The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

January 29, 1968

D.P.U. 15715

Request of Frank Properties, Inc. for an advisory ruling under the provisions of Section 8, Chapter 30A that its proposed arrangement for providing total energy to its tenants does not subject it to regulation as a gas company or an electric company under the provisions of Chapter 164 of the General Laws.

On July 10, 1967, Frank Properties, Inc., a Delaware Corporation engaged in the business of owning and operating shopping centers, having entered into leases with tenants under which it proposes to supply tenants with various energy requirements, commonly known as "total energy" plan, filed a request for an advisory ruling, pursuant to Sec. 8 of Chap. 30A of the General Laws, "as to the legality of the proposed plan in the light of the regulations and statutes administered ... "by the Department of Public Utilities, if it conducted activities described herein. Documents and written representations as to the operations of Frank Properties, Inc. have been received by the Department. The Massachusetts Electric Company was given an opportunity to be heard in this matter and declined this opportunity.

The promulgation of advisory rulings is discretionary with the Department. Since Frank Properties, Inc. proposes to make a substantial investment, the advis bility of which may depend in large part on the legal effect of the proposed operation and since the total energy concept is one that is receiving wide attention, 1/ the Department believes that this is an appropriate matter for an advisory

---

1/ See e.g., Address of Ernest W. Gibson, Chairman, Public Service Board of Vermont, New England Public Utility Commissioners Conference, June 26-28, 1967.

ruling. It must be emphasized that the ruling relates to the specific facts set forth in this opinion, and any variation from these facts in this or any other case might require a different ruling.

In addition, it is important that the issue we are ruling on be precisely defined. The request for the ruling states the issue in terms of "legality" which is too general. The arrangement might or might not be legal for a company subject to chapter 164. There is a threshold question, however, namely, whether this arrangement would constitute Frank Properties, Inc. a "gas company" or an "electric company" under the provisions of sections 1 and 2 of Chapter 164 of the General Laws. In this opinion we address ourselves to that question alone and we note no determination as to the propriety of this arrangement for a company which is subject to regulation under Chapter 164.

Frank Properties, Inc. has entered into leases with various tenants for a shopping center in Worcester, Massachusetts. It will purchase gas from the Worcester Gas Company and will use the gas directly, or by converting it, for all the energy requirements of the tenants. Under its lease arrangement the landlord will supply heating and chilling water for air conditioning and heating, electric current, and domestic hot water. Each tenant will pay 55 cents per annum, per square foot as an additional component of this rental.

Each lease will be for a minimum period of 10 years. During the first two years meters will be installed to measure the tenant's consumption of electricity, heating, cooling and domestic hot water. The meters will be read each month and the tenant will be furnished a copy of the reading. At the end of two years a new charge for the services will be fixed determined on the basis of the following:

(a) Average cost of filters used,

(b) Meter readings based on the unit cost for electricity at the rate of $.0131 per Kwh, heating $.0183 per unit of 10,000 BTU, cooling $.0272 per unit of 10,000 BTU domestic hot water $.125 per 100 gallons exclusive of normal water charges.

The amount previously paid by the tenant during the two-year period will be adjusted and the tenant will pay the new fixed charge during the remainder of the lease-term without regard to the quantity of energy he consumes during this period.

Our determination is governed by the provisions of sections 1 and 2 of Chapter 164, which delineate the entities that are subject to regulation by this Department and have the duties and obligations of public utilities (although that term is not used in the chapter). Section 1 determines which domestic corporations are subject to chapter 164, and is not therefore applicable to Frank Properties, Inc. Section 2, however, contains substantially identical definitions applicable to foreign corporations. The difference between the two sections is that foreign corporations are not subject to certain types of regulation, principally control of security issues.

Section 2 provides that substantially all the other regulatory provisions shall apply to

> "all.....corporations which .....operate works .... for the manufacture and sale or distribution and sale of gas .... or of electricity....."

Because of this special language defining the jurisdiction of this Department, decisions in other states relating to similar arrangements between landlord and tenants are not appropriate. In Drexelbrook Associates v. Pennsylvania Public Utility Commission, 212 A2d 237, 60 PUR 3d 175, the landlord proposed to acquire certain equipment from the electric and water company serving it. It would then buy gas, water, and electricity at certain metering points and dis-

tribute the gas, water and electricity to tenants who would be separately metered and charged by the landlord. The Commission denied the application of the companies to sell the equipment because the consummation of the transaction would make the landlord a "public utility" for which a separate authorization of the Commission was required. The Pennsylvania Supreme Court reversed. The applicable statute defined a "public utility" as one furnishing gas or electricity "to.... the public," and, the court held, service limited to tenants only was not service to the "public.".

Similarly, in Freehold Water & Utility Co. v. Silver Mobile Home Park, Inc. (N.J. Board of Public Utility Commissionwers) Docket No. 666 - 411, 68 PUR 3d 523, a mobile home park owner which supplied water to its tenants was held not to be a public utility under a statute which defined utility as a company which supplied water for "public use". Among the reasons cited by the Commission were the absence of metering, the limitation of service to tenants, and the incidental nature of the operation of the water supply as compared to the main business of the trailer park.

The Wisconsin Public Service Commission dealt with a "total energy" arrangement in re City of Sun Prairie (DR-30), 57 PUR 3d 525, (1965) and held that the landlord was not a "public utility" because the use of energy, being limited to tenants was not being supplied to the "public," as provided in the statute. It was pointed out that there would be no submetering though apparantly no reliance was placed on this fact. See also General Split Corporation v. P.&.V. Atlas Industrial Center, Inc. (Code, P.S.C. 2-4-5662) 44 PUR 3d 334.

It is the public nature of the activity which controls regulatory jurisdiction in these states. Whether gas or electricity is being sold is only incidentally relevant if at all. The cases are therefore

not persuasive in construing our statute which makes no reference to the "public," but makes regulation depend on the existence of a "sale."

On the other hand, our decisions (and those of the Supreme Judicial Court) relating to "resale" of electricity, though not directly related to possible regulatory jurisdiction over landlords, furnish useful clues as to the meaning of our statute as applied to total energy arrangements. In Boston Edison Company, D.P.U. 8862 (March 4, 1953) aff'd. sub nom Boston Real Estate Board v. D.P.U. 334 Mass. 477, we held that Boston Edison Company was justified in filing a tariff under which no power would be sold within the territory in which it sold electricity to any person purchasing the power for resale. By this tariff amendment the Company brought an end to the practice of landlords purchasing power at wholesale rates and sub-metering it to their tenants. There was no occasion to decide whether such landlords were themselves subject to regulation, but it is clear from the language that this Department and the Surpreme Judicial Court considered that the practice constituted a "resale." Compare E. W. Perry, Inc. D.P.U. 7697 (October 31. 1947); Boston Edison Company D.P.U. 8228 (October 19, 1949).

If Frank Properties, Inc. proposed to meter the electricity or gas consumed by each tenant and charge on the basis of the meter reading, we would be constrained to hold that this constituted a "sale" of gas or electricity, subjecting Frank Properties, Inc. to regulation under Chapter 164. Michael Lowell d/b/a Dorimore Trailer Park, D.P.U. 11694 (July 8, 1957). This is not such a case, however. The charge which the landlord proposes to make covers far more than the use of electricity or gas. It includes, for example, heating and cooling. Although the fuel cost may be a component to his charge to

the tenant, it cannot be separately stated apart from the cost of equipment and labor necessary to provide the tenant with heat. The use of meters described herein does not make the arrangement a sale of gas or electricity. At most, only the electricity portion of the charge could be said to be said to be directly measured. The use of gas for heating and air conditioning is only indirectly measured through the measurement of heat.

The controlling fact is that over the entire course of the lease the charge will not be based on measured consumption, even of the electric portion of the charge. Because the total energy concept is new, it is difficult to estimate the portion of the rent that the landlord must charge for heat, hot water, air conditioning and electricity. The metering for the two year period merely provides a basis for estimating a fair rental of the premises. The situation is not significantly different from that of an apartment building landlord who supplies heat and hot water and electricity to the tenants without metering. The difference is that this landlord through the accumulated experience of apartment house owners is able to estimate with reasonable certainty the cost to him of supplying these services over the long run. The metering in this case provides for a new arrangement on the same basis as exists for the long standing practice with respect to apartment houses.

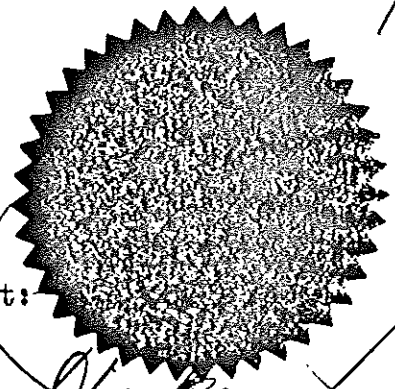
Accordingly, we believe that the arrangement described herein is rent inclusion as that term was used in D.P.U. 8862, and we rule that

on these facts the landlord Frank Properties, Inc. would not be a gas company or an electric company.

By order of the Department,

/s/ FRANCIS J. HICKEY, JR.

Francis J. Hickey, Jr.
Secretary



A ~~true~~ Copy
Attest:
Secretary

Appeal as to matters of law from any final decision, order of ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after said decision, order or ruling. (Sec. 5, Chapter 25, G.L., Ter. Ed.)