

AN INVITATION TO PUBLIC UTILITIES—THE  
 AMENDED PENNSYLVANIA BUSINESS  
 CORPORATION AND PUBLIC  
 UTILITY LAWS \*

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In 1963 the Pennsylvania General Assembly, in a major step toward the completion of corporate law revision in Pennsylvania, authorized almost all public utilities, at their option, to incorporate under, or be governed by, the Business Corporation Law.<sup>1</sup> Repealed at the same time was the anachronistic requirement of specific advance approval by the public utility commission of the incorporation, qualification, change of charter, or dissolution of public utilities.

Further progress necessarily depends upon the reaction of utility counsel. This Article will, accordingly, present the new election in perspective before considering potential trouble-spots for the practitioner.

I. THE STRUCTURE OF PENNSYLVANIA UTILITY CORPORATE LAW

The relatively small utility corporate bar, subdivided into groups specializing in the peculiarities of various statutory schemes, has heretofore been compelled by historical accident to solve twentieth-century Pennsylvania public utility needs by a complex and perhaps confusing nineteenth-century scheme. Prior to 1921, when the codification of corporate law began, banks, building and loan associations, and insurance companies were governed by hundreds of unconsolidated acts dating back to the early 1800's.<sup>2</sup> Separate laws governed railroads,<sup>3</sup> water and manufactured gas companies incorporated before

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<sup>1</sup> PA. STAT. ANN. tit. 15, §§ 2852-1 to -1202 (1958), as amended, PA. STAT. ANN. tit. 15, §§ 2852-2 to -1105 (Supp. 1963) [hereinafter also referred to as BCL].

<sup>2</sup> These acts are collected in historical notes at: PA. STAT. ANN. tit. 7, § 819-1602 (1939) (banks); PA. STAT. ANN. tit. 15, § 1074-1302 (1958) (building and loan associations); PA. STAT. ANN. tit. 40, § 991 (1954) (insurance companies).

<sup>3</sup> Pa. Laws 1868, No. 29, at 62 (railroads) (now in scattered sections of PA. STAT. ANN. tit. 67 (1930)); Pa. Laws 1849, No. 76, at 79 (now in scattered sections

1874,<sup>4</sup> natural gas companies,<sup>5</sup> street railways,<sup>6</sup> ship canals between the Great Lakes and points on navigable rivers in the commonwealth,<sup>7</sup> and the Philadelphia subway-elevated system.<sup>8</sup> The Corporation Act of 1874<sup>9</sup> governed most other corporations, both profit and nonprofit, including a number of public utility companies.<sup>10</sup>

Not one of these acts contained any comprehensive scheme of corporate regulation. Reference was therefore necessary to a multitude of supplementary acts, *e.g.*, for change of name,<sup>11</sup> amendment of charter,<sup>12</sup> change of principal office,<sup>13</sup> merger and consolidation,<sup>14</sup> or foreign corporations' qualification to do business.<sup>15</sup> The typical nineteenth-century general corporation act concentrated on the formation and initial operation of the corporation; postincorporation problems were usually left to subsequent,<sup>16</sup> and often *ad hoc*,<sup>17</sup> legislation.

of PA. STAT. ANN. tit. 67 (1930)); Pa. Laws 1832, No. 189, at 501 (lateral railroads) (now included in PA. STAT. ANN. tit. 67, §§ 781-793 (1930)). Most railroads were originally incorporated under special acts of assembly. See PA. STAT. ANN. tit. 67, § 1 historical note (1930).

<sup>4</sup> Pa. Laws 1857, No. 92, at 77 (now included in PA. STAT. ANN. tit. 15, §§ 1281-1332, 1334 (1958)).

<sup>5</sup> Pa. Laws 1885, No. 32, at 29 (now included in PA. STAT. ANN. tit. 15, §§ 1981-2091 (1958)).

<sup>6</sup> Pa. Laws 1889, No. 227, at 211 (now included in PA. STAT. ANN. tit. 67, §§ 1111-1244 (1930)).

<sup>7</sup> Pa. Laws 1895, No. 129 at 221 (now included in PA. STAT. ANN. tit. 67, §§ 941-1052 (1930)).

<sup>8</sup> Pa. Laws 1901, No. 251, at 523 (now included in PA. STAT. ANN. tit. 67, §§ 1391, 1393-94, 1396-1411 (1930)).

<sup>9</sup> Pa. Laws 1874, No. 32, at 73 (now in scattered sections of PA. STAT. ANN. tit. 15 (1958)).

<sup>10</sup> These included boulevard, bridge, boom, drain, electric, ferry, fuel, heat, inclined plane railway, light, lumber, manufactured gas, omnibus lines, other transportation, petroleum products pipeline, plank road, private wire lines, telegraph, telephone, transportation by vessel, tunnel, turnpike, water for manufacturing, water power, water for supply to public, and wharf. See PA. STAT. ANN. tit. 15, § 3 (1958).

<sup>11</sup> Pa. Laws 1903, No. 185, at 251 (now PA. STAT. ANN. tit. 15, § 462 (1958)).

<sup>12</sup> Corporation Amendment Act, Pa. Laws 1883, No. 108, at 122 (now PA. STAT. ANN. tit. 15, §§ 401-04 (1958), as amended, PA. STAT. ANN. tit. 15, § 404 (Supp. 1963)).

<sup>13</sup> Pa. Laws 1893, No. 289, at 355 (now PA. STAT. ANN. tit. 15, § 55 (1958)).

<sup>14</sup> Pa. Laws 1909, No. 229, at 408 (now PA. STAT. ANN. tit. 15, §§ 421-25 (1958)). In addition to the foregoing general act there are many others relating specifically to mergers between particular types of public utilities. See, *e.g.*, Pa. Laws 1927, No. 169, at 297 (now PA. STAT. ANN. tit. 15, §§ 3021-26 (Supp. 1963) (gas companies)).

<sup>15</sup> Pa. Laws 1911, at 710 (now PA. STAT. ANN. tit. 15, §§ 3141-45 (1958), as amended, PA. STAT. ANN. tit. 15, § 3144.1 (Supp. 1963)).

<sup>16</sup> All but 12 of the scores of corporate acts repealed by the BCL were enacted subsequent to the Corporation Act of 1874. See PA. STAT. ANN. tit. 15, § 2852-1202 historical note (1958).

<sup>17</sup> The special merger acts are a good example. See PA. STAT. ANN. tit. 15, § 1931 (1958) which authorizes *any* motor power company to enter into a "short form" merger with *any* turnpike company if: (1) the motor power company owns

Although reform through codification began in 1921,<sup>18</sup> only in 1933 with the Banking Code,<sup>19</sup> the Building and Loan Code,<sup>20</sup> the Nonprofit Corporation Law,<sup>21</sup> and the Business Corporation Law<sup>22</sup> did the revisors make substantial progress. The BCL authorized the formation of profit-making corporations for "any lawful purpose or purposes."<sup>23</sup> "No corporation which might be incorporated under" the BCL could thereafter be incorporated except under its provisions.<sup>24</sup> The act applied to all existing corporations (within the reach of the general assembly's power) "which, if not existing, would be required to incorporate under" the BCL.<sup>25</sup>

However, despite the partial repeal of much of the old nineteenth-century corporate legislation by one or more of the new codes, the vast bulk of it, principally with respect to public utilities, continued in effect. The BCL was still inapplicable to corporations subject to the "supervision" of the public utility commission (then the public service commission) or the water and power resources board,<sup>26</sup> because of a failure to agree on codification of public utility eminent domain powers. Unfortunately, employing the jurisdiction of regulatory agencies as the critical factor in delineating the scope of the BCL resulted in a series of problems, some still unresolved.<sup>27</sup>

two-thirds of the capital stock of the turnpike company; (2) the commonwealth has taken over the turnpike of the company; and (3) the turnpike company (a) has acquired the franchises of a railroad corporation, and (b) has leased such franchises to the vendee motor power company. Presumably the department of state does not stock mimeographed forms for filings under this provision.

<sup>18</sup> Insurance Company Law, Pa. Laws 1921, No. 284, at 682 (now PA. STAT. ANN. tit. 40, §§ 341-1005.6 (1954), as amended, PA. STAT. ANN. tit. 40, §§ 420-1007.15 (Supp. 1963)).

<sup>19</sup> Pa. Laws 1933, No. 112, at 624 (now PA. STAT. ANN. tit. 7, §§ 819-1 to -1603 (1939), as amended, PA. STAT. ANN. tit. 7, §§ 819-2 to -1506 (Supp. 1963)).

<sup>20</sup> Pa. Laws 1933, No. 108, at 457 (now PA. STAT. ANN. tit. 15, §§ 1074-1 to -1303 (1958), as amended, PA. STAT. ANN. tit. 15, §§ 1074-2 to -1205 (Supp. 1963)).

<sup>21</sup> Pa. Laws 1933, No. 105, at 289 (now PA. STAT. ANN. tit. 15, §§ 2851-1 to -1702 (1958), as amended, PA. STAT. ANN. tit. 15, §§ 2851-10 to -1806 (Supp. 1963)).

<sup>22</sup> Pa. Laws 1933, No. 106, at 364 (now PA. STAT. ANN. tit. 15, §§ 2852-1 to -1202 (1958), as amended, PA. STAT. ANN. tit. 15, §§ 2852-2 to -1105 (Supp. 1963)). Section 4 of the BCL provided, *inter alia*, that the act "does not relate to, does not affect, and does not apply to" corporations governed by the Nonprofit Corporation Law or subject to the "supervision" of the department of banking (which in effect excluded corporations governed by the banking and building and loan codes) or the insurance department (which in effect excluded corporations governed by the Insurance Company Law of 1921).

<sup>23</sup> PA. STAT. ANN. tit. 15, § 2852-201 (1958).

<sup>24</sup> Pa. Laws 1933, No. 106, art. I, § 6(C), at 372 (now PA. STAT. ANN. tit. 15, § 2852-6(C) (Supp. 1963)).

<sup>25</sup> Pa. Laws 1933, No. 106, art. I, § 3(A), at 370; note 54 *infra*.

<sup>26</sup> Pa. Laws 1933, No. 106, art. I, § 4(3), at 371.

<sup>27</sup> The Section on Corporation, Banking and Business Law of the Pennsylvania Bar Association, through its corporation law committee, has urged a number of additional changes in both the BCL and the Nonprofit Corporation Law. Pennsylvania Bar Association Corporation Law Committee and Section, *Report on Corporation*,

Two examples are illustrative:

(1) Contract carriers by motor vehicle originally were governed by the BCL since they were not subject to the "supervision" of the public service commission.<sup>28</sup> However, in 1937 the general assembly subjected contract carriers to commission supervision,<sup>29</sup> thereby excluding them from the BCL, but in amending section 4(3) of the BCL to substitute "Pennsylvania Public Utility Commission" for the former "Public Service Commission," no change in language was made to continue expressly the prior inclusion of contract carriers.<sup>30</sup> Twenty years were to pass before contract carriers were again technically included under the BCL,<sup>31</sup> and even that change failed to clarify the status of a corporation lawfully engaged in dual operations<sup>32</sup> as both a common (presumably as an "other transportation" corporation under the Corporation Act of 1874) and a contract carrier.<sup>33</sup>

(2) The "supervision" of the water and power resources board is generally thought to encompass only water companies, hydroelectric and steam power companies, and other public utilities holding water rights or limited water supply or limited power permits granted by the board.<sup>34</sup> However, the board's powers relating to the licensing

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*Banking, and Business Law*, 35 PA. B.A.Q. 308 (1964). Section 4 of the BCL would be amended to eliminate, except as to public utilities, the unsatisfactory exclusion of corporations subject to the "supervision" of certain regulatory agencies. Thus clauses (1) through (3) of § 4(A), see note 42 *infra* (text of BCL § 4), which exclude certain cooperative, nonprofit, banking, and insurance corporations, would be replaced by a provision enumerating Pennsylvania's other nonpublic utility corporation laws and eliminating from the BCL corporations within their scope unless expressly provided otherwise in those laws. Section 4 of the Nonprofit Corporation Law would be similarly amended. These provisions would make the BCL and the Nonprofit Corporation Law "residuary" laws, *i.e.*, a corporation falls within their scope unless its corporate purpose places it under one of the more specialized acts expressly identified in § 4.

<sup>28</sup> See, *e.g.*, *Dairymen's Co-op. Sales Ass'n v. Public Serv. Comm'n*, 318 Pa. 381, 177 Atl. 770 (1935), *affirming* 115 Pa. Super. 100, 174 Atl. 826 (1934).

<sup>29</sup> Public Utility Law, art. VIII, PA. STAT. ANN. tit. 66, §§ 1301-13 (1959).

<sup>30</sup> Pa. Laws 1937, Vol. II, No. 595, § 4(3), at 2829.

<sup>31</sup> Pa. Laws 1957, No. 370, § 4(3) (ii), at 715.

<sup>32</sup> Dual operations as both common carrier and contract carrier are expressly contemplated in certain cases by § 210 of the Interstate Commerce Act, 54 Stat. 923 (1940), 49 U.S.C. § 310 (1959), and § 805 of the Public Utility Law, PA. STAT. ANN. tit. 66, § 1305 (1959).

<sup>33</sup> This point was clarified by PA. STAT. ANN. tit. 15, § 2852-4(3) (ii) (Supp. 1963) (Pa. Laws 1963, No. 534, at 1355), which limited the inclusionary exception of former BCL subdivision 4(3) (ii) to corporations formed for the purpose of acting "solely" as a contract carrier. The problem has become moot because motor carriers, whether common or contract, have been subject to the BCL since January 1, 1964, by reason of PA. STAT. ANN. tit. 15, § 2852-4 (Supp. 1863) (Pa. Laws 1963, No. 536, at 1381), which eliminated § 4(3) (ii) of the BCL effective that date. See text accompanying notes 42-43 *infra*.

<sup>34</sup> See PA. STAT. ANN. tit. 32, §§ 591-600 (1949), as amended, PA. STAT. ANN. tit. 32, § 592 (Supp. 1963). See also PA. STAT. ANN. tit. 32, §§ 631-41 (1949), as amended, PA. STAT. ANN. tit. 32, § 638 (Supp. 1963).

of "water obstructions"<sup>35</sup> are so broad that, for example, a corporation operating a fish hatchery has been held subject to the board's jurisdiction.<sup>36</sup> Since the board's powers relate, *inter alia*, to any structure or obstruction or encroachment upon any stream or body of water,<sup>37</sup> almost any corporation which owns real estate having a stream or other body of water upon it is subject to the jurisdiction of the board. Does such jurisdiction constitute "supervision" under section 4(A)(4), thus excluding such corporations from the BCL?<sup>38</sup>

Such is the folly of a statutory scheme which predicates the applicability of one of several possible corporate statutes upon external, and often fortuitous, factors unrelated to the corporation's needs and the intentions of its stockholders and directors. Indeed, the consequences of a literal reading of the "supervision" language were so bizarre that, with notable exceptions,<sup>39</sup> corporate practitioners tended wholly to ignore the problem. It was only as a result of the combined efforts of committees of the Pennsylvania Bar Association's section on corporation, banking and business law and its section on public utility law that the general assembly in 1963 approved bills bringing under the BCL all common carriers by motor vehicle and permitting public utilities (except railroads) to elect BCL coverage.<sup>40</sup>

## II. THE 1963 AMENDMENTS TO THE BCL

### A. Applicability of BCL to Existing Domestic Motor Carriers

As noted earlier, contract carriers by motor vehicle were in 1957 excepted from the class of corporations excluded from the BCL because supervised by the public utility commission.<sup>41</sup> This exception is

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<sup>35</sup> PA. STAT. ANN. tit. 32, §§ 681-91 (1949).

<sup>36</sup> Pennsylvania Water & Power Resources Bd. v. Green Spring Co., 394 Pa. 1, 145 A.2d 178 (1958).

<sup>37</sup> PA. STAT. ANN. tit. 32, § 681 (1949).

<sup>38</sup> A corporation may now moot any such claim by expressly electing to be governed by the BCL. See text accompanying note 54 *infra*.

<sup>39</sup> In 1957 the BCL was amended to settle the status of contract carriers, see note 31 *supra* and accompanying text, as well as insurance agents and brokers, public adjusters, public adjuster solicitors, transportation brokers, consumer discount companies, small loan companies, and loan brokers. Pa. Laws 1957, No. 370, § 4(3), at 715. In 1963 the subsection was further amended to settle the status of safe deposit, real estate and mortgage companies, securities dealers, and investment advisors. PA. STAT. ANN. tit. 15, §§ 2852-4(3)(v)-(vi) (Supp. 1963) (Pa. Laws 1963, No. 534, at 1355). See Corporation Law Committee, *Report*, 34 PA. B.A.Q. 418-19 (1963).

<sup>40</sup> See Mulford, *Proposal To Bring Pennsylvania Public Utilities Under the Business Corporation Law*, 33 PA. B.A.Q. 112 (1962); The Corporation Law Committee and the Special Committee, *Proposed Legislation Bringing Motor Common Carriers Under the Business Corporation Law of 1933 and Permitting the Acceptance of That Act by Other Public Utilities—A Joint Report*, June 24, 1963 [hereinafter cited as *Joint Report*].

<sup>41</sup> *Joint Report* 1; Mulford, *supra* note 40, at 112.

broadened by the 1963 amendment to the BCL by substitution of the term "motor carrier" for the former term "contract carrier by motor vehicle."<sup>42</sup> Common carriers by motor vehicle are thereby brought

<sup>42</sup> PA. STAT. ANN. tit. 15, § 2852-4(A)(4)(i) (Supp. 1963).

The full text of section 4 of the BCL, PA. STAT. ANN. tit. 15, § 2852-4 (Supp. 1963) (Pa. Laws 1963, No. 536, at 1381), with deleted provisions in brackets, is as follows:

Scope of Act. A. This act does not relate to, does not affect, and does not apply to:

- (1) Cooperative associations, whether for profit or not for profit.
- (2) Any corporation which may be organized under the Nonprofit Corporation Law, or which, if not existing, would be required to incorporate under that act.
- (3) Any corporation which, by the laws of this Commonwealth, is subject to the supervision of the Department of Banking or the Insurance Department, [the Pennsylvania Public Utility Commission or the Water and Power Resources Board] except a corporation formed for the purpose of acting as—
  - (i) an insurance agent, insurance broker, public adjuster or public adjuster solicitor as defined in the Insurance Department Act of one thousand nine hundred and twenty-one;
  - [(ii) contract carrier by motor vehicle or as broker as defined in the Public Utility Law;]
  - (iii) a small loan company or loan broker regulated by the act of June 17, 1915 (P.L. 1012), and its amendments and supplements; or
  - (iv) a consumer discount company regulated by the Consumer Discount Company Act.
- (4) Any corporation which by the laws of this Commonwealth is subject to the supervision of the Pennsylvania Public Utility Commission or the Water and Power Resources Board except—

(i) a corporation formed for the purpose of acting as a motor carrier or broker or both as defined in the Public Utility Law.

(ii) a proposed or existing domestic corporation or a foreign corporation which elects to accept the provisions of this act in the manner set forth in subsection B of this section: Provided, that this exception shall not apply to any corporation formed for the purpose of acting as a railroad as defined in the Public Utility Law.

B. The acceptance provided for in subclause (ii) of clause (4) of subsection A of this section shall be effected—

(1) In the case of proposed domestic corporation or a foreign corporation not qualified to do business in this Commonwealth, by the insertion in the articles of incorporation or application for certificate of authority of a statement that the incorporators or corporation have elected to proceed with the formation or qualification of a corporation under this act.

(2) In the case of an existing domestic corporation or a qualified foreign corporation, by the filing with the Department of State of a certificate which shall be executed under the seal of the corporation, shall be signed by two duly authorized officers of the corporation and shall set forth:

- (i) the name of the corporation;
  - (ii) the act of Assembly by or under which it was created or qualified;
- and
- (iii) a statement that the board of directors of the corporation have elected to accept the provision of this act for the government and regulation of the affairs of the corporation, or for the regulation of its affairs in this Commonwealth, in the case of a qualified foreign corporation.

This act shall become applicable to the corporation upon the filing of such certificate to the Department of State.

C. The Department of State shall maintain a distinct register of the names of the corporations which have elected, pursuant to subclause (ii) of clause (4) of subsection A of this section, to accept the provisions of this act.

automatically within the scope of the BCL, since the term "motor carrier" includes common as well as contract carriers.<sup>43</sup> Furthermore, not only corporations formed for the purpose of engaging in both common and contract carriage are brought within the act, for the term "motor carrier" has clearly been employed in the Public Utility Law in a generic sense.<sup>44</sup> Thus, corporations formed for such purposes as taxicab or bus operations, moving of household goods, etc., are definitely included.<sup>45</sup>

However, a corporation formed for both a motor carrier and a nonmotor carrier purpose, such as a freight forwarder, does not appear to be subject automatically to the BCL. A number of considerations suggest that the exception be interpreted narrowly, *i.e.*, as though it read "formed solely for the purpose of acting as a motor carrier or broker,"<sup>46</sup> rather than receiving a broad reading such as "has as a corporate purpose the furnishing of service as a motor carrier or broker."<sup>47</sup> The rules of statutory construction suggest such an interpretation,<sup>48</sup> since the provision is an exception to the general exclusion of BCL section 4(A)(4).<sup>49</sup>

The prime reason for placing motor carriers automatically under the BCL was their lack of eminent domain (including street entry) powers. It therefore follows that a company possessing such powers should have the right to elect to remain outside the act. For example, where a corporation provides both bus and street railway service, the street entry problems related to the latter service make appropriate an optional election or rejection of the BCL by the corporation's directors.

The definition of "common carrier by motor vehicle" in the Public Utility Law includes "common carriers by rail . . . insofar as such common carriers are engaged in such motor vehicle opera-

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<sup>43</sup> PA. STAT. ANN. tit. 66, § 1102(13) (1959).

<sup>44</sup> See, *e.g.*, § 405 (unlawful interchanges by "motor carriers" prohibited), § 915 (insurance required of "motor carriers") and § 916 (arrest on view of anyone operating as unauthorized "motor carrier"); PA. STAT. ANN. tit. 66, §§ 1175, 1355, 1356 (1959).

<sup>45</sup> In most cases questions of interpretation will not arise since the public utility commission, in rule 3(a) of its Trucking Regulations (General Order No. 29) and rule 4 of its Bus and Taxicab Regulations, prescribed the exact corporate purpose language which would be approved for proposed common carrier corporations. Such language necessarily qualifies, since the general assembly presumably knew that almost all domestic motor common carrier corporation charters are so worded.

<sup>46</sup> Compare the use of "solely" in the contract carrier context, note 33 *supra*.

<sup>47</sup> Compare the use of similar language in amended BCL § 202(A), discussed in text accompanying notes 74-76 *infra*.

<sup>48</sup> Cf. Commonwealth *ex rel.* Margiotti v. Lawrence, 326 Pa. 526, 193 Atl. 46 (1937).

<sup>49</sup> PA. STAT. ANN. tit. 15, § 2852-4(A)(4) (Supp. 1963).

tions . . . .”<sup>50</sup> But it would be manifestly unreasonable to say, as is required by a broad construction of the amendment, that after expressly depriving railroads (other than street and rapid transit railways) of even the option to elect the BCL,<sup>51</sup> the general assembly at the same time automatically placed railroads under the BCL if they operate but a single truck or bus in motor vehicle service.

### B. Applicability of BCL to Other Existing Public Utilities

While all motor carriers are now governed by the BCL,<sup>52</sup> other existing domestic public utilities continue under a number of distinct statutory systems, each amplified by its own highly complex supplementary legislation.<sup>53</sup> The BCL, however, offers such public utilities optional release.

#### 1. Creation of Election

The BCL is generally inapplicable to a public utility (*e.g.*, a “corporation of the second class”) but applies only if it “elects to accept the provisions of this act” in the manner provided.<sup>54</sup> The draftsmen intended to allow a public utility corporation *hereafter* formed under the old nineteenth-century acts to elect the BCL no less than any corporation previously organized under such an act.<sup>55</sup>

<sup>50</sup> PA. STAT. ANN. tit. 66, § 1102(6) (Supp. 1963).

<sup>51</sup> PA. STAT. ANN. tit. 15, § 4(A) (4) (ii) (Supp. 1963); note 42 *supra*.

<sup>52</sup> See text accompanying notes 42-51 *supra* and 80-85 *infra*.

<sup>53</sup> See text accompanying notes 2-15 *supra*.

<sup>54</sup> PA. STAT. ANN. tit. 15, § 2852-3(A) (Supp. 1963). The amendment renders the BCL applicable to “every corporation of the second class, heretofore organized and incorporated under the Corporation Act of 1874, its amendments and supplements, and every corporation heretofore created by any special act or formed under any general act, and which . . . (2) elects to accept the provisions of this act in the manner set forth in section 4 of this act . . . .”

<sup>55</sup> To make that intention manifest, amendment of the word “heretofore” in § 3(A) to read “heretofore or hereafter” was considered. Such an amendment, however, seemed unnecessarily confusing since neither any corporation created by a special act nor any corporation organized under another act but now required to organize only under the BCL would ever come into existence “hereafter.”

Accordingly, reliance was placed upon the Statutory Construction Act, art. viii, § 101(50), PA. STAT. ANN. tit. 15, § 601(50) (1952), which defines “hereafter” as having “reference to the time after the time when the law containing such word takes effect.” As the term “hereafter” in § 3(A), PA. STAT. ANN. tit. 15, § 2852-3(A) (Supp. 1963), indicates, the amendments proceed upon the theory that the BCL “takes effect” with respect to any nonmotor carrier public utility corporation only at the time the election is made by the corporation, and not before. Statutory Construction Act, art. viii, § 101(51), PA. STAT. ANN. tit. 46, § 601(51) (1952), defines “heretofore” as having “reference to the time previous to the time when the law containing such word takes effect,” *i.e.*, in this case to the time prior to the exercise of the election by the corporation proposing to accept the BCL. Thus a corporation organized in 1964 under the Corporation Act of 1874, and which desires to accept the BCL in 1965, is one which was “heretofore” organized, as that word is used in amended subsection 3(A). The corporation law committee’s 1965 legislative program, see Pennsylvania Bar Association Corporation Law Committee and Section, *Report on Corporation, Banking, and Business Law*, 35 PA. B.A.Q. 308, 321-24 (1964), proposed a series of amendments to BCL § 3 and § 4, rewriting § 3(A) in a manner incidentally eliminating this question.



However, at the insistence of railroad industry representatives, section 4(A)(4)(ii) excludes from the act "any corporation formed for the purpose of acting as a railroad as defined in the Public Utility Law."<sup>56</sup> The problems of interpretation are parallel to those discussed above concerning corporations "formed for the purpose of acting as a motor carrier."<sup>57</sup> Again, the proviso probably should be interpreted narrowly as though it read "formed *solely* for the purpose of acting as a railroad."<sup>58</sup> Thus, it apparently would affect only railroad corporations governed by the nineteenth-century acts,<sup>59</sup> since before the 1963 amendments no other corporations could operate railroads, while these corporations evidently could do little else. However, since a modern multipurpose corporation is not organized "solely" for any purpose, it may be possible, even within the limitations of the present constitution of Pennsylvania and its implementing act,<sup>60</sup> to organize a single corporation under the BCL to transport persons and property as a common carrier by railroad, express, motor vehicle, pipeline, and aircraft.

## 2. Exercise of Election

An existing domestic corporation may elect the BCL by filing with the department of state a certificate stating: (1) its name; (2) the act by or under which it was created; and (3) that the board of directors have elected to accept the BCL for the government and regulation of the affairs of the corporation.<sup>61</sup>

By making the BCL elective, the general assembly merely identified the event which is to call the BCL into play, *i.e.*, its acceptance by representatives of the corporation. Comparable conditional legislation often has been held valid,<sup>62</sup> and statutory provisions for the acceptance of new and better general corporation acts are well known to Pennsylvania law.<sup>63</sup>

<sup>56</sup> PA. STAT. ANN. tit. 15, § 2852-4(A)(4)(ii) (Supp. 1963).

<sup>57</sup> PA. STAT. ANN. tit. 15, § 2852-4(A)(4)(i) (Supp. 1963); see note 42 *supra*.

<sup>58</sup> See text accompanying notes 44-51 *supra*.

<sup>59</sup> See note 3 *supra*.

<sup>60</sup> PA. CONST. art. 17, § 5, as implemented by PA. STAT. ANN. tit. 67, §§ 761-62 (1930), prohibits any "incorporated company doing business of a common carrier" from "directly or indirectly" engaging "in any other business than that of common carriers . . . ." The effect of this provision was avoided by the organization of subsidiary companies, notwithstanding the use of the term "indirectly." *Hartwell v. Buffalo, R. & P. Ry.*, 6 Dist. 212, 19 Pa. County Ct. 231 (Bureau of Rys. 1897).

<sup>61</sup> PA. STAT. ANN. tit. 15, § 2852-4(B) (Supp. 1963); see note 42 *supra*.

<sup>62</sup> See *Baldwin Township's Annexation*, 305 Pa. 490, 158 Atl. 272 (1931).

<sup>63</sup> PA. STAT. ANN. tit. 15, § 28 (1958) (enacted in 1874 for corporations which could have been incorporated under the Corporation Act of 1874); PA. STAT. ANN. tit. 15, § 29 (1958) (enacted in 1909 for trackless-trolley companies); PA. STAT. ANN. tit. 15, § 1191 (1958) (enacted in 1889 for electric companies); PA. STAT. ANN.

Election is to be made solely by the directors because the technical nature of eminent domain and other considerations governing election of the BCL would have made reference to the shareholders, after favorable action by the directors, an empty formality.<sup>64</sup> However, the right of the directors to effect the election does not free them from liability for breach of duties owed shareholders,<sup>65</sup> creditors,<sup>66</sup> or other third parties.<sup>67</sup>

The corporation bureau has ruled that the acceptance cannot be incorporated in articles of amendment or similar corporate action, but must be set forth in a distinct certificate and a separate ten dollar fee paid.<sup>68</sup> The corporation becomes subject to the BCL on the date the certificate is "filed" with the department of state. Unless a later date is specifically requested, this is ordinarily the day the papers are physically delivered to the department.<sup>69</sup>

Once effected the election is final; there may be no direct reverting to the former law.<sup>70</sup>

### C. Proposed Domestic Public Utilities

#### 1. Applicability of BCL

The right to elect the BCL is expressly extended to "a proposed . . . corporation"<sup>71</sup> which may accept "by the insertion in the articles

tit. 15, § 1898 (1958) (enacted in 1887 for motor power companies); PA. STAT. ANN. tit. 15, § 2081 (1958) (enacted in 1885 for natural gas companies); PA. STAT. ANN. tit. 15, § 2334 (1958) (enacted in 1919 for telephone companies); PA. STAT. ANN. tit. 67, § 1114 (1958) (enacted in 1889 for street railway companies).

<sup>64</sup> Authority for director's choice can be found as early as 1879, when the supreme court upheld acceptance by a railroad of an option limiting the railroad's liability for loss of life to \$5000, Pa. Laws 1868, No. 26, at 58, although it clearly appeared that the railroad's acceptance was authorized solely by resolution of its board of directors. *Pennsylvania R.R. v. Langdon*, 92 Pa. 21 (1879). Note that, in contrast to § 4(B) of the BCL, authority to accept the Act of 1868 was not expressly conferred upon the board of directors.

<sup>65</sup> *E.g.*, under a close corporation agreement.

<sup>66</sup> *E.g.*, under a trust indenture.

<sup>67</sup> *E.g.*, under a franchise agreement with a municipality.

<sup>68</sup> See PA. STAT. ANN. tit. 71, § 803 (1962) (imposing fee).

<sup>69</sup> The department is also required to keep a distinct register of the names of all corporations accepting the BCL. PA. STAT. ANN. tit. 15, § 2852-4(C) (Supp. 1963); note 42 *supra*. The purpose of this provision is to provide a means for determining when all important utilities of a particular class, *e.g.*, street railway companies, airline companies, etc., have accepted the act. Section 4(A)(4)(i) of the BCL, PA. STAT. ANN. tit. 15, § 2852-4(A)(4)(i) (Supp. 1963), could then be amended to add such a class to those (*i.e.*, motor carriers) automatically subject to the act.

<sup>70</sup> Direct merger with nineteenth-century "paper corporation" is unavailable, because article IX of the BCL applies only to business corporations; Pa. Laws 1909, No. 229, §§ 1-5, at 408, is expressly repealed as to business corporations; the other similar acts are undoubtedly impliedly repealed as to business corporations. However, the BCL corporation could, of course, merge with and into a foreign corporation, and the surviving corporation could merge with and into the appropriate domestic nineteenth-century "paper corporation."

<sup>71</sup> PA. STAT. ANN. tit. 15, § 2852-4(A)(4)(ii) (Supp. 1963); see note 42 *supra*.

of incorporation . . . of a statement that the incorporators . . . have elected to proceed with the formation . . . of a corporation under [the BCL] . . . ." <sup>72</sup> Since forms for organization under the BCL are widely available, while forms for organization under the nineteenth-century acts are seldom encountered, the requirement of a specific statement of election is meant to prevent the promoters of a proposed public utility from proceeding under the BCL unaware of the choice open to them. <sup>73</sup>

## 2. Availability of Public Utility Name

It was formerly provided that "the corporate name shall not imply that the corporation is . . . a public utility as defined in the . . . 'Public Utility Law' . . . ." <sup>74</sup> Two 1963 amendments have altered this. Act No. 536 inserted after the above-quoted words: "unless the corporation or proposed corporation has as a corporate purpose the furnishing of service subject to the jurisdiction of the Public Utility Commission." <sup>75</sup> The corporation law committee's 1963 general revision bill, Act No. 534, inserted after the first above-quoted language the following words without reference to the amendment effected by Act No. 536: "unless there be submitted to the Department of State a certificate from the Public Utility Commission certifying that the corporation or proposed corporation is entitled to use such designation." <sup>76</sup> Section 75 of the Statutory Construction Act <sup>77</sup> provides that such changes shall both be effective if each act, without regard to the other, can be put into effect simultaneously. Here the result of both acts is to create two consistent exceptions. In case of doubt, Act No. 536, as the last enacted, must control, <sup>78</sup> and thus

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<sup>72</sup> PA. STAT. ANN. tit. 15, § 2852-4(B) (1) (Supp. 1963).

<sup>73</sup> This choice was formerly unavailable. Section 6(C) of the BCL stated unqualifiedly that "no corporation which might be incorporated under this act shall hereafter be incorporated except under the provisions of this act." At the request of the director of the corporation bureau, the corporation law committee's 1965 legislative program would eliminate the requirement that the incorporators set forth in the articles an express election of the BCL. Pennsylvania Bar Association Corporation Law Committee and Section, *Report on Corporation, Banking, and Business Law*, 35 PA. B.A.Q. 308, 324 (1964). The filing of articles of incorporation under the BCL would be considered sufficient evidence of an intention to proceed under that act and by the proposed effective date of the amendments (January 1, 1966) most public utility corporate practitioners may be expected to be thoroughly familiar with the existence of the election.

<sup>74</sup> Pa. Laws 1933 No. 106, art II, § 202, at 364.

<sup>75</sup> PA. STAT. ANN. tit. 15, § 2852-202(A) (Supp. 1963) (Pa. Laws 1963, No. 536, at 1381).

<sup>76</sup> *Ibid.* (Pa. Laws 1963, No. 534, at 1355).

<sup>77</sup> PA. STAT. ANN. tit. 46, § 575 (Supp. 1963).

<sup>78</sup> *Ibid.* The corporation law committee's 1965 legislative program, note 73 *supra*, would resolve the potential conflict by eliminating the language added by Act No. 534.

preliminary reference of the charter papers to the public utility commission can be avoided by drafting an apt purpose clause.<sup>79</sup>

#### D. Foreign Public Utilities

A "foreign business corporation" subject to article X of the BCL was formerly defined as "a corporation for profit, organized under or by virtue of any laws other than those of this Commonwealth, for any purpose or purposes for which a corporation may be formed under this act."<sup>80</sup> Even before 1964, domestic business corporations could be formed under the BCL for the purpose of engaging in exclusively *interstate* public utility operations. Section 4's exclusion of corporations subject to the jurisdiction of the public utility commission is here nullified by section 1402 of the Public Utility Law<sup>81</sup> which deprives the commission of any jurisdiction over purely interstate activities. Thus, a variety of foreign public utilities, primarily interstate gas transmission companies and interstate common carriers by motor vehicle, have long been subject to the BCL. Under the language quoted above, the extension of the BCL to all domestic motor carriers had the additional effect of automatically bringing under the BCL all *intrastate* common carriers by motor vehicle incorporated in foreign jurisdictions.

Act No. 536 also amended the definition of "foreign business corporation" by adding the phrase "and not excluded from the scope of this act by Section 4 of this act."<sup>82</sup> In the absence of this amendment, all foreign public utility corporations (except railroads) engaged in rendering intrastate service would have been brought automatically under article X of the BCL, since under the new provisions,<sup>83</sup> a domestic business corporation "may be formed" under the BCL for any intrastate or interstate public utility purpose other than a railroad purpose.

<sup>79</sup> *E.g.*, "The furnishing of service subject to the jurisdiction of the Pennsylvania Public Utility Commission, limited to the transportation of persons and property as a common carrier by taxicab." The effect of the restrictive language is to make clear that the proposed corporation is *solely* a "motor carrier," and thus subject to the BCL without express election. Such language also avoids possible questions under the Interstate Commerce Act § 20a(1), 41 Stat. 494 (1920), 49 U.S.C. § 20(a)(1) (1958), which subjects to prior Commission approval certain security issues of "any corporation organized for the purpose of engaging in [interstate] transportation by railroad." This provision is also applied to motor carriers. See Motor Carrier Act of 1935, § 214, 49 Stat. 557, as amended, 49 U.S.C. § 314 (1958). *But cf.* Wood Indus., Inc.—Control—United Transp., Inc., 85 M.C.C. 672 (1960) (requirement inapplicable in absence of specific intent to commence jurisdictional operations within a definite period).

<sup>80</sup> Pa. Laws 1933, No. 106, art. 1, § 2, at 3619, as amended, Pa. Laws 1957, No. 370, § 1, at 711.

<sup>81</sup> PA. STAT. ANN. tit. 66, § 1532 (1959).

<sup>82</sup> PA. STAT. ANN. tit. 15, § 2852-2 (Supp. 1963).

<sup>83</sup> PA. STAT. ANN. tit. 15, § 2852-4(a)(4) (Supp. 1963); note 42 *supra*.

With the exception of motor carriers and railroads, a foreign public utility now faces essentially the same election as a domestic corporation. If not yet qualified, it may qualify, as previously, under the Act of 1911,<sup>84</sup> or under article X of the BCL by applying for a certificate of authority. If the foreign corporation is already qualified under the Act of 1911, it may accept the BCL by filing a certificate of acceptance in essentially the same form as that used for domestic corporations.<sup>85</sup>

### E. Eminent Domain

"The eminent domain provisions . . . proved to be the most difficult aspect" of the Bar Association's preparation of the 1963 amendments.<sup>86</sup> Each of the existing nineteenth-century public utility corporation acts contains a specific, and frequently distinctive, grant of the eminent domain power and the related right to enter streets and other public property.<sup>87</sup> The difficulty of preserving these special powers undoubtedly had resulted in the original exclusion of public utilities from the BCL.

The 1963 solution was relatively short, but comprehensive:

SECTION 322. Power of Eminent Domain—A public utility corporation shall have the same powers and employ the same procedures to take or enter upon private or public property necessary for the rendition of its authorized service or each of its authorized services as it would have if it had been organized under any other act or acts of Assembly for the purposes of rendering such service or services, including

<sup>84</sup> PA. STAT. ANN. tit. 15, §§ 3141-45 (1959), as amended, PA. STAT. ANN. tit. 15, § 3144.1 (Supp. 1963).

<sup>85</sup> Domestic corporations accept the BCL for "the government and regulation of the affairs of the corporation," while foreign corporations need only accept the BCL for "the regulation of its affairs in this Commonwealth." PA. STAT. ANN. tit. 15, § 2852-4(B)(2)(iii) (Supp. 1963).

<sup>86</sup> Joint Report 7.

<sup>87</sup> The following statutory provisions confer important eminent domain and right of entry powers upon the public utilities indicated: *Electric*: PA. STAT. ANN. tit. 15, §§ 1181 (public), 1182 (private) (1958); *Ferry*: PA. STAT. ANN. tit. 15, § 815 (1958); *Gas*: PA. STAT. ANN. tit. 15, §§ 1381, 2031 (1958) (public and private); *Inclined Plane Railway*: PA. STAT. ANN. tit. 15, § 1494 (1958); *Railroad*: PA. STAT. ANN. tit. 67, §§ 271, 277, 280, 281, 321 (1930); *Refrigeration*: PA. STAT. ANN. tit. 15, 2201 (1958) (public and private); *Sewer*: PA. STAT. ANN. tit. 15, §§ 3 cl. XXV (public), 491 (private) (1958); *Street Railway*: PA. STAT. ANN. tit. 67, §§ 1196 (public), 1221 (private) (1930); *Telegraph*: PA. STAT. ANN. tit. 15 § 2292 (1958) (public); *Telephone*: PA. STAT. ANN. tit. 15, §§ 2292, 2332 (public), 2297 (private) (1958); *Trackless Trolley*: PA. STAT. ANN. tit. 15, § 3, cl. XXIII (1958) (public); *Pipeline*: PA. STAT. ANN. tit. 15, § 2153 (1958); PA. STAT. ANN. tit. 58, § 71 (1930) (public and private); *Subway-El*: PA. STAT. ANN. tit. 67, § 1401 (1930) (public and private); *Water-Water Power*: PA. STAT. ANN. tit. 15, §§ 1403 (public and private), 1442 (public), 1443 (private) (1958); PA. STAT. ANN. tit. 32, §§ 622, 623, 639 (1949) (public and private).

the powers it would have if it had been created through the merger or consolidation of two or more corporations organized under such other acts of Assembly.<sup>88</sup>

The powers "to take . . . private . . . property" and "to . . . enter upon . . . public property" are together all-inclusive and thus encompass all property of every type and all highways in the state.

Even if no power of eminent domain had been expressly granted to BCL public utility corporations, they could nevertheless incorporate "paper" subsidiary corporations under the appropriate nineteenth-century acts to make any necessary condemnations and, thereafter, sell or lease the resulting property to the parent utility. Historically, railroads and street railway systems were built up by the lease of facilities from these "underlier corporations."<sup>89</sup>

Under the Corporation Act of 1874 gas, water, and electric companies may be organized only for service in a single political unit (county, municipality, etc.).<sup>90</sup> However, the general assembly almost immediately authorized the so-called "short form merger" of these corporations to provide common ownership and more practical operation over larger areas,<sup>91</sup> a procedure later regularized by the statutory merger acts of 1901<sup>92</sup> and 1909.<sup>93</sup> Thus gas, water, and electric corporations operating over substantial territory have traditionally been organized by creating the appropriate number of "paper" corporations under the proper nineteenth-century acts, which corporations were then merged into the operating utility company.

Section 322 now avoids such complexities as illustrated by a hypothetical example: Consider corporation *A*, a BCL public utility whose corporate purpose is "the conduct of any business anywhere in the world," and which is authorized by the public utility commission

<sup>88</sup> PA. STAT. ANN. tit. 15, § 2852-322 (Supp. 1963). As indicated by the language of amended section 202(a)(3) of the Public Utility Law, PA. STAT. ANN. tit. 66, § 1122(a)(3) (Supp. 1963), the term "authorized" includes the possession of "grandfather" rights under section 1401 of that act, PA. STAT. ANN. tit. 66, § 1531 (1959). See note 152 *infra*. Where the utility is engaged solely in interstate commerce, "authorized" would, of course, include the immunity conferred by the commerce clause of the federal constitution. See note 162 *infra*.

<sup>89</sup> For a description of underlier arrangements, see, *e.g.*, Philadelphia Rapid Transit Co., 18 Pa. Pub. Util. Comm'n 595, 598 (1938); Harrisburg Ry., 14 Pa. Pub. Serv. Comm'n 200 (1935).

<sup>90</sup> See, *e.g.*, PA. STAT. ANN. tit. 15, §§ 1181 (electric companies), 1381 (gas), 1403 (water) (1958). Pa. Laws 1913, No. 304, § 1, at 458, expressly required that electric corporations improperly formed for operation in excess territory elect the one district which they choose to serve.

<sup>91</sup> Pa. Laws 1876, No. 25, § 5, at 33 (now PA. STAT. ANN. tit. 15, § 595 (1958)).

<sup>92</sup> Pa. Laws 1901, No. 216, at 349.

<sup>93</sup> Pa. Laws 1909, No. 229, at 408 (now PA. STAT. ANN. tit. 15, §§ 421-25 (1958)), as amended, PA. STAT. ANN. tit. 15, §§ 421-25 (Supp. 1963)). See also *Pennsylvania Util. Co. v. Public Serv. Comm'n*, 69 Pa. Super. 612 (1918).

to furnish electric and water service in township *X*, and water service only in township *Y*. Section 322 provides that the services are to be considered independently.<sup>94</sup> Thus, in township *X* corporation *A* may exercise the condemnation<sup>95</sup> and right of entry<sup>96</sup> powers of a company organized under the 1889 supplement<sup>97</sup> to the Corporation Act of 1874 to supply light, heat, and power to township *X* by means of electricity. In *X* and *Y* townships, corporation *A* may exercise the condemnation and right of entry powers<sup>98</sup> of a water company formed by merger of two water companies organized under clause 2 of section 34 of the Corporation Act of 1874,<sup>99</sup> the one to supply water to township *X* and the other to township *Y*. Thus, section 322, in its comprehensive simplicity, incorporates previously existing complicated devices without the freight of their empty formalisms.

Foreign public utilities which elect to qualify under the BCL acquire the same powers of eminent domain as are conferred upon domestic corporations by section 322.<sup>100</sup> Thus, the previous practice of organizing domestic subsidiaries will no longer be necessary.

#### *F. Other Miscellaneous Changes*

##### 1. Conforming Changes

To accommodate the BCL to present regulatory practices concerning the reorganization<sup>101</sup> or merger<sup>102</sup> of a public utility, the BCL was amended to provide that such transactions will not be effective until

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<sup>94</sup> PA. STAT. ANN. tit. 15, § 2852-322 (Supp. 1963). Because § 322, by reference to "each of its authorized services," obviously contemplates multiple-purpose corporations, it is not concerned with whether the corporation "could have been" created through the merger or consolidation of the several corporations. Instead, § 322 allows the BCL corporation powers equal to the sum of those it would have possessed if it "had been" created through the merger of such corporation, without regard to the legal possibility of such merger under prior law.

<sup>95</sup> Pa. Laws 1889, No. 153, at 136 (now PA. STAT. ANN. tit. 15, § 1182(b) (1958)).

<sup>96</sup> PA. STAT. ANN. tit. 15, § 1181 (1958).

<sup>97</sup> Pa. Laws 1889, No. 153, at 136 (now in scattered sections of PA. STAT. ANN. tit. 15 (1958)).

<sup>98</sup> Conferred by Pa. Laws 1874, No. 32, § 34, cl. 2, at 93-94 (now PA. STAT. ANN. tit. 15, § 1403 (1958)); Pa. Laws 1893, No. 103, §§ 1-2, at 158 (now PA. STAT. ANN. tit. 15, §§ 1442-43 (1958)); Pa. Laws 1923, No. 291, §§ 2-3, at 702 (now PA. STAT. ANN. tit. 32, §§ 622-23 (1949)); Pa. Laws 1939, No. 365, § 9, at 846 (now PA. STAT. ANN. tit. 32, § 639 (1949)).

<sup>99</sup> PA. STAT. ANN. tit. 15, § 1403 (1958).

<sup>100</sup> PA. STAT. ANN. tit. 15, § 2852-1010 (1958); see Carnegie Natural Gas Co. v. Swiger, 72 W. Va. 557, 79 S.E. 3 (1913) (interpreting similar provision).

<sup>101</sup> PA. STAT. ANN. tit. 15, § 2852-312 (1958), as amended, PA. STAT. ANN. tit. 15, § 2852-312(C) (Supp. 1963).

<sup>102</sup> PA. STAT. ANN. tit. 15, § 2852-905 (Supp. 1963).

any required Pennsylvania Public Utility Commission approvals have first been secured.<sup>103</sup>

The blanket BCL authorization of mergers and consolidations now excludes those "prohibited by the Constitution of Pennsylvania as the same shall exist at the time of the proposed merger or consolidation unless otherwise ordered by an officer or agency of the United States acting within his or its lawful jurisdiction."<sup>104</sup> The present text of the constitution of Pennsylvania<sup>105</sup> and its implementing statutes prohibit certain telegraph<sup>106</sup> and railroad<sup>107</sup> mergers. Since an active effort is underway to eliminate these obsolete provisions from the constitution,<sup>108</sup> the restriction was phrased in terms of the constitutional provisions existing at the time of the proposed merger.

Under the BCL the limitation or denial of preemptive rights or the special rights and preferences of any class of shares gives rise to dissenters' rights<sup>109</sup> only in "holders of shares of a class" issued before July 3, 1933 (the effective date of the BCL),<sup>110</sup> doubtlessly because any shares issued after that date are subject to the BCL's provisions for modification of rights and preferences upon less than a unanimous vote.<sup>111</sup> Since under the nineteenth-century acts all shares, regardless of the date of their issue, carry dissenters' rights on modi-

<sup>103</sup> PA. STAT. ANN. tit. 66, § 1122(e) (1959) (section 202(e) of the Public Utility Act) requires commission approval of transfers of certain public utility property, including transfers effected by merger. However, as pointed out, see text accompanying note 154 *infra*, neither amended § 905 of the BCL nor the identical provisions of PA. STAT. ANN. tit. 15, § 422(C) (1958) any longer require prior public utility commission approval of the merger of a "paper" company into an operating public utility corporation.

<sup>104</sup> PA. STAT. ANN. tit. 15, § 2852-901(C) (Supp. 1963). The exception in favor of the paramount power of the federal government is in recognition of the existing powers of the Federal Communications Commission and the Interstate Commerce Commission to authorize certain telegraph and railroad mergers, notwithstanding contrary state laws. See § 222(c)(1) of the Communications Act of 1934, 57 Stat. 7 (1943), as amended, 47 U.S.C. § 222(c)(1) (1958) (telegraph); Interstate Commerce Act § 5(11), 54 Stat. 908 (1940), as amended, 49 U.S.C. § 5(11) (1958) (railroad).

<sup>105</sup> PA. CONST. art. 16, § 12 (merger of competing telegraph lines); PA. CONST. art. 17, § 4 (merger of competing railroads).

<sup>106</sup> PA. STAT. ANN. tit. 15, §§ 422, 2351-57 (1958). Because telephone service was originally performed by corporations organized under telegraph charters, competing telephone companies could not merge, *Cochran v. Public Serv. Comm'n*, 263 Pa. 506, 107 Atl. 877 (1919), and thus the elimination of duplicating telephone service had to await PA. STAT. ANN. tit. 15, §§ 2331-34 (1958) authorizing telephone companies to incorporate as such. See *Shaffer v. Public Serv. Comm'n*, 268 Pa. 456, 111 Atl. 877 (1920).

<sup>107</sup> PA. STAT. ANN. tit. 67, §§ 608-09 (1930).

<sup>108</sup> See *A Revised Constitution for Pennsylvania ("Project Constitution")*, 34 PA. B.A.Q. 147 (1963).

<sup>109</sup> PA. STAT. ANN. tit. 15, § 2852-810(A) (Supp. 1963).

<sup>110</sup> PA. STAT. ANN. tit. 15, § 2852-810(B) (Supp. 1963).

<sup>111</sup> PA. STAT. ANN. tit. 15, §§ 2852-611, -801(4) (1958); PA. STAT. ANN. tit. 15, § 2852-805 (Supp. 1963).



fication,<sup>112</sup> section 810(B) of the BCL was amended to extend such dissenters' rights to holders of shares of a class issued by a public utility at any time before the particular "public utility corporation" becomes subject to the BCL.<sup>113</sup>

## 2. Validating Provisions

### a. Recording

The Corporation Act of 1874 specifically provides that corporate existence does not commence until the incorporation papers have been placed on record in the office for the recording of deeds in the proper county.<sup>114</sup> Since this step, unknown to the BCL, is frequently overlooked, a new section 12 has been added to the BCL which, when triggered by an appropriate filing under newly added section 15,<sup>115</sup> validates the organization of defective corporations having unrecorded charters and provides that their date of incorporation shall be the date shown on the Governor's letters patent. A new section 13 similarly validates, again subject to section 15, postincorporation acts, such as name changes and charter amendments, not properly consummated by recording.<sup>116</sup>

### b. Franchises

When all or part of the franchises of a public utility corporation governed by one of the nineteenth-century acts are "sold" to a vendee corporation in either a "short-form merger"<sup>117</sup> or a partial franchise sale,<sup>118</sup> the term of existence of the transferred franchises is unclear.

<sup>112</sup> PA. STAT. ANN. tit. 15, § 224(d) (1958).

<sup>113</sup> PA. STAT. ANN. tit. 15, § 810(B) (Supp. 1963). This ambulatory phraseology thus accommodates effectively contract carriers (which fall within the BCL's definition of "public utility corporations"), common carriers, and other utilities, regardless of when they did or will become subject to the BCL. However, since the language does not reach those nonpublic utility corporations brought under the BCL by the 1957 and 1963 amendments, the corporation law committee's 1965 legislative program proposes to correct this defect by deleting "in the case of a public utility corporation or July 3, 1933, in the case of any other business corporation." Pennsylvania Bar Association Corporation Law Committee and Section, *Report on Corporation, Banking, and Business Law*, 35 Pa. B.A.Q. 308, 314, 329 (1964).

<sup>114</sup> PA. STAT. ANN. tit. 15, § 21 (1958). Some of the other nineteenth-century acts contain a similar requirement.

<sup>115</sup> PA. STAT. ANN. tit. 15, § 2852-15 (Supp. 1963). Sections 2852-12 through 2852-16 were added by Pa. Laws 1963, No. 536, at 1381. Section 2852-12 brings up to date Pa. Laws 1935, No. 364, at 1139 (now PA. STAT. ANN. tit. 15, § 30 (1958)), but does not require the recording of the charter, since a filing under BCL § 15 satisfies the constitution. See text accompanying note 123 *infra*.

<sup>116</sup> PA. STAT. ANN. tit. 15, § 2852-13 (Supp. 1963). As to the requirement of recording, see PA. STAT. ANN. tit. 15, §§ 391, 403, 462 (1958).

<sup>117</sup> Pursuant to PA. STAT. ANN. tit. 15, § 595 (1958), or one of the many other franchise sales statutes.

<sup>118</sup> See PA. STAT. ANN. tit. 15, §§ 3021-26 (1958) (gas companies).

The Corporation Act of 1874<sup>119</sup> permits the vendee corporation to obtain an extension of the nonexistent vendor corporation's franchises when they are about to expire. New section 14,<sup>120</sup> when triggered by section 15, merges all such franchise rights into the charter of the existing corporation, whether the existing corporation is the vendee itself, or is the direct or remote successor of the vendee, regardless of the inadvertent expiration of the vendor corporation's franchises. All such franchise rights take the life of their longest-lived constituent. The same is true of mergers and consolidations. There is no revival, however, of expressly surrendered powers.

In prohibiting special corporate legislation and providing<sup>121</sup> that "no law . . . shall create, renew or extend the charter of more than one corporation,"<sup>122</sup> the Pennsylvania constitution casts doubt upon the automatic application of sections 12, 13, and 14. However, provisions of general corporation laws permitting corporations to incorporate or to amend their charters or to extend their existence have never been questioned. The filing required under section 15<sup>123</sup> is technically a charter application for section 12, a suitable amendment for section 13 and for section 14 a shortened charter amendment. The filing requirement makes clear that the new sections create a procedure and do not purport by their own force to effect any change in corporate powers or rights.

Although this procedure moots any constitutional questions, its application would be very limited if restricted to cases where the corporation affirmatively seeks the benefits of sections 12 through 14, since, *ex hypothesi*, the corporation is ignorant of the defects which necessitate validation. Section 15(A)<sup>124</sup> therefore provides that *any filing* by the corporation under the BCL triggers sections 12, 13, and 14 unless: (1) The filing expressly disclaims any such intent, or (2) no permanent record of the filing is retained by the department of state.<sup>125</sup> A statement also may be filed expressly for the purpose of invoking sections 12, 13, and 14, but here too the substance is indefinite because section 15(B) provides that "it shall not be necessary or *permissible*" to identify specifically "the acts and transactions to be validated or the franchise rights to be acquired or extended . . ." <sup>126</sup>

<sup>119</sup> PA. STAT. ANN. tit. 15, § 391(b) (1958).

<sup>120</sup> PA. STAT. ANN. tit. 15, § 2852-14 (Supp. 1963).

<sup>121</sup> PA. CONST. art. 3, § 7.

<sup>122</sup> PA. CONST. art. 16, § 10.

<sup>123</sup> PA. STAT. ANN. tit. 15, § 2852-15 (Supp. 1963).

<sup>124</sup> PA. STAT. ANN. tit. 15, § 2852-15(A) (Supp. 1963).

<sup>125</sup> Thus such trivial findings as a request for reservation of a changed corporate name would have no effect.

<sup>126</sup> PA. STAT. ANN. tit. 15, § 2852-15(B) (Supp. 1963).

Section 15(C) provides that a filing shall not affect any rights in any proceeding pending at the time of the filing, but obviously contemplates that the filing would be effective in any subsequent action.<sup>127</sup>

### c. Transfer of Pre-1914 Rights

A new section 16 provides that the granting by the Pennsylvania Public Utility Commission of a certificate approving the transfer by a public utility of any pre-1914 rights shall, without more, vest such rights in the transferee.<sup>128</sup> The fact that this section, derived from the short-form merger and partial franchise sale provisions of prior law,<sup>129</sup> is probably superfluous has apparently contributed to widespread misunderstanding of its limited purpose.

All rights to render public utility service in Pennsylvania arising since 1913 are evidenced by certificates granted either by the present commission or its predecessor, the public service commission.<sup>130</sup> Accordingly, these rights may be transferred in whole or in part by appropriate proceedings before the commission, long the common practice in motor carrier cases, without any special corporate formalities. If the proposed service is not within its charter purpose, the transferee corporation simply amends its articles appropriately under article VIII of the BCL.<sup>131</sup>

Under sections 202(a)(3)<sup>132</sup> and 1401<sup>133</sup> of the Public Utility Law, corporate charter provisions evidence so-called "grandfather rights," *i.e.*, rights to render public utility service which arose prior to 1914, including rights acquired before that date through "short-form merger," partial franchise sale, or statutory merger or consolidation.<sup>134</sup> However, the commission has stated that transfer after January 1, 1914, of pre-1914 rights nullifies their special status as "grandfather rights" evidenced by charter provisions and renders them ordinary certificate rights evidenced by the language of the certificate of public convenience which authorized their transfer.<sup>135</sup>

<sup>127</sup> PA. STAT. ANN. tit. 15, § 2852-15(C) (Supp. 1963).

<sup>128</sup> PA. STAT. ANN. tit. 15, § 2852-16 (Supp. 1963).

<sup>129</sup> See notes 117-18 *supra*.

<sup>130</sup> See Public Utility Law §§ 202(a)(1)-(2), PA. STAT. ANN. tit. 66, §§ 1122(a)(1)-(2) (Supp. 1963); note 149 *infra*.

<sup>131</sup> PA. STAT. ANN. tit. 15, § 2852-801(A)(3) (1958).

<sup>132</sup> PA. STAT. ANN. tit. 66, § 1122(a)(3) (Supp. 1963); see note 149 *infra*.

<sup>133</sup> PA. STAT. ANN. tit. 66, § 1531 (1959).

<sup>134</sup> See generally *Fogelsville & Trexlertown Elec. Co. v. Pennsylvania Power & Light Co.*, 271 Pa. 237, 114 Atl. 822 (1921); *Harmony Elec. Co. v. Public Serv. Comm'n*, 78 Pa. Super. 271 (1922), *aff'd*, 275 Pa. 542, 119 Atl. 712 (1923).

<sup>135</sup> See *Wattsburg Tel. Corp.*, 37 Pa. Pub. Util. Comm'n 77, 88 (1959), *aff'd sub nom. General Tel. Co. v. Pennsylvania Pub. Util. Comm'n*, 192 Pa. Super. 563, 161 A.2d 906 (1960).

Thus, in a "transfer" of pre-1914 rights, an entirely new right is actually created, with the pre-1914 right serving only as a substitute for proof of public need for the new right. Therefore the "right" itself does not survive and thus its "transfer" requires no *corporate* machinery.

Section 16's sole function is to provide expressly, *ex abundanti cautela*, that any rights capable of surviving a transfer and not otherwise barred will pass to a transferee without corporate, as distinguished from regulatory, formalities. The transfer of any utility plant in connection with a transaction to which section 16 is applicable would, of course, be accomplished by deed and bill of sale as previously.<sup>186</sup>

### III. THE 1963 AMENDMENTS TO THE PUBLIC UTILITY LAW

#### A. Revision in the Mechanics of Public Utility Regulation

Formerly, the institution of new or extended public utility service required: (1) Deposit with the department of state of papers for the organization or qualification of a new utility or territorial extension of an existing one; (2) transmittal of the papers, if in order, to the public utility commission; (3) application for commission approval under former section 201(a) (organization of a new domestic public utility), former section 202(a) (qualification of a new foreign public utility), or former section 202(b) (acquisition of additional corporate power) of the Public Utility Law; (4) registration of a securities certificate under section 601 of the Public Utility Law<sup>187</sup> for organization of or for additional financing by a domestic public utility; (5) attachment to corporate papers of a certificate of public convenience and an order evidencing the commission's approval of the applications in (3) and (4) above; (6) presentation of corporate papers to the Governor for his approval (under the Corporation Act of 1874 an independent exercise of discretion);<sup>188</sup> (7) transmittal from the Governor to the secretary of the commonwealth, who prepared draft letters patent; (8) dispatch of the draft letters patent to the

<sup>186</sup> No provision was made for the automatic dissolution of the transferor corporation in such a case because the transfer of physical property and any vested "grand-father rights" under regulatory acts is not necessarily inconsistent with the continued existence of the "shell" of the transferor corporation, which in any event can be easily extinguished under article XI of the BCL. See PA. STAT. ANN. tit. 15, §§ 2852-1101 to -1103.1 (Supp. 1963); PA. STAT. ANN. tit. 15, § 2852-1104 (1958), as amended, PA. STAT. ANN. tit. 15, §§ 2852-1104(b)-(c) (Supp. 1963); PA. STAT. ANN. tit. 15, §§ 2852-1105 to -1111 (1958); cf. BCL § 311. No provision for shareholder or other special approval was included because it was intended that the formalities governing the transfer of any rights under this section should be identical to the formalities requisite to effect the transfer of post-January 1, 1914, rights.

<sup>187</sup> PA. STAT. ANN. tit. 66, § 1241 (1959).

<sup>188</sup> See the proviso in PA. STAT. ANN. tit. 15, § 21(d) (1958).

Governor for execution; (9) transmittal of the letters patent, corporate papers, and certificates of the commission's approval to the incorporators for recording in the proper county or counties; (10) application to the commission to begin exercise of all or some part of the new corporate powers; and (11) issuance to the corporation of a certificate of public convenience and an order evidencing the commission's approval of the application in (10) above.

In practice steps (3), (4), (5), (10), and (11) were performed simultaneously at the commission, and steps (6), (7), and (8), simultaneously in the executive department. Still their distinct nature was carefully preserved by the issuing of multiple certificates of public convenience by the commission and by the affixing of two distinct autographs by the Governor.

Under the 1963 amendments these steps are sharply curtailed. Those public utilities which elect the BCL are free of steps (6), (7), (8), and (9). Furthermore *no* public utility is subject to steps (2), (3), and (5),<sup>139</sup> or (4) in the case of initial financing by a proposed public utility.<sup>140</sup>

The former dual approval of corporate action, *i.e.*, commission approval of acquisition of the charter power, step (5), preceding approval of the right to exercise the power, as in step (11), arose for historical, not functional reasons.<sup>141</sup> Today, however, the corporate powers of a public utility are largely irrelevant.<sup>142</sup> Indeed, in recent times the

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<sup>139</sup> PA. STAT. ANN. tit. 66, §§ 1121-22 (Supp. 1963).

<sup>140</sup> However, the commission retains the power to require the filing of a securities certificate as part of an initial service application.

<sup>141</sup> Prior to the creation of the Pennsylvania State Railroad Commission, Pa. Laws 1907, No. 250, at 337 (repealed by Pa. Laws 1913, No. 854, art. IV, § 51, at 1434), and the extension of the commission principle of regulation to all public utilities, Public Service Company Law, Pa. Laws 1913, No. 854, at 1374 (repealed by Pa. Laws 1937, No. 286, art. XV, § 1502, at 1118), public utility rate and service regulation was largely in the hands of the courts. See, *e.g.*, the Corporation Act of 1874, Pa. Laws 1874, No. 32, at 73, which contemplated judicial regulation of the rates of ferries, PA. STAT. ANN. tit. 15, § 811 (1958), and gas and water companies, PA. STAT. ANN. tit. 15, § 1353 (1958), and of the service of gas, water, and road companies, PA. STAT. ANN. tit. 15, § 1384 (1958); Pa. Laws 1874, No. 32, cl. 7, at 87 (repealed in part by Pa. Laws 1878, No. 109, § 5, at 86). Apparently, legislative or administrative limitations on the exercise of specially conferred charter powers were considered impractical and possibly invalid.

By 1913 public utility regulation had developed to the point where direct regulation of business activities, rather than of the corporate powers of utilities, seemed both feasible and desirable. Concurrent authority, however, over the acquisition and surrender of charter powers was conferred upon the public service commission. Pa. Laws 1913, No. 854, art. III, §§ 2(a), 3(a), at 1388 (repealed Pa. Laws 1937, No. 286, art. XV, § 1502, at 1118). When the Public Utility Law was enacted in 1937 the public utility commission continued to exercise such so-called "Folder 1" authority under the former provisions of Pa. Laws 1937, No. 286, art. II, §§ 201(a), 202(a)-(b), at 1063.

<sup>142</sup> An exception is the extent to which they confer the power of eminent domain.

commission's review of applications for such powers, virtually perfunctory, has been limited to a determination that the powers of the public utility would be at least as broad as the scope of the utility's so-called "certificate" application, step (10).

The inability to incorporate without formal commission approval, as in step (5), resulted almost universally in foreign incorporation (usually in Delaware) of those motor carriers having both state and federal authority. Delaware incorporation created a company capable of participating as transferee in Interstate Commerce Commission proceedings, which under federal law must be concluded before the Pennsylvania commission may act.<sup>143</sup> Similarly, proposed gas companies have been forced to initiate proceedings before the Federal Power Commission for natural gas allocations in the names of their incorporators, another example of the red-tape problems engendered by the step (5) requirement.

### *B. Preservation of Existing Commission Jurisdiction*

In 1963 Act No. 512 rewrote sections 201 and 202 of the Public Utility Law,<sup>144</sup> the heart of the commission's broad powers over the organization and service of public utilities. However, it left unchanged the commission's existing jurisdiction, as the Bar Association's *Joint Report* indicated by its careful wording of the act's title—"An act . . . providing for the regulation of public utilities and proposed public utilities to the same extent as heretofore by means independent of the charter and corporate rights, powers, franchises and privileges of such utilities,"<sup>145</sup>—and by including the following note in its report:

*Other Powers.* The control which the Commission might have heretofore exercised over the affairs of public utility corporations by means of the regulation of their charter powers is continued by existing provisions of the Public Utility Law, such as Sections 401 (service and facilities), 506 (budgets) and 901 (general regulatory power), which have been left unaffected by the terms of the proposed act.<sup>146</sup>

<sup>143</sup> Technically a separate Folder 1 proceeding (steps (3), (4), and (5)) could be had before the Pennsylvania commission, followed by the ICC proceeding, and concluding with a separate Folder 2 proceeding (steps (10) and (11)) before the Pennsylvania commission; but as indicated, such was not the practice.

<sup>144</sup> PA. STAT. ANN. tit. 66, §§ 1121-22 (Supp. 1963).

<sup>145</sup> Joint Report A-1 to A-2. The title of an act may be considered in the construction thereof. *Hoffman v. Pittsburgh*, 365 Pa. 386, 398, 75 A.2d 649, 654 (1950); Statutory Construction Act, PA. STAT. ANN. tit. 46, § 554 (1952).

<sup>146</sup> Joint Report 11.

*C. Elimination of Jurisdiction Over Corporate Organization,  
Qualification and Charter Amendments*

Section 201 now governs all initial utility service.<sup>147</sup> Under its revised language commission approval is no longer required prior to the incorporation of a domestic public utility,<sup>148</sup> although domestic and foreign proposed public utilities must still obtain a certificate from the commission before entering upon public utility status. Since the charter will no longer delineate the nature and scope of the utility's permissible activities, the commission's certificate of public convenience must now contain this information.

Section 202,<sup>149</sup> covering all alterations of service by a public utility subsequent to initial certification, has been amended along the

<sup>147</sup> PA. STAT. ANN. tit. 66, § 1121 (Supp. 1963), with deleted provisions in brackets and new provisions in italics, reads:

Section 201. [Organization of Public Utilities and] Beginning of Service.—Upon the *application of any proposed public utility* and the approval of *such application* by the commission evidenced by its certificate of public convenience first had and obtained, and not otherwise, it shall be lawful for any *such proposed public utility* . . . .

(a) To be incorporated, organized, or created: Provided, That existing laws relative to the incorporation, organization, and creation of such public utilities shall first have been complied with, prior to the application to the commission for its certificate of public convenience.

(b) To] *to begin to offer, render, furnish or supply service within this Commonwealth.*

*The commission's certificate of public convenience granted under the authority of this section shall include a description of the nature of the service and of the territory in which it may be offered, rendered, furnished, or supplied.*

<sup>148</sup> Pa. Laws 1937, No. 286, art. II, § 201, at 1063.

<sup>149</sup> The amended text of subdivisions (a) through (d), with deleted provisions in brackets and new provisions in italics, as it appears in Pa. Laws 1963, No. 512, § 2, reads:

Section 202. Enumeration of Acts Requiring Certificate—Upon the *application of any public utility* and the approval of *such application* by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful:

(a) [For a foreign public utility to obtain the right to do business within this Commonwealth, if existing laws permit such foreign public utility to exercise its powers and franchises within this Commonwealth.

(b) For any public utility to renew its charter, or obtain any additional right, power, franchise, or privilege, by any amendment or supplement to its charter, or otherwise.

(c) [For any public utility to begin [the exercise of any additional right, power, franchise, or privilege] *to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized by—*

(1) *A certificate of public convenience heretofore or hereafter granted under this act or under The Public Service Company Law, July 26, 1913 (P.L. 1374), or*

(2) *A registration certificate granted by the commission under section 1401 of this act, or*

(3) *An unregistered right, power, or privilege preserved by section 1401 of this act.*

[(d)] (b) For any public utility to [dissolve, or to] abandon or surrender, in whole or in part, any service [, right, power, franchise, or privilege]: Provided, That the provisions of this paragraph shall not apply to discontinuance of service to a patron for nonpayment of a bill, or upon request of a patron.

lines of section 201. Commission approval is no longer required prior to the qualification of a foreign public utility corporation,<sup>150</sup> before the renewal or amendment of public utility charters, or the acquisition of any additional corporate power.<sup>151</sup>

Under former subdivision (c), amended and relettered (a), any domestic or foreign public utility must obtain a certificate from the commission before extending its utility activities. This requirement stems from revised language making unlawful any rendition of utility service unless rendered pursuant to a certificate issued by the commission or its predecessor, the public service commission, as in step (11), or pursuant to the savings provisions of section 1401 (service rendered on January 1, 1914, and continuously thereafter).<sup>152</sup>

The surrender of charter powers or the dissolution of former public utilities, or both, is permitted without commission approval. However, a public utility still cannot avoid its service obligations by surrender of charter powers or dissolution.<sup>153</sup>

The amendment to section 202 also eliminates the need for commission approval of the merger of a "paper" company<sup>154</sup> into, or the sale of its franchises to, an operating public utility corporation. The commission exercised jurisdiction over such transactions under former section 202(b) because the operating public utility was thus obtaining an "additional right, power, franchise, or privilege." The transaction continues to fall within the literal wording of section 202(e),<sup>155</sup> which requires advance commission approval of the acquisition "by any method or device whatsoever, including a consolidation [or] merger" by any public utility of "the title to . . . any . . . intangible property . . . useful in the public service . . . ." However, by the commission's own standards, the recordable value of new corporate franchises

<sup>150</sup> Pa. Laws 1937, No. 286, art. II, § 202, at 1063.

<sup>151</sup> *Ibid.*

<sup>152</sup> PA. STAT. ANN. tit. 66, § 1531 (1959). The *Joint Report* states that service heretofore rendered has been "authorized" by a certificate of public convenience within the meaning of the language of amended subdivision (a) despite the fact that the utility may have possessed identical or broader charter powers, because without a certificate the rendition of such service (if begun after 1913) would be illegal. *Joint Report* 10.

<sup>153</sup> Public Service Company Law, Pa. Laws 1913, No. 854, at 1374, did not regulate the dissolution of a public utility corporation, but Pa. Laws 1856, No. 308, at 293, provided for court review in such cases. Accordingly, it was held that the public service commission had no jurisdiction over total abandonment of service, since such an abandonment was considered tantamount to dissolution. *Swarthmore Borough v. Public Serv. Comm'n*, 277 Pa. 472, 121 Atl. 488 (1923). The amendments to this section do not revive the *Swarthmore* doctrine, because the language of amended subdivision (b) expressly extends to abandonments of the "whole" of any service, and in any event Pa. Laws 1856, No. 308, at 293, was repealed absolutely by Pa. Laws 1963, No. 494, § 2(3), at 1163.

<sup>154</sup> *I.e.*, a newly organized corporation having as its only asset a nominal paid-in capital.

<sup>155</sup> PA. STAT. ANN. tit. 66, § 1122(e) (1959).



is certainly no more than the expenses associated with the organization of the corporation.<sup>156</sup> Thus mergers involving "paper" corporations are exempt from section 202(e), which applies only to personalty having an "undepreciated book value" of more than \$1,000.<sup>157</sup> On the other hand, a consolidation transfers the plant and patrons of the operating utility to the resulting new corporation. Therefore, such a union is probably subject to 202(e), which is by its terms applicable to transfers involving either patrons or substantial amounts of utility property.

No special provision was made for a commission review of utility authority comparable to the review formerly exercised when a fifty year utility charter was renewed or made perpetual. The utility has an obligation to operate indefinitely.<sup>158</sup> In the rare instance where the commission might desire to order otherwise, section 1007<sup>159</sup> should be adequate.

The total effect of these provisions is to permit a proposed public utility to organize and issue its initial securities without commission supervision.<sup>160</sup> The commission still possesses ample power, in reviewing the fitness of an initial corporate applicant, to deny or condition a certificate on the ground of improper capitalization.<sup>161</sup>

Finally, a new section 204 prohibits all public utility corporations from exercising eminent domain power before receiving their initial certificates of public convenience from the commission. This provision was required because all the nineteenth-century acts confer eminent domain power upon any newly-formed corporation.<sup>162</sup>

<sup>156</sup> See, e.g., *Somerset Home Gas Co.*, 13 Pa. Pub. Serv. Comm'n 672, 8 P.U.R. (n.s.) 383 (1935).

<sup>157</sup> PA. STAT. ANN. tit. 66, § 1122(e)(2)(b) (1959).

<sup>158</sup> See PA. STAT. ANN. tit. 66, § 1122(b) (Supp. 1963).

<sup>159</sup> PA. STAT. ANN. tit. 66, § 1397 (1959).

<sup>160</sup> In this connection the *Joint Report* observed:

No textual change has been proposed in . . . [Section 601] which relates to securities certificates, but it is intended that [the amendments to Sections 201 and 202] will eliminate the present practice of requiring the registration of securities of proposed public utilities. Under Section 2(17) of the Act a corporation does not become a "public utility," and hence subject to Section 601, until it acquires utility "facilities." Assuming that the newly organized corporation has not yet acquired any property, it will have no "facilities" and may issue its original securities free of Section 601, since that section, in contrast to Section 201, does not purport to reach proposed public utilities.

Joint Report 11.

<sup>161</sup> *Ibid.* The Commission could also amend its rules of practice to suggest or to require that only organizational shares of a newly-organized public utility be issued prior to commission action on the application under § 201. A securities certificate under § 601 for the initial capitalization would then necessarily accompany the § 201 application. The commission appears to have been applying such a policy on an *ad hoc* basis since Act No. 512 became effective.

<sup>162</sup> PA. STAT. ANN. tit. 66, § 1124 (Supp. 1963): "Certain Appropriations by the Right of Eminent Domain Prohibited—Neither a proposed domestic public utility hereafter incorporated nor a foreign public utility hereafter authorized to do business

*D. Voluntary and Involuntary Extension of Service*

The Pennsylvania Public Utility Commission clearly has no power to order service of a different kind<sup>163</sup> or to a different territory<sup>164</sup> than that authorized by a public utility's charter. Despite the future insignificance of corporate charter provisions, the requirement that a certificate of public convenience be issued only "upon the application of the" utility or proposed utility<sup>165</sup> will prevent the commission from requiring extension of service to would-be patrons located in uncertified territory, if the utility declines to "apply" for a certificate to serve there. This preserves the incentive to elect the BCL and thus secure a charter without specific territorial limitations, an incentive which would be eliminated if freedom from territorial limitation necessarily meant exposure to involuntary extensions of service.<sup>166</sup> Furthermore, a charter requirement that an application for additional territory be evidenced by formal resolution of the directors should eliminate any danger of the commission's construing less formal action of the corporation<sup>167</sup> as an "application."<sup>168</sup>

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in this Commonwealth shall exercise any power of eminent domain within this Commonwealth until it shall have received the certificate of public convenience required by section 201 of this act." This section is inapplicable to a corporation engaged exclusively in interstate commerce since such a corporation is not "required" by § 201 to obtain a certificate. *Buck v. Kuykendall*, 267 U.S. 307 (1925); PA. STAT. ANN. tit. 66, § 1532 (1959).

<sup>163</sup> Cf. *Haugh & Keenan Storage and Transfer Co. v. Pennsylvania Pub. Util. Comm'n*, 133 Pa. Super. 175, 2 A.2d 548 (1938).

<sup>164</sup> *Abington Elec. Co. v. Pennsylvania Pub. Util. Comm'n*, 131 Pa. Super. 200, 198 Atl. 200 (1938); *Johnstown Water Co. v. Public Serv. Comm'n*, 107 Pa. Super. 540, 164 Atl. 101 (1933); *Passyunk Ave. Business Men's Ass'n v. Public Serv. Comm'n*, 73 Pa. Super. 242 (1919); *Allied Ass'ns v. Public Serv. Comm'n*, 70 Pa. Super. 13 (1918).

<sup>165</sup> See text of amended § 201 and § 202, notes 147 and 149 *supra*.

<sup>166</sup> Of course the commission may still order extension into uncertificated territory chartered as of December 31, 1963, "by noting that the requisite application to the Commission or indication of willingness to serve is embodied in the public utility's prior application for the right to incorporate or for the additional charter territory." Joint Report 9. Where a public utility is in fact legally exposed to an extension complaint, the request still must be reasonable and factually justifiable. See, e.g., *Wyoming Valley Water Supply Co. v. Public Serv. Comm'n*, 104 Pa. Super. 432, 159 Atl. 340 (1931). Similarly, there clearly was no intention to interfere with the commission's power to require the certification of "de facto" utilities.

<sup>167</sup> E.g., voluntary service to borderline customers, statements to developers. Cf. *Philadelphia Rural Transit Co. v. Public Serv. Comm'n*, 103 Pa. Super. 256, 158 Atl. 589 (1931) in which the court states: "The right to apply to the commission for the privilege of extending service in the territory mentioned in the charter carries with it an obligation to make extensions which the commission determines to be reasonably necessary for the accommodation of the public." *Id.* at 264, 158 Atl. at 592. (Emphasis added.) *But cf.* text accompanying note 169 *infra*.

<sup>168</sup> As an added protection a BCL public utility corporation may make the geographic scope of the corporation's charter territory automatically coextensive with its certificate territory. Thus a water company originally organized under the Corporation Act of 1874 for the purpose of serving water to the public in the borough of Z could, after accepting the BCL, amend its charter purpose to read:

To furnish water to the public in the borough of Z and in such other territory within the Commonwealth as the Pennsylvania Public Utility Commis-

Common carriers here pose a special problem, for the Public Utility Law<sup>169</sup> expressly authorizes the commission in appropriate cases to require them to extend service to new points. Undoubtedly, this specific power should override the more general amendments to sections 201 and 202, especially in the absence of any discussion in the *Joint Report* and in view of the title of Act No. 512<sup>170</sup> purporting to leave the substance of the commission's powers unchanged.<sup>171</sup>

#### IV. CONSIDERATIONS ADVISING ELECTION OR REJECTION OF THE BCL

Adoption of the BCL is optional in order to allow each utility to analyze its own situation and thus evaluate the suitability of the BCL to its particular status and operations.<sup>172</sup> Such a study is not, however, always necessary. For example, with the exception of a single act applicable to pipeline companies,<sup>173</sup> there seems to be no statutory authorization for the merger or consolidation into a foreign corporation of a company formed under the Corporation Act of 1874.<sup>174</sup> After such a union, the Pennsylvania domestic corporate scheme would no longer be of substantial importance, and thus for the domestic corporation necessary acceptance of the BCL would be a mere technicality.<sup>175</sup> Similarly, after the recent repeal of the provision for voluntary corporate dissolution by court decree,<sup>176</sup> public utility corporations must be dissolved under article XI of the BCL—the necessary prior acceptance of that act is a mere technical step in the course of dissolution.

But where domestic corporate existence is to continue, comparison of the BCL with the applicable nineteenth-century acts is vital to deter-

sion, or its successor in office, may authorize upon the voluntary application of the corporation, evidenced by a resolution of its board of directors duly entered upon the minutes of the corporation.

If the company was chartered before January 1, 1914, a description of the company's territory on that date should be separately stated to record its grandfather rights.

<sup>169</sup> PA. STAT. ANN. tit. 66, § 1173 (1959).

<sup>170</sup> See text accompanying note 145 *supra*.

<sup>171</sup> The commission could, of course, meet this problem directly by adopting a general requirement that applications for common carrier authority contain an express request for any route extensions ordered under § 403.

<sup>172</sup> See text accompanying note 64 *supra*.

<sup>173</sup> PA. STAT. ANN. tit. 15, §§ 2161-68 (1958).

<sup>174</sup> Neither the statutory merger act, PA. STAT. ANN. tit. 15, §§ 421-25 (1958), nor § 23 of the Corporation Act of 1874, PA. STAT. ANN. tit. 15, § 595 (1958), the "short form" merger provision, contemplates a foreign corporation as the resulting entity.

<sup>175</sup> Section 901(B) of the BCL authorizes, *inter alia*, the merger or consolidation of a domestic business corporation into a surviving or new foreign corporation.

<sup>176</sup> Pa. Laws 1856, No. 308, at 293 (repealed by Pa. Laws 1963, No. 494, § 2(3), at 1163).

mine whether any one scheme of applicable nineteenth-century legislation, *taken as a whole*, is significantly less desirable than the BCL. As a limited guide, we discuss below several of the more important areas of distinction between the BCL and the other schemes of corporate regulation.

### *A. Capital Structure and Distributions to Shareholders*

Articles VI and VII of the BCL constitute a comprehensive regulation of corporate capital structure and shareholder distributions respectively. In contrast the nineteenth-century acts say little more than that a corporation may have preferred stock which may be redeemable and issued in series,<sup>177</sup> may purchase its own shares with shareholder consent,<sup>178</sup> and may pay dividends only out of "net profits"<sup>179</sup> or "surplus earnings."<sup>180</sup> Indeed, there is no statutory definition of "stated capital" applicable to a par stock corporation, and the definition applicable to a no-par corporation borders on the unintelligible.<sup>181</sup>

Only superficially does the latter scheme present a desirable flexibility absent under the more detailed BCL. Actually, this "flexibility" exposes the directors of such a corporation to a much greater risk of personal liability to creditors and shareholders than under the BCL, a danger which alone may dictate acceptance of the BCL in many cases.

First, the very indefiniteness of the regulatory structure deprives the directors of clear guideposts marking a course of conduct which the courts may reasonably be expected to sustain. Proposed shareholder distributions after partial liquidations, recapitalizations, periods of deficit operations, and the like are difficult enough under the BCL; under the nineteenth-century acts they frequently involve total speculation.

Second, the personal consequences to the directors of incorrect advice are far more severe. Directors voting for a distribution by a BCL corporation are immunized from personal liability by section 707(A)<sup>182</sup> if they have relied in good faith upon financial statements certified as correct by, *inter alia*, independent accountants. Not only do directors of a nineteenth-century corporation function without such

<sup>177</sup> See PA. STAT. ANN. tit. 15, § 161 (1958). PA. STAT. ANN. tit. 15, § 224(f) (1958) authorizes preferred stock to be divided into series.

<sup>178</sup> PA. STAT. ANN. tit. 15, § 662 (1958).

<sup>179</sup> PA. STAT. ANN. tit. 15, § 631 (1958) (par stock).

<sup>180</sup> PA. STAT. ANN. tit. 15, § 231 (1958) (no par).

<sup>181</sup> PA. STAT. ANN. tit. 15, § 226 (1958).

<sup>182</sup> PA. STAT. ANN. tit. 15, § 2852-707(A) (1958).

protection, but they are also in certain instances deprived of the common-law protection of their objecting vote, unless they notify the shareholders of their dissent.<sup>183</sup>

### B. Charter Purposes and Territory

Since electric, manufactured gas, and water companies may be incorporated to serve no more than a single municipality (or county, in the case of manufactured gas companies),<sup>184</sup> they traditionally have resorted to the incorporation and merger of "paper" companies to expand their charter territory.<sup>185</sup> While the elimination of the Pennsylvania Public Utility Commission's jurisdiction over such "mergers"<sup>186</sup> has reduced their complexity, they still require effort and delay wholly out of proportion to their real significance.<sup>187</sup> Under the BCL,<sup>188</sup> an apt purpose clause eliminates the need for such steps.

<sup>183</sup> See, e.g., PA. STAT. ANN. tit. 67, § 104 (1930); PA. STAT. ANN. tit. 67, § 1133 (1930). Of course, as a practical matter the risk of liability to shareholders is non-existent when the corporation is a wholly-owned subsidiary company, while the risk of successful creditor claims against a subsidiary company is minimized by the financial strength of the parent and the other members of the holding-company system.

<sup>184</sup> See text accompanying notes 90-93 *supra*.

<sup>185</sup> Water companies may also effect limited extension of their territory pursuant to the petition procedure of PA. STAT. ANN. tit. 15, § 1407 (1958). While the Corporation Amendment Act of 1883, Pa. Laws 1883, No. 108, §§ 1-4, at 122-24, has been amended to authorize expressly amendments extending charter territory, PA. STAT. ANN. tit. 15, §§ 401-404 (1958), there is considerable doubt that as applied to electric, manufactured gas, and water companies the amendment accomplished anything more than to permit a corporation originally incorporated to serve a part of a single municipality to expand so as to serve an additional part of the original municipality. This view results from the failure of the amendment to eliminate § 4 of the act which provides that

nothing in [the Corporation Amendment Act of 1883] . . . shall be construed to repeal or authorize the repeal of any of the requirements or restrictions of the [Corporation Act of 1874, under which electric, manufactured gas and water corporations are formed] . . . nor to dispense with any of the provisions of the said act, nor to authorize the right of eminent domain to be given to any corporation by amendment of its charter, nor to permit any change in the objects and purposes of such corporation as shown by its original charter,

and the proviso in § 3 which states:

[N]othing . . . contained [in the Corporation Amendment Act of 1883] . . . shall authorize the amendment including the right to extend the . . . territory in which the corporation may operate . . . of the charter of any gas or water company, so as to interfere with or cover territory previously occupied by any other gas or water company.

<sup>186</sup> See text accompanying notes 154-57 *supra*.

<sup>187</sup> For example, such transactions still require publication of notice; preparation of charter papers; delay amounting in some cases to a month or more while awaiting issuance of Letters Patent; recording approved charter; conduct of incorporators' meeting; conduct of initial directors' meeting; issuance of stock; filing of department of revenue registration form; preparation of plan of merger or papers for franchise sale; adoption of such plan or papers by the boards (and sometimes the shareholders) of the surviving and "paper" companies; filing of plan of merger, or recording the deed and bill of sale in the case of a franchise sale; filing of request for corporate clearance; filing of final state tax returns; and final settlement of taxes.

<sup>188</sup> See note 168 *supra*.

Since nineteenth-century corporations are limited to a single purpose (generally interpreted to mean a single utility service), the BCL, by allowing multiple purposes, may be advantageous. Thus, for example, instead of separate heating and refrigeration subsidiaries formed under the nineteenth-century acts to provide an integrated hot-water heating and chilled-water cooling service,<sup>189</sup> the combined service can be provided by a single BCL corporation.

### C. Dissenters' Rights

Experience has shown that one effect of the explicit and detailed appraisal provisions of section 515 of the BCL<sup>190</sup> is to reduce both the frequency with which shareholders dissent from corporate action and the cost and expense to the corporation of their dissent.<sup>191</sup> Since the varied dissenters' rights provisions of the nineteenth-century acts usually specify procedure only in the most general terms, the acceptance of the BCL might well be a desirable antecedent to merger.

### D. Compulsory Sale of Gas and Water Companies

Under the Corporation Act of 1874, the municipality (except third class cities) in which a gas or water company is located has a statutory right to purchase the facilities of the company for a formula price.<sup>192</sup> Since the BCL is silent upon the matter, gas and water companies incorporated under it are clearly not subject to any such provision. Moreover, since the formula price provision has proved very complex in practice, the strong possibility exists that the courts will hold that the savings provisions of the BCL<sup>193</sup> preserve such right after a gas or water company has accepted the BCL only when the municipality prior to acceptance has taken some action looking toward acquisition.

### E. Eminent Domain

Since section 322 of the BCL<sup>194</sup> confers eminent domain and street entry powers which incorporate by reference the applicable nineteenth-century acts, the scope of such powers should not be a

<sup>189</sup> See, *e.g.*, Equitable Gas Steam Heating Co., 40 Pa. Pub. Util. Comm'n 556 (1963).

<sup>190</sup> PA. STAT. ANN. tit. 15, § 2852-515 (1959).

<sup>191</sup> Apparently, this is due to the multiple opportunities afforded to abandon the appraisal proceedings.

<sup>192</sup> PA. STAT. ANN. tit. 15, § 1353 (1958). See also PA. STAT. ANN. tit. 15, § 1283 (1958).

<sup>193</sup> PA. STAT. ANN. tit. 15, § 2852-5(A) (1933).

<sup>194</sup> See text accompanying note 88 *supra*.

factor here. While one of the first utilities to exercise the section 322 powers will doubtless be forced to defend that section all the way to the Supreme Court of the United States,<sup>195</sup> the enactment of the Eminent Domain Code<sup>196</sup> has ensured that any section 322 issue will be carried along in the wake of litigation on more substantial issues.<sup>197</sup>

### F. Foreign Corporations

By accepting the BCL, a foreign corporation becomes subject to the compulsory production of records provisions of section 1011.1 of that act.<sup>198</sup> On the other hand, the foreign public utility corporation is relieved of the little-known and seldom-followed requirement of obtaining public utility commission approval before acquiring real

<sup>195</sup> Three of the most likely avenues of attack would probably be: (1) under PA. CONST. art. 3, § 3 on the ground that while the title of Act No. 536 mentions eminent domain, the title of the BCL itself was not amended to state that BCL corporations have such power (*But see, e.g.*, the titles to Corporation Act of 1874 and Nonprofit Corporation Law, PA. STAT. ANN. tit. 15, § 2851 (1958), which latter act as originally enacted conferred the power of eminent domain in § 314, PA. STAT. ANN. tit. 15, § 2851-314 (1958)); (2) under the same provision on the ground that the reference to "eminent domain" in the title of Act No. 536 is not broad enough to encompass street entry powers (*But see, e.g.*, the titles to PA. STAT. ANN. tit. 15, §§ 491-93 (1958); PA. STAT. ANN. tit. 15, §§ 2153-56 (1958)); (3) under PA. CONST. art. 3, § 6 on the ground that by incorporating the prior law by reference, the section fails as "blind legislation" (*But see, e.g.*, L. J. W. Realty Corp. v. Philadelphia, 390 Pa. 197, 134 A.2d 878 (1957); *In re Greenfield Ave.*, 191 Pa. 290, 43 Atl. 225 (1899)).

<sup>196</sup> PA. STAT. ANN. tit. 26, §§ 1-101 to -903 (Supp. Sept. 1964).

<sup>197</sup> The unsettling effects of articles VI and VII of the Eminent Domain Code, which rewrite the law on measure of damages and rules of evidence respectively, are obvious and affect condemnors generally. Some questions, however, can be resolved only by litigation involving public utilities. Thus, § 901 of the code provides that nothing in the code shall "repeal, modify or supplant any law insofar as it . . . prescribes the procedure for condemnation of rights-of-way or easements for occupation by [certain public utility] . . . lines." PA. STAT. ANN. tit. 26, § 1-901 (Supp. Sept. 1964). However, when the foregoing exclusion was inserted in the text of the former bill, Pa. H. 683, 1st Sess. (1963), no corresponding changes were made to the specific repeals. Thus, notwithstanding the foregoing exclusion, § 902 of the code repealed "absolutely" a host of procedural provisions which implemented the existing power of eminent domain of public utilities. PA. STAT. ANN. tit. 26, § 1-902 (Supp. Sept. 1964). The "absolute" repeal of Pa. Laws 1907, No. 310, §§ 1-2, at 461, for example, apparently strips public utilities of the right to judicial assistance in obtaining physical possession of easements acquired by condemnation and delegates them to the employment of self-help, which, according to *Commonwealth v. Schaffer*, 32 Pa. Super. 375 (1907), is the only remedy available to a public utility in the absence of statute. Doubtless litigation will also ensue over the scope of the undefined term "lines" in § 901. The Committee on Eminent Domain of the Pennsylvania Bar Association's Section on Public Utility Law are distributed for comment a proposed "Corporate Powers Act" which would set these issues to rest by codifying into a single act all substantive and procedural law (except the measure of damages and rules of evidence, which are covered by the Code) applicable to the exercise of the power of eminent domain by public utilities.

<sup>198</sup> PA. STAT. ANN. tit. 15, § 2852-1011.1 (1958). This provision probably imposes little additional burden upon a foreign public utility, since § 906 and § 910 of the Public Utility Law, PA. STAT. ANN. tit. 66, §§ 1346, 1350 (1959), require the appointment of an agent for receipt of process and the production of documents on request. See also the second proviso to PA. STAT. ANN. tit. 15, § 3161 (1958).

estate<sup>199</sup> and acquires, under section 1010 of the BCL,<sup>200</sup> the same eminent domain powers as domestic public utilities enjoy under section 322.

### G. Other Considerations

The BCL contrasts with the nineteenth-century acts in that pension provisions are more liberal (section 316), directors' and shareholders' meetings may be held out of the state (sections 402(4) and 501(A)), an executive committee is authorized (section 402(6)), the board may remove a director for cause (section 405(B)), proxies are valid for three years rather than two months (section 504(A)), voting trusts are validated (section 511), fractional shares may be issued (section 608), stock options may be granted without affording shareholders appraisal rights (section 612), and mergers may be effected with subsidiary corporations without shareholders' approval or dissenters' rights (section 902(B)).

However, under the BCL, directors may be removed by the shareholders without cause (section 405(A)), unpaid directors are held to a higher degree of duty than under the former case law (section 408), and certain restrictions on shareholder "strike" suits are subject to waiver by the courts (section 516).

## V. CONCLUSION

The vast preponderance of Pennsylvania's incorporated businesses, including some of this country's largest and most diversified, have satisfactorily operated under the BCL for more than thirty years. All that now remains is for our public utilities to adopt a generally-accepted twentieth-century solution to their many twentieth-century corporate problems.<sup>201</sup>

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<sup>199</sup> See the first proviso to PA. STAT. ANN. tit. 15, § 3161 (1958).

<sup>200</sup> PA. STAT. ANN. tit. 15, § 2852-1010 (1958); see note 100 *supra*.

<sup>201</sup> As of October 18, 1964, the register established by PA. STAT. ANN. tit. 15, § 2852-4(C) (Supp. 1963), note 42 *supra*, indicated that forty-five public utilities have already accepted the BCL. A number of these acceptances, however, were effected in connection with dissolution proceedings.