Chapter 1: Public Utilities

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CHAPTER 1

Public Utilities

PETER ROTH

§1.1. Introduction. The 1971 Survey year was marked by an emerging concern for the consuming public by the Department of Public Utilities. (D.P.U.). In the two Supreme Judicial Court cases of interest, there was basic disagreement between the Court and the department over such issues as attrition, cost of service during a test year, and the selection of a capital structure appropriate for rate-setting purposes. Whereas departmental policy in these areas tended to give the benefit of the doubt to the consumer, the Court has seemingly enunciated its own regulatory philosophy by giving the benefit of the doubt to the utility company. In the area of administrative law, departmental concern for the consumer was expressed in the maximum rate order on towing by police, the denial by the D.P.U. of an increase in minimum rates for the carriage of dump truck commodities, and regulations on billing and termination procedures for residential customers of gas and electric companies. Similar concern was evidenced by departmental support of House Bill 5336, relative to assessing certain utility corporations for payment of part of the cost of operating the D.P.U.

A. COURT DECISIONS

§1.2. Boston Gas Co. v. Department of Public Utilities.1 February 12, 1969, the Boston Gas Company filed with the D.P.U. requests for rate increases totaling $3,493,600.2 After public hearings and consideration, the department disallowed the new filings by orders dated January 8 and March 4, 1970, and ruled that the company was entitled to increases limited to $2,021,022. The company put these

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2 The term test year refers to "a recent operating period during which revenues, expenses, and plant requirements are either generally in balance, in the sense that the[ir] relationship . . . is generally representative of the recent past, and therefore likely to be representative of the near term future, or can be so adjusted that such relationships are representative of the near term future." Id. at 626 n.23, 269 N.E.2d at 260 n.23.


2 D.P.U. 16102.
increases into effect and appealed from that part of the decision which had denied the remainder.

While this appeal was pending, the company applied to the Supreme Judicial Court for a stay of the department's orders, which would allow the company to collect the disputed amount subject to repayment to the consumer. This application was considered and denied by a single Justice on April 7, 1970, but without prejudice to its renewal at a later time. Thereafter the company did reapply, and a stay was granted on December 11, 1970. Accordingly, the company began to collect from its customers the disputed amount of approximately $1.5 million and continued to do so until the Court rendered its decision on the appeal on April 15, 1971. On that date, the Supreme Judicial Court remanded the case to the department for further proceedings, concluding that the department "has closely restricted the rates allowed to [the] Company, and in doing so has resorted to tests and estimates which (in respects noted) have tended to understate [the] Company's reasonable revenue requirements." The department was directed by the Court to reconsider several issues and to file additional findings and rulings on these questions in accordance with the views expressed by the Justices. While the proceedings upon remand have not been completed, it is clear that compliance with the Court's decision will require the department to approve the $1.5 million increase.

On an appeal to the Supreme Judicial Court of a rate decision of the D.P.U., the burden is upon the petitioning company to establish that revenues presently received for its services are inadequate to provide a fair return upon investment in property used in extending utility service. Consequently, it is necessary to make determinations regarding the amount of investment in such property (rate base), the cost of service during a test year (in this proceeding, 1968), and the fair rate of return to be allowed. In the process of making these determinations, there were disagreements between the company and the department.

Cost of capital. The D.P.U. rejected use of the gas company's actual capital structure (53.7 percent debt, 46.3 percent equity at the time of the hearings) and calculated capital costs upon the basis of a projected 60 percent debt, 40 percent equity ratio which the department believed to be desirable, as well as attainable in the near future. On January 8, 1970, when the D.P.U. announced its rate decision, it expected that the company would be able to borrow at 8 percent. Later financing, however, did not work out as well as had been anticipated, and the effective interest cost of the new bonds to the company was 9.73 percent. The new bonds increased the company's debt ratio to only 56 percent because the company limited the new issue and abandoned any plan to reduce its capital stock. The company thereupon

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4 G.L., c. 25, §5.
obtained an order directing the D.P.U. to transmit to the Supreme Judicial Court the evidence concerning the unexpectedly high cost and more limited amount of the new 1970 debt issue. The company contended that it should be treated as having the 56 percent - 44 percent debt-equity capital structure in effect after the 1970 bond issue. In opposition, the D.P.U. contended that the Supreme Judicial Court should not consider the changed circumstances which arose after the department’s rate decision of January 8, 1970, and, indeed, even after the modification of that decision on March 4, 1970.

The Supreme Judicial Court said that it would not remand this case for a new hearing since the limited additional evidence to be adduced at said hearings relates to matters of public record contained in the D.P.U.’s own files. The Court stated:

It is now possible and proper for us (since the “rate order is challenged on constitutional grounds in this court”) and for the D.P.U., to examine and evaluate the current facts with the aid of “the improved vision of intervening experience.” See Boston Consol. Gas Co. v. Department of Pub. Util., 327 Mass. 103, 104-107, 97 N.E.2d 521; Opinion of the Justices, 328 Mass. 679, 686-690, 106 N.E.2d 259, 263 (where the Justices said that this court, with respect to constitutional issues, in performing its duty to afford “a utility claiming confiscation . . . an independent judicial review as to both law and fact,” must have authority to require the production of “new evidence necessary to bring the proof as nearly as reasonably possible down to the date of final decision”).

The Court also said:

If, during the pendency of this appeal, Company had been able to issue debt obligations at a substantially lower interest cost than had been predicted, parties other than Company could have brought that evidence to the attention of this court.

As previously noted, however, the legislature had established a procedure in rate cases whereby the utility requesting a rate increase from the D.P.U. has the burden of establishing that revenues presently received for its services are inadequate to provide a fair return upon investment in property used and useful in extending utility service. It would appear that by its remand to the department, the Court has disregarded the legislative determination that the burden of proof shall rest on the utility company. The Court has accepted the testimony of the company without allowing the D.P.U. to analyze or contest that testimony.

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5 This additional evidence included the gas company’s 1969 return to the D.P.U., filed about March 31, 1970, two orders of the D.P.U. authorizing specified financing by the company, and excerpts from certain testimony before the D.P.U. concerning that financing. See D.P.U. 16470 and 16470-A.
7 Id. at 615 n.10, 269 N.E.2d at 253 n.10.
8 G.L., c. 25, §5.
The rationalization by the Court that the department could have presented evidence appears to place a burden upon the department which was not envisaged by the legislature. The Court in *Boston Gas*, in remanding to the D.P.U. for further hearings and a new decision, has not only made a determination that the rate of return is confiscatory, but, by hearing new evidence and establishing a new capital structure and rate of return, has also preempted the departmental prerogative of establishing its regulatory philosophy.

Relying in part on evidence arising after the hearings and on evidence arising subsequent to issuance of the department's original order, the Supreme Judicial Court went on to hold that the department could not, on the record before it, substitute a projected capital structure for the structure actually in effect during the test year. The Court said:

> It would be unreasonable, and an undue interference with reasonable Company judgment, for the D.P.U. to insist that Company's rate of return conform with precision to what the D.P.U. regards as an optimum 60% debt ratio. Within a substantial range this is a matter for Company's determination. . . . There is no evidence that (in disregard of fair and prevailing utility practice or of D.P.U. admonitions) Company has adopted an unreasonably low debt ratio which may be regarded as a "company luxury" imposing an undue burden on consumers.9

The cost of debt is a matter of record and was correctly calculated as 6.86 percent. The cost of common equity is far more a question of judgment. The company witness expressed the opinion that potential investors in the common shares of the company would require a return of 12 to 12.5 percent upon equity before they would make an investment. However, the Court stated that in the absence of expert testimony to the contrary, it could not say that the D.P.U.'s allowance of only a 10.75 percent cost of equity capital was below the range of permissible judgment and, therefore, confiscatory.

*Rate of return, rate base, and attrition.* The D.P.U.'s recent attitude toward fair rate of return is evidenced by its action in *Boston Gas*. Believing that the return which is guaranteed to a regulated company ought to be set at or near the minimum consistent with constitutional requirements, the department has said:

> This philosophy is particularly compelling at a time when the resources which the petitioning company can place at the service of development and presentation of its case greatly outstrip those which the Commonwealth makes available for representation and protection of that company's customers. If, after receiving the guarantee of a minimal rate of return, the regulated company can then, by virtue of expanded revenues, operating economies or skillful financing, increase its rate of return, this department would not

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under ordinary conditions attempt to take away that reward for effective management. We do not believe, however, that the regulatory agency should properly award this additional margin merely by administrative fiat.\textsuperscript{10}

Consequently, the department awarded a rate of return which was the same as the petitioning company’s cost of capital.

The company suggested the use of a rate base as of the end of the 1968 test year as a basis for counteracting attrition. The D.P.U., on the other hand, felt that the rate base should be predicated upon the averages of accounts as they existed throughout 1968. On this issue, the Supreme Judicial Court agreed with the department that use of a so-called year-end rate base is an undesirable approach to the attrition problem. But the Court also held that the department had failed to give adequate consideration to the overall question:

The D.P.U. also, in effect, has given no weight to whatever erosion in contemplated return to Company was indicated by the evidence of actual and expected results for 1969 and 1970. In part, failure to do so may have been based upon the D.P.U.’s distrust of the feasibility of predicting (during the 1969 hearings) the results for 1969 and 1970. In part, it may have been reluctance to adjust the actual and adjusted results of the test year by the imprecise remedy (for attrition) of using a year-end rate base instead of an average test year rate base. The former difficulty no longer exists. The actual results for 1969 and 1970 are now known and . . . predictions [of the company witness] for these years can now be tested accurately.\textsuperscript{11}

The Court, in this regard, recognized that the department would have the significant advantage of hindsight in handling the question of attrition upon remand. Unfortunately, this advantage is not present in cases pending before the department. A company’s attrition analysis is prospective in nature and hence is based upon assumptions which are difficult to evaluate. The department possesses no greater clairvoyance upon this issue than upon the issue of capital structure, although as to the latter issue the Court used subsequent evidence of actual results to evaluate the reasonableness of the department’s prediction.

It does not appear that \textit{Boston Gas} requires the department to adjust for attrition \textit{at this time}. The department is required by the decision only to make “suitable adjustment of the rates . . . to reflect any attrition trend which may be confirmed by the 1969 and 1970 figures.” (Emphasis supplied.)\textsuperscript{12} Thus, the analysis is to be a retroactive rather than a prospective one, with a consequent gain in reliability. Accordingly, an attrition allowance will not be made at the time of the initial hearing but will be dealt with on a more continuing basis. Therefore,

\textsuperscript{10} D.P.U. 16515 (June 1971).
\textsuperscript{12} Id. at 625, 269 N.E.2d at 259.
if a company believes that the rate of return awarded as a result of departmental proceedings is being eroded, it would petition the department for relief based upon a period of actual experience with the new rates in effect. If a company's position is justified, and nothing else has occurred to counteract the effects of such attrition, the department would have to be prepared to use abbreviated proceedings to grant whatever relief was required.

Cost of service. The Supreme Judicial Court concluded that D.P.U. adjustments of the test year data had not been adequately explained or supported by substantial evidence, and that the test year results as adjusted by the D.P.U. may substantially understate the gas company's revenue requirements. Therefore, the Court said, these adjustments should be reconsidered by the D.P.U. in the light of the company's 1970 financing and in light of its actual 1969 and 1970 operating results.

§1.3. Mystic Valley Gas Co. v. Department of Public Utilities.¹ The Mystic Valley decision involved appeals by Mystic Valley Gas Company (Mystic), North Shore Gas Company (North Shore), and Lynn Gas Company (Lynn) from rate decisions of the department dated November 28, 1969 (with supplemental orders being issued on January 28 and 29, 1970). There was a basic disagreement between the companies—all of the New England Electric System (N.E.E.S.) gas subsidiaries except Norwood Gas Company—and the department regarding selection of a capital structure appropriate for rate setting purposes and the D.P.U.'s failure to adjust test year results to reflect known future increases in the costs of service. This dispute has now been resolved by the Supreme Judicial Court in favor of the appealing companies.

Cost of capital. The companies' witness on the subject of cost of capital testified that the capital structure which should be adopted by the department for the purpose of establishing new rates in these proceedings was the actual capital structure of each company. He expressed the view that each company should "be evaluated as an independent company that would be viable and financially sound even without"² the protection of the parent company, N.E.E.S.³ The petitioners complained that the D.P.U. erroneously disregarded the actual capital structure of the companies and the cost of long term indebtedness, substituting instead a hypothetical capital structure. The petitioners also claimed that the D.P.U. had attributed to each company the debt and other capital costs of the entire N.E.E.S. system and, as a consequence, had given it an inadequate return.

²Id. at 765, 269 N.E.2d at 237.
³The actual capital structures of the petitioners then were:

<table>
<thead>
<tr>
<th></th>
<th>Debt</th>
<th>Common Stock</th>
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<tbody>
<tr>
<td>Mystic</td>
<td>61.8 percent</td>
<td>38.2 percent</td>
</tr>
<tr>
<td>North Shore</td>
<td>60.4 percent</td>
<td>39.6 percent</td>
</tr>
<tr>
<td>Lynn</td>
<td>49.8 percent</td>
<td>50.2 percent</td>
</tr>
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http://lawdigitalcommons.bc.edu/asml/vol1971/iss1/4
As the appropriate capital structure for rate setting purposes for each of the companies involved, the department used the actual capital structure of the N.E.E.S., consolidated as it existed at the time (60 percent debt, 31 percent common stock, 9 percent preferred stock). Costs were calculated upon the basis of this structure.\(^4\) The department concluded:

\[\ldots\ (a) \text{that it was "reasonable to use as a guide the [s]ystem capitalization which reflects the average situation that the gas companies as a group would enjoy today if they had been financed in part by permanent securities over a representative period";} \]
\[(b) \quad \text{"that a common equity ratio of forty percent \ldots [was] too high for" Mystic, and (c) that "a capitalization of sixty percent debt, nine percent preferred, and thirty-one percent \ldots [would] be fair. \ldots".}\]

In support of its decision to substitute for each company's actual capital structure a hypothetical capital structure based on that of N.E.E.S. as a system, the D.P.U. relied in part on two earlier decisions.\(^6\) The Supreme Judicial Court stated that the judicial decisions relied on "do not permit the D.P.U. to disregard (in fixing rates) existing capital structures of regulated companies unless they so unreasonably and substantially vary from usual practice as to impose an unfair burden on the consumer."\(^7\) Moreover:

With respect to Mystic, the record shows no departure from what is (for Mystic as a separate entity) a reasonable capital structure. We perceive no justification for substituting a hypothetical capital structure for Mystic's actual capital structure. \ldots\ Rates are being set for Mystic and not for N.E.E.S.\(^8\)

The Court also suggested that the forthcoming divestment of these companies by N.E.E.S. pursuant to an order of the Securities and Exchange Commission\(^9\) is a factor which justifies their patterns of financing:

In view of the divestment uncertainties and other factors already mentioned, we think the D.P.U. could not fairly regard as un-

\(^4\) The D.P.U. fixed as the cost of debt a return of 5.2 percent which was the then average cost of N.E.E.S. debt. It took as the cost of each company's assumed preferred stock 5.35 percent, which was the cost of a relatively recent issue of preferred stock of a constituent N.E.E.S. company, and adopted a return of 10.75 percent as the proper return upon the 31 percent common stock equity assumed by the D.P.U.


\(^7\) Id. at 770, 269 N.E.2d at 239. See also Boston Gas Co. v. Department of Pub. Utilities, 1971 Mass. Adv. Sh. 609, 269 N.E.2d 248, discussed in §1.2 supra.

reasonable Mystic's failure during the last decade to issue long-term debt, at any particular time or even through the whole period. The evidence also does not show that Mystic (in view of the problems of Mystic and the system) has been engaging in a "company luxury."\(^{10}\)

In light of Mystic Valley, the department has no choice but to rule that the capital structures of each of the companies, as such capital structures have been determined by these companies, are fair and reasonable under the circumstances, and do not constitute unnecessarily conservative patterns of financing which would have the effect of unduly burdening the rate payers.

Cost of service. The D.P.U., in using 1968 as a test year to measure the petitioners' respective revenue requirements, declined to adjust the test year results to reflect fully those wage increases granted by the petitioners in 1968 and 1969. The petitioners contended that the 1968 and 1969 wage increases were sufficiently unusual to require some adjustment of the test year results to recognize higher expenses likely to be experienced by the petitioners in the period during which the new rates would be in effect.

With regard to property taxes, the D.P.U. adjusted the "test year" figures to reflect established increases as of January 1, 1969, in the rates of local property taxes. It made no adjustment of test results to reflect the increase in taxes on property assessed to the petitioners for the first time as of January 1, 1969. In its decision the D.P.U. said, "[I]t is inappropriate to recognize taxes imposed on additional plant, full effect of the use of which is not felt during the test year."\(^{11}\) The position of the petitioners was that to the extent that the additional plant, first assessed as of January 1, 1969, is taxed at a substantially higher rate than it would have been taxed in 1968, consideration should be given to whether the inevitable 1969 tax rate increase should not be applied to some extent to new 1968 plant in computing the tax adjustment of test year results.

With respect to wage and property tax increases, the Supreme Judicial Court has ruled clearly that provision must be made for expenses of this nature which are certain to exceed equivalent expenditures during the test year.\(^{12}\) Where the amount of anticipated increases is reasonably certain, an adjustment should be made in the test year, rather than applying adjustment clauses at a later date to rates already established.

### B. Administrative Decisions

#### §1.4. Maximum rate order on towing by police.\(^{1}\) On October 28, 1969, and March 10, 1970, the Department of Public Utilities held


\(^{11}\) Id. at 775, 269 N.E.2d at 243.

\(^{12}\) Id. at 773-776, 269 N.E.2d at 241-243.
public hearings pursuant to the provisions of G.L., c. 159B, §6C, which directs the department to establish maximum rates for towing, other than during snow removal operations, when such towing is ordered by the police or other public authorities. As a result a maximum charge of $12 was set for towing which results from a traffic violation.

The D.P.U. expended a substantial amount of time and effort on this important subject for two reasons. First, the department felt that the people of Massachusetts, particularly in urban areas, have been subjected during recent years to a highly erratic and frequently expensive system of charging by operators engaged in the business of towing pursuant to police authority. The second reason for expenditure of time on this subject stems from the fact that the legislature has set an extremely difficult task for the department: tow car operations include a wide variety of activities and are influenced by many different conditions and circumstances, and yet the appropriate legislation establishes no standards or guidelines to assist the department in its determination of towing rates. This is to be contrasted with legislation governing certain charter bus rates, which provides that rates are to be determined on the basis of miles operated, type of equipment, and waiting time. In addition, before 1971, towing operators had not been required to file annual returns with the department which would show investment in towing equipment, and revenues and expenses related to their operations. Consequently, the department did not have readily available the kind of information which ordinarily is necessary to set meaningful rates. While this problem has now been corrected, the first returns under the new statute were not required to be filed until March 31, 1971, and thus the information was not available for purposes of the public hearings which concluded on March 10, 1970.

In spite of the lack of information, the department formulated a rate schedule because of its feeling that the public needed the protection of maximum towing rates. The departmental objective was to protect the public from being gouged by irresponsible operators, while enabling the fair operator to run his business profitably. An attempt was made to analyze the random and seemingly conflicting treatment accorded towing operators and towing rates by the General Court over the previous several years. Although the problem of setting maximum rates for towing pursuant to police order has been delegated to the department, the legislature has also set certain maximum charges which may be assessed for both towing and storage. Because the legislature


2 See G.L., c. 159A, §11A.


4 Compare G.L., c. 159B, §6C, authorizing the hearings on towing, and G.L., c. 40, §22D, as amended by Acts of 1968, c. 369. These provisions appear to be in conflict on the question of whether maximum towing rates have been set by the General Court or are to be established by the D.P.U.
apparently believes that $12 is a fair maximum charge for towing which results from a traffic violation, the department has adopted that figure. Similarly, the department noted that the General Court had increased the maximum permissible charge during snow removal from $12 to $25; since a similar increase for towing after traffic violations was not adopted, the department assumed that the legislature was satisfied with the $12 figure.

The legislature has not spoken on the subject of towing pursuant to police order which occurs for reasons other than traffic violations, e.g., after an accident. Therefore, the department developed a set of rates to cover towing for reasons other than traffic violations, which rates would be fair to all concerned but which do not feature a $12 maximum charge. In this regard the department determined that a $12 maximum rate does not take into consideration the difficulties which may be involved in, and the amount of time which may be expended upon, towing procedures in situations other than those created by routine traffic violations. In order to extend some protection to the public on this subject and at the same time avoid driving responsible operators out of business, the department issued an Interim Order on November 12, 1970, and stated its intention of continuing its study of the matter to determine whether the rate schedule needs further alteration.

§1.5. Denial by D.P.U. of increase in minimum rates for the carriage of dump truck commodities. During the 1971 Survey year there was an investigation by the Department of Public Utilities into the adequacy of the minimum hourly, tonnage, and yardage rates and charges relating the carriage of dump truck commodities within the Commonwealth. This investigation followed a request for an increase in the minimum rates and charges by the Construction Truck Owners Association, Inc. Through the testimony of its witness, Frank J.

§1.5. 1 D.P.U. 16368 (March 1971).

2 The request was filed in March 1971 pursuant to G.L., c. 159B, §6, which provides in part: "The department shall annually establish reasonable maximum and minimum rates or charges consistent with industry and economic conditions and consistent with the declaration of policy contained in section one." The prior prescription of minimum rates by the department appears in D.P.U. 15620, 15672 and 15673, each dated Aug. 14, 1968, under which the minimum rates and charges contained therein became effective on Oct. 15, 1968.

The department concluded that the fact that it had been assigned by the legislature the annual task of setting maximum and minimum rates for the carriage of dump truck commodities did not mean that the department must itself go forward and produce evidence. Rather, it viewed the statutory language as merely mandating the department to consider this subject on an annual basis to determine whether any changes have occurred since the most recent rate order and to decide whether such changes were of such a character that the rate order should be amended. The department felt that the statutory language did not remove from the party which seeks a change in existing rates the tradi-
Weiner, Esq., the association contended that the minimum rates were too low. Mr. Weiner cited practices of "destructive competition" in the industry, including instances of overloading and the practice of buying and selling commodities by carriers to evade filed rates. Petitioner further claimed that there is a large turnover in the industry resulting from the inability of small carriers to make adequate returns on their investments, and the association offered into evidence a tariff from the state of Connecticut which contained substantially higher minimum rates and charges than does the equivalent Massachusetts schedule.

The D.P.U. felt that the testimony given by Mr. Weiner was considerably undercut on cross-examination, that the testimony was based on a limited sampling, and that there was no testimony, other than the bald assertion by the witness, that the situation in the dump truck industry in Connecticut was the same as the situation in Massachusetts. Furthermore, the department claimed that the rate schedule in Connecticut was not the product of the Connecticut commission’s deliberation, but was simply a filing which the commission chose not to challenge. It was the department’s position that it might look as easily to states such as Maine, New Hampshire, Vermont, and Rhode Island, each of which has chosen to have no minimum rate regulation at all.

In emphasizing that minimum dump truck rates are an important factor in the economy, the department said:

Because the cost of so much construction is affected by such rates, their alteration can have a significant effect upon a large segment of the public. A great deal of dump truck work is done for the Commonwealth and for the cities and towns; if the rates for trucking related to the building of roads, public buildings and other public works go up, obviously taxes must be affected. Likewise, trucking costs are a component of the eventual price of goods in the market place.

The department felt that it had to be particularly careful during an inflationary period not to take unwarranted action in rate proceedings which could have the effect of aggravating an already difficult economic situation. Although aware that dump truck owners are themselves affected by inflation, the D.P.U. concluded that the burden was still upon the owners to establish that existing minimum rates were not adequate. With this burden of persuasion in mind, the D.P.U. found

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3 As where the carrier, hoping to gain a competitive advantage, agrees to carry five and one-half tons at the minimum rate set for five tons.

4 As where the carrier purchases sand or gravel from a supplier and sells it to a contractor, rather than acting as carrier for the sand or gravel. The carrier sells "his" commodity at a profit margin which is less than the minimum rate he would have received as a carrier.

5 D.P.U. 16368 (March 1971).
§1.5. **No testimony which would warrant a finding that costs had so increased as to make the present rates confiscatory.** The department decided that any change in the minimum hourly, tonnage, or yardage rates would, in the light of the record, be wholly arbitrary, and it ordered that the existing rates and charges remain in full force and effect.

After acknowledging its responsibility for establishing minimum rates, the D.P.U., consistent with its present consumer-oriented philosophy, nevertheless felt constrained to comment that its experience indicated such minimum rates are not desirable.

Minimum rates have two general effects, neither of which is helpful to the general public. First, minimum rates protect marginal carriers who find it difficult to provide adequate service, and who—in an unregulated economy—would probably be driven out of business. Second, minimum rates discourage efficient carriers from maximizing their efficiency, since—regardless of how efficient they become—there is always a rate floor which prevents them from passing on potential savings to consumers. We recognize that Chapter 159B is based on a desire "to foster sound economic conditions in such transportation" (of property by motor carriers) (G.L., c. 159B §1). Sound economic conditions are not served by development of rate schedules which protect carriers which are not equipped to provide adequate service. We believe that the Massachusetts public will, in the long run, be better served by permitting the rates of this industry to adjust themselves on the basis of a free economy. Such a philosophy will admittedly result in the failure of some carriers. But it is our view that rate regulation ought to have as its primary objective the protection of the public, rather than the protection of the regulated industry.6

§1.6. **Regulations on billing and termination procedures for residential customers of gas and electric companies.**1 On December 16, 1970, the Department of Public Utilities put into effect a series of regulations designed to protect the residential customers of gas and electric companies. Specific procedures were provided for billing, termination of service, and appeal by the customer of disputed portions of a bill.2

6 Ibid.


2 Ibid. Regulation 1—Application. The following regulations "relate solely to bills rendered to residential customers by gas and electric utilities."

Regulation 2—Billing and Payment. This regulation provides in part: "All utility bills . . . shall be payable upon receipt, provided that no bill rendered by a company which bills on a monthly basis shall be considered 'due' for purposes of General Laws Chapter 164, Section 124, [termination of service] . . . in less than 45 days from receipt or unless time that has elapsed between receipt of such bill and receipt of the most recent previous bill for the company services, whichever period is greater." The regulation then provides for an extended payment period when a company bills upon the basis of periods longer than one month. This regulation also provides: 'No disputed portion of a bill shall be considered 'due' for such purposes during the pendency of any com-
Shortly after the effective date of these regulations, a number of utility companies instituted an action against the D.P.U., pursuant to G.L., c. 25, §5, and applied to the Supreme Judicial Court for a stay of the

plaint, investigation, hearing or appeal under these regulations."

Regulation 5—Actual Meter Readings and Estimated Bills. This regulation provides in part: "If a company uses an estimated billing procedure, it shall—at least every other month—make an actual meter reading and render a bill for the appropriate amount determined by such reading." This regulation then makes provisions in cases where the company is unable to make an actual reading other than by direct refusal of permission by the customer, as well as when the customer makes meter reading unnecessarily difficult.

Regulation 4—Termination of Service. This regulation provides in part: "Service can be terminated only if: a bill is not paid within 45 days from receipt . . . and the company not earlier than 30 days after receipt of the bill gives the notice required by Chapter 164, Section 124 of the General Laws of its intention to terminate on a date not earlier than 48 days after receipt of the bill; and the bill remains unpaid on the termination date indicated on the written notice. . . . [T]he company shall, however, be entitled to terminate service for failure to pay the portion of any bill as to which there is a complaint, investigation, hearing or appeal pending under these regulations. The company shall, however, be entitled to terminate service for failure to pay any portion of a bill which is not the subject of a complaint, investigation, hearing or appeal pending under these regulations. If a customer notes a dispute under Regulation 5, the utility may terminate service only as provided in this regulation and only if full payment of any disputed amount has not been made:

1. within 7 days after the decision of a complaint officer . . . which has not been appealed, after the company has determined that no appeal has in fact been taken; or
2. within 3 days after receipt of a decision by the Department of Public Utilities on an appeal which is unfavorable to the complainant; or
3. within 21 days of the date the customer appeals to the Department of Public Utilities if no final or temporary order by such Department is rendered within such time."

Regulation 5—Investigation and Appeal Prior to Termination. This regulation provides that a customer notify a representative of the company prior to termination that any matter relating to billing is disputed; that the company shall refer the matter to any company-designated complaint officer who shall investigate the customer's complaint and shall send notice in writing to the customer that the bill was inaccurate or substantiating its accuracy and advising the customer of his right to appeal within 7 days from the decision of said complaint officer; and that if within 7 days of the complaint officer's decision the customer notifies the D.P.U. that he wishes to appeal said decision, a representative of the department shall notify the company of said appeal and thereafter conduct an investigation, which investigation shall not be construed to be an adjudicatory proceeding as defined by G.L., c. 30A.

Regulation 6—Final Order. The department shall, after an investigation in accordance with Regulation 5, make a final order with regard to the complaint.

Regulation 7—General Right to Investigation and Hearing. This regulation provides that any person aggrieved by any action of a utility company allegedly in violation of these regulations may require an investigation under the provisions of said regulations.

Regulation 8—Multiple Meters. This regulation states that it shall be the policy of all gas and electric utilities to discontinue the practice of billing each residence unit in a multiple residence unit on the basis of an estimated allocation made from readings from a single meter, and that said utility shall convert to a system whereby each residence unit to be billed has a separate meter measuring only the service rendered to that unit. This regulation then provides for temporary procedures to be utilized by the utilities pending conversion.

3 G.L., c. 25, §5, provides in part: "An appeal as to matters of law from any final decision, order or ruling of the commission may be taken to the supreme judicial court by an
department's regulations. The stay was granted on February 9, 1971. Thereafter, the Massachusetts Law Reform Institute and the Massachusetts Welfare Rights Organization petitioned the Supreme Judicial Court for permission to become respondents, and their petition was allowed. The following include some of the interesting legal issues which may be raised in the pending case: (a) whether there were findings of fact as to the necessity of the regulations prior to their adoption; (b) whether the appellate procedure for customers meets due process standards, particularly with regard to the hearing before the D.P.U. representative (the proceeding does not require a record, findings of fact, or conclusions of law, and there is no further appeal); (c) whether statutory rights to an adjudicatory proceeding can be eliminated by an administrative regulation; and (d) whether the utility companies have standing under G.L., c. 25, §5 to appeal the adoption of these regulations.

C. Legislation

§1.7. Acts of 1971, c. 1093. Chapter 1093 provides for assessing certain utility corporations for the payment of part of the cost of operation of the Department of Public Utilities. This legislation, which has received the vigorous support of the D.P.U., is important because it provides the department with funds to study rate systems and to compensate consultants in hearings on rate petitions for the benefit of the consuming public. The philosophy behind this statute is particularly compelling at a time when the resources which the petitioning company can allocate toward the development and presentation of its case greatly outstrip those which the Commonwealth makes available for representation and protection of the consumer. Chapter 1093 authorizes the overseeing commission to make an assessment against all electric, gas, telephone, and telegraph companies based upon operating revenues derived from sales within the Commonwealth. This assessment is to be made at a rate not exceeding 1/4 of 1/10 of 1 percent, to be determined and certified annually by the commission "as sufficient to produce $250,000.00 in revenue." The funds produced by these assessments are to be used by the department along with other general funds to assist in defraying the general operating expenses of the department and may be used to compensate consultants in hearings on rate petitions filed by a company subject to the assessment.

aggrieved party in interest by the filing of a written petition praying that the order of the commission be modified or set aside in whole or in part."

§1.7. 1 House Bill 5386, amending G.L., c. 25, was enacted as Chapter 1093 of the Acts of 1971. It was signed into law by Governor Sargent on Nov. 15, 1971, and was to become effective on Feb. 13, 1972.

2 The D.P.U. is under the supervision and control of a seven-member commission. See G.L., c. 25, §2.