CAUTION--RELEASE UPON DELIVERY

ADDRESS

of

ROBERT E. HEALY

Chairman of

PUBLIC UTILITY LAW SECTION

of the

AMERICAN BAR ASSOCIATION

at the Section Meeting of the

ANNUAL CONVENTION OF THE BAR ASSOCIATION

Detroit, Michigan

August 24, 1942

I have designed the opening address to furnish a setting for our program rather than to convey any cogent message to the Section. Accordingly, after disposing of certain matters of Section business, I shall make a few rambling, unconnected remarks about developments in our field during the year and then, the prologue being out of the way, will turn the stage over to the principal performers.

First, I offer my sincere thanks to the members of our various committees who, in many cases at considerable inconvenience, have worked long and diligently to turn out the competent reports which by now you have all received. I also thank the members of the Council for their able and willing assistance through the year in the prosaic, but necessary, task of administering the Section's affairs.

I.

Turning now briefly to report on our membership and finances during the year 1941-1942: Between July 1, 1941, and June 30, 1942, 168 persons left the Section and 142 persons joined it. As a result of this turnover, our membership has decreased from 868 to 842. This decrease can be attributed to the departure of many of our members from the private practice of the law to the armed services of the nation.

At the beginning of the Association year 1941-1942 the Section's reserve showed a credit balance of $2,481.64. During the year there was credited to us $1,714 received from dues, $69.89 from the sale of literature, and the customary appropriation

of $250 from the National Association. Our expenses for this period totaled $371.95. Printing, amounting to $131.65, and postage, amounting to $87.60, were the largest items of expense. As of June 30, 1942, our credit with the Association was $1661.94, from which will be deducted the cost of printing for the Detroit meeting and other expenses incidental to the meeting, before the final figures for the Association year 1941-1942 can be arrived at.

One other matter of Section business must be mentioned. The armed forces have attracted many of our most active members; others, equally active in the past, have entered government service on a basis which leaves them no time for "extracurricular" work. Still others now devote their full time to the services of clients who are engaged in production for the war effort. Thus, while membership as a whole has not yet suffered materially, a substantial portion of the active participants in the Section's affairs has become unavailable. I appreciate what today's demands are on the time and energy of all utility lawyers, but I believe that the Section has a valuable purpose to serve. Its work and existence should continue. It should be kept alive during the war. Accordingly, I urge you all, during the coming year, to play an active role in the Section's affairs and to participate in the work of its Committees.

II.

The Section's sessions this year, and indeed the entire Bar Association convention, have a new and unusual significance for us. The Association's activities and its

discussions are now directed toward the struggle for survival in which our country is engaged.

There is little need to point out the implications of the war for the utilities industry. Your own experiences have revealed them. Nor is there much need to discuss the importance of the utilities to the war effort. The significance of power production and distribution, of railroad and motor transportation, and of telephone and telegraph communication to the successful operation of our nation's war industries is obvious. For the most part the industry has been keenly aware of it and has sought to furnish the utmost in service.

Nor is there any need to point out the total character of this war. By now it is clear to all of us that, although unquestionably less glamorous, the industrial and financial effort on the home front is of almost equal importance with the fighting fronts. The production capacity of our utilities becomes almost as important as the fighting capacity of our men. And it is hoped that the magnificent physical structure of some of our utilities will be matched by financial and capital structures equally admirable. Our first and foremost objective is to win the war. But so far as is consistent with that objective we must strive to protect the industry from capitalization which will sink it, when the war ends.

The developments in the field of utility law during this past year of necessity, therefore, must be examined through the somber glasses of a nation at war. Our program at these

sessions and the Reports of the Committees of our Section have been planned with that requirement in view.

III.

Now for a glance at the year's developments in our field. As has already been indicated, the regulations and laws arising from the over-all planning of the nation's production by the Federal Government have most pervasively and most profoundly affected the operations of public utilities during the past year. The W. P. B.'s allocation of materials and facilities and regulation of the use of inventory and present operating equipment affects the expansion and maintenance operations of utilities and directs them along lines considered most essential for the war program. The W. P. B. also affects utilities at the distribution, as distinguished from production, end of their operations by rationing electric power and gas in many areas. The O. P. A. regulates not only the prices of materials used by utilities in their productive process but has itself appeared in rate controversies involving utilities before regulatory bodies.

The use of rail and motor transportation facilities is subject to broad regulations by the Office of Defense Transportation. Proscription of passenger traffic and rationing of facilities are being ordered. The Federal Communications Commission has also added a new area of regulation to its duties. Not

only are the contents of certain types of communications censored, but the available facilities must be made more efficient and perhaps be allocated in accordance with some order of priority. And both the Federal Power Commission and the Securities and Exchange Commission have exercised their regulatory powers in the light of the war needs of the country. Since the developments and problems arising in these areas are the subject of intensive treatment by the Section's Special Committees and the speakers at this meeting, I need comment no further.

IV.

Turning now to the developments in public utility law which, in the absence of war would be of primary importance, we are met with what is unquestionably the most significant Supreme Court decision in the field in the last thirty years. The importance of the Natural Gas Pipeline case rests on two points. One is a sentence in the majority opinion, "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas." Like the pivotal phrase in the *Ames'* case, "the present as compared with the original cost of construction" it carries overwhelming implications for all future utility rate making. The second point is that three judges were able to equate rate-making with price-fixing and were willing, indeed, anxious, to forever bury *Smyth* v. *Ames*.

My own views on the *Ames'* case have been expressed so often that I need not stretch the prerogatives of the Chairman

to repeat them now. However, I shall trespass just long enough to point out that while the importance of the *Ames'* case in the rate-making field has never excaped recognition, and as such the case has had a profound effect upon the economic life of our nation, few have seemed to realize the extent to which it was used in the accounting field in an attempt to justify write-ups entered in books of account in order to balance inflated security issues.

The case, of course, gives rise to new if perhaps less perplexing problems. For example: Determing the boundaries of the majority opinion, particularly in view of the concurring opinion, presents important problems to the regulatory bodies. Then too what effect will the case have on the future of those state statutes which make reproduction estimates the controlling factor in establishing a rate base?

(A) The new freedom which the case offers to regulatory authorities has already been utilized by the Federal Power Commission. In the Northwest Electric Company case the Commission refused to permit the continuation in the utility's plant account of a write-up which might have been supported by evidence of the present "fair value." The Commission said: "It is erroneous to permit the Company's plant accounts to reflect changing 'value' of the nature offered in evidence here and to use such estimates of 'value' in lieu of valid cost. Adherence to such a practice with its ever-shifting plant values would nullify effective regulation of public utilities. Cost, not value, is the funda-

mental basis of accounting for public utility plant as well as for plant of other enterprises. Our System of Accounts like all accounting systems prescribed by regulatory agencies is grounded firmly in the cost principle." In its opinion in the Niagara Falls Power Company case too the Commission spoke of equating "fair value" with actual legitimate cost.

In the Hope Natural Gas Company case the Commission, citing the Natural Gas Pipeline decision, expressly refused to rely on preproduction cost estimates in fixing a rate base but turned to actual legitimate cost. In that case the Commission also held that a company which has in the past accrued excessive amounts for depreciation, will not have its base for future rates reduced below the figure which would be required if only adequate depreciation had been charged. Doubts as to the correctness of the Commission's opinion in this respect were raised in Commissioner Scott's dissenting opinion.

(B) The problems which the Securities and Exchange Commission faces in administering the Holding Company Act are accentuated by conditions resulting from the national war effort. Incidentally, in discussing the S.E.C.'s work I am speaking to you as a reporter rather than as a Commissioner. The Commission has taken the position that sound financial structures and practices must continue to be an objective of the Act's administration, that if anything, the entry of the United States into the war has emphasized the need for attaining this objective. Whatever

its evils in "normal times", the luxury of unsound utility financing can be afforded even less by the nation at this time. Present conditions have particular significance for the enforcement of Section 11 of the Act. The Commission takes the view that wartime exigencies may well increase the pressure upon the holding company managements to come to grips with the serious problems of putting the operating companies in shape to finance new construction requirements promptly by such means as will permit flexible adjustment to post-war conditions. In many circumstances that will undoubtedly involve taking substantial steps in compliance with the provisions of Section 11. The Commission states that it is not only willing, but deems it its duty, to assist far-sighted managements in straightening out the financial structure of their systems.

During this year the Commission has been carrying on many important policies which it had established earlier. For example, although exemptions from the requirement have been granted, the sale of utility issues through competitive bidding is now a usual practice. In the administration of Section 11 (b) the Commission has handed down full-dress orders with respect to the North American Company under Section 11 (b) (1) and Commonwealth and Southern under 11 (b) (2). Proceedings with respect to most other holding company systems are progressing, and a greater number of final orders may be expected next year. During the

next year, also, the Courts will have an opportunity, for the first time, to pass on the validity and meaning of Section 11 (b). Appeals are now pending from our orders under Section 11 (b) involving the U.G.I., the North American and the Columbia Gas and Electric holding company systems, and from Commission orders under 11 (b) (2) involving Commonwealth and Southern and Middle West Utilities. Another appeal from a Commission order, which deserves mention, involves the Federal Water Service Company. The Court of Appeals for the District of Columbia set aside a decision of the Commission prohibiting "insiders", who had purchased their holdings at depressed prices during a period when reorganization was being discussed, from sharing equally with the public in preferred stock exchanges in a recapitalization under the Act. The point that split the Commission in the case was not presented to the Court of Appeals. A petition for certiorari has been filed and it is hoped that a final ruling on the character of the insiders' participations in these recapitalizations will be made by the Supreme Court. One further point in connection with the enforcement of Section 11 (b) (1) -- the Commission in its recent opinion in the Associated Gas and Electric Company has indicated its position on the question of the effect to be given to pending tax legislation so far as the writing of orders is concerned. It is said in that connection that the standards

by which the retention of properties is to be tested are set forth in Section 11 (b) (1), not in the tax legislation.

(C) In connection with the growth of public ownership of utility facilities during the year, some comment might be made on the Bone Bill now pending in Congress. In general, this bill, dealing with federal power projects in the state of Washington, is designed to enable the purchase in toto of privately owned utility systems in the area by a federal authority and resale ultimately to local public power authorities. The present limited authority of local power agencies prevents anything but piecemeal acquisitions of properties, which the utility companies have indicated is an unsatisfactory practice. In an area in which the question of public vs. private ownership of utilities is so sharply raised, the issues may most fairly be tested by the complete retirement of one or the other form of ownership from the scene. A piecemeal and prolonged transition may well injure both sides.

(D) In the communications field also there have been significant developments during the year. The regulatory powers of the Federal Communications Commission have been affected by the two Supreme Court decisions. In the first case, *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, it was held that the Court of Appeals for the District of Columbia has the power to stay, pending appeal, the effectiveness of a Commission order denying to a station a license to broadcast. Implicit in the facts of the case but not at issue before,

or treated by, the Court is the question whether favorable orders may be issued without public notice and hearing and a finding of fact.

The second opinion, *Columbia Broadcasting Company* v. *United States*, a decision affecting not merely the Communications Commission but all regulatory authorities, involved a rule of the Federal Communications Commission providing that broadcast licenses or renewals would be denied to stations which entered into certain types of contracts with networks. The Supreme Court there held that the mere adoption of this rule so affected the networks that its validity could be contested by them in the courts before the rule was applied to any specific station and before any proceedings were held denying specific licenses in accordance with its requirements.

In another area, also, legal developments affecting communications companies are brewing -- the proposed merger of Western Union and Postal Telegraph under S. 2598.

Acting under its war powers, the Federal Communications Commission is also conducting a broad investigation into the efficiency of telegraph companies in handling their business. The results of this investigation and the action to be taken thereon are still unknown.

Of necessity I have limited my comments to the briefest mention of the high spots in our field during the year. The problems of railroads, motor carriers and air carriers and their regulation have not even been touched upon. And I have only hinted at the significance of the war for us as utilities lawyers and the part we can play in its successful prosecution. For a fuller discussion of these matters I turn now to the body of our program.