THE NEED FOR REGULATION
IN A
COMPETITIVE ELECTRIC UTILITY INDUSTRY

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Government interference or regulation affixes itself to an industry at that point where industry fails or refuses to conduct its affairs in a fashion which will protect the individual and social interests * * *.

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[Regulatory] standards are seldom formulated until there is a dominant need for protection which the industry is unable or unwilling to provide; which society is unable to provide for itself; and which it insists that government provide.[1]

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[1] Frank Horack and Julius Cohen, "After the Nebbia Case: The Administration of Price Regulation," 8 ***University of Cincinnati Law Review*** 219, 222, 226 (1934).

INTRODUCTION

Substantial effort is being devoted today to answering the question: does workable competition exist in a variety of public utility industries.[2] The argument presented is that, given the presence of such competition, no need exists for regulation to enforce just and reasonable rates, non-discrimination, efficient industry operation, and the like. In a workably competitive market, the argument goes, "the market" will accomplish these goals and accomplish them with a greater efficiency and effectiveness than present means of economic regulation.

In contrast to this argument, the thesis of this article is that whether or not an industry should be regulated does *not* depend on whether the industry is "workably competitive." An industry may be workably competitive but nonetheless still be necessarily subject to public control for the public good.[3] Clearly, of course, competition is not irrelevant to the issue of regulation versus deregulation. Just as clearly, it is not determinative.

The notion that competition can and should displace direct governmental intervention in economic affairs has some facial attractiveness. Since time immemorial, the doctrine that competition is the "life of trade" and that competition is the proper method and means of allocating resources --financial and natural-- has been taught.[4] Substantial effort, both public and private, is devoted to ensuring and promoting robust competition in the marketplace.

Question exists, however, whether "the market" will indeed be able to substitute for regulation in all aspects of a public utilities industry. Some industry analysts argue, for example, that interexchange markets are indeed not workably competitive at all.[5] These analysts observe that the interexchange industry is highly concentrated, is populated by firms that wield considerable market power, and has both the opportunity and the incentive to engage in monopolistic pricing. Other industry analysts argue that, whatever the structure-conduct-performance evaluation of the telecommunications industry, *consumers* in the telecommunications industry have attributes that will interfere with, if not prevent, the operation of workable competition.[6] Still other analysts argue that, given the nature of interexchange service, inadequate information exists (absent some regulatory or legislative response) for the operation of workable competition.[7]

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[2] *See*, John Horning, *et al.*, ***Evaluating Competitiveness of Telecommunications Markets: A Guide for Regulators***, National Regulatory Research Institute (January 1988).

[3] This need not be full rate-of-return, price and earnings regulation.

[4] *See e.g.*, Philip Cabot, "Competition is the Life of Trade," 3 ***Harvard Business Review*** 385 (1925).

[5] *See e.g.*, William Shepherd, ***Effective Competition, Deregulation, and `Price Caps'*** (Oct. 1988). (Paper presented at Conference on Competition and the Regulation of Telecommunications Services, Public Service Commission of the District of Columbia).

[6] *See e.g.*, R.Colton (1993). "Consumer Information and Workable Competition in the Telecommunications Industry." XXVII ***Journal of Economic Issues*** 775.

[7] *See*, Robert Rowe, ***Consumer Information in Telephone Pricing***, National Consumer Law Center (December 1989).

This evaluation examines the debate concerning regulation versus deregulation of the energy industry in yet a different context. The evaluation differs from most in that, for purposes of analysis, the presence of workable competition is assumed.[8] The objective here is to obtain an understanding of whether, even given the presence of workable competition, reasons exist to exert government regulatory authority.[9]

In pursuit of this understanding, the following analysis will be undertaken in three parts. *Part I* will articulate the basis which underlies the economic regulation of a variety of industries. *Part II* will look at the goals that regulation seeks to serve. *Part III* will examine the situations in which competition is found to be insufficient to fulfill socially-demanded tasks.

The process of deciding whether energy utilities should be regulated involves two fundamental steps. First, if workable competition does *not* exist in today's markets, the inquiry goes no further. Regulation is necessary, much the same as it is necessary for other monopolistic public utilities and common carriers.[10] If competition *does* exist, however, it is necessary next to determine whether that competition is of the type and extent to achieve the objectives that would be sought through regulation. If it is not, competition cannot displace governmental control as a means of protecting the public's interest and regulation is necessary. In the event workable competition is found to exist, *both* steps of the analysis must be completed.

In sum, any evaluation of the ultimate decision to regulate or not to regulate must look first at whether or not competition is present; if it is, the decision to regulate or deregulate should then depend on whether there is a need for public regulation, notwithstanding the presence of workable competition.

THE BASIS OF REGULATION

Even though Lord Hale, of Seventeenth Century England, did not frequently consider an extensive interdependent competitive energy industry in 1670, his advice on public regulation should serve as the starting point for examining what role government regulation should play in the energy utilities today. Lord Hale's comments have guided U.S. policymakers through all of its prior regulation and deregulation cycles.[11] Indeed, the basic foundation for government control of business in Anglo-

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[8] It is important to note, however, that the assumption of competition is made *solely* for the purposes of analysis.

[9] In this sense, "regulation" is intended to refer to what historically has been considered "economic regulation." It excludes, for example, much environmental regulation, workplace safety regulation, securities regulation, and the like.

[10] In this sense, this article categorically rejects the extreme assertion that there is no need to regulate even a monopolistic industry providing a public necessity.

[11] While perhaps it would be nice to think that the energy industry presents unique issues today, that is not so. The United States historically has gone through regulation cycles, such as the years associated with the Granger Movement and regulation of the railroads; state regulation after the public utility holding company abuses of Samuel Insull is another "regulation" cycle. So, too, has the country gone through periods of deregulation or aggressive *laissez faire* such as occurred in the early 1800s and has again

American jurisprudence can be traced directly to his commentaries. In his treatise *De Portibus Maris*, Lord Hale declared that when private property becomes "affected with a public interest," it "ceases to be *juris privati* only."[12]

The United States Supreme Court recognized the truth of this declaration when, as early as 1876, in *Munn v. Illinois*,[13] the Supreme Court held that it was upon Lord Hale's principle that the right of regulation rested in the United States.[14] Without question, the *Munn* court addressed only the *power* of the state to exercise jurisdiction, a power that is no longer questioned. Today the issue is not whether the state *may* exercise regulation, but rather whether the state *should* exercise it.

The issues have similar conceptual groundings. The answers to each question ("may" and "should") are founded in the role that regulation serves in our economic system. Regulation of industry by government is as old as the fundamental democratic precepts which underlie this nation. Regulation can be traced to when government first declared that prices charged for particular "public" products must be "just and reasonable."[15] In short, regulation is not a recent invention, flowing out of institutions associated with the New Deal. So long as private and public interests have diverged, government has retained the authority to step in and control private activities.[16]

Importantly, no single set of circumstances adequately explains each and every instance of the rise of economic regulation. Three factors, however, frequently stand out:[17]

- The presence of monopoly power
- The grant of public perquisites
- The potential for public harm

Each will be examined separately. In so doing, however, one must remember that these factors may be

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become apparent in the 1980s and 1990s. Cycles can overlap as well. While there is growing sentiment for deregulation generally today, there is a counter pressure in the prescription drug industry; moreover, there is the first glimmer of sentiment for re-regulation of the airline industry.

[12] *See generally*, Breck McAlister, "Lord Hale and Business Affected with a Public Interest," 43 ***Harvard Law Review*** 759 (1930).

[13] 94 U.S. 113 (1876).

[14] 94 U.S. at 125, 126.

[15] Indeed, economic regulation can be traced back to medieval Europe. *See generally*, Joseph Schumpeter, ***History of Economic Analysis***, at 60 - 61, 98 - 99, 359 - 360 (1954).

[16] Regulation over the years has included most industries that have stood in the gateway of commerce, including the provision of financial services, transportation, energy and communication. Indeed, few (if any) industries that substantially affect commerce today escape price, earnings or disclosure regulation. *See e.g.*, Rowe, *supra*, at Appendix B.

[17] Other factors exist. *See generally*, Ford P. Hall, ***The Concept of a Business Affected with a Public Interest*** (1940).

present individually or collectively. Like so much else, they are dynamic and interdependent.

Monopoly Control[18]

One of the primary foundations for state economic regulation was the presence of monopoly power over the offer of essential services.[19] In the terms of the times, regulation was undertaken for the "business affected with a public interest." Some of these were monopolies and were regulated as such. The railroads and the grain elevators in the 1800s are examples, as are the electric and natural gas companies of more recent years. Under this theory of regulation, the law is necessary to stand between the provider of services and the abuse that unfettered monopoly power might portend.[20]

Clearly, however, the lack of competition alone is not now and never has been the *sole* determinant of whether public control was to be exerted over a business. Neither is the monopoly control of an essential service necessarily sufficient, standing alone, to justify regulation. The monopoly provider of coal, for example, has never been subjected to regulation. Nor would a community's sole physician be subject to regulation because of her monopoly status.

The courts have recognized that regulation *may* turn on monopoly control of an essential good but generally has "something more" involved. For example, the U.S. Supreme Court relied simply on the facts that fire insurance was an important industry and that many people were affected to justify regulation.[21] So, too, did the U.S. Supreme Court expressly hold that monopoly control, unto itself, was neither necessary nor sufficient to justify the public control of business.[22] Not even in *Munn v. Illinois*, the case in which economic regulation in the United States was first judicially approved, did the Supreme Court specially predicate the power to regulate on the existence of a monopoly by the affected industry. Indeed, in words still applicable today, the Supreme Court held that it was the public nature, and not the monopolistic character, of the grain industry that justified its regulation at that time.[23]

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[18] For purposes of this paper, no distinction is made between "monopoly" and "oligopoly" power.

[19] *See generally*, Bruce Wyman, "The Law of the Public Callings as a Solution of the Trust Problem (Part I)," 17 ***Harvard Law Review*** 156 (1904); *see also*, Bruce Wyman, "The Law of the Public Callings as a Solution of the Trust Problem (Part II)," 17 ***Harvard Law Review*** 217 (1904).

[20] This theory is generally advanced to explain the rise of the "public utility" and "common carrier." For these special industries, the law has imposed special duties. These duties include the obligation to provide reasonably adequate service to all who apply for it; to provide that service at just and reasonable rates; and to provide that service in a non-discriminatory fashion. However, the "public utility," with its special obligations, and the "business affected with a public interest," with its public regulation, are two distinctly different business entities.

[21] ***German Alliance Insurance Company v. Lewis***, 233 U.S. 389, 430 (1914).

[22] ***Budd v. New York***, 143 U.S. 517 (1891); ***Brass v. North Dakota***, 153 U.S. 391 (1894).

[23] For a superb critique of the "monopoly theory," *see*, Henry Rottschaefer, "The Field of Governmental Price Control," 35 ***Yale Law Journal*** 438, 451 - 56 (1926).

Monopoly control of essential services is a factor to consider in deciding whether or not to regulate an industry. It *may* be sufficient by itself to impose regulatory economic constraints. Nevertheless, monopoly control does not serve as the basis for *all* regulation.

Public Perquisites

The grant of special privileges to a private corporation yields corresponding public obligations.[24] Among those public obligations is submission to economic regulation in the public interest. This regulation might involve controls over price setting and disclosure, service quality, and long-term planning.

A corporation or industry that has been granted the right of eminent domain is the best example of an industry that is accordingly subject to public control. Private land, of course, cannot involuntarily be taken for private use. By definition, therefore, the exercise of the power of eminent domain must be for a "public use." The public thus has a right to ensure that property so taken, or the industry so supported, is not operated strictly for private gain with "the public good" flowing only as an incident therefrom. The industry, in other words, having been granted a right that can only be exercised for the public use must subject itself to supervision in enforcement of that responsibility.

Moreover, if an industry is granted the right to acquire property over the objection of the current title holder, that grant is a delegation of the power of the state itself; only the state may take private property.[25] Being the delegee of the *power* of the state, an industry carries with it certain *responsibilities* as well. For example, just as the state may not condition the use of streets, the availability of fire and police protection, and the offer of public education based on ability to pay, a corporation, whose existence and prosperity depends in large part on the private exercise of the power of the state, may not condition the receipt of its service based on ability to pay. The delegation of some aspect of the power of the state, itself, carries with it the obligation of regulatory oversight to ensure that the power of the government is wielded for the entire public and not merely some small fraction of the public.

Other public perquisites have been held, also, to justify public oversight. The grant of certain tax benefits, the grant of antitrust immunities, and the grant of public funds are public amenities which constitute a sufficient basis upon which to conclude that the benefitted company has a public duty to discharge and owes a duty to the community enforceable by public oversight and regulation.

Public Harm

The sheer magnitude of public harm should particular industries *not* be subject to governmental control has served as the basis for public regulation.[26] Certain industries are seen to hold a special relationship

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[24] *See generally*, Ford P. Hall, ***The Concept of a Business Affect with a Public Interest*** (1940).

[25] Other powers that carry similar restrictions include the right to obtain credit secured by a pledge of the general taxing power of the state.

[26] *See generally*, Rexford Tugwell, ***The Economic Basis of Public Interest*** (1922).

to the public. Because of their unique public position, should abuses arise in these industries, the public would suffer disproportionate harm. The proposition is stated differently at different times. Tugwell stated as early as 1922:

> there might conceivably be a clear monopoly in the business of supplying the public with watch cases for instance but that business might not be regulated because it was not sufficiently important to the public interest.[27]

The U.S. Supreme Court stated it like this:

> In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence which makes the public interest that justifies regulatory legislation.[28]

The "something more" was found to be the power and opportunity for an industry to engage in "imposition and oppression."

Unquestionably, government not only may, but must, regulate to protect the public's health, safety and comfort. In addition, if an industry is such that the public can be subjected to economic imposition and oppression, that industry is subject to public control through economic regulation. Under this approach, the opportunity and ability of the industry may arise because of the number of people affected, because of the magnitude of the payments made by the public to the industry, because of the high proportion of individual household income devoted to paying the industry, because of the life-sustaining necessity of the industry, or because of some similar factor. These factors, however, are evidentiary. They reveal the conditions which justify regulation; they are not the justification themselves. The justification is the "imposition and oppression" that cannot be stopped without public regulation.

The provision of banking and financial services, insurance, energy, water and communications are all among these industries with a special relationship to the public.[29] A number of characteristics mark these industries. First, they often involve household necessities with few close substitutes. Their loss can destroy a life in all of its social, economic and physical well-being. Second, they are often extremely complex, either in the nature of the product or in the nature of the pricing. Third, because they are often public necessities, the interruption or abuse of which would cause substantial public disruption, society cannot afford to allow them to fail, to be mismanaged, or to be marked by consumer abuses.

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[27] Tugwell, *supra*, at 65.

[28] ***German Alliance Insurance Co. v. Lewis***, 233 U.S. 389 (1914).

[29] At times and in places, housing, too, has been considered such a public necessity. In most places, for example, mobile home parks are extensively regulated. *See*, Karl Mannheim, "Tenant Eviction Protection and the Takings Clause," 1989 ***Wisconsin Law Review*** 925 (1989).

Summary

Each factor discussed above offers assistance to a determination of whether to regulate or deregulate the energy utilities. The monopoly theory, while incomplete, offers the clear choice. If workable competition does not exist in the energy utilities, regulation must follow. The remaining two theories require a more extended analysis. Nevertheless, in each instance, continued regulation is called for even though a workably competitive industry may exist.

The theory of public harm seems best suited to an evaluation of the energy utilities. It does not focus the policymaker's sole attention on the industry alone. Instead, it considers the social setting of the industry, also, as well as its market and the spread of the consequences of non-regulation.[30] It considers the extent of the consumer's disadvantage should the postulated abuses from non-regulation actually arise. These factors should be given considerable weight in a deregulation debate.

GOALS OF REGULATION

Regulation of American industry has historically served numerous goals: economic, social and political. No single set of goals is common to every industry. However, some commonalities can be identified. They are, if not overlapping, nevertheless interdependent and mutually supportive. Common goals include oversight over rates and charges, over the provision of service, over external impacts, over long-term planning and over the stability of the industry among others. In each instance, it is important to bear in mind the reasons which gave rise to public control in the first place. The fact that there might be a monopoly provision of service, the fact that there are underlying publicly-provided perquisites, the fact that the service is of essential public importance, individually or collectively, all give additional meaning to the regulatory goals discussed below.

A compendium of regulatory goals is presented below. The list is not intended to be comprehensive. No list could be. The list *is* intended to provide a relatively complete overview of the *types* of objectives which economic regulation is designed to pursue.

In reviewing any list such as presented below, it is important to bear in mind several things. First, the reasons for public regulation might change or disappear over time. Accordingly, there must be a constant reevaluation of regulation. Some industries might newly enter the realm of the regulated while others might exit. Second, the goals of regulation may not be entirely consistent one with another. In any given instance, it is up to regulators to determine how to weigh these goals and to determine which goals should predominate when conflicts arise. Third, there is no hierarchy of goals. The list presented below is presented in no order of priority.

Control of Prices and Earnings

The most public areas of regulatory control are the areas of prices and earnings. Pricing is one of the primary areas for potential abuse by non-regulated companies. It involves the potential for significant income redistribution as well as the potential for making goods and services unavailable to a large

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[30] *See*, Tugwell, *supra*, at 70.

portion of the population. The goals of price and earnings controls include:

1. **JUST AND REASONABLE RATES:** Rates must be "just and reasonable" for all consumers. Just and reasonable rates often are found to incorporate three elements.[31] First, service is to be provided at "least-cost." If two alternative means of providing an identical level of service are available, Alternative A which costs $10 and Alternative B which costs $15, the obligation is to provide Alternative A.[32] Second, service is to be provided consistent with earning a reasonable, but only a reasonable, return on equity. Investors should be permitted to profit to the extent, but only to the extent, of their exposure to risk. Moreover, no unreasonable profit, either in terms of rate or magnitude, should arise from the control of an essential public service. Third, rates are to presume efficient and economical management. Managerial imprudence, negligence, or outright incompetence, is not to be compensated.

2. **NON-DISCRIMINATION:** Rates and charges for services are to be provided on an equal basis to all who seek service, pay for it, and comply with the reasonable rules of the service provider. Non-discrimination prohibitions largely arose out of the abuses of the 19th Century, where railroads offered advantages to one shipper over another based solely on favoritism and caprice. The U.S. Supreme Court eventually held that, considering the public support of the railroads in the form of land grants, tax advantages, and the right of eminent domain, and considering the essential nature of the service, the railroads owed an equal duty to the *entire* public. So, too, have Rural Electric Cooperatives (RECs) been found to have such a duty because of the extensive federal funding devoted to bring electrification to Rural America. Similar duties, based on similar grounds, can be found for other industries subject to public control.

3. **EQUITY:** Equity is equally important to the goals of "reasonableness" and "non-discrimination." The equity goal flows from three basic sources. First, the importance of the goods and services subject to public control dictates that they be available to all who seek them. Members of the public should not be denied access to essential life services such as energy or water, or to essential economic and social services such as communications and finance, because of an inability to pay. Second, by accepting public benefits, an industry accepts the responsibility to ensure that the goods and services assisted by the public will be made available to the entire public. When a telephone company converts part of a public street to its own use, the conversion must be for the *entire* public and not merely for that part of the public which is able to pay the privately established rates. Finally, to the extent that the industry is monopoly dominated, by definition, no alternative exists for those households who are priced out of the market. Since the loss of service can be life-threatening, in that situation, the requirement that rates and charges be "equitable" is particularly important.

4. **CROSS-SUBSIDIZATION:** The issue of cross-subsidization primarily arises as between regulated and unregulated services provided by the same corporation. Speculative ventures, supported by ratepayer-provided compensation, are not to be condoned. Moreover, customers of a publicly-

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[31] In addition, "just and reasonable" can be said to incorporate the elements of "equity" and "non-discrimination" discussed below.

[32] One example of this choice is the issue of whether energy services should be provided through demand-side management strategies or through the construction of new power plants to produce more electricity.

supported essential service should not be forced to subsidize less essential services in a more competitive market. Unfortunately, when a firm participates in both a competitive market and a non-competitive market, particularly when there exist substantial common costs, that firm has both the incentive and the opportunity to provide subsidies flowing to support its competitive position. Ratepayers of the monopoly service have no choice but to take service from the monopoly provider. Their only choices are to pay or to do without. Accounting separation is generally insufficient to prevent the industry practices which tend to dump unjustified costs on most customers. As a result, regulation is necessary.

Review of Service Quality

Aside from the regulation of rates and charges, regulators oversee the quality of service as well. The objective is to ensure the maintenance of reasonably adequate service. Adequacy of service concerns issues such as the following:

5. **RELIABILITY:** When the light-switch is flipped, the lights should go on. When the receiver is picked up, a dial tone should be present. That is the essence of reliable service. Reliability means that service will be available at the time and to the extent that it is reasonably demanded. Regulation of reliability often takes the form of ensuring that investment is adequate to maintain the facilities necessary to meet peak demand and to provide against reasonably foreseeable contingencies.

6. **RUINOUS COMPETITION:** Ruinous competition occurs in situations where firms compete so aggressively as to threaten their long-term financial stability. Ruinous competition can be prevented by entry regulation, by price regulation, by capital investment regulation, and the like. To prevent ruinous competition is to *preserve* short-term reliability and to *foster* long-term reliability.

7. **SAFETY AND SOUNDNESS:** Ensuring the safety and soundness of an industry protects the customers of that business from external risks. Concerns over safety and soundness in the banking industry, for example, arise from the involvement of banks in risky endeavors such as insurance and securities. The collapse of the heavily leveraged utility holding company structures of Samuel Insull in the early 20th Century gave rise to efforts to protect the safety and soundness of regulated utilities. The collapse of the savings and loan industry, and the threat to commercial banking due to real estate and Third World loans, are of similar moment today. Given the increasingly broad geographic interdependence of even seemingly small "neighborhood" businesses, the preservation of the safety and soundness of society's infrastructure industries is essential.

8. **STABILITY:** There is a need, with some industries, to cushion against the impacts of substantial swings in economic conditions. With industries that have an obligation to serve, in particular, there is an exposure to the vicissitudes of the economy. The obligation to serve generally requires a significant capital investment in facilities. Economic downswings are thus likely to result in a substantial under-utilization of these facilities, potentially jeopardizing the financial viability of the firm. The public thus has an interest in foreseeing and forestalling (or cushioning) swings which might threaten the stability of the industry.

Control of External Impacts

Regulation is designed in many instances either to obtain or to prevent certain external impacts, either positive or negative. These are impacts that might not be of direct concern to business investors, since the business investor does not pay the cost or receive the benefit. These are impacts that might have no easily quantifiable economic value. They can be of substantial social concern, however. External impacts might include:

9. **UNIVERSAL SERVICE:** The provision of service to each household is a social goal for essential public services. As a reasonably affluent society, the determination has been made that every household should have services such as housing, telephones, energy, water, banking and insurance. Moreover, there is a value to society as a whole by ensuring universal service. The failure to have insurance\33\ or telephones,\34\ for example, imposes a cost on the public unrelated to the service itself. A competitive firm will not *ipso facto* seek to ensure universal service.

10. **ENVIRONMENTAL IMPACTS:** Environmental impacts are often public costs that cannot reasonably be expected to be accounted for in the decisionmaking of a competitive firm. To the extent that the clean-up or mitigation of environmental degradation is mandated by statute or regulation, the environmental costs are internalized. To the extent, however, that the environmental costs are *not* subject to clean-up or mitigation, they may not be considered in a competitive environment. In addition, aesthetic impacts are often found to have little or no economic value. Regulation is designed to account for, or control, these otherwise ignored environmental impacts.

11. **CUMULATIVE IMPACTS:** The cost to society of any particular industry is not the cost of each firm standing alone. Nor, for that matter, is the societal cost that of each individual firm summed. One goal of regulation is to consider the synergistic and cumulative impacts of all firms acting together.\35\ One impact of a multi-billion investment in fiber optics, for example, is to reduce available capital for remaining societal needs. One impact of central station generation is to increase reliance on demonstrably fragile transmission and distribution networks. Competition provides no mechanism for considering the social impacts of an industry as a whole. Regulation does.

\33\ Insurance is a product with such external benefits. Because of the adverse effect on remaining consumers if any one consumer fails to purchase insurance, state governments often require both the purchase of insurance and/or the purchase of minimum amounts of insurance. *See*, Jon Hanson, *et al.*, ***Monitoring Competition: A Means of Regulating the Property and Liability Insurance Business***, at 124 - 125 (1974).

\34\ For example, in a 1988 study of winter-heating disconnections in Maine, the Colton found that 70 percent of the households for whom a winter disconnection was sought, and 80 percent of the households for whom a winter disconnection was granted, lacked telephone service. He found that the lack of telephone service directly contributed to the loss of heating during the winter. Households without telephone service, the report concluded, were less able to respond to their inability-to-pay situations, either by making payment arrangements or by obtaining public assistance. *See*, R.Colton (1988). ***An Evaluation of Low-Income Utility Protections in Maine: Winter Requests for Disconnect Permission***, at 16 - 18, National Consumer Law Center: Boston.

\35\ This responds to what Don Kanel has referred to as the "tyranny of small decisions." Donald Kanel, "Institutional Economics: Perspectives on Economy and Society," 19 ***Journal of Economic Issues*** 815, 826 (Sept. 1985).

12. **CONCENTRATIONS OF POWER:** Concentrations of power, political and economic, have always been inimical to the American conscience. Based on this philosophy, for example, there has been a mandatory separation of banking and commerce. The federal Public Utility Holding Company Act (PUHCA) serves the same purpose for that industry. Arising from the trust challenges in the late 19th Century, American policy has sought to discourage, inhibit or outright proscribe the ability of single corporations or individuals to wield excessive control over essential public facilities. Regulatory policy dictates that control of financial and energy resources, or communication facilities, should be diversified.

System Improvements

Regulation often serves to bring about necessary improvements in the *process* of decisionmaking. The underlying philosophy is that if the process is made better, the results of the process are made better as well. These process-oriented goals often have little to do with economic issues, but relate instead to social and political mores.

13. **CONSUMER INPUT:** One goal of regulation is to help democratize the decisionmaking process regarding the provision of essential public services and regarding the allocation of substantial public resources.[36] The need for public participation has become even greater as the stakes in this decisionmaking have increased: the offer of services to entire segments of the population; the commitment of billions of dollars to one economic endeavor rather than another. The decisions made by energy utilities affect all of society, including all of its diverse constituent parts. Consumers *qua* consumers, environmental interests, poverty interests, business interests, low-income housing interests. The board of directors of a private corporation has neither the incentive nor the ability to consider these diverse interests. For the various interests to be represented, a broad spectrum of participation is necessary. That participation can occur through the regulatory process. Whether "economic efficiency" should be sacrificed to some extent (or to what extent) in order to provide high quality rural electric service in Utah, for example, is a decision *not* best left to middle class white executives sitting in New York or Atlanta.[37] Regulation allows for the type of public participation dictated by the magnitude of the decisions made today by national and multinational corporations whose single group of directors make policy affecting entire populations.

14. **LONG-TERM PLANNING:** Given the obligation to serve, and the capital intensity of most

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[36] "* * *those who experience the consequences of policy are expected to be the determiners of whether policy meets acceptable standards of performance in addressing the needs and concerns that led to the policy formation." Jerry Petr, "Fundamentals of an Institutionalist Perspective on Economic Policy," 18 ***Journal of Economic Issues*** 1, 10 (March 1984).

[37] And, unfortunately, it is not at all clear *who* is making decisions for whom, for whose benefit, and for what purpose. *See generally*, John Munkirs and Michael Ayers, "Political and Policy Implications of Centralized Private Sector Planning," 17 ***Journal of Economic Issues*** 969 (Dec. 1983); John Munkirs, "Centralized Private Sector Planning: An Institutionalist's Perspective on the Contemporary U.S. Economy," 17 ***Journal of Economic Issues*** 931 (Dec. 1983); John Munkirs and James Sturgeon, "Oligopolistic Cooperation: Conceptual and Empirical Evidence of Market Structure Evolution," 19 ***Journal of Economic Issues*** 899 (Dec. 1985).

industries subject to this obligation, it is often not possible for appropriate long-term planning to occur within a competitive context. Taking fixed capital investment as "a given," prices are often set at any level above short-run marginal costs. While this obtains some contribution toward fixed system costs in the short-run, it does not permit for the long-term financial viability of the firm. This has been the plague of the airline industry in recent years. Moreover, given investor expectations for short-run profits, long-term planning is often subordinated to meeting these short-run expectations. In such circumstances, consistent with the need to provide reasonably adequate service, ensure reliability, and prevent threats to safety and soundness, public oversight of planning is implemented.

15. **SOCIALIZED COST OF REGULATION:** The elimination of governmental control of business does not necessarily eliminate "regulation." It instead may merely substitute private regulation for public. For a competitive industry, for example, if the market is expected to provide price discipline, each individual consumer must seek out price information. If there is no public control of unfair or discriminatory practices, individual enforcement actions must substitute for the public control.

There is, however, a cost to the private control of business. There is a search cost to individual consumers for discovering price information. There is a cost, as well, for each action challenging discrimination. Clearly, also, there is a "cost" in lost consumer welfare when individuals do *not* engage in private regulation.

The public control of business often simply recognizes these private costs of regulation. It recognizes that the cost of regulation is often too great --if not in absolute terms, in terms relative to the benefits to be obtained-- for any given individual for private action to occur. This prevents *any* regulation even though in the aggregate the societal cost of the lack of oversight is substantial. The public control of business, therefore, is designed to socialize the costs of regulation to attain the substantial public good.

16. **FUNDAMENTALLY FAIR PROCEDURES:** Providing that the actions of private companies comply with fundamentally fair procedures in the denial or termination of service is one objective of public regulation. This regulation imputes to private corporations those processes which, if action is taken by the government, would be required by Constitutional Due Process principles. Providing adequate and timely notice prior to the denial of service, ensuring an opportunity to contest a denial of service as unjustified, and requiring a rational nexus between the reason for denial and the service itself are all examples of these "fundamentally fair" procedures. The need for such procedures lies in the political mores of "fair dealing" and not in any notion of economic efficiency.

17. **CONSUMER PROTECTIONS:** Public protections against unfair and abusive practices is one example of regulation undertaken in a competitive industry. Ensuring that consumers can gain access to check deposits in a timely fashion, prohibiting the denial of services for nonpayment of a bill owed by a third party, ensuring that mobile home park owners or operators do not unreasonably tie the sale of fuel oil to the rental of mobile park space, and the like, are all examples of protections against potential consumer abuses. Moreover, regulation can seek to provide added protections to ensure consumers an ability to maintain essential services. Mandating deferred payment agreements for arrears and minimum notice to tenants prior to the conversion of rental property or mobile home park space to other land uses are examples of this type of consumer protection.

18. **INABILITY OF CONSUMERS TO PROTECT THEMSELVES:** It matters not whether an industry's structure is conducive to competition if barriers exist to having consumers take advantage of that competitive market structure. The lack of information, the inability to obtain information, or the inability to assimilate information, are ways in which consumers are unable to protect themselves. Consider the impact of such an inability in the consumer credit area. Before federal Truth-in-Lending legislation, consumers were expected to comparison shop for interest rates on loans. However, borrowing $500 at 10 percent for two years can in fact be *more* expensive than borrowing $500 at 15 percent for two years, if the 10 percent is calculated by the add-on method and the 15 percent is calculated by the actuarial method. And the same loan at 20 percent calculated by the actuarial method is cheaper than if it were 10 percent discount. The inability to obtain, understand or assimilate information is a significant barrier to allowing consumers to protect themselves.

Lack of information, however, is not the sole barrier to self-protection in the marketplace. Market rationing, the lack of cash, and disparities in bargaining power, for example, all often lead to oppression. High prices in inner-city markets, oppressive "rent-to-own" terms, and high credit costs for loans from "finance companies" are examples of the results of such barriers.

Special Protections

Regulation often stands as a barrier between an industry and the oppression of particularly vulnerable customer classes. The vulnerability of the class may arise because of attributes of the customers, because of attributes of the industry, or because of market failures.

19. **RESIDUAL MARKETS:** Residual markets are those markets for which little or no effective competition exists. In these markets, consumers are "rationed": their demand for services exceeds the supply available to them. In such circumstances, it is not possible for their market sector to control or "regulate" the supplier. Consumers take what is available.

In the energy utility industry, for example, the residual market is the rural residential market. In the insurance industry, the residual market encompasses the high risk households or drivers. In the banking industry, the residual market involves those households with few assets and fewer dollars of income. These markets need public protection. Even if competition exists, the members of the public may have neither the resources nor the ability to make competition work. More often, however, the markets are such that no sellers are engaged in active rivalry for the business of these households. Accordingly, the abuses which such power portends is controlled only by public regulation.

Summary

The objectives of public regulation of business incorporate both economic and non-economic factors. The oversight of prices and earnings is but one function of a regulatory agency. Ensuring the adequacy of service, controlling the presence and magnitude of external impacts, providing for procedural improvements, and protecting special customer classes all fall within the purview of regulatory agencies as well.

Some, but not all, of the objectives of state regulation are "economic" in nature. Accordingly, some, but not all, of these objectives might be addressed (or even considered "relevant") by a competitive

market. Even those objectives deemed "relevant," however, will not necessarily be achieved through the process of workable competition. Non-economic objectives not only *will* not be achieved, but *can* not be achieved through the operation of competition. In these instances, regulation is necessary, competition or not.

CONCLUSION

The presence of absence of competition is not determinative of whether the electric industry should be regulated or unregulated. Some industries that are subject to workable competition are nevertheless subject to regulation by the state. Any one of a number of factors can justify the imposition of state economic regulation. These factors may be present in isolation or in tandem. If there is monopolistic or oligopolistic control of an industry, public regulation may be justified. If the industry is (or has been) supported by the grant of governmental powers or public perquisites, regulation may be in order. If an industry has the opportunity to impose significant public harm or oppression, regulation can be justified. Any one of these factors, when coupled with the provision of essential public services, is made more compelling.

The pubic control of business has both economic and non-economic objectives. The control of prices and earnings is but one aspect of public regulation. Ensuring the adequacy of service, controlling the presence and magnitude of external impacts, providing for procedural improvements, protecting special customer classes, and providing consumer protections, all fall within the purview of state regulatory agencies.
Some, but not all, of the objectives of regulation will be addressed (or even considered "relevant") by a competitive market. Even those objectives deemed "relevant," however, will not necessarily be achieved through the process of workable competition. Non-economic objectives not only will not be achieved, but cannot be achieved through the operation of competition.

A competitive market may not seek to effectuate certain regulatory objectives for any number of reasons. Market failures may prevent the operation of the market to pursue economic goals such as fair and non-discriminatory prices. Some goals involve factors that are external to the industry, with the costs not being paid, and the benefits not being realized, by investors but by society as a whole. Some goals are non-economic in nature. Some social goals may be in direct conflict with the narrower profit-seeking goals of the industry. In short, a private economic system cannot be expected to account for, let alone achieve, each of these objectives.

In deciding whether to regulate or deregulate the electric industry, policymakers should consider more than claims that the competitive market will keep prices reasonable and the allocation of resources "efficient." Decisionmakers should instead undertake a two-step analysis in considering its decision on whether to regulate or deregulate:

First, they should determine if workable competition exists. If workable competition does *not* exist in today's markets, the inquiry goes no further. Regulation is necessary.

Second, if competition *does* exist, it is necessary *next* to determine whether that competition is of the type and extent to displace social control through the process of government as a means of protecting the public's interest. The objectives of regulation must be considered, as well as those factors that

interfere attaining those objectives.

In the event workable competition is found to exist, *both* steps of the analysis must be completed. Whether or not the electric industry should be regulated does not depend on whether the industry is "workably competitive." An industry may be workably competitive but nevertheless still be necessarily subject to public control for the public good.

BIBLIOGRAPHY

1. Edward Adler, "Business Jurisprudence," 28 ***Harvard Law Review*** 135 (1914).

2. Norman Arterburn, "The Origin and First Test of Public Callings," 75 ***University of Pennsylvania Law Review*** 411 (1927).

3. Roger Arnebergh, "Public Utilities Regulation and the Community Interest," 30 ***Southern California Law Review*** 191 (1957).

4. Richard Bernhard, "Divergent Concepts of Competition in Antitrust Cases," 15 ***The Antitrust Bulletin*** 43 (1970).

5. John Boatwright, "Competition and Electric Rates," 7 ***Journal of Land and Public Utility Economics*** 181 (1931).

6. Stephen Breyer, "Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform," 92 ***Harvard Law Review*** 547 (1979).

7. Charles Burdick, "The Origin of the Peculiar Duties of Public Service Companies," 11 ***Columbia Law Review*** 514 (1911).

8. Philip Cabot, "Competition is the Life of Trade," 3 ***Harvard Business Review*** 385 (1925).

9. Roger Colton, "Consumer Information and Workable Competition in the Telecommunications Industry." XXVII ***Journal of Economic Issues*** 775 (1993).

10. Martin Farris, "The Case Against Deregulation in Transportation, Power and Communications," 45 ***ICC Practitioners Journal*** 306 (1978).

11. Ditlew Fredericksen, "The Old Common Law and the New Trusts," 3 ***Michigan Law Review*** 119 (1904).

12. Horace Gray, "Competition as a Basis for Electric Light and Power Rates," 5 ***Journal of Land and Public Utility Economics*** 242 (1929).

13. Horace Gray, "The Passing of the Public Utility Concept," 16 ***Journal of Land and Public Utility Economics*** 8 (1946).

14. Ford Hall, ***The Concept of a Business Affected with a Public Interest*** (1940).

15. Walter Hamilton, "Affectation with Public Interest," 39 ***Yale Law Journal*** 1089 (1930).

16. Elwood Hamilton, "Justice in a Changing World," 16 ***Tennessee Law Review*** 511 (1940).

17. Jon Hanson, *et al.*, ***Monitoring Competition: A Means of Regulating the Property and Liability***

Insurance Business (1974).

18. Thomas Hardman, "Public Utilities: The Quest for a Concept," 37 ***West Virginia Law Quarterly*** 250 (1931).

19. Robert Harbeson, "The Public Interest Concept in Law and Economics," 37 ***Michigan Law Review*** 181 (1938).

20. Robert Hobbs, et al., ***Effects of Financial Services Deregulation on Senior Citizens***, National Consumer Law Center (December 1989).

21. Frank Horack and Julius Cohen, "After the Nebbia Case: The Administration of Price Regulation," 8 ***University of Cincinnati Law Review*** 219 (1934).

22. E.K. Hunt, "A Neglected Aspect of the Economic Ideology of the Early New Deal," 29 ***Review of Social Economy*** 100 (1971).

23. James Johnson and James Highsmith, "Munn v. Illinois: A Centennial Evaluation," 44 ***ICC Practitioners Journal*** 618 (1977).

24. Lee Loevinger, "Regulation and Competition as Alternatives," 11 ***Antitrust Bulletin*** 101 (1966).

25. Breck McAlister, "Lord Hale and Business Affected with a Public Interest," 43 ***Harvard Law Review*** 759 (1930).

26. J.A. McClain, Jr., "The Convenience of the Public Interest Concept," 15 ***Minnesota Law Review*** 546 (1931).

27. Karl Mannheim, "Tenant Eviction Protection and the Takings Clause," 1989 ***Wisconsin Law Review*** 925 (1989).

28. John Miller, "Competition in Regulated Industries: Interstate Natural Gas Pipelines," 47 ***Georgetown Law Journal*** 224 (1958).

29. James Nelson, "The Role of Competition in the Regulated Industries," 11 ***The Antitrust Bulletin*** 1 (1966).

30. Note, "Government Regulation of Public Service Corporations," 15 ***Marquette Law Review*** 65 (1931).

31. A.J.G. Priest, "Some Bases of Public Utility Regulation," 36 ***Mississippi Law Journal*** 18 (1964).

32. Gustavus Robinson, "The Public Utility Concept in American Law," 41 ***Harvard Law Review*** 277 (1928).

33. Henry Rottschaefer, "The Field of Governmental Price Control," 35 ***Yale Law Journal*** 438 (1926).

34. Robert Rowe, ***Consumer Information in Telephone Pricing***, National Consumer Law Center (December 1989).

35. Robert Sable and Willard Ogburn, ***Limitation and Regulation of Credit Property Insurance***, National Consumer Law Center (1978).

36. Roy Sampson, "Inherent Advantages Under Regulation," 62 ***American Economic Association*** 55 (1972).

37. Benjamin Small, "Anti-trust Laws and Public Callings: The Associated Press Case," 23 ***North Carolina Law Review*** 1 (1944).

38. Kenneth Spong, ***Banking Regulation: Its Purposes, Implementation and Effects***, Federal Reserve Bank of Kansas City (January 1983).

39. Harry Trebing, "Apologetics of Deregulation in Energy and Telecommunications: An Institutionalist Assessment," 20 ***Journal of Economic Issues*** 613 (Sept. 1986).

40. Harry Trebing, "Broadening the Objectives of Public Utility Regulation," 53 ***Land Economics*** 106 (1977).

41. Harry Trebing, "Common Carrier Regulation--The Silent Crisis," 34 ***Law and Contemporary Problems*** 299 (1969).

42. Harry Trebing, "Public Utility Regulation: A Case Study in the Debate over Effectiveness of Economic Regulation," 18 ***Journal of Economic Issues*** 223 (March 1984).

43. Harry Trebing, "Realism and Relevance in Public Utility Regulation," 8 ***Journal of Economic Issues*** 209 (June 1974).

44. Harry Trebing, "Regulation of Industry: An Institutionalist Assessment," 21 ***Journal of Economic Issues*** 1707 (Dec. 1987).

45. Harry Trebing, "Structural Change and Regulatory Reform in the Utilities Industries," 70 ***American Economics Association*** 388 (May 1980).

46. Harry Trebing, "The Chicago School versus Public Utility Regulation," 10 ***Journal of Economic Issues*** 97 (March 1976).

47. Emmet Wilson, "Property Affected with a Public Interest," 9 ***Southern California Law Review*** 1 (1935).

48. George Wilson, "The Effect of Rate Regulation on Resource Allocation in Transportation," 54 ***American Economic Association*** 160 (1963).

49. Bruce Wyman, "The Law of the Public Callings as a Solution of the Trust Problem (Part I)," 17 ***Harvard Law Review*** 156 (1904).

50. Bruce Wyman, "The Law of the Public Callings as a Solution of the Trust Problem (Part II)," 17 ***Harvard Law Review*** 217 (1904).