

ON THE ACQUISITION OF UPSTREAM INTERESTS IN NEW YORK ENERGY OPERATING COMPANIES – AN UNCHARTED AREA?

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The State of New York has not attempted to bring holding companies under the jurisdiction of this Commission except so far as they are directly involved in the affairs of operating companies under our jurisdiction. It would obviously be impossible for a single state to supervise the operations of a holding corporation which extended over several states and perhaps into the territories. So far as an operating company is also a holding company (this is true of a number in the State of New York), that company is subject to the jurisdiction of the Commission as to all matters concerning which duties and powers have been conferred upon this Commission.

New York State Public Service Commission – 1936¹

Synopsis: For years, practitioners involved in upstream transfers of indirect ownership interests in New York State electric and/or gas operating companies, through mergers, acquisitions, or restructurings of holding companies, have deemed it necessary, or at least certainly desirable, to obtain prior authorizations of these activities from the New York Public Service Commission. The Commission, without analysis of the history of New York Public Service Law, has assumed jurisdiction to review and then approve, or not approve, such upstream activities wherever located and regardless of how far removed from New York State operating companies. Over the past two years, the Commission has expanded its authority not only to reach investment companies and funds seeking to acquire certain levels of stock ownership interests in upstream holding companies, but also to review the capitalization of holding companies. The Commission has further ruled in several recent orders that minority interests in upstream holding companies could render the owner thereof an “electric corporation,” and thus subject to some degree of Commission regulation under New York Public Service Law. The Commission’s decisions and orders in all these matters have gone unreviewed by New York courts.

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1. I.N.Y. P.S.C. ANN. REP. 7-8 (1935). Until 1963, the PSC regularly prepared and published Annual Reports, which were submitted to the New York State Legislature. The Legislature reprinted all or portions of the Annual Reports in its N.Y. Leg. Doc. volumes. Until 1921, there were two PSC districts (First District and Second District), and each district issued an Annual Report.

This Article undertakes a long overdue examination of the history of New York Public Service Law and documents the absence of legal support for the Commission's assertions of jurisdiction where upstream transactions are undertaken by entities which are not also operating companies. Commission authority over holding companies and other non-operating owners of upstream interests is strictly limited to (i) reviews of direct acquisitions of controlling interests in operating companies, and (ii) rights of access to certain types of information regarding direct relations of holding companies and/or affiliates with operating companies. The implications of this determination extend far beyond New York State, as New York Public Service Law was a model statute for state regulatory schemes across the country. To the extent other state commissions have construed their statutory grants of authority as conferring jurisdiction over holding companies and other upstream entities, or are contemplating such constructions, the commissions and the parties appearing before them should take note of the history of New York Public Service Law discussed herein and determine whether their respective state legislative bodies have indeed delegated such authority.

Compelling reasons can support, and refute, state commission regulation of holding companies, and the upstream activities thereof. This Article does not resolve such policy issues. It merely concludes that, except under a theory of alter-ego liability rejected decades ago by the Commission, the New York State Legislature has delegated to the Commission no supervisory authority under New York Public Service Law over mere holding companies and investors therein, or over the upstream activities of such non-operating entities. The Article strongly recommends prompt legislative resolution of the important issue of asserted Commission regulation over these entities.

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I. INTRODUCTION

History – legislative, judicial, and institutional – has successfully eluded the New York State Public Service Commission (PSC or Commission) for a number of years. Construing New York Public Service Law (PSL) – a model for the

utility regulatory schemes of states across the country² – as if it had spirited itself out of the ether of the mid-1980's, the Commission has issued an intricate concatenation of judicially-unchallenged decisions over the past two decades, asserting supervisory authority over the restructuring, acquisition, and other business activities of major energy holding company systems, including those whose parent entities are located in other states, if not in other countries, and whose activities take place far upstream from any New York State operating company subsidiaries. But even the hardened cognoscenti of the energy investment community perhaps winced upon learning of the recent mind-numbingly rapid accretion of putative Commission authority under the PSL.

Over the past two years, and for the first time in the one hundred year history of the PSL, investment management companies and funds seeking to acquire controlling (>10%) interests in upstream companies holding indirect ownership of New York electric and/or gas operating companies have submitted themselves to the Commission's self-asserted jurisdiction under PSL § 70, *Transfer of franchises or stocks*,³ for prior approval of their transactions. Thus, T. Rowe Price and other institutional investors, including China Investment Corporation, an investment company wholly owned by the State Council of the People's Republic of China, have invoked Commission jurisdiction and have received prior Commission authorizations to proceed with proposed acquisitions of stock in upstream companies distantly removed from New York State operating companies.⁴

In some of these proceedings, the PSC has gone further and summarily declared the investment companies to be “electric corporations” under PSL § 2(13)⁵ solely by virtue of the size of their existing minority interests in holding companies owning New York State operating companies, thus triggering the Commission's specific assertion of jurisdiction under PSL § 70 provisions applicable to acquisitions of controlling interests in electric operating companies by “electric corporations.”⁶ In 2008, the Commission instituted a generic rulemaking proceeding (applicable to electric and steam corporations) regarding the extent to which minority owners of interests in holding companies would be regulated as “electric corporations,” presumably in the same manner as

2. In 1907 New York was the second state to delegate the comprehensive, state-wide regulation of public utilities to a commission, Wisconsin being the first (also in 1907). *1930 Commission Report*, *infra* note 143, at 61 (Counsel Report). See also Public Utility Law, 1907, WI Laws of 1907, ch. 499, *cited in* WIS. STAT. ANN. ch. 196, Historical and Statutory Notes (2010).

3. N.Y. PUB. SERV. LAW § 70 (McKinney 2010).

4. Declaratory Ruling on Review of Ownership Transfer Transaction, China Inv. Corp., C09-E-0842 (N.Y. PSC Feb. 17, 2010); Declaratory Ruling on Review Of Stock Transfer Transactions, T. Rowe Price Assocs., C09-E-0470 (N.Y. PSC July 21, 2009); Declaratory Ruling on Review of an Ownership Transfer Transaction, Strategic Value Partners, L.L.C., C09-E-0144 (N.Y. P.S.C. Apr. 22, 2009); Declaratory Ruling on Review of Stock Transfer Transaction, Harbinger Capital Partners Master Fund I, Ltd., C08-E-0850 (N.Y. PSC Sept. 19, 2008). N.Y. PSC decisions are electronically published at <http://www.dps.state.ny.us>.

5. N.Y. PUB. SERV. LAW § 2(13) (McKinney 2010).

6. Declaratory Ruling on Review of Stock Transfer Transaction, Harbinger Capital Partners Master Fund I, Ltd., C08-E-0850 (N.Y. PSC Sept. 19, 2008); Declaratory Ruling on the Acquisition of Common Stock, Harbinger Capital Partners Master Fund I, Ltd., C08-E-0397 (N.Y. PSC June 23, 2008). The holdings in these decisions received further review by the PSC in Order Establishing Presumption and Closing Proceedings Without Prejudice, *Regulation of Owners of Stock Interests in Electric and Steam Corporations*, C08-M-0659 *et al.* (N.Y. PSC Sept. 21, 2010) [hereinafter *Generic Proceeding Order*].

wholesale generators,⁷ by virtue of the direct or indirect control they could exercise over a downstream operating company (Generic Proceeding).⁸ In its order instituting the proceeding, the PSC proposed that the acquisition of 50% or more of the stock of a holding company would render the owner an “electric corporation,”⁹ while ownership interests of 10% or less would not.¹⁰ In the view of the Commission, the primary focus of the proceeding would thus be on those ownership interests between 10% and 50%.¹¹ In its final *Generic Proceeding Order*, however, the Commission canvassed its jurisdictional authority under all three core provisions of PSL § 70, ruling, inter alia, that (i) acquisitions of more than 10% ownership interests in holding company owners of operating companies, or of smaller ownership interests which directly or indirectly control the operations of subsidiary generating facilities, might require PSL § 70(1) approval; (ii) entities which hold more than 10% ownership interests in existing holding company owners of operating companies, or which directly or indirectly control the operations of subsidiary generating facilities through smaller ownership interests, might be deemed “electric corporations,” and thus required to obtain prior approval under PSL § 70(3) of acquisitions of additional ownership interests of any size in holding company owners of generating facilities; and (iii) any acquisition of more than 10% of the stock of holding company owners of operating companies will require PSL § 70(4) approval.

Also in 2008, Entergy Corporation (DE), a global energy holding company, made a filing with the Commission in connection with its widely-reported efforts to spin-off indirectly owned nuclear operating companies into a newly formed Delaware corporation, Enexus Energy Corporation.¹² Pursuant to the proposed restructuring, the existing subholding company owners of three New York-based wholesale nuclear operating plants (all DE L.L.C.s) would have been placed under Enexus, and no direct transfers of ownership in the New York operating companies would have been made.¹³ As related in an amended 2009 filing, Enexus would have been largely capitalized through debt financing, which would have been in part secured by a pledge of the stock and/or assets of the New York operating companies, and/or by the assignment of key contracts of those operating companies.¹⁴ Entergy, Enexus, and the operating companies petitioned the PSC for a declaration under the “lightened regulation” regime applicable to wholesale generators that the restructuring activities either would

7. As discussed *infra*, note 238, wholesale generators in New York State are subject to “lightened regulation” by the Commission, under which entities are generally relieved of certain reporting obligations, rate regulation, and other matters reserved for “fully regulated” public utility companies.

8. Order Instituting Proceeding and Notice Soliciting Comments, *Regulation of Owners of Stock Interests in Electric and Steam Corporations*, C08-M-0659 (N.Y. PSC June 23, 2008).

9. *Id.* at 1.

10. *Id.* at 4.

11. *Id.*

12. Verified Petition at 6-7, Entergy Nuclear Fitzpatrick, L.L.C., C08-E-0077 (N.Y. PSC Jan. 29, 2008).

13. *Id.*

14. Verified Amended and Restated Petition at 2-3, Entergy Nuclear Fitzpatrick, L.L.C., C08-E-0077 (N.Y. PSC Aug. 11, 2009) [hereinafter *Entergy Amended Petition*].

not be reviewed under PSL § 70 or, if reviewed, would be approved.¹⁵ The petitioners also invoked PSC jurisdiction under PSL § 69, *Approval of issues of stock, bonds and other forms of indebtedness; approval of mergers or consolidations*,¹⁶ for authorization of the collateralization of Enexus's debt issuances by the operating companies. In lieu of resolving the matter on submitted papers, the PSC initiated an unprecedented investigative proceeding regarding Enexus's capitalization and long-term financial status. At its March 25, 2010 session, the Commission voted to deny the petition, primarily on the ground of its rejection of Enexus's initial capitalization and its longer term debt ratio under the "public interest" standard of PSL § 70. In light of the PSC's action, Entergy and Enexus abandoned plans to spin-off the nuclear assets and, in advance of any written decision by the Commission, sought to withdraw their petition. By order dated September 21, 2010, the Commission closed the proceeding, but went on to institute a new proceeding in which Entergy and its New York operating companies were required to show cause why they should not be required to provide notice to the New York State Department of Public Service at least sixty days prior to any "contemplated" transaction, as described in the order, which "would impair or jeopardize" the financial strength of the New York nuclear operating plants. No jurisdictional basis was set forth in the order. As of the finalization of this Article, the matter is pending.¹⁷

In 2006 and 2007, respectively, National Grid plc (UK)¹⁸ and Iberdrola, S.A. (ESP),¹⁹ the parent companies of two of the largest utilities holding company systems in the world, commenced separate proceedings before the Commission seeking, inter alia, PSL § 70 authorizations for their respective acquisitions of controlling stock ownership of KeySpan Corporation and Energy East Corporation, both holding companies owning several operating companies. In 2007 and 2008, they received their sought-after approvals but with unprecedented conditions. Among them was the requirement that each New York utility subsidiary indirectly acquired by National Grid and Iberdrola issue a "golden share" of preferred stock to a PSC-designated party who would act to "protect the interests of New York" with voting rights to require his, her, or its consent to the subject utility's commencement of any voluntary bankruptcy, liquidation, receivership, or similar proceeding which might be triggered by a bankruptcy of a parent company or an affiliate.²⁰ Citing a congeries of risks posed to the New York utility subsidiaries as a result of the holding companies' structures and multi-national operations, including complex organizations,

15. *Id.* at 40-41.

16. *Entergy Amended Petition*, *supra* note 14, at 2; N.Y. PUB. SERV. LAW § 69 (McKinney 2000).

17. Order Closing Proceeding and Instituting New Proceeding, Entergy Nuclear Fitzpatrick, L.L.C., C08-E-0077 *et al.* (Aug. 19, 2010); Order Establishing Further Procedures, Entergy Nuclear Fitzpatrick, L.L.C., C08-E-0077 (N.Y. PSC May 23, 2008) (instituting investigative proceeding); *see also* Press Release, N.Y. PUB. SERV. COMM'N, PSC Rejects Entergy Spin-off Plan (Mar. 25, 2010), *available at* http://www.dps.state.ny.us/New_Search.html (search: 08-E-0077).

18. Order Authorizing Acquisition Subject to Conditions, National Grid, P.L.C., C06-M-0878 (N.Y. PSC Sept. 17, 2007) [hereinafter *National Grid Order*].

19. Order Authorizing Acquisition Subject to Conditions, Iberdrola, S.A., C07-M-0906 (N.Y. PSC Jan. 6, 2009) [hereinafter *Iberdrola Order*].

20. *National Grid Order*, *supra* note 18, at 127-128; *Iberdrola Order*, *supra* note 19, at 42-45.

problems with reporting and financial transparency, potential for cross-subsidization and related affiliate abuses, and potential for exacerbation of risks upon further upstream mergers or acquisitions, and the titanic difficulties its Staff would face in monitoring parental and affiliate activities in multiple countries (e.g., European accounting standards, access to books and records), the Commission also ordered, *inter alia*, operating company dividend restrictions and annual disclosures of financial information regarding parent companies and their United States subsidiaries, of the type previously provided to the Securities and Exchange Commission (SEC) pursuant to then-recently repealed Public Utility Holding Company Act of 1935 (1935 PUHCA).²¹ The required financial disclosures were not limited to information regarding direct transactions, if any, between parent companies or affiliates with New York State operating companies or regarding costs incurred by these operating companies.

Petitioning parties in the foregoing proceedings, along with the Commission, have tacitly or expressly relied on PSC decisions issued over the past two decades as the basis for jurisdiction under the PSL. All of these Commission precedents, as well as the recent rulings, rest on an approach to statutory interpretation rejected in New York, *viz.*, merely reading the words of a statute. Under settled New York law, a statute must be interpreted only upon “careful objective historical and structural analysis,”²² including a review of the “history of the times, the circumstances surrounding the statute’s passage, and . . . attempted amendments.”²³ If the PSC had undertaken such analysis, it would have determined that controlling legislative and judicial authorities and decades of its own institutional policies and precedents belie its constructions of PSL §§ 2(13), 69 and 70. Instead, pursuant to unexamined policies, the Commission now purports to wield pseudo-SEC regulatory authority and plenary PSL jurisdiction over the business activities of entities which have neither organized for public service under the laws of New York, nor have ranged themselves operationally within the jurisdiction of the Commission. Its actions

21. The required financial information included (i) consolidating financial statements in the same format previously required in SEC Form U-5S (pursuant to repealed 17 C.F.R. §§ 250.1 & 259.5S); and (ii) energy utility information consistent with former SEC Form U-9C-3 (pursuant to 17 C.F.R. § 250.58 (not repealed by the FEREC) & 17 C.F.R. § 259.208 (repealed)). *Compare* Public Utility Holding Company Act of 2005 (2005 PUHCA), 42 U.S.C. § 16453 (Supp. 2009) (under the act, a holding company owner of a public utility, or an affiliate thereof, must produce upon written request of a state commission books and other records which (i) have been identified in reasonable detail in a state commission proceeding; (ii) are relevant to costs incurred by the public utility subsidiary; and (iii) are necessary for the state commission’s discharge of its responsibilities with respect to such proceeding).

22. *State v. Owusu*, 93 N.Y.2d 398, 402, 712 N.E.2d 1228, 1231, 690 N.Y.S.2d 863, 865 (1999); *accord Merscorp, Inc. v. Romaine*, 8 N.Y.3d 90, 861 N.E.2d 81, 828 N.Y.S.2d 266 (2006); *In re Robert J.*, 2 N.Y.3d 339, 811 N.E.2d 25, 778 N.Y.S.2d 763 (2004); *Tompkins Co. v. Chamberlin*, 99 N.Y.2d 328, 786 N.E.2d 14, 756 N.Y.S.2d 115 (2003). *See also* *Cent. Hanover Bank & Trust Co. v. Comm’r*, 159 F.3d 167, 169 (2d Cir. 1947), *cert. denied sub nom. Wilkinson v. Comm’r*, 331 U.S. 836 (1947) (“There is no more likely way to misapprehend the meaning of language – be it in a constitution, a statute, a will or a contract – than to read the words literally, forgetting the object which the document as a whole is meant to secure”).

23. *Riley v. Cnty. of Broome*, 95 N.Y.2d 455, 464, 742 N.E.2d 98, 102, 719 N.Y.S.2d 623, 627 (2000) (quoting requirements under N.Y. STAT. LAW § 124 (McKinney 1971), and reviewing requirements under *id.* § 92). For the benefit of non-New York practitioners, McKinney’s Statutes, while appearing as volume one of New York’s consolidated laws, is not a set of laws. Rather, it is the publisher’s treatise on statutory interpretation, primarily under New York common law.

thus might raise substantial federal constitutional questions,²⁴ as well as other grounds of illegality.

The implications of these PSC decisions and orders have been enormous for holding companies and investors therein. Stock acquisitions, mergers, acquisitions, and corporate restructurings could be, and have been, subject to indefinite delays pending PSC reviews. Any PSC approvals could be made subject to conditions unacceptable to petitioning parties, thereby torpedoing the efforts of numerous business parties and investment partners. The Commission's declarations that upstream minority interests could render an owner an "electric corporation" raise the spectre that an investor might unwittingly find itself a regulated entity under the PSL, required, e.g., to obtain prior Commission approvals under PSL § 69 for the issuance of long-term securities or debt. To the extent PSL provisions have found their way into the regulatory schemes of other states, holding companies and investors are at risk that other state commissions might also assert jurisdiction over upstream holding company activities, thus posing the potential for conflicting state requirements.

While many aspects of the Commission's recent decisions deserve examination in extenso²⁵, this Article will focus on only one: the long-standing limitations of PSC authority over Stock Holding Companies. As developed herein, the New York State Legislature (Legislature) has vested the Commission with broad supervisory authority over New York operating companies, including those operating companies which also are holding-company owners of other operating companies (Operating Holding Companies). On the other hand, except for a theory of holding company oversight rejected by the PSC almost two decades ago, the Legislature has affirmatively withheld from the Commission general supervisory authority over entities which are not also operating companies, and which merely own or seek to own controlling interests in New York operating companies or in the owners thereof (Stock Holding Companies). Instead, as to such Stock Holding Companies, the Legislature has expressly restricted Commission authority to (i) jurisdiction over acquisitions of *direct* controlling ownership interests in operating companies; and (ii) rights of access to certain types of information related to direct Stock Holding Company and affiliate relations with operating companies. As used in this Article, the term "controlling interest" refers to a Stock Holding Company's direct or indirect ownership of more than 10% interest in an operating company.²⁶

24. *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583 (1926) (the due process clause of the fourteenth amendment prohibits a legislature from converting a purely private carrier into a regulated common carrier via mere legislative fiat); *Mich. Pub. Util. Comm'n v. Duke*, 266 U.S. 570 (1925) (same). *See also* *Motor Haulage Co. v. Maltbie*, 293 N.Y. 338, 57 N.E.2d 41 (1944) (the due process clause of the fourteenth amendment prohibits the New York State Legislature from regulating a purely private carrier as a common carrier; the PSL does not authorize the PSC to regulate a purely private carrier). *But see* *Rochester Gas & Elec. Corp. v. PSC*, 71 N.Y.2d 313, 520 N.E.2d 528, 525 N.Y.S.2d 809 (1988) (questioning the continued validity of substantive due process precedents).

25. The settled prohibition against the PSC's wielding of ultra vires authority under the guise of administering the "public interest" standard under PSL § 70; the applicability of PSL § 69 and PSL § 70(4) solely to operating companies organized under New York law.

26. As discussed in this Article, PSL § 70(4) establishes a Stock Holding Company's direct acquisition of more than a 10% ownership interest in an operating company as a jurisdictional threshold. *See* Appendix. *Compare* 2005 PUHCA, 42 U.S.C. § 16451 (8)(A) (Supp. 2009) and Public Utility Holding Company Act of 1935 (1935 PUHCA), § 2(a)(7), 49 Stat. 806 (formerly codified at 15 U.S.C. § 79b(7)) (defining "holding

In order to understand the Legislature's broad circumscription of PSC authority over Stock Holding Companies like T. Rowe Price, China Investment Bank, Entergy, Enexus, National Grid, and Iberdrola, one must first examine an earlier holding-company history errantly ignored by the Commission in recent years. Section II of this Article, thus, first reviews the history of electric holding companies in New York City. That history provides the context for the Legislature's delegation of regulatory authority to the Commission, as discussed in Section III. Sections IV and V examine, respectively, the rise of Stock Holding Companies in New York State, and the narrow reach of Commission jurisdiction over these entities. Section VI studies the Legislature's continued refusal to vest the Commission with broad authority over Stock Holding Companies and the activities thereof, in contrast to the level of regulation adopted by the federal government during this same period, as discussed in Section VII. Section VIII analyzes the Commission's more recent, unwitting digressions from judicial decisions and institutional precedents construing the PSL. Finally, this Article concludes with recommended measures to address the issues raised by the PSC's exercise of ultra vires authority.

II. THE NASCENCY OF NEW YORK ELECTRIC HOLDING COMPANIES

Throughout the latter part of the 19th century, local governments in New York State strongly encouraged competition among gas and/or electric utility operating companies,²⁷ clinging firmly to the demotic belief that competition

company" as directly or indirectly owning or controlling, such as through stock voting rights, 10% or more of the voting capital stock of an operating company).

27. During most of the 19th century, gas light corporations, like other corporations in New York State, had the option of organizing pursuant to general laws or special legislative enactments. In 1848 the first general law was enacted governing the incorporation, governance, and powers of gas light companies organized for the purpose of utilizing public rights-of-way to supply gas for the lighting of streets and public and private buildings. Act to Authorize the Formation of Gas Light Companies, ch. 37, 1848 N.Y. Laws 48, as amended by Act of Mar. 14, 1871, vol. I, ch. 95, 1871 N.Y. Laws 210 (Gas Corp. Law).

In 1879, with the advances made in electric lighting, the Legislature enacted a general law authorizing operating companies duly organized under the Gas Corp. Law to use electricity for lighting instead of gas. Act of June 16, 1879, ch. 512, 1879 N.Y. Laws 562.

In 1882, the Legislature amended this 1879 legislation to authorize use of public rights-of-way by operating companies organized for the purpose of manufacturing and using electricity for producing and supplying light, heat, or power to public and private dwellings of cities, towns, and villages in New York. Act of Apr. 17, 1882, vol. 1, ch. 73, 1882 N.Y. Laws 70. As a result of this amendment, electric operating companies began to incorporate under the general N.Y. Manufacturing Corporation Law of 1848. Act to Authorize the Formation of Corporations for Manufacturing (Mfg. Corp. Law), ch. 40, 1848 N.Y. Laws 54. *See E.g., In re Long Acre Elec. Light and Power Co.*, 117 A.D. 80, 83-84, 102 N.Y.S. 242 (N.Y. App. Div.), *aff'd*, 188 N.Y. 361, 80 N.E. 1101 (1907).

In 1890, the Legislature revised and consolidated the general corporate powers originally set forth under these and other corporations laws into three separate sets of new corporations laws: General Corporation Law, ch. 563, 1890 N.Y. Laws 1060, as substantially revised Act to Amend the General Corporation Law, vol. II, ch. 687, 1892 N.Y. Laws 1800 (GCL) (applicable to all classes of corporations); Stock Corporation Law, ch. 564, 1890 N.Y. Laws 1066, as substantially revised Act to Amend the Stock Corporation Law (SCL), vol. II, ch. 688, 1892 N.Y. Laws 1824 (applicable to "stock corporations," as defined in GCL § 2 to refer to corporations having capital stock divided into shares); and Business Corporation Law (BCL), ch. 567, 1890 N.Y. Laws 1167, as revised Act to Amend the Business Corporation Law, vol. II, ch. 691, 1892 N.Y. Laws 2042 (applicable to corporations authorized to conduct a business, e.g., for-profit corporations). All three statutory schemes were enacted at the same time, and thus were read and construed together. *E.g., Haberman v. James*, 5 A.D. 412, 39 N.Y.S. 313 (N.Y. App. Div. 1896). By 1974, the core provisions of the GCL, SCL,

lowered prices and improved service quality.²⁸ Exclusive franchises were rare, especially in the thirty-four separate municipalities (including the original, smaller City of New York) which, for the period prior to 1898, will be collectively referred to as New York City. Multiple competing gas and/or electric operating companies received franchises for the same service areas. New electric operating companies were especially invited to compete with incumbent operating companies. Between 1881, when the first electric franchise was granted to Edison Electric Illuminating Company of New York,²⁹ and 1911, the thirty-four local jurisdictions in New York City awarded at least ninety-two separate electric franchises, of which only two or three minor franchises were exclusive.³⁰ In the Borough of Manhattan alone, twenty-five electric franchises were issued to twenty-four different operating companies, and all but one franchise covered the entire Borough.³¹ Immediately prior to January 1, 1898, the effective date of the charter for the new enlarged City of New York³² as it is known today, the franchise business was particularly brisk among many of the soon-to-be-defunct jurisdictions which were to be subsumed into a single municipal entity.³³

In this montage manner, gas and electric services reached residents throughout large portions of New York City, and, at least initially, the liberal franchise policies of local governments seemingly extruded price competition resulting in lower prices. Invariably, however, some gas and/or electric operating companies were unable or unwilling to compete at low prices or otherwise went out of business, sold their assets to competing firms, and dissolved.³⁴ Others saw greater competitive advantages in combination rather than competition.³⁵ Particularly after the passage of legislation in May 1884 liberalizing requirements applicable to consolidations among corporations,³⁶

and BCL had been consolidated into the statutory scheme known today as BCL (McKinney 2003 & Supp. 2010).

Also as part of its 1890 effort, the Legislature transferred the requirements under the prior laws pertaining to the formation and operation of gas and/or electric corporations, e.g., the right to occupy public rights-of-way, to a new Act of June 5 (TCL), 1890, ch. 505, 1890 N.Y. LAWS 904. As amended, this law continues in effect in the present TCL (McKinney 1996 & Supp. 2010).

28. I N.Y. P.S.C. ANN. REP., 1ST DIST. 200 (1910).

29. *Id.* at 222. Edison Electric had been incorporated in 1880 under the Gas. Corp. Law, as amended in 1879. *Id.* at 237.

30. *Id.* at 200-01.

31. *Id.*

32. Greater New York Charter, vol. III, ch. 378, 1897 N.Y. Laws 1. The 34 consolidating municipal entities were the old City of New York; the old City of Brooklyn; three villages and three towns in the Borough of The Bronx; five towns in the Borough of Brooklyn; one city, eight villages and four towns in the Borough of Queens; and four villages and four towns in the Borough of Richmond (a/k/a Staten Island). I N.Y. P.S.C. ANN. REP., 1ST DIST. 145 (1909).

33. I N.Y. P.S.C. ANN. REP., 1ST DIST. 209-10 (1910).

34. *Id.* at 201 (as of 1911, 16 franchises could not be traced to any operating company then doing business in the City of New York).

35. *E.g.*, STATE OF NEW YORK, PUBLIC PAPERS OF BENJAMIN B. ODELL, JR., GOVERNOR FOR 1901, at 48 (J.B. Lyon Co. 1907) [hereinafter *GOVERNOR ODELL PAPERS*]. *See also* N.Y. P.S.C. ANN. REP., 1ST DIST. 201-02 (1910).

36. Mfg Corp. Law, as amended Act to Authorize the Consolidation of Manufacturing Corporations, ch. 367, 1884 N.Y. Laws 448. Prior to 1884, companies which organized under Mfg Corp. Law could consolidate and form a new single corporation, provided, inter alia, (i) the companies were engaged in the same or similar

operating companies began to consolidate with competing firms into new, larger operating companies. One of the most significant utility-company consolidations in United States history occurred a few months later, on November 10, 1884. Six companies consolidated, pursuant to the changed law, to form a new operating company named Consolidated Gas Company of New York,³⁷ which in 1936 was renamed Consolidated Edison Company of New York, Inc.³⁸ In a relatively brief period of time, Consolidated Gas came to dominate both gas and electric services in the new City of New York. Other companies operating in New York City had similar histories of consolidations.³⁹ By 1907, as a result of some dissolutions, and a far greater number of consolidations, only nine electric operating companies were active, even though there had been at least ninety-two grants of electric franchises in New York City over a thirty-year period.⁴⁰ Of the twenty-four original operating companies awarded electric franchises for the

business; (ii) the new corporation was capitalized in an amount not to exceed the aggregate amount of “capital” of the consolidating companies; and (iii) the new entity conducted only one kind of business authorized under Act of June 12, 1867, ch. 960, 1867 N.Y. Laws 2444, as amended Act of June 2, 1877, vol. I, ch. 374, 1877 N.Y. Laws 385. At this time, “capital,” or, more properly, “capital stock,” was generally understood as referring to a corporation’s money and tangible property, i.e., the term did not include a company’s intangible business franchise. In contrast, “share stock” held by stockholders was deemed to include interests in intangible property, such as a company’s business franchise and good will. *E.g.*, *Union Trust Co. v. Coleman*, 126 N.Y. 433 (1891); *Williams v. W. Union Tel. Co.*, 93 N.Y. 162 (1883).

Pursuant to the 1884 amendment, all businesses organized under any law, general or specific, for the purpose of carrying on any type of manufacturing activity, could consolidate with corporations engaged in similar businesses. In addition, the newly consolidated company was now authorized to carry on any kind of business allowed in the charter of any of the consolidating companies, and was not limited to only one kind of business. Of special significance, the amended statute specified that the capital amount of the newly-formed corporation could not exceed the “fair aggregate value of the property, franchises and rights” of the consolidating companies. By 1905, the capitalization of “franchises and rights,” and the “fair valuation” thereof assigned by consolidating gas and/or electric operating companies, had come under heavy criticism, particularly by a 1905 joint legislative committee discussed *infra*. The Legislature had opened the door for perceived “overcapitalization” of operating companies organized through consolidation under the amended statutory scheme. As reflected in their Annual Reports to the Legislature, early Commissions were to spend years on a quest to establish the “fair value” of “property, franchises, and rights” of such operating companies.

In 1890, as applied to gas and/or electric operating companies, the provisions conferring a right of consolidation were transferred to the new TCL, where they appear today in TCL § 11(4) (McKinney Supp. 2010). The corporate requirements for consolidation, including the “fair value” language, were set forth in BCL §§ 13 & 14, Act of June 7, 1890, ch. 567, 1890 N.Y. Laws 1167, and as revised and renumbered sections 8 and 9, in 1892. Act to Amend the Business Corporation Law, vol. II, ch. 691, 1892 N.Y. Laws 2042. Today the corporate requirements appear in BCL Article 9 (McKinney 2003 & Supp. 2010).

37. The six companies were: New York Gas Light Co. (inc. 1823), Manhattan Gas Light Co. (inc. 1830), Metropolitan Gas Light Co. (inc. 1848), Harlem Gas Light Co. (inc. 1855), Municipal Gas Light Co. (inc. 1874), and Knickerbocker Gas Light Co. (inc. 1876). *In re Attorney Gen.*, 56 Misc. 49, 106 N.Y.S. 407 (Sup. Ct., N.Y. Co. 1907), *aff’d sub nom. Attorney Gen. v. Consol. Gas Co.*, 124 A.D. 401, 108 N.Y.S. 823 (1st Dept. 1908); STATE OF NEW YORK, I REPORT OF THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK 5 (1905) [hereinafter *1905 Report*].

38. On March 23, 1936, Consolidated Gas filed a certificate of name change with the New York Secretary of State. II N.Y. P.S.C. ANN. REP. 876 (1936).

39. I N.Y. P.S.C. ANN. REP., 1ST DIST. 253-394 (1910).

40. II N.Y. P.S.C. ANN. REP., 1ST DIST. 527 (1907). *See also* I N.Y. P.S.C. ANN. REP., 1ST DIST. 200 (1910) (of the 92 electric franchises, 13 were believed to be illegal, 16 were not claimed by any company then operating in the City of New York, 11 had expired or been superseded, 51 were claimed by the nine active operating companies, and one was claimed by an inactive operating company).

Borough of Manhattan, only two electric operating companies were active in 1910.⁴¹

Meanwhile, in the 1890's the Legislature enacted statutory changes substantially expanding the rights of corporations to acquire the stock of other corporations, i.e., to operate as holding companies, and to do so not only through cash purchases, but also, and most importantly, through stock exchanges.⁴² Operating Holding Companies thereafter swelled in New York City.⁴³ For example, The Brooklyn Union Gas Company (which today does business as National Grid NY) almost immediately began acquiring the stock of six other operating companies upon its incorporation in September 1895, thereby

41. I N.Y. P.S.C. ANN. REP., 1ST DIST. 200-01, 222-52 (1910).

42. While prohibitions, or inhibitions, regarding ownership by one corporation of the capital stock of another corporation likely existed under New York common law, by the early 19th century statutes in New York State addressed these issues. As early as 1811 New York State laws included a prohibition against the use of corporate funds, by a corporation organized for specified manufacturing purposes, to purchase stock in another corporation. N.Y. Laws of 1811, ch. 67, § 7. The Mfg Corp. Law retained this prohibition. N.Y. Laws of 1848, ch. 140, § 11. In contrast, the Gas Corp. Law, as originally enacted and as amended, neither authorized nor prohibited stock ownership in other gas companies, whether in express language or through incorporation of general corporations laws.

By 1876, Mfg Corp. Law had been amended in limited respects to authorize certain types of holding companies. A company organized under Mfg. Corp. Law could now hold stock in the capital of any corporation (i) supplying or delivering materials used in the business of such company; or (ii) using or manufacturing materials produced by such company. The trustees of such company would have the same powers with respect to the purchase of such stock, and the issuance of stock therefor, as already existed with respect to the acquisition of property. Act of May 19, 1876, ch. 358, 1876 N.Y. Laws 334; Act of Apr. 28, 1866, ch. 838, 1866 N.Y. Laws 1896.

In 1890, newly-enacted BCL § 12 generally continued the language of amended Mfg Corp. Law, authorizing a business corporation to hold stock in the capital of any corporation engaged in the business of mining, manufacturing, or transporting such materials as are required in the prosecution of the business of such business corporation (under certain conditions), and to hold stock in the capital of any corporation which used or manufactured materials mined or produced by the company. Directors had the power either to purchase such stock with corporate funds, or to exchange stock up to the amount of the value thereof. N.Y. Laws of 1890, ch. 567, § 12. Newly-enacted SCL § 40, on the other hand, prohibited the use of corporate funds to purchase stock in any other corporation, except in the case of security for a prior debt, or where the stock corporation transacted business in other states and was acquiring the stock of foreign corporations owning land in this state or other states (subject to conditions).

In 1892, the Legislature substantially revised and expanded SCL § 40, unconditionally authorizing stock corporations (other than banks and other moneyed companies) to purchase and own stock in any other corporation, and to do so either through cash purchases or, if authorized in a certificate of incorporation, through stock exchanges. N.Y. Laws of 1892, ch. 688. Also in 1892 the Legislature revised BCL to delete section 12. N.Y. Laws of 1892, ch. 691.

With the repeal of SCL in 1966, N.Y. Laws of 1966, ch.664, its provisions were transferred (in some cases revised or omitted) to new BCL. SCL § 40 (1892), having been later recodified as SCL § 18, now appears, as amended, in BCL §§ 202(a)(6) & (8) (McKinney 2003). See also BCL's Distribution Tables (Table 2 – SCL sections to BCL sections) and McKinney's *Historical and Statutory Notes* to these N.Y. BCL provisions.

43. One of the first electric stock acquisitions under these revised laws was by Edison Electric. In 1891, Edison Electric, which operated an underground "low-tension" distribution system, acquired control through stock ownership of two of the three electric companies distributing electricity through "high-tension" systems. It subsequently acquired the stock of the third electric distribution company. I N.Y. P.S.C. ANN. REP., 1ST DIST. 237 (1910). The Legislature had required the underground installation of all existing and future electric (and telegraph) lines in New York City since 1884. N.Y. Laws of 1884, ch. 534.

establishing itself as a major New York City Operating Holding Company.⁴⁴ Consolidated Gas began acquiring the stock of other operating companies (including Operating Holding Companies) as early as 1899, when it gained control of The Astoria Light, Heat and Power Company⁴⁵ and of New York Gas and Electric Light, Heat and Power Company (which, following its organization in 1898, had acquired all the stock of six other operating companies and a controlling interest in Edison Electric).⁴⁶ By 1907, of the twenty-five operating companies directly or indirectly furnishing gas and/or electricity to City of New York occupants,⁴⁷ all or a majority of the capital stock in eighteen of these companies was held by three Operating Holding Companies, meaning that twenty-one of twenty-five gas and/or electric operating companies in the City of New York were organized under three holding company systems.⁴⁸ In terms of the number of operating subsidiaries, by far the largest Operating Holding Company was Consolidated Gas, the direct or indirect owner of controlling interests in eleven gas and/or electric operating companies, including the only electric companies operating in the Borough of Manhattan.⁴⁹ In terms of book value, of the \$71.3 million representing the total investment of operating companies in the bonds and securities of other operating companies serving the City of New York (which investment was largely accomplished through stock exchanges), \$65.1 million appeared on the books of Consolidated Gas and its subholding operating companies.⁵⁰

But competition among independent operating companies, if ever real in all cases, did not erode solely by virtue of formal combinations. "Community of interests," or affinities, arose among nominally competitive operating companies and Operating Holding Companies as a result of voting proxies and trusts, which in turn led to inter-locking directors and shared executives.⁵¹ Consolidated Gas, which already controlled the supply of gas and electric light in the Boroughs of Manhattan and most of The Bronx through majority stock ownership, proved particularly adept at arranging for its directors and executives to serve as proxies or trustees for majority shareholders; thereby it placed its representatives in positions of control over gas and/or electric operating companies located in the Borough of Queens.⁵² Similarly, directors of one or more Consolidated Gas subsidiary operating companies were elected Presidents of the other two

44. II N.Y. P.S.C. ANN. REP. 841-58 (1921) (describing the corporate histories of each gas and/or electric operating company in the City of New York); *1905 Report*, *supra* note 37, at 76-77. Five of the six companies were still active operating companies as of 1905. *Id.* at 77.

45. II N.Y. P.S.C. ANN. REP. 841 (1921).

46. I N.Y. P.S.C. ANN. REP., 1ST DIST. 238 (1910).

47. II N.Y. P.S.C. ANN. REP., 1ST DIST. 526-27 (1910). *See also* III N.Y. P.S.C. ANN. REP., 1ST DIST. 11 (1908).

48. III N.Y. P.S.C. ANN. REP., 1ST DIST. 11 (1908). In its Annual Report for 1910, the Commission documented at length in Volume I, App. A, the corporate histories of the electric operating companies then doing business in the City of New York, including their acquisitions of stock in other operating companies.

49. *Id.*

50. *Id.* at 14; II N.Y. P.S.C. ANN. REP., 1ST DIST. 469-72 (1907).

51. III N.Y. P.S.C. ANN. REP., 1ST DIST. 11-15 (1908).

52. In 1907, Consolidated Gas controlled voting proxies for 5,786 of the 5,886 votes cast in the board elections of New York and Queens Electric Light and Power Co., and for 16,984 of the 17,349 votes cast in the board elections of the New York and Queens Gas Co. As a result, Consolidated Gas directors and executives were elected to the boards of these two companies. The companies also shared other executives. *Id.* at 13-14.

Operating Holding Companies in the City of New York: Brooklyn Union⁵³ (which controlled five active subsidiary gas and electric companies as of 1907)⁵⁴ and Kings County Electric Light & Power Company⁵⁵ (which controlled two active subsidiary electric companies as of 1907).⁵⁶ In the words of a contemporaneous Commission, “harmonious cooperation instead of competition . . . [was] assured.”⁵⁷

In this manner, a handful of Operating Holding Companies gained monopoly control over the provision of electric service in the City of New York and, perhaps surprising to some, through means not involving exclusive franchises. Meanwhile, the electric industry developed along a quite different path, and at a slower pace initially, in the relatively rural areas of Upstate New York. Like the statutory changes in the late 19th century which catapulted the rise of Operating Holding Companies in New York City, a statutory change in 1918 was to spur the development of Stock Holding Companies in Upstate New York. By the late 1920’s, Stock Holding Companies – not Operating Holding Companies – dominated electricity markets in Upstate New York, as well as in numerous other areas of the country as found by the Federal Trade Commission (FTC).⁵⁸

III. THE RISE OF COMMISSION REGULATION

“The whole electric history of New York City points to the futility of competition.”⁵⁹ Such was to be the detractory judgment of history – from the perspective of an early Commission.

The faith of local governments then, like that of politicized malcontents today, in the price mitigation effects of unrestrained competition and in market-based solutions to failed practices and policies, proved powerful – persisting long after actual experience warranted a suspension of belief. In New York City, and later the City of New York, upon the consolidation of operating companies the successor entity all too frequently was capitalized in an amount well in excess of the aggregate book values of the predecessor companies’ properties.⁶⁰

53. In 1907, Consolidated Gas controlled 84,418 of the 91,234 votes cast in Brooklyn Union’s election. *Id.* at 14.

54. *Id.* at 11.

55. In 1907, Consolidated Gas controlled 71,217 of the 75,484 votes cast in Kings County Electric’s election. *Id.* at 14.

56. *Id.* at 11.

57. *Id.* at 14.

58. *1930 Commission Report, infra* note 143; *1935 FTC Report, infra* note 108.

59. Long Acre Elec. Light & Power Co., C797 (N.Y. PSC June 26, 1908), *reported in* I N.Y. P.S.C. REPS. OF DECS., 1ST DIST. 249 (July 1, 1907 to Sept.1, 1909). Between 1907 and 1921, the two PSC districts separately published their major decisions in Reports of Decisions. Upon consolidation of the districts in 1921, the Annual Reports included major decisions. Upon the cessation of regular Annual Reports in 1963, major PSC decisions appeared in the N.Y. PSC series until 1995, at which time the PSC began to publish them electronically at <http://www.dps.state.ny.us>. In addition, between 1913 and 1933, select PSC decisions were published in annual N.Y. State Dep’t Reports.

60. For example, at the time of its formation in 1884 the capitalization of Consolidated Gas approximated \$38 million, while the aggregate book value of the properties of the six predecessor companies approximated \$21 million. The approximate \$7 million delta represented the “fair value” assigned by the consolidating companies under the 1884 amended law (discussed *supra* in note 36) to “franchises and rights,” which encompassed the good will of the consolidating companies, the right to exist as a corporation, contracts

Struggling to declare dividends on the basis of such overcapitalization, the successor entity would increase prices charged to consumers,⁶¹ or inflate book profit by underfunding ongoing plant operations and maintenance.⁶² Overvaluation also arose in connection with holding company investments in stocks and bonds of other companies.⁶³ Excessive prices were paid for the capital stock of competing operating companies, signifying to some an intent to eliminate competition.⁶⁴

The Legislature, which throughout the 1800's directly regulated gas and/or electric companies via general and special enactments, was not oblivious to this situation. It responded in various ways to vigorous and frequent complaints regarding high gas prices in heavily-populated areas of New York City. Initially, beginning in the 1860's, the Legislature addressed gas monopoly issues in special statutes by authorizing designated gas operating companies to transact business in New York City, but prohibiting their consolidations with other companies operating therein.⁶⁵ The Legislature plainly was not overly concerned with corporate combinations, however, making no sweeping changes in general laws to prohibit or condition consolidations of gas operating companies. And, as noted, in 1884 the Legislature considerably liberalized its corporate consolidation laws.

By May of 1886, gas prices in some areas of New York City had reached a then run-away price of \$1.75 per one thousand cubic feet.⁶⁶ The tide began to turn with respect to free competition among gas operating companies – albeit only on a prospective basis. The Legislature enacted a general law imposing a price cap of \$1.25 per one thousand cubic feet of gas for all newly-formed gas lighting companies operating in heavily populated areas of New York City, and prohibiting such companies from consolidating with, or transferring franchises to, any other company or person, whether doing business in New York City or elsewhere.⁶⁷

Perhaps evincing conflicts within the New York State government regarding the extent to which regulation should supplant competition, anti-consolidation sentiments did not find their way into the 1890 TCL, which prospectively superseded all prior laws pertaining to the incorporation of public utility operating companies. To the contrary, the TCL authorized consolidations of gas and/or electric corporations wherever located.⁶⁸ High prices continued

with the City of New York, the right to make and sell gas, and the right to occupy the streets. *1905 Report*, *supra* note 37, at 10-15. In the 1905 Report, the legislative committee criticized such perceived overcapitalization of operating companies and Operating Holding Companies in the City of New York.

61. *E.g.*, *GOVERNOR ODELL PAPERS*, *supra* note 35, at 48.

62. *E.g.*, *Adoption of a Uniform Sys. of Accounts*, C180, 577, 578, 641 (N.Y. P.S.C. Dec. 31, 1907 & Dec. 8, 1908), *reported in* N.Y. P.S.C. REPS. OF DECS., 1ST DIST. 756 (July 1, 1907 to Sept. 1, 1909).

63. *E.g.*, II N.Y. P.S.C. ANN. REP., 1ST DIST. 469. For example, in 1904 Consolidated Gas paid approximately \$5.3 million for the acquisition of the majority of the stock of New York Mutual Gas Light Co. having a par value of approximately \$1.8 million. *1905 Report*, *supra* note 37, at 6-8, 29.

64. *1905 Report*, *supra* note 37, at 5, 23, 94.

65. *E.g.*, Act, ch. 651, 1866 N.Y. Laws 1406 (an act incorporating the New York Mutual Gas Light Co.). *See also* Act, ch. 248, 1886 N.Y. Laws 419 (an act granting a gas franchise to Standard Gas-light Co.).

66. STATE OF NEW YORK, MESSAGES FROM THE GOVERNORS, VOL. VIII—DAVID B. HILL 1885-1891, at 241 (1909) [hereinafter *GOVERNOR HILL MESSAGES*].

67. Act, ch. 321, 1886 N.Y. Laws 512.

68. TCL § 61(3) (1890) (currently codified at TCL §11(4)).

and price caps endured – especially in the City of New York. For the ensuing decades they were to be the Legislature’s remedy-of-choice in addressing complaints of high gas and electricity prices.⁶⁹ Inevitably, like all price caps, the stated ceilings became moving targets, having to be frequently reconciled to address the legitimate costs of operating companies as well as the changing expectations of consumers.

In this dispiriting context, and after four decades of disproven economic theories, New York State ultimately ended its general oversight of gas and/or electric corporations, curtailed the demonstrated franchise excesses of local governments, and adopted a scheme of state-wide commission regulation. As early as 1886, the Legislature had sought to establish a commission to oversee public utility companies – albeit only in New York City.⁷⁰ Despite a succession of requests by New York State Governors,⁷¹ New York State did not establish a state-wide commission until 1905. In that year, the Legislature appointed a joint legislative committee to undertake a comprehensive investigation of the organization and operations of all gas and/or electric companies operating in the City of New York. In a report to the Legislature submitted later that year, the committee recommended not only additional price caps for areas of the City – including, for the first time, caps on the price of electricity – but also the establishment of a permanent gas and electric commission with authority to regulate gas and electric companies throughout the state.⁷² As summarized by the committee: “The gross abuse of legal privilege in over-capitalization and in the manipulation of securities, for the purpose of unifying control and eliminating all possible competition, shows clearly that there can be no effective remedy by general legislation or through ordinary legal proceedings.”⁷³

In remarkably short order, both recommendations became law. In 1905, New York State not only adopted new electric and gas price caps for the City of New York,⁷⁴ but also enacted legislation establishing a commission to regulate state-wide various activities of gas and electric companies.⁷⁵ Soon after coming into existence, however, the Commission of Gas and Electricity (Gas Commission) began to advocate for expanded authority over operating

69. From 1886 to 1930, there was a succession of statutes establishing or revising price caps for gas and/or electricity. *E.g.*, Act of May 12, 1886, chs. 321 & 322, 1886 N.Y. Laws 512; Act of May 12, 1886, ch. 322, 1887 N.Y. Laws 517; Act of June 15, 1887, chs. 505 & 566, 1890 N.Y. Laws 904; Transportation Corporations Law, ch. 566, 1890 N.Y. Laws 1136; Act of May 7, 1897, ch. 385, 1897 N.Y. Laws 315; Act of June 3, 1905, chs. 732, 733, 736, 1905 N.Y. Laws 2087-88, 2091; Act of Apr. 3, 1906, chs. 125 & 616, 1906 N.Y. Laws 265; Act of May 24, 1906, ch. 616, 1906 N.Y. Laws of 1592; Act of June 14, 1910, ch. 479, 1910 N.Y. Laws 922; Act of May 19, 1916, ch. 604, 1916 N.Y. Laws 2001; Act of June 2, 1923, ch. 899, 1923 N.Y. Laws 1735, *codified in* N.Y. PSCL § 67-a (repealed 1930). *See also* *Ottinger v. Consol. Gas Co.*, 272 U.S. 576 (1926) (N.Y. Laws of 1923, ch. 899 confiscatory as applied); *Newton v. Consol. Gas Co.*, 258 U.S. 165 (1922) (N.Y. Laws of 1906, ch. 125 confiscatory as applied).

70. The Governor vetoed this legislation, expressing concerns about the breadth of the proposed commission’s powers and the confinement of its authority to New York City. *GOVERNOR HILL MESSAGES*, *supra* note 66, at 241-45.

71. *Id.* at 311-12; *GOVERNOR ODELL PAPERS*, *supra* note 35, at 49-50.

72. *1905 Report*, *supra* note 37, at 95-96.

73. *Id.* at 94.

74. *Id.*

75. N.Y. Laws of 1905, ch. 737 (1905 Law).

companies, particularly as to rates.⁷⁶ Meanwhile, Charles Evans Hughes, counsel to the 1905 legislative committee, had become Governor.⁷⁷ In his first annual message to the Legislature, Governor Hughes recommended the establishment of a stronger, state-wide commission to regulate public utility companies.⁷⁸

The Legislature responded in 1907 with the enactment of the New York Public Service Commissions Law (PSCL 1907).⁷⁹ PSCL 1907 divided the state into two public service districts – the First District, whose jurisdiction extended to the City of New York,⁸⁰ and the Second District, whose jurisdiction extended to the remainder of the state. Separate five-member Commissions were established for each district with supervisory authority over an array of public service entities. PSCL 1907 generally transferred and, in some cases, expanded the provisions under the prior 1905 Law. Among its provisions were: (i) a definition for “electrical corporation;”⁸¹ (ii) a general jurisdiction section;⁸² (iii) a provision for Commission approval of stocks, bonds, and other forms of indebtedness;⁸³ (iv) the requirement that an electrical or gas corporation obtain prior written consent to the transfer or lease of its franchise, works, or system;⁸⁴ and (v) a prohibition against an electrical or gas corporation “directly or indirectly” acquiring the stock or bonds of certain other electrical or gas corporations without prior Commission approval.⁸⁵

Of special significance for our purposes was the Third *Proviso* of PSCL 1907 § 70. In this regard, less than two years after its establishment the Gas Commission had called the Legislature’s attention “to the formation of so-called ‘holding companies,’ under the business corporation law. These companies have the power to acquire the securities of lighting companies and issue their own securities in exchange. *Such companies and their capitalization do not come within the supervision of this Commission.*”⁸⁶

The Legislature’s affirmative response in PSCL 1907 was *not* to establish a scheme of state-wide regulation of Stock Holding Companies. Instead, in transferring Gas Commission powers to the new Public Service Commissions the Legislature adopted the expedient of banning the formation and expansion of Stock Holding Companies. PSCL 1907 § 70’s Third *Proviso* prohibited a “stock corporation” from acquiring more than 10% of the capital stock issued by any

76. N.Y. COMM’N OF GAS AND ELEC., ANN. REP. 23-24 (1906).

77. In 1930, Charles Evan Hughes became Chief Justice of the United States Supreme Court.

78. I.N.Y. P.S.C. ANN. REP. 17-18 (1939) [hereinafter *1939 Annual Report*].

79. Public Service Commissions Law, ch. 429, 1907 N.Y. Laws 899. *See also* Appendix.

80. The original jurisdiction of the First District extended to the counties of New York, Kings, Queens and Richmond. At that time, the territory of The Bronx lay within New York County. In 1914, The Bronx became a separate county. Thereafter, in 1916 the Legislature amended the 1907 PSCL to clarify that the First District included The Bronx. I.N.Y. P.S.C. ANN. REP. 17-18 (1939); I.N.Y. P.S.C. ANN. REP., 1ST DIST. 8.

81. N.Y. Laws of 1907, ch. 429, § 2.

82. *Id.* § 5.

83. *Id.* § 69.

84. *Id.* § 70, First *Proviso*.

85. *Id.* § 70, Second *Proviso*.

86. N.Y. COMM’N OF GAS AND ELEC., ANN. REP. 22 (1906) (emphasis added).

domestic electrical and/or gas corporation.⁸⁷ As discussed *infra*, this prohibition had a short life – at least in the Second District.

While PSCL 1907 was to undergo a number of revisions in 1910 (PSCL 1910), it remained a continuation of the prior law, and not a new enactment.⁸⁸ Its amendments included an expansion of PSCL 1907 § 5 to confer express, limited authority upon the Commissions over upstream owners of majority stock interests in operating companies.⁸⁹ As codified in PSCL 1910 § 5(4), a corporation or person owning or holding a majority of the stock of an “electrical corporation” would be subject to PSC supervision, but only with respect to “relations” between such owner and the gas and/or electrical corporation, and only to the extent “*such relations arise from or by reason of such ownership or holding of stock thereof or the receipt or holding of any money or property of the regulated entity, or by reason of any contract between them.*”⁹⁰ As to those stated relations, the accounts and records of majority stockholders would be subject to Commission examination, and such persons or corporations would be required to furnish reports and information as directed.⁹¹ This provision thus effectively gave the PSC a right of access to certain types of information in the hands of majority stockholders. In adopting this new provision, the Legislature made no revisions to expand the definition of “electrical corporation” to include shareholders (majority or otherwise), parent companies, or holding companies among the list of jurisdictional entities.

In 1921 New York State abolished the public service districts and consolidated the two commissions into a single Commission. Several key provisions of the PSCL, now renamed New York Public Service Commission Law (PSCL 1921), were revised in relatively minor respects.⁹² The PSCL 1921 remained substantially unchanged until 1930 when a few key additions were added, and its name was changed to the designation by which it is known today, New York Public Service Law (PSL).⁹³ As set forth in the Appendix, provisions of 1905 Law and of the various PSCLs exist today substantially unchanged in the current PSL – with an important exception, section 70’s Third *Proviso*, as presently codified in PSL § 70(4), and as discussed hereafter.

IV. THE ASCENDANCY OF NEW YORK ELECTRIC HOLDING COMPANIES

Early Commissions recognized the significance of the wording differences between the Second *Proviso*’s applicability to a stock acquisition by an “electrical corporation” and the Third *Proviso*’s applicability to a stock acquisition by a “stock corporation.” The Second *Proviso* reflected a state policy sanctioning the establishment or expansion of an Operating Holding Company system, which, as such, would necessarily be headed by an operating

87. Public Service Commissions Law, ch. 429, § 70, 1907 N.Y. Laws 899, 931, Third *Proviso*.

88. Consolidated Public Service Commissions Law, ch. 480, 1910 N.Y. Laws 923. *See also* Appendix.

89. *Id.*

90. *Id.* § 5(4) (emphasis added).

91. *Id.*

92. Act of Mar. 30, 1921, ch. 134, 1921 N.Y. Laws 385. *See also* Appendix.

93. Act of Apr. 23, 1930, ch. 782, 1930 N.Y. Laws 1410. *See also* Appendix.

company under the broad supervision of the PSC.⁹⁴ The Third *Proviso*, in contrast, reflected a state policy banning the formation or expansion of a Stock Holding Company system.⁹⁵ In the succinct words of the Commission: “The [PSCL] contains provisions against the combination of public utility companies through holding corporations but it permits such combination to be accomplished by public service corporations with the consent of the Commission.”⁹⁶

Accordingly, notwithstanding reservations which the Commission for the First District, like the present Commission, might have harbored about the complexity of holding company systems and the financial operations thereof,⁹⁷ those grounds alone could not justify the denial of Commission authorization of stock acquisitions under the Second *Proviso*. So it was that during the period from 1907 through 1929, Consolidated Gas received a succession of PSC approvals to expand its Operating Holding Company system, and thereby acquired control of nearly all electric utility services in Manhattan, Brooklyn, and The Bronx and in areas of Queens.⁹⁸ By 1930, Consolidated Gas was reported to be the second largest public utility of any kind in the world, second only to American Telephone and Telegraph Company.⁹⁹ Only the Staten Island electric services remained wholly outside of Consolidated Gas’s New York City electric holding company system. During this same time, in the vast geographical area of Upstate New York, while Operating Holding Company systems were not non-existent, their concentration of market power nowhere neared the scale achieved in the City of New York, as evidenced in the lack of prominence accorded such systems in the Annual Reports of the Second District during this period.

Meanwhile, since 1907, and as a result of the prohibition under the Third *Proviso*, Stock Holding Companies could not lawfully acquire controlling ownership interests in any domestic New York State operating companies.¹⁰⁰ This was to change.

In the wake of the financial market downturn during the first World War and the unprecedented volume of Liberty Bonds issued by the federal government in order to finance that war effort, operating companies in New

94. I N.Y. P.S.C. ANN. REP. 245 (1913) (“policy of permitting the acquisition of the capital stock of one gas or electric company by another is clearly the present policy of the State and has received the emphatic approval of the courts.”).

95. S. Shore Nat’l Gas and Fuel Co., C5500 (N.Y. PSC Jan. 25, 1917) (Van Santvoord, Chairman, dissenting), reported in VI N.Y. P.S.C. REPS. OF DECS., 2D DIST. 34 (1917) (“The purpose of the law, as we understand it, it to prohibit the taking and holding of stock of gas or electrical corporations by so called ‘Holding Companies’”) (quoting a 1915 PSC memorandum to the Governor and Legislature).

96. I N.Y. P.S.C. ANN. REP., 1ST DIST. 47 (1917).

97. Consol. Gas Co., C1453 (N.Y. PSC May 20, 1913) (Maltbie, Comm’r, dissenting in part), reported in IV N.Y. P.S.C. REPS. OF DECS., 1ST DIST. 245 (1913) (discussing Commission policy favoring system unification in order to avoid complex inter-company accounts, unnecessary expenses, and complicated financial relationships associated with the maintenance of holding company systems).

98. I N.Y. P.S.C. ANN. REP. 56 (1945); I N.Y. P.S.C. ANN. REP., 1ST DIST. 310-11 (1914); I N.Y. P.S.C. ANN. REP. 1ST DIST. 245-46 (1913); I N.Y. P.S.C. ANN. REP., 1ST DIST. 157-58 (1911). See also II N.Y. P.S.C. ANN. REP. 837-52 (1930) (reviewing corporate histories of NYC operating companies).

99. *Business & Finance: Added Name*, TIME (June 9, 1930), <http://www.time.com/time/magazine/article/0,9171,739485,00.html> [hereinafter *TIME Article*].

100. Public Services Commission Law, ch. 429, § 70, 1907 N.Y. Laws 899, 931 (Third *Proviso*).

York State could attract capital only at prohibitively high cost.¹⁰¹ By 1918, Upstate New York operating companies, seeking to embark on reconstruction programs delayed as a result of the war effort, were disadvantaged in attracting capital as against the larger operating companies (Operating Holding Companies) in the City of New York.¹⁰² The Third *Proviso*'s prohibition, whether aptly or not, came to be viewed as adversely impacting the Upstate New York operating companies' attraction of low-cost capital.¹⁰³ In response, New York State amended PSL § 70 to authorize Stock Holding Company acquisitions of controlling interests in Upstate New York operating companies, leaving in place a prohibition against such acquisitions in the City of New York.¹⁰⁴ In adopting this amendment, the Legislature made no other changes to the PSCL, such as to expand Commission supervisory jurisdiction to Stock Holding Companies, which now were invited to acquire controlling interests in Upstate New York operating companies.¹⁰⁵ The expansion of such authority might well have undermined the intent of the statutory change, which was to attract – not repel – investors. The New York State Governor tacitly recognized this active withholding of authority in his memorandum approving the controversial¹⁰⁶ 1918 amendment to the Third *Proviso*: “No safeguard to the Public Service Commissions Law is destroyed. The corporate entity is still under the jurisdiction of the Commission. The Commission’s jurisdiction has always been over the corporate entity and the officers of the corporation, *and not over the stockholders.*”¹⁰⁷

The market demand for the financing of post-war capital projects in fact spawned the rapid proliferation of Stock Holding Companies in Upstate New York as well as across the United States.¹⁰⁸ In the words of a later Commission:

The decade following the World War was one of great activity in utility circles. The holding company [i.e., Stock Holding Company] antedated this period but it reached its zenith in the years from 1925 to 1930. As we look back upon that period, it is evident that it was one of boundless inflation. Individuals and groups went about purchasing little companies at high prices. These, in turn, were incorporated into larger units. These larger units were later incorporated into still

101. *E.g.*, I N.Y. P.S.C. ANN. REP., 2D DIST. xxiv – xxv, lxxxv (1918); I N.Y. P.S.C. ANN. REP., 2D DIST. xxii (1917); *See also* III N.Y. P.S.C. ANN. REP., 1ST DIST. 45 (1915).

102. *E.g.*, I N.Y. P.S.C. ANN. REP., 2D DIST. 73 (1920); I N.Y. P.S.C. ANN. REP., 2D DIST. xxiii (1919).

103. STATE OF NEW YORK, PUBLIC PAPERS OF CHARLES SEYMOUR WHITMAN GOVERNOR 1918, at 172-73 (1918) [hereinafter *GOVERNOR WHITMAN PAPERS*].

104. An Act to End the Public Service Commissions Law, ch. 420, § 1269, 1918 N.Y. Laws 1269. *See also* Appendix.

105. *Id.*

106. S. Shore Nat'l Gas & Fuel Co., C5500 (N.Y. PSC Jan. 25, 1917) (Van Santvoord, Chairman, dissenting), *reported in* VI N.Y. P.S.C. REPS. OF DECS., 2D DIST. 34-35 (1917) (discussing 1915 and 1916 PSC – Second District opposition to efforts to amend the Third *Proviso* to permit Stock Holding Company acquisitions of operating company securities).

107. *GOVERNOR WHITMAN PAPERS*, *supra* note 103, at 172-73 (1918) (emphasis added).

108. By 1924, Stock Holding Companies controlled approximately two-thirds of the electric utility industry in the United States, the largest single holder (13%) being the General Electric Company (primarily operating through its subsidiary Electric Bond & Share). FTC, SUMMARY REPORT ON ECONOMIC, FINANCIAL, AND CORPORATE PHASES OF HOLDING AND OPERATING COMPANIES OF ELECTRICITY AND GAS UTILITIES, S. Doc. No. 92, Part 72-A, 70th Cong., 1st Sess. 36 (June 1935) [hereinafter *1935 FTC REPORT*]; FTC, REPORT RELATIVE TO THE ORGANIZATION, CONTROL, AND OWNERSHIP OF COMMERCIAL ELEC. POWER COMPANIES, S. Doc. No. 213, 69th Cong., 2d Sess. xxii (Feb. 1927) [hereinafter *1927 FTC REPORT*]. *See also, infra* note 112.

larger units, and on top of the operating companies there were piled holding company upon holding company.¹⁰⁹

Investment banking firms, accurately sensing a business opportunity, fueled the expansion of Stock Holding Companies not only through financial assistance, but also through the flotation of holding company securities.¹¹⁰ As discussed hereafter, it was in this setting that Niagara Hudson Power Corporation emerged in Upstate New York as the largest Stock Holding Company system in New York State, as first in rank in the United States, if not in the world, in the output of electric energy, and as a major holding of the largest electric public utility Stock Holding Company ever to exist in the United States – The United Corporation.¹¹¹

In 1925 and 1926, an industrious group of investment bankers, joined by General Electric Company (GE)¹¹² and The United Gas Improvement Company (UGI),¹¹³ amalgamated properties and capital for the purpose, as reported by the

109. 1939 Annual Report, *supra* note 78, at 74.

110. 1935 FTC REPORT, *supra* note 108, at 75-77, 330. These activities took place prior to the enactment of the Banking Act of 1933 § 20, 48 Stat. 188, and of the Banking Act of 1935, 49 Stat. 707 (formerly codified at 12 U.S.C. § 377) (repealed 1999) (commonly referred to today as the Glass-Steagall Act), which required separation of commercial banking and investment banking operations. Today, many persons revile its repeal as a (chief) cause of the nation's recent financial market crisis. *E.g.*, Bethany McLean, *Meet the Real Villain of the Financial Crisis*, N.Y. TIMES (Apr. 26, 2010), http://www.nytimes.com/2010/04/27/opinion/27mclean.html?_r=1&scp=1&sq=Meet%20the%20real%20villain%20of%20the%20financial%20crisis&st=cse; Philip Bowring, *Too Big to Succeed*, N.Y. TIMES (Nov. 10, 2009), <http://www.nytimes.com/2009/11/11/opinion/11ihtbowring.html?scp=1&sq=Too%20Big%20to%20Succeed&st>.

Some Members of Congress argued for revival of the full separation requirement of Glass-Steagall. President Barack Obama and others argued for the adoption of a more limited separation requirement. Under the so-called "Volcker Rule" (named after Paul Volcker, a member of the President's Economic Recovery Advisory Board and the former chairman of the Federal Reserve Board) proposed by the President, banks would have been prohibited from owning, investing or sponsoring hedge funds and private equity funds, and from undertaking proprietary trading operations for their own account unrelated to their client business. *E.g.*, President Barack Obama, Remarks by the President on Wall Street Reform (Apr. 22, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-wall-street-reform>; Remarks by President on Financial Reform (Jan. 21, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-financial-reform>; Briefing by White House Secretary Robert Gibbs and PERAB Chief Economist Austan Goolsbee (Jan. 21, 2010), *available at* <http://www.whitehouse.gov/the-press-office/briefing-white-house-press-secretary-robert-gibbs-and-perab-chief-economist-austan>. Subject to a number of exceptions and to future mandated agency rulemaking, Title VI, § 619 of the recently-enacted Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), adopted the Volcker Rule as a new section 13 of the Bank Holding Company Act of 1956, to be codified at 17 U.S.C. § 1851.

111. TIME Article, *supra* note 99.

112. GE, which had been organized in 1892 and was based in Schenectady, New York, had seen early business opportunities in accepting utility securities in payment of GE-supplied equipment, and later in purchasing the capital stock of Upstate New York utilities outright. In 1905 it saw a still bigger opportunity, organizing a subsidiary, Electric Bond & Share Co., which was to establish in 1906 the first major electric Stock Holding Company system in the United States (The American Gas and Electric Co.) and was to go on to establish five other Stock Holding Company systems while a GE subsidiary. By January 1925, when it divested itself of Electric Bond & Share, GE held the single largest controlling interest in electricity generation in the United States, and had become the catalyst for one of the largest federal agency investigations ever undertaken, *viz.*, the decade-long FTC investigation into the practices of electric Stock Holding Companies. 1927 FTC REPORT, *supra* note 108, at xiii-xxiii, xxvi-xxxiii, 6-9, 17-22, 39, 50-51, 69-74; S. Res. 329, 68th Cong., 2d Sess. (Feb. 9, 1925) (directing the FTC to investigate GE and other companies as to any unlawful anti-competitive conduct in connection with electric operating companies).

113. As early as 1870, UGI became the first entity in the United States to establish itself in the business of managing gas operating properties, and later in the business of investing in the securities of gas operating

Wall Street Journal, of establishing ““a huge superpower development to cover a large part of New York State.””¹¹⁴ In 1925, as a first step, an investment banking firm in Buffalo, New York, Schoellkopf, Hutton & Pomeroy Inc., and Schoellkopf family members (collectively Schoellkopf interests) organized a Stock Holding Company named Buffalo, Niagara & Eastern Power Corporation.¹¹⁵ With Commission approval under the Third *Proviso*,¹¹⁶ Buffalo Niagara acquired the capital stock of several large electric operating companies, three of which were also Operating Holding Companies, serving western and central Upstate New York.¹¹⁷ Another investment banking firm, F.L. Carlisle & Co., Inc., subsequently acquired an indirect minority interest in Buffalo Niagara.¹¹⁸

Also in 1925, GE, UGI, the Aluminum Company of America with its major stockholders Andrew W. and Richard B. Mellon, collectively referred to as Mellon interests,¹¹⁹ and The Power Corporation of New York,¹²⁰ a Stock Holding Company owning key electric operating companies in northern New York, and controlled by F.L. Carlisle & Co. and others¹²¹ collectively referred to as Carlisle interests, established another Stock Holding Company named Mohawk Hudson Power Corporation. Pursuant to Commission approvals under the Third *Proviso*,¹²² Mohawk Hudson acquired control of a string of electric operating companies spanning from central Upstate New York to Albany, including a key GE-controlled operating company.¹²³ Mohawk Hudson also acquired a direct interest in Buffalo Niagara.¹²⁴

companies as a Stock Holding Company. It came to hold direct and indirect controlling interests in numerous gas and/or electric operating companies in New York State and elsewhere in the United States. 1927 *FTC REPORT*, *supra* note 108, at 234-36.

114. 1927 *FTC REPORT*, *supra* note 108, at 157 (quoting Wall Street Journal, May 14, 1925).

115. *Id.* at 155.

116. Buffalo, Niagara, and E. Corp., C3505 (N.Y. PSC Feb. 23, 1927), *reported in* I N.Y. P.S.C. ANN. REP. 147 (1927); Buffalo, Niagara, and E. Corp., C2621 (N.Y. PSC July 16, 1925), *reported in* I N.Y. P.S.C. ANN. REP. 228 (1925).

117. *E.g.*, FTC, MONTHLY REP. – NIAGARA HUDSON POWER CORP., S. Doc. No. 92, Part 72, 70th Cong., 1st Sess., 11-12, 27-28, 124, 128, 135-36, 154-57 (transmitted Dec. 1934; printed 1935) [hereinafter 1934 *FTC REPORT*]; 1927 *FTC REPORT*, *supra* note 108, at 154-57.

118. 1927 *FTC REPORT*, *supra* note 108, at 163.

119. *United States v. ALCOA*, 148 F.2d 416 (2d Cir. 1945).

120. Although The Power Corporation did not at this time turn over its northern Upstate New York assets to Mohawk Hudson, a “community of interest” existed between it and Mohawk Hudson, not only in terms of financial affairs but also in terms of interconnected electrical systems. Around the same time Mohawk Hudson and Buffalo Niagara filed PSCL § 70 petitions to acquire electric operating companies, a subsidiary of The Power Corporation of New York also filed a PSCL § 70 petition to acquire additional operating companies in northern, upstate New York. Power & Elec. Sec. Corp., C 2761 (N.Y. PSC Oct. 29, 1925), *reported in* I N.Y. P.S.C. ANN. REP. 261 (1925).

121. *See TIME Article*, *supra* note 99. The Carlisle interests were F.L. Carlisle & Co. and St. Regis Paper Co., one of the largest paper companies in the eastern United States, in which Floyd L. Carlisle and others held controlling interests and of which Carlisle was initially President and later Chairman. F. L. Carlisle & Co. acted on behalf of St. Regis.

122. Mohawk Hudson Power Corp., C2649 (N.Y. PSC July 16, 1925), *reported in* I N.Y. P.S.C. ANN. REP. 230 (1925).

123. 1935 *FTC REPORT*, *supra* note 108, at 97-98; 1934 *FTC REPORT*, *supra* note 117, at 12, 58-61, 125, 128, 189-93; 1927 *FTC REPORT*, *supra* note 108, at xxi, 23-24, 157-60.

124. 1927 *FTC REPORT*, *supra* note 108, at 163.

In 1926, GE, UGI, Mohawk Hudson, and the Schoellkopf interests – spearheaded by the Carlisle interests – took public steps to form a system for the development and interconnection of the power resources of both Upstate New York and New England, although privately, in the view of a later FTC, the plan was to multiply overvalued securities through pyramided companies. These interests organized Northeastern Power Corporation, a Stock Holding Company which, through the Carlisle interests, came to organize, along with International Paper Company and others, New England Power Association (NEPA). Northeastern Power had “practical control”¹²⁵ over NEPA, which, in turn, owned controlling interests in a number of operating companies in New Hampshire, Rhode Island, Vermont, and Massachusetts. Northeastern Power also came to hold a controlling interest in The Power Corporation and other entities.¹²⁶ The Carlisle interests, the Schoellkopf interests, and a NEPA interest thereafter established another Stock Holding Company, Eastern States Power Corporation, and made Northeastern Power Corp., a subsidiary thereof. Eastern States also acquired an interest in Buffalo Niagara.¹²⁷

By 1927, these intrepid investment companies, in the words of the FTC, had “link[ed] together, partly by community of control and partly by a union of control, a chain of properties extending from Buffalo and Niagara across northern and central New York State into Vermont and Massachusetts,”¹²⁸ “from Lake Erie and Niagara Falls to the outskirts of Boston and Providence.”¹²⁹ Other investment banking firms soon partnered with these incumbent companies.

By 1928, Drexel & Co., the Philadelphia branch of J.P. Morgan & Co.,¹³⁰ had purchased more stock in public utility operating companies and public utility Stock Holding Companies, especially the securities of UGI, Philadelphia Electric Company, and Public Service Company of New Jersey, than it was selling. Given the obvious re-marketing problem, including the price-depressing effect which would be caused by direct sales of such large volumes of securities, J.P. Morgan, in association with the investment banking firm of Bonbright & Co., Inc., decided to organize a Stock Holding Company, transfer the unsold stock to the new entity along with additionally purchased securities, including GE’s 35% interest in Mohawk Hudson, and then offer subscriptions for the securities of the thus-capitalized company. The Stock Holding Company, organized in January

125. *Id.* at 166.

126. 1935 FTC REPORT, *supra* note 108, at 98; 1934 FTC REPORT, *supra* note 117, at 63-65, 86, 193-98; 1927 FTC REPORT, *supra* note 108, at 24, 154, 160-66.

127. 1927 FTC REPORT, *supra* note 108, at 163-64.

128. *Id.* at 154.

129. *Id.* at 154, 163. By 1929, International Paper had acquired from its fellow organizers and other shareholders an 84.9% interest in NEPA. 1935 FTC REPORT, *supra* note 108, at 167. Not until 2002, by which time National Grid had acquired both New England Electric System (the 1935 PUHCA-registered, successor Stock Holding Company to NEPA and its other subholding companies; see *In re* New England Power Ass’n, SEC PUHCA Release No. 6470, 22 S.E.C. 343 (March 14, 1946), *aff’d*, 66 F. Supp. 378 (D. MA 1946), *aff’d sub nom.* Lahti v. NEPA, 160 F.2d 845 (1st Cir. 1947)) and Niagara Mohawk Holdings, Inc. (the owner of the surviving operating company of Niagara Hudson’s New York system), were the operating properties of this 1927 “community of interests” to fall once again under common control.

130. Initially, J.P. Morgan & Co. had been both commercial bankers and investment bankers. After the 1933 and 1935 federal Banking Acts, *supra* note 110, it discontinued investment banking. Thereupon, in 1935 several partners and employees of J.P. Morgan & Co. organized an investment banking firm named Morgan Stanley & Co., Inc. *Morgan Stanley & Co. v. SEC*, 126 F.2d 325 (2d Cir. 1942).

1929, was named The United Corporation.¹³¹ By 1934, the Carlisle interests were its largest single stockholder.¹³² By 1935, The United Corporation had emerged as the single most important Stock Holding Company system in the United States, having practical control not only of approximately 27% of the entire electric output of the United States, but also, except for a small geographical break in which it held putative non-controlling utility interests, of a network of electric public utility companies extending from lower Michigan, Lake Ontario, and the St. Lawrence River to the Gulf of Mexico.¹³³ In addition to Niagara Hudson, Public Service Corporation of New Jersey, and UGI, The United Corporation group included Columbia Gas & Electric Corporation and Commonwealth & Southern Corporation.¹³⁴ The United Corporation also held a non-controlling interest in Consolidated Gas.¹³⁵

Later in 1929, The United Corporation, UGI, and the Schoellkopf, Mellon, and Carlisle interests organized and capitalized yet another Stock Holding Company, Niagara Hudson Power Corporation. Through the upstream exchange of securities, Buffalo Niagara, Mohawk Hudson, and Northeastern Power (until its dissolution in 1932) became the major subholding Stock Holding Companies of Niagara Hudson. As a result of its acquisition of GE's holdings in Mohawk Hudson and of a controlling interest it owned in UGI, The United Corporation held a controlling interest in Niagara Hudson. From the time of its organization in 1929 until at least 1935, the Niagara Hudson system ranked first in the United States, if not in the world, in the output of electric energy (the Consolidated Gas system, however, operated greater generation plant capacity and carried greater peaks).¹³⁶ Shortly after its organization, and for years thereafter, Floyd L. Carlisle served as Chairman of Niagara Hudson, and members of the Schoellkopf family served as President.¹³⁷

In addition to stock investments in subsidiaries, Niagara Hudson held investments in two key unaffiliated companies: Central Hudson Gas & Electric Corporation, a large operating company serving customers along the Hudson River (29.7% capital stock ownership, representing an approximate \$17 million ledger book value),¹³⁸ and Consolidated Gas (over 200,000 shares of no par

131. For discussions of the formation of The United Corporation, see *In re The United Corp.*, SEC PUHCA Release No. 4478, 13 S.E.C. 854 (Aug. 14, 1943), and 1935 *FTC REPORT*, *supra* note 108, at 76-77, 112-15, 176-77, 592-93. See also *Morgan Stanley & Co.*, 126 F.2d 325; *Ramapo, Inc. v. IRS*, 32 B.T.A. 561 (Apr. 30, 1935).

132. 1934 *FTC REPORT*, *supra* note 117, at 78-79. See also *Phillips v. SEC*, 153 F.2d 27 (2d Cir.), *cert. denied*, 328 U.S. 860 (1946).

133. 1935 *FTC REPORT*, *supra* note 108, at 115.

134. *Id.* at 38, 114, 138-39.

135. *In re Dayton Power & Light Co.*, S.E.C. PUHCA Release No. 2654, 8 S.E.C. 950 (Mar. 27, 1941).

136. *E.g.*, 1935 *FTC REPORT*, *supra* note 108, at 113-14, 139, 168-69, 734-36; 1934 *FTC REPORT*, *supra* note 117, at 9-13, 63-65, 78-79, 125-41, 193-98, 245-46.

137. *E.g.*, *In re Cent. Hudson Gas & Elec. Corp.*, S.E.C. PUHCA Release No. 4630, 14 S.E.C. 491 (Oct. 19, 1943); *In re Dayton Power & Light Co.*, 8 S.E.C. 950; 1934 *FTC REPORT*, *supra* note 117, at 10, 133-34.

138. 1935 *FTC REPORT*, *supra* note 108, at 38-39; 1934 *FTC REPORT*, *supra* note 117, at 88-89, 230-33. Later, Niagara Hudson's ownership interest in Central Hudson would render that company a PUHCA-defined "subsidiary" of both Niagara Hudson and The United Corporation. Central Hudson avoided SEC-ordered restructuring action only upon Niagara Hudson's divestiture of its holdings therein. *In re Cent. Hudson Gas & Elec. Corp.*, S.E.C. PUHCA Release No. 6304, File No. 31-415, 1945 WL 25658 (Dec. 14, 1945); *In re Cent. Hudson Gas & Elec. Corp.*, S.E.C. PUHCA Release No. 4630, 14 S.E.C. 491 (1943). See also *In re Buffalo*,

value common stock purchased through brokers, having a ledger value of approximately \$20 million).¹³⁹ By 1935, Floyd L. Carlisle, while still the board chairman of Niagara Hudson, had also become the board chairman of Consolidated Gas (and of the 1936-renamed Consolidated Edison Company of New York, Inc.),¹⁴⁰ fueling rumors of a potential merger of the two companies.¹⁴¹ In addition, the President of The United Corporation (who also was a board director of Niagara Hudson) and members of the Schoellkopf family held positions at various times on the Central Hudson board.¹⁴²

So it was that by the end of the 1920's, electric operating companies in holding company systems accounted for 98.5% of all retail electric energy sales in New York State.¹⁴³ Of this total, Niagara Hudson system sales amounted to 54.6% and Consolidated Gas system sales amounted to 34.8%. Although the sales of a third company, Associated Gas & Electric Co., represented only 7.6%, the extortive practices of this Stock Holding Company were to capture the attention of the Legislature (and of the FTC) and be a catalyst for New York State and federal statutory changes enacted in the 1930's.¹⁴⁴

V. PRE-1930 PSC STOCK HOLDING COMPANY JURISDICTION

While this extraordinary history of the Niagara Hudson and The United Corporation systems invites many arresting observations, the singular non-involvement of the Commission in the upstream stock acquisitions, restructurings, financings, and capitalizations of the various Stock Holding Companies which came to dominate electricity supply in Upstate New York is most striking. At no time did the Legislature, individual legislators, the Governor, the PSC, the New York State Attorney General, Buffalo Niagara, Mohawk Hudson, Niagara Hudson, The United Corporation, competitor Stock Holding Companies, investment bankers, minority shareholders, bondholders, municipalities, industrial customers, other consumers, or any other person or entity pursue the notion that Commission PSCL §§ 69 or 70 authorizations were required in connection with the complex activities transpiring upstream from and indirectly affecting a vast number of New York State operating companies and consumers. Consistent with a number of settled interpretations of the PSCL, the Commission sat on the sidelines, recognizing its non-existent jurisdiction over the upstream activities of these Stock Holding Companies.

Niagara & E. Corp., S.E.C. PUHCA Release No. 6040, File Nos. 54-106, 54-107, 1945 WL 25981 (Sept. 11, 1945); *In re Buffalo, Niagara & E. Corp.*, S.E.C. PUHCA Release No. 6023, 20 S.E.C. 404 (1945).

139. 1934 *FTC REPORT*, *supra* note 117, at 89, 230, 233.

140. *In re Dayton Power & Light Co.*, 8 S.E.C. 950.

141. See *TIME* article, *supra* note 99.

142. *In re Cent. Hudson Gas & Elec. Corp.*, 14 S.E.C. 491.

143. I REPORT OF COMMISSION ON REVISION OF THE PUBLIC SERVICE COMMISSIONS LAW, N.Y. Leg. Doc. No. 75, at 27, 141 (1930) [hereinafter *1930 COMMISSION REPORT*].

144. By the early 1930's, Associated Gas & Electric was the second largest electric holding company in the United States in terms of the total ledger value of its corporate assets and total income. 1935 *FTC REPORT*, *supra* note 108, at 52. Associated was itself controlled by a pyramid of companies, at the top of which were two sole men: J.I. Mange and H.C. Hopson. *Id.* at 100-01, 167-68, 625-26. Based on an original investment of \$300,000, these men controlled a holding company system having assets with a book value in excess of \$1 billion. *Id.* at 356.

First, given the language and history of the governing statutes, early Commissions consistently expressed the view that they lacked direct supervisory authority over the upstream activities and operations of Stock Holding Companies. To the contrary, in the view of the PSC, only limited jurisdiction existed (i) under PSCL § 70's Third *Proviso*, insofar as such entities sought directly to purchase the stock of operating electric companies;¹⁴⁵ and (ii) under PSCL § 5, insofar as the Commission sought limited, statutorily-authorized information.¹⁴⁶

Second, early Commissions and New York State courts had specifically concluded that Stock Holding Companies could not be subject to regulation as "electrical corporations." In 1926, a Stock Holding Company all but begged the Commission and courts to declare it an "electrical corporation" within the meaning of PSCL § 2, so that it could evade the geographical restriction of PSCL § 70's Third *Proviso* and acquire an operating company in the City of New York under PSCL § 70's Second *Proviso*. Even though the petitioner's certificate of incorporation expressly authorized it to conduct the business of an electrical corporation, the Commission and courts rebuffed its efforts. The petitioner did not "own, operate, or manage an electric plant," did not function as an electrical corporation, and may never do so. For these reasons, the court held that the company was not a jurisdictional "electrical corporation" under PSCL § 2.¹⁴⁷ Further, the court noted, the Second *Proviso* specified that the electrical corporation being acquired must be "engaged in the same or a similar business," or it must be "operating under a franchise from the same or any other municipality" as the petitioning corporation. The court reasoned that this language "seems to contemplate that the petitioning corporation shall be an electrical corporation actually engaged in business as such operating under a franchise from some municipality."¹⁴⁸ The petitioner failed to make this showing, even if, assuming *arguendo*, it were otherwise an "electrical corporation" within the meaning of PSCL § 2.

No doubt the Commission, and likely also the court, understood the consequences of a different outcome in *New York-New Jersey Superpower*. If a

145. *E.g.*, Mohawk Hudson Power Corp., C3192 (N.Y. PSC June 19, 1926), reported in I N.Y. P.S.C. ANN. REP. 279-80 (1926) (mem. of the Chief of Accounting Div.) ("At present the [PSCL] does not give the Commission power over holding corporations except in so far as such control comes under section 70 of the [PSCL], making it necessary to obtain the consent of the Commission to the acquisition and holding by a holding corporation of the securities of a public utility, but the Commission has full regulation over operating companies whose securities are thus held . . ."); Erie Power Corp., C2596 (N.Y. PSC Nov. 12, 1925), reported in I N.Y. P.S.C. ANN. REP. 279-80 (1925) ("[U]nder the law [the PSC] has no control over the operations of holding companies except to consent or refuse to permit them to acquire the properties of operating utilities which are within the jurisdiction of the Commission"); Power & Elec. Sec. Corp., C2761 (N.Y. PSC Oct. 29, 1925), reported in I N.Y. P.S.C. ANN. REP. 265 (1925) ("This Commission has been given no jurisdiction over holding companies owning the stocks of domestic operating utilities, and . . . the only corrective it can apply is to refuse permission for the acquisition of the stock of such operating companies").

146. I N.Y. P.S.C. ANN. REP. 15 (1926) ("The only direct supervision over such holding companies given by the laws of New York relates in case of stock control only to *examination of accounts, records, memoranda, reports and information* from the controlling company in so far as the relations between such holding corporation and the utility corporation 'arise from or by reason of such ownership or holding of stock thereof or the receipt or holding of any money or property thereof, or from or by reason of any contract between them'").

147. N.Y.-N.J. Superpower Connecting Corp. v. PSC, 215 A.D. 578, 580, 214 N.Y.S. 294, 295 (N.Y. App. Div. 1926).

148. *Id.*

Stock Holding Company could acquire an operating company in the City of New York under the Second *Proviso* merely because its certificate of incorporation authorized operations as an electrical corporation, the Third *Proviso* would be gutted. Under principles of statutory construction, such a result – the negation of a statute – would surely have been avoided by New York State courts.¹⁴⁹ Accordingly, not being an Operating Holding Company, a Stock Holding Company could never fall within the reach of section 70's Second *Proviso*. Its acquisitions of operating companies could receive review only under the Third *Proviso*. Consistent with this position, during the entire period from 1907 through 1929 (and continuing thereafter) at no time did any Commission include a Stock Holding Company among the entities reported to the Legislature in Annual Reports as “electrical corporations” under its jurisdiction.

Third, apart from giving effect to the differing wording between the Second *Proviso* and Third *Proviso* with respect to the terms “electrical corporation” and “stock corporation,” early Commissions and courts further recognized that the Second *Proviso*, unlike the Third *Proviso*, referred to “direct or indirect” acquisitions of operating companies. Early Commissions thus viewed the Third *Proviso* as applicable only to a Stock Holding Corporation's acquisition of *direct* ownership interests in operating companies.¹⁵⁰

One early Commission had explicitly ruled that PSCL § 70 approval did *not* apply to a Stock Holding Company's upstream acquisition of stock in another Stock Holding Company. In discussing a Stock Holding Company's (Rochester Empire Power Corporation) acquisition of the entire capital stock of a Stock Holding Company owning a system of operating electric and/or gas companies in Upstate New York (Mohawk Valley Company), the PSC observed: “To acquire control of this system did not require the consent of the Commission, the

149. *People v. Ahearn*, 196 N.Y. 221, 227, 89 N.E. 930, 931-32 (1909). *See also* *Capital Newspapers v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987); N.Y. STAT. LAW § 97 (McKinney 1971). Perhaps for this same reason, neither the Commission nor the court discussed the application of PSCL § 5-b, *Corporations subject to chapter although not transacting business* (today, PSL § 5-b (McKinney 2000)), which, as added in the 1921 PSCL, provides: “Corporations formed to acquire property or to transact business which would be subject to the provisions of this chapter, and corporations possessing franchises for any of the purposes contemplated by this chapter, shall be deemed to be subject to the provisions of this chapter although no property may have been acquired, business transacted or franchises exercised.” N.Y. Laws of 1921, ch. 134. The Legislature would not have been deemed to have enacted a statute that negates another statute. Moreover, the Commission, as noted, and perhaps also the court, understood the PSCL as conferring upon the PSC supervisory authority over operating companies, not Stock Holding Companies. On this point, the timing of the enactment of section 5-b suggests that it was the Legislature's response to one or more decisions of the New York Court of Appeals. *E.g.*, *Cayuga Power Corp. v. PSC*, 226 N.Y. 527, 124 N.Y. 105 (1919) (discussing the status of a business corporation which erected electric plant, acquired franchises, entered into contracts, issued debt and securities, and only thereafter attempted to obtain PSC approvals for the prospective construction of electric plant and the exercise of franchises, and for issuance of bonds and stocks *nunc pro tunc*); *N.Y. Edison Co. v. Willcox*, 207 N.Y. 86, 100 N.E. 705 (1912) (holding that the Commission lacked power to authorize the issuance of stocks and bonds under PSCL § 69 where the entity had not first been duly authorized to construct jurisdictional facilities or exercise franchises under PSCL § 68, *Approval of Incorporation and Franchises; Certificate*). As written, section 5-b seems merely to clarify that PSL applies to all preparatory acts by an entity fully intending to function as an operating company, a showing New York-New Jersey Superpower failed to make. Regardless, given the court's construction of the Second *Proviso*, section 5-b would not have applied - even if the petitioner had been an “electrical corporation” under PSCL § 2, it was not the type of electrical corporation authorized to acquire operating companies under PSCL § 70's Second *Proviso*.

150. *E.g.*, decisions cited in note 145 *supra*.

petitioner having merely acquired control of the *capital stock* of the Mohawk Valley Company, which is *a holding company over which the Commission has no jurisdiction.*¹⁵¹ Thus, no “pass-through” jurisdiction existed under PSCL § 70’s Third *Proviso*, i.e., a Stock Holding Company’s upstream acquisition of stock in another Stock Holding Company was not equivalent to the acquisition of stock in a subsidiary operating company thereof.

Courts had similarly rejected the concept of “pass-through” jurisdiction in connection with the acquisition of stock in Operating Holding Companies. In *New York State Electric Corp. v. PSC*,¹⁵² a Stock Holding Company sought approval under PSCL § 70’s Third *Proviso* to purchase the remaining capital stock of an Upstate New York Operating Holding Company.¹⁵³ The petitioner, a subholding company of Associated Gas and Electric, already owned a portion of the Operating Holding Company’s stock. The Commission had denied the petition, on the ground, *inter alia*, that the acquisition would violate the geographical limitations of the Third *Proviso*, inasmuch as the Operating Holding Company owned an operating company located in the City of New York.¹⁵⁴ In the PSC’s view, the Stock Holding Company could not do indirectly, via an upstream acquisition, that which it could not do directly, i.e., acquire a controlling interest in the subsidiary operating company.¹⁵⁵ The court disagreed, holding that the Stock Holding Company’s indirect acquisition of a New York City operating company would not be contrary to the Third *Proviso*.¹⁵⁶ In discussing the Stock Holding Company’s prior acquisition of stock in the Operating Holding Company, the court explained: “[I]t is the stock of the [parent Upstate New York Operating Holding Company] which was acquired by [Stock Holding Company], not the stock of Staten Island Edison Corporation.”¹⁵⁷ In the court’s view, “ownership of stock does not give an interest in the specific assets” of a subsidiary operating company.¹⁵⁸ No “pass-through” jurisdiction existed.¹⁵⁹

Fourth, early Commissions had construed the First *Proviso* of PSL § 70 as applying solely to transfers *by* an operating company of property “essential to its very existence as *a public service corporation*: its franchises, its works, or its system.”¹⁶⁰ At no time prior to 1930 (indeed, at no time until recently, as discussed *infra*) did a Commission invoke the First *Proviso* in connection with upstream acquisitions of holding company securities or other ownership interests.

151. Rochester Empire Power Corp., C5018 (NY PSC Aug. 9, 1928), *reported in* I N.Y. P.S.C. ANN. REP. 317 (1928) (emphasis added).

152. N.Y. State Elec. Corp. v. PSC, 227 A.D. 18, 22, 236 N.Y.S. 411, 416 (N.Y. App. Div. 1929), *appeal dismissed*, 260 N.Y. 32, 182 N.E. 237 (1932).

153. *Id.* at 19.

154. *Id.*

155. N.Y. Elec. Co., C449 (N.Y. PSC May 10, 1928), *reported in* 47 N.Y. STATE DEP’T REP. 26 (1933).

156. *N.Y. State Elec. Corp.*, 227 A.D. at 21-23, 236 N.Y.S. at 415-16.

157. *Id.* at 22, 236 N.Y.S. at 415.

158. *Id.*

159. *Id.*

160. Watertown Light & Power Co. (N.Y. PSC Mar. 9, 1909) (on rehearing), *reported in* I N.Y. P.S.C. REPS. OF DECS., 2D DIST. 511 (July 1, 1907 to Apr. 1, 1909).

Fifth, consistent with their general disavowal of authority over Stock Holding Companies, early Commissions specifically held that they had no authority over the capitalization and financing of Stock Holding Companies, whether under PSCL § 69 or otherwise. In 1925, the Commission hence lamented “the failure of the Legislature of New York State to provide for the regulation of the capital issues of those holding companies which control stock of our domestic utilities.”¹⁶¹ In 1929, the Commission reminded the Legislature that:

[t]he broad supervisory powers which the Commission has over operating utilities is withheld as to holding corporations. Such corporations *are not required to file annual reports* with the Commission, nor are they held to the strict public responsibility in the transaction of their business affairs as is the case with operating companies *There is no power now vested in the Commission by statute to make any investigation as to the actual values represented by securities issued by holding corporations.*¹⁶²

Sixth, notwithstanding these statutory limitations on Commission authority, New York State courts had held that an upstream corporate entity could be deemed an “electrical corporation” subject to full PSC supervisory authority under a theory of alter-ego liability. In certain circumstances the Commission would be justified in piercing the “corporate veil” to deem the parent entity itself to be an “electrical corporation.” This arose where a parent company had so dominated the business operations of a regulated operating subsidiary, and had so obtrusively interfered with its operations that the subsidiary lacked the indicia of a separate existence, and under general rules of agency, the parent would be deemed the principal and the subsidiary an agent. In *New York State Electric Corp.*, as noted, the court held that the Third *Proviso* would not be violated where a Stock Holding Company acquired all the capital stock of an Upstate New York Operating Holding Company owning a subsidiary New York City operating company.¹⁶³ But the court explained further that the PSC would have the right to invoke the Third *Proviso* if the evidence confirmed that the upstate Operating Holding Company were dominating the affairs of the New York City operating company so as to warrant the imposition of alter-ego liability (or piercing the corporate veil).¹⁶⁴ But while *New York State Electric Corp.*, left the door open for full Commission regulation of Stock Holding Companies under a theory of alter-ego liability, a more recent Commission slammed this door shut as discussed *infra*.

Early Commissions and others thus recognized that the Legislature and courts had confined Commission authority over the upstream activities of Stock Holding Companies. Absent a basis for alter-ego liability, which at most seemed to exist hypothetically, Niagara Hudson, Buffalo Niagara, Mohawk Hudson, The

161. Power & Elec. Sec. Corp., C2761 (N.Y. PSC Oct. 29, 1925), reported in I N.Y. P.S.C. ANN. REP. 265 (1925).

162. I N.Y. P.S.C. ANN. REP. 16 (1928) (emphasis added).

163. *N.Y. State Elec. Corp.*, 227 A.D. at 21, 236 N.Y.S. at 415.

164. *Id.* 227 A.D. at 22, 236 N.Y.S. at 416 (relying on *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 155 N.E. 58 (1926) (holding that neither stock ownership nor the normal transactions undertaken between a parent and subsidiary, such as the establishment of inter-locking directors and executive officers, or reimbursable financial advances by the parent to subsidiary, suffices to invoke alter-ego liability; the essential act is the parent’s actual *operation* of the business of its subsidiary)).

United Corporation, and their complex upstream activities fell wholly outside the reach of Commission jurisdiction, except as authorized in (i) PSCL § 5 with respect to *access to information* regarding *direct* relations between operating companies and majority shareholders; and in (ii) PSCL § 70's Third *Proviso* with respect to the *direct acquisition* of controlling interests in domestic electric operating companies.

VI. THE 1930'S: THE DECADE OF LEGISLATURE NON-ACTION

Even though the Commission had aided the formation of formidable Stock Holding Company systems through PSCL § 70 Third *Proviso* authorizations for direct acquisitions of controlling interests in operating companies, such approvals did not signal unqualified acceptance of Stock Holding Companies. A number of intra-corporate practices did little to endear these entities to the PSC. Probably the most outrageous single Stock Holding Company malfeasance occurred in 1924, when Associated Gas & Electric, on the basis of an appraisal prepared by an "independent" former PSC Staff valuation engineer receiving financial remuneration from a top Associated executive, re-valued the fixed capital of a New York operating subsidiary (New York State Electric & Gas Corporation) without disclosing the same in the subsidiary's required annual report filings with the Commission. The re-valuation was disclosed only in published balance sheets of the subsidiary.¹⁶⁵ A controversial Stock Holding Company practice common to multiple systems required management and other services to be purchased by operating subsidiaries. During the period from 1926 to 1929, Buffalo Niagara derived a significant portion of its gross income (19%) from a mandatory management (also including some construction supervision) fee of 5% of the total gross operating revenues of each operating company in its system. As later found by the FTC, the amounts earned represented a 72% net profit on actual costs.¹⁶⁶ From 1924 to at least 1929, Associated Gas & Electric imposed a fee of 2-1/2% of operating company gross earnings for management services, which, along with engineering services, yielded a 301% profit.¹⁶⁷ Associated Gas & Electric also profited from loans to operating subsidiaries, charging interest at the rate of 8% per annum for sums it largely borrowed at rates of 5-1/2% and 6% per annum.¹⁶⁸

Beginning in 1927,¹⁶⁹ and continuing in 1929¹⁷⁰ and 1930,¹⁷¹ the PSC publicly lobbied the Legislature for additional, but limited, authority over Stock Holding Companies. Pointing out that its only direct supervision over Stock Holding Companies arose under PSCL § 5, and that "[t]he broad supervisory powers which the Commission has over operating utilities is withheld as to

165. 1935 *FTC REPORT*, *supra* note 108, at 284, 286, 816-17.

166. *Id.* at 605, 647-48, 662. (Niagara Hudson ceased this practice upon its 1929 acquisition of Buffalo Niagara. Engineering and related services furnished by Buffalo Niagara to Niagara Hudson subsidiaries were charged at cost. Niagara Hudson itself charged no management fees for any services it rendered to subsidiary companies.). *Id.* at 467, 647.

167. *Id.* at 214, 463, 626-28. The 1929-rendered engineering services alone yielded a 434% profit. *Id.* at 214.

168. 1935 *FTC REPORT*, *supra* note 108, at 460.

169. I N.Y. P.S.C. ANN. REP. 15-16 (1926).

170. I N.Y. P.S.C. ANN. REP. 17-18 (1928).

171. I N.Y. P.S.C. ANN. REP. 16 (1929).

holding corporations,”¹⁷² the Commission recommended four amendments to the PSCL: (i) authority to inquire into the costs and profits accruing to “non-utilities” in connection with products or services provided to operating utilities “for disposition” to consumers; (ii) a definition of “holding company” as a company which controls an operating utility, either by majority stock ownership, or by lease, operating contracts, or voting trusts; (iii) Stock Holding Company annual and periodic reports, which would include details as to property, products, or services exchanged between controlled companies and associated costs and revenues; and (iv) authority to investigate relationships between Stock Holding Companies and operating utilities, such that activities (e.g., contracts and agreements) may be a matter of public record.¹⁷³ As reflected in the proposed amendments, *not* recommended were sweeping PSCL changes to bring Stock Holding Companies and upstream activities thereof within the general supervisory authority of the Commission. Meanwhile, in early 1929, a newly-elected Governor, Franklin D. Roosevelt, advocated for the Legislature’s establishment of a commission to study “the whole subject of the public utility field.”¹⁷⁴

In April 1929, the Legislature established a temporary commission (Revision Commission) to study the existing PSCL and make recommendations for any necessary changes.¹⁷⁵ In a 1930 report (1930 Report),¹⁷⁶ the Majority members of the Revision Commission proposed a number of changes to the PSCL, among them modest amendments in line with the PSC’s recommendations.¹⁷⁷ They made no recommendation that Stock Holding Companies be deemed “electrical corporations” or otherwise brought within the PSC’s general supervisory authority under PSCL §§ 2, 69, 70, or other provisions.¹⁷⁸ To the contrary, the Majority commissioners stated that their holding company recommendations “were designed primarily to provide complete information” to the PSC in connection with its authority over the accounts of operating companies.¹⁷⁹

A number of comments in the 1930 Report merit special attention. One Minority commissioner advocated for PSC oversight of Stock Holding Company securities, noting that the Commission’s current power under PSCL § 69 was “confined to operating utilities.”¹⁸⁰ The commissioner also noted the absence of Commission authority to regulate Stock Holding Companies directly.¹⁸¹ Majority members of the Revision Commission did not share his views regarding the stock capitalization of Stock Holding Company, instead recommending that the specific issue of holding company securities be tabled pending the results of the

172. I N.Y. P.S.C. ANN. REP. 16 (1928).

173. I N.Y. P.S.C. ANN. REP. 17-18 (1928); I N.Y. P.S.C. ANN. REP. 16 (1926). *See also* I N.Y. P.S.C. ANN. REP. 16 (1929).

174. MESSAGE OF THE GOVERNOR RECOMMENDING THE CREATION OF A COMMISSION FOR THE STUDY OF PUBLIC UTILITIES, N.Y. Leg. Doc. No. 84 (1929).

175. Act of Apr. 16, 1929, ch. 673, 1929 N.Y. Laws 1607.

176. *See 1930 COMMISSION REPORT*, *supra* note 143.

177. *Id.* at 27 (Maj. Rep.).

178. *Id.* at 7-8 (Maj. Rep.).

179. *Id.* (Maj. Rep.).

180. *Id.* at 215 (Min. Rep.).

181. *Id.* at 218 (Min. Rep.).

FTC investigation of public utility holding companies which had been on-going since 1925.¹⁸² Nor did the Majority members propose any general expansion of PSC authority over Stock Holding Companies. As noted by the Majority members, the Commission already had full supervisory authority under the PSCL, where appropriate, to regulate those Stock Holding Companies acting as alter-egos of operating subsidiaries:

The domination of operating companies by holding companies may in some instances be so complete that the holding company is actually engaged in public utility operation, in which case it should be subject to regulation as a public utility corporation. Where this state of facts actually exist [*sic*] we believe that such regulation may be applied under the present law through disregard of the corporate fiction.¹⁸³

Counsel to the Revision Commission agreed:

Where there is actual domination of one corporation by another through stock ownership, contract or otherwise, complete control and regulation is required and is justified in the opinion of many of the witnesses, because in such circumstances the dominating company is actually engaged in public service. In other words, in these cases, the corporate fiction may in effect be disregarded¹⁸⁴

In this same vein, Counsel offered the following opinion regarding securities regulation of Stock Holding Companies:

Those companies that are *actually controlling the operating policy* of the utility companies should be subject to complete control, but it would seem better that the control of the security issues of holding companies not falling within this category should be provided for, if at all, by some other agency than the [PSC].¹⁸⁵

Elsewhere, Counsel opined that except where majority stock holders were so dominating the affairs of the utility so as to be engaged in public utility operation, in “all other cases” stock issuances of Stock Holding Companies should not be subject to PSC review: “[I]t would seem better to leave the security issues of holding companies of other types to be controlled by other agencies than the [PSC], even though it may be true in some cases that undesirable financial practices in these companies may effect [*sic*] adversely the services or rates of operating companies.”¹⁸⁶

With respect to Stock Holding Companies, the Legislature shared the view of the Majority members of the Revision Commission that no substantial PSCL changes were warranted at that time. In 1930, it adopted two narrow PSCL amendments (now called PSL) – PSL § 110 (1) – (3), *Control of holding companies and of transactions between affiliated interests*,¹⁸⁷ and PSL § 111, *Additional information in annual reports; disclosure of stockholdings*¹⁸⁸ – granting the Commission access to additional information regarding ownership

182. *Id.* at 27-28 (Maj. Rep.). The U.S. Senate first commissioned the FTC to investigate electric holding companies in 1925 pursuant to S. Res. 329, 68th Cong. (Feb. 9, 1925). Upon receipt of the 1927 FTC report of that investigation, the U.S. Senate initiated yet another investigation, pursuant to S. Res. 83, 70th Cong. (Feb. 15, 1928), which continued until the FTC’s submittal of its last reports in 1935.

183. 1930 COMMISSION REPORT, *supra* note 143, at 27 (Maj. Rep.).

184. *Id.* at 144 (Counsel Rep.).

185. *Id.* at 71 (Counsel Rep.) (emphasis added).

186. *Id.* at 147-48 (Counsel Rep.).

187. Act of Apr. 24, 1930, ch. 760, § 1, 1930 N.Y. Laws 1372. *See also* Appendix.

188. *Id.* at ch. 761. *See also* Appendix.

of operating companies and transactions between operating companies and their owners and affiliates.

Subsequent to the 1930 PSL revisions, at the request of the Commission, and in apparent response to holding company abuses found by the Commission in connection with its PSL § 110 investigation of the relationships between Associated Gas and Electric and its New York State operating companies,¹⁸⁹ the Legislature enacted additional amendments to the PSL of comparable moderation. In this regard, while Stock Holding Companies had once provided funding to operating subsidiaries, in the wake of the Fall 1929 market crash operating subsidiaries had been required to provide funding to holding companies and affiliates.¹⁹⁰ In 1933, the Legislature adopted PSL § 106, *Approval of loans*, which, as existing in substantially the same form today, prohibits a public utility from making any loans or issuing other evidences of indebtedness to a direct or indirect stockholder without prior PSC approval.¹⁹¹ In 1934, the Legislature enacted PSL § 107, *Approval of the use of revenues*, which, as existing in substantially the same form today, prohibits a public utility from using public service revenues for any purpose other than its internal utility operations.¹⁹² As reflected in the legislative history, PSL § 106 was intended to regulate public-utility operating company loans to upstream entities, and PSL § 107 was intended to regulate public-utility operating company loans to lateral affiliates.¹⁹³

Also in 1934, the Legislature established another committee to conduct yet another investigation into public utility holding companies, including their security issuances, and into the efforts at the federal and state level to address continued holding company abuses.¹⁹⁴ In a report issued in early 1935,¹⁹⁵ the Committee proposed, inter alia, an amendment to SCL § 85, *Merger*. Under the existing statute, a corporation could merge a subsidiary company into itself only if it owned 100% of the stock thereof. Asserting that the consolidation of operating companies held by holding companies would tend to effectuate greater economies, more efficient management and rate reductions, the Committee recommended that SCL be revised to authorize mergers of operating companies into parent entities, subject to PSC approvals, even where the parent company owned less than the entire capital stock of the subsidiary. While the report made a number of other recommendations regarding increased PSC oversight of operating company activities,¹⁹⁶ no other suggestions were made regarding the

189. N.Y. State Elec. & Gas Corp., C7413 (N.Y. PSC June 14, 1932), reported in 47 N.Y. STATE DEP'T REP. 777 (1933).

190. I N.Y. P.S.C. ANN. REP. 14-15 (1932). See also I N.Y. P.S.C. ANN. REP. 14 (1933).

191. Act of Apr. 19, 1933, ch. 255, § 1, 1933 N.Y. Laws 737. See also Appendix.

192. Act of Apr. 24, 1934, ch. 283, § 1, 1934 N.Y. Laws 792. See also Appendix.

193. N.Y. LEG. BILL JACKET, ch. 283, 1934 N.Y. LAWS 5. See also I N.Y. P.S.C. ANN. REP. 28-30, 80-81(1939).

194. CONCURRENT RESOLUTION, N.Y. Legis. Doc. No. 96 (1934).

195. REPORT OF THE JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE PUBLIC UTILITIES, N.Y. Legis. Doc. No. 67 (1935).

196. *Id.* at 13.

expansion of PSC supervisory authority over holding company activities. In 1936, the Legislature adopted the merger recommendation.¹⁹⁷

In 1939, the Legislature finally repealed the geographical exclusion of PSL § 70's Third *Proviso*, and authorized "stock corporation" acquisitions of operating companies wherever located in New York State.¹⁹⁸ It made no attendant changes to the PSL.

VII. FEDERAL DEVELOPMENTS AND CONTINUED LEGISLATURE NON-ACTION

Meanwhile, in 1930, Governor Franklin D. Roosevelt made little public effort to conceal his disdain for the modest legislative changes to the reach of PSC authority over Stock Holding Companies:

In approving these feeble bills, offered by the Legislature as its only solution to the pressing problem of dealing with the great holding companies which dominate the public utilities, I wish to emphasize my belief that they are entirely inadequate. I am approving them only as temporary expedients.

. . . .

When the State first undertook to regulate the utilities it was dealing almost entirely with local operating properties. Today the situation has entirely changed. The State is dealing with great holding companies and many of the problems of protecting the small investor and the consumer now involve the operations of these mammoth corporations The people of New York State cannot afford to have the actual control of their public services pass to a few companies which are beyond the reach of the public service law. The present crisis in utility regulation is due to a great extent to the failure to control holding companies. Without power over these, regulatory statutes are without teeth.¹⁹⁹

Governor Roosevelt pressed again in 1931 and 1932 for greater oversight over Stock Holding Companies.²⁰⁰ The Legislature turned its back on his requests.

But where Governor Roosevelt had failed, President Roosevelt was to succeed. Having campaigned on a platform calling for the federal regulation of electric holding companies,²⁰¹ and having urged the United States Congress in his 1935 Annual Message to accomplish the same after almost a decade-long FTC investigation,²⁰² President Franklin D. Roosevelt must surely have savored that day in August 1935 when he signed into law the Public Utility Act of

197. Act of May 28, 1936, ch. 778, § 1, 1936 N.Y. Laws 1658 (formerly codified at SCL § 85 (repealed 1966)) (established a minimum parental stock ownership amount of 95%). As amended and appearing today in BCL § 905, the minimum percentage stock ownership amount is 90%. *See supra* note 42, for the statutory history of the transfer of SCL provisions to the BCL. In a related 1936 amendment, the Legislature also revised PSL § 69 to include provisions regarding the effect of PSC approvals of such mergers.) Act of May 29, 1936, ch. 816, 1936 N.Y. Laws 1714.

198. Act of June 8, 1939, ch. 784, 1939 N.Y. Laws 1846. *See also* Appendix.

199. STATE OF N.Y., PUBLIC PAPERS OF GOVERNOR FRANKLIN D. ROOSEVELT FORTY-EIGHTH GOVERNOR OF THE STATE OF NEW YORK 1930, at 290, 291 (1931) (emphasis added).

200. MESSAGE OF THE GOVERNOR RELATIVE TO PUBLIC UTILITY LEGISLATION, N.Y. Leg. Doc. No. 94 (1932); STATE OF N.Y., PUBLIC PAPERS OF GOVERNOR FRANKLIN D. ROOSEVELT FORTY-EIGHTH GOVERNOR OF THE STATE OF NEW YORK (SECOND TERM) 1931, at 42-43 (1937).

201. The "*Portland Speech*" – A Campaign Address on Public Utilities and Development of Hydro-Electric Power (Portland, Ore: Sept. 21, 1932), *reprinted in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 727 (1938).

202. 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 23 (1938).

1935,²⁰³ regarded by some as one of the most important legislations of the New Deal²⁰⁴ and better known today by names specified in its two inter-related titles: Title I – *Control of Public-Utility Holding Companies*, which was designated “Public Utility Holding Company Act of 1935” (1935 PUCHA),²⁰⁵ and Title II – *Amendments to Federal Water Power Act*, section 213 of which was designated the “Federal Power Act” (FPA).²⁰⁶ Title I generally provided for plenary SEC regulation of designated activities of inter-state holding companies owning or controlling, through stock ownership, voting authority, or otherwise, 10% or more of the voting securities of electric or gas utility companies, while Title II, section 213, generally provided for plenary Federal Power Commission (FPC) regulation of designated activities of inter-state electric utility companies. Among the most significant aspects of 1935 PUCHA, were its general requirement of SEC approval of direct *or indirect* acquisitions of interests in public utilities and its stipulated “simplification” of holding company systems, including the promotion of integrated public-utility systems, which in practice also meant the elimination of unnecessary sub-tier holding companies.²⁰⁷ Piggy-backing on this latter PUCHA mandate, FPA directed the FPC, inter alia, to divide the country into regional districts for the interconnection and coordination of facilities.²⁰⁸

By 1951, following a series of SEC PUCHA restructuring orders, associated shareholder litigation, and its divestiture of controlling interests in utilities, The United Corporation had become a closed-end, non-diversified management company under the Investment Company Act of 1940.²⁰⁹ Also by 1951, Niagara Hudson’s New York holding company system had collapsed, pursuant to SEC-ordered restructuring, into a single new operating company, Niagara Mohawk Power Corporation. Niagara Hudson thereafter dissolved.²¹⁰

203. 74th Cong., 1st Sess., ch. 687, Pub. L. No. 333, 49 Stat. 803 (1935).

204. JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET AND THE HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION IN MODERN CORPORATE FINANCE* 260 (1982), discussed in *ENERGY INFO. ADMIN., PUBLIC UTILITY HOLDING COMPANY ACT OF 1935: 1935 – 1992*, DOE/EIA - 0563, at 12 (Jan. 1993).

205. Public Utility Act of 1935, Title I, §§ 1-33, 49 Stat. 803-38 (formerly codified at 15 U.S.C. §§ 79 - 79z-6) (repealed 2005) (1935 PUCHA).

206. Public Utility Act of 1935, Title II, § 213, 49 Stat. 847-63 (currently codified at 16 U.S.C. §§ 824 - 824w) (2000 & Supp. 2010) (FPA).

207. 1935 PUCHA §§ 2(29), 9 & 11, 49 Stat. 810, 817, 820 (formerly codified at 15 U.S.C. §§ 79b(a)(29), 79i & 79k (repealed 2005)).

208. FPA § 202 (currently codified at 16 U.S.C. § 824a(a) (2000)).

209. Investment Company Act of 1940, *as amended*, 15 U.S.C. §§ 80a-1 – 80a-64 (2009). *In re United Corp.*, SEC PUCHA Release No.13194, 37 S.E.C. 187 (June 28, 1956); *In re United Corp.*, SEC PUCHA Release No.10643, 32 S.E.C. 500 (June 26, 1951); *In re United Corp.*, SEC PUCHA Release No.10614, 32 S.E.C. 378 (June 15, 1951), *approved*, 128 F. Supp. 725 (D. Del. 1955), *aff’d*, 232 F.2d 601 (3d Cir.), *cert. denied sub nom.* Gen. Protective Comm. v. United Corp., 352 U.S. 839 (1956). *See also* Downing v. SEC, 203 F.2d 611 (D.C. Cir. 1953), *aff’d in part, rev’d in part sub nom.* Gen. Protective Comm. v. SEC, 346 U.S. 521 (1954), *cert. denied*, 347 U.S. 930 (1954).

210. *In re Niagara Hudson Power Corp.*, SEC PUCHA Release No. 11667, 34 S.E.C. 518 (Jan. 14, 1953); *In re Niagara Hudson Power Corp.*, SEC PUCHA Release No. 10512 (Apr. 23, 1951); *In re Niagara Hudson Power Corp.*, SEC PUCHA Release No. 10083 (Sept. 7, 1950); *In re Niagara Hudson Power Corp.*, SEC PUCHA Release No. 9295 (Aug. 25, 1949); *In re Niagara Hudson Power Corp.*, SEC PUCHA Release No. 9270, 29 S.E.C. 773 (Aug. 16, 1949), *approved*, 86 F. Supp. 697 (N.D.N.Y. 1949), *rev’d in part sub nom.* SEC v. Leventritt, 179 F.2d 615 (2d Cir. 1950), *rev’d sub nom.* Niagara Hudson Power Corp. v. Leventritt, 340 U.S. 336 (1951) (affirming dist. ct. approval). *See also* Niagara Mohawk Power Corp., C14825 (N.Y. PSC June 29,

In the words of the PSC: “The formation of Niagara Mohawk Power Corporation marks one of the most important consolidations in the history of utilities in this state.”²¹¹

During this same time, intra-state Operating Holding Companies doing business in the City of New York had independent incentives to simplify their corporate structures. The City had imposed local taxes upon corporate revenues, including taxes upon intra-corporate transfers of earnings, which resulted in double and treble taxation upon Operating Holding Companies and prompted numerous petitions to the PSC for approvals of mergers and consolidations. In response both to 1935 PUCHA and the New York City tax law changes, the PSC adopted a 1936 policy statement setting forth its standards to govern utility “unification” plans under PSL § 70’s Second and Third *Provisos* and mergers and consolidations under SCL.²¹²

As early as 1928, Consolidated Gas had already embarked upon a course of corporate simplification via the elimination of sub-holding companies, the consolidation of operating companies, and the merger of operating companies into itself with PSC approvals, as required. Along the way, it renamed itself Consolidated Edison Company of New York, Inc., in 1936,²¹³ and ultimately acquired the capital stock of the remaining New York City electric operating companies, including the company serving Staten Island. In 1961, Consolidated Edison merged its last subsidiary into itself, at which time it ceased being a holding company. Upon this final act, Consolidated Edison represented the culmination of mergers, consolidations, and acquisitions of over ninety predecessor companies.²¹⁴

Apparently satisfied with the federal legislation, its own modest PSL amendments, and the results of both, the Legislature undertook no subsequent measures to expand PSC oversight over Stock Holding Companies in any substantive way.²¹⁵ To date, and notwithstanding the repeal of 1935 PUHCA as

1950), reported in I N.Y. P.S.C. ANN. REP. 427 (1950); I N.Y. P.S.C. ANN. REP. 33-39 (1949); I N.Y. P.S.C. ANN. REP. 18-19 (1948); Buffalo Niagara Elec. Corp., C12733 (N.Y. PSC May 5, 1948), reported in I N.Y. P.S.C. ANN. REP. 319 (1948); I N.Y. P.S.C. ANN. REP. 31-39 (1945).

211. I N.Y. P.S.C. ANN. REP. 33 (1949).

212. I N.Y. P.S.C. ANN. REP. 9-11, 41-44 (1936); II N.Y. P.S.C. ANN. REP. 724-26 (1936).

213. As of 1949, Consolidated Edison remained exempt from most 1935 PUHCA requirements, pursuant to the provisions of section 3 of the Act (formerly codified at 15 U.S.C. § 79c) and the implementing of SEC Rule U-2 promulgated thereunder. *In re* Consol. Edison Co. of N.Y., SEC PUHCA Release No. 8779 (Jan. 6, 1949).

214. I N.Y. P.S.C. ANN. REP. 81-85 (1961); Consol. Edison Co. of N.Y., C14916 (N.Y. PSC Feb. 14, 1951), reported in I N.Y. P.S.C. ANN. REP. 271 (1951); Consol. Edison Co. of N.Y., C14751 (N.Y. PSC Mar. 15, 1950), reported in I N.Y. P.S.C. ANN. REP. 335 (1950); I N.Y. P.S.C. ANN. REP. 29-31 (1945); Consol. Edison Co. of N.Y., C11639 (N.Y. PSC June 5, 1945), reported in I N.Y. P.S.C. ANN. REP. 543 (1945); I N.Y. P.S.C. ANN. REP. 42-48 (1937); I N.Y. P.S.C. ANN. REP. 44-46 (1936); II N.Y. P.S.C. ANN. REP. 876-77.

215. In 1946, pursuant to N.Y. Laws of 1946, ch. 962, the Legislature enacted statutory changes to address corporations in reorganization under PUHCA. In SCL § 26-a (repealed 1966), the Legislature purported to condition SEC-approved and federal court-ordered PUHCA reorganization plans of corporations under the jurisdiction of the Commission upon PSC approval of such plans. The statute of course carried no weight with the SEC and federal courts. *E.g.*, *In re* Kings Co. Lighting Co., 72 F. Supp. 767 (E.D.N.Y. 1947), *aff’d*, 166 F.2d 784 (2d Cir.), *cert. denied sub nom.* PSC v. SEC, 354 U.S. 838 (1948). See also I N.Y. P.S.C. ANN. REP. 63-64 (1947) (discussing PSC disagreement with the SEC-approved reorganization plan for a New York operating company).

part of Energy Policy Act of 2005,²¹⁶ and the enactment of a new, far less onerous PUHCA under the same Act,²¹⁷ the Legislature has not revisited the issue of Commission authority over Stock Holding Companies and the upstream activities thereof. Instead, it has continued to consign the regulation of Stock Holding Companies to the federal government.

VIII. LATER COMMISSION DIGRESSIONS

For some time after the PSCL amendments of the 1930's, Commissions continued to acknowledge the Legislature's withholding of PSC supervisory authority over Stock Holding Companies and the upstream activities thereof, except under a theory of alter-ego liability. In 1936, the Commission observed: "The State of New York has not attempted to bring holding companies under the jurisdiction of this Commission except so far as they are *directly involved in the affairs of* operating companies under our jurisdiction . . ." ²¹⁸ In 1937, the PSC recognized that while the Consolidated Edison system had as a parent entity an operating company under full Commission jurisdiction, the Niagara Hudson system had several holding companies at the top "which are not under the jurisdiction of the Commission."²¹⁹ In 1938, the PSC stated: "The Commission has practically no control over companies organized merely for the purpose of holding securities of other companies . . . but it has jurisdiction over operating companies and companies that are operating companies and holding companies."²²⁰ In 1954, in discussing a petitioner's reliance on prior PSC rulings, the Commission stated that:

[I]n each of the cases cited, the acquiring company was a holding company, over which the Commission had no jurisdiction, and therefore was powerless to regulate the prices paid [for operating companies] except as it might be incidental to the exercise of its discretion in granting or denying the [PSL § 70] application [for the acquisition of *operating company* securities].²²¹

In the aftermath of 1935 PUHCA-mandated restructuring, however, electric Stock Holding Companies virtually disappeared from the landscape in New York State. In time, the Commission's institutional knowledge of the history of Stock Holding Company (non)regulation in New York State also seemingly vanished, resulting in the PSC's deflection from prior judicial and institutional precedents. So it was that telecommunications precedents dating back to the mid-1980's, and based on nothing more than a reading of PSL language, came to inform future Commission policy with respect to newly-emerged electric Stock Holding Companies in the 1990's and the upstream activities thereof, rather than the history of electric Stock Holding Companies informing both. As a result, the PSC unwittingly began to assert jurisdiction over upstream activities of electric Stock Holding Companies under a theory of "pass-through" jurisdiction rejected

216. Energy Policy Act of 2005 § 1263, Pub. L. No. 109-58, 119 Stat. 974.

217. *Id.* §§ 1261-1277, Pub. L. No. 109-58, 119 Stat. 972-978 (currently codified at 42 U.S.C. §§ 16451 – 16463 (Supp. 2009)) (2005 PUHCA).

218. I N.Y. P.S.C. ANN. REP. 7-8 (1935) (emphasis added).

219. I N.Y. P.S.C. ANN. REP. 9 (1936).

220. I N.Y. P.S.C. ANN. REP. 9 (1937).

221. Kings Cnty. Lighting Co., C16853 (N.Y. PSC Dec. 21, 1954), *reported in* I N.Y. P.S.C. ANN. REP. 455 (1954).

by courts and earlier Commissions and, more recently, under a similarly-rejected theory of “electric corporation” regulation.

A. *Telecommunications Industry Restructuring*

In the 1960’s and 1970’s, the PSC’s telecommunications decisions under PSL provisions analogous to those pertaining to electric companies initially expressed the settled law discussed herein. Not only, according to the Commission, did it lack general supervisory authority over telephone Stock Holding Companies, inasmuch as they transact no business as “telephone corporations,” but also it had no jurisdiction over the upstream activities thereof.²²² In a 1973 case, the PSC pointedly emphasized that it was *powerless* to prevent the upstream acquisition of a Stock Holding Company owner of a telephone public utility company, Rochester Telephone Corporation.²²³ All this changed a decade later in the wake of the restructuring of the telecommunications industry. Between 1986 and 1993, the PSC formulated a theory of jurisdiction over upstream merger and acquisition activities of Stock Holding Companies owning indirect interests in telecommunications operating companies, whether public utilities or competitive providers. The theory was the previously-discredited “pass-through” jurisdiction.

As early as 1986, the Commission initially expressed the conclusory view that the language of the Third *Proviso* counterpart in PSL § 100 required its approval of upstream Stock Holding Company merger and acquisition activities.²²⁴ Not until 1989 did the PSC, for the first time, take a hard look at the question. In a proceeding concerning a hostile takeover attempt by McCaw

222. For example, in 1969 the PSC authorized Western Union’s establishment of a holding company, in part on the basis of the following findings of the hearing examiner: “After the reorganization, Western Union would continue to be subject to regulation as a common carrier as heretofore. *The operations of the Holding Company would not be subject to direct regulation since it would not be doing business as a common carrier . . .*” W. Union Tel. Co., C25332, 9 N.Y. P.S.C. 406, 416 (Dec. 9, 1969) (emphasis added). Similarly, in 1973 Tel-Page Corp. petitioned the PSC for authorization to separate its regulated activities from its unregulated activities through the establishment of a Stock Holding Company and the transfer of its unregulated activities to that company. The PSC granted Tel-Page’s petition on the basis of the following Staff recommendations:

The formation of a holding company *which would not be subject to Commission regulation* would permit a degree of diversification which could be prevented to a considerable extent if the entire operation were a telephone corporation It would, therefore, be in the public interest to form a separate corporation engaged only in the regulated utility business in this State and thus to facilitate regulation, even though this would permit the parent corporation to engage in other ventures without Commission approval.

Tel-Page Corp., C26356, 13 N.Y. P.S.C. 139, 148-49 (Jan. 23, 1973) (emphasis added).

223. In 1978, in denying a petition by Rochester Telephone Corp. for its establishment of a holding company structure, the PSC stated:

Even if we accept petitioners’ view that Rochester’s unquestioned success in its telephone operations presages equal success in unregulated competitive communications enterprises, we have no mechanism to assure Rochester’s ratepayers, whom we must protect, as to how long – and for what purposes – the present managers would operate the proposed holding company once it was created. One of the most striking differences between Rochester and the proposed holding company is that *neither the Commission nor petitioners themselves could prevent the holding company from being acquired by interest unrepresented in this proceeding*

Rochester Tel. Corp., C27015, Op. No. 78-5, 18 N.Y. P.S.C. 271, 273-74 (Mar. 27, 1978) (emphasis added).

224. *E.g.*, British Telecom USA Holdings, Inc., C89-C-027 (N.Y. PSC May 5, 1989); IDN, Inc., C29420 (N.Y. PSC Oct. 22, 1986).

Cellular Communications, Inc., to acquire the stock of LIN Broadcasting Corporation, both telecommunications Stock Holding Companies, the Commission adopted a theory of alter-ego liability – at least in connection with the assertion of jurisdiction over upstream merger and acquisition activities of Stock Holding Companies owning competitive (non-utility) operating companies. In the PSC’s view, “reasonable regulation” might require its selective intervention in upstream activities of such entities to treat separate corporations with common stock ownership as a single entity.²²⁵ On the other hand, the Commission stated, transactions involving indirect transfers of ownership interests in public utility companies would not be viewed under this standard. Instead, the acquisition of the entire stock of a Stock Holding Company owner of a fully regulated public telecommunications utility company would be jurisdictional *per se*. In adopting this *per-se* rule, the Commission apparently was unconcerned about the inconsistency of this ruling with *Rochester Telephone Corp.*, wherein the PSC had stated that it had no power over the transfer of ownership of an upstream parent company wholly owning a subsidiary public utility company. On the basis of the facts before it, the Commission concluded that McCaw’s acquisition of the entire stock of LIN would not be jurisdictional in the absence of facts demonstrating that LIN was the alter-ego of its subsidiary.²²⁶

The Commission in *McCaw* rejected out of hand the notion that mere upstream ownership of a competitive operating company rendered an entity a “telephone corporation,” thereby triggering the approval process under the Second *Proviso* counterpart in PSL § 100. Redolent of the 1926 case where New York – New Jersey Superpower had sought to be declared an “electrical corporation,” LIN had sought to be declared a “telephone corporation” under PSL § 2 in connection with its opposition to McCaw’s hostile tender offer. The PSC refused to do so:

This argument sweeps too broadly, because if LIN is a telephone corporation, every corporate parent of a telephone corporation would become subject to our authority. LIN’s ventures in commercial broadcasting and publishing, taken with the corporate layers between itself and the corporate grandchild holding an interest in [the operating subsidiary], refute its claim that it is a telephone corporation. Acceptance of LIN’s arguments also would be at variance with our rejection of a holding company structure for Rochester Telephone Corporation on the grounds that we could not adequately control the acquisition of the stock of the holding company.²²⁷

McCaw’s alter-ego theory of jurisdiction was short-lived. A few years later, in another proceeding involving McCaw, the PSC scrapped the concept as “unworkable,” thus rejecting the only lawful basis for the exercise of its powers over upstream transactions of Stock Holding Companies. Citing the difficulty in proving that the corporate layers between a parent and an operating company are mere shells,²²⁸ the Commission stated that “the current trends in the telecommunications industry toward formation of complex corporate structures through mergers and acquisitions” required adoption of a different, “reversed”

225. *McCaw Cellular Commc’ns, Inc.*, C89-C-116 (N.Y. PSC Oct. 25, 1989).

226. *Id.* at 6, *discussed in AT&T*, C93-C-0777 (N.Y. PSC Dec. 31, 1993).

227. *Id.* at 4-5.

228. *AT&T*, C93-C-0777, at 5 (overruling *McCaw* in part).

standard: “Absent proof that transfer of the stock of a holding company that indirectly has a controlling interest in a New York telephone corporation does not effectively constitute a transfer of an interest in such telephone corporation, we will assert jurisdiction over the transaction under [s]ection 100.”²²⁹ The PSC went on to adopt a quantitative test under this standard. Jurisdiction would attach where the upstream transaction has “the effect” of transferring more than 10% ownership in the *subsidiary operating company*. Thus, acquisition of 100% ownership interests in a parent entity wholly owning a subsidiary competitive operating company would always fall under Commission jurisdiction under this standard, while acquisitions of partial interests in upstream entities owning whole or partial interests in subsidiary competitive operating companies would require a mathematical analysis as to whether the effect of the acquisition would be the transfer of more than 10% ownership in the subsidiary.²³⁰

By 1993 the PSC, in this manner, had formulated a “pass-through” theory of jurisdiction under the Third *Proviso* counterpart in PSL § 100: the acquisition of ownership in an upstream entity is equivalent to the direct acquisition of an operating company whether a public utility or competitive entity – even if as many as six corporate layers exist between the upstream owner and the operating company – and would be jurisdictional where the indirect effect is to transfer ownership of more than 10% of the stock of the operating company.²³¹ “Pass-through” jurisdiction thereafter not only took hold in the telecommunications area, but expanded.

In a 1997 proceeding involving a proposed upstream merger transaction between two major telecommunications Stock Holding Companies (Bell Atlantic and NYNEX), the PSC asserted jurisdiction, inter alia, under PSL § 70’s First *Proviso* counterpart in PSL § 99(2). Inasmuch as the upstream merger would indirectly transfer the operating company’s works and systems to another parent company, the Commission concluded that Bell Atlantic’s acquisition of NYNEX required its authorization.²³² Without explanation or reference to *McCaw* or *Rochester Telephone Corp.*, the Commission also initially characterized Bell Atlantic as a “telephone corporation,” and asserted jurisdiction under PSL § 70’s Second *Proviso* counterpart in PSL § 100.²³³ Later, it invoked PSL § 100

229. *Id.* at 6.

230. *E.g.*, MCI Commc’ns Corp., C93-C-0862 (N.Y. PSC Dec. 31, 1993) (acquisition of a 20% interest in a Stock Holding Company held jurisdictional where no showing was made that the acquisition did not effectively constitute a transfer of more than 10% interest in an operating company subsidiary); AT&T (jurisdiction lay where the transaction involved AT&T’s acquisition of the entire outstanding stock of McCaw, which held through a wholly-owned subsidiary a 52% controlling interest in LIN Broadcasting Corp.; because LIN indirectly held a 93% interest in a non-monopoly operating company, McCaw held 46% control of the operating company; McCaw also indirectly owned a 25% interest in another non-monopoly operating company). *See also* Assoc. Group, Inc., C99-C-1596 (N.Y. PSC Jan. 5, 2000) (jurisdiction exercised over upstream transfer of indirect 39.5% equity interest in an operating company).

231. *E.g.*, MCI C93-C-0862 (N.Y. PSC Dec. 31, 1993); AT&T, C93-C-0777 (N.Y. PSC Dec. 31, 1993); MCI Commc’ns Corp., C90-C-0393 (N.Y. PSC Aug. 10, 1990); LIN Broadcasting, C89-C-1046 (N.Y. PSC Jan. 12, 1990).

232. N.Y. Tel. Co., C96-C-0603, Op. No. 97-8, at 12-13 (N.Y. PSC May 30, 1997) (long order (long order) expanding Mar. 21, 1997 order in the same proceeding (short order)).

233. *Id.* (short order) at 2.

generally, leaving unclear whether the Second *Proviso*, Third *Proviso*, or both counterparts in PSL § 100 applied.²³⁴

The most noteworthy aspect of these early telecommunication decisions for purposes of this Article lies in the absence of any discussion therein of the legislative, judicial, and institutional history of PSL § 70, on which PSL §§ 99(2) and 100 were modeled. In none of its decisions did the Commission express awareness of the extensive history of electric Stock Holding Companies in New York State, and the relevancy of such history to its present analyses. Inevitably, the judicially-rejected “pass-through” theory of jurisdiction adopted by the Commission in the telecommunications arena, and not this earlier history, crept into electric proceedings.

B. *Electric Public Utility Industry Restructuring*

On the heels of the nation-wide restructuring of the telecommunications industry, the restructuring of electric utility operating companies in New York State commenced, pursuant not to legislative enactments, but to PSC policy initiatives. In a series of decisions dating back to 1997, the PSC approved restructuring plans for investor-owned electric operating companies, under which the utilities would divest generation assets and separate their regulated and “unregulated” (competitive) business operations. The PSC authorized such separation to be accomplished through the formation of Stock Holding Companies, and the transfer of competitive business functions to such holding companies or to their “unregulated” subsidiaries.²³⁵ Soon thereafter, these new electric Stock Holding Companies were to learn that they would be subject to the same type of upstream regulation as telecommunications Stock Holding Companies.

In 2000, Consolidated Edison, Inc., the recently-formed Stock Holding Company owner of two public utilities in New York State (one being Consolidated Edison Company of New York, Inc.) and Northeast Utilities, a Stock Holding Company owning operating companies in New England, petitioned the PSC, inter alia, for clarification of whether a proposed upstream merger between them would require prior Commission approval under PSL § 70. Inasmuch as no jurisdictional assets of New York operating companies would be transferred, and no stock of New York operating companies would be acquired, the companies contended that the Commission should decline to assert jurisdiction over their proposed transaction. The PSC summarily rejected this jurisdictional challenge in a footnote, stating merely that PSL § 70 jurisdiction lay because the upstream merger would involve the indirect transfer of the common stock of two New York operating subsidiaries – i.e., “pass-through” jurisdiction.²³⁶ Significantly, the Commission did not specify which section 70

234. *Id.* (long order) at 5, 13.

235. *E.g.*, Niagara Mohawk Power Corp., C94-E-0098, Op. No. 98-8 (N.Y. PSC Mar. 20, 1998); N.Y. State Elec. & Gas Corp., C96-E-0891, Op. No. 98-6 (N.Y. PSC Mar. 5, 1998); Rochester Gas & Elec. Corp., C96-E-0898, Op. No. 98-1 (N.Y. PSC Jan. 14, 1998); Consol. Edison Co. of N.Y., C96-E-0897, Op. No. 97-16 (N.Y. PSC Nov. 3, 1997).

236. Consol. Edison, Inc., C00-M-0095, 96-E-0897, 99-E-1020, 00-E-1208, 00-E-1461, 2000 WL 33939169, at 2 n.1 (N.Y. PSC Nov. 30, 2000) (Op. No. 00-14).

Proviso(s) applied. Nor did the PSC refer to the extensive legislative, judicial, and institutional history contradicting its conclusion.

In the wake of this decision, other Stock Holding Companies, including National Grid and Iberdrola, have duly petitioned the PSC for PSL § 70 authorizations in connection with their upstream acquisitions of Stock Holding Companies owning electric utility operating companies in New York State.²³⁷ And in *Iberdrola*, the Commission appeared to invoke jurisdiction under all three *Provisos* of PSL § 70. Developments in connection with wholesale generators, their upstream owners, and investors have confirmed the PSC's intent in this regard.

C. Wholesale Generators and Their Owners

Between 1991 and 1994, in a proceeding involving Walkkill Generating Co., L.P., the PSC formulated a so-called "lightened regulation" regime for wholesale generators.²³⁸ While characterizing these entities as "electric corporations," the Commission determined that they should be accorded a lesser degree of regulation than public utility companies and laid down the contours of that lightened regulation under the various PSL provisions. PSL §§ 69 and 70 were among the statute's provisions deemed applicable to wholesale generators. In connection with the latter statute, the Commission, citing prior telecommunications decisions, ruled that upstream transactions involving the transfer of indirect ownership interests in wholesale generators would not be wholly outside the reach of its jurisdiction. As the PSC later explained, "pass-through" jurisdiction existed under PSL § 70: "[T]he acquisitions of the stock in the parent entities amounted to the acquisition of the ownership interests in the New York operating entities."²³⁹ In view of the need to avoid the chilling effect "unnecessary" regulation would have on investment in generation projects, however, the Commission stated that it would adopt a presumption that PSL § 70 review would not be undertaken of such upstream transactions unless there is a "potential for harm to the interests of captive utility ratepayers sufficient to override the presumption."²⁴⁰

In reaching these conclusions, the PSC again expressed no awareness of the years of legislative, judicial, and institutional history refuting its assertion of authority over upstream transactions of Stock Holding Companies. Nor did the Commission explain its intended application of each of the three section 70 *Provisos* to upstream transactions. Rather, the PSC simply stated that PSL § 70 jurisdiction exists. Following *Walkkill*, upstream owners of wholesale generators have routinely sought and received declaratory rulings from the Commission that their upstream merger and stock acquisition transactions would receive no

237. *E.g.*, Energy E. Corp., C01-M-0404 (N.Y. PSC Feb. 27, 2002); Niagara Mohawk Holdings, Inc., C01-M-0075, Op. No. 01-6 (N.Y. PSC Dec. 3, 2001).

238. Walkkill Generating Co., C91-E-0350, Order Establishing Regulatory Regime (N.Y. PSC Apr. 11, 1994) & Declaratory Ruling (N.Y. PSC Aug. 21, 1991).

239. Sithe Energies, Inc., C00-E-1585, at 5 (N.Y. PSC Nov. 16, 2000).

240. Walkkill Generating Co., C91-E-0350, Order Establishing Regulatory Regime (N.Y. PSC Apr. 11, 1994), at 13-14.

further review under “PSL § 70” under the so-called Wallkill presumption²⁴¹ – that is, until *Entergy*.

Entergy Corporation, like many other Stock Holding Company owners of direct or indirect interests in New York State wholesale generators, had filed a petition which, inter alia, invoked the Wallkill presumption, and sought a declaratory ruling that no further PSL § 70 review would be undertaken regarding a proposed spin-off of indirectly-owned New York State nuclear operating companies to a new entity, Enexus Energy Corporation. The petition also sought PSL § 69 approvals for collateral the operating companies would provide as security for the debt financing of Enexus. Rather than granting the requested relief, as it routinely had done for other Stock Holding Companies pursuant to its so-called “lightened regulation” regime, the PSC instituted an unprecedented investigative inquiry. In prior proceedings, the Commission’s *Wallkill* inquiry regarding impacts to captive ratepayers had focused primarily on whether horizontal or vertical market power concerns existed.²⁴² In *Entergy*, the Commission for the first time issued an order directing further *Wallkill* inquiry into the capitalization and long-term financial status of an upstream Stock Holding Company, i.e., Enexus. Following an almost year-long investigative proceeding, the Commission, as previously noted, voted to deny PSL § 70 authorization, primarily on the ground that Enexus’s initial capitalization and longer term debt ratio failed to meet the “public interest” standard under that statute. Pursuant to some unspecified supervisory authority, it has now required Entergy and its New York operating companies to show cause why they should not be required to provide prior notice to the Commission’s designee of certain types of upstream transactions – in response to which notice the PSC presumably would take some unspecified action.

As discussed herein, New York State courts and prior Commissions have held that no PSC jurisdiction exists over transfers of upstream ownership interests in Stock Holding Companies. Further, as expressed in the legislative history and institutional precedents, PSL jurisdiction is non-existent over the capitalization and financing of Stock Holding Companies. The Commission’s orders in these proceedings involving the upstream activities of Entergy, Enexus, and other Stock Holding Companies are thus wholly lacking in legal support.

D. *Investors and Other Minority Owners*

The *Wallkill*-related proceedings before the Commission usually involve transfers of all or a majority of ownership interests in upstream entities owning subsidiary wholesale generators. But in 2007 and 2008 the Commission faced a number of PSL § 70 filings regarding the acquisitions of minority ownership interests in Stock Holding Companies, including acquisitions by investment companies and funds.²⁴³ In this context, and as recently reaffirmed in the

241. *E.g.*, SUEZ Energy Astoria, L.L.C., C09-E-0750 (N.Y. PSC Dec. 23, 2009); Empire Generating Co., C07-E-1390 (N.Y. PSC Feb. 19, 2008); PSEG Power N.Y. Inc., C05-E-0336 (N.Y. PSC Aug. 24, 2005); Astoria Energy, L.L.C., C04-E-0058 (N.Y. PSC Mar. 26, 2004).

242. *E.g.*, cases cited *supra* note 241.

243. *E.g.*, Harbinger Capital Partners Master Fund I, C08-E-0850 (N.Y. PSC Sept. 19, 2008); Harbinger Capital Partners Master Fund I, C08-E-0397 (N.Y. PSC June 23, 2008); LS Power Dev., C08-E-0410 (N.Y. PSC May 27, 2008); Calpine Corp., C07-E-1385 (N.Y. PSC Jan. 22, 2008).

Generic Proceeding Order, the PSC made a number of sweeping rulings regarding its putative jurisdiction under PSL § 70, pushing the “pass-through” theory of jurisdiction to new heights. For the first time in the history of the PSL, investors in upstream Stock Holding Companies could fall within the scope of Commission jurisdiction. Also for the first time, the PSC anatomized PSL § 70, explaining at some length the putative bases for jurisdiction over upstream transactions under each of the three *Provisos*. Again the Commission was blind to history.

First, the Commission ruled that PSL § 70’s First *Proviso*, PSL § 70(1), applies to upstream acquisitions of ownership interests in a Stock Holding Company where such transfer would “effectuat[e] a transfer of control, and thereby a transfer of ownership” of a subsidiary wholesale generator of such company.²⁴⁴ Under this standard, in the Commission’s view, transfers of greater than 10% ownership interests in a Stock Holding Company might fall under PSL § 70’s First *Proviso*, along with transfers of smaller ownership interests where there is some indicia of direct or indirect control over the operations of a subsidiary wholesale generator.²⁴⁵ The PSC thus articulated a “pass-through” theory of jurisdiction under PSL § 70’s First *Proviso*, i.e., an upstream transfer of ownership interests in a Stock Holding Company could be equivalent to the transfer of the “franchise, works, or system” of an indirectly owned operating subsidiary. As previously discussed, not only had prior Commissions and courts consistently rejected the concept that acquisitions of upstream interests included implied acquisitions of ownership interests in subsidiary companies, but also New York State courts had specifically held that acquisitions of upstream stock interests do not amount to acquisitions of the assets of subsidiary operating companies.²⁴⁶ Earlier Commissions, as noted, had also stated that the First *Proviso* applied to direct transfers by operating companies, and had never applied it to upstream Stock Holding Company transactions.

Second, the Commission held that PSL § 70’s Second *Proviso*, PSL § 70(3), might be triggered where a Stock Holding Company which already owns greater than 10% interests in another Stock Holding Company, or which, regardless of the size of its ownership interests, directly or indirectly controls the operations of subsidiary generation facilities, seeks to acquire upstream ownership interests of any size in another Stock Holding Company.²⁴⁷ The PSC, citing PSL § 2, concluded that such an acquiring Stock Holding Company might be deemed an “electric corporation.” It bears mention here that the Second *Proviso* specifies no ownership interest threshold. Under the Commission’s ruling, the acquisition of an interest of any size in a Stock Holding Company by an entity determined to

244. Calpine Corp., C07-E-1385, at 10-11. While the PSC in Calpine cited Sithe Energies as its source for the change in “control” standard, that decision contains no such discussion. It speaks solely in terms of “ownership.” *Accord: Generic Proceeding Order, supra* note 6, at 5-6.

245. *Generic Proceeding Order, supra* note 6, at 5-7. *See also* Calpine Corp., C07-E-1385, at 10-11.

246. N.Y. State Elec. Corp. v. PSC, 227 A.D. 18, 22, 236 N.Y.S. 411, 416 (N.Y. App. Div. 1929), *appeal dismissed*, 260 N.Y. 32, 182 N.E. 237 (1932).

246. N.Y. State Elec. Corp. v. PSC, 227 A.D. 18, 22, 236 N.Y.S. 411, 416 (N.Y. App. Div. 1929), *appeal dismissed*, 260 N.Y. 32, 182 N.E. 237 (1932).

247. *Generic Proceeding Order, supra* note 6, at 6. *See also* Harbinger Capital Partners Master Fund I, C08-E-0850; Harbinger Capital Partners Master Fund I, C08-E-0397; LS Power Dev., C08-E-0410; Calpine Corp., C07-E-1385.

be an “electric corporation” would require prior approval. Presumably, such a status would also subject the entity to a “lightened regulation” regime requiring, e.g., PSL § 69 authorizations prior to the upstream entity’s issuance of long-term debt or securities. Less clear under the Commission’s rulings is whether a Stock Holding Company with majority or greater ownership interests in a fully-regulated public utility subsidiary, such as National Grid, Iberdrola, or Consolidated Edison, Inc., would be subject to regulation as an “electric corporation” and, if so, under the “lightened regulation” regime developed in the context of an emerging wholesale generation market or under some other type of regulatory regime.

The Commission thus adopted a particularly problematic “pass-through” construction of PSL § 2 and the Second *Proviso*, i.e., the status of operating subsidiaries would be imputed to parent Stock Holding Companies and regardless of the level of direct or indirect ownership such Stock Holding Companies hold in the operating subsidiaries. New York-New Jersey Superpower and other early Stock Holding Companies would have undoubtedly been thrilled if courts and Commissions had nullified the prior prohibitions of the Third *Proviso* by declaring Stock Holding Companies indirectly owning operating properties to be “electric(al) corporations” under the Second *Proviso*. They did not, however.

In *New York State Electric Corp.*, neither the courts, the Commission, nor any petitioning party characterized an Associated Gas and Electric subholding company owning pre-existing interests in an Operating Holding Company as an “electrical corporation” under the Second *Proviso* eligible to acquire, directly or indirectly, operating properties in the City of New York. That case turned solely on the application of the Third *Proviso*. Further, and as previously noted, in *New York-New Jersey Superpower* the court held that pursuant to PSL § 2 and the Second *Proviso*, an acquiring entity must be *functioning* as an “electrical corporation,” actually owning, operating, or managing electric facilities.²⁴⁸

Third, the PSC ruled that PSL § 70’s Third *Proviso*, PSL § 70(4), applies to the acquisition of a more than 10% ownership interest in a Stock Holding Company by any entity.²⁴⁹ In this respect, the Commission seemingly unknowingly departed from its early telecommunications precedents. The rationale in those cases for the assertion of jurisdiction over upstream stock acquisitions, whether of majority or minority interests, turned on the PSC’s reading of the language of the PSL which refers to the acquisition of a greater than 10% interest in an *operating* company. Under their application of “pass-through” jurisdiction, prior Commissions analyzed whether an acquisition of stock in an upstream telecommunications Stock Holding Company effected a

248. See also *N.Y. State Cable Television Ass’n v. PSC*, 87 A.D.2d 288, 452 N.Y.S.2d 714 (N.Y. App. Div. 1982) (an entity which neither owns, operates, or manages telephone lines is not a “telephone corporation” subject to PSC jurisdiction by virtue of its mere status as a subsidiary of a regulated “telephone corporation”); *City of Rochester v. PSC*, 275 A.D. 172, 175-76, 89 N.Y.S.2d 545, 549 (N.Y. App. Div. 1949), *aff’d*, 301 N.Y. 801, 96 N.E.2d 192 (1950) (“The test is the method and scope of operations, not what its charter may say or what its previous corporate history may have been”) (discussing PSL § 2’s definition of “omnibus corporation”).

249. *Generic Proceeding Order*, *supra* note 6, at 2. See also *Harbinger Capital Partners Master Fund I*, C08-E-0397, at 5-6 (effective July 2009, the Legislature amended PSL § 70 to define “stock corporation” as including all business forms); *Calpine Corp.*, C07-E-1385, at 16.

transfer of a more than 10% ownership interest in an *operating subsidiary*.²⁵⁰ In the investment company cases, the Commission adopted an even more attenuated concept of “pass-through” jurisdiction, i.e., the acquisition of a greater than 10% ownership interest in a Stock Holding Company was equivalent to the acquisition of a greater than 10% ownership interest in the downstream operating company, however many levels such Stock Holding Company was removed from the operating company and regardless of the size of the ownership interest associated with each level. Earlier Commissions and courts had rejected this position – except in the case of alter ego liability. PSL § 70’s Third *Proviso* applies only to *direct* acquisitions of interests in operating companies. “The Legislature has drawn the line at direct holdings.”²⁵¹

Since 2008, investment companies and funds, such as T. Rowe Price and China Investment Bank, have duly filed petitions for declaratory rulings with the PSC in connection with acquisitions of ownership interests in Stock Holding Companies.²⁵² In light of the recent *Generic Proceeding Order*, such petitions will surely continue to be filed.

E. Missed Opportunities

In 2005, in the context of a jurisdictional challenge made in a merger petition filed by Verizon and MCI, the PSC reviewed only some of the early electric Stock Holding Company history including portions of the 1930 Report and some Commission precedents involving holding company acquisitions of *direct* interests in electric operating companies.²⁵³ The Commission undertook no de novo review of its jurisdictional authority under the PSL. Instead, the Commission seemed to place the burden on the petitioners to disprove the existence of jurisdiction.²⁵⁴ According to the PSC, the petitioners failed to carry that burden. As a result, the PSC once again invoked “pass-through” jurisdiction.²⁵⁵ The Commission’s decision is noteworthy for what it omits. Nowhere did the Commission discuss its earlier non-involvement in the upstream stock acquisition activities of Buffalo Niagara, Mohawk Hudson, Niagara Hudson, and The United Corporation; the narrowness of the 1930 Report recommendations; the prior Commission recommendations to the Legislature and subsequent statutory amendments; the positions expressed by earlier Commissions in Annual Reports to the Legislature; and the consistent line of judicial and institutional precedents confirming the absence of PSL § 70 authority over upstream Stock Holding Company mergers, acquisitions, and restructurings. Nor did the PSC address more recent New York State court telecommunications decisions which tacitly reaffirmed earlier precedents which

250. *City of Rochester*, 275 A.D. at 175-76, 89 N.Y.S.2d 545, 549.

251. *Weis v. Coe*, 180 Misc. 321, 323, 44 N.Y.S.2d 791, 792 (N.Y. Sup Ct. 1943) (holding that indirect ownership interests in operating companies fall outside the Third *Proviso*).

252. *E.g.*, Strategic Value Partners, L.L.C., C09-E-0144 (N.Y. PSC Apr. 22, 2009).

253. *Verizon Commc’ns, Inc.*, C05-C-0237, at 13-16 (N.Y. PSC Nov. 22, 2005).

254. *Id.* at 15 n.32 & 17.

255. *Id.* at 16-20.

held that the PSC confers no “pass-through” jurisdiction upon the Commission.²⁵⁶

In 2009, and apparently at the initiation of the PSC, the Legislature amended PSL § 70, *inter alia*, to clarify in the Third *Proviso*²⁵⁷, that “stock corporation” includes all forms of business organization including limited liability companies. No attendant changes were made to the PSL, such as to expand the PSL § 2(13) definition of “electric corporation” to include upstream owners of operating companies, or to revise PSL § 70(4) to include direct *or indirect* stock acquisitions. Among the documents comprising the legislative history of the amendment, appear memoranda by the legislative sponsors and by the Commission.²⁵⁸ None of the materials addressed the applicability of PSL § 70 to upstream Stock Holding Company activities. To the contrary, the materials spoke only in terms of acquisitions of stock in operating companies.²⁵⁹

Each of these two matters presented missed opportunities for a thorough examination of the current limits and permitted reach of Commission authority under the PSL.

IX. CONCLUSION

No doubt passionate arguments exist in favor of, and in opposition to, the regulation of the upstream activities of holding companies owning interests in operating companies. As history has demonstrated, some holding company structures might place a high premium on strong earnings and dividends performance, which could be at the expense of capital investments in infrastructure and funding for operations and maintenance. Such pressure could result in excessive rates and charges, degraded service quality, or both. Although state commissions exercise full supervisory authority over operating company subsidiaries of Stock Holding Companies, absent the proactive monitoring of, and intervention in, the business affairs of complex holding company systems, regulators can only “react” once operating company problems surface, as the PSC seemed to recognize in *National Grid*, *Iberdrola*, and *Entergy*.

At the same time, as discussed herein, a Stock Holding Company, not organized to provide public service or otherwise operate as an operating company, and whose activities might occur far upstream from any subsidiary

256. *E.g.*, N.Y. Tel. Co. v. PSC, 258 A.D.2d 234, 695 N.Y.S.2d 191 (N.Y. App. Div. 1999), *rev'd on other grounds*, 95 N.Y.2d 40, 731 N.E.2d 1113, 710 N.Y.S.2d 305 (2000) (holding that a company’s proposed transfer of ownership of subsidiary cannot be attributed to a parent company for purposes of PSL § 99, the sister statute of PSL § 70(3); no “pass-through jurisdiction” exists) (holding also that an entity’s status as a wholly owned subsidiary of a regulated entity will not of itself subject the subsidiary to PSC jurisdiction); N.Y. State Cable Television Ass’n v. PSC, 87 A.D.2d 288, 452 N.Y.S.2d 714 (N.Y. App. Div. 1982) (holding that a telephone corporation’s subsidiary which neither owns, operates, or manages telephone lines is not a “telephone corporation” subject to PSC jurisdiction by virtue of its mere status as a subsidiary of a regulated entity).

257. Now designated PSL § 70(4).

258. N.Y. LEG. BILL JACKET, N.Y. Laws of 2009, ch. 226.

259. As reflected in the *Generic Proceeding Order*, the PSC appears to view the amendment as validating its exercise of supervisory authority over acquisitions of upstream controlling interests in Stock Holding Companies. Nothing in the language of the amended statute, or in the legislative history, supports such a construction.

New York State operating company and in multiple states or countries, cannot validly be made the subject of significant regulation under the PSL, as currently designed and structured, or under other state public service laws modeled thereafter. Nor should a Stock Holding Company be made subject to multiple potentially conflicting regulations by state utility commissions, as recognized in the 1930 Report. The regulation of upstream entities as “electric corporations” also could have a chilling effect on investments in securities of such entities, placing them at a disadvantage vis-à-vis other companies with respect to the attraction of low-cost capital and impairing their ability to provide or facilitate financing for their operating companies. As Counsel to the 1930 Revision Commission questioned, is the PSC even the appropriate agency to pass judgment on certain matters, such as the capitalization of a distant upstream Stock Holding Company – particularly one organized under the laws of a foreign jurisdiction and whose capitalization is authorized under such laws? As the Commission opined in 1936, is it in fact “impossible” for New York State, or any other state, to supervise the operations of inter-state or international Stock Holding Companies?

This Article has taken no position on the relative merits of regulating upstream activities of Stock Holding Companies. It is merely a disquisition on the absence of legislatively-delegated authority in support of the PSC’s exercise of the powers it currently wields over Stock Holding Companies, except under a theory of alter-ego liability, a jurisdictional basis which, while jettisoned by a former Commission, is still recognized by New York State courts.²⁶⁰ And it is the Legislature which draws the line on jurisdiction matters under the PSL, not the Commission.²⁶¹

In contrast to the recent decisions of the PSC, this Article shows that Commission authority over Stock Holding Companies, as set forth in the current PSL, is narrowly confined to (i) *direct* acquisitions of ownership interests in operating companies under PSL § 70(4); and (ii) rights of access to certain types of information regarding *direct* relations of holding companies and/or affiliates with operating companies under PSL §§ 5(1)(h), 110, and 111. PSC invocations of “pass-through” jurisdiction and “electric corporation” regulation of Stock Holding Companies fall far outside the authorized parameters of the PSL. To the extent other states have adopted the PSL, the commissions of such states would also seem to possess similarly limited authority over upstream activities of Stock Holding Companies, absent intervening amendments adopted by the legislative bodies of such jurisdictions.

In 1930, the Majority members of the Revision Commission recommended that the matter of holding company capitalization practices be re-examined upon completion of the FTC’s investigation into the practices of public utility holding companies. To date, the Legislature has revisited none of the important decisions it made in the 1930’s to constrain Commission authority over upstream

260. *N.Y. State Cable Television Ass’n*, 87 A.D.2d 288, 452 N.Y.S.2d 714 (held that where there was no evidence that a telephone corporation’s subsidiary had been treated by the parent as its instrumentality, the subsidiary could not be deemed a “telephone corporation” solely by virtue of its status as a subsidiary of such parent telephone corporation).

261. *Everett v. Phillips*, 288 N.Y. 227, 236, 43 N.E.2d 18, 21 (1942). *See also Weiss*, 180 Misc. 321, 44 N.Y.S.2d 791.

activities of Stock Holding Companies, thereby leaving the regulation of Stock Holding Companies and the upstream activities thereof exclusively to the federal government.²⁶² As a result, the PSL remains largely frozen in a time where the perceived nemesis was the great Operating Holding Company systems in the City of New York, not Stock Holding Companies, as then-Governor Franklin D. Roosevelt observed decades ago. The objective of the PSL is today, and has always been, the regulation of *operating* companies, including Operating Holding Companies: “The Public Service Commission was established for the purpose of regulating corporations who rendered service to the public for which they were entitled to charge, that they might be required to render adequate service for a reasonable compensation.”²⁶³ If New York State wishes regulatory oversight over upstream activities of Stock Holding Companies to exist along the lines sought to be drawn by the current Commission, the Legislature should enact appropriate PSL amendments based upon a consideration of all relevant issues. The immediate goal should be to commence forthwith the public process to entertain views on the question whether the Commission should be rebranded under the PSL into a regulatory body with supervisory or other expanded authority over Stock Holding Companies and their upstream activities. The Legislature could establish an independent commission for this purpose. The Commission, for its part, could initiate a new proceeding to study the matter of its authority, and make any appropriate recommendations to the Legislature. Representatives of affected industries could engage New York State legislators or their staffs. Meanwhile, practitioners involved in upstream transfers of indirect ownership interests in New York State electric and/or gas operating companies will likely continue to deem necessary, or desirable, the receipt of prior Commission authorizations of their clients’ activities.

262. *City of N.Y. v. Interborough Rapid Transit Auth.*, 257 N.Y. 20, 38-39, 177 N.E. 295, 301-02 (1931) (stating that where the legislative history is adverse to a position claimed by a governmental agency, “courts ought not to interpret [the statute] differently from the body which produced it,” and the contrary agency argument “becomes wholly inadmissible”); *N.Y. Edison Co. v. Maltbie*, 244 A.D. 685, 692, 281 N.Y.S. 223, 230-31 (N.Y. App. Div. 1935), *aff’d*, 271 N.Y. 103, 2 N.E.2d 277 (1936) (*per curiam*) (“The brief of counsel calls attention to the refusal of the Legislature in both 1930 and 1931 to enact a statute granting the power now sought to be exercised by the Commission The failure by the Legislature to adopt the statute indicates a legislative intent not to grant the broad powers which the Commission here seeks to exercise”). *See also* N.Y. STAT. LAWS § 124 (McKinney 1971) (statutory interpretation includes the review of attempted amendments).

263. *State v. Prendergast*, 202 A.D. 308, 313, 195 N.Y.S. 815, 819 (N.Y. App. Div. 1922).

APPENDIX – KEY PSL PROVISIONS

Of the many provisions existing in early PSCLs and later in PSL, only six relate to the issue of Commission jurisdiction *vel non* over Stock Holding Companies and the upstream activities thereof. Only these six have been cited over the past century by Commissions and New York State courts in support, or disavowal, of such authority.

i. PSL § 2(13), *Definition of “Electric Corporation”*

PSCL 1907 expanded the definitions originally contained in 1905 Law to add the term “electrical corporation,” which included delivery corporation, company, association, joint-stock association, partnership, and person, their lessees, trustees or receivers appointed by any court whatsoever . . . owning, operating, managing, or controlling any plant or property for generating and distribution, or generating and selling for distribution, or distributing electricity for light, heat, or power, or for the transmission of electric current for such purposes.

In 1910, a definition of “electric plant” was added, for the apparent purpose of describing the “plant or property” originally set forth in the 1907 legislation. As subsequently revised, and expanded to include various exceptions, these core terms appear today substantially unchanged in N.Y. PSL §§ 2 (12) & (13):

12. The term “electric plant,” . . . includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.

13. The term “electric corporation,” . . . includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers . . ., owning, operating or managing any electric plant

ii. PSL § 5, *Jurisdiction, Powers and Duties of Public Service Commission*

PSCL 1907 included section 5, *Jurisdiction of commissions*, which vested the Commissions with general authority over “the manufacture, sale or distribution of gas and electricity for light, heat and power in said district, and to the persons or corporations owning, leasing, operating or controlling the same.” 1907 PSCL § 5(e). As amended in 1910 PSCL, this section was revised to include a reference to Commission authority over “electric plant.” As subsequently renumbered, these core terms appear today substantially unchanged in N.Y. PSL § 5(1)(b):

1. The jurisdiction, supervision, powers and duties of the [PSC] shall extend . . . :

b. To the manufacture, conveying, transportation, sale or distribution of gas . . . and electricity for light, heat or power, to gas plants and to electric plants and to the persons or corporations owning, leasing or operating the same.

PSCL 1910 also expanded section 5 to confer authority upon the Commissions over upstream owners of majority stock interests in operating companies. As codified in 1910 PSCL § 5 (4), a corporation or person owning or holding a majority of the stock of an “electrical corporation” would be subject to PSC supervision with respect to “relations” between such owner and the gas and/or electrical corporation, and to the extent “such relations arise from or by reason of such ownership or holding of stock thereof or the receipt or holding of any money or property of the regulated entity, or by reason of any contract between them.” As to those stated relations, the accounts and records of majority stockholders would be subject to Commission examination, and such persons or corporations would be required to furnish reports and information as directed. This provision is codified today in substantially the same form in N.Y. PSL § 5(1)(h):

1. The jurisdiction, supervision, powers and duties of the [PSC] shall extend . . . :
- h. A corporation or person owning or holding a majority of the stock of a . . . gas corporation or electrical [*sic*] corporation subject to the jurisdiction of the [PSC] shall be subject to the supervision of the [PSC] in respect of the relations between such . . . gas corporation or electrical [*sic*] corporation and such owners or holders of a majority of the stock thereof in so far as such relations arise from or by reason of such ownership or holding of stock thereof or the receipt or holding of any money or property thereof or from or by reason of any contract between them; and in respect of such relations shall in like manner and to the same extent as such . . . gas corporation or electrical [*sic*] corporation be subject to examination of accounts, records and memoranda, and shall furnish such reports and information as the [PSC] shall from time to time direct and require, and shall be subject to like penalties for default therein.

In adopting this new provision, the Legislature made no revisions, either in 1910 or at any time thereafter, to add a definition for “holding company,” or to expand the definition of “electric corporation” to include shareholders (majority or otherwise), parent companies, or holding companies among the list of jurisdictional entities. Thus the Legislature has not expanded the list of third party affiliates in PSL § 2(13), i.e., lessees, trustees, and receivers, to include shareholders, parent companies, holding companies, or the like.

iii. PSL § 69, *Approval of Issues of Stock, Bonds, etc.*

The 1905 Law included section 12, *Approval of issue of stock and bonds*, which generally required Gas Commission approval of any stocks or bonds issued by any corporation “hereinafter incorporated which is subject to the supervision of the commission.” That approval, in turn, involved Gas Commission certification of the amount of stock or bonds “reasonably required for the purposes of the corporation,” which amount could not be exceeded by the corporation. For this purpose, the 1905 Law conferred plenary authority upon the Gas Commission to determine the “value of the property and franchises owned and operated by such corporation.”

The approval requirement under section 12 found its way into 1907 PSCL as part of section § 69, *Approval of issues of stock, bonds and other forms indebtedness*. But the new section 69 also modified the 1905 Law to narrow the reach of PSC authority, requiring approval only of debt instruments payable more than twelve months from issuance and limiting section 69’s reach to only

those gas or electrical corporations “organized or existing or hereinafter incorporated, under or by virtue of the laws of the State of New York.” 1907 PSCL also specified the authorized purposes for stock and bond issues, which purposes the Legislature would expand in subsequent years. As subsequently modified from time to time, these core terms appear today in substantially the same form in N.Y. PSL § 69:

A gas corporation or electric corporation organized or existing, or hereafter incorporated, under or by virtue of the laws of the state of New York, may issue stocks, bonds, notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof for [stated purposes]; provided and not otherwise that there shall have been secured from the commission an order authorizing such issue, and the amount thereof

iv. PSL § 70(1) (“*First Proviso*” – *Electric Corporation Transfer of Franchises, Works and Systems*)

The 1905 Law included section 13, *Approval of transfer of franchise*, which, inter alia, required a corporation under the Gas Commission’s supervision to obtain prior written consent to the “transfer or lease [of] its franchise, works, system or property or any part [thereof] to any other person or corporation.” 1907 PSCL codified section 13 substantially unchanged into the first, un-enumerated portion of Section § 70, *Approval of transfer of franchise (First Proviso)*. As amended later to carve out exclusions from its requirements, 1907 PSCL § 70’s *First Proviso* appears unchanged today in N.Y. PSL § 70(1): “No gas corporation or electric corporation shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person or corporation . . . without the written consent of the commission. . . .”

v. PSL § 70(3) (“*Second Proviso*” – *Electric Corporation Acquisition of Stock in another Electric Corporation*)

Section 13 of the 1905 Law contained another restriction, forbidding a corporation “subject to the general supervision” of the Gas Commission from “directly or indirectly” acquiring the stock or bonds of “any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality” except with prior Gas Commission authorization. 1907 PSCL and later PSCLs and PSL incorporated this portion of section 13 substantially unchanged, and un-enumerated, into section 70 (*Second Proviso*). Today, the *Second Proviso*, as codified in N.Y. PSL § 70 (3), states:

No [gas or electric] corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, in this state or any other state, or proposing to operate or operating under a franchise from the same or any other municipality, . . . unless authorized so to do by the commission.

vi. PSL § 70(4) (“*Third Proviso*” – *Stock Corporation Acquisition of Stock in an Electric Corporation*)

PSCL 1907 included an un-enumerated prohibition in section 70 (*Third Proviso*) against “stock corporation” acquisitions of stock in “electrical corporations” in excess of a specified level:

[N]o stock corporation of any description, domestic or foreign, other than a gas or electrical corporation, shall purchase or acquire, take or hold, more than ten per centum of the total capital stock issued by any . . .

electrical corporation organized or existing under or by virtue of the laws of this state. . . .²⁶⁴

In 1918, the Third *Proviso* was amended to allow such acquisitions by a “stock corporation,” subject to prior Commission approval, but only of the capital stock of electrical corporations doing business outside the City of New York (First District):

[N]o stock corporation of any description, domestic or foreign, other than a gas or electrical corporation or street railroad corporation, shall purchase or acquire, take or hold, more than ten per centum of the total capital stock issued by any . . . electrical [*sic*] corporation organized or existing under or by virtue of the laws of this state Provided, that with the consent of such commission and upon and subject to such terms and conditions as such commission may fix and impose, any such stock corporation may acquire, take and hold more than ten per centum of the stock of any . . . electrical corporation, organized or existing under or by virtue of the laws of this state, provided such . . . electrical corporation is operated wholly outside of the territory embraced within the first public service commission district²⁶⁵

In 1939, the Legislature repealed this geographical exclusion and authorized such acquisitions by “stock corporations” wherever located in New York State.²⁶⁶ As subsequently amended, and expanded in 2009 to include acquisitions by entities other than true “stock corporations” (e.g., partnerships), the Third *Proviso* is codified today in substantially the same form in N.Y. PSL §70(4):

4. [N]o stock corporation of any description, domestic or foreign, company, including, but not limited to, a limited liability company, association, including a joint stock association, partnership, including a limited liability partnership, or person, other than a gas corporation or electric corporation . . . , shall purchase or acquire, take or hold, more than ten percent of the voting capital stock issued by any gas corporation or electric corporation organized or existing under or by virtue of the laws of this state Provided, that with the consent of such commission and upon and subject to such terms and conditions as such commission may fix and impose, any such stock corporation may acquire, take and hold more than ten per centum of the voting capital stock of any gas corporation or electric corporation, organized or existing under or by virtue of the laws of this state.

vii. PSL § 110, *Control of Holding Companies and of Transactions Between Affiliated Interests*

PSL § 110(1), which was adopted in 1930²⁶⁷ and exists in substantially the same form today, provides that the PSC has authority over a holding company and other owners of the voting capital stock of a “public utility company” to the extent of requiring the disclosure of the identity of owners of 1% or more of such stock. N.Y. PSL §110(1) states:

The public service commission shall have jurisdiction over holders of the voting capital stock of all public utility companies under the jurisdiction of the commission to such extent as may be necessary to enable the comm-

264. N.Y. Laws of 1918, ch. 420.

265. N.Y. Laws of 1918, ch. 420.

266. N.Y. Laws of 1939, ch. 784.

267. N.Y. Laws of 1930, ch. 760.

ission to require the disclosure of the identify in respective interests of every owner of any substantial interest in such voting capital stocks. One per centum or more is a substantial interests, within the meaning of this subdivision.

Pursuant to PSL § 110(2), as amended in 1934 and existing in substantially the same form today, the PSC has jurisdiction over affiliates engaged in transactions “with utility corporations and other utility companies under the jurisdiction of the commission,” other than transactions involving the ownership of stock and the receipt of dividends, “to the extent of” having a right of access to accounts and records of the “affiliates” (as defined) in connection with such transactions and the power to require reports to be submitted by such affiliates. N.Y. PSL § 110(2) states:

The commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with utility corporations and other utility companies under the jurisdiction of the commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports to be submitted by such affiliated interests, as the commission may prescribe. For the purposes of this section only, “affiliated interests” include the following:

According to a later Commission, these provisions empowered the PSC to identify owners of less than 10% of the voting capital stock of a public utility who might aggregate their holdings in a single entity, thereby evading required authorization under PSL § 70’s Third *Proviso*.²⁶⁸

Pursuant to PSL §§ 110(3), any management, construction, engineering or similar contract by an operating company with any affiliated interest would be ineffective until first filed with the PSC. As interpreted by New York State courts, the PSC has implied authority to direct the cancellation of any contract determined to be contrary to the “public interest.”²⁶⁹ As amended in 1934 (N.Y. Laws of 1934, ch. 279), and as existing in substantially the same form today, this section was revised to prohibit any such agreement in excess of the reasonable cost of its performance. N.Y. PSL § 110(3) states:

No management, construction, engineering or similar contract hereafter made, with any affiliated interest, as hereinbefore defined, shall be effective unless it shall first have been filed with the commission, and no charge for any such management, construction, engineering or similar service, whether made pursuant to contract or otherwise, shall exceed the reasonable cost of performing such service

PSL § 110 (4), which was adopted in a 1936 amendment²⁷⁰ and exists in substantially the same form today, subjects contracts with affiliates (and others) for electric energy, gas, or water to similar requirements. N.Y. PSL § 110(4) states:

All written contracts and all arrangements, hereafter made, effected through corporate resolutions or otherwise, and verified summaries of all

268. 1 N.Y. P.S.C. ANN. REP. 21-22 (1939).

269. *Int’l Ry Co. v. PSC*, 264 A.D. 506, 36 N.Y.S.2d 125 (3d Dept. 1942), *aff’d*, 289 N.Y. 830, 47 N.E.2d 435 (1943).

270. N.Y. Laws of 1936, ch. 780.

unwritten contracts and arrangements, including such contracts and arrangements with any affiliated interest as hereinbefore defined, for the purchase of electric energy, gas . . . , and/or water before the same shall be effective, shall first be filed with the commission, and no charge for such electric energy, gas, and/or water whether made pursuant to contract or otherwise, shall exceed the just and reasonable charge for such electric energy, gas and/or water

As New York State's highest court has noted, PSL §§ 110(3) & (4) are narrow: the Legislature declined to expand Commission regulation so as to require *all* contracts with affiliates to be filed for approval, and instead limited PSC authority to the enumerated classes of contracts. "In every other instance, the [PSC] is powerless to impair the obligation or otherwise invalidate a utility's contract."²⁷¹

viii. PSL § 111, *Additional Information in Annual Reports; Disclosure of Stockholdings*

PSL § 111, which was originally enacted in 1930²⁷² and exists in substantially the same form today, primarily addresses the reporting obligations of "utility corporations" in connection with the identity of shareholders and the extent of their interests. N.Y. PSL § 111(1) states, in pertinent part:

1. Every annual report of any utility corporation reporting under this chapter to the public service commission shall contain, in addition to any other information required to be included by or pursuant to law, the following information:
 - a. It shall state the name and address of, and the number of shares held by each holder of one per centum or more of the voting capital of the reporting corporation,
 - b. Where one per centum or more of the voting capital stock of the reporting corporation is held by a trustee or trustees, or other intermediate agency, for the beneficial interest of an owner or owners, other than the holder of record, or where one per centum or more of the voting capital stock of the reporting corporation is held by another corporation, such annual report shall state [specified information].

According to the Commission: "This law was designed to enable the Commission to determine the extent of interest of corporate officers and directors in affiliated companies and the effect of interlocking directorates upon the operating utilities."²⁷³ Where the Commission is not provided such information by public utility corporations, the statute confers authority upon the PSC to compel holding companies and other shareholders to provide the same under PSL § 111(2).

ix. PSL § 106, *Approval of loans*

In 1933, the Legislature adopted PSL § 106,²⁷⁴ which, as existing in substantially the same form today, prohibits a public utility from making any

271. *General Tel. Co. of Upstate N.Y. v. Lundy*, 17 N.Y.2d 373, 379, 218 N.E.2d 274, 277-78, 271 N.Y.S.2d 216, 221 (1966).

272. N.Y. Laws of 1930, ch. 761.

273. 1 N.Y. P.S.C. ANN. REP. 23 (1939).

274. N.Y. Laws of 1933, ch. 255.

loans or issuing other evidences of indebtedness to a direct or indirect stockholder without prior PSC approval. N.Y. PSL § 106 states:

Except with the consent and approval of the public service commission first had and obtained, no public utility shall loan moneys, stocks, bonds, notes or other evidences of indebtedness, to any corporation, company, association, partnership or individual, owning or holding, directly or indirectly, any stock of said public utility.

As reflected in the legislative history, PSL § 106 was intended to regulate public-utility operating company loans to upstream entities.²⁷⁵

x. PSL § 107, *Approval of the Use of Revenues*

In 1934, the Legislature enacted PSL § 107,²⁷⁶ which, as existing in substantially the same form today, prohibits a public utility from using public service revenues for any purpose other than its internal utility operations. N.Y. PSL § 107(1) states:

Except with the consent and approval of the commission first had and obtained, no public utility shall use revenues received from the rendition of public service within the state for any purpose other than its operating, maintenance and depreciation expenses, the construction, extension, improvement or maintenance of its facilities and service, the payment of its indebtedness and interest thereon, and the payment of dividends to its stockholders.

As reflected in the legislative history, PSL § 107 was intended to regulate public-utility operating company loans to lateral affiliates.²⁷⁷

275. N.Y. LEG. BILL JACKET, N.Y. Laws of 1934, ch. 283, at 5. *See also* I N.Y. P.S.C. ANN. REP. 28-30, 80-81 (1939).

276. N.Y. Laws of 1934, ch. 283.

277. N.Y. LEG. BILL JACKET, N.Y. Laws of 1934, ch. 283, at 5. *See also* I N.Y. P.S.C. ANN. REP., 28-30, 80-81 (1939).