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State Control of Business Through Certificates of Convenience and Necessity, by By Ford P. Hall

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STATE CONTROL OF BUSINESS THROUGH CERTIFICATES OF CONVENIENCE AND NECESSITY. By Ford P. Hall.* Bloomington: Bureau of Government Research, Department of Government, Indiana University, 1948. Pp. 154.

This little monograph brings up to date an article Professor Hall wrote on *Certificates of Convenience and Necessity* almost twenty years ago in the MICHIGAN LAW REVIEW.¹ Like its predecessor, the present study collects and discusses the statutes, court cases and commission decisions bearing on the major aspects of state control of business by means of the certificate of convenience and necessity, an instrument which is used today for regulating business in every state but Delaware. A certificate can be roughly defined as a legislative grant of quasi-monopolistic power to a particular kind of business. The theory is that public regulation has been substituted for the competitive forces of the market place either at the instance of the public or the business itself. The theory further is that in return for this grant of

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1. 28 MICH. L. R. 107, 276 (1929) (in two parts).

power the particular business assumes responsibilities as to price policy and quantity and quality of operation. The kinds of business which have so retired from the competitive economy as to come under certificate control include the traditional public utilities such as gas and electricity, the transportation services such as railroads and motor carriers, and a miscellaneous group, cotton gins and milk producers, for example, which have little in common with the recognized public utilities.

Enough of moment has occurred since 1929 when Professor Hall's original piece appeared to suggest that a revisit to the certificate device would uncover some new and valuable insights into its growth and development. The long depression of the Thirties which created a depressed market and excessive competition in many industries induced some states to extend the use of the certificate to a variety of "non-utility" businesses such as ice and milk production and marketing. The Supreme Court's declaration of 1932 in the *New State Ice* case² that such extension of certificate regulation was a denial of due process was short-lived. Two years later in the *Nebbia* case³ New York's control of its milk industry was held by the same Court not to offend the Constitution. Since *Nebbia* state experimentation with certificate regulation has developed unhampered by federal constitutional objection.

On the federal level the Thirties saw frequent application of the certificate device to meet pressing economic problems. The NRA experimented boldly, though briefly, with the issuance of certificates to control price and production policy in myriad businesses. Congress granted the Federal Power Commission plenary powers over the interstate operations of established electric utilities in 1935, and three years later the Natural Gas Act gave that Commission authority to control ingress into the interstate natural gas business through issuance of certificates of convenience and necessity. In the same year a charter for regulating airlines, keyed to the certificate device, was handed to the newly created Civil Aeronautics Board. During the same period Congress vested the Interstate Commerce Commission

2. *New State Ice Co. v. Liebmann*, 285 U. S. 262 (1932).

3. *Nebbia v. New York*, 291 U. S. 502 (1934).

with certificate control over motor carriers (1935) and water carriers (1940).⁴

Though it would be an over-simplification to suggest that excessive competition alone motivated Congress to bring natural gas pipelines, airplanes, motor carriers, water carriers and other businesses under certificate control, this was indeed one of the important depression-inspired reasons. It is therefore significant that the federal legislators at the same time attempted to safeguard against a swing of the pendulum to the other extreme of monopolistic power. The Civil Aeronautics Act, for example, includes among the criteria the CAB is required to consider before issuing a certificate "competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States. . . ."⁵ In carrying out this declaration of policy the Board has recently recognized that competition itself may aid in regulating an industry since "economic regulation alone cannot be relied upon to take the place of the stimulus which competition provides in the advancement of technique and service in air transportation."⁶ To take another illustration, Judge Edgerton recently upheld the Federal Power Commission's issuance of a certificate to a natural gas pipeline in an area already serviced by a large interstate pipeline because "there is nothing in the Natural Gas Act [to suggest] that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier of natural gas for distribution in a particular community the privilege of furnishing an increased

4. And during World War II, as Professor Hall points out (at page 9), the Office of Defense Transportation issued "certificates of war necessity" for motor transportation operations and the War Production Board issued "necessity certificates" for the construction of emergency production facilities.

5. 52 Stat. 980 (1938), 49 U. S. C. § 402 (1946).

6. *Colonial Airlines v. Atlantic Seaboard Operation*, 4 C. A. B. 552, 555 (1944). The Board has a "duty to protect the air transport industry against the evils of unrestrained competition on the one hand, and the adverse consequences of monopolistic control on the other." *Ibid.* The struggle the Board has had in steering a middle course between Scylla and Charybdis on this issue has been clearly developed in Westwood, *Choice of Air Carrier for New Transport Routes*, 16 GEO. WASH. L. R. 1, 159 (1948).

supply.”⁷ Even the Interstate Commerce Commission, which antedates the invention of the certificate device, has “recognized the value of reasonable competition” in railroad, motor carriers and water carrier regulation.⁸

In this monograph, however, Professor Hall uncovers little evidence that state legislatures or commissions have followed the lead of the Federal Government.⁹ His study discloses that they generally apply the same criteria of financial responsibility, quality of equipment, personal qualifications, etc., to determine public convenience and necessity as they employed in 1929. They either overlook or reject competition as a possible means of attaining effective control over a regulated business. Their conception of the certificate as a grant of outright monopolistic power evidently has not been influenced by the federal experience of the last two decades.¹⁰

Professor Hall’s monograph is a painstaking and exhaustive collection and discussion of the verbal formulas applied by the states in granting or denying certificates of public convenience and necessity. This is a large and proper task with which we cannot quarrel. But we may hope that Professor Hall may, as one superbly acquainted with the field, analyze in another study the basic question of whether the public is receiving substantial value in return for its grant of monopoly power to certificate holders. This may very well call for a comparison of state and federal experience, particularly in view of the recent torrent of federal regulatory legislation utilizing the certificate device.

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7. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 169 F.2d 881, 884 (App. D. C. 1948). In fact, in 1942 Section 7 (g) was added to the Natural Gas Act, 56 Stat. 84 (1942), 15 U. S. C. § 717 f (1946), to provide: “Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.”
 8. *United States v. Pierce Auto Freight Lines*, 327 U. S. 515, 532, n.20 (1946).
 9. For Professor Hall’s discussion of what little evidence there is, see pp. 81-83 of the monograph.
 10. But see the persuasive argument that the states use competition as an aid to regulation in Comment, *A Re-Examination of Competition in Gas and Electric Utilities*, 50 YALE L. J. 875 (1941). Cf. BARNES, *THE ECONOMICS OF PUBLIC UTILITIES* 168-70 (1942); TROXEL, *ECONOMICS OF PUBLIC UTILITIES* 212 (1947).

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