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## SECURITIES LEGISLATION - PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 - EXTENSION OF MATURITY DATE AS NEW "ISSUE"

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SECURITIES LEGISLATION — PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 — EXTENSION OF MATURITY DATE AS NEW "ISSUE" — Defendant a public utility holding company, wished to obtain a one year extension of the maturity date of its unsecured "5½% Convertible Investment Certificates" by inducing the holders thereof to assent to such extension in return for a twenty per cent payment of the principal of each certificate. The Securities and Exchange Commission sued to enjoin defendant from using the mails or other instrumentalities of interstate commerce in carrying out its plan, because defendant had not filed a declaration under section 7 of the Public Utilities Holding Company Act of 1935,<sup>1</sup> in connection with the proposed extension. *Held*, defendant should be so enjoined, on the ground that such extension was an issue or sale of securities within the meaning of section 6 (a) (1) of the act.<sup>2</sup> *Securities and Exchange Commission v. Associated Gas & Electric Co.*, (C. C. A. 2d, 1938) 99 F. (2d) 795.

A redefinition<sup>3</sup> of "issue" and "sale" results from holding that extension of

<sup>1</sup> 49 Stat. L. 838 (1935), 15 U. S. C. (Supp. 1938), § 79. The act was held constitutional in *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U. S. 419, 58 S. Ct. 678 (1937).

<sup>2</sup> Sec. 18 (f) specifically authorizes the commission to bring suit to enjoin violators of the act.

<sup>3</sup> "Issue" is not defined in the act, but "sale" is defined as follows in § 2 (a) (23), 15 U. S. C. (Supp. 1938), § 79b (a) (23): "Sale' or 'sell' includes any sale, disposition by lease, exchange or pledge, or other disposition."

In *Blue Mountain Consolidated Water Co. v. Public Service Commission*, 125 Pa. Super. 1, 189 A. 545 (1937), the company was attempting to secure bondholders' consent to a 1% reduction of interest on bonds issued by the company. The court denied the commission's contention that such reduction in the interest rate was an issue of bonds within the meaning of the state statute requiring the company to obtain the commission's permission before issuing securities, and interpreted the statute to mean that the commission's consent was necessary only when the interests of the consuming public—i.e., the patrons of the company—would be affected, but not when the interests of the investing public were at stake. And in *York Rys. Co. v. Driscoll*, (Pa. 1938) 200 A. 864, the Pennsylvania legislature had declared that "any change in any term or condition" of a security should be deemed an issuance of a security requiring the approval of the state public service commission. The company brought suit to enjoin the commission from refusing to register a proposed ten year extension of the maturity date of bonds issued by the company. The court held the statute to

the maturity date of a security constitutes an issue<sup>4</sup> or sale.<sup>5</sup> Tested by traditional criteria<sup>6</sup> there was no sale here, for in forwarding his certificate to defendant's agent in order that the facts of the extension might be stamped thereon the certificate holder did not intend to pass title to defendant.<sup>7</sup> And to say that such extension is an "issue" means that any alteration of the original obligation, by negotiation between holder and issuer, is equivalent to a new issue of a security.<sup>8</sup> The real basis of the decision seems to be the policy of the Public Utility Holding Company Act of 1935. Section 1 (b) declares: "the interest of investors in the securities of holding companies . . . may be adversely affected— (1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts. . . ." If an investor needs adequate information before making his original investment, certainly he needs such information when the maturity date of the obligation is to be extended, for, as the court points out,<sup>9</sup>

be an unconstitutional delegation of power to the commission, because the commission was authorized to exempt any issue of securities from the terms of the statute.

<sup>4</sup> The Interstate Commerce Act, 41 Stat. L. 494 (1920), 49 U. S. C. (1934), § 20a, requires the Interstate Commerce Commission's approval before securities may be issued by carriers. The commission has several times assumed, without discussing the question, that the extension of maturity dates of bonds issued or guaranteed by carriers is an issuance of securities requiring its approval: *Erie R. R. Extension Contracts*, 65 I. C. C. 131 (1920); *Bath & Hammondsport R. R. Bonds*, 79 I. C. C. 267 (1923); *San Luis Central R. R. Bonds*, 79 I. C. C. 737 (1923); *Minneapolis & St. Louis R. R. Bonds*, 124 I. C. C. 562 (1927).

<sup>5</sup> The lower court, in the principal case, (D. C. N. Y. 1938) 24 F. Supp. 899, expressly held the extension to be a sale on the theory that the certificate holder received a new promise and cash in exchange for the original obligation. The circuit court of appeals apparently relied upon the same theory.

<sup>6</sup> WILLISTON, SALES, 2d ed., § 5 (1924).

<sup>7</sup> The following procedure was used by defendant: Assents to extension were solicited by letter. Enclosed with the solicitation offer was a form letter of transmittal to defendant's agent, to be filled out and signed by the certificate holder agreeing to the extension, and giving authority to the agent to stamp the extension on the certificate. This legend was stamped on each certificate: "Twenty per cent (20%) of the principal amount of this Certificate has heretofore been paid. The holder of this Certificate, for value received has agreed to the extension of the maturity of the unpaid portion of the principal hereof to November 15, 1939, to which each successive holder hereof is bound by the acceptance hereof. This Certificate shall continue to bear interest, payable quarterly, upon the unpaid portion of the principal hereof, at the rate of five and one-half per cent (5½%) per annum." 99 F. (2d) at 796. In addition, coupons for the extended period were affixed to each instrument.

<sup>8</sup> "An extension of the maturity date, alteration of sinking fund or interest requirements, change in amount or rate of interest constitutes a new security for the approval and issuance of which a permit [from the proper state authority] is required." Opinion of Attorney General of California, August 10, 1932, CCH STOCKS AND BONDS LAW SERVICE, ¶ 1610.63 (1936).

<sup>9</sup> 99 F. (2d) at 797.

it may be wiser for him to insist upon immediate payment. Though the logic of the decision is debatable, the court's interpretation of the statute is consistent with the basic policies of the act.<sup>10</sup>

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<sup>10</sup> In relying upon the policies of the act the court used this language: "To treat the proposed arrangement as beyond the jurisdiction of the Securities and Exchange Commission would seem to place form above substance and to defeat the statutory purpose of safeguarding the public interest by affording the means of investigating the merits of such transactions by the Commission so that issues of securities may be stopped if found inexpedient for the security-holders." 99 F. (2d) at 797.

Further support for the court's position might be found in § 7 (c) of the act, which provides in part as follows: "The Commission shall not permit a declaration regarding the issue or sale of a security to become effective unless it finds that— . . . (2) such security is to be issued or sold solely (A) for the purpose of refunding, *extending*, exchanging, or discharging an outstanding security of the declarant. . . ." (Italics added.) However, the court did not discuss this clause.