

tion, and (3) is under an obligation to afford its facilities to the public generally, upon demand, at fair and nondiscriminatory rates, and (4) enjoys, in a large measure an independence and freedom from business competition brought about either (a) by its acquisition of a monopolistic status, or (b) by the grant of a franchise or certificate from the State placing it in this position, it is a public utility)¹⁵

The Supreme Court's decisions, however, do not provide consistent criteria from which a more precise definition of the public utility concept may be formulated. Thus, "while monopoly and lack of competition are present in the case of some undoubted public utilities, there are others, carriers by motor vehicle for example, whose business is highly competitive."⁶ The Court, in other words, has permitted detailed regulation of some industries with economic characteristics that differ from those possessed by traditional public utilities. At the same time, a legislature cannot confer public utility status on *any* business merely by passing a statute.⁷

Obligations and Rights of Public Utilities

The English courts evolved a group of obligations and rights that they attached on common callings or public-interest occupations. The obligations were not voluntary but compulsory, and could be avoided only by withdrawal from service. They were later adopted by the American courts. Today, such obligations and rights have been incorporated into, and amplified by, state and federal statutes. As with other matters, however, the courts still retain their prerogative of reviewing the reasonableness of all statutory provisions and their administrative applications. Since these obligations and rights are discussed at length in succeeding chapters, the following paragraphs merely summarize the major requirements.

Obligations

Public utilities have four major obligations or responsibilities imposed on them because of their special status. First, they are obligated to serve all who apply for service 118 Within a market (service) area, and within the limit₁ of its capacity (ability to serve), a public utility must be prepared to serve any customer who is willing and able to pay for the service. At times, this₁ requirement means that a business must provide capital investment in rural areas where it is not profitable to do so or must maintain an unprofitable t~P~ of service. The price of services in such cases may not be based on cost~ b~ often are subsidized by other services offered by the company. More cpt
monly, this requirement means that a public utility must build capacity ahe~ of demand growth (reserve capacity or margin)

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Second, public utilities are obligated to render safe and adequate service. Consequently, there exist regulations of voltage requirements for electricity, and heat value and pressure requirements for gas. Each service must be supplied by means of the safest equipment available to the industry involved. Moreover, the service rendered must be adequate. For the utility industries, this requirement means service must be provided twenty-four hours a day. All utilities must be prepared for foreseeable increases in demand. In short, utility firms must be ready to give instantaneous service on demand.

Third, public utilities have the obligation to serve all customers on equal terms. Unjust or undue discrimination among customers is forbidden. Under conditions of near monopoly, discrimination in price and perhaps service may become profitable to a business. Since there are few substitute services available, customers would be helpless in such a situation. If reasonable, regulation does permit the classification of customers for the purpose of ratemaking. But within each class, the same rate structure must apply. Regulation also permits the use of graduated rate structures; again, they must be reasonable.

Finally, public utilities are obligated to charge only a “just and reasonable” price for the services rendered. It is up to the various commissions and the courts to interpret this duty. Nonregulated businesses are under no such restraint, since competition is assumed to regulate prices in the public interest. As demonstrated throughout the book, this provision has resulted in considerable controversy among the industries, commissions and courts.

Rights

All businesses, regulated and nonregulated, have certain rights. The most important general right is the legal protection of private property. In addition, however, public utilities have four rights that are largely the result of their special status.

First, public utilities have the right to collect a reasonable price for their services. Regulatory authorities may not force such a business to operate at a loss.¹¹⁹ At the same time, a reasonable return is not guaranteed, and under adverse economic conditions, it may happen that no rate will cover the cost of service. Barring such a possibility, the courts have insisted on the right to a reasonable price.

Second, public utilities have the right to render service subject to reasonable rates and regulations. The public has certain rights and can demand that public utilities live up to their obligations. For their part, these industries have the right to reasonable office hours, prompt customer payments, service deposits and contracts, among others. Moreover, these businesses have the right to withdraw service under prescribed conditions and after giving due notice to their customers.

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Third, when they finish adequate service at reasonable rates, public utilities have the right of *protection* from competition from an enterprise offering the same service in the same service area. A public utility must receive a certificate of public convenience and necessity from the appropriate regulatory agency, and a franchise (generally dealing with the use of city streets and with city utility service) from the relevant local governmental unit, prior to commencing operations. In turn, such certificates and franchises, while not exclusive, offer a public utility some freedom from competition in its service area.

Finally, the specific right of eminent domain has been given to most public utilities. This right enables them to condemn private property and take it for “public use” when necessary to the proper conduct of their business. Public utilities are required to pay a just compensation for any property so condemned. Land may be taken, for instance, for electric or telephone pole lines or for water mains, to enable a public utility to provide adequate service for the public)²⁰

Limitations on Government Regulation

Once the right to regulate an industry has been established under the police powers of the state or the interstate commerce clause of the federal Constitution, are there any limits on the actions of the regulatory commissions? The answer is very definitely in the affirmative. The Fifth and Fourteenth Amendments to the Constitution guarantee due process of law. Since the courts have long held the right to profits as a fundamental characteristic of property, these two amendments mean that no regulation by a unit of government can reduce profits below a confiscatory level and be upheld as constitutional.

It is to this limitation on the actions of regulatory commissions that many of the difficulties in the effort to achieve effective regulation can be traced. In fact, this limitation is directly responsible for the frequent overruling of a so-called expert body (the regulatory commission) by a legal body that is often untrained in the problems of regulation (the court). As a result, to test the reasonableness of the commissions’ orders, the regulated companies have taken to the courts many important decisions made by the commissions. And the companies cannot necessarily be blamed for their actions. The companies are privately owned and privately operated. Regulation, therefore, involves the question of private rights versus public needs, and the line between them often requires judicial interpretation. But from the point of view of effective regulation, this often results in very slow enforcement of the commissions’ decisions.¹²¹

Thus, there is a good deal of uncertainty both as to the fields over which the units of government may practice regulation and as to how far such regulation may be carried. In both instances, the courts have the final word. In both instances, while the courts have laid down some general rules, they