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C H A P T E R 17

Public Utilities

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Developments of interest in the public utilities field during the 1954 SURVEY year range over a wide area of the economic life of the state. In the courts an important decision on telephone rates was passed down involving many of the fundamental questions in public utilities law. Also worthy of discussion are various matters concerning gas and electric power companies, railroad and bus lines, and other regulated activities. These matters will be examined in the four areas in which they arose, namely, court decisions, legislation, administrative decisions, and administrative rules and regulations.

A. COURT DECISIONS

§17.1. **The telephone rate case.** The decision of the Supreme Judicial Court in the appeal of the New England Telephone & Telegraph Company was handed down on September 20, 1954.¹ In this case the claim of error by the company was as follows: The rates ordered by the Department of Public Utilities are *confiscatory* in that they do not permit the company to earn a reasonable return on the fair value of its property. More specifically, the company argued that this is true because, in applying the "prudent investment theory," the Department erred in the following ways:

- (1) In using an "original cost" rate base and in refusing to consider the evidence of "reproduction cost" presented by the company.
- (2) In using a hypothetical debt ratio of 45 percent instead of the company's actual debt ratio of 36.1 percent.
- (3) In allowing as an expense of operation only one half of the company's employee pension freezing payments.
- (4) In not taking into consideration the future effect of the company's announced construction plans.

In the first of these questions, which was, of course, easily the most

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§17.1. ¹ *New England Telephone & Telegraph Co. v. Department of Public Utilities*, 1954 Mass. Adv. Sh. 701, 121 N.E.2d 896.

significant issue involved, the Department was upheld by the Court. It was a case of first impression in Massachusetts, though the matter has been bitterly contested in many other jurisdictions.² The regulatory authorities in Massachusetts have followed the prudent investment theory since long before 1923,³ but the propriety of its so doing had never been directly passed on by the Supreme Judicial Court. In sustaining the Department the Court held that there was nothing in the Constitution of the Commonwealth or in the Declaration of Rights which required the use of any particular method of evaluation. Justice Wilkins asserted, "We cannot read in the Declaration of Rights a mandate that either reproduction cost or original cost must be exclusively adopted in regulation of rates of a public utility."⁴

By this decision the implications which have been read into the dicta in some prior cases⁵ were denied, and the power of the Department to continue in its traditional policy was confirmed. The holding is consistent with a long line of decisions⁶ handed down in the courts of other states since the *Hope Natural Gas* case in 1942 removed any doubt as to the limitations presented by the Federal Constitution.

The Department was also upheld in its use of a hypothetical debt ratio instead of the company's actual balance sheet figures. The holding in this matter was foreshadowed by the decision in the prior telephone rate case,⁷ and in effect means that while the directors of a utility company may exercise their own judgment as to actual corporate financing, the Department is equally free to find that the public welfare, as distinct from the corporate interests, demands some other treatment. Since the classic pattern of holding company financing is to concentrate the debt issues in the holding company, this decision obviously tends greatly to simplify the regulatory process.

On the third specific contention, however, the telephone company's position was upheld. The Court found no evidence to justify the Department's allowing only one half of the employee pension freezing payments as an operational expense. The Court asserted that the De-

² See, for example, Rose, *The Hope Case and Public Utility Valuation in the States*, 54 Col. L. Rev. 188 (1954); Note, *Original Cost Rate Regulation and Inflation*, 66 Harv. L. Rev. 1274 (1953).

³ See the opinion of Mr. Justice Brandeis in *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 43 Sup. Ct. 544, 67 L. Ed. 979 (1923); *Donhan v. Public Service Commission*, 232 Mass. 309, 122 N.E. 397 (1919).

⁴ *New England Telephone & Telegraph Co. v. Department of Public Utilities*, 1954 Mass. Adv. Sh. 701, 712, 121 N.E.2d 896, 903.

⁵ See, for example, *Lowell Gas Co. v. Department of Public Utilities*, 324 Mass. 80, 84 N.E.2d 811 (1949); *New England Telephone & Telegraph Co. v. Department of Public Utilities*, 327 Mass. 81, 97 N.E.2d 509 (1951). These dicta had been accepted to the point where some authors classified Massachusetts as a "fair value" state. *Mendelson, Smyth v. Ames in State Courts, 1942 to 1952*, 37 Minn. L. Rev. 159 (1953).

⁶ Numerous studies of these decisions have appeared from time to time. The latest is probably that of Professor Rose — *The Hope Case and Public Utility Valuation in the States*, 54 Col. L. Rev. 188 (1954).

⁷ *New England Telephone & Telegraph Co. v. Department of Public Utilities*, 327 Mass. 81, 97 N.E.2d 509 (1951).

partment had arbitrarily allowed only one half, and it ordered the Department to allow the payments in full.

Finally, though it was found that the company had failed to clearly establish confiscation as required,⁸ the case was remanded to the Department to take further evidence on the company's financial condition in the nine months since the supplementary decision by the Department. The Court was influenced in this action mainly by the company's continued construction program which could result in earnings substantially less than those found by the Department to be reasonable.

While some troublesome legal questions were involved in this opinion, the practical answer has not yet been given, and the Department is compelled again to revise its figures on the basis of the most recent available information.

§17.2. Time limit on judicial appeals from the Department. Of practical importance in the judicial appeal of orders of the Department of Public Utilities was a decision of a single justice on which no appeal was taken to the full bench of the Supreme Judicial Court. In *Town of Holliston v. Department of Public Utilities*,¹ a case involving a proposed abandonment of the Milford branch of the Boston & Albany Railroad, the appellant municipality's notice of appeal under the General Laws, Chapter 25, Section 5, amended in 1953,² was filed with the Department twenty-one days after the date of the Department's order, and, therefore, one day late under the statute. A demurrer was interposed on behalf of the Department and was sustained by the single justice.

It appears from this decision that the 1953 amendment in regard to the time limit on notice to the Department of appeals from its orders will be taken at face value. The time limitation thereby established will probably be considered as much of a jurisdictional requirement as it is in appeals from the Superior Court.

§17.3. Standards of review: "Public convenience and necessity." In another unreported decision of a single justice on which there was no appeal to the full bench, the case of *Boston & Maine R.R. Co. v. Department of Public Utilities*,¹ the Department had ordered resumption of operations of a seasonal train to Cape Ann. The Department found this to be required for the "public convenience and necessity," the usual statutory test in utility cases. The single justice found the order was warranted by the evidence found in the record² and therefore refused to interfere with the Department's order. In so doing, he treated the question as one of fact primarily for determination by the administrative agency and not by the courts.

⁸ *New England Telephone & Telegraph Co. v. Department of Public Utilities*, 1954 Mass. Adv. Sh. 701, 713, 121 N.E.2d 896, 907.

§17.2. ¹ In Equity, No. 68485 (1954).

² Acts of 1953, c. 575, §1.

§17.3. ¹ In Equity, No. 68486 (1954) per Williams, J.

² For the standard of review in this question, see G.L., c. 25, §5.

§17.4. **Significant federal decisions: The Natural Gas Act construed.** While it is beyond the scope of the SURVEY to analyze all of the numerous federal decisions which might directly or indirectly affect Massachusetts utilities, the far-reaching implications of the decision of the United States Supreme Court in *Phillips Petroleum Co. v. State of Wisconsin*¹ in June, 1954, should be noted. In this case, the Natural Gas Act was construed to include as natural gas companies all persons engaged in selling gas to interstate pipelines.

The last of the important gas companies in Massachusetts was receiving natural gas by the end of 1953. The Tennessee Gas Transmission Company, one of the principal sources of supply of that gas, had existing contracts with a number of field producers, which contained escalator clauses calling for increases in field prices effective November 1, 1954. On the basis of these contracts, Tennessee Gas filed with the Federal Power Commission new schedules of rates to be collectible on that date, with the rates therein designed to increase its revenues enough to cover such increases.² Immediately after the *Phillips* decision, the customer companies of Tennessee Gas moved to dismiss its application on the ground that the increase in field prices had not been filed and approved under the Natural Gas Act. During the pendency of these motions, a settlement was proposed by Tennessee Gas and was accepted by the purchasing companies, whereby, in effect, Tennessee Gas withdrew its application for increased rates.

Thus, as far as local rates are concerned, the *Phillips* case has, at least to date, protected Massachusetts utilities and customers in regard to many aspects of these natural gas field purchase contracts.³ What the effect of the decision will be in the long run on gas supply and on other important phases of the industry remains to be seen.

B. LEGISLATION

§17.5. **Statutes affecting bus companies.** During the legislative session covered by the 1954 SURVEY, Section 7A of Chapter 159A of the General Laws was amended¹ to bring operators of school buses within the definition of common carriers for the purposes of that section, effectively preventing a bus company from contracting for school bus work by means of a separate corporate organization. This amendment was submitted to meet the situation presented in the *Hudson Bus Company* case,² decided by the Department in 1954 and discussed in another part of this chapter,³ and also to make sure that school bus revenues are

§17.4. ¹ 347 U.S. 672, 74 Sup. Ct. 794, 98 L. Ed. Adv. Sh. 695 (1954), 3 P.U.R.3d 129 (1954).

² Re Tennessee Gas Transmission Co., F.P.C. Docket No. G2434 (1954).

³ This is particularly true in regard to the most-favored-nation clauses and the automatic escalator clauses.

§17.5. ¹ Acts of 1954, c. 281.

² D.P.U. 10552 (April, 1954), 3 P.U.R.3d 108 (1954).

³ Section 17.13 *infra*.

not segregated from common carrier revenues by some form of corporate organization.

Section 11A of Chapter 159A of the General Laws was amended twice in 1954. In the first amendment the common carriers were in effect given back the business of hauling school athletic teams and their rooters to and from the games.⁴ The second and more far-reaching amendment,⁵ also designed to protect bus company revenues, makes it substantially more difficult to obtain a charter license. Further, it restricts the issuance of licenses for special trips where the route taken is also traversed by a common carrier. Both of these acts were justified in debate by the precarious financial condition of the bus lines, found by a Special Commission of the legislature⁶ to have been very badly hurt by the recent inflation and changing social habits.

§17.6. Statutes affecting motor vehicle carriers. Amendments to the statutes in regard to motor vehicle carriers¹ were in the main relatively unimportant and related to details of administration. Section 2 of Chapter 159A was amended² to exempt telegrams from the definition of property carriage for hire.

Sections 9 and 10 of the same chapter were amended³ to place the burden on the carriers to apply for renewal of plates, whether they receive application forms or not. Section 10A of the same chapter now requires a carrier to apply for a new identification plate if his present one becomes damaged or illegible.⁴ Section 10B now requires operators of leased vehicles to maintain detailed records of all trips in order to facilitate administration by the Department of Public Utilities.⁵

And, finally, Section 12 of Chapter 159A was amended⁶ to specify the type of notice required to be given a carrier upon institution of punitive proceedings.

§17.7. New control over securities investment by utilities. The scope of Section 17A of Chapter 164 has been enlarged¹ so that gas and electric companies must obtain the permission of the Department of Public Utilities before investing any of their funds in securities of any kind. Approval was formerly required only in regard to the loaning of funds. The new statute is aimed, of course, at tightening up controls to assure stable financial condition.

⁴ Acts of 1954, c. 319.

⁵ Id., c. 307.

⁶ House Doc. 2402, Final Report of the Special Commission Relative to Local Transit Companies (1953).

§17.6. ¹ G.L., c. 159B.

² Acts of 1954, c. 87.

³ Id., c. 481.

⁴ Id., c. 288.

⁵ Id., c. 440.

⁶ Id., c. 293.

§17.7. ¹ Acts of 1954, c. 95.

§17.8. **Statutes affecting departmental procedures: The Massachusetts Administrative Procedure Act.** The legislature in 1954 passed a far-reaching administrative procedure act applicable to all state agencies with very limited exceptions.¹ The Department of Public Utilities comes under this new law, which becomes effective on July 1, 1955. The new act is discussed at length by its draftsmen in the SURVEY chapter on Administrative Law,² so no detailed analysis will be presented here.

In most aspects, the Department of Public Utilities already complies with the requirements of the new law, which in the main merely sets minimum standards.³ The Department will, however, be required to make some changes in present practices. Notably, it is required to prepare and publish a compilation of all of its rules and regulations currently in effect.⁴

The new law is not expected to effect any changes in the law in regard to judicial review of decisions and orders. The Administrative Procedure Act installs the "substantial evidence rule."⁵ It also adopts the principal of the Department's court review statute as amended in 1953⁶ to the extent that where confiscation is the issue in a rate case and the court is constitutionally required to make independent findings of fact, the case will be remanded to the Department for the taking of any new evidence.⁷

§17.9. **Important federal statutes affecting Massachusetts utilities: The Hinshaw Act.** As in the case of federal decisions, it does not seem fitting to review in detail here all of the legislation passed by the Eighty-third Congress directly or indirectly affecting Massachusetts utilities. Attention should, however, be directed to the Hinshaw Act.¹ This amendment to Section 1 of the Natural Gas Act exempts from the jurisdiction of the Federal Power Commission those persons who receive natural gas within or at the boundaries of a state if all of that gas is ultimately consumed within the state, and the rates, services offered, and the facilities used by such persons are subject to regulation by a state commission.

This amendment clarifies the Natural Gas Act by defining the limits

§17.8. ¹ Acts of 1954, c. 681, G.L., c. 30A.

² Chapter 14.

³ G.L., c. 30A, inserted by Acts of 1954, c. 681.

⁴ Id. §6. See also Section 17.17 *infra*.

⁵ Id. §14(8).

⁶ G.L., c. 25, §5, as amended by Acts of 1953, c. 575, §1.

⁷ Id., c. 30A, §14(8)(f).

§17.9. ¹ 68 Stat. 36 (1954). There were several situations in Massachusetts incident to the introduction of natural gas which were alleviated by the passage of this act, notably the Brockton-Taunton Gas Company's troubles with the Town of Middleborough (see D.P.U. 10371 (Jan. 1954), 2 P.U.R.3d 143 (1954)). The company proceeded to claim and secure exemption under the act, and the unfortunate situation which resulted from the limitations imposed by the FPC in the Algonquin Gas Transmission Company certificate, noted in the departmental decision above, has thus been resolved.

of the jurisdiction of the Federal Power Commission with regard to this intrastate operation. It thus furthers the policy of Congress to aid and not oust state regulation of natural gas. It also serves to relieve the persons affected of the burden of complying with the regulations of two overlapping regulatory bodies.

C. ADMINISTRATIVE DECISIONS

§17.10. **Power company rate decisions.** In the field of gas, electric, and telephone service there was a substantial falling off in the number of rate cases decided by the Department of Public Utilities in the year ending on October 1, 1954.

In those cases in which orders were entered, the Department followed its traditional policy of using original cost of utility property in determining the appropriate rate base and uniformly followed the practice of basing its findings as to the allowable rate upon the cost of capital as presented to it. These methods were largely upheld by the Supreme Judicial Court this year in the *Telephone* rate case discussed earlier in this chapter.¹

In the *Telephone* case, a return of 6.313 percent was found by the Court to be allowable. Similarly, in the *Springfield Gas Company* case,² rates which would produce less than 6.25 percent were found reasonable, and comparable findings were made in the *Stockbridge Water Company* case³ and the *Ware Gas Company* case⁴ on earnings of 4.7 percent and 6.2 percent respectively.

In another proceeding, *Re Town of Middleborough*,⁵ it was held that extraordinary expenses attributable to a single customer must be covered by the rates charged to that customer and could not be charged against other operations. The peculiar problem in this case arose from the assertion by the Federal Power Commission of jurisdiction over the sale of natural gas by the Brockton-Taunton Gas Company to the Town of Middleborough for resale. This difficulty was afterward eliminated by the enactment of the Hinshaw Bill discussed in Section 17.9 *supra*.

§17.11. **Accounting control.** Upon petition of the Boston Edison Company, the Department ruled¹ that savings in income tax accruals resulting from accelerated amortization of emergency facilities under Section 124(a) of the Internal Revenue Code should be placed in reserve until the end of the amortization period in order to meet the increased tax payments which would result. A similar order was subsequently made affecting the Western Massachusetts Electric Company.

§17.10. ¹ Section 17.1 *supra*.

² D.P.U. 9876 (Oct. 1953), 1 P.U.R.3d 65 (1953).

³ D.P.U. 10875 (July, 1954).

⁴ D.P.U. 10932 (Sept. 1954).

⁵ D.P.U. 10371 (Dec. 1953), 2 P.U.R.3d 143 (1954).

§17.11. ¹ D.P.U. 10744 (Dec. 1953) 2 P.U.R.3d 137 (1954).

§17.12. Extensions of power company service: Underground lines.

The policy which had been previously adopted¹ by the Department on application from municipalities to compel power companies to use underground construction in extending their facilities was again reaffirmed over the protests of residents of the Town of Falmouth.² It was there again found that the general public interest in reasonable rates for electric service was paramount to the interest of any community in preserving its natural beauty or property values. The application was, therefore, denied.

§17.13. Passenger transportation rate decisions. The unfortunate economic situation among local public transportation companies has not materially improved. A Special Commission¹ appointed by the General Court to investigate the matter reported the companies to be in a precarious financial state.

One of the results of this condition in the industry has been a number of further decisions by the Department involving bus company fare rates.² In most of these cases there were no novel points involved. The Department used the same approach to the problem as it has in the past, giving more attention to the operating ratio yardstick than to the more conventional rate base procedure. However, the department continues to analyze the financial data presented to it on each occasion, with a critical eye to expenditures as well as to the over-all effect of the company's proposals. For example, in the *Gloucester Auto Bus Company* case excessive salaries for officers, particularly where they controlled the corporation, were again disallowed.³

In the *Hudson Bus Lines* case,⁴ a transit company was a common carrier under Chapter 159A of the General Laws and at the same time held school bus contracts with municipalities. Its application for increased fares was denied, although its common carrier operations were being conducted at a loss, while its over-all earnings were adequate.

§17.14. Railroad rate decisions. An application for certain changes in railroad commutation rates was approved in regard to the Boston & Maine Railroad during the year.¹ It was a routine matter, except that in the course of permitting the changes the department noted that, as

§17.12. ¹ Re Boston Edison Co., D.P.U. 8272, 8272A (Apr. 1949), 79 P.U.R. (N.S.) 1 (1949); Re Boston Edison Co., D.P.U. 10585 (Jan. 1954).

² Re Cape and Vineyard Electric Co., D.P.U. 10880 (July, 1954).

§17.13. ¹ House Doc. 2402, Special Commission Relative to Local Transit Companies (1953).

² Re Gardner Templeton Street Ry., D.P.U. 10617 (Oct. 1953); Re Mischand Bus Lines, D.P.U. 10844 (May, 1954); Re Massachusetts Northeastern Bus Co., D.P.U. 10896 (June, 1954); Re Dalton Hinsdale Bus Co., D.P.U. 10864 (July, 1954); Re Short Line of Massachusetts, Inc., D.P.U. 10878 (Sept. 1954); Re Union Street Ry., D.P.U. 10946 (Sept. 1954).

³ D.P.U. 10859 (July, 1954). It seemed, however, that even with this action, the utility's pro forma earnings statement showed a loss, and the proposed rate schedule was therefore approved and the increase allowed.

⁴ D.P.U. 10552 (April, 1954), 3 P.U.R.3d 108 (1954).

§17.14. ¹ D.P.U. 10688 (May, 1954).

the Attorney General had ruled, the provisions of Chapter 160, Section 190 of the General Laws, which purports to establish commutation rates within fifteen miles of Boston, is inconsistent with the general regulatory power over rates later granted to the Department of Public Utilities by Chapter 159, Sections 14 and 19, and the former had thereby been repealed by implication.

In the continuing battle between the railroads and the trucking industry over competitive freight rates, the Department followed the Interstate Commerce Commission in finding that no carrier is required to maintain rates which would be unreasonable when judged by conventional standards, for the purpose of protecting the traffic of a competitor.² On the other hand, it also followed the ICC in holding that it would not accept as evidence pertinent to the cost of carriage of a particular commodity the over-all cost to the railroad of handling all freight, and consequently it disallowed the railroad's proposal for lack of proof.

§17.15. **Motor transport decisions.** Out of the numerous appeals by truckmen to the Public Utilities Commission under Chapter 25, Section 12F, decided during the survey year, four seem worthy of brief notation for those readers particularly interested in this field.

In the *Foster* case¹ the fact that the carrier owned and operated a specialized type of equipment was considered enough to warrant the issuance of an irregular route common carrier certificate.

As a result of the *A.B. & C. Motor Transportation Company* cases² the Department is now fully committed to making an investigation, in connection with the proposed transfer of a certificate, as to whether the transferor actually has any business to be transferred under Section 11 of Chapter 159B.

In two cases the distinction between common and contract carriage under Chapter 159B of the General Laws was in issue. In the first, the *Haverhill-Lawrence Transportation Company* case,³ it was considered that regularity of operations alone was not decisive on the question. In the second, *Appeal of William Mazauszowski*,⁴ the Department refused to issue a certificate as a contract carrier to one who was authorized under his certificate as a common carrier to transport the same commodities within the same area.

² For a particularly searching analysis of the administrative process before such agencies as the ICC, see Jaffe, *The Effective Limits of the Administrative Process*, 67 *Harv. L. Rev.* 1105 (1954).

§17.15. ¹ *Appeal of John R. Foster, Inc.*, D.P.U. 10846 (April, 1954).

² *A.B. & C. Motor Transportation Co. v. Department of Public Utilities*, 329 *Mass.* 719, 110 *N.E.2d* 377 (1953).

³ D.P.U. 10858 (July, 1954).

⁴ D.P.U. 10979 (July, 1954).

D. ADMINISTRATIVE RULES AND REGULATIONS

§17.16. **New regulations.** There were no important changes in procedural matters before the Department during the survey year, and no rules or regulations of general significance were promulgated. In compliance with the 1954 statute,¹ rules were promulgated during the year governing the filing of schedules of rates of water districts.

§17.17. **Departmental procedure on regulations.** With the passage of the new Massachusetts Administrative Procedure Act,¹ discussed in Section 17.8 *supra*, various changes will be made in the DPU procedures for the adoption, amendment, and repeal of regulations. The procedures under the new act are discussed at length in the chapter on Administrative Law.²

To begin with, all formalized rules and regulations will now be known by the common term "regulation."³ The Department may still issue informal advisory rulings without going through the mechanisms of the new act.⁴ A system will be set up by which persons interested in receiving notice of the adoption of regulations by the Department can do so by filing yearly requests with the Department for that service.⁵

The Department is required under the act to compile and publish all of its regulations currently in effect and to make them available to the public.⁶ The Department has until July 1, 1956, to comply with this requirement.⁷

As previously noted, the actual changes in agency practice under the Administrative Procedure Act will be minor. The act generally sets up minimum standards with most of which the DPU is already in compliance.

It should be noted at this point, perhaps, that a thorough and interesting study of the practices and procedures of the Massachusetts Department of Public Utilities was the subject of an extended student note in the Harvard Law Review this year.⁸

§17.16. ¹ Acts of 1954, c. 610.

§17.17. ¹ Acts of 1954, c. 681.

² Section 14.4 *supra*.

³ G.L., c. 30A, §1(5).

⁴ *Id.* §8.

⁵ *Id.* §2(1)(6).

⁶ *Id.* §6.

⁷ Acts of 1954, c. 680, §21.

⁸ Note, State Administrative Practice: An Illustrative Survey of the Procedure of the Massachusetts Department of Public Utilities, 67 Harv. L. Rev. 845 (1954).