

**AN ANALYSIS OF SELECTED ISSUES REGARDING
THE REGULATION OF PUBLIC UTILITIES IN MICHIGAN**

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CITIZENS RESEARCH COUNCIL OF MICHIGAN

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ROBERT L QUELLER, Vice President - Executive Director

August 27, 1991

Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, Michigan 48909

Dear Commissioners

Pursuant to your requests it is our pleasure to submit to the commission this report on the Michigan public service commission.

The Research Council was requested to review the major issues in public utility regulation in Michigan: the role, legal status, and authority of the public service commission; elements of the management structure of the commission; and some of the major problems facing the commission. The report includes suggestions to strengthen the policies, programs, and structure of the commission. The report does not attempt to evaluate the substantive decisions of the commission in rate cases or other proceedings. The emphasis of this effort was that of a broad public policy perspective on public utility regulation, rather than that of a detailed study of commission decisions and administrative operations.

During the course of this study, Research Council staff requested and received assistance from numerous individuals and organizations including members of the public service commission and staff. We thank them all for their time and cooperation in providing assistance, information, and suggestions.

It has been our pleasure to be of service, and we hope that you and your colleagues find the report both timely and useful. We will be pleased to provide such further assistance as may be requested.

Sincerely

/S/ Robert L. Queller

Vice President-Executive Director

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Summary of Findings

- * The current statutory framework of utility regulation in Michigan, which originates from the early days of the twentieth century, has been created by the Legislature superimposing statute upon statute until neither citizens, nor the courts, can comprehend its meaning without substantial difficulty. The Michigan Supreme Court has characterized the task of analyzing this statutory framework as “a journey into the heart of darkness.” It is suggested that the various statutes be organized into a single codification that clearly delineates the commission’s authority, particularly with respect to utility holding companies, subsidiaries, and technological developments.
- * The commission occasionally takes considerable time to issue final orders in rate cases. In 1972, the state Legislature adopted a law requiring the commission to decide rate cases within nine months. The state Court of Appeals subsequently held, however, that the law was a goal rather than a requirement. With respect to 228 rate-case applications filed during the 1980s, 188 applications (82.5 percent) were decided in nine months or less, while forty other applications (17.5 percent) took longer than nine months.
- * The 1972 law also directed the commission to adopt rules for the filing, investigation and hearing of petitions or applications to increase or decrease utility rates and charges as necessary or appropriate to enable the commission to reach a final decision within nine months. The commission has yet to adopt any such rules.
- * The present statutory time limit of nine months may be of insufficient length to permit the commission to adequately consider and decide certain major rate cases. Since such rate cases often involve substantial sums of money and may have long-term economic consequences, neither the public interest nor that of the parties to such rate cases are well served by hastily-reached decisions. If the present time limit is unrealistically short, then an appropriate remedy lies in amending the act, rather than in its continued non-observance.
- * The state Attorney General, through separate divisions, performs the dual role of providing legal counsel to the public service commission and challenging most commission decisions in courts. There is general agreement that such a dual role would be inappropriate in the private practice of law, due to the potential conflict of interest inherent in representing both sides in the same dispute. It is suggested that the present arrangement be reviewed from a public policy standpoint to determine whether the commission should be served by legal counsel appointed by, and responsible to, the commission as is the case in a number of other states.
- * Utility regulation involves a number of academic backgrounds such as engineering, finance, law and statistics. Ideally, all of this knowledge should be represented on the commission. At least during the last decade, education in the law has been the principal educational requirement for appointment to the commission. Because a mix of disciplines may better serve ratemaking decisions, it behooves the governor to consider appointing individuals with a more diverse professional background.

Summary of Findings (continued)

- * The technical staff of the commission provides not only technical information on regulatory matters, but also participates in rate-case proceedings and takes positions on issues presented to the commission. Because commissioners and staff may have daily contact, there is a perception among some utilities and intervenors that they are not playing on a “level field” because the present arrangement may permit the staff to offer information to commissioners without other rate-case participants being present. In order to deal with these issues and to reduce the time devoted to management activities by the commission, consideration should be given to separating the technical staff from the commission.

- * The commission is an operating unit within the Michigan Department of Commerce. It is not possible to reach a rational conclusion, however, about whether the amount of commission-restricted revenues appropriated to the core Department of Commerce is an appropriate amount for the staff services provided. This is true because there is no rational system in place to determine these allocations. It is suggested that the Department of Commerce develop an allocation system that can be used throughout the department.

AN ANALYSIS OF SELECTED ISSUES REGARDING THE REGULATION OF PUBLIC UTILITIES IN MICHIGAN

Introduction

The governmental regulation of private enterprise that provides public utility service has long been accepted, even within the private sector itself, to a greater degree than would likely be tolerated regarding private enterprise in general. The term “public utility” generally suggests a private concern, the chief business of which is to supply a source of energy — electricity or natural gas, for example — to the public. In its more precise sense, however, the term is broadly descriptive of any business that is peculiarly affected with a public interest, or that provides a service upon which the public has become peculiarly dependent. Thus, for example, it was held by courts at the national level during the latter portion of the nineteenth century that the storage and weighing of grain was a business “affected with a public interest” and, therefore, properly made subject to regulation as a public utility. A like conclusion was reached with respect to railroads.

The view that utilities are businesses affected with a public interest, which is to say that use of their property has in effect been granted to the public, affords but one justification for subjecting them to more stringent regulation than is generally considered acceptable with other businesses. A second justification may be found in the view that utilities exhibit the characteristics of natural monopolies. Traditionally, it has been thought that greater economies of scale with respect to utility service might be achieved by granting a given utility the exclusive right of operation in a geographic area. Governmental regulation of the sort here described has been viewed as a necessary, though imperfect substitute for the economic controls that would otherwise be supplied through an appropriate competition to assure fair prices and adequate service to the public.

The regulatory framework in Michigan, developed as it was in the early portion of the twentieth century, was premised upon the traditional views above noted. It should invite no controversy to observe that much of the relevant landscape has changed since the basic contours of the state’s regulatory framework were established. As but one example, the consequences of legal developments and technological change have introduced into the telecommunications field a measure of competition doubtless not contemplated when the state’s regulatory system was established.

Similarly, large industrial enterprises often possess the technological means by which to generate energy sufficient to meet their own needs, or to transport energy such as natural gas directly from its sources in either instance bypassing, and to some extent competing with, utilities. But since these enterprises are not typically looked upon as businesses affected with a public interest, they may in some measure avoid the regulation to which utilities are subject. Whether these, and other, changes have been of sufficient magnitude to suggest changes in the existing regulatory framework is a matter of appropriate inquiry towards which this report is directed.

Part I. Overview of the Public Service Commission

The Michigan public service commission regulates most public utilities in the state including electric investor-owned and rural electric cooperatives; natural gas utilities; telecommunications utilities; and the intrastate motor carrier industry. The commission is regarded as one of the most powerful and important agencies in state governments affecting the lives of eight million ratepayers and is responsible for regulating over \$16 billion in utility assets and \$12 billion in gross revenues. The discussion below is designed to provide an overview of the commission including its mission and goals; its regulatory responsibilities; and a comparison of commission and commission staff characteristics in Michigan to those in other selected states.

A. Mission and Goals of the Public Service Commission

The mission of the commission as stated in its 1989 annual report is to formulate and administer policies and regulations necessary to ensure that state energy and regulated communication and transportation services are provided in an efficient, reliable, safe and environmentally acceptable manner sufficient to meet the diverse needs of Michigan citizens. The mission also includes formulating the state's energy policy by engaging in long-range energy planning activities. The goals of the commission, as enumerated in the 1989 annual reports include the following:

- Encourage the efficient production, distributions and utilization of the state's energy and regulated communication and transportation services.
- Ensure a supply of regulated services of dependable quality at reasonable rates adequate to meet public needs and maintain a healthy state economy.
- Ensure that the regulated services are provided in a safe, efficient, environmentally sound and socially acceptable manner.
- Ensure that responsive action is directed toward recognized concerns of Michigan ratepayers.
- Minimize hardship and economic disruption in times of service reduction or energy curtailment.
- Provide a fair and efficient ratemaking process that accurately identifies revenues needed to provide regulated services, balances cost to consumers, assures adequate supply, reliability and safety, and protects the environment.
- Provide for reduced regulation and increased reliance upon market forces where competition is sufficient to protect the public interest.
- Provide regulatory oversight in the most prudent and expedient manner, while adhering to federal and state constitutional requirements.

The public service commission has quasi-legislative and quasi-judicial powers and duties. In its quasi-legislative capacity, the public service commission sets rates and makes rules governing utility operations. In a quasi-judicial manner, the commission hears and decides complaints, and issues written orders. Commission orders may be appealed to the Michigan Court of Appeals.

B. Responsibilities of the Public Service Commission

The commission establishes rates for the state’s investor-owned public utilities and rural electric cooperatives. The public service commission considers rate and service applications and issues orders that stand as law unless overturned or amended by judicial review. It is the role of commissioners to act as the decisionmakers in proceedings brought before them by regulated firms or other interested parties. The commission also is statutorily responsible for:

- Approving construction, safety and operation of gas and oil pipelines, gas storage fields and gas production wells.
- Establishing and enforcing rules on the equitable handling of customer grievances.
- Approving issuance of securities and other financial transactions by regulated utilities.
- Conducting hearings and investigations of rates and operations of regulated utilities.
- Long-range energy forecasting and planning and development of programs to both increase and conserve energy resources.

The commission regulates ten investor-owned electric utilities, thirteen rural electric cooperatives, eight natural gas utilities, thirty-eight local telephone companies, and over 4,500 common and contract motor carriers. The commission is not authorized to regulate municipally-owned utilities. In 1989, the commission regulated Michigan utilities with total operating revenues of over \$12 billion.

Table 1

Total Operating Revenue (In Millions) of General Industry Regulated by the Michigan Public Service Commission, 1989

Industry	Operating Revenue
Electric	\$5,357.7
Rural Electric Co-ops	\$141.9
Gas	\$2,703.9
Telephone	\$2,982.2
Water	\$1.5
Motor Carrier	\$938.5
Total	\$12,125.7

Source: Michigan Public Service Commission.

1. Electric Companies

Investor-owned utilities provide electric service to the vast majority of Michigan electric customers. In 1989, more than 3.5 million customers (88.6 percent) were served by investor-owned firms and just over 200,000 by electric cooperatives. (See **Table 2.**)

Table 2
Regulated Electric Companies, 1989

Company Name	Customers				Total
	Res.	Bus.	Ind.	Other	
Investor-owned:					
Alpena Power Co.	12,411	2,600	5	186	15,202
Consumers Power Co.	1,281,269	149,170	8,856	1,568	1,440,863
Detroit Edison Co.	1,728,348	160,778	2,638	1,921	1,893,685
Edison Sault Electric Co.	16,335	2,806	4	43	19,188
Indiana Michigan Power Co.	68,735	7,938	750	325	77,748
Michigan Power Co.	27,112	3,770	300	140	31,322
Northern States Power Co.					
Wisconsin	8,815	1,106	13	54	9,988
Upper Peninsula Power Co.	53,836	6,118	11	161	60,126
Wisconsin Electric Power	19,921	2,427	9	55	22,412
Wisconsin		Public			Service
Corp.	7,326	838	3	23	8,190
Subtotal Investor-owned	3,224,108	337,551	12,589	4,476	3,578,724
Cooperatives:					
Alger Delta Coop. Electric					
Assoc.	7,074	350	0	19	7,444
Cherryland Electric Coop.	18,303	1,327	0	141	19,771
Cloverland Electric Coop.	12,587	622	4	198	13,411
Fruitbelt Electric Coop.	21,108	583	0	0	21,690
O&A Electric Coop.	22,587	912	0	145	23,644
Oceana Electric Coop.	8,638	266	10	37	8,951
Ontonagon County Rural					
Electrification Assoc.	3,326	99	0	59	3,484
Presque Isle Electric Coop.	23,538	943	2	194	24,687
Southeastern Michigan Rural					
Electric Coop.	3,777	132	0	24	3,932
Thumb Electric Coop.	9,313	216	0	0	9,529
Top O'Michigan Electric Co.	37,155	559	8	101	37,823
Tri-County Electric Coop.	17,014	633	2	110	17,759
Western Michigan Electric					
Coop.	9,135	225	0	59	9,419
Subtotal Cooperatives	193,565	6,867	26	1,086	201,544
Subtotal Municipals	217,895	32,305	1,172	5,840	257,212
Total Michigan	3,635,568	376,723	13,787	11,402	4,037,480

Source: 1989 Annual Report, Michigan Public Service Commission.

Among investor-owned electric utilities, Detroit Edison Company customers accounted for half (50.1 percent) of total customers, and 50.6 percent of total residential customers. Consumers Power Company is the second largest investor-owned electric utility, serving 37.5 percent of the total state residential customers. The combined customers of the two largest electric utilities accounted for 88.1 percent of the total residential customers in Michigan.

2. Natural Gas Companies

The public service commission reported over 2.7 million natural gas customers in 1989, the vast majority of whom (2.5 million or 92.6 percent) were residential customers. (See **Table 3.**)

Table 3
Regulated Natural Gas Companies, 1989

Company Name	Customers				Total
	Res.	Bus.	Ind.	Other	
Companies Regulated by Commission:					
Consumers Power Co.	1,227,431	87,345	8,029	890	1,323,695
Michigan Consolidated Gas Co.					
Michigan Gas Co.	1,003,511	73,445	1,099	627	1,078,682
Michigan Gas Utilities	71,218	8,768	757	30	80,773
Northern States Power Co.-	107,856	10,025	470	39	118,390
Wisconsin	3,737	468	17	0	4,222
Peninsular Gas Co.	2,945	287	0	1	3,233
Southeastern Michigan Gas Co.	69,571	6,972	70	27	76,640
Wisconsin Public Service Corp.	4,440	359	59	1	4,859
Subtotal	2,490,709	187,669	101,501	1,615	2,690,494
Companies Regulated by Franchise Provisions:					
Aurora Gas CO.	390	60	0	0	450
Battle Creek Gas Co.	30,346	2,148	46	20	32,560
Citizens Gas Fuel Co.	10,112	921	33	1	11,067
Subtotal	40,848	3,129	79	21	44,077
Total Michigan	2,531,557	190,798	10,580	1,636	2,734,571

Source: 1989 Annual Report, Michigan Public Service Commission.

Consumers Power Company was the largest natural gas utility in 1989 serving over 1.3 million customers, and Michigan Consolidated Gas Company was second largest serving just over one million customers. In 1989, the two largest natural gas utilities combined served over 2.4 million, or almost 90 percent, of the 2.7 million statewide natural gas customers.

3. Telephone Companies

In 1989, there were thirty-eight regulated local exchange companies serving over 3.4 million residential and 1.2 million business customers in Michigan. (See **Table 4.**)

Table 4
MPSC Regulated Telephone Companies, 1989

Company Name	Customers		Total
	Residential	Business	
Michigan Bell Telephone Co.	2,830,704	1,148,237	3,978,941
GTE North, Inc.	431,812	96,598	528,410
Century Telephone of Mi.	37,281	6,972	44,253
Century-Telephone-Midwest	19,584	3,371	22,955
Alltel Michigan	34,496	6,520	41,016
C.C.&S. Telco.	15,941	1,646	17,587
Wolverine Telephone Co.	6,618	688	7,306
Barry County Telephone Co.	5,217	426	5,643
Ontonagan County Telephone Co.	3,060	704	3,764
Shiawassee Telephone Co.	3,712	426	4,138
Hiawatha Telephone Co.	3,486	706	4,192
Allendale Telephone Co.	3,424	566	3,990
Ace Telephone Co. of Michigan	3,087	497	3,584
Communications Corp.	3,015	401	3,416
Baraga Telephone Co.	5,217	426	5,643
Upper Peninsula Telephone Co.	2,712	389	3,101
Pigeon Telephone Co.	2,077	432	2,509
Chatham Telephone Co.	1,935	228	2,163
Deerfield Farmers Telephone Co.	1,925	239	2,164
Kingsley Telephone Co.	1,720	241	1,961
Lennon Telephone Co.	1,611	80	1,691
Springport Telephone Co.	1,434	140	1,574
Bloomington Telephone Assoc.	1,352	148	1,500
Kaleva Telephone Co.	1,193	220	1,413
Carr Telephone Co.	1,345	50	1,395
Sand Creek Telephone Co.	931	85	1,016
Blandchard Telephone Assoc.	932	95	1,027
Climax Telephone Co.	848	109	957
Winn Telephone Co.	472	55	527
Peninsula Telephone Co.	903	125	1,028
Midway Telephone Co.	679	83	762
Chippewa County Telephone Co.	693	42	735
Westphalia Telephone Co.	709	78	787
Island Telephone Co.	561	112	673
Waldron Telephone Co.	472	71	543
Drenthe Telephone Co.	475	50	525
Chapin Telephone Co.	440	25	465
Ogden Telephone Co.	370	27	397
Total	3,432,443	1,271,308	4,703,751

Source: 1989 Annual Report, Michigan Public Service Commission.

In 1989, Michigan Bell Telephone served the largest share of residential and business customers in Michigan, 82.5 percent and 90.3 percents respectively. GTE North was the second

largest local exchange company, with 12.6 percent of the state’s residential customers and 7.6 percent of the total business customers. The remaining thirty-six firms comprised just 4.9 percent of residential and 2.1 percent of business customers in the state.

4. Motor Carriers

The public service commission also regulates the intrastate motor carrier industry in Michigan. The interstate motor carrier industry is regulated by the federal government. Of the approximate 2,200 motor carriers regulated, over 600 are contract carriers that offer service to parties only under contract. The remaining 1,500 are either common carriers, offering transportation service to the general public, or common-restricted carriers, that are restricted by shipper, or commodities, or both, as shown in **Table 5**.

Table 5

WSC Regulated Motor Carriers by Type, 1991

Type of Carrier	Number of Carriers
Contract	605
Common	32
Common, Restricted	1,529
Total	2,166

Source: Michigan Public Service Commission.

The commission uses nine functional classifications for motor carriers, including general freight carriers, household goods movers, petroleum and petroleum products carriers, automobile parts carriers, iron and steel articles carriers, auto haulers, heavy machinery carriers, small packages carriers and miscellaneous carriers. **Appendix A** identifies the major carriers by functional classification based on Michigan intrastate revenues for 1989.

C. Comparison of Commission and Staff Organization Characteristics

A selective interstate comparison of commission organization and staff organization characteristics is available using data compiled and published by the national association of regulatory utility commissioners. The tables in this comparison include the 15 most-populous states and the neighboring states of Minnesota and Wisconsin. The 15 most-populous states are: California, Florida, Georgia, Illinois, Indiana, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, and Virginia.

1. Commissioner Selection

The public service commission is composed of three members, each of whom is appointed by the governor, with the advice and consent of the Senate, for a term of six years. No more than two commissioners may be from the same political party. While there are several models of commission type and structure in other states, the number, terms and method of selection used in Michigan are the same as are used in the majority of states.

Nationally, thirty-nine states have appointed utility commissions and eleven states have elected commissions. All of the fifteen most-populous states have appointed commissions, with the single exception of Georgia, where commissioners are elected. All of the Great Lakes states select commissioners in the same manner as Michigan, appointment by the governor and confirmation by the Senate. (See **Table 6.**)

Table 6
Number of Commissioners, Method of Selection
and Tenure of Office

State	Number of Commissioners	Method of Selection	Commissioners Term of Office
California	5	Gov/Sen confirm	6 yrs-staggered
Florida	5	Gov/Sen confirm	4 yrs-staggered
Georgia	5	Elected	6 yrs-staggered
Illinois	7	Gov/Sen confirm	5 yrs-staggered
Indiana	5	Gov/Sen confirm	4 yrs-staggered
Massachusetts	3	App't-Gov	4 yrs-concurrent
MICHIGAN	3	Gov/Sen confirm	6 yrs-staggered
Minnesota	5	Gov/Sen confirm	6 yrs-staggered
Missouri	5	Gov/Sen confirm	6 yrs-staggered
New Jersey	3	Gov/Sen confirm	6 yrs-staggered
New York	7	Gov/Sen confirm	6 yrs-staggered
North Carolina	7	Gov/Sen confirm	8 yrs-staggered
Ohio	5	Gov/Sen confirm	5 yrs-staggered
Pennsylvania	5	Gov/Sen confirm	5 yrs-staggered
Texas	3	Gov/Sen confirm	6 yrs-staggered
Virginia	3	Elected-Leg	6 yrs-staggered
Wisconsin	3	Gov/Sen confirm	6 yrs-staggered

Source: 1989 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners.

Nationally, thirty of the fifty states have three-member commissions, sixteen states have five-member commissions, and the remaining four states have commissions with seven members. Of the seventeen states shown in **Table 6**, Michigan is one of six states with a three-member commission, while eight states have five-member commissions and three have seven-member commissions.

2. Commissioner Compensation

Salaries for both commissioners and the chairman in Michigan rank close to the national average and are competitive with those of the five neighboring Great Lakes states. However, compensation in Michigan is generally lower than that of the fifteen most-populous states. (See **Table 7.**)

Table 7

Comparison of 1989 Annual Salary of Commission Officials

State	Chairman	Commissioners
California	\$86,533	\$83,869
Florida	87,404	875,404
Georgia	68,493	68,493
Illinois	70,455	61,530
Indiana	50,014	49,517*
Massachusetts	56,732*	52,090*
MICHIGAN	65,000	62,500
Minnesota	51,908	51,908
Missouri	64,323	64,323
New Jersey	95,000	90,000
New York	91,957	79,437
North Carolina	71,992	70,992
Ohio	76,592*	76,592*
Pennsylvania	57,500	55,000
Texas	71,400	71,400
Virginia	91,162	90,162
Wisconsin	63,538*	63,538*
U.S. Average	\$62,518	\$60,670
Fifteen Most-Populous States Average	\$73,637	\$70,887
Great Lakes States** Average	\$62,501	\$60,617

Source: 1989 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners; CRC calculations. *Average of reported salary range. **Great Lakes States include: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

The 1989 salaries of commissioners range from a low of \$49,517 in Indiana to a high of \$90,162 in Virginia. The Michigan commissioner salary of \$62,500 ranks twelfth among the seventeen combined largest and neighboring states. Michigan is higher than the \$60,617 average of the five neighboring Great Lakes states, and lower than the fifteen most-populous states average of \$70,877.

Chairman salaries range from a low of \$50,014 in Indiana to a high of \$95,000 in New Jersey. Michigan, with a salary of \$65,000, is higher than the neighboring states' average of \$62,501, but lower than the \$73,637 average for the fifteen most-populous states.

3. Selection of Chairman

In Michigan, as in the majority of thirty-two states, one member of the commission is appointed chairman by the governor. In the remaining states, the chairman is elected by the commission in seventeen states, and in one state — Alaska — the chairman is elected by the voters.

Table 8
Selection of Chairman

State	Commission Elected	Governor Appointed
California	x	
Florida	x	
Georgia	x	
Illinois		x
Indiana		x
Massachusetts		x
MICHIGAN		x
Minnesota		x
Missouri		x
New Jersey		x
New York		x
North Carolina		x
Ohio		x
Pennsylvania		x
Texas	x	
Virginia	x	
Wisconsin		x

Source: 1989 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners.

As shown in **Table 8**, Michigan is among twelve of the seventeen states representing the most-populous and neighboring Great Lakes states where the governor appoints the chairman of the commission. All of the Great Lakes states select commission chairmen in this manner.

4. Staff Organization Characteristics

A comparison of Michigan to selected other states regarding three characteristics of commission staff organizations size of staff, presence of an executive director or chief of staff, and separate staff, are summarized in **Table 9**, below. Some of these characteristics will be discussed at length as part of the analysis of technical staff found in **Part IV**.

Table 9**Characteristics of Commission Staff**

State	Total Staff FTE's	Staff/100,000 Population	Executive Director or Chief of Staff	Separate Staff
California	1,080	3.6	Yes	No
Florida	377	2.9	Yes	No
Georgia	159	2.5	Yes	No
Illinois	450	3.9	Yes	No
Indiana	101	1.8	Yes	Yes
Massachusetts	134	2.2	Yes	No
MICHIGAN	245	2.6	No	No
Minnesota	39	0.9	Yes	Yes
Missouri	188	3.7	Yes	No
New Jersey	382	4.9	Yes	No
New York	670	3.7	Yes	No
North Carolina	134	2.0	Yes	Yes
Ohio	490	4.5	No	No
Pennsylvania	614	5.2	Yes	No
Texas	214	1.3	Yes	No
Virginia	579	9.4	No	No
Wisconsin	185	3.8	Yes	No

Source: 1989 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners.

The size of commission staff varies widely among the combined most-populous and neighboring states, from thirty-nine full time equivalent staff in Minnesota to 1,080 in California. (See **Table 9**.) Of the seventeen states, one has less than forty full-time equivalent staff; six states range between 100 and 200 full-time equivalent staff; four states, including Michigan, fall between 200 and 400 full-time equivalent staff; three are between 400 and 600 full-time equivalent staff; and three states have more than 600 full-time equivalent staff positions. Of the seventeen states, full-time equivalent staff per 100,000 population ranges from a low of 0.9 in Minnesota to a high of 9.4 in Virginia. Michigan, at 2.6 full-time equivalent staff per 100,000 population, ranks eleventh highest among the seventeen states.

Nationally, the majority of states – thirty-seven – employ a staff director or equivalent, to oversee commission technical staff. Only Michigan, Ohio, and Virginia of the seventeen most-populous and Great Lakes states do not have a staff director to manage commission staff. There are only four states in the nation that have an organizational structure with a technical staff separate from the commission: Indiana, Minnesota, North Carolina, shown in **Table 9**, and Mississippi.

Part II. The Legal Basis of Public Utility Regulation

The authority of a state to regulate public utilities is based upon the police power. **Todd v Hulls** (288 Mich 521; 1939). The police power is that authority inherent in a government to enact laws, within constitutional limitations to promote the health, safety, and general welfare of society. While it is not possible to mark with precision the boundaries of the police power, they may be viewed as coextensive with the reach of the Tenth Amendment to the United States Constitution which provides that “[t]he powers not delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” In the absence of a state constitutional provision to the contrary, the reserved power contemplated by the Tenth Amendment is exercised by the legislative branch of state government.

Due to practical considerations, state legislatures have seldom directly exercised the regulatory powers in question, electing instead to delegate certain quasi-legislative responsibilities to commissions. The Michigan Legislature has subscribed to the accepted practice, by enacting a succession of statutes requiring public utilities to charge reasonable and just rates, but delegating to multi-member commissions the authority to conduct an investigation upon the facts in a given case. In **Michigan Central Railroad Company v Michigan Railroad Commission**, (160 Mich 355; 1910), the state Supreme Court considered the legal rationale underlying such delegation and noted that

[i]t is now quite uniformly held by the courts that the action of such a body [as a regulatory commission] in fixing a rate is not a legislative act upon its part, but is only administrative or ministerial in its function, in putting into effect the legislative will which has been previously declared by the legislature. If the legislature were to attempt to delegate a purely legislative power to a commission, it would be unconstitutional, as in fact this court has repeatedly held. It is unnecessary to point out the cases. But the legislative will is declared when the law is passed, affirming that all rates shall be reasonable and just. This is done by the legislature itself. The work of the commission making the investigation upon the facts, and declaring what is a reasonable and what is an unreasonable rates is by the courts held to be simply administrative of the law as previously enacted by the legislature. (160 Mich at 361-362.)

A. Antecedent Utility Commissions

Public utilities in Michigan are regulated by a public service commission that the Legislature created in 1939. The commission is the direct lineal descendant of the railroad commission that was created in 1907. Two years later the Legislature replaced the railroad commission with another commission of the same name but with broader powers. Public Act 300 of 1909, the railroad commission act, required common carriers to furnish reasonably adequate service and facilities, to transport passengers and property upon reasonable request, and to charge reasonable and just rates for such services. The commission was authorized to investigate unreasonable rates or inadequate service.

The second railroad commission continued in operation until 1919. Public Act 419 of 1919,

the public utilities commission act, abolished the railroad commission and created a public utilities commission in its place.

Section 3 of the public utilities commission act provided as follows:

Immediately upon the taking effect of this act, the Michigan railroad commission shall cease to exist and the tenures of office of the members thereof shall be at once terminated. All the rights, powers and duties now vested in said railroad commission shall be deemed to be transferred to the public utilities commission and shall be exercised thereby, except as herein otherwise provided.

It is noteworthy that while the Legislature abolished the railroad commission, it did not repeal the act that had created it. Instead, the Legislature simply superimposed the public utilities commission act upon its predecessor, the railroad commission act. As a result, the authority of the public utilities commission could not be completely delineated without also examining the railroad commission act. But there is more.

By the start of 1939, the Legislature had likewise grown dissatisfied with the performance of the public utilities commission. So great was the legislative dissatisfaction that it found expression in statute. Section 4 of Public Act 3 of 1939, the public service commission act, provided as follows:

The Michigan public utilities commission, having failed and refused to properly carry out the legislative mandates with respect to public safety, and having failed and refused to properly enforce the provisions of the several acts conferring jurisdiction upon it with respect to the use of the various highways of the state In a safe and proper manners is hereby abolished, and immediately upon the taking effect of this act said Michigan public utilities commission shall cease to exists and the tenure of office of the members thereof and other employment of each employe of said commission shall be thereby terminated.

Section 4 of the act further provided in pertinent part that

[a]ll the rights, powers, and duties vested by law In said Michigan public utilities commission, and in the Michigan railroad commission and transferred to the Michigan public utilities commission, shall be deemed transferred to and vested in the Michigan public service commission hereby created, and shall hereafter be exercised and performed by said commission.

Once again the state Legislature abolished the existing commission, this time the public utilities commission, but without repealing the statute that had created it and constructed upon its statutory edifices yet a third commission. Thus, by 1939, the state Legislature had erected a confusing statutory framework: the public service commission exercised all the rights, powers, and duties of the public utilities commission that had in turn exercised all of the rights, powers, and duties of the railroad commission. Regrettably, however, the Legislature failed to specify what the earlier commissions' authority had been that was now being transferred to the public service commission. Due to this legislative oversight, whenever a question arose concerning the powers of the public service commission, it would also be

necessary to examine both of the prior acts, the former of which had been adopted thirty years earlier.

B. The Public Service Commission Act

The public service commission was created by Public Act 3 of 1939. The commission consists of three members, appointed to six-year terms — and until their successors are appointed and qualified — by the governor, with the advice and consent of the Senate. No more than two commissioners may be of the same political party and they are prohibited from being retained or employed by a public utility subject to the jurisdiction and control of the commission during their appointment and for six months thereafter.

Section 2 of the act requires the governor to designate one member of the commission as chairman. The state Attorney General has concluded that although a majority of commissioners may delegate their ministerial responsibilities to a chairman, the commission must discharge its substantive duties as a body. (OAG 1975-76, No. 4840.) The opinion noted that except for Section 2, “[a]ll other statutory provisions [of the act] refer to the commission as a body, and all delegations of power are so directed.” On January 22, 1979, the commission adopted bylaws, section 2 of article II of which provides in pertinent part that “[t]he Chairman shall preside at all meetings of the Commission and shall be the chief administrative officer of the Commission, having general supervision over the business and affairs of the Commission, provided that the policy of the Commission shall be set by the Commission.”

The general regulatory jurisdiction of the public service commission is contained in the first paragraph of Section 6 of the act, that provides that

[t]he public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formations operations or direction of such public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining top necessary, or incident to the regulation of all public utilities, including electric light and power companies, whether private, corporate, or cooperatives gas companies, water, telephone, telegraph, oil, gas, and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies.

The commission shall have the same measure of authority with respect to railroads and railroad companies as is granted and conferred under the various provisions of law creating the Michigan railroad commission and its successor, the Michigan public utilities commission, and defining their powers and duties. *

Despite the seemingly expansive sweep of Section 6, the Michigan Supreme Court has held that “[t]he broad language, however, furnishes no grant of specific powers. It is an outline of jurisdiction in the commission and does not purport to be more.” **Huron Portland Cement**

* Executive order 1975-1 transferred the public service commission’s regulatory authority with respect to railroad matters to the Michigan Department of Transportation.

Company v Public Service Commission, (351 Mich 255t 263; 1958). The Court reasoned as follows:

If, indeed, the general language quoted had the effect of vesting particular, specific, powers in the commission, not only would a constitutional question be presented arising from an asserted lack of standards [citations omitted], but there would have been no need whatever for the many statutes enacted (both before and after the effective date of PA 1939, No 3) vesting specific powers in the commission. *Id.*

As the Court indicated, its conclusion that the broad language of Section 6 is but an outline of jurisdiction was based on the existence of other regulatory statutes and on a lack of standards contained in the public service commission act. It need only be said of an asserted lack of standards in the public service commission act that the same objection might be made with equal force regarding the other acts. As for the existence of those other acts, while the Court correctly observed that they had been enacted both before and after the public service commission was created, those acts that govern major utilities were all enacted before 1939. (For example, the acts governing electric, telephone, and natural gas utilities were enacted in 1909, 1913, and 1929 respectively.) Thus, the Legislature may have intended to grant specific powers to the public service commission under Section 6 and to have those earlier acts superseded in certain respects by the public service commission act, it being at the time of its enactment the latest expression of the legislative will.

C. Other Relevant Regulatory Statutes

Because Section 6 of the public service commission act has been held to be but an outline of jurisdiction, **Huron Portland Cement Company**, the basis for the commission's authority to exercise specific regulatory powers must be found in other statutes. The following is a summary analysis of significant features of those statutes.

1. Electric Utilities

Public Act 106 of 1909 regulates the transmission of electricity in or between counties in Michigan. The act prohibits an electric utility from establishing any rate or charge without commission approval. Section 1 provides that whenever electricity is generated in any county of the state and is transmitted for consumption in that or another county within the state, the rate to be charged and the conditions of service are subject to regulation under the act. In addition, the act governs, in certain respects, the construction and maintenance of transmission lines, and requires electric utilities to provide the commission with information necessary to fulfill the terms of the act.

2. Telephone Companies

Public Act 206 of 1913 as amended, contains the specific grant of authority under which the commission regulates telephone companies. Section 2 of the act vests in the railroad commission (public service commission) the same jurisdiction and powers over all telephones,

telephone lines, and telephone companies within the state as it had over railroad companies. In **Michigan State Telephone Company v Michigan Railroad Commission**, (193 Mich 515; 1916), it was held that the Legislature had subjected telephone companies to regulation because competing companies had created an unworkable and undesirable proliferation of telephone lines and equipment. "These evils come largely from the existence of competing companies in the same community, and so far as reasonable regulation can improve the situation such regulation is assuredly required by public convenience and necessity." (193 Mich at 525.)

The telephone statute was amended by Public Act 305 of 1986, which added seven new sections, the last of which requires significant portions of the existing act to expire on January 1, 1992. With the exception of the expiration-date provision, the amendatory sections authorize the commission to reduce the degree of regulation when it determines that a competitive market exists in the state for a particular telephone service. Notwithstanding the level of competition, however, the commission is required to preserve the availability of local exchange services at reasonable rates.

Proposed Successor Act. In February 1991, House Bill 4343 and Senate Bill 124 were introduced and would, if enacted, repeal certain acts, and parts of acts, including Public Act 206 of 1913, the telephone company act. (The two bills being substantially similar at the time of their introduction, the Senate Bill is discussed.) Senate Bill 124 consists of nine articles, one through six, eight and nine of which would be known as the Michigan telecommunications act, while article seven, entitled "emergency telephone service," would be known separately as the emergency telephone service enabling act. Several provisions of the proposed legislation are examined below, though an analysis at this stage must, of necessity be circumspect given the vagaries of the legislative process.

First, Senate Bill 124 would establish in the Michigan Department of Commerce a separate Michigan "telecommunications commission" that would possess all of the rights, powers, and duties conferred by law on the public service commission for all matters relating to telecommunications. Because, like prior regulatory statutes, Senate Bill 124 makes no attempt to define what the "rights, powers, and duties conferred by law" on the public service commission are, as they relate to telecommunications, should a doubt arise regarding the proposed commission's authority, an answer will have to be arrived at by resort to current statutory provisions governing telecommunications — most of which Senate Bill 124 would repeal — and to case law.

Senate Bill 124 does not specify the rationale underlying the establishment of a separate regulatory body solely for the telecommunications field. Among the quite different views that have been proffered are that the telecommunications field is deserving of unique consideration, or that a means by which to reduce the public service commission's workload, and thus regulatory lag, would be to transfer an entire category of utility matters to another regulatory body and that a timely opportunity to do so is supplied by the impending expiration of Public Act 206 of 1913, the telephone company act. Like the public service commission, the proposed commission would: consist of three members, appointed to six-year terms — and until their successors are appointed and qualified -by the governor, with the advice and

consent of the Senate; no more than two commissioners could be of the same political party; and commissioners would be prohibited from being retained or employed by a public utility subject to the jurisdiction and control of the commission during their appointment and for six months thereafter.

Second, Senate Bill 124 would authorize the proposed commission to hire, among other staff, legal counsel whose duty it would be to represent the commission in all legal matters, “[e]xcept as otherwise provided by this act.” This proposed provision of separate legal counsel is significant because of, as will be fully discussed in **Part IV**, differing views regarding the propriety of the present arrangement whereby one division of the state Attorney General acts as legal counsel to the public service commission, while another division challenges commission decisions in the courts. This matter is complicated by the traditional role that Attorneys General have played in counseling executive-branch agencies on legal matters, a role that is buttressed to some extent by statute and the common law, and by the fact that historically, state Attorneys General have taken a dim view of statutes authorizing state agencies to employ their own attorneys.

Third, Senate Bill 124 essentially would maintain the monopoly characteristic, and, therefore, the resulting necessary regulation of, basic local service while deregulating many other telecommunications services within which a sufficient degree of competition is deemed to exist. The bill provides that “residential and general local exchange” rates could not exceed those in effect on November 1, 1990, although the proposed commission could, in the public interest, order that rates be reduced. It should be noted that in the bill, the definition of “residential and general local exchange” rates derives from the definition of “basic local exchange service” which can reasonably be read to extend only to access to a dial tone. Thus, the actual “rate freeze” may be far more limited than it appears.

Providers of basic local exchange service would be required to first obtain a license, although an existing license would remain in effect. Telecommunications companies providing other services could do so without a license by providing annual notice to the commission. (Among the telecommunications services that Senate Bill 124 authorizes are those that a modified final judgment, issued by a federal district court in 1982, prohibits local Bell operating companies from providing. The “modified final judgment” — so called because, technically it modified a 1956 consent decree agreed to by the federal government and American Telephone & Telegraph Company — required the company too among other things, divest itself of local Bell operating companies, and prohibited the local operating companies from certain lines of business.) To the extent that Senate Bill 124 contravenes the modified final judgment, the former would, of course, have no legal effect.

Fourth, it is noteworthy that Senate Bill 124 would require providers of basic local service to provide at actual cost to governmental units and educational institutions such services as are necessary for the latter to perform legally-mandated programs. The fact that the term “legally-mandated programs” is not defined poses a substantial problem. In the absence of a definition in Senate Bill 124, it is impossible to determine with certainty whether the legislative intent was to accord the term an existing meaning or some other meaning peculiar to the bill. For example, there has been considerable litigation over the question of what programs

are mandated of units of local government by state law for purposes of Section 29 of Article 9 of the state Constitution. The bill defines the term “actual cost of service” as excluding any rate of return. The extent to which a Legislature may require a utility to provide certain services, while denying that utility any rate of return on the investments which make that service possible, is not entirely clear. State courts have generally held that a public utility has a substantive rights grounded in statute and the Constitution, to a reasonable rate of return on investments, although the rate of return need not be that which the utility might earn were it an unregulated business. At the same time, as stated in **Michigan Bell Telephone Company v Public Service Commission**, (332 Mich 7, 26; 1952),

[w]hat return a public utility shall be entitled to earn upon its invested capital, **and what items shall be considered as properly going to make up the sum total of that invested capital**, are questions of fact for the determination of the commission, and their conclusions thereon, upon which the rate is based, are unassailable unless, as a necessary result, it can be affirmatively asserted that the resultant rate is unreasonable and unlawful. (Emphasis supplied.)

Finally, it should be noted that Senate Bill 124 would establish a basic telecommunication service fund within the Michigan treasury. The purpose of the fund would be to reimburse telecommunication utilities for the cost of providing basic local and other specified service to the extent that allowable rates are insufficient. The amount credited to the fund annually would equal five percent of each telecommunication utility’s liability under Public Act 228 of 1975, the single business tax act. The Michigan Department of Treasury estimated the single business tax liability for telephone utilities as a group was approximately \$30 million for tax years ending in 1988. Thus, a fund based upon five percent of this liability would have contained approximately \$1.5 million.

3. Natural Gas Utilities

Public Act 9 of 1929 governs natural gas utilities. However, not all provisions of the act apply equally to all aspects of the natural gas industry. By its terms, Act 9 does not apply to a business within the state that transports natural gas through pipelines for use in its own plants that are located entirely within the state. Nor does the requirement of commission approval for pipeline construction apply to a business that produces gas from its own wells and transports it for sale to a single purchaser under contract. **Michigan Consolidated Gas Company v Sohio Petroleum Company**, (321 Mich 102; 1948).

Section 1 enumerates three classes of businesses that are subject to the act: (1) those who transport natural gas by pipeline for hire; (2) those who engage in the business of transporting natural gas; and (3) those who engage in the business of buying and selling natural gas. Utilities falling within the scope of Section 1 are granted certain powers, such as that of eminent domain, but are likewise subject to certain restrictions that do not apply generally. They are required to obtain commission approval before constructing pipelines, for example, and since they are deemed to be common purchasers under the act, are required to purchase all natural gas reasonably available within their vicinity without regard to the producer.

Section 3 empowers the commission to regulate those engaging “in the business of purchasing, selling, or transporting natural gas for public use.” In **Nelson v Galpin**, (277 Mich 529; 1936), it was noted that a purpose of Act 9 was to provide for the equitable withdrawal of natural gas by those businesses having an interest in a common natural gas deposit and to restrict the flow or output to that end. Thus, the commission is authorized to prescribe rules that limit the amount of natural gas that can be withdrawn from any well to a specified percentage of its daily natural flow.

4. Issuance of Public Utility Securities

Public Act 144 of 1909 as amended authorizes the commission to approve the issuance and amount of stocks, bonds, notes, or other evidences of indebtedness issued by public utilities. * One purpose of the act was to protect potential investors in public utility securities. Another purpose was to afford ratepayers a greater degree of protection than would result from the regulation of utility rates alone, it being recognized that securities issued by a utility have a direct effect on its rate structure. Thus, in **Indiana & Michigan Power Company v Public Service Commission**, (405 Mich 400; 1979), the Michigan Supreme Court held that the commissions authority to regulate public utility securities was not merely ancillary to its authority over rates and therefore, could be exercised even though the issuing utility was not before the commission in a rate proceeding.

In **Michigan Gas Storage v Public Service Commission**, (405 Mich 376; 1979), the state Supreme Court held, among other things, that the application of Act 144 to natural gas utilities did not conflict with the federal government’s jurisdiction over natural gas utilities doing business in interstate commerce. However, eight years later, the United States Supreme Court held in **Schneidewind et al v ANR Pipeline Company et al**, (485 US 293; 1987), that the authority of the public service commission to regulate the issuance of long-term securities by a natural gas utility was preempted by the federal natural gas act of 1938. The Court concluded the federal act vested in the federal energy and regulatory commission exclusive authority to regulate the transportation and sale of natural gas for resale in interstate commerce.

The commission had relied upon Section 1 of Act 144 which, among other things, authorized it to approve securities issued by companies claiming the right to or that engage in the business of, transporting natural gas for public use. The Court noted that the federal act did not expressly authorize the federal energy and regulatory commission to regulate the issuance of securities by a natural gas utility. However, the Court concluded that the federal act was so comprehensive as to reveal a congressional intent to exclude states from regulating the transportation and sale of natural gas for resale in interstate commerce and that the attempted application of the Michigan statute to natural gas utilities would amount to such regulation.

* Act 144 should be distinguished from Public Act 265 of 1964, the uniform securities act, (occasionally referred to as the “blue sky” law). The latter act regulates securities in the traditional sense by governing their registration and sale in Michigan to protect against fraudulent or deceptive issuance. Conversely, Act 144 regulates securities issued by Michigan utilities, regardless of where the securities are sold.

5. Motor Carriers

Public Act 254 of 1933 as amended, the motor carrier act, authorizes the public service commission to regulate both common motor carriers and contract motor carriers. The former are generally defined as persons who hold themselves out to the general public as being in the business of transporting persons or property for hire, while the latter provide such services only under contract to individual customers rather than to the public in general.

In 1982, the state Legislature adopted significant modifications to the motor carrier act in response to changes in federal law. In 1980, Congress had enacted a federal motor carrier act that substantially deregulated firms serving interstate routes. Subsequently, the Legislature adopted Public Act 399 of 1982 that simplified entry requirements into the industry and partially deregulated common carrier rates. For example, Section 7a of the act allows common carriers to increase or reduce the rate in effect the prior year by not to exceed ten percent in real terms without commission approval. Even with passage of Act 399, motor carrier deregulation, particularly further economic deregulation, remains a burning issue. One such issue is whether the present regulatory framework adversely affects competition in the motor carrier industry.

Prior to the adoption of Public Act 399 of 1982, the commission regulated the transportation of both passengers and property, whether by common motor carriers or contract motor carriers. Act 399 deleted the commission's authority to regulate common motor carriers of passengers. The responsibility for that regulation was transferred to the Michigan Department of Transportation under the terms of Public Act 432 of 1982, the motor bus transportation act. As indicated in **Table 10**, common motor carriers of property and of passengers are required to apply for and receive from the commission and the Michigan Department of transportation respectively, a certificate of authority (referred to formerly as a certificate of convenience and necessity) before conducting business. Contract motor carriers of property must apply for and receive a permit from the commission.

Table 10

Summary of Motor Carrier Regulation

	Type of Carrier			
	Property		Passenger	
	Common Motor Carrier	Contract Motor Carrier	Common Motor Carrier	Contract Motor Carrier
Regulatory Agency	commission	commission	transportation department	none
Authorizing Document Required	certificate of authority	permit	certificate of authority	none

Source: Public and Local Acts of the Legislature of the State of Michigan.

D. Judicial Interpretation of Commission Authority

State courts have issued a number of decisions that are of assistance in clarifying the authority of the public service commission in certain respects. Judicial review of commission orders is narrow in scope since they are deemed to be prima facie lawful and reasonable. The judicial review standard under Section 28 of Article 6 of the state Constitution is whether the decision is supported by competent material, and substantial evidence on the whole record.

1. Nature of the Authority

The commission possesses no common-law powers. **Huron Portland Cement Company v Public Service Commission**, (351 Mich 255; 1958). State courts have held consistently that the authority of the commission, and that of its predecessors, must be found in statutory enactments. **Sparta Foundry Company v Michigan Public Utilities Commission**, (275 Mich 562; 1936). However, this holding has not always received literal application.

For example, the commission approved a procedure in 1978, allowing an electric utility to recover increased costs — exclusive of fuel costs, purchased power and production maintenance — by adjusting its monthly bills. The Court of Appeals upheld the application of the so-called “other operations and maintenance expense indexing system” in **Attorney General v Public Service Commission #1**, (133 Mich App 719; 1984). While the appellate Court admitted that the procedure was not authorized by any specific statute, it nevertheless concluded that the establishment of such a procedure was within the commission’s statutory power since Section 6 of the public service commission act “confers broad discretion **and authority** upon the public service commission.” (133 Mich App at 725-726; emphasis supplied.) This conclusion seemed directly contrary to the holding of the Michigan Supreme Court in **Huron Portland Cement Company v Public Service Commission**, (351 Mich 255; 1958), that Section 6 furnished no grant of specific powers, but was an outline of jurisdiction only.

2. Management Decisions

In **Union Carbide Company v Public Service Commission**, (431 Mich 118; 1988), it was held that the power to fix and regulate rates does not explicitly nor implicitly authorize the commission to exercise general management powers of a utility subject to its regulation. Consumers Power Company had entered into a contract with Union Carbide under the terms of which the utility purchased oil to operate two of its power plants. During the course of a rate hearing, the commission determined that the power plants were being operated out of economic order, meaning that less expensive alternatives were available, but not being utilized. The commission prohibited the utility from passing on to its customers the increased fuel costs stemming from the noneconomic operation of its power plants. But in addition, the commission ordered the utility to take no further deliveries of oil under its contract with Union Carbide.

Union Carbide had not been a party to the rate hearing, but subsequently filed suit alleging that the commission’s order had exceeded its statutory authority and impaired the constitutional obligation of contracts. In deciding the case on statutory grounds, the state Supreme

Court concluded that

[w]hile the commission has such a statutory duty, [to maintain just and reasonable rates] this duty does not necessarily imply the power to require utilities to undertake prudent management practices. The commission may disallow increased expenses incurred as a result of mismanagement, but it may not require a utility not to incur particular expenses. (431 Mich at 159.)

E. The Case for Statutory Revision

As has been discussed, the Legislature established and subsequently abolished three separate public utility commissions between 1907 and 1938, prior to establishing the public service commission in 1939. In each instance, the Legislature superimposed each successive statute upon existing law and simply transferred the authority of each abolished commission to its successor without specifying the authority that was being transferred. Contemporaneously, the Legislature enacted several additional statutes that vested specific power in the commission to regulate specific categories of utilities.

The predictable result of this legislative patchwork has been statutory confusion and it has proven problematic even to the courts. In **Union Carbide Company v Public Service Commission**, (431 Mich 118; 1988), the Michigan Supreme Court noted with palpable frustration that

[t]he historical process of legislative overlays in which the Public Service Commission act, 1939 PA 3, was superimposed upon the Public Utilities Commission act, 1919 PA 419, which was itself superimposed upon the Railroad Commission act, 1909 PA 300 (with reference to 1909 PA 106 governing the transmission of electricity), has created a statutory jungle. Each decision issued by the courts in the area of utilities regulation entails a journey into the heart of darkness in which the only reliable guideposts are this Court's own prior decisions. The time has long since passed for a comprehensive review of this legislation. (431 Mich at 135, footnote 15.)

While the Legislature has made no attempt to reconcile the various statutes in question, nor to reorganize them in a logical fashion, a candid assessment of the matter suggests that the present regulatory process would sorely benefit from such an undertaking.* The present statutory framework seems to have been shaped more by piecemeal response to considerations of the moment than by sedate legislative reflection. In any events there is no rational basis whatever for a statutory framework that is so convoluted that neither citizens nor the courts, can comprehend it without substantial difficulty. This situation would be worsened should the proposed telecommunications bill be enacted as introduced since it provides that the proposed telecommunications commission would possess "all of the rights, powers, and duties conferred by law on the public service commission for all matters relating to telecommunications."

* It is noted that special legislative committees were established in 1975 and 1985 to study the public service commission. While each committee made numerous recommendations, neither committee report addressed the threshold concerns of whether the various regulatory statutes are compatible with each other and whether, when read as a wholes the statutes clearly delineate the commission's authority. Thus, the comprehensive statutory review contemplated by the state Supreme Court in **Union Carbide**, has yet to be undertaken

It will be stated in response to a proposed revision of the utility statutes that despite admitted deficiencies that presently exists such a revision would be inappropriate on two grounds. The first is that because the statutes have been in place for some time and have been subjected to much judicial interpretation, a revision might undo the underlying case law and thereby produce uncertainty in the field of utility regulation. The second is that a revision might unwittingly alter the relative balance of influence to which the various interests that participate in rate cases have become accustomed.

Not much need be said in respect to the first ground, since it would be difficult to conceive that any reasonable revisions might render the statutes less comprehensible than is presently so. Certainly, necessary revisions could be effected without doing violence to beneficial case law. As was noted earlier, the state Supreme Court has concluded that, in its opinions the time has long since passed for a comprehensive review of these statutes.

The second ground, that of the respective influence of rate-case participants, deserves further examination, but seems little more persuasive than the first. Among the various interests that typically participate in a rate case are the given utility, various consortia of industrial or residential ratepayers, the state Attorney General, and commission staff.

While the various participants might support statutory revision in theory, the practical reality is quite different. For example, it would seem that a participant in a given rate case that complained of delays should look favorably upon statutory revisions that would produce more expeditious decisions. However, such support would likely be tempered by the realization that such a revision might deny that same participant the means of delay in some future case where delay would be to its advantage. Hence, a participant would not likely support a proposed revision, even of those provisions most complained of, absent assurances that no loss would result in any tactical advantage that might be useful in a future rate case.

Not only does such a formulation render meaningful revision impossible, but it also obscures the essential fact that the public interest must remain of paramount importance. Ratemaking, though performed in a quasi-judicial manner, is a legislative function and the Legislature has delegated certain aspects of that function exclusively to the public service commission. Certainly, utilities and various ratepayer groups have no responsibility legal or otherwise, to represent the public interest and it would be unfair to impose such a burden upon them since their interests are necessarily more narrow in scope. For example, it may be in the best interests of public utilities which are after all private companies to maximize profits, while it may be in the best interests of consumer groups to promote the lowest possible rates. Neither circumstance may be in the long-term best interest of the general public.

Nor is the foregoing observation a denigration of the Attorney General's statutory authority to intervene in matters in which the public may have an interest, or in counseling executive branch agencies relative to the requirements of state law. Much of the litigation that arises in which the office of Attorney General and the commission are adverse parties appears to involve more a policy difference over the question whether a rate increase should be granted

at all, and if so, in what amount rather than a question of law. The fact that the office of Attorney General and the public service commission may in a given rate proceeding hold different conceptions of what is in the public interest, and that the former office may be authorized to litigate this difference does not displace the commission's responsibility to make the initial determination.

Because the lawful responsibility to regulate utilities in the public interest resides with the commission, it is necessary that the commission be governed by a rational statutory framework that facilitates the ability to further that interest. * It is this view that should commend statutory revision.

A revision of the state laws that govern Michigan utilities need not fall victim to special-interest considerations. One means by which such a revision could be effected through careful and disinterested reflection already exists. Section 15 of Article 4 of the state Constitution established a bipartisan legislative council, one purpose of which is to "periodically examine and recommend to the legislature revision of the various laws of the state." This responsibility is reposed in a Michigan Law Revision Commission established by Public Act 412 of 1965, the legislative council act. (The Legislature subsequently enacted Public Act 268 of 1986, the legislative council act, that repealed Public Act 412 of 1965.) The law revision commission, exclusive of its legislative membership, is composed of four private citizens appointed to four-year terms of office, who are distinguished members of the legal profession, and would seem to be uniquely suited to examine and recommend to the Legislature appropriate revisions to the state's utility laws.

The suggested revision should have as its chief object first, to organize the relevant but presently disparate statutes into a single internally consistent codification that clearly delineates the commission's authority particularly with respect to utility holding companies, subsidiaries and technological developments and second, to ensure that the commission carries out its responsibilities in the timely manner specified by statute, the latter concern being the next focus of this analysis.

* For example, it is not presently clear what regulatory authority if any, the commission may exercise over, or what information if any, it may demand from a nonregulated holding company that holds a controlling interest in a regulated utility. This absence of clarity is problematic, in the context of a holding company-subsidary relationship, because of the managerial temptation to allocate profits to nonregulated activities and to allocate expenses to regulated activities in an attempt to recover them from ratepayers as a cost of service.

Likewise unclear is what regulatory authority the commission may exercise relative to technological developments. The question in general is whether an act authorizing the commission to regulate a particular type of industry should be read broadly enough to encompass related technologies that the Legislature had not foreseen, or should be read narrowly to encompass only matters that existed at the time the statute was written. For example, the commission concluded in 1982 that it lacked authority to regulate radio common carriers even though it had done so for the past fifteen years by treating them as "telephone companies" under the telephone company act. **Ram Broadcasting of Michigan, Incorporated v Michigan Public Service Commission**, (113 Mich App 79; 1982).

Part III. The Timely Disposition of Rate Cases

A. General Considerations

An area of continuing controversy is the length of time generally required for the commission to issue a final order in certain rate cases. Without deciding whether the commission takes longer than is reasonably necessary to issue final decisions, two factors contribute to the length of rate cases, as measured from the date an application is filed with the commission to increase or decrease utility rates to the date upon which the commission issues a final order in the matter.

First, ratemaking falls within the definition of contested cases contained in Public Act 306 of 1969, the administrative procedures act of 1969. The various procedural due process safeguards of the act do not always lend themselves to an expeditious resolution of rate cases. Second, since the commission cannot issue orders with retroactive applications the party wishing to maintain the status quo in a rate case has a substantial incentive to delay the outcome for as long as possible.

The foregoing considerations will be examined in more detail shortly. First, it should be noted that the second paragraph of Section 6a of the public service commission act provides in pertinent part as follows:

The commission shall adopt such rules and procedures for the filing, investigation and hearing of petitions or applications to increase or decrease utility rates and charges as the commission finds necessary or appropriate to enable it to reach a final decision with respect to such petitions or applications within a period of 9 months from the filing thereof.... If a final decision has not been reached upon a petition or application within the 9-month period, the commission shall give priority to such case and shall take such other action as its finds necessary or appropriate to expedite a final decision.

The third paragraph of Section 6a provides as follows:

If a final decision has not been reached upon a petition or application to increase or decrease utility rates within the 9-month period, the commission shall give priority to such case and shall take such other action as it finds necessary or appropriate to expedite a final decision. If the commission fails to reach a final decision with respect to a petition or application to increase or decrease utility rates within the 9-month period following the filing of such petition or applications the commissions within 15 days, shall submit a written report to the governor and to the president of the senate and the speaker of the house of representatives stating the reasons a decision was not reached within the 9-month period, and the actions being taken to expedite such decision. The commission shall submit a further report upon reaching a final decision providing full details with respect to the conduct of the cases including the time required for issuance of the commission's decision following the conclusion of hearings.

The nine-month requirement that was added to Section 6a by Public Act 300 of 1972, appears to be mandatory since the statutory language provides that the commission “shall” adopt rules and procedures that enable it to reach a final decision within a nine-month period. In **Detroit Edison Company v Public Service Commission**, (127 Mich App 499; 1983), plaintiff appealed from a commission decision on several grounds, one being that a decision had not been made within nine months. The Court of Appeals held, however, that “[t]he nine-month provision of the statute is not a requirement; it is only a goal.” (127 Mich App at 508.) The Court of Appeals cited no authority in support of its holdings noting simply that “[t]he sanction imposed by the statute for noncompliance with the nine-month period is merely that the commission report the delay to the Governor and Legislature.” (127 Mich App at 508-509.)

The purpose of statutory interpretation is to ascertain legislative intent and when that intent is unambiguously expressed, it should be given the utmost respect. Furthermore, a statute should be construed so as to accord meaning to each word employed since it is not to be presumed that the Legislature intends to adopt a useless act. It is certainly questionable whether the Legislature intended nothing more than a statutory goal when it amended the public service commission act to require the commission to render final orders within a specific time limit.

Nor was the conclusion reached by the Court of Appeals supported by its observation that the only sanction for noncompliance was that the reasons for delay be reported. The reporting requirement, rather than supporting the view that the Legislature intended a goal suggests that the Legislature recognized that there might be exceptional cases where the nine-month requirement could not be met, but that the Legislature considered such exceptions to be so significant that it wished to be informed of them and to have the governor be informed of them as well. In any event, a statutory requirement is not transformed into a mere goal for want of an appropriate sanction to be imposed in the event of a violation. Indeed, since the public service commission act is replete with instances in which the Legislature has directed that certain actions “shall” be taken by the commission but in regards to which no sanction is imposed for noncompliance, an extension of the logic of **Detroit Edison** would render much of the entire statute a mere goal. *

* As examples, Section 3 of the act requires the public service commission to turn over to the state Treasurer each month all fees and other moneys received by the commission. Section 5a of the act requires the commission to make an annual report summarizing its activities to the governor and the Legislature. Section 6c(5) requires the commission to promulgate administrative rules to govern an energy conservation loan program established by that section of the act. Section 6h(5) requires the commission to evaluate the reasonableness and prudence of decisions underlying gas cost recovery plans filed by natural gas utilities. Section 6j(6) imposes upon the commission the same requirement with respect to cost recovery plans filed by electric utilities. In none of the examples noted does the statute provide a sanction to be imposed against the commission for noncompliance. (In fact the statutory provision that the commission “shall” report to the governor and the Legislature its failure to meet the nine-month requirement provides no sanction.) Nevertheless, an argument has not been seriously advanced that these statutory requirements are, ‘as a result, merely goals.

Furthermore, as the state Auditor General noted on July 3, 1990, in a performance audit of the commission covering the period October 1, 1985 through July 31, 1989, the commission has not consistently complied with the dual statutory requirement of Section 6a that when the commission fails to render a final decision within nine months, it must report that fact to the governor and Legislature, within fifteen days after the nine-month period, together with an indication of what action has been taken to expedite a final decision and that the commission further report upon the length of time taken to decide those cases that exceeded nine months.

The Auditor General found that, with respect to twelve applications filed during the audit period that took longer than nine months to resolve, the commission failed in five instances to report to the Governor and Legislature within the post-fifteen day period, and in two other instances did not report at all. According to the Auditor General, commission staff were of the view that the reporting requirement applies only to major rate cases, a distinction not made by the statute itself, which applies explicitly to any "petitions or applications to increase or decrease utility rates...."

The foregoing is not to suggest that the commission is taking longer to decide certain rate cases than is reasonably necessary only that the commission often takes longer than the Legislature has statutorily authorized. With respect to 228 rate-case applications filed during the decade of the 1980s, 188 applications (82.5 percent) were decided in nine months or less, while forty applications (17.5 percent) took longer than nine months. (See **Appendix B.**) Because the Legislature has not repealed the nine-month requirement it remains the appropriate benchmark against which to gage commission performance in disposing of rate cases in timely fashion.

The argument may be made that it is unrealistic to expect that the varied and complicated factors involved in major rate cases can be adequately weighed, and appropriate decisions rendered with respect to them, within nine months. Since major rate cases often involve substantial sums of money and may have long-term economic consequences, neither the public interest, nor that of the parties to such cases, are well served by hastily-reached decisions. However, it is equally clear that the public interest is not promoted by a procedure in which deliberations towards a final order in some rate cases often appears to be endless.*

The necessity for some statutory time limit by which the commission must issue final orders is not lessened by the fact that the time limit the Legislature did provide may be of insufficient length in some instances. The unfortunate result of the **Detroit Edison** holding would

* While the commission is authorized by statute to grant utilities partial and immediate (interim) rate relief, there are two reasons why this approach does not necessarily expedite the ratemaking process. First, interim relief is uncertain because the decision whether to grant it is entirely within the discretion of the commission. Second, the commission may grant such relief only after: (1) it has given to interested parties within the service area to be affected notice and reasonable opportunity for a full and complete hearing and (2) its technical staff has investigated the facts and reported thereon. There is some suggestion that smaller utilities do not file for interim relief based upon the view that to do so might actually prolong the ratemaking process.

be to substitute for what may be a defectively short time limit none at all. As already noted, the Court of Appeals apparently **assumed** that the nine-month requirement was a goal because of the absence of a sanction. Since there is no indication from the language of the **Detroit Edison** opinion that the Court accorded any consideration to the important issues discussed above, that decision, as it relates to the nine-month requirement, is of questionable precedential value. This is so because it has long been the law of Michigan that “[a] point thus assumed [by a court] without consideration is of course not decided.” **Allen v Duffie**, (43 Mich 1, 11; 1880); **People v Aaron**, (409 Mich 672, 722; 1980).

Should the present statutory time limit be of insufficient length to allow the commission to adequately consider and conclude certain rate cases, an appropriate remedy lies in amending the act rather than in its continued nonobservance. Until such time, the commission must be bound by the law as it presently is and not as it perhaps should be. This matter of the nine-month requirement will be revisited below after an examination of the administrative procedures act of 1969.

B. The Contested Case Process

A primary purpose of Public Act 306 of 1969^t the administrative procedures act of 1969, was to provide procedural safeguards where a personal right, duty, or privilege is at stake. **Midland Township v State Boundary Commission**, (401 Mich 641; 1977). The act provides two methods by which an administrative agency may exercise its powers: through the promulgation of rules having the force and effect of law, or through the contested case process. Of relevance here is the second of the two methods.

Certain administrative agency actions, among them ratemaking, must be handled as contested cases under the administrative procedures act of 1969. * Section 3(3) defines a contested case as “a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing.” It is noteworthy that in contrast to the public service commission act requirement that a final decision be made within nine months, Section 85 of the administrative procedures act of 1969 requires only that a final decision of an agency in a contested case be issued “within a reasonable period.”

Chapter 4 of the administrative procedures act of 1969 (Sections 71 through 87) governs the contested case procedure. The parties to a contested case have specific procedural rights, among which are the right to an opportunity for a hearing; to notice regarding the hearing; to present oral and written argument on issues of fact; to cross examine opposing witnesses; and to present rebuttal evidence. (See **Appendices C and D.**)

Neither Public Act 88 of 1943 nor Public Act 197 of 1952 applied to the public service commission. Act 88 provided for the compilation of administrative rules, but excluded from the definition thereof those administrative actions that established rates or tariffs. Act 197, the administrative procedures act, expressly excluded the public service commission from its terms. Both of these acts were repealed by the administrative procedures act of 1969.

Section 81 of the act provides that if the agency officials or a majority of them, who are to make a final decision do not hear the contested case or read the records and the decision to be reached is adverse to any party other than the agency itself, the agency cannot issue a final decision until each party is served with a "proposal for decision" and given an opportunity to file exceptions and written arguments with the agency officials who will render a final decision. This section applies to ratemaking cases because they are presided over by administrative law judges rather than by the public service commission. A proposal for decision must contain the issues of fact and law upon which it is based and becomes the final decision unless exceptions are filed, or the agency elects to review it. (In addition to the contested case provisions of the administrative procedures act of 1969, the commission has promulgated "rules of practice and procedure," that govern the admissibility of evidence, establish deadlines by which documents must be filed, and in general set forth the rights of parties to a proceeding.)

It will be observed that the contested case procedure has many of the attributes of a criminal or civil trial and, unfortunately many of the attendant delays as well. Regardless of the procedural benefits that the contested case process may provide in other administrative contexts, it is questionable whether that process, in its entirety, is the most appropriate method by which to conduct rate cases.

There remains the question of whether the nine-month requirement in the public service commission act and the contested case provisions of the administrative procedures act of 1969 present a practical incompatibility. In **Detroit Edison**, examined earlier, the public service commission, in a document filed with the trial court and quoted by the Court of Appeals, offered one explanation of why it could not comply with the nine-month requirement at issue, by noting that

the commission is not the master of its own house. The Legislature requires that the commission follow the 'contested case' provisions of the Administrative Procedures Act of 1969 *** in deciding rate cases. The 'nine month rule,' *** did not eliminate this requirement. The commission does not control the number of parties or the number and complexity of issues raised. Each party is entitled to present a direct case *** and to cross-examine all of the other parties' witnesses; except where the parties with substantially the same positions consolidate cross-examination. Some time is saved by the requirement that prepared testimony be filed for direct cases. However, because rates are set for the future, it is always the future, an open-ended subject, which is on trial, and a very large number of areas are technically relevant. It is thus extremely difficult to put tight time limits on cross-examination. (127 Mich App at 509.)

Contrary to the view expressed by the commission in **Detroit Edison**, it is not clear that the enactment of the nine-month requirement left the contested case provisions unaffected as they relate to ratemaking. Resolution of the matter requires an analysis of two issues. The first concerns the time frame within which the commission must operate; the second, the procedure to be followed by the commission.

Presumably, the Legislature knew when it amended the public service commission act in

1972 that ratemaking was then subject to the contested case provisions of the administrative procedures act of 1969t and that Section 85 of that act required a final decision to be issued by an agency “within a reasonable period.” Nevertheless, the Legislature amended the public service commission act to specifically require the commission to act within nine months. It is therefore reasonable to assume that the Legislature intended the more specific time frame of nine months to supersede with respect to ratemaking, the more general provision of the administrative procedures act of 1969 that an agency issue a final decision “within a reasonable period.” It should be noted that the two provisions are not necessarily contradictory, since they may be read together to require the commission to act **within a reasonable period that does not exceed nine months.** However, to the extent there is an incompatibility, the nine-month requirement should prevail since, as between the two provisions, it is the last expression of legislative will. Hamilton described the applicable rule as follows in **Federalist** No. 78:

It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first.

The second issue is whether the nine-month requirement likewise superseded the contested case provisions of the administrative procedures act of 1969. Resolution of this issue is not dependent upon the manner in which the first issue was resolved since it was within the authority of the Legislature to impose a nine-month requirement upon the commission but without exempting it from the contested case provisions. This is essentially the view that has been offered by the commission to explain why the nine-month requirement cannot be complied with: namely, that the demands of the contested case provisions do not permit it. This view depends upon the assumption that the Legislature intended that those provisions would continue to apply to ratemaking.

Suppose, however, that the Legislature was well aware that the contested case provisions might be too cumbersome to comply with a nine-month time frame. Under such a circumstance, it is reasonable to assume that the Legislature would have provided simultaneously for the adoption of new rules and procedures that would be consistent with the new time frame. The statutory language supports this conclusion. It is indicative of the legislative intent in the matter that the 1972 amendment to the public service commission act did not simply direct the commission to issue final orders within nine months. Instead, the Legislature also directed the commission to “adopt such rules and procedures for the filing, investigation and hearing of petitions or applications to increase or decrease utility rates and charges as the commission [found] necessary or appropriate to enable it to reach a final decision” within nine months. The commission has yet to adopt such rules.

It may be asked why the Legislature chose to amend the public service commission act rather

than the contested case provisions of the administrative procedures act of 1969. One reason may be the fact that the Legislature's focus was on ratemaking while the contested case provisions do not apply exclusively to that area, but to a number of other administrative areas as well.

Certainly the 1972 amendments to the public service commission act were inconsistent, in certain respects, with the then-existing administrative procedures act of 1969, as the commission has duly noted. However, Michigan courts have long held that the Legislature may adopt "an act complete in itself" that by implication amends an existing act.

Amendment by implication occurs when the Legislature adopts an act that is inconsistent with, but that does not actually amend, an existing act. There being no actual amendment, state courts have held that amendment by implication does not violate Section 25 of Article 4 of the state Constitution which provides that "[n]o law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be reenacted and published at length." In construing the analogous provision of the 1850 state Constitution, the state Supreme Court in **People v Mahaney**, (13 Mich 481, 496-497; 1865), reasoned as follows:

If, whenever a new statute is passed, it is necessary that all prior statutes modified by it by implication should be re-enacted and published at length as modified, then a large portion of the code of laws of the state would require to be republished at every session, and parts of it several times over, until from the mere immensity of the material, it would be impossible to tell what the law was.

Thus, consistent with the reasoning of **Mahaney**, the Legislature could, as it did in 1972, amend the public service commission act to enact provisions that were inconsistent with the administrative procedures act of 1969, but without also having to re-enact and republish at length the affected provisions of the latter act.

C. The Prohibition Against Retroactive Ratemaking

A second factor that contributes to the length of rate cases is the fact that commission orders operate only prospectively. Michigan courts have consistently held that the public service commission has no authority to issue retroactive orders. **Michigan Bell Telephone Company v Public Service Commissions** (315 Mich 533; 1946); **Building Owners and Managers Association of Metropolitan Detroit v Public Service Commission**, (131 Mich App 504; 1984). The holdings in such cases appear to be predicated upon the absence of statutory authority on the part of the commission, rather than upon some inherent, constitutional defect in retroactive ratemaking. Thus, it would appear the Legislature, if it so chose, could authorize the commission to engage in retroactive ratemaking. (That has been argued, by some, to be the practical effect of Public Act 304 of 1982. That act amended the public service commission act to authorize the commission to allow a utility to recover the booked cost of purchased power by including a cost-recovery clause in its monthly rates and requires the commission not less than once a year to reconcile revenues resulting from the cost-recovery clause against actual expenses during the **preceding** twelve months.)

The fact that the commission must, with the limited exception noted, operate only prospectively favors those participants in a given rate case that seek to maintain the status quo. For example, when an application for a rate increase is filed with the commissions those participants in the rate case that oppose the increase have an incentive to delay the outcome for as long as possible since whatever increase is ultimately permitted will not apply retroactively to the -date the application was filed, but only from the date of the order. Conversely, if an application is filed for a rate decrease, the utility that would be affected has the incentive to delay, because each day the proceedings are prolonged is an additional day during which the utility can continue to collect revenues at the existing, higher rate. Given the effects of inflation, substantial delay between the date an application is filed and the date of a final order can significantly erode the monetary value of whatever relief is finally granted, whether to a utility or to its customers.

Even were it reasonable to conclude that the relative fortunes of the various participants in rate cases balance out over time, because those delays experienced by utilities when seeking rate increases might essentially be offset by those delays occurring when rate decreases are sought by other parties, it is clear that the public interest is not well served by unnecessary delay. Under the present statutory framework, not only do those that wish to maintain the status quo have a strong incentive to delays but there is no penalty for doing so. Statutory changes that reduce, or that authorize the commission to reduce, the incentives to delay may be necessary.

One approach might be for the Legislature to statutorily authorize the commission, or its administrative law judges, or both, to impose appropriate sanctions against any participant determined to be unnecessarily prolonging the proceedings. The predicate for such a sanction might be found to exist where, for example: a participant (1) raised an issue that was substantially similar to one that the commission had disposed of in a substantially similar factual context in a prior rate case; (2) the issue had been decided adversely to the position being advanced by the participant; and (3) the intervening period between the prior rate case and the present proceeding was not so great as to reasonably suggest that the commission would view the matter any differently. Second, the commission might, in general consider it beneficial to delegate to its administrative law Judges more authority to establish and strictly enforce the hearing schedules in rate cases. In the past, the commission has received some criticism for overruling its administrative law judges in instances where the latter have attempted to hold participants to a rigorous schedule.

It should be noted in this regard that in February 1991, the commission issued a guideline to govern the completion of rate cases. Under the guidelines cases are to be completed within nine months, but the administrative law judge assigned to the case may, for good cause shown, extend the proceeding to twelve months. Any additional time extension, not to exceed a maximum of six months, may be granted only by the commission. The guideline also specifies the time to be allocated among the various phases of the hearing process. (Since Section 3 of Public Act 306 of 1969, the administrative procedures act of 1969, defines a guideline as an agency policy statement that has neither the effect of law, nor binds any person other than the agency issuing the same, the object of the guideline in question can only be the commission's administrative law judges, or the commission itself.)

Third, the Legislature could statutorily provide that a utility that filed an application for a rate increase be allowed to begin collecting the higher rate after a specified period had elapsed, regardless of whether the commission had issued a final order. There are several variations on this approach employed by the various states and the federal government. Some provide for the collection of rates under bond during the pendency of the rate proceeding, with the amount so collected being subject to refund in the event that the requested increase is ultimately determined to be without merit. The 1985 special legislative committee on utility regulation established by the Michigan House of Representatives thought this approach worthy of legislative consideration, but was troubled by the fact that a utility allowed to collect revenue under bond would still have had use of the money collected even if it were subsequently refunded. However, this deficiency might be cured by requiring a utility to pay an appropriate rate of interest, accruing from the initial date of collection, on any money refunded.

Part III may be summarized essentially as follows: an area of continuing controversy is the amount of time the commission occasionally takes to issue final orders in certain rate cases. Delays can be exacerbated by the fact that ratemaking falls within the contested cases process, a process which does not always lend itself to an expeditious resolution of rate cases, and by the fact that any party wishing to maintain the status quo in a rate case has a considerable incentive to delay the outcome for as long as possible because the commission cannot issue orders with retroactive application. Given the effect of inflation, substantial delays between the date an application is filed and the date of a final order can significantly erode the monetary value of whatever relief is finally granted, whether to a utility or to its customers.

While the Legislature amended the public service commission act in 1972 to require the commission to reach a final decision within nine months, the state Court of Appeals concluded that the statutory provision was a goal rather than a requirement. The Legislature has yet to repeal the provision, however. The 1972 amendment also directed the commission to “adopt such rules and procedures for the filing, investigation and hearing of petitions or applications to increase or decrease utility rates and charges” as necessary or appropriate to enable the commission to reach a final decision within nine months. The commission has yet to adopt such rules.

Finally, the present nine-month statutory time limit may not be of sufficient length to allow the commission to adequately consider and conclude certain major rate cases. Since such rate cases often involve substantial sums of money and may have long-term economic consequences, neither the public interest nor that of the parties to such rate cases, are well served by hastily-reached decisions. However, if the present time limit is unrealistically shorts then an appropriate remedy lies in amending the act, rather than in its continued nonobservance.

Part IV. Organization and Management

A. Background

The public service commission is an operating unit within the Michigan Department of Commerce. Line activities within the Department of Commerce either foster economic development or regulate specific phases of economic activity. The public service commission falls into the regulatory group. Prior to 1965, the commission had been an independent organization within the executive branch. Public Act 380 of 1965, the executive organization act, transferred the public service commission to the Department of Commerce as a Type I transfer. The essence of a Type I transfer is that the organization transferred retained its substantive status independent of the department head, but was dependent on the principal department for the provision of staff services such as budgeting, purchasing and personnel management.

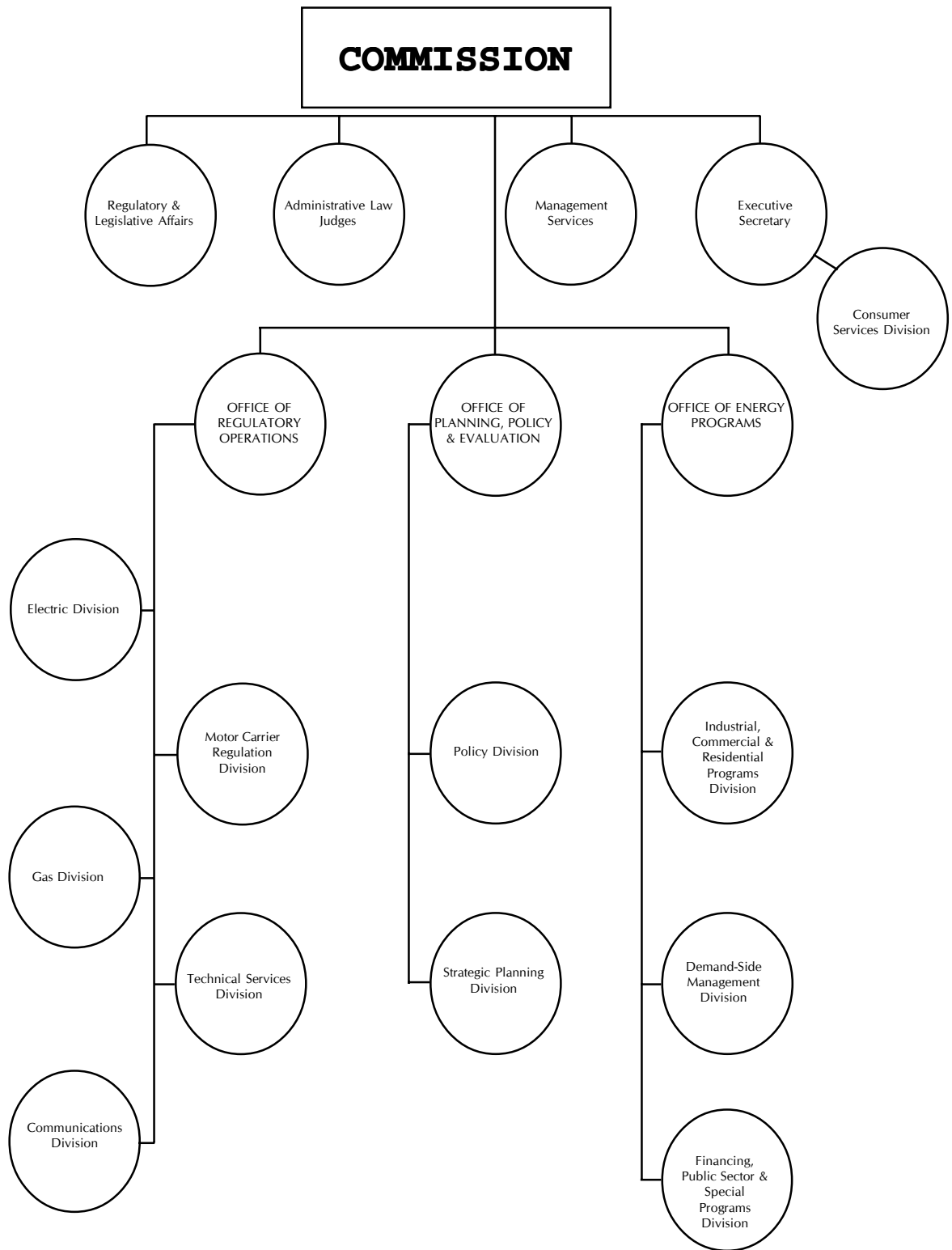
There are three management issues, exclusive of the internal organization of the commission, that warrant review. One relates to the practice of the state Attorney General, one division of which provides legal counsel to the public service commissions while at the same time another division challenges most of the public service commission's decisions in the courts. A second issue relates to the potential conflict that can occur when a commission manages a staff that is a major participant in adversarial hearings. This concern raises the question of how a commission is organized and what regular relationship, if any, should exist between the commission and the technical staff. The third issue concerns the value of staff services provided by the Department of Commerce as compared with the actual amount charged for these services.

1. Public Service Commission Organization

Historically, public agencies have been organized on the basis of: (1) purpose or function, (2) process, (3) clientele or (4) geography. In organizational terms, a function or purpose relates to a broad based organization with more than one substantive activity. An example of purpose is a department of social services with public assistance, child welfare and youth delinquency programs. Process relates to a specific activity such as a department of sanitation. Clientele relates to a specific group being served such as a veterans department. Geography refers to a location where governmental services are provided and usually relates to an organization that is decentralized. Many public agencies are organized using two or more organizational criteria. For example, a state department of social services might include a medical staff, a children's division and be decentralized throughout the state.

The public service commission is organized on a process basis. (See chart on next page.) This is true not only at the office level, but also at the division level. Because regulation is process oriented, it is not surprising to find the agency organized in this manner. There are seven principal organizational units of the public service commission. A brief description of each is provided below.

Regulatory and Legislative Affairs. (11 positions.) Staff in regulatory and legislative affairs work under the direction of the commission, and with the assistance of technical staff, prepare the orders issued by the commission and draft and monitor legislation that affects the commission.



Source: 1990 Annual Report, Public Service Commission.

All orders prepared by technical staff in draft form for settled cases, uncontested cases, and ex parte cases are sent to this division for review and preparation for commission action. Staff is also the commissioner's link with the Legislature and is responsible for coordinating the legislative activities of the commission.

Administrative Law Judges. (14 positions.) Eleven of the positions are administrative law judges, and the remaining three are support positions. The administrative law judges conduct hearings and issue proposals for decision to the commission in contested cases involving a wide variety of matters concerning public utilities and motor carriers. Some cases involve amounts in controversy in excess of \$100 million with complex issues in such diverse areas as finance, accounting, economics, engineering, utility operations, and rate theory and design. There also are many less complex cases, such as consumer complaints, applications, for motor carrier certificates or permits, and applications for approval of gas pipeline construction.

Management Services Division. (13 positions.) Management services has responsibilities for the internal staff services of the public service commission. The division is responsible for all matters related to budget, procurement, financial control, personnel, employee relations, affirmative action, office facilities, training, and data processing.

Executive Secretary. (20 positions.) The executive secretary is responsible for maintaining the commission's official docket files and authorizing the issuance of official documents such as notices of hearings, orders, certificates and permits, and subpoenas. The consumer services division reports to the executive secretary and is responsible for assisting and advocating the customer interest of the state's utility customers; Investigating and resolving customer complaints; and administering the state's solar tax credit program.

Office of Regulatory Operations. (113 positions.) The office of regulatory operations composed of five divisions, provides the commission with recommendations and options on utility issues and works together to represent the public interest for Michigan consumers. Each division provides the commission with recommendations and options on regulatory issues before the commission. This is accomplished generally by presenting evidence in the contested case process. There are separate divisions for electric, gas, communications, and motor carrier areas, and a technical service division that provides support to the other regulatory areas.

Office of Planning, Policy and Evaluation. (31 positions.) The office of planning, policy and evaluation is the commission focal point for state energy and regulatory policy analysis, research, planning and forecasting. This office has two divisions: the policy division and the strategic planning division. The policy division is responsible for assisting the commission in establishing its policy agenda by identifying and analyzing emerging issues in the energy, telecommunications and motor carrier areas. The strategic planning division oversees electric utility planning activities, provides planning services to the commission and its staff, evaluates selected utility and commission sponsored programs, and prepares electric utility sales and demand forecasts.

Office of Energy Programs. (35 positions.) The office of energy programs provides services

and incentives that promote energy conservation and efficiency in the commercial industrial, institutional and residential sectors. It also stimulates pilot-energy conservation projects and promotes cost effective energy demand reduction strategies for the resource planning efforts of Michigan utilities. In addition, it oversees utility implementation of commission approved conservation and demand-side management programs.

2. Public Service Commission Budget

The 1990-91 public service commission operating budget as appropriated essentially follows the organizational structure, except regulatory and legislative affairs, administrative law judges, the management services division and the executive secretary are combined in one administrative support appropriation. Following is a summary of the 1990-91 operating appropriations.

Table 11

Public Service Commission 1990-91 Appropriation

Commission salaries	\$196,700
Administrative support	4,111,800
Regulatory operations	7,099,300
Planning and policy evaluation	1,927,400
Energy programs	2,176,800
Attorney General - legal services	1,211,300
Other legal expenses	287,500
Research and analysis fund	650,000
Grant to Department of Public Health	522,200
Total	\$18,183,000

Source: Public Act 205 of 1990.

The 1990-91 public service commission appropriation totals \$18.2 million, but not all of the appropriation is available for day-to-day operations of the commission. For example, \$1.3 million is transferred to the Department of Attorney General to support the legal counsel provided the commission. The amount available for the daily operational expenses of commission staff is included in the first five items above and total \$15.5 million.

The public service commission primarily is funded from public utility assessments and motor carrier fees rather than general revenues of the general fund. The 1990-91 public service commission appropriation included \$15.8 million in restricted revenues from public utility assessments (\$13.9 million) and motor carrier assessments (\$1.9 million). General fund-general purpose revenue is \$1.4 million and funds energy programs. Other restricted revenues, primarily from the federal government, raise total revenues to \$18.2 million. There had been no general fund-general purpose revenue used to support the public service commission for a number of years. General fund-general purpose revenue reappeared in the public service commission's 1987-88 appropriation when the energy administration was transferred to the public service commission.

The system for assessing public utilities to finance their regulation is established by the provisions of Public Act 299 of 1972 as amended. The appropriation for the public service commission and Department of Commerce overhead costs is apportioned among the state's public utilities based on their intrastate revenues of the preceding calendar year. Each utility is assessed an amount equal to the amount the utility's intrastate revenue is to the total intrastate revenue of all public utilities. If a utility's revenue is ten percent of total revenues its assessment is ten percent of the appropriation. There is a minimum assessment of \$50. The assessments are adjusted in the fiscal year following the fiscal year for which the appropriation was made to reflect any unexpended appropriations. The adjustments are made in the same proportions as the original assessments. Based on information from the public service commission, 1989-90 collections were \$17 million.

The regulation of motor carriers is funded by a fee system established by Public Act 254 of 1933 as amended, the motor carrier act. Current fees range from \$3 to replace a lost or stolen decal to several fees of \$100. The latter fee applies for purposes such as applications or permits, vehicle identification, and renewal certificates. The public service commission collects these fees and reported collections of \$5.4 million in 1989-90.

B. Locus of Legal Services

The Department of Attorney General, through its public service division represents commission staff in proceedings before the commission. In addition, the special litigation division of the Attorney General intervenes on behalf of ratepayers before the commission. The public service division and the special litigation division appear in court representing respectively the commission and the attorney general. It is alleged by some parties that attorneys from the same office representing different positions results in the potential for a conflict of interest to occur.

1. Authority of Attorney General

The attorney general is a constitutional officer established in Section 21 of Article 5 of the state Constitution. The constitutional provision provides for a four-year elected term along with the governor lieutenant governor and secretary of state. Public Act 380 of 1965, the executive organization act of 1965, established the Department of the Attorney General as one of the principal departments of state government.

The statutory authority for the attorney general to represent the state in legal matters surprisingly is sparse. Section 28 of Chapter 12 of the Revised Statutes of 1849, authorizes the attorney general to intervene in any court on behalf of the people "in any cause or matter, civil or criminal, in which the people of this state may be a party or interested." Section 29 of Chapter 12 requires the attorney general to represent the governor, the secretary of state, the treasurer or the auditor general in all suits when requested by any of these officials. (At the time these Sections were adopted the auditor general and treasurer were elected officials but since the adoption of the present state Constitution the treasurer is appointed by the governor and the auditor general is appointed by the Legislature.)

Public Act 232 of 1919 authorizes the attorney general "to intervene in any action heretofore

or hereafter commenced in any court of the state whenever such intervention is necessary in order to protect any right or interest of the states, or of the people of the state.” The Michigan Supreme Court in **Mundy v McDonald**, (216 Mich 444, 450; 1921), interpreted Act 232 as it relates to the authority of the attorney general, saying: “A broad discretion is vested in this office in determining what matters may, or may not be of interest to the people generally.” The decision went on to indicate that the attorney general has additional powers at common law.

Attorney General opinion (OAG 1926-28, March 25, 1927) concluded that the attorney general of a state whose duties are not defined by constitution has the powers of an attorney general at common law. This same opinion acknowledged that there were specific statutes which authorized departments to employ attorneys, but these statutes were regarded by the attorney general as unconstitutional, and had been acquiesced in only because the attorney general had not had adequate appropriations to enable it to employ necessary legal staff.

The Attorney General in (OAG 1947-48, No. 262), indicated the Michigan employment security commission may be represented in court by attorneys of the commission’s own selection. Such attorneys had to be designated by the attorney general for such purpose and could not be identified as assistant attorneys general. However, the attorney general reserved the right to intervene in any matter before the commission to protect the interests of the state.

During this same period, the Office of Attorney General initiated a campaign to bring all assistant attorneys general under the budget control of that department by having all appropriations for legal staff made part of the department’s appropriation. This effort primarily was directed at legal staff supported by restricted revenue sources such as federal- and highway-supported positions. The transmittal letter in the Attorney General’s 1949-50 Biennial Report recommended that all assistant attorneys general be budgeted as part of the Office of Attorney General. The 1952-54 Biennial Report indicated that all legal activities of the Highway Department had been assumed by the attorney general and legal aides from other state agencies also had been transferred to the attorney general, which is the practice that continues to this day. The Department of Civil Service and the Executive Office of the Governor are special situations and they sometimes use outside counsel. The former has strong constitutional authority unlike any other state agency, and the governor has obvious special needs for independent legal counsel.

2. The Attorney General and Conflict of Interest

Although it is clear that the attorney general has authority to represent all state agencies and to appear in any court to represent the state’s interest, this authority does not answer concerns as to whether a potential conflict of interest exists in such an environment and more importantly, whether such a dual representation is good public policy. There is general agreement that a conflict of interest would exist in a private law firm if both sides in a dispute were represented by attorneys in the same firm. For example, Canon 514 concerning ethical considerations of the American Bar Association’s Selected Standards on Professional Responsibility, 1986, make it clear that an attorney may not represent two or more clients who may have differing interests.

An article in the February 1978 edition of the Illinois Bar Journal, entitled "The Illinois Attorney General's Representation of Opposing State Agencies — Conflicts of Interest, Policy and Practice" pointed out an attorney general is in a different position than is an attorney in private practice. It was argued that the attorney general is responsible not only to represent the special interests of state agencies, but also the public interest. This responsibility to the public interest obviates any possible conflict of interest. It was further argued that the attorney general is not obligated to represent any interest he does not believe is in the public interest. The author concluded that if the attorney general's office operates as an association of independent divisions there should be no problem concerning conflict of interest. Presumably, however, if the attorney general's office had a strong position on regulatory matters there could be a potential conflict of interest. As noted above, the Attorney General of Michigan represents both sides of an issue, involving the commission, through separate divisions.

In February, 1985, the Pennsylvania Legislative Budget and Finance Committee of the General Assembly published a performance audit of the Pennsylvania public utility commission. Included in the review was a discussion of the three roles performed by the law bureau of the commission. The same staff could advise the commission, prosecute a case before the commission and represent the commission in litigation even though the commission decision might be contrary to the position argued by the attorney before the commission. This situation is different than the current practice in Michigan and raised more serious conflict of interest problems than is found in Michigan. The recommendation was not for change, but rather that the appropriate standing committee of the General Assembly review this matter.

In April, 1976, a special committee of the Michigan House of Representatives, established to study and evaluate the effectiveness of the public service commission, issued its report entitled *Utility Regulation in Michigan: Blueprint for Reform*. The committee gave consideration to an independent legal counsel for the commission, but rejected the proposal. The committee concluded that the existing system functions well, and there were no extraordinary circumstances that warranted the commission being treated differently than other state agencies. However, two members of the committee filed a dissent from this viewpoint. They pointed out that: "The Attorney General's Department, in its dual role of legal representative of the PSC and intervenor in commission cases, is in a position which could result in a conflict of interest."

A more recent legislative report on the commission was issued on December 11, 1985, and was completed under the auspices of a special Michigan House of Representatives committee to study the commission. Although the committee made no specific recommendation concerning the organization of legal services for the commission, it did recognize that the potential for conflict of interest existed. Testimony was given to the committee that indicated in 1983 Iowa established an office of general counsel in the Iowa regulatory commission that is independent of that state's attorney general.

3. Quality of Legal Service and Practice in Other States

In addition the question of whom is providing legal services to the public service commission, some effort needs to be devoted to assessing the quality of that service. Thus, one legitimate concern is the quality of service provided by the public service division, which represents the commission, and the special litigation division, which represents ratepayers. This is a difficult factor to measure but one indication of quality is stability of staff. It is argued that if there is a significant amount of turnover, it is difficult for attorneys in either division to become well versed in rate making which is a technical area.

During the first eight years of the 1980's, the Attorney General reported a staff of nine attorneys for the public service division that increased to eleven attorneys for years 1989 and 1990. The special litigation division had three attorneys assigned for 1981 and 1982, five for 1987 and 1988 and six for the other six years. These figures represent the number of attorneys as of a specific point in time.

Table 12 presents information on longevity for attorneys in the two divisions who served during the ten year period 1981-1990. The table shows that twenty-five different persons filled the attorney positions in the public service division during the ten-year period, and twelve different attorneys served in the special litigation division during the decade.

Table 12

Attorney Longevity in the Public Service Division and Special Litigation Divisions 1981-1990

	Public Service Division		Special Litigation Division	
	Number	Percent	Number	Percent
7 years or more	4	16.0	2	16.7
5-7 years	2	8.0	2	16.7
Less than 5 years	12	76.0	8	66.6
Total	25	100.0	12	100.0

Source: Biennial Reports of the Attorney General.

Although the statistical evidence is not comprehensive, it is apparent that both divisions had a nucleus of staff with five or more years, experience in each of the divisions during the decade. However, by the end of the decade, there was only one attorney in the special litigation division with more than five years' service in that division but six of the attorneys in the public service division with more than five years in the division remained on the staff. This data does not support the contention that the public service division is staffed by inexperienced attorneys.

Michigan has a history of the attorney general representing the commission, but in many states the regulatory body employs its own staff. **Table 13** provides data on this matter for the fifteen most-populous states and the neighboring states of Minnesota and Wisconsin.

Table 13

Agency Legal Representation

State	State Attorney General	Staff Attorneys
California	No	Yes
Florida	No	Yes
Georgia	Yes	No
Illinois	No	Yes
Indiana	Yes	Yes
Massachusetts	No	Yes
MICHIGAN	Yes	No
Minnesota	Yes	Yes
Missouri	No	Yes
New Jersey	Yes	No
New York	No	Yes
North Carolina	No	No
Ohio	Yes	Yes
Pennsylvania	No	Yes
Texas	Yes	Yes
Virginia	No	Yes
Wisconsin	No	Yes

Source: 1989 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners, except information on Missouri was provided by the Missouri Public Service Commission.

Of the seventeen states, only three of the regulatory bodies are represented exclusively by the state's attorney general, four other states are represented by both the attorney general and staff attorneys. Nine regulatory bodies are represented only by their own staff attorneys, and the North Carolina agency is represented by outside counsel. The fact that only three states are represented exclusively by the attorney general indicates that this is not the preferred organizational pattern.

4. Serving the Public Interest

Most of the discussion concerning the dual role of the state attorney general relates to the authority of the attorney general to represent both sides of the issue in a contested case involving a commission decision, and the question of potential conflict of interest on the part of the attorney general. There is a plethora of materials that demonstrate the attorney general has authority to represent state officers and to protect the public interest. Defenders point to the common law, constitutional and statutory provisions, court cases and attorney general opinions. Several of these sources have been referred to above.

In terms of the conflict of interest question, it is argued that the public sector is different from

the private sector. This difference arises from the attorney general's responsibility to represent not only the narrow interests and views of individual state departments, but also the general public interest. In Michigan, it has been contended that the attorney general has given independence to the public service divisions and has not sought to influence its activities. Thus, there is no conflict of interest.

Rather than discussing authority and conflict of interests attention should be directed to what is good public policy. There are a number of other states where a regulatory body has its own legal staff. Michigan has had such a practice in the past in areas other than utility regulation. Thus, it appears that if public policy dictates there should be independent counsel for the commission, any legal objections could be resolved.

It can be argued that an environment where adversarial relationships exist within the Department of Attorney General is not conducive to serving the public interest. Staff in both divisions depend on the same attorney general for promotions and other expressions of support for a job well done. Such a situation potentially is not a healthy environment for staff. Staff may not want to work in a division involved in an adversarial relationship with another division, if they believe the attorney general's sympathy lies with that other division. The existing system also is not conducive to fostering an image of fairness and evenhandedness with the various intervenors in rate cases nor with the general public.

It has been argued that it is normal practice for the Attorney General to litigate both sides of a public issue. There are instances where the Attorney General has organized teams from within his office to argue both sides in a court setting. The difference in the commission situation is that this is the daily mode of operation. The public service division clearly represents the commission. The most recent biennial report of the Attorney General indicates the primary responsibility of the special litigation division is to represent the general public in utility regulatory proceedings before the public service commission and the courts. The daily relationship between the two divisions is adversarial in nature, not like other situations in which the Department of Attorney General is representing both adverse parties which results in an occasional adversarial relationship.

Defenders of the current system point out that the current Attorney General has a history of fairness in dealing with staff and has given significant independence to the public service division. This is an institutional issue not a personal one. There is nothing to prevent a future state official from exploiting the existing system by undermining the independence of either the public service division or the special litigation division.

In summary, there should be a serious discussion by elected state officials concerning whether the commission should be serviced by legal counsel appointed by and responsible to the commission. This review should focus on the public policy issue rather than legal or conflict of interest issues.

C. The Commission and Management of the Technical Staff *

1. Education and Experience of Public Service Commissioners

As was pointed out in **Part I**, the public service commission consists of three members, appointed by the governor to six-year terms with the advice and consent of the senate. No more than two commissioners may be of the same political party. The practice has been to appoint individuals who are attorneys and have no background in public utility issues, although there is no specific statutory prohibition to an appointee having a background in the management or regulation of utilities. **Table 14** presents information concerning the commissioners who served during the period from January 1, 1981 through December 31, 1990.

Table 14

Michigan Public Service Commissioners 1981-1990

Name	Term of Office	Professional Background
Daniel J. Demlow	1975-81	Attorney
Eric J. Schneidewind	1979-87	Attorney
Edwyna G. Anderson	1980-89	Attorney
Matthew E. McLogan	1981-87	Newscaster
William E. Long	1985-present	Attorney
Steven M. Fetter	1987-present	Attorney
Ronald E. Russell	1988-present	Attorney

Source: Public Service Commission. One person who served one month in 1985 is not listed.

All but one of the seven is an attorney. Several of the commissioners had previous governmental experience, but only two had any high level management experience. One commissioner was director of one of the principal departments of state government, and another was the deputy director in a principal department of government and the director of a major bureau in a state agency. These management experiences covered a two- to three-year period in each of the two situations.

Utility regulation involves a number of academic disciplines such as engineering, finance, accounting, law, statistics and business organization. Ideally, all of this knowledge should be represented on the commission. However, it is not practical to expect a three-member commission to have the full range of knowledge and experience required to make prudent public-policy decisions. Admittedly, this is one of the arguments for the commission having a technical staff. It appears that at least during the last decades education in the law has been the principal educational requirement for appointment to the commission. It may be that a mix of disciplines would better serve ratemaking decisions. One of the reasons for any

* For a comprehensive discussion of this issue, see "The Effect of Commission Structure on Decision Makings" by William M. Barvick, Public Utilities Fortnightly, November 10 and November 24, 1983.

multi-member body is to allow for diversity in education, experience and social philosophy. It is believed that diversity provides the opportunity for better decisionmaking.

Most persons view the public service commission as a quasi-judicial body. Thus, it seems to make sense to appoint attorneys to the commission. This may be an erroneous belief as Mr. William M. Barvick pointed out in his November 10, 1983 article:

The perception of utility regulators as Judges reflects an ignorance of what utility regulators are called upon to do and an equal misunderstanding of what judges traditionally do. There is a general division of labor in the judicial system. Judges decide what the law is. Juries decide questions of fact....

If a utility regulatory commission is analogized to the judicial systems then the appropriate comparison would be with the jury not with the judge.

Although public service commissioners interpret the regulatory statutes they do not render their own legal advice. That is the responsibility of the attorney general. Instead the commission is involved with the substance of the decision itself. This again suggests that commissioners with a diverse background might complement one another and result in better quality decisions.

2. The Public Service Commission and Management

In addition to a diversified commission, another important concern relating to the effective operation of the commission is the commission's responsibility for managing a large technical staff and the public's perception of a staff that is one of the major participants in rate cases being part of the body making the decision. This in turn raises the perception of a commission-staff relationship that is not conducive to objective decision making.

The 1976 special committee of the Michigan House of Representatives expressed concern about this issue. The committee pointed out that a utility rate hearing is an adversary proceeding and that the staff has the responsibility to represent the interests of the utility ratepayers. The committee report expressed concern that the staff did not operate independently of the commission, which has the final authority to approve rate increases. The committee indicated they found evidence that the staff adjusted its presentation to be compatible with the position of the commission. The report recommended, "that those persons who appear as staff witnesses in contested rate cases be administratively reorganized into a separate division of the Michigan PSC, as an advocacy unit." Nothing came of this recommendation.

The 1985 study of the special Michigan House of Representatives committee to study the commission considered the aspect relating to intervention for the purpose of protecting the public interest. The committee recommended the ' creation of an office to represent utility customers before the public service commission. The director was to be appointed by the governor and would have a small staff of technical experts. Again nothing came of this recommendation.

The 1985 Pennsylvania performance audit referred to above recognized the fundamental issue concerning the potential conflict between a commission regulating utilities and a staff that is one of the major participants in the ratemaking process. The report indicates: "In light of the Commission's quasi-judicial functions, it appears inappropriate to combine the ratemaking function with the management of a staff that is a major participant in almost all aspects of the Commission proceedings." The recommendation to solve the problem was to assign responsibility for overall staff management to the chairman of the commission with responsibility for daily administration delegated to a director of operations. This approach does not deal with the concern that the commission's staff, to some degree, is under the influence of the commission. Thus, a more radical solution may be required.

The existing system of direct staff management by the public service commission raises a number of concerns that impact the public perception of whether a fair hearing for all participants can occur. It may be that, over time, a staff member will develop credibility with the commission to the extent that commission members subconsciously will give greater weight to testimony from that staff person. When a daily relationship exists, it is difficult to maintain an environment of independence. There is a possibility that this independence will break down as a relationship develops and matures. This is not to suggest that a staff member always will fall under the influence of a commissioner. An experienced and knowledgeable staff member can influence a commissioner in what is a technical and often esoteric field. Although this may not occur, there is the perception of utilities and intervenors that they are not playing on a "level field."

Public Act 306 of 1969, the administrative procedures act of 1969, generally prohibits an employee of a state agency involved in a contested case from communicating with any party involved in the case unless all parties involved in the case are present. Agency staff are authorized to communicate with other agency staff who have not been involved in investigating or prosecuting the case. However, these requirements do not apply to public service commission employees with professional education in accounting, actuarial sciences, economics, financial analysis or ratemaking in a contested case. Thus, there are no practical statutory limitations relating to communication among the public service commission staff and the commission.

There are other problems. Rendering rate decisions is a full time job, but so is management of a large complex organization. The public service commission has a budgeted staff of 240 persons. Managing a staff that size requires a whole series of management skills developed over time. Not all the chairmen of the public service commission have had an opportunity to develop these skills.

This management problem is exacerbated when responsibility is diffused among a multi-member commission. In such an environment, conflicting requests of staff and direction to staff can be given. These and similar practices undermine organizational efficiencies and staff morale. The public service commission has addressed this issue, as was pointed out in Part II of this report, through the adoption of bylaws. These bylaws, in part, indicate the chairman of the commission "shall be the chief administrative officer of the Commissions having general supervision over the business and affairs of the Commission." On major

administrative matters, other commissioners are consulted by the chairman. Thus, the system appears to be functioning well at the present time. The commission is to be commended for dealing with this issue, but it should be recognized that the existing policy is subject to change by a majority of the commission.

Because the system is dependent on the delegation of authority to the chairman by two commissioners, there is a potential breakdown in the system. Without the consent of the two commissioners, administrative authority could not be placed in the chairman. This situation does not lead to an environment that generally is conducive to the development of strong leadership. If this model is to be continued, it may strengthen the chairman's authority if it is derived from a statutory provision rather than commission bylaws.

One alternative to the management Issue is the appointment of a staff director to coordinate and direct work flow between the commission and staff. Of the seventeen states identified in Table 13, only three (Michigan, Ohio and Virginia) operate without a chief of staff. The public service commission operated with a staff director until a staff reorganization in 1987 created the existing organizational structure. One problem with a chief of staff concept is that it can be undermined by commission members directly contacting staff members rather than operating through the staff director. There also is the possibility of the emergence of a staff director who overshadows commission members because of a long career as staff director. This may occur in situations where there are several turnovers in chairmen of a commission with no change in the staff director.

Another alternative would be to separate the substantive staff of the regulatory body from the commission. Under this proposal, the technical staff would be assigned to a separate agency. The staff would exist to represent the public interest and would operate in the same manner as the other intervenors and the regulated utilities. There would be no reason for special relationships to develop between individual commissioners and staff. The public perception would be that all parties have the same opportunity to present their case to the commission. The time devoted to management activities on the part of the commission would be diminished.

Of the three management alternatives discussed above, it appears that assigning the technical staff to a separate agency may be a better alternative than either the existing system whereby the public service commission chairman is appointed as chief administrative officers or to appoint a staff director to manage the staff. The separate agency concept not only deals with the management issue, but provides a mechanism for an objective analysis of rate increase requests independent of any interested parties. This independent analysis and recommendation to the public service commission should raise public confidence as it relates to utility regulation in Michigan.

If the establishment of a separate agency were to occur the nucleus of the agency should be the existing office of regulatory operations. It is this office that presents the commission with recommendations and alternatives on specific rate cases before the commission. Based on the 1990-91 budget, the office of regulatory operations has 113 positions or 47 percent of the total 240-member public service commission staff. In addition, there are elements of the office of energy programs and the office of planning policy and evaluation that should be

considered for inclusion in a separate agency. For example, the short range forecasting capability of the policy division probably should be included in any independent agency.

If this alternative were adopted and because the state Constitution limits the number of executive departments to twenty, it is not reasonable to recommend that the independent agency be one of the twenty principal departments. A case could be made to include the agency in the existing Department of Commerce, but the public service commission is an organizational entity in the Department of Commerce, and it is desirable to eliminate any appearance of influence by the public service commission. An agency making recommendations to the public service commission should be located in an agency independent of the commissions possibly the Department of Management and Budget.

In conclusion, it behooves the governor to devote more attention to the background of commission members with a conscious effort made to appoint individuals with a more diverse professional background. The public interest does not appear to be served by limiting appointments to attorneys. At the same time, consideration should be given to separating the technical staff from the commission. This would have the effect of raising public confidence in the performance of the commission by removing one of the intervenors from a direct employer-employee relationship with the commission. It also would allow the commission to concentrate on making decisions concerning utility regulation rather than devoting time to management activities.

D. The Commission's Relationship with the Department of Commerce

It was pointed out earlier in this chapter that the public service commission is dependent on the Department of Commerce for traditional support services such as accounting, budgeting and personnel management. In addition it is assumed that the top management of the department provides central planning and coordination. A reasonable charge to the public service commission is the appropriate method for a department of state government to recover its cost of providing staff services.

One recent example of the mundane but important issues that have to be resolved in order for the public service commission to operate effectively involved the potential bumping of commission staff from within the Department of Commerce if a reduction in force occurred within other units of the department. Many of the public service commission staff have generic civil service titles common to other civil service positions in the Department of Commerce. Thus, it appeared individuals with more seniority than commission staff would transfer into the public service commission leaving the commission with a staff that did not possess the technical skills required in utility regulation. This potential problem has been resolved by using more specific criteria when defining the experience and education necessary for individuals to function effectively in a utility regulatory environment.

1. Charging Administrative Support Costs to the Public Service Commission

At the present time, there is no rational system to allocate administrative support costs to the public service commission or to any other unit within the Department of Commerce. To the extent there is a system for allocating costs, it is a laissez faire system. As one official indi-

cated, the department "follows the legislative lead." Although the percentage of total charges for support costs to the public service commission budget has fluctuated over time, the bases for the charges are not related to actual experience.

The Auditor General recognized this problem in two of his reports, one covering the period July 1, 1976 through September 30, 1980 and the second covering October 1, 1980 through September 30, 1982. The earlier report recommended "that the department develop a cost allocation system which identifies the operating costs incurred by the administrative services and executive direction components for providing support services to restricted funds." The department was not sympathetic to the recommendation and presented several arguments for not implementing the recommendation. Although Michigan operates under an executive budget concept, the department concluded that a proposed executive branch allocation system would not be a useful endeavor. The department's response in part said: "It would be the exception, rather than the rule, that the department's suggested allocation of funding sources would be adopted. The Legislature has indicated in the past, and continues to indicate, that they make the final determination of funding source." Although the second sentence literally is true, the executive branch clearly influences these decisions. Thus, there is reason to believe a well-formulated cost allocation plan would receive serious consideration by the Legislature. There are a number of reasonable ways to allocate support service costs to line agencies.

Although there did not appear to be significant interest in developing a cost allocation plan for support services, the Department of Commerce, in 1986, did contract for a study to develop a plan for the allocation of the cost of operating the directors office and the cost of staff services to the line units. The study identified performance measures for each organizational unit and used these measures to allocate costs to line organizations. Specifically, the consultant reviewed 1985-86 adjusted appropriations for the director's office, bureau of management services and the business ombudsman office.

The 1985-86 adjusted appropriations for the three organizational units totaled \$17.4 million, of which \$4.3 million was general fund money and \$13.1 million was restricted revenue. Although there were significant shifts between general fund and restricted monies recommended for each organizational unit, to a significant extent, the increases and decreases in recommended adjustments balanced each other out. For example, an increase of \$1 million in general fund monies was recommended for the bureau of management services, while a \$300,000 decrease in general fund monies was recommended for the directors office. The bottom line recommendation was a \$600,000 increase in general fund support with a commensurate reduction in restricted revenue support. No effort was made to implement the recommendations included in the study.

The study did not identify proposed adjustments in specific restricted revenue sources. Thus, there is no information on the direct impact the recommended system would have had on the public service commission. Based on Public Act 205 of 1990, the 1990-91 Department of Commerce appropriation act, and based on the consultant's recommendation, the public service commission would be the second biggest beneficiary of a shift in source of funding. Only the liquor control commission is assessed a larger contribution for executive direction

and staff services than is the public service commission.

The Department of Commerce has negotiated an indirect cost proposal with the U.S. Department of Housing and Urban Development. The proposal is for the fiscal year ending September 30, 1991, and is renewed annually. The plan provides a basis for the state to obtain federal funds to cover support services attributable to federal programs. For example, a portion of the director's office costs should be charged to the federal government. The indirect cost proposal provides a basis to make these charges. The negotiated rate for the public service commission is 18.13 percent; thus the federal government agrees to reimburse the state 18.13 percent for any federal grant to the public service commission to cover overhead costs. A \$1,000 grant would generate \$181.30 in federal indirect funds. It may be that the indirect cost plan negotiated with the federal government could serve as the basis for a rational allocation system to allocate state restricted funds for central staff services.

Although no specific system exists to allocate public service commission restricted revenues for the support of central staff services and executive management, this allocation is made annually.

Table 15 presents this information for the most recent six-year period.

Table 15

Public Service Commission's Financial Support for Department of Commerce's Central Staff Services, 1986-1991

Year	Appropriation*	Allocation for Support**	Percent of Appropriation for Support
1985-86	\$15,609,300	\$2,543,900	16.3
1986-87	17,401,800	2,819,600	16.2
1987-88	17,128,000	2,526,400	14.8
1988-89	19,526,700	2,770,700	14.2
1989-90	20,330,800	2,940,800	14.5
1990-91	19,464,100	3,001,700	15.4

Source: Department of Commerce unpublished data. *Department of Commerce appropriation, including the public service commissions supported from public utility assessments and motor carrier fees, and Department of Attorney General appropriation for the first four years. **Amount of public utility assessments and motor carrier fees allocated for support services.

In 1985-86, 16.3 percent of total public service commission public utility assessments and motor carrier fees were allocated to support services and executive direction provided by the Department of Commerce. This percentage declined over the next three years reaching a low of 14.2 percent in 1988-89. The trend was reversed in 1989-90 when the percentage figure increased to 14.5 percent and continued to increase in 1990-91. In 1990-91, the allocation for support is 18.2 percent of direct service funds (\$3,001,700/\$16,462,400). This percentage is very close to the indirect rate (18.13 percent) negotiated with the federal government for 1990-91.

Because there is no system in place for allocating support service costs, there is no empirical basis to conclude whether the allocations were appropriate or inappropriate. It may be that the increase in the 1990-91 percentage allocation to support services reflected the \$1 billion general fund/general purpose budget deficit that faced the state. In the absence of any system to charge restricted funds for support services it would not be difficult to increase the percent charged to restricted revenues in order to conserve general fund revenues.

It also is worth noting that public utility assessments and motor carrier fees increased twenty-five percent between 1985-86 and 1990-91. During this same period, the increase in the amount of these restricted revenues allocated to support services was eighteen percent.

One reasonable criterion to determine an appropriate allocation of restricted revenues for staff support is the number of restricted funded positions as a percentage of total positions in a department. Some staff services can be related directly to the number of staff (e.g. personnel and payroll). There are other staff activities that are not related directly to number of personnel. Data processing services relate to the number and volume of systems that are automated rather than the number of personnel. Some activities lend themselves to automation better than others. However, it is worth reviewing the number of appropriated positions in the public service commission with the comparable number of positions in the Department of Commerce.

Table 16
Appropriated Positions in the Public Service
Commission and the Department of Commerce, 1986-1991

Year	Appropriated Positions in Dept. of Commerce	Appropriated Positions in Public Service	Public Service Commission as a Percent of Dept. of Commerce
1985-86	1,958	203	10.4
1986-87	1,960	203	10.4
1987-88	1,927	248	12.9
1988-89	1,898	248	13.1
1989-90	1,902	242	12.7
1990-91	2,421	243	10.0

Source: Annual Appropriation Acts.

The percentage that the public service commission staff comprises of the total Department of Commerce staff is below the percent of public service commission restricted revenues appropriated to the Department of Commerce reported in **Table 15**. For example, the 1990-91 allocation for staff support services was 15.4 percent, although the appropriated staff comprised only ten percent of the total department staff. Using the staff measure, it would appear that the public service commission is allocating a disproportionate amount of its restricted revenue to staff support services. However, it again is recognized that allocation based on staff is not a fully adequate method for determining staff support costs.

There was an increase of forty-five public service commission positions in the 1987-88 fiscal year. This twenty-two percent increase was not the result of a program expansion, but rather a transfer of the energy administration from the Department of Commerce to the public service commission. This was accomplished by the promulgation of executive order 1986-17.

Table 16 shows a significant increase in the total staffing level for the Department of Commerce in 1990-91. The increase is 519 positions or a twenty-seven percent increase over the prior year. This increase primarily is attributable to the placement of the Michigan accident fund in the Department of Commerce after several years of litigation relating to whether the accident fund is a private or public agency. The accident fund is funded one hundred percent from restricted revenues (\$31 million in 1990-91). However, no restricted revenues were diverted to support central staff services provided by the Department of Commerce. It appears that there is justification for some allocation of accident fund revenues to the central Department of Commerce.

In summary, it is not possible to reach a rational conclusion concerning whether the amount of public service commission restricted revenues appropriated to the core Department of Commerce is an appropriate amount for the staff services provided. This is true because there is no rational system in place to determine these allocations. The use of a personnel criterion suggests that the public service commission allocation is more than is warranted, but this criterion has limitations. In addition, the indirect cost plan negotiated with the federal government indicates that the current allocation percentage used by the state is similar to the rate negotiated with the federal government. The fact is there are reasonable systems in existence that allocate staff support costs. It is suggested that the Department of Commerce develop an allocation system that could be used throughout the department.

Part V. The Appropriate Degree of Regulation

The public service commission act, together with its predecessor and companion acts, and Public Act 306 of 1969, the administrative procedures act of 19690 examined in **Part III**, comprise the statutory framework in Michigan within which the commission regulates businesses affected with a public interest. It has long been recognized that such regulation constitutes a substantial intrusion into the rights of ownership of private property. In **Michigan State Telephone Company v Michigan Railroad Commission**, (193 Mich 515, 524; 1916), the state Supreme Court observed that

[i]n one sense there may be, and often is, a taking of property through the legitimate exercise of the power of regulations and as necessarily incident thereto. In such case the company whose business is subjected to the regulation is not deprived of the title to or possession of its property, but it may be required to forego profits which it might otherwise receive; to apply its property, within the dedicated uses to some purpose contrary to its wishes; to expend its money as it would not otherwise expend it; to perform service it would not except for the regulation; and to submit to losses which it would prefer to avoid.

The Court further noted that the burden imposed could only be justified by the demands of public convenience and necessity and that therefore, the regulation must be reasonable in view of the public interest to be served. As was noted earlier, the traditional view has held that the public interest is best served and greater economies of scale with respect to utility service best achieved, by granting a given utility the exclusive right of operation in a geographic area. Within this context, governmental regulation has been seen as a necessary substitute for the economic controls of the market place that would ensure fair prices and adequate service to the public in absence of exclusive franchises.

The observation that governmental regulation of the sort here described serves as a necessary substitute for market forces has generally been interpreted to mean that the public must be protected from practices that might arise from an absence of competition, such as inadequate service or exorbitant prices. However, a corollary purpose has also been to protect against those practices resulting from an excess of inappropriate competition. For example, one reason the state Legislature subjected telephone utilities to regulation was that, in some communities an excess of competition resulted in an unworkable and undesirable proliferation of telephone lines and equipment. Thus, regulation has also had as its objective to achieve greater rationality and an avoidance of economic waste with respect to those services upon which the public has become peculiarly dependent.

The regulation of utilities should be viewed as a means to an end, rather than an end in itself. Bearing in mind the ends to be achieved — adequate service at reasonable prices and an avoidance of economic waste — it is appropriate to inquire whether the public interest is best served by the current regulatory framework, much of which was developed in the early days of the twentieth century, or by a modification of that framework in certain respects.

Unfortunately, the nature of the subject inquired into does not permit a precise definition of

what constitutes an appropriate degree of regulation. What may be appropriate to a given circumstance may be inappropriate to another. For example, the degree of regulation required to protect residential or small business customers may not only be unnecessary to protect large industrial or commercial customers that are able to wield considerable bargaining power; it may be economically detrimental. The reasonable extent of what may be stated here is that a regulatory framework should first, clearly set forth the broad public policy ends to be achieved — be they adequate service at reasonable prices, an avoidance of economic waste, or such other ends as the Legislature may specify — and second, should afford the commission sufficient flexibility to exercise its administrative expertise to achieve those ends.

Any attempt to statutorily enumerate the myriad considerations involved would be as futile as an attempt to statutorily determine what constitutes just and reasonable rates. With respect to the latter subject, the state Legislature chose the judicious course of declaring what the law was by affirming that all rates were to be reasonable and just, but making it the responsibility of the commission to conduct an investigation upon the pertinent facts in each given case. **Michigan Central Railroad Company v Michigan Railroad Commission**, (160 Mich 355; 1910).

A. Emergent Issues

It was suggested at the conclusion of **Part II**, that one of the chief objects to be achieved by revising the state's utility statutes should be to clearly delineate public service commission authority with respect to regulatory matters that are at present unclear. There are several such matters to which the Legislature may wish to give consideration. The matters that are examined below are viewed as emergent issues, either because they relate to technological advancement that has occurred since the applicable statutes were enacted, or because they involve significant public policy considerations that are unrelated to technology, but about which the existing statutes are silent.

1. Independent Generation of Power

One issue is the effect that independent electricity producers have had on the traditional regulatory framework. As a response to the energy crisis, Congress in 1978 adopted the public utility regulatory policy act, that requires utilities to purchase electricity from qualified independent producers and cogenerators. One rationale underlying the act is that utilities ought to provide to consumers the lowest cost electricity available, regardless of whether that electricity is produced by the utility or by someone else. A utility may, through rates charged to its customers, recover the cost of electricity purchased from independent producers, but not earn a profit on the transaction. In effect, a guaranteed market for independently produced electricity has been mandated by federal law.

Several considerations arise regarding the relationship between utilities and independent producers of electricity. The first is the extent to which, if at all, a non-utility business that engages in cogeneration should be regulated as a utility. (In its 1988 annual report, the public service commission defined the term "cogeneration" as the "dual use of steam, heat or resultant energy for industrial, commercial or manufacturing plant and for the production of

electricity.”) Independent producers generally are exempt from the state regulation to which utilities are subject. A second consideration is the extent to which, if at all, a utility should be obliged to provide independent producers access to its transmission system for the purpose of transporting their electricity.

With respect to the first consideration, it may initially seem strange to suggest that the public interest might be advanced by regulating that portion of a private business that produces energy as a by-product of its primary mission to the same extent that a public utility is regulated. It is readily conceded that not every business is one “affected with a public interest,” the traditional touchstone for utility regulation. However, a business that produces substantial energy as a by-product may have a significant, if indirect impact upon utility rate structures. For examples the electricity that a large industrial business produces for its own operations is electricity that it need not purchase from a utility. This may in turn affect not only the rates paid by residential or small business customers that lack a similar ability to produce a significant portion of their needed electricity, but also adversely affect any incentive that the utility may have to meet future capacity demands by constructing additional generating plants.

In addition, a business of the sort described may operate facilities at multiple locations that are not in proximity. While electricity produced at one facility may be intended for use at another facility, the business may not possess the transmission system needed to transport the electricity from where it is produced to where it is needed. The preferred course might appear to be simply to require the utility to provide other businesses access to its transmission system for a fee. However, the matter is complicated by the fact that a business that produces electricity for its own use is to an extent as much a competitor with, as a customer of, the utility. Furthermore, a transmission system is property of the utility, notwithstanding the fact that it may have been financed through customer rates.

2. Standards: Used and Useful Versus Prudent Investment

It has been noted on several occasions during the course of this analysis that state statutes require the commission to establish just and reasonable rates, and that a public utility possesses a substantive constitutional right to earn a reasonable rate of return on investments made to provide service to the public. The aggregate dollar value of these investments, that include generating plant and other assets, is generally referred to as a utility’s rate base.

Unfortunately, the foregoing formulation offers little practical guidance regarding what standards should be applied to determine which investments ought to be included, and which excluded, from the rate base. The necessity for such a determination stems from the fact that not all investments made by a utility are necessarily of equal merit. The two standards most often applied by utility regulatory commissions are whether an investment proves to be used and useful, or whether the investment is prudent. Neither standard is completely without some difficulty.

The former of the two standards is arguably the easier to apply, at least conceptually, because whether a power plant for example, ever produces any electricity is susceptible to factual determination. If no power is produced, then the plant cannot be considered used and useful. This is so, regardless of how prudent the decision may have been to construct the

plant. Due to this fact, the used and useful standard may seem to work a harsh result. However, it may be argued that the risk imposed by the used and useful standard is simply that which unregulated businesses confront on a daily basis. For example, an automobile company that chooses, albeit with unquestioned prudence, to build a car that no one buys, must suffer not only the loss of any capital invested in the car, but also any profit that was expected to be earned. The consuming public would think it a novel proposition that it should afford the automobile company a profit for a product that was never sold. Thus, it may be argued that one characteristic that commends the used and useful standard is its tendency to impose free market risks upon an industry that generally expresses a preference for free market outcomes as opposed to regulatory ones.

Application of the prudent investment standard involves greater difficulty for two reasons. First, as held in **Union Carbide Company v Public Service Commissions** (431 Mich 118; 1988), the power to regulate rates does not authorize the commission to exercise general management powers of a utility. The Court held that the commission cannot “require a utility to undertake prudent management practices.” (431 Mich at 159.) The commission may only disallow expenses incurred as a result of imprudent management. This formulation casts the role of the commission as a retrospective one that is examining management decisions after the fact. Such retrospective examination in order to determine the prudence of an investment invariably involves second-guessing management decisions.

Second, is the issue of whether the prudence of an investment should be judged in the light of conditions that existed when it was made, or in light of conditions as they exist when the utility seeks to have the investment included in its rate base. Utility power plants, particularly of the nuclear variety, take a considerable number of years to construct. During the period intervening between commencement and completion of construction, general economic conditions and the related demands for additional capacity may change significantly. So too may the relative availability of cheaper alternative sources. As a result, an investment that may have been prudent at the time it was made may, from the vantage of hindsight, appear quite the opposite.

Neither statute nor case law requires the commission to employ one standard to the exclusion of the other. Public Act 3 of 1939, the public service commission act, is silent upon the matter of which standard should govern. The commission has used both standards in the past. On May 7, 1991, the commission decided with respect to an abandoned facility, that the utility should be permitted a return of its prudent construction costs — amortized over a ten-year period — but be denied any return on abandoned assets that were not actually used and useful. In so deciding, the commission noted that investment on which a utility is entitled to earn a return is limited to that investment which is used and useful.

The commission should establish as a matter of policy a single standard for the treatment of investment in rate cases. The benefit to be derived from the commission establishing in advance the standard to be applied all rate cases might ultimately be more important than which standard is established. Such consistent application would serve the salutary purpose of apprising in advance utility management investors, and ratepayers alike of what costs would be subject to recovery.

Appendix A

Regulated Major Motor Carriers by Carrier Classification, 1989

Carrier Classification	Intrastate Revenues (In Thousands)
General Freight Carriers	
Central Transport	\$38,449
Alvin Motor Freight	17,033
Earl C. Smith	12,547
Inter-City Trucking Service	10,988
Parker Motor Freight	10,945
ANR Freight System	9,568
Jones Transfer Company	7,457
TNT Holland Motor Express	5,962
U.S. Truck Company	3,632
Household Goods Movers	
Palmer Moving and Storage Company	\$ 4,288
Columbian Storage and Transport	2,356
Stevens Van Line, Incorporated	1,188
Allen Storage and Moving Company	1,023
Rose Moving and Storage Company	1,000
Frisbe Moving and Storage	716
J.W. Cole and Sons	497
Henry H. Stevens	286
Petroleum and Petroleum Products Carriers	
Liquid Transports Incorporated	\$ 8,052
Ray Molder, Incorporated	6,592
Refiners Transport and Terminal	5,298
McKinley Trucking Company, Incorporated	2,049
M.L. Asbury, Incorporated	610
Ken Hohskins Trucking, Incorporated	262
C and S Transportation, Incorporated	174
Automobile Parts Carriers	
Eagle Expediting, Incorporated	\$10,681
Blazer Truck Lines	10,582
Crown Freights Incorporated	6,248
O.J. Transport Company	5,825
R.J. Liddy Transport	2,143
E.L. Hollingsworth & Company	1,418
First Class Expediting	1,068
Baker Motor Freight	474
Gallant Transports Incorporated	215

Appendix A (continued)

Iron and Steel Articles Carriers

Capitol Transit, Incorporated	\$8,110
George F. Alger Company	3,926
Capitol Trucking, Incorporated	2,508
Capitol Transportation	1,120
C.J. Rogers Trans. Company	1,024
W & P Corporation	891
Modular Transportation Company	843
Haskins and Sons, Incorporated	701
G & B Transportation Company	512

Automobile Haulers

Complete Auto Transit	\$15,953
Anchor Motor Freight	5,467
M & G Convoys Incorporated	4,540
Nu-Car Carriers	3,771
F.J. Boutell Driveway	2,451
Cassens Transport Company	2,322
Commercial Carriers, Incorporated	1,486
Fleet Carriers Corporation	699

Heavy Machinery Carriers

Kalkaska Construction Services	\$4,586
Mullins Construction Service	3,252
Poquette Leasing Company	2,712
Judd Machinery Company	2,493
Jimmy's Heavy Haul, Incorporated	471
McNally-Nimergood Heavy Haul	214
Dobson Heavy Haul	166

Small Packages Carriers

United Parcel Service	\$62,798
Pony Express Courier	7,023
City Transfer Company	5,476
PDQ Carrier System	1,193
MGS Instant Carriers Incorporated	547

Miscellaneous Carriers

Central Cartage Company	\$66,081
Universal Am-Can, Limited	4,306
Tri-City Aggregates Haulers	3,664
Gra-Bell Truckline, Incorporated	3,063
Troy Aggregate Carriers	2,383
Wiederhold Freight Lines	2,164
Love Brothers, Incorporated	2,104
Davis Cartage Company	1,968

Appendix A (continued)

Miscellaneous Carriers

Warner Trucking Company	1,932
Wolverine Contractors	1,586
Gravel Trucking Company	1,200
Ralph Moyle, Incorporated	1,155
Commodore Cartage Company	1,078
Hare Cartage Company	1,044
A. Luurtsema Truck Lines	437
Weiss Trucking Company	431
Keller Transfer Line, Incorporated	376
Troy Aggregate Haulers	314
RTI Transport	205

Source: Public Service Commission.

Appendix B

What follows is an analysis of the extent to which the public service commission has complied with the nine-month requirement of Public Act 3 of 1939. The analysis examines the time taken by the commission to decide approximately 228 rate case applications that were filed between January 1, 1980 through December 31, 1989. The data have certain limitations as will be explained below. The nine-month statutory requirement remains the appropriate benchmark against which to gage commission performance in deciding rate cases in a timely fashion because the Legislature has never repealed the requirement and because, as noted in **Part III**, the reasoning of the Court of Appeals in the **Detroit Edison** case with respect to the requirement was seriously deficient.

It should be noted that the commission has developed a somewhat confusing lexicon of rate-case categories. Among them are: general rate cases, major rate cases, excess earnings rate cases, and so called “times interest earned ratio” rate cases that are applicable to electric cooperatives. The difficulty that attends these various categories is twofold.

First, as noted in **Part III**, the statutory provision that requires the commission to act within nine months draws no distinction among rate cases based upon the number or complexity of issues, the amount of revenue involved, or any other criteria. Arguably the statute should provide for the fact that certain rate cases are far more complex than others and, therefore, take longer to resolve. However, the statute has not been amended in this regard. Rather, it applies in equal degree to all “petitions or applications to increase or decrease utility rates and charges.” This is not to suggest that the commission-established categories are of no benefit, for they may serve a valid purpose internally for the commission and its staff. The point is simply that the statute requires the commission to decide all rate cases with equal dispatch, regardless of whether they be general rate cases, major rate cases, or quite insignificant rate cases. And what the statute requires, the commission may not avoid through terminology.

Second, the various rate-case categories make it exceedingly difficult to accurately determine how long the commission takes to decide rate cases because the definitions that mark the categories are often blurred. One example will suffice. As noted above at Page 27, the state Auditor General found that the commission had not filed certain reports with the Governor and Legislature because commission staff were of the erroneous opinion that the requirement only applied to “major” rate cases. Furthermore, the commission maintains more information about some categories of rate cases than others.

In providing data for this analysis, commission staff were uncertain—exactly how many petitions or applications to increase or decrease utility rates were filed between 1980 through 1989, but were able to identify those that met the internal definition of a general rate case. Commission staff then added to this group a number of rate cases from two other categories — excess earnings and times interest earned ratio — that do not satisfy the definition. (The definition of a “general rate case” that was contained in the 1988 annual report of the commission was “a proceeding before the commission in which interested parties are given notice and a reasonable opportunity for a full and complete hearing on a utility’s total cost of

service and all other lawful elements considered in determining Just and reasonable rates.”) This analysis likewise includes rate cases from those two categories since the distinctions between them and general rate cases are, as noted, statutorily irrelevant with respect to the nine-month requirement.

Given the foregoing limitations, **Table 17** presents data on 228 rate-case applications that were filed between January 1, 1980 and December 31, 1989 by electric, natural gas, and telephone utilities. Over the course of the decade, the commission issued final orders within the nine-month statutory time frame for approximately 188 of the 228 applications (eighty-two percent) filed during the period. Performance varied: in 1985, final orders were issued within nine months with respect to ninety-one percent of the applications filed that year while in 1982, only sixty-five percent of the applications were resolved as expeditiously.

In several instances, a considerable number of applications took substantially longer than nine months to conclude. For example, one fourth of the applications filed during 1982, 1983, and 1984, respectively, were still unresolved more than a year after the filing date. And of the twenty-three applications filed in 1983, three took the commission longer than thirty months to resolve and one of those applications was still pending at the end of 1990. It should be noted that the latter rate case, along with several others that are part of this analysis, consisted of several phases which it may be argued ought to be treated as separate rate cases. The better view in each instance is that the several phases were part and parcel of the same rate case. For example, with respect to the application that was filed in 1983 and that was still pending at the end of 1990, the same utility company was involved throughout, many of the issues were the same during the various phases, and the commission itself assigned the same, rather than a different application case number to all of the phases.

Electric utilities filed ninety-six applications during the period under examination, as shown in **Table 18**. These applications accounted for forty-two percent of total applications filed. The commission issued final orders within the nine-month statutory time frame for seventy-nine of these ninety-six applications (eighty-three percent). Again, the commission’s track record was a mixed one. The three applications identified in the preceding paragraph that were filed in 1983 and that took longer than thirty months to resolve, including the one that was still pending at the end of 1990 were filed by electric utilities. On the other hand, during the three-year period 1984 through 1986, all twenty of the applications filed during those years were decided within eight months.

Table 19 presents data with respect to those applications filed by natural gas utilities. While comprising only thirteen percent of total applications filed from 1980 through 1989 (thirty of 228 applications), natural gas utility applications generally took the commission a considerable length of time to finally resolve. For example, in five of the ten years, forty percent or more of the applications filed were unresolved one year later. In the case of 1984, only two applications were filed, but they took sixteen and twenty months respectively to conclude.

Finally, as shown in **Table 20**, telephone utilities filed 102 applications, or forty-five percent of the total for the ten-year period. With respect to this category of applications, the commission fared much better. Ninety-three of the 102 applications (ninety-one percent) were de-

cided within nine months. Only five applications — three in 1980, one in 1982, and one in 1984 — took longer than one year to resolve. It should be noted that of the 102 applications, sixty-five involved excess earnings proceedings that would generally be expected to take a shorter period of time to conclude.

Table 17

LENGTH OF TIME ELAPSED BETWEEN APPLICATION AND FINAL ORDER
1980-1989

Months	1980		1981		1982		1983		1984		1985		1986		1987		1988		1989		
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	
1	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	2	8%	2	14%	1	2%	0	0%	
2	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	2	8%	2	14%	1	2%	0	0%	
3	0	0%	5	17%	0	0%	3	13%	1	9%	0	0%	2	8%	3	21%	2	5%	0	0%	
4	9	35%	11	37%	2	9%	5	22%	1	9%	3	27%	4	16%	4	29%	20	45%	0	0%	
5	15	58%	12	40%	5	22%	6	26%	2	18%	5	45%	7	28%	8	57%	22	50%	0	0%	
6	17	65%	15	50%	10	43%	13	57%	4	36%	9	82%	8	32%	10	71%	41	93%	17	81%	
7	18	69%	20	67%	14	61%	15	65%	6	55%	10	91%	24	96%	10	71%	42	95%	17	81%	
8	18	69%	25	83%	15	65%	16	70%	8	73%	10	91%	24	96%	10	71%	42	95%	17	81%	
9	18	69%	25	83%	15	65%	16	70%	8	73%	10	91%	24	96%	10	71%	43	98%	19	90%	
10	20	77%	26	87%	16	70%	17	74%	8	73%	11	100%	24	96%	10	71%	43	98%	19	90%	
11	20	77%	26	87%	16	70%	17	74%	8	73%	-	-	24	96%	10	71%	43	98%	19	90%	
12	21	81%	26	87%	17	74%	17	74%	8	73%	-	-	25	100%	10	71%	43	98%	19	90%	
Over 12	5	19%	4	13%	6	26%	6	26%	3	27%	0	0%	0	0%	4	19%	1	2%	2	10%	
Total																					
Applications	26		30		23		23		11		11		25		14		44		21		

Source: Michigan Public Service Commission; CRC Calculation. Includes one application filed in 1983 that was still pending as of 12-30-90.

Table 18

LENGTH OF TIME ELAPSED BETWEEN APPLICATION MD FINAL ORDER
1980-1984
(Electric Cases)

Months	1980		1981		1982		1983		1984		1985		1986		1987		1988		1989				
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%			
1	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	
2	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	
3	0	0%	5	25%	0	0%	3	25%	1	13%	0	0%	0	0%	0	0%	1	13%	0	0%	0	0%	
4	7	50%	11	55%	1	40%	5	42%	1	13%	3	38%	2	50%	2	20%	4	50%	0	0%	0	0%	
5	11	79%	12	60%	2	20%	5	42%	2	25%	5	63%	3	75%	6	60%	6	75%	0	0%	0	0%	
6	13	93%	13	65%	4	40%	7	58%	4	50%	7	88%	4	100%	8	80%	6	75%	1	50%	1	50%	
7	13	93%	14	70%	6	60%	7	58%	6	75%	8	100%	-	-	8	80%	7	88%	1	50%	1	50%	
8	13	93%	17	85%	6	60%	7	58%	8	100%	-	-	-	-	8	80%	7	88%	1	50%	1	50%	
9	13	93%	17	85%	6	60%	7	58%	-	-	-	-	-	-	8	80%	7	88%	1	50%	1	50%	
10	13	93%	17	85%	6	60%	8	67%	-	-	-	-	-	-	8	80%	7	88%	1	50%	1	50%	
11	13	93%	17	85%	6	60%	8	67%	-	-	-	-	-	-	8	80%	7	88%	1	50%	1	50%	
12	13	93%	17	85%	7	70%	8	67%	-	-	-	-	-	-	8	80%	7	88%	1	50%	1	50%	
Over 12	1	7%	3	15%	3	30%	4	33%	0	0%	0	0%	0	0%	2	20%	1	12%	1	50%	1	50%	
Total																							
Applications	14		20		10		12		8		8		4		10		8		2		2		2

Source: Michigan Public Service Commission; CRC Calculation. Includes one application filed in 1983 that was still pending as of 12-30-90.

Table 19

**LENGTH OF TIME ELAPSED BETWEEN APPLICATION AND FINAL ORDER
1980-1989
(Natural Gas Cases)**

Months	1980		1981		1982		1983		1984		1985		1986		1987		1988		1989	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	1	50%	1	25%	1	50%	0	0%
2	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	1	50%	1	25%	1	50%	0	0%
3	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	1	50%	2	50%	1	50%	0	0%
4	1	20%	0	0%	0	0%	0	0%	0	0%	0	0%	1	50%	2	50%	1	50%	0	0%
5	2	40%	0	0%	0	0%	0	0%	0	0%	0	0%	2	100%	2	50%	1	50%	0	0%
6	2	40%	1	33%	1	20%	2	40%	0	0%	0	0%	-	-	2	50%	2	100%	0	0%
7	2	40%	2	67%	2	40%	3	60%	0	0%	0	0%	-	-	2	50%	-	-	0	0%
8	2	40%	2	67%	2	40%	3	60%	0	0%	0	0%	-	-	2	50%	-	-	1	50%
9	2	40%	2	67%	2	40%	3	60%	0	0%	0	0%	-	-	2	50%	-	-	1	50%
10	3	60%	2	67%	3	60%	3	60%	0	0%	0	0%	-	-	2	50%	-	-	1	50%
11	3	60%	2	67%	3	60%	3	60%	0	0%	0	0%	-	-	2	50%	-	-	1	50%
12	4	80%	2	67%	3	60%	3	60%	0	0%	0	0%	-	-	2	50%	-	-	1	50%
Over 12	1	20%	1	33%	2	40%	2	40%	2	100%	0	0%	0	0%	2	50%	0	0%	1	50%
Total Applications	5		3		5		5		2		0		2		4		2		2	

Source: Michigan Public Service Commission; CRC Calculation.

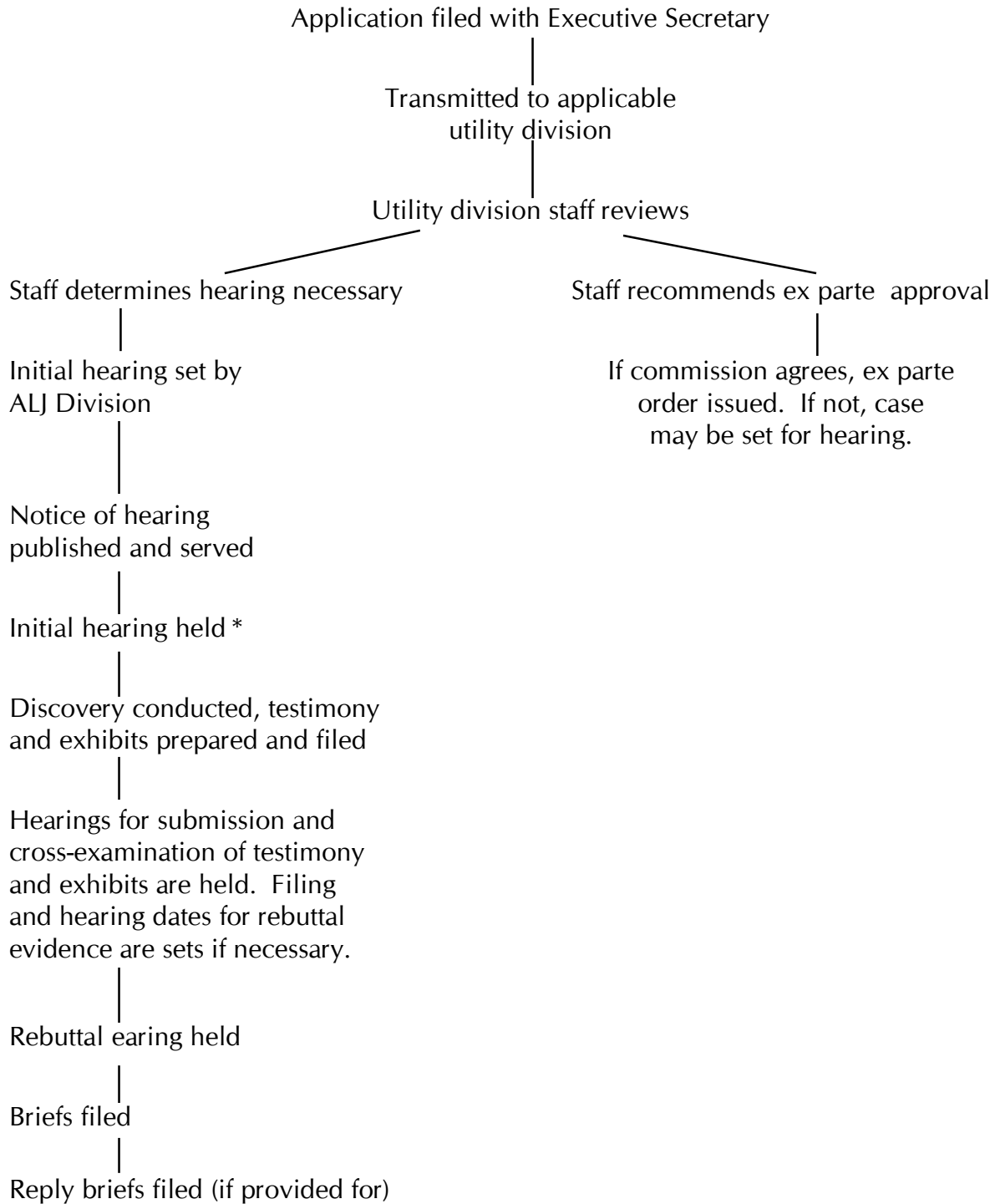
Table 20
LENGTH OF TIME ELAPSED BETWEEN APPLICATION AND FINAL ORDER
1980-1989
(Telephone Cases)

Months	1980		1981		1982		1983		1984		1985		1986		1987		1988		1989	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	1	5%	0	0%	0	0%	0	0%
2	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	1	5%	0	0%	0	0%	0	0%
3	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	1	5%	0	0%	0	0%	0	0%
4	1	14%	0	0%	1	12%	0	0%	0	0%	0	0%	1	5%	0	0%	15	44%	0	0%
5	2	29%	0	0%	3	38%	1	17%	0	0%	0	0%	2	11%	0	0%	15	44%	0	0%
6	2	29%	1	14%	5	63%	4	67%	0	0%	2	67%	2	11%	0	0%	33	97%	16	94%
7	3	43%	4	57%	6	75%	5	83%	0	0%	2	67%	18	95%	0	0%	33	97%	16	94%
8	3	43%	6	86%	7	88%	6	100%	0	0%	2	67%	18	95%	0	0%	33	97%	16	94%
9	3	43%	6	86%	7	88%	-	-	0	0%	2	67%	18	95%	0	0%	34	100%	17	100%
10	4	57%	7	100%	7	88%	-	-	0	0%	3	100%	18	95%	0	0%	-	-	-	-
11	4	57%	-	-	7	88%	-	-	0	0%	-	-	18	95%	0	0%	-	-	-	-
12	4	57%	-	-	7	88%	-	-	0	0%	-	-	19	100%	0	0%	-	-	-	-
Over 12	3	43%	0	0%	1	12%	0	0%	1	100%	0	0%	0	0%	0	0%	0	0%	0	0%
Total Applications	7		7		8		6		1		3		19		0		34		17	

Source: Michigan Public Service Commission; CRC Calculation.

Appendix C

Contested Case Process - Utility Application



* At initial hearing, or prehearing conference, additional hearing dates are scheduled as needed, filing dates for testimony and exhibits are set, pretrial procedures are discussed.

Appendix C (continued)

ALJ issues proposal for decision (PFD)

|
Exceptions filed

|
Replies to exception filed (if provided for)

|
Commission reviews PFDP exception, replies to exceptions, provides comments to Regulatory and Legislative Affairs Division (R&LA)

|
R&LA drafts order

|
Draft order circulated to commission

|
Commission edits draft order

|
R&LA finalizes order

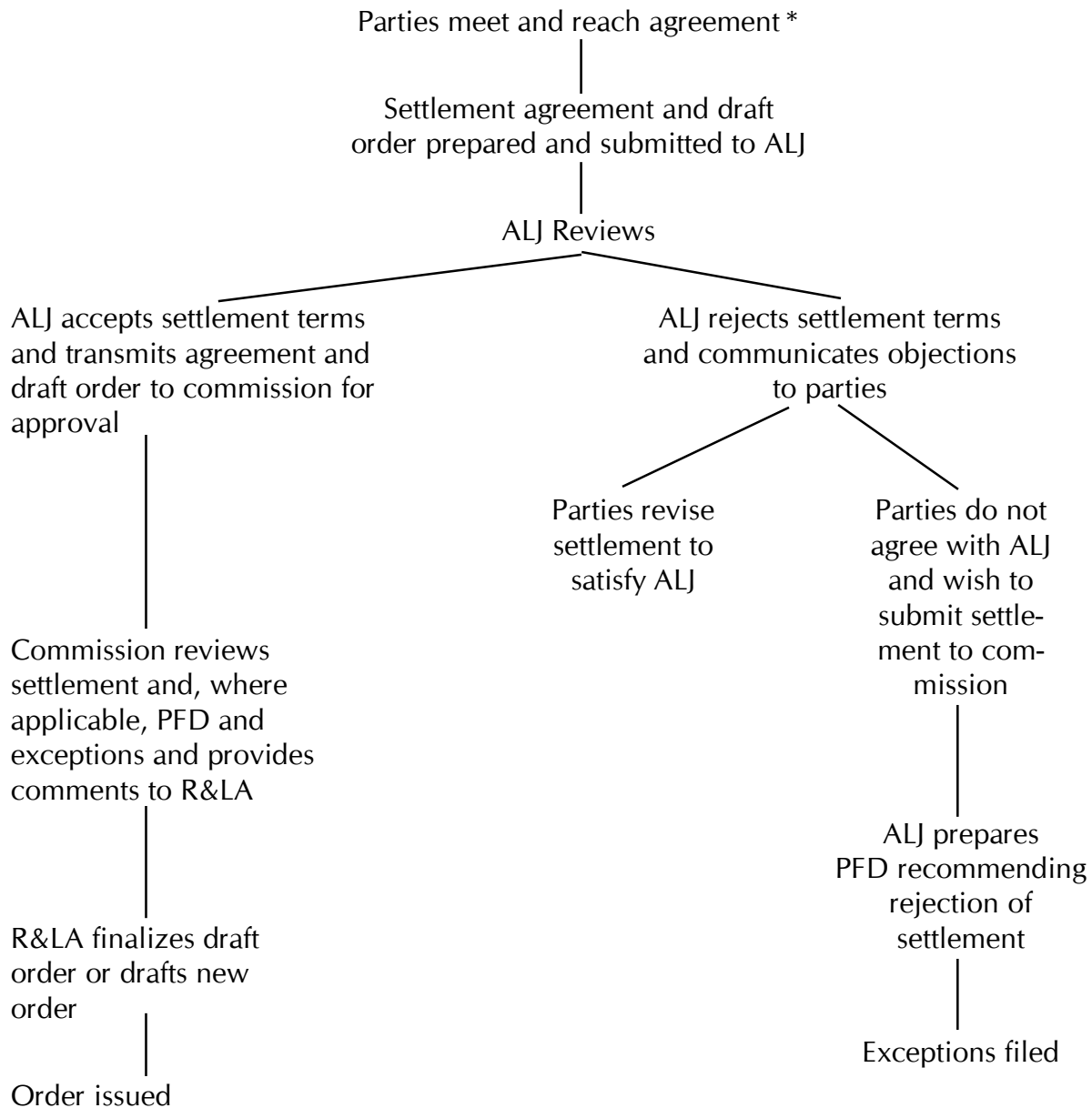
|
Commission issues order

|
Utility makes filings consistent with orders e.g. tariff changes

|
Staff reviews filings, approves when correct and complete

Appendix D

Contested Case Process - Settlements



* Settlements can occur during any phase of the case.