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

Chapter Thirteen

Jurisdiction's Future

Scott Hempling
Attorney at Law LLC

Since regulatory law's beginnings a century ago, much about utility service has changed. Market structures, products and services, sellers and buyers, regulatory techniques and federal–state relations—all are in motion. Yet regulation's foundational legal principles remain in force. The statutory "just and reasonable" standard guards against monopoly markets' tendencies toward exploitation, inefficiency and indifference while protecting shareholders from regulatory capriciousness. The statutory prohibition against "undue preference" is still the small entrants' slingshot in their battle for access to incumbent-controlled bottlenecks. The Constitution's Takings and Due Process Clauses continue to protect shareholders and landowners from regulatory confiscation. The Supremacy Clause allows Congress to adjust federal–state jurisdictional relationships, subject to the state-protective limits in the Commerce Clause and Tenth Amendment. There is nothing "old world" about the law of public utility performance. It continues to allocate powers and protections among legislators, regulators, sellers, buyers, landowners and others affected by our infrastructural industries. Utility law's past is very much a part of the present.

These legal principles also provide stability for an uncertain future. Thirty years ago, utilities' obligations and activities were well-defined. Utilities issued debt and equity, built infrastructure, sold utility service and charged regulated rates. Regulators' roles were comparably clear: They approved financings, authorized and sited infrastructure, established quality of service standards and set rates. The utility's job was to provide its customers defined services at reasonable rates while earning a fair return for shareholders. The commission's job was to protect customers from monopoly abuse while keeping the utilities healthy.

Regulatory life is no longer so simple. Today's commissions design programs, make markets, collect and disburse funds, oversee construction projects, protect the environment, promote economic development, stimulate renewable energy and energy efficiency, host interest group gatherings and broker compromises. These activities are bumping up against statutory boundaries—exposing mismatches between expanding public needs and traditional regulatory powers and inviting the aggrieved to accuse commissions of exceeding their authority. When these disputes reach the courts, judges focus on three questions:

1. Is the commission pursuing an authorized *goal?* The traditional goals are adequate service, reasonable rates and reasonable returns. The expanded goals include diverse energy sources, increased access to telecommunications technology, economic development and environmental protection.

2. Is the commission performing an authorized *role?* The traditional roles are setting rates, establishing and enforcing standards, and controlling market entry. The expanded roles include changing customer behavior; restructuring markets; and administering programs for energy conservation, renewable energy and consumer education.

3. Assuming the commission is performing an authorized role to achieve an authorized goal, is the commission basing its decisions on authorized *criteria?* Traditional criteria were cost and need. Expanded criteria include environmental effects, aesthetic values, market competitiveness, labor–management peace, economic growth, and respect for historic and indigenous sites.[1]

These three dimensions—goals, roles and criteria—define how legislatures delegate authority. So when commission aspirations exceed legislative clarity, courts push back. The risk of judicial reversal

> increases when regulators (1) pursue state goals without a clear statutory basis; (2) play a new role without sufficiently delegated authority; (3) make decisions based on criteria that are not aligned with explicit goals, or (4) balance criteria without a statutory preference or balancing test.[2]

As the regulatory profession continues to search for the best mix of incumbents and newcomers, of monopoly services and competitive services, of legislative roles and commission roles, this risk is a constant. There will always be friction between new policy aspirations and existing statutory boundaries. But the process of change will be smoother if decisionmakers and practitioners identify the uncertainties before they become conflicts. This concluding chapter therefore raises, for each of this volume's Parts, key questions that deserve our attention.

13.A. Market structure

13.A.1. Evaluating alternative arrangements

Part 1, on market structure, described our four-decade experiment in converting monopoly markets to competitive markets. To evaluate this effort, policymakers are asking these questions:

1. For each product and service provided by markets in which a utility is a participant: Is the market performing to its full potential, in terms of cost, quality, innovation and responsiveness to consumers?

2. If not, what feature(s) of the market structure must change to improve performance? Is it, for example, the array of sellers, their market shares, their incentives (both positive and negative), the costs of entry and exit, or the actions or inactions of regulators?

3. To induce improvement, should regulators focus on the performance of a particular company, the performance of the market as a whole, or both? Each focus produces a

1. The goal-role-criteria analysis was introduced in a seminal paper, Eric Filipink, Serving the "Public Interest": Traditional vs. Expansive Utility Regulation (National Regulatory Research Institute 2009), *available at* http://www.nrri.org/pubs/multiutility/NRRI_filipink_public_interest_jan10-02.pdf.
2. *Id.* at 5–6.