Electric Rates; Fuel Adjustment Charges
35 MRSA 131
Fuel Adjustment Charges

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Honorable James F. Wilfong
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Honorable Richard A. Spencer
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Sebago Lake, Maine 04075

Dear Representatives Wilfong and Spencer:

This responds to your request for an opinion on the constitutionality of 35 M.R.S.A. § 131, the Maine statute which permits electric utilities to adjust customer's monthly bills to reflect increases or decreases in the amount the utility pays for fuel used in generating electricity or for power purchased from other utilities. The mechanism by which the adjustment is made is termed a "fuel adjustment charge."

Our research and our interpretation of the Maine statute persuade us that the statute would survive a constitutional challenge in the Maine courts.

Fuel adjustment charges have been challenged frequently, on both statutory and constitutional grounds. Though your inquiry pertains to constitutional questions, it may be useful to discuss some of the statutory considerations first. The statutory challenge is made where a fuel adjustment clause has been permitted to be inserted in a utility's rate schedule by order of a regulatory agency but is not specifically authorized by statute.[1/] Though the

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1/ Before 1975, such charges were permitted or denied in Maine by order of the Public Utilties Commission under its general rate-making authority. Central Maine Power Co. industrial users were subject to a fuel adjustment clause from 1942. Portland Gas Light Co.'s 1947 request to make permanent its war-emergency fuel clause, applicable to all customers, was denied. 69 PUR (N.S.) 154 (MPUC 1947). A Maine Public Service Co. request to apply a fuel charge to residential customers was denied in 1956. 14 PUR 3rd 507 (MPUC 1956). In 1958, Central Maine Power Co.'s

argument has been put in due process terms, it is not a constitutional challenge, but rather an assertion that statutory rate-change procedures, which generally involve some kind of public notice and hearing, represent the legislatively-prescribed minimum of procedural protection for the interests of utility customers, which is violated by a fuel adjustment clause permitting rate changes to be made unnoticed and unheard. Though there have been some successes, City of Evansville v. Southern Illinois Gas and Electric Co., 339 N.E.2d 562 (Ind., 1975) (fuel adjustment clause violative of statute requiring public hearing on rate change); Petition of Allied Power and Light, 321 A.2d 7 (Vt., 1974) (variable clause violative of legislative intent to maintain fixed and certain rates unless changed with notice and hearing), in the majority of cases this challenge has failed, City of Norfolk v. Virginia Electric and Power, 90 S.E.2d 140 (Va., 1955) (statute requires hearing on insertion of clause in rate schedule and on changes therein, but not on each increase or decrease caused by the clause); Consumers Organization for Fair Electricity Quality, Inc. (COFFEE) v. Department of Public Utilities, 335 N.E.2d 341 (Mass., 1975) (permissible under statute for fuel adjustment clause to operate without hearing; statute subsequently amended to require hearing on each increase caused by the clause, see Mass. G.L., Chapter 164, § 94G); Utilities Commission v. Edmisten, 217 S.E.2d 201 (N.C., 1975) (clause valid part of rate schedule; monthly computation not so imprecise as to be impermissible).

In Maine, § 131 of Title 35 specifically authorizes the use of fuel adjustment charges, prescribes the formula to be used in computing the charge and the method of its application to customer's bills, and requires a public hearing and written opinion before additional factors may be included in the formula. An argument could be made that since the Legislature has authorized fuel

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1/ Con't.

request to extend the fuel adjustment charge to residential users was granted, the Commission finding In Re Caribou Light and Power, 121 Me. 426, 117 A.2d 579 (1922) inapplicable. Caribou, on which the Commission had relied in the Portland Gas Light Co. matter, was decided either on the basis that fluctuating fuel charges contravened the implicit statutory requirement for definite and certain rates or that rates which fluctuated by reason of the acts of some other body (rates were tied to taxes set by the town on utility property) contravened the Public Utility Commission's authority to set rates. In its 1958 order, the Commission implied that it considered fuel charges neither a rate nor an element of a schedule which rendered rates impermissibly variable. Rather, a fuel adjustment charge was seen as a mechanism for integrating rigid utility rates into a flexible economy. 22 PUR 3rd 466 (MPUC 1958).

adjustment charges, prescribed their operation and provided for Commission oversight, such a charge is not open to challenge under other provisions of the public utility law requiring investigation of and notice and hearing on electric rates and their operation and effect. In this respect, it should be noted that the Maine Court in Cumberland Farms Northern v. Maine Milk Commission, 377 A.2d 84 at 93 (Me., 1977) specifically approved the operation of a "pass-through" clause which permitted changes in milk prices at dealer and retailer levels without a public hearing when changes occur at the producer level. The statute in question provided specifically that price changes may occur without a public hearing only in instances where the only change to be made was a change to conform dealer and retailer prices to producer prices. Implicitly, a public hearing is required where such a change is one among others, and nothing exempts producer-price-related changes from consideration when the presence of other changes requires a hearing.

In the public utility law, those sections which provide ways in which consumers may protect themselves, or the Commission may protect them, apply in general to unreasonable and unjust rates, tolls, charges and schedules. See, e.g., § 291. In our opinion, § 131 is essentially a highly specific definition of a particular kind of charge which may be made for electric power to which the statutory procedural protections against unreasonable or unjust charges would be applicable. Thus, the operation of a fuel adjustment charge could presumably be investigated and go to public hearing on the Commission's own motion, § 296, or on complaint of any ten persons or of the Commission itself on the grounds that it was unreasonable or unjustly discriminatory, §§ 291, 298. Any change proposed in the application of a fuel adjustment charge would come under the § 64 requirement for filing 30 days in advance of its proposed effective date and thus would be open to challenge at public hearing under § 69.

The constitutional due process challenge to fuel adjustment charges is the very specific one that such charges in operation infringe on property rights and therefore require certain procedural protections before taking effect. The success of such a challenge depends on the existence and constitutional stature of such a right and the adequacy of given procedures to protect that right. Some courts considering this question have held that no property rights of constitutional stature are impinged by an action the effect of which may be to reduce purchasing power by permitting higher prices for a regulated commodity, Rivera v. Chapel, 493 F.2d 1302 (1st Cir., 1974) (purchasing power not property traditionally protected under the Constitution), or have simply held that no property right of the consumer is infringed by the operation of the fuel adjustment clause, Georgia Power Company v. Allied Chemical Corp., 212 S.E.2d 628 (Ga., 1975) (dissent argues that since utilities can challenge the constitutionality of rates as a confiscatory taking of property, consumers ought to possess a correlative right). The determination that no property right exists is in reality a decision that the plaintiff has no standing to raise the issue of the adequacy of protections for the right. Thus, the question of adequate protections is not reached in these cases.

In other cases, the existence and protectable stature of the right is simply assumed. COFFEE v. Department of Public Utilities, supra, (opinion states without analysis that customers have property right in charges obliged to pay); City of Norfolk v. Virginia Electric and Power, supra, (procedural protections analyzed with no preceding discussion of property rights); see also Public Utilities Commission of California v. United States, 356 F.2d 236 (9th Cir., 1966). These cases, analyzing the available protections, require no prior hearing each time a fuel adjustment clause operates to raise rates where consumers could participate in hearings on general rate changes in which fuel adjustment charges would be considered and could effectively protest rates in force as unreasonable or unjust.

If we assume that the Maine Court would find a property right of constitutional stature in the interests of consumers of electricity, an assumption by no means certain, the Maine cases indicate that the procedures presently available under the public utility law to utility customers would be found adequate to protect that right and that a hearing prior to increases in electric bills caused by operation of the fuel adjustment charge is not required. The Law Court has stated the principle basic to decision of constitutional due process cases in City of Auburn v. Mandarelli, 320 A.2d 22 (Me., 1974): what is due process in specific procedures must be determined by taking into account the purposes of the procedures themselves and their effect on the rights asserted and all of the circumstances which may render the devised process appropriate to the nature of the case. In those instances where deprivation of property is slight and may be substantially restored, there is little likelihood of insistance on a prior hearing. Randall v. Patch, 108 A. 97 (Me., 1919); Warren v. Waterville Renewal Authority, 235 A.2d 295 (Me., 1967). With fuel adjustment charges, if the deprivation of property is the extra amount which a given consumer pays on account of an instance of the operation of the fuel adjustment clause, the deprivation in any particular adjustment is not substantial. Moreover, such a customer, by resorting to the statutorily provided right to complain, § 291, may compel a public hearing and may be relieved of the charge or even recover at least some portion of his property. See also § 131, ¶ 3. The customer may also participate in general rate change hearings, at which fuel adjustment charge questions may be raised, § 69. And, of course, the customer has the protection meant to be provided by the imposition of a regulatory agency between the industry and the dependent public.

Fuel adjustment charges have also been challenged on the ground that their operation constitutes an unconstitutional delegation of authority to a private agency; that is, that in effect such clauses permit utilities to set their own rates.[2/] Where a fuel adjustment

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2/ This was the position taken by the Maine Public Utilities Commission in denying the request of Portland Gas Light Co. to continue its fuel adjustment charge. 69 PUR (N.S.) 154 (MPUC, 1947).

clause has been permitted by action of the regulatory agency, the argument is that the agency has made an unlawful subdelegation of its own authority. No such challenge appears to have been sustained by a court. See City of Evansville v. Southern Indiana Gas and Electric Company, supra, n. 6, p. 592, citing other cases. The courts have generally noted that the agency retains considerable control over the inclusion and operation of such a clause. In Maine, where the Legislature in enacting § 131 has explicitly permitted the Public Utilities Commission to exercise its rate-making authority in this way, the argument must be that the Legislature itself has made an unlawful delegation of its own authority. Section 131 provides detailed guidance for the administrative action permitted and thus satisfied the basic test for valid delegation of legislative authority. The section also specifies the Public Utilities Commission's watchdog functions: it calls for annual Commission review of the method of calculating fuel charges, and requires monthly reports from the utilities on fuel costs, purchased power charges, kilowatt hour usage and income derived from fuel charges. The Commission is directed to review these reports periodically and must order rebates if billed fuel charges exceed the amount the utility is required to pay for fuel and purchased power.

Review of the cases from other jurisdictions and of the related law in Maine compels our conclusion that § 131 would survive a constitutional challenge. In reaching this conclusion of law, we suggest no opinion on the merits of the fuel adjustment clause as a matter of policy. For policy arguments see Trustees of Village of Saugerties, et al. v. Central Hudson Gas and Electric, abstracted at 9 PUR 4th 639 (NYPSC 1975);[3/]; In Re Duke Power, 82 PUR 3rd 410 (1970); Trigg, Escalator Clauses in Public Utility Rate Schedules, 106 Univ. Pa. L. Rev. 964 (1958).

If we can be of further help with this question, please do not hesitate to call on us.

Very truly yours,

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

JEB/ec

3/ The complete opinion is on file in our office.