

Council Comments:

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AN ANALYSIS OF SELECTED ISSUES REGARDING THE REGULATION OF PUBLIC UTILITIES IN MICHIGAN

This Council Comments summarizes a study that was requested by the Michigan public service commission. Report No. 302 (69-pages) reviews the major issues in public utility regulation in Michigan: the role, legal status, and authority of the commission; elements of the management structure of the commission; and some of the major problems facing the commission. It includes suggestions to strengthen the policies, programs, and structure of the commission, but does not attempt to evaluate the substantive decisions of the commission in rate cases or other proceedings.

Background on the Public Service Commission

The Michigan public service commission regulates most public utilities in the state including investor-owned electric companies and rural electric cooperatives; natural gas utilities; telecommunications utilities; and the intrastate motor carrier industry. The commission does not regulate municipally owned utilities. The role of the commission is to render decisions in proceedings brought before them by regulated firms or other interested parties. The commission is responsible for regulating over \$12 billion in gross revenues.

Utilities Regulated by the Public Service Commission, 1989

<u>Industry</u>	<u>Number of Utilities</u>	<u>Operating Revenue (in Millions)</u>
Electric	10	\$5,357.7
Rural Electric Co-ops	13	141.9
Gas	8	2,703.9
Telephone	38	2,982.2
Water	18	1.5
Motor Carrier	<u>4,500</u>	<u>938.5</u>
Total	4,587	\$12,125.7

Source: Michigan Public Service Commission.

The mission of the public service commission is to formulate and administer policies and regulations necessary to ensure that energy and regulated communication and transportation services are provided in an efficient, reliable, safe, and environmentally acceptable manner sufficient to meet the diverse needs of Michigan citizens. The mission also includes formulating the state's energy policy by engaging in long-range energy planning activities.

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The commission has quasi-legislative and quasi-judicial powers and duties. In its quasi-legislative capacity the commission sets rates for the state's investor-owned public utilities and rural electric cooperatives and makes rules governing utility operations. In a quasi-judicial manner, the commission hears and decides complaints, and issues written orders. Commission orders may be appealed to the Michigan Court of Appeals.

Analysis of the Legal Basis of Public Utility Regulation

History The authority of a state to regulate public utilities is based upon the police power and is exercised by the legislative branch of state government. Due to practical considerations, state legislatures have seldom directly exercised the regulatory powers in question, electing instead to delegate certain quasi-legislative responsibilities to commissions. The Michigan Legislature has subscribed to the accepted practice, by enacting a succession of statutes requiring public utilities to charge reasonable and just rates, but delegating to a multi-member commission the authority to conduct an investigation upon the facts in a given case.

The Case for Statutory Revision The Michigan Legislature created and subsequently abolished three separate utility commissions between 1907 and 1939, when the present public service commission was established. In each instance, the Legislature superimposed each successive statute upon existing law and simply transferred the authority of each abolished commission to its successor without specifying the authority that was being transferred. Contemporaneously, the Legislature enacted several additional statutes that vested specific power in the commission to regulate specific categories of utilities. The predictable result of this legislative patchwork has been statutory confusion. In a 1988 decision, **Union Carbide Company v Public Service Commission**, (431 Mich 118; 1988), the Michigan Supreme Court noted that this continuing superimposition of one statute upon another, "has created a statutory jungle." The Court further stated:

Each decision issued by the courts in the area of utilities regulation entails a journey into the heart of darkness in which the only reliable guideposts are this Court's own prior decisions. The time has long since passed for a comprehensive review of this legislation. (431 Mich at 135, footnote 15.)

Because the lawful responsibility to regulate utilities in the public interest resides with the commission, it is necessary that the commission be governed by a rational statutory framework that facilitates the ability to further that interest. The present disparate statutes should be revised into a single, internally consistent codification that clearly delineates the commission's authority.

Timely Disposition of Cases An area of continuing controversy is the length of time generally required for the commission to issue a final order in certain rate cases. Two factors contribute to the length of a rate case. First, ratemaking falls within the definition of contested cases contained in the administrative procedures act of 1969. The various safeguards of the act do not always lend themselves to an expeditious resolution of rate cases. Second, since the commission cannot issue orders with retroactive application, the party wishing to maintain the status quo in a rate case has a substantial incentive to delay the outcome as long as possible.

Section 6a of the public service commission act contains a nine-month requirement for the completion of contested cases, and requires the commission to issue rules and procedures to achieve

the nine-month requirement. An analysis of rate cases between 1980-1989 shows that the commission has completed 82 percent of the cases in nine months or less. However, the commission has not consistently complied with the requirements that it report delays to the governor and the Legislature. It also has not adopted rules and regulations to achieve the nine-month requirement as provided by statute. It is clear that the public interest is not served by unnecessary delay. Statutory changes that reduce, or that authorize the commission to reduce, the incentives to delay may be necessary.

Several approaches are worthy of legislative consideration. First, the Legislature might statutorily authorize the commission, or its administrative law judges, or both, to impose appropriate sanctions against any participant determined to be prolonging unnecessarily the proceedings. Second, the commission might delegate to its administrative law judges more authority to establish and strictly enforce the hearing schedules in rate cases, and the commission took steps in this direction in February 1991. Third, the Legislature could provide statutorily that a utility that filed an application for a rate increase be allowed to begin collecting the higher rate after a specified period had elapsed, regardless of whether the commission had issued a final order. Finally, the present nine-month statutory time limit may not be sufficient for certain major, complex rate cases and the appropriate remedy would be to amend the act rather than to continue its nonobservance.

Analysis of Organization and Management

Legal Services and the Attorney General The Department of the Attorney General, through its public service division, represents commission staff in proceedings before the commission. In addition, the special litigation division of the Department of the Attorney General intervenes on behalf of ratepayers before the commission. The public service division and the special litigation division appear in court representing respectively the commission and the Attorney General. It is alleged by some parties that attorneys from the same office representing different positions results in the potential for a conflict of interest to occur.

Although it is clear that the Attorney General has authority to represent all state agencies and to appear in any court to represent the state's interest, this authority does not answer concerns as to whether a potential conflict of interest exists in such an environment and, more importantly, whether such a dual representation is good public policy. In summary, there should be a serious discussion by elected state officials concerning whether the commission should be serviced by legal counsel appointed by and responsible to the commission.

Qualifications of Commissioners The public service commission consists of three members, appointed by the governor to six-year terms with the advice and consent of the Senate. The practice has been to appoint individuals who are attorneys and who lack background in public utility issues. There is no statutory requirement that an appointee be an attorney and no prohibition against an appointee having utility experience.

Utility regulation involves a number of different disciplines such as finance, accounting, engineering, law, statistics, and business organization. Ideally, all of these disciplines should be represented on the commission. It may be that a mix of disciplines would better serve ratemaking decisions. Thus, it is suggested that the governor give consideration to appointing individuals with more diverse professional backgrounds.

Management of Technical Staff A concern relating to the effective and impartial operation of the commission is the combination of the commission's dual responsibility for ratemaking and managing a large technical staff that is one of the major participants in rate cases. The existing system raises concerns about whether a fair hearing for all participants can occur when one of the parties is the commission's own staff. Concerns include staff influence on commissioners as well as influence of commissioners on staff that can erode the environment of independence. Further, rendering rate decisions is a full-time job, but so is the management of a large, complex organization. These concerns are then amplified when responsibility is diffused among a multi-member commission.

Consideration should be given to an alternative to the current management system that would separate the technical staff from the commission. This would have the effect of raising public confidence in the performance of the commission by removing staff intervenors from a direct employer-employee relationship with the commission. At the same time, it would allow the commission to concentrate on making decisions concerning utility regulation rather than devoting time to management activities.

Conclusion

Governmental regulation of utilities has been viewed as a necessary, but imperfect, substitution for economic competition. The regulatory framework in Michigan was premised upon this traditional view. However, increased competition has been emerging in the utility field resulting from new technological, legal, and business developments, which challenge the traditional regulatory system. The findings presented in this report are designed to assist policymakers and the commission in meeting these challenges, so that the public service commission can continue to serve the public interest in utility regulation.