The Commonwealth of Massachusetts

Department of Public Utilities

State House, Boston 33

October 19, 1949

(D.P.U. 8228)

Investigation by the Department upon its own motion as to the propriety of rates and charges stated in M.D.P.U. No. 55 filed on May 14, 1948, to become effective June 1, 1948, by Boston Edison Company.

APPEARANCES: Frederick Manley Ives, Esq.)
F. H. Perry, Esq.)for Boston Edison Company
William F. Byrne, Esq.)for Building Owners Management
Clarence A. Roberts, Esq.)Ass'n. of Boston Real Estate Board
David H. Stuart, Esq., Asst. Atty. Gen., for the Commonwealth
Loring P. Jordan, Jr., Esq., for Quaker Building Company
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Richard J. Walsh, Esq.)for A. W. Perry, Inc.
Edmond J. Blake, Esq., for Hotel Statler Company
Lewis H. Weinstein, Esq., for Massachusetts Association of Housing Authorities
Manuel K. Berman, Esq., for Keany Square Building
Owen F. Brock, Esq., Asst. Corp. Counsel, for City of Boston
Mayo Adams Shattuck, Esq., for Longwood Towers
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Daniel Bloomfield, Esq.)for Retail Trade Association
Max R. Kargman, Esq., for Compton Building

Boston Edison Company filed to be effective June 1, 1948, a new tariff termed M.D.P.U. No.55 amending its existing tariff in certain limited respects particularly as to availability of service under certain existing schedules and establishing a new rate termed "Redistribution Rate R" available to persons reselling to others electricity purchased from the Boston Edison Company. The proposed rates were suspended by the Department on May 18, 1948, until April 1, 1949. By agreement of the Boston Edison Company made in open hearing on March 9 it engaged not to place these rates into effect, if granted, until

the effective date established by the Department in its order in this case.

Public hearings were held on the proposed rates on June 22, September 21 and 22, October 20 and 21, December 2, 7, 8, 28, 29 and 30, 1948, January 12, 13, 14, 19, 20 and 26, February 2, 3, 10, 15 and 24, and March 9, 1949. The transcript of the hearing covers 2160 pages and the evidence includes some 92 exhibits.

Boston Edison Company serves 453,787 customers' meters in Boston and thirty-nine nearby towns and cities in a territory covering some 600 square miles. Its rates to any given class of customers are uniform throughout its territory. It had a gross plant investment as of December 31, 1947, of $213,228,105, subject to a depreciation reserve of $54,321,907. This depreciation reserve, which amounts to about 25 per cent of its gross plant account, is ample, but not so large as to warrant any interference by the Department with the determination made by the management as to the proper annual accrual. The then outstanding securities of the company included $61,716,400 par value of common stock on which $41,105,947.45 had been paid as premiums, and $55,563,000 in long-term debt. Its income statement for 1947 showed a balance transferable to profit and loss of $6,786,669. It had a total surplus of $9,057,643 on December 31, 1947. Dividends paid during the year 1947 totaled $5,924,774 and were at the rate of $2.40 annually or 9.6 per cent on its stock and 5.76 per cent on its stock and premium. Gross earnings of $8,690,385 for 1947 represented a return of slightly over 5.46 per cent on plant account less depreciation. In December, 1948, the company declared a dividend payable February 1, 1949, of 70 cents a share, or at the rate of $2.80 per year, and indicated its desire to restore the $3.00 "historic" annual dividend paid prior to 1934. We do not find the earnings figures so reported to us to be unreasonable.

The Edison Company made voluntary reductions in its so-called Residential Rate B and in other rate schedules in 1940 to the extent of $800,000 yearly, in 1946 of $1,200,000 and in December, 1948, of $620,000. The level of its residential rates had been criticized from time to time as being among the highest in the country. After it had filed its annual return for 1947 in March, 1948, the Department instituted conferences which finally resulted in the announcement by the Company in November that since its financial condition would permit it to do so, it was filing rates which would result in this last reduction effective December 1.

On July 27, 1948, Boston Edison Company addressed a letter to the Department reading as follows:

> "In connection with the suspension proceeding, dockets D.P.U. No. 8228, which involves proposed rates and regulations of this Company governing the resale and redistribution of electricity by its customers, I am pleased to answer your inquiry and to state that it is the Company's intention, upon which the Department may rely, to devote the proceeds of any recovery, which may result from a discontinuance or curtailment of the resale or redistribution activities of its customers, for the benefit of those customers who take service under the residence rates, unless the Department should request a different use."

This letter was interpreted by both Edison and the Department and was intended to mean that Edison will, from time to time and as the Department orders or unless it otherwise orders, lower its B rates in such a manner that, if M.D.P.U. 55 is allowed or if reduction of the practice of submetering is accomplished in any other way, the net revenues of Edison will remain unaffected. In other words, Edison's net earnings are not going to be increased by our decision in these proceedings.

Subsequent to the filing of the proposed tariffs, in M.D.P.U. 55, twenty or more customers of the Boston Edison Company, who were members of the Building Owners Association, appearing by counsel in these proceedings, filed a request for a general investigation of the rates

and charges of the Boston Edison Company under the provisions of section 93 of chapter 164 of the General Laws. This application was docketed as D.P.U. 8255. Thereupon a motion was made by such customers to consolidate such proceedings with the pending proceedings in D.P.U. 8228. On July 28, 1948, in the exercise of its discretion, and upon the foregoing facts, the Department denied this motion.

The proposed rates in M.D.P.U. 55 together with the other provisions contained therein were designed to establish a new rate applicable to persons other than utilities or persons operating under special contracts who resold electricity to persons renting premises from the reseller. It also forbids resale of electricity by customers of the Edison Company to persons who are not their tenants.

Persons appearing in opposition to the establishment of the rates contained in M.D.P.U. 55 fall naturally into three categories. The first category, which is by far the largest group, consists of customers who own office buildings in Boston and purchase electricity through master meters for resale to their respective tenants. This practice will be referred to hereinafter as "tenant resale". The second group consists of those who purchase electricity for use and resale not only in their own buildings but also to other buildings or to the tenants of buildings owned by other persons. It may be noted that in no case in the evidence do the facilities used in the redistribution of current by these purchasers utilize the public ways. This class of user descends from the quondam so-called "block plants" and such utilization will be hereinafter referred to as "non-tenant resale". The third group of customers consists of the various Housing Authorities established under the Acts of the Legislature (Acts of 1946, c. 574; Acts of 1948, c. 200) designed to cope with and remedy so far as possible the existing housing shortage. This utilization will be

referred to as "housing authority resale".

The situation which this filing is attempting to meet arises as a result of the early efforts of the predecessors of the Boston Edison Company to establish a monopoly in the manufacture and sale of electric current within its present territory and particularly within the City of Boston. There is nothing wrong with this ambition, See Boston v. Edison Electric Illuminating Co., 242 Mass. 305. In 1912, there were within the territory sought to be served by the oompany 532 private generating plants, a substantial proportion of which were engaged in the business of selling current to others and were commonly known as "block plants". Of these, 414 were in the city of Boston. The company made every effort to buy out or otherwise get rid of this competition over a period of many years. As the company acquired, or otherwise caused to be disposed of, these individual generating plants, some of the building owners insisted upon retaining the privilege of reselling to their tenants the current supplied by the Edison Company. In view of the fact that the current supplied by the Edison Company was furnished under a wholesale step-type rate whereby the greater this amount of current passing through the master meter the less the charge per unit, and since the tenants were charged on their individual meters the applicable retail rate involving much smaller individual use and at a higher rate per unit, these particular building owners realized a substantial profit which they have enjoyed ever since. Since, as we have said, some of the generating plants superseded by Edison Company service in the early days served more than one building, there were a number of instances where the owner of the generating plant ended up by purchasing current from the Edison Company for resale not only to his own tenants but also to the tenants in adjacent buildings or sometimes in other buildings within the city block.

This campaign by Edison was successful to the point where there are at the present time none of these "block plants" in existence, and relatively few private power plants of any variety in Edison's territory. Its task was made easier in some instances by the fact that the private plant is relatively expensive, susceptible to service failures and in many cases uneconomical.

It is urged by Edison that the practice of resale of electricity was and is detrimental to the finances of the Edison Company and accordingly to the disadvantage of its other customers, since its rates are uniform throughout its territory, and since transmission and distribution costs naturally vary as between communities of high use concentration and less highly developed areas and it is normally expected that the high net revenue per customer in Boston will go to support the relatively low net in other places. But, it argues that the practice of resale has been confined to crowded business areas, where the costs are lowest, and the lower resulting net revenue per customer to the Edison Company in serving resale customers has to be made up at the expense of other users not taking service under these conditions. For the law requires, with but a few inapplicable qualifications, that this Department permit any utility to collect charges from the aggregate of its customers sufficient to cover all of its costs and leave a profit sufficient to assure confidence in the financial integrity of the enterprise so as to maintain its credit and attract new capital. They must yield a fair return on the aggregate value of all the property employed by the utility in the public service after paying costs and carrying charges. Lowell Gas Company v. Department of Public Utilities, ______ Mass.________, 1949 A.S. 327. And, obviously, the lower the revenue from one class of consumer, the higher must be the revenue from the balance of the consumers.

It was not long before the Edison Company saw the danger of condoning non-tenant resale, and by 1930 it was refusing to extend this privilege to any new customers. As a matter of fact, in other jurisdictions, other power companies had apparently arrived at the same conclusion at an earlier date. In New York City, for example, non-tenant resale has never been permitted by the dominant utility company. The practice of non-tenant resale has not increased in Boston since 1930 and is, in fact, constantly decreasing as buildings heretofore so served are torn down or drop the arrangement for other reasons. At the present time there are 93 buildings so served by non-tenant resale, involving an estimated 721 ultimate consumers. Six of these buildings, involving some 20 customers will soon be served direct by Edison, and there was evidence that five more involving some 23 customers were apparently considering installing direct service. Furthermore, it must be noted that these figures included 13 buildings containing 110 customers which are served by Quaker Building Company, a qualified electric company. Of the balance of 69 buildings, involving 568 tenants, 28 were served through A. W. Perry, Inc. Aside from four of these primary purchasers, which four situations involve special conditions, the gross present annual revenues received by Edison from customers supplying non-tenant resale amount to about $362,000.

In 1941 one of Edison's customers, A. W. Perry, Inc., which was practicing non-tenant resale and which had theretofore been supplied only with direct current by Edison, requested that Edison furnish it alternating current under the same conditions. In 1947, after much negotiation, Edison refused to do this and in D.P.U. 7697 the Department refused to compel Edison so to do on a petition brought under section 92 of chapter 164 of the General Laws. It was as a result of consideration of this decision and in its search for a means to

meet the various problems involved in this practice that the Edison Company designed and filed the rates contained in M.D.P.U. 55. Proceedings in the Supreme Judicial Court under chapter 25 of the General Laws have been commenced and are pending wherein the decision in D.P.U. 7697 will be reviewed by the Court.

Quite understandably the Edison Company is not cognizant of every instance in its territory where resale is practiced. It has, however, conducted a study which we find to be reasonably comprehensive. As to tenant resale, this study indicates that at the time it was made in 1947 there were 161 building owners buying electricity from the Edison Company under its existing commercial rate D-1 and which were reselling this current to about 8,000 tenants. There were some 33 more such customers who purchased electricity from the Edison Company under other rates, usually the industrial rate G-1, and which were reselling electricity to about 841 tenants. About 40 customers were purchasing electricity under various rates, usually the so-called D-1 rate, and were reselling current to 1549 consumers, some of whom are non-tenants of Edison's customers. There were 7 instances of housing developments involving some 4826 units where the Authority was purchasing under either the so-called D-2 or special contract rates and reselling the current to their tenants.

The present tariffs of the Edison Company as shown in M.D.P.U. No. 54 under General Wholesale Rate D-1 offer a dual rate comprised of a demand charge and an energy charge, with a fuel adjustment clause. A comparison of the proposed Rate R at various demands with the D-1 Rate and with the other rates under which service is now taken by customers who would be affected by the new tariffs, shows the Rate R to be substantially in excess of the charges under which these customers are now being billed. Under Rate R for the average large

user, about two-thirds of the profit now realized by the building owners will accrue to the Edison Company. Depending on the size and load factors of the individual customer, the R rate is from one to one and one-half cents higher per kilowatt hour than the D-1 rate. In some locations and under some circumstances, particularly as to customers now on rates other than the D-1 rate, the proposed Rate R is considerably higher than existing rates, due to the increased demand period, an increased minimum demand or other factors. However, these are exceptional cases, and the usual effect of the new rate is as we have outlined it.

Most of Edison's retail commercial customers are now served under Rate A, and that is apparently the rate generally charged by the building owners to their customers. Rate R is at a higher level on the initial steps than Rate A but, of course, the existence of the step rates might still make it profitable for the building owner to take service under Rate R and resell under Rate A, depending upon the aggregate type and amount of use. If Rate R is permitted to go into effect, there will be a natural tendency for the building owners, particularly the smaller units, to abandon the practice of resale and permit the Edison company to serve and bill the ultimate consumer direct.

What would be the net revenue effect to the Edison Company of the insertion of Rate R in the Edison's schedules as well as that of the possible abolition of the practice of resale generally by the Edison Company were matters of great dispute as between the company and the protestants. Figures were introduced as to 126 locations involving tenant resale, now taking current under the D-1 Rate, which indicated that, by the application of Rate R, the Edison Company would benefit by an annual increase of $506,677.89 in its gross revenues, i.e., the

estimated gross revenues resulting from the application of Rate R to these locations would exceed the present revenues by this amount. This is only part of the picture, since there was some testimony that the exhibits introduced by the Edison Company did not include all customers now reselling current. In addition to the foregoing D-1 customers, there are 33 tenant resale customers on various other rates. It was estimated that there would be additional annual revenue of $231,680 to the Edison Company if these customers also shifted to Rate R. If the housing authority resale customers are included, the total effect on the annual gross revenues of Edison would be an increase of about $1,095,405. All of these estimates are, however, postulated upon the assumption that all of these customers would elect to continue resale under the proposed Rate R. This assumption admittedly did not necessarily follow, since it is quite possible that any or all of them might choose either to give up the idea of resale entirely or to install private plants.

Just what would be the revenue effect of the prohibition included in M.D.P.U. 55 of non-tenant resale is a very complicated problem. By using numerous ingenious assumptions, some of which are open to serious question, it was estimated that the maximum effect upon Edison's annual revenues of this particular provision would be from $50,000 to $60,000. This is probably as good an estimate as can be made along this line. However, we do not believe the exact amount of such revenue effect is important, in view of the conclusions to which we have come herein.

In 1929, 140 customers of Edison who were thought then to be reselling electricity purchased 49,947,743 kilowatt hours of current for $1,394,503, or at the rate of 2.8 cents per kilowatt hour. It was then estimated that these customers resold at an average rate of 5 cents, making a total aggregate differential of not less than

$1,500,000 per year between what the company actually received and what it would have received had it sold its current direct to the ultimate consumers at retail rates.

It was estimated that, in the 157 locations practicing tenant resale to a substantial extent in 1947, and assuming that all the tenants were to take current direct from the Company, Edison's gross annual revenues would be increased by $1,017,950. This would indicate a net annual revenue increase to Edison in these locations after assignable expense of about $900,000. The difference in revenue to the Edison Company at locations of this nature as between resale and no resale is in the order of from about 1.29¢ to 1.65¢ per kilowatt hour. These estimates cannot be given too much weight because of the many factors which might affect revenues in case all resale, including tenant resale were flatly forbidden.

In 19 locations where such data was available, the building owners taking current for resale paid Edison an average of 2.47 cents per kilowatt hour and received from their tenants an average of 3.93 cents. At these locations, about 76% of the current which Edison furnished was resold, the remaining 24% being used for building purposes. If these ratios are applied to the 157 locations having substantial tenant resale, it would appear that 48,013,794 k.w.h. were used for resale. The difference between Edison's revenues and the building owners revenues on this assumption and for this current would be about $700,000. In addition, the balance of 15,162,252 k.w.h. used for building services would be sold on higher rate steps, although here it is impossible even to estimate the net revenue effect.

Between August 1, 1946, and November 17, 1947, there were 11 locations in Boston at which service had previously been rendered direct by the Edison Company to the consumer which locations were changed

over to a master meter arrangement. At these locations before resale was instituted, the arithmetical average of the revenue per kilowatt hour to the Edison Company was 4.75¢, ranging from 3.09¢ per kilowatt hour to 5.61¢. After resale, a similar arithmetical average of the revenue to the Edison Company at these locations was 3.38¢, ranging from 2.3¢ to 4.11¢ per kilowatt hour, depending upon the use characteristics at the various locations.

It will be noted that the only saving in expense to the Edison Company in furnishing these same buildings after resale as opposed to that before resale was in the capital investment involved in the customers' meters, the customers' meters being furnished by the landlords after the cut-over, and some small business and maintenance expense, very minor in nature. Such savings would include meter reading, billing, credit and customer accounting, meter operating, maintenance and trouble call service, together with the overhead costs assignable thereto. Judging from the level of charges in effect until 1937 for rental meters, which, it was testified, did not include any items of profit, these savings would be substantial. But an analysis of the Company's accounts clearly shows to the contrary. From these it appears that the aggregate additional annual cost per customer to the Edison Company when service is rendered direct as compared with a resale arrangement would be $7.96. On the basis of 7,113 additional customers, the aggregate annual additional cost to the company, including $37,233 in Federal Energy tax and an allowance of $1,117 for uncollectible accounts, would be in the neighborhood of $50,000. The difference per customer in this last figure, aside from taxes and reserves, is due to diminution in costs attributable to the high concentration of the particular meters involved. There was testimony that the figure of 7,113 was not an accurate estimate and that the

Edison Company would probably come closer to installing 12,000 to 14,000 additional meters to serve direct all customers now being served under the various types of resale. This makes little difference in the final conclusion, however, since the additional cost per meter would still be insignificant as compared with the additional revenue involved. It further appears that even this figure, which is arrived at through pro-rating costs, does not represent the incremental cost, since, of course, in a large organization a certain amount of additional work can always be taken up by the existing personnel. On an incremental cost basis, 7,113 additional meters would add only about $10,000 to the Edison Company's annual costs. We find that the difference in expense to the Edison Company as between the two situations is negligible and that the average net revenue loss per kilowatt hour attributable to a changeover from direct service to resale would amount to about 1.37¢, representing a 29% revenue loss.

There would be some additional expense incurred by Edison in order to give direct service to buildings now served by non-tenant resale. However, this expense would be in the nature of capital investment in new plant, and would not, except as to carrying charges thereon, be chargeable to operations. Such carrying charges are insufficient in amount seriously to affect the additional revenue which would accrue to Edison. When the Boston Edison installs new facilities for service at any location, it is and has always been its practice to furnish such facilities up to a point two feet outside the street line. From there to the ultimate use, i.e., the light, motor, relay or what not, the distribution facilities are and have been furnished by the customer or, at least, the cost of such underground or interior installation is not included in Boston Edison's plant account. To install new connections from Edison's existing street mains to the buildings now being served

by non-tenant resale, which installation would be necessary in order to provide them with direct service, would involve an average investment per building of $872 or, for the 90-odd buildings which would be involved, an aggregate of $84,584. This figure might be increased to as much as $100,000 in the course of actual construction. These installations could be and probably would be engineered for either direct or alternating current and the investment would be depreciable over a period of many years. Even assuming the figure of $250,000 testified to by the witness Shaw as the amount of new plant required, its carrying charges on this investment would be insignificant in relation to the additional revenue which would then accrue to the Edison Company.

At the present time there are seven developments under Housing Authorities in Boston Edison territory, all operating on a no-profit basis, involving some 4,826 dwelling units. They now purchase current from the Boston Edison Company under its Rate D-1 or under special contracts, and the current is resold to the tenants at actual cost. Application of the proposed Rate R to these situations would increase the cost of electric current supplied to these authorities from $139,745 to $244,950. The average increase per month per family unit would be $1.82. There are additional projects involving 6,712 additional units which are in planning and construction stages in Boston Edison territory. There are 109 Housing Authorities now established throughout the State under Chapter 200 of the Acts of 1948, involving an additional estimated 10,000 dwelling units.

It was contended at the hearings that the Edison Company should not be permitted to change its rates unless it showed a necessity for additional revenue in proceedings involving an investigation into its entire rate and revenue structures. This was the basis for the motion

for consolidation filed in these proceedings and in D.P.U. 8255, to which we have referred as having been denied by us. Our attitude in this regard is governed by two considerations. In the first place, it seems clear to us that a utility may change a rate to a particular customer upon a showing that such customer is receiving preferential treatment, irrespective of the effect of the change upon the general revenues of the company, and it is the duty of the Department thereafter to control the overall earnings picture. The question of net earnings is by no means necessarily involved in the determination as to the legality and desirability of a rate to a given class of customers. In the second place, the Boston Edison Company has agreed that any increase in its net revenues which might result from the approval of M.D.P.U. No. 55 would, in effect, be the basis for reconsideration by the Department of the level of the general residential rates charged by the Boston Edison Company. In other words, the Boston Edison Company has agreed that its net revenue picture will not be affected by our approval, if we grant it, of M.D.P.U. No. 55.

This agreement was attacked on the ground that it was an attempt to devote a part of the income of the building owners for the benefit of general residential customers, and that it was too vague for enforcement.

We do not believe that any class of consumer has any assurance as regards the maintenance of the level of utility rates for service furnished to him. To agree to such an argument would seem to us to tear to shreds the jurisdiction over utility rates given to the Legislature by the common law and entrusted by the Legislature to us. We believe that we have power at any time to decide whether any class of consumer is being charged rates which are inequitable from the standpoint of the general public and to remedy this situation. See

G.L., Chap. 164, Sec. 93. We further believe that we have power to determine that such action will not, upon the basis of the commitments of the utility company, increase its net revenues and that we may enforce such a commitment and need not open up the entire earnings structure of the utility in the course of such investigation.

A great deal of emphasis was devoted by the protestants to their claim that the Edison Company was estopped to change these rates and to improve its net earnings picture at what they claim to be the expense of the building owners, because of its actions in the past in persuading them to sell or dismantle their private plants and to purchase their current from the Edison Company.

We have had occasion before to note this practice and to point out to the Edison Company the pitfalls that lay in its path when it pursued such a policy (Consumers v. Edison Electric Illuminating Co., P.U.R. 1926A, 525). But we believe that there is no estoppel, if it may be termed so, which can operate to divest the Commonwealth of its power to order or approve a change in the rates of a public utility when it considers such a change to be in the public interest. We have so held very recently (Complaint of Mayor of Everett, etc., D.P.U. 8144) and we believe this conclusion to be supported by the weight of sound authority. See cases cited in D.P.U. 8144. Furthermore, on December 1, 1930, the Edison Company warned all of its non-tenant resale customers that it was seriously considering the advisability of forbidding all resale. True, it took no further affirmative steps at that time, nor for that matter until after the decision in the Perry case, and apparently did not feel it was even in position to do more than try to discourage extension, at least of the on-premise tenant resale practice. However, it did keep close watch over the situation, its salesmen were kept advised of the

policies of the company and at least from the time of the institution of the Perry case in May, 1947, most if not all of the building owners were aware that the Edison Company was opposed to the resale practice. Again, in 1937, it ceased its practice of renting meters to be used for such purpose.

The principal answer to this argument advanced by the objectors is that it is based upon the theory that the Boston Edison Company is a private individual. This company may, in a degree, be a private enterprise in the sense that its capital funds are furnished by private individuals. However, the State has a keen and decisive interest in its affairs, and, to all intents and purposes, they are public affairs, and not private, in so far as they involve the cost to the consumer of the service rendered by the company. So, an action of the company designed to benefit the general run of its customers and which we determine to be in the best interest of the public must, as we see it, receive our support, even though the persons adversely affected by such action may complain of individual inequitable treatment. It is for this reason that we give no weight to the voluminous testimony that the present situation has existed for many years, and that the building owners had no suspicion prior to the instant proceedings that they would even be restricted in their resale activities. And it is for the same reason that we give no weight to some testimony that at least some of the employees and officers of the Edison Company have from time to time and even relatively recently actively encouraged extension of this practice. The control of the State over public utilities cannot be limited by any actions on the part of the utilities or their customers. This power "can neither be abdicated nor bargained away and is inalienable even by express grant," and "all contract rights and property rights are held subject to its fair exercise." Atlantic Coast Line

R. Co. v. Goldsboro, 232 U.S. 548. As Mr. Justice Holmes observed, "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them." Hudson County Water Co. v. McCarter, 209 U.S. 349. See Dorsey v. Stuyvesant Town Corporation, ______ N.Y.________, 87 N.E. (2d) 541.

We are of the opinion that the Edison Company is not estopped from filing new rates and we are not prevented from approving them, if we find this action to be in the public interest.

The purpose of the proposed Rate R was frankly expressed by the company to be to increase its gross revenues and thereby to enable the company to endeavor to decrease its General Residential Rate B. It was designed to discourage the practice of resale by setting a rate which would be considerably above the existing wholesale rate and still below the point at which it would be economical for the building owner to install his own generating equipment. It was not designed on a cost basis. It is higher than the presently effective rates (Rate A, D1, etc.) to the same customers, and it was admitted that the present rates were above the cost of service to these customers.

Thus, it appears that, under the proposed Rate R, if the tenant of a building and the building itself take service direct from Edison, such service is to be supplied at the A, C or D1 rates. But if the same amount of current having identical use characteristics is purchased by the owner of the building for resale purposes, it is to be charged for at a higher rate, to wit, Rate R. We do not believe that a rate ought to be based solely on the purpose for which the commodity is to be used, when all other factors remain constant. We said in Re Boston Consolidated Gas Co., D.P.U. 4885, 14 P.U.R. (N.S.) 433, that "unless the different use creates a dissimilar condition

from that pertaining to others, mere difference in use does not justify a different rate." And see Re Nantucket Gas and Electric Co., D.P.U. 4646; Re Edison Electric Illuminating Co., D.P.U. 3402, P.U.R. 1929 D, 1. This has been the result in other jurisdictions in which regulatory bodies have considered this problem. Erie v. Pennsylvania Gas Co. (Pa.) P.U.R. 1920 B, 396; Re Green Mountain Power Corp. (Vt.) P.U.R. 1930 B, 171; Re Wisconsin Public Service Corp. (Wis.), 7 P.U.R. (N.S.) 1.Cf. Int. Commerce Comm. v. Del. L. & W. R.R., 220 U.S. 235; Crancer v. Lowden (1941), 121 F (2d) 645. The situation under the New York statute is different, since rates in that territory are specifically authorized to be graded according to the nature of the use of the commodity. Croyden Syndicate v. Consolidated Edison Co., 69 P.U.R. (N.S.) 103.

Accordingly, we find that the rates and practices contained in the proposed M.D.P.U. 55 are not just, proper and equitable and we therefore will disallow all of the proposed filing in M.D.P.U. 55.

Requests for rulings were filed by several parties, and the limitation of time in Section 5 of Chapter 25 of the General Laws was waived by stipulation. We deny the requests of Boston Edison Company for findings of facts Nos. 1, 2, 3, 4, 5 (a), 5 (b), 6 (a), 6 (b), 6 (c), 6 (d), 7 (a), 7 (b), 7 (c), 7 (d) and 7 (e). We grant its request for rulings of law No. 4. We deny its said requests Nos. 1, 2, 3, 5, 6, 7, 8, 9, 10 (a), 10 (b), 10 (c), 10 (d), 11 (a), 11 (b), 11 (c), 11 (d) and 11 (e). We grant the requests for rulings filed by the Building Owners and Managers Association of the Boston Real Estate Board Nos. 1, 5 and 6. We deny its said requests Nos. 2, 3, 4 and 7. We grant the requests for rulings filed by Quaker Building Company No. 13. We deny its requests Nos. 1, 4, 5, 6, 7, 9, 10, 11 and 12. We deny its requests Nos. 2, 3, 8 and 14 as immaterial in these

proceedings.

Accordingly, after due notice, public hearings, investigation and consideration, it is

ORDERED: That the schedules of rates and charges for electric service contained in M.D.P.U. No. 55 filed by Boston Edison Company on May 14, 1948, be and the same hereby are disallowed; and it is further

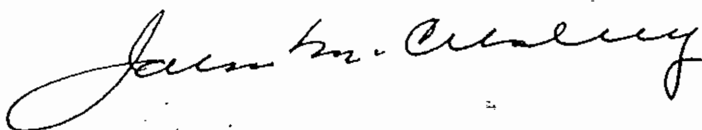
ORDERED: That the investigation in D.P.U. 8228 be and the same hereby is terminated.

By order of the Department

(signed) JAMES M. CUSHING

Secretary

A true copy,
Attest:



Secretary

Commissioner Gadsby, Concurring:

I agree with my colleagues as far as they go. My trouble is that, in my opinion, they do not go far enough. It is apparent that the Boston Edison Company is faced with a serious problem in connection with the resale of current. There was a plethora of evidence at

these hearings upon which a determination could be made on the merits as to what remedy the company should adopt to meet this problem. The fact that the proposed Rate R is not the proper answer in the opinion of the majority, in which conclusion I agree, does not, as I see it, mark an end to our duties. I believe that a regulatory commission has a positive affirmative duty in a situation where the public interest demands, to order a utility under its jurisdiction to file just and proper regulations when the commission determines that a given filing is not just and proper.

M.D.P.U. No. 55 of Boston Edison Company is a schedule of charges filed under Section 94 of Chapter 164. Under this section, the Department is authorized to suspend any such schedule and investigate its propriety. Section 94 further states: "An order by the department directing a change in any schedule filed shall have the same effect as if a schedule with such changes were filed by the company, and shall become effective from such time as the department shall order." I believe this provision, to say nothing of common sense, demands that we enter an affirmative order now rather than to put the company, the building owners and the Commonwealth through the agony and expense of further protracted hearings on identical facts. There can be no factual or legal argument used in connection with a filing by Boston Edison simply forbidding resale that has not been used in connection with this filing which attempts to govern resale by a special rate. I contend essentially that we should face the problem here and now, enter an order directing the company to file a new tariff forbidding all resale, and let the parties take the matter to the courts for review, if they so desire. I do not like decisions which do not decide or equivocations indulged in for the sake of keeping out of controversy.

It appears clearly from the evidence that, if the practice of

resale is allowed to continue, it will have very important effects upon the net revenue which the Edison Company can derive from its activities as a whole. It was contended during the hearing that the Edison Company was erecting a straw man, that the resale practice is a minor irritation which is not currently growing and that its fears as to the effect of this practice upon its future revenues were unfounded. I do not find this to be the fact. The extent of the practice at present may be gathered from the fact that, of the 366 customers of Edison taking service under Rate D-1 in 1947, considerably more than 157 were reselling current. It is true that in 1930 a study conducted by the Edison Company showed that there were 80 customers to whom the Edison Company rented meters, and that the annual average growth since that time is not alarming. Only a few of these locations in 1930, however, had any substantial number of tenants and there were only 947 ultimate customers involved. The situation in 1947 was very different and, as we have already indicated, in the 15 months ending November, 1947, there was a decided tendency among building owners to take advantage of this means of increasing their income at the expense of the Boston Edison Company. It may be pointed out that the decision in the Perry Case which has been previously referred to was handed down in June, 1947, which unquestionably adversely affected the speed at which these conversions were taking place. That the percentage increases over a period of years in amount of power sold, in number of customers and in revenue as between D-1 customers on the one hand, under which rate alone any substantial resale has been permitted, and A or B rate customers on the other is less as to the D-1 customers is not significant for many reasons, chief of which, perhaps, is the fact that the D-1 rate is available only in direct current areas, which are limited in extent and within which there had for many years been

relatively little new building. But the revenue effect to Edison is important, and the possibilities of further damage are even more alarming, particularly after we have already found in D.P.U. 7697, that there is no sound distinction to be made between customers on the type of current supplied him, and therefore it is open to alternating current customers to insist upon treatment which is identical with that afforded direct current customers. I am of the opinion that the questions of resale were and are very important to the Edison Company and that the matter should be decided in these proceedings with a view to the wide public interest involved.

There is no question but that the building owners who have been buying current from the Edison Company and reselling it have been realizing a substantial profit, which has gone into the general revenues from the property. Data concerning nineteen locations were introduced in evidence from which it appears that any building purchasing a total of over 200,000 kilowatt hours per year makes a substantial cash profit from this practice over and above the current for the building's own use (hallways, elevators, etc.). The result is, of course, that an office building which receives this revenue needs just so much less revenue from rentals, and is in a superior competitive position in the struggle for tenants. And the importance of this to my mind is that this advantage is subsidized by the other customers of the Edison Company.

What advantages Edison acquired by its bargains leading to the dismantling of the private plants have long since been paid for. The building owners have for many years had substantial profits from a business in which they have little or no investment, very small costs and few worries. And the position of many of such building owners, as in the eleven cases which have within the past two years persuaded

their tenants to take service from them through a master meter where previously their tenants bought from the Edison Company, does not recommend itself to my sense of justice. When Edison was originally engaged in buying out the generating equipment of the so-called block plants and the equipment serving the various buildings now engaged in tenant resale, it had spare capacity which it could to the benefit of the public generally devote to this use at relatively low rates. But at the present time, it is engaged in adding new generating equipment as rapidly as it can obtain and finance it. The considerations which made it good business from the public standpoint to acquire all of the load it could thirty years ago are no longer in existence. It is, in my opinion, not in the public interest longer to condone a practice which affords a profit to a middle-man from the resale of Edison's product when the basic reason for originally permitting it has vanished some years since.

There was testimony that the level of the tax assessments on these office buildings is governed, in part at least, by the earning power of the building, which, in turn, depends in part on net revenues received from the resale of electric current. Consequently, we are urged not to interfere with this practice because it might boomerang in the tax rate.

In the first place, the earning power of the building is by no means the only consideration by which the assessors must, under the law, be governed. See Massachusetts General Hospital v. Belmont, 233 Mass. 190; Assessors of Quincy v. Boston Cons. Gas Co., 309 Mass. 60. But what seems more important to me is the point I have just made, i.e., that the revenues of the building should come from the tenants and not be deducted from the income of the utility company.

Specifically, I do not believe that the diminution in gross income to the building owners resulting from the application of the proposed Rate R would substantially affect the valuations of the buildings for tax purposes.

The question suggests itself as to the effect such a provision would have upon housing authority resale. The practice which we approve in Boston Edison territory is, quite obviously, going to apply to all of these existing and contemplated developments. They are all being designed to be on this basis.

It is true that these authorities are corporate bodies politic (Opinion of the Justices, 322 Mass. 745). But the fact that public tax money may be appropriated for their use and that public credit may be used in their construction does not, in my opinion, warrant placing them in a separate rate classification. To hold otherwise would compel a public utility and its customers, who are not necessarily the same group as the taxpayers of the states or even of the utility's franchise area, to contribute to the maintenance of these developments. See Re United States Government Housing Project, (N.C.), 72 P.U.R. (N.S.) 113; D. L. Stokes & Co., Inc. v. Georgia Power Co. (Ga.), 71 P.U.R. (N.S.) 15. I see no reason why the Boston Edison Company should be required to furnish electricity to a veteran who is a resident of a housing development at a different price from that which it charges to a veteran who is not a resident of such a development. It is my opinion that the imposition of rates whose level depends upon whether the veteran's housing is partially subsidized by the government, constitutes unfair discrimination and is forbidden by law. We have refused to approve such discrimination as it applies to governmental agencies themselves. Re U.S. War Department, D.P.U. 4680. I am unable logically to differentiate between governmental agencies on the

one hand and bodies politic supported in part by public funds on the other.

We decided in the Perry case that Boston Edison Company could not be compelled to furnish current to a building owner reselling such current. In the course of that opinion, we came to the conclusion that the Perry Company was an electric company as defined in sections 2 and 3 of chapter 164 of the General Laws. We said then that we realized the implications of such a holding, and we are now faced with the necessity of either disaffirming our prior conclusions or of holding that any person who resells electricity is in the same category. I believe we were right in our prior decision.

It was argued that these persons cannot be so considered, since they do not use the highways, nor are they permitted to take recourse to the remedy of eminent domain. As to the first point, I do not believe the power of the General Court is so to be confined. I do not believe that the telephone or telegraph company which transmits its messages by modern radio beam transmission ceases to be a common carrier as defined in G.L., Chap. 159, because it ceases to use the highways. And I believe that the power of eminent domain is granted by the state to a utility for reasons of public policy, and is not necessarily an identifying feature of such utility. For example, I note that the statutes in some states grant the power of eminent domain to privately owned low-cost housing developments, yet it is not argued that this identifies such developments as public utilities.

A great deal of emphasis was placed in argument on the fact that service is allegedly not offered by the building owners to the publi at large. This is no answer. No electric utility offers service except to that portion of the public within the territorial lim its operations. Boston Edison Company holds itself out to f

service to anyone residing or having a place of business within certain well-defined limits. It does not, for example, furnish service in Charlestown, which is a part of the City of Boston, or in Cambridge or Wellesley or Springfield. But it does so within the territorial limits of some forty other communities. The building owners hold themselves out to furnish service to persons residing or having places of business within their respective buildings, and no other source of electric current is available to their respective tenants. I think that is enough, that a building contained within four walls is just as much a "territory" for the purpose of distribution of electricity as is a plot of land contained within the official boundaries of a town or city. Consequently, I feel as we intimated in the Perry case that owners who are engaged in the business of selling electricity are electric companies under the statute. None of the parties appearing before us, except Quaker Building Company, has ever admitted this, or has complied with any of the requirements of G.L., Chapter 164.

To hold that the building owners are not electric companies would strip their tenants of all the protections so laboriously established by the General Court against unfair rates and practices in connection with the furnishing of electricity. Unless they are electric companies, their tenants may be charged for service at any rates higher or lower than those quoted by the Edison Company, they have no protection against inaccurate meters, or against any of the other various discriminatory practices to guard against which this Department was originally established. A new kind of public service company would be founded under such concept, free to act as it pleased and insulated from any of the controls of public interest. I do not believe this result is consistent with sound regulation. The witness Shaw, for the building owners, admitted that, in the absence of any lease restriction,

the landlords doubtless would simply pass along to the consumers the increase represented by the establishment of Rate R, regardless of Edison's established rates. I do not imply that present building owners have been shown to charge exorbitant rates or to indulge in any of the practices we here condemn. The contrary appears so far as any of the building owners testified in these hearings. I believe sound public policy to require this decision regardless of the actual situation so long as the possibility of unfair treatment of any segment of the public exists.

This conclusion is fortified by the situation as regards manufacturing plants which sell surplus current to their employees or to the surrounding communities. I do not understand that any distinction has ever been made in these situations based upon whether the ultimate consumer was a tenant of the supplier. Historically, many of these employees so served lived in premises owned by the employer. These concerns have for many years been considered as electric companies, though their activities in this connection are a very minor and incidental part of their business. The General Court has so considered them and has made special provisions for the filing of their annual reports with the Department. See Sections 81 and 83 of chapter 164, Gen. Laws (Ter. Ed.).

It follows from this conclusion and under our holdings in the Perry case, that we ought not to require the Boston Edison Company to furnish service to a competing electric company, at least to a concern whose status as an electric company is not and has not been admitted by the concern itself. Indeed, in the last analysis, it should not be allowed to do so unless the public interest requires.

To my mind the most serious objection to the proposed Rate R is that it is intended to and does establish a rate classification based

on a character of use which we have condemned in what I thought were adequately plain words. I do not believe we should, under the statutes as they now exist, bring ourselves to condone this situation. To approve the proposed Rate R would, in effect, be to approve the practice of resale, with all of its concomitant unfortunate results. The end results would be, as I see it, to establish some hundreds of additional electric companies each of which would be under our jurisdiction, and as to each of which it would be our duty to ascertain that the rates charged do not yield more than a reasonable return on the property used and useful in its operations. Since each such situation would necessarily stand alone, this might mean that the tenants of one building would be required to pay different electric rates from the tenants of an adjacent building whose investment and costs were different. I believe that the Supreme Judicial Court meant what it said when it observed in Brand v. Water Commissioners, 242 Mass. 223, that: "By the general character of their customary undertaking, the duty of service, and accordingly the duty of equal service, if any, is owed by the respondents only to the occupiers of premises." I believe it is the duty of the Edison Company, a utility company operating under the strictest supervision of this Department, and of it alone to furnish electricity to the persons occupying premises within the territorial limits where it operates.

It is true that such a tariff provision, and a determination that persons reselling electricity are electric companies present many difficulties of administration. It was pointed out at the hearing that very many situations exist where a tenant is charged for electric current by his landlord and which are certainly not within the intent of Rate R and are equally not within the intent of the General Court in defining an electric company, but which might be considered to fall

within these classifications under my analysis and under the proposed Rate R. For example, a person sub-renting a small floor space who charges his sub-tenant for electricity consumed, though the consumption of the ultimate consumer is not metered, might equally be considered as an electric company. I feel that it is far more desirable in the public interest that this Department assume the duty of applying the statute in a manner consistent with common sense than that thousands of business men in Boston and vicinity be stripped of the protection against unreasonable rates and practices afforded by the statutes under which we operate.

Furthermore, I am not at all certain that a building owner who includes a charge for electric service in his rent falls within the same category. It does not seem to me that, unless he meters the consumption and makes a separate charge for the service, he is selling electricity under our statutes. The distinction, it seems to me, is there, though it may be logically tenuous. It is clear, for example, that parcel delivery by a store in its own truck is not subject to the provisions of chapter 159B of the General Laws, though I have no doubt that the cost of the delivery is paid by the customer as part of the purchase price of the merchandise. Accordingly, I do not believe that a landlord who furnishes unmetered current as part of the service furnished under the lease of his premises is in the business of selling electricity. It has never been held that a landlord furnishing unmetered water as a part of his duties as a landlord is in the water utility business, though the amount of his water rates are a part of his operating costs which the rent he receives must cover.

The Boston Edison Company has also available a so-called Rate C, which contemplates a form of tenant resale. However, it is so designed that the revenue received by the company is substantially that

paid by the tenants. The same is true in certain specific situations under Rate B. There is no disadvantage under these rates either to the tenants or to the other customers of the Edison Company.

The disposition of this matter ordered by the majority seems clearly to me to place the parties in a most unsatisfactory technical situation, since it would leave the provisions of M.D.P.U. 54 still in effect, which allow resale as it existed at the time of filing, but prevent further extension of the practice. Unless the landlords who now resell have acquired some special rights, as to which we are all agreed to dissent, I would not favor a distinction in treatment based solely on historical grounds. If it is proper for present customers to resell, it would seem to be proper for anyone to do so. And such a disposition of the problem would not enable the contentions of the parties adequately to be presented to the courts for review. Consequently, I think we should order the filing of new tariffs specifically forbidding Boston Edison Company to furnish current for resale except under such circumstances as the Department may deem to be adequately unusual in nature.

The introduction of a provision forbidding resale will not mean any loss to the building owners except as to income, to which I believe they are not entitled. It is true that, in certain instances, a building owner might be compelled to go to some expenses in new wiring on his premises if his tenants are to be supplied directly by the Edison Company. If, in any particular situation, any rewiring of the premises would be required, the building owner may avoid such additional cost by the use of series meters. It is clear that the use of series meters is not desirable, but it is equally clear to me that it is more desirable than the various alternatives presented to their use. They are in use in New York, albeit against the wishes of the operating

utility. However, the proposed Section 7B of M.D.P.U. 55, which provides for series metering should be redesigned so that the master meter is given adequate credit for the total demands on the series meters. The building owner in such case would have to pay for energy lost within the building, but I do not find that such loss would be material in amount or that it would exceed what the building owner might be expected to pay as a part of his legitimate operating expense. It is the practice, for example, in New York City for the landlords to absorb such losses, and they do so apparently without any great burden. Suitable regulations to this end, to permit sufficient elasticity to avoid individual hardship and also to provide for purchase by Boston Edison Company of existing customers' meters, should be filed by the Company effective simultaneously with the other tariff provisions I feel to be necessary.

The Boston Edison Company conducted a long and careful study before it filed Rate R with the Department. It considered the feasibility of prohibiting resale entirely. In fact, in the original conferences leading up to the adoption of Rate R, a majority of the executives of the company favored a tariff which would accomplish this result. Counsel for the Edison Company indicated in his argument that it would not be disappointed if we ordered it to file such a tariff as the result of this investigation. The reasons stated by Edison's witnesses for not doing so do not convince me that such a procedure is impracticable. The two principal objections to such a provision are (1) that the building owners had an appreciable investment in redistribution facilities which should be recognized, and (2) that it might encourage the establishment of private generating plants. However, other electric companies have apparently had no insuperable difficulties in administering similar tariffs. See the line of cases in the

District of Columbia (Re Potomac Electric Power Co., P.U.R. 1929B, 600; Kerrick v. Potomac Electric Power Co., P.U.R. 1932 C, 40; Lewis v. Potomac Electric Power Co., 64 F (2) P.U.R. 1933 C, 337), New Jersey (Sixty-seven South Munn v. Public Service Electric & Gas Co., 106 N.J.L. 45, P.U.R. 1929 E, 616, cert. den. 283 U.S. 828) and Florida (Florida Power & Light Co. v. Florida, 107 Fla. 657; P.U.R. 1933 E, 157.) And I have dealt elsewhere with the rights of the building owners.

Edison's president intimated on the stand that such an eventuality was the goal of the Edison Company, but that he felt it would take from six months to two years to iron out the mechanical difficulties. If this step is to be taken eventually, I favor taking it now. The new tariff can give such leeway, both financial and temporal, as is necessary to do the job without too much hardship or friction. And it can still be true that resale may be countenanced by the Department where adequate evidence convinces us of its absolute necessity from the public standpoint.

It may be pointed out that the commitment of July 27, 1948, of the Boston Edison Company regarding the disposition of any increased net income resulting from our decision in these proceedings is applicable equally to a discontinuance or a curtailment of resale activities, and I believe that the order in the form that I favor would result in sound benefit both to the Edison Company in the solution of an annoying problem and to the public in a resultant decrease in electric rates. The amount of such decrease to the general public would be determined six months after the effective date of any new tariff by conference between our Accounting and Engineering divisions and the officials and staff of the Edison Company, and would be corrected from time to time thereafter.

This question of resale is not new, as we indicated in our opinion in the Perry case, and the conclusion to which I have arrived is consistent with that indicated in many other jurisdictions, as well as in the Brand case, supra, which I am unable to distinguish and which I believe is binding on us. We cited a long list of precedents in the Perry case. To them I would add Dept. of Public Serv. v. Puget Sound Pr. & Lt. Co. (Wash.) 20 P.U.R. (N.S.) 457; Re City of Fulton, (Mo.) P.U.R. 1930 D, 11; Rogers Iron Works, Inc. v. Public Ser. Comm., 323 Mo. 122, P.U.R. 1929 E, 293; Re W. F. Cobb (Col.) 78 P.U.R. (N.S.) 54; and D. L. Stokes & Co., Inc. v. Georgia Power Co., supra, (Ga.), 71 P.U.R. (N.S.) 15. I have found no cases to the contrary.

The situation presented by Quaker Building Company differs in several material aspects from that of the other protestants in these proceedings. This concern was organized in 1911 as an electric company and has been engaged in business within a limited area in the downtown Boston district since that time. Its wires do not cross any public streets (see Section 87 of chapter 164, G.L.) but run into the rear of the 22 buildings it serves, via some private alleyways. Whether these alleyways have ever been dedicated to the public use does not appear. It was originally in the business of generating as well as selling electricity, but, because of largely increased load, abandoned its generating equipment in 1915 and since then has been buying from Edison at Edison's regular D1 and H rates. It has filed its annual returns with the Department and admits that its activities in sale of electricity are under our jurisdiction. The rates it charges its customers are the regular Edison rates, except that some customers have historically enjoyed some discount from these rates. It has no other business except a steam sales business. I see no distinction between Quaker Building Company, and, say, Boston Consolidated Gas

Company, which buys power from Boston Edison and furnishes current to customers in the Charlestown area of the City of Boston. I believe that this company is entitled to protection within the area it serves. If Boston Edison refuses to furnish current to Quaker Building, I believe the latter company is privileged to invoke the provisions of Section 92A of Chapter 164 of the General Laws.

It is always painful for me to differ with my learned colleagues, and I hope to be pardoned for burdening the record with a rather over-long statement of my personal views. However, I feel we are neglecting our clear duty by our order herein and are taking a step backward from the position we took in the _Perry_ case. As I have said before, I think we were right then, and I think we should stick to our guns.