

Regulating Public Utility Performance:
The Law of Market Structure, Pricing and Jurisdiction

Chapter One

Regulatory Law: Purposes, Powers, Rights and Responsibilities

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The law of regulation serves the purpose of regulation. This chapter begins by explaining that purpose, as viewed from varied perspectives. It then describes the specific purpose of utility regulatory law: to define the powers, responsibilities, rights and procedures that direct, guide and constrain the actors and agencies with a stake in utility regulation. The chapter closes by describing the subjects and sources of regulatory law and relating those topics to the organization of this work.

1.A. Purposes of regulation

Regulation's purpose varies with one's perspective. Economists see regulation as a means to exploit economies of scale from natural monopolies while reducing economic loss in markets with imperfections; imperfections such as high entry barriers, unique products and insufficient information. Absent regulation, those imperfections can lead to destructive competition, unanticipated scarcity, insufficient innovation, negative or positive "externalities" arising from "public goods," and the "deadweight" economic loss that results when demand and supply curves intersect suboptimally.¹

Then there are perspectives of interest groups: consumers ("Protect us from abuse of monopoly power"), shareholders ("Set rates that allow us to earn a fair return on investment"), lenders ("Ensure cash flow sufficient to pay down debt"), competitors of the incumbent utility ("Create conditions allowing new entrants to compete and win on the merits"), low-income advocates ("Make essential services affordable"), environmental advocates ("Minimize environmental damage associated with production and consumption"), rural residents ("Ensure universal service") and large industrial customers ("Set rates that allow us to compete globally"). Each of these perspectives occupies a narrow band on the private interest spectrum. Some are conflicting. A regulator will find it hard to honor them all.

Overlapping with interest group perspectives are political perspectives. Depending on one's views, regulation reduces inequities in wealth; protects the vulnerable from deceptive sales practices and price-gouging; "eliminat[es] price as the basis of exchange" in resources that have special societal value (such as worker safety, cultural treasures and endangered species);² or responds when people "demand more for society than any individual will seek for herself as a consumer."³ These purposes too can come into conflict—with each

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1. See FREDERICK M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 21–23 (1990); RICHARD PIERCE & ERNEST GELLHORN, *REGULATED INDUSTRIES* 38–62 (1999); JOSEPH P. TOMAIN & RICHARD D. CUDAHY, *ENERGY LAW IN A NUTSHELL* 26–32 (2004).
 2. See SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *REGULATORY LAW AND POLICY: CASES AND MATERIALS* 58–62 (2003). This citation is not meant to imply that the authors have that perspective or exclude other perspectives; it is one among many they identify.
 3. LISA BRESSMAN, EDWARD RUBIN & KEVIN STACK, *THE REGULATORY STATE* 62, 79–87 (2010). Again, this perspective is only one among many identified by the authors.

other and with a view that regulation is less able to solve these problems than are unregulated markets.

Given these possibilities of conflict, some describe the role of regulation as “balancing” the interests of shareholders and consumers. A balance presumes opposition of interests. But customers’ and shareholders’ legitimate interests—reasonable prices, reasonable returns, satisfied customers and satisfied shareholders—are consistent and mutually reinforcing. High-quality performance and efficient consumption benefit multiple interests: consumers, shareholders, bondholders, employees, the environment and the nation’s infrastructure. What regulation must balance is not competing private interests but competing components of the public interest—e.g., long-term versus short-term needs, affordable rates versus efficient price signals, environmental values versus global competitiveness.⁴

For the practitioner and decisionmaker seeking clarity of purpose, the best single lodestar is the statutory language. Regulatory statutes commonly direct regulators to act “in the public interest.” This command necessarily presumes that private interests, absent regulation’s constraints and inducements, will diverge from the public interest.⁵ Universal, reliable, safe service at reasonable rates doesn’t happen by itself. In short, regulation is necessary to align private behavior with the public interest. Regulation defines standards for performance, then assigns consequences, positive and negative, for that performance. The purpose of regulation is performance.

1.B. Purposes of regulatory law

Regulatory law establishes the powers, responsibilities and rights that achieve regulation’s purpose. How does law distribute these powers, responsibilities and rights among those with a stake in regulatory outcomes?⁶

1.B.1. Powers

Legislatures receive their powers from constitutions. Using those powers, they establish the responsibilities and rights of citizens and businesses. Legislatures also delegate a portion of their powers to commissions by enacting statutes spelling out duties, procedures, conditions and instructions. Some state commissions also receive powers directly from

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4. *Cf.* *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (interpreting statute to mean that “Commission is vested with wide discretion to balance competing equities against the backdrop of the public interest”).
 5. The premise is neither universally shared nor permanently held. Policymakers revisit regulatory statutes when they perceive changes in the facts supporting the original enactment. That has been the case with each of the federal statutes discussed in this book, and many state statutes. The wisdom of regulatory statutes, and their changes, is a subject of continuous debate. The point here is that when a regulatory statute does exist, it exists because its enactors concluded that constraints and inducements were necessary to align private actions with the public interest.
 6. Experienced lawyers are welcome to skip this short section, but non-lawyers and new lawyers will benefit from understanding how law organizes its multiple components to produce public interest results.