

ENERGY REGULATION QUARTERLY



A forum for discussion and debate on issues affecting regulated energy industries

BOOK REVIEWS

Regulating Public Utility Performance by Scott Hempling¹

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Scott Hempling has produced a unique contribution to public utility law and policy. On the one hand *Regulating Public Utility Performance* is a simple and straightforward primer. On the other hand the book weaves important legal principles with the history and rationale of the public policy initiatives that drive them. The title itself tells us something. In the old days we thought we were regulating price. Today we understand that the regulators' role is more complex.

There are three sections in this book. The first deals with the basics of market structure. Why do we have regulated monopolies? Why are certain markets open to competition and unregulated? And of course how do we transition from one to the other – something that always concerns us as disruptive technologies alter the boundary lines between competition and monopoly.

This is something that concerns us today. Rooftop solar is taking customers from electric utilities at alarming rates – the product of breakthrough technology coming to the market at constantly reduced prices. This leads to the possibility of stranded costs as utilities attempt to cover fixed costs from lower revenues. This, Hempling discusses in detail, including the constitutional issues that are unique to the United States.

While solar and the related utility death spiral may not be as stark in Canada as it is in the sunny South, it is something that Canadian policymakers worry about to an increasing degree, often turning to the old bandaid of increased fixed charges. The pipeline side of this equation, horizontal drilling and fracking have Marcellus shale gas in the East replacing Alberta gas in the West that in turn causes national pipeline throughput to drop to a fraction of its capacity, something that the National Energy Board recently faced in its MainLine decision.² The resulting deregulation debate also receives a detailed discussion from Hempling.

The second section of this book deals with the basic pricing questions regulators often face. What are just and reasonable prices and what is undue discrimination? What is retroactive ratemaking and why is it prohibited? What is a prudent investment? What costs can be recovered in rates and when? These are well known concepts but many are still winding their way through Canadian appeal courts as disruptive technology forces courts and regulators to redefine traditional regulatory concepts in new and difficult circumstances.

The third and final section of this book deals with jurisdiction, particularly the divisions between the state and the federal governments. This tends to be a more lively debate in the United States than Canada. Nonetheless it is an important issue in both countries. The principles are similar. And the division never goes away.

This book is refreshing. Despite the author's extensive knowledge the book is not based on thousands of footnotes supporting black letter law in the manner of the two leading classics that have long occupied the stage. Hempling wisely chose not to simply update the classics but rather offered a plain language blend of current law and policy.

In this sense the book reflects Hempling's background. For a number of years his mission in life was to educate regulators as Executive Director of the National Regulatory Research Institute. His first book *Preside or Lead* summarised that experience and learning.

This latest book continues that mission. Hempling continues to offer seminars to this community in an important commitment to public service. He also continues to serve as an Adjunct Professor in Public Utility Law at the Georgetown University Law Center in Washington.

Scott Hempling is an active lecturer in conferences around the world including Canada. He has lectured twice at the annual CAMPUT Conference and three times at the annual Energy Law Forum. Hemplings lectures are characterized by wry humor merged in a detailed knowledge of law and economics. He is the Will Rogers of the public utility law lecture circuit. He resembles the famous Alfred Kahn, the Chairman of the Economics Department at Cornell who subsequently became Chair of the Civil Aeronautics Board in Washington. While at the Board, Kahn observed that he did not know one plane from another – to him they were all marginal costs with wings. Sounds like Scott Hempling. But the ability to turn sophisticated economic and legal concepts into catchy phrases is an important teaching tool.

Hempling promises that a second volume will be released sometime next year. This will deal with market structure including merger policy. It no doubt will also be a useful addition to the literature and to utilities and regulators forced to navigate the challenging future of the energy sector.

One of the refreshing approaches in this book is the occasional shift from the energy sector to telecommunications. That is where we first saw the challenges regulators face from disruptive technology as that industry transformed regulation driven by new low-cost semiconductors and fiber-optic technology.

The energy sector now faces many of those challenges. Although the technology is different, the regulatory implications are the same. And a review of the basic regulatory concepts, such as the obligation to serve, unbundling, essential facilities, predatory pricing and undue discrimination, are all worth the read.

Similarly the time-honored concepts in Part Two dealing with pricing issues such as just and reasonable rates, prudence, guarantees of cost recovery, undue discrimination, affiliate transactions and cross subsidies will all ring a bell with Canadian regulators and those that appear before them.

It is remarkable how similar these concepts are between the two countries. Those that argue these cases on a regular basis know how often we rely on American legal principles even though we sometimes don't understand the policy rationale that underlies those concepts in the United States. Often the principles are based on US antitrust laws opposed to public utility law. But a better understanding of the American principles only serves to create better understanding of the principles and their application in this country. Even the analysis of the federal and state jurisdictional

relationships bears a remarkable similarity to the Canadian battles over the years despite the differences in government structure.

Today Scott Hempling is more than a teacher of regulators. He has become an expert witness testifying in many jurisdictions and a practising attorney who counsels both regulators and the utilities they regulate. This more recent experience has produced a deeper and more imaginative handling of the issues. And it shows in his work.

We look forward to the second volume and expect it will match the excellence of this one. This is a quick read but experienced counsel and regulators will not find it a waste of time. For new regulators and counsel it is required reading.

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¹ Scott Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction*, (ABA Section of Environment, Energy, and Resources, 2013).

² National Energy Board, *Re TransCanada Pipelines Limited* RH-003-2011 (March 2013) (Reasons for Decisions).

³ James C Bonbright, Albert L Danielsen & David R Kamerschen, *Principles of Public Utility Rates*, 2d ed (Arlington, VA: Public Utilities Reports, Inc., 1988); Charles F Philips, *Regulation of Public Utilities: Theory and Practice*, 3d ed (Arlington, VA: Public Utilities Reports, Inc., 1993).

⁴ Scott Hempling, *Preside or Lead? The Attributes and Actions of Effective Regulators*, 1

⁵ ed (National Regulatory Research Institute, 2010).

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