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## Public Service Commission: A Legal Analysis of an Administration System

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## NOTES

### THE PUBLIC SERVICE COMMISSION: A LEGAL ANALYSIS OF AN ADMINISTRATIVE SYSTEM

This report comprises an effort to examine the workings of the Public Service Commission of New Mexico. The method used is a simple form of systems analysis.<sup>1</sup> Study of the structure, the inputs and the processes results in identification of a number of deficiencies. Where deficiencies are identified, this study attempts to define their origins and trace their effects through the major outputs, rates and return on investment. Then, assessing deficiencies in terms of the entire system and environment, this study suggests ways in which the activity of the Public Service Commission can be strengthened and improved.

As one of the early great industrial nations, the United States was among the first to apply regulation to the energy industries. From about 1880 into the 1920s, basic patterns of regulation were established. Monopoly powers were granted to producers in exchange for the public right to oversee decisions affecting control, distribution and use of energy. This first regulatory phase culminated in the 1930s when, having experienced the consequences of financial disaster in the energy industries, the federal government and many state agencies extended their power to participate in ordering arrangements for financing, ownership and management.<sup>2</sup>

The first regulatory phase produced a great body of scholarship, statutory and decisional law, administrative practice and management policy. All of it dealt with the corporation and its duties to investors, and with the needs of society for energy, delivered reliably and at reasonable cost. Since 1940, the lines of legal development have been substantially at an end.<sup>3</sup>

Since the mid-1960's, there has been a resurgence of interest in the regulation of energy. There are three identifiable areas of concern. First, problems of adequacy, reliability and availability of service have been dramatized by failures ranging from

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1. This report is an abridgement of a paper prepared for Professor A. E. Utton's class in Administrative Law at UNM Law School and which is on file in the New Mexico Law Review office.

2. T. Gies, *The Need for New Concepts in Public Utility Regulation*, in *Utility Regulation* 8 (W. Shepherd and T. Gies eds. 1966).

3. *Id.*

brownouts and blackouts, to corporate bankruptcies in regulated industries. Second, a widespread and growing concern for environmental quality has resulted in pressures to control locations of energy-producing plants and their emissions of noise, smoke and odor. Third, the poor have attempted, sometimes successfully, to obtain improved access to goods and services, including energy.<sup>4</sup>

In 1941 the Public Service Commission became a major part of the process by which decisions are made on the control, distribution and use of energy resources in New Mexico.<sup>5</sup> That process is extensive. It begins with the producers—those in immediate charge of energy resources. Producer decisions come to the Commission for ratification or adjustment. The decisional process goes on in the courts and among the public. Producers, Commission, courts and consumers all feed information back to the decisional process and to the legislature which may alter or add to the decisional rules.

In this lengthy process the role of the Commission is critical. It is the only state agency which has as its sole purpose the duty of applying public policy to the essential questions of energy control, distribution and use. The Commission is the first formal point in the decisional process in which the consumer and public interests are brought to bear.

#### THE LAW: STATUTES AND CASES

Statutory law is the structure upon which the utility regulation system is built and the great constraint within which it operates. Judicial decisions have similar importance. It is a fundamental rule of the law that, when private property is affected with a public interest, it ceases to be *in juris privatii* only, and becomes subject to public regulation. The power is in the legislature and may be exercised administratively.<sup>6</sup>

The New Mexico Public Utilities Act states:

It is the declared policy of the state that the public interest, the interest of consumers, and the interest of investors require the regulation and supervision of such public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates, and to the end that capital and investment may

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4. *Id.*

5. Laws 1941, ch. 84, §§ 1 to 86, at present codified in N.M. Stat. Ann. §§ 68-3-1 to 68-11-13 (Repl. 1961, Supp. 1971).

6. 73 C.J.S. *Public Utilities* §§ 1 to 10 (1951).

be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities for the rendition of service to the general public and to industry.<sup>7</sup>

In two cases on the point, New Mexico's courts have held that the public interest dominates those of consumers and investors.<sup>8</sup>

The present scope of the act is broad. Only municipally owned utilities and H class counties are excluded from its provisions, unless they elect to come within the act's terms.<sup>9</sup> At the present time, the Commission's jurisdiction extends to seven investor-owned electric and seven investor-owned natural gas utilities, twenty-one rural cooperatives, twenty-four investor-owned water utilities (most of which are quite small, serving only one subdivision), three liquified petroleum gas utilities, and five utility associations.<sup>10</sup>

Practice, opinions of the attorney general and judicial dicta support the proposition that the essential jurisdictional test is ". . . whether or not [services] are open to the use and service of all members of the public who may require it."<sup>11</sup>

The Commission's grant of jurisdiction appears very broad. Several New Mexico cities and towns operate their own utilities; none have elected to accept P.S.C. jurisdiction. With that exception, however, the Commission's jurisdiction over utilities is complete and has been supported by the courts and the Attorney General.

#### A. *The Commission—Powers and Duties*

The statute provides that commissioners will be appointed for six-year terms by the Governor with the advice and consent of the State Senate. By statute, they may be removed for "incompetency, neglect of duty, or malfeasance in office," or for accepting "any gift, gratuity, emolument, or employment" from any person interested in any public utility. Prior to removal, the statute provides for notice and an opportunity for hearing before the governor.<sup>12</sup>

7. N.M. Stat. Ann. § 68-3-1 (Repl. 1961, Supp. 1971).

8. *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers Ass'n*, 67 N.M. 108, 353 P.2d 62 (1960); *Hogue v. Superior Util.*, 53 N.M. 452, 210 P.2d 938 (1949).

9. N.M. Stat. Ann. § 68-5-4 (Repl. 1961, Supp. 1971).

10. 26 Report 36-37 Public Service Commission (1969-70).

11. 73 C.J.S. *Public Utilities* § 2 (1951); *Llano, Inc. v. Southern Union Gas Co.*, 75 N.M. 7, 18, 399 P.2d 646, 653 (1964); cf. [1953-1954] N.M. Att'y Gen. Biennial Rep. No. 92, at 109; [1947-1948] N.M. Att'y Gen. Biennial Rep. No. 181, at 153.

12. N.M. Stat. Ann. § 68-4-5 (Repl. 1961).

The statute notwithstanding, commissioners have been subject to direct and continuing political influence. Very few commissioners have served as many as four years; almost none have served six. Incoming governors routinely request that commissioners submit resignations, and incumbent commissioners routinely do so. This state of affairs results in the appointment of new commissioners who rarely have appreciable knowledge of the field. It militates against the appointment of substantial and responsible commissioners. It also prevents the accumulation of expertise on the Commission.<sup>13</sup>

The absence of tenure is a critical constraint upon the Commission's ability to regulate effectively. Utility regulation is a broad and complex field. It requires much expert knowledge. Masses of detailed facts call for fine analytical study and detailed synthesis.

Underlying the Governor's power to remove is a 1927 case, *State ex rel. Ulrich v. Sanchez*,<sup>14</sup> in which the State Supreme Court upheld, two to one, the power of the Governor to remove appointed officials summarily. The case arose when two incumbent associate state tax commissioners, Felipe Sanchez y Baca and John S. Clark, were fired for incompetence by an incoming governor. The two objected to the general charge of incompetence and called for a hearing. They were forcibly ejected from their capitol offices. To settle the matter, the State brought quo warranto proceedings. The officials raised two defenses: that as officers appointed with the Senate's advice and consent, they could be removed only by impeachment, and that they had been denied due process in the absence of notice, hearing and evidence. The court disposed of the first defense by observing that impeachment proceedings are available only against public officials elected by the people at large.

On the second issue, the court began with the State Constitution, Art. 5, Section 5, allowing the Governor to remove for incompetence, and went on to consider whether, under the constitution, notice and hearing are required. There are no such

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13. H. Weihofen, Report to the Committee for Study and Recommendation of Reorganization of the Executive Branch 14 (1952) [hereinafter cited the Weihofen Report]; Interview with Morris Yashvin, Commissioner, Pub. Serv. Comm'n, in Santa Fe, New Mexico, Nov. 12, 1971 [hereinafter cited Yashvin Interview] at which Commissioner Yashvin reported that, with the exception of Governors Burroughs and King, the Commission has had two majority and one minority party members. Under Burroughs and King, the Commission was entirely Democratic.

14. 32 N.M. 265, 255 P.1077 (1927).

requirements, said the court: “. . . omission from the provision on removals of any requirement of notice or hearing must be regarded as the expression of an intention that notice or hearing should not be essential to the enforcement thereof.”<sup>15</sup>

Mr. Justice Parker entered a strong dissent that would have restricted the Governor's power of removal to those officials he himself had appointed.<sup>16</sup> *Ulrich* remains law in New Mexico. It was relied upon as recently as January, 1971, in an opinion of the Attorney General that supported Governor King's summary removal of two members of the board of the State Health and Social Services Department.<sup>17</sup> *Ulrich* implants a major element of weakness in the Commission's structure. Its implications in the administrative sphere have been touched upon here. Its political implications are more significant. They will be discussed in a following section of this report.

Broad powers over the conduct of utility enterprises are delegated to the Commission. It has general and exclusive power and jurisdiction to regulate and supervise rates, service regulations, and security transactions of every public utility. Sales for resale to the public are subject to regulation, but only insofar as is required for determination of “reasonable cost.”<sup>18</sup> Securities are subject to regulation as to time and terms of issuance and value of issue, unless payable at periods of 18 months or less.

The Commission may prescribe uniform accounts, inspect or require the production of records, and may set standards for service, accuracy of metering devices and safety. To enforce its orders and standards, the Commission and its staff are empowered to enter any premises occupied by any utility after giving proper notice.<sup>19</sup>

### *B. The Valuation Power*

The Commission's power of valuation is the nucleus of its regulatory authority. The rate-setting process is founded upon a calculation whereby total assets in public service are multiplied by a decided percentage rate of return to yield a maximum allowable profit after tax to the utility company. The statute provides that, in determining value of property in public service,

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15. *Id.* at 289, 255 P. at 7610.

16. *Id.* at 300, 255 P. at 1090.

17. N.M. Att'y Gen. Opinion No. 71-6 (Jan. 21, 1971).

18. N.M. Stat. Ann. 68-5-4 (Repl. 1961, Supp. 1971).

19. N.M. Stat. Ann. §§ 6 -5-16 to 24 (Repl. 1961, Supp. 1971).

the Commission will "give due consideration to the history and development of the property and business of the particular public utility, to the original cost thereof, and to the cost of reproduction as a going concern, and to other elements of value recognized by the laws of the land for rate making purposes."<sup>20</sup> The inclusion of what the statute terms "cost of reproduction as a going concern" is a matter of considerable significance and controversy.

Simply put, rates are the product of two variables: first, the value of property in public service and second, the percentage applied (often identified as rate of return) to yield the amount to be produced by the utility as revenue. "A public utility," says one authority, "is entitled to charge and receive for its product or service such rates, and such only, as will give it as profit a fair return on the reasonable value of its property at the time used and useful in the public service. . . ."<sup>21</sup> And, says another authority:

In general, rates are reasonable or fair if they provide sufficient revenue to cover the total costs properly incurred in furnishing the required service. Total costs include the following four cost categories: (1) Operating expenses; (2) depreciation charges; (3) taxes and (4) return on investment.<sup>22</sup>

Operating expenses, depreciation charges and taxes are definite, factual concepts. As facts, they appear periodically on the company's operating statements. But the fair value of investment is something else again: it is indefinite, nonfactual and, at best, difficult to ascertain and subject to wide differences of opinion. By statute, however, the Public Service Commission is required to set a "fair value" on utility companies' investments as a first step in setting rates.

The fair value concept had its origin in the U.S. Supreme Court's decision in *Smyth v. Ames*.<sup>23</sup> In that 1897 case, the court said: ". . . [T]he basis of all calculations as to the reasonableness of rates to be charged by a corporation . . . must be the fair value of the property being used by it for the convenience of the public."<sup>24</sup> Among components of fair value, said the *Smyth* court, were original cost and reproduction cost. The latter is defined as the cost of replacing a facility at the present time.

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20. N.M. Stat. Ann § 68-5-14 (Repl. 1961).

21. 73 C.J.S. *Public Utilities* § 13 (1951).

22. Parker, *The Regulation of Public Utilities*, 10 *Natural Resources J.* 828 (1970).

23. 169 U.S. 466 (1897).

24. *Id.* at 546.

That decision led into four decades of conflict over the respective weights to be given original and reproduction costs. The conflict came to an end in most jurisdictions in 1944 with the U.S. Supreme Court's decision in *Federal Power Commission v. Hope Natural Gas Co.*:<sup>25</sup>

Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called "fair-value" rate base.<sup>26</sup>

The *Hope* decision has been interpreted to have abandoned fair value in favor of any method producing reasonable results:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.<sup>27</sup>

The statement in the *Hope* decision appears to tie reasonableness to the cost of money. That cost, of course, is factual; it is reflected in disbursements for interest and in funding of debt retirement on corporate financial statements. What is not factual and what is not reflected in the statements is the cost of building, at present, facilities that in fact were built and put into service in the past. Commissions attempting to administer the reproduction cost standard "are faced with conjectural and conflicting claims, with questionable weight to be accorded to the dubious amounts, and with the burdensome, time consuming, costly, and inconclusive task of making the required determination."<sup>28</sup>

It is important here to note that, in the critical matter of ratemaking, the Public Service Commission is bound by its statute to a method ruled unnecessary by the U.S. Supreme Court twenty-eight years ago. The Commission is not free to devise less cumbersome and more reasonable methods. This is indeed a major structural constraint on its ability to function effectively. In effect, the Commission has the power to calculate. But it has no power to alter its mode of calculation.

Incumbent commissioners and their staff are acutely aware of

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25. 320 U.S. 591 (1944).

26. *Id.* at 605.

27. *Id.* at 603.

28. Parker, *supra* note 22, at 831, quoting J. Bauer, *Updating Public Utility Regulation: Assuring Fair Rates and Fair Returns* 59 (1966).



this state of affairs. Amendatory legislation was introduced in the State Legislature in 1971.<sup>29</sup> That bill would have confined valuation of investment “. . . to evidence of the actual, legitimate costs of the property when first devoted to public use,”<sup>30</sup> doing away entirely with the reproduction cost standard. The measure died in committee.<sup>31</sup>

### C. Utilities—Duties and Restrictions

The statute imposes on regulated utilities the requirement that rates be just and reasonable, and that service be adequate, efficient and reasonable. Schedules of rates showing classifications of users must be approved by the Commission and be available at the utility for public inspection. Rates actually charged must adhere to those published. No utility may discriminate among users of the same class or between classes or localities.<sup>32</sup> At hearings to increase rates, the statute places the burden of proof on the utility to show that the charge is just and reasonable. New rates may be suspended pending a hearing for no longer than 12 months. Suspended rates, however, may be made effective under bond or with the Commission's consent.<sup>33</sup> Where the Commission finds any proposed rate to be unjust, unreasonable or in violation of law, it may order the utility to submit new rate schedules or the Commission may itself set rates.<sup>34</sup>

By a 1967 amendment, utilities must obtain a certificate of necessity and convenience prior to beginning new construction unless the new facility is to extend service in a place already served, or unless the work is in the ordinary course of business.

A 1971 amendment declares the policy of the State Legislature to be that electric facilities comply with air and water pollution control standards, as set by the Environmental Improvement Agency.<sup>35</sup> The P.S.C. must withhold certificates until compliance with environmental standards, but it may not set such standards

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29. H.B. 260, 30th N.M. St. Legislature, 1st Sess. (1971).

30. *Id.*

31. See the section of this report concerning the Public Service Company in legislative politics, *infra*.

32. N.M. Stat. Ann. §§ 68-6-1 to 6 (Repl. 1961).

33. N.M. Stat. Ann. § 68-6-7A to 7C (Repl. 1961, Supp. 1971).

34. N.M. Stat. Ann. §§ 68-6-7D (Supp. 1971); but the P.S.C. may not order flow-through of refunds to the utility, *N.M. Elec. Serv. Co. v. N.M. Pub. Serv. Comm'n*, 81 N.M. 683, 472 P.2d 648 (1970).

35. N.M. Stat. Ann § 68-7-1.2 (Supp. 1971).

itself. Where, however, the Commission finds that local zoning ordinances or land-use plans are "unreasonably restrictive," it may void them.<sup>36</sup> As a structural matter this seems a major weakness: responsibilities for administration of environmental standards are split, with the result that clear-cut authority has no single resting place.

#### *D. Orders, Appellate Review and Enforcement*

On completion of hearings, the Commission must make and file its findings of fact and order. "The findings of fact," according to the statute, "shall consist only of such ultimate facts as are necessary to determine the controverted questions presented by the proceeding."<sup>37</sup> The cases and the authorities put this directive in question.

The New Mexico Supreme Court recently said that ultimate fact means conclusion of fact, not a very helpful observation, perhaps. The Court continued, "The requirement of only a finding of the ultimate fact is not the most desirable method of assuring clear thinking by the administrative agency or effective judicial review of the agency's decision."<sup>38</sup> Professor Cooper's text on administrative law agrees: administrative decisions must contain findings of fact sufficient to permit judicial review and to improve the agency's decision-making processes. "Just, carefully reasoned, and fully informed decisions" rely on findings presented in sufficient detail to support conclusions.<sup>39</sup> And Cooper cites the Revised State Model Administrative Procedure Act: "Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."<sup>40</sup>

While reasoned findings are not required, a complete hearing record is. The Commission must furnish a court reporter whose transcript must be made available to any party to the hearing on payment of a reasonable fee for reproduction.<sup>41</sup>

Record requirements notwithstanding, the statute's failure to call for detailed findings is a major deficiency. If there is no

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36. N.M. Stat. Ann. § 68-7-1.2H (Supp. 1971).

37. N.M. Stat. Ann. § 68-8-14 (Repl. 1961).

38. *International Minerals and Chem. Corp. v. N.M. Pub. Serv. Comm'n*, 81 N.M. 280, 283, 466 P.2d 557, 560 (1970).

39. F. Cooper, 2 *State Administrative Law* 465-68 (1965).

40. *Id.* at 469. The N.M. Administrative Procedure Act, not applicable to the P.S.C., contains the language quoted at N.M. Stat. Ann. § 40-32-12A (Supp. 1971).

41. N.M. Stat. Ann. 68-8-15 (Repl. 1961, Supp. 1971).

appeal, neither the parties nor those who come after have access to the reasons behind the decision. If an appeal ensues, the court has the record and the "ultimate facts," but it will not have the reasoning drawn from the Commission's expertise which is an essential element of administrative usefulness. In effect, the court may be left with the parties' contentions, supporting partisan conclusions, but no support whatever for conclusions founded upon the consumer and public interests.

If nothing else, the absence of required reasoned opinions may encourage sloppiness and unthinking decision-making among well-trained and specialized people. It is more likely to do so where, as on the Commission, those who decide have no specific training and no significant specialized experience.

The Commission's final order exhausts administrative process. Parties aggrieved by Commission actions may petition for review in the district court of the county in which the complaint or controversy originated. Trial is to the court on the record. The petitioner bears the burden of showing that the order is unreasonable or unlawful.<sup>42</sup>

By statute ". . . [T]he court shall have no power to modify said action or order appealed from, but shall either affirm or annul and vacate the same."<sup>43</sup> The court's incapacity to modify is contrary to the directives of both the state and the Revised Model Administrative Procedure Acts.<sup>44</sup> The court's inability to order further proceedings on remand seems contrary to efficient practice. A vacation sets aside the Commission's decision, without substituting judicial guidance or direction.

Pendency of judicial review does not of itself stay or suspend Commission orders. The court may, however, order stay or suspension. A party may obtain suspension by posting a supersedeas bond.<sup>45</sup> District Court decisions are appealed directly to the Supreme Court, in accordance with the latter court's rules for appeal of judgments in civil actions.<sup>46</sup>

The entire appellate procedure is contrary to the State Administrative Procedure Act, which does not apply to the Commission. Under the Act appeals are directed from the

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42. N.M. Stat. Ann. § 68-9-1 to 4 (Repl. 1961, Supp. 1971).

43. N.M. Stat. Ann. § 68-9-5 (Repl. 1961).

44. N.M. Stat. Ann. § 4-32-22 (Supp. 1971); Revised Model State Administrative Procedure Act 15 (1961).

45. N.M. Stat. Ann. § 68-9-6 (Repl. 1961).

46. N.M. Stat. Ann. § 68-9-7 (Repl. 1961, Supp. 1971).

administrative agency to the State Court of Appeals. By this procedure, drafters of the procedure act hoped to build a body of expertise in the appellate court.<sup>47</sup> The present mode of appeal does not further that purpose.

The cases demonstrate that the scope of judicial review of Commission orders is limited to whether the order is unreasonable or unlawful, whether it is supported by substantial evidence, and whether the Commission acted within the scope of its authority. Two cases are directly in point. In *Llano, Inc. v. Southern Union Gas Co.*,<sup>48</sup> the State Supreme Court defined the scope of its review. In *New Mexico Elec. Serv. Co. v. Lea County Electric Cooperative*,<sup>49</sup> the opinion is clear that the Commission's findings failed to disclose substantial evidence that the utility had not begun construction within the one year allowed for the beginning of work under a certificate.

The Commission is authorized by statute to bring action for mandamus or for an injunction in the district court against any person believed not in compliance with the Public Utility Act and Commission orders issued under it. Responsibility for prosecution is delegated to the Attorney General, in mandatory language.<sup>50</sup> The State consents to suits against the Commission where it is alleged that it exceeded its jurisdiction or authority, or where it failed to perform a duty.<sup>51</sup>

The statute grants calendar preference to causes involving the Commission. It specifies a range of fines from \$100 to \$1000 for each violation of a Commission order, and directs that each violation (where continuing, each day in violation after conviction) is a separate offense. Penalties are cumulative and do not bar criminal prosecution.<sup>52</sup>

#### THE COMMISSIONERS AND STAFF

At the present time, the Public Service Commission consists of three commissioners, of whom only one has been in office more than one year, and of a staff including an administrator, a lawyer, a budget officer, two engineers, three rate analysts, an account

47. Lecture by Albert Utton, Professor of Law, U.N.M. School of Law, Sept. 17, 1971.

48. 75 N.M. 7, 399 P.2d 646 (1964).

49. 76 N.M. 434, 415 P.2d 556 (1966).

50. N.M. Stat. Ann § 68-10-1 (Repl. 1961).

51. N.M. Stat. Ann § 68-10-2 (Repl. 1961); *Potash Co. of American v. N.M. Pub. Serv. Comm'n.* 62 N.M. 1, 303 P.2d 908 (1956).

52. N.M. Stat. Ann § 68-10-3 to 7 (Repl. 1961).

technician, and two secretaries. A vacancy exists for a natural gas engineer, but the Commission is not attempting to fill the position for budgetary reasons.<sup>53</sup> The staffing table has changed in its internal details over the last two decades. The total employment of the Commission, however, is at the same level today as it was when Professor Weihofen studied the agency almost 20 years ago.<sup>54</sup>

The Commission's responsibilities have grown. In 1949-1950, it regulated 38 organizations with operating revenues of approximately \$23 million. In the 1969-1970 fiscal year, it oversaw 67 organizations with operating revenues of about \$142.3 million.<sup>55</sup>

Two decades ago, Professor Weihofen pointed out that, among all commissioners and employees only one, Carroll R. Anderson, had more than three years' experience with the agency. Anderson, the administrator, continues in the same role; he has now served about 25 years. Commissioner Morris Yashvin is now in his fifth year of service.<sup>56</sup>

The high rate of turnover among commissioners is part of *Ulrich's* heritage. Typically, the commissioners' terms coincide with the terms of the governors who appoint them. Over the past 15 years, eight commissioners have held office for two years, and six for four years. Only two have survived into a fifth year of service.<sup>57</sup>

Though no such practice is required by law, most governors have organized the Commission with one member of the minority party, and two representatives of the majority. Governors Burroughs (1958-1960) and King (incumbent) have ignored the practice and appointed the full membership from their own party, the Democrats.<sup>58</sup> In the past, it has been the carryover of a minority member as a part of the majority on a new Commission that has produced the only sign of continuity on the Commission in the persons of the two members who have served into a fifth year.

Whoever the governor, appointments have followed a consistent pattern. In no case has a member come to the Commission

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53. Interview with James L. Parmelee, Staff Counsel for the Public Service Comm'n, in Santa Fe, New Mexico, Nov. 12, 1971 [hereinafter cited Parmelee Interview].

54. The Weihofen Report, *supra* note 13.

55. 25 P.S.C. Report 10-45 (1969-70).

56. The Weihofen Report, *supra* note 13; Parmelee interview, *supra* note 53.

57. 26 P.S.C. Report (1969-70); and 11 P.S.C. Report (1954-55).

58. Yashvin interview, *supra* note 13.

with any credentials or experience in any field relating to Commission business.<sup>59</sup> It is hard to escape the impression that, between absence of qualifications for the job and high rate of turnover, problems of nonprofessionalism and inexperience compound themselves.

Perhaps more to the point in terms of Commission structure and the inputs to that structure, however, is the fact that appointees must, in the nature of the case, carry into their offices political and personal loyalties that are almost certain to conflict with their duties to regulate in accordance with ". . . the public interest, the interest of consumers, and the interest of investors. . . ."<sup>60</sup> It is precisely this importation of outside loyalties into the regulatory arena that the concept of long, staggered terms is intended to mitigate. And as long as *Ulrich* remains law, commissioners are going to remain under pressure to attend to outside loyalties.

The first observation coming to mind about the staff is that if it was the right size in 1952, it cannot be the right size now. The volume of work has increased enormously. But Weihofen, almost 20 years ago, took the position that the staff was then inadequate.<sup>61</sup> Until recently, the Commission's staff included a certified public accountant. "We miss him greatly," says one member of the P.S.C. staff.<sup>62</sup> There is no one working for the Commission at the present time who is professionally capable of auditing utility company records, normally done prior to hearings on applications for rate increases.<sup>63</sup>

Likewise, the absence of a natural gas engineer is significant. There is no one on the staff capable of auditing the quality of gas service.<sup>64</sup> In fact, the heat content of one million cubic feet of natural gas delivered in New Mexico may vary by almost 300 BTU, or by about 30 per cent of average, from Raton, where heat content is least, to Floyd and Fort Sumner, where it is greatest.<sup>65</sup> Obviously, heat content is a major part of gas service quality. At

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59. The incumbent chairman, Richard Montoya of Santa Fe, was appointed by Governor King. A high-school graduate, he is a former Santa Fe police officer recently involved in real estate. In some quarters, at least, his main qualification for his job is seen as his ability to deliver large segments of the Santa Fe County vote. See the New Mexico Legislative Review, Nov. 1971, at 14-15.

60. N.M. Stat. Ann. § 68-3-1B (Repl. 1961, Supp. 1971).

61. The Weihofen Report, *supra* note 13.

62. Parmelee interview, *supra* note 53.

63. *Id.*

64. *Id.*

65. 26 P.S.C. Report 30-31 (1969-70).

present, that aspect of quality is wholly unaudited and unsupervised.

There are many other areas in which the P.S.C. is structurally incapable of supervising service quality and compliance with regulations. For example, accounts are audited only prior to requests for rate increases, and then only for a limited span of time. A firm exempts itself from Commission audits by the simple expedient of not requesting rate increases. Perhaps, instead, it chooses to slightly diminish service quality.<sup>66</sup>

Structural incapacities to one side, one has the impression, at least, that the present staff is dedicated and very hard-working indeed. In these two recent large rate cases, involving the state's two largest public utilities, the staff challenged and finally overcame the companies' positions.<sup>67</sup>

#### SYSTEMS INPUTS: PROCESS, DOCUMENTS AND ENVIRONMENT

Generally, inputs are of two types. What are characterized here as formal inputs fall into four categories: applications, petitions, complaints and interventions. They are the documents that trigger the administrative process of the Public Service Commission. The operation of formal inputs is governed by the Commission's published Rules of Practice and Procedure.<sup>68</sup> The rules are the subject of the first part of this section. In the main, however, inputs are shaped by those who submit them to the Commission—primarily, the regulated utilities.

The formal inputs do not stand alone. They enter into the process alongside an array of informal inputs. These informal inputs arise in the environment for administration: partisan politics, the State Legislature, and economic and social conditions.

#### A. *The Input Process*

The Commission Rules provide that hearings will begin regularly on the first Monday of each month (rule 1). Proceedings may be formal or informal, (rule 2). Intervention is permissible at

66. Parmelee interview, *supra* note 53; Yashvin interview, *supra* note 13.

67. Southern Union Gas Co. v. Pub. Serv. Comm'n, Civil No. 41646 (Dist. Ct. Santa Fe County, N.M. 1971), Public Service Co. v. Pub. Serv. Comm'n, Civil No. 41796 (Dist. Ct. Santa Fe County, N.M. 1971). Another case involving a request by Southern Union for an escalator clause tying the price of gas to consumers to the well-head cost is pending on appeal. Southern Union Gas Co. v. Pub. Serv. Comm'n, Civil No. 44527 (Dist. Ct., Santa Fe County, N.M. 1972), *appeal docketed*, No. 9486, N.M. Sup. Ct., 1972.

68. N.M. Pub. Serv. Comm'n Rev. Gen. Order 1 (Apr. 15, 1965) [hereinafter cited R.P.P.].

the Commission's discretion, which is to be exercised to assure that proceedings are not unduly broadened (rule 9). The Commission may initiate any action on its own motion (rule 10). All hearings must be open to the public with at least twenty days notice, except where the public interest demands prompt action (rule 27). The rules may be modified or suspended to safeguard the rights of the public (rule 50). A fee of \$25 must accompany all applications, petitions and complaints (rule 51).

Nowhere in the supporting statute<sup>69</sup> or in the rules themselves is there specification of the rule-making process. In practice, however, the Commission evidently follows a twenty-day notice and hearing procedure on new rules.<sup>70</sup>

The rules do not require confrontation, but the nature of the hearing process makes confrontation usual. As a matter of practice, the Commission will accept statements on any matter from any person, whether in writing or delivered orally at hearings. But only a formal intervenor or a party to the case have the right to cross examine any witness.<sup>71</sup>

Limitation of the right to cross examine is seen as critical by the Commission's attorney, who strives to provide a "courtroom format." "I think these are pretty good rules," he says. "The Environmental Improvement Agency has a circus with its rules—everybody can cross examine everybody."<sup>72</sup>

Openness may well be the first and most essential touchstone for sound administrative procedure. The Commission's hearings are clearly open. Though there has been rather light traffic, the Commission's policy has been to remain receptive and to encourage access on the parts of all affected parties. The rules are clearly stated and reasonably comprehensible.

What comes in under the rules, however, is seldom clearly stated or reasonably comprehensible. And that fact is a direct consequence of the fair value method, to which the Commission must adhere by statute. The material asserted as factual in rate proceedings is understandable only by the well-trained specialist. And in New Mexico its level of comprehensibility is further reduced by its conjectural character. In effect, the rules seem to provide easy access to and openness of proceedings, the contents of which very few people can understand.

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69. N.M. Stat Ann. § 68-5-1 to 24 (Repl. 1961, Supp. 1971).

70. See, e.g., N.M. Pub. Serv. Comm'n Rev. Gen. Order 12 (April 15, 1965).

71. Parmelee interview, *supra* note 53.

72. *Id.*



This is a major problem, and one of which commissioners and staff are well aware. The rules by themselves have proven insufficient to assure reasonable clarity and comprehensibility of input. Several important consequences follow. Public and consumer counteraction can hardly occur when no one in the public understands that action is being taken affecting his or her interest. The Commission's staff, therefore, with all its limitations, is often left alone to confront the vast array of legal and accounting talent usually mustered by intervenors and applicants. The hearing record cannot contain much information produced by the Commission and its staff. What goes forward on appeal must be essentially what the parties at interest put into the transcript.

Where the proceedings involve matters other than rates, the defects of process imposed by the fair value method remain, though probably somewhat less apparent. Again, the parties at interest are capable of mustering a great deal of talent. It is difficult for affected individuals—Indians living on power line routes, for example—to match the showing.

The fundamental defect in process, however, remains the fair value method. Eliminating the defect will require statutory changes. And that is a political proposition.

### *B. The Environment for Administration*

The environment amid which regulation occurs is of critical importance to the administrative process. It is also very difficult to evaluate. The political, economic and social factors are rarely well documented. And the operation of these factors often results in things left undone and in actions not taken.

#### *1. Legislative Politics*

Despite a legislative attempt to insulate incumbent commissioners from partisan politics, *Ulrich*<sup>73</sup> continues to cast a long, black shadow across tenure at the policy-making and legislating levels of Commission function. New Mexico's regulated utilities are highly potent politically. They are interested, of course, in assuring that the Commission remain reasonably receptive to their needs. They are far more interested in assuring that the severance tax structure, now quite low, is not increased. They are interested in maintaining a high degree of legislative influence to

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73. 32 N.M. 265, 255 P. 1017.

combat or emasculate potentially troublesome enactments such as those dealing with environmental issues.

There are three subjects which seem ripe for legislative action to the staff. The first is the Commission budget, which at present is incapable of procuring an adequate staff to perform essential duties. The second is the problem of fair value, which mires all deliberations on rates in a swamp of conjecture and conflicting opinion.<sup>74</sup> And the third is the problem of *Ulrich* which may, given the force of *stare decisis*, require a constitutional amendment for its solution.<sup>75</sup>

The first two of these subjects were presented to the most recent meeting of the legislature. The Commission chairman is reported to have "worked closely" with the chairman of the House Appropriations Committee to obtain a modest budget increase. The increase was insufficient, however, to fill the vacancy existing for a natural gas engineer.<sup>76</sup>

Staff members drafted and arranged for the introduction of a measure that would have deleted the fair value component of the valuation process.<sup>77</sup> "Our lobbying effort was pretty pitiful," says the Commission's counsel. "And the utilities had a lot of clout."<sup>78</sup> The proposal died quietly in committee.

The one measure affecting its regulatory powers that did get through the legislature in 1971 confers on the Commission jurisdiction to approve plant locations where the facility is of 300,000 kilowatts or more, and transmission line routes where the line is to transmit at least 230 kilovolts.<sup>79</sup> Very few plants outside the Four Corners area reach the 300,000 kilowatt level. Most new major transmission lines, however, are within the new grant of jurisdiction.

"The Commission is weak as a matter of politics," says its counsel. "It comes out in what we don't do. We don't get into audits. We don't get into heat value regulations. We don't require cost of service studies. We don't do these things because we don't have the money to do them and we don't have the money because we're politically weak."<sup>80</sup>

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74. Yashvin interview, *supra* note 13; Parmelee interview, *supra* note 53.

75. Parmelee interview, *supra* note 53.

76. *Id.*

77. H.B. 260, 30th N.M. St. Legislature, 1st Sess. (1971); H.B. 345, 30th N.M. St. Legislature, 1st Sess. (1971).

78. Parmelee interview, *supra* note 53.

79. N.M. Stat. Ann. § 68-7-1.2 (Supp. 1971).

80. Parmelee interview, *supra* note 53.

## 2. *The Economic Environment*

From the standpoint of a public utility, a great multitude of small consumers does not wield the influence of one or two large ones. The utilities' market in New Mexico consists of thousands of small residential and commercial uses of energy and of a very few major users. The two largest are the U.S. Government and the Public Service Co., which is the single largest customer of Southern Union Gas.<sup>81</sup>

One important question is whether the largest users of energy are paying at least enough to permit the producer of energy to break even on the sale. While it has been held that no reasonable method of computing rates is foreclosed, as long as the public, consumer and investor interests are taken into account,<sup>82</sup> it seems clear that any rate that fails to return costs of services forces other classes of users to subsidize the beneficiaries of exceptionally low rates.<sup>83</sup> Commissioners and staff believe that the federal government, the Public Service Co. and other major users may be the beneficiaries of subsidized rates.

Nothing in statute, regulation or accepted administrative practice prevents the Commission from investigating possible inequities on its own motion. On the contrary, the statute makes several provisions authorizing such action.<sup>84</sup> The Public Utilities Act provides that unreasonable preferences, prejudices and advantages are unlawful.<sup>85</sup> Yet the commissioners have fallen back on a practice of sanctioning "arms-length contracts," whatever their terms.<sup>86</sup>

"The big users are getting a break," says one commissioner. "They are probably subsidized."<sup>87</sup> But like his colleagues, this commissioner indicates no inclination to seek the funds to support auditors, or to engage in the tedious process of acquiring detailed cost-of-service reports and subjecting them to critical and professional analysis.

## 3. *The Social Environment*

"For the last three to five years, the inputs have been coming

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81. *Id.*

82. *State v. Mountain States Telephone & Telegraph*, 54 N.M. 315, 224 P.2d 155 (1950); and *cf. Panhandle Eastern v. F.P.C.*, 324 U.S. 635 (1945).

83. 73 C.J.S. *Public Utilities* § 25 (1951).

84. *See, e.g.*, N.M. Stat. Ann. § § 68-5-4, 14, 16, 68-6-7 (Repl. 1961, Supp. 1971) and Rule 10, R.P.P. *supra* note 68.

85. N.M. Stat. Ann. § 68-6-6 (Repl. 1961).

86. Parmelee interview, *supra* note 53.

87. Yashvin interview, *supra* note 13.

in," says an incumbent commissioner. "And over the last four or five months," he adds, "even the newspapers have become aware of our existence."<sup>88</sup>

Two factors have contributed to the new visibility of the Public Service Commission. The first and by far the most important is the wave of concern for the environment that has swept the nation in the last three years. The second was a period during the summer of 1971 when the New Mexico Public Service Co. found itself unable to provide clean water in Santa Fe. The matter came before the Commission as regulator. A great many people, especially in Santa Fe, became aware of the Commission's existence. "Ever since last summer," says one commissioner, "we've had newspapermen at every meeting. We never saw them before that."<sup>89</sup>

Environmental issues are sharply felt in much of New Mexico. The State's residents take pride in the beauty of their natural surroundings. That beauty has been markedly degraded in recent years by emissions from new plants in the northwest corner of the State. Environmentalists have turned their attention to the Commission in an attempt to direct regulatory authority toward behavior damaging the scenic and health qualities of New Mexico. The Commission permitted two environmentalist groups, the Sierra Club and the New Mexico Citizens for Clean Air and Water, to intervene in recent proceedings on an application for a certificate to build a transmission line from northwestern New Mexico to Tucson.<sup>90</sup> The 22 days of hearings generated extensive publicity<sup>91</sup> and intense public interest in environmental matters and had the immediate effect of intensifying Commission relations with other agencies of state government, most notably the Environmental Improvement Agency (EIA) and the State Planning Office. The EIA is part of the State Health and Social Services Department, the largest bureaucracy in state government. At this point, it is the repository of most statutory authority to act on environmental matters. "I'm uncertain and worried about EIA conflicts," says one Commission employee. "We know, for example, that water quality is a part of adequate water service. We're willing to rely on EIA as to

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88. *Id.*

89. *Id.*

90. Yashvin interview, *supra* note 13; Parmelee interview, *supra* note 53.

91. See, e.g. Albuquerque Journal, Nov. 10, 1971, at 1, col.1.

that. But there's the possibility of confusing the quality of service and the quality of life issues. We have concurrent jurisdiction. EIA should not make decisions going to quantity or to volume of service. And our decisions should not go to quality."<sup>92</sup>

In recent years, the poor have displayed a new consciousness of their social problems. In New Mexico, the awareness has grown quite recently in association with ethnic movements. Thus far, the organized poor do not seem to have perceived the likelihood that environmental controls will increase costs of energy, thus making energy less available to them. When this is realized, however, action may well be focused in the forum provided by the Commission.

### THE SYSTEM PROCESSES

#### A. *Ongoing Administrative Activities*

Day in and day out, the Public Service Commission administers a number of routine duties. These include the collection of a number of financial and operational reports, the maintenance of current files of effective rates, and administrative duties in preparation for hearings, which include sending of notice, issuance of subpoenas, preparation of transcripts and issuance of orders.

The Commission's administrator is responsible for these duties. From all accounts, he was discharging them efficiently 20 years ago, and he continues to do so at present.<sup>93</sup> "This may be the only agency in the state," said one source, "that knows it can find what it files."<sup>94</sup>

A survey of the Commission's annual reports for the last 15 years discloses no action apparently traceable to deficiencies in routine administration.<sup>95</sup> Litigation is frequent. Almost all of it involves appeals from rate determinations. Many reports, however, list actions for court orders supporting Commission decisions. As a rule, these involve proprietary utilities that have failed to meet reporting and fee requirements set out by the statute.<sup>96</sup>

The major means of ongoing enforcement are unannounced spot checks by engineers in the field and by accountants at home

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92. Parmelee interview, *supra* note 53.

93. Weihofen report, *supra* note 13.

94. Parmelee interview, *supra* note 53.

95. 11 P.S.C. Report (1954-55) *et seq.*

96. 26 P.S.C. Report 56-57 (1969-70); 25 P.S.C. Report 62-63 (1968-69).

offices. Because the staff is small, such checks are rather infrequent. "But we're not aware of cheating," says the Commission's counsel.<sup>97</sup>

### *B. Complaint Procedure*

For the last two or three years, if not before, the Commission has maintained a policy of rapid followup on complaints. The great majority of informal cases are cleared with a few telephone calls. Most involve complaints of wrong rates. Most come from businessmen.<sup>98</sup>

Formal complaints require a hearing and have, in recent years, given rise to a substantial volume of litigation. The Commission's most recent published report lists three major cases that had their origins in complaints, rather than in applications or petitions.<sup>99</sup>

Last year for the first time, the Commission went beyond responding to complaints to bring a proceeding, on its own motion, to force a utility to refund to its customers a \$935,000 overcharge rebate. Where commercial customers had contracts calling for such adjustments, the rebate was passed on to users. The Commission ordered flow through rebates to all customers.<sup>100</sup> The utility appealed. The Commission was overruled in the district court and later, by the State Supreme Court.<sup>101</sup> The case, though it did not succeed, indicates that the Commission's awareness of its duty to consumers may be increasing. At a minimum, the case indicates an attitude very different from that of ten years ago, when the Commission reported that complaints were decreasing, and that ample evidence suggested utilities were continuing to improve.<sup>102</sup>

Evidently, the great majority of Commission determinations are acceptable to the parties. In the 1969-1970 fiscal year, the Commission issued 35 final orders. Five of them were appealed. Two of the appeals, still pending in the district court, were of orders denying petitions of Southern Union Gas Co. and Public Service Co. for major rate increases.<sup>103</sup>

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97. Parmelee interview, *supra* note 53.

98. *Id.*

99. 25 P.S.C. Report 55-57 (1969-70), one complaint involved rate discrimination alleged by a large-scale user, a second and third related to efforts of a rancher to block transmission line, construction on an especially scenic tract of land.

100. P.S.C. case No. 850, 25 P.S.C. Report 57-58 (1968-69).

101. N.M. Elec. Serv. Co. v. N.M. Pub. Serv. Comm'n, 81 N.M. 683, 472 P.2d 648 (1970).

102. 17 P.S.C. Report 41 (1960-61).

103. 26 P.S.C. 57 (1969-70).

### C. *The Process in Terms of Administrative Law*

“The rise of administrative bodies,” said Mr. Justice Jackson in a 1952 opinion, “probably has been the most significant legal trend of the last century. . . .”<sup>104</sup> Administrative decisions, he pointed out, affect far more people than those of the courts. “. . . [T]he administrative process affects nearly everyone in many ways nearly every day,” writes another authority.<sup>105</sup> That is clearly true of the Public Service Commission on whose decisions most consumers run up bills daily and hourly.

The rapid development of the law has brought with it formulation of a number of specific problem areas. Those that seem to have immediate relevance to the Commission include problems of investigation, issues involved in rule making, problems of institutional decision, questions of notice, bias, concern for retroactivity and the problem of primary jurisdiction.

The Public Utility Act confers on the Commission power to do all things necessary and convenient in the exercise of its power and jurisdiction.<sup>106</sup> It may inspect in the interest of safety,<sup>107</sup> to assure accuracy of metering devices,<sup>108</sup> and for adequacy of service.<sup>109</sup> Utilities are required to keep uniform records,<sup>110</sup> which they may be required to produce before the Commission, and which they must retain at an office within the state.<sup>111</sup> The Attorney General has upheld the power of the Commission to order service shut off without notice to any party where it appears that a hazardous condition exists.<sup>112</sup>

Despite the Commission’s broad grant of authority, actual field inspections of records and plant installations are almost nonexistent. Safety inspections are carried out by the companies themselves, except for those conducted under the Federal Natural Gas Safety Act,<sup>113</sup> which are handled in New Mexico by the State Corporation Commission.<sup>114</sup> Except for examinations of records that precede relatively infrequent hearings on applica-

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104. *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, 487 (1952).

105. K. Davis, *Administrative Law Text* 3 (1959).

106. N.M. Stat. Ann. § 68-5-4 (Repl. 1961, Supp. 1971).

107. N.M. Stat. Ann. § 68-5-24 (Repl. 1961).

108. N.M. Stat. Ann. § 68-5-23 (Repl. 1961).

109. N.M. Stat. Ann. § 68-5-19 (Repl. 1961).

110. N.M. Stat. Ann. § 68-5-16 (Repl. 1961).

111. N.M. Stat. Ann. § 68-5-17 (Repl. 1961).

112. N.M. Atty. Gen. Opinion No. 69-81 (July 23, 1969).

113. *Natural Gas Pipeline Safety*, 49 U.S.C. § § 1671-84 (1968).

114. Parmelee interview, *supra* note 53.

tions to increase rates, spot checks are rare.<sup>115</sup> The Commission's budget does not provide for enough people at sufficiently high levels of competence to perform ongoing inspections and investigations.

This state of affairs concerns the staff. Realistic determinations of cost of service depend entirely on thorough and professional audits of company records. Without such audits, it is impossible to determine whether certain large customers are unduly favored, and whether net return to the company is justified by sound accounting and business practice.<sup>116</sup>

Rule making power is granted the Commission in many different parts of the Public Utility Act. Article III of the act confers powers and duties, together with the authority to make necessary rules.<sup>117</sup> The Commission must enter all its orders on its own records.<sup>118</sup>

It is generally considered that sound rule-making involves participation of the parties. Procedures for obtaining such participation include presentations and conferences, advisory committees, hearings and provisions for legislative and executive review.<sup>119</sup> Nowhere does the statute require the Commission to elicit participation of any kind.

In practice, the Commission gives notice to affected utilities well before promulgation of new or changed rules. Generally, the companies are expected to respond with objection in writing. The procedure may be very informal, including personal visits and telephone calls. These procedures have not presented problems in the past, although the companies do request, from time to time, that changes be made. Several amendments, for example, alter record-keeping requirements to conform to national industry standards.<sup>120</sup>

#### D. *The Problem of Bias*

One who stands to gain or lose personally by a decision either way is disqualified by reason of interest.<sup>121</sup> Accordingly, the Public Utility Act provides that no commissioner may own the

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115. *Id.*

116. *Id.*

117. N.M. Stat. Ann. § 68-5-1 to 24 (Repl. 1961, Supp. 1971).

118. N.M. Stat. Ann. § 68-8-12 (Repl. 1961).

119. Davis, *supra* note 105 at 101-08.

120. *See, e.g.*, N.M. Pub. Serv. Comm'n Gen. Orders 13, 14, 21 and 22 (April 15, 1965).

121. Davis, *supra* note 105 at 220.



securities of or any interest in any public utility.<sup>122</sup> And it prohibits commissioners and employees from rendering services of any kind to any utility.<sup>123</sup>

But “[o]ne meaning of bias is a preconceived point of view about issues of law or policy. . . . [c]losely related but distinguishable is bias or prejudice concerning issues of fact about the parties in a particular case. . . . ”<sup>124</sup>

There are several identifiable sources of bias in the proceedings of the Public Service Commission. The commissioners themselves are subject to *Ulrich*, and can be expected to carry to the Commission a number of political loyalties and obligations. The fair value method is in effect an instrument of bias, which benefits utilities by rendering issues incomprehensible to the public at large and to consumers. Likewise, the inadequacy of the Commission’s staff, when measured against the manpower available to the utilities, results in a record that typically favors the companies’ contentions.

Most of these biases tend to favor the companies, as opposed to consumers and the public interest. If that is true, it should follow that companies enjoying a favored position will show high rates of profitability, obtained by high rates for service. As the next section of this report will show, that is precisely what happens.

#### SYSTEM OUTPUTS AND THEIR EFFECTS

Thus far we have examined and evaluated the Public Service Commission’s structure, its environment and the shape of matters coming before it for decision—the input factors. Two defects stood out above all others: the *Ulrich* problem and the fair value standard. We have also reviewed the Commission’s procedures for reaching decisions. Still to be examined are the output factors, which will be assessed in terms of the Commission’s statutory charge, and evaluated in terms of social and economic effects. These effects, after all, are what the entire system is about.

The Commission’s outputs are two. First it issues certificates of necessity or convenience franchising utility companies to build and operate facilities to produce and transmit energy. Second, it issues tariffs—the rates that consumers of energy are required to

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122. N.M. Stat. Ann. § 68-4-4 (Repl. 1961).

123. N.M. Stat. Ann. § 68-5-3 (Repl. 1961).

124. Davis, *supra* note 105 at 220.

pay for its use. In reaching the decisions that underlie these documentary outputs, the Commission is instructed by statute that:

it is the declared policy of the state that the public interest, the interest of consumers, and the interest of investors require the regulation and supervision of such public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates, and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities for the rendition of service to the general public and to industry.<sup>125</sup>

In assessing the manner in which the Public Service Commission carries out this charge, two facts are inescapable: First, rates charged the State's consumers are among the nation's highest; and second, earnings of the State's utility companies are among the nation's highest. It appears, therefore, that the interest of investors is emphasized at the expense of the consumer interest.

#### A. Rates to Consumers

##### 1. Some Generalizations on Cost

It would seem that the resource factors of energy production are in good supply in New Mexico. New Mexico is commonly reported to be fourth, fifth or sixth in the nation in production of natural gas. Gas is the fundamental energy resource, because practically all electricity generated for intra-state consumption is developed in gas-fired plants.<sup>126</sup> Moreover, natural gas is New Mexico's major source of heat energy.<sup>127</sup> Electrical generating capacity if considered quite adequate at present. There is excess energy available to New Mexicans from Four Corners' plants.<sup>128</sup>

The final factor of energy production is money. Though the state's economy is regarded as deficient in terms of funds available for private investment,<sup>129</sup> New Mexico's utilities have never encountered difficulties in raising money on the national

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125. N.M. Stat. Ann. § 68-3-1B (Supp. 1971).

126. Interview with Shirley Huzarski, Data Bank Supervisor, Bureau of Business Research, U.N.M., at Albuquerque, New Mexico, Nov. 14, 1971. Mrs. Huzarski reports that major inaccuracies of data collection have been discovered in this field, and that current statistics are considered very unreliable.

127. *Id.*, referring to the 1970 Census of Housing and Population.

128. *Id.*

129. *Id.*

financial market.<sup>130</sup> The Public Service Commission's reports for the period from July 1, 1968, to June 30, 1970, show that regulated companies sold a total of \$125.1 million in debt securities during that two-year period, and an additional \$5 million-plus in common and preferred stock. A total of thirty-one issuances were authorized, of which many were in the \$20,000 range and of which the largest was a \$16 million Public Service Co. sale of seven and one-quarter percent first mortgage bonds. Many small issues carried the two percent interest rate available to rural cooperatives from the federal government. Other rates varied from seven-plus to nine-plus percent, reflecting tightness in the money markets. But there is no indication whatever that investment funds are unavailable for New Mexico energy development, or that New Mexicans must pay premium rates to obtain them.<sup>131</sup>

Money is an especially important production factor in the utility industry, which is highly capital-intensive and a very low ranking user of labor. Electrical utilities maintain about \$4.33 of plant per dollar of annual revenue; the figure for natural gas utilities is \$3.61. By contrast, the automobile industry, while a heavy user of labor, maintains only forty-three cents of plant for each dollar of annual sales, and manufacturing industries as a whole maintain only twenty-five cents of plant per annual sales dollar.<sup>132</sup>

In short, examination of the factors of production in the utility industry indicates no factor in which New Mexico utilities are at any particular disadvantage when compared to other utilities elsewhere in the country. On the contrary, their ready access to fuel is an important advantage.

## 2. *The Rates Proper*

Rates are scheduled on two sets of variables. They vary with the amount of energy consumed—the larger the number of units, the lower the unit cost to the user—and they vary with location. There is no obvious pattern, but consumers in different parts of New Mexico pay markedly different rates.

The Federal Power Commission compares rates on the basis of

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130. Interview with Tom Corr, Vice-President for Community Relations (Ret.), Southern Union Gas Co., in Albuquerque, New Mexico, Oct. 16, 1971.

131. 25 P.S.C. Report (1969-70); 25 P.S.C. Report (1968-69).

132. P. Stathas, *Some Future Considerations and Implications for Regulated Industries and Regulatory Agencies*, in the *Economics of Regulation of Public Utilities* 173 (Northwestern U. Conf. 1966) [hereinafter cited *Northwestern Papers*].

a fixed number of units for typical household, commercial and industrial consumption, and averages across jurisdictions. The Commission concludes that New Mexico ranks 36th in the nation in cost of electrical energy—consumers in 14 states pay more, and consumers in 35 states pay less.<sup>133</sup> New Mexico's average figure for small households is \$7.67. There are significant variations, however, within the state. Consumers purchasing power from El Paso Electric pay a low \$6.75, Albuquerqueans buy the same energy from Public Service Co. for \$7.18, and Socorro residents pay a high of \$9.25. Nor is there the slightest uniformity in percentages of increase from one user class to the next.<sup>134</sup>

When the focus shifts to commercial users, the picture changes. For relatively small to middle-sized commercial accounts, energy charges in New Mexico are slightly below the national average. But for large commercial users, those drawing at least 200,000 kilowatt hours monthly, the New Mexico bill is seven percent more than the national average, and exceeded in only seven of the fifty states.<sup>135</sup>

Natural gas rates show a similar pattern of variation. A medium-sized household bill might range from \$15.00 in Hobbs, served by Hobbs Gas Co. with gas of unusually high heating value, to \$25.95 in Ruidoso, served by a small local utility with gas of a quality somewhat lower than that delivered in Hernandez. Since prices are set by million cubic feet, the Ruidoso consumer will pay even more than the rate quoted to obtain the actual heat energy sold in Hernandez for \$15.00. The net effect of both quality and price differentials is on the order of seventy-five percent in favor of Hernandez—a substantial differential indeed.<sup>136</sup>

The largest users of energy contract with producers for special rates, subject to Commission ratification. Such negotiated rates are the subject of much concern on the parts of commissioners and staff. They believe that at least some negotiated contracts call for sales at less than cost, and thus involve a direct subsidy.

In one instance, near Deming, household users have complained of such discrimination. At issue are low charges for power delivered to irrigators, as against relatively high charges

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133. Federal Power Commission, *Typical Electric Bills 1968*, x (1968).

134. Parker, *supra* note 22 at 837.

135. Parker, *supra* note 22 at 835.

136. 26 P.S.C. Report 30-31, Table 10 (1969-70).

for residential use. The electric company contends that its rates are justified, because if irrigation charges were to increase, the local cotton growers would switch to natural gas.<sup>137</sup> Assuming there is good support in public policy for subsidizing service to certain users, or for subsidizing the competitive positions of certain utilities, the reasons for doing so have not been explored to date by any state regulatory agency.

### *B. Returns to Companies*

There are 206 major privately owned electrical utilities in the United States. Of that number, twenty-six earned net incomes of nineteen percent or more of gross operating revenues. Of those twenty-six, three were located in New Mexico. New Mexico's five investor-owned power companies averaged net incomes of 16.4 percent of gross revenues, or one full percentage point more than American utilities as a whole. The two companies not at the high end of the range were well below the mid-point at 12.1 and 9.2 percent.<sup>138</sup> In terms of net income, New Mexico utilities varied in rate of return by more than 100 percent. This suggests that some utilities are not receiving the rate approvals that enable others to realize higher earnings. Alternatively, the lower-earning utilities may not be, for any one of several reasons, as effective as the higher-earning ones in their relationships with the Commission and with other regulatory bodies with whom they deal.<sup>139</sup>

Discrimination between and among companies may be implied from these facts. But even at 9.2 percent, the worst performer among the five is a reasonable attractive investment. Only the top twenty percent of major American corporations earn fifteen percent or more; another forty percent fail to earn as much as nine percent. More than sixty percent of all large American firms earn between seven and twelve percent on revenues.<sup>140</sup>

In the conventional wisdom of the investment community, high rates of return are associated with high risks, or with stagnation, in terms of prospects for growth. Neither justification

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137. Parmelee interview, *supra* note 53.

138. Parker, *supra* note 22 at 837-38.

139. Three of the five companies have substantial operations in Texas. One of the three is the best performer in terms of earnings, and another is the worst.

140. L. Pendleton, *Economic and Regulatory Problems of the Communications Industry*, in *Northwestern Papers*, *supra* note 132 at 34 *et seq.*

appears to support earnings on the order of twenty percent achieved by New Mexico utilities.

Utilities, says one authority, are not very risky:

The conventional . . . method employed to appraise relative degree of risk has been to compare the fluctuations in rates of return of various industries and firms over some past period of time. . . . Most such analyses that I have made and seen show that the fluctuations in rates of return of utility enterprises . . . have been of lower magnitude than those of industrial concerns. Among the utilities, the magnitude of these fluctuations usually fall in the following order: (1) telephone (with greatest fluctuation), (2) natural gas pipeline, (3) natural gas distribution, and (4) electric power (with least).<sup>141</sup>

Nor do utilities appear to be stagnating. The population of New Mexico has grown markedly in the last generation. That growth has slowed in recent years, but there is no reason to believe that New Mexico's utility companies are trapped in a stagnant economic situation. They have substantial opportunities for growth.

On the strength of the survey, it is difficult to see anything in the factors of production, in the business situations of the companies, or in the status and characteristics of the energy-consuming public that justifies the unusually high rates of earnings of New Mexico's regulated utilities. It is hard to escape the conclusion that, in the regulatory process of the Public Service Commission, the investor interest is favored over the interests of consumers and public. Two questions remain. Why is that so? And what can be done about it?

### C. *The Bias for the Investor Interest*

Where bias exists in the administrative process, it must be attributable to deficiencies in that process' structure, its inputs, or its process as such. This study has identified a number of such deficiencies:

The heritage of *Ulrich* assures that commissioners carry into office political and personal loyalties that inhibit objectivity and, more important, constrain the Commission against taking positive and affirmative action to enlarge its budget and to increase the scope of its regulatory activity.

The fair value basis for rate-making is cumbersome and conjectural

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141. B. Kolb, *The Role of Risk in Public Utility Regulation*, in *Northwestern Papers*, *supra* note 132 at 152.

at best. At worst, it masks reality behind a cloud of financial fiction. And its presence in the statute forestalls serious consideration of alternative methods of rate setting.

The Commission's staff is inadequate to do much more than handle office routine and conduct hearings. It is incapable of field inspection and auditing. It lacks the manpower to perform meaningful studies for policy guidance. Without adequate staff support, the Commission cannot act affirmatively in new directions such as the regulation of the environment.

Competence and expertise of the judiciary are likewise undermined by provisions for appellate procedure that prevent the accumulation of experience in any single court.

Of these deficiencies, the *Ulrich* problem and the difficulties of the fair value method stand out. Their implications are extensive. Moreover, unless these two problems are cured, or at least mitigated, they will block efforts to make less fundamental changes.

The holding in *Ulrich* goes directly to tenure on the Commission, and to the attitudes and loyalties that commissioners bring to their jobs. It places the tenure of commissioners at the pleasure of a Governor who must, in the partisan political arena, look frequently to the preferences and desires of utility company executives. Thus, *Ulrich* assures not only that tenure on the Commission will be limited to gubernatorial terms of office, but that appointments to the Commission will be limited to those persons who present no offense to influential utility interests.

It is contrary to these interests that the Commission be staffed to aggressively carry out its statutory duties, or that hard and precise thinking be devoted by staff, Commission, or courts to the utilities' own proposals for rate increases and service franchises. Therefore, unless the fundamental problem of Commission tenure can be resolved, it is unlikely that meaningful correction can be made in derivative problem areas.

The fair value process shrouds all Commission processes in a miasmatic fog of conjecture, unsupported assertion, unprovable claims, and corporate self interest. Sound administrative procedure is capable of moving this fog from place to place but is not capable of dispelling it. The fair value standard contributes to confusion of facts and difficulty of decision. It renders the contentions of one party practically inaccessible to affected members of the public, for only that party can understand his own contentions.

"The present rate base method is nonsense," says one member of the Commission staff. "It's question-begging. The real question is, what does the company need? We shouldn't let unconscionable amounts flow through to investors, not where there's low risk."<sup>142</sup> Ultimately, if the consumer interest is to be balanced with the interest of investors, commissioners must have tenure and the fair value standard must be overturned.

#### D. Bias: What Can Be Done

##### 1. Burying Ulrich

There are four means of overruling *Ulrich*. One is by amending the State Constitution.<sup>143</sup> A second is by amending the statute conferring tenure on the commission.<sup>144</sup> A third means would involve a commissioner refusing to leave office, in the hope that the State Supreme Court would overrule its prior holding. And a fourth involves a willingness on the part of several governors in sequence to recognize the mandate of the act as written. Nothing is impossible, but the fourth alternative is rather unlikely. Very few elected officials can be expected to give up a practice that costs so little and is worth so much. In fact, none have done so since the Commission was established in 1941. The other three alternatives seem somewhat more feasible.

A constitutional amendment, while desirable in terms of the Commission's needs, and probably in terms of the needs of many other agencies, presents two problems: first, the Commission's weakness in legislative politics, and second, the difficulty commonly encountered by amendments generally, when they reach the New Mexico electorate. The Commission, acting alone, would seem to stand little chance of negotiating all the hurdles. But with substantial support from other state administrative agencies and from an informed public, the idea seems feasible.

Amending the statute, to add mandatory language on tenure, leaves the problems of legislative politics and possible gubernatorial veto, but avoids that of electoral approval. Again, the Commission's weakness probably requires allies for the fray. Such alliances, however, are relatively feasible for the short

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142. Parmelee interview, *supra* note 53.

143. N.M. Const. art. 5, § 5.

144. N.M. Stat. Ann. § 68-4-2 (Supp. 1971).



periods of time required for legislative success. They tend to fold while awaiting elections on constitutional amendments.

A challenge to the statute seems less likely to succeed. Commissioners are appointed in the first place because they are unoffensive to utility interests and because they are well-connected in partisan politics. Such a person may be quite reluctant to resist termination. If he does so, and loses, he cannot expect to retain either his job or his political friendships. Assuming there might be a commissioner of unusual intestinal fortitude, however, he can resist his removal on at least three points of law. The first is Mr. Justice Parker's dissent, which would have limited the Governor's firing power to persons he himself has appointed.<sup>145</sup> Second, there is the fact that the *Ulrich* decision came down 14 years before enactment of the Public Utility Act in 1941. Since the language that derogates the decision was enacted subsequent to the decision, it can be argued to override the law of the earlier case.

A courageous commissioner might find a third point of reliance in *Humphrey's Ex'r. v. United States*,<sup>146</sup> decided by the U.S. Supreme Court in 1935. In that case, the Court limited the right of the chief executive to remove appointed officials where the official served as commissioner of a legislatively created agency with quasi-judicial functions.

Enactment of a constitutional amendment seems difficult. A massive infusion of gubernatorial virtue seems unlikely. The best alternatives seem to be amendatory legislation, which seems quite feasible with reasonable public support, or opposition to termination, carried into the courts.

## 2. *Fair Value: Dispelling the Fog*

Use of the fair value standard is mandated by statute.<sup>147</sup> Getting it out of the statute will require legislation. As this study has pointed out the Commission is weak in legislative politics. That weakness is attested by the very short shrift given by the House Committee on Corporations and Banking of the 1971 State Legislature to a measure intended to do away with fair

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145. 32 N.M. 265, 255 P. 1077.

146. 295 U.S. 602 (1935).

147. N.M. Stat. Ann. § 68-5-14 (Repl. 1961).

value.<sup>148</sup> Nevertheless, if fair value is to be done away with, a legislative confrontation seems unavoidable. In both partisan and legislative politics, the utilities are tough, able, experienced and influential. They cannot be expected to let fair value be defeated without a fight.

Moreover, the Commissions's natural allies in such a battle are likely to be far from the field. No other state administrative agency is going to get anywhere near the fray. And the general public, given the mysteries of the subject, is unlikely to have the faintest idea that anything is happening.

### 3. "The Bigger the Issue . . ."

"The public's taste in issues is less than outstanding," says one authority on administrative law. But he goes on to concede that, where the public is strongly involved in the decisional process, it is capable of strongly influencing outcomes, and processes as well.<sup>149</sup> "The public," says another student of the subject, "as well as the regulated must fully accept regulation. That acceptance will strengthen the regulatory process."<sup>150</sup>

In essence, the consuming public needs to perceive that its interests are at stake in utility regulation, organize to protect its interests, and apply pressure in sensitive areas of the State Legislature, of state government and of the utilities themselves. "The bigger the issue, the harder it is to keep it within conventional processes."<sup>151</sup>

Issues can become big in a number of ways. Some are exposed in books, magazines or newspapers. Others result from dedicated work (or agitation) on the part of a small group of people. However, an issue becomes big, the process starts with someone becoming acquainted with the facts. It is a great virtue of the fair value standard, from the companies' standpoint, that it is not subject to factual comprehension.

Other issues in which the Commission plays a role are less difficult to understand. The environmental threats traceable to utility activities in the Four Corners area have brought the Commission under the active scrutiny of several substantial citizens' groups. Perhaps this interest, though tangential to most

148. H.B. 260, 30th N.M. St. Legislature, 1st Sess. (1971).

149. Lecture by Albert Utton, *supra* note 47.

150. Priest, *Some Bases of Public Utility Regulations*, 36 Miss. L.J. 18, 28 (1964).

151. Lecture by Albert Utton, *supra* note 47.

of the actual work of the Commission, can be translated into concern with other areas of utility operation.

In recent years, the citizenry has shown a decreasing inclination to sit back and be regulated. "A new insistence upon citizen involvement or participation has also been stimulated by the essentially personal or emotional nature of issues which have been uppermost in the public mind in recent years, such as equal rights and protection of the environment."<sup>152</sup>

The same authority suggests several means by which the public can participate in the administrative process. These include filing complaints, service on program planning and advisory committees, attendance at public hearings, and direct participation by formal intervention.<sup>153</sup> All these methods are sound. All have proven effective in various situations. But the list seems to overlook the obvious: the value of honest-to-God hell-raising.

The informed critic at precinct or other political meetings, the worker who effectively convinces and converts his friends, and the dedicated citizen watching the actual behavior of politicians, legislators and office holders are, to the practicing public man, fearsome and influential sights. Their very presence may clarify in his mind issues previously difficult of resolution. Their conviction may prove contagious.

"Participation by representative groups of citizens, other than those who have a primarily partisan interest, can inform the agency and presumably assist it in reaching a decision which will further the public interest or accommodate the public convenience and necessity," says one authority. And he goes on, "The degree to which society will be benefited by such massive citizen involvement will be determined, for the most part, by the discipline, responsibility, and wisdom of the participants."<sup>154</sup> High standards, indeed, but it is hard to see that citizen participation, even if less than totally disinterested and objective, can have effects worse than the nonparticipation that has been characteristic of the last thirty years.

A number of governments, including New York City, New York State, California and the federal government have attempted to institutionalize consumerism within their bureaucra-

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152. Hanes, *Citizen Participation and Its Impact Upon Prompt and Responsible Administrative Action*, 24 Sw. L.J. 731, 732 (1970).

153. *Id.* at 732-36.

154. *Id.* at 736.

cies. New Mexico made the same attempt with an office of consumer counsel within the Public Service Commission some years ago and with a consumer frauds division in the office of the Attorney General at present. Though these agencies seem to display many of the structural weaknesses and defects of relationships within the political environment that the Commission exhibits, there are some authorities who see these as the primary means of regularizing consumer concerns within governmental processes.<sup>155</sup> That conclusion is not foregone. Though organizational obstacles are great and hazards to continuity are formidable, it may well be feasible to organize effective pressure outside government, as has been done in recent years by environmentalists. Such independent organization (e.g., the Sierra Club) has many political, economic and social advantages.

#### 4. *Improving the Process*

With *Ulrich* dead and buried, the fog of fair value forever dispelled, and the citizen concern requisite for these achievements in being, the remaining deficiencies identified in this study should not prove difficult to overcome. Staffing levels are a function of budget, which is a function, in turn, of strength in legislative politics. And given adequate staff and the strength of conviction that results from secure tenure, nothing prevents the Commission from ordering frequent audits and field inspection, and from examining the records to assure itself that no service is delivered by a New Mexico public utility at less than cost.

With the end of fair value, confusion in the record should diminish as the record itself is confined to facts supportable in the account books. Appellate decisions should be similarly simplified.

### CONCLUSIONS

Impressions are impossible to footnote and often difficult to begin to explain. Several impressions emerge from this study that might well be included here.

The commissioners and their staff want to do a good job. They take seriously their tripartite duties to the consumer interest, the public welfare, and the well-being of investors. Bias, as developed in this study, is certainly not a matter of influence peddling or back room intrigue. It is a matter of legal structure. It is a

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155. Interview with David Hamilton, Professor of Economics, U.N.M., in Albuquerque, New Mexico, Oct. 15, 1971. See also D. Hamilton, *Consumer Protection in New Mexico* No. 54 (1971).

matter of human nature, in the sense that there are some things people do willingly, and other things they do not at all. The statutory insertions and the decisional law result from able counsel doing and doing effectively, precisely what counsel are supposed to do. And incumbent commissioners can hardly be expected to butt their heads against the brick wall of legislative politics, given their situations in life and the facts of New Mexico's political environment.

Where action is less difficult to take, commissioners have proven demonstrably willing to take it. In the last two years, each of New Mexico's two largest utilities requested substantial rate increases. In each case the Commission denied the application. But in approaching the legislature for statutory changes, they come as supplicants, one among many. Among the many, they are among the weaker.

Given the structural nature of problems of tenure and fair value, it seems impressive that much change can be accomplished by minor alterations in law. But while the prospects for change do loom large, they should not be overrated. Were *Ulrich* to be buried tomorrow, there would remain all the weight of years of political habit. Such burdens are rarely thrown off quickly. By the same token, intelligent lawyers and accountants, even without fair value to fall back on, can be expected to find forceful arguments for their clients. What one hopes for in removing the fair value standard is that these advisors will thereafter be required to hold their arguments closer to relatively determinable facts.

Finally, this study indicates clearly that the institutions of democratic government function best when the interests concerned forcefully and effectively represent themselves, and function poorly when any of those interests are absent from the proceedings. For thirty years, the New Mexico utility industry has presented its case, consistently, year in and year out. The public has not been heard—not because the public has been kept out, but because it has not chosen to come in. No law, no process and probably no human invention can do for people what people do not do for themselves.

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