

## Louisiana Law Review

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Volume 36 | Number 1

*The Federal Rules of Evidence: Symposium*

Fall 1975

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# PUBLIC UTILITIES LAW ANTHOLOGY: VOLUME I. International Library, Inc., Arlington, Virginia, 1974. 803 pp. \$59.95.

Frederick Davis

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### Repository Citation

Frederick Davis, *PUBLIC UTILITIES LAW ANTHOLOGY: VOLUME I. International Library, Inc., Arlington, Virginia, 1974. 803 pp. \$59.95.*, 36 La. L. Rev. (1975)

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## BOOK REVIEW

PUBLIC UTILITIES LAW ANTHOLOGY: VOLUME I. International Library, Inc., Arlington, Virginia, 1974. 803 pp. \$59.95.

*Frederick Davis\**

Although it offers little in the way of original material, the *Public Utilities Law Anthology* is an extremely valuable and useful collection of articles, particularly for the academician attempting to keep abreast of developments in this field. While the price of the volume appears somewhat prohibitive, the publishers apparently believe that anthologies of law review articles tied together with overview comments and elementary indices can answer real informational needs, since the publishers have previously released two advertising law anthologies<sup>1</sup> and are planning others.<sup>2</sup>

Many law schools no longer offer courses dealing with the unique legal problems common to public utilities, despite mounting evidence that an appreciation of such problems is not easily acquired in a general course dealing with government regulation of business. In a similar vein, the literature dealing with the legal problems of public utilities regulation is lacking. Although a number of academicians who are not lawyers have prepared useful and informative treatises on the subject,<sup>3</sup> Professor William K. Jones appears to be one of the few legal scholars currently writing in the area.<sup>4</sup> Other lawyers and law teachers have, of course, made invaluable contributions to the literature,<sup>5</sup> but few have contributed

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1. ADVERTISING LAW ANTHOLOGY: VOLUME I (1973); ADVERTISING LAW ANTHOLOGY: VOLUME II (1974).

2. Letter from Philip A. Garon, Managing Editor of International Library, Inc. to Frederick Davis, Dec. 10, 1974.

3. *E.g.*, I. BARNES, THE ECONOMICS OF PUBLIC UTILITY REGULATION (1942); J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES (1961); M. GLAESER, PUBLIC UTILITIES IN AMERICAN CAPITALISM (1957); H. KOONTZ, GOVERNMENT CONTROL OF BUSINESS (1941); THE REGULATED BUSINESSMAN (J.A. Larson ed. 1966).

4. W.K. JONES, CASES AND MATERIALS ON REGULATED INDUSTRIES (1967). Homage should be given, however, to earlier scholars and their very helpful treatises. *See* A.J.G. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION (2 volumes, 1969); F.X. WELCH, CASES AND TEXT ON PUBLIC UTILITY REGULATION (1961).

5. Helpful discussions of public utilities law are found in PUBLIC UTILITIES FORTNIGHTLY, now in its ninety-fifth volume, and in the ANNUAL

what might be called integrated treatments of the subject.<sup>6</sup> Thus, this anthology should have obvious appeal for both the professor and the utilities lawyer, although it has the usual shortcomings of an anthology: unevenness, lack of symmetry, and the absence of any unifying theme or consistent writing style.

Twenty-seven law review articles of exceptional value make up the body of the anthology. One could categorize these articles in various ways, but for this review the selection can be neatly divided into eight divisions: functional overviews, consumerism, natural gas regulation, procedure, refusals to deal, taxation, economic theory, and tort law.

Professor Melvin Dakin has contributed an original "Overview," which, while consisting of only eight pages, is of considerable assistance to the reader in placing in context the articles and their treatment of the various subjects.<sup>7</sup> For example, Professor Richard Pollock's discussion of the highly esoteric relationship between income tax collections from public utilities who employ accelerated depreciation options and the regulatory requirements of "flow through" or "normalization"<sup>8</sup> would have been virtually unintelligible to this reviewer without the explanation by Professor Dakin, who is

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REPORTS OF THE SECTION OF PUBLIC UTILITY LAW OF THE AMERICAN BAR ASSOCIATION. Sections of two significant treatises are devoted to the unique problems of public utilities. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 139-66 (1973); L. SCHWARTZ, *FREE ENTERPRISE AND ECONOMIC ORGANIZATION* 647-807 (4th ed. 1972). Of many articles dealing with the special problems of utilities regulation, two (other than the discussion of Professor W.K. Jones which is reprinted in the Anthology) which this author has found unusually helpful are Cramton, *Some Modest Suggestions for Improving Public Utility Rate Proceedings*, 51 IOWA L. REV. 267 (1966) and Dakin, *The Changing Nature of Utility Rate Regulation: Just Compensation, Due Process and Equal Protection*, 36 TUL. L. REV. 401, 411 (1962).

6. The comprehensive treatise by Ellsworth Nichols is focused more on "rate of return" problems than on what Professor W.K. Jones has identified as the "operating-service" and "economic-environmental" cycles. E. NICHOLS, *RULING PRINCIPLES OF UTILITY REGULATION: RATE OF RETURN* (1955); E. NICHOLS & F.X. WELCH, *RULING PRINCIPLES OF UTILITY REGULATION: RATE OF RETURN* (Supplement A, 1964). The division of the problems of utility regulation into three cycles is found in Jones, *An Example of a Regulatory Alternative to Antitrust: New York Utilities in the Early Seventies*, 73 COLUM. L. REV. 462, 551-54 (1973). Also found in 1 PUBLIC UTILITIES LAW ANTHOLOGY 157, 248-51 (P. Garon ed. 1974) [hereinafter cited as ANTHOLOGY].

7. Dakin, *Overview*, in ANTHOLOGY at xv-xxii.

8. Pollock, *The Effect of Alternative Regulatory Treatment of Tax Depreciation on Utility Tax Payments*, 26 NAT'L TAX J. 43 (1973) in ANTHOLOGY at 503.

knowledgeable in the fields of both law and finance. In addition to the Dakin "Overview," the anthology contains a preface<sup>9</sup> by the managing editor of the series and an interesting introduction<sup>10</sup> by Denver University Law School Professor John A. Carver, Jr. Professor Carver directs his comments to the various subject matters covered by the anthology articles, and, like Professor Dakin's "Overview," they are helpful to the reader unfamiliar with the problems analyzed in the various articles.

Consumer challenges to the practices of public utilities have received a good deal of publicity in recent years,<sup>11</sup> and it is only natural for an anthology to republish articles analyzing the reactions to these challenges. Nine of the twenty-seven articles included in the anthology are in fact concerned with conflicts between utility policies and consumer expectations. Seven of these articles deal with procedural protections against arbitrary service terminations, including whether such terminations can be characterized as state action for purposes of the 14th Amendment.<sup>12</sup> Another deals with the so-called late payment problem and the limitations on the semantic games which utilities may play in characterizing early payments as "discount eligible" in order to avoid treating the increase over the early payment discount as a finance charge.<sup>13</sup> The last of the articles in the consumerism section deals with the now-defunct Cost of Living Council and its relative ineffectiveness in bringing utility practices into harmony with the rules governing other economic activities subject to the jurisdiction of the Council.<sup>14</sup> While the author

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9. Garon, *Preface to ANTHOLOGY* at vii-viii.

10. Carver, *Introduction to ANTHOLOGY* at ix-xiv.

11. See, e.g., Comment, *Constitutional Restrictions on Termination of Services by Privately Owned Public Utilities*, 39 MO. L. REV. 205 (1974).

12. Haydock, *Public Utilities and State Action: The Beginning of Constitutional Restraints*, 49 DENV. L.J. 413 (1973) in ANTHOLOGY at 263; Hillman, *Constitutional Law—Procedural Due Process—Notice and Hearing Required Prior to Utility Termination*, 6 CREIGHTON L. REV. 417 (1973) in ANTHOLOGY at 253; Ilardi, Jr., *The Right to a Hearing Prior to Termination of Utility Services*, 22 BUFFALO L. REV. 1057 (1973) in ANTHOLOGY at 37; Note, 86 HARV. L. REV. 1477 (1973) in ANTHOLOGY at 419 (1974); Note, 58 IOWA L. REV. 1161 (1973) in ANTHOLOGY at 467 (1974); Note, 48 N.Y.U. L. REV. 493 (1973) in ANTHOLOGY at 521 (1974); Note, 34 OHIO ST. L.J. 222 (1973) in ANTHOLOGY at 553 (1974).

13. Samuels, *Commentary: Utility Late Payment Charges*, 19 WAYNE L. REV. 1151 (1973) in ANTHOLOGY at 753.

14. Terrar, III, *A Consumer-Oriented Approach to Regulation of Public*

laments the Cost of Living Council's failure to utilize the opportunity which it had to resolve a number of ambiguities which bedevil utility regulation today, his general comments on the problems are both innovative and profound.

The unique problems of the Federal Power Commission in the regulation of the production and distribution of natural gas continue, aggravated to a considerable extent by the current energy crisis. Four articles in the anthology deal with the special problems of the controversial agency. One is simply an excellent overview of the agency.<sup>15</sup> A second deals with the little-publicized problem of harmonizing the terms and conditions for regulating the price and distribution of imported natural gas in liquefied form with the present regulatory framework governing natural gas in its normal state.<sup>16</sup> The final two articles deal with an important 1972 decision of the United States Supreme Court<sup>17</sup> upholding the authority of the FPC to regulate direct sales of interstate gas to consumers.<sup>18</sup>

Procedural problems involving public utilities implicate questions of administrative law. Three articles deal with such procedural questions. The perplexing question of the standing of a public official, the state attorney general, to challenge a decision of a coordinate state agency is thoroughly analyzed in one article.<sup>19</sup> Two others analyze the implications of the practice recently introduced by the Federal Power Commission of treating area rate-making as being encompassed by its informal rule-making power.<sup>20</sup>

The extremely important case of *Otter Tail v. U.S.*,<sup>21</sup> which *Utility Prices by the Cost of Living Council*, 23 CATHOLIC U. L. REV. 61 (1973) in ANTHOLOGY at 115.

15. Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 HARV. L. REV. 941 (1973) in ANTHOLOGY at 369.

16. Note, 13 VA. J. INT'L L. 384 (1973) in ANTHOLOGY at 723.

17. FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972).

18. Note, 6 INDIANA L. REV. 589 (1973) in ANTHOLOGY at 449; Note, 61 GEO. L.J. 833 (1973) in ANTHOLOGY at 355.

19. *City of York v. Pennsylvania Public Utility Comm'n*, 449 Pa. 136, 295 A.2d 825 (1972); Comment, *The Attorney General as Consumer Advocate: City of York v. Pennsylvania Public Utility Commission*, 121 U. PA. L. REV. 1170 (1973) in ANTHOLOGY at 707.

20. Dakin, *Ratemaking as Rulemaking—The New Approach at the Federal Power Commission: Ad Hoc Rulemaking in the Ratemaking Process*, 1973 DUKE L.J. 41 in ANTHOLOGY at 305; Mogel, *The Federal Power Commission's Authority to Set Area Rates by Rulemaking*, 5 SETON HALL L. REV. 31 (1973) in ANTHOLOGY at 581.

21. 410 U.S. 366 (1973). See the excellent discussion of this case by

found an electric utility's refusal to transport electric power from an external source to a consumer within the territory served by the utility to be (1) an arguable violation of the antitrust laws and (2) not within the primary jurisdiction of any administrative agency, is the subject of three articles, each of which expresses a different view.<sup>22</sup> Two of the articles criticize the decision, while one favors it.<sup>23</sup>

In the tax field, a first article explores the privileges and perils of a utility tax partnership created to utilize the advantages available in joint construction and operation of a commonly owned generating facility.<sup>24</sup> A highly informative discussion of the California practices and procedures explains the formulas and procedures involved in the local assessment of utility properties.<sup>25</sup> A third article involves a challenging analysis, through the use of so-called "models," of the ways in which income tax revenues from utilities which are governed by "flow through" regulatory requirements, applicable to benefits secured through the utilization of accelerated tax depreciation prerogatives, differ from those utilities which use or are required to use "normalization" techniques.<sup>26</sup> The article challenges the conventional assumption that "flow through" formulas automatically reduce income tax revenues from the utility.

In the area of economic theory, one article explores the environmental implications of a regulatory system which allegedly is not responsive to public expectations.<sup>27</sup> The second

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Mathis, *Regulatory Agencies and the Antitrust Laws—The Otter Tail Chapter*, ANNUAL REPORT OF SECTION OF PUBLIC UTILITY LAW OF THE AMERICAN BAR ASSOCIATION 21 (1973).

22. Allen, *Otter Tail and its Import for Regulated Utilities*, 9 WAKE FOREST L. REV. 407 (1973) in ANTHOLOGY at 735; Note, 23 DRAKE L. REV. 182 (1973) in ANTHOLOGY at 293; Note, 5 SETON HALL L. REV. 92 (1973) in ANTHOLOGY at 563.

23. ANTHOLOGY at 735 (approving); ANTHOLOGY at 293 (disapproving); ANTHOLOGY at 563 (disapproving).

24. Kern, *Public Utility Tax Partnerships*, 40 BROOKLYN L. REV. 77 (1973) in ANTHOLOGY at 19.

25. Bertane, *The Assessment of Public Utility Property in California*, 20 U.C.L.A. L. REV. 419 (1973) in ANTHOLOGY at 671.

26. Pollock, *The Effect of Alternative Regulatory Treatment of Tax Depreciation on Utility Tax Payments*, 26 NAT'L TAX J. 43 (1973) in ANTHOLOGY at 503. See also text accompanying note 8, *supra*.

27. Case & Schoenbrod, *Electricity or the Environment: A Study of Public Regulation without Public Control*, 61 CALIF. L. REV. 961 (1973) in ANTHOLOGY at 63.

article dwells upon the advantages of conservation and efficiency which might be obtained from fuller integration of electrical producers from different sections and regions into a power grid,<sup>28</sup> contending that the present organizational structure of our public utilities operates to frustrate the achievement of the goal.

The sole article dealing with tort liability discusses the liability exposure resulting from the use of natural draft cooling towers by utilities operating steam-electric power plants.<sup>29</sup> The engineering descriptions of the different methods used to avoid or soften thermal pollution are interesting, although that such activities will generate significant tort problems seems to this reviewer highly unlikely.

Finally, the anthology boasts two excellent analyses of particular regulatory commissions. Mr. Brasfield's study of the Virginia State Corporation Commission provides a number of interesting insights into the everyday functioning of that agency,<sup>30</sup> which this reviewer found particularly helpful in connection with his own efforts to describe the Missouri Public Service Commission.<sup>31</sup> Complementing this fine work is Professor William K. Jones' masterful description of the problems of utility regulation faced by the New York Public Service Commission during the early 1970's.<sup>32</sup> Hardly an aspect or a problem of public utilities regulation is not touched upon or discussed in this splendid monograph. The author's brilliant insights and constructive suggestions make his a discussion which should be seriously considered by all who are concerned with public utilities and their relationship to our economy in the closing quarter of the 20th Century. Professor Jones has considerably advanced the thinking on the subject of utilities regulation through his system of classifying the

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28. Breyer & MacAvoy, *The Federal Power Commission and the Coordination Problem in the Electric Power Industry*, 46 SO. CAL. L. REV. 661 (1973) in ANTHOLOGY at 617.

29. Comment, *Considerations of Potential Tort Liability with Respect to Natural Draft-Cooling Towers Associated with Steam-Electric Power Plants*, 6 AKRON L. REV. 47 (1973) in ANTHOLOGY at 1.

30. Brasfield, *Regulation of Electric Utilities by the State Corporation Commission*, 14 WM. & MARY L. REV. 589 (1973) in ANTHOLOGY at 771.

31. Davis, *The Missouri Public Service Commission*, 42 U.M.K.C. L. REV. 279 (1974).

32. Jones, *An Example of a Regulatory Alternative to Antitrust: New York Utilities in the Early Seventies*, 73 COLUM. L. REV. 462 (1973) in ANTHOLOGY at 157.

problems into three interrelated and interdependent cycles: (1) revenue-financing, (2) operating-service, and (3) economic-environmental.<sup>33</sup>

Despite the broad coverage of the articles, the anthology is hardly a work of reference. There is no subject index in the traditional sense, although the editors have created a helpful "Selected Subjects Index."<sup>34</sup> The editors have also provided an index of leading cases<sup>35</sup> as well as a bibliography of articles and notes cited in the texts of the materials comprising the anthology. Regretfully, the index supplies neither the page in the anthology nor the page of the article in which the authority is cited.<sup>36</sup>

Nonetheless, the work does bring together in one volume a series of informative and thought-provoking discussions of significant problems which might otherwise escape the attention of those interested in the contemporary problems of public utilities law. The teacher will find it particularly useful, especially in connection with a general course or seminar dealing with the legal problems of public utilities. No other work provides a better introduction to the spectrum of critical relationships between our public utilities and our legal systems.

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33. *Id.* at 551-54 in ANTHOLOGY at 248-51.

34. ANTHOLOGY at 795-98.

35. *Id.* at 791-94.

36. *Id.* at 799-803.