§23.1. Public utility rate regulation: Standards of judicial review in Massachusetts; Effects of inflation on the regulatory process: Significance of management prerogatives. The regulation of public utilities has always implied an effort to keep prices down in the face of generally rising prices for the services which the utilities rendered. In the United States the legal question of whether, under the Constitution, the states had the power to regulate utilities was settled positively by the Supreme Court in *Munn v. Illinois*.\(^1\) In this case a utility was described as private property imbued with a public interest.\(^2\) Immediately after the affirmation of the power of the states to regulate utilities, the courts dealt with the question of how the amount which utilities could charge would be determined. The Supreme Court decided that the methods used in determining the charges were very important in balancing the interests of the public and that of the private corporation in *Smyth v. Ames*.\(^3\) Generally speaking, the proper level of utility revenues is determined by multiplying the dollar amount of the utility in service to the public by the rate of return judged "fair" in order to arrive at a total revenue figure. Under the *Smyth v. Ames* type of standard, the dollar amount of utility in service to the public is litigated and adjusted with respect to inflation and costs. The fair value of the utility in service, according to the Supreme Court, included original cost of construction, value of permanent improvements, market value of securities and other specific items on a company's books.\(^4\) This fair value standard is a composite of several different valuation methods which were all to be weighed by a court.\(^5\) Valuation of the plant and equipment became a fertile source of court appeals due to the uncertainty of the standards included in fair value and the fact that the valuation of plant and equipment usually is the largest part of any utility's total investment.\(^6\) State commissions

\(^1\) 94 U.S. 113 (1877).
\(^2\) Id. at 126.
\(^3\) See 169 U.S. 466, *modified in rehearing*, 171 U.S. 361 (1898).
\(^4\) 169 U.S. at 546-47.
\(^5\) P. GARFIELD AND W. LOVEJOY, PUBLIC UTILITY ECONOMICS 59-60 (1964) [hereinafter cited as Garfield and Lovejoy]. The problem is that actual cost may include either the historical cost, prudent investment or original cost method of computing valuation of plant facilities already in service. Each yields a different value depending on individual utility circumstances and the state of its books. Id.
\(^6\) Garfield and Lovejoy at 56.
§23.1 PUBLIC UTILITIES

were generally bound to the fair value standard after 1898 and before 1944.\(^7\)

In 1944 the Supreme Court retreated from the standards of *Smyth* by suggesting in *FPC v. Hope Natural Gas Co.*\(^8\) that the result reached, and not the method employed, was most important in utility regulation cases.\(^9\) The FPC (and by implication any state commission) was no longer obliged to use any particular method of valuation.\(^10\) Method of computation has therefore diminished as an issue in regulatory litigation. The actual impact of the rates is now more important than the theory which the regulatory commission applies to determine the rates.\(^11\) The *Hope* decision freed states from federally imposed constitutional standards.\(^12\) After *Hope*, many states abandoned the theory of fair value as a determinant of public utility rates. However, during the late 1950's the number of fair value states was again rising.\(^13\) The rise in fair value states has been attributed to judicial recognition of inflation after World War II.\(^14\) The inherent flexibility of the fair value method lends itself particularly to the need for fine inflationary adjustments.

Massachusetts, on the other hand, has since 1914 adopted a form of prudent investment as its standard.\(^15\) The prudent investment standard is predicated on the assumption that capital honestly and prudently invested should generally yield a particular return. Utility rates are then set at a level which guarantees that the utility will receive the prescribed return on its invested capital. This implies that both the regulatory commission and the courts of Massachusetts prefer to adjust the rate of return when confronted with problems of inflation or cost. Since rate of return is less flexible than rate base as a mechanism for adjusting returns to compensate for inflation, decisions in Massachusetts show the strain of attempting to bend the theory to the economic reality of the times.

The 1971 *New England Telephone* case illustrates problems which are implicit in Massachusetts rate making procedures for utilities at the present time. Following a brief description of the *New England Telephone* case, this paper will analyze judicial dominance of the utility regulation process as it has evolved in Massachusetts. Particular attention will be paid to the statutory basis of review and the Supreme Judicial Court's insistence on hearing evidence *de novo* in cases alleging confiscatory rates regardless of the statutory scheme. This paper will then discuss the

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\(^7\) Joslin & Miller, Public Utility Rate Regulation: A Re-Examination, 43 Va. L. Rev. 1027, 1050-31 (1957) [hereinafter cited as *Joslin & Miller*].

\(^8\) 320 U.S. 591 (1944).

\(^9\) Id. at 602.

\(^10\) Id. The court cited with approval FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942).

\(^11\) 320 U.S. at 602; see *Garfield & Lovejoy* 73.

\(^12\) *Garfield and Lovejoy* at 73.

\(^13\) Id.

\(^14\) Id. at 77.

\(^15\) Id. at 74.

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http://lawdigitalcommons.bc.edu/asml/vol1972/iss1/26
peculiar pressures exerted upon the regulatory scheme by the post-World War II inflationary trends, and will analyze problems which have arisen under the Massachusetts regulatory process in the light of those trends. Finally, it will be suggested that the Department of Public Utilities is in fact the most appropriate agency to evaluate the quality of management in regulated utilities, a factor which should weigh heavily in the regulatory process. It will then be concluded that the judicial domination of public utilities regulation should not continue in Massachusetts because it tends to produce confusion, delay and inefficiency.

1. NEW ENGLAND TEL. & TEL. CO. v. DEPT. OF PUB. UTILITIES.16

New England Telephone and Telegraph Company (the Company) appealed certain orders and rulings issued June 10, 1970, by the Massachusetts Department of Public Utilities (the Department) on the Company's petition for a comprehensive tariff revision filed on July 15, 1969.17 The Department ordered New England Telephone not to put into effect the tariff which would produce $55,000,000 in additional revenues but rather to submit a new tariff tending to produce additional revenues of $7,713,000.18 The Company argued that the decision of the Department in rejecting the original tariff was confiscatory in nature and deprived New England Telephone "of its property and appropriate[d] the same to public uses without reasonable compensation and without due process of law, contrary to Articles X and XII of the Declaration of Rights of the Constitution of the Commonwealth."19 The decisional areas to which the Company objected included (1) the determination of rate base,20 (2) the application of a hypothetical as opposed to actual capital structure in rate computations21 and (3) the allowance of certain expenses.

17 Id., 275 N.E.2d at 497.
18 Id. at 1614, 275 N.E.2d at 497.
19 Id. at 1615, 275 N.E.2d at 498.
20 The rate base is created by adding the value of plant in service and an allowance for working capital and may include various overhead costs. Garfield & Lovejoy at 56. Rate of return on the other hand tends to be a percentage designed to yield a proper return on the net amount invested in the utility over a number of years. J. Bonbright, Principles of Public Utility Rates 149-50, 238-83 (1961) [hereinafter cited as Bonbright].
21 Since the capital structure of any company is arrived at by discrete inputs over a long period of time, arguments about whether a company was wasteful in its choices of forms of financing center around whether a structure other than that on the books should be attributed to a company. Arguments over actual and hypothetical capital structure occur because there is, at any one point in time, a hypothetical capital structure which will minimize the costs of all capital to any company, and use of a hypothetical capital structure by a public utilities commission may lower the overall costs of capital which may be presented at a regulatory hearing and thereby necessitate a lesser rate of return. Garfield & Lovejoy at 128-31. The Company objected to both parts of the standard regulatory equation, i.e. rate base x rate of return = revenues. 1971 Mass. Adv. Sh. at
The Company raised several objections to the Department's determination of rate base. The first involved the disallowance of the Company's claim that the year-end dollar amount of physical plant in service should be used as part of the rate base as opposed to an average test-year figure. The Company argued that the year-end amount was necessary to protect it from erosion of its rate base and subsequent attrition of its rate of return as a result of inflation. Inflation allegedly caused investment and expenses to grow faster than revenues. Therefore, the Company contended that the year-end figures more accurately represented the actual investment of the company. Since the Department had historically used the average plant investment over the test year in computing the rate base, the Supreme Judicial Court held that it was a discretionary matter for the Department to use average plant investment as the criterion unless "that particular practice resulted in rates which are confiscatory."

Closely allied with the above allegation was the Company's claim that the total amount of plant under construction should be included in the rate base at the amount reached at year-end. The Department permitted the Company to add to the rate base only the interest or similar cost of capital used for the new plant until it actually went into service. Citing the fact that there is a considerable split among jurisdictions on how this sort of problem should be treated, the Court held that no constitutional principle required the Department to use the value of the plant under construction rather than the cost of capital to determine the rate base during construction.

The Company also contended that money on deposit with various banks should be included in the rate base. The Court sustained the Department's finding that the Company had not sustained the burden of proof of showing how much of the aggregate amount was held in banks to avoid paying service charges to the banks (an amount includable in rate base) and how much represented money accumulated for payment.
of dividends, plant construction or the payment of interest (amounts not includable in rate base).\(^{30}\)

The Company further refused to deduct the amounts of the federal investment tax credit which it received from its basis in plant and equipment in the years in which it received the credits. Instead, the Company placed the amount of the investment credit into a reserve account of "unamortized investment tax credit" which it then deducted yearly from its basis, predicated on the deductible amounts on the yearly proportion of the total useful life of the article for which the original investment credit had been obtained.\(^{31}\) The result of this accounting method was to defer the reduction in rate base and give the Company both a larger rate base and the use of the money not paid in taxes. This would produce a double return. The Court held that deferral of the reduction in rate base, while an acceptable accounting practice, was not justifiable given the regulatory context in which it occurred.\(^{32}\)

The rate of return portion of the regulatory formula was appealed on two general grounds. The first involved the application of an actual as opposed to a hypothetical debt-equity ratio while the second concerned the determination of actual cost of debt and equity capital and therefore the actual rate of return which the Company was to receive as a result of this particular round of rate hearings. Although the Court had previously upheld the Department's use of hypothetical debt-equity ratios\(^{33}\) it noted that the use of hypothetical as opposed to actual debt-equity ratios was an issue to be decided on the facts of each case.\(^{34}\) In the particular case, this determination by the Court meant that the Company's planned move to a position of 45% of total capital as debt (which took place on September 1, 1970) was a factor which had to be reflected in the Department's assignment of debt-equity ratio.\(^{35}\) The Court found that the 45% debt ratio was within a range of reasonableness and the Company should not be penalized by an assumption of a 50% debt ratio by the Department.\(^{36}\) The Court rejected the Department's contention that the Company's previous issue of equity in a period of relatively low debt interest rates while issuing $175,000,000 worth of debentures in a period of relatively high debt interest rates was questionable within a regulatory context.

The Department made its determination of the cost of debt capital

\(^{30}\) Id. at 1626, 275 N.E.2d at 504-05.
\(^{31}\) Id. at 1626-27, 275 N.E.2d at 505.
\(^{32}\) Id. at 1627-28, 275 N.E.2d at 505-06.
\(^{33}\) Id. at 1629, 275 N.E.2d at 506.
\(^{34}\) Id.
\(^{35}\) Id. at 1630-33, 275 N.E.2d at 507-09.
\(^{36}\) Id. at 1633-34, 275 N.E.2d at 509. When a 50% debt ratio is attributed to a firm whose actual ratio is 45%, the 5% difference between the two figures means that the firm has 5% less equity capital cost attributed to it and therefore will have a total cost which is less than its actual cost for capital, since debt as a rule has a lower cost than equity does.
before the actual issue of the $175,000,000 of long-term debt. It used the testimony of the witnesses before it, who were unanimous in their opinion that the proposed debt issue would cost 8%. Actual cost for the issue was 8.73%.37 Since new evidence can be introduced during judicial review of rate cases,38 the 8.73% figure, the Court held, had to be taken into account for the determination of the cost of all long-term debt of New England Telephone. Composite cost for debt is an actual figure in the Court's decision.

The Company questioned whether the figure of 9.9% return on equity capital was a fair rate of return and above the line of confiscation. The Court held that it was not.39 The Court expressed displeasure over the fact that the Department, the finder of fact in the case, was also statutorily empowered to call its own witnesses as if it were one of the adversaries in the case.40 Although the Department had called only one witness according to the Court and the Company had called three witnesses on the matter of the proper rate of return upon equity capital, the Department consistently followed the figures which its own witness produced on return for both equity capital and a figure for composite return on capital.41 Although the Court did not base its decision on any single factor, it is clear that the failure of recent stock offerings by New England Telephone to produce anticipated capital was also a major factor in the Court holding "that a return of nothing less than 11% on equity capital will be sufficient to attract new stock capital to the Company at its actual debt ratio of about 45%."42 The Court then applied the capital costs which it had determined to the Company's actual capital structure and computed the minimum composite cost of capital to be 8.615%.43

On a number of expense items used in computing the rate base, the Company successfully challenged the figures allowed by the Department. The Supreme Judicial Court required the Department to determine and consider the amount of expected or known change in federal income taxes, Social Security taxes, municipal taxes and wages.44 Furthermore, the Department had disallowed a portion of the Company's advertising expense on the grounds that it was designed to improve the image of the company rather than provide information to consumers.45 Since there was "no finding by the Department that the total amount spent for advertising is more than reasonably necessary,"46 the Court held that the Department should not question the judgment of management that

37 Id. at 1635, 275 N.E.2d at 510.
38 G.L., c. 25, §5.
40 Id. at 1640-41, 275 N.E.2d at 513.
41 Id. at 1641-42, 275 N.E.2d at 513.
42 Id. at 1643, 275 N.E.2d at 514.
43 Id. at 1644, 275 N.E.2d at 515.
44 Id. at 1645-47, 275 N.E.2d at 515-17.
45 Id. at 1648, 275 N.E.2d at 517.
46 Id. at 1648, 275 N.E.2d at 517.
the advertising expenses were a cost of good service. 47 Similarly, the Court found that charitable contributions, disallowed by the Department, were a proper operating expense if reasonable in amount. 48

In its appeal, the Company put pressure upon the whole regulatory equation. It asked for upward reevaluation in rate base and rate of return, arguing that its revenues were not yielding a sufficient return for the amounts invested in the public service. Basic to these claims was the decision by the Company that it had been adversely affected in the public service by increased costs caused by general economic conditions. In its search for what it considered the proper level of return the Company encountered the Department, seemingly statutorily entrusted with the task of overseeing utilities' profits and efficiencies in the interests of the public. Both the Company and the Department implicitly based their opposing views of the treatment of inflation and its sub-issue of utility efficiency on the Massachusetts statutes dealing with utility regulation. As will be later seen, the statute covering judicial review of Department decisions, Mass. G.L., c. 25, §5, has had a unique interpretation by the Supreme Judicial Court which underlies the interpretation of inflation arguments inevitably made by the Company and attempts to adjust Company efficiency assayed by the Department.

II. Judicial Review of Administrative Rate Making

The limits of judicial review of administrative rate making in Massachusetts have to a large extent been governed by the interpretation of G.L., c. 25, §5 [the Statute]. This judicial interpretation of this statute has produced a peculiar standard of review, perhaps unique to Massachusetts, which has strongly encouraged appeals from Department decisions. An early version of the Statute provided that "[t]he supreme judicial court shall have jurisdiction in equity to review ... but only to the extent of the unlawfulness of such ruling or order. ..." 49 In Lowell Gas Co. v. Department of Public Utilities, 50 the gas company sued in equity to amend a rate order of the Department on the grounds that the order was confiscatory and unlawful. The Supreme Judicial Court held that the Statute did not bar the Court from hearing new evidence and reviewing findings of fact in cases where constitutional rights are involved. 51 In a subsequent Opinion of the Justices concerning the constitutionality of compulsory automobile insurance, the Court reiterated its position:

47 Id. at 1648-50, 275 N.E.2d at 517-18.
48 Id. at 1654-55, 275 N.E.2d at 521.
49 G.L., c. 25, §5 (1932 Ter. Ed.). This Section was substantially revised in 1953. See text at note 78, supra.
51 Id. at 86, 84 N.E.2d at 815. See also Segal, Administrative Procedure in Massachusetts: Rule Making and Judicial Review, 33 B.U.L. Rev. 1, 21 (1953) [hereinafter cited as Segal].
A fundamental principle of rate making by public authority is that in general the rate so established must be sufficient to yield a fair return on the reasonable value of the property used or invested for doing the business after paying costs and carrying charges. Rates not sufficient to yield such return are unjust, unreasonable and confiscatory. . . . The making of rates may be treated as a legislative or executive function. "In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause. . . ."\(^{52}\) (Emphasis added).

The Court thereby rejected the usual standards of judicial review of administrative decisions\(^{53}\) and adopted, where confiscation of property is alleged, the view of the United States Supreme Court in Ohio Valley Water Co. v. Ben Avon Borough.\(^{54}\) According to the Supreme Judicial Court, the Ben Avon doctrine applied equally to Articles I, X and XI of the Declaration of Rights of the Massachusetts Constitution in the utility regulation context.\(^{55}\)

In 1928, the Court made it clear that the Statute did not permit appellants to introduce new evidence in an attempt solely to reverse findings of fact by the Department of Public Utilities.\(^{56}\) However, if the appellant wished to make a claim of right under the Constitution of the Commonwealth, he could introduce evidence not presented before the Department to support that claim.\(^{57}\) Twenty years later, despite arguments that the United States Supreme Court had vitiates the Ben Avon doctrine by its decision in Federal Power Commission v. Hope Natural Gas Co.,\(^{58}\) the Supreme Judicial Court upheld its earlier rule: since its past decisions in the field of rate regulation in Massachusetts rested on the Declaration of Rights, any change in the Ben Avon rule did not affect Massachusetts rulings.\(^{59}\) The Court further stated that when constitutional rights respecting rates were involved, the rule that the Court could not review or revise "pure findings of fact" by the Department of Public Utilities would not apply.\(^{60}\) This stand on utility rate regula-


\(^{54}\) 253 U.S. 287 (1920).

\(^{55}\) 251 Mass. at 611, 147 N.E. at 700.


\(^{57}\) Id. at 142, 159 N.E. at 745.

\(^{58}\) 320 U.S. 591 (1944).


\(^{60}\) Id. at 84-85, 84 N.E.2d at 814.
tion conflicted with the position taken by the Supreme Judicial Court in other administrative areas, not involving constitutional claims, during the same period.61

The Supreme Judicial Court illustrated the theory of confiscation which grew out of the Declaration of Rights in a series of cases which were part of the country-wide round of Bell System rate cases in the late 1940's.62 In New England Telephone & Telegraph Co. v. Dept. of Pub. Utilities,63 the central case in Massachusetts, (hereinafter the 1951 Telephone case) the parties had stipulated the facts which were to come before the Court.64 After analyzing its concept of judicial review in connection with the rate case before it and drawing heavily upon its reasoning in Lowell Gas,65 the Court said:

It is elementary that the fixing of rates is not a proper judicial function. On the other hand, where a rate established by a public regulatory body is attacked as confiscatory the Constitution of this Commonwealth and seemingly still that of the United States require that there be a full opportunity for judicial review as to both fact and law. . . . It is the contention of the company here that the rates set up by the order of the department . . . do not permit a fair return upon the property of the company devoted to the public service and are confiscatory. That issue is before us in all its aspects.66

Although the Court reiterated that it was beyond its power to fix rates, the Court was adamant in its statement that it would investigate all aspects of the confiscation issue raised by New England Telephone. The Court stated that it had a duty

to draw to the best of our ability the line where confiscation begins, and in the circumstances of this case, in order to make our decision as useful as possible and not merely the starting point of a series of attempts to ascertain by the method of trial and error just what figure this court would allow to stand, it seems that we should state where in our judgment on the evidence before us that line must be drawn.67

61 Segal at 21.
63 327 Mass. 81, 97 N.E.2d 509 (1951).
64 Id. at 84, 97 N.E.2d at 511-12.
66 327 Mass. at 85-86, 97 N.E.2d at 512.
67 Id. at 95, 97 N.E.2d at 517.
Even where the parties had stipulated the facts which had been introduced below, the Supreme Judicial Court still felt compelled to delineate the minimum rates which should be allowed New England Telephone and it insisted on additional evidence to facilitate that determination.

Despite the 1925 interpretation of the Statute as the remedy to an owner pleading confiscation of his property, the judgment in the 1951 Telephone case confirmed the proposition that whenever unconstitutional confiscation of rates was pleaded by the utility company, the presence or the absence of mere statutory powers to review the decisions of the Department were irrelevant. Indeed, the Court went further in the 1951 Telephone case in discussing G.L., c. 25, §5 in terms of its effect solely as a remedy against the Department of Public Utilities. Investigating the construction of the Statute, the Court decided that the word “modify” enabled it to rewrite directly the Department’s original order without sending the case back to the Department for rehearing.\(^68\) G.L., c. 25, §5 thereby speeded up the final disposition of a successful utility rate fight following judicial review. Therefore, the Company saved time and did not have to refile under the rate decision of the Court.\(^69\)

The Department had anticipated the result in the 1951 Telephone case after the decision in Lowell Gas. The Department correctly reasoned that the introduction of an allegation of unconstitutional confiscation could consistently reduce the Department to the status of an easily circumvented body. Under the Lowell Gas rationale the Department could statutorily only delay the ultimate hearing and decision before the dissatisfied public utility appealed to the Supreme Judicial Court on the grounds of confiscation of its property. While the 1951 Telephone case was being fought, the Department reacted to the Lowell Gas case by filing legislation in 1949 and 1950 designed to change the scope of review of Department decisions.\(^70\) In 1950, the annual message of the Governor attacked the Court interpretation of the regulatory appeals process, characterizing it as a basic defect in the law and suggesting that with such a process Department control over public utility rates was futile.\(^71\) The Governor advocated that findings of fact by the Department should be final, for under the rule of the Lowell Gas case, the public utility had everything to gain and nothing to lose by not acceding to a Department rate decision.\(^71\) Despite support from the Governor, the legislation filed by the Department died in the Senate in both 1949 and 1950.\(^72\) At its next filing, the Department signified that it was willing to omit provisions it had previously insisted upon: specifically, a proposal that facts supported by substantial evidence be treated as conclusive.\(^73\) But the Department

\(^{68}\) Id. at 99-101, 84 N.E.2d at 519-20.
insisted that if the Lowell Gas rule were allowed to stand, then this rule “would relegate the functions of the [Department] to a mere testing ground for the legality or illegality of proposals by these companies.”

This expansive interpretation of the guarantees against confiscation, which the Department attempted to change, goes far beyond the usual bounds of due process which other courts use in connection with review of administrative agency decisions. The 1951 recommendation by the Department elicited a request for an advisory opinion and a consolidation of the Court’s position.

It, therefore, was entirely consistent for the Supreme Judicial Court to suggest in that advisory opinion one year after the 1951 Telephone decision that

there is no constitutional requirement, even in a case involving a claim of confiscation or of other violation of constitutional right, as to the precise method by which the court must review a commission’s finding of fact, provided the method is fully adequate to enable the reviewing court to make certain that it has before it all available pertinent evidence on the constitutional issue and provided that, as to that issue, the court is free to act upon its own independent judgment as to both law and fact.

Since the Court had determined in the 1951 Telephone case that G.L., c. 25, §5 is irrelevant in cases involving claims of confiscation and therefore that the evidentiary restrictions imposed by Section 5 did not apply, the Court still insisted in the 1951 advisory opinion that it had to be free to act both on law and fact in a confiscation case and that the final determination of confiscation was a judicial question.

In 1953, the General Court sought to restrict review by the Supreme Judicial Court in these cases solely to matters of law. G.L., c. 25, §5 as amended provides that

No evidence beyond that contained in the record shall be introduced before the court, except that in cases where issues of confiscation or of constitutional rights are involved the court may order such additional evidence as it deems necessary for the determination of such issues to be taken before the commission and to be adduced at the hearing in such a manner and upon such terms and conditions as to the court may seem proper.

The legislature further provided that the burden of proof would be on the appellant to show that Department decisions were erroneous and

75 Segal at 22-23 & nn.77-85; Garfield & Lovejoy at 40-43.
77 Id. at 683, 106 N.E.2d at 262.
79 G.L., c. 25, §5.
that no evidence was to be introduced on appeal except that evidence already on the record before the Department.\textsuperscript{90}

On its face, the Statute as amended appeared to prohibit judicial review of the Department's findings of fact and the admission of new evidence on appeal. In practice, however, the scope of judicial review was unchanged. The Supreme Judicial Court's insistence on complete discretion to review both law and fact on appeals involving constitutional rights makes the Statute as amended meaningless. It should be noted that the utility companies have consistently pleaded confiscation in appeals from Department rate making decisions. In basing the scope of its review on constitutional grounds, the Court has effectively precluded the possibility of limiting that scope except with the Court's own acquiescence, or by constitutional amendment. It is submitted that the historical existence of a statute in Massachusetts which originally permitted the adducement of new evidence before the Court coupled with the subsequent judicial interpretations of Article X of the Declaration of Rights of Massachusetts has severely weakened the powers of the Department to regulate utilities and has also prolonged the battles over rates which almost inevitably wind up before the Court. The initial Department decision rarely stands. The 1953 amendments to the review statute did not materially alter this situation, and it remained vulnerable to the same interpretation it had been designed to restrict. The 1971 round of rate appeals bear this out.

Recent utilities regulation cases appealed before the Supreme Judicial Court have shown the utilities careful to plead the issue of confiscation.\textsuperscript{81} Furthermore, the Boston Gas case, the Mystic Valley Gas case as well as the 1971 Telephone case have in common significant time lags between original test years and the date evidence was offered to the Supreme Judicial Court. The existence of a considerable period of time between the original test year upon which a Department decision is based and the time when a final appeal of a confiscation case is decided means that the Court does not review the rates on the basis of the evidence which the Department originally worked with. Rather, the Court may consider actual facts which may not have been predictable by the Department. The Court recognized this problem in 1949.\textsuperscript{82}

It is clear that the Court, despite protestations that it is doing nothing of the sort, is actually indulging in rate making by defining the border between confiscation and fair rate. The amended form of G.L., c. 25, §5 becomes irrelevant when the Court is concerned with a claim of confiscation. In answer to an objection by the Department of Public Utilities

\textsuperscript{80} Id.


that the evidence being used in *Boston Gas* had not been adduced before
the Department the Court recently claimed that:

> [t]he third argument [dealing with non-hearing of evidence before
> the Department as set forth in the statute] is rendered irrelevant
> because we direct the D.P.U. to verify the evidence, at further rate
> hearings if necessary, and, if verified, to take it into account there­
> after in accordance with principles stated in this opinion.83

On the one hand this attitude on the part of the Court can be de­
defended as an expression of impatience with the delays created by appeals
from regulatory cases. On the other hand, this attitude emphasizes the
relative lack of power of the Department when dealing with utility com­
panies seeking higher rates. Despite the revised statute, the Court still
deals with confiscation cases as if all evidence could be introduced before
it in the first instance. Although the statute purports to limit the Court's
jurisdiction to hear new evidence, the Court still finds it advisable to
set itself up as the primary body in the area of rate regulation once an
appeal has been initiated. The Department appears to function as a
rubber stamp upon the remand of a case which the Court has actually
decided.

The Supreme Judicial Court applied this theory to the 1971 *Telephone*
case. In this case, as in other recent utility cases, the Department is
charged with knowledge at the time of its initial decision of what will
happen in the intervening time between the rate decision and the ult­i­
mate decision by the Court. In fact, the Department was penalized for
having guessed the economic conditions which would actually transpire.
A review by the Court is less a review of the decision which the De­
partment made on the basis of the test year originally presented to them
and more a review of whether the Department's projections matched
the facts as they subsequently unfolded. Evidence which has been pro­
duced before the Supreme Judicial Court and upon which the Court
has made its decision is verified by the Department upon remand by the
Court.84 Since the Court, it is assumed, does not pretend to expertise
in the area of rate regulation, the accuracy of the evidence before it
and its interpretation is presumed by the Court. The premise of expertise
is implicit in the original act of the legislature creating a commission to
oversee utilities rather than leaving the problem to the courts as a
primary matter.

### III. Public Utility Regulation in an Inflationary Period

Regulation of utilities in general is a phenomenon which first occurred
in the nineteenth century. The Supreme Court of the United States first
acknowledged the power of the states to regulate rates in 1877 in *Munn*

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§23.1 PUBLIC UTILITIES

v. Illinois.85 Because utility regulation originated in the nineteenth century, a period of relatively stable and even arguably decreasing prices,86 utility regulation itself is predicated upon an assumption of stable economic conditions.87 By the end of the nineteenth century, new natural monopolies in electrical, gas and telephone service had sprung up which were regulated under the state police powers first exposed by Munn v. Illinois. These public utilities were also initially regulated in periods of little inflation or of actual deflation.88 The post-World War II economic world did not retain the characteristic of stable price patterns which originally faced public utilities and their regulators. There has been varying inflation since World War II coupled with large scale expansion among the public utilities due to an increased demand for utility services derived from a generally better standard of living.89

The post-World War II inflation has affected all regulated utilities. In the case of telephone service, the substantial growth of the demand for telephone services which had built up during the war90 required significant expansion by the telephone companies. Rapid growth on the part of a regulated utility makes it necessary for repeated trips to the capital market.91 Inflation combined with company expansion means that there are substantially higher costs with the addition of plant facilities while the revenues of a regulated firm tend to remain steady. This is so because the regulated utility is not free to raise its prices in response to higher costs as non-regulated firms are.92

Inflation causes two essential problems: regulatory lag and higher capital cost for each consumer of the utility service. The utility regulators have fashioned several new methods by which they may compensate for the inflationary component of economic life which has continued since World War II. They are (1) compensation for regulatory lag; (2) adequate allowance for depreciation (where replacement cost exceeds the original cost of equipment); (3) allowance of a higher dollar return on capital investment to offset lowered dollar purchasing power; and (4) periodic revision of individual rate schedules to bring these into line with current prices of substitute products or services.93 In other words, the utility must be allowed additional operating revenues if it has shown either that (a) its rising costs have exceeded previous allowances for revenue, or (b) its current revenues are based on a formula which was

85 94 U.S. 113 (1877).
87 Joslin & Miller at 1034 n.34.
88 Id. at 1033.
89 Id.
90 Id.
92 Id. at 363.
93 Bonbright, Public Utility Rate Control in a Period of Price Inflation, 27 Land Econ. 16 (1951).
admittedly out of date at the time of its allowance because of a time lag between the original rate request and the regulator’s final decision. Once it has been determined that the utility was adversely affected in some way by inflation and that it needs additional revenues, the problem is one of devising the rationale which will fit the allowance of revenues. Analytically, the rationale can only stem from solutions (2), (3) or (4) above. Any one or combination of these may satisfactorily arrive at an allowance of additional revenue. However, political results may vary with the alternatives adopted. In Massachusetts, any argument over the effects of inflation on rate making devolves into a discussion of the effects of regulatory lag and the need for a higher dollar return on capital investment. For example, the Supreme Judicial Court, in the 1954 Telephone case rejected the Company’s contention that in periods of inflation the fair value of the company’s investment should be a major part of the rate making procedure. The rejection of fair value was of course based on a decision by the Department, made at some early point in the history of utility regulation, to make a policy choice in favor of original cost. Most adjustments for inflation are therefore made

94 For example, alternative (2) changes the rate base figures in the general regulatory equation, i.e., tariff per consumer = (rate base x rate of return) ÷ number of consumers (assuming a simple situation with one flat tariff for each discrete customer). Alternative (3) changes the rate of return figure. Both (2) and (3) have the tendency to supply the illusion to the consumer and other observers that an across-the-board change is taking place in the rates charged. On the other hand, alternative (4) adjusts the portion of the equation relating to the tariff per consumer end of the equation and tends to cause political problems if used since it can easily be perceived as a selective means of raising revenues.

95 The Court quoted a previous case, Donham v. Public Service Commissioners, 232 Mass. 309, 313, 122 N.E. 397, 399 (1919): “The rule established . . . is that under the Massachusetts law ‘capital honestly and prudently invested must under normal conditions, be taken as the controlling factor in fixing the basis for computing fair and reasonable rates,’ and that ‘such rates are to be allowed as will yield a fair return upon such investments.’” New England Tel. & Tel. Co. v. Dept. of Pub. Utilities, 331 Mass. 604, 614, 121 N.E.2d 896, 902 (1954). The Court later states that “In this state of the authorities we shall not adopt at this relatively late date a construction of the Constitution of this Commonwealth which compels the use of any particular theory . . . for determining a rate base . . . We would not be justified in laying hold of any part of our fundamental law for the purpose of overriding the department merely because a particular approach to rate regulation was not used.” Id. at 616, 121 N.E.2d at 903.

96 Fair value is a method of determining rate base associated with Smyth v. Ames, 169 U.S. 466 (1898) which considers depreciation, actual cost and reproduction cost new less depreciation, with each input being weighted. Garfield & Lovejoy at 57.

97 There is a problem here in that it is difficult to tell from the opinions what the Court feels is the actual regulatory theory which the Department is functioning under. For example, in the 1954 Telephone case, the Court equates the prudent investment theory with that of original cost. 331 Mass. at 616 n.1, 121 N.E.2d 403 n.10. However, Garfield & Lovejoy define the prudent investment theory and the original cost theory as two separate ways of working with facts. In this
within the figures for the rate of return. Among theorists the dispute centers on the question of whether the fair return on capital theory, or the payment of enough revenues in order to fairly "hire" utility capital, should include some sort of an adjustment upward for the ravages of inflation, especially in light of the fact that investors in other forms of securities do not have the opportunity to make inflationary adjustments. Massachusetts decisions do not directly consider these factors, but the theories are constantly in the background of Massachusetts regulation. The Massachusetts decisions do consider the regulatory lag argument and the necessity to compensate investors for the slippage which has occurred in the value of their investment in order to continue attracting further investors as capital sources for the utilities. The Court's interpretation of G.L., c. 25, §5 compliments the Court's perception of the needs of regulated utilities during periods of inflation. Since the Court will not hear cases solely on the basis of the evidence presented before the Department, the introduction of new evidence upon a confiscation charge is actually part of the introduction of an inflation adjustment argument. Thus, the Court has said that inquiry . . . on the issue of confiscation is not confined to the findings of the department or to the evidence introduced before the department. . . . A determination of rates is necessarily made in large part upon a view taken through the dim lenses of prophecy. When a rate order is challenged on constitutional grounds in this court, our observations must be undertaken with the improved vision of intervening experience.

The Court is obviously concerned with the problems which occur as a result of regulatory lag. There is some question whether the intervening experience fosters improved vision or justifies continued use of the de novo power of the Court to review regulatory cases. In 1952 the Court justified its insistence on the preservation of the right to introduce new evidence in a confiscation case by arguing that:

in view of the inevitable delays sometimes encountered in the de-

system, original cost is the total investment cost of constructed and acquired property when first devoted to public service, less depreciation. Prudent investment, on the other hand, is the historical cost (defined as the construction and acquisition costs including additions and betterments, less depreciation), less any amounts which are wasteful or dishonest. Prudent investment carries an assumption that the utility has not been wasteful or dishonest. Garfield & Lovejoy at 57.

For the proposition that there should be upward adjustments for inflation, see Morton, Rate of Return and the Value of Money in Public Utilities, 28 Land Econ. 91 (1952); see also numerous articles in Public Utilities Fortnightly; contra, Clemens, Some Aspects of the Rate-of-Return Problem, 30 Land Econ. 32 (1954); Thatcher, Cost-of-Capital Techniques Employed in Determining the Rate of Return for Public Utilities, 30 Land Econ. 85 (1954).

cision of these cases, especially in times of rapidly changing costs, the court might sometimes be compelled to decide upon evidence already outdated and no longer applicable to the existing situation. Moreover, intervening experience may furnish the very best guide and should not be excluded from consideration, especially where violation of the Constitution is at stake.\textsuperscript{100}

Regrettably, this sort of regulatory lag argument is not consistent with the fact that the Department and the Court agree that Massachusetts is an original cost jurisdiction which does not take into consideration reproduction cost and only tries to determine what should be the proper return to induce the prudent investor to supply capital. The concepts of original cost and the test year however, assume a relatively stable price system. These conditions do not exist at the present. The original cost theory further assumes that the rates which are finally set will have enough of a buffer built in that any subsequent increase will not hurt the utility. The buffer does not work under the present system because the Court insists on giving the minimum rate of return which the utility may have. The Department tends to use this minimum rate as the basis for its further decision and therefore refuses to build in any extra compensation to protect the utility against the further course of inflation. Thus, unless the utility places some buffering in the figures which it presents to the Department or is purposefully inefficient in the test year operation in anticipation of this sort of situation (neither of which is supposed to be encouraged by the regulatory system), the utility will be forced to come up for rate adjustments over shorter periods of time in order to retain a relatively stable earnings picture. The Court, on the other hand, with its insistence upon the introduction of new evidence through G.L., c. 25, §5 is more realistic in assuming the existence of a relatively inflationary price system and that the original observations of the Department must be corrected. When New England Telephone argued that the Department did not give sufficient effect to inflationary trends by asking that both the rate base and rate of return be adjusted, the Court answered in effect that the rate base was not the point at which to quibble about inflation.\textsuperscript{101} With reference to rate of return, however, the Court had stated in an earlier case that the Department should not require "the cost of stock capital to be ascertained by reference to some supposedly normal period and in disregard of the stubborn facts existing in the period when the capital must be raised. . ."\textsuperscript{102}

Even if the Department is not tied to a "normal period," it still is trying to spot a trend by observing economic patterns at one specific point, and applying whatever projection of trends it can deduce from the history of costs for the particular utility. The Court, with its insistence upon the

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\textsuperscript{100} Opinion of the Justices, 328 Mass. 679, 690 106 N.E.2d 259, 265 (1952).
\textsuperscript{102} 327 Mass. at 94, 97 N.E.2d at 516.
\end{flushright}
introduction of new evidence has a second, more recent point of reference. It may therefore construct a line with a slope and can interpret what the Department could only try to prophesy. But, as the Department report of 1971 Telephone case observed, "fair rate of return for this company is not one that changes from day to day or month to month. If adequate capital can be raised over reasonable time spans at reasonable rates, the requirement of fairness is met."\textsuperscript{103}

The Court and the Department both recognize that the Company's operations must be observed over a period of time if an accurate prediction of the future of the utility is to be made. However, there is disagreement over which observations are most valuable. The Department feels that conclusions drawn from observation of the general long-term operation of the Company are more accurate while the Court attaches greater weight to the events and forces surrounding the Company's decision to ask for a new rate schedule. Each view has some merit. The Department's approach enables it to penalize and control any long-term mismanagement of the utility. On the other hand, the Court's view addresses the problems encountered in a period of high inflation.

It is suggested that the better way to deal with inflation is to insist on frequent Department reviews of the rate schedules and structures of utilities, particularly in an inflationary economic situation which may adversely affect their rate base and their ability to "hire" capital. If the Department were not emasculated by the Court's hospitality to appeals for confiscation, utility companies such as New England Telephone would then approach the Department more frequently for rate adjustments and the adjustments could be made with greater precision. At present, if the adjustment for inflation in the tariff schedule is excessive, the utilities may simply avoid rate hearings in order to continue making a substantial profit in a period of lesser inflation on rates which are predicated upon assumptions of relatively higher inflationary rates. The adequacy of the rate structures should be examined more often for the benefit of all parties involved.

IV. MANAGEMENT PREROGATIVES

The disagreement between the Department and the Court with regard to the treatment of an admitted inflation is reflected in other areas of the 1971 Telephone case. The most significant of these areas is the basic disagreement between the Department and the Court over the role of the Department in overseeing management decisions. In the 1971 rate case the disagreements between the Department and the Court concerned the use of a hypothetical rate base and the inclusion of expenses in the years after the test year (which the Department was charged with

knowing) in the determination of the overall rates.\textsuperscript{104} The Department had attempted to explain its interest in the management of New England Telephone in the following manner:

"That return, [the Massachusetts decisional standards of a fair rate of return required for a company to earn the cost of its capital] moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."

Implicit in this standard, however, is a requirement that the company management must operate the company upon a reasonably economic basis. The company is not guaranteed a fair rate of return. It is entitled to charge rates which will produce a fair rate of return if the business is conducted in a manner in which the public may reasonably expect it to be managed. The department cannot dictate financial policy to the management. On the other hand, if management elects an uneconomic fiscal policy, the fair rate of return does not require that the company be compensated for the extra costs caused by its uneconomic policies.\textsuperscript{105}

Apparently the Department had not been impressed with the recent management decisions of New England Telephone. The Court quoted in its opinion three areas of dissatisfaction which the Department had registered: (1) failure of the Company to follow the judgment of the Department with regard to the proper debt ratio; (2) failure to elect liberalized depreciation under the Internal Revenue Code; (3) permitting the service level in Massachusetts to deteriorate markedly in the months preceding the rate hearings.\textsuperscript{106} The Supreme Judicial Court was not persuaded, on the basis of its theory of management prerogative, that the reasons that the Department advanced for limiting the rate of return of New England Telephone should control.\textsuperscript{107}

Since the Court had permitted the application of hypothetical capital ratios in the 1951 and 1954 Telephone cases it became necessary for the Court to distinguish the refusal to use hypothetical ratios in the present case. In the 1951 Telephone case, New England Telephone proposed to go from a 62% debt ratio to a 33 1/3% debt ratio in a short space of time. The Department disagreed with the Company and claimed that a better reduction of debt would be to a position of 45%.\textsuperscript{108} The Court agreed with the Department on this matter:

\textbf{We agree of course that a public regulatory board cannot assume the management of the company and cannot under the guise of rate making interfere in matters of business detail with the judgment of}
§23.1 PUBLIC UTILITIES 665

its officers reached in good faith and within the limits of a reasonable discretion. . . . [I]n this instance, in the circumstances now existing and especially in proceeding upon the "cost of capital" theory, the debt ratio is not a matter of that kind. . . . [T]o say the department could not even consider debt ratio would be to blind its eyes to one of the elements in the problem before it. . . . Yet the evidence shows that such a decision under present conditions might well double or even triple the cost of new capital and increase correspondingly the burden laid upon the public for obtaining it.109

The Court essentially felt that actions on the part of the management of the corporation, even though they might be entirely worthy from the standpoint of loyalty to the corporation's interests on the part of the board of directors, might not be well considered from the point of view of the consuming public and therefore from the point of view of the Department.110 The Court observed that debt capital during the period involved with the rate making was very plentiful and inexpensive while the costs of raising capital through stock issues at that time were very high.111 The Department had decided that the Company's choices were generally expensive for the consumer of the utility service and were not justified by any special exigencies. It therefore penalized the Company to some extent by attributing a higher than actual debt ratio, and this decision was upheld by the Court in the 1951 Telephone case.

In 1954, New England Telephone again argued that the prerogatives of management meant that the Department could not assign hypothetical debt ratios to the capital structure of the Company.112 The Department, on the other hand, argued that the Company had flagrantly disregarded the Department's recommendations for a proper ratio of debt to equity.113 The Court held that "[a]s a matter of internal management, the company's directors had the right to determine" the capital structure of the corporation,114 but the actual ratio in light of the circumstances before the Court could be considered something in the nature of a "company luxury."115 The Court again permitted the Department to use a hypothetical capital structure. In the 1971 New England Telephone case, however, the Court chose to distinguish the previous cases before it by applying the rule which had been established in Mystic Valley Gas Co. v. Department of Public Utilities.116 In Mystic Valley the Court refuted the Department's claim that a hypothetical capital base should be used by

109 Id.
110 Id. at 90-91, 97 N.E.2d at 514.
111 Id. at 91, 97 N.E.2d at 514.
113 Id.
114 Id.
115 Id.
suggesting that the circumstances surrounding the 1951 Telephone decision had been unusual while the economics of the 1969-1970 period demanded forebearance on the part of the Department in order to fulfill its regulatory mandate. The new rule which the Court set out was: the Department may not disregard actual capital ratios "unless they so unreasonably and substantially vary from usual practice as to impose an unfair burden on the consumer."

The 1971 Telephone decision imposed no greater burden of responsibility on management decisions of a regulated utility than on those of any other business corporation. However, it overlooks a very significant factor which distinguishes utilities from other industries, namely, that any decision by the utility with regard to its capital structure directly affects the cost of service to the public in a market which is devoid of competition. There ought to be a different standard of responsibility for obtaining capital for a utility. A company decision to enter the debt markets in an inflationary period, no matter how proper in terms of management prerogative, is a move which is guaranteed to produce higher overall capital costs since interest rates almost invariably rise during periods of inflation. If a company chooses to float debt during a period such as 1969-1970 where interest rates rose to a spectacularly high level in comparison to the preceding year of the 1960's and showed indications of remaining at a high level over a short run, a regulator may justifiably conclude that the decision is unreasonable, albeit entirely within its management rights. Consider, for example, the 1951 situation where the Company decided to shift from a 62% debt position to a 33 1/3% position and subsequently did so. The decision was well within the Company's power, but the Court allowed the Department to question the business judgment of management and, in effect, to penalize management by the imputing to the Company a more reasonable 45% hypothetical debt ratio for rate setting purposes. The 1971 situation can be distinguished, perhaps, on the grounds that the difference between an actual debt ratio of 45% and the hypothetical one of 50% is not particularly large. However, the Department clearly expressed its sense that the Company's timing had been very poor since it chose an unfavorable time to go into the debt markets, costing the users of the utility service far more over a longer period of time (the life of the bond issue) than otherwise would be the case. Only if New England Telephone could prove that it sorely needed additional capital in 1969-1970 should it have been allowed to pass on the increased costs of capital to the public. The Department concluded that the Company should have moved to a higher debt position at an earlier time when interest rates were lower, and the 50% hypothetical debt ratio reflected savings which would have been realized if the Company had followed that course of action.

This decision by the Department stems from a general understanding

117 Id. at 769, n.14, 269 N.E.2d at 239 n.14.
that New England Telephone, as part of the Bell System, has problems similar to the Bell System in obtaining financing for itself. The general problem of the whole system is that the parent corporation, (American Telephone and Telegraph Co.) and most of its subsidiaries have been to the capital markets too often in the years after World War II. Bond and stock issues of the various Bell System companies are very widely represented in many different portfolios. The Bell System in general (which tended to act as a unit vis-a-vis financial matters in the past) has issued a large variety of debt securities in order to secure capital, even stooping to the issuance of warrants, which have been described as the "savings stamps of security financing." The sheer quantity and frequency of such issues have produced understandable fears of market saturation. If New England Telephone had been able to prove that it was afflicted with the problems generally assigned to the Bell System and its subsidiaries in procuring capital, then the Company's decision to shift to a 45% debt ratio at that time would not appear unreasonable, and the Court's decision in the 1971 Telephone case would be correct. However, in the absence of such proof, there is a problem in defining whose usual practice it is to increase debt figures during high interest periods. Is New England Telephone here to be compared with the average industrial company (which would rarely have an Aaa rating if carrying 45% debt), with other utilities (whose debt ratios tend to be considerably higher on the average), or with another regional telephone company (with different expansion and capital needs predicated on the uniqueness of the region)? Comparison to other industries and utilities is very difficult in the case of a telephone utility. The comparison is especially difficult in light of the standard which the Court has said the Department must consider, namely, whether the behavior of the regulated company has placed an unreasonable financial burden upon the consumer of the utility. By determining that the Department cannot posit a hypothetical capital ratio on the grounds that the Department is invading the company's managerial prerogative the Court has itself invaded the province of the Department of Public Utilities.

V. Conclusion

Regulation of public utilities in Massachusetts developed under a statute which allowed review by the Supreme Judicial Court of both law and fact. Later, the Court held that due process considerations flowing from the Declaration of Rights meant that review by the Court of

both law and fact under a constitutional standard rather than a substantial evidence standard was necessary to prevent confiscation of a utility's property in the public service. The existence of the appeals statute was immaterial. The essential immateriality of the statute granting review in regulatory cases has been demonstrated by the 1971 Telephone decision, despite extensive revision of the appeals statute in 1953. This revision was designed to control the problems arising out of the Court's interpretation of judicial review under the original statute in the Lowell Gas case of 1949. Since the Court's interpretation is founded on the Declaration of Rights, little can be done statutorily to relieve the interpretation which effectively emasculates the Department of Public Utilities in its statutory duties of overseeing the conduct and rates of public utilities in Massachusetts.

The Court's policy of review of facts has led it to frequently pass on the proper level of rate of return upon capital invested for the production of public services. This, in effect, is rate making. Furthermore, this willingness to review fact as well as law is a powerful incentive toward appeal which aggravates the problems of rate regulation in an inflationary context, since the appeals process consumes time and accentuates the slippage of revenues due to inflation. Since the rate set by any regulator is a figure designed to average out over a period of years (a higher return at the beginning if one assumes inflation and company expansion offset by a lower return later), the introduction of new evidence before the Court throws off the averaging process. The Department, at a disadvantage in forecasting because it obviously does not know the contours of the future, is liable to be reversed by the Court. The Department of Public Utilities is thus deprived of discretion which it should have to balance the utilities' desire for profits against the interests of the consuming public.

The 1971 Telephone case also illustrates the extent to which interference with internal corporate decision-making will be tolerated to achieve utility compliance with standards which the Court may wish to see in the areas of financial management, overall company efficiency and provision of adequate public service. The Department has a legislative mandate to oversee utilities. However, its discretion is severely confined under the present decisional standards because the Court has stated that managerial prerogative may be questioned only when unreasonable; the Court forgets that what may be unreasonable for a public utility because of the nature of its mandate to serve the public may not be unreasonable in other corporate settings. Barred from effectively setting rates, the Department is also prevented from guiding utility operations through consideration of both public and private interests.

The Court, despite protestations to the contrary, has installed itself in the business of rate making. Although public utility rate making may not warrant any particular expertise, the General Court did establish the Department of Public Utilities with the intention that it develop
expertise in the determination of a proper balance between public and corporate interests. The Court, therefore, has stepped into the role of the Department and applied its standards of rate determination; it has thereby created an inconsistent system which, in the long run, hurts the public.

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