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Report to the Mississippi Legislature

Public Utility Regulation: Mississippi and Other States' Structures

PEER: The Mississippi Legislature's Oversight Agency

The Mississippi Legislature created the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER Committee) by statute in 1973. A joint committee, the PEER Committee is composed of seven members of the House of Representatives appointed by the Speaker and seven members of the Senate appointed by the Lieutenant Governor. Appointments are made for four-year terms, with one Senator and one Representative appointed from each of the U.S. Congressional Districts and three at-large members appointed from each house. Committee officers are elected by the membership, with officers alternating annually between the two houses. All Committee actions by statute require a majority vote of four Representatives and four Senators voting in the affirmative.

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The Committee assigns top priority to written requests from individual legislators and legislative committees. The Committee also considers PEER staff proposals and written requests from state officials and others.

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August 21, 2018

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On August 21, 2018, the PEER Committee authorized release of the report titled ***Public Utility Regulation: Mississippi and Other States' Structures.***

A handwritten signature in cursive script, reading "Videt Carmichael".

Senator Videt Carmichael, Chair

This report does not recommend increased funding or additional staff.

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Public Utility Regulation: Mississippi and Other States' Structures

Executive Summary

Introduction

Questions often arise as to whether Mississippi's public utility regulatory structure comports with best practices for utility regulatory bodies. In 2009 the PEER Committee released *Regulation of Public Utilities in Mississippi* (December 8, 2009, Report #531) in response to a legislative mandate to study allocation of responsibilities between the Mississippi Public Service Commission and the Public Utilities Staff.

In the 2018 legislative session, bills were filed that would have combined the Public Utilities Staff with the Public Service Commission (S.B. 2838, Regular Session, 2018) or limited the Public Utilities Staff's discretion in carrying out its functions (H.B. 1179, Regular Session, 2018). Although both bills that would have accomplished this reorganization died in their respective houses, questions concerning the best organizational structure for utility regulation linger.

Background

Following an 1876 United States Supreme Court decision, states began to adopt legislation empowering state agencies to regulate rates and services of private industries "affected with a deep public interest." Today public service commissions typically regulate the following services:

- electric power,
- gas,
- telephone, and
- water and sewerage.

Generally, these agencies are charged with ensuring fair and reasonable rates for utilities under their jurisdiction, and currently all U.S. states have an agency or agencies that carry out such regulation.

Mississippi separates utility regulatory functions between the Public Service Commission and Public Utilities Staff. At present, the commission oversees gas, water, sewer, telephone (limited), and electric utilities as included in the definition of a public utility in MISS. CODE ANN. Section 77-3-3 (1972).

In 1983 the Legislature created within the Public Service Commission an organizational unit known as the Public Utilities

Staff, which became independent of the commission in 1990. Public Staff has been given the legal responsibility to provide advisory support to the Public Service Commission in its decision-making activities and is responsible for filing complaints before the commission when management believes the best interests of the public will be advanced by such action.

In 1990 the Legislature passed Chapter 530, Laws of 1990, which mandated considerable structural reform in Mississippi's utility regulatory agency. Provisions within the chapter collectively made clear that the Public Service Commission is to function as an adjudicator and rulemaker, with the Public Utilities Staff providing technical and professional advice and carrying out advocacy functions that advance the broad interests of the state.

How do other states, including contiguous states, structure and empower their public utility regulatory agencies?

None of the states contiguous to Mississippi organize their public utility regulatory agencies as Mississippi does. Staff members involved in the regulation of utilities work in the same organization with the commissioners who carry out quasi-legislative and judicial functions.

Beyond the contiguous states, other models of regulation appear. Several bear similarity to the model of regulation in Mississippi in that, within them, certain functions are moved away from the state public service commission and placed under other agencies. The "other agency" may be a separate agency established specifically to carry out certain aspects of utility regulation or may be an agency of government with broad powers extending beyond utility regulation, e.g., Office of the Attorney General.

Do utility professional organizations recommend best practices that suggest a preferred structure and assignment of duties?

States take different approaches to the structure of regulatory bodies. Mississippi, like several states, chooses to place staff in separate entities. Although the states contiguous to Mississippi tend to use a more traditional structure of placing all regulatory activities in one agency, others do not.

A review of literature shows that there is no "best practice" with respect to the structure of a public utility regulatory body. Although there are best practices for utility regulatory bodies, none address the issue of structure and assignment of duties to regulators.

In 2009, PEER reported on a general lack of best practices that could guide the structure and assignment of duties to utility regulators.¹ The National Regulatory Research Institute (NRRI) has since developed some best practices. In 2017 the NRRI completed an extensive review titled "Evaluation of Public Regulation

¹PEER Report #531, *Regulation of Public Utilities in Mississippi* (December 8, 2009).

Commission Staffing and Budget Allocation.” The study focused on certain aspects of commission staffing. The report takes no position on whether separation or combination of staffs into a single agency should be considered a best practice, and none of its best practices addressing the conditions necessary for a regulatory body to be effective at carrying out its mission are specifically directed toward a particular legal or organizational structure.

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Public Utility Regulation: Mississippi and Other States' Structures

Introduction

Authority

In accordance with MISS. CODE ANN. Section 5-3-51 et seq. (1972), the PEER Committee conducted a review to determine whether “best practices” exist with respect to the structure of a public utility regulatory body.

Scope and Purpose

In 1990 the Mississippi Legislature Enacted Chapter 530 Laws of 1990, which separated the Public Utilities Staff from the management and control of the Public Service Commission, in an effort to address concerns regarding the propriety of relations and communication between the commission and staff. Since then, questions have arisen as to the wisdom of separating the two staffs and whether the separation comports with best practice for the regulation of utilities. This report reviews Mississippi’s regulatory structure in consideration of best practices.

Method

In conducting this review, PEER

- reviewed the basic components of utility regulation;
- described the structures of regulation in Mississippi and other states;
- identified regulatory best practices as presented by the National Regulatory Research Institute (NRRI);
- interviewed NRRI staff who worked on the Institute’s review of New Mexico’s regulatory efforts in which the best practices were discussed; and
- discussed Mississippi’s structure considering the NRRI best practices.

Background

Questions often arise as to whether Mississippi's public utility regulatory structure comports with best practices for utility regulatory bodies. In the 2018 legislative session, bills were filed that would have combined the Public Utilities Staff with the Public Service Commission (S.B. 2838, Regular Session, 2018) or limited the Public Utilities Staff's discretion in carrying out its functions (H.B. 1179, Regular Session, 2018). Although both bills that would have accomplished this reorganization died in their respective houses, questions concerning the best organizational structure for utility regulation linger.

To contribute to the ongoing discussion of this subject, PEER specifically addresses herein the following questions about Mississippi's regulatory scheme:

- What do public utility regulators do?
- How does Mississippi structure and assign responsibilities to its public utility regulatory agencies?
- How do other states, including contiguous states, structure and empower public utility regulatory agencies?
- Do utility professional organizations recommend best practices that suggest a preferred structure and assignment of duties?

What do public utility regulators do?

Following an 1876 United States Supreme Court decision, states began to adopt legislation empowering state agencies to regulate rates and services of private industries "affected with a deep public interest."

Public utility regulatory agencies, often called public service commissions, are state agencies charged with the responsibility of overseeing rates and services provided by public utilities. Following the 1876 United States Supreme Court decision in *Munn v. Illinois*,² states began to adopt regulatory legislation empowering state agencies to regulate rates and services of private industries that are "affected with the deep public interest." In *Munn*, the rates in question were those associated with the warehousing of grain.

As the years passed, states expanded from storage- and transportation-related regulatory issues to become more involved in the regulation of other public services. Today public service commissions typically regulate the following services:

- electric power,
- gas,
- telephone, and
- water and sewerage.³

²94 U.S. 113 (1876).

³Deloitte Center for Energy Solutions, *Regulated Utilities Manual: A Service for Regulated Utilities* (New York: Deloitte Development LLC, 2012), 2.

Generally, these agencies are charged with ensuring fair and reasonable rates for utilities under their jurisdiction. Commissions also adopt and enforce regulations that protect the public's safety and interests, study the economic and environmental impact of utility operations, ensure the safe and reliable service of electricity and other utilities to customers, and, in some cases, mediate disputes between the utility and its customers. Commissions are also charged with electric system reliability.⁴

Currently all U.S. states have an agency or agencies that carry out such regulation.

How does Mississippi structure its public utility regulatory agencies?

Mississippi separates utility regulatory functions between the Public Service Commission and Public Utilities Staff.

History

The Public Service Commission's antecedent, the Railroad Commission, was established in 1884. The commission's powers and duties have expanded and contracted over time. Originally empowered to regulate railroads, the commission's authority was expanded to telephone and telegraph companies (1892); motor carriers (1926); and electric, water, and gas utilities (1956). In addition, the commission oversaw prisons as part of its authority from 1886 to 1906. At present, the commission oversees gas, water, sewer, telephone (limited), and electric utilities as included in the definition of a public utility in MISS. CODE ANN. Section 77-3-3 (1972). Railroad and motor carrier regulatory duties are no longer the responsibility of the Public Service Commission. The commission consists of three elected commissioners, one from each of the state's three Supreme Court districts. MISS. CODE ANN. Section 77-1-1 (1972) requires that commissioners be at least 25 years of age and be citizens of the state five years immediately prior to the general election, the same qualifications as required for the Secretary of State. Additionally, a commissioner may not operate or own stock in any utility or carrier under the commission's jurisdiction.

Powers and Duties of the Public Service Commission

Chapters 1, 2, and 3, of Title 77, MISSISSIPPI CODE ANNOTATED set out responsibilities of the Public Service Commission with respect to the regulation of public utilities, although several other CODE sections also address certain specific subjects. Generally, the commission is empowered to

- adopt rules and regulations. MISS. CODE ANN. Sections 77-2-3, 77-3-45, and several others specifically related to rates and

⁴Office of Electricity Delivery and Energy Reliability, *United States Electricity Industry Primer*, DOE/OE-0017 (Washington, DC: U.S. Department of Energy, 2015), 27.

certificates of convenience and necessity refer to the rulemaking powers of the commission. The commission has the power to adopt rules and regulations reasonably appropriate to carry out the purposes of the statutes from which it derives its authority.

- issue certificates of convenience and necessity. These certificates are, in essence, licenses to operate a public utility in a particular geographic area. Construction of new plants and generating capacity must also be approved by the issuance of a certificate. Public utilities must agree to provide specified services for fair rates within the certificated service area. The commission also regulates the quality of such service. Certificates may also be canceled by Commission action.
- regulate rates. Another major area of regulation is rate approval. Because utilities are given a local monopoly of service, it is important to oversee their rates lest they charge excessive amounts to customers. The commission must determine whether rates are just and reasonable (see MISS. CODE ANN. Sections 77-3-33 through 77-3-43 [1972]).
- establish utilities' accounting systems—MISS. CODE ANN. Section 77-3-31 (1972) requires the commission to establish a system of accounting to be utilized by public utilities. The establishment of accounting systems for utilities helps the commission and Public Utilities Staff determine a just and reasonable rate for a utility.

In 1983 the Legislature created within the Public Service Commission an organizational unit known as the Public Utilities Staff, which became independent of the commission in 1990.

Powers and Duties of the Public Utilities Staff

The Public Utilities Staff, an agency separate from the Public Service Commission, is responsible for the following:

- investigating and reviewing contested matters before the Public Service Commission and making recommendations with respect to the reasonableness of rates charged or proposed to be charged by utilities;
- reviewing, investigating, and making recommendations with respect to services furnished or proposed to be furnished by public utilities; and
- making recommendations regarding all Commission proceedings affecting the rates, service, or area of public utilities when deemed necessary and in the broad public interest.

Divisions of the Public Utilities Staff

At present, the Public Utilities Staff has five divisions:

- Administrative Services
- Electric, Gas, and Communications
- Water and Sewer
- Economics and Planning
- Legal

As discussed in the following section, the separate Public Staff has been given the legal responsibility to provide advisory support to the Public Service Commission in its decision-making activities and is responsible for filing complaints before the commission when management believes the best interests of the public will be advanced by such action.

1990 Legislation

Although the Public Utilities Staff was once a part of the Public Service Commission, legislation adopted in 1990 mandated a complete organizational separation of the two agencies. Prior to 1990, a commissioner and a former commissioner were indicted on federal extortion charges arising out of activities that occurred while serving on the commission. Some of the facts that gave rise to the prosecutions were

- ex parte communications between commissioners and parties and, in one case, documented evidence of commissioners' extorting monies from officers of utilities;
- attempts at modifying reports and audits regarding the Grand Gulf Nuclear Plant to prevent Mississippi Power and Light (now Entergy Mississippi, Inc.) from passing on certain costs of operations to consumers; and
- attempts to force a settlement between an electric utility and a gas pipeline in a dispute over charges.

Subsequent to these events, the Mississippi House of Representatives and the Senate studied state utility regulation functions and drew some conclusions about structural and substantive weaknesses in the state's regulatory programs. Specifically, the weaknesses included the following:

- the lack of an independent staff free from the political influences of the commission;
- no prohibition of ex parte communications between the commission and parties;⁵

⁵Ex parte communications are prohibited contacts between parties and adjudicators. In general, parties, including staff members who represent the public interest, may only communicate with the commission through pleadings filed with the commission and served on all other parties and intervenors. Administrative adjudicators have rules forbidding such communications.

- no prohibition against campaign contributions from regulated utilities to Commission candidates; and
- lack of a centralized staff for the commission.

In 1990 the Legislature passed Chapter 530, Laws of 1990, which mandated considerable structural reform in Mississippi's utilities regulatory agency. Included in the act was language later codified as MISS. CODE ANN. Section 77-2-1, which provided, in part:

There is hereby established a Public Utilities Staff, which shall be completely separate and independent from the Public Service Commission and the Public Service Commission staff. Such staff shall consist of the personnel positions of the executive director, the economic and planning division, legal division, engineering division and accounting division with a State Personnel Board organizational code of twenty thousand (20,000) or larger which were formerly authorized and appropriated under the provisions of Section 77-3-8, Mississippi Code of 1972. The executive director shall establish the organizational structure of the staff, and shall have the authority to create units as deemed appropriate to carry out the responsibilities of the staff. The Public Utilities Staff shall represent the broad interests of the State of Mississippi by balancing the respective concerns of the residential, commercial or industrial ratepayers, and the state and its agencies and departments, and the public utilities. The staff shall consist of a sufficient number of professional, administrative, technical, clerical and other personnel as may be necessary for the staff to perform its duties and responsibilities as hereinafter provided. All such personnel shall be competitively appointed by the executive director and shall be dismissed only for cause in accordance with the rules and regulations of the State Personnel Board. All equipment, supplies, records and any funds appropriated by the Legislature to the Public Service Commission for and on behalf of the Public Utilities Staff shall be transferred to such staff on September 1, 1990. The Public Utilities Staff shall be funded separately from the Mississippi Public Service Commission. Any appropriated funds to the Public Utilities Staff shall be maintained in an account separate from any funds of the Public Service Commission and shall never be commingled therewith....

Consistent with the theme of staff independence were several other provisions intended to ensure the staff's ability to conduct effective independent investigations and render recommendations that were uninfluenced by the commission. Specifically, these provisions were the following:

- establishment of the position of Executive Director of the Public Utilities Staff, appointed by the Governor for a term of six years, subject to the advice and consent of the Senate (see MISS. CODE ANN. Section 77-2-7);
- provision for a staff hired by the Executive Director (see MISS. CODE ANN. Section 77-2-9);
- prohibition against communications between the commission and parties (including staff when acting as a party) in contested matters, also known as the ex parte communication rule (see MISS. CODE ANN. Section 77-2-13);
- a prohibition against the Public Service Commission's hiring of personnel whose functions or activities would duplicate those of the Public Utilities Staff (see MISS. CODE ANN. Section 77-1-29); and
- a requirement that the Public Service Commission staff be managed as a unit (see MISS. CODE ANN. Section 77-3-8).

Perhaps the most significant provision of Chapter 530, Laws of 1990, was codified as MISS. CODE ANN. Section 77-2-3 (1972). This section provides the following:

(1) The public utilities staff created pursuant to Section 77-2-1 and the Public Service Commission and Commission staff shall have and possess all of the rights and powers to perform all of the duties vested by this chapter.

(2) The functions of the commission, with the aid and assistance of its staff, shall be regulatory and quasi-judicial in nature. It may make such investigations and determinations, hold such hearings, prescribe such rules and issue such orders with respect to the control and conduct of the businesses coming within its jurisdiction. It may adjudicate all proceedings brought before it in which the violation of any law or rule administered by the commission is alleged.

(3) The primary functions of the public utilities staff shall be investigative and advisory in nature.

These provisions collectively made clear that the Public Service Commission is to function as an adjudicator and rulemaker, with the Public Utilities Staff providing technical and professional advice and carrying out advocacy functions that advance the broad interests of the state.

2009 PEER Report

During the 2009 Legislative Session, some consideration was given to legislation that would have returned the Public Utilities Staff to the supervision of the Public Service Commission. H.B. 1090, Regular Session, 2009, passed the Mississippi House of Representatives but died on the Senate Public Utilities Committee's calendar. Perhaps because of some differences of

opinion regarding the appropriate structure and management for public utilities regulation, the Legislature was not able to arrive at an appropriation for either the Public Utilities Staff or the Public Service Commission for fiscal year 2010. Eventually, in a special session, the Legislature adopted H.B. 1 and H.B. 2, Third Extraordinary Session, 2009, which provided the two agencies with appropriation authority. Included in H.B. 1 (Chapter 1) was the following language:

SECTION 11. It is the intention of the Legislature that the PEER Committee shall study the regulation of public utilities and the best practices utilized by other states in the regulation of utilities, and report its findings to the members of the Senate Public Utilities Committee, Senate Appropriations Committee, House Public Utilities Committee and the House Appropriations Committee on or before January 1, 2010.

In response to this mandate, the PEER Committee published *Regulation of Public Utilities in Mississippi* (December 8, 2009, Report #531), with the following conclusions:

- The Public Utilities Staff was providing support to the commission required by statute.
- While the current Mississippi practice of placing the advisory and advocacy staff in a separate, independent agency was not the practice of most states, there was no generally accepted “best practice” regarding the location of such staff against which Mississippi’s practice could be judged.
- Appropriating some professional support positions to assist the commissioners to act strictly as advisers to the rulemaking and adjudication functions was advisable and permissible.

In Report #531, PEER noted that three other states—North Carolina, South Carolina, and Vermont—had created separate agencies or entities into which certain regulatory functions could be managed and directed, independent of the public service commissions of those states. Neither the Public Utilities Staff nor Public Service Commission took exception to the findings and recommendations of the PEER report.

How do other states, including contiguous states, structure and empower public utility regulatory agencies?

Generally, states place all functions associated with the regulation of utility rates and services in a single Commission. Typically called a public service commission, or a public utilities commission, these bodies are generally composed of appointed commissioners. Thirteen states have elected commissions (see Appendix A, page 17). While most states place advisory and advocacy staffs within the same agency, there is variation, with some states placing such staffs in other agencies.

This chapter examines several state models.

Contiguous States

None of Mississippi's contiguous states organize their public utility regulatory agencies as Mississippi does. Staff members involved in the regulation of utilities work in the same organization with the commissioners who carry out quasi-legislative and judicial functions.

Alabama

Alabama, like Mississippi, has a three-member elective commission. Based on a review of the commission's website, each commissioner has two to three support staff, primarily secretaries or administrative/executive assistants. A single executive director heads the staff as well as legal services, which is one of six divisions: Legal, Administrative, Electricity Policy, Utility Services, Utility Enforcement, and Gas Pipeline Safety.

Under its rules of practice, the commission may order staff to investigate a matter and staff may appear before the commission in such instances (see Alabama Public Service Commission Administrative Code, Section 770-X-4-.08). Thus, commission staff may become advocates for the public interest at the commission's behest. Its six divisions also provide the commission advice and guidance in its rulemaking and adjudicative functions.

Arkansas

Arkansas has a three-member commission appointed by the Governor. The Arkansas Public Service Commission employs the commissioners' staff; the general staff, headed by an executive director; and the tax division staff.

The commissioners' staff consists of administrative law judges, who hear disputes referred to them by the commission. Legal staff advises the commission and the administrative law judges. The commission's research and policy staff advises on important policy matters in functional areas, such as energy,

telecommunications, and water industries. The secretary's staff functions much the way a court clerk's office functions by docketing cases and assigning them. Administrative and information technology staffs perform the functions commonly assigned to them. The commission has a total of 29 positions, including three attorneys and five research and policy personnel.

In addition to these individuals, the Arkansas Public Service Commission, as mentioned previously, has 67 general staff persons who report to an executive director and conduct analyses of matters before the commission and may take advisory or advocacy roles as well.

The commission's tax division consists of 15 staff members who are involved in the valuation of utility property. The total staffing for the commission is 114, including the three commissioners.⁶

Louisiana

The Louisiana Public Service Commission consists of five elected commissioners, who serve overlapping terms of six years, and a staff of 92. It is constitutionally created and empowered by Article IV, Section 21, of the Louisiana Constitution of 1974 and has sole jurisdiction for utility regulation on the state level.

The chief executive officer is the executive secretary, who is appointed by and responsible to the commissioners for the commission's day-to-day operations. Commission staff consists of administrative law judges, attorneys, auditors, economists, engineers, professional and clerical support, and rate analysts. The staff is organized into nine divisions, all having a division head, who reports directly to the executive secretary.

Tennessee

Tennessee has a five-member commission appointed by the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives. Organizationally, it consists of an executive director, who oversees five divisions: Consumer Services, Gas Pipeline Safety, Information Technology, Legal, and Utilities.

The staff of the commission consists of attorneys, accountants, and other professionals involved in the analysis of rate and service matters, as well as administrative personnel. Unlike Arkansas, there is no dedicated pool of professional staff to work exclusively for the commissioners.

Staff may become a party in cases pending before the commission. In such instances, the staff must both represent the public interest and advise the commissioners. In these cases the state's ex parte communications rule requires that staff members

⁶The sources for all Arkansas information are the 2017 Annual Report and other descriptive information found on the commission's website, www.arkansas.gov/psc.

performing advocacy functions do not communicate with the commissioners or staff assigned to advise the commissioners.

Other States

Beyond the contiguous states, other models of regulation appear. Several bear some similarity to the model of regulation in Mississippi in that, within them, certain functions are moved away from the state public service commission and placed under other agencies. The “other agency” may be a separate agency established specifically to carry out certain aspects of utility regulation or may be an agency of government with broad powers extending beyond utility regulation, e.g., the Office of the Attorney General.

Minnesota

Utilities regulation in Minnesota falls to three entities: the Minnesota Public Utilities Commission, the Department of Commerce, and the Office of the Attorney General.

Minnesota Public Utilities Commission: This commission, composed of five gubernatorial appointees, is responsible for rulemaking and adjudication. It has a staff of 50. An executive secretary functions as a chief of staff for the commission and the Business Services, Consumer Affairs, Legal, and Regulatory Analysis divisions. The Minnesota Attorney General’s Office is responsible for representing the agency in state and federal courts.

The staff carries out advisory duties for the commission. Advocacy is the responsibility of the Minnesota Department of Commerce and the Office of the Attorney General. Both agencies by commission rules may intervene in all cases as a matter of right.

Minnesota Department of Commerce: The Department of Commerce, Energy Planning and Advocacy Division has the legal authority to challenge petitions filed before the public utilities commission in the public interest. This entity is completely independent of the commission.

Minnesota Attorney General: The state’s Attorney General likewise has the power to intervene in rate cases before the public utilities commission in which the interests of consumers or small businesses are affected by rates or other actions of utilities.

North Carolina

North Carolina separates regulatory functions between the Utilities Commission and Public Staff.

The North Carolina Utilities Commission was created by the general assembly to regulate the prices and services of some, but not all, public utilities in North Carolina. It is the oldest regulatory body in state government. It evolved from the Railroad Commission, which was created in 1891 to regulate railroad, steamboat, and telegraph companies.

Today the commission regulates investor-owned or privately owned electric and gas utilities, as well as private water and sewer

companies, bus companies, telephone service providers, and ferryboat companies. As in Mississippi, the commission also administers a gas pipeline safety program.

Seven commissioners appointed by the governor serve six-year terms subject to confirmation by the General Assembly. The governor designates one of the commissioners to be chairman for a four-year term. The chairman is the chief executive and administrative officer of the commission. The commission's 56-member staff is composed of four divisions: Legal, Operations, Clerk and IT Services, and Fiscal Management. It employs attorneys, accountants, engineers, IT specialists, clerks, and administrative personnel.

The commission is required by law to secure for the people of the state an efficient and economic system of public utilities. The commission functions as a rulemaking and adjudicative agency. Complaints regarding rate or service matters may be filed with the commission by the North Carolina Public Staff, or by other interested parties. The commission may also, on its own motion, file a complaint. See Rule R-1-9 Chapter 1, Rules and Regulations of the North Carolina Utilities Commission.

The North Carolina Public Staff was created in 1977 to advance the best interests of the customers on all issues before the commission. The executive director is appointed by the governor and confirmed by the General Assembly for a six-year term.

Under North Carolina law, Public Staff represents the using and consuming public—the customers of certain of the state's electric, telecommunications, natural gas, water, sewer, and transportation utilities—in matters before the North Carolina Utilities Commission affecting public utility rates and service. Public Staff is organized into 11 operating divisions: Accounting, Communications, Consumer Services, Economic Research, Electric, Executive, Information Technology, Legal, Natural Gas, Transportation, and Water/Sewer.

Public Staff is a separate and distinct entity from the North Carolina Utilities Commission. It and the commission are independent agencies with separate staffs, leadership, and budgets. The commission does not direct or oversee Public Staff operations. Public Staff appears as a party before the commission and is subject to rules prohibiting ex parte communications with the commission. Public Staff does not participate in commission decision-making.

South Carolina

Like Mississippi, South Carolina faced allegations of corruption in its utilities regulatory agency and chose to separate the advocacy functions from the advisory functions. The state legislature responded in 2004 by creating an Office of Regulatory Staff.

The South Carolina Office of Regulatory Staff (ORS) was established with passage of Act 175 of 2004. The office is responsible for many of the nonadjudicative functions associated with utilities regulation that formerly fell under the auspices of the public service

commission. Prior to Act 175, the commission handled all aspects of utilities regulation. The creation of the Office of Regulatory Staff provided a revised structure for addressing the public interest that clearly separates the adjudicative function (which remains with the public service commission) from the investigative, legal, prosecutorial, and educational roles necessary to utilities regulation.

Specifically, the Office of Regulatory Staff has sole responsibility for the inspection, audit, and examination of public utilities. It must be considered a party of record in all filings, applications, or proceedings before the public service commission, and is charged with representing the public interest of South Carolina in utilities regulation for the major utility industries—electric, natural gas, telecommunications, water/wastewater, and transportation—before the commission, the court system, the general assembly, and federal regulatory bodies. The agency also has responsibility for oversight of railroad safety and natural gas pipeline safety in South Carolina and for monitoring the construction schedule and budget of new nuclear development in the state. Act 175 defines public interest as a balance among three essential components: the concerns of the using and consuming public, the financial integrity of public utilities, and the economic development of South Carolina.

The agency is organized as follows: Consumer Services; Electric, Natural Gas, Pipeline Safety, Railroad, and Economics; New Nuclear Development; Telecommunications; Transportation; Water/ Wastewater; Legal; Information Services; Auditing; and Administration.

The creation of this office left the South Carolina Public Service Commission solely with rulemaking and adjudicative functions. Public service commission rules and regulations make clear that the Office of Regulatory Staff may initiate investigations at its own discretion or upon request of the public service commission. Commission staff performs those functions necessary to support adjudication and rulemaking, including docketing staff as well as technical advisers.⁷

Arizona

In Arizona, utilities regulation is a function of the Arizona Corporations Commission, overseen by three elected commissioners. Staff is organized into nine divisions—Administration, Corporations, Hearing, Information Technology, Legal, Media Services, Safety, Securities, and Utilities Divisions. Each division is headed by a director, all of whom report to an executive director. Each commissioner has a policy adviser and an administrative assistant.

The commission regulates investor-owned or privately owned utilities that provide gas, water, electricity, or telephone service,

⁷Two other states, Utah and Vermont, assign utility regulation functions to multiple state agencies. Because the examples set out in this draft discuss in detail structures similar to those found in these states, a detailed recitation of their duties and responsibilities was omitted.

e.g., Southwest Gas, Arizona Public Service, Tucson Electric Power, Qwest, and Arizona-American Water.

The commission also regulates utility cooperatives (owned by the customers), such as Graham County Electric Cooperative, Mohave Electric Cooperative, and Doney Park Water Cooperative.

Do utility professional organizations recommend best practices that suggest a preferred structure and assignment of duties?

A review of literature shows that there is no “best practice” with respect to the structure of a public utility regulatory body. Although there are best practices for utility regulatory bodies, none address the issue of structure and assignment of duties to regulators.

States take different approaches to the structure of regulatory bodies. Although Mississippi’s contiguous states tend to use a more traditional structure of placing all regulatory activities in one agency, others do not. Minnesota, North Carolina, and South Carolina, as discussed, separate certain functions of regulation and place them in different agencies.

2009 PEER Report

In 2009, PEER reported on a general lack of best practices that could guide the structure and assignment of duties to utility regulators. Fortunately, the National Regulatory Research Institute has since developed some best practices. The Institute, known as NRRI, was founded in 1976 by the National Association of Regulatory Utility Commissioners (NARUC). NARUC, as the association of all state utility regulators, is invested in quality research serving its members. The NRRI coordinates its activities to support NARUC’s policy, research, educational, and member-support services to state commissions. NRRI’s mission is to serve state utility regulators by producing and disseminating relevant, high-quality applied research that provides the analytical framework and practical tools necessary to improve their public interest decision-making.

NRRI Report

In 2017 the NRRI completed an extensive review titled “Evaluation of Public Regulation Commission Staffing and Budget Allocation,” which was delivered to the New Mexico Legislative Council Service in May of that year.

The New Mexico Regulatory Commission has faced serious challenges in recent years that in addition to a heavy workload and staff turnover have soiled the commission’s reputation among persons seeking professional and technical employment. An earlier study conducted by the New Mexico League of Women Voters identified similar problems.

The study focused on certain aspects of commission staffing, particularly staff size, allocation, expertise and competence, and work environment. With regard to staffing, the report mentioned different models and noted that while most states house their staffs in a single agency, several (including Minnesota, North Carolina, and South Carolina) separate much of the advocacy and investigative functions into agencies other than the quasi-

legislative/quasi-judicial commissions. The authors noted that this arrangement may safeguard against problems associated with ex parte communication violations and that such was the impetus for South Carolina creating its Office of Regulatory Staff.

The report takes no position on whether separation or combination of staffs into a single agency should be considered a best practice, and notes that great care should be taken in comparing the relative merits of each state's utility regulation practices.

Fully set out in Appendix B at page 18, the NRRI best practices focus on certain attributes of a regulatory entity that make it effective. The following paragraphs summarize these best practices.

At the highest level, good regulators have clear missions articulated through mission statements. In conjunction, they should have clear, useful metrics for measuring their effectiveness and to help promote efficient operations. Organizations utilizing best practices will also be adaptable to changes in their regulatory, business, and legal environments.

In carrying out its mission, a regulator following best practices should be aware of the need to balance interests of competing stakeholders and do so in a manner so as to foster public trust and an image of independence. In addition, regulatory agencies should institute policies and procedures that ensure effective communication between staff and commissioners and further foster respectful staff and commissioner interactions.

The NRRI best practices, or attributes, address the conditions within a regulatory body that are necessary for it to be effective at carrying out its mission. None, however, are specifically directed toward a particular legal or organization structure.

Conclusion

As the foregoing discussion establishes, states take varied approaches to staffing and assigning responsibilities to regulatory bodies. Mississippi, like several states, chooses to place staff in separate entities. A review of literature indicates that there is no "best practice" respecting the structure of a regulatory body. Best practices tend to relate to the quality of agency staffing, communications, balancing of public interests, clearly articulated mission, and skills, as opposed to structure.

Appendix A: List of States with Elected Public Regulatory Bodies

<u>State</u>	<u>Created by</u>
Arizona	State Constitution
Georgia	State Constitution
Louisiana	State Constitution
Nebraska	State Constitution
New Mexico	State Constitution
North Dakota	State Constitution
Oklahoma	State Constitution
Virginia	State Constitution
Alabama	Legislation
Mississippi	Legislation
Montana	Legislation
South Carolina	Legislation
South Dakota	Legislation

SOURCE: NRRI, 2017.

Appendix B: NRRI-Identified Best Practices

The following excerpt of utilities' regulation best practices comes directly from "Evaluation of Public Regulation Commission Staffing and Budget Allocation: A Report to the New Mexico Legislative Council Service." Footnotes are omitted.

IV. Features of "Best Practice" Regulation

This section identifies "best practices" of state utility commissions in regulating public utilities. Our observations come from a combination of knowledge of those agencies, generally acceptable principles for the operation of well-functioning governmental agencies, and the essential attributes for these agencies to serve the general public. While the criteria for determining "best practices" cannot avoid subjective impressions, there are objective metrics that can distinguish between well-performing and poor-performing agencies. One example is the establishment of just and reasonable rates that allow a prudent utility to be financially healthy and able to obtain funds for capital projects without paying a high risk premium. The emphasis, in line with the major topic of this report, is on the capability of the technical staff to assist the commissioners in their duties.

A. Balancing legitimate interests

As its fundamental duty, "best practice" regulation (hereafter "good regulation") makes well-informed decisions driven toward the public interest. It strives for balance and justice. Specifically, good regulation weighs legitimate interests and makes decisions based on facts. Its decisions do not unduly favor any one interest group over the public interest. They should coincide with the law and the evidentiary record.

While the public interest is subject to different interpretation, most regulators over time have defined it in terms of just and reasonable rates. State utility regulators generally associate such rates to satisfy the following five conditions: (a) compatible with the costs of an efficient and prudent utility; (b) reflective of the cost of serving different customers and providing different services; (c) avoidance of undue price discrimination; (d) fairness among customer groups, and between utility shareholders and customers; and (e) reasonable opportunity for a prudent utility to receive sufficient revenues to cover its cost of capital so as to attract new capital and enjoy good financial health.

A different perception of the public interest is the composite indicator of the public well-being that "adds up" the individual effects of a regulatory decision on stakeholders' and other societal interests. A third perception relates the public interest to the stakeholders' collective consent to a regulatory action.

The central premise in any definition of the public interest is that the aggregate interest of society overrides the well-being of special interest groups. Major obstacles in regulatory decisions are making the various regulatory objectives comparable (e.g., measured in dollars) and scaling up individual objectives to arrive at a "public interest" metric. Because of this impracticability the ultimate decision of whether one action advances the public interest more than another action comes down to non-qualitative factors or judgment.

Good regulation also avoids excessive politicization and influence by any one interest group, actions which weaken regulation as an institution and instrument of public policy. Politically expedient decisions tend to undermine the agency's commitment to promoting the long-term interest of the state.

Each stakeholder group, as expected, promotes positions and makes arguments that it regards as economically or otherwise beneficial to itself. The regulator's job is to sift these arguments in identifying those that arise only from self-interest, and in discerning those arguments that arise from self-interest but promote the public interest. For example, any regulatory assessment on rate mechanisms is complex, requiring a combination of analytics, unbiased information, and judgment by regulators to make decisions that are best for the public good.

In today's environment balancing involves the recognition of (1) utility competitors wanting a "level playing field " (2) many customers no longer wanting just plain vanilla service (e.g., lower prices and reliable service) but wanting such things as more control over their utility bill, the ability to self-generate and real-time information from their utility, (3) utilities wanting rates that allow them to be financially healthy, and (4) environmentalists wanting clean energy and energy efficiency.

Trying to accommodate these varied and somewhat conflicting objectives poses a daunting challenge for regulators—certainly much more than in the past when fewer stakeholders appeared before regulators in contested proceedings. Through their history, regulators have emphasized (at least on paper if not always in practice) the longer-term consequences of their actions, rather than trying to appease the immediate demands of stakeholders and others.

B. Trust and independence

A respectable regulatory agency will earn the trust of the general public and the various interest groups that come before it. As perhaps their biggest challenge, regulatory agencies have the obligation to make decisions on behalf of the public interest, notwithstanding the decisions' unpopularity and political resistance, even decisions at odds with expressed public preferences.

Mutual trust, perhaps more than anything, requires credibility or integrity. One outcome is an agency responsive to the requests, concerns, and complaints of the various players. Integrity must start at the top with the commissioners and penetrate throughout the agency, with a commitment to the public good, which after all is the social obligation of the agency.

Independence is essential for allowing an agency to protect the general public in the face of strong economic and political pressures. Jeopardy of a commission's independence can originate from different parties: Utilities; the executive branch of state government; the state legislature; special interest groups; and the judicial branch.

Independence is constrained, however, partly by law and because a regulatory agency must be held responsible to the public for its actions. To say differently, good government requires that an agency is held accountable when it makes decisions that affect the general public.

C. Effective internal communications

An important attribute for a regulatory agency, which is particularly germane to this study, is effective communications within the agency. Communications refer to the flow of information (1) among commissioners (open/closed meetings), (2) from commissioners to staff (via chief of staff, directly to lower staff), and (3) from staff to commissioners (advice, testimony, memos, reports).

D. Optimal agency efficiency

Agency efficiency is another crucial feature of good regulation. First, it helps to minimize the waste of resources, say, from excessive delay of agency decisions. Second, public utilities and other stakeholders should not have to expend unusually large amounts of money and management resources on litigation and inordinate regulatory procedural requirements. Wasted resources by public utilities will drive up their costs and, ultimately, prices to customers. The reduction of “excessive” regulatory costs is a real economic benefit.

While agency efficiency is commensurate with good regulation, overemphasizing it can lead to inadequate regulatory oversight and generally lax regulation. Utilities may then be able to pass through imprudent costs to their customers and other actions that harm customers to the benefit of utilities. A challenge for regulatory agencies is to make sure that efficiency does not interfere with its effectiveness.

E. Meaningful metrics for agency performance

No single metric and set of criteria, with surety, can measure or evaluate the overall performance of a regulatory agency. Still there are metrics that evaluators can apply to “red flag” problems that warrant further review. They relate to:

1. Utility financial health;
2. Rates;
3. Utility safety, reliability and service quality;
4. Overall customer service;
5. Attainment of state public-policy objectives;
6. Utility adoption of new technologies and other innovations;
7. Avoidance of overt “failure” (e.g. violations of ex parte rules, frequent judicial
8. overturn of commission decisions, unresponsive to customer complaints); and,
9. Regulatory agency organization and actions compared with “best practices.”

Overall, performance metrics can play an important, even if only a subordinate, role in evaluating a regulatory agency. By themselves, they lack the capability to assess the agency’s overall performance. They can, however, supplement other information to assist the legislature and others in assuring that the agency is meeting its duty to serve the public interest.

F. Adaptability to new conditions

State legislatures have allowed utility commissions broad authority to achieve the principal goals of “public convenience and necessity,” “public interest,” and “just and reasonable rates.” In most states the legislature’s role is to provide broad guidance to regulators who then establish specific rules policies and procedures to achieve the legislature’s objectives. A commission can then adapt its practices to fulfill its obligations in a dynamic world of changing utility industries, economics, and public policy.

Any successful institution in challenging times must be open to new ideas and new practices. Otherwise, besides being anachronistic, the institution loses the ability to achieve its goals, which for regulatory agencies is to serve the public interest.

Prudent regulators must therefore evaluate their existing practices, including ratemaking and the scope of utility functions, in a transformed utility environment. Regulatory errors originate from practices that assume a certain state of affairs rather than what actually transpired. In other words, a mismatch exists between practices and actual conditions. For example, average cost pricing might clash with the desires of engaged customers to control their utility bills with time-varying rates. Another example is old interconnection and other

rules unduly restricting customers who want to self-generate because of changed economics or other reasons.

With utility-industry transformation, utility customers can suffer losses from wrongly applied regulatory practices. These practices might relate to the regulators' preference for a particular utility business model, ratemaking method, and financial incentives for clean technologies.

G. Respectful commissioner-staff interaction

Good regulation requires a relation between commissioners and staff that involves the following five conditions:

1. Respect for each other (each recognizes the role that the other plays);
2. Frequent communications (under appropriate circumstances);
3. Commissioners supporting staff's independence in litigation and rulemaking proceedings (but can disagree with staff);
4. Commissioners not dictating or pressuring staff to take certain positions on key (e.g., politically charged) issues; pressure can be tacit or overt; and,
5. Commissioners not overly influenced by staff (caused often by commissioners who are not knowledgeable on particular issues).

H. Mission statement

Like other entities, a regulatory agency should have a strong mission statement. Just as a successful business is responsive to consumers, a successful regulatory agency is responsive to the general public; a strong sense of mission is important for crystallizing what the agency's personnel should be doing, and for motivating them to do their jobs well. It can embrace the agency's defining culture of independence and integrity while recognizing the importance of teamwork and workforce competence.

As another benefit, an agency with a strong mission statement will have an open and good relationship with legislators, elected and appointed officials, and citizens. On the other hand, an agency with internal friction or lack of a common vision will often be defensive and have a bad relationship with outside parties.

Finally, a strong mission statement allows a regulatory agency to make decisions according to rules based on principles. For public utilities and other interest groups, a strong mission statement reduces the uncertainty over future agency policies and practices. Similar to a coach's game plan however no matter how good, an agency still must well execute its mission statement, or else it has minimal effect. We observe that most utility regulatory agencies have perfectly acceptable mission statements and visions for the future, but many have deviated from them in practice in recent years. One example is while many mission statements stress—implicitly, if not explicitly— the “balancing act” of regulation their execution has been less than commendable, especially as politics have become a larger part of regulatory decision-making.

SOURCE: Ken Costello and Rajnish Barua, Ph.D., “Evaluation of Public Regulation Commission Staffing and Budget Allocation: A Report to the New Mexico Legislative Council Service Santa Fe, New Mexico, Report No. 17-02 (Silver Spring, MD: NRRI, May 2017).

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