Diversity in Utility Regulation

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The essay, "Promoting Diversity and Prohibiting Discrimination: Is There a Regulatory Obligation to Society?," *addressed the Supreme Court's 1976 decision in National Association for the Advancement of Colored People v. Federal Power Commission. The Court held that the Commission had no power to issue a rule banning racial discrimination. The reason: While certainly consistent with the general "public interest," such a rule lay outside the Federal Power Act's purpose, which was the electric industry's economic performance.*

The essay accepted the premise that utility regulation is about economic performance, but argued that diversity in a utility's board, executive suite, managerial ranks and employee base is relevant to a utility's performance. A utility that looks like the community it serves will better serve that community. That premise supports, indeed requires, that regulators make diversity a priority. Regrettably, since that essay came out 10 years ago, few state commissions have taken the necessary actions. Maybe recent events can make a difference.

The essay received commentary from five committed, thoughtful people: Steven Weissman, Jeffrey Ackermann, David Yaffe, Jason Zeller and Cynthia Chaplin. Their submissions follow.

Steve Weissman, Lecturer, Univ. of Calif. Berkeley Goldman School of Public Policy; Former ALJ and Commission Advisor, Calif. PUC

The *NAACP* case provides an invitation for regulators to think more expansively about how utility processes and behavior have an impact on ratepayers' interest in safe, reliable, and reasonably priced service. For instance, a Commission could conclude that a utility with strong minority hiring practices will be better situated to provide the best service at the best price because: (1) a welcoming work environment improves employee morale which can enhance safety, reliability and economic efficiency, and (2) active consideration of the full range of contractors (including minority contractors) enhances competition based on price and service quality. With these concepts in mind, regulators could conclude that utility rates and service cannot be just and reasonable without an active minority hiring program.

Regardless of how wide of a lane was paved by the Court in *NAACP*, regulators have long moved beyond a blindered view of ratepayers' interests to ensure that utilities are good corporate citizens. For instance, when Pacific Gas & Electric's transformers started leaking carcinogenic chemicals. It wasn't just a matter of it responding by doing just what the law might require. The utility was expected to spare no expense and clean up the mess, regardless of fault. Regulators have ordered utilities to convert their vehicle fleets to low- or no-carbon cars and trucks, even when this was not the cheapest alternative. Regulators, at least in California, have long erred on the side of supporting union labor by approving prevailing wage formulas for the

labor component of the revenue requirement. Perhaps some of the decisions in this spirit get by just because no one contests them, or no court elects to hear the case. But there also may be a tacit agreement that utility regulation is a broader expression of the collective values of the community. In providing services that are vested with a public interest, the utilities are expected to do the right thing. *NAACP* does not address this rationale, but it also does not get in the way.

Jeffrey Ackermann, Chair, Colorado Public Utilities Commission

If there is one particular take-away from the past several weeks of focus upon racial inequity, it's a growing awareness of the depth and persistence of its systemic nature. As such, as a regulator who is looking to be more aware of unconscious complicity, I'm curious as to how the more systemic aspects might be brought to bear upon the pursuit of the public interest. For example, in the siting of power plants, transmission/distribution lines and other assets, how can we become more cognizant of how minority (and poor) populations bear a disproportionate amount of burden? And as we engage in new aspects of electric utility regulation, how can we be more cognizant of how communities of color may be overlooked?

The realm of "decision making theory and practice" is one place where profound disruption and (hopefully) positive change will occur concerning utility regulation. Specifically, I've been exploring how our decision making construct needs to actively embrace the optimization of multiple objectives in an era of increasing uncertainty. This may occur through a more sophisticated use of scenario planning (learning from Royal Dutch Shell and several other corporations). And/or it may require a new approach to the underlying modeling programs, to fully utilize optimization modeling. (For more details, I recommend the podcast *Energy Policy NOW from the Kleinman Center for Energy Policy, specifically episode 2 of Season 3; 9/17/18.*) My point is that there are educated folk trying to put some better framing around optimization modeling, in a way that might benefit utility regulation. How we add in to optimization a commitment to social equity only increases the challenge. Possibly the pathway forward is via "multisolving" as a way to address climate and societal concerns concurrently. (See: https://www.youtube.com/watch?v=prF8trTallQ&authuser=1)

Jason Zeller, Senior attorney, Utility Consumer's Action Network

California has had programs designed to encourage regulated utilities to contract with women, minority, disabled veterans, and LGBT enterprises for many years pursuant to Pub. Util. Code sections 8281-8286. In addition to reporting requirements the Commission has a verification process to confirm whether a given enterprise is indeed owned by a member of one of these groups. All utilities operating in California with annual revenues in excess of $25 million are subject to the provisions of these statutes. Take a look at these code sections for more information.

David Yaffe, Senior Counsel, Van Ness Feldman LLP; Professorial Lecturer in Energy Law, George Washington University Law School

I think there are at least two areas for making a difference. The first, as you point out, is to push diversity in utility management, boards of directors and workforces. The second is to at least examine, if not rethink, the application of market-based theories in promoting greater energy efficiency and distribution of renewable distributed resources as among zip codes, types of businesses and residences. If one takes a slightly different view of public interest and regulation to include not only orders leading to desired outcomes but also collection and disclosure of information on precisely the mal-distribution of economic and environmental benefits, perhaps that collection and disclosure of information might lead to the policy changes needed to move the equity ball down the court. For example, might there be benefits in urging regulatory commissions to require electric and gas utilities to include in their Form 1 and Form 2 information about diversity in employment as well as energy efficiency in end uses by socio economic criteria.

Cynthia Chaplin, Executive Director, Canadian Association of Members of Public Utility Tribunals; former Vice Chair, Ontario Energy Board

I think this topic should be one of the defining issues of our generation generally, and therefore has an important place in the conversations of regulators. The situation in Canada is the same and different. And while we have been advancing the issue within CAMPUT, there is now more urgency and broader scope.

My interest is in both the regulators and the regulated. Just as regulators should be holding utilities to account, regulators should be holding themselves to account.

Your focus on performance offers a number of avenues of analysis, but I wonder whether the analysis you describe might be at a level which should already be settled. For example: Is it necessary to demonstrate that enhanced diversity improves performance in a fact-specific way for utilities? I would argue perhaps not. We don't re-establish the factual basis for economies of scale, for example, in each case, or the risk of price discrimination, or the potential for incentives. We accept these - subject to evidence to the contrary - and move on from there. There are certainly a variety of studies which support a strong link between diversity and team performance, and others demonstrating a link between diversity and financial performance. One example is a McKinsey study.

If diversity is accepted as a societal expectation and the evidence supports the link between diversity and performance, then might the focus shift to examining utility performance on various measures of diversity?

A recent change to the *Canada Business Corporations Act (CBCA)* requires extensive reporting by issuers, including:

1. The level of diversity on boards and in senior management in terms of women, visible minorities, Indigenous people, and people with disabilities (each separately).

2. Whether there is a written policy regarding board diversity, and if not, why.

3. If there is a policy, reporting on whether and how effectiveness is measured.

This law only applies to corporations that come under the federal statute, and Canadian utilities generally come under provincial business corporations laws, which don't carry these requirements (yet). However, the new requirements originated with disclosure requirements under Canadian securities regulation, which were related to gender representation. Many utilities in Canada are not public issuers, but I would argue that against this backdrop, regulators should consider requiring comparable disclosure by regulated utilities. I think disclosure could be illuminating, don't you? So the discussion and investigation would start from a different premise and advance from there.

Another angle might be to look at what investors are looking at and requiring. In Canada we are certainly seeing more attention on all components of ESG—environment, social, governance. I think that regulators would be interested in knowing about corporate practices and the impact on access to capital. Again, the impact of the disclosure provisions required in Canada will be interesting to follow.

And why should diverse communities continue to pay full freight into a system which is marked by systemic racism--in hiring, promotion, etc? Perhaps a broader and more philosophical approach to "undue discrimination" would be in order?

So while the U.S. Supreme Court may have decided 35 years ago that such issues were not the purview of the regulators, I wonder if that would still hold today. Perhaps different arguments would be brought to bear, and perhaps there would be a different outcome.

It's an area where Canadian regulators might have more opportunity to pursue the issue, in part given the signal from changes in the *CBCA*—both those related to diversity, and the provisions (not yet in force) that the directors must act in the best interest of the corporation—and including the interests of all stakeholders, not just shareholders.

I also think about the regulator's own responsibility within their institution. I once worked for a far-seeing chair who expected to bring in young professionals, work them hard and train them up – and then release them to the higher remuneration and broader opportunities of the world of utilities, law and consulting - confident that they would retain the important public interest grounding that working for the regulator would provide. Under this regulatory philosophy, the regulator has a significant opportunity to both bring diversity to its own workforce—and seed the sector as well.