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Chapter 15: Public Utilities

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C H A P T E R 1 5

Public Utilities

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A. COURT DECISIONS

§15.1. **Administrative exemptions from zoning regulations.** The Supreme Judicial Court, in a case of first instance presented by the town of Wenham, had occasion to define the powers of the Department of Public Utilities under G.L., c. 40A, §10, which permits the Department to authorize a zoning variance to a public service corporation.¹ The statute authorizes the Department to grant a variance from the local zoning by-law or ordinance if, on petition of the utility, the Department, after public notice and hearing, finds the variance “reasonably necessary for the convenience and welfare of the public.” On petition of the Haverhill Gas Company such notice was given and a hearing was convened. The land in question was situated adjacent to the Boston & Maine Railroad at a point where the high pressure natural gas line passed through. The gas company intended to construct a metering station at this point. The Department made detailed findings of fact as a result of the hearing and concluded in terms of the statute that the variance was reasonably necessary for the convenience and welfare of the public.

The appeal of the town was on the grounds that the proposed location was not the “most economic and efficient” one and that no credible evidence had been adduced at the hearing to indicate efforts to purchase more “suitable” sites.

The Supreme Judicial Court heard the case on direct appeal on questions of law under G.L., c. 25, §5. The Court affirmed the decision of the Department holding that (1) the statute granting these powers to the Department did not require that the proposed site be, in the opinion of the Department, the best possible one, but only that it be reasonably necessary for the convenience or welfare of the public;

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§15.1. ¹ *Town of Wenham v. Department of Public Utilities*, 1955 Mass. Adv. Sh. 757, 127 N.E.2d 791.

doubt has now been resolved¹ and such advertising may now be arranged for in Boston and in the city or town where the company maintains its principal office as reported to the Department of Public Utilities.

General Laws, c. 164, §17 was amended in 1954 to extend the supervisory power of the Department to investments by electric and gas utilities in other securities as well as in bonds or notes.² Through legislative oversight, this section had never been made applicable to water companies by the cross reference Section 2 of Chapter 165. This oversight was remedied in the 1955 session of the General Court,³ and such investment of surplus funds by water companies must now have Department approval.

Following the lead of several other states, the legislature has made it a misdemeanor to fail to give way to a proposed emergency call over a telephone party line.⁴ When this legislation was originally proposed to the General Court by the Department in 1954 it was reported unfavorably out of committee because of the obvious difficulties of enforcement. That difficulty still remains, of course, though the very presence of the statute, which by its terms must be printed in a prominent place in every telephone directory, may result in fewer complaints of this nature.

§15.7. Legislation affecting motor vehicle carriers. Following a legislative investigation of the rates and practices of tow-car operators and a departmental report thereon,¹ the definition of private carrier contained in G.L., c. 159B, §2 was amended to exclude specifically persons towing cars for a consideration.² This is consistent with the interpretation which the Department of Public Utilities had previously placed on the prior statute, and merely makes perfectly clear the jurisdiction of the Department over these activities.

By an amendment to G.L., c. 159B,³ it has been made unlawful for any person to contract to pay a common carrier less than the filed rate. It has, of course, always been unlawful for the carrier itself to violate its own tariffs, and now the same penalties⁴ will apply to a shipper or contractor who is a party to such an arrangement. Thus, one who becomes a party to a rebate or similar arrangement is now not only civilly liable,⁵ but is also subject to criminal prosecution.

§15.6. ¹ Acts of 1955, c. 188.

² See 1954 Ann. Surv. Mass. Law §17.7.

³ Acts of 1955, c. 187.

⁴ *Id.*, c. 120.

§15.7. ¹ Resolves of 1954, c. 37.

² Acts of 1955, c. 569.

³ *Id.*, c. 353.

⁴ G.L., c. 159B, §21.

⁵ *Papetti v. Alicando*, 317 Mass. 382, 58 N.E.2d 155 (1944).

C. ADMINISTRATIVE DECISIONS

§15.8. **Gas, electric and water utilities: Rates.** There were several relatively important rate cases decided in the Department of Public Utilities applicable to this field during the 1955 SURVEY year. In the *Fall River Gas* case,¹ a rate complaint of the city government against retail gas rates was dismissed when it was proved that the rate of return under the rates complained of was only 4.72 percent. Similarly, in the *Southbridge Water* matter,² rates which were designed to net the utility less than 6 percent on a net original cost rate base were approved. In the *Monterey Water Co.* case,³ a return of 6.5 percent was approved for a small water system. In the case of the *Lynn Gas & Electric Co.*,⁴ the Department made it quite clear that it would not permit a utility to increase its rates above proved cost to small users in order to enable the company to introduce promotional rates at high uses. The importance in cases involving rates to particular classes of consumers of having available accurate and reliable cost studies was similarly emphasized in the *New Bedford* street lighting case.⁵

A case involving principles of substantial practical importance was before the Department in the matter of the *C & A Construction Co.*⁶ Here as in so many cases, a real estate developer had installed a water system under private property. So long as the pipes did not use the "public streets," the service was not subject to Department jurisdiction,⁷ and the contracts between the developer and his customers were binding and enforceable. But when the city accepted the streets, the service became that of a water company, and the rates had to be governed by the customary criteria applicable to such utilities, regardless of contract,⁸ the customers being relegated to the courts to determine their rights under their deeds which contained covenants purporting to govern water rates.

§15.9. **Gas, electric and water utilities: Schedules.** The Department of Public Utilities has approved the practice adopted by many gas companies, particularly the customers of the Tennessee Gas Transmission Company,¹ of inserting purchased gas price adjustment clauses in their tariffs, whereby increases in wholesale gas prices are

§15.8. ¹ Re *Fall River Gas Co.*, D.P.U. 10772, 11099 (Dec. 17, 1954).

² Re *Southbridge Water Co.*, D.P.U. 11012 (Feb. 10, 1955).

³ Re *Monterey Water Co.*, D.P.U. 11128 (Mar. 11, 1955).

⁴ Re *Lynn Gas & Electric Co.*, D.P.U. 10977 (Apr. 13, 1955).

⁵ Re *New Bedford Gas & Edison Light Co.*, D.P.U. 11048 (Feb. 23, 1955).

⁶ Re *C & A Construction, Inc.*, D.P.U. 10907, 10912 (Nov. 30, 1954).

⁷ See G.L., c. 165, §1.

⁸ Cf. *New England Telephone & Telegraph Co. v. City of Brockton*, 1955 Mass. Adv. Sh. 637, 127 N.E.2d 301.

§15.9. ¹ See 1954 Ann. Surv. Mass. Law §17.4.

§15.13. **Passenger transportation agencies: Bus company rates.** The changing social habits of the public accompanied, among other phenomena, by the enormously increased use of private automobiles has resulted in steadily diminished use of public transportation facilities which are, at the same time, the victims of the same increased cost of living that affects the rest of us. The result has been, during the 1955 SURVEY year, that numerous orders have been made on application by bus companies for increased rates.¹ There are no significant new developments to be noted in these cases. The situation of these utilities is such that, even under the proposed increased fares, they are operating on very small margins of profit, and there is little necessity for considering the factors which are of importance in other types of rate cases. In general, the tendency has been to give paramount weight to the operating ratio and to consider as of only secondary importance the questions of rate base and rate of return.

§15.14. **Passenger transportation agencies: Service.** The Department of Public Utilities had some misgivings as to its power under G.L., c. 159A to issue charter licenses for limited purposes, such as for the transportation of churchgoers, etc., and asked the Attorney General for his opinion in this regard. The Attorney General has ruled that the power to issue such licenses of general scope carried with it the power to issue limited licenses, and a departmental investigation of certain outstanding orders was consequently dismissed.¹ The practical importance of the decision bears on liability insurance costs which are much lower under a limited license.

In a case involving the transportation of students to distant schools, it became necessary to interpret the 1954 amendment to G.L., c. 159A, §11A.² It was there held that the present wording of that statute barred the issuance of a special permit to carry groups of persons along a route paralleling existing bus lines.³

The powers of the trustees of the only transportation area which has ever been established under the general enabling act⁴ have been broadly defined in a complaint as to their action in discontinuing certain service.⁵ The Department held that the regulatory authority ought not thus to interfere with the powers of management given to

§15.13. ¹ Re Pierce Bus Lines, D.P.U. 10838, 10865 (Nov. 5, 1954); Re William A. Luddy, D.P.U. 11066 (Nov. 5, 1954); Re Cozy Cab & Bus Co., D.P.U. 11143 (May 19, 1955); Re Middlesex & Boston Street Railway Co., D.P.U. 11313 (Aug. 17, 1955); Re Laporte's Bus Line, D.P.U. 11362 (Sept. 12, 1955); Re Plymouth & Brockton Street Railway Co., D.P.U. 11363 (Aug. 17, 1955); Re Springfield Street Railway Co., D.P.U. 11406 (Sept. 12, 1955); Re Berkshire Street Railway Co., D.P.U. 11407 (Aug. 17, 1955).

§15.14. ¹ D.P.U. 10690 (Dec. 27, 1954).

² Acts of 1954, cc. 307, 317.

³ Petition of McGinn Bus Co., D.P.U. 11079 (Feb. 18, 1955).

⁴ Acts of 1920, c. 599, enacting G.L., c. 161, §§143-158.

⁵ Petition of Patrons of Greenfield and Montague Transportation Area, D.P.U. 11315 (Aug. 17, 1955).

the trustees, and that the remedy of disgruntled riders as political and not administrative.

The financial plight and diminishing public use of the railroads has caused them to make major revisions in their operating schedules or other passenger service. Such proposals are almost invariably resented, sometimes quite vigorously, by the areas affected. A number of such cases were passed on during the year.⁶ The principles governing such cases are quite clear, and, probably due to the carriers' policies of not proposing such changes except as a last resort, the decisions have almost invariably been to uphold the railroads.

§15.15. Motor vehicle transportation: Rates. While the very numerous rate proceedings regarding motor vehicle carriers under G.L., c. 159B, most of which are informal in nature and are settled at staff level, are not of general interest, the minimum rate orders issued under the applicable statute¹ are very important to the numerous truckmen affected as well as to contractors and municipalities. During the 1955 SURVEY year, two of these orders were entered. The first of these orders² was applicable to the carriage of lumber and related products. It brought up to date a similar order issued in 1938 which was of doubtful validity and was badly in need of revision. The second such order³ revised a 1952 minimum rate prescription applicable to dump truck commodities and was based on the increased operating costs accrued since that time. It was noted in the order that the prescribed minima generally become the established rates, due to the effect of the intense competition between carriers.

§15.16. Motor vehicle transportation: Operating rights. Only three of the numerous appeals from the decisions of the Director of the Commercial Motor Vehicle Division¹ decided during the year are of general interest.

In the *Barbuto-Corrigan* appeal,² the trustee of a bankrupt corporation who had not operated the business since his appointment was deprived of his operating rights for failure to serve thereunder.³ Similarly, approval of the transfer of a certificate was denied where it appeared that such business as had been carried on was for the ac-

⁶ Petition of Boston & Maine Railroad (Lexington Branch), D.P.U. 11035 (Jan. 28, 1955); Petition of Boston & Albany Railroad (Train 31), D.P.U. 11076 (Dec. 9, 1954); Re Boston & Albany Railroad (Newton Lower Falls Branch), D.P.U. 11092 (Dec. 9, 1954); Petition of Boston & Albany Railroad (Westfield Station), D.P.U. 11115 (Feb. 4, 1955); Petition of Boston & Albany Railroad (Highland Branch), D.P.U. 11187 (June 3, 1955); Petition of City of Gloucester, D.P.U. 11287 (May 5, 1955).

¹ G.L., c. 159B, §7(c).

² Petition of Thomas Cook & Sons, Inc., D.P.U. 11025 (Jan. 5, 1955).

³ Petition of The Dump Truck Owners Association of Massachusetts, D.P.U. 10730 (July 25, 1955).

¹ G.L., c. 25, §12F; Rule 18, D.P.U. 10405(2) (May 3, 1955).

² Appeal of Barbuto-Corrigan Co., D.P.U. 11030 (Jan. 26, 1955).

³ See G.L., c. 159B, §3(c).

count of the transferee,⁴ and did not constitute the bona fide business of the transferor within the requirements of the *A.B. & C. Motor Transportation* case.⁵

In the *Goguen* appeal,⁶ the extent of the irregular route service in part of its operations was held to be such as to warrant the issuance to a carrier of a regular route certificate between those points. This decision is another example of the difficulties of administration caused by the definitions of regular and irregular route carriers contained in G.L., c. 159B, §2, which were alluded to in the 1954 SURVEY.⁷

D. ADMINISTRATIVE RULES AND REGULATIONS

§15.17. **New regulations.** Under Chapter 285 of the Acts of 1955, adoption of rules of procedure for hearings and orders in the Department of Public Utilities is now governed by the general provisions of the State Administrative Procedure Act, and the approval of the Governor and Council thereto is no longer required.

Effective July 1, 1955, and in accordance with the terms of the Administrative Procedure Act,¹ discussed at length in the 1954 SURVEY,² the Department requires any person who wishes to have a tentative or proposed decision in a case which has not been heard by the Commission to make a written request in advance.³ This regulation was necessitated by the large number of routine departmental hearings required by law, principally in the Railway and Bus Division⁴ and the Commercial Motor Vehicle Division,⁵ and which are customarily held before examiners or other Department employees.⁶ No notice was given prior to the adoption of this regulation, which contains the necessary preamble dispensing with such action.⁷

The compilation of departmental regulations required by the Administrative Procedure Act⁸ has been completed by the Department and copies are available for public use in the office of the Secretary of State and in the Department. Since the regulations are contained in five volumes and since many are of limited interest, it is not contemplated that they will be republished in toto, but they will continue to be available in sections for public distribution.

⁴ Appeals of *A.B. & C. Motor Transportation Co., Inc.*, D.P.U. 11281 (Aug. 17, 1955).

⁵ *A.B. & C. Motor Transportation Co. v. Department of Public Utilities*, 329 Mass. 719, 110 N.E.2d 377 (1953). See also 1954 Ann. Surv. Mass. Law §17.15.

⁶ Appeal of Clarence Goguen, D.P.U. 11285 (Aug. 17, 1955).

⁷ See 1954 Ann. Surv. Mass. Law §17.15.

§15.17. ¹ G.L., c. 30A, §§9, 11(7).

² 1954 Ann. Surv. Mass. Law §§14.1-14.22, 17.16, 17.17.

³ D.P.U. 11027T (July 1, 1955).

⁴ G.L., c. 159A.

⁵ *Id.*, c. 159B.

⁶ See G.L., c. 25, §4.

⁷ See *id.*, c. 30A, §3(3).

⁸ Acts of 1954, c. 681, §21.