



HARRISON INSTITUTE FOR PUBLIC LAW  
GEORGETOWN LAW

## SERVING THE “PUBLIC INTEREST” – TRADITIONAL VS EXPANSIVE UTILITY REGULATION

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National Regulatory Research Institute

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***Publisher’s Note: This document, commissioned by NRRI, is likely to be among the most important ever published by this institute. I have designated it, for now, as a “working paper.” This designation means that NRRI invites comments from the community of regulators and legislators, whose practices and processes this paper assesses and seeks to improve. This paper thus serves NRRI’s mission—to help regulation achieve the highest possible quality. Your comments on this paper will help achieve that mission. Please send comments to me at [shempling@nrri.org](mailto:shempling@nrri.org). We also will set up a section of our upcoming Knowledge Communities web site to host detailed dialogue. After a period of a few months, we will publish the paper in final form.***

***Scott Hempling, Esq.  
NRRI Executive Director***

This paper can be accessed online at  
[http://www.nrri.org/pubs/multiutility/NRRI\\_filipink\\_public\\_interest\\_jan10-02.pdf](http://www.nrri.org/pubs/multiutility/NRRI_filipink_public_interest_jan10-02.pdf).

## INTRODUCTION

Consider the arguments for and against a new power plant. It will increase the supply of power to the state's customers and lower their energy bills through competition. It will retain businesses and jobs that are on the verge of leaving the state due to high power costs. At the same time, the plant will increase pollution and greenhouse gas emissions. How does this plant fit within the state's new campaign to expand alternative energy production and create sustainable "green" jobs? Should regulators evaluate the environmental impact locally or on the cumulative impact of all existing and proposed power plants in the state or region? Does the proposed plant conform to the state's long-term energy plan? Regulators must answer these questions as they work to determine: Where does the public interest lie?

Statutes command utility regulators to protect the "public interest,"<sup>2</sup> which is indefinite and constantly changing. Originally, it meant restraining the monopoly power of utility companies.<sup>3</sup> Regulators focused their activities on setting rates and establishing standards of service.<sup>4</sup> Today, environmental and economic needs expand the public interest.

Regulators like the flexibility of public interest regulation. It enables them to respond to changing conditions such as climate change, rising energy costs, new technologies, diversity in products and providers, and new business models. Yet when regulators expand public interest regulation, it unsettles utilities. They are prone to challenge the boundaries of regulators' authority in court or to limit it through legislation.

Courts usually interpret the limits on public interest regulation by analyzing the elements of legislatively delegated authority. Courts look for delegation of: (1) *roles* such as setting rates or siting power plants;<sup>5</sup> (2) *criteria* for making decisions;<sup>6</sup> and (3) *policy goals* that guide regulators and help courts interpret the roles and criteria.<sup>7</sup> The risk of litigation increases whenever the legislative delegation omits one of these elements, whenever delegation is implicit rather than explicit, and whenever an explicit delegation is indefinite, all of which are frequent.

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<sup>2</sup> See, e.g., WASH. REV. CODE § 80.01.040(3) ("[The Washington Utilities and Transport Commission shall] regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation.").

<sup>3</sup> See generally Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 NAT. RESOURCES J. 289, 295–314 (1992).

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., *Process Gas Consumers Group v. Pa. Pub. Util. Comm'n*, 511 A.2d 1315 (Pa. 1986) (looking into whether the commission had the role to oversee energy conservation programs).

<sup>6</sup> See, e.g., *New Bedford v. Energy Facilities Siting Council*, 597 N.E.2d 1032 (Mass. 1992) (assessing whether economic development was a valid decision-making criterion); *Alaska Fed'n for Cmty. Self-Reliance v. Alaska Pub. Utils. Comm'n*, 879 P.2d 1015 (Alaska 1994) (assessing whether environmental impact was a valid decision-making criterion).

<sup>7</sup> See, e.g., *Ark. Gas Consumers, Inc. v. Ark. Pub. Serv. Comm'n*, 118 S.W.3d 109 (Ark. 2003) (evaluating the extent of the state's goal to assist low-income customers); *Energy Ass'n of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 169 Misc.2d 924 (N.Y. 1996) (reinforcing the state's goal of instituting long-term planning).

For each element of delegated authority – goals, roles and criteria – this article identifies where courts have responded to statutory gaps and indefinite elements of regulation. From those cases, a path emerges to clarify regulators’ authority and strengthen accountability. We start with the policy goals that guide how courts will interpret the scope of public interest regulation.

*Expanded policy goals.* Goals supply the purpose courts need to resolve conflicts and boundaries. Litigation is most likely when regulators’ decisions do not align with explicit statutory goals. The traditional goals were narrow (e.g., reasonable rates and reasonable return on investment). The regulator’s job is now more complicated as lawmakers expand the goals to promote energy conservation and efficiency,<sup>8</sup> increase the use of renewable energy,<sup>9</sup> protect the environment and public health,<sup>10</sup> and stimulate economic development.<sup>11</sup> These new goals sometimes conflict (e.g., protecting the environment vs. stimulating state economic growth through new power plants), but it is difficult to foresee the conflicts in advance. In the absence of legislative guidance, regulators can simply recite competing goals and decide, or, they can explicitly weigh the trade-offs and articulate how they resolve the tension between goals that appear to conflict.

*Expanded commission roles.* Regulators’ traditional roles are to set rates, set standards and control market entry. Expanded roles entail more policy discretion.<sup>12</sup> They aim to affect consumer behavior as much as utility behavior, alter allocation of energy resources, and distribute ratepayer funds. For example, New York delegated planning to meet future energy needs;<sup>13</sup> Maine<sup>14</sup> and Ohio<sup>15</sup> delegated administration of programs to promote conservation. The

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<sup>8</sup> See, e.g., MINN. STAT. § 216C.05 (2008) (“It is the energy policy of the state of Minnesota that: (1) the per capita use of fossil fuel as an energy input be reduced by 15 percent by the year 2015, through increased reliance on energy efficiency and renewable energy alternatives; and (2) 25 percent of the total energy used in the state be derived from renewable energy resources by the year 2025.”).

<sup>9</sup> See, e.g., MONT. CODE ANN. § 69-3-2002 (2007) (“The legislature finds that: (1) Montana is blessed with an abundance of diverse renewable energy resources; (2) renewable energy production promotes sustainable rural economic development by creating new jobs and stimulating business and economic activity in local communities across Montana; (3) increased use of renewable energy will enhance Montana’s energy self-sufficiency and independence; and (4) fuel diversity, economic, and environmental benefits from renewable energy production accrue to the public at large, and therefore all consumers and utilities should support expanded development of these resources to meet the state’s electricity demand and stabilize electricity prices.”).

<sup>10</sup> See, e.g., CAL. PUB. UTIL. CODE § 701.1 (West 2004) (“(a) The Legislature finds and declares that, in addition to other ratepayer protection objectives, a principal goal of electric and natural gas utilities’ resource planning and investment shall be to minimize the cost to society of the reliable energy services that are provided by natural gas and electricity, and to improve the environment... (c) In calculating the cost effectiveness of energy resources, including conservation and load management options, the commission shall include, in addition to other ratepayer protection objectives, a value for any costs and benefits to the environment, including air quality....”).

<sup>11</sup> See, e.g., CONN. GEN. STAT. § 16-19e(a)(3) (2003) (“[T]he department and all public service companies shall perform all of their respective public responsibilities with economy, efficiency and care for public safety and energy security, and so as to promote economic development within the state with consideration for energy and water conservation, energy efficiency and the development and utilization of renewable sources of energy and for the prudent management of the natural environment.”).

<sup>12</sup> See David Nichols, *The Role of Regulators: Energy Efficiency*, 18 PACE ENVTL. L. REV. 295, 297–299 (2001).

<sup>13</sup> See, e.g., N.Y. PUB. SERV. LAW § 5(2) (McKinney 2000) (“The commission shall encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or

U.S. Supreme Court has suggested that regulators can promote expansive goals, so long as they do it within the bounds of established roles.<sup>16</sup> State courts have offered similar advice.<sup>17</sup> However, the risk of litigation remains high when regulators pursue an expansive goal without an explicit delegation – unless, that is – they use a *traditional* role based on *traditional* criteria that align with *traditional* goals. The notion that regulators can simply squeeze a new goal into a traditional role is risky in the absence of explicit legislative goals or criteria.

*Expanded decision-making criteria.* Traditionally, regulators used a few criteria like cost and need. However, the number and diversity of criteria have grown to include some like “community values” or “aesthetic values”<sup>18</sup> that are indefinite and subjective. Some legislatures authorize dozens of criteria (*e.g.*, impact on the environment, impact on educational facilities, economic development, etc.).<sup>19</sup> Evolving criteria tend to be general or indefinite, or if not, they are specific and numerous, but lacking a balancing test to resolve subjectivity or conflicts.

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cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.”).

<sup>14</sup> Maine’s legislature directed the state’s public utilities commission to use ratepayer funds to develop and run the “10,000 Carbon Free Homes Project” to help reduce energy costs for electricity consumers. *See generally* Me. Pub. Utils. Comm’n, *In re* Efficiency Maine Program Plan, 255 Pub. Util. Rep. 4th 426 (2007).

<sup>15</sup> The Ohio Biomass Energy Program promotes the development of renewable energy resources in Ohio, including wood and agricultural residues, ethanol and biodiesel biofuels, landfill gas to energy, and energy crops. The Public Utilities Commission of Ohio oversees this program by providing information, resource referrals, business connections and periodic grant funding. *See* Pub. Utils. Comm’n of Ohio, *Ohio Biomass Energy Program* brochure, <http://www.puco.ohio.gov/emplibrary/files/media/publications/brochures/The%20Ohio%20Biomass%20Energy%20Program.pdf>.

<sup>16</sup> *NAACP v. FPC*, 425 U.S. 662, 668 (1976).

<sup>17</sup> *See* *Am. Hoescht Corp. v. Dept. of Pub. Utils.*, 399 N.E.2d 1 (Mass. 1980) (holding that the commission’s jurisdiction over the entire rate structure includes authority to implement reduced-rate electricity service for elderly poor as an experiment). In this case, the original request for a tariff reduction came from the utility itself. The court would likely have barred the commission from acting on its own initiative to force utilities to accept lower tariffs using the same rationale. *Id.* at 3. *But cf.* *Ky. v. Ky. Pub. Serv. Comm’n*, No. 2006-CA-001652-MR, No. 2006-CA-001652-MR (Ky. Ct. App. 2008), *modified on denial of reh’g* (June 6, 2008), *discretionary review granted* (Apr. 15, 2009) (Nos. 2008-SC-0483-D & 2008-SC-0489-D) (finding that the commission’s authority over rates did not extend to approving a utility’s request to offer reduced rates to stimulate the development of brownfield sites).

<sup>18</sup> *See, e.g.*, CAL. PUB. UTIL. CODE §§ 1002 (West 1994).

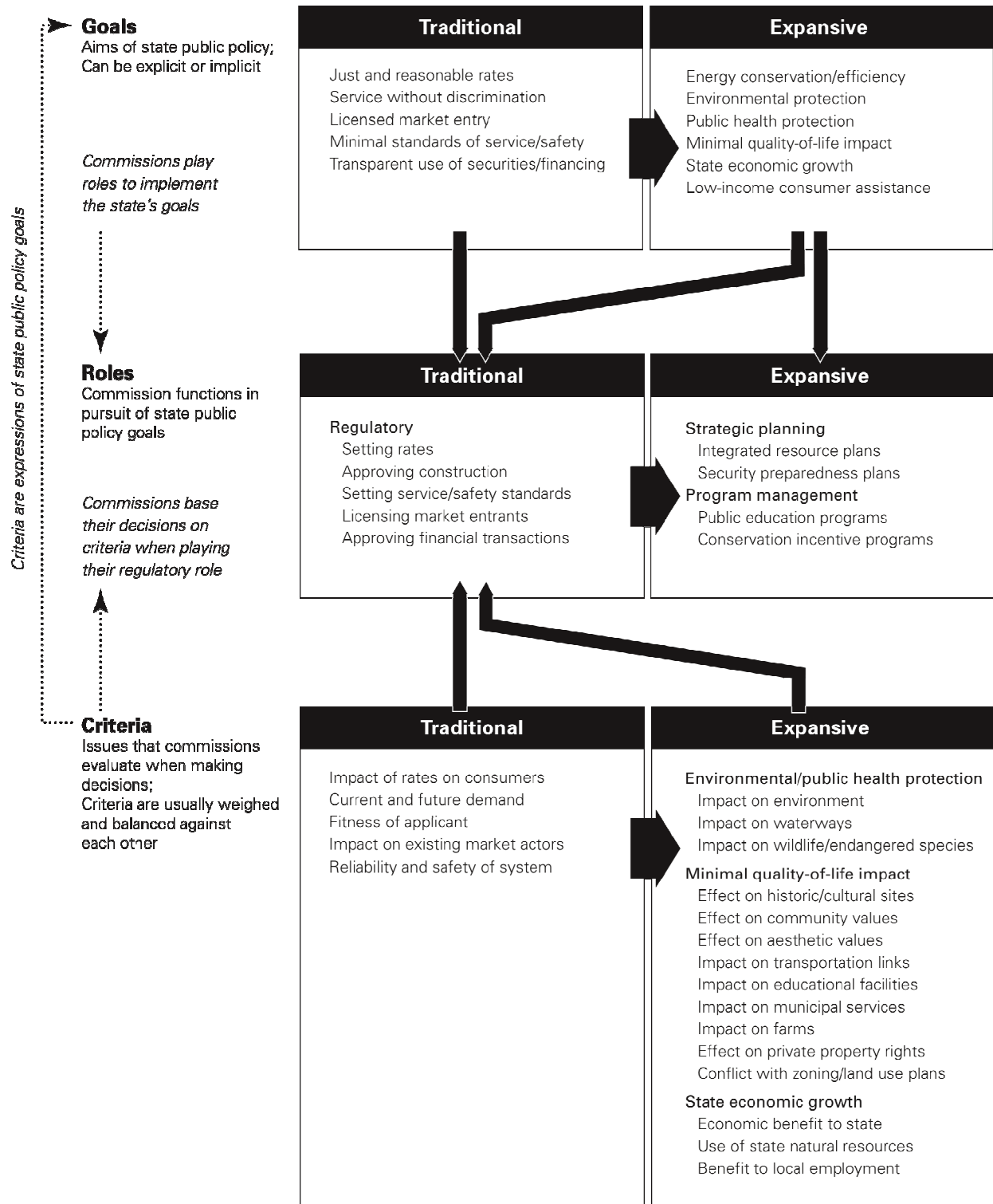
<sup>19</sup> *See, e.g.*, VT. STAT. ANN. tit. 10, §§ 1424a(d) (Supp. 2008), 6086(1)–(8), (9)(K) (1997), tit. 30 § 248(b) (2007). Criteria include: (1) orderly development of the region; (2) demand for service; (3) system stability and reliability; (4) economic benefit; (5) aesthetics, historic sites, air and water purity, the natural environment and public health and safety; (5a) resource waters; (5b) air and water pollution; (5c) headwaters; (5d) waste disposal; (5e) water conservation; (5f) floodways; (5g) streams; (5h) shorelines; (5i) wetlands; (5j) burden on water supply; (5k) soil erosion; (5l) transportation; (5m) educational services; (5n) municipal services; (5o) aesthetics; (5p) historic sites; (5q) rare and irreplaceable natural areas; (5r) wildlife habitat and endangered species; (5s) development affecting public investments; (6) least-cost integrated resource plan; (7) compliance with electric energy plan; and (8) outstanding resource waters; (9) waste-to-energy facility; (10) existing or planned transmission facilities.

Figure 1 illustrates how goals, roles, and criteria are interrelated. The ideal is a logical hierarchy from general goals, to roles that implement the goals, to the most specific criteria.

When analyzed within this framework, the risk of litigation increases when regulators (1) pursue state goals without a clear statutory basis; (2) play a new role without sufficiently delegated authority; (3) make decisions based on criteria that are not aligned with explicit goals, or (4) balance criteria without a statutory preference or balancing test. Often, the cases are not clear-cut. Many state courts will defer to regulators' decisions, but some will seize an opportunity to intervene where they see gaps left in the delegated authority.

**FIGURE 1**  
**EXPANSION OF GOALS, ROLES, AND CRITERIA**

Legislators and regulators have responded to new challenges and changes in the public interest. Lawmakers have expanded the number of public policy goals that utility regulation seeks to achieve. To meet these expanded goals, lawmakers have also expanded regulators' roles and the variety of the regulators' decision-making criteria.



*Guidance.* The National Regulatory Research Institute (NRRI) advises regulators that the “breadth [of public interest regulation] invites flexibility, but flexibility requires accountability. Accountability comes from articulation.”<sup>20</sup> Yet articulation of clear goals, roles and criteria is not a one-shot remedy. Greater clarity usually requires multiple criteria, which in turn can strain staff resources. As a result, strengthening accountability requires three steps of problem-solving.

- ***Step One***

*Problem: Indefinite authority.* To what extent are goals, roles, or criteria indefinite, implicit or vague, rather than limited, explicit and clear?

*Solution: Clarify.* Legislatures can clarify regulators’ goals, roles, and criteria by being explicit and aligning all the three elements. Regulators can also clarify these elements through their procedures for making rules and writing orders.

- ***Step Two***

*Problem: Multiple elements of authority.* To what extent do multiple goals or criteria require highly subjective balancing?

*Solution: Explain.* Legislatures can provide standards or values to balance competing criteria. Regulators can fully explain the tradeoffs among multiple criteria and how they apply any balancing test.

- ***Step Three***

*Problem: Limited resources.* Do regulators have sufficient resources—and the right resources—to evaluate multiple and conflicting criteria?

*Solution: Deploy resources efficiently.* Regulators can evaluate whether they have the resources to carry expanded roles or evaluate multiple criteria. Legislators can reallocate roles to other appropriate agencies or develop shared decision-making mechanisms.

Figure 2 illustrates this three-step path, which follows a zig-zag pattern:

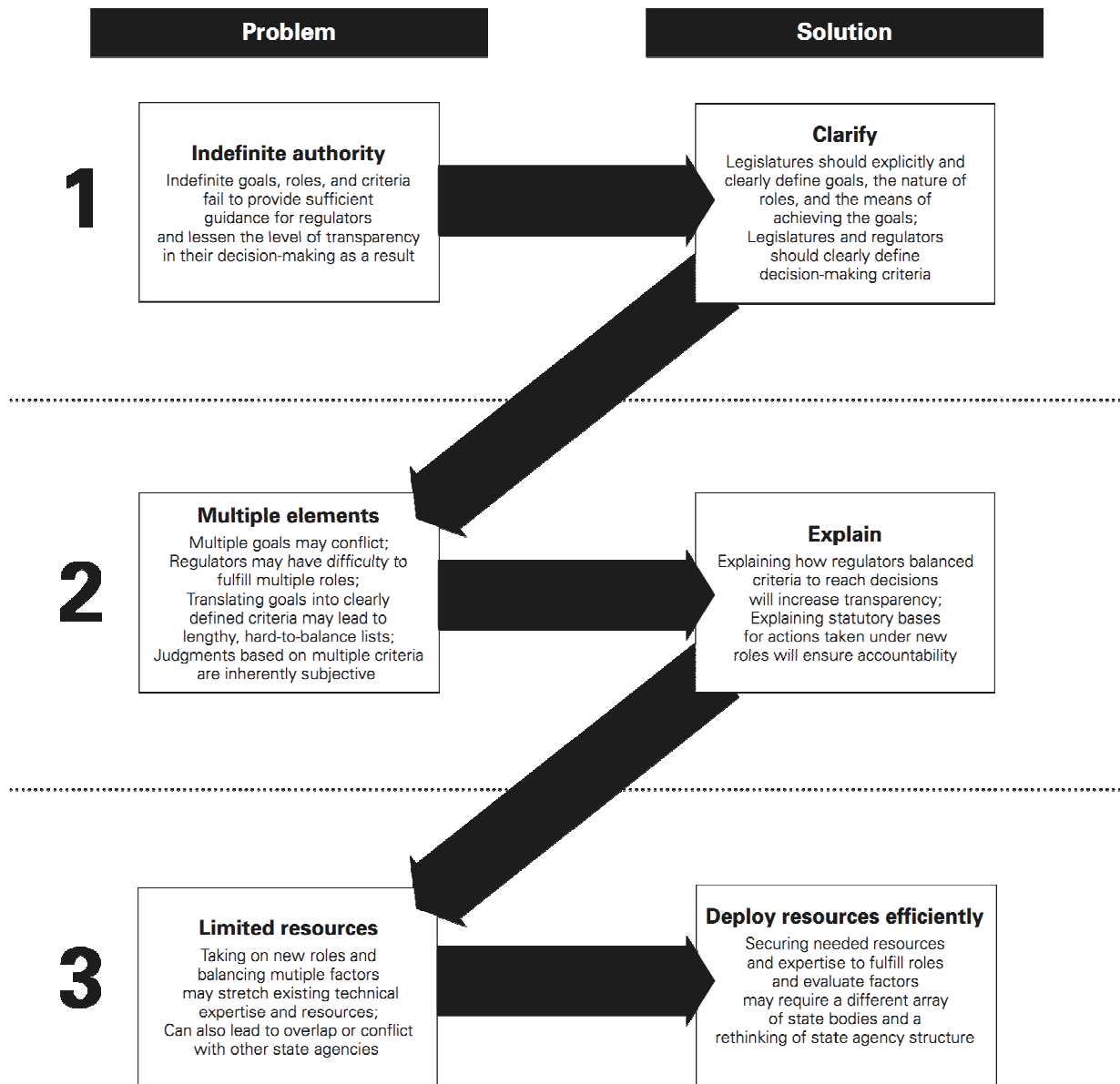
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<sup>20</sup> Scott Hempling, *The Effective Regulator, Part I: Purposefulness*, available at [http://nrri2.org/index.php?option=com\\_content&task=view&id=21&Itemid=38](http://nrri2.org/index.php?option=com_content&task=view&id=21&Itemid=38) (last visited July 6, 2009).



**FIGURE 2**  
**PATH TO STRONGER ACCOUNTABILITY**

State legislatures and regulators have options to address the problems inherent in their regulatory legislation, beginning with the problem of indefinite authority. The problems and solutions are linked, as each solution potentially creates a new problem. Addressing all of these concerns in sequence creates a path to making the decisions of regulators more transparent and accountable.



**Part I** of this paper sets the stage by describing traditional regulatory goals. **Part II** shows the risk of litigation that arises when regulating in the public interest expands to address environmental and economic problems. By deconstructing how legislatures delegate power through goals, roles, and criteria, regulators can better understand their litigation risks and their need to clarify delegated authority. **Part III** identifies problems resulting from gaps in delegated authority: *indefinite authority*, *multiple elements of authority*, and *limited resources*. Linking the problems and solutions provides a three-step path to make regulation more transparent and accountable. **Part IV** concludes that legislatures and regulators can strengthen accountability and reduce the risk of litigation through code revision, rulemaking, and order-writing.

## I. TRADITIONAL UTILITY REGULATION

Utility regulation springs from states' police power to protect the health, safety, morals, and general welfare of their citizens.<sup>21</sup> Regulation was a response to the growth of, and the public's dependence on, railroads and related businesses (*e.g.*, grain silos) across the United States. Given the economic power of these industries and the essential nature of their services, governments sought to protect the public from the effects of monopoly power. This original rationale is the baseline for examining how the public interest is expanding.

### A. Rationale for regulation

By the late 19<sup>th</sup> century, it had become clear that free market competition was not providing sufficient checks on the growing influence of railroads and utilities.<sup>22</sup> Many of these businesses were "natural monopolies" because of economies of scale. A single supplier can serve the market at lower cost than multiple suppliers.<sup>23</sup> Once such a company exists in a market, entry by a newcomer cannot occur without building an entire new infrastructure. The customer has little or no opportunity to switch suppliers if prices rise or service quality declines.<sup>24</sup>

Recognizing the need to protect consumers from utilities' economic power, states began to regulate utilities, who in turn challenged the regulators' authority in court. *Munn v. Illinois*,<sup>25</sup> the first such case to reach the U.S. Supreme Court, established the principle that certain businesses were "clothed with the public interest." When these businesses act in a manner "of public consequence," the government could step in to exert regulatory control to protect the

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<sup>21</sup> CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE* 87 (Public Utilities Reports, Inc., 3rd ed. 1993). The U.S. Supreme Court has recognized that the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States. *Ark. Elec. Co-operative Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

<sup>22</sup> Swartwout, *supra* note 3, at 296.

<sup>23</sup> ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS*, VOL. 1: ECONOMIC PRINCIPLES 11 (1970).

<sup>24</sup> PHILLIPS, *supra* note 21, at 54–56.

<sup>25</sup> 94 U.S. 113, 126 (1876).

commons, despite the Fourteenth Amendment's prohibition on government takings without due process and compensation.<sup>26</sup>

After *Munn*, regulators increasingly confronted the scope of regulatory authority. They had to determine which types of businesses were “clothed with a public interest” and therefore subject to regulation.<sup>27</sup> In its 1934 decision, *Nebbia v. New York*,<sup>28</sup> the Supreme Court broadened the scope by declaring that state legislatures could regulate any industry (not just monopolies) within their borders.<sup>29</sup> The legislatures could adopt any economic policy that bore a reasonable relation to a proper legislative purpose without being arbitrary or discriminatory.<sup>30</sup>

## **B. Legislatures delegating powers to regulatory commissions**

Regulation of businesses through direct legislative action proved to be cumbersome and inflexible.<sup>31</sup> Legislatures did not have the necessary expertise. They could change regulations only through legislative amendments, and they could not react quickly enough to changing conditions.<sup>32</sup> Efforts to regulate at the municipal level were as problematic as regulation by state legislatures.<sup>33</sup> Municipalities had counted on competition to protect the public interest, but in the absence of competition, the result was abuse: price discrimination, price fixing, cartelization, and monopolization. Reliance on competition (that never came) actually *increased* utility prices.<sup>34</sup>

At the national level, Congress established the Interstate Commerce Commission in 1887 to ensure “just and reasonable” railroad rates.<sup>35</sup> In the ICC, states found a model for regulatory commissions (usually called public utility commissions, PUCs, or public service commissions, PSCs). The Supreme Court lent its support for these commissions in *Smyth v. Ames*.<sup>36</sup> In recognizing the principle of a fair rate of return, the Court asserted that a commission of experts would be the best format for weighing the various considerations needed to arrive at reasonable

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<sup>26</sup> *Id.*

<sup>27</sup> In a series of Supreme Court decisions following *Munn*, the Court declared businesses such as banks, fire insurance companies, and insurance agents as being affected by the public interest. Those falling outside this group, such as manufacturers of food, clothing, and fuels, employment agencies, service stations, and ice plants were left unregulated. The businesses engaged in the generation and distribution of electrical power; manufacture and distribution of natural gas; telephone, telegraph, and cable; water and sewerage; and common-carrier transportation all fell within the states' regulatory scope. KAHN, *supra* note 23, at 3.

<sup>28</sup> 291 U.S. 502, 536 (1934).

<sup>29</sup> *Id.* at 537.

<sup>30</sup> *Id.*

<sup>31</sup> PHILLIPS, *supra* note 21, at 110–114.

<sup>32</sup> Swartwout, *supra* note 3, at 298; PHILLIPS, *supra* note 21, at 110–114.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> PHILLIPS, *supra* note 21, at 132.

<sup>36</sup> 169 U.S. 466 (1898).

railroad rates.<sup>37</sup> New York and Wisconsin set up the first state commissions with full regulatory authority over public utilities in 1907.<sup>38</sup>

### C. Traditional utility regulation

Initially concerned about abuse of monopoly power, governments wanted to guarantee consumers just and reasonable rates for services, while ensuring that railroads and utilities received a fair return on their investment. Legislation historically limited regulators to five roles: (1) controlling market entry and exit; (2) setting rates; (3) setting standards for quality and safety of service; (4) assuring non-discriminatory service; and (5) preventing undue financial risk.<sup>39</sup> These remain at the core of PUC responsibilities throughout the United States.<sup>40</sup>

*Controlling market entry.* Commissions decide which businesses can enter the regulated sector by issuing licenses and certificates of public convenience and necessity. These certificates allow utilities to build the infrastructure (*e.g.*, telephone lines, power plants, water mains) necessary to supply their services. In exchange, utilities traditionally received protection from competition.<sup>41</sup> They also benefit from the government's power of eminent domain so that they can take private property for public use (*e.g.*, erecting power lines).

*Setting rates.* Without regulation, utilities could charge rates without regard to reasonableness because of their monopolistic power. If regulators kept rates excessively low to protect consumers, however, utilities would not earn sufficient income to maintain their infrastructure or make future investments.<sup>42</sup> "Just and reasonable rates," therefore, also allow a

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<sup>37</sup> *Id.* at 527 ("[A] commission composed of persons whose special skill, observation, and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people.").

<sup>38</sup> States had already set up state regulatory commissions beginning in 1839 in Rhode Island, but these commissions largely focused on railroads, not utilities. Swartwout, *supra* note 3, at 300.

<sup>39</sup> KAHN, *supra* note 23, at 3; Swartwout, *supra* note 3, at 305.

<sup>40</sup> See *e.g.*, TEX. UTIL. CODE ANN. § 11.002 (2007). The section describes the purpose of the Texas statute as protecting the public interest inherent in the rates and services of public utilities. It finds that "[p]ublic utilities traditionally are by definition monopolies in the areas they serve. As a result, the normal forces of competition that regulate prices in a free enterprise society do not operate. Public agencies regulate utility rates, operations, and services as a substitute for competition. The section also recognizes that significant changes have occurred in the telecommunications and electric power industries since the code was adopted and that the "[c]hanges in technology and market structure have increased the need for minimum standards of service quality, customer service, and fair business practices to ensure high-quality service to customers and a healthy marketplace where competition is permitted by law."

<sup>41</sup> PHILLIPS, *supra* note 21, at 120. The introduction of competition in the 1990s has made this less so now.

<sup>42</sup> The U.S. Supreme Court validated the basic method of deciding "just and reasonable" rates in *Bluefield Waterworks v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) and *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). These decisions said that a return should be reasonably sufficient so that investors had confidence in the financial soundness of the utility and should be adequate to raise necessary financing. It is important that there be enough revenues not only for operating expenses, but also for the capital costs of the business, which include service on debt and stock dividends. While a utility company has no constitutional right to profits as high as speculative ventures can achieve, the return should be sufficient to assure confidence in the financial integrity of the enterprise so as to maintain its credit and to attract capital. The standards now implied are based less on the *Bluefield* and *Hope* decisions, but more on what the public will allow and what the market implies. See Douglas

reasonable rate of return on investment for the utility. When setting rates, commissions constantly work to align the consumer and business interests.

*Setting standards for quality and safety of service.* Utilities protected from competition have less incentive to maintain the quality of service than businesses that can lose market share for poor performance. For this reason, commissions set minimum standards for service quality and safety. Some statutes also delegate power to investigate whether the service is adequate, sufficient, and safe.<sup>43</sup> Standards include voltage requirements for electricity, heat value and pressure requirements for gas service, and accuracy of meters.<sup>44</sup> Utilities must also meet customer demands and provide continuous service twenty-four hours a day.<sup>45</sup> Commissions use periodic inspections and customer complaints as ways to keep the utilities in check.<sup>46</sup> In setting rates, commissions can force unresponsive utilities to meet standards by disallowing their ability to recapture costs if the service is substandard.<sup>47</sup>

*Assuring non-discriminatory service.* Given the cost of infrastructure, utilities would likely avoid areas with low returns, such as rural areas. Statutes require utilities to serve all consumers who are able to pay,<sup>48</sup> which means utilities are sometimes forced to maintain service to some consumers who are subsidized by others.<sup>49</sup> Statutes also forbid utilities from unduly discriminating among their customers by charging different rates to similarly situated customers.<sup>50</sup> Regulators can group customers into classes for ratemaking (e.g., residential vs. industrial customers), but within each class, the same rate structure will apply.<sup>51</sup>

*Preventing undue financial risk.* Even though states could regulate rates and market access, some utilities were still able to commit abuses by using their utility assets to support non-utility investment.<sup>52</sup> Thus, states began to extend their regulatory reach in 1930 to utility securities and financing as a way of curbing abusive practices.<sup>53</sup>

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N. Jones, *Regulatory Concepts, Propositions, and Doctrines: Casualties, Survivors, Additions*, 22 ENERGY L.J. 41, 58 (2001).

<sup>43</sup> KAHN, *supra* note 23, at 21.

<sup>44</sup> PHILLIPS, *supra* note 21, at 553–559.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Jones, *supra* note 42, at 57; PHILLIPS, *supra* note 21, at 118.

<sup>49</sup> PHILLIPS, *supra* note 21, at 118.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Swartwout, *supra* note 3, at 306.

<sup>53</sup> *Id.*

## II. EXPANSIVE GOALS, ROLES, AND CRITERIA

The traditional roles reviewed in Part I have expanded since the 1950s as a result of the interaction among stakeholders (regulators, utilities, consumers, businesses and others) in confronting new challenges. These challenges include climate change, rising energy costs, air pollution, new technologies, and new business models for energy production and transmission.

When lawmakers do not address these challenges explicitly, stakeholders encourage regulators to play a more political role that may exceed delegated authority due to unclear boundaries. Alternatively, regulators may refrain from acting to the full extent of their authority. In either case, regulators may leave stakeholders disappointed and lose political credibility.

When asked to intervene, courts usually interpret the limits on public interest regulation by analyzing the explicit and implicit elements of legislatively delegated authority. In doing so, courts look for delegation of: (1) *roles* such as setting rates or siting power plants;<sup>54</sup> (2) *criteria* for making decisions, such as environmental or aesthetic impacts;<sup>55</sup> and (3) *goals* that guide regulators and help courts interpret the roles and criteria.<sup>56</sup> The risk of litigation increases whenever the legislative delegation omits one of these elements (which is frequent), whenever delegation is implicit rather than explicit (which is frequent), and whenever an explicit delegation is indefinite (which is usual). This part looks at litigation to see where utilities have challenged decisions and where courts have set limits on regulatory authority as a result.

### A. Defining goals, roles, and criteria

This analysis divides delegated authority into a logical sequence of three elements: goals, roles, and criteria. This hierarchy emerged from a classification of the components of twenty-seven state statutes.<sup>57</sup> First, we looked at the roles of public utility commissions to understand the extent to which state legislation was stretching the commission beyond a traditional regulatory purpose. It became readily apparent that regulators were playing multiple roles and that they based their regulatory decisions on a wide variety of criteria, especially with siting decisions. We classified the roles and criteria as either traditional or expansive. Distinguishing between traditional and expanded criteria helped to identify the state policy goals motivating the legislation.

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<sup>54</sup> See, e.g., *Process Gas Consumers Group v. Pa. Pub. Util. Comm'n*, 511 A.2d 1315 (Pa. 1986) (looking into whether the commission had the role to oversee energy conservation programs).

<sup>55</sup> See, e.g., *New Bedford v. Energy Facilities Siting Council*, 597 N.E.2d 1032 (Mass. 1992) (assessing whether economic development was a valid decision-making criterion); *Alaska Fed'n for Cmty. Self-Reliance v. Alaska Pub. Utils. Comm'n*, 879 P.2d 1015 (Alaska 1994) (assessing whether environmental impact was a valid decision-making criterion).

<sup>56</sup> See, e.g., *Ark. Gas Consumers, Inc. v. Ark. Pub. Serv. Comm'n*, 118 S.W.3d 109 (Ark. 2003) (evaluating the extent of the state's goal to assist low-income customers); *Energy Ass'n of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 169 Misc.2d 924 (N.Y. 1996) (reinforcing the state's goal of instituting long-term planning).

<sup>57</sup> States in a survey by the author include Alaska, Arizona, Arkansas, California, Connecticut, Florida, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin.

*Goals.* Goals supply the legislative purpose that courts apply to resolve conflicts and boundaries.<sup>58</sup> Traditional goals include reasonable rates, reasonable return on investment, and safe utility operations. Expansive goals include reduced greenhouse gas emissions and greater use of alternative energy sources. Goals can be explicit or implicit. Statutes imply goals when they give roles to commissions and provide them with decision-making criteria without directly stating the policy goal.

*Roles.* Commissions play roles to achieve goals.<sup>59</sup> Traditional regulatory roles involve making regulatory decisions like setting rates to achieve the goal of ensuring just and reasonable rates. Expansive roles include strategic planning and administering programs to achieve goals like energy conservation and developing alternative energy sources.

*Criteria.* Regulators make value judgments based on discrete criteria that establish a legal test, a standard of performance, or an outcome that reflects a goal.<sup>60</sup> Traditional criteria include need for a facility and fitness of the applicant. Expansive criteria are related to environmental or socio-economic issues, such as the impact on a region's waterways, effect on local employment, or impact on aesthetic values. A traditional regulatory decision such as whether to grant an application to construct a power plant requires evaluation of both traditional and expansive criteria. Where criteria are in tension (meaning more emphasis on one criterion necessitates de-emphasis of another), commissions must resolve the tensions by weighing each one and choosing the one most aligned with the public interest.

## **B. Patterns of Litigation**

This remainder of this part discusses litigated cases that test whether regulators exceeded their statutory authority in relation to expansive goals, roles, or criteria. The analysis does not cover cases in two areas where courts routinely uphold traditional roles – evaluating traditional economic criteria (*e.g.*, price, need) and disallowing costs in a ratemaking case. Reading the cases together, regulators tend to exceed their authority when they (1) pursue state goals without a clear statutory basis; (2) play a new role without delegated authority; (3) make decisions based on criteria that are not aligned with explicit goals, or (4) balance criteria without a statutory preference or balancing test.

Figure 3 provides an overview of the state-level cases discussed in this part, and it classifies them according to whether the “goals” and “roles” involved are traditional or expansive. Organizing the cases this way helps to see the alignment between goals and roles. There is no separate column or row containing “criteria” in the chart because criteria are a reflection of goals. For example, in *Kentucky v. Public Service Commission of Kentucky*,<sup>61</sup> the state challenged the Public Service Commission's decision to allow reduced tariffs as a means of

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<sup>58</sup> A goal articulates public policy. OXFORD AMERICAN DICTIONARY & THESAURUS 628 (Oxford Univ. Press 2003).

<sup>59</sup> *Id.* at 1306.

<sup>60</sup> A criterion in this context is an instrument of judging; a test, principle, rule, canon, or standard, by which anything is judged or estimated. OXFORD ENGLISH DICTIONARY ONLINE (2008).

<sup>61</sup> No. 2006-CA-001652-MR (Ky. Ct. App. 2008), *modified on denial of reh'g* (June 6, 2008), *discretionary review granted* (Apr. 15, 2009) (Nos. 2008-SC-0483-D & 2008-SC-0489-D).

stimulating development of a brownfield site. This case shows how the regulator pursued an expansive policy goal (state economic development) when playing a traditional role (setting rates). In *Energy Association of New York v. Public Service Commission of New York*,<sup>62</sup> utilities challenged the Commission's pursuit of an expansive goal (increased energy conservation and energy efficiency) through an expansive role (acting as a strategic planner).

Figure 3 also shows that most challenges to expanded authority involve commission decisions that use a *traditional* role to implement *expanded* policy goals and criteria. This result is not surprising since utilities are likely to incur additional costs when commissions use their traditional regulatory powers (*e.g.*, rate setting) to implement expanded policy goals. For example, in *Process Gas Consumers Group v. Pennsylvania Public Utility Commission*,<sup>63</sup> the court struck down the Commission's use of a surcharge to promote energy conservation.

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<sup>62</sup> 169 Misc.2d 924 (N.Y. 1996).

<sup>63</sup> 511 A.2d 1315 (Pa. 1986).



Figure 3  
**Patterns of Litigation:  
Where Do Utilities Challenge Regulators' Authority?**  
**Commission Roles**

		<i>Traditional</i>	<i>Expansive</i>
<b>Policy Goals</b>	<i>Traditional</i>		<b>AR</b> court rejected: Low-income assistance during winter paid by non-low-income ratepayers <sup>64</sup> <b>UT</b> court rejected: Pooling arrangement to subsidize public phones in underserved areas <sup>65</sup>
	<i>Expansive</i>	<i><b>Role challenged</b></i> <b>KY</b> court rejected: Lower rates in brownfield areas <sup>66</sup> <b>PA</b> court rejected: Surcharge to promote conservation <sup>67</sup> <b>MA</b> court upheld: Reduced rates for poor and elderly (because of traditional ratemaking role) <sup>68</sup> <i><b>Criteria challenged</b></i> <b>MA</b> court rejected: Favoring economic dev't factor <sup>69</sup> <b>AK</b> court upheld: Environment not a factor to be used <sup>70</sup> <b>AZ</b> court upheld: Interests of out-of-state residents as a factor <sup>71</sup> <i><b>Role and criteria challenged</b></i> <b>WV</b> court rejected: Failure to investigate / enforce; and Not favoring economic dev't factor <sup>72</sup>	<b>NY</b> court upheld: Long-term planning authority <sup>73</sup> <b>CA</b> legislature rejected: Climate policy institute <sup>74</sup>

<sup>64</sup> Ark. Gas Consumers, Inc. v. Ark. Pub. Serv. Comm'n, 118 S.W.3d 109 (Ark. 2003).

<sup>65</sup> Mountain States Tel. and Tel. Co. v. Pub. Serv. Comm'n of Utah, 754 P. 2d 928 (Utah 1988).

<sup>66</sup> Ky. v. Pub. Serv. Comm'n of Ky., No. 2006-CA-001652-MR (Ky. Ct. App. Feb. 1, 2008), *modified on denial of reh'g* (June 6, 2008), *discretionary review granted* (Apr. 15, 2009) (Nos. 2008-SC-0483-D & 2008-SC-0489-D).

<sup>67</sup> Process Gas Consumers Group v. Pa. Pub. Util. Comm'n, 511 A.2d 1315 (Pa. 1986).

<sup>68</sup> Am. Hoescht Corp. v. Dept. of Pub. Utils., 399 N.E.2d 1 (Mass. 1980).

<sup>69</sup> New Bedford v. Energy Facilities Siting Council, 597 N.E.2d 1032 (Mass. 1992).

<sup>70</sup> Alaska Fed'n for Cmty. Self-Reliance v. Alaska Pub. Utils. Comm'n, 879 P.2d 1015 (Alaska 1994).

<sup>71</sup> Grand Canyon Trust v. Ariz. Corp. Comm'n, 107 P.3d 356 (Ariz. Ct. App. 2005), *review denied*.

<sup>72</sup> Affiliated Constr. Trades Found. v. W. Va. Pub. Serv. Comm'n, 565 S.E.2d 778 (W. Va. 2002).

<sup>73</sup> Energy Ass'n of N.Y. v. Pub. Serv. Comm'n of N.Y., 169 Misc.2d 924 (N.Y. 1996).

<sup>74</sup> Cal. Pub. Utils. Comm'n, Order Vacating Decision (D.) 08-04-039, as Modified by D.08-04-054, and Dismissing the Applications for Rehearing the Decision, Decision 08-11-060, at 1 n.2 (Nov. 21, 2008) [hereinafter *Vacating Decision*].

The following sections analyze the delegation of authority within the framework of goals (section C), roles (section D) and criteria (section E), respectively. The sections begin with a synopsis of the trend toward expanding regulatory authority. Each section then looks at where courts have set limits on expanding authority, and each concludes with broader observations on delegation and accountability.

The purpose of this analysis is to provide a foundation for regulators and legislators to strengthen the accountability of regulating in the public interest. The claimants in our sample of cases alleged a break in regulators' accountability under their enabling statute. Looking at these court decisions is a logical place to begin for several reasons. First, litigation drains commission resources. Second, losing in litigation wastes the regulatory effort. Third, litigation erodes the credibility of the regulators. For these reasons, minimizing the risk of litigation (including the risk of losing in litigation) is a worthwhile objective. That said, avoiding litigation is but a means of efficiency and not an end unto itself.

The higher purpose of studying the risk of litigation is to learn the logic of accountability so that regulators can write decisions and make rules that align with their delegated authority. Where gaps in authority exist, regulators can communicate the need for legislative action. Strengthening accountability pays dividends in the form of regulatory certainty, which utilities value, and regulatory effectiveness, upon which consumers and the state's economy depend.

In pursuit of more efficient and accountable regulation, then, we turn first to the cases that focus on policy goals.

### **C. Policy goals**

The risk of litigation increases when regulators' decisions do not align with explicit statutory goals. Regulators traditionally followed narrowly defined regulatory goals (*e.g.*, ensuring reasonable rates and a reasonable return on utility investment). Changing conditions have prompted regulators and lawmakers to expand their goals to confront new challenges such as rising energy costs and climate change. A 1992 survey of regulatory trends noted that many emerging issues still fall within the scope of traditional "economic" regulation, but in addition, there are new "social" goals concerning health, safety, and the environment.<sup>75</sup> A review of current state statutes finds that expansive goals fall into four broad categories: (1) promoting energy conservation, energy efficiency, and renewable energy; (2) protecting the environment and public health; (3) minimizing the quality-of-life impact of utilities; and (4) promoting state economic development.<sup>76</sup>

The expansion of new goals expands the authority of regulators, but it potentially increases the risk of litigation or confuses accountability if the new goals are vague or merely implied from other elements of delegation (*e.g.*, new criteria for decisions). The examples in this section show that challenges to regulatory authority occur when the regulators act without the benefit of explicit legislative goals.

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<sup>75</sup> Swartwout, *supra* note 3, at 314–340.

<sup>76</sup> States surveyed by the author, *supra* note 57.

## 1. *Litigated cases*

Regulators often explain that their decisions protect the public interest as defined in a statutory goal. Challenges to this authority attack the applicability of the goal. The litigated cases show that regulators cannot always invoke their general ratemaking authority to solve particular social or economic problems, even if general state public policy would support such an initiative. In these cases, courts limit regulators' authority to legislatively delegated goals that are directly applicable to the regulator's decision.

In one of the few cases to define the "public interest," the U.S. Supreme Court considered the Federal Power Commission's (FPC) authority to pursue the goal of ending employment discrimination. In *National Association for the Advancement of Colored People v. Federal Power Commission*,<sup>77</sup> the NAACP challenged the FPC's refusal to issue a rule to force utilities to adopt affirmative action programs. The NAACP argued that the Natural Gas and Federal Power Acts gave the FPC authority to advance the public interest in general, and that ending discrimination in employment was in the public interest.<sup>78</sup> The Court disagreed. In upholding the FPC's refusal to act, the Court found that the goal of advancing the public interest did not direct the FPC to eradicate employment discrimination in utilities that it regulates.<sup>79</sup> The Court did observe that the FPC could consider the consequences of discriminatory employment practices as a factor in setting just and reasonable rates, but only to the extent that the discrimination resulted in illegal, duplicative, or unnecessary labor costs.<sup>80</sup> This case shows how the Court differentiated between a general policy goal and a directly applicable goal in determining the bounds of the FPC's authority.<sup>81</sup>

In the absence of clear goals for responding to new problems, some state commissions look to general statewide policies to support their decisions, even though the legislation does not specifically delegate them a role in implementing such policies. For example, Kentucky has a policy goal to redevelop brownfield sites.<sup>82</sup> In *Kentucky v. Public Service Commission of*

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<sup>77</sup> 425 U.S. 662 (1976).

<sup>78</sup> *Id.* at 666.

<sup>79</sup> *Id.* at 669.

<sup>80</sup> *Id.* at 668.

<sup>81</sup> By comparison, the California statute explicitly incorporates a goal to improve the business opportunities of minority groups. Public agencies are directed to award 30 percent or more of their contracts to these business enterprises. On this basis, the California Public Utility Commission is to encourage greater economic opportunity for businesses owned by these disadvantaged groups in procurement contracts utilities of technology, equipment, supplies, services, materials, and construction work by regulated public utilities. The commission shall require each utility with gross annual revenues exceeding twenty-five million dollars to submit annually, a detailed and verifiable plan for increasing women, minority, and disabled veteran business enterprise procurement in all categories. CAL. PUB. UTIL. CODE §§ 8281, 8283 (West Supp. 2009).

<sup>82</sup> The state has established the Kentucky Brownfield Program, which is working to get an estimated 8,000 brownfield properties back into productive use. The program offers a variety of services and incentives to turn problematic properties into economic development opportunities. See KENTUCKY DEPARTMENT OF COMPLIANCE ASSISTANCE, BROWNFIELD PROGRAM, available at <http://www.dca.ky.gov/brownfields/> (last visited May 17, 2009).

*Kentucky*,<sup>83</sup> the state attorney general sued the commission for approving a utility's request to offer reduced tariff rates to customers who located their operations in designated brownfield sites. The Kentucky statute authorizes free or reduced-rate services to a utility's employees, the United States, charitable organizations, and to provide relief after a natural disaster.<sup>84</sup> The commission determined that the goals of redeveloping brownfield sites and spurring economic development were reasonable policy objectives to justify approving the reduced rates.<sup>85</sup> Though describing the commission's intentions as "admirable,"<sup>86</sup> the state court of appeals disagreed. It held that the utility's customers were not the types of entities that could receive reduced rates under the statute.<sup>87</sup> Thus, the court found that the commission lacked the authority to approve the utility's request.<sup>88</sup> The Kentucky Supreme Court is currently reviewing the case. Even if the court sides with the commission, the case highlights the risk of litigation when a commission pursues state goals that are not explicitly aimed at utility regulation.

*Arkansas Gas Consumers, Inc. v. Arkansas Public Service Commission*<sup>89</sup> deals with generally worded goals that a legislature adopts for utility regulation.<sup>90</sup> The Arkansas statute authorizes the PSC to protect public health, both as a general goal of regulation and as a basis for approving surcharges for utilities to recover costs.<sup>91</sup> The commission was concerned that 30,000 disconnected families would face a severe winter without heat, which would certainly threaten their health and safety.<sup>92</sup> The legislature was not in session that year, and thus, unavailable to

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<sup>83</sup> No. 2006-CA-001652-MR (Ky. Ct. App. Feb. 1, 2008), *modified on denial of reh'g* (June 6, 2008), *discretionary review granted* (Apr. 15, 2009) (Nos. 2008-SC-0483-D & 2008-SC-0489-D).

<sup>84</sup> *Id.* at 3. See KY. REV. STAT. ANN. § 278.170 (West 2006) (allowing any utility to grant free or reduced rate service to its officers, agents, or employees; the United States; charitable and eleemosynary institutions; persons engaged in charitable and eleemosynary work; and for the purposes of providing relief in case of flood, epidemic, pestilence, or other calamity; and for fighting fires or training firefighters).

<sup>85</sup> *PSC of Kentucky*, No. 2006-CA-001652-MR at 3–4.

<sup>86</sup> *Id.* at 9.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> 118 S.W.3d 109 (Ark. 2003).

<sup>90</sup> See also *Mountain States Tel. and Tel. Co. v. Pub. Serv. Comm'n of Utah*, 754 P. 2d 928 (Utah 1988) (rejecting the Utah commission's argument that the public policy goal of providing universal telephone service to all Utah residents should allow it to institute a pooling arrangement to subsidize discounted phone service for those on state assistance); *Mountain States Legal Found. v. N.M. State Corp. Comm'n*, 687 P.2d 92 (N.M. 1984) (finding that the commission lacked authority to effect social policy through preferential ratemaking for telephone services for the elderly and indigent). But see *Am. Hoescht Corp. v. Dept. of Pub. Utils.*, 399 N.E.2d 1 (Mass. 1980) (upholding the commission's ability to reduce rates for the elderly and poor due to its jurisdiction over entire rate structure); N.H. Pub. Utils. Comm'n, *Statewide Low-Income Electric Assistance Program*, 218 Pub. Util. Rep. 4th 442 (2002) (approving a utility's voluntary assistance program on the basis that nothing in the New Hampshire statute prohibited the establishment of such a program as part of its traditional oversight role.)

<sup>91</sup> ARK. CODE ANN. § 23-3-301 (2002) (establishing that the methods and manner in which utility services are provided are directly related to the continued health, safety, and welfare of the citizens of Arkansas); § 23-4-501 (allowing utilities to recover the costs of complying with administrative regulations relating to the protection of the public health, safety, or the environment through the use of interim surcharges).

<sup>92</sup> *Id.* at 122; Brief and Supplemental Addendum of Appellee at 3, *Ark. Pub. Serv. Comm'n, Ark. Gas Consumers v. Ark. Pub. Serv. Comm'n*, Case No. CA02-0051 (Ark. Ct. App. Apr. 3, 2002).

respond to this threat.<sup>93</sup> Relying on its general authority to set rates and protect public health, the commission initiated a program to continue gas service to the disconnected families.<sup>94</sup> To accomplish this, the commission used specific authority to impose a surcharge on all ratepayers, which the commission allocated to cover the utility's bad-debt expenses.<sup>95</sup>

The Arkansas court discounted the general health goal, primarily because the statute delegated surcharge authority for specific purposes: (1) only upon request of the utility and (2) only for recovering costs associated with an existing facility.<sup>96</sup> The court characterized the commission's program as "commendable" but "social," and hence, outside of the purpose of utility regulation in the absence of an explicit statutory delegation.<sup>97</sup> In effect, the court foreclosed an expansive reading of a general goal because, in its view, the goal did not align with a specific delegation of the surcharge role.

Several justices dissented, observing that revising the disconnection policy was well within the scope of ratemaking, which the statute defines expansively to include "every compensation, charge, [etc.] collected by any public utility ... and includes any rules, regulations, practices, or contracts ...".<sup>98</sup> The dissenters were satisfied that the commission policy pertained to charges under consumer contracts, and in addition, the surcharge was consistent with the statute that enables utilities to recover costs as a direct result of "legislative or regulatory requirements relating to the protection of the public health ...".<sup>99</sup>

The split court in Arkansas reflects the fundamental ambiguity that regulators face when elements of a complex statute are arguably out of alignment. Even when regulators interpret their statute reasonably, they run the risk that courts will not always defer to their interpretation.

## **2. Observations**

In these cases, courts found that regulators can exceed the scope of public interest regulation when there is no explicit legislative goal to support a decision. The U.S. Supreme Court held that regulating employment discrimination exceeds the purpose of utility regulation under the Federal Power Act; the Kentucky court held that promoting brownfield development exceeds the utility purpose of ratemaking; and the Arkansas court held that assisting low-income consumers is precluded by a statute that permits cost recovery for "existing facilities" of a utility.

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<sup>93</sup> Correspondence from D. David Slaton, Chief Administrative Law Judge & Chief of Commissioners' Staff, Ark. Pub. Serv. Comm'n (July 15, 2009, 19:20:07 EDT) (on file with author).

<sup>94</sup> *Arkansas Gas Consumers*, 118 S.W.3d at 112.

<sup>95</sup> *Id.* at 113. Under the PSC's program, utilities would credit back the surcharge payments collected from the broad customer base once the reconnected customers made payments. The debits and credits would flow through a Purchased Gas Adjustment and Gas Supply Rate mechanism. *Id.* at 113, 115.

<sup>96</sup> *Id.* at 119.

<sup>97</sup> *Id.* at 123. In support of its reasoning, the court cited the fact that the Arkansas legislature had explicitly authorized such a program for electricity consumers, but not gas consumers. *Id.* at 120.

<sup>98</sup> ARK. CODE ANN. § 23-1-101(10) (2002).

<sup>99</sup> ARK. CODE ANN. § 23-4-502 (2002), cited by dissenters in *Arkansas Gas Consumers*, 118 S.W.3d at 131.

Three cases do not establish a black-letter boundary, but they do show a pattern of litigation. One can predict that utilities are more likely to challenge regulators' decisions (either the role or the criteria that implement a role) if the decisions are not supported by an explicit legislative policy goal directed at utility regulation. Courts will differ from state to state in their degree of deference to regulators' interpretation of their authority, partly because the statutes vary. It is clear, however, that the courts will work from the statutory goals to interpret the limit of regulatory authority.

States define their goals with varying degrees of specificity. Some states express them in the form of legislative declarations and findings. For example, West Virginia promotes the use of the state's coal resources: "It is the purpose and the policy of the Legislature . . . to encourage the well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the state's energy resources, such as coal."<sup>100</sup> Washington State's code promotes energy conservation:

The legislature finds . . . that the potential for meeting future energy needs through conservation measures, including energy conservation loans, energy audits, the use of appropriate tree plantings for energy conservation, and the use of renewable resources, such as solar energy, wind energy, wood, wood waste, municipal waste, agricultural products and wastes, hydroelectric energy, geothermal energy, and end-use waste heat, may not be realized without incentives to public and private energy utilities. The legislature therefore finds . . . that actions and incentives by state government to promote conservation and the use of renewable resources would be of great benefit to the citizens of this state by encouraging efficient energy use and a reliable supply of energy based upon renewable energy resources.<sup>101</sup>

Many states define their goals by choosing a precise numerical target. The most common example is renewable portfolio standards, which require electricity retailers to provide a minimum quantity of their electricity supplies from renewable energy sources, and grant state commissions the authority to shape and enforce this requirement.<sup>102</sup> By the end of 2007, 28 states and the District of Columbia had adopted goals to encourage renewable energy, ranging from 2 percent of electricity supply in Iowa to 40 percent in Maine.<sup>103</sup> Another example of a numerical target is the California legislature's support for promoting business opportunities for women, minority, and disabled veterans. The statute requires utilities to award 30 percent or more of procurement contracts to businesses owned by disadvantaged groups and requires them

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<sup>100</sup> W. VA. CODE R. § 24-1-1(a)(3) (2008).

<sup>101</sup> WASH. REV. CODE § 80.28.024 (2008).

<sup>102</sup> K.S. Corey & B.J. Sweazey, *Renewable Portfolio Standards in the States: Balancing Goals and Implementation Standards*, U.S. Nat'l Renewable Energy Laboratory, NREL/TP Report No. 670-41409 at 1 (Dec. 2007).

<sup>103</sup> *Id.* at 1. The following states are currently implementing RPS programs: Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri (non-binding goal), Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota (non-binding goal), Oregon, Pennsylvania, Rhode Island, Texas, Vermont (non-binding goal), Virginia (non-binding goal), Washington, Wisconsin.

to report to the California PUC on how they plan to achieve this goal.<sup>104</sup>

An explicit statutory goal provides a statement of purpose to guide commissions. In cases of conflict, it also guides how courts interpret the ends to which commissions exercise their roles. Even explicit goals can be ambiguous (Do they authorize utility regulation or not?) when they are general and not directed to a specific regulatory decision. In the absence of explicit goals, commissions (and courts) can reasonably infer implied goals from explicitly delegated criteria for making decisions. Yet implied goals remain ambiguous until a court confirms the inference. Acting on implied goals, therefore, also carries a risk of litigation.

#### **D. Commission roles**

The traditional role of commissions has been to make regulatory decisions (*e.g.*, on rates, standards, siting permissions) delegated by the state legislature, within the legislature's policy guidelines. Under traditional regulation, commissions make decisions on applications from utilities on a case-by-case basis. This gives commissions a limited policymaking role.<sup>105</sup> To meet the states' new environmental and economic goals, legislatures have delegated new types of roles. These include two broad categories of roles: (1) overseeing the development of strategic plans, and (2) developing and administering programs. The expanded roles often entail more policy discretion than traditional decision-making.<sup>106</sup>

The programs and plans surveyed for this paper show that expanded roles seek to affect consumer behavior as much as the utility behavior,<sup>107</sup> influence allocation of state energy resources,<sup>108</sup> and involve the use and distribution of ratepayer funds.<sup>109</sup> The following cases show that challenges to regulators' authority occur when these new roles do not align with legislatively delegated goals.

##### **1. Litigated cases**

When utilities or other interest groups challenge an expanded role, courts usually look at whether a statute grants specific authority to play that role.

A Pennsylvania case shows the risk of litigation when a commission interprets an implicit goal as authority for taking on a new role. In *Process Gas Consumers Group v. Pennsylvania Public Utility Commission*,<sup>110</sup> a group of industrial consumers challenged the Pennsylvania PUC's use of a new surcharge to fund conservation programs. In response to a change in federal

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<sup>104</sup> CAL. PUB. UTIL. CODE § 8281 (West Supp. 2009).

<sup>105</sup> See Terrance J. Fitzpatrick, *The Tension Between Policy and Principle in the Pennsylvania Public Utility Commission*, 13 WIDENER L.J. 101 (2003) (discussing the overlap between the quasi-judicial and policymaking functions of the Pennsylvania Public Utility Commission and the commission's increasingly political role).

<sup>106</sup> See Nichols, *supra* note 12, at 297–299 (2001).

<sup>107</sup> *E.g.*, Maine's 10,000 Carbon Free Homes project.

<sup>108</sup> *E.g.*, integrated resource plans.

<sup>109</sup> *E.g.*, Ohio's Biomass Energy Program.

<sup>110</sup> 511 A.2d 1315 (Pa. 1986).

policy, the commission instituted the surcharge on industrial consumers using natural gas as boiler fuel.<sup>111</sup> The statute authorized the commission to establish a bureau to research future energy needs and develop an energy conservation program.<sup>112</sup> Reasoning that the statute implied a goal and authority to promote energy conservation, the commission set up three long-term conservation programs funded by the surcharge.<sup>113</sup> The Pennsylvania court disagreed with this approach.<sup>114</sup> It held that the commission could only encourage energy conservation through the regulatory process.<sup>115</sup> According to the court, the statute did not empower the commission to take on a new role of creating funds or to mandating programs to use those funds.<sup>116</sup> Although the court found the commission's proposals "laudatory" in showing concern for the earth's resources, it held that the commission did not have the requisite legislative powers of taxation and appropriation.<sup>117</sup> By adopting a narrow interpretation of the statute, the court thus limited the commission's role.

While the Pennsylvania court said that the regulators went too far, the West Virginia court found that its regulators stopped short of fulfilling a role. In *Affiliated Construction Trades Foundation v. West Virginia Public Service Commission*,<sup>118</sup> a union (ACT) sued to force the commission to investigate a power company's method of financing a power plant and its failure to use a local workforce in constructing the facility.<sup>119</sup> The West Virginia statute explicitly balances the goals of utility regulation between the interests of the state's economy and the interests of utility customers and companies.<sup>120</sup> The West Virginia PSC rejected ACT's allegations that the power company had misrepresented the benefits it would provide to the local economy.<sup>121</sup> The commission noted that the certificate of public convenience and necessity had

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<sup>111</sup> The Pennsylvania PUC introduced the Boiler Fuel Rider in response to the Natural Gas Policy Act of 1978, which instituted a surcharge on industrial customers. The PUC's actions preempted the federal program in Pennsylvania and allowed the funds collected to remain entirely within the state. *See id.* at 1316–1317.

<sup>112</sup> 66 PA. CONS. STAT. § 308(c) (Supp. 2009) (establishing the Bureau of Conservation, Economics, and Planning under the Pennsylvania PUC's auspices), *amended by* 2008 Pa. Legis. Serv. Act 2008-129, § 1.2 (Oct. 15, 2008) (removing explicit reference to the Bureau of Conservation, Economics, and Planning, but authorizing the PUC to set up "other bureaus and offices").

<sup>113</sup> *Id.* at 1318.

<sup>114</sup> *Id.* at 1321.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> 565 S.E.2d 778 (W. Va. 2002).

<sup>119</sup> *Id.* at 782. ACT also claimed that the company had indicated it would fund construction through internal financing, but had in fact funded the project through industrial and commercial development revenue bonds. *Id.*

<sup>120</sup> W. VA. CODE, §24-1-1(b) (2008).

<sup>121</sup> *Id.* at 783. A key issue concerning the extent of PSC's jurisdiction was whether the company, a wholesale power generator, had the status of a public utility. The court held that, because the company planned to sell power for eventual sale to the public and had made use of public financing for the project, the PSC has full oversight. *Id.* at 785, 788. The commission also argued that ACT had no standing because it was not a party to the original case awarding the certificate of convenience and necessity. *Id.* at 783.



not limited the means of financing nor required any particular workforce composition.<sup>122</sup> Siding with ACT, the court found that the commission had broad authority for a “comprehensive consideration” of the public interest.<sup>123</sup> Rather than simply accept the company’s “vague assurances” of serving the public interest, the commission had both the right and the duty to inquire into the suitability of the company’s financial arrangements and promises regarding the local workforce.<sup>124</sup> From the expansive goal of state economic development, the court derived a larger non-traditional role for the commission to ensure the company’s compliance in providing promised benefits to the local economy.

In *Energy Association of New York v. Public Service Commission of New York*,<sup>125</sup> electric utilities challenged the reach of the New York PSC’s authority. They asserted that the commission had no jurisdiction to require utilities to file plans (such as how the utilities would restructure themselves in a competitive marketplace) that went beyond the commission’s traditional legal authority.<sup>126</sup> The statute left open the extent of the commission’s authority through its use of “encourage” rather than “require”:

The commission shall encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for public safety, the preservation of environmental values and the conservation of natural resources.<sup>127</sup>

The court firmly sided with the commission, describing the law as a “revolutionary enhancement of the functions of the commission ... transforming the traditional role of the [c]ommission from simple case-by-case consideration of rates to being charged with the duty of long-range planning for the public benefit.”<sup>128</sup> In confirming the commission’s new role, the court recognized the state’s “avowed legislative policy” in support of conservation.<sup>129</sup> This example shows how utilities will question commission authority, even if explicitly delegated and properly aligned, when it will cost them money or potentially force them to reveal sensitive information.

## **2. Observations**

In *NAACP v. FPC*, the U.S. Supreme Court suggested that regulators can promote expansive goals (e.g., anti-discrimination), so long as they do it within the bounds of established

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 789.

<sup>124</sup> *Id.* For example, it could have revoked or suspended the construction permit or imposed monetary penalties. *Id.*

<sup>125</sup> 169 Misc.2d 924 (N.Y. 1996).

<sup>126</sup> *Id.* at 931.

<sup>127</sup> N.Y. PUB. SERV. LAW § 5(2) (McKinney 2000).

<sup>128</sup> *Energy Association*, 169 Misc.2d at 929.

<sup>129</sup> *Id.* at 931.

regulatory roles.<sup>130</sup> State courts have offered similar advice.<sup>131</sup> Yet the Pennsylvania case illustrates how the risk of litigation increases when regulators maximize their delegated powers to pursue a delegated expansive *goal* (conservation) through a non-delegated expansive *role* (program management). By comparison, the West Virginia case shows how litigation by interest groups may result when a commission adopts a narrow view of its traditional role and leaves some of its regulatory authority unused in relation to an expansive goal (economic development). Even after explicit delegation of a new and expanded commission role, the New York utilities were still willing to litigate in hopes of persuading the court to interpret the delegation of an expansive goal (conservation/alternative energy development) narrowly. The risk of litigation therefore remains when regulators pursue an *expansive* goal unless they use a *traditional* role based on *traditional* criteria.

In Connecticut, regulators heeded their concerns about such risk in the absence of a relevant legislative goal. Concerned that the state was at an economic disadvantage due to high electricity rates, the Connecticut Department of Public Utility Control (DPUC) wanted to reduce tariffs for business customers of the electric utilities.<sup>132</sup> The statute authorized the DPUC to implement programs to promote economic development.<sup>133</sup> Still, the department found that the statute constrained its ability to promote economic development through load retention tariffs or special contracts.<sup>134</sup> Rather than risk litigation over its statutory authority, the department instead recommended legislative changes to authorize rate relief.<sup>135</sup> In so doing, the DPUC provides a model for reducing the risk of litigation.

Expansive goals like encouraging energy conservation and stimulating the development of alternative energy can be pursued through the traditional role of rate setting.<sup>136</sup> Many states, however, pursue these goals through expansive commission roles. States have adopted a variety of planning mechanisms such as integrated resource management plans, renewable portfolio standards, and strategic energy assessments to set targets for reducing energy consumption and increasing energy from renewable sources. Integrated resource plans (IRPs) were common in most states in the 1980s and 1990s until many lapsed with the breakup of vertical monopolies.<sup>137</sup>

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<sup>130</sup> NAACP v. FPC, 425 U.S. 662, 668 (1976).

<sup>131</sup> See Am. Hoescht Corp. v. Dept. of Pub. Utils., 399 N.E.2d 1 (Mass. 1980). In this case, the original request for a tariff reduction came from the utility itself. The court would likely have barred the commission from acting on its own initiative to force utilities to accept lower tariffs using the same rationale. *Id.* at 3. *But cf.* Ky. v. Pub. Serv. Comm'n of Ky., No. 2006-CA-001652-MR (Ky. Ct. App. Feb. 1, 2008), *modified on denial of reh'g* (June 6, 2008), *discretionary review granted* (Apr. 15, 2009) (Nos. 2008-SC-0483-D & 2008-SC-0489-D).

<sup>132</sup> See Conn. Dept. Util. Control, *In re Electric Load Retention Tariffs*, 253 Pub. Util. Rep. 4th 98 (2006).

<sup>133</sup> See CONN. GEN. STAT. § 16-19e(a)(3) (2003) (Establishing that the DPUC and all public service companies shall perform all of their respective public responsibilities with economy, efficiency and care for public safety and energy security, and so as to promote economic development within the state with consideration for energy and water conservation, energy efficiency and the development and utilization of renewable sources of energy and for the prudent management of the natural environment).

<sup>134</sup> *Load Retention Tariffs*, *supra* note 132, at 106.

<sup>135</sup> *Id.* at 110.

<sup>136</sup> See JAMES C. BONBRIGHT, ET AL., PRINCIPLES OF PUBLIC UTILITY RATES 109–120 (2<sup>nd</sup> ed. 1988).

<sup>137</sup> Nichols, *supra* note 12, at 297.

The goal of integrated resource planning is to ensure that a utility identifies and procures that set of resources – both demand and supply – that produces efficient production and consumption of electricity.<sup>138</sup> IRPs require utilities to forecast future demand and submit ten- to twenty-year plans to meet that demand based on a least cost outcome, drawing on both supply-side (new generation) and demand-side (conservation) measures.<sup>139</sup> The commissions then oversee the utilities in meeting the targets.

Strategic energy assessment (SEA) is a form of comprehensive planning appropriate for states with restructured competitive markets, whereby policymakers and stakeholders analyze the unfolding market forces in the power sector.<sup>140</sup> Unlike traditional IRP, SEA does not select the electric generation resource mix and investments, but rather provides benchmarks for possible market interventions such as public benefits charges and portfolio standards.<sup>141</sup> For example, the New Jersey Energy Master Plan offers a mix of targets, incentives, and legislative proposals to reduce demand and even surpass the state's renewable portfolio standard.<sup>142</sup> The plan recognizes that the price of electricity now depends on a regional wholesale market and the FERC, while reliability of supply depends on unregulated power plants.<sup>143</sup>

Wisconsin approved its most recent SEA in April 2009.<sup>144</sup> The Wisconsin code gives the Public Service Commission the duty to prepare a biennial strategic assessment to: assess generation capacity and demand; identify activities to discourage inefficient and excessive power use; consider the public interest in economic development, public health and safety; protect the environment and diversify energy supplies; and assess the extent to which effective competition is contributing to reliable, low-cost and environmentally sound electricity for the public.<sup>145</sup> However, the Wisconsin SEA demonstrates another example of where the delegated role may not match its corresponding goal. In the late 1990s, the Wisconsin legislature limited the PSC's planning abilities upon instituting the SEA, initially reducing the SEA to a report on the state's energy capacity and needs.<sup>146</sup> In a comment attached to the commission's order approving the SEA, Commissioner Lauren Azar highlights the difference between the commission's grant of

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<sup>138</sup> Scott F. Bertschi, Comment, *Integrated Resource Planning and Demand-Side Management in Electric Utility Regulation: Public Utility Panacea or a Waste of Energy?*, 43 EMORY L.J. 815, 815 (1994).

<sup>139</sup> Edan Rothenberg, Comment, *Energy Efficiency in Regulated and Deregulated Markets*, 24 UCLA J. ENVTL. L. & POL'Y 259, 286 (2006).

<sup>140</sup> Nichols, *supra* note 12, at 298–299.

<sup>141</sup> *Id.*

<sup>142</sup> See N.J. GOVERNOR'S OFFICE, N.J. ENERGY MASTER PLAN (Oct. 2008), [http://www.state.nj.us/emp/docs/pdf/081022\\_emp.pdf](http://www.state.nj.us/emp/docs/pdf/081022_emp.pdf). The state's Renewable Portfolio Standard requires that renewable energy sources generate 22.5% of electricity consumption by 2020, but the Energy Master Plan calls for achieving a 30% reduction within the same time frame. See *id.* at 12.

<sup>143</sup> *Id.* at 22–23.

<sup>144</sup> WIS. PUB. SERV. COMM'N, STRATEGIC ENERGY ASSESSMENT—ENERGY 2014. FINAL REPORT. DOCKET 5-ES-104 (Apr. 2009) [hereinafter *Wisconsin SEA*].

<sup>145</sup> WIS. STAT. ANN. § 196.491(2)(a) (West 2002 & Supp. 2008).

<sup>146</sup> Correspondence from Lauren Azar, Commissioner, Wis. Pub. Serv. Comm'n, to Scott Hempling, Executive Director, National Regulatory Research Institute (July 7, 2009, 7:50 EDT) (on file with author).

statutory authority and what it needs to accomplish the state's goals.<sup>147</sup> In her view, additional legislative action is needed to give the commission a proactive role in defining the energy resources and needs of the state, rather than simply reporting on what is:<sup>148</sup> "If Wisconsin is to truly be strategic about its energy policy, it is essential that the Legislature take action to provide the Commission with the planning tools that [it] need[s]."<sup>149</sup>

*Programs* are different from *strategic planning* in that they usually authorize commissions to spend ratepayer funds and manage activities (as opposed to regulating utility management). Commissions with program administration roles have set up a variety of research-related and public education programs to advance their states' goals of energy conservation. The Public Utilities Commission of Ohio (PUCO) oversees the Ohio Biomass Energy Program. The program promotes the development of renewable energy resources by using wood, agricultural residues, landfill gas, and other waste as an energy source to achieve energy sustainability and a cleaner environment.<sup>150</sup> The program provides information, resource referrals, business connections, and grant funding.<sup>151</sup> Another example is Maine's project to establish 10,000 Carbon Free Homes to help reduce energy costs for electricity consumers.<sup>152</sup> The legislature authorized the commission to use ratepayer funds to educate consumers about cost-effective methods of conserving energy and to stimulate the market for efficient products and services.<sup>153</sup>

Stakeholders can be critical when commissions interpret their planning or programmatic authority so as to redistribute ratepayer funds. The story of the California Institute for Climate Solutions (CICS) provides an example. In 2008, the California Public Utility Commission approved the establishment of the CICS.<sup>154</sup> Under this program, the CPUC planned to partner with various California colleges and universities to run a dynamic research and educational center focused on climate change and training a new generation of researchers and public officials.<sup>155</sup> The commission planned to fund the \$600 million budget over ten years from a

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<sup>147</sup> *Wisconsin SEA*, *supra* note 144, at xiii–xiv.

<sup>148</sup> Azar correspondence, *supra* note 133.

<sup>149</sup> *Wisconsin SEA*, *supra* note 144, at xiii–xiv.

<sup>150</sup> Pub. Utils. Comm'n of Ohio, *Ohio Biomass Energy Program* brochure, <http://www.puco.ohio.gov/emplibrary/files/media/publications/brochures/The%20Ohio%20Biomass%20Energy%20Program.pdf>. The statutory authority for this program rests on OHIO REV. CODE ANN. § 4905.70 (2000): "The public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs;" and § 4905.70: "To the extent funding is available in the biomass energy program fund, the public utilities commission shall maintain a program to promote the development and use of biomass energy."

<sup>151</sup> *Id.*

<sup>152</sup> *See generally* Me. Pub. Utils. Comm'n, *In re Efficiency Maine Program Plan*, 255 Pub. Util. Rep. 4th 426 (2007).

<sup>153</sup> ME. REV. STAT. ANN. § 3211-A (Supp. 2008).

<sup>154</sup> Cal. Pub. Utils. Comm'n, Op. Establishing California Institute for Climate Solutions, Decision 08-04-039, at 6 (Apr. 10, 2008).

<sup>155</sup> *Id.*

surcharge on customers' bills. Relying on the Global Warming Solutions Act of 2006<sup>156</sup> and related legislation, the commission considered CICS part of its continuing effort to pursue creative and cost-effective ways to reduce greenhouse gas emissions in California's energy sector. Consumer groups opposed this decision and lobbied to convince the legislature that the commission had exceeded its statutory authority.<sup>157</sup> The legislature responded by passing a new law, signed by the governor, to prevent the commission from adopting any orders related to CICS or from collecting any rate revenue unless expressly authorized by statute.<sup>158</sup> Having no other option to continue, the commission vacated its decision establishing the CICS.<sup>159</sup>

Expanding commission roles are usually part of a strategy to mobilize state resources to meet new policy goals for energy conservation and renewable sources. Utilities and consumer groups are watchful of how the commissions carry out these new roles because of the direct and indirect financial burden. The risk of litigation increases when these roles do not align with the legislatively delegated goals.

## **E. Decision-making criteria**

Traditionally, regulators based their decisions on just a few criteria like price and need, but the number and diversity of criteria have grown in response to expanding goals and roles. Deliberations on siting applications provide the most evidence of how commissions balance multiple criteria because these decisions most frequently raise environmental and economic questions. For example, a 2006 study found that thirty states consider environmental protection in their certification and siting review procedures.<sup>160</sup>

The risk of litigation grows when statutes instruct commissions to use criteria like "community values" or "aesthetic values,"<sup>161</sup> which are indefinite and subjective. In an attempt to be more prescriptive and complete, some legislatures authorize regulators to use dozens of criteria (*e.g.*, impact on the environment, impact on educational facilities and municipal services, and economic benefit to the state). In those states, there is increased risk that utilities will challenge a decision that balances multiple criteria as being arbitrary or subjective. A utility or public interest group may claim that the commission ignored certain relevant criteria or gave the wrong weight to the criteria in the balancing process. This is why most of the cases reviewed below in this section involve the commission's choice and use of evaluative criteria.

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<sup>156</sup> AB 32 (Stats. 2006, ch. 488, effective September 27, 2006), codified in Division 24.5 of the Health and Safety Code. AB 32 requires, among other things, that the California Air Resources Board ("CARB") adopt regulations to require the reporting of GHG emissions and to monitor and enforce compliance with the program (Health & Saf. Code, § 38530, subd. (a)), and approve a statewide GHG emissions limit equivalent to the level to be achieved by 2020. (Health & Saf. Code, § 38550). See *Vacating Decision*, *supra* note 74, at 1 n.2.

<sup>157</sup> *Vacating Decision*, *supra* note 74, at 2.

<sup>158</sup> See AB 1338 § 27(a) (Sept. 30, 2008).

<sup>159</sup> *Vacating Decision*, *supra* note 74, at 7.

<sup>160</sup> *Id.*

<sup>161</sup> See, *e.g.*, CAL. PUB. UTIL. CODE §§ 1002 (West 1994).

## 1. *Litigated cases*

Challenges to regulators' use of expansive decision-making criteria account for the largest set of litigated cases in this study. As in federal administrative law, most state courts defer to an agency's interpretation of its statutory authority.<sup>162</sup> The leading federal doctrine, or "*Chevron* deference,"<sup>163</sup> holds that courts should defer to reasonable agency interpretations of the statute that delegates authority to that agency.<sup>164</sup> Although state practice shows that a well-developed deference principle already existed prior to the *Chevron* decision, the *Chevron* framework has had an impact on states,<sup>165</sup> and some state decisions refer to it.<sup>166</sup>

In the context of litigation involving decision-making criteria, state courts generally follow a three-step inquiry: (1) whether the statute explicitly provides the criteria or delegates authority to develop the criteria; (2) whether the decision was reasonable; and (3) whether the decision can be supported by substantial evidence.

### a. *Challenging the choice of criteria*

A statute might not provide any guidance on the choice of criteria, leaving the commission with wide discretion in determining which criteria to consider. In such circumstances, the court will usually defer to the commission's choices, especially if special expertise is required. In *Public Utility Commission of Texas v. Texas Telephone Association*,<sup>167</sup> an incumbent telephone carrier challenged the Texas PUC's approval of subsidies for a new carrier after evaluating the competitiveness of the local telephone market. It did so without also assessing the impact of a second carrier on the incumbent carrier's ability to continue existing services in a rural area.<sup>168</sup> The statute did not specify the criteria to be used to determine the public interest.<sup>169</sup> The commission determined that serving the public interest meant increasing the competitiveness of the local market.<sup>170</sup> Reasoning that decisions on the public interest are

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<sup>162</sup> William R. Andersen, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1018 (2006); CHARLES H. KOCH, JR., 3 ADMIN. L. & PRAC. § 12.36[2] (2d ed.).

<sup>163</sup> *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>164</sup> Andersen, *supra* note 162, at 1017.

<sup>165</sup> *Id.* at 1027. KOCH, *supra* note 162, at § 12.36[2].

<sup>166</sup> See, e.g., *Ky. v. Pub. Serv. Comm'n of Ky.*, No. 2006-CA-001652-MR (Ky. Ct. App. Feb. 1, 2008), *modified on denial of reh'g* (June 6, 2008), *discretionary review granted* (Apr. 15, 2009) (Nos. 2008-SC-0483-D & 2008-SC-0489-D).

<sup>167</sup> 163 S.W.3d 204 (Tex. Ct. App. 2005) (finding that the Texas Public Utility Commission was correct to consider the competitiveness of the local market when deciding that a telecommunications company's receipt of universal service funding was in the public interest).

<sup>168</sup> *Id.* at 213–214.

<sup>169</sup> *Id.* at 212.

<sup>170</sup> *Id.* at 215.

based on specialized knowledge and are entitled to “due respect,”<sup>171</sup> the court deferred to the commission’s choosing to use the degree of competitiveness as a factor.<sup>172</sup>

Statutes with indefinite criteria invite commissions and reviewing courts to choose the most appropriate criteria. Courts have the last word, depending on the particular court’s degree of deference. In *Gulf States Utilities Company v. Federal Power Corporation*,<sup>173</sup> one utility challenged the FPC’s approval of applications from other electric utilities to issue bonds. The Federal Power Act empowers the FPC to authorize a security issue only if it is compatible with the public interest.<sup>174</sup> The utilities proposed issuing bonds to refund part of their outstanding corporate debt, but two cities opposed the issue claiming that the proceeds would finance anticompetitive activities.<sup>175</sup> Rejecting the FPC’s choice to ignore the anti-trust issues, the U.S. Supreme Court found that anti-trust issues were indeed a factor that the court must consider.<sup>176</sup> By inserting the omitted anti-trust issues into the inquiry, the Court not only refused to defer to the FPC’s choice of evaluative criteria, it also instructed the commission to look beyond its statute to the “fundamental national economic policy expressed in the anti-trust laws.”<sup>177</sup>

The Court’s approach in *Gulf States* contrasts with its approach in *NAACP v. FPC*<sup>178</sup> when it told the commission *not* to look outside its statute to pursue the non-utility goal of ending employment discrimination. In *Gulf States*, the Court rejects the FPC’s assertion that the Federal Power Act limits its role to considering only the financial implications of issuing the security. The Court’s decision holds important implications for the paradigm of goals, roles, and criteria set out in this paper. In this federal context, it establishes that utility regulators must consider a criterion as essential to the “public interest” if it is a fundamental part of economic policy. This is so even if it derives from a statute apart from the regulators’ own grant of authority. The fact that Congress did not grant an explicit role to the utility regulators in the antitrust statute is not grounds for excluding antitrust policy as a criterion for analyzing the “public interest” in utility regulation.

In a case about externalized environmental costs, the Alaska court hewed closer to the Supreme Court’s logic in *NAACP* than in *Gulf States*. In *Alaska Federation for Community Self-Reliance v. Alaska Public Utilities Commission*,<sup>179</sup> a public interest group challenged the commission’s choice of criteria used to approve a clean coal plant.<sup>180</sup> The Alaska statute prohibits the Alaska PUC from approving an application for constructing a plant unless it finds

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<sup>171</sup> *Id.* at 213.

<sup>172</sup> *Id.* at 216.

<sup>173</sup> 411 U.S. 747 (1973).

<sup>174</sup> *Id.* at 749. See 16 U.S.C. 824c.

<sup>175</sup> *Gulf States*, 411 U.S. at 750–751.

<sup>176</sup> *Id.* at 759–760.

<sup>177</sup> *Id.* at 759.

<sup>178</sup> 425 U.S. 662, 670–671 (1976).

<sup>179</sup> 879 P.2d 1015 (Alaska 1994).

<sup>180</sup> *Id.* at 1020.

the applicant is “fit, willing, and able to provide the utility services.”<sup>181</sup> Arguing against the plant, the Alaska Federation for Community Self-Reliance asserted that the commission failed to evaluate the plant’s environmental costs and that determinations of “public necessity” and “public interest” required a broad range of criteria bearing on the overall public good.<sup>182</sup> The commission concluded that it was not required to consider any criteria outside its traditional area of jurisdiction unless specifically directed to do so by the legislature.<sup>183</sup> The court agreed.<sup>184</sup> Although the statute declares that the commission’s powers are open to a liberal construction,<sup>185</sup> the court described the traditional purview of utility commissions as limited to the reasonableness of rates charged by utilities and paid by consumers.<sup>186</sup> Any additional costs to society at large fell outside the traditional area of policy making.<sup>187</sup> Therefore, the commission did not have to consider these criteria.<sup>188</sup>

Adherence to traditional criteria may lead a commission to ignore alternative options, as the court points out in *Scenic Hudson Preservation Conference v. Federal Power Corporation*.<sup>189</sup> Under the Federal Power Act, a proposed project must meet the statutory test of being adapted to a comprehensive plan for improving or developing a waterway.<sup>190</sup> In setting aside the FPC’s approval of a pumped storage hydroelectric project, the court found that the FPC had not evaluated alternative options and that the record of evidence was therefore insufficient to support

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<sup>181</sup> ALASKA STAT. § 42.05.241 (2008).

<sup>182</sup> *Alaska Fed’n*, 879 P.2d at 1019–1020.

<sup>183</sup> *Id.* at 1020.

<sup>184</sup> *Id.*

<sup>185</sup> ALASKA STAT. § 42.05.141(a)(1) (2008). A currently proposed amendment removes reference to “liberally construing the commission’s powers.”

<sup>186</sup> *Alaska Fed’n*, 879 P.2d at 1020.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* See also N.D. CENT. CODE § 49-02-23 (1999) (prohibiting the North Dakota Public Service Commission from using, requiring the use of, or allowing electrical utilities to use environmental externality values in the planning, selection, or acquisition of electrical resources or the setting of rates for providing electrical service). The prohibition on using environmental externality values has been the subject of recent litigation in North Dakota. A non-profit organization challenged the PSC’s decision to exclude evidence of reasonably anticipated costs of CO<sub>2</sub> emissions when making an early prudence determination for a proposed electric generation facility. *Dakota Resource Council v. Pub. Serv. Comm’n*, No. 08-08-C-2434, *appeal denied* (N.D. Burleigh Cty. Aug. 19, 2009), *appeal filed* (N.D. Nov. 25, 2009). By denying the appeal, the district court upheld the commission’s view that the statute’s prohibition is unambiguous and requires no further interpretation. Appellees Brief at 5–7, *Dakota Resource Council v. Pub. Serv. Comm’n*, (N.D. Ct. App. Feb. 13, 2009). But cf. N.D. CENT. CODE § 49-22-09 (1999) (directing the commission to take environmental and public health factors into consideration when evaluating applications and designation of sites, corridors, and routes for energy conversion and transmission facilities). See also *Mass. Elec. Co. v. Dept. of Pub. Utils.*, 643 N.E.2d 1029, 1033–1034 (Mass. 1994) (accepting the Department’s argument that it had implied authority to consider direct environmental externalities through its rate-making powers, but finding that the Department exceeded its statutory authority in considering the overall impact of pollution on society at large, including non-ratepayers).

<sup>189</sup> 354 F.2d 608 (2d Cir.1965).

<sup>190</sup> *Id.* at 612. See 16 U.S.C. § 803(a).



its decision.<sup>191</sup> Emphasizing that cost should not be the only factor, the court remanded the case so that the FPC could evaluate other engineering options and criteria, including historical and aesthetical values and impact on local fisheries.<sup>192</sup> In so doing, the court observed that public interest regulation does not permit the commission “to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.”<sup>193</sup>

As *Scenic Hudson* implies, regulatory goals can conflict, particularly when the criteria of economic development and the environment are involved in the same decision. While conflicts cannot be avoided, conflicting goals require a rational method for making decisions, whereby a cost-benefit analysis or discussion of the trade-offs occurs prior to a subjective decision.

Potentially conflicting goals featured in *New Bedford v. Energy Facilities Siting Council*,<sup>194</sup> in which a local government challenged the siting council’s decision to approve construction of a power plant. The Massachusetts statute mandates that the siting council consider the proposed plant’s environmental harm along with the goal of providing energy supply at the lowest possible cost.<sup>195</sup> The court found that the council had declined to conduct a full review of the environmental consequences, relative benefits, and feasibility of using alternative fuels before approving the plant.<sup>196</sup> According to the court, the council’s methodology did not comport with the statute, which required that the project meet a minimum environmental impact standard.<sup>197</sup> Moreover, the court agreed with the Attorney General that the council had elevated economic development to primary importance.<sup>198</sup> The statute did not authorize its use as a criterion for the siting of a new power plant.<sup>199</sup>

## **b. Challenging the balancing tests**

Once the decision-making criteria are identified, regulators must then decide how to balance them. In determining whether a commission’s decision is arbitrary or capricious, some courts try to define the type of balancing test to apply to the criteria. Other courts accept that there is no one test to apply, but instead look to see if the evidence can support the conclusion.<sup>200</sup>

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<sup>191</sup> *Id.* at 620–622.

<sup>192</sup> *Id.* at 624–625.

<sup>193</sup> *Id.* at 620. Another example of how the public interest is closely connected to the local economy can be seen in *Affiliated Constr. Trades Found. v. W. Va. Pub. Serv. Comm’n*, 565 S.E.2d 778 (W. Va. 2002). The West Virginia Public Service Commission has the obligation to encourage the well-planned development of utility resources in manner consistent with the state’s needs and in ways consistent with the productive use of the state’s energy resources, such as coal. W. VA. CODE, §24-1-1 (2008).

<sup>194</sup> 597 N.E.2d 1032, 1035 (Mass. 1992).

<sup>195</sup> *Id.* at 1034. *See* MASS. GEN. LAWS ch. 164, § 69H (Supp. 2009).

<sup>196</sup> *New Bedford*, 597 N.E.2d at 1035.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 1037.

<sup>199</sup> *Id.*

<sup>200</sup> *E.g., In re Pinetree Power*, 871 A.2d 78 (N.H. 2005).

The Maryland court devised an early balancing test for traditional factors in *Electric Public Utilities Company v. Public Service Commission*.<sup>201</sup> In deciding on whether to allow the purchase of stock by a utility in another company, the Maryland PSC balanced the potential of a rate increase, the potential for managerial efficiencies, the extension of 24-hour service, and the recipients of the financial benefits of the investment.<sup>202</sup> Finding that the financial rewards accrued only to the investors, the commission rejected the request.<sup>203</sup> The court reversed. It found that the commission did not need to show that the public would benefit.<sup>204</sup> Rather, it only needed to show that it would not work to the public detriment.<sup>205</sup> The court concluded that the statutory phrase “in the public interest” could reasonably mean “not detrimental to the public.”<sup>206</sup>

This same test was more recently applied by the Missouri court in *AG Processing, Inc. v. Public Service Commission* and subsequent decisions.<sup>207</sup> By equating “in the public interest” with “not detrimental,” these courts strike a balance on the side of avoiding harm rather than affirmatively advancing the public interest. In the absence of an explicit statutory preference, these courts were free to weigh the balance in a way that favors the utility.

Minnesota’s statute provides a slightly more nuanced standard; it states that the commission can approve a merger if it is “consistent with the public interest.”<sup>208</sup> In *Re Stock of Natrogas, Inc.*, Minnesota regulators reasoned that the statute does not require a proposed merger to affirmatively benefit ratepayers or the public, or otherwise promote the public interest, but it may not contravene the public interest and must be shown to be compatible with it.<sup>209</sup>

The Oregon Public Utility Commission followed a different standard – the “net benefit standard.” Its statute provides that a merger must “serve the public utility’s customers in the public interest.”<sup>210</sup> Taking the verb “serve” in an active sense, the commission concluded that the legal standard should show (1) a net benefit to the utility’s customers, and (2) no detriment

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<sup>201</sup> 140 A. 840 (Md. 1928).

<sup>202</sup> *Id.* at 843.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 844.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See, e.g., *AG Processing, Inc. v. Pub. Serv. Comm’n*, 120 S.W.3d 732 (Mo. Banc 2003) (finding that the commission must evaluate both present and future impacts of a stock transfer when making its decision); *St. Louis v. Pub. Serv. Comm’n*, 73 S.W.2d 393, 400 (Mo. Banc 1934) (asserting that the commission must grant approval unless it finds the transfer of stock would be detrimental to the public interest). See also *Mo. Pub. Serv. Comm’n, In re Great Plains Energy, Inc. et al.*, 266 Pub. Util. Rep. 4th 1 (2008) (where the Missouri PSC applied the “not detrimental” standard to a merger application).

<sup>208</sup> MINN. R. § 216B.50 (2000).

<sup>209</sup> See *Minn. Pub. Utils. Comm’n, In re Stock of Natrogas, Inc.*, 199 Pub. Util. Rep. 4th 167 (2000).

<sup>210</sup> OR. REV. STAT. § 757.511(3) (2007).

on Oregon citizens as a whole.<sup>211</sup> This meant the commission would need to take into account a whole set of conditions beyond consideration of economic criteria alone, as well as the interests of an entirely different constituency from the utility's customers.<sup>212</sup>

Some decisions require consideration of many criteria, which leads some courts not to ask for a “net” benefit or detriment. New Hampshire’s statute allows the Public Service of New Hampshire (PSNH) to modify its generation assets if the commission finds that it is in the public interest of PSNH’s retail customers.<sup>213</sup> In *In re Pinetree Power, Inc.*,<sup>214</sup> the New Hampshire Public Utilities Commission approved an application from PSNH to modify its generating plant to burn wood rather than oil or coal because of its multiple benefits. These benefits included the existence of a sustainable market for low-grade wood products, lower emissions, increased fuel diversity, and improved reliability of the unit.<sup>215</sup> The court upheld the commission. It concurred with the commission’s “public interest” standard, rather than the “net benefit” standard that opponents sought.<sup>216</sup> The court held that the “public interest” of PSNH’s customers encompassed more than the impact on customer rates.<sup>217</sup> The public interest standard, therefore, represents a holistic balance of traditional and expansive criteria such as health, environmental, and renewable energy criteria.<sup>218</sup>

The previous examples cite various elements of the public interest, but it is not always clear who compromises the “public.” For example, by taking into account the interests of Oregon’s citizens as a whole, the commission shifts its analysis to how the criteria affect people other than utility customers. The result may be that the impact on these non-customers actually outweighs the impact on a utility’s own customers.

A conservation group challenged a constituency shift by regulators in *Grand Canyon Trust v. Arizona Corporation Commission*.<sup>219</sup> In the 1990s, after legislation authorized retail competition in the intrastate supply of electric service, Arizona utilities began producing electricity for consumers in other states.<sup>220</sup> The Arizona statute requires regulators to balance the need for power with the need to minimize impact on the environment in the broad public interest.<sup>221</sup> The Arizona commission rejected a challenge to the construction permit of a new

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<sup>211</sup> The commission took the verb “serve” to mean “to be of use,” “to be favorable,” or “to promote the interests of.” See Or. Pub. Util. Comm’n, *In re Legal Standard for the Approval of Mergers*, 212 Pub. Util. Rep. 4th 449, 455–457 (2001).

<sup>212</sup> *Id.* at 456 (noting that the statutory language compelled use of the more stringent “net benefit” standard even though the commission really felt that the correct standard should instead be “no net detriment”).

<sup>213</sup> N.H. REV. STAT. § 369-B:3-a (Supp. 2008).

<sup>214</sup> 871 A.2d 78 (N.H. 2005).

<sup>215</sup> *Id.* at 83.

<sup>216</sup> *Id.* at 82.

<sup>217</sup> *Id.* at 81.

<sup>218</sup> *Id.* at 81.

<sup>219</sup> 107 P.3d 356 (Ariz. Ct. App. 2005).

<sup>220</sup> *Id.* at 362.

<sup>221</sup> “In arriving at its decision, the commission shall comply with the provisions of § 40-360.06 and shall balance, in

power plant, but conditioned the construction upon a showing of firm wholesale contracts for the power output of the plant.<sup>222</sup> These wholesale contracts would include customers both in and outside the state.<sup>223</sup> Siding with the commission, the court deferred to the commission's choice of criteria, its balancing test, and its definition of "customer."<sup>224</sup> The court agreed that the statute did not require the commission to determine power needs solely on the basis of in-state consumers.<sup>225</sup> Recognizing that it might not be the best public policy for the statute to allow consideration of out-of-state customer needs, the court directed critics to address their concerns to the legislature, not the commission.<sup>226</sup>

## 2. Observations

Judicial deference to specialized commissions is a strong theme in many cases. In some, the court is sympathetic to the regulators' choice of criteria (*Alaska Federation*), and in others, the court defers even when it would not strike the same balance among criteria (*Grand Canyon*). The common thread among these decisions is that courts defer to regulators when the statutes do not require a particular test or preference. However, some courts may not defer in certain circumstances. This can occur when regulators omit criteria when doing so is inconsistent with regulatory goals (*Scenic Hudson, New Bedford*).

Judicial balancing tests fill a statutory void. Utilities argue that the absence of a rational test begs for judicial intervention to guide regulators away from highly subjective decisions that undermine regulatory certainty. However, the judicial tests are themselves vague and, at least in the case of the "not detrimental" test, appear to move away from the statutory goal of affirmatively advancing the public interest. In requiring only a showing that the utility's proposed action will not harm the public, the "not detrimental" test used in *AG Processing* seems to require a lower burden of proof for utilities than the "net benefit" test proposed in Oregon.<sup>227</sup>

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the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state. ARIZ. REV. STAT. § 40-360.07(B) (2001).

<sup>222</sup> 107 P.3d at 359. Grand Canyon Trust challenged the construction of plant because fourteen years had elapsed since the award of the permit to Tucson Electric Power (TEP) in 1986. Grand Canyon argued the commission should require an amended application based on current environmental factors. When the commission originally issued the permit to TEP, it conditioned construction of a fourth coal-powered electric generating unit upon a showing of need. TEP did so, and the commission agreed. However, the commission then further required TEP to have wholesale contracts in hand before construction could begin. *Id.* at 358–359.

<sup>223</sup> *Id.* Under the wholesale contracts, TEP would sell electricity into an integrated power delivery system throughout the southwestern U.S. *Id.* at 363.

<sup>224</sup> *Id.* at 362–363.

<sup>225</sup> *Id.* at 364.

<sup>226</sup> *Id.*

<sup>227</sup> See Or. Pub. Util. Comm'n, *In re Legal Standard for the Approval of Mergers*, 212 Pub. Util. Rep. 4th 449, 455–457 (2001); OR. REV. STAT. § 757.511(3) (2007). The Oregon commission takes pains to note that its use of a net benefit standard for merger approval is "compelled by the statutory language and is not the policy preference of the Commission." *Id.* The commission prefers a "no detriment" standard for mergers as compared with "net benefit," which could put it in the position of second-guessing the business decisions of the companies it regulates, even when the business decisions do no harm to Oregon customers.

These tests may have limited applicability. Many commissions employ the “public interest” test used in *Pinetree Power* because it offers the greatest flexibility in considering any applicable criteria.

Courts will not always defer to regulators when commissions omit or fail to consider specific criteria. While both *Alaska Federation* and *Texas Telephone* deferred to the regulators’ interpretation, the two federal decisions did not. While the federal court in *Scenic Hudson* opposed substituting its judgment for the commission, it also opposed reducing the commission’s role to that of an umpire “blandly calling balls and strikes for adversaries appearing before it.”<sup>228</sup> The court saw its role as deciding whether the commission had correctly discharged its duties.<sup>229</sup> These duties included affirmatively analyzing all relevant facts,<sup>230</sup> so the court offered criteria for consideration on remand.<sup>231</sup> Read along side the later U.S. Supreme Court decision in *Gulf States*, the federal cases signal that regulators should not expect judicial deference if they omit evaluation of any factors that align with the goals of the statute. The more recent Massachusetts decision in *New Bedford* makes clear that some state courts will check that the evaluative criteria aligns with the statutory goals before deciding how much deference to give the regulators’ methodology.

The legislative trend supports a prediction of job security for utility litigators. Evolving criteria tend to be general or indefinite. Or, they are specific and numerous, but lack a balancing test or means of ranking priorities to resolve conflicts. For example, California’s regulatory statute on certificates of public convenience and necessity lists four non-traditional criteria for the commission to consider: (1) community values; (2) recreational park areas; (3) historical and aesthetic values; (4) influence on environment.<sup>232</sup> Such general language requires regulators to define the criteria (*e.g.*, which community values), and it invites litigation to test the criteria that do not align with explicit goals.

Through their rulemaking procedures, commissions can clarify the scope of the evaluative criteria they should use in their decision-making. The California Commission adopted an order requiring it to find that the facilities “are necessary to promote public health, safety, comfort and convenience of the public, and that they are required by the public convenience and necessity.”<sup>233</sup> The order clarifies the requirements of California Public Utility Code § 1001 for issuing a certificate of public convenience and necessity and aligns the Commission’s responsibilities with the provisions of the California Environmental Quality Act.<sup>234</sup> While the evaluative criteria remain indefinite (as in the statute), the “necessity” test contained in the order establishes a burden of proof with respect to the criteria.

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<sup>228</sup> *Scenic Hudson v. FPC*, 354 F.2d 608, 620 (1965).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> CAL. PUB. UTIL. CODE § 1001 (West 1994).

<sup>233</sup> Pub. Utils. Comm’n of Cal., General Order 131-D § III(A) (Aug. 11, 1995).

<sup>234</sup> CAL. PUB. RES. CODE §§ 21000–21194 (Deering 1996 & Supp. Dec. 2008).

Other legislatures have taken a more directive approach by enumerating a detailed list of criteria in their statutes. Listing the criteria gives the decision-making process a more structured “checklist” format. For example, Vermont’s statute lists ten criteria for siting applications, which the Public Service Board (PSB) must evaluate positively (“no undue adverse effect”) before it approves a project.<sup>235</sup> The environmental criterion<sup>236</sup> encompasses more than twenty additional sub-criteria, for which the PSB must give “due consideration.”<sup>237</sup> These sub-criteria range from the effect on wildlife habitats to the effect on educational facilities and transportation links. *See* Appendix for how the statutes fit together to lay out the criteria and sub-criteria.

The statute defines the criteria and describes evaluation standards for each sub-criterion. This is how the PSB should treat water conservation:

A permit will be granted whenever ... the design has considered water conservation, incorporates multiple use or recycling where technically and economically practical, utilizes the best available technology ... and provides for continued efficient operation of these systems.<sup>238</sup>

Vermont’s no-adverse-effect test requires independent compliance with each criterion. The PSB would have to reject an application if only one criterion failed to satisfy the test. For example, if there is an adverse effect upon system stability or reliability, it does not matter that the economic benefit would be significant.<sup>239</sup> In other words, there is no balancing test; utilities have a burden of showing that they have mitigated the potential adverse impact for each criterion.

For one set of criteria, the statutes appears to give the PSB more discretion phrased as requiring “due consideration” (rather than “no adverse effect”). Usually, the PSB will also seek an affirmative finding of “no undue adverse effect” for each sub-criterion, but the law does not impose such a requirement.<sup>240</sup>

By detailing criteria and defining them, legislatures clarify the indefinite elements that invite litigation. But in their effort to be more complete, legislatures increase the number of

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<sup>235</sup> VT. STAT. ANN. tit. 30, § 248(b) (Supp. 2007).

<sup>236</sup> “Aesthetics, Historic Sites, Air and Water Purity, the Natural Environment, and Public Health and Safety.” VT. STAT. ANN. tit. 30, § 248(b)(5) (Supp. 2007).

<sup>237</sup> VT. STAT. ANN. tit. 10, § 1424a(d) (Supp. 2008); tit. 10, § 6086 (1997).

<sup>238</sup> VT. STAT. ANN. tit. 10, § 6086(a)(1)(C) (1997).

<sup>239</sup> Correspondence from George Young, Policy Director, Vermont Public Service Board, to Scott Hempling, Executive Director, National Regulatory Research Institute (July 1, 2009, 16:31:11 EDT) (on file with author). *See also* VT. STAT. ANN. tit. 30, § 248(b)(5) (Supp. 2007) (requiring an affirmative finding of no “undue adverse effect on esthetics, historic sites, air and water purity, the natural environment and the public health and safety, with due consideration having been given to the criteria specified in subsection 1424a(d) and subdivisions 6086(a)(1) through (8) and (9)(K) of Title 10.”).

<sup>240</sup> Correspondence from George Young, *supra* note 239. For an example of how the individual sub-criteria are assessed and weighed, *see* Vt. Pub. Serv. Bd., Amended Petition of Deerfield Wind, LLC, for a Certificate of Public Good Authorizing It To Construct and Operate a 15-Turbine, 30MW Wind Generation Facility, Docket No. 7250 (Apr. 16, 2009), *available at* <http://psb.vermont.gov/sites/psb/files/orders/2009/7250finalorder.pdf>.

criteria that they must evaluate. This creates a problem of multiplicity that can burden the commissions.

## **F. Summary**

Disaggregating the scope of the public interest into its component aspects of *goals*, *roles*, and *criteria* is useful for understanding how legislatures define the public interest and how the courts will interpret the statutory delegation of authority. Courts tend to defer to regulators, but some courts have overruled regulators in the context of varying statutes:

### **Some courts have limited regulatory authority when ...**

*Goals* do not support a decision-making role or factor:

- Promoting brownfield development exceeds the purpose of rate-based incentives (Kentucky, *PSC of Kentucky*).
- Assisting low-income consumers is not supported by rate-making authority to protect public health, welfare and the environment (Arkansas, *Arkansas Gas Consumers*).
- Regulating employment discrimination by utilities exceeds the purpose of utility regulation (Supreme Court, *NAACP v FPC*).

*Roles* have not been explicitly delegated by the legislature:

- Imposing a surcharge (Pennsylvania, *Process Gas*).

*Criteria* are inconsistent with regulatory goals:

- Anticompetitive impact is a factor in the public interest. (Supreme Court, *Gulf States*)
- Engineering alternatives are essential for assessing the impact of a power facility on a comprehensive plan that balances power, environmental and tourism objectives. (2<sup>nd</sup> Circuit, *Scenic Hudson*)
- Vague assurances are not sufficient evidence when the statute provides specific goals of regulation, including economic development. (West Virginia, *Affiliated Construction Trades*)
- Ignoring environmental impact in favor of economic development, which was not a statutory factor. (Massachusetts, *New Bedford*)

### **Some courts have interpreted balancing tests to rationalize multiple criteria:**

- “Not detrimental” is the appropriate test in the context of utility mergers. (Missouri, *AG Processing*).
- “Public interest” is the appropriate test in the context of changing fuel sources because it allows consideration of criteria beyond the impact on retail consumers. (New Hampshire, *Pinetree Power*)

- “Public interest” is the appropriate test in the context of wholesale exports because it does not limit consideration to benefits for in-state retail consumers. (Arizona, *Grand Canyon*)

### III. GUIDANCE FOR REGULATORS AND LEGISLATORS

The expansion of goals, roles and criteria makes the job of regulators more difficult. Without sufficient statutory guidance, decisions based on implicit or indefinite goals, roles, and criteria run the risk that utilities will challenge regulators’ authority. This part offers guidance to strengthen regulators’ accountability and reduce the risk of litigation.

Regulators and legislators can resolve the indefinite scope of the public interest by clarifying goals, roles, and criteria, but this solution creates another problem: multiple elements of authority. Regulators can solve “multiplicity” by evaluating the many criteria and then transparently explaining their analysis, but this solution raises yet another problem: limited resources. Legislatures can solve this problem by efficiently deploying agency resources. This problem-solution chain offers a three-step path for strengthening regulatory accountability.

#### A. Step One

##### 1. *Problem: Indefinite authority*

The concept of the public interest is indefinite. Originally, it meant restraining the monopoly power of utility companies. Today, environmental and economic problems expand the public interest. Statutes do not always disaggregate the public interest into more specific policy goals of regulation. Statutes often imply goals in their descriptions of commission roles or decision-making criteria. The problem of indefinite authority also affects commission roles with respect to the newer non-regulatory functions. Many decision-making criteria are as indefinite as the goals they are meant to support. Criteria such as “aesthetic values,” “community values,” or even, “environmental impact” fall short of providing sufficient guidance for commissions. The result is that the risk of litigation increases and accountability to the public suffers.

##### 2. *Solution: Clarify*

Legislatures and commissions can resolve indefinite authority by clarifying and aligning goals, roles, and criteria.

*Clarify goals.* Clarifying goals explicitly in legislation can guide commissions and courts. Explicit legislative intent helps regulators avoid acting on the basis of implied goals, which can be easily misinterpreted. Washington State offers an example: “The legislature intends ... to authorize immediate actions in the electric power generation sector for the reduction of greenhouse gases emissions.”<sup>241</sup> The legislature then distributes specific tasks to relevant state agencies to achieve this goal. For example, the Washington PSC must review the long-term financial commitments of electric companies to determine whether the agreed base

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<sup>241</sup> WASH. REV. CODE § 80.80.005(3) (2008).



load for electric generation complies with the performance standard for greenhouse gases emissions.<sup>242</sup>

Legislatures should take care to reduce goal conflicts. Conflicts may occur when the statute refers commissions to goals in separate, non-utility sections of the statute or code. Conflicts may also occur when a very long list reflects the common practice of “compromise,” which results when interest groups insert their goals with no legislative language to resolve the tensions. Avoiding conflicting goals is not always possible. Commissions necessarily manage goal conflicts when they balance multiple criteria, especially when balancing the interests of consumers against those of utilities. In this case, what can be clarified is the method of balancing as noted below.

*Clarify roles.* Commissions that create new roles to implement general goals increase the risk of litigation. In *Arkansas Gas Consumers*, the commission tried to protect low-income consumers during the winter based on a statutory goal to protect public health and general ratemaking authority.<sup>243</sup> A trade association successfully challenged the expanded role, in part because the legislature had specifically authorized the PSC to protect against disconnected electricity service but not gas.<sup>244</sup> Lacking explicit authority to reconnect gas service, the commission will need a legislative amendment to clarify its role in a parallel fashion across the sectors that it regulates.

A similar result came from Pennsylvania’s *Process Gas* case, in which the commission interpreted the statute as implicitly authorizing the disposal of surcharge funds through conservation programs.<sup>245</sup> In 2008, the Pennsylvania legislature clarified the three goals to guide the commission:<sup>246</sup> (1) efficient and environmentally sustainable electric service at the least cost; (2) energy efficiency and conservation; and (3) expansion of alternative energy. The amended statute now states the goals and roles in a detailed and comprehensive way,<sup>247</sup> and it provides

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<sup>242</sup> WASH. REV. CODE § 80.80.060 (2008).

<sup>243</sup> *Ark. Gas Consumers, Inc. v. Ark. Pub. Serv. Comm’n*, 118 S.W.3d 109 (2003).

<sup>244</sup> *Id.* at 120. *See* ARK. CODE ANN. § 23-2-304(a)(9)(2002) (Supp. 2009) (giving the PSC authority to “[a]ssure that retail customers should have access to safe, reliable, and affordable electricity, including protection against service disconnections in extreme weather or in cases of medical emergency or nonpayment for unrelated services”).

<sup>245</sup> *Process Gas Consumers Group v. Pa. Pub. Util. Comm’n*, 511 A.2d 1315, 1320–1321 (Pa. 1986) (referring to 66 PA. CONS. STAT. § 308(c) (2000)).

<sup>246</sup> Act No. 2008-129, H.B. No. 2200 (Oct. 15, 2008) (amending Title 66 (Public Utilities) of the PA. CONS. STAT.).

<sup>247</sup> These functions include: (1) Review and provide advice regarding applications, petitions, tariff filings and other matters filed with the commission; (2) Provide advice, review exceptions and prepare orders regarding matters to be adjudicated; (3) Conduct financial reviews, earnings analyses and other financial studies; (4) Conduct economic research, forecasting, energy conservation studies, cost studies and other economic studies related to public utilities; (5) Monitor industry markets to detect anticompetitive, discriminatory or other unlawful conduct; (6) Insure adequate maintenance, safety and reliability of utility networks; (7) Insure adequate service quality, efficiency and availability at just and reasonable rates; (8) Conduct financial, management, operational and special audits; (9) Provide consumer information, consumer protection and informal resolution of complaints; (10) Insure adequate safety, insurance, fitness and other requirements relevant to transportation utilities; (11) Take appropriate enforcement actions, including rate proceedings, service proceedings and allocation proceedings, necessary to insure compliance with this title, commission regulations and orders; (12) Perform

explicit statutory authority to set consumer rates that cover reasonable and prudent costs to fund these initiatives.

*Clarify criteria.* Most statutes provide a range of criteria commissions must consider. The clearest statutes are those that define decision-making criteria, rather than merely list them, or set a standard that describes the level of performance. Vermont's statute is an example of the former; it contains ten criteria that must each have an affirmative finding.<sup>248</sup> The environmental criterion is further broken down into more than 20 sub-criteria, some of which are very specifically defined.<sup>249</sup> See Appendix for the list of Vermont criteria.

The downside of so many criteria is that it can limit flexibility for regulators to act when new issues arise. As Vermont has done, legislatures can make some criteria mandatory and others discretionary. Legislatures can also provide flexibility by delegating rulemaking authority to expand or refine criteria.

An evaluative standard guides the commission in how to weigh the criteria. But how prescriptive can an evaluative standard be? The Iowa Code employs a reasonableness test, but neglects to define the meaning of "reasonable."<sup>250</sup> The lack of a clear definition provides an opportunity for regulators to initiate rulemaking to clarify the criteria.

By comparison, the Vermont statute provides more detailed guidance, such as the method to calculate the impact of growth resulting from the construction of a utility plant or development in a community. It asks the PSB to calculate current plus anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police, fire other services.<sup>251</sup> This calculation aids in determining the community's financial capacity to accommodate new construction, which must be satisfied before commission can grant approval.<sup>252</sup>

Oregon's standards-based approach provides instructions for the Energy Facilities Siting Council.<sup>253</sup> For example, an applicant must comply with the habitat mitigation goals and

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other functions the commission deems necessary for the proper work of the commission. 66 PA. CONS. STAT. § 308.2 (Supp. 2009).

<sup>248</sup> See VT. STAT. ANN. tit. 30, § 248(b) (Supp. 2007).

<sup>249</sup> VT. STAT. ANN. tit. 10, §§ 1424a(d) (Supp. 2008) & 6086 (1997). For example, in § 6086(a)(1)(A), "headwaters" is further broken down into even more technical elements: (i) headwaters of watersheds characterized by steep slopes and shallow soils; or (ii) drainage areas of 20 square miles or less; or (iii) above 1,500 feet elevation; or (iv) watersheds of public water supplies designated by the agency of natural resources; or (v) areas supplying significant amounts of recharge waters to aquifers.

<sup>250</sup> The Iowa Public Service Board must find that "[t]he construction and maintenance, and operation of the facility will be consistent with reasonable land use and environmental policies and consonant with reasonable utilization of air, land, and water resources, considering available technology and the economics of available alternatives." IOWA CODE § 476A.6(3) (2007).

<sup>251</sup> VT. STAT. ANN. § 6086(a)(9)(A) (1997).

<sup>252</sup> *Id.*

<sup>253</sup> See ENERGY FACILITY SITING COUNCIL, COMPARISON OF SITING REQUIREMENTS, <http://www.oregon.gov/ENERGY/SITING/compare.shtml> (last visited May 23, 2009) (comparing Oregon's

standards of the Oregon Department of Fish and Wildlife. In addition:

The Council must determine whether the applicant has done appropriate site-specific studies to characterize the fish and wildlife habitat at the site and nearby. If impacts cannot be avoided, the applicant must provide a habitat mitigation plan. The plan must provide for appropriate mitigation measures, depending on the habitat category affected by the proposed facility. The plan may require setting aside and improving other land for fish and wildlife habitat to make up for the habitat removed by the facility.<sup>254</sup>

The Appendix provides other examples of decision-making criteria.

Legislatures can also identify their preferred balancing test or priority among criteria as a further means of clarifying commission authority. In part derived from the case law (*see* Part II.E above), the approaches include:

- A “no net detriment” test, which appears to require the lowest burden of proof for utilities.<sup>255</sup>
- A “net benefit” test, which appears to require the highest burden of proof for utilities and a degree of overall accountability to criteria and goals.<sup>256</sup>
- A “public interest” test, which is more deferential to regulators (but also so open-ended that it may invite judicial intervention).<sup>257</sup>
- A checklist approach, which is consistent with the “public interest” test, but requires utilities to independently satisfy at least some of the criteria that aim to avoid adverse impacts.

## B. Step Two

### 1. *Problem: Multiple elements of authority*

Clarifying goals, roles, and criteria will not automatically increase the transparency or accountability of commission actions, particularly its factor-based decisions. The problem is multiplicity. A larger number of goals, roles, and criteria require a complex balancing exercise

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siting requirements to those of California, Montana, and Washington). *See also* OR. ADMIN. R. §§ 345-022-0000–345-024-0720 (2008).

<sup>254</sup> OR. ADMIN. R. § 345-022-0060 (2008).

<sup>255</sup> The Maryland court interpreted the following language to require a “no net harm” test for approving the acquisition of one utility by another: “If the Commission finds that the acquisition is consistent with the public interest, convenience, and necessity, including benefits and no harm to consumers, the Commission shall issue an order granting the application.” MD. CODE ANN., Pub. Util. Cos. § 6-105(g)(3)(i) (LexisNexis Supp. 2008); *Elec. Pub. Utils. Co. v. Pub. Serv. Comm’n*, 140 A. 840 (Md. 1928).

<sup>256</sup> *See* Or. Pub. Util. Comm’n, *In re* Legal Standard for the Approval of Mergers, 212 Pub. Util. Rep. 4th 449, 455–457 (2001); Or. Rev. Stat. § 757.511(3) (2007).

<sup>257</sup> *See* N.H. Pub. Utils. Comm’n, *In re* Pinetree Power, Inc., 871 A.2d 78 (N.H. 2005).

as commissions try to satisfy the legislatures' intent. Multiple goals can conflict. In cases where states have clarified indefinite elements of regulation by drafting lists of criteria, the increase in clarity comes at the expense of simplicity. The risk grows that utilities can challenge the result as arbitrary or subjective, and transparency and accountability suffer.

## **2. Solution: Explain**

Commissions can remedy the problems with multiple elements of authority by explaining the evaluative standard, the requirements of each factor, and how each factor was balanced against the other.

*Explain goals.* Multiple goals may conflict. In particular, state economic development and environmental protection are often at odds. *New Bedford* shows how one factor must give way to other considerations when these goals cannot be reconciled.<sup>258</sup> While legislatures could explain which criteria regulators should weigh most heavily, it is difficult to anticipate potential conflicts in advance. Therefore, it usually falls to the commissions to make their decisions more transparent by explaining how they resolve the conflicting goals.

*Explain criteria.* Requiring commissions to provide full explanations ensures that they do not merely restate conflicting evidence and then announce a decision. Full explanations detail the balancing process and the criteria considered or rejected. In *New Bedford*, the court found that the Energy Facility Siting Council failed to state that it was approving a dirtier fuel and plant on the basis that other criteria outweighed the environmental harm of the facility.<sup>259</sup> The court declared that the regulators must do more than merely identify conflicting interests;<sup>260</sup> they must explain how each factor was weighed against the others.

The New York statute requires the New York PSC to file an opinion with its full reasoning only when it denies an application.<sup>261</sup> Like many regulators, the commission provides detailed explanations of its reasoning for all decisions on certificates of environmental compatibility and public need.<sup>262</sup> A recent New York order<sup>263</sup> rejecting a new power plant explains in detail how the commission assessed whether the proposal minimized its aesthetic impact.<sup>264</sup> "Aesthetic" is indefinite and subjective. To avoid making an arbitrary decision, the

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<sup>258</sup> See *New Bedford v. Energy Facilities Siting Council*, 97 N.E.2d 1032 (Mass. 1992).

<sup>259</sup> *Id.* at 1037.

<sup>260</sup> *Id.*

<sup>261</sup> N.Y. PUB. SERV. LAW § 126(1) (McKinney 2000). The statute makes an opinion granting an application optional. N.Y. PUB. SERV. LAW § 127 (McKinney 2000).

<sup>262</sup> See, e.g., N.Y. Pub. Serv. Comm'n, Application by KeySpan Energy for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 250 Megawatt Combined Cycle Electric Generating Facility to be Developed in the Town of Huntington, Suffolk County, Case No. 01-F-0761, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (May 8, 2003).

<sup>263</sup> N.Y. Pub. Serv. Comm'n, Application of TransGas Energy Systems LLC for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 1,100 Megawatt Combined Cycle Cogeneration Facility in the Borough of Brooklyn, Case No. 01-F-1276, Opinion and Order Dismissing and Denying Application 41 (Mar. 21, 2008).

<sup>264</sup> N.Y. PUB. SERV. LAW § 168(2)(c)(i) (McKinney 2000) requires the Siting Board to find that the proposed facility

commission relied on the Department of Environmental Conservation's Visual Policy, which equates "significant adverse visual impact" with "aesthetic impact."<sup>265</sup> Using these definitions,<sup>266</sup> the commission explained that the proposed construction would not minimize its aesthetic impact.<sup>267</sup>

## C. Step Three

### 1. *Problem: Limited resources*

The burden of evaluating multiple goals, roles, and criteria raises the question of whether legislatures allocate sufficient resources to regulators. This problem has two aspects: (1) whether a commission has sufficient resources to exercise delegated authority, and (2) whether the commission is the best agency to carry out the delegated responsibilities. The problem primarily relates to commission roles. Being responsible for developing strategies related to climate change or security preparedness<sup>268</sup> can stress commission capacity, since its staff expertise can lag behind the pace of change due to budget pressures, civil service rules and insufficient opportunities for regulatory education in frontier issues. Overseeing programs such as alternative energy research may stretch existing capacity and expertise. The problem is also

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"minimizes adverse environmental impacts, considering the state of available technology, . . . the interest of the state with respect to aesthetics, preservation of historic sites, . . . and other pertinent considerations."

<sup>265</sup> *Id.*, at 37 nn.77 & 78.

<sup>266</sup> See N.Y. DEPT. OF ENV'T'L CONSERVATION, ASSESSING AND MITIGATING VISUAL IMPACTS (July 31, 2000). The policy states that aesthetic impact occurs when there is a detrimental effect on the perceived beauty of a place or structure. Mere visibility, even startling visibility of a project proposal, should not be a threshold for decision making. Instead a project, by virtue of its visibility, must clearly interfere with or reduce the public's enjoyment and/or appreciation of the appearance of an inventoried resource (e.g. cooling tower plume blocks a view from a State Park overlook). *Id.* at 9. Visual impact occurs when the mitigating effects of perspective do not reduce the visibility of an object to insignificant levels. Beauty plays no role in this concept. A visual impact may also be considered in the context of contrast. For instance, all other things being equal, a blue object seen against an orange background has greater visual impact than a blue object seen against the same colored blue background. Again, beauty plays no role in this concept. *Id.* at 10–11.

<sup>267</sup> *Id.* at 38–42. *But cf.* Vt. Pub. Serv. Comm'n, In re Petition of Tom Halnon, CPG NM-25 at 10–11 (Mar. 15, 2001) (describing the so-called "Quechee analysis" for evaluating aesthetic criteria). Vermont's Quechee analysis includes a two-step test to determine: (1) whether a project will have an adverse impact on aesthetics and the scenic and natural beauty; and (2) whether the adverse effect is "undue." A project will have an adverse effect if it is out of character with its surroundings. The effect is undue if *any* of the following questions can be answered affirmatively: (1) Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?; (2) Have the applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings?; (3) Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

<sup>268</sup> See, e.g., N.Y. Pub. Serv. Comm'n, Order Instituting Proceeding and Establishing Procedures for Preparation of Security Evaluations, Case 02-M-0953 (Aug. 2, 2002). Concerned over the adequacy of existing telephone and energy utility programs for protecting the security of their physical equipment and cyber systems, the NY Public Service Commission ordered public utilities to engage consultants or experts to evaluate their security arrangements. The commission developed guidelines for the consultants and would monitor their progress. Recognizing it lacked the proper expertise, the commission decided to hire a consultant to review the other consultants' work and report on the adequacy of utility security arrangements.

evident in the process of balancing multiple criteria. In doing so, commissions may lack the necessary technical expertise and resources necessary to complete the analysis. When commissions rely on the expertise of other state agencies for technical findings, the recommendations of the other agencies may conflict, leaving the commission to sort out which agency prevails.

## **2. Solution: Deploy resources efficiently**

Addressing the problem of limited resources requires legislators to rethink how they deploy agency resources and how the public utility commission relates to other agencies.

*Roles.* Some legislatures direct commissions to take on a new role but do not fully specify how the commission resources should be deployed to achieve the underlying goals. For example, the New Jersey Electric Discount and Energy Competition Act of 1999<sup>269</sup> gave the Board of Public Utilities the responsibility of determining the appropriate level of funding for new energy efficiency and renewable energy programs (in consultation with the Department of Environmental Protection).<sup>270</sup> The act remained silent as to program administration.<sup>271</sup> Looking for the most efficient oversight mechanism, the board initially decided that the utilities would manage their own programs for one year, during which time the board would retain a consultant to make recommendations on an independent state-wide administrator.<sup>272</sup> The state currently contracts two private non-utility companies to administer these programs, now collectively known as the Clean Energy Program.<sup>273</sup>

Similar to New Jersey, the debate between the New York PSC, the utilities, and other state agencies over how to structure the new Energy Efficiency Portfolio Standard (EEPS) offers insight into delegating roles for program administration.<sup>274</sup> The commission and stakeholders

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<sup>269</sup> 1999 N.J. Sess. Law Serv. ch. 23 (West).

<sup>270</sup> N.J. STAT. ANN. § 48:3-60(a)(3) (Supp. 2009); N.J. Bd. of Pub. Utils., *Re Electric Discount and Energy Competition Act of 1999 – Comprehensive Resource Analysis of Energy Programs*, 208 Pub. Util. Rep. 4th 221, 221 (2001) [hereinafter *CRA Order 1999*].

<sup>271</sup> N.J. STAT. ANN. § 48:3-60(a)(3) (Supp. 2009). Although the Board of Public Utilities acted upon an implicit instruction to identify a program administrator, several interested parties disputed that the legislation even addressed the issue of program administration. *See CRA Order 1999, supra* note 271, at 242–248.

<sup>272</sup> *Id.* at 277.

<sup>273</sup> *See* N.J. Bd. of Pub. Utils., *Re the 2009–2012 Clean Energy Program*, Docket No. EO07030203, 2008 WL 5423815 (Sept. 30, 2008); *see also* N.J. Bd. of Pub. Utils., *Re Comprehensive Energy Efficiency and Renewable Energy Resource Analysis*, Docket No. EX04040276, 2004 WL 3197932 (Dec. 23, 2008) (describing the establishment of the Clean Energy Council, an advisory body, and its recommendation to transition from program administration by the utilities to administration by the Office of Clean Energy under the Board of Public Utilities).

<sup>274</sup> *See* N.Y. Pub. Serv. Comm’n, *Order Establishing Energy Efficient Portfolio Standard and Approving Programs*, Case No. 07-M-0548 (June 23, 2008), *available at* [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/544F8DE178C8A15285257471005D41F6/\\$File/201\\_07m0548\\_final.pdf?OpenElement](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/544F8DE178C8A15285257471005D41F6/$File/201_07m0548_final.pdf?OpenElement) [hereinafter *Order Establishing EEPS*] (outlining the goals, structure, administration, and targets of the EEPS). *See also* N.Y. Pub. Serv. Comm’n, *Ruling Presenting Straw Proposal*, Case No. 07-M-0548 (Feb. 11, 2008), *available at*

faced a complex structure of interlocking state, local, and private authorities.<sup>275</sup> The commission decided to establish a hybrid model, beginning with the New York State Energy Research and Development Agency (NYSERDA), an experienced state program administrator.<sup>276</sup> Eschewing a wholly state-run program, the commission also offered a role to utilities as program administrators.<sup>277</sup> As the distributor of ratepayer funds, the commission maintains an oversight role in implementing the EEPS to ensure that the program is well-executed.<sup>278</sup> Through its regulatory role, the commission can keep utilities on track to meet EEPS targets.<sup>279</sup>

*Criteria.* When balancing multiple criteria, commissions often rely on the expertise of other state agencies, environmental expertise in particular. Agencies' authorities frequently overlap. For example, in 2002, the Virginia State Corporation Commission remanded an application for a new electric generating plant to the hearing examiner to study the cumulative environmental impact of the proposal with other pending plant applications.<sup>280</sup> The hearing examiner had recommended approval based in part on the analysis of the Department of Environmental Quality (DEQ), which had found that the plant by itself would not exceed standards for criteria pollutants.<sup>281</sup> Declaring that it was "required to make an independent decision," the commission remanded the matter because the DEQ's analysis had not considered the cumulative impact of the other pending generators, of which only the commission had knowledge.<sup>282</sup>

A dissenting opinion from one commissioner highlights the issues with overlapping agency authority.<sup>283</sup> "Our staff has not one environmental engineer, forester, hydrological engineer, water quality chemist, transportation engineer, or emergency management professional. ... Unlike rate cases ... we have no particular expertise ... on many of the issues..."<sup>284</sup> One energy company contended that rejecting the DEQ's opinion creates an uncertain regulatory landscape with "additional layers of complex, questionable, and inconsistent environmental analyses by two institutions of the state government."<sup>285</sup>

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<http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId={404B7FE5-F269-4EEA-9F9D-4E27C430093A}> [hereinafter *Straw Proposal*] (presenting the PSC's proposal for program administration).

<sup>275</sup> See generally *Straw Proposal*, *supra* note 275.

<sup>276</sup> *Order Establishing EEPS*, *supra* note 275, at 49.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 50.

<sup>279</sup> *Id.* at 53–54.

<sup>280</sup> Va. State Corp. Comm'n, *In re Tenaska Virginia Partners, L.P.*, 215 Pub. Util. Rep. 4th 119, 134 (2002).

<sup>281</sup> *Id.* at 131.

<sup>282</sup> *Id.*

<sup>283</sup> See *id.* at 138, 145.

<sup>284</sup> *Id.* at 140.

<sup>285</sup> *Id.* at 126.

In response to the commission's decision, the Virginia legislature amended its statute to clarify that commission should defer to other state agencies:<sup>286</sup>

[T]o avoid duplication of governmental activities, any valid permit or approval required for an electric generating plant and associated facilities issued or granted by a federal, state or local governmental entity charged by law with responsibility for issuing permits or approvals regulating environmental impact and mitigation of adverse environmental impact or for other specific public interest issues such as building codes, transportation plans, and public safety ... shall be deemed to satisfy the requirements of this section . . . and the Commission shall impose no additional conditions with respect to such matters.<sup>287</sup>

### 3. *Policy options*

To solve the problem of resource allocation, legislatures can consider a variety options for distributing authority among its different agencies. In general terms, these include:

*Return to tradition.* By scaling back the number of regulatory criteria and non-regulatory roles, commissions could focus on their traditional role of setting rates and standards. This option need not abandon the state's expansive public policy goals. Rather, commissions would shift environmental and other roles to other agencies. Several states (*e.g.*, Oregon,<sup>288</sup> Washington<sup>289</sup>) have done this by creating independent energy facility siting councils. Program administration and energy research can also be assigned to independent agencies dedicated to energy issues, such as the New York State Energy Research and Development Agency.<sup>290</sup>

*Consult with other agencies.* Commissions can maintain their expanded authority, but conclude cooperative arrangements with other agencies. Variations on this theme would be for a commission to: (1) accept the conclusions of other state agencies (the Virginia model); (2) act as a "first among equals"; or (3) take a "lead agency" role and assesses the impact of proposals within the scope of its own expertise.<sup>291</sup> Under the second and third alternatives, decisions of the

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<sup>286</sup> *Tenaska* was decided on January 16, 2002, while the amendments were approved about two months later on Apr. 4, 2002.

<sup>287</sup> The legislation precludes the Commission from adding conditions only with regard (i) to matters that were within the authority of the other agency to consider and (ii) that were considered by such other agency. The ability of the Commission to impose environmental mitigation conditions has been limited, but not extinguished. Act of Apr. 4, 2002, S.B. No. 554, sec. 1, 2002 Va. Laws ch. 443 (codified as amended at VA. STAT. ANN. § 56-46.1(A) (2009)). The legislature directed the commission to conclude a memorandum of agreement with the Department of Environmental Quality to coordinate their reviews. VA. STAT. ANN. § 56-46.1(G) (2009)).

<sup>288</sup> See OR. REV. STAT. §§ 469.300–.619 (2007).

<sup>289</sup> See WASH. REV. CODE §§ 80.50.010–.904 (2008). See also Margaret H. Hornbacker & William H. Rodgers, Jr., *The Evolution of the Energy Facility Site Evaluation Council*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 253 (2001) (describing the history behind the formation of the Washington State Energy Facility Site Evaluation Council).

<sup>290</sup> See N.Y. PUB. AUTH. LAW §§ 1850–1883 (McKinney 1995 & Supp. 2009).

<sup>291</sup> For an example of the rules establishing a lead agency in the case of an environmental impact review, see N.Y. COMP. CODES R & REGS., tit. 6, § 617.6 (1995).



state agencies are sequenced. The commission retains authority to apply its own balancing tests and decide the weight to give reports from expert agencies when making its own decisions.<sup>292</sup>

*Strengthen internal capacity.* In many states (e.g., California,<sup>293</sup> Wisconsin<sup>294</sup>), commissions are at the forefront of the states' efforts to mitigate climate change and promote alternative energy. Statutes give these commissions important roles as planners in setting new standards and overseeing the efforts of utilities to meet those targets. The need for greater resources can be addressed with right-sized appropriations or a combination of dedicated taxes, user fees, or transaction costs to support a strong staff and a network of independent consultants to meet commission needs.<sup>295</sup>

#### IV. CONCLUSION

Regulation in the public interest has expanded beyond curbing the monopoly power of utilities. Because the public interest is indefinite and constantly changing, utilities are prone to litigate its boundaries. Courts rarely decide these cases by defining the public interest. Rather, they analyze the elements of delegated authority – the goals, roles, and criteria for making regulatory decisions.

When legislatures are silent on any of these elements of delegation, they draw regulators into a political role, and that increases legal risk. Conversely, when legislatures and commissions communicate about goals and gaps in authority, they can complement each other's strength. Legislatures are best at deciding major trade-offs; commissions are best at quantifying trade-offs and setting technical standards.<sup>296</sup>

Legislatures and commissions can strengthen accountability and reduce litigation if they follow a three-step path. First, clarify and align the goals, roles and criteria that regulators need to make decisions. Second, explain trade-offs and provide the rational tests that regulators need to balance multiple and sometimes conflicting goals and criteria. Third, deploy agency roles to strengthen expertise and cope with limited resources.

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<sup>292</sup> Policymakers pursuing this option should look to the practices of states employing the state environmental policy act (SEPA) process to find the best way of coordinating the overlapping authority of the public utility commission with the state's environmental agency. For a discussion on administrative duplication involving SEPA, see Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. LAW 949 (2007).

<sup>293</sup> See Michael R. Peevey, President, Cal. Pub. Utils. Comm'n, Update to the Senate Energy, Utilities and Communications Committee (May 6, 2008) (PowerPoint presentation), available at <http://www.cpuc.ca.gov/PUC/aboutus/Commissioners/01Peevey/speeches/>.

<sup>294</sup> See WIS. PUB. SERV. COMM'N, COMMISSION INITIATIVES, <http://psc.wi.gov/aboutus/initiatives-index.htm> (last visited Apr. 15, 2009).

<sup>295</sup> The unsuccessful attempt by the California Public Utilities Commission to fund the California Institute for Climate Solutions through a surcharge, *supra* note 154, was aimed at ensuring the commission remained at the forefront of research and development of alternative energy solutions.

<sup>296</sup> Scott Hempling, *Legislatures and Commissions: How Well Do They Work Together?*, available at [http://nrri2.org/index.php?option=com\\_content&task=view&id=21&Itemid=38](http://nrri2.org/index.php?option=com_content&task=view&id=21&Itemid=38) (last visited July 6, 2009).

The three-step path suggests a logical sequence; but actually, the process can start at any step and move in any direction. For example, regulators could take advantage of any rulemaking to clarify the criteria they use to make a decision (fulfill a particular role). They could also develop recommendations for the legislature to clarify language to delegate that role. Going further, regulators could use the rulemaking process to evaluate the goals supported by their decision, specifically: (1) whether the statute expresses those goals, (2) whether any of the goals conflict with each other, and (3) how the commission prefers to resolve the conflict. Regulators can use these insights to recommend language for code revision that clarifies their authority.

Regulators can also use this approach to write stronger decisions.<sup>297</sup> For example, regulators could (as many already do) write an order that grants a certificate of need for a new power plant by explicitly aligning the decision-making criteria with relevant goals and roles. Then, to the extent that multiple goals and criteria conflict with each other, the regulators can explain the tradeoffs and what standard or test they use to resolve the conflict.

Regulators can use the three-step path to clarify their decisions and codify the lessons of experience through rulemaking or legislative proposals. Regulators can approach legislators in common cause to strengthen regulatory accountability and reduce the risk of litigation.

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<sup>297</sup> See Hempling, *The Effective Regulator*, *supra* note 20.

## APPENDIX

### EXAMPLES OF DECISION-MAKING CRITERIA

Legislators and commissions have developed often lengthy lists of detailed decision-making criteria. These examples show the variety that can be found in statutes, administrative codes, and commission orders.

*Some states elaborate lengthy lists of detailed decision-making criteria in their statutes. These lists of factors as largely related to expansive socio-economic goals, such as protecting the environment and minimizing quality-of-life impacts.*

*Not all lists of criteria concern siting decisions. Some states also elaborate lists of criteria for other types of decisions, such as for acquisitions of one utility company by another.*

#### VERMONT

Statute	
(Vt. STAT. ANN. tit. 30 § 248(b); tit. 10, §§ 1424a(d), 6086)	
Conditions and criteria for issuing a permit (as as reordered and consolidated from the statute by the Vermont Public Service Board in its orders):	
1. Orderly development of the region	
2. Need for present and future demand for service	
3. System stability and reliability	
4. Economic benefit to the state and its residents	
5. Aesthetics, historic sites, air and water purity, the natural environment and public health and safety	
Sub-criteria:	
- Outstanding resource waters	Vt. STAT. ANN. tit. 10 § 1424a(d)
- Air and water pollution	
- Headwaters	
- Waste disposal	
- Water conservation	
- Floodways	
- Streams	
- Shorelines	
- Wetlands	
- Sufficiency of water and burden on existing water supply	
- Soil erosion	Vt. STAT. ANN. tit. 10 § 6086
- Transportation systems	
- Educational services	
- Municipal services	
- Aesthetics	
- Historic sites	
- Rare and irreplaceable natural areas	
- Wildlife, including necessary wildlife habitat and endangered species	
- Development affecting public investments	
6. Least-cost integrated resource plan	
7. Compliance with electric energy plan	
8. Outstanding resource waters	
9. Waste-to-energy facility	
10. Existing or planned transmission facilities	

#### MARYLAND

Statute
(MD. CODE ANN., PUB. UTIL. COS. § 6-105(g)(2) (2008))
The Commission shall consider the following factors in considering an acquisition under this section:
(i) Potential impact on rates and charges paid by customers and on the services and conditions of operation of the public service company
(ii) Potential impact on continuing investment needs for the maintenance of utility services, plant, and related infrastructure
(iii) Proposed capital structure that will result from the acquisition, including allocation of earnings from the public service company
(iv) Potential effects on employment by the public service company
(v) Projected allocation of any savings that are expected to the public service company between stockholders and rate payers
(vi) Issues of reliability, quality of service, and quality of customer service
(vii) Potential impact on community investment
(viii) Affiliate and cross-subsidization issues
(ix) Use or pledge of utility assets for the benefit of an affiliate
(x) Jurisdictional and choice-of-law issues
(xi) Whether it is necessary to revise the Commission's ring fencing and code of conduct regulations in light of the acquisition
(xii) Any other issues the Commission considers relevant to the assessment of acquisition in relation to the public interest, convenience, and necessity

*Some statutory provisions are less detailed than in other states and use only traditional criteria.*

#### ALASKA

Statute
(ALASKA STAT. § 42.05.241 (2008))
A certificate may not be issued unless the commission finds that the applicant is fit, willing, and able to provide the utility services applied for and that the services are required for the convenience and necessity of the public. . . .

*Some states elaborate in great detail the decision-making factors in their administrative code.*

## NORTH DAKOTA

### Statute

(N.D. CENT. CODE § 49-22-09 (2008))

The commission shall be guided by, but is not limited to, the following considerations, where applicable, to aid the evaluation and designation of sites, corridors, and routes:

1. Available research and investigations relating to the effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment.
2. The effects of new energy conversion and transmission technologies and systems designed to minimize adverse environmental effects.
3. The potential for beneficial uses of waste energy from a proposed energy conversion facility.
4. Adverse direct and indirect environmental effects which cannot be avoided should the proposed site or route be designated.
5. Alternatives to the proposed site, corridor, or route which are developed during the hearing process and which minimize adverse effects.
6. Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated.
7. The direct and indirect economic impacts of the proposed facility.
8. Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.
9. The effect of the proposed site or route on existing scenic areas, historic sites and structures, and paleontological or archaeological sites.
10. The effect of the proposed site or route on areas which are unique because of biological wealth or because they are habitats for rare and endangered species.
11. Problems raised by federal agencies, other state agencies, and local entities.

### Administrative Code

(N.D. ADMIN. CODE § 69-06-08-019 (2008))


1. **Exclusion areas:**
  - a. Designated . . . national parks, . . . wildlife areas . . . .
  - b. Designated . . . state parks, . . . nature preserves.
  - c. County parks and recreational areas . . . .
  - d. Prime farmland and unique farmland . . . .
  - e. Irrigated land.
  - f. Areas critical to . . . threatened or endangered animal or plant species.
  - g. Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.
2. **Avoidance areas:**
  - a. Historical resources . . . .
  - b. Areas within the city limits of a city or the boundaries of a military installation.
  - c. Areas within known floodplains as defined by the geographical boundaries of the hundred-year flood.
  - d. Areas that are geologically unstable.
  - e. Woodlands and wetlands.
  - f. Areas of recreational significance . . . .
3. **Selection criteria:**
  - a. The impact upon agriculture:
    - (1) Agricultural production.
    - (2) Family farms and ranches.
    - (3) Land . . . economically suitable for irrigation.
    - (4) Surface drainage patterns and ground water flow patterns.
    - (5) The agricultural quality of the cropland.
  - b. The impact upon the availability and adequacy of:
    - (1) Law enforcement.
    - (2) School systems and education programs.
    - (3) Governmental services and facilities.
    - (4) General and mental health care facilities.
    - (5) Recreational programs and facilities.
    - (6) Transportation facilities and networks.
    - (7) Retail service facilities.
    - (8) Utility services.
  - c. The impact upon:
    - (1) Local institutions
    - (2) Noise-sensitive land uses.
    - (3) Rural residences and businesses.
    - (4) Aquifers.
    - (5) Human health and safety.
    - (6) Animal health and safety.
    - (7) Plant life.
    - (8) Temporary and permanent housing.
    - (9) Temporary and permanent skilled and unskilled labor.
  - d. The cumulative effects of the location of the facility in relation to existing and planned facilities and other industrial development.
4. **Policy criteria:**
  - a. Recycling of the conversion byproducts and effluents.
  - b. Energy conservation through location, process, and design.
  - c. Training and utilization of available labor in this state for the general and specialized skills required.
  - d. Use of a primary energy source or raw material located within the state.
  - e. Nonrelocation of residents.
  - f. The dedication of an area adjacent to the facility to land uses such as recreation, agriculture, or wildlife management.
  - g. Economies of construction and operation.
  - h. Secondary uses of appropriate associated facilities for recreation and the enhancement of wildlife.
  - i. Use of citizen coordinating committees.
  - j. A commitment of a portion of the energy produced for use in this state.
  - k. Labor relations.
  - l. The coordination of facilities
  - m. Monitoring of impacts

## LOUISIANA

General Order (Mar. 18, 1994)	
Commission Approval Required of Sales, Leases, Mergers Consolidations, Stock transfers, and All Other Changes of Ownership or control:	majority of all affected public utility or common carrier shareholders.
1. Whether the transfer is in the public interest.	10. Whether the transfer will be beneficial on an overall basis to State and local economies and to the communities in the area served by the public utility or common carrier.
2. Whether the purchaser is ready, willing and able to continue providing safe, reliable and adequate service to the utility's ratepayers.	11. Whether the transfer will preserve the jurisdiction of the Commission and the ability of the Commission to effectively regulate and audit public utility's or common carrier's operations in the State.
3. Whether the transfer will maintain or improve the financial condition of the resulting public utility or common carrier ratepayers.	12. Whether conditions are necessary to prevent adverse consequences which may result from the transfer.
4. Whether the proposed transfer will maintain or improve the quality of service to public utility or common carrier ratepayers.	13. The history of compliance or noncompliance of the proposed acquiring entity or principals or affiliates have had with regulatory authorities in this State or other jurisdictions.
5. Whether the transfer will provide net benefits to ratepayers in both the short term and the long term and provide a rate making method that will ensure, to the fullest extent possible, that ratepayers will receive the forecasted short and long term benefit.	14. Whether the acquiring entity, persons, or corporations have the financial ability to operate the public utility or common carrier system and maintain or upgrade the quality of the physical system.
6. Whether the transfer will adversely affect competition.	15. Whether any repairs and/or improvements are required . . .
7. Whether the transfer will maintain or improve the quality of management . . .	16. The ability of the acquiring entity to obtain all necessary health, safety and other permits.
8. Whether the transfer will be fair and reasonable to the affected public utility or common carrier employees.	17. The manner of financing the transfer and any impact that may have on encumbering the assets of the entity and the potential impact on rates.
9. Whether the transfer would be fair and reasonable to the	18. Whether there are any conditions which should be attached . . .

*The administrative codes of other states are sometimes not much more than restatements of the decision-making factors already in the statutes.*

## IOWA

Statute (Iowa Code § 476A.6 (2008))	
A certificate shall be issued to the applicant if the board finds all of the following:	2. The applicant is willing to construct, maintain, and operate the facility pursuant to the provisions of the certificate and this subchapter . . .
1. The services and operations . . . are consistent as expressed in section 476.53 and the economic development policy of the state . . . and will not be detrimental to the provision of adequate and reliable electric service.	3. The construction, maintenance, and operation of the facility will be consistent with reasonable land use and environmental policies and consonant with reasonable utilization of air, land, and water resources, considering available technology and the economics of available alternative
	
Administrative Code (Iowa Admin. Code r. 199-24.10(2) (2008))	
In rendering its certification decision, the board shall consider the following criteria:	(1) Whether all adverse impacts attendant the construction, maintenance and operation of the facility have been reduced to a reasonably acceptable level;
a. Whether the service and operations . . . are consistent with the legislative intent as expressed in Iowa Code section 476.53 and the economic development policy of the state . . . and will not be detrimental to the provision of adequate and reliable electric service . . .	(2) Whether the proposed site represents a reasonable choice among available alternatives;
b. Whether the construction, maintenance, and operation of the proposed facility will be consistent with reasonable land use and environmental policies, and consonant with reasonable utilization of air, land, and water resources, considering available technology and the economics of available alternatives.	(3) Whether the proposed facility complies with applicable . . . zoning requirements and, if not, whether the location . . . is reasonably justified from an economic, technical, and social standpoint.
Such determination shall include:	c. Whether the applicant is willing to construct, maintain, and operate the facility pursuant to the provisions of the certificate and the Act.
	d. Whether the proposed facility meets the permit and licensing requirements of regulatory agencies.
	e. Requirement for good engineering practice.