the operating company to the holding company,¹⁶ by the regulation of financial and security transactions between the operating and the holding company,¹⁷ and by the regulation of the acquisition of operating companies by holding companies.¹⁸

(1924); *In re Power & Electric Securities Corp.* 1925 N.Y.P.S.C.R., 1, 261 (1925); *In re Erie Power Corp.* 1925 N.Y.P.S.C.R., I, 276 (1925).

¹³ David E. Lilienthal, "The Regulation of Public Utility Holding Companies," op. cit., p. 409. "A holding company is not a public utility in the legal sense for it has neither the power nor does it in fact serve the public with these services." Cf. *Public Utilities Comm. v. Romberg*, 275 Ill. 432, 114 N.E. 191 (1916); *Toledo Light, Traction & Power Co. v. Smith*, 305 Fed. 643 (D.C. Oh., 1913).

¹⁴ David E. Lilienthal, "The Regulation of Public Utility Holding Companies," op. cit., p. 408.

¹⁵ R. G. Lynch, *The Milwaukee Journal*, May 10, 1933, p. 13. "Some of the things reported by the investigators in the phone case are: That A. T. & T. made an apparent profit of more than \$14,000,000 at one stroke in 1927 by selling its subsidiaries the telephone instruments and coils which previously had been leased to them; * * * That the company's method of charging its overhead, engineering and supervision expenses to its subscribers was so faulty that simple purchases on which there obviously was no engineering, such as lawn seed, manure, panes of glass, lineoleum and countless other items, had been heavily loaded with engineering expense."

Also see William A. Prendergast, "The Ordeal By Water of The Holding Co." op. cit., p. 595. "The milking of operating companies by holding companies has in some instances gone to the extent of causing operating companies to pay out dividends greater than earnings. Holding companies have lent to operating subsidiaries at unfairly high rates. They have borrowed from subsidiaries at unfairly low rates. In some recent instances holding companies have borrowed from operating subsidiaries or affiliates on unsecured notes, have gone bankrupt, and have left the operating companies without funds and without recourse."

¹⁶ See *Reno Power, Light and Water Co. v. Public Service Commission*, 289 Fed. 790 (D.C. Nev., 1923); *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 43 Sup. Ct. 544, 67 L.Ed. 981 (1923); *Jones & Bigham*, op. cit., p. 614; *Cassius M. Clay*, op. cit., pp. 254-256.

¹⁷ David E. Lilienthal, "The Regulation of Public Utility Holding Companies," op. cit., pp. 420-421; *Jones & Bigham*, op. cit., p. 615. See *Re Eastport Water Company*, P.U.R. 1929E, 136, (1929); *Cassius M. Clay*, op. cit., pp. 256-257.

¹⁸ David E. Lilienthal, "The Regulation of Public Utility Holding Companies," op. cit., pp. 421-422. In 1929 only six states required that the purchase of stock of a public utility company by a holding company be approved of by the commissions. They were Illinois, Indiana, Maryland, Missouri, New Jersey, and New York. The number has been greatly increased since then. See sec. 196.52 (3), Wis. Stats.

But it is one thing to try to regulate the reasonableness of charges made by a holding company to its operating subsidiary, and quite another thing to succeed. Thus, as early as 1923, the Federal Courts recognized that the operating expenses of a utility¹⁹ were of necessity open to scrutiny by the regulatory commission.²⁰ Yet until 1930, both legislatures and courts failed to realize that the efficiency of this regulation depended upon the ability of the commission to determine whether or not the charges made by a holding company to its subsidiaries were reasonable. For example, the greatest practical difficulty is met with in evaluating the services which a holding company renders with regard to management and construction.²¹ According to Commissioner Lilienthal, "By far the most common contract is that under which the holding company agrees to furnish the technical and financial service" to the operating company.²² Yet, with all the difficulty involved in ascertaining the reasonableness of fees for service, with the necessary documents and records and cost accounts in the possession of the holding companies charging these fees, the courts have in the past held that the burden of proving the unreasonableness of these fees lay with the commission.²³ Typical of this attitude is the decision of

¹⁹ See *Reno Power, Light and Water Co. v. Public Service Commission*, supra.

²⁰ But notice the language of *State P.U.C. ex rel. Springfield v. Springfield G. & E. Co.*, 291 Ill. 209, 125 N.E. 891 (1920): "The Commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers."

²¹ *Cassius M. Clay*, op. cit., p. 254-255. "Perhaps the first and foremost (difficulty) is the practical difficulty of defining and evaluating the services which a holding company renders. Fees for construction work are more easily related to a market test of the value of the services than fees for management."

David E. Lilienthal, "The Regulation of Public Utility Holding Companies," op. cit., p. 415, points out that in an attempt to ascertain the value of services, some states have adopted a basis of computation under which the holding company receives as compensation a fixed percentage of the gross revenues of the operating company. See *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, supra; *Houston v. Southwestern Bell Telephone Co.*, 259 U.S. 318, 42 Sup. Ct. 486, 66 L.Ed. 961 (1921); *Indiana Bell Tel. Co. v. P. S. C.*, 300 Fed. 190 (D.C. Ind., 1924); *State ex rel Hopkins v. Southwestern Bell Tel. Co.*, 115 Kan. 236 (1924); *Pacific Tel & Tel. Co. v. Whitcomb*, 12 F. (2) 279 (D.C. Wash., 1926).

²² David E. Lilienthal, "The Regulation of Public Utility Holding Companies," op. cit., p. 415.

²³ Justice Stone in *United Fuel Gas Co. v. Railroad Comm. of Ky.*, 278 U.S. 300, 49 Sup. Ct. 150, 73 L.Ed. 390 (1929): "We recognize that a public service commission, under the guise of establishing a fair rate, may not usurp the function of the company directors and in every case substitute its judgment for theirs as to the propriety of contracts entered into by the utility; and common ownership is not of itself sufficient ground for disregarding such intercorporate agreements when it appears that, although an affiliated corporation may be receiving the larger share of the profits, the regulated company is still receiving substantial benefits from the contract and probably could not have secured better terms elsewhere." Also see *Missouri ex rel. St. Joseph v. Public Service Comm.* (1930), 30 S.W. (2d) 8: "It is no concern of either the customers of the water company or the commission, if the water company obtains necessary material, labor, supplies, etc. from the holding company so long as the quality and price of the service rendered by the water company are what the law says they should be."

the Nebraska Federal District Court in the case of *Northwestern Bell Telephone Co. v. Spillman*,²⁴ where the court held:

"The presumption is that this contract (between the holding and operating company for services) was entered into in good faith and in the exercise of a proper discretion by the officers of both corporations. To overcome this presumption, it was incumbent on the defendants (the state authorities) to show that the contract was not made in the exercise of a proper discretion by the plaintiff's officers."²⁵

As a result of this view, the regulatory commissions were forced to attack the service charges levied by holding companies upon their operating subsidiaries, with the meager data they were able to obtain by means of "fishing trips" into the records of hostile companies. And although statutes have been enacted in several states giving the commissions power to search the books and records of holding companies,²⁶ yet a holding company incorporated in a foreign state, may if it chooses to do so, prevent the enforcement of these statutes.²⁷

But this stand has not escaped criticism. In 1925 the Wisconsin Railroad Commission attacked the decision of *Northwestern Bell Telephone Co. v. Spillman*,²⁸ on the ground that state commissions have no power to demand the records of foreign holding companies.²⁹ Later decisions have served but to emphasize the Commission's position that failure to prove the cost of management fees to the holding company will result in the disallowance or reduction of such fees.³⁰ Commissioner Lilienthal, writing in the *Columbia Law Review* for 1931,³¹ points out that the Federal Power Commission, together with commissions in California, Illinois, and Pennsylvania have reduced or disallowed fees where proof of their value had not met with the approval of the commissions, or where they had involved duplication.³² In the famous case of *Smith v. Illinois Bell Telephone Company*,³³ the United States Supreme Court, although not deciding the question of whether the commission or the utility should bear the burden of prov-

²⁴ 6 F. (2) 633 (D.C. Neb., 1925).

²⁵ Cf. David E. Lilienthal, "The Regulation of Public Utility Holding Companies," *op. cit.* p. 419.

²⁶ New York, Laws of 1930, ch. 760; Massachusetts, Acts of 1930, ch. 395.

²⁷ See Jones & Bigham, "Principles of Public Utilities," *op. cit.*, p. 616: "The State of New York, for example, cannot compel a holding company incorporated in another state to bring its books and records to New York. The state cannot even serve an order on a foreign corporation which is not doing business within the state; and service on an agent of the subsidiary does not effect service on the parent corporation."

²⁸ 6 F. (2) 633 (D.C. Neb., 1925).

²⁹ *In re Wisconsin Telephone Co.*, 28 Wis. R.C.R. 351 (1925).

³⁰ *In re St. Croix Valley Telephone Co.*, P.U.R. 1929B, 597 (1929); *In re Wisconsin Public Utility Co.*, P.U.R. 1930A, 119 (1929).

³¹ David E. Lilienthal, "Recent Developments in the Law of Public Utility Holding Companies," *op. cit.*, p. 189.

³² *Redlands v. Southwestern H. Tel. Co.*, 35 Cal. R.C.R. 150 (1930); *In re Los Angeles G. & E. Co.*, 35 Cal. R.C.R. 443 (1930); *In re Boynton Tel. Co.*, 8 Ill. C.C.R. 396 (1928); *In re Mimier Mutual Tel. Co.*, 8 Ill. C.C.R. 653 (1928). Also see *In re Dayton Power & L. Co.*, Ohio P.U.C. No. 341 (1930), where the commission held that an increase in retail rates would not be authorized unless the petitioning company established proof of the reasonableness of the wholesale contract rate paid to the parent company.

³³ 282 U.S. 133, 51 Sup. Ct. 65, 75 L.Ed. 255, P.U.R. 1931A, 1 (1930).

ing the reasonableness of the service fees, did decide that in judging fees paid by operating companies to their parent corporations, the commissions could use the cost test³⁴ and hold the utility's management to the proof of reasonableness on that as well as on other bases.³⁵

Thus, in the year 1931 the feeling was growing among the courts that it was to the best interests of state regulation that the relations between operating and holding companies be more strictly regarded. But the situation was far from perfect as evidenced by the following words of Commissioner Lilienthal, written in 1931:

"From time to time it has been said that state regulation of transactions between operating and holding companies is doomed to failure because the state commissions are powerless to compel the production of facts in the possession of a foreign holding company, and beyond the reach of the commission's subpoena.

"If the doctrine should become established that the burden is upon the operating company to establish the cost to the holding company of services or supplies, this difficulty is minimized. Clearly the holding company will see to it that the information is available to its operating subsidiary without respect to the holding company's amenability to process. . . .

"There may be circumstances under which access to data in the hands of the holding company is desired, even where no rate case is pending or contemplated. Whether the indirect compulsion suggested by the Supreme Court in the Smith case can be supplemented by more direct methods is open to serious doubts under the existing authorities and statutes."³⁶

As though in answer to his words, the Wisconsin Legislature in 1931 enacted statutes requiring that the operating company assume the burden of proving the cost to the holding company of services and supplies, and giving to the commission the power to collect this data without the necessity of opening a rate case.³⁷ In fact, under the Wisconsin statutes, every contract between a public utility and its holding company is required to have the approval of the Public Service Commission, and that approval will not be given unless it appears that the contract is reasonable and consistent with public interest.³⁸ Further provisions give the Commission the power to forbid the payment of dividends on the common stock of the utility held by a foreign parent company, when such payment impairs the capital resources of the util-

³⁴ That is, the cost to the holding company of furnishing the service. Thus, if by large scale production, the holding company could reduce the cost, the benefit would go to the consumer rather than to the company. See James C. Bonbright, 31 Col. Law Rev. 209 (1931).

³⁵ This decision supersedes the case of *Houston v. Southwestern Bell Tel. Co.*, supra.

³⁶ David E. Lilienthal, "Recent Developments in the Law of Public Utility Holding Companies," op. cit., p. 205.

³⁷ Sec. 196.52 (3), Wis. Stats.

³⁸ Sec. 196.52 (3), Wis. Stats.: "* * * No such contract or arrangement shall receive the commission's approval unless satisfactory proof is submitted to the commission of the cost to the affiliated interest of rendering the services or of furnishing the property or service described herein to each public utility. * * *

ity.³⁹ On Nov. 9, 1932, the state of Alabama joined Wisconsin in the strict regulation of holding companies, through control of the activities of the operating companies, by passing the Harrison Bill which incorporates the essential features of the Wisconsin statutes.⁴⁰ In the state of New York, Governor Lehman, on March 22, 1933, sent a message to the state legislature recommending that laws be enacted whereby the commission be given clear statutory jurisdiction to pass upon the reasonableness of all fees paid by operating utilities for management or other "services" rendered by parent or affiliated corporations. It is interesting to note that the governor's measures were supported by Floyd L. Carlisle, chairman of the boards of the Niagara Hudson Power Corporation and of the Consolidated Gas Company.⁴¹

In step with these progressive enactments, two state commissions definitely asserted their right to be shown the proof of the reasonableness of service fees charged by holding companies. In California, the Railroad Commission pointedly held in the case of *Paul J. Hopper et al. v. Lassen Electric Co.*⁴² that the jurisdiction of the Commission in fixing utility rates could not be restricted or circumvented by any agreements which a utility might make for the purchase of power, unless it could be affirmatively shown that such agreements were just and reasonable and in the public interest. And in Oregon, the Public Utilities Commissioner decided in the case of *Re Northwestern Electric Company*,⁴³ that fees paid under a contract by an operating utility to an affiliated company, under common corporate control, could be charged to operating expenses only when services actually needed were rendered, when such services were valuable to the operating company, when charges represented the actual cost of rendering such service, and when such charges did not exceed the cost of substitute service.

Most typical of the "new deal" attitude is that of the Wisconsin Public Service Commission in the case of *Re Mid-West State's Telephone Co., Inc.*⁴⁴ Payment of dividends by an electrical utility on its common stock which was held by a foreign parent concern was forbidden pending further investigation by the Commission, where preliminary evidence indicated that expenditures needed to keep service unimpaired had been postponed by the utility. The language of the Commission is as follows:

"It has frequently been asserted during the past decade that Commission jurisdiction over holding companies or their financial transactions with operating subsidiaries was not necessary for adequate protection of consumers' interest in service and reasonable rates. In this instance we apparently have a direct refutation of such assertions. Here is an operating company which appears to be postponing expen-

³⁹ Sec. 184.11, Wis. Stats.: "Whenever the commission shall find that the capital of any public service corporation is impaired it may, after investigation and hearing, issue an order directing such public utility to cease paying dividends on its common stock until such impairments have been made good."

⁴⁰ See Hugh White, president of the Public Service Commission of Alabama, "Regulating Operating Companies," Public Utilities Fortnightly, March 30, 1933, p. 379.

⁴¹ See Public Utilities Fortnightly, April 27, 1933, p. 531.

⁴² P.U.R. 1933B, 277 (1933).

⁴³ P.U.R. 1933B, 41 (1933).

⁴⁴ P.U.R. 1933A, 249 (1933).

ditures needed to keep service unimpaired and turning over its cash resources to a holding company seemingly for the sole or primary benefit of still another holding company which is in the hands of receivers. If further investigation establishes these indications as facts beyond reasonable doubt, a direct and immediate injury to consumers' interests is involved. If long continued, this policy will probably require higher rates to restore service to that quality contemplated by the existing rate schedule. Even now or in the immediate future, the present rates may prove unreasonably high because paid for poorer service resulting from the postponement of necessary expenditures."

A survey of the present situation, consequently, reveals that the interests of the rate payer can be adequately protected by the strict regulation of the transactions between operating and parent holding companies. Close scrutiny of service and management charges and careful checking of the financial relations of subsidiary companies should serve to safeguard the consuming public with regard to reasonable rates and adequate service. In that respect, it is quite clear that indirect regulation of the holding company by the state commissions is both practical and desirable. It is equally clear, however, that state regulation fails to exercise any control over the holding company with respect to the protection of the investing public.⁴⁵ There is a definite need today for Federal regulation of the financial transactions of the holding companies to prevent over-capitalization of these corporations.⁴⁶ It is with the recognition that the case for and against direct regulation of holding companies has been over-stated by the opponents and adherents of the holding company, that the writer closes this article. Certainly, indirect regulation through the state commissions will not be proven a failure until the new statutes of Wisconsin and Alabama have been thoroughly tested. Likewise, there is an obvious need for supplementary Federal direct regulation to safeguard the investing public which is not protected by state regulatory bodies. The holding company has a definite place in our modern economic civilization. But it is imperative that our legislatures, commissions, and courts recognize that American society cannot tolerate the continuation of those legal principles which made possible the outrageous exploitation of the consuming and investing public by the holding companies in the past eight years. The law must either yield to modern changes, or break.

ERNEST O. EISENBERG.

⁴⁵ See Hugh White, *op. cit.*, p. 389: "The Federal government should regulate the security issues of all utility holding companies * * * When the Federal government exercises the authority of regulating holding company securities, it will not only have the right, but if it does the job efficiently, it will be necessary for it to inquire into the entire business of the holding company. Whenever the light is turned upon the affairs of a company whose house is not in order, the disorder stands out in bold relief and will be remedied."

⁴⁶ *Jones & Bigham, op. cit.*, p. 617.