

## **Utility Workers: Is Their Mistreatment a Commission Responsibility?**

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Whether it's 100 degrees or 20 degrees, men and women are outside—digging trenches, laying pipes, flagging traffic, climbing poles, repairing transformers. It's difficult, dangerous work. For years I have driven, biked, walked, and run right by these hard-hatted, orange-vested workers, not thinking twice about their pay and their treatment. Now, as result of working with the Laborers' International Union of North America and its D.C-area affiliate, I've learned a few things.

Every franchised utility has an obligation: to provide service cost-effectively, reliably, and safely. Utility service is capital-intensive; so utilities need to get the right equipment and treat it right. But utility service is also labor-intensive; so utilities need to get the right workers and treat them right.

### **Utility workers are at risk**

Two trends—outsourcing and multiyear rate plans—are converging to put utility service and utility workers at risk. With outsourcing, utilities are replacing some of their full-time employees with temporary workers hired by contractors.<sup>1</sup> With multiyear rate plans, utilities can keep savings from cost-cutting for longer periods. Combined, these practices can mean utilities earn more while workers earn less. Why? Because any rate plan that lets a utility keep the excess of projected cost over actual cost rewards the utility for contracting out work to companies that underpay their workers. And if the contractors can also keep the excess of projected cost over actual cost, the incentive to mistreat is amplified.

Worker mistreatment takes multiple forms: illegal underpayment (such as payments below minimum wage and failure to pay overtime); legal underpayment (paying workers below their value); and insufficient sick leave, vacation time, and training time. We want utilities to keep costs down. But a utility's obligation to minimize its customers' costs is always subject to other constraints, both legal and practical. Just as a cost-minimizing utility may not use child labor, it may not underpay its workers, or tolerate contractors that mistreat their workers.

Outsourcing to specialty companies, and outsourcing when labor needs temporarily exceed internal staff, can be cost-effective. But when outsourcing is motivated by earnings rather than cost-effectiveness, we risk mistreating workers. Mistreating workers leads to productivity losses, errors, and injuries—problems that affect utility service both now and in the future. Those effects make a utility's labor practices legally relevant to utility regulation.

If a utility causes contractors to compete on price, with no standards for worker treatment, contractor competition can lead to contractor mistreatment. Labor supply is often

inelastic. For a contractor's other needs, like equipment and rent, supply is relatively elastic. If the contractor doesn't pay what suppliers want, they'll sell to someone else. But for workers—especially non-union workers with limited options (due to ethnicity, race, immigration status, language, childcare or eldercare responsibilities, or transportation costs), their supply is relatively inelastic. So the contractor can lower its workers' pay, treat them poorly, and still get the workers it needs.

## **Working conditions are a commission responsibility**

Worker treatment affects utility performance. So if a utility treats its workers poorly, or hires contractors that treat their workers poorly, or signs contracts that allow contractors to increase their earnings by treating their workers poorly, the utility is violating its legal obligation to act prudently, to serve at reasonable cost. Whether the utility's actions are intentional, inadvertent, indifferent, or ignorant, that violation must have consequences. A utility cannot plead ignorance about, or powerlessness over, its contractors' practices. Selecting a contractor is an act of discretion. A utility is responsible for its acts of discretion.

It is true that some employment practices are regulated by others, like the National Labor Relations Board or by equal employment opportunity commissions. But because labor practices affect the cost and quality of utility service, they trigger the jurisdiction of utility commissions as well. Consider the seminal case of *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662 (1976). The Supreme Court there held that the Commission had no statutory authority to issue a rule prohibiting racial discrimination by utilities. The Federal Power Act requires utilities to act in the “public interest.” Prohibiting racial discrimination is indisputably in the public interest. But the “public interest” is a general phrase; it gets its specific meaning from the statute's purpose. The Federal Power Act's purpose, said the Court, is not racial justice but economic performance. But: If a utility's racially discriminatory practices lead to penalties and cost increases, said the Court, those penalties and cost increases, and their causes, do become relevant to the Commission.<sup>2</sup> Similarly, when worker mistreatment affects the cost and quality of utility service, that mistreatment becomes relevant to utility commissions.

## **Commission actions can reduce the risks**

Commissions should require each utility to know, and deem the utility to know, how its contractors treat workers. And because the contractors are performing work that is the utility's responsibility to perform, commissions should impute to the utility the decisions of its contractors. When your dog bites someone, the responsible party is you, not your dog. If a utility's contractor mistreats workers, the responsible party is the utility. (The contractor will have separate accountability to agencies responsible for worker safety and worker pay, but the utility remains responsible to the utility commission.) So on contractor treatment of workers, commissions should make clear their expectations, along with the consequences for not meeting those expectations.

If rates are about performance, and if performance depends on treating workers properly, then the Commission needs to set standards for worker treatment, compensate the utility for the cost of meeting those standards, and establish serious consequences for violating those standards. With those requirements in place, there is no need for complicated rate plans. All that is necessary is clarity, compliance, and enforcement.

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*This essay is drawn from my October 17, 2019 comments to the D.C. Public Service Commission on behalf of the Baltimore-Washington Construction and Public Employees Laborers' District Council, which paid for that work.*

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<sup>1</sup> For an essential source on utility outsourcing of labor, see Scott Strauss and Katharine Mapes, [\*The Role of State Commissions in Setting Policy for Responsible Contracting\*](#) (Nov. 2018).

<sup>2</sup> For my recommendations on how commissions can apply NAACP to diversity in utility hiring, see my essay “Promoting Diversity and Prohibiting Discrimination: Is There a Regulatory Obligation to Society?”