

Resale

34390

May 27, 1947

Tuesday, May 27, 1947.

Chairman Meins, Commissioners McKeown, Whouley, Flaherty  
and Gadsby.

was given upon petition of A. W. Perry, Inc., for a  
electricity by the Boston Edison Company.

J. Cotter, Esq., for petitioner  
M. Ives, Esq., for Boston Edison Company

continued to September 9, 1947.

(D. P. U. 7697)

Re supply of  
electricity  
by Boston  
Edison Co.

(7697)

Sitting:  
McKeown  
Gadsby

34765

Sept. 9, 1947

Tuesday, September 9, 1947

Present: Chairman Gadsby, Commissioners McKeown, Whouley,  
and Marr.

A.W. Perry, Inc. A hearing was given upon petition of A. W. Perry, Inc. re supply of electricity by the Boston Edison Company.  
supply of electricity by the Boston Edison Company.  
Edison Co.

(7697)

Sitting:  
Gadsby  
McKeown  
Flaherty  
Whouley  
Marr

Richard J. Cotter, Esq., for petitioner  
Richard J. Walsh, Esq., for petitioner  
Frederick Manley Ives, Esq., for Boston Edison Company  
Clarence Roberts, Esq., Counsel, for Boston Real Estate  
David H. Stuart, Esq., Asst. Atty. General, for Commonwealth  
of Massachusetts

Hearing continued to September 10, 1947, at 10.30 A.M.

(D. P. U. 7697)

A true record,  
Attest:

Wednesday, September 10, 1947.

Chairman Gadsby, Commissioners McKeown, Whouley, Flaherty  
and Gadsby.

Hearing was given upon petition of A. W. Perry, Inc.  
for supply of electricity by the Boston Edison Company.

Richard J. Cotter, Esq.)  
Richard J. Walsh, Esq. ) for petitioner  
Frederick Manley Ives, Esq., for Boston Edison Company  
Wald H. Stuart, Esq., Asst. Atty. Gen., for Commonwealth  
of Massachusetts

Continued to September 11, 1947.

(D. P. U. 7697)

A. W. Perry  
Inc. -  
supply elec  
tricity by  
Boston Edi  
son Co.

(7697)

Sitting:  
Gadsby  
McKeown  
Flaherty  
Whouley  
Marr

It was

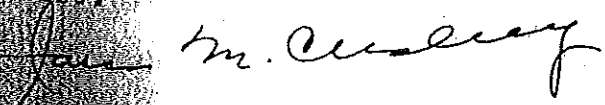
RESOLVED: To appoint provisionally to the position of Gas  
Inspector in the Division of Gas, Electric and Water  
Utilities of the Department, James MacDonald of 44 Farring-  
ton Street, Quincy, at an annual salary of \$2280, to be  
effective September 15, 1947, and subject to all rules and  
regulations of the Division of Civil Service.

Provision  
app't. Jar  
MacDonald  
as Gas Me  
Inspector

(7438-0

Voting:  
Gadsby, C  
Marr  
McKeown

Record,  
Attest:



Clerk.

34767

Sept. 11, 1947

Thursday, September 11, 1947

Present: Chairman Gadsby, Commissioners McKeown, Flaherty  
and Marr.

A.W. Perry,  
Inc. -  
supply elec-  
tricity by  
Boston Edison  
Co.

A continued hearing was given upon petition of A. W. Perry  
for supply of electricity by the Boston Edison Company.

(7697)

Richard J. Cotter, Esq.) for petitioner  
Richard J. Walsh, Esq.)  
Frederick Manley Ives, Esq., for Boston Edison Company  
David H. Stuart, Esq., Asst. Atty. General, for Commonwealth  
of Massachusetts

Sitting:  
Gadsby  
McKeown  
Flaherty  
Whouley  
Marr

Hearing continued to October 14, 1947.

(D. P. U. 7697)

Metropolitan  
Transit  
Authority -  
trackless  
trolley in  
Somerville

Upon petition of Metropolitan Transit Authority for certification  
preliminary to operation of a trackless trolley line in the City  
of Somerville, the following action was taken:

(7309)

Examination having been made of the trackless trolley  
of the Metropolitan Transit Authority in the city of Somerville,  
it is

ORDERED, That the Department hereby certify that all laws  
relative to the construction of poles, wires and other  
structures, including apparatus and equipment for the pur-  
pose of maintaining and operating trackless trolley lines  
over public ways in the city of Somerville as follows:

SOMERVILLE: Cross street, between Broadway and McGrath  
Highway

have been complied with and that the line appears to be  
a safe condition for operation.

The Commissioners participating in decision of D. P. U. 7309

34861

Oct. 14, 1947

Re supply of A continued hearing was given upon petition of B  
electricity  
by Boston Edison Co. for a supply of electricity by the Boston Edison

(7697)

Richard J. Cotter, Esq., for petitioner  
Richard J. Walsh, Esq. " "  
F. M. Ives, Esq., for Boston Edison Company  
David H. Stuart, Esq., Asst. Atty. Gen., for  
of Massachusetts

Sitting:  
Gadsby  
McKeown  
Whouley  
Flaherty  
Marr

Hearing closed.

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were:

on motion, it was

VOTED: To appoint Michael J. Horrigan, Holden, Commercial Motor Vehicle Examiner in the Commercial Motor Vehicle Division of the Department provisionally at an annual salary of \$2280, said appointment to be effective as of November 17, 1947, the foregoing subject to all Civil Service Laws, Rules and Regulations.

App't. Micha  
J. Horrigan  
Examiner in  
Commercial  
Motor Vehi-  
cle Div.  
  
(7438-OS)  
  
Voting:  
Gadsby, Chm.  
Fleherly  
McKeown  
Whouley  
Marr

nd  
Taxi,  
engers  
were:

pon petition of A. W. Perry, Inc. for a supply of electricity by the Boston Edison Company, the following action was taken:

APPEARANCES: Richard J. Cotter, Esq. }  
Richard J. Walsh, Esq. } for petitioner  
F. M. Ives, Esq., for Boston Edison Company  
Clarence Roberts, Esq., for Boston Real Estate Board  
David H. Stuart, Esq., Asst. Atty. Gen., for Commonwealth of Massachusetts

Supply of  
electricit  
by Boston  
Edison Co.  
A. W. Perry,  
Inc.  
  
(7697)

The complainant in this matter, A. W. Perry, Inc. (hereinafter referred to as Perry), is a corporation which, with its predecessors in interest, has been in the business of owning and managing real estate properties in the City of Boston since 1887. Very early in its history, it installed electric generators in its buildings, apparently selling surplus current. In this connection, it obtained a limited franchise from the City of Boston for the use of the streets. In 1903, it sold this franchise to the defendant, Boston Edison Company (hereinafter referred to as Edison). It proceeded thereafter to buy power from

Oct. 31, 1947

(7697)

Edison both for its own purposes and to resell that power to its tenants. This practice has continued up to the present time.

In addition to selling this power to its tenants, Perry (or its predecessors in title) has also for many years resold substantial amounts of Edison's power to other consumers who are not tenants of Perry's buildings, but who are located within the same city block as one of Perry's buildings. Perry makes a profit on this resale, due to the fact that it buys in wholesale blocks at low rates and resells at retail.

In the early stages of the industry, while this practice was developing, all of the current furnished was direct current. In fact the production and distribution plant in downtown Boston, which was one of the first areas to use electricity widely, was originally designed for this type of current exclusively. It thereafter became apparent that this distributing system should be designed to accommodate alternating current. Edison determined to accomplish this change gradually, instead of simultaneously in substantial areas, as was done in some other cities.

In the meantime, Edison had begun to consider the problem of resale of electricity posed by such middle-man activities as those of Perry. It determined upon a policy of refusing to extend this practice and particularly to refuse to furnish alternating current for resale to persons other than tenants of the pur-

chaser. This policy was carried into effect, at least in part, by tariff effective March 1, 1946, Edison's rate D-1, which was stated to be available "for direct current service for any use, and for alternating current service for any use on the premises specified in the agreement for service." Perry's service is furnished under this rate schedule.

In 1945, Perry found itself under a very considerable pressure, due in large measure to the invention and extensive use of fluorescent or luminescent lighting, to install alternating current for the use of its tenants and others to whom it resold current. Pursuant to its policy of which warning had been given to Perry or its grantor in 1930 and again in 1937, and in accordance with its interpretation of its filed tariff, Edison has refused to supply alternating current unless Perry agrees not to resell except to its tenants. This petition is brought by Perry to compel Edison to furnish alternating current without such restriction. Extended hearings were held developing the facts, and we have been furnished with very able briefs by counsel on both sides.

It does not seem to us that the difference between direct and alternating current alone furnishes a sound basis for the refusal of Edison to furnish this service, if both types of current are available. If Perry is entitled to be furnished with any service at all, it is entitled to be furnished with alternating current on the same basis

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as is any other customer of Edison. Nor do we believe that the contractual status of the ultimate consumer should make any difference in our decision. We fail to see why the fact that the consumer rents premises from Perry makes him any less a consumer of electric current or any less entitled to the protection of the law and of this Department. We say this with full realization of the ultimate logical conclusions to which this argument may be carried.

Edison has a gross yearly revenue of about \$50,000,000. Its income balance transferable to profit and loss as of December 31, 1946, was \$6,240,025.70, according to its annual return filed as of that date with this Department. It appears that there are in Boston a total of some 6,000 retail customers who are served through privately-owned meters. Edison estimates that it has some 170 customers doing a business similar to that done by Perry, as to 132 of which it is able to make fairly accurate estimates as to the scope of the business. These 132 customers now produce a revenue to Edison, under resale practices, of some \$1,304,000, resulting from the sale of 53,603,400 kilowatt hours in 1946. Upon an analysis of these accounts, making the best possible assumption as to distribution as between types of sub-use, it appears that Edison would receive a gross of somewhere near \$2,332,200 for this current if it sold such current direct to the consumers at the rates applic-

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able for each consumer's respective type and amount of use. (7697)

Stripped down to their bald framework, these figures mean that 132 middlemen in the city of Boston are dividing up a profit derived from electricity which they do not manufacture or distribute (except for relatively short distances) and which is made possible solely by Edison's rate structure, in the amount of more than \$1,000,000 per year. This figure is only about 2% of Edison's gross income, but it is 15% or more of its net. And the additional expense to Edison in handling the new accounts would not be unduly large: Perry handles the accounts at present at a cost of about 10 to 15 per cent of his gross. Perry is, it appears, one of Edison's largest wholesale customers. It furnishes current at retail to 700 or more customers, through 1200 submeters. It paid Edison \$212,000 in 1946 for all of its current. Edison would have received \$370,000 for the same service if it had sold direct, or additional gross revenue of \$157,600.

This Department would consider a request of Edison for \$1,000,000 additional gross revenue per year as a major item on its calendar. Edison's president frankly stated that if Edison had the income these middlemen are getting, it might help avoid increased rates, if it did not actually result in decreased rates to the general public. In fact, the more deeply and dispassionately the record is studied, the more doubt appears as to the economic or legal justification of this practice.

Oct. 31, 1947

(7697)

Perry charges practically all of his customers at the appropriate Edison rates as filed with this Department. But its president admitted that some cases do exist where the consumer receives current from Perry for less than he would otherwise have to pay. We believe this constitutes discrimination. And what assurance is there that Perry will not charge what it pleases for light and power, regardless of Edison's rates?

Another unfortunate result of Perry's relationship to Edison came to light when it developed that in at least one case still another middleman had appeared to participate in the profits derived from this resale of current. As was pointed out in Sixty-seven South Munn v. Public Service Electric & Gas Co., 106 N.J.L. 45, cert. den., 283 U.S. 828, and as Edison's witnesses testified, there is nothing to prevent an extension of this practice of resale to the point where each business block in the city would be furnished current by its own retailer which might so adversely affect Edison's revenues as to require revision of its rates to the detriment of its ordinary customers. And such retailers would, if the complainant's contention is correct, be subject to no control as to prices, practices or service. We are not prepared to arrive at this conclusion unless we are required to do so as a matter of law.

The jurisdiction of this Department to order service to be supplied is granted by sections 92 and 92A of

General Laws (Ter.Ed.), chapter 164. Section 92 is intended to protect the individual consumer and section 92A applies to sales in bulk, i.e., to other electric companies. (See section 1 of chapter 164.) Neither section is mandatory, leaving it within the power of the Department to refuse such order upon adequate showing. It is well settled that such an order will not issue where the purchaser is a competitor of the seller (Brand v. Water Commissioner of Billerica, 242 Mass. 223; People ex rel N.Y. Edison Co. v. Pub. Ser. Comm., 191 App. Div. 237, aff'd. 230 N.Y. 574), and we find and hold that Perry is competing with Edison in the distribution and sale of electricity within the City of Boston. Moreover, section 92A of the statute specifically provides that "such order shall not be made where it appears that compliance therewith would result in permanent financial loss to the corporation." We believe, and so find, that the issuance of such order in this case would result in permanent financial loss to Edison.

Furthermore, in section 1 of chapter 164 of the General Laws (Ter.Ed.) an "electric company" is defined as "a corporation organized under the laws of the commonwealth for the purpose of making by means of water power, steam power or otherwise and selling, or distributing and selling, electricity \*\*\*\*\*." By section 76 of the same chapter, this Department is given the broadest sort of supervisory power over all electric companies. Mr. Perry, president of the company, was asked: "And is it fair to say

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that you're in the business of selling and distributing electricity?" His answer, which was correct and incapable, was: "Yes, sir, I should say it was." We find and hold that complainant is acting as an electric company under the laws of this Commonwealth in reselling the current supplied to it by Edison and is therefore subject to all of the provisions of chapter 164 and of the other applicable statutes.

In our opinion, it makes little difference in arriving at this conclusion whether or not Perry uses the highways in his distribution of current. Public utility businesses are: "Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public." Wolff Co. v. Industrial Court, 262 U.S. 522, at 535. Among these privileges is the right to use the highways. But there are other privileges as well, one of which is the privilege of carrying on business without competition. And while it is doubtless true, as pointed out in the Wolff Packing Co. case, *supra*, that the legislative characterization of a given business as a public utility is not necessarily final, still, where the legislature has included Perry within the clear terms of the statute, we feel impelled to follow these terms until we are otherwise instructed by the courts. Perry has complied with none of the calls of the statutes

relating to electric companies. It files no tariffs nor (7697)  
annual reports with this Department. Its security issues  
have not been submitted for approval nor does it hold  
any franchise rights. Its counsel contended at the instant  
hearing that it is not subject to our jurisdiction. To  
compel Edison to furnish current to Perry for purposes of  
resale would, in our opinion, be equivalent to a condona-  
tion, if not approval, of the type of business which Perry  
is carrying on. This we decline to do.

We do not feel that we are, by this decision, jeopardiz-  
ing Edison's revenues through encouraging the installation  
of private plants to serve Perry's customers. If our  
reasoning is accurate on the facts before us, Perry has  
no more right to establish a private plant and sell to  
its customers without subjecting itself to our jurisdic-  
tion and obtaining the necessary authority than it has to  
buy current for the same purpose. There is no law against  
Perry's installing a plant to supply current for its own  
use. In our opinion, there is a law against Perry's  
manufacturing such current for sale to others.

There may possibly be little essential difference between  
a tariff provision duly filed with the Department and a  
reasonable regulation adopted by the company without for-  
mal filing. However, since the adoption of a policy such  
as appears in the instant case results in refusal by the  
utility to furnish service to applicants of a certain  
description, we suggest that Edison amend its filed tariffs  
in this respect rather than to rely upon unpublished  
rules.

Oct. 31, 1947

(7697)

Our conclusion in this matter agrees with that of the New York commission which was faced in 1939 with an almost identical situation. See Re Central Hudson Gas & Electric Corporation, 30 P.U.R. (N.S.) 257. It agrees also with the determination of various regulatory bodies involving resale of telephone service. See 1015 Chestnut St. Corp. v. Bell Telephone Co., P.U.R. 1931A, 19; Gelsam Realty Co. v. New York Telephone Co., P.U.R. 1929A, 224; Williams & Colmer, Inc. v. Southwestern Bell Telephone Co., 70 P.U.R. (N.S.) 35. It has very substantial support in other jurisdictions in many cases where administrative bodies and the courts have upheld the reasonableness of rules and regulations of utilities forbidding the resale of electricity. Florida Power & Light Co. v. Florida, 108 Fla. 657, P.U.R. 1938 E, 157; 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; Re Potomac Electric Power Co. (D.C.) P.U.R. 1929B, 600; Karrick v. Potomac Electric Power Co. P.U.R. 1932 C, 40; Lewis v. Potomac Electric Power Co., 64 F (2) 701, P.U.R. 1933 C, 155; Re Rates and Rate Structures of Corporations, (N.Y.) P.U.R. 1931 C, 337; Holmes Electric Company, Inc. v. Carolina Power and Light Company, 197 N.C., 766; Re Beloit Water, Gas & Electric Company (Wis.) P.U.R. 1922 E, 133.

And we find it very difficult to avoid the application to the facts before us of the language of the Supreme

Judicial Court in Brand v. Water Commissioners of Billerica, 242 Mass. 222, at page 228, where the Court said:

(7697)

"An even more conclusive answer to the petitioner's claim is that the respondents were under no legal obligation to supply the land company, apart from the existing contract voluntarily made by the parties. 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."

Both Edison and Perry have filed requests for rulings and have waived by stipulation the limitations of section 5 of chapter 25 of the General Laws (Ter.Ed.). Perry's requests Nos. 1 and 4 are granted, and its requests Nos. 2, 3, 5, 6, 7 and 8 are denied. Edison's requests Nos. 4, 5, 6, 7 and 8 are granted, and its requests Nos. 1, 2 and 3 are denied.

After due notice and a public hearing and due consideration being had, it is hereby

ORDERED: That the petition of A. W. Perry, Inc. as amended be and the same hereby is denied.

The Commissioners participating in decision of D.P.U. 7697 were:

Gadsby, Chm., Flaherty, McKeown, Whouley

Marr, Commissioner, concurring:

Although I concur in the result of the order of the Department that the Perry Company petition be dismissed, I do not subscribe to all of the findings and rulings of my associates on the Commission and believe that in fairness to all concerned I should state wherein I am not in accord. The Edison Company in its refusal to furnish Perry Company with alternating current for resale to persons other



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than its tenants has, in my opinion, used sound business judgment in its best interests of the public. I believe that this is sufficient ground for its action. That Edison as an electric company benefits or will benefit more is undoubtedly to the public's advantage as clearly presented in the Department's order. The company's stand has been taken with due consideration of such factors as financial, engineering and construction problems peculiar to this electric business.

The resale field is one in which the petitioner especially and others have operated profitably for many years, the petitioner supplying his tenants primarily and also certain other buildings in the same blocks. Perry's activities have been principally the ownership and management of business properties accommodating many tenants. Electric current both for lighting and manufacturing has been in the main supplied incidental to rental, the sums derived from resales of electric current being a small part of total income from realty operations. Our statutes do not expressly cover this situation. The Perry Company admittedly was not organized to manufacture and distribute electricity. The Edison Company is so organized. Express provisions are found in the statutes for certain sales in bulk, G.L. (Ter.Ed.), c. 164, s. 92A. Even though petitioner does not come within the terms of this section (s.92A), it cannot, of course, do business with or in competition with Edison in a way to

Oct. 31, 1947

cause that public service corporation permanent financial (7697)  
loss. Section 92 of said chapter 164 is sufficiently broad  
to cover the present situation.

I do not wholly concur in the rulings of the majority of  
the Commissioners upon the "Petitioner's Requests for  
Rulings." I am of the opinion that Nos. 2, 3, 4, 5, 6 and  
7, which were denied, should as framed be allowed because  
the words "may find" connote "would be warranted in finding."  
I would, however, as a matter of fact, find in the nega-  
tive, i.e., not so find upon each of these Requests except  
No. 6 as to giving Edison permission "to withdraw from  
rendering that service (resale) by refusal to supply alter-  
nating current at the locations described in the evidence",  
and except as to No. 7, for I find that "the interest of  
the public" may be served by such permission from the  
Department as specified in both Requests Nos. 6 and 7.  
As to No. 8, I find that the Department has the power to  
require the Respondent to supply the Petitioner with  
alternating current or to refuse such service, and so I  
would allow Request No. 8.

The Petitioner's resale business may be termed ancillary to  
its real estate operations. This reselling of electrical  
current is a unique service long carried on openly and  
apparently without any serious question as to its propriety.  
The finding of the Department (page 6 of the order) that  
the Perry Company is an electrical company (de facto),  
having in mind the definition under section 1 of chapter  
164, with the implications drawn from that ruling, puts

Oct. 31, 1947

(7697)

the matter in a new light. A new status is created or established for the resellers of electric current described in this case by this legal construction. Without going so far as the Order in my own conclusions, I nevertheless have reached the same main conclusion to deny relief and have based it upon the Respondent's right and duty to operate its business wisely in the public interest rather than upon conclusions as to the legal aspects of resale of electric current. Their determination has not seemed to be absolutely essential to a proper disposition of the petition.

New England Trans. Co. - temporary license  
Upon application of New England Transportation Company, the following action was taken:

(7832-F)

After consideration and in order to provide for unusual, sudden and unforeseen transportation needs between Woods Hole and Boston, it appearing that public convenience and necessity so require, it is  
ORDERED: That under the provisions of section 5 of chapter 159A of the General Laws (Tercentenary Edition), the Department hereby grants to the New England Transportation Company a temporary license for sixty (60) days beginning October 31, 1947, and ending December 29, 1947, for the operation of motor vehicles for the carriage of passengers for hire over the following route between Boston and Raynham so as to connect with its existing