

Teaching Public Utility Performance

Scott Hempling
September 2018

Each fall at Georgetown University Law Center I teach a course on public utilities. To attract modern students to a class on century-old principles, I title the course *Renewable Energy, Internet, Uber: Bringing Competition to Historically Monopolistic Industries*.

Contradictory trends: We learn that today's utility industries display contradictory trends. Long monopolistic, they now host ambitious entrants: in electricity, providers of renewable energy, storage, modular nuclear plants, and energy efficiency services; in telecommunications, sellers of cellular phones, broadband access, content and more. But juxtaposed with this energetic activity is a three-decade parade of mergers and acquisitions, by which the original monopolists consolidate and complicate their industries and markets. A student's local electric company, for decades an independent, widows-and-orphans investment, now likely sits underneath a multi-layer, multi-utility, multi-state, even multi-industry and multi-national holding company. AT&T's original, vertically-integrated monopoly, broken up by a 1984 antitrust settlement, has now reintegrated, while major communications incumbents are merging with major content providers. We contrast Madison Gas & Electric, a small company whose entire focus is one city, with Baltimore Gas & Electric, a minor member of Exelon's six-utility, 20-affiliate, multi-layer sprawl of nuclear, coal, gas and merchant (some bankrupt) businesses.

The basics and the struggles: We cover the basics—the six features of the state-granted monopoly franchise (exclusivity, consent to regulation, obligation to serve, quality of service, power of eminent domain, limitations on negligence liability); the difference between rhetorical competition and real competition, between authorizing competition and making competition effective; cost-based ratemaking and market-based rates; the four key doctrines—undue discrimination, filed rate doctrine, prohibition against retroactivity and *Mobile-Sierra*; corporate structure, mergers and acquisitions; and the federal-state jurisdictional relationship—constitutionally framed in 1789, statutorily designed in 1935, awkwardly applied in 2018.

Those are only the basics. Students soon grasp that the euphemistic “transition” from monopoly to competition is a struggle. Utility incumbents are uniquely advantaged by their long history of government protection from competition. From that perch they disparage, then defeat or acquire, new entrants seeking to inject diversity, innovation and competition. The last century casts a long shadow over the next. Why else would the same companies still be in charge? How is it that Chobani and Fage are displacing Dannon, but FirstEnergy and Exelon are untouched?

Law is not linear: The main teaching challenge is the calendar. It's linear, 13 successive weeks. But the law is a web, multiple doctrinal interdependencies demanding that students understand in September what they won't learn until December. The pedagogical challenge is to bring out our field's key commonalities: its *mission* (to align utility performance with the public interest); its *legal principles* (ranging from the state law on exclusive monopoly franchise to

federal constitutional protection of shareholder investment); its *policy flexibility* (accommodating multiple market structures—from monopolies to competition, and multiple public purposes—from reliability to environmental accountability); its reliance on multiple *professions* (law, economics, finance, accounting, management, engineering and politics); and its *formal administrative procedures*, such as adjudication and rulemaking.

Today's challenges: While these common elements are constants, they are being stretched and strained by new political challenges. Three examples are *climate change* (e.g., To what extent should we make utilities and their customers responsible for "greening" energy production and consumption?); *universal service* (e.g., Should we bring broadband to every home, and at whose cost?); and *privacy* (e.g., How do regulators induce personal changes in energy consumption while protecting the related data from public exposure?). And then there are two constants: *ideological debate* (e.g., private vs. public ownership, government intervention vs. "free market"); and *state-federal tension* (e.g., Which aspects of utility service are "national," requiring uniformity, and which are "local," warranting state experimentation?).

Pedagogical purposes: Students who survive the 13 weeks gain eight strengths. They will have learned to—

1. recognize and critique the *multiple and conflicting purposes of economic regulation*; then articulate their own law-based definitions of the "public interest"—a phrase appearing in every regulatory statute but rarely defined by those who apply the statute;
2. develop a mental file cabinet that stores the legal principles regulators use to (a) *induce the performance of monopolies* and (b) *convert monopoly markets into effectively competitive markets*;
3. see the *complementary and conflicting roles of competition and regulation*, not as ideological poles, or as weapons in a century-long struggle for market control, but as tools that can be combined, productively or counterproductively, to *induce market performance*;
4. understand that today's regulated industries reflect both "*old world*" *policies* and "*new world*" *technologies*—the combination of which can either sustain or impede performance progress; and then, see why efforts to transform historically monopoly markets into competitive markets is exceedingly difficult legally, economically and politically;
5. evaluate the effectiveness of a regulatory policy, in terms of the multiple dimensions of performance; e.g., *costs, quality, competitiveness, innovation*;
6. understand how our *federal-state, dual-jurisdictional system* makes regulatory policymaking simultaneously rich and frustrating, requiring decision-makers to grasp, and value, the local and the national;
7. see how the major forms of government decision-making—*legislation, rulemaking, adjudication and judicial review, at the state and federal levels*—work together (or in conflict) to produce or undermine policy; and

8. understand the *multiple roles lawyers play* in this field (*e.g.*, drafting legislation, planning and executing adjudication, advising decision-makers, drafting regulatory decisions, defending decisions on judicial review); and how those roles make use of experts and expertise from the disciplines of economics, accounting, finance, engineering, management and politics.

* * *

Students are innocents, uninfected by the careerism and narrowness that afflict lawyers who “represent” a “client.” So before the legal profession and its monetary inducements pull students into representing private interests, teachers have a chance to teach the public interest. In utility regulation, the public interest is performance—performance by the sellers, performance by the consumers, performance by the regulators, performance by the industry. Effective regulators align private actions with the public interest. The purpose of regulation is performance.