

FINANCE DOCKET No. 6114¹PROPOSED CONTROL OF ERIE RAILROAD COMPANY
AND PERE MARQUETTE RAILWAY COMPANY BY
CHESAPEAKE & OHIO RAILWAY COMPANY

Submitted November 2, 1927. Decided May 8, 1928

1. Acquisition by the Chesapeake & Ohio Railway Company of control of the Pere Marquette Railway Company by the purchase of capital stock conditionally approved and authorized.
2. Proposed acquisition by the Chesapeake & Ohio Railway Company of control of the Erie Railroad Company by purchase of capital stock not found to be in the public interest. Application denied.
3. Authority conditionally granted the Chesapeake & Ohio Railway Company to issue not exceeding \$20,000,000, par value, of common capital stock, to be used in connection with the acquisition of control of the Pere Marquette Railway Company or for other stated purposes.

Herbert Fitzpatrick, George H. Gardner, Frank H. Ginn, C. C. McChord, and R. Granville Curry for applicant; Newton D. Baker for O. P. Van Sweringen.

Henry W. Anderson, Thomas B. Gay, and Irvin G. Craig for George S. Kemp and others, intervening stockholders of Chesapeake & Ohio Railway Company; Moultrie Hitt, Clarence A. Miller, and G. Kibby Munson for Arcadia & Betsey River Railway Company, Chicago, Attica & Southern Railroad Company, Arcade & Attica Railroad Corporation, Mount Jewett, Kinzua & Riterville Railroad Company, Morehead & North Fork Railroad Company, New York & Pennsylvania Railway Company, and Prattsburg Railway Corporation; R. E. Quirk and Norman, Quirk & Graham for Big Sandy & Kentucky River Railway Company; J. A. Smith for Middletown & Unionville Railroad Company; Carl R. Henry for Detroit & Mackinac Railway Company.

REPORT OF THE COMMISSION

BY THE COMMISSION:

The Chesapeake & Ohio Railway Company, on February 11, 1927, filed an application under paragraph (2) of section 5 of the interstate commerce act for an order authorizing it to acquire control

¹ This report also embraces Finance Docket No. 6113, Proposed Issue of Capital Stock by Chesapeake & Ohio Railway Company.

of the Erie Railroad Company and the Pere Marquette Railway Company by the purchase of all, or at least a numerical majority, of their shares of capital stock. All of these companies are carriers by railroad subject to the act. On the same date, the Chesapeake & Ohio filed an application under section 20a of the act for authority to issue \$59,502,400 of common capital stock, consisting of 595,024 shares of the par value of \$100 each.

Intervening petitions in each proceeding were filed by George S. Kemp and others, representing a stockholders' protective committee of the applicant's shareholders. This committee introduced the only objections which have been presented to us against granting the applications. Petitions of intervention were also filed by the Detroit & Mackinac Railway Company, Big Sandy & Kentucky River Railway Company, Arcade & Attica Railroad Corporation, Prattsburg Railway Corporation, New York & Pennsylvania Railway Company, Morehead & North Fork Railroad Company, Mount Jewett, Kinzua & Riterville Railroad Company, Chicago, Attica & Southern Railroad Company, Arcadia & Betsey River Railway Company, and Middletown & Unionville Railroad Company. These short lines do not oppose the plan proposed by the applicant, but in the event it is approved by us they ask that provision be made for their inclusion in the projected system or for protection of existing rights. A hearing upon both applications has been had, briefs have been filed, and the cases have been argued orally.

The plan proposed is an intermediate step toward unification of the three lines of railroad, and the applicant represents that the advantages in operation and service to be derived hereafter from unification will be realized to a large extent during the period of stock control. It is contended that the lines are not competitive, but that they are complementary and supplementary. The present plan is the outgrowth of our denial of the applications in *Nickel Plate Unification*, 105 I. C. C. 425, decided March 2, 1926. In that case, the New York, Chicago & St. Louis Railway Company, a new corporation, sought authority, *inter alia*, under paragraph (2) of section 5 of the act, to acquire control of the Chesapeake & Ohio Railway Company, Hocking Valley Railway Company, Erie Railroad Company, Pere Marquette Railway Company, and New York, Chicago & St. Louis Railroad Company, the latter generally known as the Nickel Plate. It was proposed to issue stock of the new company to stockholders of the other companies, except the Nickel Plate, in exchange for the stock held by them, upon the basis of certain ratios, and to issue to the Nickel Plate itself stock of the new company equal in amount and kind to the outstanding stock of the Nickel Plate. The new com-

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pany also proposed to lease the properties of the other companies. We found that the consideration, terms, and conditions of the proposed acquisition of control were not just and reasonable, and the applications were denied. The Nickel Plate and the Chesapeake & Ohio are controlled by O. P. and M. J. Van Sweringen and their associates, generally referred to as the Van Sweringen interests, and the Chesapeake & Ohio owns approximately 80 per cent of the stock of the Hocking Valley. In the present case the Nickel Plate is omitted, and instead of a new company acquiring control of the carriers named above by exchange of capital stock and by leases, the present plan contemplates acquisition by the Chesapeake & Ohio of control of the Erie and the Pere Marquette by purchase of at least a sufficient amount of the stock of each of those companies to insure such control.

The applicant operates 2,650.95 miles of road, including 266.76 miles operated under trackage rights. Its railroad extends from Newport News, Va., through Cincinnati, Ohio, to Chicago, with numerous branches in the coal fields of West Virginia and Kentucky. Washington, D. C., and Louisville, Ky., are reached by trackage rights over the lines of other companies. Through its control of the Hocking Valley Railway and the Chesapeake & Hocking Railway, the applicant reaches Toledo, Ohio. The applicant transported 67,863,293 tons of revenue freight during 1926, of which 55,807,362 tons were bituminous coal. The total coal produced by mines on the road and its short-line connections was 58,509,638 tons. This class of traffic was more than doubled in the five years ended December 31, 1926.

The Erie system embraces 2,564.53 miles of line, of which 129.05 miles are operated under trackage rights other than intrasystem agreements. Separately operated lines which the Erie Railroad controls by ownership of capital stock are the Chicago & Erie, operating 269.56 miles of road; New York, Susquehanna & Western, operating 134.47 miles; Wilkes-Barre & Eastern, operating 87.04 miles; New York & New Jersey, operating 45.72 miles; and Bath & Hammondsport, operating 9.20 miles. The principal terminals of the system are New York and Chicago, and it has important lines reaching Rochester and Buffalo, N. Y., Cleveland, Cincinnati, and Youngstown, Ohio, and the Mahoning and Shenango Valleys of Pennsylvania. It connects with the Chesapeake & Ohio at Cincinnati and at several points in and near Chicago; with the Hocking Valley at Marion, Ohio; and with the Pere Marquette at Buffalo, N. Y., and Chicago. The revenue freight tonnage transported in 1926 on the main lines was 51,764,346 tons. The tonnage originated

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on the system was 21,856,681 tons, of which 8,151,662 tons were anthracite coal. Bituminous coal produced on the Erie amounts to only 750,000 tons per year and is used for company fuel. Of the total anthracite production in 1926, 5,607,333 tons, or 68.8 per cent, were from mines controlled by the Erie. Of total freight revenue in 1926, 29 per cent was derived from coal traffic and 71 per cent from merchandise. The reverse of these proportions obtained, approximately, in the Chesapeake & Ohio-Hocking Valley revenues. The density of freight traffic on the Erie system in 1926 is represented by 4,050,660 revenue ton-miles per mile of road, while that of the Chesapeake & Ohio-Hocking Valley is 7,485,583. On the line are located some 2,600 industries, and 16,000 others are served by switching connections.

As of December 31, 1926, the Erie had outstanding \$176,386,300 of capital stock, consisting of \$112,481,900 of common, \$47,904,400 of first preferred 4 per cent noncumulative, and \$16,000,000 of second preferred 4 per cent noncumulative, the par value of each class being \$100 per share, and each class having general voting powers. Including the Chicago & Erie, it also had outstanding funded debt unmatured aggregating \$225,090,034.96. The Erie and Chicago & Erie together are capitalized at \$173,274 per mile of road operated, as compared with \$117,978 for the applicant.

The consolidated income account of the Erie for the year ended December 31, 1926, shows net income of \$9,616,417. After deducting income applied to sinking and other reserve funds amounting to \$1,369,464, the balance transferred to credit of profit and loss is shown as \$8,256,953. Included in this amount is \$5,600,000 received by the Erie as dividends from two of the four coal companies controlled by it. Excluding the coal company dividends, the profit and loss credit balance shown above would have been reduced to \$2,646,953. After dividends on the preferred stock, the net available for dividends on the common stock would have been \$90,777. The applicant's president testified that it would not have been prudent for the Erie to have paid dividends at any time during the past 10 years.

The Pere Marquette operates 2,286.13 miles of road, of which 337 miles are in Canada. A total of 307.97 miles is operated under trackage rights. Its eastern termini in the United States are Port Huron and Detroit, Mich., and Toledo, Ohio. Its Canadian lines terminate at Eriean, on Lake Erie, and at St. Thomas, Ontario, and by trackage rights over the Michigan Central it reaches Black Rock and Suspension Bridge, N. Y., at both places making connection

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with the Erie. From its western terminus at Ludington, Mich., car ferries are operated across Lake Michigan to Kewaunee, Manitowoc, and Milwaukee, Wis. It enters Chicago by using 47.34 miles of other lines. At La Crosse, Ind., it connects with the applicant's Chicago division and at Toledo, Ohio, with the Hocking Valley. The latter connection is effected by trackage over the Toledo Terminal Railroad. The Pere Marquette's entrance into Toledo involves trackage agreements with eight companies, none of these agreements being long-term contracts. Of 19,402,508 tons of revenue freight carried in 1926, 9,390,180 tons originated on its line, and it is stated that nearly 80 per cent of the entire freight business handled by the road either originates, terminates, or is local to its own rails. Coal constitutes a relatively small part of the total traffic, and the coal produced on the line is small in amount and of inferior quality. Freight traffic density in 1926 was 1,475,198 revenue ton-miles per mile of road. The Pere Marquette serves about 1,100 industries directly and 6,500 others through switching connections.

As of December 31, 1926, the Pere Marquette had outstanding \$68,675,000 of capital stock, consisting of \$45,046,000 of common, \$12,429,000 of preferred 5 per cent cumulative, and \$11,200,000 of prior preference 5 per cent cumulative, the par value of each class being \$100 per share, and each class having general voting powers. It also had outstanding \$52,003,000 of funded debt unmatured. Its net income for the year ended December 31, 1926, was \$7,702,004.

The applicant represents that when the unification of these lines shall have been accomplished, there will have been created a system comprising approximately 7,553 miles of road in the United States and 337 miles of road in Canada, comparable in all essential respects with the existing large systems serving the territory between Chicago and the Mississippi River on the west and the Atlantic seaboard. Numerous transportation advantages are claimed for this combination, among them being elimination of delays at interchange points and a more efficient use of equipment. The applicant desires to be the dominant factor in a strong system and to secure control of the Erie and Pere Marquette before other interests shall have done so; to be freed from its dependence on the large systems operating in the same general region for distribution of much of its originated traffic, and to serve its consuming territory more directly.

The applicant has already acquired through the Virginia Transportation Corporation, a subsidiary, or has secured options upon, a
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substantial proportion of the Erie's outstanding stock, as shown in the following table:

	Number of shares	Average cost per share	Total cost
Held by Virginia Transportation Corporation:			
First preferred.....	137,405	\$47.210	\$6,486,882.90
Second preferred.....	50,495	44.936	2,269,068.32
Common.....	357,300	38.583	13,785,644.84
Stock.....	545,200	41.346	22,541,596.06
Under option from O. P. Van Sweringen (Vaness Co.):			
First preferred.....	23,695	45.875	1,087,008.13
Second preferred.....	22,305	43.750	975,843.75
Common.....	345,239	34.500	11,910,745.50
Stock.....	391,239	35.716	13,973,597.38
Interest Sept. 29, 1926, to June 30, 1927.....			628,811.89
Total.....		37.323	14,602,409.27
Total acquired.....	936,439	38.994	36,515,193.44
Total, with interest.....	936,439	39.665	37,144,005.33
Authorized to be purchased at same prices as in Van Sweringen option; owner's name not given:			
First preferred.....	1,000	45.875	45,875.00
Second preferred.....	2,400	43.750	105,000.00
Common.....	131,500	34.500	4,536,750.00
Stock.....	134,900	34.749	4,687,625.00
Interest Sept. 29, 1926, to June 30, 1927.....			210,943.13
Total.....		36.313	4,898,568.13
Grand total.....	1,671,359	39.243	42,042,573.46
Total Erie shares outstanding at the time of filing the applications.....	1,763,863		

The Virginia Transportation Corporation was organized under the laws of Maryland in October, 1926, at the direction of O. P. Van Sweringen, with an authorized capital stock of 500,000 shares without nominal or par value, all of which is held by the applicant. It is admittedly a convenience corporation, formed for the purpose of holding the applicant's interests in the Erie and the Pere Marquette.

While the aggregate amount shown above indicates acquisition of 60.7 per cent of stock control of the Erie, it appears that there is now no assurance of the applicant's ability to purchase the block of 134,900 shares at the prices shown. Omitting this block, the percentage is 53.1, and giving effect to \$19,317,400 of Erie convertible bonds, series D, which had been converted into 386,348 shares of common stock, as of October 18, 1927, it falls to 43.6. A further reduction would result from the exercise of certain voting rights by holders of Erie prior-lien and general-lien mortgage bonds, of which there are \$70,885,000, corresponding to 708,850 shares of stock outstanding. As the applicant has not submitted the details of its procedure in making further acquisitions of Erie stock, and as the market prices of such stocks have changed materially since the date of the applications, it is manifest that the cost, terms, and conditions of procuring an assured numerical majority are not now before us.

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It is not improbable that the ultimate cost of acquiring 51 per cent of voting control, including bonds which have been converted into stock and bonds which carry voting privileges, might exceed \$65,000,000.

The situation as to Pere Marquette stocks is as follows:

	Number of shares	Average cost per share	Total cost
Held by Virginia Transportation Corporation:			
Prior preference.....	2,100	\$93.655	\$196,676.29
Preferred.....	12,600	90.702	1,142,838.79
Common.....	1,900	117.168	222,620.11
Stock.....	16,600	94.105	1,562,135.19
Under option from O. P. Van Sweringen (Vaness Co.):			
Common.....	36,500	110.000	4,015,000.00
Total.....	53,100		5,577,135.19
Expired option from Nickel Plate R. R.:			
Common.....	169,100	110.000	18,601,000.00
Common.....	5,800	110.180	639,162.50
Stock.....	174,900		19,240,162.50
Authorized to be purchased at same prices; owner's name not given.....	50,000	110.000	5,500,000.00
Grand total.....	278,000		30,317,297.69
Total Pere Marquette shares outstanding.....	686,750		

¹ Carrying charges to be added.

The entire 278,000 shares represent 40.5 per cent of stock control, and after deducting the Nickel Plate shares, upon which an extension of the option, expired July 1, 1927, has been formally refused by the Nickel Plate board of directors, and after also deducting the 50,000 shares the purchase of which at the stated price is now doubtful because of the advance in market price, there remain only 53,100 shares, or 7.7 per cent, of the total Pere Marquette outstanding stocks actually owned or available to the applicant at known prices.

The applicant's board of directors has authorized further purchase of stocks of the Erie and Pere Marquette, up to a numerical majority of each, at such prices and on such terms as the board may from time to time determine.

Of the aggregate cost of stocks so far acquired, \$24,103,731, the applicant has contributed from its treasury \$19,535,085. The difference between these sums corresponds substantially to the indebtedness carried by the Virginia Transportation Corporation, which, in exchange for 475,000 shares of Erie stocks, issued and transferred to the applicant all of its capital stock.

The purchases of Erie and Pere Marquette stocks by the applicant have been made in accordance with appropriate action by its board of directors, which also approved the adoption of the then prevailing market prices in the Van Sweringen option on 391,239 shares of Erie stocks of all classes owned by the Vaness Company, and the 134,900

shares held by other interests, the consideration to be paid for the 174,900 shares of Pere Marquette common stock controlled by the Nickel Plate Railroad through its subsidiary, the Pere Marquette Corporation, and the similar consideration to be paid for 36,500 shares of Pere Marquette common stock held by the Vaness Company. The decision to purchase a large interest in Erie was made on September 29, 1926, and in Pere Marquette on October 18, 1926, in both cases being based on the recommendations of a special committee of five directors appointed by the chairman early in May of the same year. The application herein was approved by the stockholders at their annual meeting held on April 19, 1927, the vote being 810,437 shares in favor of, and 126,496 shares against, adoption of the ratifying resolution. The outstanding capital stock of the applicant was then 1,190,080 shares. The protective committee claims to represent 126,268 shares, held by 1,269 persons.

Paramount among the reasons advanced by the applicant for securing control of the Erie and Pere Marquette is the necessity for transporting its coal traffic more directly and efficiently by single-line hauls and coordinated train service from the coal mines on its lines to the territory in which the coal is consumed, and particularly to Chicago, Detroit, and southern Michigan, thus placing it on a parity with its principal competitors. It claims to be dependent on other lines for delivery of a large proportion of its westbound coal and represents that shippers would benefit from the greater elasticity and efficiency of service which would result from the arrangement proposed. Of 38,482,568 tons of bituminous coal originated on its lines and moved westward in 1926, 68.6 per cent was delivered to connections of the Chesapeake & Ohio and the Hocking Valley. Approximately 33,000,000 tons passed through the gateways of Cincinnati and Columbus to the following destinations: Ohio 7,730,403 tons; Indiana 2,799,964 tons; Michigan 7,379,124 tons; Chicago 4,472,665 tons; Illinois points other than Chicago 302,569 tons; lake cargo 8,974,218 tons; lake ferries and the Northwest 966,098 tons; and Canada 315,605 tons. More than one-half of the total tonnage which moved through these gateways, including a considerable amount received from connections, was delivered to New York Central, Pennsylvania, and Baltimore & Ohio lines, while the tonnage delivered to the Erie and Pere Marquette aggregated approximately 3.5 and 5 per cent, respectively, of the total.

The extent to which the New York Central and other large systems acted as bridge carriers between the Chesapeake & Ohio lines and the Erie and Pere Marquette can not be definitely ascertained from the record, but it was probably not great. The applicant claims that it was during a period when the coal production on their

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own lines was restricted by labor conditions that the New York Central, Pennsylvania, and Baltimore & Ohio were most active in taking the applicant's coal. There has been a heavy increase in such interchange since 1922, and although instances have occurred in which connecting lines have failed to take the applicant's coal expeditiously, it must be conceded that, in the main, no serious difficulty has been encountered up to the present time in distributing an increasing tonnage. Total revenue coal shipments on the applicant's lines in 1926 amounted to 55,807,362 tons as compared with 23,756,528 tons in 1921. And this was despite the traffic restrictions heretofore imposed upon the movement of freight by congestion at the Cincinnati gateway and between Gregg and Valley Crossing. The applicant's westbound coal tonnage has increased by large amounts each year since 1921, the rate of such increase being considerably greater than that of the eastbound movement. With the removal of the restrictions referred to, through the enlargement of facilities at Cincinnati now in progress, and the construction of the Chesapeake & Hocking Railway between Gregg and Valley Crossing, recently completed, the applicant would apparently be in position to expand its business in the future with less restraint than in the past, without regard to any change in its relations with either the Erie or the Pere Marquette.

The Erie's function under the plan would be principally to provide a low-grade high-capacity line between Marion, Ohio, and Chicago, for the movement of coal to Chicago and beyond. Of the 4,472,665 tons originating on applicant's line and shipped to or through Chicago in 1926 only 2,529,759 tons moved over the applicant's Chicago division. The route proposed would be via Chesapeake & Ohio, Chesapeake & Hocking, and Hocking Valley lines to Marion, and west via the Erie. This route is 5 miles longer than the applicant's route via Cincinnati, but is double track and has 0.2 per cent ruling grades westbound, while the applicant's Chicago division is single track and has a grade of 1.9 per cent between Cincinnati and Cheviot, Ohio, and many other ruling grades in excess of 1 per cent. Operating savings from the use of the Erie route, based on the coal tonnage of 1926, have been computed by the applicant at more than \$1,000,000 in out-of-pocket expense per annum. It is testified that the Erie line can handle an increase in traffic of at least 100 per cent. As the coal movement is transferred to the Erie-Marion route, it is expected that an equal amount of merchandise and other high-class freight will be secured for the Chicago division through solicitation, and by routing all future Chicago division business, as so constituted, over the Erie between North Judson, Ind., and Griffith, Ind., it is contended that a yearly saving of \$168,000

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can be made. Additional economies, to be gained by changes in yard and terminal operations at Marion and Chicago, bring the total estimate of savings in connection with the use of Erie facilities, other than shops, to approximately \$1,744,000 per annum.

A further advantage anticipated by the applicant is that of securing a market for its coal in the territory lying east of Marion and extending as far as Meadville, Pa. It is estimated that the Akron-Youngstown industrial district of Ohio consumes 12,000,000 tons of coal per annum. The quantity of Chesapeake & Ohio coal now used in that district is not of record, but as little bituminous coal is produced on the Erie lines or is delivered to the Erie by the Chesapeake & Ohio and Hocking Valley, it may be assumed that the district is now supplied principally by other roads. The record indicates, however, that the Erie line between Marion and Meadville operates over heavy grades. This fact also was recognized in the *Nickel Plate Unification case* and it was there proposed to relieve the congestion by routing some of the Erie eastbound traffic, especially perishable freight, over the Nickel Plate from Lima, Ohio, returning it to the Erie at Buffalo.

In connection with the proposed use of the Erie in handling Chesapeake & Ohio coal destined to Chicago and beyond, the applicant submits that to improve its Chicago division so that the cost of operation would be approximately equal to that of the Columbus-Marion-Chicago route would entail an expenditure of \$33,993,000. It is to be noted that of this total, \$21,186,500 is attributable to a new line crossing the Ohio River near Carrol Street, Cincinnati, affording connection with the Baltimore & Ohio, Big Four, and other systems east of Cincinnati, and extending about 65 miles northerly before joining the present location at Boston, Ind. The reason for allocating the cost of this project entirely to the Chicago division, whereas former plans for developing a belt line east of Cincinnati had not been so considered, appears to arise from the fact that the applicant has begun extensive improvements on its present Ohio River bridge and approaches and has deferred consideration of the belt line. The improvements being made in the present location will increase the operating capacity of the Cincinnati gateway and the facilities for interchange with connecting lines, but will not relieve the very unfavorable conditions existing on the Chicago division.

The extent to which the present situation has been influenced by the prospect of an alliance of the Erie with the Chesapeake & Ohio can not be determined, but it is clear that the excessive grades on the Chicago division will continue to impose a burden on the system, even though a change in the character of traffic handled may

tend to reduce the losses heretofore suffered on that division. In the absence of evidence indicating the probable effect of grade reduction upon the cost of operation, nothing conclusive is proved by a comparison between the expenditure for reconstruction and the estimates of operating savings to be gained by use of the Erie route. It is evident that the applicant would benefit directly from any improvements made on the Chicago division to increase its capacity and reduce the cost of operation, while savings to be effected from the use of the Erie route would be distributed among the constituent lines. The economic advantages of the proposition have not been demonstrated with the completeness and clarity that are required when it is evident that the advantage of the Erie route to Chicago constitutes the most important consideration advanced in favor of the applicant's proposed control of the Erie system.

The applicant states that of the 7,379,124 tons of coal mined on its lines and shipped by various routes to destinations in the State of Michigan during 1926, approximately 5,500,000 tons were delivered at points reached by the Pere Marquette, and might, inferentially, have been transported by that carrier. There is nothing of record to show what percentage of this traffic was destined to industries located on the Pere Marquette, neither is it shown to what extent the traffic was and is routed by the shippers. Probably not more than 1,500,000 tons were delivered either directly by the applicant or via the Hocking Valley to the Pere Marquette, whose total receipts of coal from all connections were only 4,135,765 tons. It was testified that some difficulty had been experienced by the applicant in making deliveries to the Pere Marquette because of the limitations of the Norfolk & Western line between Gregg and Parson's Yard (Columbus), and that a very considerable part of the tonnage which reached Michigan was delivered to connections at Cincinnati.

By means of its car ferries operating across Lake Michigan throughout the year, the Pere Marquette makes connection with several of the northwestern systems, thus providing a route to the territory served by those systems without passing through the Chicago gateway. It is also in position to afford the applicant an entrance into Detroit. Geographically, the Pere Marquette constitutes a northern extension of the Chesapeake-Hocking Lines, which terminate at Toledo. The field for the consumption of Chesapeake & Ohio coal beyond Chicago, the Mississippi River, and Lake Michigan is said to be increasing, partly by reason of competitive rates to points in Iowa, Kansas, Minnesota, Missouri, Nebraska, and the Dakotas.

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In addition to the benefits claimed for the plan in the matter of coal distribution, it is represented that both the Erie and Pere Marquette would furnish a considerable amount of traffic moving east and south that is needed by the applicant to balance its west-bound movement of coal. Several new main routes are contemplated, such as that between Detroit, Mich., and Youngstown, Ohio, via Pere Marquette, Hocking Valley, and Erie. A direct merchandise line to the south and southeast, by way of Elkhorn City, Ky., is suggested. The products of iron, steel, rubber, machinery, etc., originating in the Akron-Youngstown district and the Mahoning and Shenango Valleys, would be made more available than they are at present to markets in the applicant's territory. The advantages of the port of Hampton Roads are also mentioned, and the prospect of developing that port by means of the proposed association of these railroads is described.

No specific objection from a transportation standpoint has been presented to us with respect to the applicant's proposed control of the Pere Marquette. Such control, as we have seen, would in effect extend the applicant's territory in a northerly direction, embracing a large part of the State of Michigan, where a considerable amount of Chesapeake & Ohio coal is consumed, and would afford the applicant a direct route to lake ferries making connection with north-western systems. There would be created an enlargement of the extension already accomplished by the applicant's control of the Hocking Valley through its ownership of 80 per cent of that company's stock. There is no substantial competition between the Chesapeake & Ohio and the Pere Marquette; on the contrary, the supplemental nature of their transportation functions is evident. Regarded as a single system, the Chesapeake & Ohio, Hocking Valley, and Pere Marquette would operate in competition with the Pennsylvania, New York Central, and, to a considerable extent, with the Baltimore & Ohio, between the Atlantic seaboard on the east and the Great Lakes and Michigan points on the west. It has been argued in this and other proceedings that the great coal-producing roads should be kept separate for independent operation, to the end that this basic commodity may move freely to all connections, but we are of the opinion that no restriction on its coal distribution would result from the applicant's control of the Pere Marquette. In addition to maintaining all existing outlets and connections, the applicant would be in position to transport its coal more directly and efficiently to a territory where much of that coal is now marketed, and to connections which it does not at present reach by its own lines. Both the Chesapeake & Ohio and the Pere Marquette are operating on a sound dividend-paying basis. Through increased interchange

of traffic and economies in operation, made possible by rearrangement of facilities under common management, both carriers should profit by the arrangement. We are convinced that as regards the Pere Marquette, the proposal is sound from a transportation standpoint.

We are unable to find that the proposal to control the Erie is to the same extent free from criticism. The applicant has not demonstrated a necessity for control of the Erie because of lack of outlet for its coal traffic. It has not shown the extent of demand for its coal at points on the Erie not reached by its own lines, nor has it established the merits of the proposal to utilize the Erie's route between Marion and Chicago for a portion of its westbound business, except to the extent that the Hocking Valley and Erie would benefit thereby. If this route possesses manifest advantages to the Chesapeake & Ohio and Erie, there should be no obstacle to the making of a joint trackage agreement by them to provide for the operation here proposed. Such an agreement might well assist the movement of westbound coal, pending the desirable betterment of the Chicago division of the Chesapeake & Ohio. The applicant used the tracks of the Norfolk & Western between Gregg and Valley Crossing for many years until it became necessary to develop its own facilities between those points. There is no assurance that the applicant would be able to change the routing of more of its coal than now moves over the Chicago division. The testimony is that while formerly the routing of coal was left very largely to the carriers, there has been an increasing diversion resulting from solicitation and that at present about one-half of the applicant's coal traffic is routed by shippers. With the maintenance of existing routes, therefore, it can not reasonably be expected that the applicant could reassume its former control of the movement of its coal. It may also be doubted that the applicant would be able through solicitation to increase the movement of high-class traffic over its Chicago division adequately to replace the loss of coal tonnage. Were it possible to do this, the advantage could be equally realized whether the coal traffic be diverted as the result of corporate control or as the result of a trackage agreement. The diversion of eastbound business from the port of New York to the port of Hampton Roads is also most uncertain. All of the projected routes which proponents of the plan contend would be converted from "tariff routes" to "service routes" are in existence to-day and are capable of development. The record offers little to show that the proposed control would affect in any way the large mileage of the Erie system east of Meadville, Pa.

We do not consider that the relationship of the Chesapeake & Ohio and the Erie is complementary or supplementary. The Erie constitutes an east-and-west connection in contrast with the northerly

extension provided by the Pere Marquette. The Chesapeake-Hocking lines reaching from the seaboard to Lake Erie make contact with practically every important trunk line in eastern and central territory and are thus in position to distribute their coal both east and west over many connecting lines. Control of the Erie by the applicant would tend to disturb this structure and to disrupt existing channels of traffic to a much greater extent than would its control of the Pere Marquette. To effect the proposed transportation alliance through the acquisition of a majority of the Erie's capital stock would involve a large additional expenditure.

A further objection to the present acquisition of control of the Erie by the applicant is found in the fact that it would constitute practically an allocation of an important New York-Chicago trunk line in advance of the adoption of any general plan for the formation of competitive systems in eastern territory. Although it may be said that the acquisition of control through the holding of capital stock would not be such a consolidation as would necessarily be permanent, there is no exigency in the affairs of either the Chesapeake & Ohio or the Erie which requires action at this time. *Control of B., R. & P. Ry.*, 131 I. C. C. 750, decided December 13, 1927.

As we said in our report in *Control of Virginian Ry.*, 117 I. C. C. 67, and have repeated in other proceedings, a clear showing of public gain must be made in order adequately to support an affirmative finding in cases of proposed control. We are unable to find such showing in this record so far as it relates to proposed control of the Erie.

Before filing the applications, the applicant expended from its treasury the sum of \$19,535,085 in acquiring 119,005 shares of Erie first preferred stock, 50,295 shares of second preferred, and 305,700 shares of common. Additional purchases, made by the Virginia Transportation Corporation, brought the total purchases in Erie to 545,200 shares, and the total investment of the Virginia Transportation Corporation therein to \$22,537,476. It appears that the Erie stocks thus acquired were bought at fair market prices as of the dates of purchase. The common stock of the Erie represents an equity much in excess of the prices paid, measured either by book investment or on the basis of the tentative valuation made by us. No dividends on any class of Erie stock have been paid for many years but there are indications of material improvement in the net income of the system. In part reflecting this favorable prospect, the market value of all classes of Erie stocks has risen in a marked degree since the purchases under consideration were made. As events have transpired, the applicant's present investment in Erie does not indicate any financial loss. We have pointed out in several instances

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that the purchase by one railroad company of securities of another is fraught with risk to the carrier making the purchase.

No purchases of stock of the Pere Marquette have been made directly by the applicant, but in its interest the Virginia Transportation Corporation has obligated itself in acquiring 2,100 shares of prior preference stock, 12,600 shares of preferred, and 1,900 shares of common, at a total cost of \$1,562,135. The prices paid were consistent with the then prevailing market. The common stock had an equity, as of December 31, 1926, of approximately \$148 per share based on book investment in road and equipment, and approximately \$124 per share based on the final value found by us. All of the Pere Marquette stocks just described, together with 70,200 shares of Erie, costing about \$3,000,000, were acquired by the Virginia Transportation Corporation. The current liabilities of that corporation as of April 30, 1927, amounted to \$4,648,931. Among these liabilities was a promissory note for \$2,800,000 in favor of J. P. Morgan & Company, secured by pledge of 140,000 shares of Erie common stock. All of the securities which the Virginia Transportation Corporation holds are in the hands of J. P. Morgan & Company for safekeeping.

The only facts before us concerning the procedure proposed by the applicant for securing a majority of outstanding stock of the Pere Marquette are comprised in the statement on page 523 of this report. From this it is evident that the prosecution of the plan is contingent upon reconsideration by the Nickel Plate of its refusal to extend the option on 174,900 shares, upon the applicant's present ability to purchase 50,000 other shares at a base price of \$110 per share, and upon further action of the board of directors in fixing the terms and prices of acquiring additional stock. As we said in our report in *Nickel Plate Unification, supra*, "Under any circumstances the burden is upon applicants to make an affirmative showing that the terms, conditions, and considerations of acquisitions and control are just and reasonable." In the absence of a presentation in definite form of the terms, conditions, and consideration upon which the applicant proposes to acquire a majority of the outstanding stock of the Pere Marquette, authority will be granted for the acquisition of certain shares at fixed prices, and for the purchase of additional shares at prices not to exceed those hereinafter named.

We are asked by the minority committee to deny these applications on the ground that the proposal is a great speculative enterprise rather than a transportation development. The committee has caused to be placed in the record a large amount of data upon the transactions of the Van Sweringens in transportation matters, their financial profits both realized and realizable, and the control which

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they exercise over the various companies involved in these proceedings and those indirectly related. We are also requested to take into consideration the managerial policy of the applicant with respect to improvements and extensions of its facilities and the probable influence of merger schemes thereon. In dealing with all these questions we must confine ourselves to the essential requirements imposed by the act. Management, *per se*, does not come within our province. The evidence showing personal and corporation profits, use of company credit and control, and factors of similar character has received attention in the degree which these matters have a bearing upon the public interest in the plan immediately before us. Not all of the transactions leading to the proposed acquisition of control may be accepted as necessary, or as justified by the results to be attained, nor can they be rectified by conditions attached to our order. The operations of subsidiary companies, notably the Special Investment Corporation organized by the Nickel Plate and the Virginia Transportation Corporation by the Chesapeake & Ohio, which, in effect, pledge carrier assets and incur obligations for the carrier, are of a nature to raise grave doubts as to their legality in view of the provisions of section 20a. Again, the sale of securities to the applicant by the chairman of its board, and by other directors, could have been done legitimately only when all the conditions as to original cost, etc., were made known, and we consider it to have been the duty of those directors, in the fiduciary relationship to the company which they occupied, to stipulate that no personal profit accrue to them in the transactions.

Among the acts less intimately connected with this case we find the distribution of stock of the Chesapeake Corporation among the common-stock holders of the Nickel Plate in consideration of the transfer of certain Chesapeake & Ohio stock which had theretofore been purchased by the Nickel Plate with its treasury assets, including the proceeds of a large issue of its refunding-mortgage bonds. The Chesapeake Corporation was organized in May, 1927, in the State of Maryland, with O. P. Van Sweringen as president. It acquired 345,000 shares of Chesapeake & Ohio common stock originally purchased by the Nickel Plate and its subsidiary the Special Investment Corporation, and 255,000 shares originally purchased by the Vaness Company. The total comprises a majority of the outstanding stock of the applicant. An indebtedness of \$67.50 per share, carried by the 600,000 shares when they were transferred, has been provided for by the issuance of \$48,000,000 face amount of Chesapeake Corporation 20-year 5 per cent collateral-trust-bonds, secured by pledge of the 600,000 shares of stock. As a consideration for this

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stock, the Chesapeake Corporation issued its capital stock ratably to the common-share holders of the Nickel Plate and of the General Securities Corporation, the latter representing the Vaness Company. As the Vaness Company holds a majority of the Nickel Plate's voting stock, and as a majority of its stock is in turn owned by O. P. and M. J. Van Sweringen, these persons hold control of the Chesapeake & Ohio by their direct and indirect ownership in stock of the Chesapeake Corporation. It follows that the plan as contemplated would extend this jurisdiction to the Erie and Pere Marquette. As a matter of fact, the aggregate of Erie stocks now owned by the applicant and by the Vaness Company constitutes virtual control of that system.

Financial manipulation of great railroad properties as an accompaniment of acquisition or consolidation under the law should not be tolerated. Unification of existing lines should have its inception primarily in the traffic and transportation conditions of the territory served. If the regulation of railroads, with especial reference to their unification and capitalization, can be effectively and justly administered under the acts passed by Congress for that purpose, these projects should be so controlled and governed as to be made productive of large benefits in transportation.

It is proposed to issue 595,024 additional shares (\$59,502,400 par value) of common capital stock, and to offer the entire amount at par for cash, pro rata, to the holders of common capital stock of the applicant, to the extent of 50 per cent of the par amount of their respective holdings as registered upon the transfer books of the applicant on a date hereafter to be determined by the board of directors; such portion of the issue as is not so disposed of to be sold for cash at not less than par. The applicant's financial program for 1927 and 1928 contemplates the expenditure of \$115,731,925, part of which will be obtained from the proceeds of the proposed stock issue. This program includes the expenditure of \$22,507,488 for Erie stocks, in addition to the \$19,535,085 already spent, the expenditure of \$30,317,298 for Pere Marquette stocks, and the capitalization of advances aggregating \$23,711,985 made to subsidiary companies "pending permanent financing thereof." If these items be deducted from the total, the carrier's immediate requirements are reduced to \$39,195,154.

As compared with this cash requirement, the applicant's estimated receipts from operation during 1927 and 1928, less dividends of 10 per cent on its common stock, are over \$35,000,000. The excess of its current assets over its current liabilities as of December 31, 1926, was \$12,751,456. In view of these facts it is evident that a finding

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of necessity for an issue of additional capital stock by the applicant depends in substance upon the requirements in connection with accomplished and proposed purchases of stocks of the Pere Marquette.

The applicant is authorized to issue not to exceed 200,000 shares of its common stock for the purpose of providing funds to (1) discharge the indebtedness upon, and acquire, 16,600 shares of Pere Marquette stocks of three classes now held by the Virginia Transportation Corporation; (2) acquire 36,500 shares of Pere Marquette common stock from the Vaness Company at the cost of such stock to that company, namely, \$2,522,881; and (3) acquire such other shares of Pere Marquette common stock as may be obtainable at a price not to exceed \$110 per share, or such prior preference or preferred stock as may be obtainable at a price not to exceed \$100 per share. The expenditure of the proceeds under these terms will not acquire a majority stock interest in the Pere Marquette, but the applicant may, if found necessary, submit a supplemental application for authority to issue additional stock for that purpose. A period of one year from the date of our order is allowed for the carrying out of this program. The applicant may, however, if it sees fit, in the event it finds that it is unable to accomplish the purchases of Pere Marquette stock on the terms herein fixed, apply the proceeds, or such part thereof as may be required, to the discharge of its interest-bearing obligations, or to expenditures chargeable to capital account and not previously capitalized.

The issue authorized will rest upon the expenditures shown in the application as having heretofore been made for additions and betterments to the applicant's property and its leased lines, on capital expenditures for the acquisition, construction, and extension of branch and spur lines, and to such extent upon the discharge and replacement of first-lien and improvement 20-year mortgage bonds as may be necessary in order that the aggregate of all shall equal the par amount of stock to be issued, namely, \$20,000,000. The issue is not to be considered as deriving its primary support from the asset value of Pere Marquette stocks to be acquired, although such acquisition may fairly be assumed to strengthen the applicant's financial position. The expenditures here referred to have been adequately supported and verified by detailed statements furnished in accordance with our requirements. The applicant's capital structure will permit the issue of additional stock in the amount which we have determined, and will be improved thereby in respect of the ration of capital stock to funded debt.

We are of the opinion that the privilege proposed to be extended to registered holders of the applicant's stock to purchase the new stock at par and in an amount equal to 50 per cent of the par amount

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of their present holdings would result in imposing an unnecessary financial burden upon the applicant company. The fact that a corporation engaged in transportation has capitalizable assets in sufficient amount to support an increase in securities does not, in itself, justify such increase, and the prospect of increased earnings, the improvement in ratio of stock to funded debt, and other considerations which may favor the proposal, are not to be taken as controlling factors. The necessity for the proposed issue must be demonstrated and the terms upon which it is to be sold must be found reasonable. With full respect to the rights of the applicant's stockholders to receive substantial benefits from the prosperity of the road, we do not believe that the offering of additional stock to them on the basis proposed would be consistent with the public interest. As a further condition, the additional common stock now authorized to be issued shall be offered to holders of common capital stock, pro rata, at \$150 per share, to the extent of one share of additional stock for each six shares of their respective holdings as registered upon the transfer books of the applicant on a date hereafter to be determined by the applicant's board of directors. Such portion of the issue as may not be so disposed of shall be sold for cash at not less than \$150 per share.

Of the intervening short lines, the Big Sandy & Kentucky River and the Morehead & North Fork connect with the Chesapeake & Ohio; the New York & Pennsylvania, the Prattsburg, the Mount Jewett, Kinzua & Riterville, the Arcade & Attica, and the Middletown & Unionville connect with the Erie; the Arcadia & Betsey River and the Detroit & Mackinac connect with the Pere Marquette; and one, the Chicago, Attica & Southern, connects with both the Chesapeake & Ohio and the Pere Marquette. Certain of these roads have still other connections.

In our report in *Nickel Plate Unification, supra*, we said:

Every applicant (in unification proceedings) should assume the burden of making reasonable provision in its plan for the possible incorporation of every connecting short line now in operation in the territory covered or to be covered by the proposed grouping or unification.

The applicant's position in regard to short lines is that the proposed acquisition of control will not change the existing situation but in the event of unification or consolidation each short line will be considered with a view to acquisition. Should the applicant feel that any short line should not be acquired it is willing to submit to us the question, first, as to whether or not the line should be continued in operation, and, second, if operated, whether it should be allocated to the Chesapeake & Ohio. Should we decide that the line should be operated as a part of the applicant's system, the applicant will endeavor to agree upon a fair basis for acquisition or operation

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with the owner of the property and in the event of failure so to agree to refer the question to arbitration under the Federal Arbitration Act.

Although the applicant's view that the contemplated acquisition of control will not be a unification or consolidation is technically correct, it is nevertheless acknowledged to be a step toward that result. The probable effect upon connecting short lines should be considered. Several of these interveners placed in the record evidence tending to show that the continued operation of their lines is necessary and in the public interest. Since it may be assumed that no present change in the business relations between the applicant and the short lines with which it connects is in contemplation, our principal concern regards the future of the short lines connecting with the lines of the companies over which control is to be extended. Some change in policy is more probable in their case as the result of the change in control of the principal carrier. Under proper circumstances we would be justified in conditioning our approval of a proposed acquisition upon the acquisition of the short lines involved, or provision for the maintenance of such relations for their protection as the public interest might require.

As above shown, only three of the short lines connect with the lines of the Pere Marquette. In the case of the Chicago, Attica & Southern the record does not permit a finding upon the question of public convenience and necessity and no allocation of this road to any trunk line or system is desirable at this time. The Arcadia & Betsey River is not at this time engaged in interstate commerce and therefore does not come within our jurisdiction, and the Detroit & Mackinac intervened solely for the purpose of placing in the record a certain agreement made between it and the Pere Marquette covering the joint use of facilities at Bay City, Mich., to the end that its rights thereunder be protected. Contractual relations of this kind will not be affected by our decision.

Not all of the short lines situated in the territory of the applicant and the Pere Marquette entered appearances in the case now before us. Under the announced policy of the applicant consideration will be given to each short line in this territory when and if unification or consolidation of the roads embraced in the application is undertaken. In view of the statement that the plan is a step toward unification, it is urged that the applicant initiate an investigation of all the lesser lines of railroad which maintain direct traffic relations with its own lines or those of the Pere Marquette to the end that a final and equitable disposition of them may be expedited.

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With respect to short lines, and all other rail connections, it is understood that, so far as lies within the power of the applicant, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Chesapeake & Ohio or the Pere Marquette will be preserved, and existing gateways for the interchange of traffic with all other carriers will be maintained.

We find (1) that the acquisition by the Chesapeake & Ohio Railway Company of control of the Erie Railroad Company, as proposed in the application, would not be in the public interest and the application for an order authorizing such acquisition will therefore be denied; (2) that the acquisition by the Chesapeake & Ohio Railway Company of control of the Pere Marquette Railway Company by purchase of capital stock, upon the terms and conditions and for the consideration stated herein, which we find to be just and reasonable, will be in the public interest and it will therefore be authorized; (3) that the issue of \$20,000,000, par value, of capital stock by the Chesapeake & Ohio Railway Company, to be used in connection with the acquisition of control of the Pere Marquette Railway Company or for other purposes, under the conditions stated herein, will be (a) for lawful objects within the corporate purposes of the applicant, and compatible with the public interest, which are necessary or appropriate for or consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) will be reasonably necessary and appropriate for such purposes.

An appropriate order will be entered.

PORTER, *Commissioner*, concurring in part:

In the consideration of the important matter here before us, it is well to have in mind as a background a few fundamental principles. Few persons, if any, seemingly realize and appreciate the very radical change that was effected in the relationship heretofore existing between this commission and the railroad systems of this country by the act of Congress effective February 29, 1920, or the tremendous grants of power to this commission therein contained.

This new policy and enumeration of powers have been well summarized and stated by the Supreme Court of the United States in *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456-478, wherein that court speaking through the Chief Justice said:

The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their property and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the

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country more completely than ever under the fostering guardianship and control of the Commission, which has to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, to secure a fair return upon the properties of the carriers engaged.

In addition to the grants of powers there enumerated, the court might well have added the entirely new and exceedingly important one of the unification and consolidation of the railways of this country into a comparatively limited number of railway systems. It was further provided by this act that in bringing about this unification two important considerations were to guide this commission. One was that the idea of competition, heretofore the dominant policy of this country in all channels of trade and commerce, was to be preserved. In order that this theory of competition might be effectually and successfully preserved, we were in unmistakable terms admonished that in bringing about these consolidations and building up these new competitive units, they were to be built up into units of as nearly equal power and strength as may be possible for us to do.

This new policy of consolidation here briefly alluded to, in the face of violent controversy and dispute, has been allowed to remain unaltered by Congress with no actual attempt worthy of the name to repeal it. The only changes seriously proposed in Congress seem to be those thought necessary to strengthen this policy and to place in this commission's hands additional authority to more effectually and speedily bring about this predetermined policy.

It may be that lurking in my mind as an individual may be serious misgivings as to whether or not the ultimate accomplishments of this new scheme of things will bring the hoped-for benefits to the public that its sponsors so fondly anticipated. But to my way of thinking, that has nothing to do with the problem confronting us as the administrative agent of Congress created for the purpose of carrying out legislative powers and policies established by it. I am convinced that it is our duty, irrespective of individual opinions and beliefs, with all of the ability at our command, earnestly to strive in sincerity and truth to carry out this declared program of Congress placed in our hands as its servants for its execution.

With these things in mind, let us approach the question here immediately at hand. Leave is sought of us for the Chesapeake & Ohio Railway Company to purchase substantially stock control of the Pere Marquette Railway Company and the Erie Railroad Company. The majority of this commission grants this application in so far as it concerns the Marquette on terms and conditions set out by it, but refuses the authority as applied to the Erie. I concur in

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all that the majority says and authorizes in its holding, save and except that I would go still further and under like proper terms and conditions authorize the purchase of the Erie. The refusal of the majority is based almost entirely upon the fact that it does "not consider that the relationship of the Chesapeake & Ohio and the Erie is complementary or supplementary." In my judgment this entirely overlooks the very fundamental fact that, assuming the Chesapeake avails itself of the authority herein granted and purchases the stock of the Marquette, the relationship of the Erie should not then be considered only as concerns the Chesapeake & Ohio, but also in the relationship that it bears to both the Chesapeake and the Marquette. It is conceded by all that the scheme proposed by the applicant is an intermediate step looking to the ultimate consolidation of these three and probably additional carriers into one system. I do not think it is necessary at this time that this ultimate proposal need be considered in the light of a so-called four-system plan, five-system plan, six-system plan, or any other numbered plan, but must at least be considered in the face of the plain mandate of Congress that should govern us. If the purchase of the stock in the Erie be permitted, and at a later date it should be seen or determined that it does not fit into our ultimate plan of consolidation, the permission that would be granted in this case would not by any means be irrevocable or irremedial.

I am constrained to believe, despite the judgment of my brothers, that the Chesapeake and the Erie considered in and of themselves, would be benefited by this step toward consolidation. The Chesapeake is admittedly one of the great coal carriers of this country. It would be benefited in at least two material respects by acquisition of the Erie: First, by the additional route afforded it via Marion to Chicago, thus obviating the expenditure of large sums of money necessary to perfect the present route between Cincinnati and Chicago; and second, in affording an outlet for bituminous coal produced on the Chesapeake to the numerous industries located on the Erie east of Marion, at the same time affording these large manufacturing industries located on the Erie east of Marion a more ready access to the markets east of Cincinnati on the Chesapeake. Increased traffic with increased revenues and increased facilities of transportation ought ultimately to result in increased economies with the resulting benefits in the way of reduction of freight rates.

As I have said, however, to my mind, the principal reason overlooked by the majority of the commission, and which appeals to me, is the harmonious way in which the Erie fits into the combined Marquette-Chesapeake system. The Marquette reaches large markets in the West in the State of Michigan, and across Lake Michigan by

ferry those in Wisconsin and farther west. All these will be afforded a choice of gateways to the East by the way of the Marquette through Buffalo to New York over the Erie, or by the way of Toledo over the Hocking Valley to Marion and then east over the Erie. All shippers in the great Mississippi Valley tributary to this new proposed system would have the choice of reaching the Atlantic seaboard either through the port of New York or through Newport News, thus having the choice of two Atlantic ports as is afforded by several other of the large eastern trunk lines now reaching the Atlantic seaboard. A glance at the map of these three systems as they would thus be brought together is to my mind after all the most convincing and persuasive argument of how admirably they fit together.

The unification of these three systems is also, in my judgment, in thorough obedience to the plain mandate of Congress for us to assist in the building up of as nearly equal competitive systems as we can. This system, if permitted, would in number of miles under operation and in other respects compare favorably with the great New York Central, Baltimore & Ohio, and Pennsylvania systems as they now exist. It is manifest to me that the permission of this step toward unification of these three railways would not militate in the slightest against the further building up of one or more additional systems, if ultimately deemed expedient, to compete with the three systems already named and the fourth that would be herein in a measure established.

At present the Erie lies between the powerful New York Central system on the north and the powerful Pennsylvania system on the south. Unless aided by other railways, is it not in the position of being between the upper and lower millstones created by these two systems where it is apt ultimately to be ground into pieces? I find in the opinion of the majority of my brethren no constructive indication of any kind of what is to become of the Erie in the light of its refusal in this case.

I am further persuaded to my view by the comparative lack of opposition to the proposed plan. In the Chesapeake itself, out of over 1,000,000 shares of stock issued, objection is made in behalf of approximately 126,000 shares of stock. It is difficult for me to imagine any important and far-reaching proposition on the part of a majority of the shareholders of any corporation that would have so few dissenters in proportion to the amount of stock issued as is here presented.

Short-line systems that have appeared in this case have done so, not in opposition to this plan of unification on proper terms and conditions, but very largely, if not wholly, for the purpose of urging

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upon this commission that in the proposed unification their rights be considered and protected. This of course should be done, and this commission even at present is not lacking in power by proper orders and conditions attached to this proposed merger to see, as properly it should, that all the interests of the intervening short-line carriers are protected.

Notice of this proposed scheme was given to those in authority in all the States which this more than 7,000 miles of railway traverses, and it is a circumstance worthy of consideration that not a single protest has been lodged against the proposed plan by any of these officials representing States whose people are most vitally and directly interested in this scheme. I can not presume that all those in authority would be so derelict in their duty as to fail to be represented and make vigorous protest if they as officials had any strong feeling that the plan was inimical.

Eight years of what is now history certainly must be convincing to everyone, that the policy of consolidation of railways determined upon by Congress can not be achieved over night. It is inevitably at best a slow and toilsome process. This scheme here proposed is at least a step looking in the direction of carrying out the mandate of Congress which it is our duty faithfully to execute.

CAMPBELL, *Chairman*, dissenting in part:

I dissent from the conclusions of the majority that the acquisition by the Chesapeake & Ohio Railway Company of control of the Pere Marquette Railway Company by purchase of capital stock will be of advantage to the public. The report is not convincing that such advantage has been shown.

EASTMAN, *Commissioner*, dissenting in part:

This application is brought under the provisions of paragraph (2) of section 5 of the interstate commerce act. No consolidation is involved, for by the plain terms of that paragraph it does not apply to consolidations but only to acquisitions of control. Our duty is clear; it is to determine whether the acquisitions proposed are "in the public interest" and, if we so find, to authorize them upon such terms and conditions as we believe to be "just and reasonable." In determining what is in the public interest, we must be guided by what is shown of record, and not by what we may think that Congress may think is in the public interest.

So far as acquisitions of control are concerned, Congress has not undertaken to define the public interest. Nor, indeed, has it done so with respect to consolidations, whatever may be the general impression to the contrary. Paragraph (4) of section 5 requires us to

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prepare a plan for the consolidation of the railway properties of the United States into a "limited number" of systems, whatever that may mean; but after such plan has finally been prepared it is provided by paragraph (6) that we shall not thereafter authorize any consolidation unless we find it to be in harmony with the plan and unless we *also* find, after a public hearing, that the public interest will be promoted thereby. Clearly the direction to prepare a consolidation plan was not intended as a declaration that all or any consolidations would be in the public interest, for Congress very carefully provided that this fact must be established of record to our satisfaction in each particular case.

In *Control of Virginian Ry.*, 117 I. C. C. 67, we said, very properly, that applications for authority to acquire control "must be supported by a clear and strong showing of public gain" and that if serious doubt exists regarding the wisdom of what is proposed, "that doubt must be resolved against the applications." So far as the Erie is concerned, the majority find that the necessary clear and strong showing of public gain has not been made. In the case of the Pere Marquette, they apparently find that it has been made. With this latter finding I disagree.

The majority do not state with any clarity and strength the advantages which they believe will flow from acquisition of the Pere Marquette. The impression is left that they approve the acquisition largely because they see in it no clear public disadvantage. But that is not the statutory test. The public advantages claimed by the applicant seem to center in the propositions that it will gain a better "outlet" for its coal in Michigan and that single-line hauls will be substituted for joint-line hauls, with better coordination of train service.

Any idea that the Chesapeake & Ohio is in need of outlets for its coal in Michigan or elsewhere is quite baseless. There is no evidence that this coal does not move with the utmost freedom to all parts of the country, including Michigan, to which it might reasonably be expected to move. The traffic has increased with amazing rapidity. It is not shown that there is any lack of through routes and joint rates or that any connection has attempted to obstruct the movement. On the other hand, it is quite possible that with the Chesapeake & Ohio in possession of the Pere Marquette there might be less freedom of movement. All practicable and reasonable routes, broadly speaking, are now open to Michigan destinations, and the coal is free to move over whatever route may be most direct, expeditious, and convenient to the shipper. Following the acquisition of the Pere Marquette, the routes via that line will at least be favored, and it may be that various other routes, more direct and convenient, will be closed to protect

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the long haul over the new system. Such diversion of traffic to what may often be circuitous and less economical routes might be to the advantage of the Chesapeake & Ohio and the Pere Marquette and yet not to the advantage of shippers or of the national economy. The figures suggest that more Chesapeake & Ohio coal now moves into Michigan over other connections than over the Pere Marquette. The majority say that they understand that existing routes and channels of trade and commerce will be maintained, but do not require this by their order. And even if they are maintained, there are ways of discouraging the movement of traffic over routes which are not favored.

It is a mistake to assume that consolidations or acquisitions of control always tend to promote freedom of traffic movement. They may have an opposite effect. At the hearings on the consolidation plan this was why so many New England shippers, for example, were opposed to consolidation of New England railroads with connecting trunk lines. Once the traffic of these shippers passes the Hudson River, it may now move at will over a number of competing routes, whereas under a trunk-line consolidation plan the shippers fear that the tendency would be to discourage such freedom of movement. So far as economy and efficiency of transportation are concerned it has not, I think, been shown that the public interest has anything to gain from the Pere Marquette acquisition here proposed.

But a broader question is involved. The Pere Marquette is a prosperous railroad in no need of financial help, and apparently it is well and ably managed. Aside from any direct and immediate transportation effect, will public benefit be derived from placing this road in the hands of the interests which now dominate the Nickel Plate and the Chesapeake & Ohio? It seems to me that harm rather than benefit is likely to result. The policies and practices of these interests in many important respects have not been such as to inspire public confidence and were the occasion for sharp criticism in the *Nickel Plate Unification case*. Not all was there said that might have been said. In this connection I refer to my dissent in the *Cleveland Passenger Terminal case*, 70 I. C. C. 659, 662-671, which was not only justified by the record in that case but has been more than justified by the further evidence with respect to the same matter in the *Unification case*. The record deals with other questionable transactions, but without going into such details it will be sufficient for present purposes to direct attention to certain aspects of the methods which these interests have followed in the promotion and financing of their various railroad unification projects. These projects have been characterized by the creation and use of a maze of dummy corporations. A partial list follows: Vaness Company, Special Investment Corporation, Chesapeake Corporation, General Securities Corporation, 138 I. C. C.

Virginia Transportation Corporation, Pere Marquette Corporation, Nickel Plate Securities Corporation, Clover Leaf Company, Western Company. Dummy corporations are legal perversions, commonly used for purposes of concealment or evasion. Without attempting to follow through the tangled operations of those above listed, it is reasonably clear that they have here been used for at least two inter-related purposes:

1. To facilitate shoe-string financial operations on a very large scale. These operations were started in the original Nickel Plate acquisition with the help of the New York Central, a help which was extended again in the Lake Erie & Western acquisition and, to the great advantage of the promoters in a time of need, in the Cleveland terminal project. They have since been carried on with the help of the New York Central bankers, and with the credit of the Nickel Plate and the Chesapeake & Ohio as the corner stone of the structure, to the great personal profit of individual directors of those carriers.

2. To escape supervision by this commission. Stocks bought in the process of acquisition by the Nickel Plate and Chesapeake & Ohio have been transferred to dummy corporations so that they might be pledged as collateral for further loans for the purpose of buying further stocks. If the stocks had remained in the possession of the Nickel Plate and the Chesapeake & Ohio, those carriers could not have borrowed money with the stocks as collateral without our approval under section 20a of the act. The theory is that by the creation and interposition of dummy corporations such supervision can be escaped. Whether this theory is correct remains to be seen, but the purpose and intent admit of no doubt.

That this sort of thing is in the public interest or ought to be encouraged I can not believe. Nor is the method of bringing about railroad unifications by operations in a stock market fevered by such operations or the prospect of them for the general good, however profitable it may be to individual operators. The result is to divert the credit of railroad companies, which ought to be conserved for transportation purposes, to the ends of speculation and private profit. The unifications which this method is likely to accomplish are those which offer the greatest opportunity for speculative profit rather than those which offer the greatest opportunity for transportation advantage. The consolidations which the country needs are more apt to be those which offer so much prospect of mutual benefit that they can be agreed upon by direct negotiations of boards of railroad directors and accomplished through exchange of shares without prior speculative operations.

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This suggests another point. These applications and our action upon them have many of the characteristics of stage thunder. In the *Nickel Plate Unification case* we were asked to approve a union of the Nickel Plate, Chesapeake & Ohio, Erie, and Pere Marquette. We refused to approve it. We are now asked to approve a union of the Chesapeake & Ohio, Erie, and Pere Marquette, and the Nickel Plate has apparently disappeared from the picture. In reality, however, the Nickel Plate and the Chesapeake & Ohio are now certainly under common control, the Erie is probably under the same control, and perhaps the Pere Marquette. This situation will continue after our action herein, unless something is done about it. That the Nickel Plate, Chesapeake & Ohio, and Erie are all in active competition is plain. The common control of these three properties should be considered in a Clayton Act proceeding.

One further comment is suggested by the separate opinion of COMMISSIONER WOODLOCK. Public regulation is in its very essence interference with private management, but such interference is founded upon the public interest and ought not to occur where no such interest is involved. Our power over stock issues under section 20a is plenary, and we are required by that section to make certain findings before we approve such issues. One finding is that the issue is "reasonably necessary and appropriate for" a lawful object, and another is that the issue is "necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier" and that it "will not impair its ability to perform that service." It is difficult to see, for example, how an issue of 300,000 shares of stock at par is "reasonably necessary" when an issue of 200,000 shares at 150 can be made and will serve the same purpose. And manifestly it is not in the public interest that a carrier should issue more stock than is "reasonably necessary," for if it does, its further financing by issues of stock at not less than par is likely to be impaired to the detriment of the public which it serves. Nor is the ability of the carrier to declare whatever amounts in dividends its resources permit in any way interfered with by what is here done. We are following, under the plenary provisions of section 20a, what has been the public policy and practice in the Commonwealth of Massachusetts for a great many years, to the advantage, according to my observation, not only of the public but of the companies themselves.

WOODLOCK, *Commissioner*, dissenting in part:

I have cast no vote and express no opinion upon the question of acquisition of Erie and Pere Marquette stock by the Chesapeake &

Ohio. I dissent, however, from the denial of the latter's application to issue stock to its stockholders at par.

The power of directors to determine what dividends shall be paid on a corporation's stock is as nearly plenary as any power can nowadays be. Its exercise is one of the most essential functions of management and has been uniformly so treated by the courts. Stock "rights," as they are commonly termed in the financial district, are by their nature the same thing as dividends and directors have the same power with respect thereto. If a company has need for capital and if its directors determine to raise it by sale of new common stock to stockholders pro rata, they have the right to determine at what price stockholders shall have opportunity to subscribe thereto. The matter is one which concerns stockholders alone. As the law stands no question of "public interest" arises. The price at which the new stock is sold does not affect rates or service nor, obviously, does it affect the solvency of the company. It is a matter of intracorporation policy pure and simple, and with such a matter we have no legitimate concern. We have stated more than once that regulation and management are two different things and that the law has not made us managers of the carriers. To the extent that we arrogate to ourselves the powers of management we are sabotaging the law that it is our duty to administer, and I can not readily imagine a greater offense by us against the real "public interest" than this.

ORDER

Entered May 8, 1928

A hearing and investigation of the matters and things involved in these proceedings having been had, and this commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the application of said Chesapeake & Ohio Railway Company for authority to acquire control of the Erie Railroad Company, by purchase of capital stock of that company, be, and it is hereby, denied.

It is further ordered, That the acquisition by the Chesapeake & Ohio Railway Company of control of the Pere Marquette Railway Company by the purchase of capital stock of that company, under the terms and conditions and for the consideration stated in said report, be, and the same is hereby, approved and authorized.

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It is further ordered, That the said Chesapeake & Ohio Railway Company be, and it is hereby, authorized to issue not exceeding \$20,000,000 of its common capital stock, consisting of 200,000 shares of the par value of \$100 each, said stock to be used only for the purposes and under the conditions set forth in said report.

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by said Chesapeake & Ohio Railway Company, unless and until so ordered by this commission.

It is further ordered, That said Chesapeake & Ohio Railway Company shall report concerning the matters herein involved in conformity with the commission's order dated February 19, 1927, respecting applications filed under section 20a of the interstate commerce act.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock or dividends thereon on the part of the United States.

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