HARVARD POLITICAL STUDIES

PUBLISHED UNDER THE DIRECTION OF
THE DEPARTMENT OF GOVERNMENT
IN HARVARD UNIVERSITY

HARVARD POLITICAL STUDIES

A BRIEF HISTORY OF THE CONSTITUTION AND GOVERNMENT OF MASSACHUSETTS
BY LOUIS ADAMS FROTHINGHAM
(Out of print)

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INTERSTATE TRANSMISSION OF ELECTRIC POWER

PUBLISHED FROM THE INCOME OF THE
LOUIS ADAMS FROTHINGHAM FUND

LONDON : HUMPHREY MILFORD
OXFORD UNIVERSITY PRESS

INTERSTATE TRANSMISSION OF ELECTRIC POWER

A Study in the Conflict of State and Federal Jurisdictions

BY

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HARVARD UNIVERSITY PRESS
CAMBRIDGE, MASSACHUSETTS
1931

PRINTED AT THE HARVARD UNIVERSITY PRESS
CAMBRIDGE, MASS., U.S.A.

TO

PETER AND DAVID

PREFACE

THE interactions of law, government, and economics are exposed to the view of all observers in this day of increasing governmental control of industry. Constitutional interpretation and the form of industrial organization must be considered in devising agencies of control. Constitutional interpretation and government regulation substantially modify industrial development. Finally, the direction of industrial growth and the experiences of government control profoundly influence the trend of constitutional law. These interacting influences are peculiarly evident in the field of government regulation of public utilities, particularly with respect to the division of authority between the federal government and the states. This is perhaps because the commerce clause is no more than a signpost for the guidance of the courts, because the agencies of control are admittedly experimental, and because the utilities are of comparatively recent development and change with astonishing rapidity. It is hoped that this analysis of the problem of the interstate transmission of electric power may contribute something towards a clarification of the issues involved in the regulation of industry in a federal state.

My acknowledgments are few but great. This book would not have been written but for the never-failing

aid and encouragement of Professor A. N. Holcombe of Harvard University. I am also greatly indebted to Professor Henry A. Yeomans of Harvard University for careful reading of the manuscript and helpful suggestions. Professor Thomas Reed Powell of the Harvard Law School was kind enough to read earlier drafts of the second and third chapters. His criticisms and suggestions were invaluable in the putting of these chapters into their present form.

H. L. E.

February, 1931

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ABBREVIATIONS FOR REPORTS CITED

Ann. Proc. Nat. Asso. R. R. & U. Comrs. = Annual Proceedings of the National Association of Railroad and Utilities Commissioners.

Ann. Rep. Ala. P. S. C. = Annual Report of the Alabama Public Service Commission.

Ann. Rep. Ida. P. U. C. = Annual Report of the Idaho Public Utility Commission.

Ann. Rep. Md. P. S. C. = Annual Report of the Maryland Public Service Commission.

Ann. Rep. N. C. C. C. = Annual Report of the North Carolina Corporation Commission.

Ann. Rep. N. D. R. C. = Annual Report of the Board of Railroad Commissioners of North Dakota.

Ann. Rep. Neb. S. R. C. = Annual Report of the Nebraska State Railroad Commission.

Ann. Rep. Nev. P. S. C. = Annual Report of the Public Service Commission of Nevada.

Ann. Rep. Okla. C. C. = Annual Report of the Corporation Commission of Oklahoma.

Ann. Rep. Ore. P. S. C. = Annual Report of the Public Service Commission of Oregon.

Ann. Rep. R. I. P. U. C. = Annual Report of the Public Utilities Commission of Rhode Island.

Ann. Rep. Tenn. R. & P. U. C. = Annual Report of the Tennessee Railroad and Public Utilities Commission.

Ann. Rep. Utah P. U. C. = Annual Report of the Public Utilities Commission of Utah.

Ann. Rep. Va. S. C. C. = Annual Report of the State Corporation Commission of Virginia.

Ann. Rep. Wash. D. P. W. = Annual Report of the Department of Public Works of the State of Washington.

Ann. Rep. Wash. P. S. C. = Annual Report of the Public Service Commission of the State of Washington.

Bien. Rep. Vt. P. S. C. = Biennial Report of the Public Service Commission of Vermont.

Cal. R. C. R. = California Railroad Commission Reports.

Ill. C. C. R. = Illinois Commerce Commission Reports.

Ill. P. U. C. R. = Illinois Public Utilities Commission Reports.

Mass. D. P. U. = Massachusetts Department of Public Utilities, Decisions and Findings.

Mich. P. U. C. R. = Michigan Public Utilities Commission Reports.

Mo. P. S. C. R. = Missouri Public Service Commission Reports.

Mon. U. R. = Montana Utilities Reports.

N. H. P. S. C. R. = New Hampshire Public Service Commission Reports.

N. J. P. U. C. R. = Reports of the Board of Public Utilities Commissioners of New Jersey.

P. U. Fortnightly = Public Utilities Fortnightly.

P. U. R. = Public Utilities Reports.

Pa. P. S. C. R. = Pennsylvania Public Service Commission Reports.

Trien. Rep. Arizona C. C. = Triennial Report of the Arizona Corporation Commission.

Wis. R. C. R. = Wisconsin Railroad Commission Reports.

INTERSTATE TRANSMISSION OF ELECTRIC POWER

I

INTRODUCTION

THE field of public utility regulation is rich in material for those who would study the effect of economic development upon governmental mechanism. In railroad transportation we have seen state control replaced almost completely by centralized regulation under the Interstate Commerce Commission. This transition, however deplored it may have been, was brought about by the transcending of state boundaries and the predominance of national interests in the transportation industry. The rapid growth of other public service industries has stimulated intense discussion as to whether they too have not expanded beyond the scope of state control. Of these utilities none has presented a more critical problem than the electric power industry.

The earliest phase of administrative supervision over this public service was municipal regulation. As inventions and improvements in engineering science extended the possibilities of generating and transmission systems, the industry rapidly outgrew municipal boundaries. Within the past two decades municipal regulation has been almost entirely superseded by state control exercised through state utility commissions. But engineering and economic considerations have frequently necessitated a disregard even for state lines. The location of water and coal resources sometimes requires that generating systems in one state should serve industrial and domestic consumers in other states. Technical improvements in the science of transmission, making it possible to transmit current at high voltage over long distances, have made it more economical in many cases to import power from generating plants in other states. The effort to secure low generating cost combined with uninterrupted service has led to the interconnection of water and steam generating systems, often located in different states. We are now witnessing the harnessing together, by means of interconnection, of great transmission systems, assuring an even distribution of power over large areas by means of mutual interchanges.

Accompanying this physical expansion of transmission systems there has been an astonishing concentration of financial control. The first step in consolidation was the tying together of naturally allied operating units into larger but cohesive operating systems. But with the advent and development of the public utility holding company there has come a new and gigantic process of combination and consolidation. This begins with the purchase of a controlling interest in the securities of operating companies. In this way, and through the medium of intermediary holding companies, scores of operating utilities are grouped under a single financial control. The extent of control actually exerted varies with the type of holding corporation. Some are merely investment companies; others act chiefly as the financial manager of their operating subsidiaries; others are management companies in the real sense of the word, supervising and controlling the corporate activities and the operation of their subsidiaries. Some holding companies follow the policy of consolidating their subsidiary operating units into state-wide or larger systems. In many instances, however, operating units are scattered over twenty or more states, without regard to their physical connection.

These two problems, the physical transmission of power and the concentration of financial control, are allied to a certain extent. The development of interconnecting systems has been made possible largely through this concentration. From another angle, the regulation of the operating utilities is affected in some measure by their relations with the holding companies. On the other hand, the two problems must be studied along entirely different lines. The holding companies have never been recognized as public utilities, because they are not actively engaged in the furnishing of a public service. They have not as yet been regulated by the utility commissions. The problem is, therefore, largely one of studying their activities and the nature and extent of their control over the operating companies with a view to ascertaining if they should be supervised in some manner. That is an undertaking which cannot form a mere part of a study of the regulation of the transmission and distribution of electric power. For that reason it is a subject which will not be dealt with in this discussion.[1]

The purpose of this study is to consider the constitutional and administrative problems arising out of the interstate transmission of electric power. The states

[1] The Federal Trade Commission is now engaged in making an exhaustive investigation into the extent and character of holding company control in the electric power industry, and into the relations existing between the holding companies and their operating subsidiaries

have attempted to extend their jurisdiction to conform to the changing economic situation. This has been done in some cases by restricting interstate transmission, but more frequently by regulating the rates and capitalization of companies doing an interstate business. This action must be considered in the light of judicial interpretation of the commerce clause of the Federal Constitution. Accordingly, Chapters II and III are concerned with the extent to which state control is legally permissible. The remaining chapters deal with the administration of state regulatory laws as affecting interstate transmission and with proposals for new types of control. In these chapters the method of investigation pursued has been intended to provide a clearer conception of the economic and administrative problems than can be obtained from a bare presentation of statistical data and analysis based thereon. What is needed is not so much a knowledge of the quantity of electric power in interstate commerce as of the circumstances under which this commerce is carried on. The most satisfactory way of finding this out seemed to be to examine the proceedings relative to interstate transactions which took place before the state commissions. A study of these cases indicates fairly accurately the nature of the interstate problems which arise and at the same time shows to what extent and in what ways the states are handicapped in dealing with them.

The comprehensiveness and accuracy of this investigation are necessarily subject to certain limitations. In order to keep the material to be covered within reasonable bounds it was necessary to select somewhat arbitrarily a period for which all available commission reports would be examined. The period selected was from 1919 to the present. This is not a serious limitation, partly because the development of long-distance transmission is a very recent matter, and partly because the state commissions did not function in their normal manner during the World War. Valuations and rate proceedings were for the most part neglected owing to lack of appropriations and personnel.

A more serious limitation is that by no means all of the state commission reports from 1919 to the present were available. In some states no decisions and findings are published, while in others only the more important cases are reported. These gaps are filled to some extent by the Public Utilities Reports, which frequently contain commission decisions not otherwise published. All cases of unusual interest are to be found in these compilations. Supplementing the cases there found with those secured from an examination of the reports and the decisions of the state commissions for the past ten years, it was possible to collect a large number of widely scattered cases. Taking into consideration that reports were missing from only three or four states having any large amount of interstate power, it is not likely that many of the cases involving interstate commerce were unreported.

Finally, this method of investigation is subject to the limitations of any study based on written reports. There is infinite variation in the practice of state commissions in making reports of their findings and decisions. Some reports would compare favorably with those of the highest courts. Others are so sketchy as to make it virtually impossible to make any use of them. For this reason it was often extremely difficult to discover the exact circumstances under which an application was made and the character of the business involved. In some cases this incompleteness of data may have resulted in erroneous interpretation, although an effort was made to resolve all doubtful cases by discarding them. The value of such a method of investigation as this would be greatly enhanced if supplemented by discussion with the respective state commissioners of the cases examined which had been decided by them. This was impossible in this study.

II

THE PROHIBITION OF THE INTERSTATE TRANSMISSION OF ELECTRIC POWER

GOVERNMENTAL regulation of the generation, transmission, and distribution of electric power has as its primary object the furnishing of an adequate supply to the consumer at reasonable rates. This regulation ordinarily takes the form of requiring certificates of convenience and necessity for the installation of plants and the building of transmission lines, of outlining requirements as to the rendering of service, and of providing for the supervision of rates and charges. In many cases supervisory control is exercised over the financing and corporate activities of operating companies. The administration of these various regulations is now commonly entrusted to commissions, whose duties are more or less specifically outlined by legislative enactments.

For the purpose of insuring the supplying of all local demands, state legislatures and utility commissions have occasionally provided for a much more drastic method of control. Four states have laws which prohibit absolutely or conditionally the exportation of hydro-electric energy generated within the state. In some cases a prohibitory jurisdiction has been asserted by state commissions, even in the absence of specific legislative authorization. This chapter will deal with the nature of these restrictive statutes and orders, their economic significance, and their legal status.

Statutes and Orders

A Wisconsin statute authorizes the Railroad Commission to render null and void any contracts for the sale of hydro-electric energy outside of the state when such sales are found to interfere with the furnishing of adequate service at reasonable rates to consumers within the state.[1] All applications for permits to develop power dams must contain a statement to the effect that the companies will agree to do what the statute requires.[2] There has been no case where the Railroad Commission has actually cancelled a contract for the exportation of power.[3] In one instance, however, it required an amendment to the petition made by a company for permission to build a dam for the purpose of generating power. The language of the Commission in this case illustrates clearly the contractual arrangement secured by the statute.

The application, as originally filed, alleged that the White River Power Company has no contracts of any kind for the sale of hydroelectric power outside this state and that it does not intend to enter into any contracts for the furnishing of power outside the state of Wisconsin, but did not specifically

[1] *Wisconsin Statutes*, 1925, 31.27. The relevant passage is as follows: "Upon complaint by any party affected, setting forth that any grantee of a permit to develop hydraulic power and generate hydroelectric energy for sale or service to the public is not furnishing citizens of this state with adequate service at a reasonable rate in consequence of sales of such energy outside of the state, the commission shall have power to declare any or all contracts entered into by said grantee for such sales null and void in so far as they interfere with such service or rate. Such declaration shall be made only after a hearing and investigation and a recorded finding that convenience and necessity require the sale of a specified part or all of such energy within this state."

[2] *Ibid.*, 31.16.

[3] Letter from Commission, September 30, 1929.

state that said corporation agrees to cancel all contracts for the sale of hydroelectric power outside this state which shall at any time be found by the Commission to interfere with adequate service and reasonable rates to the people of this state.[1]

The company was required to insert a provision to conform to the statute before the permit was granted. While the Commission has not up to this time interfered with the exportation of energy from the state, it is in a position to establish a policy of preference for domestic consumers whenever it is shown to be necessary.

The West Virginia Water Power Act of 1913 provided that every corporation applying for a permit to develop water powers must consent to regulation by the Public Service Commission to the extent that the exportation of current from the state might be entirely prohibited.[2] No proceeding under this statute ever took place before the Commission because there was no hydro-electric development under it.[3] The Legislature of 1929 amended the water power act, but did not substantially change the provisions affecting the exportation of hydro-electric current. The present law provides as follows:

[1] *Re White River Power Co.*, 28 Wis. R. C. R. 398, 399 (1925).

[2] *Barnes' West Virginia Code Annotated*, 1923, Ch. 54B, Sec. 15. The relevant passage is as follows: "Every corporation in its application for a permit shall agree for itself, its successors and assigns, that the state of West Virginia by its proper authority shall at all times have and freely exercise the power to regulate and control the distribution and sale of all power generated under such a permit to the extent, at the election and discretion of the state by its proper authority of requiring that such power shall be distributed, sold, and used within the state of West Virginia, and such agreement and stipulation shall be signed by the applicant as a part of its application, and shall be incorporated by the public service commission into and as a part of each and every permit that may be granted hereunder. . . ."

[3] Statement in letter from the Public Service Commission of West Virginia, September 30, 1929.

> Under all licenses, excepting those of railroad corporations licensed solely for their own use, the reasonable needs for electric power and energy on part of the state and consumers in this state who can reasonably be served by the licensee shall have preference as compared with the needs of others, and the commission shall have power to enforce this provision by appropriate orders.[1]

This provision constitutes a contract between the licensee and the state.[2] The West Virginia policy, like that of Wisconsin, is to permit the exportation of power under normal conditions, but on such terms that the Commission may prohibit it whenever there is a local shortage.

A third state which places restrictions upon the exportation of hydro-electric power is New Hampshire. It is provided by statute that no corporation shall export such power from the state except with the consent of the Public Service Commission.[3] The Commission is instructed by the statute to grant the permission when there is no available market near by, subject to the condition "that consumers within the state shall be furnished service by said corporations upon terms as favorable as shall be granted to consumers outside the state, having due regard to all facts and conditions which may affect the subject. . . ."[4] In 1922 the Twin State Gas and Electric Company, operating in Maine, New Hampshire, Vermont, and New York, petitioned under this statute for authority to connect its hydro-electric plant at Gorham, New Hampshire, with its electric plant at St. Johnsbury, Vermont, for interchange purposes.

[1] *Water Power Act*, 1929, Sec. 6 (*f*). [2] *Ibid.*, Sec. 3 (*e*).
[3] *Public Laws of New Hampshire*, 1926, Ch. 240, Sec. 33.
[4] *Ibid.*, Sec. 34.

After a public hearing the Commission granted the petition, on the grounds that there was not an available market at a fair price for such electricity in New Hampshire within a reasonable distance of the power development, and that at any rate New Hampshire would probably import more power than it would export by the exchange.[1]

In 1928 a situation arose which resulted in the amendment of the statute. The Grafton Power Company, a subsidiary of the New England Power Association, filed petitions asking for authority to operate as an electric public utility and for that purpose to construct two hydro-electric plants. After conferences and hearings the petitions were granted.[2] When work was under way the company, pursuant to the provisions of the New Hampshire law, filed with the Commission a notice of its intention to engage in the business of transmitting power beyond the confines of the state. Hearings were held in September, 1928, and it was stated that the parent company had a contract with Boston interests for 150,000 kilowatt hours per year, to be supplied largely from the Grafton plants installed or to be installed in New Hampshire. The total completed development was estimated at 400,000 kilowatt hours per year.[3] The Commission conducted investigations to determine the available market in New Hampshire, but no order was issued until June, 1929.

In the meantime the provisions relative to the exportation of power were amended by the legislature. The

[1] *Re Twin State Gas & Electric Co.*, 8 N. H. P. S. C. R. 378 (1922).

[2] *Re Grafton Power Co.*, 11 N. H. P. S. C. R. 455, 517.

[3] *Re Grafton Power Co.*, 12 N. H. P. S. C. R. 194, 196, 197 (1929).

new law stated that corporations engaged or authorized to engage in conveying electric power beyond the confines of the state pursuant to an order of the Commission "shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use." [1] The company thereupon filed a supplementary petition to conform to the amended statute and the Commission then issued its final order, authorizing the exportation of power. It stated that the New Hampshire market was not great enough to absorb the total output, and that under the conditions which could be fixed under the amendment of 1929 the future needs of the state could be safeguarded. These conditions, as well as others pertaining to rates, were affixed to the order.[2]

The reason for the 1929 amendment is obvious. Under the old law consent to export power was required, but there was no method of safeguarding the rights of domestic consumers in case of a shortage or of a growth of local needs. The Commission could not require com-

[1] *Laws of 1929*, Ch. 106.

[2] *Re Grafton Power Co.*, 12 N. H. P. S. C. R. 194, 201. The order contained the following provision: "Said Grafton Power Company shall discontinue such business, in whole or in part, to such extent and under such conditions as the commission may order, whenever after notice to said Grafton Power Company and hearing thereon the Public Service Commission shall find that such electrical energy, or any portion thereof affected by this order, is reasonably required for use within this state, and that the public good requires that it be delivered for such use."

panies exporting power to accord preference to local consumers. Under the present statute New Hampshire, like Wisconsin and West Virginia, exports only surplus power and makes provision for the curtailment of exportation to the extent necessary to supply all reasonable needs in the state.

The Maine law is more drastic than any of the others, in that it prohibits the exportation from the state of hydro-electric power except with the express authorization of the legislature.[1] The Commission has no discretion whatever, and there is no provision for exportation of surplus energy other than by the cumbersome process of a special act of the legislature.[2] Exception was made for those persons, firms, or corporations already engaged in exporting energy at the time the act was passed. Aside from this no hydro-electric power was exported under this statute.[3]

There was an attempt to amend this so-called Fernald law in 1929. A measure was passed by the legislature and submitted to a referendum under the title of "An Act to Provide for the Exportation of Surplus Power."[4] This very complicated act provided that companies might be organized under the general laws of the state to buy surplus power for the purpose of exportation.

[1] *Revised Statutes of Maine*, 1916, Ch. 60, Sec. 1.

[2] "No corporation, unless expressly authorized so to do by special act of the legislature, shall transmit or convey beyond the confines of the state for the purpose of furnishing power, heat or light, any electric current generated directly or indirectly by any water power in this state; nor sell or furnish, directly or indirectly, to any person, firm or corporation, any electric current so generated to be transmitted or conveyed beyond the confines of the state for any of such purposes."

[3] Statement in letter from the Department of State, September 30, 1929.

[4] *Public Laws*, 1929, Ch. 280 (proposed).

These companies were not to be permitted to generate power themselves but only to buy, transmit, and sell. Maine utilities were to be permitted to sell any or all of their surplus power after hearing and investigation by the Public Utilities Commission. This power could be sold only to the above specially incorporated companies and delivered to them at a point not less than one-quarter mile from the Maine boundary. The company selling such surplus power was to pay as an excise tax to the state four per cent of the gross operating revenue receipts from the sale of this excess energy. The provisions of the statute were to be incorporated in all permits and were to constitute a contract between the companies and the state. Revocation of the permit was the penalty for violation of the statute. In spite of a vigorous campaign in behalf of the proposed enactment it was defeated at the polls and the Fernald non-export law is still in effect.

Summarizing these four state water power laws, we find that in New Hampshire hydro-electric power can be exported only with the approval of the Public Service Commission, and in Maine only with the consent of the legislature; and that in Wisconsin, New Hampshire, and West Virginia the Commissions may order the discontinuance of contracts for exportation of hydro-electric power whenever such contracts are found to interfere with the furnishing of adequate service at reasonable rates to consumers within the state.

It is interesting to note that in some cases utility commissions of states which do not have legislation restricting the exportation of water power have inserted provisions in orders to the effect that no power should be transmitted from the state by the applicant until local needs had been met. In one case the Vermont Commission allowed a local utility to purchase a New Hampshire company subject to the condition "that in the sale of electric energy by the said Colonial Power and Light Company, persons doing business in the State of Vermont requiring electric energy for use therein shall have the first right to all electric energy developed by said corporation in Vermont upon demand made for the same."[1] The order further provided that this condition should be considered as a contract between the company and the state. The penalty fixed for violation of the terms of the contract was forfeiture of all right of the corporation to do business in Vermont.

In 1929 the Indiana Commission consented to an Insull merger project involving Illinois and Indiana companies on the condition that no power be exported from Indiana until Indiana consumers had been supplied.[2] Interchange contracts between Illinois and Indiana companies were approved by the Illinois Commission in other cases, with the reservation that the Commission should have the right at any time to cause the contracts to be abrogated.[3]

This means of safeguarding the interests of local consumers was employed by the Maryland Commission in the so-called Conowingo case.[4] This project provided for a dam across the Susquehanna River which would

[1] *Re Western Vermont Power & Light Co.*, Bien. Rep. Vt. P. S. C., 1918–1919, p. 44 (1919).

[2] *Re State Line Generating Co.*, *P. U. Fortnightly*, Vol. III, no. 4 (February 21, 1929), p. 166 (Ind. P. S. C., 1929).

[3] *Re Commonwealth Edison Co.*, 6 Ill. C. C. R. 576 (1927); *Re Central Illinois Public Service Co.*, 6 Ill. C. C. R. 880 (1927).

[4] *Re Susquehanna Power Co.*, P. U. R. 1926-B, 732 (Md. P. S. C., 1926).

form a pool located partly in Maryland and partly in Pennsylvania. Generating plants were to be erected in Maryland but a large part of the power was to be distributed in Pennsylvania. After an extensive investigation and lengthy hearings the Maryland Commission gave its approval to the project, on condition that no power should be exported until Maryland needs had been supplied. It was also stipulated, in order to protect the rate-making power of the Commission, that no energy distributed to Maryland consumers should be placed in interstate commerce.[1]

An extreme assertion of jurisdiction was made by the New Hampshire Public Service Commission in 1927. The Bellows Falls Canal Company, a Vermont corporation, had a dam across the Connecticut River between Walpole, New Hampshire, and Bellows Falls, Vermont. Power was generated on the Vermont side of the dam. The company wished to reconstruct and heighten the dam and build a new plant in Vermont in order to increase its output. This change required the approval of the New Hampshire as well as of the Vermont Commission because part of the dam was in New Hampshire. In its petition the company stated that electricity would be sold to Vermont and New Hampshire utilities.[2] At the first hearing the Commission raised the question as to its jurisdiction to permit a foreign corporation to use the right of eminent domain for the purpose of generating power in another state.[3] The petition was given a rehearing at which legal evidence and new facts were

[1] *Ibid.*, 746.
[2] *Re Bellows Falls Canal Co.*, 11 N. H. P. S. C. R. 174.
[3] *Ibid.*, 177.

presented. The Commission came to the conclusion that the case did not come under the water power statute, because no energy was to be generated in New Hampshire.[1] It also stated that as a foreign corporation, generating its power in another state, the Bellows Falls Company could refuse to sell energy to the New Hampshire companies, or could charge them such a high rate that the New Hampshire consumers would have to pay an unreasonable price for their supply.[2]

To overcome this objection, the company "entered into an agreement and stipulation submitting itself to the jurisdiction of this commission as to the amount of electricity so generated that it should deliver in New Hampshire and as to the reasonableness of the terms upon which it should be delivered." [3] This was inserted as a condition in the order.[4]

The significance of this case is that the approval of the Commission is made subject to the positive condition that the company will import power into the state as the

[1] *Ibid.*, 180. [2] *Ibid.* [3] *Ibid.*

[4] The essential clauses of the stipulation are as follows:

"Whereas, the electricity to be generated by said company may be generated without the limits of the state of New Hampshire; and

"Whereas, said company desires to irrevocably evidence its willingness to perpetually deliver in New Hampshire electricity in such amount of the total electricity which is from time to time generated by virtue of the raising and holding of the waters by said dam as may hereafter be required by the New Hampshire Public Service Commission;

"Now, therefore, the Bellows Falls Canal Company hereby stipulates and agrees with the State of New Hampshire that in consideration of permission being granted to said company by said New Hampshire Public Service Commission to raise the elevation of the water as aforesaid, said company will deliver electricity in New Hampshire for use within that state in such amount of the total electricity which is from time to time generated by virtue of the raising and holding of the waters by the dam as shall be ordered by said commission and under such reasonable regulations as to rates and service as may be from time to time determined by the commission." (181.)

Commission requires.[1] The basis of the Commission's authority, however, seems to be the same as in the other cases. It is that since the discretion exists to grant or refuse the application, the approval may be given subject to any conditions the Commission sees fit to impose. The fact that these conditions are made in the form of an agreement between the state and the company does not mean that the company voluntarily submits to the regulations imposed. It means simply that the company is willing to submit to them because in no other way can it proceed with its project. In this respect these conditional orders are similar to the provisions of the New Hampshire, West Virginia, and Wisconsin water power statutes, which provide that the conditions laid down shall constitute a contract between the state and the company.

Distribution of Water Power Resources

The significant feature of these restrictive statutes and orders is that they represent a conflict between the natural desire of the states to give preference to their own inhabitants in the enjoyment of the benefits of a great natural resource, and the new engineering and

[1] Somewhat similar conditions were prescribed by the Illinois Commission in two instances. In *Re Central Illinois Public Service Co.*, 1 Ill. C. C. R. 165 (1921), the Commission authorized an Illinois utility to guarantee a part of the bond issue of an Indiana company on condition that the former contract with the latter for the purchase of power upon terms agreeable to the Commission. In *Re United Utilities Co.*, 1 Ill. C. C. R. 45 (1922), the Commission permitted an Illinois utility to sell its Wisconsin properties to a Wisconsin company on condition that the Illinois company contract with the Wisconsin company for the purchase of all power generated by the latter not needed for service in Wisconsin. The earlier case is not easy to distinguish from the New Hampshire case, but the latter clearly differs in that it is specifically provided that only the Wisconsin surplus shall be sold and delivered to the Illinois company.

economic tendency to pool the power resources of given areas into interconnected systems, with full and free exchange. Although hydro-electric energy represents only forty per cent or less [1] of the total power generated in the United States, the value of water power sites has been greatly enhanced by the development of interconnected systems. The great disadvantages of water power are that the point of generation may be located in an area of low power consumption, and that its production varies with changes in stream flow. By means of interconnection the diversity in production capacity may be utilized advantageously by moving surplus power from one central station to another.[2] Moreover, substantial economies can be effected by connecting hydro and steam plants.[3]

The uneven distribution of water power resources, however, makes it impossible to realize these economies if the use of hydro-electric energy is confined to the state in which it is generated. The accompanying table shows the distribution of potential resources. In the New England states, where the power demand is largely in the Massachusetts, Rhode Island, and Connecticut area, Maine, which forbids the exportation of water power, has more than half of the potential supply. As a result of Maine's policy the other New England states may ultimately be compelled to obtain power from Canada. The distribution among the Middle Atlantic states is even more unequal, New York having practically all of the resources. Tennessee and Alabama

[1] *Electrical World*, January 4, 1930, pp. 36, 37. The percentage has varied from 36.1 per cent in 1924 to 40.4 per cent in 1928.

[2] Walter H. Voskuil, *The Economics of Water Power Development* (1928), p. 21.

[3] *Ibid.*

possess a large part of the supply in the East South Central region, while four of the eight Mountain states have approximately four-fifths of the potential resources in that section. The three Pacific Coast states have substantially equal resources, but the demands are much the heaviest in California.

DISTRIBUTION OF POTENTIAL WATER POWER RESOURCES IN THE UNITED STATES[1]

Section	Number of states	Percentage of total resources
NEW ENGLAND	6	3.60
Maine	..	1.95
New Hampshire	..	.64
MIDDLE ATLANTIC	3	10.35
New York	..	9.03
EAST NORTH CENTRAL	5	2.53
Illinois	..	.66
Michigan	..	.50
WEST NORTH CENTRAL	7	3.35
Minnesota	..	.73
Iowa	..	.72
Nebraska	..	.62
SOUTH ATLANTIC	8	8.11
Georgia	..	1.74
North Carolina	..	1.48
Virginia	..	1.48
EAST SOUTH CENTRAL	4	3.64
Alabama	..	1.91
Tennessee	..	1.29
WEST SOUTH CENTRAL	4	1.61
Texas	..	.94
MOUNTAIN	8	28.19
Idaho	..	7.33
Montana	..	6.72
Arizona	..	5.25
Utah	..	2.88
PACIFIC	3	38.63
Nearly evenly divided		

[1] These figures are compiled from the United States Geological Survey, "Power Capacity and Production in the United States," *Water-Supply Paper 579* (1928), pp. 123–128. The estimates are for potential water power resources available 50 per cent of the time.

Excluding the three Pacific Coast states, of forty-five states and the District of Columbia possessing 61.37 per cent of the total water power resources of the United States, eighteen states have 45.87 per cent. They have three-quarters of the power resources of these forty-five states and less than half of the population. It is obvious from this distribution that the potential advantages to be derived from interconnected hydro and steam plant systems cannot be attained in the face of restrictive legislation on the part of the states having the great power sites. Up to the present time Maine is the only state in this category which has adopted such a policy. The result has been exceedingly unfortunate for New England as a whole, whatever it may have been for Maine. From the national standpoint, this restrictive legislation cannot but be viewed as undesirable.

The Legality of Restrictive Policies

From the legal standpoint the question is whether or not these statutes and orders exceed the power of the states because of their prohibitory effect upon interstate commerce. The Supreme Court has definitely stated that the transmission of electric current from one state to another is interstate commerce.[1] It is maintained by the states, however, that their control over hydro-electric current is such that its exportation can be restricted or forbidden.[2] The possible assumptions un-

[1] *P. U. C. v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 86 (1927).

[2] It is interesting to observe that state utility commissioners admit uncertainty. The Special Committee on Water Power of the National Association of Railroad and Utilities Commissioners made a survey of non-export laws and concluded that "such provisions may become of prime importance in the future in preserving to the people of the state the first call on its natural

derlying this assertion of jurisdiction are that the states have the power to retain for themselves their natural resources, including hydro-electric energy, and that the control of the states over water and streams within their boundaries is such that exploitation can be forbidden entirely or granted on condition that electric energy generated therefrom shall not be exported. The testing of these assumptions seems to revolve about three fundamental questions. (1) Is electric energy generated by means of water power a natural resource? (2) Admitting for the sake of argument that it is a natural resource, does it follow therefrom that the states can restrict its exportation? (3) Whether or not it is a natural resource, can the states require that it shall not be exported as a condition on the permission to generate and transmit it? The two complicated problems of constitutional law involved in the second and third questions, the power of the states to preserve their natural resources and the doctrine of the constitutionality of unconstitutional conditions, are so inextricably mingled in the relevant cases which have arisen that it seems better not to discuss these questions apart from each other. The attempt to synthesize these two problems may result in lack of clarity at some points but the alternative method of separate discussion would be a patent oversimplification of the issues involved. At any rate the conclusion to resort to this method was the result of trying both.

As for the first question, it is not easy to conceive of

resources, but the fact should also be noted in connection with this provision that its constitutionality is by no means free from doubt." (*Ann. Proc. Nat. Asso. R.R. & U. Comrs.*, 1926, p. 64.)

electric current, in a form suitable for utilization for lighting and power purposes, as a natural resource. One refers to the "generation," "production," or even "manufacture" of electric power. With respect to hydro-electric energy we say that it is "generated" by falling waters. In order to obtain the final utilizable product water must be impounded, dams constructed or natural sites harnessed, and generating apparatus installed. The energy secured is an artificial product whose generation from the basic natural resource requires large financial investment and great technical skill. Steam power is not called a natural resource, although its generation requires the consumption of natural resources — coal or oil.

We cannot get far, however, by a discussion of this question. Its decision would not help much in deciding upon the power of the states to retain their hydro-electric energy because not all natural resources can be kept within the state. Moreover, practically all of the statutes and orders cited seem to rely chiefly on the conditional nature of the grant of the use of water power sites or other privileges and so could be justified apart from the power to preserve natural resources. The remaining part of this discussion, therefore, is not predicated upon any supposition as to whether or not hydro-electric energy is a natural resource. It assumes that it may be, but not that it is or is not.

The chief precedent for the legality of restrictive state policies is the case of *Hudson Water Co. v. McCarter*.[1] This case concerned the validity of a New Jersey statute

[1] 209 U. S. 349 (1908). See Charles E. Gurney, "The Water Power Problem in Maine," *P. U. R.* 1928-D2, p. 15.

of 1905 making it unlawful to transport or carry through pipes, conduits, ditches, or canals the waters of any fresh water lake, pond, brook, creek, stream, or river of the state into any other state. The Hudson Water Company contracted to furnish water to the city of New York and was enjoined by the state of New Jersey. The company set up as its defence the unconstitutionality of the Act of 1905, alleging that it constituted a deprivation of the property of the riparian owners without due process of law; that it impaired the obligation of contracts made with persons outside the state; that it was a denial of equal privileges and immunities to citizens of other states, and that it was an illegal interference with interstate commerce. The statute was sustained by the New Jersey Court of Errors and Appeals mainly on the grounds that the only right possessed by the riparian owners in the body of a stream was to have the flow continue, and that there was a residuum of ownership in the state.[1] An appeal was taken to the Supreme Court of the United States where the decision of the state court was affirmed.[2]

Mr. Justice Holmes, speaking for the majority, recognized "that the State as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned."[3] He added, however, that the Court preferred "to put the authority which cannot be denied to the State upon a broader ground than that which was

[1] 70 N. J. Eq. 695 (1906).
[2] *Hudson Water Co. v. McCarter*, 209 U. S. 349.
[3] *Ibid.*, 355.

emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the State may be said to possess."[1] This "broader ground" was said to be the police power. The private right to appropriate was held to be subject "to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."[2] Upon this principle the act forbidding the exportation of water was upheld as a police measure. The contract was illegal when made because the private rights of property and contract were subject to the initial limitations prescribed in the statute. Nor could the act be called an illegal interference with interstate commerce. "A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end."[3]

The effect of this decision was to give to the water of flowing streams a position comparable to that given wild game in *Geer v. Connecticut* some years earlier.[4] In this case the Supreme Court had upheld a Connecticut statute forbidding the transportation from the state of game birds killed within the state. As in the opinion of Mr. Justice Holmes in the New Jersey case, Mr. Justice White invoked both common law principles and the police power. But whereas the former relied chiefly on the police power the latter stressed the point that from earliest times it had been recognized that the state, in its sovereign capacity as representative of the people,

[1] *Ibid.* [2] *Ibid.*, 356.
[3] *Ibid.*, 357. Mr. Justice McKenna dissented, without opinion.
[4] 161 U. S. 519 (1896).

possessed an ownership in animals *ferae naturae*.[1] From this common ownership flowed the right always to keep the property within the state.[2] Standing in the position of owner the state could forbid the killing of game entirely or grant it on whatever conditions it chose to impose. Therefore, "no contracts made in relation to such property were exempt from the law of the State consenting that such contracts be made, provided only they were confined to internal and did not extend to external commerce." [3] He added, however, that the law might also be justified as a police measure, flowing from the duty of the state to preserve for its people a valuable food supply. This police power he held could be exercised even though interstate commerce was "remotely and indirectly affected." [4]

Even in these two cases, involving what were unquestionably natural resources, it becomes apparent that a close connection exists between the power to keep natural resources in the state and the constitutionality of unconstitutional conditions. Mr. Justice White argues in *Geer v. Connecticut* that a state, either in its proprietary capacity or on the basis of the police power, can prevent absolutely the taking of wild game and *therefore* can permit it on such conditions as it chooses to impose. Mr. Justice Holmes says in *Hudson Water Co. v. McCarter* that the police power of the state to preserve its natural resources for the use of its inhabitants is complete, and that *as a result* such conditions may be im-

[1] *Ibid.*, 529. [2] *Ibid.*, 530.

[3] *Ibid.*, 532. Justices Field and Harlan dissented, while Justices Brewer and Peckham did not hear the argument and took no part in the decision.

[4] *Ibid.*, 534.

posed on their exploitation as the state desires. In each case it is held that the restriction cannot be termed a burden upon interstate commerce because the right to take the thing at all was subject to the condition that it should not be sent out of the state. This reasoning was directly in line with the then prevailing opinion as to the constitutionality of unconstitutional conditions.

The field of foreign corporations has provided the great battle ground for the struggle over this doctrine.[1] In a line of cases beginning with *Paul v. Virginia* [2] the Supreme Court seemed to accept the theory that inasmuch as a state could entirely exclude foreign corporations from doing business within its borders, it might permit them to enter and do business on whatever conditions it wished to impose. In 1876 a statute providing for the revocation of the license of a foreign corporation if it should remove cases to the federal courts was upheld.[3] It is significant that this decision was reaffirmed in a case contemporaneous with *Hudson Water Co. v. McCarter.*[4]

These cases presented logical dilemmas. On the one hand, the states cannot interfere with interstate commerce or prevent resort to federal courts. On the other hand, persons cannot exploit natural resources and foreign corporations cannot do business in a state with-

[1] See "Modern Development of the Doctrine of Unconstitutional Conditions," 42 *Harvard Law Review*, 676 (1929). See also W. W. Willoughby, *The Constitutional Law of the United States* (2nd ed., 1929), Vol. I, pp. 206 ff.; M. H. Merrill, "Unconstitutional Conditions," 77 *Univ. Penn. Law Review*, 879 (1929), and Gerard C. Henderson, *The Position of Foreign Corporations in American Constitutional Law* (1918), Ch. 8.

[2] 8 Wall. 168 (1868).

[3] *Doyle v. Continental Insurance Co.*, 94 U. S. 535.

[4] *Security Mutual Life Insurance Co. v. Prewitt*, 202 U. S. 246 (1906).

out the consent of the state. Up to this point the Court grasped the second horn of the dilemma, insisting that no constitutional provisions are infringed upon because the state, in driving a hard bargain for the sale of its consent, has imposed as part of its price the condition that the constitutional provisions involved shall not be invoked. The assumption is that the state would not give its consent if the constitutional provisions could be invoked. The underlying argument is that a person cannot be said to have a constitutional right when he obtains the consent of the state to exercise one of its privileges on the condition that he shall not invoke the right. He must abide by the terms of the bargain or forfeit the privilege granted by the state.

Both the power of the state to prevent the exportation of its natural resources and its power to require unconstitutional conditions as the price of consent for the exercise of its privileges have been severely modified since the cases above cited were decided. As a matter of fact Mr. Justice White indicated in an obiter dictum delivered in 1900 that the Court intended to limit the application of the principle laid down in *Geer v. Connecticut*.[1] Indiana enacted a statute in 1893 for the purpose of regulating the production of natural gas and preventing its wastage. The statute was upheld on the grounds that by Indiana law the individual had no title to natural gas and oil until extracted, and that the state could therefore regulate the manner of extraction to prevent wastage.[2] But before coming to this conclusion the Court, through Mr. Justice White, pointed out cer-

[1] This was in *Ohio Oil Co. v. Indiana*, 177 U. S. 190.
[2] *Ibid.*, 208.

tain limitations on the power of the state to make regulations affecting natural gas, and one of them was said to be that once natural gas was reduced to possession the state could not prevent the owner from transporting it from the state.[1]

The state had contended that its regulatory authority was complete, even to the point of keeping the gas within the state, on the ground that the principles governing wild game were also applicable to natural gas. Indiana and Pennsylvania cases were cited, as showing an analogy between gas, oil, and water, minerals *ferae naturae*, on the one hand, and wild game on the other.[2] But the analogy merely establishes a similarity of relation, says Mr. Justice White, and does not prove the identity of the two things. The distinction is that as to animals *ferae naturae* the state stands in the position of proprietor, in behalf of the public, and may absolutely prevent everyone from reducing them to

[1] *Ibid.*, 205, citing *State v. Ind. & O. Oil, Gas & Mining Co.*, 120 Ind. 575; 22 N. E. 778 (1889). In this case the Supreme Court of Indiana held invalid a statute making it unlawful to transport natural gas from the state.

[2] *Brown v. Vandergrift*, 80 Penn. St. 142, 147, 148 (1875); *People's Gas Co. v. Tyner*, 131 Ind. 277, 280 (1892). The analogy was said to exist in the peculiar nature of each, whereby the property, though at one moment on one's land, might the next have moved on, whereupon the right of ownership was gone. In *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Penn. St. 235 (1889), it is stated as follows: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract was uncertain,' as said by Chief Justice Agnew in *Brown v. Vandergrift*. . . . They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas."

possession, whereas with respect to minerals *ferae naturae* the state has merely a sovereign or governmental interest to protect the rights of the surface owners, to provide an equitable distribution between them, and to prevent wastage.[1]

This obiter dictum that a state could not prohibit the exportation of natural gas was accepted in *Oklahoma v. Kansas Natural Gas Co.*, decided in 1911.[2] This case in-

[1] 177 U. S. 190, 208, 209. The relevant passage is as follows:

"This follows because things which are *ferae naturae* belong to the 'negative community'; in other words are public things subject to the absolute control of the State, which, although it allows them to be reduced to possession, may at its will not only regulate but wholly forbid their future taking . . . But whilst there is an analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals *ferae naturae* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character . . . On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property."

[2] 221 U. S. 229.

volved an Oklahoma statute providing that no corporation organized for the purpose of or engaged in the business of transmitting natural gas within the state should be granted a charter, or right of eminent domain, or right to use the highways of the state unless it should be expressly stipulated that gas would be transmitted only to points within the state. Mr. Justice McKenna, speaking for the Court, referred first to the contention of the state that the ruling principle was conservation, not commerce, and that the statute was a reasonable exercise of the police power to preserve the gas from being used up in the near future, and from being sold in other states while Oklahoma cities were still unsupplied.[1] It was claimed that the effect on interstate commerce, if any, was only incidental. With this contention the Court did not agree. Statutes of true conservation, said Mr. Justice McKenna, such as the one involved in *Ohio Oil Co. v. Indiana*, are valid. A state may regulate the taking of natural gas to prevent waste. But the law in the present case does what the Court took pains to show the Indiana law did not do. This law not only regulates the right of reduction to possession of the gas, but when the gas becomes property it takes from it the attributes of property by refusing to allow the owner to dispose of it in interstate commerce.[2] The state recognizes it to be the subject of intrastate commerce but refuses to allow it to become the subject of interstate commerce. The purpose of the conservation is mainly the business welfare of the state, and would hold as readily for coal and timber as for gas.[3] *State v. Indiana*

[1] *Ibid.*, 245. [2] *Ibid.*, 254.
[3] *Ibid.*, 255.

& Ohio Oil, Gas and Mining Co. was cited as showing that this was an unlawful burden on interstate commerce.[1] Granted that natural gas reduced to possession is a commodity of commerce, said Mr. Justice McKenna, a state cannot say that it shall never become an article of interstate commerce.[2]

Justices Holmes, Lurton, and Hughes dissented, but without opinion.

The first reaction from reading the opinion of the Court in this case is that *Geer v. Connecticut* and *Hudson Water Co. v. McCarter* have in effect been overruled. There is no reference to Mr. Justice White's subtle distinction between animals *ferae naturae* and minerals *ferae naturae.* It is simply stated that if natural gas when reduced to possession can be a subject of commerce at all it can be a subject of commerce among the states. The decision in the wild game and water cases was that articles in internal commerce could be forbidden to enter interstate commerce. The language of the cases cannot easily be reconciled.

It must be kept in mind, however, that Mr. Justice McKenna dissented in *Hudson Water Co. v. McCarter.* He apparently did not think the states could prohibit the exportation of any of their natural resources. The other majority justices in the Oklahoma case may have followed the distinction made in *Ohio Oil Co. v. Indiana* and may have thought the gas statute bad because of the lack of a proprietary jurisdiction by the state. If the state police power alone were involved, apart from any common law principles of proprietorship, the cases would obviously be irreconcilable. It would appear

[1] *Ibid.*, 256. [2] *Ibid.*

from the language of the water diversion case that it was decided apart from these principles. But we know from later cases that Mr. Justice Holmes thinks the states can forbid the exportation of any of their natural resources. The other members of the Court in the New Jersey case may have accepted the opinion without realizing its significance. The opinions in the two cases were written by members who held opposing extreme views and it would be inadvisable to conclude on the basis of these opinions that the Court had turned a complete somersault by 1911.

A strong plea for the power of the state to keep its natural resources for its own inhabitants was made a few years later by West Virginia in one of the most involved and perplexing cases ever before the Supreme Court.[1] Aroused by the discovery that the supply of natural gas in the state was rapidly diminishing and that local needs were being inadequately supplied, the West Virginia legislature passed an act in 1919 requiring natural gas utilities, to the extent of their supply of gas produced in the state, to satisfy the needs of all intending consumers in the state. The act also authorized the Public Service Commission, upon a finding that a local company was without an adequate supply for the furnishing of local needs, to order another company having gas in excess of what was required for consumers within the state to furnish the supply lacking to the other com-

[1] *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923). The case was first argued in December, 1921. It was restored to docket for reargument in January, 1922, and reargued in February and March of that year. It was again restored to docket in November, 1922, reargued in April, 1923, and decided two months later, with three justices dissenting.

pany.[1] The states of Pennsylvania and Ohio, before any action under the statute had been taken by the state of West Virginia or the Public Service Commission thereof, brought suits to enjoin the enforcement of the act, upon the grounds that it would curtail or cut off the supply of natural gas produced in West Virginia and carried by pipe lines into Pennsylvania and Ohio, and there sold for fuel and lighting purposes.[2]

The Court sustained the application for the injunction on the ground that the statute was unconstitutional. Mr. Justice Van Devanter, who delivered the majority opinion, first disposed of the contention that the Court had no jurisdiction.[3] The statute, he said, raises the question whether a state may withdraw a product from an established current of commerce moving into another state, and consequently it involves an interpretation of the commerce clause and is a justiciable controversy.[4] Nor was the suit prematurely brought because the act had not been tested in actual practice. "One does not have to await the consummation of threatened injury to obtain preventive relief," said Mr. Justice Van Devanter.[5]

The opinion then went on to discuss the principal issue, "whether a State wherein natural gas is produced and is a recognized subject of commercial dealings may require that in its sale and disposal consumers in that

[1] Acts 1919, Ch. 71. Quoted at 262 U. S. 582.

[2] 262 U. S. 553, 555.

[3] It should be noted that the first time the Court restored this case to docket it specifically stated that it should be reargued with special reference to the questions whether the suit was not prematurely brought and whether the bill presented a cause justiciable between the parties.

[4] *Ibid.*, 591.

[5] *Ibid.*, 593.

State shall be accorded a preferred right of purchase over consumers in other States, when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current whereby it is supplied in other States to consumers there. Of course, in the last analysis, the question is whether the enforced withdrawal for the benefit of local consumers is such an interference with interstate commerce as is forbidden to a State by the Constitution."[1] The question, the opinion continued, is an important one, because what one state may do with one natural product others may do for other natural products. But notwithstanding its importance, "its solution is not difficult." This latter assertion is somewhat surprising in view of the history of the case.

In short, Mr. Justice Van Devanter held that the transmission of natural gas is interstate commerce; that any state law which by its necessary operation prevents, obstructs, or burdens it is a prohibited interference; and that the present law of West Virginia clearly constitutes such an interference.[2] The quasi-public character of the business does not alter the situation. Even in the regulation of these businesses the state may not regulate the interstate business to the advantage of the local consumers.[3] Nor is any merit seen in the contention that the gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer adequate for all needs, and that the act is therefore a legitimate measure of conservation in the interest of the state. That contention the justice regards as

[1] *Ibid.*, 595.
[2] *Ibid.*, 597.
[3] *Ibid.*, 597.

having been met and overruled in *West v. Kansas Natural Gas Co.*,[1] where the question was "in essence the same." [2]

Finally, the opinion disposed of the claim that the bills should be dismissed because the Court could not prescribe and execute regulations respecting the apportionment of the gas among the states, by saying that the Court was merely enjoining the enforcement by West Virginia of an unconstitutional enactment.

> To dismiss the bills and leave the act to be enforced would be quite inadmissible. If there be need for regulating the interstate commerce involved, the regulation should be sought from the body in whom the power resides.[3]

The dissenting opinions of Justices McReynolds and Brandeis deal with the jurisdictional aspects of the case, although Mr. Justice Brandeis says that he regards the argument of Mr. Justice Holmes as unanswerable.[4] The latter's contention is that the statute reaches the natural gas before it has begun to move in commerce of any kind, and that it applies only to gas hereafter to be collected. Furthermore, "products of a State until they are actually started to a point outside it may be regulated by the State notwithstanding the commerce clause." [5] There is no substantial difference, he adds, between the present form of regulation and a tax on mining ore destined to leave the state; [6] nor between the present statute and one forbidding the sale or offer for shipment of immature citrus fruits; [7] nor between this

[1] 221 U. S. 229, *supra*.

[2] 262 U. S. 553, 598.

[3] *Ibid.*, 600.

[4] *Ibid.*

[5] *Ibid.*

[6] *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172 (1923).

[7] *Sligh v. Kirkwood*, 237 U. S. 52 (1915).

act and the Connecticut wild game statute;[1] nor between this act and one regulating the use of natural gas so as to prevent waste;[2] nor between this act and one prohibiting the manufacture for export of colored oleomargarine.[3] "I see nothing in the commerce clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages," says Mr. Justice Holmes.[4] It is admitted that there is some general language in the Kansas Natural Gas case,[5] "a decision that I thought wrong,"[6] implying "that Pennsylvania might not keep its coal, or the northwest its timber. But I confess I do not see what is to hinder."[7] Mr. Justice Holmes concludes his dissent with the statement that "the Constitution does not prohibit a State from securing a reasonable preference for its own inhabitants in the enjoyment of its products even when the effect of its law is to keep property within its boundaries that otherwise would have passed outside."[8]

It is not easy to agree with Mr. Justice Holmes that there is no substantial difference between the West Virginia statute and the measures cited by him. The tax on mining ore and the regulation of gas to prevent wastage did not discriminate against interstate commerce. Furthermore, regulation and taxation are not necessarily the same thing as prohibition. The citrus fruits and the colored oleomargarine were held not to be legitimate articles of commerce. As for wild game and natural gas,

[1] *Geer v. Connecticut*, 161 U. S. 519 (1896).

[2] *Walls v. Midland Carbon Co.*, 254 U. S. 300 (1920).

[3] *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238 (1902).

[4] 262 U. S. 553, 602.

[5] 221 U. S. 229, 255.

[6] 262 U. S. 553, 602.

[7] *Ibid.*

[8] *Ibid.*, 603.

there is, as Mr. Justice White said in *Ohio Oil Co. v. Indiana*, a similarity of relation but not an identity. With respect to animals *ferae naturae* the state stands in the position of proprietor, as representative of the people. With respect to minerals *ferae naturae* it has only a governmental interest to protect the rights of the surface owners and to prevent wastage. A state can give a preference to its own inhabitants in the enjoyment of its products only when this element of common proprietorship is present.

A recent case indicates that even as to animals *ferae naturae* the authority of the state is not that of absolute proprietorship. In *Foster Packing Co. v. Haydel* the Court held invalid the Louisiana Shrimp Act.[1] This act declared that all shrimp and parts thereof in Louisiana waters were the property of the state, and regulated their taking and reduction to private ownership. It made it unlawful to export from the state any shrimp from which the heads and hulls had not been removed, and also to export raw shells, heads, and hulls, these being useful for the manufacture of fertilizer. There were no restrictions on the exportation of meat obtained from shrimp whose heads and hulls had been removed. The facts alleged showed that 95 per cent of the shrimp caught in Louisiana waters were for outside consumption, and that for many years the shrimp had been taken to the canning plants at Biloxi, Mississippi. These plants were almost totally dependent on the Louisiana Marshes for their supply of shrimp. The Court, through Mr. Justice Butler, said that in view of these facts and

[1] 278 U. S. 1 (1928). The relevant provisions of the act are found at pp. 5–7.

the provisions of the act it was apparent that conservation was a feigned purpose. The real purpose was declared to be "to prevent the interstate movement of raw shrimp from the Louisiana Marshes to the plants at Biloxi in order through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana." [1] This was held to be unlawful. "A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." [2] The Court recognized that animals *ferae naturae* were not private articles of trade and admitted that according to the principles accepted in *Geer v. Connecticut*, the state of Louisana, as representative of its people, might have retained the shrimp for consumption and use therein. It does not follow, however, that the state can retain the shrimp for other purposes. Were it absolute proprietor it could do so, but ownership is really vested in the people of the state. The Court held that when the state authorized the interstate shipment of the food it released its control, and that the shrimp thereby became private articles of trade.

Mr. Justice McReynolds dissented. He thought that the state had absolute control over the shrimp and that it could require canning before exportation.[3]

The effect of this decision is to qualify to a considerable extent the control of the state over wild game.

[1] *Ibid.*, 10. [2] *Ibid.*

[3] *Ibid.*, 15. In *Johnson v. Haydel*, 278 U. S. 16, the Louisiana Oyster Act was held invalid, the Court merely stating that the same principles governed as in the Shrimp case.

From the statement in *Geer v. Connecticut* that the state is proprietor in behalf of the people the Court deduces the principle that the control of the state is limited to conservation. The reason for this deduction is not clearly apparent. Even though the state is proprietor only as representative of the people, why has it not the authority to exercise its control over wild game for the industrial as well as for the alimentary welfare of those for whom it stands? Granting that there may be a distinction, it is hard to believe that the Court is not paring down *Geer v. Connecticut* in order to prevent as far as possible interference with interstate commerce. Whatever the motive for the decision, the case seems to have an important bearing on water power legislation. Restrictions on the exportation of water power may be designed to attract industries and manufacturing plants as well as to conserve a natural resource. The Court might draw a distinction between absolute prohibition and the according of preference to local consumers.

This recital of cases is given to indicate the ambiguity of the opinions and the respective attitudes of the present members of the Court. The language of the opinions is such that one cannot be sure whether the Court is making a distinction between the proprietary and sovereign capacities of the state, or whether it is in reality getting away from the earlier cases. The use of the argument that if one state can keep its natural gas, others may keep their coal, timber, and other resources suggests strongly that the Court senses the danger of a war of discrimination and retaliation between the states, such as the commerce clause was designed to prevent, and wishes to forestall the possibility of its occurring.

Mr. Justice Holmes has from the first insisted that these cases should be treated as involving the extent of the state police power, irrespective of what he terms the "more or less attenuated residuum of title." [1] On the basis of the police power he believes that the states can retain all of their natural resources. Mr. Justice Brandeis is on record as being in accord with him on this point. Mr. Justice McReynolds dissented in the West Virginia case, but on jurisdictional grounds. We do not know what he thought as to the validity of the statute. He thought the Louisiana Shrimp Act valid. It should also be noted that Mr. Justice Hughes dissented with Justices Holmes and Lurton in the Oklahoma case.

On the other hand, Mr. Justice Van Devanter was with the majority in both the West Virginia and the Oklahoma cases. Justices Sutherland and Butler also were with the majority in the West Virginia case, the only one of these cases in which they participated. Either because they accept the learned opinion of Mr. Justice White on the distinction between the proprietary jurisdiction of the state over animals *ferae naturae* and its sovereign or governmental jurisdiction over minerals *ferae naturae*, or for reasons suggested above, they do not think that the Constitution allows a state to keep its natural gas. They have subscribed to an opinion where it is implied that a state cannot keep its oil or timber.

We have it from Mr. Justice Sutherland that the validity of legislative enactments cannot be decided by counting heads. But when some members of the Su-

[1] This is perhaps why he did not dissent in *Foster Packing Co. v. Haydel.* The restriction there was based on title.

preme Court think that statutes prohibiting the exportation of natural resources are valid and others think that they are invalid we know of no other method. It is inconclusive in the present instance because we do not know how to count the heads of Justices Stone, Roberts, and McReynolds. It is conceivable that the Court as now constituted would uphold this restrictive legislation. In view of the hesitancy of the Court in expressly reversing itself, however, it seems very unlikely that it will be baldly proclaimed that a state has an unrestricted right to preserve all of its natural resources for its own use.

As might be expected, the apparent trend in the decisions of the Supreme Court against the power of the states to keep their natural resources has been accompanied by the waning of the doctrine of the constitutionality of unconstitutional conditions. There was evidence of this, of course, in *Oklahoma v. Kansas Natural Gas Co.* The statute there provided that certain privileges should not be granted to gas companies unless they stipulated that they would not transmit gas from the state. The Court grasped the other horn of the dilemma this time and pointed to the immovable object of the commerce clause. In the earlier cases the statutes were viewed as valid because the condition of non-exportation related to a privilege which the state could withhold at its discretion. Here the statute is held invalid because the condition necessarily results in a prohibition of interstate commerce.

More direct evidence of the paring down of the doctrine is found in cases involving foreign corporations.

Between 1910 and 1916 the Court held invalid three attempts of the states to revoke licenses of foreign companies for resorting to the federal courts.[1] The earlier cases were distinguished on the ground that the companies were there subject to the complete control of the state because doing only an intrastate business, whereas the present companies were engaged in interstate business. The opinions did not always emphasize this distinction, however, and in 1922 the Court, through Mr. Chief Justice Taft, declared that a state could not, in imposing conditions upon the entrance of a foreign corporation to do business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, without regard to whether it was doing a state or an interstate business.[2] This conclusion, said the Chief Justice, "rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to Federal Courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, *as in the exercise of all others of its sovereign powers,* is subject to the limitations of the supreme fundamental law." [3] The opinion then stated that the earlier cases sustaining such unconstitutional conditions must be considered as overruled.[4]

[1] *Herndon v. Chicago, R. I. & Pac. Ry. Co.,* 218 U. S. 135 (1910); *Harrison v. St. Louis & S. F. R. R. Co.,* 232 U. S. 318 (1914); *Wisconsin v. Phil. & Reading Coal & Iron Co.,* 241 U. S. 329 (1916).

[2] *Terral v. Burke Construction Co.,* 257 U. S. 529, 532.

[3] *Ibid.* Italics mine.

[4] *Ibid.*

Conditions requiring the assent of foreign corporations to taxes placing a burden on interstate commerce, conditions requiring them to submit to the regulation of business and the taxation of property outside the state, and conditions contrary to the equal protection clause of the Fourteenth Amendment were likewise held to be beyond the power of the state to impose as the price of permission to do business in the state.[1]

The most sweeping language in this connection is found in Mr. Justice Sutherland's opinion in *Frost Trucking Co. v. R. R. Commission.*[2] In this case the Court held invalid a California statute providing that all private carriers using the public highways should submit to the same regulation as common carriers. It is not disputed, said Mr. Justice Sutherland, in delivering the opinion of the majority, that legislative fiat cannot change private carriers into public carriers without their consent. It follows, then, that "the naked question which we have to determine . . . is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so." [3] If this is so, he continues, "constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion." [4]

[1] See Willoughby, *op. cit.*, and Merrill, *op. cit.*, and cases there cited.
[2] 271 U. S. 583 (1926).
[3] *Ibid.*, 592.
[4] *Ibid.*, 593.

Then follows this statement:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.[1]

In the light of this opinion it is not surprising to find the statement that "the early conception that a state's right of absolute prohibition includes the right to regulate on any terms has been almost entirely repudiated."[2]

Taking into consideration the decisions in the gas cases and the sweeping language in the Frost case it would seem that the invalidity of the water power statutes and orders could not be subject of much doubt. It is unlikely that hydro-electric energy could be called a natural resource, and even if it is the Court has apparently limited the application of the principles involved

[1] *Ibid.* Justices Holmes, Brandeis, and McReynolds dissented. The ground of dissent, however, was not the right of the state to impose whatever conditions it chose, but that the nature of the business was such as to subject it to the regulations provided for. There being no right to go unregulated, it could not be claimed that the Fourteenth Amendment was violated.

[2] 42 *Harvard Law Review*, 677.

in *Geer v. Connecticut* and *Hudson Water Co. v. McCarter* to the specific circumstances found in those cases. And the decline of the doctrine of the constitutionality of unconstitutional conditions would seem to make it impossible for the states to exact an agreement of non-exportation in return for the privilege of developing power sites, exercising the right of eminent domain, or other privileges.

One learns, however, that nothing is certain in the realm of constitutional law. In 1927 the Court handed down a unanimous decision which at first sight it seems impossible to reconcile with the preceding cases on unconstitutional conditions.[1] This case is particularly significant in that it involved a provision of the Wisconsin Water Power Act of 1925. This provision was that all applicants for the development of water power sites should agree to recapture by the state on such terms as fixed by the state, and that applicants should waive all right to any further compensation. Plaintiffs filed a petition to repair their dam. The Railroad Commission rejected the petition because the conditions of section 31.09, above, were not included. Plaintiffs brought suit for a writ of mandamus ordering the Commission to proceed with the examination of the application, alleging that section 31.09 constituted a deprivation of property without due process of law because of the method of computing the fair value of the property. The provision was upheld in the trial court and sustained in the Supreme Court of Wisconsin by an evenly divided Court.[2]

[1] *Fox River Co. v. R. R. Comm.*, 274 U. S. 651.
[2] 189 Wis. 626 (1926).

Mr. Justice Stone, speaking for the Supreme Court of the United States, said that the question to be decided was whether the plaintiffs had any right which could be protected by the Fourteenth Amendment. The existence of that right, he said, depended entirely upon the construction given by the state courts of the rights of riparian owners to develop power sites. The trial court, the only court to express an opinion on this point, had decided that the right of the riparian owners was subordinate to the plenary power of the state to regulate the use or obstruction of the stream. The state might forbid any use at all, and consequently the right of the riparian owners was an inchoate right until the state had given its consent. The words of the trial court were quoted, without comment:

> "If the legislature may wholly refuse permission to erect a dam or other structure in the navigable waters of the state, it follows that it may grant such permission upon such terms as it shall determine will best protect the interests of the public." [1]

The Fourteenth Amendment, continued Mr. Justice Stone, affords no protection to supposed rights of property which state courts determine to be non-existent. It makes no difference, then, whether or not the recapture provisions would be a deprivation of property without due process of law, for even assuming that they do go too far there is no property right to be protected. The opinion concludes with the statement that "compliance with section 31.09 is the price which plaintiffs must pay to secure the right to maintain their dam." [2]

[1] 274 U. S. 651, 654.
[2] *Ibid.*, 657.

The more carefully this opinion is regarded the more difficult it is to reconcile it with the line of decisions culminating in the Frost case.[1] And yet the Court must have thought the case very different, for not a word is said about unconstitutional conditions or any of the cases thereon. It must have been assumed that there was no question of an unconstitutional condition because the riparian owner had to have the consent of the state before he could claim any right under the Fourteenth Amendment. But the inescapable conclusion from the language used in the previous cases is that the state cannot make its consent conditional upon the waiver of the right to resort to constitutional guarantees. If the final result of the imposition is to deprive the permittee of constitutional privileges the condition cannot be demanded.[2] In other words, if a state cannot by legislative fiat provide that all water power developments shall be valued upon a basis adjudged not to meet the requirements of the Fourteenth Amendment, it cannot reach the same result by requiring all applicants, as the price of being permitted to develop water power sites, to agree to the admittedly unconstitutional method of valuation. It is hard to see any other possible interpretation of the Frost case and its forerunners.

If the principle that the state cannot use its most characteristic powers to reach unconstitutional results is to be maintained in spite of this case, is the explanation for this decision to be found in the peculiar nature of the power of the state in respect to its waters? Did

[1] Merrill, *op. cit.*, p. 888, believes the cases irreconcilable.

[2] "The States cannot use their most characteristic powers to reach unconstitutional results." *Burnes National Bank v. Duncan.*, 265 U. S. 17, 24 (1924), quoted in the Frost case, 271 U. S. 583, 599.

the Court believe that the relation of the state to the water of flowing streams was of such a character that it could prescribe conditions on its use which it could not prescribe as a condition to the exercise of the right to use the highways, or of eminent domain, or of the other characteristic powers of the state? Had the state courts advanced a theory of government proprietorship in the streams this might seem plausible. Mr. Justice Stone took considerable pains, however, to point out that the rights of riparian owners in Wisconsin were even greater than in many states. The title to the bed of the stream was said to be in the riparian owners, with the state having merely the regulatory right to control its use and prevent injurious obstructions. So far as the nature of the state's power is concerned it seems to be that of sovereign and not of proprietor. It is emphasized, however, that the state could prevent altogether the building of dams, and that therefore it could permit them to be built on such conditions as it saw fit. Is the distinction made that between the power to deny altogether the use of something, and the power to deny altogether the use of something to a particular applicant? Mr. Justice White seems to have had in mind some such line of demarcation in distinguishing the power of the state over animals *ferae naturae* from its control over minerals *ferae naturae* in *Ohio Oil Co. v. Indiana.*[1] It was said that the taking of the former could not only be regulated, but could be entirely prohibited to all, whereas with the latter the state had only a regulatory right.[2] This distinction, however, appeared to be based on the

[1] 177 U. S. 190.
[2] *Ibid.*, 208, 209.

principle that the state was in the position of proprietor as to animals *ferae naturae*, while in the instant case it is specifically stated that the power of the state is a regulatory one. Unfortunately these words do not mean much. We find Mr. Justice Stone saying that the plaintiff's case rests upon the contention that under the laws of Wisconsin riparian owners are allowed to develop water powers subject to mere police regulation by the state.[1] He finds, apparently, that the power of the state is something more than mere police regulation. It is not the power of proprietorship, for the riparian owners own the bed of the river by Wisconsin law. This right is subject to the power of the state to regulate the use of the river and to prevent obstructions, to the extent that "the riparian owner can have no right in the water power created by damming a navigable river, so long as the state withholds its consent to the construction or maintenance of the dam."[2] Whatever kind of jurisdiction this may be, it is held that the fact that it enables the state to forbid the construction of dams altogether enables it to grant the permission on any terms. Whereas we thought after the Frost case that a state could not use its powers to bring about the waiver of constitutional guarantees, we now know that it can use one of its powers to bring about the waiver of at least one constitutional guarantee.

If the basis for distinction is not to be found in the substantive character of the privilege, is it to be found in the question whether the condition affects other interests than those of the grantee? If the condition places a burden or discrimination on any federal power it

[1] 274 U. S. 651, 654. [2] *Ibid.*, 656.

might be held invalid, while conditions affecting only the rights of the grantee could be held valid.[1] The decisions in the foreign corporation cases could be distinguished because the federal judicial power is involved. It is not easy to see how the Frost case could be distinguished on this basis, however, and it is certain that the language in that case leaves no loophole for any such distinction.

Reiterated applications and overstatements of two conflicting principles have placed the Court in a dilemma. It has been declared time and again that the power to deny the use of a state privilege carries with it the power to grant it on any conditions. It has also been categorically stated that a state cannot use any of its characteristic powers to accomplish unconstitutional results. In deciding particular cases the Court takes hold of whichever horn of the dilemma will save it, without admitting that the dilemma exists. In one case it invokes the irresistible force and in another the immovable object. The cases do not yet seem to be sufficient in number and variety of circumstance to enable one to discover the guiding light which leads the Court in making its choice.

Does the decision in the Fox River case mean that section 31.27 of the Wisconsin Water Power Act, authorizing the Railroad Commission to cancel contracts for the sale of power outside the state and making companies agree to this provision as the price of securing development permits, is also valid? If there is no right

[1] See Merrill, *op. cit.*, pp. 882 ff. He suggests this criterion as the most satisfactory boundary mark between constitutional and unconstitutional conditions.

in the water power before the consent is secured how can there be a right to engage it in interstate commerce? Of course this has been the contention of Mr. Justice Holmes in the gas cases. He has been consistently overruled there, although the Court has admitted that natural gas was not the property of the surface owner until reduced to possession by extraction. The owner could not be compelled to waive his constitutional right to engage in interstate commerce, but the riparian owner in the Fox case could be compelled to waive his constitutional right to secure a "fair value" for his property. In both cases the right of the applicant is an imperfect one until the consent of the state is obtained. The non-exportation cases, whether regarding gas or electric power, cannot be distinguished from the Fox River case on the basis of the substantive character of the privilege. In the Wisconsin statute, of course, an identical privilege, the development of water power sites, is the basis for both the valuation and the non-export conditions. A difference does exist, however, in respect to the interests affected. The non-export provisions concern broader interests than those merely of the grantee and affect the national power over interstate commerce. In the condition concerning valuation only the interests of the grantee are affected and there is no burden on or discrimination against any federal power. Accepting this as the criterion, what the boundary between constitutional and unconstitutional conditions would be is hard to say, but conditions burdening interstate commerce would clearly be invalid on that basis.

If any further illustration is necessary to show the chaos existing in this field, it may be found in a case decided by the Tennessee Chancery Court in 1928.[1] In this case the Court held invalid a number of conditions imposed by the Utilities Commission on all applicants for permission to develop water powers. One condition was that the companies agree to pay a fee based on the production of the plant; another was that the charter should be forfeited at the option of the Commission if the company should enter into any unlawful trust or combination; finally, there were conditions regarding the method of valuation for the purposes of recapture and rate fixing, substantially the same as in the Wisconsin case. In spite of the fact that the decision was made a year after that in the Fox River case, the latter was not mentioned, and the case cited and quoted was *Frost v. R. R. Commission.* In this case there was no act of the legislature, but the Court merely said in that connection that inasmuch as it had been decided that the state legislature could not impose unconstitutional conditions an administrative body certainly could not. It was maintained as to the valuation provisions that under the Fourteenth Amendment questions of what elements should be considered in fixing a fair value must finally be determined by the federal courts, and that it was unreasonable and arbitrary to compel the applicant to agree to the rule of the Commission because he might thereby be estopped from asserting his constitutional rights.[2]

We leave the doctrine of unconstitutional conditions and the entire subject of state restrictions on the expor-

[1] *Tennessee East. Elec. Co. v. Hannah,* P. U. R. 1928-D, 50. Affirmed by the Supreme Court of Tennessee in 157 Tenn. 582 (1928).

[2] P. U. R. 1928-D, 72.

tation of water power at this point. The state of the law is such that it would be audacious to prophesy as to the outcome. On the grounds of policy too, there are conflicting interests and considerations: questions of conservation, local preference, and local industrial development as opposed to the most effective regional utilization of each state's resources in interconnected systems. The courts should keep in mind that a decision upholding the power of the state to refuse to permit its hydroelectric energy to be exported will retard the development of these regional and national systems.

III

INTERSTATE TRANSMISSION AND THE REGULATION OF RATES

THE regulation of rates charged for the furnishing of electric current is the most general of the functions of state utility commissions, insofar as light and power companies are concerned. Forty states have commissions exercising such jurisdiction.[1] To the extent that this regulation applies to current generated, transmitted, and used wholly within one state we are not here concerned. It frequently happens, however, that power generated in one state is transmitted across state lines and distributed in another state or sometimes even in other states. The first part of this chapter will deal with the amount of this interstate power. The second part will deal with the question how far the states can go in regulating the sale and distribution of interstate current without conflicting with the constitutional protection given to interstate commerce.

THE AMOUNT OF POWER TRANSMITTED ACROSS STATE LINES

Statistical bulletins on this problem were issued by the Harvard University Bureau of Business Research for 1926,[2] by the National Electric Light Association for

[1] W. E. Mosher, *Electrical Utilities* (1929), p. 34; see also Chart in Bonbright and Company's "Survey of State Laws on Public Utility Commission Regulation" (2nd ed., 1930).

[2] "Interstate Transmission of Power by Electric Light and Power Companies in 1926," Bureau of Business Research, Harvard University, Vol. XIV, No. 9, Bulletin No. 68 (December, 1927). Hereinafter referred to as H. U. Bulletin.

1928,[1] and by the Federal Trade Commission and the National Electric Light Association for 1929.[2] Different methods of computation make it difficult to form conclusions as to the extent of interstate transmission and the rate of increase. The most significant figures found for each study have been summarized in tabular form. There is a striking discrepancy between the Federal Trade Commission and the National Electric Light Association figures for 1929. The ratio of outward movement to total power generated is found to be 15.18 per cent by the former, and only 11.84 per cent by the latter. The inclusion of international transmission in the Federal Trade Commission data is more than offset by the inclusion of generation and transmission figures for railroad and governmental plants. The difference is adequately explained in correspondence between the Association and the Commission, which has been incorporated in the final report. In cases where power was interchanged across state lines between interconnected companies, the Commission figures apparently show gross transfers, whereas in some instances the Association found only the preponderance of flow. It would also appear that the Commission had included cases where power was consumed in the state where generated, though transmitted across a portion of another state, and that it had counted twice transmissions from one state to another where passing

[1] "Interstate Transfer of Electric Power in 1928," Statistical Bulletin No. 4 (October, 1929). Hereinafter referred to as N. E. L. A. Bulletin No. 4.

[2] "Interstate Movement of Electric Energy," Senate Document, No. 238, 71st Cong., 3d Sess., and "Interstate Transfer of Electric Power in 1929," Statistical Bulletin No. 5 (June, 1930). N. E. L. A. Bulletin No. 5.

through a third state. These varying methods of calculation may account for the difference of over three and a half billions of kilowatt hours in the two reports.[1]

TABLE I. INTERSTATE TRANSMISSION IN 1926
(H. U. Bulletin)

Total power generated in the United States[2]	68,145,217,000 kwh.
Power crossing state lines[3]	6,171,530,837 kwh.
Ratio of interstate power to power generated	9.06%
Number of interstate crossings	453

Whatever the method of computation, it is apparent that the ratio of interstate to intrastate power is increasing. The Harvard and Association figures are comparable and they show that the amount of interstate transmission increased from approximately 6,171,000,000 kilowatt hours in 1926 to 8,920,000,000 kilowatt hours in 1928, and to 10,856,000,000 kilowatt hours in 1929. The respective ratios to total power generated were 9.06 per cent, 10.90 per cent, and 11.84 per cent. Another, though less accurate, indicator of the rate of increase may be found in the number of interstate trans-

[1] See N. E. L. A. Bulletin No. 5, p. 3. "If no attempt were made to eliminate any duplications whatever, it is estimated that the interstate transfers of power by the light and power industry would amount to 15 per cent of the total power generated, instead of 11.8 per cent as shown in this report.

[2] Based on United States Geological Surveys, not including power generated by railroads, street railway systems, industrial companies, and the United States Government.

[3] Based on reports obtained from companies and estimated 99.9 per cent complete. These figures are exclusive of power crossing the Mexican and Canadian borders, which amounted to 1,127,073,793 kwh. In cases where power generated in one state moved across a part of a second state to reach its market in a third state, such power was reckoned only once as interstate power. Where power passed through a section of another state on the way to its market back in the state where it was generated it was not called interstate power.

mission lines. The Harvard Bulletin reported 453 crossings in 1926, of which 152 or 33.6 per cent were placed

TABLE II. INTERSTATE TRANSMISSION IN 1928
(N. E. L. A. Bulletin No. 4)

Total power generated in the United States (in millions of kwh.)	81,868
Total consumption of electricity in the United States (in millions of kwh.)[1]	83,147
Power crossing state lines (in millions of kwh.)[2]	8,920
Ratio of interstate power to power generated	10.90%
Ratio of interstate power to power consumed	10.73%
Number of interstate crossings[3]	510

TABLE III. INTERSTATE TRANSMISSION IN 1929
(N. E. L. A. Bulletin No. 5)

Total power generated in the United States (in millions of kwh.)	91,656
Total consumption of electricity in the United States (in millions of kwh.)[4]	91,656
Power crossing state lines (in millions of kwh.)[5]	10,856
Ratio of interstate power to power generated	11.84%
Ratio of interstate power to power consumed	11.84%
Number of interstate crossings[6]	554

[1] The term "consumption" is used in the Bulletin, but it is misleading. It really means availability for consumption, making no allowance for line losses, and not actual consumption. It is derived as follows:

Generated by electric light and power plants	——
Add: Procured from enterprises not public utilities	——
Add: Imported from adjacent states	——
Total	——
Subtract: Exported to adjacent states	——
Balance: "Consumption" in state	——

(See N. E. L. A. Bulletin No. 4, p. 3, and No. 5, pp. 2, 3.)

[2] This data is based on reports from members of the Association and on estimates as to transmission across state lines by non-members. The method of calculating interstate power was the same as in the Harvard Bulletin. In cases of interchange of power across state lines by interconnected companies, an effort was made to find the gross amount of the transfers and not merely the preponderance of flow. Where no metering was made, however, only net transactions are shown. (N. E. L. A. Bulletin No. 4, p. 1).

[3] Lines carrying less than 2,300 volts were not counted.

[4] Computed as in N. E. L. A. Bulletin No. 4.

[5] *Ibid.* [6] *Ibid.*

in operation during the years 1924, 1925, and 1926. The Association Bulletin reported for 1928 a total of 510 lines, an increase of 12.6 per cent. It reported 554 for 1929, an increase of 8.6 per cent. The Federal Trade Commission report shows 927 crossings in 1929, but this figure cannot be compared with the earlier ones because it includes international, non-utility, and low voltage lines.

TABLE IV. INTERSTATE TRANSMISSION IN 1929
(Federal Trade Commission Report) [1]

Total power generated in the United States [2]	95,582,144,161 kwh.
Total power consumed in the United States [3]	80,968,440,669 kwh.
Outward movement across state boundaries [4]	14,505,190,623 kwh.
Inward movement across state boundaries [5]	15,906,132,127 kwh.
Ratio of outward movement to power generated [6]	15.18%
Ratio of inward movement to power consumed [7]	19.64%
Number of interstate crossings [8]	927

All of the reports give detailed information as to the exports and imports of power for each state. There is also a large amount of data as to the preponderant importance of a comparatively small number of large plants, many of which are located near state boundaries and were built chiefly to furnish service in another

[1] Senate Document No. 238, 71st Cong., 3d Sess.

[2] This includes power generated by railroads and governmental plants.

[3] This is power actually reaching the consumer. 15,000,000,000 kwh. are lost between points of generation and consumption.

[4] Including exports to Canada and Mexico, which total 37,552,487 kwh.

[5] Including imports from Canada and Mexico, which total 1,438,493,-991 kwh.

[6] Excluding railroad operations it is stated that this ratio would be 15.41 per cent. If municipal and governmental plants were excluded it would be still higher.

[7] Excluding railroad operations this ratio would be 21.49 per cent. It would be even more if governmental plants were excluded.

[8] This includes those crossing the international boundaries.

state.[1] This data is all interesting, but it does not seem to lend itself to helpful analysis. In some cases it is employed to show that the problem created by interstate transfers is much more serious than would be indicated by the general average, while it is employed by others to show that the general average paints an exaggerated picture of the situation.[2] There is a great deal of truth in both conclusions. It can be said on the one hand that, leaving out certain states which have little or no interstate power, the general average is much higher than the given per cent. It can also be shown that in a number of states the power imported amounts to nearly or more than half of the total power consumed. On the other hand, it can be demonstrated that with the omission of a few large plants and the states in which they are located or serve, the amount of power engaged in interstate commerce would be much less than the given per cent. In short, this data proves beyond a shadow of doubt that several large plants account for a great part of the energy transmitted across state lines and that there is a great deal more of interstate commerce in electric power in some states than in others.

While statistics as to the amount of interstate energy may be subject to the drawing of contradictory conclusions in some cases, they are not nearly so treacherous as some of the charts which have been prepared

[1] See N. E. L. A. Bulletin No. 4, p. 2, and N. E. L. A. Bulletin No. 5, p. 4. It is stated that twenty-four water power plants and six steam plants contributed 66 per cent of the total interstate power in 1928, and that twenty-four water power plants and seven steam plants contributed 63 per cent in 1929.

[2] See Mosher, *Electrical Utilities*, Ch. 4. Cf. Paul S. Clapp, "Progress of the Electrical Industry Under State Commission Regulation," *P. U. R.* 1928-cl, p. 9.

showing interconnected transmission systems. One of these maps was printed in *The Annalist* in June, 1928, and it is reprinted in Mosher's *Electrical Utilities*.[1] In some respects it looks remarkably like a railroad map. There are interconnected systems extending from the state of Washington to Mexico; from the Atlantic seaboard to the Mississippi River; covering practically all of the New England and Middle Atlantic states and extending along the Atlantic seaboard to Florida. These pictures unquestionably suggest a greater degree of interstate commerce than actually exists. Such systems do not provide an unbroken chain of interstate commerce. It is maintained that the average distance traversed by the average kilowatt hour in its path from power-house to consumer in the United States is only about twenty-two miles.[2] A single transmission rarely involves more than two states. This is said not by way of deprecating the necessity of finding a new and more effective method of dealing with this problem, as has been done, but to guard against letting impressions take the place of facts. However much an interconnection map may look like a railroad map, when analyzed it is found to be quite a different thing.

The future of interstate transmission of electric power is dependent, of course, upon technological improvements, making it possible to transmit power economically for greater distances. There is at present no reason to believe that the steady and substantial expansion of long distance transmission will not be maintained. "The fact that the United States, by reason of technological

[1] Page 92.
[2] N. E. L. A. Bulletin No. 4, p. 7.

developments generally in the science of communications, is becoming in effect smaller, would seem to suggest an increasing disregard of state lines in electricity supply as in other phases of industry and trade." [1]

The Regulation of Rates

While it has been readily conceded by state utility commissions and state courts that the transmission of electric power across state lines is interstate commerce, it has not usually been admitted by these bodies that the regulation of the sale and distribution of this power is beyond the jurisdiction of the state involved. The right to regulate has been asserted, either on the ground that interstate commerce had ceased before the point at which the attempt was made to exercise jurisdiction, or on the ground that in default of congressional action this was a matter upon which the states were permitted to act even though interstate commerce was involved.

The first thorough discussion of the problem of state regulation as applied to interstate power transmissions is found in a 1916 case before the Idaho Public Utilities Commission involving the sale in Idaho of power generated in Montana.[2] While disavowing all jurisdiction over the transmission or transportation of electric power in interstate commerce, the Commission argued that it could nevertheless control the distribution. In this case the Montana company did not itself sell the power to Idaho consumers, but had wholesale contracts with Idaho distributing companies. The Commission main-

[1] Press Release, Federal Trade Commission, December 20, 1930.

[2] *Washington Water Power Co. v. Montana Power Co.*, P. U. R. 1916-E, 144.

tained that the resale by the local utilities was not a part of interstate commerce, but was entirely an intrastate transaction, on the ground that the breaking up of the energy for distribution purposes put an end to the interstate nature of the transaction. It went on to say, however, that in any case the regulation of the distribution of electric energy was of local concern only, not requiring uniform action, and that in the absence of congressional legislation the states could govern distribution within their borders.[1]

A very similar line of reasoning had been used a year earlier by the Kansas Supreme Court in a case involving the transmission of natural gas from Oklahoma into Kansas.[2] The gas was distributed to Kansas consumers

[1] *Ibid.*, 170. The Commission made the following statement as to its powers:

"The electrical energy which, after having been delivered to the distributor, is being distributed to the users, in Idaho, has ceased to be an article of trade between Montana and Idaho, regardless of whether the distributor is or is not the transmitter. The electrical energy purchased in Montana and transmitted in bulk into Idaho is a subject of interstate commerce while it retains that character. The act of breaking up this energy by its owner for the purpose of distribution is not commerce in and of itself, but the sale of the broken up energy or the resale of the energy in its original form is commerce, and if such sale or resale is wholly within the state of Idaho, it is not interstate commerce.

"In the absence of any discrimination against electrical energy generated in or transmitted from another state, and in the absence of any action by Congress indicating that Federal supervision has been assumed this Commission cannot see how the impartial state regulation of the distribution of such energy within the state can be repugnant to the provisions of the Federal Constitution as affecting interstate commerce in any essential or vital part, or as preventing or unreasonably burdening interstate commerce. The local distribution of electrical energy is peculiarly a subject of local concern, and is not a subject requiring uniformity as between states; and this Commission believes that the state has a right to enact reasonable laws governing such distribution within its borders, in the absence of Federal control."

[2] *State ex rel. Caster v. Flannelly*, 96 Kan. 372; 152 Pac. 22; P. U. R. 1916-c, 810 (1915).

by local companies, acting as agents of the producing and transmitting company. The Court relied even more heavily on the application of the original package doctrine than did the Idaho Commission in the Washington Power Company case.

If the analogy of original packages or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail sale. The gas then becomes mixed with the common mass of property in the state.[1]

The Court did not rely entirely on this analogy, however, insisting that even if this were interstate commerce it was not that kind of commerce requiring uniform national regulation but required rather the diversity of local control.[2]

[1] 96 Kan. 372, 383.

[2] *Ibid.*, 384. An even more impressive attempt to apply the original package doctrine to the transmission of natural gas was made by the Maryland Court of Appeals in 1919, in a case involving a West Virginia company (*West Va. & Md. Gas Co. v. Towers*, 134 Md. 137; 106 Atl. 265; P. U. R. 1919-D, 332). At local points in Maryland the pressure was reduced by regulators and the gas sent through low-pressure mains. The Court said that the gas was no longer in interstate commerce when in the low-pressure mains because it was no longer in the "original package." "The term 'original package,' when used in these cases, means the form or physical condition of the article of commerce in which it is transported in its interstate commerce." And in more detail:

"Whether the gas is separated from the general bulk of gas and confined in the intermediate pipe lines where it cannot return to the main pipe lines and where it must remain until consumed, or whether it is so separated and stored in tanks awaiting consumption, the effect is the same, in our opinion, in determining the question whether the original package has been broken and the gas mixed with the common mass of property in this State. There

The first definite rejection of the application of the original package analogy to interstate transmission of gas or power came from the Supreme Court of West Virginia in 1919.[1] This case involved the Appalachian Power Company, a Virginia corporation, which generated most of its current in Virginia and transmitted large quantities of it to substations in West Virginia, where it was transformed to commercial voltage and distributed to consumers. In a rate proceeding the West Virginia Public Service Commission asserted its jurisdiction on the ground that interstate commerce ended at the substations where the power was stepped down to a low voltage. Following the earlier cases, however, the Commission added that regardless of the point at which interstate commerce ended, the state could regulate rates to consumers because that was of local and not of national concern.[2] The Court upheld the Commission order, but in its opinion completely re-

may be a constant movement of the molecules of the gas, but we do not see how this movement, because of the peculiar properties of the article, can affect the question to be determined.

"It also, before reaching the consumer, has to pass not only through pipes laid in the streets of the towns or villages, which is done under rights acquired from local authorities, but through pipes belonging to the owner of the premises upon which the gas is consumed. These facts all aid in characterizing the transaction as being of a local and not of a national nature. The gas when it leaves the main lines, where it is separated from the bulk of gas in such lines and forced into the intermediate lines and the pipes of the individual consumers where it cannot return to the main line, and where it remains until used, is, we think, such a breaking of the original package as to remove it from interstate commerce and to make it subject to State legislation, and consequently a subject of regulation by the Public Service Commission of this State, in respect to the powers granted the Commission. (134 Md. 137, 145.)

[1] *Mill Creek Coal & Coke Co. v. P. S. C.*, 84 W. Va. 662; 100 S. E. 557; P. U. R. 1920-A, 704.

[2] *Re Appalachian Power Co.*, P. U. R. 1919-D, 286.

jected the original package application and based the regulatory power of the states over local rates wholly upon the ground that it was only an indirect and incidental burden on interstate commerce, such as could be exercised pending action by Congress. It was stated that the essential character of the commerce remains unchanged "unless theretofore sold to independent distributing companies for resale to local consumers, or, possibly, unless stored in the state of distribution for a period of such length that it can fairly be said to have lost its original character and to have become merged with the general property of the state."[1] Of course there is a suggestion of the original package doctrine here, but in a very different sense from that used when it is said that the character of the power is changed when it is transformed from a high to a low voltage and sent into local transmission systems.

These early utility commission and state court cases indicate a unanimous disposition to justify state control over charges of distribution to consumers but no agreement as to reasons. It was perhaps significant that in the case where it was denied that the original package doctrine applied there were no intervening local distributing companies. Two distinct situations had been presented in these cases, one where electric power or gas was distributed by the interstate transmitting company and the other where it was distributed by companies having wholesale contracts with the transmitting company. The only question raised had been the jurisdiction of the commissions over rates to consumers, and this jurisdiction had been upheld in both situations.

[1] 84 W. Va. 662, 672.

The question of state jurisdiction over the contracts between transmitting and distributing companies had not yet been presented.

With this introduction we can turn to the decisions of the United States Supreme Court bearing on the problem. The first one of these dealt with the situation presented in *State ex rel. Caster v. Flannelly.*[1] Defeated in the state courts, the companies took another case to the United States District Court for Kansas, where it was held that state regulation of rates for gas transmitted from Oklahoma was an illegal interference with interstate commerce.[2] The case was appealed by the Public Utility Commission of Kansas to the Supreme Court, where the order of the lower court was reversed.[3]

The Court apparently based its decision on the ground that the local distributing companies, which had wholesale contracts with the transmitting company, were not mere agents of the latter, as had been found in the District Court. Consequently, the sale of gas by the local companies was not part of an unbroken transaction in interstate commerce. It was admitted that the transportation of gas through pipe lines from one state to another was interstate commerce. It was also said that the transporting company "might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state."[4] It was held that the state could regulate the sale and delivery to consumers, however, because no interstate commerce

[1] 96 Kan. 372.
[2] *Landon v. P. U. C.*, 242 Fed. 658 (1917).
[3] *P. U. C. v. Landon*, 249 U. S. 236 (1919).
[4] *Ibid.*, 245.

was involved. That ended when the gas went into the local main.[1]

This opinion was ambiguous, to say the least. Did the Court mean that the regulation of rates was an "unreasonable interference" where interstate commerce was involved? And if so would not rate regulation of distribution to consumers be invalid where no wholesale contract intervened to interrupt the interstate commerce? Or did the Court mean that interstate commerce ended when the gas went into the local main regardless of the existence of wholesale contracts? The language used was far from discouraging the idea that the vital factor in the cessation of interstate commerce was the passing of the gas from the big pipe lines into the local ones, although emphasis was placed on the element of sale. Anyway, the case did decide definitely the status of regulation of rates for the local distribution of gas transported from another state and sold at wholesale to local distributing companies. Not much light was shed upon the right of regulation in other situations.

The right of the state to regulate the rate to consumers where the transmitting company was the distributor was settled beyond all doubt in *Pennsylvania Gas Co. v. Public Service Commission.*[2] The Pennsylvania company furnished gas in Pennsylvania and New York. The New York Commission attempted to fix the rates for service in Jamestown, New York, and the company attacked the order as being an obstruction to interstate commerce. The order was sustained in the New York courts,[3] and an appeal was taken to the Supreme Court

[1] 249 U. S. 236, 245.
[2] 252 U. S. 23 (1920).
[3] 184 App. Div. 556 (1918); 225 N. Y. 397 (1919).

of the United States. There the decision below was affirmed. It was said, as in the West Virginia electricity case, that the entire transmission was continuous and single and therefore a transmission in interstate commerce.[1] The Court added, however, that the service rendered was essentially local, requiring the use of the city streets, and not of that character requiring general and uniform regulation by Congress. It was conceded that the regulation of local rates affected interstate commerce, but it was said that in the absence of the exercise of the superior authority of the federal government local regulations of a reasonable character were necessary in the interest of consumers.[2]

The Landon and Pennsylvania cases clearly establish the right of the state to regulate the rate of distribution to consumers. The Landon case asserted that the state could regulate when the gas was resold by local companies because the resale was not a part of interstate commerce. The Pennsylvania case decided that the state could regulate when the transmitting company was the distributor, because the regulation was local in nature and only an incidental burden on interstate commerce. This case is important not only because it decided that regulation of local rates is not an "unreasonable interference" with interstate commerce, but also because it said that where no wholesale contract intervened local sale and distribution *was a part of interstate commerce.* The application of the original package doctrine was definitely rejected. This apparently leaves the door open for Congress to regulate if and when it sees fit. The states are allowed to exercise authority in-

[1] 252 U. S. 23, 28. [2] *Ibid.*, 30.

cidentally affecting interstate commerce unless and until the federal government exercises its superior authority. Had the original package analogy prevailed the federal government would have been entirely excluded from the regulation of sale and distribution to consumers.

The inference in the "unreasonable interference" language in the Landon case was that the state could not regulate sale and delivery of interstate gas by the transporting company to local distributors. This point was finally decided in *Missouri v. Kansas Natural Gas Co.*[1] In this case local distributing companies complained because of rate increases by the transmitting company and the Missouri and Kansas utility commissions intervened to prevent the increase.[2] The Court held that the commissions had no jurisdiction. The sale and delivery of the gas to the distributing companies, said the Court, is

> an inseparable part of a transaction in interstate commerce — not local but essentially national in character, — and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the Commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the State and before it had become part of the general mass of property therein.[3]

The Court went on to say that the character of the transaction was such as to require uniformity of regulation.

[1] 265 U. S. 298 (1924).

[2] The Kansas Natural Gas Company transmitted gas from Oklahoma through Kansas and into Missouri, furnishing gas at wholesale to distributing companies in both states.

[3] 265 U. S. 298, 308.

Such uniformity, even though it be the uniformity of governmental non-action, may be highly necessary to preserve equality of opportunity and treatment among the various commodities and States concerned.[1]

The rule thus applied to the interstate transmission of natural gas was shortly after applied to the interstate transmission of electric power. The Narragansett Electric Lighting Company of Rhode Island distributed 97 per cent of its energy in Rhode Island and sold the remaining three per cent at wholesale to the Attleboro Steam and Electric Company of Massachusetts. The delivery was made at the state line. The Rhode Island Commission investigated the contract rates and found them so low as to impair the furnishing of adequate service at reasonable rates to Rhode Island consumers. It issued an order establishing new rates for the power sold to the Massachusetts company.[2] The latter company attacked the validity of the order in the Rhode Island Supreme Court where it was decided that the Commission had no jurisdiction over interstate wholesale contracts.[3] The Commission then appealed to the Supreme Court of the United States, which sustained the decision below.[4]

The Court said that the sale was a transaction in interstate commerce, notwithstanding the fact that the current was delivered at the state line, and that a regulation of the selling price was a direct burden upon the

[1] *Ibid.*, 310.

[2] *P. U. C. v. Narragansett E. L. Co.*, P. U. R. 1925-D, 545 (R. I. P. U. C., 1925).

[3] *Attleboro Steam & E. Co. v. P. U. C.*, 46 R. I. 496; 129 Atl. 495; P. U. R. 1925-E, 495 (1925).

[4] *P. U. C. v. Attleboro Steam & E. Co.*, 273 U. S. 83; P. U. R. 1927-B, 348 (1927).

transmission. The attempt to distinguish the Kansas Natural Gas case on the ground that there the regulating state was the receiving and not the transmitting state, as in the present case, met with failure. Nor was any merit seen in the argument that in the case at bar the major part of the business was local in character, and that the purpose of the regulation was to prevent discrimination against consumers using intrastate power. The Court said that the test of the validity of a state regulation was whether the particular business regulated was national or local in character, and that in the present case it was undoubtedly of national interest and therefore not subject to state jurisdiction. If regulation is found to be necessary it may be exercised by Congress. It was pointed out that if Rhode Island could regulate to protect its interests, Massachusetts had a similar right, whereupon confusion and chaos would be the inevitable result.[1]

Mr. Justice Brandeis dissented. He argued that the fact that only three per cent of the business was interstate indicated that the regulation was not a direct burden on interstate commerce and that the problem was essentially local. He also maintained that the regulation was not a direct burden because it merely prevented discrimination in the price and did not fix the rates of transportation.[2]

The effect of court decisions on the power of the states to regulate rates for the sale of electric energy transmitted across state lines is to give the states juris-

[1] 273 U. S. 83, 90.
[2] *Ibid.*, 91.

diction over rates to consumers in all cases, and to deny them jurisdiction over prices fixed in wholesale contracts. With the growth of holding companies it is necessary to know what a wholesale transaction is. In some cases contracts for the sale of power are entered into between corporate entities located in different states but under the same ownership. In these cases is the regulatory body of the state in which the power is delivered to consumers precluded by the Attleboro case from going back of the contract rate? Or may it, in fixing local rates, disregard the contract and examine the cost of production of the energy as it does where there are no intervening companies? These questions are still unanswered by the courts, although they have decided a number of cases on the point. It has generally been maintained by the courts that the mere fact of common ownership, aside from fraud or collusion, is not grounds for disregarding intercorporate agreements.[1] There is some indication, however, of a change in attitude on this point. The state utility commissions have in several instances disregarded the contract price.[2] In one case, where the District of Columbia Commission attempted to fix the contract rate between a District company and its Maryland subsidiary, the United States Court of Appeals for the District denied the authority

[1] See *Southwestern Bell Tel. Co. v. P. S. C.*, 262 U. S. 276, 288, 289 (1923); *United Fuel & Gas Co. v. R. R. Comm.*, 278 U. S. 300 (1929). For general discussions of the disregard of the corporate fiction see 60 *American Law Review* 19 (1926); 13 *Cornell Law Quarterly* 99 (1927).

[2] The Commission specifically dealt with this question in *Re Clarksburg L. & H. Co.*, (P. U. R. 1917-A, 577, 608, W. Va. P. S. C.); *Re West Union Gas Co.*, (P. U. R. 1922-A, 657, W. Va. P. S. C.); *Re Point Pleasant Natural Gas Co.*, (P. U. R. 1927-B, 805, 817, 818, W. Va. P. S. C.); *Re Gallatin Natural Gas Co.*, (P. U. R. 1926-A, 145, 148, Mon. P. S. C.).

of either the District or the Maryland Commission in spite of the corporate relationship.[1] The Court admitted the question to be a troublesome one, but pointed out that in any event the District Commission would have no jurisdiction. The only result of the disregarding of the corporate fiction would be that in fixing rates of distribution for Maryland consumers the Commission of that state might go back of the contract rate.[2]

The latest expression by the Supreme Court on this question is the opinion in *United Fuel & Gas Co. v. Kentucky R.R. Comm.*[3] This case involved contracts between a West Virginia gas company and its Kentucky subsidiary, to whom it sold a part of its supply. Prior to 1923 the United Company itself distributed gas in Kentucky, and its rates to consumers were regulated by the Commission. Following upon an order by the Commission substantially reducing its rates, the United Company organized the Warfield Natural Gas Company, incorporated in Kentucky, and gave notice that it had ceased doing business in the state. All of the stock of the subsidiary was owned by the parent company. A contract was entered into between them by which it was provided that the United Company would deliver gas at the state line to the Warfield Company for thirty cents per 1,000 cubic feet. The latter promptly filed a new rate schedule, considerably higher than that fixed by the Commission for the United Company, and petitioned the Commission to approve the new rates or to permit it to discontinue service in specified cities. The Commission denied the application and ordered the

[1] *Galloway v. Bell*, 11 F. (2nd) 558 (1926).
[2] *Ibid.*, 561.
[3] 278 U. S. 300 (1929).

company to serve at the lower rates. The company brought a bill for an injunction in the United States District Court, claiming that the rate fixed by the Commission was confiscatory. The District Court dismissed the bill [1] and an appeal was taken to the Supreme Court.

The Court first stated that the Commission was justified in ordering the company to continue its service as long as it wished to do business in the state.[2] It then passed on to the consideration of the rates.

> Gas is sold by the United Company to the Warfield Company at the state line at 30 cents per 1,000 cubic feet, but in view of the history and intercorporate relations of the appellants it is not contended that this contract rate is of any controlling significance in determining the propriety of the rate fixed by the commission. For this purpose appellants do not deny that they, with respect to their entire property and business, may be treated as a unit, and we so treat them.[3]

It can readily be seen that this aspect of the case does not afford much help on the subject of contracts between related companies, because it was not even seriously contended by the companies that their corporate entities should be regarded as distinct and separate. The history of the case shows clearly that the subsidiary was organized as a subterfuge to avoid regulation of the gas rates. Nevertheless, the mere fact that the Court would examine the intercompany relationship is significant.

Another interesting contract was uncovered in the examination of the United Company's revenue data.

[1] *United Fuel & Gas Co. v. R.R. Comm.*, 13 F. (2nd), 510 (1925).
[2] 278 U. S. 300, 307. Part of the business was to be continued.
[3] *Ibid.*, 310.

The Commission had included in the company's income 50 per cent of the net proceeds from the sale of gasoline extracted from the natural gas before the distribution of the latter. The company maintained that this amount exceeded the profits from this branch of its business as shown by its books. It was found that the United Company had formerly extracted the gasoline itself, and that 50 per cent of the net return from this business had been credited to the natural gas business. The company had then formed a new corporation, to which it conveyed the extraction plant. The stock of the new company went to the stockholders of the United Company. A contract was made according to which the United Company received one-eighth of the gross profits from the sale of the gasoline. The Court disregarded the terms of this contract.

> We need not labor the point that a public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary or a corporation owned by its stockholders. . . . We recognize that a public service commission, under the guise of establishing a fair rate, may not usurp the functions of the company's 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.[1]

In this case, however, the Court said that the interre-

[1] 278 U. S. 300, 320.

lated corporation was simply a device to make the rates of the United Company appear confiscatory.[1]

The subject of intercompany relationships is of fundamental importance in the field of electric light and power, and the extent of state regulation of interstate rates depends upon the solution. It should be pointed out in this connection, however, that even where the corporate fiction may be disregarded, only the state into which the power is transmitted and in which it is distributed can exercise its regulatory jurisdiction. This is of real importance because of the fact that the state from which power is transmitted may be discriminated against by the charging of too low rates to its *alter ego* in another state.

From the statistical side it is impossible with the existing data to determine what percentage of interstate power is sold at wholesale under circumstances where state regulation would be invalid. According to the Harvard Bureau of Business Research Bulletin, the transmission across state lines of 1,622,100,618 kilowatt hours, or 26.28 per cent of the total interstate power in 1926, involved no change in ownership.[2] The transmission of 4,549,430,219 kilowatt hours, 73.72 per cent of the total interstate power and 6.67 per cent of the total power generated in 1926 in the United States, involved change of ownership, and presumably wholesale transactions. It was stated, however, that a transfer from one operating company to another, both subsidiaries of the same holding corporation, counted as a change in ownership.[3]

[1] *Ibid.*, 321. [2] H. U. Bulletin, p. 1.
[3] *Ibid.*, 5.

The study made by the National Electric Light Association attempts to show the exact amount of interstate transmission not subject to state regulation. This is said to be the amount of power transmitted at wholesale, excluding transactions between parent and subsidiary companies where all of the stock, common and preferred, of one company was owned by the other. While confessing uncertainty on the legal point involved, it was stated that the basis of this classification was the decision of the Supreme Court of the United States in *United Fuel & Gas Co. v. Kentucky R.R. Comm.*[1] On this hypothesis it was found that 6.62 per cent of all power consumed in 1928 was transmitted in interstate commerce and sold at retail, while 4.11 per cent was sold at wholesale.[2] The 6.62 per cent, it was believed, could be regulated by the states in the absence of federal action, while the 4.11 per cent, sold at wholesale, was not subject to state regulation, except indirectly through the regulation of the resale rate to consumers. It will be recalled that the Harvard study showed that 6.67 per cent of all power generated was transmitted across state lines under conditions involving change of ownership. This decrease in wholesale transactions is only apparent, of course, because in the earlier study all changes of ownership were included.[3] With the available data it is impossible to say whether or not

[1] N. E. L. A. Bulletin No. 4, p. 8. The case does not seem to justify this conclusion. It held merely that the corporate device could not be used in bad faith to evade regulation or to make a return appear confiscatory. On the other hand, it was said that common ownership alone did not justify the disregard of an intercompany contract. See discussion above.

[2] *Ibid.*

[3] H. U. Bulletin, p. 5. The report by the Federal Trade Commission contains no data on wholesale as distinguished from retail transactions.

the ratio of unregulated to regulated power is increasing. Both legally and statistically there is considerable uncertainty on this subject. The truth seems to be, as will be illustrated below, that the attempted distinction between "wholesale" and "retail" transactions is artificial, and furthermore that a division of interstate power into categories of what the state may regulate and what it may not regulate is not particularly helpful in marking out the limits of adequate and effective state regulation.

This chapter has been written from the point of view of the limits of state authority over the interstate transmission of electric power. With the exception of a provision of the Federal Water Power Act of 1920 Congress has not exercised its paramount authority to regulate this form of interstate commerce. Section 20 of the Water Power Act gives the Federal Power Commission jurisdiction over the rates, services, and securities of corporations engaged in interstate commerce, as to licensees of the Commission only, where one of the states concerned has no jurisdiction or where the states are unable to come to an agreement. This provision has been applied only once, and then indirectly.[1] In view of the in-

[1] This was in the Conowingo case. See *Eighth Annual Report*, Federal Power Commission (1928), p. 11. Sec. 19 of the act gives the Commission jurisdiction over intrastate rates, under certain conditions, where there is no state commission. In such cases the authority is said to be based on the contractual relation with the licensee. In other words, permission is given to develop power sites on navigable streams subject to the condition that rates can be regulated by the Commission. This raises the interesting question as to whether this provision constitutes an unconstitutional condition. The extension of this principle to all licensees would bring about some peculiar situations. In the states which have restrictive policies the state could make its approval for the development of water power subject to the condition that interstate commerce might be regulated, and the federal government

creasing amount of interstate transmission it becomes important to mark the boundaries of federal control.

In its decisions as to the limits of state authority, the Court has said that interstate wholesale transactions must go unregulated unless and until Congress exercises its authority. It has also clearly indicated that the right of the state to regulate the rate of distribution to consumers, as to natural gas transmitted directly from another state, can be exercised only in the absence of federal regulation. Inasmuch as the Court applied the same principles to wholesale electric power transactions as to wholesale gas transactions, it almost certainly would hold that the principles governing distribution are the same. Of course it has not been positively asserted that the federal government can regulate wholesale contracts and local rates where there is no wholesale contract, because no such authority has been exercised. We do know that as to wholesale contracts there must be a twilight zone of immunity from regulation if Congress cannot regulate. There is nothing in the language of any of the opinions, however, which suggests this possibility. On the contrary, there is the strongest implication that Congress can regulate whenever it sees fit.[1]

make its approval subject to the condition that it might regulate intrastate rates. To use language which the Supreme Court sometimes resorts to, observe what horrible things may possibly happen if this use of unconstitutional conditions is allowed to go on.

[1] In spite of all the opposition which has developed against the extension of federal control over interstate power rates, the writer knows of but one attempt to show that the federal government does not have that authority. In 1930, during the hearing on the bill (H. R. 11408) for reorganization of the Federal Power Commission, Paul S. Andrews, representing the office of the attorney general of New York as special counsel, said that Congress could not fix the selling price of electric power transmitted in interstate commerce. His argument was that selling price was not a part of interstate commerce.

A more doubtful point is whether Congress could regulate distribution rates where a wholesale contract has intervened. The earlier cases upheld state control in this field on the ground that interstate commerce came to an end when the power was sold to the distributing company. The Attleboro case raises some doubt as to the attitude of the Court on this point. Mr. Justice Sanford says in that case that "the transmission of electric current from one state to another, like that of gas, is interstate commerce . . . , and its essential character is not affected by a passing of custody and title at the state boundary, not arresting the continuous transmission to the intended destination."[1] In itself this statement would seem to regard the entire transmission, from point of entering the conduits to the place of consumption, as interstate commerce. In that case, however, the Court was dealing with an attempt of the sending state to regulate the wholesale contract with the distributor in the receiving state. The claim was made that there was no transaction in interstate commerce because of the fact that custody and title passed at the state line. The only point that the Court decided was that it was a transaction in interstate commerce because the power sold at wholesale at the state line was intended for distribution in another state. Nothing was said specifically as to the nature of the commerce which took place within the state of distribution. Of course, if

In this respect he seems to have misread the opinions, for the Court in the gas and electric cases specifically ruled that sale was a part of interstate commerce. Mr. Andrews elaborated his argument in a letter to the *New York Times*, June 1, 1930. Professor Edward S. Corwin replied in a letter appearing in the *Times* June 22, 1930.

[1] 273 U. S. 83, 86.

the state where such energy is distributed employs its regulatory authority in such way as to discriminate against or unduly burden the interstate part of the business, the superior authority of Congress would almost certainly be recognized to prevent such action.

There is little question but that the opposition of the state commissions to any federal control over interstate commerce in electric power is based largely on the fear that such control will be extended even over large portions of the intrastate business.[1] The situation in regard to the regulation of rates of transportation is said to justify this fear. How far Congress could go in controlling intrastate rates as a means of regulating interstate commerce is purely problematical. Suppose a company generating power in New York, distributing 90 per cent of it in New York and transmitting the remaining 10 per cent into Ohio. Could the federal government regulate the intrastate rates of this interstate company if it found it necessary as a means of protecting the interstate business? In the event of federal regulation these problems are almost sure to arise. Similar problems will involve the supervision and regulation of the financial operations of interstate companies. The situation is an extremely delicate one because of the large number of companies engaged in interstate transmission and the comparatively small percentage of power transmitted. In the field of railroad transportation the business of the interstate companies is largely interstate and the extension of federal regulation, though vigorously protested in

[1] See below, Chapter VI, for a discussion of the resolutions of state utility commissions condemning the Couzens bill.

some quarters, is perhaps inevitable. In regard to electric companies, in many cases the interstate business will be only a small fraction of the total business and conflicts between federal and state authorities will be bitter unless careful adjustment is made.

IV

INTERSTATE TRANSMISSION AND THE ADMINISTRATIVE PROCESS

THE presentation of statistics as to the amount of electric power transmitted in interstate commerce and the demarcation of the legal boundaries between state and federal jurisdiction over this power do not constitute an analysis of the problem of regulation. They set off the field within which the state administrative authorities go about the business of regulating. They give a quantitative impression of the limitations upon the control of the states, but they convey no idea of the actual extent to which and manner in which the effectiveness of utility regulation is impaired by interstate transmissions. The real nature of the problem cannot be perceived without a study of the multitudinous situations which confront the commissions, and an estimate of the way in which these situations are dealt with. This necessitates the review of a large number of administrative proceedings and orders dealing with cases involving interstate operating companies.

In view of the distinction established by the courts between interstate transmissions which involve wholesale contracts and those which do not, it will be convenient to classify the cases on this basis. In addition some attention will be given to administrative problems arising out of the corporate activities of electric power companies doing an interstate business.

Cases Involving Wholesale Contracts

There are three kinds of situations in which the question of state jurisdiction over interstate wholesale contracts may be presented. The commission may be asked to assume jurisdiction directly over the contract. The price fixed in the contract may become indirectly involved in the regulation of rates for distribution to consumers. Finally, the supervision of service conditions occasionally necessitates consideration of the relations between wholesaler and distributor.

It might be thought that the Attleboro case [1] disposed of the problem of direct jurisdiction over interstate wholesale contracts, by declaring it outside the competence of the states. This is not entirely true. In the first place, such jurisdiction may be assumed by the state commissions in spite of the decision of the Supreme Court and may be acquiesced in by the companies. The commissions had exercised authority over interstate wholesale contracts in a surprising number of cases prior to January, 1927, the date of the Attleboro decision.[2]

[1] *P. U. C. v. Attleboro Steam & Electric Co.*, 273 U. S. 91.

[2] The most important of these cases were *Re Southern Sierras Power Co.*, 18 Cal. R. C. R. 818 (1920), in which the California Commission authorized increased rates in wholesale contracts between California companies and distributing companies in Mexico, Arizona, and Nevada; *Re Iron Mountain Electric Light & Power Co.*, 4 Mich. P. U. C. R. 758 (1922), in which the Michigan Commission refused to approve a five year rate contract under which a Michigan company was to furnish power to a Wisconsin company at four cents per kilowatt hour, on the ground that it was "required to approve all rates of electric utilities and it has the authority to change any such rates from time to time if circumstances and conditions warrant. Therefore, it is our opinion that we cannot approve this contract as to any term of years insofar as the price of electric energy is concerned;" *Re Southern Power Co.*, P. U. R. 1924-B, 821 (N. C. C. C., 1924), where the North Carolina Corporation Commission examined contract rates for the wholesale disposal

Similar authority has been exercised in a few cases since that date.[1] In other instances, however, the commissions have refused to assume jurisdiction over wholesale contracts because of the Attleboro case.[2] The possibil-

of power generated by the company in South Carolina and sold to North Carolina distributors; *Re Commonwealth Edison Co.*, 5 Ill. C. C. R. 111 (1925), in which the Illinois Commerce Commission approved of interchange contracts between Illinois and Indiana companies. See also *Re Wisconsin-Minnesota Light & Power Co.*, 25 Wis. R. C. R. 88 (1920), *Re Central Illinois Public Service Co.*, 1 Ill. C. C. R. 165 (1921), and *Re Susquehanna Power Co.*, 7 Penn. P. S. C. 335 (1926), and P. U. R. 1926-B, 732 (Md. P. S. C., 1926), all discussed below.

[1] *Re Central Illinois Public Service Co.*, 6 Ill. C. C. R. 880 (1927), *Re Commonwealth Edison Co.*, 6 Ill. C. C. R. 576 (1927), and *Re State Line Generating Co., P. U. Fortnightly*, Vol. III, No. 4, p. 166 (1929), all involving interchange contracts between Illinois and Indiana companies. See also *Re Bellows Falls Canal Co.*, 11 N. H. P. S. C. R. 174 (1927), discussed below.

[2] In *Re Idaho Power Co.*, P. U. R. 1928-A, 113 (Ore. P. S. C., 1927), the Oregon Commission stated specifically that according to the Narragansett case it had no jurisdiction over the contract rates between the Idaho company and the Vale Electric Company of Oregon. This is the first case found where a state commission has refused to assume jurisdiction. *Arizona Edison Co. v. Southern Sierras Power Co.*, P. U. R. 1928-D, 586 (Cal. R. C., 1928), involved the wholesale rate charged by the Southern Sierras Company to the Arizona distributing company. The California Commission had approved the contract rate in *Re Southern Sierras Power Co.*, 18 Cal. R. C. R. 818 (1920). In the instant case the Arizona company claimed that the Attleboro case had in effect invalidated the earlier Commission order and asked the Commission to issue a declaratory order and also to direct the Southern Sierras Company to pay it reparations, on the ground that the prices charged had been higher than those set by the Commission. The Commission very properly pointed out the inconsistencies in the application. While not actually admitting that the circumstances were the same as in the Attleboro case, it said that, if they were, no jurisdiction at all could be exercised over the contract and no reparations could be awarded. A declaration by the Commission that its earlier orders had been without legal justification would be incompatible with an order directing a company to make reparations for violation of the invalid orders. See also *Re Public Service Co.*, P. U. R. 1929-E, 467 (Colo. P. U. C., 1929). The company made a connection between two of its lines in order to supply Colorado consumers with power purchased at wholesale in Nebraska. The Commission had earlier ordered the company to show cause why it should not procure a certificate of convenience and necessity, and to show why its new service would not interfere with an existing system

ity of a concerted policy of ignoring the Supreme Court decision, therefore, seems unlikely. A second point, however, is that the jurisdiction of the state commissions may be saved on collateral grounds. The existence of a bona fide wholesale contract may be questioned by showing the corporate identity of the contracting companies.[1] Again, the commissions may require consent to regulation of interstate wholesale contracts as the price of approval of permits to develop water powers.[2] These

(P. U. R. 1929-C, 48). The Commission now held that it had no jurisdiction to prevent the importation of the power bought in Nebraska, even though competition resulted. It said that the prevention of competition between interstate and domestic utilities was illegal.

[1] It should be noted, however, that if the corporate fiction is not to be regarded the only result is that the state of distribution can regulate rates to consumers without consideration of the alleged wholesale price. It would not justify the state of the transmitting company in assuming jurisdiction over the intercompany price. One of the four wholesale contracts authorized in *Re Southern Sierras Power Co.*, 18 Cal. R. C. R. 818 (1920), was between commonly owned subsidiaries in California and Nevada, for the sale of power to the Nevada company. In spite of the fact that the companies were interrelated, and admitting that this was not a valid wholesale contract, it is clear that the California Commission had no jurisdiction. This power was distributed in Nevada and the only authority that could have had jurisdiction was the Nevada Commission. The point is that where there is a bona fide wholesale contract neither state can regulate it. If there is no bona fide contract the state in which the power is distributed can, in fixing rates for consumers, refuse to accept the alleged contract price as a base and can go back to production plus transmission data. As has been shown, however, it is by no means established that the mere fact of common ownership warrants disregard of the contract.

[2] In *Re Central Illinois Public Service Co.*, 1 Ill. C. C. R. 165 (1921), prescribed this condition as the price of its approval of an application by an Illinois company to guarantee part of a bond issue of an Indiana company for hydro-electric developments in Indiana. The source of authority here seems to be approval of bond issues rather than of power developments, however. Another case in which the basis of regulation is complex is *Re Susquehanna Power Co.*, the so-called Conowingo case. (See 7 Penn. P. S. C. R. 335; P. U. R. 1926-B, 732; *Sixth Annual Report*, Federal Power Commission, 1926, p. 104). The project was for the construction of a dam across the Susquehanna River in Maryland, creating a pool partly in Maryland and partly

problems of corporate identity and unconstitutional conditions have been considered elsewhere and need not be discussed again. In this connection the significant

in Pennsylvania. The generating plants were to be located in Maryland, but most of the power was to be transmitted to Pennsylvania and distributed therein. To carry out this project a most ingenious corporate set-up was devised. For our purposes it is sufficient to say that a Maryland company was to deliver power at the state line to a Pennsylvania company, which owned the stock of the Maryland company. The intercompany contracts were approved by the Maryland and Pennsylvania Commissions and by the Federal Power Commission. The proceedings all took place before the decision in the Attleboro case and there was little discussion as to jurisdiction over the wholesale contract. A reading of the Commission orders would indicate that regulation of the terms of the contract was a condition upon the right to develop the water powers. Pennsylvania might also claim the right to disregard the contract because of the common ownership of the companies. An important sidelight is thrown on this question in the *Annual Report* of the Federal Power Commission for 1928, where the Conowingo case is discussed as an example of interstate wholesaling. (*Eighth Annual Report*, pp. 7 ff.) Executive Secretary Merrill pointed out that the price at which power was to be sold at the state line was indirectly fixed by the Power Commission because the intercompany contracts were concurrently approved by it and the two state commissions. It is not specifically stated, but the inference is clear that the state commissions could not have regulated the rates apart from the action of the Federal Commission. We have, therefore, three possible grounds for regulation: state control over water power developments, disregard of the corporate fiction, and federal control. In *Re Bellows Falls Canal Co.*, 11 N. H. P. S. C. R. 174 (1927), however, the control seems to be based entirely on the power to prescribe conditions for permission to develop water powers. The company, incorporated in Vermont, petitioned the New Hampshire Commission to reconstruct and heighten its dam across the Connecticut River between Bellows Falls, Vermont, and Walpole, New Hampshire. The power was generated in Vermont and some of it was sold at wholesale to New Hampshire companies. The Commission seemed to concede its lack of jurisdiction over wholesale transactions generally by pointing out that the Vermont utility could "without the permission of this commission, if it were so disposed, cease delivering any current to these companies operating as public utilities in this state, or it could charge these utilities such an excessively high price for the electricity that it furnished them that the consumers in New Hampshire would have to pay an unreasonable rate." (11 N. H. P. S. C. R. 180.) The Commission thereupon proceeded to do indirectly what it admitted it could not do directly. It compelled the company to make an agreement providing "that in consideration point is that their ultimate solution will greatly influence the actual extent to which state jurisdiction over interstate transmission is cut down by the decision in the Attleboro case.

In spite of the now admitted gap in state authority as to interstate wholesale contracts, and in spite of the substantial and increasing amount of power transmitted under such contracts, it may be insisted that the state commissions can deal adequately with the situation through their power to regulate rates for distribution to consumers. Does it appear in practice that the regulation of the distribution rate is an adequate safeguard to consumers where the wholesale price cannot be controlled? The answer to this question requires a consideration of those cases where the matter before the commissions is the retail rate to consumers, but where a wholesale contract is indirectly involved.

In the majority of cases found the commissions granted rate increases on the basis of increased charges by the wholesaling company, apparently without attempting to determine the reasonableness of these charges.[1] In three cases wholesale contracts were ig-

of permission being granted to said company by said New Hampshire Public Service Commission to raise the elevation of the water as aforesaid, said company will deliver electricity in New Hampshire for use within that state in such amount of the total electricity which is from time to time generated by virtue of the raising and holding of the waters by the dam as shall be ordered by said commission and under such reasonable regulations as to rates and service as may be from time to time determined by the commission." (*Ibid.*, 181.) The difficulties latent in the use of unconstitutional conditions can be realized if we assume that the Vermont Commission grants its permission for the development on terms contrary to those prescribed by the New Hampshire Commission.

[1] *Re Mineral Point Public Service Co.*, 22 Wis. R. C. R. 524 (1919); *Re McHenry County L. & P. Co.*, 6 Ill. P. U. C. R. 773 (1919); *Re Eastern Penn.*

nored in the fixing of distribution rates because of the common ownership of the companies involved.[1] In two cases increases in rates to consumers were permitted where increases in the wholesale charge had been previously granted by commissions in one or both of the states involved.[2] Only one case was found where the commission refused to allow an increase in local rates based on an increase in the wholesale price of power purchased from a company in another state, not in a

Power Co., 7 N. J. P. U. C. R. 241 (1919); *Re East St. Louis L. & P. Co.*, 6 Ill. P. U. C. R. 683 (1919), in which the Illinois Commission refused to permit the applicant to raise its local rates because there had been no increase in the cost of its power, obtained from a Mississippi company; *Re Marwell L. & P. Co.*, 11 Mo. P. S. C. R. 218 (1921); *Re River Falls Power Co.*, 26 Wis. R. C. R. 491 (1922); *Re Wisconsin Utilities Co.*, 27 Wis. R. C. R. 695 (1923); *Re Peninsular Power Co.*, 8 Mich. P. U. C. R. 60 (1926).

[1] *Re Kansas City L. & P. Co.*, 8 Mo. P. S. C. R. 223 (1919). This case is discussed below. *Re Empire District Electric Co.*, 12 Ann. Rep. Okla. C. C. 453 (1919). This company was owned and controlled by a Kansas company, which furnished all of the power used by the Oklahoma company, receiving therefor 95 per cent of the gross revenues from Oklahoma sales. The Oklahoma Commission said that this charge was inequitable and considered the properties of the two companies as a unit in determining rates for distribution. *Re Southern Power Co.*, 21 Ann. Rep. N. C. C. C. 45 (1920). In fixing rates charged by the company to North Carolina consumers the Commission accepted contract rates between the Southern company and affiliated companies in South Carolina from which part of the energy was obtained, but reserved its right to question the reasonableness of these charges at any time.

[2] *Re Vale Electric Co.*, 14 Ann. Rep. Ore. P. S. C. 93 (1920). In this case the Oregon Commission granted an application for an increase in local rates, stating that the Idaho and Oregon Commissions had conjointly agreed to a change in the contract rate with the Idaho Power Company. It will be recalled that in 1927 the Oregon Commission admitted that in view of the decision in the Attleboro case it had no jurisdiction over this wholesale rate. (*Re Idaho Power Co.*, P. U. R. 1928-A, 113). *Re Yuma Ice., El. & Mfg. Co.*, Trien. Rep. Arizona C. C., 1921–1924, p. 93. Here a local increase was allowed where the California Commission had previously permitted an increase in the wholesale price charged by the California company to the Arizona distributor.

parent-subsidiary relation.[1] In this case a Vermont company had increased its local rates on the ground that it had to pay a higher price for energy purchased, part of which came from New Hampshire. The Vermont Commission refused to allow the increase because the companies had not secured the approval of either the Vermont or New Hampshire Commissions for the new wholesale contracts entered into. It added that both the contract rates between the companies and the rates to consumers must remain in force until found unreasonable by the tribunal having authority. It is clear since the Attleboro case that no such tribunal exists, insofar as the contract rates are concerned.[2]

While state commissions have gone back of the contract rate in a few cases, such action is so clearly unwarranted, where the companies are not interrelated, that it is not likely to be exerted in the future. The courts have upheld the right of the states to regulate rates of local distributing companies, even where the power sold comes from another state, but in deciding that the states cannot question rates fixed in wholesale contracts for interstate power they have in effect prevented the states from regulating effectively the local rates for consumers. The commissions are compelled to base these rates on

[1] *Fellows Gear Shaper Co. v. Colonial L. & P. Co.*, Bien. Rep. Vt. P. S. C. 1919, p. 24.

[2] A somewhat ambiguous statement was made by the Arizona Corporation Commission in *Re Arizona Edison Co.*, P. U. R. 1927-c, note on p. 600. The Arizona company, which purchased power at wholesale from a California company, petitioned for an increase in rates. The Commission said that it recognized the interstate factor involved, but asserted its right, in the absence of federal action, to regulate Arizona utilities when "the interests of the public and the rights of Arizona consumers so require." It does not appear from available reports of the case that the Commission found it necessary for the public interest to interfere with the wholesale contract.

the wholesale price. If the wholesale price is unreasonably high the retail rate will be unreasonably high. The jurisdiction of the state commissions is limited to seeing that the local companies do not make an unreasonable profit over and above what they pay for their current.

There is another potential danger from the lack of control by the states over wholesale contracts. The argument that only a small percentage of power is transmitted across state lines under wholesale contracts and that there is little danger from excessive charges on that account does not regard the possibility of an unreasonably low charge for this power. The complaint in the Attleboro case was that the wholesale price in the contract between the Rhode Island and Massachusetts companies was less than the cost of producing the energy, and that the Rhode Island utility was therefore compelled to charge an unreasonably high rate for energy distributed in Rhode Island or give inferior service.[1] The discrimination was not against the three per cent of interstate power, but against the 97 per cent of intrastate power. Two earlier cases illustrate this same danger. In 1919 the Kansas City Light and Power Company, generating current in Missouri and distributing part of it to Missouri consumers and part to a Kansas subsidiary, petitioned the Missouri Commission for an increase in rates.[2] In fixing the Missouri rate base the Commission considered only the value of properties in the state, but in estimating revenues from this property it included sales to the Kansas company. The Commission refused to accept the price actually paid,

[1] *P. U. C. v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 87.
[2] *Re Kansas City L. & P. Co.*, 8 Mo. P. S. C. R. 223, 236.

but estimated the sales at production cost, saying that "any charge of less than this for energy sold to the Standard would create a loss that would be unjustly imposed on the Missouri consumers."[1] Another case involved the Wisconsin-Minnesota Light and Power Company, generating power in Wisconsin and distributing to cities in Wisconsin and Minnesota.[2] It also had an exchange contract with the Northern States Power Company of Minnesota. This contract was held by the Wisconsin Commission to be

> unjust and discriminatory, and in fixing rates for Wisconsin communities only such rates are authorized as would be approved if this energy were sold at an adequate rate. The contract covering the energy delivered to Minneapolis also provides a rate which in our opinion is unreasonably low, and we have fixed rates in this case upon the basis which would obtain if a proper rate were secured for this energy. The utility will be authorized to cancel existing contracts with the Northern States Power Company.[3]

The complaint in these three cases is that consumers in one state are discriminated against because of wholesale contracts with companies in another state which provide for such low rates as to impair the furnishing of adequate service at reasonable rates in the state in which the power is generated. It is at least doubtful if it is within the competence of the states to prevent entirely the discrimination against intrastate rates resulting from this dumping of power. Local rates can be fixed on the basis of production cost, as was done by the

[1] *Ibid.*, 276.
[2] *Re Wisconsin-Minnesota L. & P. Co.*, 25 Wis. R. C. R. 88 (1920).
[3] *Ibid.*, 156.

Missouri and Wisconsin Commissions. But it is certain since the Attleboro case that the contract rate cannot be increased. Neither can a state compel a company to discontinue exportation, unless possibly of water power. The point is that so long as the contract remains in force consumers in the state from which power is exported may suffer from inadequate service even if the company is not allowed to recoup its losses by charging unreasonable rates. The complaint of the Rhode Island Commission in the Attleboro case was not so much that the rates being charged to local consumers were excessive as that service was being impaired.[1]

In addition to these possibilities of the rendering of inadequate service in the state of generation, the state commissions are sometimes confronted with a situation where inadequate service by a distributor is the fault of the interstate wholesaling company, which is not within the jurisdiction of the commission. In a case before the Illinois Commission involving a complaint against the service furnished by the Central Illinois Public Service Company, the company said that it purchased the power distributed in Illinois from the Indiana Power and Water Company at Edwardsport, Indiana, and that the poor service was due largely to the generating plant.[2] The Commission admitted that it had no jurisdiction over either an operating company or a plant located in another state, even though it supplied electric energy to an electric utility in Illinois. It added, however, that this jurisdictional limitation was immaterial, for where

[1] 273 U. S. 83, 87.

[2] *City of Olney v. Central Ill. P. S. Co.*, P. U. R. 1920-c, 487 (Ill. P. U. C., 1920).

the complaint is against the quality of service in an Illinois city the source of the energy is irrelevant. The local company must bear the responsibility. In this case the remedy suggested was that the Illinois company be required to maintain in operation a plant in the city of Olney which had previously been abandoned.

In another case before the Illinois Commission much the same circumstances were found to exist. A charge of poor service was entered against an Illinois company which obtained all of its energy from a Wisconsin company.[1] The Illinois utility said that it had done everything in its power to improve its service, but that it could not secure adequate energy from the Wisconsin company. The Commission again stated that while it had no control over a generating company in another state it would expect all distributing companies in Illinois to maintain good service. The suggestion as to how the service could be improved in this case was not forthcoming, but as an incentive to the local company to find some method it was allowed only a very low rate of return.

A case arose before the Oregon Commission over the refusal of the Idaho Power Company to continue furnishing energy to an Oregon irrigation district, a municipal corporation.[2] The company claimed that the District had violated the terms of the contract, but the Commission ordered it to continue the service. Assuming that this was a wholesale transaction, as it appears to have been, it would seem that it was beyond the

[1] *Re McHenry County L. & P. Co.*, 1921-B, 10 (Ill. P. U. C., 1920).

[2] *Payette Oregon Slope Irrigation District v. Idaho Power Co.*, 17 Ore. P. S. C. R. 70 (1923).

power of the Commission to compel the company to continue the Oregon service. Insofar as retail distribution is concerned an interstate company can probably be compelled to continue a given part of its service, provided it wishes to do business in the state, but wholesale contracts are wholly outside the jurisdiction of a state.

While few in number, these cases illustrate a difficulty inherent in a system of state regulation. To say that a state has complete control over the local distribution of electric power, even though it may come from another state, is true only in the legal sense. We have seen that as to rates the regulation of the retail or distributing rate cannot go back of the wholesale contract where one is involved. The same limitation exists as to service. The legal power of the state to regulate local service conditions does not necessarily guarantee adequate regulation. The real remedy in the above cases could be provided only by a body having jurisdiction over both the wholesale and retail systems. In the two Illinois cases cited it was admitted by the Commission that the real blame for the poor service attached to the wholesaling company, but owing to lack of jurisdiction the Commission was compelled to make the local company pay the penalty. In the light of the limited number of cases found, this defect in state authority cannot be said to have created a really serious problem in itself. Taken in conjunction with the other cases discussed in this chapter, however, it provides further illustration of the manner in which state regulation of local rates and service is affected by the lack of authority over interstate wholesale contracts.

Cases Not Involving Wholesale Contracts

It has been clearly established that the state has jurisdiction to regulate the rates of distribution where electric current is delivered directly by an interstate transmitting company without the intervention of a wholesale transaction. The existence of legal control does not necessarily imply that there is in fact adequate and effective regulation. Where a utility is engaged in distributing energy to consumers in two or more states are the commissions in practice able to prevent discriminations as regards consumers in different states? And are they under these conditions always able to ascertain the facts necessary to the fixing of the rate base for energy consumed in their respective states?

As regards the possibility of discrimination, the charges may be of two sorts. The state in which the interstate power is received may claim that the rates of the transmitting company for power sold in the state of generation are unreasonably low, thus constituting a burden on the recipients of the interstate power; or, secondly, the state from which the power is exported may claim that the rates of the company in the other state are so low as to constitute a discrimination against consumers in the state where the power is generated. It will be noted here that, as in the former discussion, the discrimination may operate against intrastate as well as against interstate commerce.

Few cases have been found in which the alleged discrimination operated against consumers in the state where the power was generated. In 1921 the Utah Power and Light Company, serving 80 per cent of Utah and part of Idaho, petitioned the Utah Commission for an increase in rates.[1] The company generated a large part of the power used in Utah in Idaho. The complaint in this case was made by Utah milling companies, which alleged that their Idaho competitors, who enjoyed a lower rate, would secure a considerable advantage if Utah mills had to pay the higher rate. In this instance the Commission found that the higher rate was reasonable and that no discrimination was involved. This decision was affirmed by the Supreme Court of Utah.[2]

Another interesting case arose over an action of the Idaho legislature in allowing tax exemptions to accrue to the benefit of irrigation users. Evidence submitted before the Oregon Commission showed that a differential amounting to over ten per cent existed between bills paid by users of power for irrigation purposes in Idaho and for the same service in Oregon.[3] This differential was to last to a certain date. The Oregon Commission took no other action than to say that it believed that the differential should not be maintained.[4] The Commission did not indicate what it could have done other than to recommend the change. It obviously could not have compelled the Idaho legislature to refuse to extend the term of the law, nor could it have compelled the Oregon legislature to grant a like exemption. It could not have ordered the company to lower its Oregon rates because they were admittedly not unreasonably high. This was apparently a purely "political" case, and beyond the power of the regulatory body of either state.

[1] *Re Utah P. & L. Co.*, P. U. R. 1921-c, 294 (Utah P. U. C., 1921).
[2] *Utah Copper Co. v. P. U. C.*, 59 Utah 191 (1921).
[3] *Re Idaho Power Co.*, 16 Ann. Rep. Ore. P. S. C. 167 (1922).
[4] *Ibid.*

By far the most important case in this group was that involving the rates of the Southern Power Company, in a proceeding before the North Carolina Corporation Commission.[1] The Southern company furnished energy in both North and South Carolina, at wholesale and retail. A substantial part of the power retailed in North Carolina was generated in South Carolina. One of the chief complaints against the proposed new rate schedule was that there was a discrimination against North Carolina consumers. The Commission denied that this was the case. It added, however, that there was no duty on the part of the North Carolina Commission to establish other than what it considered fair rates for North Carolina.

There would seem to be little doubt that this opinion is the only one which a state commission can safely follow. The commission certainly has no jurisdiction over rates in another state. It cannot do other than to attempt to establish what it believes to be a reasonable rate for service within the state, and it cannot make unreasonably low rates even if such rates are given by the company in another state.

Turning to those cases where the discrimination is charged against the company as to its rates for the interstate power, we find first of all an international case. The Arizona Gas and Electric Company petitioned the Arizona Corporation Commission for a surcharge.[2] The Commission eventually granted the petition but expressed dissatisfaction because part of the company's

[1] *Re Southern Power Co.*, P. U. R. 1924-B, 821 (22 Ann. Rep. N. C. C. C. 44, 1924).

[2] *Re Arizona Gas & Electric Co.*, P. U. R. 1919-D, 666 (Arizona C. C., 1919).

business was done in Mexico, and no reliable figures were obtainable as to the Mexican business. The Commission's statement follows:

> We may have no authority to prescribe surcharges or in any other way adjust rates for electricity sold in Mexico, but we will decline to permit increases in rates in the territory under our jurisdiction sufficient to care for all deficiencies in revenues unless proper rate adjustments are made applying to the system as a whole.[1]

The Commission allowed the increase, but ordered the company in the future to give it data on its international business.

The Wisconsin-Minnesota Loop case has already been mentioned insofar as it referred to discriminatory wholesale rates. The charge of discrimination was also raised as regarded the retail business.[2] The company generated 95 per cent of its power in Wisconsin, whereas Minnesota received about three-eighths of the total energy distributed. Thirty-three Wisconsin and nine Minnesota cities were supplied. The peculiar feature of this case was that the Commission acted in such a way as to discriminate against Wisconsin consumers. What the Commission did was to consider the entire loop system as a whole, and in the allocation of expenses and revenues the Minnesota cities were considered along with the Wisconsin cities. As has been indicated, the wholesale contracts with the Northern States Power Company were found unreasonably low and the Wisconsin company was authorized to cancel them. The Commission decided on what it considered to be reason-

[1] P. U. R. 1919-D, 666, 670.

[2] *Re Wisconsin-Minnesota L. & P. Co.*, 25 Wis. R. C. R. 88 (1920).

able rates for retail service in the Minnesota cities and in estimating revenues it credited these figures. The Commission, as it said, "assumed that rates in Minnesota would be the same as for comparable localities in Wisconsin."[1] Moreover, the Commission did not fix the rates strictly in proportion to the cost for each unit served. It pointed out that the undertaking of great hydro-electric projects such as this would be impossible on such a basis. No one unit far from the source could be built if charged up with its exact proportion of the expense. Furthermore, power was run into the system all along the loop and an exact proportioning would have been impossible.[2]

Several Wisconsin cities attacked the validity of the Wisconsin order. The Supreme Court of Wisconsin decided the case solely on the interpretation it gave of the legislative act giving the Commission power to fix rates.[3] This act, said the Court, intended that the Commission should find each city's cost separately and should fix the rates accordingly. In apportioning rates for the system as a whole the Commission had not followed the statute and had discriminated against cities nearest the source of supply. New rates were later fixed to conform to the principles laid down by the Court.[4] This is a unique case in that the Commission was found to have discriminated against cities in its own state as against Minnesota cities, they being farthest from the source of supply.

In a North Dakota case the company involved did business in Manitoba and Minnesota as well as in North

[1] *City of Menominee v. Rd. Comm.*, 26 Wis. R. C. R. 27 (1921).

[2] *Ibid.*, pp. 30 ff.

[3] *Eau Claire v. Rd. Comm.*, 178 Wis. 207 (1922).

[4] *Re Wisconsin-Minnesota L. & P. Co.*, 27 Wis. R. C. R. 349 (1923).

Dakota. The Commission refused to grant an increase in North Dakota rates until rates in Manitoba and Minnesota were raised, partly on the ground that there had been great difficulty in obtaining the company's books, which were kept in Minnesota, and badly kept, and partly because it was alleged that service was being furnished in Manitoba and Minnesota cities at less than cost.[1] In another case, the North Dakota Commission in fixing the rates of a company operating in North Dakota and Minnesota "advised" rates for Minnesota service and fixed North Dakota rates on the assumption that the advised rates would be put into effect in Minnesota.[2]

In this connection attention should be called to a Nevada case in which the Nevada-California Power Company, generating power in California and serving a large number of Nevada consumers, petitioned the Nevada Commission to discontinue some of its Nevada service.[3] The Commission refused to grant the application, saying that the Nevada business was really profitable, but that the book-keeping, in California, made it pay more than its share of the expenses. Here again the Commission was within its legal rights in compelling the company to keep up all of its service as long as it chose to do business in Nevada, but the real remedy would be to require the company to allocate properly the expenses of the California and Nevada businesses.

The conclusion as to the factor of discrimination in

[1] *Re Pembina L. & P. Co.*, P. U. R. 1923-A, 810 (N. D. R. C., 1922).

[2] *Re Red River Power Co.*, P. U. R. 1923-E, 534 (N. D. R. C., 1923).

[3] *Re Nevada-California Power Co.*, P. U. R. 1920-D, 235 (Nev. P. S. C., 1920).

regard to these retail transactions in interstate commerce is not so easy to draw as in the cases where the wholesale transaction is concerned. There we have simply a jurisdictional problem, with the state legally unable to prevent any discrimination arising from an unreasonably high or low wholesale rate. The problem as to retail transactions is of course jurisdictional to a certain extent. The state feeling itself discriminated against cannot fix the rates in the other state even though it believes them to be unreasonable. On the other hand, it is more free to fix a reasonable rate as to power served within the state because of the fact that there is no wholesale rate involved which must be accepted as a basis. Legally, the state has full authority here to make a reasonable rate for whatever power the interstate company supplies therein. Actually, these cases show a practical difficulty which makes it almost impossible to avoid a certain amount of discrimination. When there is a discrimination resulting from the furnishing of service at rates which are too low in one of the states concerned, the only really adequate remedy is the enforcement of a reasonable rate in that state. The discrimination cannot be removed by compelling the company to accept an unreasonably low return in the state discriminated against. Of course, this state has a right to prevent the company from recouping its losses in one state by the imposing of excessive rates in another. There is here, however, the inherent difficulty that discovering the discrimination involves an investigation of rates in another state.

The difficulty, however, is not so unsurmountable, from the standpoint of the states, as where wholesale rates are involved. There the states can do nothing, jointly or separately. In this case there is little actual discrimination likely to result where the states between which interstate commerce takes place have effective regulatory powers and exercise them. With the exception of the international features involved in the cases discussed above, there are none where state regulation, by both states concerned, could not have done all that could have been done by any regulatory authority. Obviously, the most effective method for these cases where discrimination is charged by consumers or others in either state would be coöperative action by the commissions of both states concerned, and a joint determination of reasonable rates.

Leaving aside all questions of discrimination as between consumers in different states, are the commissions able in practice to regulate the rates of utilities transmitting and distributing power which they have generated in another state as effectively as utilities doing only an intrastate business are regulated? The discussion of this question is based on an examination of commission procedure in about forty cases, all involving the fixing of rates charged by utilities operating at retail in two or more states. We are not concerned here, of course, with the methods and technique of commissions in valuation and rate-making proceedings generally. The problem is to discover whether or not the interstate factors create special difficulties and to see how fully these difficulties are met.

State commissions may act on either one of two general principles in fixing or investigating the rates of an interstate utility. They may attempt to establish rates on the basis of a reasonable return on property used and useful in the state, excluding all property located outside of the state and used only in service in another state. On the revenue side only revenue from the property within the state would be considered. On the other hand, the Commission may consider the entire system of the interstate company as a unit, and fix such rates for service within the state as would provide a reasonable return on the whole property, assuming that rates in the other state or states involved are similarly fixed. The question which method should be employed is largely dependent on the circumstances of the particular case being dealt with. We will examine first the cases wherein only property used and useful in the state is considered in the rate base.

The difficulties of determining what properties are "used and useful" in the state and of finding the proper amount of revenues derived from those properties are illustrated in the proceedings of the Washington Public Service Commission in its valuations of utilities operating in Washington and Oregon. The utility chiefly involved was the Pacific Power and Light Company.[1] A rate investigation was conducted in 1919.[2] The company had a Washington system called the Yakima-

[1] A valuation of the North Coast Power Company in 1919 showed that this utility had two plants in Oregon. The Commission found that "the respondent's electric system at Rainier, Oregon, obtains its energy from the respondent's generating and transmission system in Washington thereby creating a condition of interstate business which this Commission recognizes." In order to protect Washington rate payers the Commission included receipts from this interstate business in revenues derived from Washington properties. (*Re North Coast Power Co.*, 10 Ann. Rep. Wash. P. S. C. 54).

[2] *P. S. C. v. Pacific P. & L. Co.*, 9 Ann. Rep. Wash. P. S. C. 92.

Walla Walla system which was connected by a fifteen-mile transmission line with a Walla Walla river power plant in Umatilla county, Oregon. This latter plant was used not only for the Oregon business, but for purposes of interchange with the Washington plant. Whenever one of the plants had surplus power available it was transmitted to the other. The Commission came to the conclusion that this interchange was mutually beneficial and valuable to the Oregon and Washington business of the company, and it divided the property for valuation purposes at the state line. That part of the interchange transmission line located in Washington and all of the plant in Washington was called used and useful in the Washington business.[1]

The company also had a transmission line located chiefly in Washington, connecting the Oregon plant with the generating plant of the Northwestern Electric Company of Washington, for purposes of interchange. The commission excluded this line from its valuation of the Washington properties of the company on the ground that it was used and useful only in the Oregon business.[2]

In 1920 the city of Yakima entered a complaint against the rates of the Pacific company and the Commission again excluded that part of the Yakima-Walla Walla plant located in Oregon from the valuation of the company's property.[3] But in 1925 the city of Walla Walla entered a complaint against the rates, charging that the Umatilla property in Oregon had been included

[1] 9 Ann. Rep. Wash. P. S. C. 94.

[2] *Ibid.*

[3] *City of Yakima v. Pacific P. & L. Co.*, 10 Ann. Rep. Wash P. S. C. 82 (1920).

in the valuation.[1] The Commission discovered that in spite of its finding that this Oregon property was used and useful only in the Oregon business of the company it had by an error neglected to subtract its value from the total valuation figure. In order to do this the Commission made a valuation of this property, including development costs and water rights. Finally the Oregon value was found and subtracted. It was found, however, that other parts of the Oregon system were used and useful in furnishing service in Washington, and these items were included in the company's valuation. This finding was attacked in the Supreme Court of the State of Washington by the Pacific Company.[2] The Court upheld the finding of the Commission in an opinion which merits careful attention.

The respondent was engaged in interstate business. The plant in consideration was one of the units operated by the respondent in the generation of electric energy used in its interstate business. The plant was directly connected by a transmission line with the distributing lines in the state of Washington, and much of the electric energy there generated was transmitted into the latter state by the respondent and disposed of therein to its patrons requiring such energy. The purpose of valuing the property of a public service company is, of course, to aid in fixing a base on which to determine the reasonable rates and charges which the company may exact for the services it renders. Manifestly, if this base is to be a just one, the value of all of the property necessarily used by the utility in the performance of the service, wheresoever situated, must be taken into consideration in forming it. It

[1] *City of Walla Walla v. Pacific P. & L. Co.*, 6 Ann. Rep. Wash. D. P. W., 112 (1925).

[2] *State ex rel. Pacific P. & L. Co. v. Dept. of Public Works*, 143 Wash. 67; 254 Pac. 839; P. U. R. 1927-c, 781 (1927).

could be that a company supplying electric energy to consumers in this state would have all of its generating plants located outside of the state with nothing but transmission lines herein, and it could be that all of the energy generated was used in this state. In such a case it is plain that a charge for services, based alone upon the value of the transmission lines, would not be remunerative to the company; in fact, since the value and cost of upkeep of the transmission lines bear but a small proportion to the value and cost of the upkeep of the generating plant, it is difficult to see how it could perform the service at all. Were this the situation no one could rightly say that the value of the entire plant should not be taken into consideration in fixing the rate base, and this being so, it must follow that, when a proportionate part of the energy used in the state is generated outside of the state, a like proportion of the cost of such generation must be added to the rate base.[1]

This opinion presents clearly and irrefutably the futility of attempting to fix reasonable rates solely on a basis of property within the borders of the state where interstate business is done. The other situation might have been indicated, where the company might have a very large amount of property in the state but might sell a large part of the power generated thereby in another state. In such cases of course the commission can do nothing by a consideration merely of the intrastate business. It must either include the revenues received from the interstate business, or deduct a percentage of the property value in the state based on the ratio of interstate to total business done. This, it is evident, is the only effective method where an attempt is made to separate the intrastate business and to fix rates based on that business only. This point should be empha-

[1] 143 Wash. 67, 82.

sized, because the result is that the state commissions are placed in a dilemma. If they do not consider the interstate business, the above situation results and it is impossible to properly regulate local rates. On the other hand, the necessity of considering the interstate business places an extra burden upon the commission. Frequently it is an exceedingly delicate task to discover what percentage of a company's property is "used and useful" in business in the state as contrasted with that devoted to business in another state. It involves a valuation of property in another state, as in the above case, or an examination of the records and accounts of business done in the other state. Not only is there this jurisdictional difficulty on the part of this state, but in any rate proceedings by the other state the same difficulties arise and there is a duplication of checking of valuations and revenue data. This difficulty, which exists only to a minor extent in these cases, becomes much more significant where state commissions value the property of interstate companies as a unit for rate-making purposes.

In the case of the Kansas City Light and Power Company, considered above, it was claimed by the company that the value of the Standard Electric Light Company should be included in the Missouri valuation.[1] The commission excluded this property on the ground that it was located in Kansas and served Kansas customers only. The commission did, however, include the revenues obtained by the Missouri company for power sold to the Kansas company, or rather estimated these sales at production cost saying that a lesser price would discriminate against Missouri consumers.

[1] *Re Kansas City L. & P. Co.*, 8 Mo. P. S. C. R. 223 (1919).

Another interesting case arose in the Supreme Court of the District of Columbia over the valuation of the Potomac Electric Power Company.[1] In valuing the company's property in 1917 the District Commission refused to include the Great Falls power site, located outside of the District. Some property outside of the District was valued as used and useful in service in the District, but the claim for a million dollars, representing money paid for water rights for the Great Falls site, was disallowed.[2] The District Supreme Court sustained the Commission on the grounds that the title had never been perfected; that it was located outside of the District; that the value was problematical, and that certain federal rights were involved. The property not only was not located in the District of Columbia, but was not used in any way in furnishing electric current therein. It is apparent from the tone of the opinion that the situation would be very different if the site were actually used to supply current in the District. Under the circumstances, of course, the inclusion of the item would have meant that consumers in the District would have been paying interest on a million dollar site which was in no way connected with the service they received.

The difficulties arising out of an attempt to segregate the properties of an interstate company are illustrated by a recent Maryland case.[3] In fixing rates for a Maryland company, the commission was compelled to take

[1] *Potomac Electric Power Co. v. P. U. C.*, 8 Ann. Rep. Dist. Col. P. U. C. 87 (1920).

[2] *Re Potomac Electric Power Co.*, 5 Ann. Rep. Dist. Col. P. U. C. 64 (1917).

[3] *Re Eastern Shore Gas & Electric Co.*, P. U. R. 1929-E, 244 (Md. P. S. C., 1929).

into account the fact that part of the Maryland property was used in service in Delaware, current being sold there to an affiliated company. The commission engineer attempted an allocation of the Maryland property upon the basis of the amount of current consumed in each state. In defending this method of allocation the commission made the following statement:

> The Commission understands Mr. Wolf's allocation of values to be an effort to determine the extent to which property in Maryland is used for serving Delaware communities and vice versa. His allocation of power plant values is based upon the amount of current consumed in each state and the allocation of transmission system values is based upon the lengths of the transmission circuits which are used jointly and the amounts of current transmitted over each circuit, for use in each state, as determined by transformer capacity.
>
> The Commission believes that an allocation of values for such purpose cannot reasonably be misunderstood to be a transfer of property from one ownership to another, and considers it to be as accurate and equitable as any method that could be employed under existing conditions.[1]

Employing this method of allocation, it was found that $466,000 of Maryland properties was devoted to serving Delaware consumers, and that the return on such value should come from Delaware, and not Maryland revenues. The rates fixed in Maryland were not calculated to provide a reasonable return on this value.[2] The commission believed this to be fairly accurate, but admitted that there were "uncertainties involved in such an estimate." [3]

The other cases in this group are not of great im-

[1] *Ibid.*, 247. [2] *Ibid.*
[3] *Ibid.*, 248.

portance. In one instance the Wisconsin Commission included in the value of the Interstate Power Company a transmission line located in Iowa, since it was used in furnishing service in Wisconsin.[1] In another case the New Jersey Commission was forced to fix rates on the basis of Pennsylvania properties.[2] This was a peculiar case in that the New Jersey company owned no property whatever. The transmission and distribution systems in New Jersey were leased by the local company from a Pennsylvania company. The energy was generated at the plant of the Pennsylvania company at Easton, Pennsylvania. The company claimed rates entitling it to a return on a fair share of this Easton property, measured by the proportion of New Jersey demands to the total demands on the generating plant. Upon this basis the New Jersey rates were fixed.

In the remainder of the cases examined falling in this group there are no particularly significant features. All involve interstate companies with plant or plants in one state and a part of the distribution system in another. In each case the commission attempted to fix rates based on property used and useful in its state, whether located there or not, and in each there was an attempt to estimate out of state revenues derived from property located in the state.[3]

In view of the fact that the state has jurisdiction to regulate only the intrastate rates of an interstate utility, it is obvious that the most proper method, wherever it

[1] *Re Interstate Power Co.*, 25 Wis. R. C. R. 602 (1920).

[2] *Re Eastern Pennsylvania Power Co.*, 7 N. J. P. U. C. R. 241 (1919).

[3] *Re Rockland El. Co.*, 8 N. J. P. U. C. R. 501 (1920); *Re Jensen*, 15 Ann. Rep. Ore. P. S. C. 25 (1921); *Re California-Oregon Power Co.*, 17 Cal. R. C. R. 23 (1919); *Re Mountain States Power Co.*, 16 Mon. U. R. 300 (1923).

is practicable, is for the state commission to do as in the above cases, base the rates on a valuation of property used and useful in service within the state, excluding property within the state not so used and including property in another state which is used for purposes of service in the state. The same considerations apply to the revenue data. Revenues received from the use of property within the state must be included in determining the company's receipts even though they are in another state. As we have pointed out, there are inherent difficulties in this method owing to the extraterritorial feature involved, the task of allocating intrastate and interstate business, and the overlapping of functions. There is also the further difficulty that it may be practicably impossible or unwise to attempt this method of valuation in specific cases, owing to the closeness of the relation between the company's business in the two states involved, the lack of distinctive data as to such business, or other reasons. We find, therefore, a large number of rate cases where there is no attempt to fix rates upon a base of property used and useful in the state. Instead of that, rates are fixed for the system as a unit, though of course all the commission can actually prescribe are the rates to be charged for service within the state.

Occasionally, as was pointed out in the discussion of discriminatory rates, the state commission even makes its approval of a rate schedule contingent upon the fixing of like rates in another state. This was done by the North Dakota Commission for a company operating in Manitoba and Minnesota as well as in North Dakota.[1]

[1] *Re Pembina L. & P. Co.*, P. U. R. 1923-A, 810 (N. D. R. C., 1922).

No increase was allowed in North Dakota rates until increases in rates should have been made in the rest of the territory served. In another case where the company whose rates were involved served in North Dakota and Minnesota the Commission considered the property as a whole, and while saying that it was without jurisdiction to fix rates in Minnesota, it advised as to what rates should be charged there.[1]

The Wisconsin Commission also adopted this method of valuation in several cases. In the case of the Peninsular Power Company, doing business in Wisconsin and Michigan, the Commission took the whole value on the grounds that the business in both states was similar.[2] The requested increase was not to be allowed until the Michigan Commission had allowed a similar increase in Michigan. This case is not of great practical importance because the rates in question were for iron-mining companies, only one of which was located in Wisconsin.

In another instance, the Northern Power Company applied for a rate increase and the commission stated that, as it was a subsidiary of the Great Northern Power Company of Minnesota and operated as a part of its system, the revenues and expenses of both companies would be considered together.[3] On this basis the increase was granted, with no mention of the Minnesota rates.

That there are limits on the power of the commission to consider all properties of a company as a unit in fixing rates was stated by the court in the already much discussed Wisconsin-Minnesota Loop case.[4] The court in

[1] *Re Red River Power Co.*, P. U. R. 1923-E, 534 (N. D. R. C., 1923).
[2] *Re Peninsular Power Co.*, P. U. R. 1923-A, 545 (Wis. R. C., 1922).
[3] *Re Northern Power Co.*, 24 Wis. R. C. R. 173 (1919).
[4] *Eau Claire v. Rd. Comm.*, 178 Wis. 207 (1922).

that case, it will be recalled, required that the costs of each city be separately found and rates fixed accordingly. This decision invalidated an order of the commission fixing rates for a company operating in thirty-three Wisconsin and nine Minnesota communities, insofar as Wisconsin rates were concerned, on the basis of the consideration of the system as a unit, and assuming the obtaining of like revenues in Minnesota as would be secured from comparable Wisconsin business. The court said that the commission was required by law to determine the cost of the service furnished to each city and base rates accordingly. Apparently this decision was not interpreted as forbidding the commission in all cases to consider electric systems as a unit, for in a case involving a company serving Marinette, Wisconsin, and Menominee and two small villages in Michigan, the commission took the value of the combined properties, and the combined revenues and expenses irrespective of the location of the property.[1] The commission said that this method was necessary here because the costs of service in each city were largely dependent upon the consumption of energy in the other. There seems to be no doubt as to the wisdom of the commission's action in this case, and for that matter the method of consideration of the whole system as a unit would seem to have been the better method in the Loop case.

The commissions of Oklahoma, Missouri, and Kansas have experienced no little difficulty in fixing the rates of the Empire District Electric Company. The main or parent company was a Kansas corporation, and its subsidiary of the same name was incorporated in

[1] *Re Menominee & Marinette L. & T. Co.*, 28 Wis. R. C. R. 693 (1924).

Kansas. All power was furnished by the Kansas company, and the relations were such that in all cases the commissions did not attempt to distinguish between the two. A very large percentage of the power used was generated in Kansas, and distributed widely in Kansas, Missouri, and Oklahoma. In 1919 the company applied to the Oklahoma Corporation Commission for an increase in rates. The Commission attempted a valuation of the property as a whole, and then finding that thirty-five per cent of the energy was used in Oklahoma it charged that percentage of the property to that state and fixed rates accordingly.[1] In the same year like applications were made to the Kansas and Missouri Commissions. In the hearing before the latter Commission transcripts of the testimony before the Oklahoma and Kansas Commissions were presented, and the company submitted its data as to its total property valuation. The Commission stated that it had not "made a valuation of this property, and because of its nature it is not wise to attempt to arrive at a value upon a comparative basis."[2] What the Commission apparently did was to grant the increases requested because like increases had been granted by the Kansas and Oklahoma corporations on a lesser capital or production value than claimed before the Missouri Commission.[3] In other words, so far as the report of this case goes there was no independent investigation by the Missouri Commission and the decision was made apparently on the basis that increases were granted in the other states on data less favorable

[1] *Re Empire District El. Co.*, 12 Ann. Rep. Okla. C. C. 453 (1919).
[2] *Re Same*, 7 Mo. P. S. C. R. 466, 471 (1919).
[3] *Ibid.*, citing Docket No. 2708, Kan. P. U. C., June 5, 1919.

to the company than the data presented here. Again in 1921 the company petitioned for an increase in Missouri rates. The Commission this time considered the value of the properties as a whole, found the total operating revenues and expenses, allowing and disallowing Kansas and Oklahoma items, and finally allowed the increase.[1]

From the facts given as to the nature of the business done by this utility, it would appear that the method of considering the business as a whole was the only practical one in this case. An allocation among the three states of property used and useful in those states, and of expenses properly chargeable to each, would apparently have been an impossibility. It also is evident, however, that the consideration of the business as a whole has some disadvantages. In the first place, it is impossible, as the Missouri Commission admits, to make an actual valuation, or even a careful check-up on the company's valuation figures. The wide extent of the properties and their location in three states makes this a practical impossibility. Secondly, it involves a situation where one commission must pass upon the validity of expense and revenue items in other states. Thirdly, it involves a duplication of effort, of rate proceedings, and time. Finally, it does not insure consistent, or rather is likely to involve inconsistent, findings. Each commission may and will undoubtedly arrive at different conclusions as to the company's valuation, revenues, and expenses. In these cases all of the increases requested were granted, but there did not appear in any of them to be any definite idea as to what the combined value of the properties was. There was

[1] *Re Empire District El. Co.*, 10 Mo. P. S. C. R. 335.

merely the decision that the rates requested were not unreasonable. It would seem that this case ought to have been decided not three distinct times in three distinct hearings before the commissions of three different states, but by one consolidated hearing before these commissions acting in coöperation. At least the proceedings could be made contemporaneous and the testimony presented identical, with an agreement between the commissions to divide the work of investigation among them and not waste their efforts duplicating each other's work.

A case somewhat similar to this arose out of an application for a rate increase by the Northern Virginia Power Company, before the State Corporation Commission of Virginia.[1] This company owned and operated hydro and steam plants in West Virginia and supplied light and power to consumers in West Virginia, Virginia, and Maryland. The Commission found that there had been no cost accounting such as would show the cost of the various plants or the operating cost as divided between the states.

> Under such circumstances, the company itself not having segregated its operations into their several units of value, it is impossible for this Commission to undertake at this time to separate the cost of service as between Virginia, West Virginia, and Maryland, and will consider the entire operations of the company as a single unit; even though it might be proper under other circumstances to consider the Virginia portion alone.[2]

The decision finally made was a qualified refusal of the increase. The Commission stated that the West Vir-

[1] *Re Northern Virginia Power Co.*, 1919 Ann. Rep. Va. S. C. C., p. 22.
[2] *Ibid.*, p. 24.

ginia Commission had already refused an increase until better service should be furnished and the Virginia Commission said that it would refuse an increase until the results of the West Virginia decision could be determined.

Of the remaining cases where the business of the company is considered as a unit only a few need to be discussed. Several are of no special significance.[1] It should be noted that in four Michigan cases examined the commission each time granted the increase requested without any apparent independent investigation by the commission. In each case the company involved operated in another state as well as in Michigan, and in each instance the rate requested was already in force in the other state. In two instances the order of the Wisconsin Commission granting the increase in Wisconsin rates was offered in evidence by the company,[2] and in the other two cases it was merely stated that the rates asked for were already in force, in one case in Indiana, and in the other case in Wisconsin.[3] The assumption in these cases was apparently that one state commission had already investigated thoroughly the entire system of the applicant, including its Michigan properties, and that further rate researches would be mere waste and duplication. This practice is somewhat simi-

[1] *Re Tarkio El. & Water Co.*, 12 Mo. P. S. C. R. 260 (1922). Transmission line in Iowa and Iowa business not segregated in rate investigation. *Re Bristol G. & El. Co.*, 1921 Ann. Rep. Va. S. C. C. 19 (1921), and 15 Ann. Rep. Tenn. R. & P. U. C. 92 (1923). Rate investigations by the Commissions of Virginia and Tennessee of a company operating in Bristol, Va., and Bristol, Tenn.

[2] *Re Menominee-Marinette L. & T. Co.*, 8 Mich. P. U. C. R. 202 (1926); *Re Peninsular Power Co.*, 4 Mich. P. U. C. R. 735 (1922).

[3] *Re Indiana & Michigan El. Co.*, 5 Mich. P. U. C. R. 456 (1923); *Re Peninsular Power Co.*, 7 Mich. P. U. C. R. 192 (1925).

lar to rulings made in two instances by the Montana and South Carolina Commission, ordering companies therein to serve local consumers at the same rate as served in North Dakota and Georgia, respectively, where the plants of the applicants were located.[1] This practice may be justified by peculiar circumstances in individual cases, but it obviously is not a satisfactory method to pursue as a general rule. The question raised by these cases is why a method of rate investigation is not pursued which will result in an accurate body of data as to the company's business and property in the states concerned and at the same time avoid the needless duplication of effort involved where each commission feels itself obliged to examine the entire business of the company.

That it is possible and feasible to conduct rate hearings on this basis has been demonstrated in a series of cases before the Idaho and Oregon Commissions involving the rates of the Idaho Power Company. This company was engaged in generating, transmitting, and distributing energy in southern Idaho, northern Nevada, and eastern Oregon. The rates involved in all of these cases were rates for retail distribution in Idaho and Oregon. The first cases involved applications for increases in irrigation rates. Joint hearings were held by the Idaho and Oregon Commissions and the increase was allowed in both states. Hearings were held before both Commissions.[2]

[1] *Citizen's Committee of Wibaux v. Eastern Montana L. & P. Co.*, 17 Mon. U. R. 672 (1924); *Re Augusta-Aiken Ry. & El. Corp.*, 1926 Ann. Rep. S. C. R. C. 12 (1926).

[2] *Re Idaho Power Co.*, 14 Ann. Rep. Ore. P. S. C. 42, and 8 Ann. Rep. Ida. P. U. C. 344 (1920).

In 1922 the company petitioned the two Commissions for a general increase in rates. The Idaho report stated that "the commissions of the two states have, in a large part, joined forces in the checks and studies made and in the proceedings had." [1] In 1924 further valuation proceedings were necessary. The Oregon Commission then stated that each Commission had valued the property of the company in its state, had held joint hearings, and had made the same findings as to the respective values in the two states.[2] The same procedure was followed as to consideration of revenue requirements, identical testimony being presented to the two Commissions and practically concurrent findings being made.[3] In the final order by the Oregon Commission fixing rates for service in Oregon the rates were based on the joint findings, and were the same as in Idaho with certain changes to conform to local conditions.[4]

It should also be mentioned that in a still earlier case the Idaho and Washington Commissions had held joint conferences and made joint investigations and joint findings as to the respective values of the properties of the Washington Water Power Company in the two states.[5]

The importance of these cases as bearing on this problem can hardly be overestimated. If the states themselves are to deal adequately and effectively with the regulation of rates of interstate companies it would

[1] *Re Idaho Power Co.*, 10 Ann. Rep. Ida. P. U. C. 57, 60 (1922).

[2] *Re Same*, 18 Ann. Rep. Ore. P. S. C. 24 (1924).

[3] *Ibid.*, 34.

[4] *Re Same*, 18 Ann. Rep. Ore. P. S. C. 99 (1924).

[5] *Peterson v. Washington Water Power Co.*, 8 Ann. Rep. Ida. P. U. C. 34 (1921).

seem that some form of coöperation between public service commissions is essential. Insofar as wholesale rates are involved the states may be powerless to prevent discrimination, both as to interstate and intrastate rates. In these cases coöperation is futile, because only the federal government can deal with the source of the discrimination. As respects all of the other problems here dealt with, however, coöperative action on the part of the state commissions would be almost entirely adequate. The question of constitutional limitations on state action applies here only to the extent that the commission of one state may not prescribe rates which shall be charged in another state. But it has full legal authority to establish reasonable rates for service within the state, even though the power be imported from another state. It has been pointed out, however, that in practice there are grave difficulties to be overcome. If the commission regards only property and business within the state, the fixing of rates may be a farce, because the plant may be located outside of the state, or on the other hand the plant may be within the state but nearly all the revenue may be obtained from business in another state. This method then is rarely if ever possible where interstate commerce is involved. If the commission goes upon the principle of property used and useful in service within the state, and revenues derived from such property, as a basis for rate fixing, the most satisfactory results may be obtained on certain conditions. The conditions are first that an allocation between the states concerned is possible, and secondly that there is a valuation and check-up on property and business done without the state as carefully made as for property and business within the state. If the first condition is not met, as is frequently the case, this method is impossible. If the second condition is not met, rate regulation is haphazard and not much more than refined guesswork. If it is met, it involves an increased burden on an already overworked commission machinery, as well as duplication of the work of other commissions. If the alternative method is pursued, that of considering the property and business of the interstate company as a unit, the difficulties of allocation are avoided, but the defects and weaknesses of the other character are multiplied. The magnitude of the investigation and the duplication of functions are greatly enlarged. It appears from the cases examined that there is rarely an attempt to make actual valuations and field studies of the entire business of an interstate system. Data submitted by the company is supplemented by data compiled by the commission on the business of the company within the state and sometimes by data or evidence obtained from hearings and findings before the commissions of the other state or states involved. There is of course a certain kind of informal and necessitated coöperation in practically all of these cases. But only in a very few has this plan been systematically and scientifically worked out. And yet only by such coöperative action can the states effectively deal with this problem.

The concrete suggestion is that the state commissions be given authority, where it does not already exist, to have joint hearings, conduct joint investigations, and issue joint or concurrent findings and orders with commissions of other states. Whenever a petition or investigation concerning the rates or service of a company generating, transmitting, and distributing energy in more than one state is made, the commissions of the states involved would first determine whether or not the particular case was one where extensive coöperative work was necessary. If such was found to be the case the commissions should set dates for hearings, which would take place before the two commissions. To insure that all interested parties be given equal and fair opportunity it might frequently be advisable to conduct hearings in both or all of the states affected. To this extent, then, the evidence before each commission would be identical. Whenever actual valuation or check-ups on valuation and revenue and expense data was necessary, the investigations would be divided between or among the commissions according to the property and business within their respective jurisdictions. All of this data would then be assimilated and joint or concurrent findings made as to the combined values and records. Decisions could then be made as seemed best to fit the situation. Obviously where the business conducted was of practically the same nature the decisions should not be different. In many cases, however, there might be local conditions such as to necessitate modifications or even quite different decisions by one or more of the commissions. The most important step is to assure that all of the commissions involved do that part of the work which lies within their jurisdiction, and that the material and evidence upon which decisions are made should be the same for each. This makes possible a consideration of the business of the interstate company as a unit, without requiring a detailed investigation of the entire system by any one or all of the commissions concerned. It need not necessarily require the same decisions. Local applications are still possible and should of course be made when conditions warrant them.

It may be objected that an insurmountable difficulty would be met here because of the varying practices of state commissions as respects valuation methods, accounting practices, and differences in state laws concerning the jurisdiction and authority of the commissions. To the extent that gaps in state authority and differences in the practices of state commissions exist the value of state coöperation is of course impaired. We wish, however, to point out three things in this respect. In the first place, this is not a study in the uniformity, or lack of uniformity, of state laws or commission procedure. We are concerned with the sphere of state as contrasted with federal action. It is naturally highly desirable that as much uniformity should be attained in these respects as is possible, and to the extent to which the laws and practices are uniform the potential efficiency of state action and regulation is increased. For the purpose of this study we assume that a fair degree of uniformity is attainable and is in fact being reached.

In the second place, it should be pointed out that coöperation in these interstate problems is one of the most certain methods for promoting uniformity. The joint consideration of these cases would emphasize and bring out diversities in laws and procedure, and would lead to strong efforts being made to eliminate unwise or inefficient methods and substitute those found more practicable.

In the third place, it is not absolutely essential to the successful functioning of coöperation that this uniformity should exist. If identical data is presented to the commission, and identical testimony heard, together with all records and examinations made by each commission for its share of the work, there is still room for the application of different principles. It is undoubtedly more desirable that each should have, for example, the same principle as to valuation, but if they do not, they have all of the data assembled upon which to apply their respective theories. Such differences and discrimination as would result therefrom would certainly be likely to be less than results from divergent theories applied to dissimilar and unchecked data and evidence.

V

THE REGULATION OF SECURITY ISSUES

WE HAVE hitherto been concerned with the regulation of the generation, transmission, sale, and distribution of electric energy in interstate commerce. This presents, however, only one aspect of the interstate problem. The regulation of the corporate activities of electric utilities, notably as regards capitalization and security issues, presents equally interesting and in some cases even more complicated interstate problems.

Twenty-four states and the District of Columbia have statutes providing for the regulation, through their utility commissions, of the issuance of utility stocks, bonds, notes, and other evidences of indebtedness.[1] One of the statutes, that of Pennsylvania, merely requires the utilities to report security issues to the commission. The Virginia Commission also has limited jurisdiction. The other statutes require commission approval before the issuance of securities.[2] The lack of uniformity in respect to these laws is so considerable that the Committee which drafted the Uniform Public Utilities Securities Act came to the conclusion that uniformity

[1] Report of Committee on a Uniform Public Utilities Securities Act, p. 3 (Report made to the National Conference of Commissioners on Uniform State Laws, 1928). See also "A Survey of State Laws on Public Utility Commission Regulation in the United States," Bonbright and Company (2nd ed., 1930), pp. 15, 16, and chart.

[2] *Ibid.*

should not be attempted until the issues involved became less controversial and the details of the problem better understood.[1] The scope and effectiveness of state regulation is greatly impaired because of the lack of jurisdiction on the part of many commissions and because of the lack of uniformity where jurisdiction is conferred. What we are mainly interested in here, however, is whether or not state regulation where it does exist is handicapped by the interstate business carried on by electric light and power companies. The method, as in the previous chapters, is through a study of those cases which have arisen before state commissions where interstate operations of the applicant were involved.

The statutes usually enumerate the purposes for which securities may be issued and direct the commission to approve issues for the specified purposes when "reasonably required" or "reasonably necessary" therefor.[2] The most important function of the commission in this connection, assuming the purpose of the issue to be valid, is to find out whether or not the issue requested is reasonably required for that purpose. Insofar as issues of domestic corporations doing business only within the state are concerned the problem is purely intrastate. Is the commission able to perform its function properly, however, as regards the security issues of interstate corporations? In view of the possibilities of overcapitalization, this question would seem to deserve more consideration than has been given to it.[3]

[1] Report of Committee on a Uniform Public Utilities Securities Act, p. 4.

[2] *Ibid., supra,* p. 8.

[3] The distribution by states of the cases examined is very uneven. The explanation for this is found in the varying procedures of state commissions

Roughly speaking, there are three types of security statutes, insofar as the extent of jurisdiction conferred is concerned. The statute may authorize the commission to approve all of the issues of all utilities doing business within the state, whether incorporated locally or not; it may authorize the approval of all issues made on the basis of property or payments within the state by foreign or domestic corporations; [1] or it may authorize the approval of all issues of domestic corporations only. A study of some of the cases arising before commissions exercising their regulatory powers under these various kinds of statutes will indicate the difficulties of each one with respect to the security issues of interstate companies.

The Nebraska Commission is one of those having jurisdiction over all of the security issues of all corporations operating public utilities in the state. This jurisdiction has been exercised only since 1923, by which time there were a large number of foreign corporations operating utilities in Nebraska. Many of these were interstate companies, with which the Commission experienced some difficulties under the new law.

in the consideration of security applications and in reporting findings. For the most part applications for the issuance of securities are dealt with informally and no finding is made other than the bare fact that the issue was granted or not granted. A few commissions make more detailed findings in nearly all cases. Formal reports with opinions are made only where points of special interest and importance are raised. No reports at all were available for some commissions. Regulation by "blue-sky" commissions was not considered because it is chiefly concerned with protection to the investor against fraudulent securities.

[1] It is sometimes provided that all obligations constituting a lien on property within the state must be approved, thus conferring a somewhat wider jurisdiction.

One of the interstate companies was the Western Public Service Company, a Colorado corporation, owning plants in Colorado, Texas, Missouri, Nebraska, and Wyoming. In one instance it asked the Nebraska Commission for permission to issue securities against the entire properties. The Commission gave its approval, saying:

> It is obvious that this Commission cannot check the physical properties in so wide-flung a territory. In consideration of this application it has confined itself to careful scrutiny of the company's plan of doing business and of financing.[1]

Shortly after this the company petitioned for approval of a large increase in the issue. In giving its approval the Commission again said:

> It is apparent that in properties existing from Texas to northern Wyoming and Nebraska this Commission cannot check the physical property in the field as it usually does for more localized properties in this state. It must rely on other information.[2]

Applicant's valuations apparently provided the only other available information. The Commission gave warning that in permitting the issue of the securities it must not be understood that it approved of them as an investment. It said that there did not seem to be "any sound reason in law for refusal to approve the refinancing, even under the rather heavy fixed charges which will result." [3]

[1] *Re Western Public Service Co.*, 16 Ann. Rep. Neb. S. R. C. 367, 368 (1923).

[2] *Re Same*, 16 Ann. Rep. Neb. S. R. C. 381, 383 (1923).

[3] *Ibid.*, 384.

Between 1923 and 1925 the company issued some securities without the permission of the Commission. In examining these issues the Commission was forced to rely on the data of the company's accountant, who was severely criticized by the Commission.

In our opinion the investor in securities of the company can have no adequate idea as to the property back of his securities, and no correct knowledge of net earnings from operation under such accounting practices.

Despite what we have said here, the Commission is of the opinion and so finds that the application should be approved, that the securities mentioned in the application are reasonably necessary for corporate purposes as they exist to-day, that the proceeds of securities issued in the past year and a half have been for legitimate purposes, although it is obviously impossible for this Commission to pass on whether the acquisition of property were accompanied by proper business judgment.[1]

In the same year the company applied for permission to issue bonds and preferred stock for new developments in Texas and for the purchase of properties. There was no showing of facts and no specific showing as to the location of the properties and the Commission refused to give its approval.[2]

The regulation of the security issues of the Northwestern Public Service Company, a Delaware corporation operating in Nebraska and South Dakota, also caused the Commission some trouble. In 1923 it requested permission to issue securities for the purchase of properties in both states. The South Dakota laws do not provide for the regulation of security issues, and

[1] *Re Same*, 18 Ann. Rep. Neb. S. R. C. 236, 239 (1925).
[2] *Re Same*, 18 Ann. Rep. Neb. S. R. C. 360 (1925).

the Nebraska Commission took jurisdiction over the entire issue.[1] The following year the company asked permission to issue bonds, mortgaged in part on Nebraska properties, for the purchase of plants in South Dakota. The Commission found the purchase price excessive and would not authorize the amount of securities requested.[2] This is an unusual case in that the application was not denied by the state of incorporation nor by the state in which the purchases were located, but by the commission of a state in which it did business. This case also shows the advisability, at least where neighboring states do not regulate the issue of securities, of requiring approval of issues made for expenditures outside the state establishing liens on properties in the state.

In two other cases the Commission disallowed part of a requested security issue for the purchase of South Dakota properties by this company, on the ground that the price paid was excessive.[3] In two instances issues were permitted, after an examination by the Commission of the value of the properties.[4] The Commission did not of course actually make a physical appraisal of these South Dakota purchases, but scrutinized the detailed report of expenditures submitted by the company, and in some cases had its engineer inspect the properties.[5]

In 1927 the Iowa-Nebraska Light and Power Com-

[1] *Re Northwestern Pub. Ser. Co.*, 16 Ann. Rep. Neb. S. R. C. 373.

[2] *Re Same*, P. U. R. 1924-E, 224 (Neb. S. R. C.).

[3] *Re Same*, 17 Ann. Rep. Neb. S. R. C. 375 (1924); *Re Same*, P. U. R. 1926-B, 585 (Neb. S. R. C., 1926).

[4] *Re Same*, 17 Ann. Rep. Neb. S. R. C. 456 (1924); *Re Same*, 20 Ann. Rep. Neb. S. R. C. 423 (1927).

[5] *Ibid.*, 424.

pany, a Delaware corporation, asked permission to issue bonds to the amount of $12,000,000 for the purchase of the securities of the subsidiaries of a holding company. The properties involved extended over a large section of Nebraska, eastern Iowa and northern Missouri. The application was granted.[1] The issues of another interstate company operating in Iowa, Minnesota, and Nebraska were also approved by the Commission.[2]

Nebraska is in a peculiar situation in that there is no utility commission regulation of the issue of securities by electric light and power companies in Iowa, South Dakota, Minnesota, Colorado, and Wyoming.[3] The result is that in order to protect its own properties against overcapitalization it is compelled to assume jurisdiction over purchases in other states. The Commission itself admits that it cannot check the issues made for expenditures in other states as carefully as for localized companies. In view of the large number of interstate companies it is evident that an actual appraisal in all of these cases would involve a terrific expense. What is happening is that the Nebraska Commission is attempting to do the work of five or six commissions, and must do some of it very imperfectly. Yet it must either attempt to do it or allow a large part of the issues of interstate companies to go unregulated. The danger in seizing the latter alternative is that local properties of interstate utilities may be heavily burdened by issues made in other states constituting liens upon these properties.

[1] *Re Iowa-Nebraska L. & P. Co.*, 20 Ann. Rep. Neb. S. R. C. 414 (1927).

[2] *Re Minnesota El. Distributing Co.*, P. U. R. 1926-B, 785 (Neb. S. R. C., 1925).

[3] Bonbright Utility Regulation Chart, *op. cit.*

All electric light and power companies doing business in Michigan must secure the approval of the Public Utilities Commission before issuing securities, and must pay a fee of one-tenth of one per cent of the amount of the issue or of that fraction thereof which represents the proportion of the value of the company's Michigan properties to its total value. For example, suppose that a company with 80 per cent of its property in Wisconsin and 20 per cent in Michigan desires to issue $100,000 of securities. The company is required to secure the approval of the Michigan Commission and pay a fee 20 per cent of one-tenth of one per cent of $100,000, whether or not the issue is to be applied to Michigan properties.

In each of the thirty-eight Michigan cases examined the approval of the Commission was granted. In two cases it was definitely stated that the purpose of the issue was for improvements or extensions in Michigan only. One was a petition by a Wisconsin corporation for permission to do business in Michigan and to issue securities for the construction of hydro-electric plants on the Menominee River in Michigan.[1] The other was for a transmission line.[2]

There were five cases where it definitely appeared that the purpose of the issue was to finance additions located partly in Michigan and partly in another state. In one instance a Wisconsin corporation, doing business in Wisconsin, petitioned to do business in Michigan and to issue securities for the purchase of two companies, one located wholly in Wisconsin, and one located about equally in Wisconsin and Michigan.[3]

[1] *Re Northern Electric Co.*, 8 Mich. P. U. C. R. 379 (1926).
[2] *Re Wisconsin Gas & Electric Co.*, 7 Mich. P. U. C. R. 296 (1925).
[3] *Re Lake Superior District Power Co.*, 4 Mich. P. U. C. R. 391 (1922).

The Michigan law compelled the Michigan Commission to approve the entire issue, amounting to nearly five million dollars of stocks and bonds. The Commission granted its approval, stating that the consent of the Wisconsin Commission had already been obtained.[1] There was apparently no investigation by the Michigan Commission except for the purpose of finding what percentage of the property would be located in Michigan so that the amount of the fee could be determined. An amendment of this order was sought and approval secured shortly afterwards, the Michigan Commission again referring to the action of the Wisconsin Commission.[2]

A very similar case involved a petition by an Indiana corporation to be admitted to do business in Michigan and to issue securities for the purpose of acquiring Indiana and Michigan utilities.[3] Here again, although the Michigan Commission had no jurisdiction so far as the purchase was concerned, its approval was required for the entire security issue. This company later applied for permission to issue securities based on a merger with an Indiana corporation, admitted to do business in Michigan but apparently not operating therein at the time of the merger.[4] An application was made in the same form to the Indiana Commission, whose consent was necessary for the merger agreement as well as for the security issue. Transcripts of the testimony before the Indiana Commission and proofs as to the value of

[1] Order of Wis. R. C., April 15, 1922.

[2] *Re Lake Superior District Power Co.*, 4 Mich. P. U. C. R. 760 (1922), citing order of Wis. R. C., September 25, 1922.

[3] *Re Indiana Electric Utilities Co.*, 6 Mich. P. U. C. R. 317 (1924).

[4] *Re Same*, 7 Mich. P. U. C. R. 102 (1925).

the properties were presented to the Michigan Commission, which cited the approval of the Indiana Commission in its order.[1]

In 1927 the Wisconsin-Michigan Power Company petitioned for permission to issue $4,025,000 in common stock, $1,275,000 in preferred stock, and $5,000,000 in bonds for the acquisition of six Michigan and six Wisconsin utilities, a dam site located partly in each state, and real property located in Wisconsin.[2] This application was approved by the Michigan Commission, estimates by the company and the finding of the Wisconsin Commission being accepted as evidence of the value of the properties.[3]

Where security issues are to be based in part on properties located in Michigan it would seem that the Michigan Commission should take some share in the investigations and findings aside from ratifying the orders of the Wisconsin and Indiana Commissions. Under the procedure followed in the cases cited the Michigan Commission apparently waits until the Wisconsin or Indiana Commission has made its investigation and finding before granting its approval. There is no independent investigation even of the Michigan part of the project. Of course the jurisdiction of the Commission is made so broad that it could not possibly make careful examinations of all applications. It could, however, cooperate with the other Commissions by finding how much of the issue requested was reasonably necessary for Michigan purposes, leaving the Wisconsin and Indiana

[1] *Re Indiana Electric Utilities Co.*, 7 Mich. P. U. C. R. 102, 105 (1925). Order of Ind. P. S. C., March 6, 1925.

[2] *Re Wisconsin-Michigan Power Co.*, 9 Mich. P. U. C. R. 228 (1927).

[3] *Ibid.*, 229. Cf. order of Wis. R. C., May 17, 1927.

Commissions to make the findings for the projects within their jurisdiction. By exchanging evidence and findings each Commission would then be able to pass upon the application as a whole. Such a procedure would permit the Commissions to make more thorough investigations, and would avoid the exercise of extra-territorial jurisdiction and the duplication of functions so evident in the present procedure.

In seven cases before the Michigan Commission, security issues were requested for the purpose of purchasing property or making extensions or improvements entirely in Wisconsin.[1] In five of these cases the previous approval of the Wisconsin Commission was cited.[2] The companies were incorporated in Wisconsin, but the consent of the Michigan Commission was required for the issues because the companies were doing business in Michigan. Insofar as issues of foreign corporations establish liens on utility property within the state, it may be desirable that the Commission be given jurisdiction.[3] Where no lien is established no reason is apparent why the approval should be required. Local utility properties are not affected, and the Commission is burdened with the performance of a duty for which it is not well equipped. Even where liens on property within the state are established by the issues of foreign

[1] *Re Lake Superior District Power Co.*, 6 Mich. P. U. C. R. 8 (1924); *Re Same*, 7 Mich. P. U. C. R. 9 (1925); *Re Peninsular Power Co.*, 2 Mich. P. U. C. R. 150 (1920); *Re Same*, 2 Mich. P. U. C. R. 743 (1920); *Re Same*, 2 Mich. P. U. C. R. 839 (1920); *Re Same*, 3 Mich. P. U. C. R. 320 (1921); *Re Same*, 5 Mich. P. U. C. R. 219 (1923).

[2] In all except 2 Mich. P. U. C. R. 839 and 3 Mich. P. U. C. R. 320.

[3] The Uniform Public Utilities Securities Act provides for the approval of all except the non-lien issues of foreign corporations. (Report, *op. cit.*, pp. 6, 7.)

corporations, it would seem advisable to limit the jurisdiction of the Commission to ascertaining that an unreasonable burden is not placed upon local properties. The function of determining the reasonableness of the issue in itself, in relation to the purpose for which it is proposed, should be exercised by the Commission of the state in which the company is incorporated or in which the additions, extensions, or improvements are to be made. In this way duplication of functions would be avoided, while the properties in each state would be protected from overcapitalization.[1]

The experience of the Michigan Commission, while rather clearly indicating the futility of the attempt of a

[1] In a number of Michigan cases it is impossible to tell from the reports whether the issue of the interstate company involved was for the purpose of financing Michigan projects or established liens on Michigan utility property. For the most part the companies were incorporated in Wisconsin and conducted most of their business in that state. In eight of the cases the order of the Michigan Commission approving the issue stated that the consent of the Wisconsin Commission had already been obtained. (*Re Ironwood & Bessemer Ry. & L. Co.*, 2 Mich. P. U. C. R. 77 (1920); *Re Same*, 3 Mich. P. U. C. R. 78 (1921); *Re Same*, 4 Mich. P. U. C. R. 248 (1922); *Re Northern Electric Co.*, 8 Mich. P. U. C. R. 415 (1926); *Re Peninsular Power Co.*, 1 Mich. P. U. C. R. 39 (1919); *Re Same*, 3 Mich. P. U. C. R. 734 (1921); *Re Lake Superior District Power Co.*, 8 Mich. P. U. C. R. 156 (1926); *Re Same*, 8 Mich. P. U. C. R. 605 (1926). In two cases the approval of the Indiana Commission was cited. *Re Indiana & Michigan Electric Co.*, 4 Mich. P. U. C. R. 711 (1922); *Re Same*, 8 Mich. P. U. C. R. 131 (1926). In a large number of cases it is not stated whether the issue of the interstate company was previously approved by another commission or not. *Re Ironwood & Bessemer Ry. & L. Co.*, 3 Mich. P. U. C. R. 497 (1921); *Re Niagara L. & P. Co.*, 3 Mich. P. U. C. R. 103 (1921); *Re Peninsular Power Co.*, 3 Mich. P. U. C. R. 319 (1921); *Re Same*, 5 Mich. P. U. C. R. 655 (1923); *Re Same*, 5 Mich. P. U. C. R. 954 (1923); *Re Same*, 6 Mich. P. U. C. R. 10 (1924); *Re Lake Superior District Power Co.*, 7 Mich. P. U. C. R. 10 (1925); *Re Same*, 7 Mich. P. U. C. R. 329 (1925); *Re Same*, 8 Mich. P. U. C. R. 541 (1926); *Re Ford Hydro-Electric Co.*, 7 Mich. P. U. C. R. 437 (1925); *Re Ind. & Mich. Elec. Co.*, 2 Mich. P. U. C. R. 192 (1920); *Re Same*, 2 Mich. P. U. C. R. 901 (1920); *Re Same*, 4 Mich. P. U. C. R. 63 (1922); *Re Twin Branch P. Co.*, 6 Mich. P. U. C. R. 53 (1924).

state to effectively supervise all of the issues of foreign corporations operating public utilities in the state, is not conclusive because of the fact that there have been no attempts to actually check the relations between assets and securities. The Commission has apparently acted as a "rubber-stamp" in approving applications to issue securities. For this reason it is doubly interesting to observe the experience of the Vermont Public Service Commission, which, acting under a statute similar to the Michigan law, is required to make an actual valuation of a company's properties before permitting the issue of securities.

By the Vermont Public Service Commission Law the Commission is given the same jurisdiction to approve stock and bond issues of foreign corporations as of domestic corporations.[1] Prior to 1925, however, there were practically no attempts to make valuations, or even to supervise accounting practices and property records. This was true both as to domestic and foreign companies.[2] In one case the petition of a Massachusetts company to issue securities for the purchase of properties in Massachusetts, Vermont, and New Hampshire had been denied because the issue proposed had been in excess even of the company's estimate of the valuation of the properties.[3] But in the absence of such flagrant efforts at overcapitalization as this the Commission was powerless to maintain a relation between the assets and the securities of the utilities. In 1925 the legislature enacted a statute requiring the Commission to

[1] *General Laws of Vermont*, sec. 5012.

[2] Bien. Rep. Vt. P. S. C., 1924–1925, p. 5.

[3] *Re Colonial Light & Power Co.*, P. U. R. 1920-A, 215 (Vt. P. S. C., 1919).

make an appraisal of the entire properties of all utilities making application for permission to issue securities.[1]

Shortly after the passage of this law, the Twin State Gas and Electric Company, a Connecticut corporation operating in Vermont, New York, and New Hampshire, asked for authority to issue prior lien stocks as against its properties in the three states.[2] The Commission agreed that according to the statute it was compelled to take jurisdiction over the entire issue and it directed its engineers to investigate the company's assets. In their report to the Commission the engineers stated that the total cost of the appraisal was $76,245.43, of which $42,936.00, or 56 per cent, was incurred for the work on the properties and assets in New York and New Hampshire.[3]

In the same year, the Vermont Hydro-Electric Corporation of Massachusetts petitioned for the approval of a security issue.[4] The Commission again directed the engineers to investigate the assets of the company. This investigation involved the appraisal of properties "scattered in a broad belt across the middle of the State with a minor portion in New York and New Hampshire."[5]

The Commission lost no time in asking for an amendment of the stock and bond law. In its report to the legislature in 1925 it said that as to the general provisions of the new legislation, requiring an actual appraisal before approval of security issues, it believed the

[1] No. 85, *Laws* of 1925.

[2] *Re Twin State Gas & Electric Co.*, P. U. R. 1925-E, 799 (Vt. P. S. C., 1925).

[3] Report of Barker and Wheeler, Engineers, Bien. Rep. Vt. P. S. C., 1924–1925, p. 16.

[4] *Ibid.*, p. 17.

[5] *Ibid.*

expense involved to be well merited. It was pointed out that once made the valuations could be kept up to date without undue trouble or expense, and that they would be useful for many purposes besides guaranteeing the soundness of the particular security issue requested.[1] The Commission added, however, that in assuming the same jurisdiction over issues of foreign as of domestic corporations needless expense was involved. It pointed out that in the case of the Twin State Company the Commission had been put to a long and expensive investigation conducted largely for the benefit of other states.

> We are informed that Connecticut has no jurisdiction to approve these issues because this Company does not operate in that State. As we understand it Massachusetts has no jurisdiction to approve the security issues of a foreign corporation doing business within its borders. It is therefore evident that the laws of the several states are in a most chaotic condition on this subject and we believe that it should not be necessary for this Commission to extend its jurisdiction in cases of this kind beyond the boundaries of the State. We suggest therefore that the legislature consider carefully the enactment of an amendment to Section 5012 so as to limit our jurisdiction to approve capital issues of a foreign corporation to the property in this State against which such stock and bonds are issued.[2]

It is apparent that the attempts of the states to supervise the financial activities of interstate companies cannot be satisfactorily accomplished by requiring their respective commissions to assume jurisdiction over all of the security issues of all utility companies, foreign

[1] Bien. Rep. Vt. P. S. C., 1924–1925, p. 7. [2] *Ibid.*, p. 8.

and domestic, doing business within their borders. In some cases, as in Michigan, the commission may merely second the action of the commission of another state or accept the statement of the interstate company as to the soundness of the issue. This in fact must be done unless the commission is provided with very generous appropriations for the investigations of these interstate companies. Where the commission is enabled or required to make appraisals, as in Vermont, the guarantee of the financial stability of the utility is secured at perhaps a greater price than it is worth to any one of the states in which it operates. If each state applied this principle, there would be two or three complete appraisals for each interstate company. Duplication of effort is so inherent in this method of supervision that it is very unlikely to be widely employed.[1]

The recommendation of the Vermont Commission was that its jurisdiction be limited, as to the capital issues of foreign corporations, to the property in the state against which such securities were issued. The New Hampshire Commission operates under a statute of this sort, its authority extending only to the regulation of issues made for expenditures within the state. This limitation applies to the issues of both foreign and domestic utilities. Even with such limited jurisdiction,

[1] The Missouri Commission exercises jurisdiction over the issues of foreign corporations operating in Missouri, but only one case in point was found in the formal reports. In this case the Commission was asked to approve a $664,000 bond issue, for the purchase of properties and extensions about equally divided between Arkansas and Missouri. The company was incorporated in Arkansas. The Commission authorized a small part of the issue for each state but refused to approve of the major portion of the issue on the ground that no definite showing had been made as to the value of the properties. *Re Arkansas-Missouri Power Co.*, 14 Mo. P. S. C. R. 453 (1924).

however, the Commission has experienced considerable difficulty in the regulation of the security issues of interstate companies.

The same situation is encountered in the application of the New Hampshire security law as in the attempt to segregate the properties of an interstate company for rate-making purposes. It sometimes proves impossible to apportion the securities to the respective states. In 1922 the Connecticut River Power Company, incorporated under the laws of New Hampshire and Vermont and operating in both states, asked for authority to issue securities for plant additions and for the retirement of bonds.[1] As to the former, it was comparatively simple to make an apportionment between the Vermont and New Hampshire additions, and the Commission approved only the securities issued against that property. But in regard to the stocks to be issued for the retirement of bonds, neither the company nor the Commission was able to make an apportionment. The company requested the Commission to authorize the issue of an amount of stock sufficient to take care of the retirement of all of the bonds and this was finally done as the only convenient method. In this case the Commission was able to cite the approval of the Vermont Commission.[2]

[1] *Re Conn. River Power Co.*, P. U. R. 1922-c, 780 (N. H. P. S. C. R., 1922).

[2] *Ibid.*, 781. The Commission referred to an earlier petition by the Twin State Company for authority to issue securities for improvements in Maine and New Hampshire and quoted from its language in that case: "So far as expenditures have been actually made in the acquisition or improvement of plants partly within and partly without the state in such way that it is more convenient to pass upon the propriety of the entire expenditure than to determine the portion which should be allocated to New Hampshire, we may properly authorize capital to cover the entire amount of such expenditure." (4 N. H. P. S. C. R. 9, 12.)

In considering one request to issue bonds for additions the Commission stated that part of the properties involved were outside of the state, thus "raising a question of jurisdiction, upon which we are unwilling to state our conclusion at this time." [1] It does not appear what portion of the issue was authorized, or whether the Commission assumed jurisdiction over all of it.

In one instance the Twin State Gas and Electric Company asked permission to issue bonds for the purchase of the bonds of a Maine utility.[2] The Commission concluded that it had no jurisdiction because of the fact that the company whose bonds were to be purchased had no property in New Hampshire.

In a number of instances the Commission was able to make an apportionment of the issue requested so that it was obliged to take jurisdiction only over issues against New Hampshire property.[3] Where this can be done the superiority of this procedure over that which the Vermont Commission must follow is clearly indicated. The evidence needed by the Commission for its investigation is entirely within the state and at the same time the Commission is able to prevent the overcapitalization of properties in the state, to a great extent. The one qualification is that according to the wording of the statute the Commission has no jurisdiction over the issue of securities for properties outside the state even

[1] *Re Public Service Co.*, 11 N. H. P. S. C. R. 251 (1927).

[2] *Re Twin State G. & E. Co.*, 10 N. H. P. S. C. R. 534 (1926).

[3] In one case items for Boston office expenditures were excluded, *Re Twin State G. & E. Co.*, 7 N. H. P. S. C. R. 51 (1919); *Re Same*, 9 N. H. P. S. C. R. 149 (1923), excluding part of an issue for development work in Vermont; *Re Same*, 10 N. H. P. S. C. R. 54 (1925), apportioning an issue of bonds as between New Hampshire and other states.

though they constitute a lien on New Hampshire properties.[1] In this respect the Uniform Public Utilities Securities Act stands midway between the Vermont and New Hampshire statutes, in that it requires the Commission to authorize all issues constituting liens on property in the state.[2] This is a more adequate safeguard against overcapitalization and at the same time does not require the Commission to appraise property outside the state. It merely authorizes it to see that utilities do not in an indirect way place too heavy a burden on their properties in the state.

There is another respect in which the New Hampshire law is at variance with the laws of most of the states. It does not require the approval of the Commission for all of the issues of domestic corporations, but only of those issued for additions, improvements, and extensions made for properties in the state. There is this advantage in the New Hampshire law, that it restricts the work of the Commission to the examination of local projects. On the other hand, a heavy overcapitalization of the properties of a domestic utility which are located in another state might endanger the position of the company as a whole. Where the commissions of both or all of the states in which an interstate company operates exercise jurisdiction over security issues against local properties

[1] *Public Laws of New Hampshire,* Ch. 241, sec. 9. "Foreign Business. Public utilities and railroad corporations shall not be subject to the provisions of the seven preceding sections when their stock or obligations are to be issued for the acquisition of property, the construction, completion, extension, or improvement of their facilities, or the improvement or maintenance of their service entirely without this state, or the discharge or refunding of their obligations or reimbursements of money actually expended for such purposes."

[2] *Op. cit.,* sec. 2, p. 6.

this danger is avoided. Even then it might be advisable for the commission in which the utility was incorporated to approve all of its issues. In such case the approval should be based, however, on findings made by the commission in the state where the property in question is located. Without coöperative effort there would exist needless duplication.

We have now considered the experiences of state commissions under two types of security statutes, one requiring the commission to approve all of the issues of all utilities doing business in the state, and the other requiring approval only of issues made for local purposes, both as to domestic and foreign corporations. A third type of law is that requiring commission approval of all of the issues of domestic utilities, for local and outside purposes, but giving the commission no jurisdiction over the issues of foreign corporations operating utilities within the state.

The disadvantages of this form of regulation are obvious. Whenever foreign companies are permitted to operate public utilities the commission is without any means of supervising their security issues, and local properties may become heavily burdened. The Massachusetts Commission, for example, had no jurisdiction over the issues of the Twin State Company referred to above in connection with the Vermont and New Hampshire statutes.[1] The California Commission is unable to regulate the security issues of the Southern Sierras Power Company, doing an extensive utility business in the state of California, but being incorporated in Wyom-

[1] See above.

ing.[1] These Commissions also labor under the disadvantage of being compelled to approve the issues of domestic utilities made for properties outside of the state. In one instance the Massachusetts Commission was asked to approve an issue of the New England Power Company for the construction of a hydro-electric generating station and the erection of transmission lines in Vermont. This involved investigating a $1,400,000 undertaking outside its proper jurisdictional limits.[2] In another case its approval was required for an issue of securities for plant additions, "including investment in the securities of the Connecticut River Conservation Company necessary for the creation of storage in the states of New Hampshire and Vermont beneficial to the operation of the hydro-electric plant in this Commonwealth of the Turners Falls company." [3] Both of these cases would have provided excellent opportunities for coöperation had the Commissions concerned been functioning under similar statutes.

In a case involving the California-Oregon Power Company, a California corporation operating in California and Oregon, the California Commission was able to utilize data prepared by the Oregon Commission, although the latter has no jurisdiction over security issues. The company petitioned the California Commission for the issue of securities for the purpose of reorganization. To attempt a valuation of the entire properties would have been practically impossible. What the Commission did was to find the value of the California portion

[1] *Re Southern Sierras Power Co.*, 30 Cal. R. C. R. 838 (1927).
[2] *Re New England Power Co.*, Mass. D. P. U., 1921 Rep. 159.
[3] *Re Turners Falls Power & E. Co.*, Mass. D. P. U., 1922 Rep. 122.

of the properties, accept the latest available figures prepared by the Oregon Commission for rate-making purposes, and add to that the figures of the Company for additions and betterments made since the date of the last Oregon valuation.[1] This is perhaps not the ideal method of valuation, but it indicates what might be done in the way of team-work if the Oregon Commission had jurisdiction over security issues.

There can be little doubt that where foreign corporations are allowed to operate utilities in the state, regulation of the issues of domestic companies is not sufficient to safeguard the public interest. The incentive to obtain advantages over other utilities by incorporating outside of the state is ever present. In 1922 the New York Public Service Commission recommended that the law be amended to give it jurisdiction over the security issues of foreign utility corporations operating in the state on the ground that many such companies had "issued securities under conditions which would not be permitted had they been incorporated under the laws of the State of New York and thus been within the jurisdiction of this Commission." [2] Several states have dealt with this problem by the drastic method of allowing only domestic corporations to operate domestic public utilities. New York itself permits only domestic corporations to purchase local franchises.[3] In Arkansas, Illinois, Indiana, Ohio, Wisconsin, Virginia, and several other states all electric light and power companies must be domestic incorporations.

[1] *Re California-Oregon Power Co.*, 19 Cal. R. C. R. 487 (1921).

[2] 2 Ann. Rep. N. Y. P. S. C., p. 50 (1922).

[3] *Cahill's Consolidated Laws 1923*, Ch. 60, sec. 20.

Although this requirement fulfills its purpose in respect to the protecting of local utility properties from overcapitalization, it does not avoid the difficulty of compelling the commission to take jurisdiction over securities issued against properties in other states. The solution of this interstate difficulty is suggested by the procedure of the Illinois Commission in dealing with a petition to approve an issue of an Illinois company for the financing of an Indiana hydro-electric project. The Illinois Commission did not attempt a thorough investigation in this case, but made its approval subject to the authorization of the project by the Indiana Commission.[1]

A very interesting case arose in Wisconsin over an attempt to evade the spirit of the law requiring local incorporation. The Wisconsin Utilities Company asked permission to mortgage its properties in order to secure bonds to be issued by the United Utilities Company, the Illinois parent of the Wisconsin company.[2] The Attorney General advised the Commission that its approval was not required for the mere making of a mortgage, but that by the transaction the Illinois company was made the agent of the Wisconsin company, the latter thereby being responsible for the security issues of the Illinois company.[3] The Commission stated that if it accepted this theory it would certainly have to refuse the application, because the outstanding stocks and bonds of the Wisconsin company already equalled the value of its properties and that the Illinois company as

[1] *Re Central Ill. P. S. Co.*, 1 Ill. C. C. R. 165 (1921).

[2] *Re Wis. Utilities Co.*, P. U. R. 1923-B, 855 (Wis. R. C., 1923).

[3] *Ibid.*, 856.

its agent could not be permitted to issue any more securities against it. But the Commission was not willing to accept this theory as to its jurisdiction, and maintained instead that the mortgage was inseparable from the issue of the bonds constituting a lien on the Wisconsin property. It stated that otherwise

> a situation might arise where a corporation having capital stock outstanding in the hands of the public equal to the full value of the property would place its property under a mortgage of a foreign corporation to secure the obligations of the foreign corporation, and upon a foreclosure, the property of the Wisconsin corporation might thereby be taken to satisfy the obligations of the foreign corporation even though the Wisconsin stockholders held stock to the full value of the domestic corporation's property.[1]

The Commission then denied the application, saying that for it

> to approve of the issuing of securities by a foreign corporation under a mortgage issued by a Wisconsin corporation would establish a precedent against public policy and contrary to the clear intent of the stock and bond law, and might create a condition under which the Commission would be deprived of its entire jurisdiction over the regulation of the issuance of securities by a Wisconsin corporation.[2]

It is evident from an examination of these cases that two sorts of difficulties have arisen in connection with the regulation of the security issues of interstate utilities. On the one hand there is the danger that the jurisdiction conferred on the commission may not be broad enough to protect adequately the public interest of the

[1] P. U. R. 1923-B, 855, 857.

[2] *Ibid.*, 858.

state in its local properties. This may happen where only the issues of domestic corporations are regulated, or where there is no control over issues for projects in another state placing a burden on local properties. The other difficulty occurs where the jurisdiction of the commission is so broad that it is compelled to exercise its authority over utilities in other states. The attempts on the part of the states to avoid the danger of overcapitalization have invariably resulted in the burdening of the commissions with tasks not properly in their jurisdiction. No more perfect illustration of the existing situation can be found than the case of the Twin State Company. This company was incorporated in Connecticut, but operated only in New York, New Hampshire, and Vermont. The Connecticut Commission had no jurisdiction over its security issues because it did not operate in Connecticut. The Massachusetts Commission had no authority to protect the Massachusetts properties of the company from being overcapitalized because it was not a domestic corporation. The New Hampshire Commission approved that part of the issue made for New Hampshire properties. The Vermont Commission was required to approve the entire issue and in so doing had to make a valuation of all of the company's assets, wherever located.[1] Here we find every sort of difficulty raised by the problem of interstate companies. Massachusetts secures protection only by Vermont's large generosity; Vermont is put to a great expense, most of which is for the purpose of doing what some other state should do or needlessly duplicating what some other state does also; only New Hamp-

[1] See discussion of this case above.

shire both safeguards its properties and avoids extra-territorial jurisdiction.

The present chaotic condition of state laws on this subject, referred to by the Vermont Commission in the above case, is responsible for some, but not all, of the present difficulties in the way of efficient regulation of the security issues of interstate electric utilities. As long as some states have no laws, the financial activities of these utilities will be imperfectly supervised, and the states which do attempt to regulate their security issues will be constrained to extend their jurisdiction to outside expenditures. But even with a system of uniform state laws, the problem of financial supervision of interstate companies is a very different one from the regulation of intrastate utilities. Accepting as a basis of uniformity the act proposed by the Uniform State Laws Committee, it is apparent that in the application of the statute there would be substantial overlapping of jurisdiction. The commissions are required to see that local properties are not unduly burdened, at the cost of supervising all of the issues of domestic utilities and those issues of foreign corporations constituting liens on properties within the state. This may be necessary or at least highly advisable as a means of assuring that local utility properties will not be overcapitalized, but taken by itself it is an impracticable solution of the problem. What does not appear to have been fully realized is that the regulation of the security issue of an interstate utility is essentially one problem, and not two or three. It may be that public policy requires the approval of more than one commission in certain cases, but public policy, at least under a system of approximately uniform laws, need never require two or three independent and overlapping investigations to ascertain the soundness of a proposed issue. Nothing could be more absurd than a system of laws whereby Connecticut, New York, Vermont, and New Hampshire would each be required to make an appraisal of the entire properties of the Twin State Gas and Electric Company on a petition to issue securities for a reorganization of the company. Any duplication of the valuation or examination of projects is so much wasted effort. Public policy demands coöperation, not duplication. The cost to a state of checking the soundness of issues made for the purpose of undertakings or against properties in other states would be far greater than the return secured. Not only this, but the company itself is put to needless expense, in having to maintain from two to four independent petitions and assist in the findings of each commission involved.

The one outstanding example in this field of what may be accomplished by coöperation is furnished by the proceedings relating to the Conowingo project. The physical features of this undertaking have been discussed above. It was in respect to the security issues, however, that the greatest difficulties arose. Under the arrangement made there were to be two Maryland and two Pennsylvania corporations. Insofar as the issues of the Maryland corporations were concerned, the Maryland Commission had jurisdiction over the issues of the Maryland companies, but the Pennsylvania Commission had no supervision over the issues of its companies. It was therefore unwilling to approve of the original application because it disapproved of some of the provisions as to the financial set-up devised, which under its laws it would be unable to control. In this case, however, the consent of the Federal Power Commission was required by the applicants. Upon the request of Pennsylvania the Commission exerted its power under Section 19 of the Federal Water Power Act to assume jurisdiction over the security issues of its licensees where the state involved had no control.[1] Maryland approved the arrangement as to the issues of the Maryland companies.[2] The most interesting feature of all was the manner in which the entire plan was studied. The Maryland, Pennsylvania, and Federal Commissions met together in all of the hearings and came to an agreement among themselves as to all of the provisions of the orders to be issued.[3] This joint action is even more significant than the action of the Federal Commission in assuming jurisdiction over the security issues of the Pennsylvania corporations. The Commissions realized the absurdity of having three independent sets of hearings and investigations for one unified project.

As in rate cases, the states have not yet made even a beginning in the way of coöperation in the regulation of security issues of interstate utilities. Along with the adoption of uniform statutory provisions as to the jurisdiction of the commissions should go the power to act with other commissions in the supervision of the issues of interstate companies. Confining the work of each

[1] *Sixth Annual Report*, Federal Power Commission (1926), p. 105. Cf. 7 Pa. P. S. C. R. 335 (1925), and *Giant Power Board Report*, 1926, App. VII, p. 100.

[2] *Re Susquehanna Power Co*, P. U. R. 1926-B, 732 (1926).

[3] See *Sixth Annual Report*, Federal Power Commission (1926), p. 6, for an account of the procedure.

commission to the utility property within the state is as essential to efficient regulation as are statutes providing for uniformity of jurisdiction. Wherever an application for a security issue requires the approval of more than one commission there should be an agreed form of joint hearings and a division of labor as respects the appraisals or investigations necessitated. Naturally the degree of coöperative effort required would vary with the location of the company and the character of the application. The important thing is that there should exist statutory authority to act in coöperation with other commissions, and that the state commissions should make free use of such authority.[1]

It may have been observed that a large number of the security issues discussed above were for the purchase of other companies. Insofar as state commissions are required to approve the transaction in itself, aside from the issue of securities to finance it, similar difficulties arise in regard to interstate companies. Where the properties involved in the merger or consolidation are located in two or more states, the problem, both as to the merits of the purchase and as to the price to be paid, is one of interest to each state concerned. Here, as in the case of security issues, there are gaps and lack of uniformity in state laws.[2] But even where substantial uniformity exists there is rarely any attempt at co-

[1] The proposed Uniform Public Utilities Act contains the following provision: "In the discharge of its duties under this act the commission may cooperate with similar commissions of other states and may hold joint hearings and make joint investigations with such commissions." Section 42. (National Conference of Commissioners on Uniform State Laws, 1928.) Securities not included.

[2] Twenty-two states require commission approval. See Bonbright and Company Chart.

operation and joint consideration. Some of the cases illustrate clearly overlapping of duties.

In 1922 the Empire District Electric Company of Oklahoma petitioned the Oklahoma Commission for permission to sell its properties to a company of the same name incorporated in Kansas. The Kansas Commission has jurisdiction over mergers and consolidations, but the records show no evidence of joint consideration of the application. It was approved by the Oklahoma Commission on condition that the price paid should not be binding for the purpose of fixing rates and that the jurisdiction of the Commission should in no wise be affected.[1]

In one Illinois application eighteen electric companies operating in Illinois, six in Iowa, three in Kansas, two in Missouri, and one in Nebraska were involved.[2] It is obvious that the Illinois Commission could make nothing resembling a thorough examination of all of these properties. In a Vermont case, operating companies in Vermont, Massachusetts, and New Hampshire were not allowed to merge on the ground that they were heavily overcapitalized.[3]

Purchases of Oregon properties by the California-Oregon Power Company must be approved by the California Commission. As in the case of the approval of security issues, the Commission utilizes the rate data prepared by the Oregon Commission as far as possible

[1] *Re Empire District Electric Co.*, 16 Ann. Rep. Okla. C. C. 206.

[2] *Re St. Louis Electric Bridge Co.*, 2 Ill. C. C. R. 215 (1923). See *Re Ill. L. & P. Corp.*, 3 Ill. C. C. R. 250 (1924), approving the sale of the Missouri properties of an Illinois company to a Missouri company, and *Re Northern Ill. Utilities Co.*, 5 Ill. C. C. R. 511 (1926), approving the purchases of properties partly in Iowa.

[3] *Re Colonial Power & Light Co.*, P. U. R. 1920-A, 215 (Vt. P. S. C., 1919).

in checking the purchase price.[1] Where that is impossible the Commission confines its work to examining the figures presented by the company.[2] Another instance of belated coöperation was the approval by the Alabama Commission of a petition of a Tennessee utility to lease, manage, and operate the properties of an Alabama utility. The Commission indicated in its order that the approval of the Tennessee Commission had already been given.[3]

The New Hampshire Commission, as in the case of security issues, is authorized to approve only the transfers of property located within the state. Moreover, a New Hampshire statute forbids the transfer of any local utility to a foreign corporation, unless such foreign corporation is engaged in interstate commerce.[4] The Commission was therefore somewhat hesitant as to whether or not it should approve applications by Vermont companies for the purchase of properties located partly in Vermont and partly in New Hampshire.[5] In one case the Vermont Commission had already given its consent.[6] The New Hampshire Commission finally approved also, with the condition that the operation of the New Hampshire properties be kept separate and distinct and that an annual report thereon be made to the Commission.[7]

Two other New Hampshire cases involved only domestic corporations, but in each case part of the proper-

[1] *Re California-Oregon Power Co.*, 23 Cal. R. C. R. 632 (1923).

[2] *Re Same*, 30 Cal. R. C. R. 2 (1927).

[3] *Re Southern Cities Power Co.*, 35 Ann. Rep. Ala. P. S. C. 19 (1924).

[4] *Public Laws of New Hampshire*, 1926, Ch. 240, Sec. 22.

[5] *Re Bradford El. L. Co.*, 10 N. H. P. S. C. R. 5 (1925); *Re Vermont Hydro-Electric Corp.*, 7 N. H. P. S. C. R. 270 (1919).

[6] *Re Western Vermont Power & L. Co.*, Bien. Rep. Vt. P. S. C., 1919 p. 37.

[7] 7 N. H. P. S. C. R. 274.

ties affected by the transfer were located in Vermont and in the Province of Quebec.[1] The Commission stated in one case that "the transfer of this property out of the state . . . is very essential to the success of this plan. For lack of jurisdiction, our authorization will be confined to the transfer of the property in New Hampshire."[2]

In all of the cases which have been discussed in this chapter, whether involving applications for the issue of securities or for the transfer of property, two or more states were interested. In those cases where one or more of the states concerned exercised no jurisdiction over the subject-matter, another state sometimes found it necessary to assume jurisdiction over expenditures and transfers not made in its confines, in order to protect the interest of the public in its own utilities. Frequently there was an overlapping of jurisdictions on the part of two or more states and consequently a duplication of effort. The adequate and efficient regulation of security issues and property transfers necessitates, first of all, a substantial degree of legislative uniformity, comparable at least to that already existing as to rate regulation. Along with that must go an appreciation of the fact that interstate companies are units and should be dealt with as such. Joint action by the commissions of the states in which such utilities operate has the merit of providing such consideration, while at the same time permitting the respective commissions to confine their appraisals and investigations to properties in their own jurisdiction.

[1] *Re Southern N. H. Hydro-Electric Corp.*, 11 N. H. P. S. C. R. 27 (1927); *Re Same*, 11 N. H. P. S. C. R. 248 (1927). [2] *Ibid.*, 250.

VI

PROPOSED METHODS OF REGULATION

FOR several years past there has existed a sharp clash of opinion with respect to the manner in which interstate commerce in electric power should be regulated. Fundamentally, this controversy has centered around the necessity or desirability of the exercise of federal control. In a more academic sense, the differences of opinion have concerned specific proposals. In regard to this latter issue, however, it will usually be found that criticisms of proposals involving federal regulation are based primarily upon the conviction that any exercise of the federal authority is unnecessary, rather than on disagreement with the particular form of regulation suggested. The volume and intensity of the criticism heaped upon a proposed system of control is generally in strict proportion to the degree of federal regulation involved.[1]

Almost without exception, the utilities and the state utility commissions are unqualifiedly opposed to any further extension of federal control over interstate commerce in electric power than is already provided by the Federal Water Power Act.[2] By this act the Federal Power Commission is given jurisdiction over the rates

[1] See below for the resolutions drawn up by the state commissions condemning the Couzens bill, Senate Bill 6, 71st Cong., 1st Sess.

[2] This refers to control over the physical transmission of power and over the operating companies engaged in such transmission. There is less unanimity of opinion in regard to federal regulation of utility holding companies.

and security issues of licensees whenever a state involved has no commission or no jurisdiction. As has been pointed out, this control has rarely been exercised. Until very recently the Commission was an *ex officio* body, composed of the Secretaries of War, the Navy, and the Interior, with a staff so small that it could not keep up with the investigation of applications for water power permits. The reorganized Commission has five full time members,[1] but the jurisdiction is so limited that under the present circumstances it cannot take any considerable part in the regulation of interstate transmission.[2]

The reasons generally advanced against the exercise of federal control are that only a small percentage of power is transmitted in interstate commerce; that the states can deal adequately with whatever interstate commerce does exist, and that the problem is essentially local in nature and not suited to centralized and bureaucratic control from Washington.[3] It is not very difficult to understand the real grounds of opposition on the part of the utilities. In the course of two decades

[1] An Act to reorganize the Federal Power Commission, signed June 23, 1930. See *Tenth Annual Report* of the Federal Power Commission (1930), p. 14.

[2] See *Eighth Annual Report* of the Federal Power Commission (1928), p. 12, and *Ninth Annual Report* (1929), pp. 6, 7. The latter report shows that licensees operate in twenty-one states, all but two of which have commissions, and that the business of these licensees comprises only 6.3 per cent of the total for steam and hydro-electric companies.

[3] It would be a useless task to make any comprehensive listing of references on the attitude of the utilities and the state commissions on this subject. The most valuable sources of information are as follows: *Ann. Proc. Nat. Asso. R. R. & U. Comrs.*, *Ann. Proc. N. E. L. A.*, *P. U. Fortnightly*, *The Electrical World*. Hearings before the Committee on Interstate Commerce, U. S. Senate, 70th Cong., 1st Sess. on Senate Resolution 83.

See below for resolutions of state commissions against Couzens bill.

of state regulation they have learned to coöperate with the commissions in valuation, rate, and security cases. More and more cases are settled informally. As a result the utilities feel that they have everything to lose and nothing to gain from federal control. Possibly the fact that under a system of state regulation some interstate business is not subject to control or is inadequately controlled has something to do with the preference for the status quo, but underneath this lies the dread of some federal authority such as the Interstate Commerce Commission or the Federal Trade Commission.

The attitude of the state commissions is growing more and more hostile to federal intervention. Before the decision of the Attleboro case, and at a time when it was thought that not more than four per cent of power generated was engaged in interstate commerce, there were several suggestions by state commissioners as to the inadequacy and difficulties of state regulation in this field.[1]

[1] In delivering the report of the Committee on Public Utility Rates to the 1925 Convention of the National Association of Railroad and Utilities Commissioners, Henry G. Wells of the Massachusetts Department of Public Utilities stated that while only 4 per cent of power generated might be transmitted in interstate commerce, "yet 4 per cent will total a fairly large amount, and this will increase rather than decrease. This 4 per cent or more may also cause greater difficulties than the other 96 per cent." Mr. Wells then suggested a number of these possible difficulties. "Are rates to be apportioned according to geographical units? How are costs to be apportioned? How shall the costs of transmission lines be allocated? What effect upon costs and rates shall the percentage of water power to steam power have where, as is usually the case, the two are intermingled and where one geographical unit is near the source of water power and another near the source of steam power? What effect does the loop type of construction have upon the whole problem? What difference, if any, shall govern in, first, the case of where power is delivered from one state to another whether steam generated or hydroelectric, or both, but where it is so delivered in bulk as to be easily identified, and second, where power, whether steam or water produced, or both, is transmitted from one state to another as a part of a common system

In view of the fact that it is now known that nearly fifteen per cent of power generated is transmitted across state lines, the sale of part of which the Supreme Court has said the states cannot regulate, it is curious to find the commissions even more opposed than ever to any extension of federal control. The National Association of Railroad and Utilities Commissioners at its 1929 Convention by a unanimous vote adopted a resolution stating that the Association was opposed not only to the

and so mingled with other power produced in one or the other or both ways in the latter state as not to be readily identified?" *Ann. Proc. Nat. Asso. R. R. & U. Comrs.*, 1925, pp. 359, 360.

In the 1924 report of the New Jersey Commission it was said that the development of electric transmission systems was "a matter of much more than local importance engaging the attention of the Federal Government. These transmission systems cross state lines and it is generally agreed both by the federal and state departments that have given the matter consideration the public interest will be served by coöperation in their development." 15 Ann. Rep. N. J. P. U. C. 12. But in its 1927 report the Commission stated that federal regulation was unnecessary. "It is respectfully suggested that any legislation proposed to centralize in a federal bureau, regulation of interconnected companies should be strongly opposed." 18 Ann. Rep. N. J. P. U. C. pp. 6–8.

The following recommendation was made by the Maryland Commission in its 1926 report:

"Recent developments in the field of interstate utility operation, particularly with reference to super-power companies, have rendered it desirable that the Commission be authorized to make joint investigations, hold joint hearings and issue joint or concurrent orders in conjunction with or concurrence with any official board or commission of any State or of the United States, under agreements or compacts between States, or under the concurrent power of the States to regulate interstate commerce, or as an agency of the Federal Government, or otherwise, and a bill empowering it to do so has been drafted at the request of the Commission. Only by close co-operation between the regulatory bodies of the various States and the Federal Government can adequate control be assured in cases where the activities of a utility are not confined within the borders of a single State, and this is particularly true where the power of the Federal authorities under the interstate commerce clause of the Constitution is not complete or adequate." 17 Ann. Rep. Md. P. S. C. 14.

Couzens bill, but "to any enlargement of Federal authority by the creation of new agencies or the enlargement of authority of present agencies whereby the regulatory authority of the State commissions would be interfered with in a field where they are now adequately functioning."[1]

The commissions are unquestionably influenced by what has happened in the field of railroad transportation. They feel that once the federal government has entered the field of utility regulation through its control over interstate commerce the means will be found of extending the control over intrastate commerce. This fear that the powers of the state authorities will be emasculated, coupled with the comprehensive character of the Couzens bill, goes far towards explaining the present position taken by the commissions. Insofar as they are willing to recognize that the existing situation in regard to the regulation of interstate power is unsatisfactory, uniform state laws and interstate coöperation are suggested as the most effective remedies. No better statement of this position can be found than in the address of the President of the National Association in the 1923 Convention.

The area of both electric and gas service has long outgrown municipal or political bondage. Such service crosses state

[1] *United States Daily*, November 13, 1929. Cf. the statement of Chairman Gettle of the Wisconsin Railroad Commission made in behalf of the Association before the Senate Interstate Commerce Committee in 1928. Hearings, pp. 35 ff. See also *P. U. Fortnightly*, Vol. V (January 9, 1930), No. 1, p. 3; Chairman Prendergast in the *New York Times*, March 3, 1929, and I. C. Bailey of the North Carolina Commission in an address to the Southeastern Division of the N. E. L. A., *P. U. Fortnightly*, Vol. IV (July 11, 1929), No. 1, pp. 47, 48.

lines and conditions and economics warrant demand. Complete service for the future will not be related to political boundaries, but the resources of the country will be made available for every economic use as distance disappears as a major element of cost.

We are facing changed and changing economic conditions, and we naturally ask ourselves: first, Is regulation recognizing them and keeping abreast of them? Secondly, we inquire, How can regulatory bodies as now established best function for future full performance of public service? The first question must as a whole be answered in the affirmative, and the second question, it seems to me, depends for its solution on wholehearted coöperative action between the commissions of the various states.

You will readily recognize two conflicting tendencies; first, a tendency to increase the federal government's regulatory functions through federal administrative authority. Secondly, the insistent tendency to counteract or curtail the growth of federal regulation and to co-ordinate state regulation of the various states along most effective lines. Nothing that I am aware of has happened since I ceased to be a state commissioner to change the views which I formerly expressed in favor of retaining a standardizing administrative authority of state commissioners. I do not believe that there can be created or can be made available through federal action a more effective administrative agency for protecting the real public interest than is to be found in standardized state regulation.[1]

Either because the tendency towards coöperation and standardization has not been sufficiently manifested, or for other reasons, federal regulation is now being seriously urged by many observers. The decision of the Supreme Court in the Attleboro case has undoubtedly been an important factor, as has been the discovery that

[1] Carl D. Jackson, *Proc. Nat. Asso. R. R. & U. Comrs.*, 1923, p. 111, at 112, 113.

the amount of interstate power was much greater than had been commonly supposed. An extension of federal control to cover wholesale contracts was recommended in the 1925 and 1928 annual reports of the Federal Power Commission.[1] With the coming of a new Executive Secretary, however, the Commission in 1929 advised that there should be no increase in its jurisdiction over interstate transmissions.[2] It remains to be seen what the attitude of the new full-time Commission will be. Oddly enough, the sudden reversal of the Commission's position in 1929 was accompanied by an equally sudden change on the part of President Hoover. Long openly opposed to federal regulation,[3] the President in his first Message to Congress advocated a widening of the jurisdiction of the Federal Power Commission to cover those aspects of interstate transmission now un-

[1] *Fifth Annual Report*, pp. 7–11; *Eighth Annual Report*, pp. 7–13. Mr. O. C. Merrill was then Executive Secretary.

[2] *Ninth Annual Report*, pp. 5, 6. Mr. F. E. Bonner was Mr. Merrill's successor.

[3] See *Proc. Nat. Asso. R. R. & U. Comrs.*, 1923, pp. 87–91 and p. 349 for Mr. Hoover's views at that time. His arguments for state rather than federal control are given at some length in an address delivered before the National Association of Railroad and Utilities Commissioners at Washington in 1925. This address was entitled "Why the Public Interest Requires State Rather Than Federal Regulation of Electric Public Utilities." (See *Proceedings*, 1925, pp. 262–271.) This address was broadcast and later published in pamphlet form. Copies were sent by the Convention to every member of Congress. For practically the same statement see *Investment Bankers Association of America Bulletin*, 14: 156–160, Ap. 30, 1926, "State Utility Control the Only Way." Mr. Hoover was still opposed to federal control in the presidential campaign of 1928. See *Boston Herald*, November 2, 1928. For suggestions as to the explanation of President Hoover's new stand, see editorials in the *Boston Herald*, December 7, 1929, and the *New York Times*, December 7, 1929. In view of the nature of his proposal (see below), it would appear that he is attempting to present Congress with an alternative to Senator Couzens's bill, which would affect far more seriously the jurisdiction of the states.

controlled by the states.[1] Going far beyond any of these proposals was Senator Couzens's bill providing for a Commission on Communications, with control over radio, interstate telegraph and telephone companies, and interstate commerce in electric power.[2] These proposals lend renewed vigor to the two controversies which were suggested at the beginning of this chapter. The conflict is primarily one concerning the desirability of any extension whatever of federal control. Secondarily, among those who favor federal regulation, there is great difference of opinion as to how much is desirable and how it should be exercised.

In the preceding chapters the jurisdiction and procedure of state commissions in dealing with applications

[1] The statement is as follows:

"The Federal Power Commission is now comprised of three Cabinet officers, and the duties involved in the competent conduct of the growing responsibilities of this commission far exceed the time and attention which these officials can properly afford from other important duties. I recommend that authority be given for the appointment of full-time commissioners to replace them.

"It is also desirable that the authority of the commission should be extended to certain phases of power regulation. The nature of the electric utilities industry is such that about 90 per cent of all power generation and distribution is intrastate in character, and most of the States have developed their own regulatory systems as to certificates of convenience, rates and profits of such utilities. To encroach upon their authorities and responsibilities would be an encroachment upon the rights of the States. There are cases, however, of interstate character beyond the jurisdiction of the States. To meet these cases it would be most desirable if a method could be worked out by which initial action may be taken between the commissions of the States whose joint action should be made effective by the Federal Power Commission with a reserve to act on its own motion in case of disagreement or non-action by the States."

[2] Senate Bill 6, 71st Cong., 1st Sess. Since the reorganization of the Federal Power Commission the provisions relative to interstate power have been removed from this bill and incorporated in Senate Bill 3869, 71st Cong., 1st Sess.

involving interstate electric light and power companies have been examined. On the basis of the large number of cases studied it cannot fairly be maintained that there are not serious defects in the present system of regulation. Lack of jurisdiction over rates, service, and security issues of electric utilities in some states makes more difficult and less effective the work of commissions in other states. Lack of uniformity in utility laws and in administrative procedure leaves gaps in the system of control in some cases and involves duplication in others. Lack of coöperation on the part of the commissions makes possible discrimination and conflicts, and results in overlapping of functions. Finally, the lack of control over interstate wholesale contracts has seriously hampered the state commissions in some cases in the regulation of the rates of distribution to consumers. The real issue as regards the regulation of interstate power is not whether the present system is adequate, but whether an adequate system can be devised by the states without any federal control. It is contended by the state commissions that standardized utility laws and administrative procedure, coupled with coöperation, can regulate interstate power more effectively than any federal agency.

In the discussion of the making of valuations, the fixing of rates and the supervising of security issues it has been indicated that in most cases uniformity and coöperation would enable the states to deal adequately with the interstate problems involved. Of all of the cases examined only a handful concerned more than two states. The evidence and data required for the regulation of interstate operating companies are almost entirely within the jurisdiction of two or at most three states.[1] To this extent the regulation of the rates, service, and security issues of these companies is a local and not a national problem, and the joint action of the state agencies affected has many advantages over a system of centralized administration.

The conclusion cannot be avoided, however, that any system of control based on uniform public utility legislation and coöperative action has certain intrinsic limitations. These limitations may be of two sorts. In the first place, only Congress can regulate wholesale transactions in interstate commerce. This means a possibility of discrimination either in the form of excessively high rates for the consumers in the receiving state, or in the form of unreasonably low wholesale contracts affecting adversely service in the sending state, which neither uniform laws nor coöperation can prevent. It may very well be that the power thus inadequately controlled will not attain great proportions, but enough instances of discrimination have been observed to show that the danger is a real one.

In the second place, assuming again an ideal situation as regards uniformity of laws and willingness to coöperate, there is no way of assuring that state agencies will always come to an agreement in the settlement of these interstate problems. Differences of opinion may exist as to the method of valuation, the fixing of rate schedules, the percentage of return, the desirability of projected undertakings, and the amount of securities to

[1] This must be qualified insofar as operating companies have management and supervision contracts with holding companies, since the activities of the latter are not now regulated.

be issued. The commission of each state involved is charged with the duty of protecting the public interest of its own state, and not that of two or three states. While absolute agreement as to details may not always be necessary, substantial accord on the main factors is clearly required. In the event of the failure to reach this accord, a system based merely on voluntary coöperation provides no method of coming to a decision. The result in some cases will be, as has been said, conflict, deadlock, and non-action.[1]

What has been said above assumes that the states will adopt uniform laws and administrative procedure, and that they will coöperate. Insofar as they have not shown and are not showing a tendency to do this, the argument against federal action is weakened. The situation as to uniform legislation is unquestionably improving. In what is probably the most important matter, the regulation of rates, forty states have commission control, and differences of jurisdiction and procedure would not prove an insuperable obstacle to joint action. On the other hand, one-third of the states have no provision for accounting systems, though there is a substantial degree of uniformity in existing legislation. More than half of the states do not require commission approval for security issues, mergers, consolidations, and lease agreements, and there is very little uniformity among the laws which do require such approval.[2] Non-action or lack of uniform action on the part of the states, insofar as they affect intrastate utilities only, are not urged as grounds for federal regulation. When, how-

[1] *Eighth Annual Report,* Federal Power Commission, 1928, p. 13.

[2] See Bonbright and Company survey, *op. cit.*

ever, non-action and lack of uniformity have as a necessary consequence the inadequate and ineffective regulation of interstate commerce, they constitute legitimate reasons for the exercise by Congress of its authority.

It is in the field of coöperation and joint action that the states have most neglected their opportunities. In all of the interstate cases which we have discussed there have been only two or three whole-hearted attempts at coöperation. Oregon and Idaho, Maryland and Pennsylvania,[1] Wisconsin and Illinois have indicated what might be accomplished, not what is generally being done.[2] Another promising indication is the action of the commissions of Pennsylvania, Maryland, New Jersey, and New York in organizing the Middle Atlantic States Utilities Commissions' Association, for the purpose of discussing the interstate problems common to the four commissions.[3] Somewhat similar moves have been made by the states in the northeastern section of the country.[4] On the whole, however, the present attitude of the states does not presage any great development in the way of

[1] In a statement before the Senate Committee on Interstate Commerce, Chairman Ainey of the Pennsylvania Commission stated that the commissions of Pennsylvania and Maryland dealt coöperatively with all of the interstate problems arising out of the Conowingo Dam project. See Hearings, p. 216. No reference was made to the part taken in the proceedings by the Federal Power Commission. In view of the fact that the subject of the Committee's discussion was the power of the states coöperatively to regulate interstate projects *without* the intervention of any federal authority, this would seem to be a rather important oversight. It was not noted. See above for the part played in this case by the Power Commission.

[2] In regard to this subject, and to all others here examined, conclusions are based on the published reports available. It may be that there have been other examples of joint action on the part of the commissions than those which are discoverable from the reports.

[3] *P. U. R.* 1928 A-2, iv.

[4] Mosher, *Electrical Utilities*, p. 141.

coöperation. The underlying difficulty is the assumption by the states that the problem is a local one, in the sense of being intrastate. There is far too much confusion and blindness on this point. When it is said that the regulation of the interstate transmission of electric power is a local and not a national problem, as is the case of railroad transportation, what is meant, or what should be meant, is that it is a problem affecting in each instance not more than three and usually only two states. It is a serious mistake to confound the electric power problem with the railroad problem. But it is equally serious to consider the electric power problem as solely an intrastate problem because it is not a national problem. It is perhaps unfortunate that there are no political or administrative units between the state and the federal government. In the absence of such intermediary units, economic situations which have outgrown the boundaries of individual states will have, sooner or later, to be dealt with by an administrative system which can regulate them as entities, and not break them up artificially into particularized problems. Insofar as the states, by method of coöperation, can provide such an administrative system, interstate problems which are local to two or three states may be better solved in that way than by national authorities. But a system of individual state regulation, which makes two or three problems of what is really one, ought not to and will not controvert the tendency towards federal regulation.

Those who have seen the situation in this light, and who realize the inherent limitations on a system of voluntary coöperation, but who at the same time deplore the intervention of a federal administrative authority, have proposed as an alternative the making of interstate compacts under the approval of Congress. Only one real effort has been made to negotiate such a compact, but that has a most interesting history. It was the outgrowth of a recommendation made by the Giant Power Survey Board of Pennsylvania. In 1923 this Board was authorized by the legislature to outline a giant power policy, including plans for the interchange of electrical energy with other states.[1] In reporting its findings to the General Assembly in 1925, the following recommendation was made:

> That the Giant Power Board be authorized to negotiate with the representatives of other states compacts for ratification by the legislatures of the respective states and for approval by Congress under Article I, Section 10, paragraph 3 of the Federal Constitution, for the regulation of interstate electric transmission on principles of mutuality, equality, justice and efficiency; also to grant permits for the construction of major interstate lines under such compacts.[2]

A bill incorporating this suggestion was introduced in the legislature, but failed of adoption.[3] A bill providing

[1] Act No. 240 of the General Assembly, 1923. See 1925 Report of the Board, *Giant Power*, p. 1.

[2] *Giant Power*, p. 10. This was only one of a series of recommendations. It was proposed, in the first place, that the three businesses of generation, transmission, and distribution should be segregated in separate corporate ownerships. By this method it was stated that interstate business would be reduced to its lowest terms. It was further proposed that Pennsylvania utilities furnishing power to consumers in another state should not be permitted to extend their interstate business. The same provision was made as to wholesale transactions, with the exception of transmission campanies granted permits for that purpose by the Giant Power Board. These transactions were to be subject to regulation under the compacts formed. See Report, pp. 3–9, 157 ff. See also Philip P. Wells, "Giant Power," *National Municipal Review*, Vol. XV (October, 1926), No. 10.

[3] See Giant Power Board, Report, December 7, 1926, p. 82.

for the creation of a permanent Giant Power Board was also defeated, and it appeared as though the entire investigation would be without tangible result. At this point Governor Pinchot, by executive order, appointed a Giant Power Board in order "to set the problem in a clear light before the people and to coördinate toward its partial solution all the executive and administrative authority given by existing law." [1] One of the members of this new Board suggested to the Governors of New York and New Jersey that they appoint commissions to meet jointly with the Pennsylvania representatives for the consideration of a tri-state compact for the regulation of interstate electric power companies. The three Governors, by a statement released to the press October 26, 1925, announced that they had appointed commissioners constituting a joint Giant Power Commission to negotiate such a compact for submission to the legislatures of the three states.[2] Governor Pinchot appointed three members of the Giant Power Board; Governor Smith of New York appointed three members of the Public Service Commission, and Governor Silzer of New Jersey appointed one member of the Board of Public Utility Commissioners and two prominent business men. Later the Governors of the states bordering on the negotiating states were invited to appoint representatives to act as observers and advisers, with a view to protecting their interests, securing their coöperation and criticism, and seeking their future participation in the compact.[3] In response to this invitation representa-

[1] *Ibid.*, p. 22, at p. 24.

[2] *Ibid.*, p. 155. The proceedings are briefly summarized at pages 19–22. Minutes of all of the meetings of the Joint Commission are printed in Appendix XI, pp. 155–183.

[3] *Ibid.*, p. 20.

tives of seven adjoining states took part in the discussions.[1]

At the first meeting of the Joint Commission an executive committee was nominated to bring in a statement of principles for the consideration of the Commission.[2] The first deadlock occurred in the attempt to formulate such a statement. Agreement was reached by the Committee as to the ultimate area of the compact, the method of adhesion by states, the formation and composition of a joint tribunal, the regulation of the service standards of interstate utilities in case of dispute between member states, and the prorating of expenses. But no agreement could be reached as to the subject matter to be regulated as interstate business; the scope of regulation of such business; segregation of interstate transmission; rate base, security issues, and fair return; uniformity of rate structures, and incorporation of interstate electric utilities.[3] At the second meeting of the Commission it was proposed by Commissioner Prendergast of New York that the question of the necessity of a compact be discussed before considering what should be included in such a compact. The Commission decided to proceed with the reading and discussion of the report of the executive committee, "as if there were to be a compact, postponing the question as to whether or not there should be one." [4] No agreement could be reached, however, and it was decided that the next meetings should be devoted to the discussion of the necessity of a compact.

This was the rock on which the proceedings finally

[1] Giant Power Board, Report, December 7, 1926, pp. 20, 21.
[2] *Ibid.*, p. 159. [3] *Ibid.*, pp. 160, 161. [4] *Ibid.*, p. 162.

foundered. At the third meeting Commissioners Vanneman and Prendergast of New York submitted statements expressing the belief that a compact was both unnecessary and undesirable.[1] Their argument relied mainly on the small amount of power engaged in interstate commerce and the ability of the states acting separately to adequately regulate this transmission.[2] Commissioner Prendergast, however, devoted some attention to the method of regulation by compact, assuming regulation of some sort to be required. He pointed out that it was a very cumbersome and ineffective device. Not only would the compact have to be ratified by each state concerned and approved by Congress, but all amendments would have to be approved in the same manner.

> In this connection it will be admitted by all that what is proposed to be here covered by compact, i. e., the electric power industry, is in a period of tremendous epoch-making development, so it is at once apparent that any legislation now will of necessity require amendment within a very short time.[3]

He added that the result of a compact would be to limit the freedom of action of the states in respect to their intrastate policies, and that nothing would be added to their powers.[4] In his conclusion he summarizes all of his objections to this form of regulation:

> A state compact provides a cumbersome and indirect method for correcting a minor deficiency in the present system of regulation; it is to be applied to conditions to be met in an

[1] *Ibid.*, pp. 168–177.
[2] The Attleboro case had not yet been decided.
[3] *Ibid.*, p. 172. [4] *Ibid.*

unknown future; where those conditions are encountered, prompt relief is prevented by the compact, since amendment is as difficult as the adoption of the compact itself; it thus limits the freedom of future action, does not add to the regulatory powers of any of the states, is unnecessary, surrenders state sovereignty, and furnishes an entering wedge to complete Federal regulation of local problems.[1]

At the last meeting of the Commission it was voted that any compact "should be so drafted as not to diminish by one iota the powers now exercised by the state commissions under present laws and regulations," although Commissioner Prendergast stated that this would involve the compact in impossible difficulties.[2] Even with this concession, however, the New York representatives would not vote for the desirability of a compact. They withdrew from the negotiations, which were not continued.[3]

One example of failure does not in itself prove the inefficacy of interstate and regional compacts as a method of regulating the interchange among the states of electric power. This particular example, however, indicates that there are almost insuperable obstacles in the way of negotiating such compacts. In this case the breakdown resulted from the fact that the representatives of one of the states involved were not convinced of the necessity of any further regulation, and were in any event opposed to the compact method. But even assuming agreement among the negotiators on these points, there remains the task of framing terms upon which all can agree. The list of subjects upon which the members

[1] Giant Power Board, Report, December 7, 1926, p. 177.
[2] *Ibid.*, p. 179. [3] *Ibid.*, p. 180. See also p. 22.

of the Joint Commission could not agree included every matter which would be in the jurisdiction of the regional board established except the regulation of the service standards of interstate utilities.[1] It would be a delicate task to mark the boundaries between state and regional regulation of interstate companies in such a way as to satisfy the demands of each state. Beyond this lies the even more difficult task of agreeing upon the principles of valuation, rate-fixing, accounting, etc., to be followed by the regional board. If the representatives of the various states were successful in making a compact suitable to all, it would have to be ratified by each state and approved by Congress.[2]

Aside from the disadvantages of this method involved in negotiation and ratification, it does not seem to be adapted to the settlement of the problem of the regulation of interstate power.[3] If it is proposed to have compacts between small groups of states, there would have to be an infinite number of compacts, because there would always be exchange of power between states under different compacts. Obviously what is intended is the gradual formation of regional compacts. That in-

[1] This principle was agreed upon only by the executive committee.

[2] The efforts to form a Colorado River compact illustrate the difficulties to be encountered in this respect. New York, New Jersey, and Pennsylvania were also unsuccessful in an attempt to settle by the compact method their respective utilization of the waters of the Delaware River.

[3] But see Mosher, *Electrical Utilities*, p. 141. "This solution is nearly ideal but state jealousies are still too dominant to hope that it could be made effective on a large scale." See also Frankfurter and Landis, "The Compact Clause of the Constitution," 34 *Yale Law Journal* (May, 1925), p. 704. "State compact furnishes an effective answer. . . . Here is a ready means for avoiding undue congestion at Washington and the ineffectiveness of individual State control." This method is discussed with particular reference to electric power at pp. 708–718.

dividual states would oppose the delegation of power to regulate interstate commerce to regional commissions was clearly indicated in the discussions of the Joint Commission.[1] A more fundamental objection is that this phase of the electric power problem, the regulation of the interstate transmission of power and of the operating companies engaged in such transmission, is not economically regional in character. Other aspects which may require more than state regulation, such as holding companies and interconnection, would transcend the bounds of even regional authorities. In the case of interstate transactions, on the other hand, the region would have no advantage over a federal authority because it would be dealing with a matter which belonged essentially to two or three states.[2] This method has the disadvantage of superimposing a structure of administration upon that of the states which has no clear relationship either to the states or to the federal government.

Another consideration against the compact method is that it does not meet the fundamental objection against individual state control, inability to regulate wholesale rates to distributors. Compacts among the states can provide for the regulation only of those matters over which the states have jurisdiction. With the decision that even in the absence of federal action the states cannot take jurisdiction over interstate wholesale rates the

[1] See statement of Commissioner Prendergast, Giant Power Board, Report, p. 172. See also p. 181 for statement of the Vermont observer that Vermont would not consider joining any compact unless it could always have a member on the joint board.

[2] But *contra*, Frankfurter and Landis, *op. cit.*, p. 717. It should be emphasized that what is said here refers to operating utilities and not to holding company systems. The latter would seem to require a different administrative mechanism.

field of interstate compacts in relation to electric transmission across state lines is so narrowed as to be entirely inadequate.[1] It is now being suggested instead that federal control with regional administrative decentralization or state coöperation is the most effective method.

The most significant of the proposals made for the solution of this interstate problem is for some system of federal and state coöperation. In his Annual Message to Congress in December, 1929, President Hoover urged the desirability of a method "by which initial action may be taken between the commissions of the States whose joint action should be made effective by the Federal Power Commission with a reserve to act on its own motion in case of disagreement or non-action by the States." [2] What is somewhat vaguely suggested here has been worked out in some detail by the former Executive Secretary of the Federal Power Commission, Mr. O. C. Merrill.[3] The plan provides that the states exercise plenary control over the interstate transmission where the transmitting company also distributes to consumers. As to wholesale transactions, the state commissions sitting jointly would be given original juris-

[1] "Between these limits — what Congress may do and the States obviously may not do — lies the field in which compact would operate." Frankfurter and Landis, *op. cit.*, p. 718. It should be noted that this article was written before the Attleboro case was decided. The plea made was that the Court should not preclude the possibility of joint state action by decisions denying the regulatory power of the states over those aspects of interstate commerce which Congress had not regulated. The Court has left no way open, apparently, for state action regulating the price charged by a company in one state for power delivered to a distributor in another state.

[2] See above.

[3] For his suggestions see address, "State and Federal Co-operation in Electric Utility Regulation," *Proc. Nat. Asso. R. R. & U. Comrs.*, 1925, pp. 340–349; *Eighth Annual Report*, Federal Power Commission (1928), pp. 7–13; *P. U. Fortnightly*, Vol. III (April 18, 1929), No. 8, pp. 449–454.

diction. These agencies being more familiar with local conditions than a federal authority, could hold hearings, take testimony, assemble the evidence, and determine the issues. In the event of disagreement or on appeal the Federal Power Commission or other federal authority would be given final jurisdiction. It would exercise original jurisdiction only where the states failed to act.

This proposal is somewhat summarily dismissed in Mosher's *Electrical Utilities*.[1] It is said in the first place that it probably involves an unconstitutional delegation of authority. It is suggested that this constitutional difficulty might be avoided by giving the federal authority original jurisdiction in all wholesale cases, but allowing the state commissions to act as federal agents in any given dispute. But the criticism made of any such proposals is that they do not take into account the possibility of the refusal of the state commissions to enter into these coöperative arrangements.[2] They are characterized as "half-hearted endeavors to solve a clear-cut issue." The solution advanced by Mosher is that the Federal Power Commission be given entire control over the rates, service, and financial methods of all wholesale interstate transmission.[3] It is further said that inasmuch as electric transmission is a sectional rather than a national problem the administrative set-up of the Commission should include the establishment of regional boards.[4]

[1] See pp. 142–144.

[2] This is true of the earlier proposal made by Mr. Merrill in *Eighth Annual Report*, Federal Power Commission, above. It is not true of his later proposals. See *P. U. Fortnightly*, above. Federal jurisdiction is to be exercised where the states fail to act at all and where they do not agree.

[3] *Electrical Utilities*, p. 144.

[4] *Ibid.*, 144, 145.

The debate as to the method of federal control will center about these alternatives. It is very unlikely that federal regulation of the entire interstate transmission of electric power will be seriously considered in the near future. To require the federal agency to make valuations, fix local rates of distribution, and supervise the financial activities of all companies transmitting power across state lines, when their business is mainly intrastate, would be indeed a poor solution of the problem.[1] Nevertheless, the attempt to draw a sharp line between wholesale and retail transactions is not wholly logical. In this respect Mr. Mosher's division of jurisdiction is more artificial than Mr. Merrill's. The latter leaves the state agencies to do the field work in both cases, where they will, and authorizes the federal agency to hear appeals and act in an original capacity where the states do not act or do not agree, as to wholesale transactions only. Mr. Mosher gives the federal tribunal no jurisdiction over retail transactions and complete control over wholesale transactions.

A legal differentiation between these two classes of interstate transactions has been firmly established by the decisions of the Supreme Court. It is submitted, however, that the legal distinction should not be permitted to obscure the fact that there are many features in which they do not essentially differ. The data and evidence required for the regulation of the rates, service, and security issues of a company transmitting power at wholesale across state lines may be as much within the

[1] The Federal Trade Commission report states that its compilations listed 448 corporate and other senders or receivers of electric energy across interstate boundaries, including some in Canada and Mexico.

jurisdiction of a state, geographically speaking, as in the case of an interstate company distributing at retail. In all cases the largest and most important item is cost of generation. In the retail transaction in interstate commerce, the plant and most of the items of valuation are located in another state. The physical difficulties in the way of regulating a retail interstate company are not intrinsically less important than are encountered in the case of wholesale contracts. On the other hand, the possibilities of conflict, deadlock, and discrimination are greater in regard to wholesale transactions. Only the state in which power is distributed can regulate local rates, whereas with wholesale contracts, particularly where current is delivered at the state line, one state would have as much jurisdiction as the other. It is in that respect that the Court has held that the regulation of wholesale contracts was not a local affair. But this does not mean that it is absolutely essential that some national administrative authority is best suited to undertake itself the entire task of regulating interstate transmissions under these circumstances. Conversely, the decision that the regulation of the local rates to consumers, in the case of current transmitted across state lines and distributed by the same company, is essentially local and subject to state authority in the absence of federal action, does not at all mean that interstate commerce under such conditions is inherently and entirely a matter which the states individually should control.

What has been entirely overlooked in these proposals is a provision for federal control in the last resort where interstate retail transactions are not regulated or are inadequately regulated. In a preceding chapter, several instances were pointed out in which there was discrimination against the consumers of one of the states involved. It was further pointed out that failure of one state to regulate the business of an interstate company necessarily impaired the efficiency of the control of the other state or states concerned. Conflicts, deadlocks, and non-action may be the result of exclusive state control in regard to interstate retail transactions in many cases. Constitutional factors have placed a definite limitation on the exercise of the powers of the states, but they have not and cannot decide in themselves the most effective distribution of functions between the federal government and the states in this field.

The provisions in the Couzens bill to amend the Federal Water Power Act furnish the most comprehensive mechanism of regulation yet suggested.[1] This measure gives the Federal Power Commission authority to require reports, prescribe accounting forms, make valuations and regulate security issues, both as to operating companies engaged in interstate transmission and as to their holding and management corporations. It is in respect to the regulation of rates and abandonment of service, however, that the new mechanism is proposed. It is provided that

> rates and charges to any distributor, consumer, or other purchaser of power transmitted in interstate commerce for ultimate public consumption, and the rates and charges to any producer or distributor for the transmission in interstate

[1] Senate Bill 3869. 71st Cong., 2nd Sess. Somewhat similar provisions had been made in Senate Bill 6, 71st Cong., 1st Sess., also introduced by Senate Couzens, setting up a Commission on Communications and Power. The present bill incorporates the earlier provisions as to interstate transmission of power, with some changes and additions.

commerce of power for ultimate public consumption or for facilities or services furnished in connection with such transmission, shall be just and reasonable.[1]

It is made unlawful

to discriminate in rates, charges, or services with respect to power transmitted in interstate commerce for ultimate public consumption by making or giving any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever or to subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Abandonment of service in interstate commerce is permitted only after the obtaining of a certificate of convenience and necessity.

The method of regulation is as follows:

A petition complaining as to rates, charges, or services may be made by the commission upon its own motion, or may be made, and filed with the commission, by any State commission, or by a distributor, or by a substantial number of consumers of the power involved (to be determined by the commission in accordance with such regulations as it shall prescribe). A petition for the abandonment of service may be made, and filed with the commission, by any producer, transmitter, or distributor. The commission shall refer any such petition with respect to rates, charges, services, or abandonment of service to an agency of the United States, to be known as a joint board, composed of one representative from each State in which the power involved is produced or consumed, as determined by the commission. In the case of a State having no State commission, the petition may be filed by the governor. The representative of each State upon any

[1] These provisions are found in sec. 31 of the bill.

joint board shall be selected in such manner as the State may by law provide; except that if the State has no provision of law for such selection, the representative of the State shall be appointed by the State commission for that State, or if there is no State commission, then by the governor of the State. A joint board shall permit or may require any person, State commission, or other State authority having an interest in any proceeding before it to assert such interest by intervention, and shall afford to all parties in interest in any such proceeding reasonable notice and opportunity for hearing. A determination by a joint board shall be made upon a majority vote of its members. The establishment of a joint board shall be valid and the joint board may function notwithstanding failure of any State to provide a representative thereon and notwithstanding any vacancy in the joint board; except that in case a majority of the States entitled to representation upon a joint board fail to provide representatives thereon within thirty days after the establishment of the board by the commission, or in case the proceedings before or the determination of the joint board are delayed beyond such time as the commission shall fix, then the commission shall take original jurisdiction of the petition, and shall have the same powers and duties with respect thereto as are in this section provided as to joint boards.

It is further provided that if any party to the proceeding files exceptions to the determination of the joint board the commission shall take appellate jurisdiction. It may hear additional evidence after notice to the parties and the state commissions involved.

Another important provision is that the commission and the joint boards shall utilize to the fullest extent practicable reports, records, data, and information in the hands of the state commissions.

The jurisdiction of the states is safeguarded in two ways. In the first place, it is stated that

Nothing in this Act shall be construed to authorize the commission or any joint board to regulate rates, charges, or services for or in connection with the generation, transmission, sale, distribution, and/or delivery of power which does not enter into or become a part of interstate commerce, whether for the purpose of removing discrimination against interstate commerce or for any other purpose.

In the second place, it is provided as follows:

Notwithstanding the foregoing provisions of this section, nothing therein shall be construed to abridge the jurisdiction or authority of any State to regulate, to the same extent as if this Act had not been passed, the rates and charges for the sale to consumers within the State of any power transmitted in interstate commerce, service to consumers with respect to such power, or the abandonment of any power service to consumers, unless a substantial number of the consumers of such power (to be determined by the commission in accordance with such regulations as it shall prescribe) file with the commission a petition requesting Federal regulation of such rates, charges, and service under this section. Upon the filing of any such petition the foregoing subsections shall apply with respect to such rates, charges, and service, and such petition shall have the same effect as a petition of a State commission under subsection (b) of this section.

The remaining sections of the bill are not important for this discussion.

The Couzens bill, against which the National Association of Railroad and Utilities Commissioners passed a unanimous resolution,[1] was characterized by a former Vice-President of the Association as one of the most insidious pieces of legislation offered in Congress in the past quarter-century.[2] The state commissions object

[1] *United States Daily*, November 13, 1929.

[2] *Ibid.*, December 11, 1929. Statement of Harvey H. Hannah. Mr. Hannah is now President of the Association.

most strongly to those provisions dealing with the regulation of the telephone and electric power industries.[1] It is not easy at first sight to account for the unanimity and the vigor of their opposition. The reasons advanced in their resolutions provide an interesting and striking illustration of the way in which the old dogmas of state sovereignty and the natural right of self-government can be employed even at this date.[2] In a sense, this

[1] See article of John E. Benton, General Counsel of the Association, "Why the State Commissions Oppose the Couzens Bill," *P. U. Fortnightly*, Vol. V (January 9, 1930), No. 1, pp. 3–14. Mr. Benton says that there is no objection to federal control over radio transmission, and very little as to telegraph companies. The resolutions of the National Association and of the Kentucky, Washington, Maryland, Idaho, Wisconsin, and Minnesota commissions all single out for special criticism federal regulation of telephones and power. See below for citations. See also Harold E. West, Chairman of the Maryland Commission, "The Menace of the Couzens Bill," *P. U. Fortnightly*, Vol. VI (November 13, 1930), No. 10, p. 579, and statement of Harvey H. Hannah, Chairman of the Tennessee Commission and recently elected President of the National Association, in *United States Daily*, December 22, 1930.

[2] See the following resolutions, all taken from the *United States Daily*. The Connecticut P. U. C., endorsed by Governor Trumbull, says that these matters are all naturally in the control of the states, and that the bill is an invasion of state rights (November 4, 1929); the Kentucky commission, which has no jurisdiction over electric light and power companies, calls on its representatives "to stand by, defending the rights of Kentucky and her sovereignty . . ." (November 16, 1929); the South Dakota Board of Railroad Commissioners, which is in the same situation, says that state regulation should not be precluded by uncalled for federal action (December 9, 1929); the North Dakota Board and the Indiana P. S. C. protest the invasion of state rights (November 30, 1929); the same protestations are made by the commissions of Arizona, Maine, and Louisiana (December 4, 1929); the most striking of all is the statement of the Director of the Department of Public Works of the state of Washington: "The bill is unethical and un-American. It ignores the first constitutional privilege of State sovereignty — the State's right to take care of its own affairs. Self government is a fundamental recognized right. This bill sets up an alien regulation which will result in the ultimate extinction of local State independence" (December 2, 1929). The commissions of Maryland, New Hampshire, Idaho, Wisconsin, and Minnesota are content with the argument that the telephone and power industries are essentially intrastate and that federal regulation is unnecessary

really is the explanation of their hostility. It is admitted by the General Counsel of the National Association that the degree of federal jurisdiction as outlined in the bill is very limited.[1] The commissions are opposed, not to this particular measure, but to any provision for federal regulation. The General Counsel describes the situation perfectly when he states that the real reason for the opposition of the commissioners is that many of them were officials at the time of the passage of the 1920 Transportation Act.[2] They sincerely believe that the assumption of any regulatory jurisdiction whatever upon the part of the federal government over interstate transmission of electric power will be the beginning of the end insofar as state control is concerned. The provision of paragraph (h) of Section 47, that state control will not be affected as to the local distribution of interstate power, is said to be practically nullified by the qualification that "a substantial number" of the consumers may petition for federal regulation.[3] From this point, the federal commission will assume jurisdiction over purely intrastate commerce, on the ground that in this way only can interstate commerce be adequately regulated. The inevitable result of giving the federal commission rate-making power over interstate commerce in electric power, says Mr. Benton, will be prac-

(January 28, 1930). Similar statements were made by the Vermont Commission (February 10, 1930), the North Carolina and Kansas commissions (February 13, 1930), and the Nebraska Commission (February 14, 1930). The only commission ready to admit the possibility that federal regulation might become necessary was the Colorado Commission, which added, however, that the time had not yet come (November 16, 1929).

[1] *P. U. Fortnightly*, Vol. V (January 9, 1930), No. 1, p. 12.

[2] *Ibid.*, p. 4.

[3] *Ibid.*, p. 13.

tically exclusive federal control, because of the principle of federal supremacy.[1]

This argument assumes, of course, that the federal tribunal is going to lay hands on every weapon which may aid it in extending its jurisdiction, and that the courts will sanction this invasion of state rights. It assumes, in other words, that the disposition of a business which is 85 per cent intrastate and 15 per cent interstate will be the same as of a business which is perhaps 85 per cent interstate and 15 per cent intrastate. Such a result would be disastrous, but it is not the foregone conclusion that it is said to be. The Federal Power Commission has certainly never attempted to stretch in the slightest its rate-making powers, and the reasons given were precisely that the matter was essentially local, and that federal jurisdiction should be confined to filling the gaps left by state regulation. It must be recognized that a different system of regulation must be devised for the electric power problem, as well as for motor bus regulation, than that adopted for the problem of railroad transportation. But the ultimate solution of this problem cannot be to leave it entirely to the states because of the fear that the federal government will go too far. What is needed is a system which will utilize to the greatest extent possible existing agencies of control and which at the same time will remedy the defects inherent in the present system.

The Couzens bill should be regarded, not as an insidious measure designed to strip from the states their control over their utilities, but as a praiseworthy attempt to provide for a new type of federal regulation.

[1] *Ibid.*, p. 14.

The method of joint boards is probably more suited to this subject than regional compacts or regional federal agencies, as proposed by Mr. Mosher. In this respect, however, the Couzens bill might meet with difficulties. It is like the other proposals in that it provides an additional agency, which in this case it definitely linked with the federal administrative system, but which is not so surely coördinated with the state commissions. What is essentially required in this problem is the coöperation of the state commissions with a federal tribunal. It is by no means certain that this coöperation can best be secured by the interposition of a new local federal agency. Why not utilize the state commissions themselves? It has been pointed out that there are legal difficulties in the way of this method. The state commissions cannot be compelled to act as federal agencies if they do not wish to. On the other hand, if they were given sufficient jurisdiction to assure them of real control there is little doubt but that they would welcome this position. From the standpoint of the Federal Constitution, there does not seem to be any obstacle to this procedure. It is now well settled that the federal government may, where not prohibited by a state, use state courts, judges, and other officials in the enforcement of federal laws.[1]

[1] For a most interesting discussion of the alternative methods of regional boards and the use of state commissions as federal agencies in regard to the transportation problem see George G. Reynolds, *The Distribution of Power to Regulate Interstate Carriers Between the Nation and the States* (1928), pp. 382 ff. It is pointed out here that state officers have aided in the enforcement of federal laws relating to the return of fugitive slaves, compulsory military service, eminent domain proceedings, the naturalization of aliens, and the liability of employers for death or injury to their employees. (Page 391.)

It might also be well to change somewhat the method by which the Couzens bill provides for the assumption by the federal authority of jurisdiction over rates and service to consumers of interstate power. Although it has been contended here that some federal control should be exercised, it seems desirable to confine that control to cases of non-action, conflict, or discrimination in state action. The blanket provision in the Couzens bill that an appeal may be taken to the federal agency whenever a substantial number of consumers petition for federal regulation is somewhat too wide. It might be provided in this connection that, where state regulation existed, application to the federal agency could be made only on the grounds that rates or service were discriminatory, not as between consumers in the same state, but as between consumers in different states. Where no state agency had authority to regulate rates in a state, federal jurisdiction should be exercised upon petition by consumers, a company, or another state commission. In such cases the federal commission would take original jurisdiction, acting in coöperation with the commission of the other state affected by the interstate transmission.

It would be unwise and unprofitable to enter here into a prolonged discussion of the ideal solution of this problem. Certain conclusions can be drawn as to the defects in the existing scheme of regulation. It can be stated with conviction that the interstate transactions of operating electric utilities cannot be adequately controlled by any system which does not provide for the regulation of the rates, service, and security issues of any company engaged in the interstate transmission of electric power, insofar as such control is necessary to the regulation of interstate commerce, in the following circumstances:

(1) Whenever one of the states directly affected by an interstate transaction has no commission or other authority having jurisdiction over rates, service, and security issues within the state.

(2) Whenever the commissions of the states affected by an interstate transaction cannot come to an agreement as to an application requiring the approval of each.

(3) Whenever charges of discrimination are made as regards service and rates for consumers in different states.

(4) Whenever the states directly affected by an interstate transaction are legally inhibited from exercising jurisdiction by virtue of the commerce clause of the Federal Constitution.

No such certainty can possibly exist as to the machinery of administration which is best adapted to meet these requirements. Several principles have been suggested which ought to be given weight in forming any system of regulation. There is one which cannot be stated too frequently nor too emphatically. The solution proposed must recognize that this problem is neither national nor state. As evident as that may appear to be, it has only too rarely been observed. In the regulation of the transmission of electric power, as in the case of motor bus transportation, we are confronted with a problem which calls for a different mechanism than has yet been employed. There is a brilliant paragraph in an article already referred to which ought to be the starting point for anyone attacking this and similar problems.

We must face, therefore, two sets of legal authorities — the individual States and the United States — with their respective fields of action not definitively delimited by law and yet constantly interacting in fact, particularly in crucial legislative areas. The challenge of the situation is to make legal accommodations of these practical impingements. Inasmuch as there are these two categories of law-making agencies, State and Nation, the solution of the problem has usually been conceived in terms of exclusive duality. Evils calling for legislative redress, recognized subjects of administrative control, governmental promotion of social ends, have throughout our history divided men into two hostile camps, those seeking relief through State action and those appealing for national intervention. As a result legal inventiveness has been curbed and its resources largely confined to an untrue antithesis. The combined legislative powers of Congress and of the several States permit a wide range of permutations and combinations for governmental action. Until very recently these potentialities have been left largely unexplored. Political energy has been expended on sterile controversy over supposedly exclusive alternatives instead of utilized for fashioning new instruments adapted to new situations. Our rapid industrialization is generating an insistent variety of interaction in the affairs of the several States. The exclusiveness of the traditional choice in governmental intervention is becoming correspondingly inadequate. Creativeness is called for to devise a great variety of legal alternatives to cope with the diverse forms of interstate interests.[1]

In the five years which have passed since that paragraph was written there has in some respects been fruitful appreciation of what was there said. Of creative proposals there have been many. Interstate compacts, federal control with regional decentralization, joint boards as federal agencies, federal and state coöperation

[1] Frankfurter and Landis, *op. cit.*, p. 687.

with state commissions as federal agencies — all of these proposals are a result of insight into the real character of the problem of regulation of the transmission of electric power. On the other hand, those who from their position and from their wealth of experience in this field are best fitted to act as the leaders in the solution of this problem, the state utility commissioners, are precisely those who conceive the solution of the problem in terms of exclusive duality. In taking a position of unequivocal and unrelenting opposition to any system devised calling for any assertion whatever of federal control they bid fair to retard seriously the efforts of those who are working towards a compromise plan. The state commissioners are crying state rights and state control in the face of an economic situation which demands coöperation among the states and between the states and the federal government. Coöperation among the states is unquestionably the greatest present need. But the economic and legal situations are such that there must be a modicum of federal control. With respect to operating companies and their interstate transactions, at least, it would appear that this federal control could be most effectively exercised through the medium of the existing state commissions, with final authority in certain cases vested in a central federal tribunal, acting insofar as possible in coöperation with the state commissions.

The greatest danger is that the states will not cooperate. If their commissions, as federal agencies, are given substantial control, and not merely advisory or testimonial functions, the incentive to coöperate will be great. If they maintain their present attitude, or if cooperative action proves to be too cumbersome, a more centralized system of federal regulation will certainly be the ultimate result. In their assumption that the electric power problem is a state problem, because primarily local in nature, the states see only the exclusive duality of federal or state control. Their uncompromising attitude is to be regretted, not so much because it is responsible for temporary ineffectiveness in the regulation of an important element in the business of a great public utility, but because it will if maintained prevent a most hopeful and necessary experimentation in administrative mechanism.

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