

FEDERAL REGULATION OF CARRIER SECURITIES

JOHN R. TURNEY*

Issuance of capital securities by railroads and motor carriers is controlled and regulated by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act.¹ Securities of air and water carriers and freight-forwarders are included in those of commercial and industrial corporations, which are regulated by the Securities and Exchange Commission under provisions of the Securities Act of 1933.² This article attempts to survey, compare, and evaluate the federal regulation of the carrier securities of these two respective groups of carriers under the two acts. No effort will be made to review powers, procedures, activities, or decisions of commissions, except as they relate to the regulation of carrier securities.

I

BACKGROUND

In England, legislative efforts to regulate the issuance of corporate securities seem to have begun with the "Bubble Act" of 1719.³ It was only near the end of the nineteenth century, however, that a number of the state legislatures in this country, responding to a rising public demand, commenced to police the issuance of securities by public utilities, including railroads, and later securities generally, by both regulatory and Blue Sky laws.

The ICC first officially suggested that the issuance of carrier securities be regulated following its investigation of Harriman's use of railroad credit and funds to bring about common control of the Union Pacific, Southern Pacific, and Illinois Central Railroads. It said, "The time has come when some reasonable regulation should be imposed upon the issuance of securities . . .";⁴ and in 1910, the Mann-Elkins Act provided for the appointment of a Commission by the President to investigate the proposal.⁵ In the following decade, the ICC, both by formal recommendation and in its annual reports, and in connection with its investigation of alleged financial manipulation and "reckless and profligate financiering" of management and investment bankers, reiterated recommendations for federal regulation.⁶

* LL.B. 1908, Vanderbilt University. Member of the Tennessee, Arkansas, and District of Columbia bars.

¹ 41 Stat. 494 (1920), 49 Stat. 557 (1935), 49 U.S.C. §§ 20a, 314 (1952).

² 48 Stat. 75, 15 U.S.C. § 77 (1952).

³ The Bubble Companies Act, 1719, 7 Geo. 1, cc. 1, 2.

⁴ Consolidations and Combinations of Carriers, 12 I.C.C. 277, 306 (1907).

⁵ Act of June 18, 1910, ch. 309, § 16, 36 Stat. 556.

⁶ E.g., St. Louis & San Francisco R.R., 29 I.C.C. 139 (1914); New York Central & H. R.R., 30 I.C.C. 147 (1914); New York, N.H. & H. R.R., 31 I.C.C. 32 (1914); Chicago, R.I. & Pac. Ry., 36 I.C.C. 43 (1915); Pere Marquette R.R., 44 I.C.C. 1 (1917); Wabash Pittsburgh Terminal Ry., 48 I.C.C. 96 (1917).

In its 1919 annual report, the Commission, in response to a request of the Senate Committee on Interstate Commerce, said:⁷

It would serve no good purpose to recite the many instances in comparatively recent years in which, through financial deals for which it is difficult to find any words of excuse, railroad properties have been bankrupted or saddled with almost overwhelming burdens of indebtedness, which have not increased the amount or value of property devoted to the public service, have not improved the service rendered, and have on the whole had the effect of increasing the charges for service. There should be some way by which under the law these things could be prevented. . . .

The advisability, desirability, and propriety of public or governmental regulation of the issuance of securities by public-service corporations is conceded generally by thinking and fair-minded men. A proper Federal regulation of the issuance of securities by the corporations engaged in interstate transportation and supervision of the application of the proceeds therefrom would go far toward preventing the abuses referred to in the preceding paragraph. The Commission is on record for several years past as favoring such supervision and regulation of the issuance of securities.

The complete collapse of railroad credit resulting in part from these abuses and in part from the severe financial depression of 1914, together with the breakdown of service and the consequent seizure of the railroads by the federal government during the World War I, led to a demand by other public authorities, state commissions, and bankers, as well as railroad officers and directors, for the rehabilitation and support of railroad credit as indispensable to the development of an adequate transportation system.⁸

In the Transportation Act of 1920,⁹ therefore, Congress added section 20a to the Interstate Commerce Act. This section, unlike the English laws, the state Blue Sky laws, and, to a lesser degree, the state public utility laws, had as its primary objective not the protection of the investing public from the distribution of fraudulent issues, but rather the establishment of a soundly-capitalized transportation industry, capable of adequate service at reasonable rates. The industry's credit had been impaired by, among other things, the improvident issuance of securities during the previous three decades. To accomplish this basic objective, section 20a imposed upon the Commission the duty not to pass upon the value or soundness of the securities from the investors' standpoint, but to regulate the purpose and necessity for their issuance, and the nature, terms, and conditions of the securities themselves.

Just as the scandals of railroad finance around the turn of the century led to the enactment of section 20a of the Interstate Commerce Act, the stock market crash of 1929 and the ensuing economic depression set the stage for the Securities Act of 1933 and the Securities Exchange Act of 1934.¹⁰ These acts, disregarding the precedent of the Transportation Act of 1920 and reverting to the theory of the English laws

⁷ ICC 33D ANN. REP. 5 (1919).

⁸ See *Hearings Before the Senate Committee on Interstate Commerce on Extension of Tenure of Government Control of Railroads* vol. 3, 65th Cong., 3d Sess. 1395 (1919).

⁹ 41 Stat. 494, 49 U.S.C. § 20a (1952).

¹⁰ 48 Stat. 881, 15 U.S.C. § 78 (1952).

and the state Blue Sky laws, are primarily compulsory-disclosure and compulsory "clean living" acts. They seek to protect the investor—first, by making available to him information upon which an intelligent investment decision can be based; and second, by outlawing fraudulent and wildcat practices in the distribution and sale of securities. The SEC, unlike the ICC, has no responsibility to control or regulate the issuer or the security itself, but merely to prevent fraud upon, and overreaching by, investors.

In 1935, despite the fact that the securities of motor carriers were then subject to the Securities Act, Congress, in the enactment of the Motor Carrier Act, reverted to the philosophy of the Transportation Act of 1920, and by section 214 of the Motor Carrier Act, it subjected motor-carrier securities to the provisions of section 20a of the Interstate Commerce Act.¹¹ It should be borne in mind that at that time there was no history of financial scandals in issuance or distribution of motor-carrier securities. In fact, with but few exceptions, largely in the motorbus field, motor carriers were small and had, up to that time, publicly offered only a very limited quantity of securities.

Under the Civil Aeronautics Act of 1938,¹² part three of the Interstate Commerce Act (regulating water carriers), enacted in 1940,¹³ and part four (regulating freight-forwarders), enacted in 1942,¹⁴ carrier securities were left to regulation under the Securities Act.¹⁵

II

JURISDICTION

Under the Interstate Commerce Act, a railroad or a motor carrier may lawfully issue a "security" or assume an obligation with respect to the securities of another only if and as authorized by the ICC. The Commission may authorize such issuance or assumption by a carrier only upon finding, after investigation, that its purposes and uses are:¹⁶

- (a) for some lawful object within its corporate purposes and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and
- (b) reasonably necessary and appropriate for such purpose.

The Commission may grant or deny the application in whole or in part, or grant it with such modifications or conditions as it considers necessary or appropriate.

¹¹ 49 Stat. 557 (1935), 49 U.S.C. § 314 (1952).

¹² 52 Stat. 977, 49 U.S.C. §§ 401-722 (1952).

¹³ 54 Stat. 929, 49 U.S.C. §§ 901-23 (1952).

¹⁴ 56 Stat. 284, 49 U.S.C. §§ 1001-22 (1952).

¹⁵ Under § 77 of the Bankruptcy Act, 47 Stat. 1474 (1933), 11 U.S.C. §§ 205, 208 (1952), an elaborate procedure is provided for the reorganization of insolvent interstate railroads in which the ICC plays an important role: Provision for "voluntary" reorganization of railroads, the alteration of capital structures or the terms of outstanding securities; to forestall a financial crisis was added in 1948 by § 20b of the Interstate Commerce Act. 62 Stat. 162, 49 U.S.C. § 20b (1952).

¹⁶ 41 Stat. 494 (1920), 49 U.S.C. § 20a (1952).

This jurisdiction is exclusive and plenary, and a carrier may issue securities and assume obligations so authorized without obtaining any other approval, state or federal. Thus, Congress has wholly pre-empted the field.¹⁷ Securities issued without the Commission's authorization are void, and the persons responsible for their issuance are subject to civil and criminal penalties.¹⁸

Under the Securities Act, the use of any means or instrumentality of interstate transportation or communication to offer, advertise, or sell securities, except certain specifically exempted securities, is restricted to securities with respect to which a registration statement under the Act is in effect, and it must be accompanied by a prospectus which complies with the requirements of the Act.

A. Types of Securities the Issuance of Which Is Subject to Regulation

Section 20a of the Interstate Commerce Act applies to issuance of

any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier . . . ,

or assumption of

any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person. . . .

In an early case, the Commission held that the provisions of section 20a of the Interstate Commerce Act were to be construed restrictively under the principle of *ejusdem generis* and hence "were intended to apply to instruments negotiable or quasi-negotiable in character" and similar in nature to the securities specified—*i.e.*, shares of stock, bonds, and notes.¹⁹ A later decision of a division of the ICC that refused to follow this view with respect to motor-carrier issues was overruled by the entire Commission.²⁰ As a result, the ICC has held that mortgages, real or chattel, conditional sales contracts, loan or credit agreements, and leases or other contracts are not "securities" for which ICC authority is required, even if they contain an express promise to pay money or assume an obligation,²¹ but that negotiable or

¹⁷ Pittsburgh & W. V. Ry. v. ICC, 293 Fed. 1001 (D.C. Cir. 1923).

¹⁸ Although the Act provides no means for validating unauthorized securities, St. Paul. & K. C. S. L. R.R. Bond, 180 I.C.C. 272 (1932); Great Southern Trucking Co. Notes, 282 I.C.C. 809 (1951), the Commission has authorized the issuance of a new security to replace the obligation represented by the void security. See Merchants Motor Freight, Inc., Note, 275 I.C.C. 817 (1951).

¹⁹ Louisiana Ry & Nav. Co., Authority to Execute a Purchase Contract, 67 I.C.C. 808 (1921).

²⁰ Lehigh Valley R.R., Conditional Sales Contract, 233 I.C.C. 359 (1939). In 1955, the Commission referred to this case in recommending that § 20a of the Interstate Commerce Act be amended to include "any contract for the purchase or lease of equipment not to be fully performed within one year." A more appropriate and forthright amendment would strike out the limiting terms "share of capital stock or any bond or other," so that the Act would apply to "any evidence of interest in or indebtedness of the carrier." ICC 69TH ANN. REP. 124 (1955).

²¹ See Hayes Freight Line, 39 M.C.C. 576 (1944); Hancock Truck Lines, 56 M.C.C. 276 (1949); Wilson Truck Co., Inc., 63 M.C.C. 223 (1954); Capital Transit Co., 40 M.C.C. 17 (1944); Texas & Pac. Ry., 271 I.C.C. 230 (1948). However, Division 4, in Transcontinental Bus System, Inc., Notes, Finance Docket No. 20382, ICC, Feb. 3, 1959, held that a loan agreement for a sum certain, with acknowledgment of receipt thereof by the borrower and a promise by the latter to pay the debt in fixed installments on specified dates with interest at a specified rate, has "substantially all of the attributes, except negotia-

"semi-negotiable" evidences of debt secured by such instruments are subject to the Interstate Commerce Act. (The term "semi-negotiable" is applied to an instrument which is "uttered" or capable of being "uttered"—*i.e.*, of being put in circulation where it can be "traded" as stocks and bonds are traded.)²² This rule has been applied even where such an instrument expressly changes the terms, conditions, rights, or obligations under authorized outstanding issues.²³ Similarly, a binding and transferable contract to execute and deliver shares of stock, such as a stock option or warrant, also is not considered a security within the meaning of section 20a of the Interstate Commerce Act, since it merely represents a right to purchase such a security.²⁴ The ultimate issue of the stock itself would require prior Commission authorization, however; and both stock splits and stock dividends require Commission authorization, as both constitute the issue of securities.²⁵

The Securities Act is applicable to "securities" such as notes, shares of stock, bonds, debentures, and any interest or instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing. The term has been very broadly construed by the SEC and the courts²⁶ to include practically any instrument evidencing an interest or obligation.²⁷

bility, possessed by an ordinary promissory note" and "constitutes an evidence of indebtedness . . . within the meaning of such term as used in section 20a of the Interstate Commerce Act." The apparent contrary decision in the *Capital Transit* case, *supra*, was distinguished on the ground that there the agreement was for a loan in the future, conditional upon the happening of certain events, leaving uncertain the amount of the loan, whether it actually would be made, its date, and the amount and maturity of installment repayments.

²² See *Lehigh Valley R.R. Conditional Sales Contract*, 233 I.C.C. 359 (1939). See also *People v. Descant*, 124 P.2d 864 (Cal. Dist. Ct. App. 1942).

²³ See *United States v. New York, N.H. & H. R.R.*, Civil A No. 140-42, S.D.N.Y. Feb. 17, 1959, where the New Haven, in consideration of the purchase of certain of its outstanding preferred shares by a banking group, agreed to repurchase them at a price that would assure the bankers a profit of \$10 per share. In this suit, the Government, upon behalf of the ICC, claimed that this instrument, in effect, changed the rights and liabilities of the preferred stock in so far as the involved shares were concerned; and that in this respect, the agreement was, in effect, an issuance requiring authorization similar in all respects to that which would be required in a case where the interest rates upon notes or the rights of preferred holders of securities originally authorized were subsequently changed. The district court sustained the contention of the defendants that the Commission's inaction for three years, despite the full knowledge of the fact, "shows that the challenged agreement is not within the purview of section 20a as construed and applied by the Commission since 1920 when the section was enacted." The circuit court of appeals, however, upon appeal of the companion case by a stockholder of the New Haven, overruled the decision of the district court and held that the agreement would be an amendment of the terms of the stock, which, while not an "issue" in the corporation law sense, was within the jurisdiction of the ICC under § 20a.

²⁴ *Western Maryland Ry. Stock*, 295 I.C.C. 100, 102 (1955); *Norfolk Southern R.R.*, 240 I.C.C. 99, 111 (1940).

²⁵ *Capital Transit Co.*, 282 I.C.C. 77, *modified*, 282 I.C.C. 192 (1951); *Midwest Transfer Co.*, 271 I.C.C. 796 (1949).

²⁶ *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943).

²⁷ Voting trust certificates, SEC Release No. 97, Dec. 28, 1933, pt. 1; *Corporation Trust Co. v. Logan*, 52 F. Supp. 999 (D. Del. 1943); extension of maturity on investment certificates, *SEC v. Associated Gas & Electric Co.*, 24 F. Supp. 899 (S.D.N.Y.), *aff'd*, 99 F.2d 795 (2d Cir. 1938); receipts for oil when, as, and if produced, *SEC v. Aldrich Blake, Inc.* (S. Ct. D. C., May 19, 1936); receipts for loans by shareholders, *SEC v. Sunbeam Gold Mines Co.*, (W.D. Wash., July 23, 1937), *rev'd on other grounds*, 95 F.2d 699 (9th Cir. 1938); receipts for personal loans, *United States v. Monjar*, 47 F. Supp. 421 (D. Del.

B. Issues Subject to Regulation Under the Acts

The Interstate Commerce Act applies to issues by the carrier, both nominal and actual. The Securities Act applies to the offering whether it be by the original issuer or by the holder of an existing security. Secondary offerings of securities of rail and motor carriers where the original issue was authorized by the ICC are not subject to either the Interstate Commerce Act or the Securities Act. The ICC treats execution and authentication alone, without pledge, transfer, or delivery to a third person, as a "nominal issue" requiring authorization. If pledge, transfer, or delivery are subsequently desired, additional authority must be obtained for the "actual issue," just as it must also be obtained for increases in interest rates. The Securities Act applies only to securities that are to be publicly offered; it is not concerned with either "nominal issues" or private placements.

The respective jurisdictions of the commissions are summarized in the following chart:

	JURISDICTION TO REGULATE CARRIER SECURITIES	
	<i>Interstate Commerce Commission</i>	<i>Securities & Exchange Commission</i> ²⁸
<i>Issuers</i>		
Railroads engaged in interstate commerce	Yes	No
Motor carriers engaged in interstate commerce having aggregate capitalization of over \$1,000,000	Yes	No
Other rail and motor carriers	No	Yes
Air carriers, water carriers, & freight forwarders	No	Yes
Noncarrier holding companies authorized under the Interstate Commerce Act to control rail or motor carriers	Yes	No ²⁹
Governmental agencies, judicial or administra- tive officers	Yes	No
<i>Nature of Issue</i>		
Nominal issues	Yes	No
Secondary offerings	No	Some ³⁰

1942); investment contracts on profit sharing agreements, *SEC v. Tung Corp. of America*, 32 F. Supp. 371 (N.D. Ill. 1940); contracts for bottling and sale of whiskey, *Penfield Co. of California v. SEC*, 143 F.2d 746 (9th Cir.), *cert. denied*, 323 U.S. 768 (1944); chinchilla sales agreement, *SEC v. Chinchilla, Inc.* (N.D. N.Y. March 16, 1953); investment pool interests, *SEC v. Wickham*, 12 F. Supp. 245 (D. Minn. 1935); shares in fishing boats entitling owners to shares of profit, *SEC v. Pyne*, 39 F. Supp. 434 (D. Mass. 1941); oil lease coupled with a promise of development, *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943); franchise agreements to prospective automobile distributors, *Tucker Corp.*, SEC Release No. 3236, June 26, 1947; *SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65 (1959).

²⁸ Where "yes" occurs in this column, it covers only public offerings.

²⁹ § 7 of S. 1181, and H.R. 2481, pending in the 86th Congress sponsored by the SEC, would subject to the Securities Act holding companies that are "primarily engaged directly or indirectly in the business of investing, re-investing, owning, or trading in securities," even though they already are subject to Interstate Commerce Act.

³⁰ Rail or motor-carrier securities the original issue of which, for whatever reason, was not required to be authorized by the ICC.

Public offerings	Yes	Yes
Private placement	Yes ³¹	No
Treasury re-issues	Yes	Yes
Stock dividends	Yes	No
Exchange of securities	Yes	Yes
Intrastate offerings	Yes ³²	No ³³
<i>Kind or Amount of Issue</i>		
Minimum issues	None	\$300,000
Stock options or warrants	No	Yes
Capital issues (bonds, capital shares, long-term notes, voting trust certificates)	Yes	Yes
Transferable nonnegotiable contracts	No	Yes
Short-term obligations	Partly ³⁴	Partly ³⁵

Section 20a of the Interstate Commerce Act applies to common carriers by railroad, sleeping-car companies and motor carriers engaged in interstate or foreign commerce, and also, when ordered by the Commission, to noncarrier holding companies authorized under section 5(2) of the Interstate Commerce Act to control a carrier or carriers.³⁶ The Securities Act applies to securities that are not subject to the Interstate Commerce Act. This means that any issues of railroads or motor carriers exempt under section 20a of the Interstate Commerce Act, secondary offerings of such carriers, and security issues of air and water carriers and freight-forwarders are subject to the Securities Act to the same extent as noncarrier corporations.

III

STATUTORY STANDARDS

In light of the financial mismanagement of railroads prior to 1920, it is not difficult to understand why section 20a of the Interstate Commerce Act rigidly limits carrier issues to securities that are issued for a lawful (carrier) object; compatible

³¹ Resale of rail securities issued prior to Feb. 28, 1920, and motor-carrier securities issued prior to Aug. 9, 1935, are exempt. Delaware, L. & W. Ry., Finance Docket No. 19335, I.C.C., Nov. 6, 1956; Eastern Mass. St. Ry. Stock, 37 M.C.C. 112 (1941); Chesapeake & O. Ry. Stock, 162 I.C.C. 689 (1930); Seaboard Air Line Equipment Trust Obligations, 105 I.C.C. 757 (1926); Bonds of Seaboard Air Line Ry., 99 I.C.C. 142 (1925).

³² Interstate Commerce Act applies to issues of interstate carriers, regardless of the extent or area of distribution.

³³ The Securities Act exempts issues where the issuer and all purchasers reside and do business within a single state.

³⁴ Amounts equal to 5% of aggregate capitalization, and in case of motor carriers \$200,000, are exempt; but this latter exemption does not create a cumulative exemption of \$1,200,000. If the carrier has \$1,000,000 in capital stock and a long-term debt outstanding, it can issue, without Commission approval, an additional \$200,000 in short-term notes. If, on the other hand, however, it has more than \$200,000 in short-term notes outstanding, they can be exempt only if those notes, taken together with the capital stock and long-term indebtedness, do not exceed \$1,000,000. In short, the carrier may utilize either of the exemptions of § 20a, but not both, to issue short-term notes.

³⁵ The Securities Act exempts current transactions where maturity is 9 months or less, as well as all issues where total amount of issue is \$300,000 or less.

³⁶ 24 Stat. 380 (1887), 49 U.S.C. § 5(2) (1952).

with the public interest; necessary, appropriate, or consistent with the performance of carrier service, without impairment; and also necessary and appropriate to accomplish that objective. The statutory standard of proof required by section 5(3) of the Interstate Commerce Act³⁷ of holding companies authorized under section 5(2) to control a rail or motor carrier or carriers is that the proposed issue or assumption is consistent with the proper performance of carrier service by the carrier subsidiary, will not impair the ability of such subsidiary to perform such service, and is otherwise consistent with the public interest.³⁸

The statutory standard under the Securities Act is much simpler. The Commission must be satisfied that a complete, accurate, and honest disclosure has been made by the issuer of all information necessary in the public interest and for the protection of investors.³⁹

IV

ADMINISTRATIVE POLICIES

A. Purpose of Issue

SEC regulations require only that the purpose of the issue be fully disclosed. On the other hand, the ICC withholds authorization of all carrier securities except those involved in the acquisition or betterment of property or assets used or intended for continuing productive use in the service of transportation;⁴⁰ or to provide capital for the refunding of obligations issued for such purposes; or for the payment of carrier debt, including in some cases interest and dividends. It refuses to authorize issues by a carrier for noncarrier purposes, even in cases where capital is sought in behalf of a noncarrier subsidiary.⁴¹ It also has refused to authorize an issue of stock the purpose of which was to assure continuity of management after the death of controlling stockholders as not being necessary or appropriate for the proper performance by the applicant of transportation service to the public; but upon reconsideration it held that since the action necessary to assure such continuity rested in the future discretion of the applicant's directors, it was without jurisdiction to apply the above dictum.⁴²

B. Capitalization of Surplus

In two cases that arose shortly after the enactment of section 20a of the Interstate Commerce Act,⁴³ the carriers sought to capitalize earned surplus by the issuance of stock dividends. Rejecting the contention of the carriers in these cases that they had the legal right so to capitalize their surplus, the ICC held that compatibility with

³⁷ 24 Stat. 380 (1887), 49 U.S.C. § 5(3) (1952).

³⁸ *Ryder System, Inc. Stock*, 295 I.C.C. 626 (1957).

³⁹ 48 Stat. 78, 79 (1933), 15 U.S.C. §§ 77g, 77h (1952).

⁴⁰ *Securities of Louisville & N. R.R.*, 76 I.C.C. 718 (1923).

⁴¹ *Consolidated Freightways, Inc. Stock*, 282 I.C.C. 616 (1952).

⁴² *Commercial Motor Freight, Inc. Stock*, 290 I.C.C. 94 (1953), *rev'd*, 290 I.C.C. 349 (1954).

⁴³ *Securities of Louisville & N. R.R.*, 76 I.C.C. 718 (1923); *Delaware, L. & W. R.R.*, 67 I.C.C. 426, 433 (1921).

the public interest required that "a substantial surplus remain uncanceled as a support for the applicant's credit, providing for emergency needs, offsetting obsolescence and necessary investments in nonrevenue-producing property, and serving as a general financial balance-wheel. . . ." This view assumes that corporate surplus and cash are equivalent and that the alternative to a stock dividend paid out of surplus is the investment of cash for some of the purposes mentioned in the above quotation. The exact contrary, however, is true in many cases. Whether the surplus has already been invested in carrier property, as is true in the great majority of cases, or is represented by cash, the declaration of the stock dividend acts as a permanent capitalization of the retained earnings. Otherwise, since the Commission has no control over the payment of cash dividends, these earnings could, under most, if not all, state corporation laws be used to pay cash dividends. These facts were later realized in a case where capital surplus, as distinct from earned surplus, was sought to be capitalized.⁴⁴

C. Assets Capitalizable

The question of whether a particular asset is "capitalizable," as that term is used by the ICC, becomes important in either of two events: (1) where the carrier proposes to issue securities to acquire a particular asset; and (2) in fixing the maximum amount of securities that can be issued compatibly with the public interest. Assets that are held to be "capitalizable" are those presently in, or which are intended for, continuing productive use in transportation.⁴⁵ These include:

1. Working capital (which is treated as the net excess of current assets over current liabilities, but not to an "unreasonable" amount; the maximum is usually related to average monthly cash operating expenses—*i.e.*, exclusive of depreciation).⁴⁶
2. Original cost to carrier, predecessor, or vendor of tangible carrier operating property actually in use or to be immediately used.
3. Investment in securities (but not advances which are said to be "flexible"⁴⁷ of owned or controlled carrier or carrier-purposed subsidiaries).

D. Maximum Capitalization

In two early cases,⁴⁸ the ICC laid down what has come to be known as the capitalizable-assets rule. Where shares of stock are proposed to be issued as a stock dividend, the aggregate capital liability to be created—consisting of (a) all long-term debt obligations; and (b) all outstanding capital stock, taken at par if of par value, otherwise at fair market value as of original date of issue, plus premium on capital stock—could not exceed the sum of its capitalizable assets as that term has

⁴⁴ Chicago, M., St. P. & Pac. R.R. Bonds, 193 I.C.C. 725, 730 (1933).

⁴⁵ Securities of Louisville & N. R.R., 76 I.C.C. 718 (1923).

⁴⁶ Missouri Pac. R.R. Bonds, 180 I.C.C. 352 (1932).

⁴⁷ Central Freight Lines, Inc. Stock, Finance Docket No. 19127, ICC, Feb. 6, 1956.

⁴⁸ Securities of Louisville & N. R.R., 76 I.C.C. 718 (1923); Delaware, L. & W. R.R., 67 I.C.C. 426 (1921).

been defined.⁴⁹ This rule has been extended to cover debt and stock issues incident to the acquisition of another carrier where the property to be received is partly intangible. While the Commission will approve the acquisition of the latter for a reasonable consideration in cash or securities, it will not permit the issuance of securities to an amount that will cause the aggregate capital obligations, as calculated above, after the unification to exceed the aggregate capitalizable assets of the unified property.

This rule has been relaxed in recent cases, both rail and motor carrier, to permit temporary overcapitalization where the issue is necessary to preserve a going concern,⁵⁰ or where the issue of stock is necessary to provide funds for payment of maturing debt,⁵¹ or where there is a present deficit in capitalizable assets that will not be increased by the proposed issue.⁵²

The objective of this rule is to prevent overcapitalization of carriers. The ICC seeks to determine the fact of overcapitalization by a formula that balances the book value of investments in tangible carrier property against the investment by creditors and stockholders in the carrier's securities. Assuming that the actual investment of the carrier is correctly recorded on the asset side, it does not actually or purportedly represent the present value of those assets, much less the value, of the carrier's going business. On the other hand, while the amount of outstanding debt does correctly represent a capital obligation, the amount of the capital stock (and premium) represents no obligation of the carrier, but merely the amount which the owners paid for their equity in the property. Even if the formula were sound from an accounting standpoint (which it is not), it provides, at most, an irrelevant and unlawful basis for either authorization or denial of security issues.

Generally accepted accounting principles require that property acquired by a corporation be recorded in the investment account at the purchaser's actual cost. The uniform rules promulgated by the ICC to govern motor-carrier accounts follow that principle in all cases, with a single, but very important, exception—namely, where carrier-operating property (terminals, equipment, etc.) is acquired in a transaction in which the carrier also acquires any operating authority from another carrier, the purchasing carrier's investment is limited to the original cost to the vendor carrier.⁵³ The amount of the purchasing carrier's investment in excess of the selling carrier's original cost is required to be accounted for as an intangible, which is not capitalizable. In recent years, due chiefly to inflation but partly to appreciation in

⁴⁹ Roscoe, Snyder & Pac. Ry. Securities, 170 I.C.C. 403 (1931). In *Stock Dividend of Oahu Ry. & Land Co.*, 86 I.C.C. 137 (1923), the ICC said that appreciation of assets not realized by sale or otherwise is not capitalizable.

⁵⁰ Howard Van Lines, Inc., 70 M.C.C. 389, 404-05 (1957); General Expressways, Ltd. Merger, 65 M.C.C. 377, 386 (1955); C. & R. Trans., Inc., 60 M.C.C. 173, 195 (1954); Transcontinental Bus System, Inc., 50 M.C.C. 525 (1948).

⁵¹ Southeastern Greyhound Lines, 15 M.C.C. 117 (1938); *Stock of New York, N.H., & H. R.R.*, 131 I.C.C. 233 (1927).

⁵² *Ryder System, Inc., Stock*, Finance Docket No. 20437, I.C.C., March 18, 1959.

⁵³ Uniform System of Accounts for Class I Motor Carriers of Property, Instruction 19, 49 C.F.R. § 182.01-19 (1949).

terminal properties, it happens that where a carrier has purchased substantial carrier-owned assets, its actual investment will exceed its book investment in the particular property by millions of dollars; and its ability to issue securities is thereby drastically restricted. As the result of the application of the formula, the normal and healthy growth of a carrier whose successful past operations have resulted in market prices for shares of its capital stock substantially above the book value of those shares may be frustrated.

From a transportation standpoint, the evil of carrier overcapitalization lies in the fact that where the earnings are insufficient to service the capitalization, funds required for adequate service, maintenance, and safety of operation are very likely to be diverted from such purposes and applied to fixed charges or dividends. This is but another way of saying that capitalization is the handmaiden of earning power, and that so long as earnings are sufficient to service it, there is no overcapitalization. This leads to the conclusion that security issues to obtain assets necessary for carrier service, efficiency, and economy should be externally limited only by the ability of the carrier's earning power adequately to service them.

In administering its duties in railroad reorganization under section seventy-seven of the Bankruptcy Act,⁵⁴ the ICC recognized the foregoing principle. In every reorganization case, and with the complete approval of the Supreme Court,⁵⁵ the Commission determined the maximum capitalization of the reorganized company by capitalizing its future prospective earnings. Strangely enough, it has expressly rejected this sound method in determining maximum capitalization under sections 20a and 214 of the Interstate Commerce Act,⁵⁶ although it has held, and correctly, that despite an excess of capitalizable assets under the formula, it will not authorize issues beyond the earning power of the carrier adequately to service them.⁵⁷

The SEC requires complete disclosure of the use to which the proceeds of a proposed issue are to be put. Under section 20a(10) of the Interstate Commerce Act, the ICC must require periodic or special reports showing the disposition of the securities authorized and the application of the proceeds thereof.⁵⁸

The ICC holds that although a carrier may have capitalizable assets ample to support a proposed issue and prospective earnings ample to service it, and although its equity-debt ratio would be improved thereby, the carrier must, nevertheless, demonstrate that the proposed issue is necessary for its operation.⁵⁹ The ICC will determine the reasonableness of the proposed issue with respect to the kind and

⁵⁴ 47 Stat. 1474 (1933), 11 U.S.C. §§ 205, 208 (1952).

⁵⁵ *Institutional Investors v. Chicago, M., St. P. & Pac. R.R.*, 318 U.S. 523, 539 (1942); *Wisconsin Cent. Ry.*, 282 I.C.C. 567, 579 (1952); *Missouri Pac. R.R. Reorganization*, 257 I.C.C. 479, 522 (1944).

⁵⁶ *Grand Trunk W. R.R.*, 158 I.C.C. 117 (1929).

⁵⁷ *Louisiana Ry. & Nav. Co. of Texas*, 99 I.C.C. 357 (1925).

⁵⁸ An alleged failure to police such application was criticized in the report of the House of Representatives Oversight Committee, H.R. REP. No. 2711, 85th Cong., 2d Sess. 57 (1959), in the case of the proceeds of an issue used by the St. Louis & S.F. R.R. to acquire control of the Central of Georgia Ry. without prior ICC authorization. *Central of Georgia Ry. Control*, Finance Docket No. 19159, ICC, Nov. 14, 1958.

⁵⁹ *Eric R.R.*, 138 I.C.C. 527 (1928).

duration of the securities and their discount, interest, and redemption provisions. If the issue is for acquisition of property, the applicant must show that the consideration proposed to be paid is fair and reasonable. In the case of rail securities, the applicant, except where an exemption is specifically made, must sell them at competitive bidding.

V

ADMINISTRATIVE PROCEDURE AND ACTION

A proceeding for the authorization by the ICC of the proposed issue of securities commences with the filing of an application containing complete information concerning the proposed issue in a form prescribed by the Commission.⁶⁰ When this application is filed, the Commission causes a notice, accompanied by a copy of the application, to be filed with the governor of each state in which the applicant operates and inquires whether he or some other appropriate authority of the state desires to be heard. The state authorities have the right to make representations designed to conserve the rights and interests of any of their citizens who may be involved in the proceeding. Petitions to intervene may also be filed by other persons who are able to show an interest in the proceeding. The ICC will conduct a public hearing where it deems this necessary; but in the great majority of cases, no such hearing is held.⁶¹ Where a public hearing is held, however, it is governed by the Administrative Procedure Act.⁶² Generally, a proposed report by the hearing officer is filed. The formal order is then entered by the ICC, usually by Division Four, granting or denying authority for the issue.

Under section 6(a) of the Securities Act,⁶³ the issuer of a proposed security files with the SEC a registration statement containing the information hereinafter described and pays as a filing fee 1/100 of one per cent of the maximum aggregate price at which the securities are to be offered, but not less than \$25.00. If the registration statement is complete and accurate and complies in all material respects with the requirements of the statute and the regulations of the Commission, it becomes effective twenty days after the filing, unless the Commission fixes an earlier date. Where the registration statement is incomplete or inaccurate on its face, the SEC may, by personal and telegraphic service within ten days after the filing, call this to the attention of the issuer. Within ten days thereafter, it may issue an order refusing to permit the registration to become effective until it has been amended. If the amendment is filed after the time when the registration would have become effective, the SEC is also authorized to issue a stop order suspending the effectiveness of the registration statement, if at that time it finds that the registration statement includes an untrue statement or fails to state a material fact. It is further empowered to

⁶⁰ 49 C.F.R. § 56 (1949).

⁶¹ In the years 1957 and 1958, where the applications did not involve sections of the Act other than section 20a, hearings were held in only 4 of 133 proceedings.

⁶² 60 Stat. 237-44 (1946), 5 U.S.C. §§ 1001-11 (1952).

⁶³ 48 Stat. 78 (1933), 15 U.S.C. § 77f(a) (1952).

make an examination in any case to determine whether or not a stop order should be issued.

Under both the Interstate Commerce and the Securities Acts, the commissions require information respecting:

1. the organization, financial structure, nature of business;
2. the terms, position, rights, and privileges of different classes of securities of the issuer presently outstanding;
3. terms of the offering to the public of the issue;
4. underwriters;
5. balance sheet and income statements;
6. articles of incorporation and by-laws;
7. underwriting agreements; and
8. plans of acquisition or reorganization that are involved.⁶⁴

The Securities Act and the regulations of the SEC under the Act require and prescribe the contents of a prospectus or offering circular under which securities must be offered to the public. The same requirements for candor and completeness of information, as well as absence of misleading or fraudulent representations, that apply to the registration statement also apply to this prospectus. There is no similar requirement in section 20a of the Interstate Commerce Act or in ICC regulations thereunder. However, when the issue is underwritten by an investment banker and publicly offered, an offering circular complying with practically all of the requirements of the SEC regulations is usually used in the sale and marketing. In many, if not most, cases where a public offering is made, the Bureau of Finance of the ICC requests that a copy of the offering circular be filed with the Commission, and generally in advance of the final order of authorization. Preparation and filing of such a document should be made mandatory.

From the foregoing, it should be clear that the facts upon which the two commissions exercise their statutory powers and discharge their statutory duties are very similar. Likewise, the ultimate result of the administrative action of both commissions—*i.e.*, the issuance or nonissuance of the proposed securities—is precisely the same. The difference, however, lies not only in the nature of the authority exercised, but in the consideration given to the facts developed by the administrative

⁶⁴ ICC: 49 C.F.R. §§ 56.1, 56.2 (1949); SEC: 48 Stat. 88, 91 (1933), 15 U.S.C. § 77aa, Schedule A (1952), Form S-1 and Regulation S-X. In addition to the above, the SEC Form S-1 and Regulation S-X require the following information not required in the ICC application, but which is contained in the carrier's annual report filed with the ICC: "Description of carrier property, carrier's officers, directors and principal stockholders, subsidiaries, franchises, material contracts, capitalization, sales of existing securities by applicant, sales of same to particular persons, remuneration, bonus, profit sharing, management and service contracts and agreements and amounts owing company; detailed financial statements, supporting balance sheet and income statements, voting trust agreements." The SEC Form and Regulation also require the following information which is not required by the ICC: "A full and candid prospectus, indemnification of officers and directors, options on securities, warrants and rights, relation with experts, accounting treatment of stock being registered, foreign patents held, terms of the offerings of previous issues."

investigation. In the case of the ICC, the security is issued or not depending on whether the Commission finds that from the standpoint of the particular carrier and of the general transportation service, the issue of this security will be beneficial. For all practical purposes, the ICC exercises the power of a supermanagement to determine whether the proposal is a provident one. On the other hand, the consideration given to the same facts by the SEC in a carrier proceeding is not whether the proposed issue is prudent or provident from a carrier or public standpoint, but whether, from the standpoint of a potential investor, a full disclosure of all relevant facts is made upon which he can exercise his independent judgment as to the value of the proffered security.

In applying the respective statutory standards, an entirely different type of expertise is required as between the two commissions. In dealing with railroads and motor carriers, the ICC utilizes the knowledge that it and its staff have accumulated over the years with respect to the operations, traffic, and financial needs of the carriers. Even though the jurisdiction that the ICC exercises is restricted to these two forms of transportation, a tremendous amount of information, experience, and expertise must be accumulated. Even were it desirable from economic or political standpoints, it would seem beyond the capacity of an administrative agency to exercise the managerial functions over security issues of all American industry and business such as those the ICC exercises over issues of railroads and motor carriers. As a result, therefore, the expertise which the SEC has acquired is confined almost, if not entirely, to the field of finance and to the branches of law relating to the prevention and punishment of fraud.

VI

TIME LAG

One of the purposes in the enactment of section 20a of the Interstate Commerce Act was to obtain expedition in the handling of railroad securities and to avoid the delay involved in complying with the security laws of the states in which the carrier operated.⁶⁵ In reporting the bill, the House Committee on Interstate and Foreign

⁶⁵ Thus, in the 1919 hearings before the Senate Committee on Interstate Commerce, the chairman of the California Railroad Commission urged: ". . . that the necessary machinery [be] given to the Interstate Commerce Commission so that it can handle these matters promptly. There is no branch of public regulation of railroads that so much requires prompt action as the issue of securities." *Hearings Before the Senate Committee on Interstate Commerce on Extension of Tenure of Government Control of Railroads* vol. 3, 65th Cong., 3d Sess. 1395 (1919). Likewise, a representative of the railroads emphasized: "In this connection, I should like to emphasize the importance of time in transactions involving the sale of corporate securities. Bankers are almost indispensable in floating large issues; but bankers never buy such securities to keep—only to sell. Their function is precisely that of the ordinary merchant, except that they count on making quicker sales, and therefore work on a smaller margin of profit, than the ordinary merchant makes of his merchandise. When bankers make an offer for an issue of bonds or stock they base their price upon current financial conditions and quotations, expecting to make a quick turnover. If they are required to wait for the delivery of the securities, they reduce the price to cover the risks of financial changes in the meantime, and the seller gets less for his securities. If the period of waiting is long or indefinite and the transaction is a large one, bankers sometimes will not buy at all—particularly if the financial world has any menacing features." *Id.* vol. 2, at 663. See also *id.* at 82-83.

Commerce stated that:⁶⁶

The enactment of the pending bill will put the control of stock and bond issues exclusively in the hands of the Federal government and will result in uniformity and *greater promptness of action*.

This is also indicated by the fact that hearings are not required, although permissive under the Act, thereby eliminating the necessity for a formal evidentiary record that generally is required in other proceedings. Also, by the provisions of paragraph eleven of section 20a of the Interstate Commerce Act, no security issued in accordance with the authorization of the Commission

. . . shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization.

In the Securities Act, Congress also recognized the need for speed in passing upon security issues, and to that end, it provided deadlines of ten and twenty days in which the SEC, under ordinary circumstances, is required to act.⁶⁷

The time required for processing applications by the ICC is not strictly comparable with that required by the SEC because of (1) the greater responsibility with respect to the decisions; (2) the complexity of the technical problems that it must face in considering any security issue; (3) the fact that notice must be given to the governors of the states in which the carrier operates; and (4) the preparation of a report describing in detail the application, the information relating to the providence of the issue and its conclusions with respect thereto, and the formal order of authorization or disapproval. None of these is required of the SEC, except in cases where the requirements of the Securities Act and the regulations with respect to the registration are not met.

The Securities Act fixes twenty days as the time after which a filed registration statement will become effective, unless the SEC finds that it will not be able to complete the processing of the statement within that time or a material amendment has been requested by a letter of comment—in which case, the issuer will be asked to file a delaying amendment. The Commission, under certain circumstances, has the power to accelerate the effective date of a registration statement, but this is infrequently done.

That the SEC is keenly aware of the need for speed is shown in its 24th Annual Report to Congress for the year ended June 30, 1958, in which it stated that the median time required from the date of filing to the effective date of a registration statement under the Securities Act was twenty-four days,⁶⁸ as compared with

⁶⁶ H.R. REP. NO. 456, 66th Cong., 1st Sess. 21 (1919). (Emphasis added.)

⁶⁷ 48 Stat. 79 (1933), 15 U.S.C. § 77h (1952).

⁶⁸ SEC 24TH ANN. REP. 30 (1958). Broken down as follows:

(a) 14 days from the date of filing to the date of the letter of comment;

(b) 6 days from the date of the letter of comment to the date of the filing of the first material amendment; and

(c) 4 days from the date of the filing of the first amendment to the date of filing the final amendment and effective date of registration.

twenty-three days during each of the previous two years. The Report adds:⁶⁹

This increased average lapsed time is a matter of concern to the Commission. It is being carefully watched and all appropriate steps are being taken to reduce the time lapse as much as possible, including steps to cure personnel shortages.

There appears in the margin⁷⁰ an analysis of the handling of registration statements during the calendar year 1958, which has been obtained through the courtesy of the staff of the SEC.

Of the 370 applications processed by the ICC during the period January 1, 1957, to April 28, 1959, forty-three were involved with other applications under the Interstate Commerce Act, principally in connection with authority to consolidate or unify under section five; and in a number of instances, formal hearings were held. Since the processing of these latter applications cannot in any way be compared with the processing of a registration statement under the Securities Act, they have been excluded from the analysis.

During the year 1957, 179 applications for authority to issue securities were processed by the ICC (175 without hearing), of which 128 involved railroads and fifty-one involved motor carriers. The median time required for processing was twenty-eight days for rail applications, thirty-six for motor-carrier applications, and twenty-nine days for all applications. The minimum time was fifteen days, and the maximum was 196 days.⁷¹

⁶⁹ *Id.* at 30.

⁷⁰ Elapsed Days for Effectiveness of SEC Registration Statements
Calendar Year 1958

Days	Registrations	Cumulative %
10 or less.....	6	0.9
11-15.....	11	2.5
16-19.....	126	21.1
20-24.....	202	50.3
25-29.....	89	63.3
30-34.....	46	70.0
35-39.....	43	76.3
40-49.....	43	82.5
50-60.....	14	85.9
Over 60.....	99	100.0

⁷¹

Elapsed Days for ICC Security Authorizations
Year 1957

Days	RAILROADS		MOTOR CARRIERS	
	Applications	Cum. %	Applications	Cum. %
Under 20.....	17	13	2	4
20-24.....	27	34	5	5
25-29.....	32	59	9	31
30-34.....	24	78	4	39
35-39.....	8	85	12	63
40-49.....	9	91	7	76
50-59.....	1	92	6	87
60-79.....	4	95	2	92
80-99.....	1	96	2	96
100-119.....	3	98	1	98
Over 120.....	2	100	1	100
Total.....	128		51	

From January 1, 1958, to April 28, 1959, 150 security applications were processed by the ICC without hearing, of which ninety-nine involved railroads and fifty-one involved motor carriers. The median time required for processing was twenty-nine days for rail application, forty-one days for motor-carrier applications, and thirty-one days for all applications. The minimum time was twelve days, and the maximum was 375 days.⁷²

Prior to 1958 the ICC staff freely conferred with parties and counsel in non-contested proceedings; in 1958, it was forbidden to continue such conferences. In marked contrast to this policy, the SEC encourages registrants and their counsel to confer freely with its staff, and this practice enhances mutual understanding of one another's problems and greatly expedites processing.

As indicated above, the median time required for processing motor-carrier applications was twenty-seven per cent longer in 1957 and forty per cent longer in 1958 than the time required for processing rail applications. A case-by-case examination does not reveal a satisfactory explanation for this. In the detailed analysis of the fifty 1958 issues,⁷³ the percentages of the issues disposed of (by public offerings and private placements) for both rails and motor carriers were quite similar. Although these are the critical issues that demand the most expeditious handling, they required a longer period for processing than did issues of stock dividends. The suggestion that greater time was required for processing motor-carrier than for processing rail issues because of imperfect applications seems not to be well taken in view of the fact that the necessity for supplementation was about the same in both cases.

72

Elapsed Days for ICC Security Authorizations
Jan. 1, 1958-Feb. 9, 1959

Days	RAILROADS		MOTOR CARRIERS	
	Applications	Cum. %	Applications	Cum. %
Under 20.....	7	7	4	8
20-24.....	24	31	10	28
25-29.....	20	51	8	44
30-34.....	15	66	1	46
35-39.....	10	76	1	47
40-49.....	8	84	8	63
50-59.....	5	89	7	77
60-79.....	6	95	2	81
80-99.....	2	97	4	89
100-119.....	0	97	5	98
Over 120.....	2	100	1	100
Total.....	99		51	

73

Analysis of 1958 Processing of 50 Security Applications by ICC

	PUBLIC OFFERINGS		PRIVATE PLACEMENT		"NOMINAL" ISSUES		STOCK DIVIDENDS	
	Rail	Motor	Rail	Motor	Rail	Motor	Rail	Motor
Per Cent of Issues.....	20	21	33	28	30	11	17	42
Median Time Lag (Days)	31	40	49	56	35	49	25	30
Per Cent Supplemented..	100	100	70	80	44	50	40	17
Per Cent Amended.....	—	—	—	20	22	—	—	—

Since substantially the same factual information is examined by the staffs of both the Commissions, it would appear possible to reduce the period for ICC processing of these applications substantially below the 1958 level. The relatively poor performance in 1958 as compared with the SEC, is, in the writer's opinion, largely due to excessive judicialization of the process that the ICC has imposed upon its highly competent, but overworked and inadequate, staff.

VII

CONCLUSION

In view of the long and successful administration of section 20a of the Interstate Commerce Act prior to 1958, there would seem to be no reason, at least at this time, to repeal that section and permit security issues of railroads and motor carriers to be governed by the provisions of the Securities Act. Because they are much less important from the standpoint of their effect upon the national transportation system, there would be less objection to the transfer of motor-carrier security issues to the SEC than there would be to the transfer of the greater and more important railroad issues.

Moreover, it is believed that the ICC can, without statutory change, make procedural changes in the processing of security issues that would greatly reduce the time required for their authorization. The Commission has gained sufficient experience in the thirty-nine years during which it has administered the statutory standards of section 20a of the Interstate Commerce Act to define by administrative rule-making the requirements that any class of security issue must meet in order to conform to the statutory standards.⁷⁴ Once requirements are clearly defined, it will be possible to adopt the SEC procedure of determining from the face of the application and supporting information whether or not a particular issue meets those requirements.⁷⁵ In such cases, all that is required would be an order of authorization unaccompanied by a report.⁷⁶ And in connection with such a procedure, the Commission should fix definite deadlines, approximately, if not exactly, the same as the deadlines fixed by statute in the case of the SEC. Under such circumstances,

⁷⁴ Such specific standards might embrace: (1) the particular purposes for which security issues will be authorized; (2) the conditions under which capitalization of surplus will be permitted; (3) a clear definition as to the particular assets which are "capitalizable"; (4) a sound formula by which the working capital required can be determined; (5) the precise rules governing maximum capitalization; (6) the extent to which the earnings of the company must be sufficient to service proposed debt issues and to provide some return to stockholders; (7) the manner in which the proceeds are to be used; (8) limitations upon the amount of debt as compared with equity securities; (9) reasonable terms with respect to time, duration, discounts, interest rates, redemption provisions, bankers' spread or commission, etc.

⁷⁵ There are, of course, proceedings in which a report as well as an order is necessary; but even in such cases, the recital of statistical information contained in the application would seem to impose an unnecessary burden and expense upon the Commission's staff. Also, of course, orders would be necessary, or at least appropriate, where an application was denied or more onerous terms or conditions imposed than those proposed in the application. A case by case inspection of 172 rail and motor-carrier applications in 1957 and 1958 indicates that in very few was a report necessary.

⁷⁶ ICC processing undoubtedly would be speeded by amending the regulations to require all of the factual information of an SEC registration statement, for much of which the ICC staff must resort to annual reports of the carrier.

it should be able to obtain congressional authorization of a sufficient staff to meet them.

The ICC, in administering section 20a of the Interstate Commerce Act, would also greatly increase benefits to the public if, in fixing the requirements necessary to meet the statutory standards, it should find that the public requires the same complete and accurate disclosures with respect to a proposed issue as is required by the SEC under the Securities Act. Then, in the case of public offerings, the ICC should implement this finding not only by provisions designed to deny applications where such disclosure is not fully made, but also by assumption of the control of the offering through requiring and regulating a prospectus or offering circular. In this connection, sound transportation as well as comity would seem to require close cooperation in this area between the ICC and the SEC in conforming their regulations.