

**Corporations, Fee for Filing Certificate of Merger. Fees of Secretary of State, for Filing Certificate of Merger.**

Where two foreign corporations are consolidated, one of such corporations retaining its name and increasing its capital stock so as to take over the property of the other corporation, it must pay a fee upon the total increase of capital stock, notwithstanding the fact that a part of such increase is used to take over the property of the other corporation, which had already paid a fee on its capital stock.

Helena, Montana, March 3, 1910.

Hon. A. N. Yoder,  
Secretary of State,  
Dear Sir—

We are in receipt of your request for an opinion as to the proper fee to charge for filing the Agreement of Merger of the Capital City Power Company with the United Missouri River Power Company.

It appears from said Agreement of Merger that the Capital City Power Company, a New Jersey corporation, has merged into and consolidated with the United Missouri River Power Company, a New Jersey corporation, under the name of the United Missouri River Power Company, and such agreement states that the said United Missouri River Power Company:

“Shall maintain its identity and shall not be considered for any purpose whatsoever as a newly incorporated company.”

It further appears that prior to the merger of these two corporations, the Capital City Power Company had a capital stock of \$2,000,000.00, and had been admitted to do business in the state of Montana, and had paid the fees required by law to entitle it to transact business in this state.

It further appears that the United Missouri River Power Company prior to said merger had a capital stock of \$10,250,000.00, and that it also had paid the fees required by the laws of the state of Montana, and was admitted to do business in this state.

It further appears from said Agreement of Merger that for the purpose of making such merger and taking over the stock and all property, real, personal and mixed, of the said Capital City Power Company that the United Missouri River Power Company increased its capital stock from \$10,250,000.00 to \$14,000,000.00, and that the owners of the shares of capital stock of the Capital City Power Company should have the right to surrender such shares of stock to the United Missouri River Power Company and receive in exchange therefor shares of stock from the United Missouri River Power Company after said increase to \$14,000,000.

It also appears that the Capital City Power Company, in consideration of \$1.00, granted, bargained and sold all its estate, title, right and interest in all property owned by it to the United Missouri River Power Company.

This Agreement of Merger clearly shows that the United Missouri River Power Company has increased its capital stock \$3,750,000.00. Said agreement also shows it does not change the name, franchises, rights, immunities and organization of the said United Missouri River Power Company, but that the same "shall remain intact, except as herein expressly modified." In other words, said Agreement of Merger is intended as an amendment to the original article of incorporation of the United Missouri River Power Company, and one of such amendments is the increasing of the capital stock to \$14,000,000.00.

Counsel for the United Missouri River Power Company admit that said Agreement of Merger increases the capital stock to such amount, but contend that inasmuch as a part of such increase was used in taking over the property, franchises, etc., of the Capital City Power Company which had already paid the secretary of state the fees required by law to entitle it to transact business in this state, that, therefore, the United Missouri River Power Company was not required to pay to the secretary of state any fee for the increase of its capital stock save and except the amount in excess of the capital stock of the Capital City Power Company taken over by it.

With this contention we cannot agree.

Subdivision 7 of section 4413, revised codes, provides, among other things as follows:

"Whenever any such corporation increases its capital stock.  
\* \* \* it shall pay to the secretary of state at the time of filing in his office, the duly authenticated copy of the certificate thereof, the same fee that is required by law from domestic corporations for filing certificates of increase of capital stock."

In our opinion it makes no difference as to what use a corporation makes of its increased capital, and that whenever it tenders to the secretary of state a certificate showing an increase of its capital stock that under the laws of this state the secretary must demand the fees required for such increase. The fact that the corporation saw fit to buy up the property and stock of another corporation which had paid the fees required of it before it could do business in this state is in law no different so far as the duty of the secretary of state is concerned than if the corporation increasing its capital stock had used such increase to acquire the property of an individual who had never paid any fee for the privilege of doing business in the state.

It has been held by the courts of other states that where two corporations have been incorporated, each paying to the secretary of state the fees required by law, and thereafter such corporations merge by the forming of a new corporation, the capital stock of which is simply the aggregate capital stock of the two corporations merging, that the new corporation must pay the fees, based upon its total capitalization, regardless of the fact that each of the corporations merged into it had already paid the fees based on their capital stock. And this rule is also followed where the name of the consolidated or new corporation is that of the one of the corporations entering into the merger.

People v. Rice, 11 N. Y. Supp. 249;

Chicago, etc. Ry. Co., v. State, 51 N. E. (Ind.) 924;

State v. Lesueur, 46 S. W. (Md.) 1075;

Electric Light & P. Co. v. Baltimore, 65 Atl. (Md.) 40;

Ashley v. Ryan, 31 N. E. (Ohio.) 721.

The principal of law recognized in the above decisions in our opinion applies with equal force to the increase of capital stock involved in this opinion. If the United Missouri River Power Company in the present case is entitled to deduct from the amount of its increase of capital stock of the company merged into it, then a new corporation which took over the capital stock and property of two other corporations would also be entitled to deduct from its capital stock the amount of capital stock of each of the other companies for which they had paid fees to the secretary of state. But we have been unable to find any authority holding that such is the law.

To the extent of its increase of capital stock; namely, \$3,750,000.00, the United Missouri River Power Company is in exactly the same position as if it was a new corporation taking over the stock and property of another corporation, and therefore, comes within the rule laid down in the above authorities.

You are therefore advised that, in our opinion, you should collect for the filing of said Agreement of Merger the fees required by law for the total increase of \$3,750,000.00, instead of for the increase of \$1,750,000.00, as contended for by the United Missouri River Power Company.

Very truly yours,

ALBERT J. GALEN,

Attorney General.