

One Hundred Years of State Utility Regulation

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It would be a herculean effort to study the past 100 years of utility regulation in each of our now fifty states. Instead, the State Regulatory Committee has settled for a much more modest essay on the history of the commissions in three states: California, Illinois, and Virginia. These were not randomly selected; they happen to be the jurisdictions and commissions where three of our committee co-chairs maintain active public utility practices. Yet a look at the history of just these three commissions is sufficient to identify some recurring patterns in state regulation.

State commissions originated from popular anger, distrust, and fear of monopoly enterprises—in most cases, the railroads—and they have never abandoned those roots. Regulation is still seen as necessary to prevent exploitation of those who need and use services that remain essential and without comparable alternatives. While appointed or elected commissioners may have a more neutral viewpoint, commission staff typically define success in terms of giving utilities less than requested. Economists find this process inefficient, but it elevates the importance of lawyers and their advocacy.

From their inception and certainly



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continuing today, state commissions have been often subject to the public perception that they are too cozy with those they regulate. This is probably inevitable. Those who regulate have to be knowledgeable about the business and the technologies they oversee. And those who are regulated want all the access they can get in order to educate regulators and their staffs. There is nothing wrong with these objectives, but members of the public and entities who have more limited exposure to state commissions and often fewer resources feel greatly disadvantaged by these long-term relationships. In many jurisdictions, this has led to many new procedural requirements in the form of ex parte rules and aggressive use of public records act requests.

State commissions and the enterprises they regulate have always been creatures of social policy making. Traditionally, this has been limited to rate subsidies for low income or special needs customers. But with each new policy objective, such as conservation, carbon reduction, contractor diversity, renewable resources, and promotion of electric transportation, state commissions and energy utilities are now engaged in a stream of pilot projects, resource reviews, and technology upgrades. And the resulting commission proceedings are bringing large numbers of intervenors and interested parties new to commission practice.

The three-way tug of war among state commissions, legislatures, and governors continues. Legislators alternatively want to expand or contract commission jurisdiction; governors are sometimes surprised that

their commission appointees are not always predictable in their policy positions or their votes—not to mention those commissioners appointed by previous governors. This tug of war may soon take on a fourth dimension as commissions in some states aggressively pursue policies to reduce carbon consumption while the Federal Energy Regulatory Commission goes in a different direction.

Predicting the future is always hazardous, even with a 100-year perspective. But it is probably safe to expect state commission legal practice to involve increasingly higher stakes in terms of dollars, social impact, and legal complexity. This in turn will push state commissions toward more formal rules of practice and procedure, more emphasis on transparency in dealing with utility personnel, and probably more frequent resort to state court reviews.

If there is good news in any or all of this, it would seem to be that regulatory lawyers will still be in high demand.

I. California Public Utilities Commission

“Are the business men, the home owners, the honest laborers of Los Angeles, whether union or non-union, willing to change our local government into an absolute despotism in comparison with which that of the Czar of Russia is mild and just?”

No—that quote was not pulled from today’s paper, but from a September 30, 1911 editorial in the *Los Angeles Times* arguing against the state constitutional amendment that would create the Railroad Commission, or what today is called the California Public Utilities Commission (CPUC). In honor of the 100th birthday of the Infrastructure and Regulated Industries Section, this article will briefly trace the 105-year history of the CPUC, the way in which its jurisdiction has expanded, and explore two of the more contentious public issues the Commission has faced in recent years: the 2000 Energy Crisis and its recent *ex parte* scandals.

A. CPUC History

The regulation of public utilities in California is as old as the state itself, going back to the first session of the state legislature in 1850. In fact, prior to any railroad being operational in the state, California passed a law setting the maximum rates a railroad could charge for passengers and freight. The first administrative body

to regulate the railroads came in 1876 with the three-member State Board of Transportation Commissioners. The commissioners exercised limited jurisdiction over the railroads, requiring them to file rates, and prohibiting rate discrimination and extortion. In 1879, the state’s new constitution established a three-member elective Railroad Commission with the power to fix rates for railroads and other transportation companies. Despite this authority, the Railroad Commissioners were widely regarded as beholden to the railroads whose requests to raise rates were rarely refused. This regulatory structure lasted for the next thirty-two years.

In 1910, Hiram W. Johnson ran for governor on an anti-railroad platform targeting the power the Southern Pacific Railroad had amassed during the previous thirty years. After Johnson won the election, the progressive ideas he espoused were passed as constitutional amendments to re-constitute the Railroad Commission, made up of five members with the power to set rates, subpoena witnesses and records, and hear complaints by the public. The Public Utilities Act, which implemented the amendments, was passed in 1911. On March 23, 1912, the Act went into effect and the present-day Public Utilities Commission was born, although it retained its original Railroad Commission moniker until 1946. Originally, the Commission was divided into six departments: office, legal, rate, engineering, statistics, and accounts and service. The five members of the commission were each paid a yearly salary of \$6,000 (almost equivalent in today’s dollars to the current salary of the commissioners of about \$140,000).

Independence from the judicial, legislative, and executive branches has been an important hallmark of the CPUC from its earliest days in existence. The CPUC is one of the few public utility commissions in the United States that derives its power from the state constitution. While the legislature can confer additional authority on the CPUC, it cannot reduce its jurisdiction without a constitutional amendment. This amendment also officially changed the Railroad Commission name to the more fitting, all-encompassing, Public Utilities Commission. While the governor appoints commissioners subject to the approval of the state senate, they serve six-year terms compared to the governor’s four-year term; only the legislature can remove a commissioner and only with a two-thirds vote. The state courts are enjoined

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from hearing matters within the CPUC's jurisdiction, and appeals of Commission decisions are narrowly circumscribed.

The CPUC has evolved to regulate privately owned electric, natural gas, telecommunications, water, railroad, rail transit, and passenger transportation companies. As the scope of the CPUC's jurisdiction grew, one of the major trends has been its decentralization. From its six original divisions, the Commission has eleven today. This decentralization has allowed the CPUC to give specialized attention to each of the industries it regulates. Ironically, this "specialized attention" has periodically been viewed as creating far too cozy a relationship between the regulators and those companies they oversee—exactly the problem Hiram Johnson was trying to solve in 1910.

B. Expanded Jurisdiction

The original Railroad Commission of California, created by the Constitution of 1879, had the authority to regulate "railroad and other transportation companies" by fixing rates and prescribing a uniform system of accounts. This limited sphere of influence was natural since railroads were one of the few true public utilities then in existence.¹ However, as technologies advanced, state officials began testing the limits of "other transportation companies." In 1901, the California Supreme Court held that "other transportation companies" was not a catch-all term, encompassing new transportation companies like streetcars. Instead, looking to the original intent of the Constitution, the court held that the purpose of the Commission was to prevent discriminatory rates and practices on the part of "great corporations engaged in the carrying of freight and passengers from one portion of the state to another. . . . [I]t is inconsistent with the idea that the people of the state were interested in rates for carrying passengers within the limits of a town or municipality."² With this ruling, it became clear that if California wanted to expand the jurisdiction of the Railroad Commission, it would have to do so with a constitutional amendment.

The amendment came in 1911 with changes to what was then Sections 22 and 23 of the California Constitution. Section 22 was amended to give the legislature the ability to expand the scope of the Railroad Commission's authority. Section 23 was amended to declare that "every common carrier" was a public utility but that those public utilities could be regulated

by the Commission only after the legislature expressly conferred the power to do so. In 1911, the legislature exercised this new power with the Public Utilities Act. Under the Public Utilities Act, the Railroad Commission saw its jurisdiction widened. California public utilities were defined as

"the corporations or persons which own, control, operate or manage railroads; street railroads; express companies; sleeping, dining, fruit and other car companies; vessels regularly engaged in transportation over regular routes between points within this state; pipe lines; gas plants; electric plants; telephone lines; telegraph lines; water systems; public wharves; and warehouses used in connection with the transportation of property by a common carrier or vessel, or the loading or unloading of the same."

The Commission's powers and duties were also greatly expanded, including among many additions:

"the authority to fix all rates and fares; prescribe safe and proper service, equipment and methods; regulate crossings of railroad tracks and streets or highways; to investigate the cause of accidents and to take steps to prevent their recurrence; and to regulate and control the issues of stocks, bonds and other evidences of indebtedness of all public utilities within the state."

It did not take long for new questions over jurisdiction to arise. In 1916, the Commission declined to exercise its jurisdiction over the Wichita Transport Company, which

transported freight in motor trucks, and the Peninsula Company, which ran a system of inter-city auto buses. The Commission contended that although the amended Constitution gave it the ability to regulate those entities, the state legislature had yet to expressly confer the power to do so as required. Competitors challenged the Commission's decision in court and the California Supreme Court held that the 1911 constitutional amendments did grant regulatory powers over such corporations.³ The court dismissed the legislature's failure to confer the power simply by stating "no reason appears why such powers should not have been conferred upon it, and multitudinous reasons exist why it should have been conferred."⁴ Future cases rejected this

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conclusion and reiterated that the Commission must be given a specific legislative mandate to act before it can exercise jurisdiction over a new type of service. The legislature passed numerous such statutes in the first half of the twentieth century.⁵

In 1943, the issue of whether the Commission had the power to regulate the burgeoning taxi industry came to the California Supreme Court. The court agreed with the Commission's position that "while a taxi is a common carrier . . . and section 23 of article XII of the Constitution declares every common carrier to be a public utility, the constitutional section further expressly declares that the public utilities therein designated shall be subject to such control and regulation by the Railroad Commission 'as may be provided by the Legislature.'"⁶ Because the legislature had not specifically provided the Commission this authority, it did not have the authority to regulate the taxi industry. In fact, in 1961 with the passage of the Passenger Charter-Party Carriers' Act, the legislature specifically excluded taxis from the jurisdiction of the CPUC, instead allowing local cities and municipalities to set the rules with which taxis must comply.

The Passenger Charter-Party Carriers' Act separated two classes of passenger carriers for the purpose of CPUC regulation. Passenger stage corporations (PSCs) operate regularly scheduled routes between fixed stops and must be issued a "certificate of public convenience and necessity" (CPCN) to operate particular routes. Transportation Charter Party carriers (TCPs) are carriers that do not operate fixed-routes but have their services prearranged. As mentioned above, taxis are excluded from CPUC regulation. TCPs are subject to CPUC registration, insurance, and safety requirements but can operate anywhere in the state. Uber, Lyft, and other "rideshare" companies are clearly not PSCs, but are they TCPs? This has been an issue that the CPUC has grappled with over the past five years, with the rideshare industry claiming exemption from both CPUC and local regulation because they viewed themselves as technology firms. The taxi industry wanted rideshare companies subject to the same local rules as applied to taxis.

The CPUC's opening move in 2012 was to begin an enforcement action against Uber, Lyft, and the now defunct Sidecar for operating without CPUC approvals. To avoid a \$20,000 per day fine, the three companies entered into settlements with the CPUC to continue

operations pending official CPUC rulemaking on the new industry. One year later, the CPUC classified ride-share companies as Transportation Network Companies (TNC), a subset of TCPs. Importantly, this meant that the CPUC would be responsible for oversight instead of local municipalities.

Despite these objections and appeals from the taxi industry, the CPUC upheld its decision and the legislature codified CPUC jurisdiction with the passage of Assembly Bill 2293. Under this and subsequent statutes, TNCs must obtain a license from the CPUC, conduct 19-point inspections of their drivers' cars, require a certain level of liability insurance, and establish driver training programs and zero tolerance policies regarding alcohol and drugs.

The legislature attempted to pass a law intended to level the playing field for taxis by removing the authority of cities and municipalities to regulate the taxi industry and instead shift authority to the CPUC. However, Governor Jerry Brown vetoed AB 650 in September 2016, stating that he did not believe a "massive change" in the current regulatory framework was warranted.

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in the midst of the crisis and what it has tried to do since to prevent a recurrence.

The initial electric system developed in the United States was comprised of local power plants transmitting power over short distances and largely regulated by state commissions. Federal electric regulation was limited to interstate transmission and wholesale electricity sales, both of which were rare. As technology allowed power to be transmitted over longer distances, the industry consolidated into investor-owned utilities (IOUs). IOUs grew to become the main source of electricity for the American public by the end of World War II, but because of the Public Utility Holding Company Act, IOUs were usually confined to a single state.

C. Electric Market Deregulation: From Top Down to Ground Up

On June 14, 2000, more than 100,000 residents and businesses in the San Francisco Bay area were plunged into darkness and heat as Pacific Gas & Electric (PG&E) intentionally interrupted electric service for the first time in its history. A unique, California energy crisis ensued for the next year, complete with rolling blackouts and wholesale electricity prices increasing an average of 270% higher than the year before. Below is a brief history of how the CPUC found itself

For the next twenty-five years, the electric industry grew steadily, encouraged by new technologies and little change in industry structure. However, the national energy crisis of the 1970s changed the landscape and began an era of rapid change in the sector.

As part of President Carter's National Energy Act, the Public Utility Regulatory Policies Act (PURPA) introduced competition into the wholesale energy sector by allowing non-utility generators to produce and sell energy. After the success of PURPA, free market advocates heavily lobbied for the deregulation of electric generation. In 1992, the CPUC undertook a review of the California electric industry to determine whether the state could move toward deregulation. In 1995, the CPUC adopted a set of policies outlining how the state would go about deregulating the market.

The CPUC's recommendations were codified in Assembly Bill 1890. Under AB 1890, the three major IOUs were required to (1) sell off most of their electric generation assets; (2) purchase all of their electricity at wholesale through the newly created Power Exchange (PX); (3) transfer control of their transmission lines to the California Independent System Operator (ISO); and (4) freeze their electric rates until 2002 or earlier if the utility had recovered costs related to previous infrastructure investments (which SDG&E was able to do by 1999).

At first, the system seemed to be working with wholesale prices low and consumer rates frozen. However, a "perfect storm" hit in the spring and summer of 2000 that caused chaos in the market. An abnormally cold winter and warm summer caused demand to surge. A drought kept stream levels low, decreasing the availability of utility-retained hydro-electric power. Because of the transition from IOU-produced energy to third-party produced energy, there was a shortage of new power plants. This imbalance of supply and demand caused two days of rolling blackouts in the San Francisco Bay area in addition to dramatic increases in wholesale prices. With retail rates still frozen, the IOUs began incurring tremendous amounts of debt, ultimately leading to PG&E filing for bankruptcy in April 2001. The CPUC found itself at the center of the storm but unable to regulate the wholesale market and unwilling to allow retail rates to rise. There were multiple flaws with the system implemented under AB 1890 that led to the California energy crisis. While not comprehensive, the following

represent core problems contributing to the crisis.

1. The design of the electricity market was fundamentally flawed.

"In the final analysis, it doesn't matter what you crazy people in California do, because I got smart guys who can always figure out how to make money."—Enron CEO Kenneth Lay

AB 1890 kept the electric utilities' retail rates regulated while allowing the wholesale market to operate in a deregulated environment. This provided incentives for actors in the wholesale market, like Enron, to manipulate the market and drive up the wholesale price through techniques like "megawatt laundering." In this scheme, Enron bought power produced in California, sold it out of state, and then rebought it in California as out-of-state power, allowing Enron to circumvent the price caps.

2. Inability of IOUs to enter into long-term contracts for energy.

Under the terms of AB 1890, IOUs were restricted from entering into long-term contracts with energy producers, forcing them to purchase power on the spot market. When wholesale prices spiked, the IOUs had no protection from the volatility and were forced to pay the higher rates.

3. IOUs were unable to recover costs associated with wholesale price spikes.

Exacerbating the problem of purchasing power on the spot market was the fact that the IOUs were unable to raise their customers' electric rates. Because the IOUs could not pass

on the increased rates to customers, they were forced to take on large amounts of debt. Some independent power generators then became reluctant to sell their power to the IOUs for fear of not receiving payment. This led to the intensification of the power shortage.

During and after the crisis, the CPUC moved to modify the structure of the electric market to prevent new crises in the future. Below are a few of the key steps the CPUC took:

1. In August 2000, CPUC stabilized rate prices for SDG&E customers.

Because SDG&E customers were not locked into the frozen rates, SDG&E had hiked customer rates from 11

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cents per kilowatt-hour to 16 cents per kilowatt-hour. The CPUC responded by stabilizing the rate to provide relief to SDG&E customers but thereby jeopardized SDG&E's financial condition.

2. CPUC approved emergency rate hikes.

In January 2001, staring down the barrel of bankruptcy, SCE and PG&E requested and received authority from the CPUC for ninety-day rate hikes of 7 percent to 15 percent above the frozen rates that had been in effect. Again in March, the CPUC approved a 3-cents per kilowatt-hour average rate increase.

3. FERC instituted a Western state price cap on wholesale energy prices.

The CPUC and other California officials lobbied the Federal Energy Regulatory Commission (FERC) to institute a price cap on wholesale energy prices to complement the action the CPUC had taken to increase retail rates. On April 25, 2001, FERC took the initial step of instituting price caps when statewide energy reserves fall below 7 percent. On June 19, 2001, FERC extended the price cap, limiting the wholesale price to 85 percent higher than the highest hourly price that was last in effect.

4. New CPUC regulations mandated long-term contracts.

New CPUC regulations limited the amount of power the utilities could purchase on the spot market and mandated the purchase of some power through long-term contracts. By June 2006, IOUs were required to show they had acquired 100 percent of the projected peak power needs plus a 15 percent cushion.

5. Energy Action Plans

The CPUC, along with the California Energy Commission (CEC), has issued three Energy Action Plans (EAP), which identify specific goals and actions to eliminate energy outages and excessive price spikes. The EAP accelerated the renewable portfolio standards goal and established loading order priorities. The first priority is to conserve energy to minimize demand. The second priority is to fill new generation needs with renewable energy or locally (rooftop, etc.) produced resources. The third priority is clean natural gas.

Additionally, under the EAP, the CPUC takes a proactive role in reviewing and approving utility energy procurement plans. These plans must account for

policies for cost-recovery mechanisms, adequate reserve requirements, and long-term planning processes. This is a contrast to the past practice of “prudence reviews,” which allowed the Commission to assess the reasonableness of IOU decisions only after the fact.

As the electric market becomes more diversified, the role of the CPUC will again shift in the coming years. It is estimated that by the mid-2020s, 85 percent of Californians' electricity will be provided by a source other than IOUs. Consumers have more choice than ever when it comes to how they receive their electricity. This is the result that the CPUC and others hoped (and failed) to achieve through their deregulation efforts in the 1990s. Current CPUC President Michael Picker believes the previous attempt failed because of a top-down approach.

“We're starting to see retail choice come into being simply because of technology and renewable electricity allowing it to take place,” he said. “It's being hollowed out by innovation and technology rather than by policy regulation.” However, as the traditional market shifts, the CPUC must evaluate its current framework of regulation in order to ensure consistent, affordable access to electricity.

Through a variety of programs established after the 2000 energy crisis, the IOUs are seeing their market share dwindle. This has the potential to cause prices to spike for those customers still relying on the IOUs, pushing many of them to alternative sources, thus squeezing the IOUs even further. This is one of many problems the CPUC will grapple with as we move into the next decade.

In May 2017, the CPUC and California Energy Commission held an en banc hearing titled “Changing Nature of Consumer and Retail Choice in California.” This hearing and the cor-

responding white paper were intended to begin the public discussion of many of the questions arising out of this new market. And the many new players have already suggested the CPUC is being far too protective of the financial interests of the electrical utilities—does that sound familiar?

D. Ex Parte Communications and Public Records Requests

The CPUC was created as part of the Progressive Era's reforms, looking to divorce the overly cozy relationship between the railroads and their regulators. Throughout its history, the CPUC has grappled with its relationship with the entities it regulates. This section will briefly explore recent developments regarding how the CPUC

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interacts with both regulated entities through ex parte communications⁷ and the public through Public Records Act (PRA) requests.

Recently, ex parte communications became front-page news after thousands of emails were released showing a close relationship between PG&E and CPUC Commissioners following the 2010 San Bruno pipeline explosion that killed eight people. Trying to demonstrate improper contact with decision makers related to the explosion, the City of San Bruno submitted a PRA request demanding records of such communications. The CPUC took over a year to respond, after San Bruno filed a lawsuit in superior court alleging violations of the PRA. In a settlement agreement, the CPUC agreed to release the requested documents and accelerate future requests.

Many of the released emails documented improper ex parte communications between CPUC and PG&E personnel. For instance, in one email between PG&E's Vice President of Regulatory Affairs, Brian Cherry, and the CPUC's then Executive Director, Paul Clannon, regarding an upcoming control room audit, Cherry asked Clannon if the CPUC could "focus elsewhere" as PG&E had "problems in this area." The CPUC found a number of ex parte violations, and PG&E agreed to pay \$73.5 million in bill credits to ratepayers.

When law enforcement officials executed a search warrant at former CPUC President Michael Peevey's home related to the San Bruno scandal, they found handwritten notes on a Warsaw hotel notepad. The notes were from a private meeting between Peevey and a Southern California Edison (SCE) executive regarding the outline of a possible settlement allocating costs between shareholders and ratepayers for the closure of the San Onofre nuclear power plant. The CPUC found that the meeting should have been disclosed by SCE as an ex parte communication, but was not. SCE was fined \$16.7 million and the actual SONGS settlement was ordered re-opened.

These incidents have prompted lawmakers to call for stricter rules regarding ex parte communications at the CPUC. In 2015, the California legislature unanimously passed a package of CPUC reforms, including one bill that would have prohibited ex parte communications in adjudication and rate-setting cases. In any quasi-legislative proceeding, ex parte communications would need to be reported within three days. However, Governor Jerry Brown vetoed the package of bills, calling them "unworkable."

A scaled-back version of the CPUC reform package, SB 215, was passed and signed into law in 2016. Governor Brown called on the Commission to take additional steps to reform from within as well. "I am calling on the Commission to use its existing authority to take immediate action. Together, these administrative reforms and legislative acts will bring much needed improvement to the commission." On May 4, 2017, Chief Administrative Law Judge Karen Clopton issued a draft resolution approving amendments to the Rules of Practice and Procedure reflecting the changes required by SB 215.

E. Conclusion

The CPUC has seen its jurisdiction expand and contract over the course of its 105-year history. However, the one thing that has remained constant has been the public's insistence on the Commission's independence. From the railroad barons of the early twentieth century to the investor-owned utilities of today, the public has demanded that the Commission avoid "regulatory capture" and keep the industries it regulates at arm's length. The CPUC remains under pressure to prove that independence.

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II. Illinois Commerce Commission

The Illinois Commerce Commission, first established as the Public Utilities Commission, has reflected the politics and broader economic climate of Illinois throughout its 103-year history. The commission was established in response to consolidation among utility companies and attempts by the City of Chicago to regulate consumer rates. Its more recent history has seen the break-up of those monopolies, deregulation and modernization of utility industries, and various competitive entrants, bringing new questions about the commission's role in the future economy and its ability to spur economic investment and protect consumers.

A. Origins of Statewide Utility Regulation in Illinois

Illinois established its first state utility regulatory commission, the Public Utilities Commission, in 1913.⁸ The state was responding to the mutual frustration of municipalities and utility companies seeking to negotiate utility supplies and rates. Although municipalities had successfully negotiated for utility supply contracts for decades, by the start of the twentieth century the effectiveness of the contracting model was under stress as municipalities, including the City of Chicago, sought

greater authority to regulate consumer rates.⁹

Federal and state courts dealt a serious blow to the viability of long-term municipal contracting. State laws at that time authorized municipalities to “contract with such person or incorporated company for a supply of water for public use for a period not exceeding thirty years”¹⁰ and “to authorize any person or private corporation to construct and maintain [water systems] at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.”¹¹ In a series of cases, the U.S. Supreme Court and Illinois Supreme Court held that municipal ordinances were not binding for the full duration of the contract, meaning that rates could be altered during the term of the contract.¹²

At the same time, utility companies experienced quick and significant consolidation. In 1897, the Illinois General Assembly enacted the Gas Consolidation Act to remove legal obstacles to company consolidation and the Street Frontage Act, which added barriers to entry by new utility companies.¹³ By 1913, there was only one gas company, Peoples’ Gas Light and Coke Company, supplying gas to Chicago consumers.

The rapid industry consolidation, which improved the bargaining power of utility companies, provoked the passage of a new law in 1905 to explicitly grant the power to regulate consumer utility rates to the City of Chicago.¹⁴ The Chicago City Council then passed an ordinance reducing gas rates below the last agreed-upon rates, which gas suppliers refused to honor.¹⁵

The Illinois General Assembly stepped in again in 1913 to resolve the escalating tension between municipalities and utility companies. The legislature’s special joint committee established to investigate the matter reported that municipalities and utility companies were relying on “constant litigation” to regulate rates and services, which was proving to be “unscientific, expensive, vexatious and cumbersome.”¹⁶ While utility companies had previously opposed statewide regulation, local regulation was more threatening in the opinions of many utility executives.¹⁷ The legislature concluded that it was the “duty” of the state both to protect consumers “from unjust exactions of public service corporations” and to protect utility companies from attempts by local officials to “confiscate public utility investments.”¹⁸ Illinois thus joined the growing list of states with statewide public utility regulatory commissions.

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B. Establishment of the Illinois Commerce Commission

The Illinois Public Utility Commission, created in 1913, succeeded to the Railroad and Warehouse Commission, which had existed since 1871.¹⁹ The new commission, which was initially resident within the Department of Trade and Commerce, was authorized to supervise all public utilities, including transportation, telephone, telegraph, water, gas, heating, lighting, and electric companies. The commission could set rates and regulate contracts. In 1921, the legislature re-organized the Public Utility Commission as the Illinois Commerce Commission (ICC), which was also made independent from the Department of Trade and Commerce.²⁰

Since its origins as the Public Utility Commission, the ICC has comprised five members, each of whom is appointed by the governor with the advice and consent of the Illinois Senate.²¹ The 1913 law set terms at six years; those terms have since been reduced to five years. No more than three members may be from the same political party.

Since January 1914, 111 individuals have served on the ICC.²² The longest serving member, Cyrus J. Colter of Chicago, who was appointed by Governor Adlai Stevenson in 1951, served for twenty-two years. Colter was the ICC’s second African-American member. His tenure extended over the terms of six governors. He resigned in 1973 to serve on the faculty of Northwestern University in the newly created Department of African American Studies.

The ICC was not immune to controversies during the administration of Governor Rod Blagojevich (2003–2009). Blagojevich had appointed a number of commissioners considered to be friendly to utility companies. In 2005, the Illinois

Attorney General accused ICC Chairman Edward Hurley of violating state ethics rules by accepting free meals from utility lobbyists, prompting an investigation of ICC commissioners and staff and their ethics practices and leading to the chairman’s early departure from office.²³

Blagojevich then appointed long-time consumer advocate Martin Cohen, the former head of the Citizens Utility Board, to replace Hurley. The Illinois Senate rejected that appointment, however, after senators expressed concern that Cohen would be too prejudiced against utility companies.²⁴ His two-month service as acting chairman ranks among the shortest tenures in ICC history.

C. Modernization Efforts

Illinois has often been at the forefront of utility modernization, particularly in electricity and telecommunications.

1. Electricity Modernization

Following California's lead a year earlier, Illinois was among the first states to deregulate the electricity market in 1997.²⁵ ICC Chairman Dan Miller (1994–1998) had developed a "10 point plan" to reduce retail rates and address utilities' "stranded costs," i.e., the high costs of operating generating facilities, such as nuclear power plants, that could not be recouped through competitive retail rates.²⁶ Miller's plan was praised by legislators as "tremendous progress for a regulatory body."²⁷

Illinois's Electric Service Customer Choice and Rate Relief Law of 1997 deregulated the state's two large electricity monopolies, Commonwealth Edison Company, which serves the Chicago region, and the Illinois Power Company (now known as Ameren), which serves most of the rest of the state. The law permits consumers to purchase electricity from alternative retail electric suppliers; today there are ninety-nine alternative retail electric suppliers certified by the ICC.²⁸ The law also permitted electric companies to divest their generating facilities, which most did by sale to an unregulated affiliated company. Although costs were reduced, utilities were allowed to maintain their retail rates, subject to certain mandatory rate reductions during a transition period.²⁹ Consumers were effectively insulated from the changing costs of electricity generation during the transition period.

In anticipation of the expiring rate freeze, the ICC approved utility plans in 2006 to conduct reverse auctions.³⁰ The resulting prices caused electricity rates to soar by as much as 50 percent.³¹ The state responded by creating the Illinois Power Agency, which now acts as a broker for the supply of electricity through competitive auctions.³² All retailers were required to procure their electricity supplies pursuant to the procurement plan developed by the agency and approved by the ICC. The new law established the state's first renewable energy portfolio standard.

In 2011, the state authorized the development of an electric "Smart Grid."³³ The new law, enacted over the veto of Governor Pat Quinn, authorized ComEd to invest \$2.6 billion in its electricity infrastructure over ten years. Quinn, a longtime advocate of consumer interests who

had led the drive to create the watchdog Citizens Utility Board in 1983, said the bill was a "drastic departure from a long tradition of Illinois laws protecting consumers against high energy bills."³⁴ The Illinois General Assembly passed additional legislation in late 2014 to extend the Smart Grid implementation timeline until 2019.³⁵ Concerned that Quinn would again veto the bill, the legislature held the bill until it could be presented to Governor Bruce Rauner, who had just defeated Quinn in an election. Quinn called the legislative maneuver "sneaky."³⁶

In December 2016, Illinois enacted significant energy legislation to keep two Exelon nuclear power plants operating.³⁷ The new law, titled the Future Energy Jobs Act, provides Exelon with \$235 million in annual zero emission credits for ten years in exchange for keeping nuclear plants in Clinton and the Quad Cities open and for commitments on energy costs. The bill also updated Illinois' renewable portfolio standard and expanded energy efficiency programs. The ICC was charged with its implementation.

A coalition of power producers, led by Calpine Corp., Dynegy Inc., and NRG Energy Inc., filed a complaint in federal court against the ICC in February 2017, arguing that the bill improperly usurps FERC's exclusive authority over wholesale electricity markets.³⁸ They allege that the zero emissions credits constitute an illegal wholesale rate adjustment. The litigation is ongoing.

Illinois was among the first states to deregulate the electricity market in 1997.



2. Telecommunications Modernization

Telecommunications have also experienced significant deregulation over the past several decades. The state granted pricing flexibility to providers of "competitive" telecommunications services in 1985.³⁹ Through ICC orders under the Public Utilities Act, Illinois became one of the first states to deviate from traditional "rate of return" regulation. In 1987, the ICC removed cellular service, including tariff provisions, from active regulatory oversight.⁴⁰

Following the federal government's lead with the Telecommunications Act of 1996, Illinois enacted its own regulatory reform law in 2001.⁴¹ The Illinois law provided additional definition around competitive services, required Ameritech (the dominant Illinois carrier at the time) to offer consumers three flat-rate packages for telephone service, and increased certain enforcement rights of the ICC. In 2006, the ICC declared that AT&T's residential services in the Chicago region were competitive.⁴² Most recently, the Illinois General Assembly

enacted further reforms to eliminate AT&T's obligation to act as carrier of last resort, pending approval by the Federal Communications Commission.⁴³

D. Funding and Staffing Challenges

The deregulation and modernization of electricity and telecommunications markets over the past several decades have posed significant challenges to the ICC's funding and staffing levels.

The ICC is funded principally by the proceeds of several utility taxes and fees that are deposited into the Public Utility Fund and the Transportation Regulatory Fund.⁴⁴ Those taxes and fees have funded \$35 million to \$42 million per year over the past decade.⁴⁵ The ICC also managed the state's 9-1-1 grant system from 2004 through 2015, but that responsibility—and funding—was moved to the Illinois State Police. The state has occasionally provided one-time infusions of general revenues or other state funds, but not with consistency.

The ICC's reliance on utility taxes and fees has presented significant funding and staffing challenges. Excluding 9-1-1 spending, the ICC's budget fell from \$51 million in FY 2003 (which is equivalent to \$69 million today) to \$41 million in FY 2016.⁴⁶ That contributed to a reduction in staff headcount of 30 percent over the past decade.

Over the past year, despite the state's two-year budget impasse that has affected most state agencies, the governor and the legislature have taken steps to improve funding and staff resources for the ICC. For FY 2018, the governor proposed a budget of almost \$57 million, including \$12.8 million for personnel, and a targeted headcount of 232 employees. That proposed budget was enacted in the state's FY 2018 budget in July 2017.⁴⁷

E. Conclusion

Through its history, the Illinois Commerce Commission has evolved as the State of Illinois and the regulated utility industry have evolved. Illinois and its Commerce Commission have been leaders in addressing the changing nature of utilities in the United States, first in the origins of the state's system of utility regulation in the early twentieth century and more recently with utility modernization, particularly in the electricity and telecommunications industries. We may not be able to predict how the regulated utility industry will continue to evolve in Illinois but we can be certain that it will continue to evolve and the Illinois Commerce Commission will evolve with it.

III. State Corporation Commission of Virginia

It is not unusual for the State Corporation Commission of Virginia (SCC) to be aligned with the Office of the Attorney General (OAG) before the Virginia Supreme Court. And the SCC has stood, on occasion, before the Court along with certain entities it regulates in defense

of one of its orders. But it is not typical for the SCC to find itself, as it did in April 2017, along with the OAG as fellow appellees, with the state's two investor-owned electric utilities in an appeal of an SCC order regarding the breadth of the SCC's constitutional power and the ability of the General Assembly to curtail such power.

Before the Court was a constitutional challenge to a controversial 2015 law that froze base rate reviews of Dominion Energy and AEP subsidiary Appalachian Power for several years, in effect, preventing the SCC from ordering refunds and rate decreases if the SCC concluded that the utility was over-earning. Large industrial customers argued that the General Assembly usurped the SCC's constitutional obligation to set rates when it passed the so-called rate freeze law. The SCC, defending its order that upheld the constitutionality of the rate freeze law, argued that the General Assembly's action was not unconstitutional, because the rate freeze law was not a "clear, palpable, and plainly repugnant violation of the General Assembly's constitutional authority." The SCC noted that the Court has recognized that "The General Assembly can restrict the [SCC's] rate authority and, moreover, has instructed that the [SCC's] authority is not plenary and is subordinate to that of the General Assembly."

The Court agreed, finding that the Virginia Constitution preserves the General Assembly's essentially unfettered power to limit the SCC's ratemaking authority, noting that the "limiting principle in this instance, enshrined in our constitution, is the democratic process to which we certainly must also defer."⁴⁸ One justice, who in previous roles has served as a legislator, an Attorney General, and, for a short stint, as a lobbyist for Appalachian Power, rejected the notion that voters can serve as an adequate limit on the General Assembly's power. (Perhaps taking his dissent to heart, the draft legislation queue for the 2018 General Assembly session is populated with various attempts to undo the rate freeze law.)

Despite being subordinate to the General Assembly, the SCC is arguably one of the most powerful entities in Virginia. It traces its roots to a Board of Public Works created in 1816 with authority over transportation by water and road. The General Assembly later added canal and railroad companies to its charges. And it was the ineffectiveness and inefficiency of the regulation over railroad companies in the late 1800s, especially as the railways destroyed during the Civil War were rebuilt, that led to the evolution of the Board into the State Corporation Commission, which was created in Virginia's 1902 Constitution. The framers, driven by the desire to protect consumers from the supposed predatory behaviors of monopolies, vested the SCC with legislative, judicial, and executive powers. By 1914, the General Assembly decided, by statute, to include electric companies among those alleged evils.

Throughout the years, the General Assembly has expanded the SCC's powers far beyond monopolies—at one point, the SCC regulated aviation, party boats, and parachute

jumping and investigated arson. Housed under its authority is the Bureau of Insurance; the clerk grants charters to corporations; the Division of Securities and Retail Franchising regulates broker-dealers and investment advisers. The Commission also enforces underground safety statutes.

In addition to the subject matter breadth, the SCC has all the powers of a court of record. The Commissioners can levy fines, hold people in contempt, and impose penalties (presumably, these penalties do not include a spell in the local gaol, leftover from the Colonial days, but very few of us who practice before the Commission are willing to press them on this point).

The SCC's most prominent role, at least in the eyes of the public, is approving the construction of transmission facilities, a power that has also been the source of a Virginia Supreme Court case or two, and setting the rates of investor-owned electric utilities. Even during the pendency of the rate freeze law, the SCC continues to set rates for fuel, generation facilities, and energy efficiency. Even though the Court has ruled that the General Assembly did not overstep its bounds by enacting the rate freeze law, the significance of the SCC's power and authority in the Commonwealth cannot be overstated.

Endnotes

1 The classic elements of a "public utility" include an enterprise that provides an essential service to the general public and is required by government to provide that service under certain terms and conditions. Traditionally, public utilities were "natural monopolies," where the enterprise was granted an exclusive franchise or route in exchange for rate regulation. While that continues today in areas such as electricity, gas, and water, there are many competitive "public utilities" in transportation and communications that remain subject to CPUC regulation in areas other than rates.

2. Bd. of R.R. Comm'rs of State of Cal. v. Mkt. St. Ry. Co., 132 Cal. 677, 679, 64 P. 1065 (1901).

3. W. Ass'n of Short Line Railroads v. R.R. Comm'n of State of Cal., 173 Cal. 802, 808, 162 P. 391 (1916).

4. *Id.* at 805.

5. See, e.g., Act for Regulation of Water Companies, 1913; Food Warehouseman Act, 1919; For-Hire Vessel Act, 1933; Highway Carriers' Act, 1935; City Carriers' Act, 1935; Household Goods Carrier Act, 1951.

6. Ex parte Martinez, 138 P.2d 10, 11 (Cal. 1943).

7. Ex parte communications are written or oral communications concerning a substantive issue in a formal proceeding between an interested person and a decision maker that do not occur in a public hearing, workshop, or in a noticed public forum. Under CPUC rules, ex parte communications are permitted in rulemaking proceedings, permitted subject to reporting requirements in ratemaking proceedings, and prohibited in adjudicatory proceedings.

8. 1913 Ill. Laws 459.

9. See generally WERNER TROESKEN, THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY (1994).

10. 1885 Ill. Laws 64.

11. 1872 Ill. Laws 218.

12. Rogers Park Water Co. v. Fergus, 180 U.S. 624 (1901); Freeport Water Co. v. Freeport, 180 U.S. 587 (1901); Danville Water Co. v. Danville, 180 U.S. 619 (1901).

13. 1897 Ill. Laws 100, 179.

14. 1905 Ill. Laws 110.

15. Mills v. Peoples Gas Light and Coke Co., 327 Ill. 508 (1927).

16. Illinois General Assembly, Report of the Special Joint Committee to Investigate Public Utilities (Apr. 17, 1913).

17. TROESKEN, *supra* note 9, at 71–72.

18. *Id.*

19. 1913 Ill. Laws 459.

20. 1921 Ill. Laws 702.

21. 1913 Ill. Laws 459; 220 ILL. COMP. STAT. 5/2-101.

22. *List of Commissioners*, ILL. COMMERCE COMM'N (as of July 2017).

23. Robert Manor, *ICC's updated ethics policy wins approval*, CHI. TRIB. (Oct. 6, 2005).

24. Christi Parsons & Robert Manor, *Consumer advocate rejected as ICC chief*, CHI. TRIB. (Nov. 4, 2005).

25. Ill. Pub. Act 90-561 (1997).

26. Eckert, *ICC Chief's road map would steer Illinois utilities toward deregulation*, CRAIN'S CHI. BUS. (Mar. 23, 1996).

27. *Id.* (quoting Sen. Steven Rauschenburger).

28. *List of Certified Alternative Retail Electric Suppliers*, ILL. COMMERCE COMM'N (as of July 2017).

29. 220 ILL. COMP. STAT. 5/16-111.

30. 2011 Annual Report, ILL. POWER AGENCY.

31. Ryan Keith, *Power bills soar as electric deregulation fails*, ASSOC. PRESS (Apr. 21, 2007).

32. Ill. Pub. Act 95-481 (2007).

33. Ill. Pub. Act 97-616 (2011).

34. Governor's Veto Message (Sept. 12, 2011), S.B. 1652, 97th Ill. Gen. Assem.

35. Ill. Pub. Act 98-1175 (2015).

36. Ray Long & Lauren Zumbach, *ComEd smart grid signed into law by Rauner*, CHI. TRIB. (Apr. 3, 2015).

37. Ill. Pub. Act 99-906 (2016).

38. Elec. Power Supply Ass'n v. Star, 1:17-cv-01164 (N.D. Ill.).

39. Ill. Pub. Act 84-617 (1985).

40. 1987 Ill. PUC LEXIS 10, at *59–60 (Feb. 18, 1987).

41. Ill. Pub. Act 92-22 (2001).

42. Ill. Commerce Comm'n v. Ill. Bell Tele. Co., ICC Docket No. 06-0027 (Aug. 30, 2006).

43. Ill. Pub. Act 100-20 (2017).

44. 220 ILL. COMP. STAT. 5/2-201.

45. FY 2003–2016 Budget Books, Illinois Gov. Off. of Mgmt. and Budget.

46. *Id.*

47. Ill. Pub. Act 100-21 (2017).

48. Old Dominion Comm. for Fair Util. Rates v. State Corp. Comm'n, No. 161519, slip op. at 14 (Va. Sept. 14, 2017), www.courts.state.va.us/opinions/opnscvwp/1161519.pdf.