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An Investigation of the Public Utility Regulation in Hawaii

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Public Utility Regulation in Hawaii

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#### STRUCTURE OF THE HAWAII PUBLIC UTILITIES COMMISSION

The Hawaii Public Utilities Commission was established in 1913, under Act 89 of the Regular Session of that year, subsequently incorporated into Chapter 104, Revised Laws of Hawaii 1955, as amended. The Hawaiian Organic Act, although it required congressional approval of franchises, placed no restrictions on the Territory's authority with respect to the regulation of public utilities. The Legislature was free, therefore, to set up the Commission in whatever form and to confer upon it any authority, it chose.

Many states were setting up new regulatory commissions, or revising the form and substantially increasing the authority of their earlier commissions, at this time. In its 1898 decision in *Smyth v. Ames* (169 US 466. 42 L ed 819) the Supreme Court had drastically revised the concept of the regulatory power it had enunciated in its 1877 decision in *Munn v. Illinois* (94 US 113. 24 L ed 77). In the earlier case, it had held that regulation is an exercise of the police power. It could be exercised only with respect to public utilities: businesses "affected with a public interest. It which the Court carefully distinguished from other types of business which could not be regulated. But, 'over those utilities, the power of the legislature was supreme and exempt from judicial interference. The only remedy for those injured by regulation was to elect different legislators. It was not much of a chore for legislatures to act directly in the fixing of rail- road or utility rates when they could act arbitrarily and without reference to any judicially-enforced standards. So. while over half of the states had commissions, their functions were largely advisory and they had no substantial authority.

2 [starting with page 2, numbers at the top of each page]

The 1898 Court took the quite different position that regulation is an exercise, not of the police power, but of the power of eminent domain. Legislatures can, of course, under this power, condemn private property for public use. But whereas under the police power property can be seized without compensation to its owners, under the power of eminent domain it can be taken only on payment of just compensation. To require a utility to serve at non-compensatory rates, depriving it of a fair return on its property dedicated to public use, would be effectively to confiscate its property in violation of the Fifth and Fourteenth Amendments. The Court laid down standards by which the fair value of utility property, on which a fair return must be allowed, must be determined; and made it clear that legislatively-fixed rates that failed to comply with these standards would be held unconstitutional by the courts. This made rate-making a more difficult and exacting task, and legislatures soon realized that they could best exercise their authority by laying down broad principles and delegating their implementation to commissions having full power to carry out the legislative intent. Frequently, the legislative intent was expressed no more specifically than in the form of a mandate to the commission that it regulate "in the public interest."

New York, in 1907, established the first "full-powered" commission; Wisconsin followed, in the same year.. with a somewhat stronger commission that became the model followed in many other states. Seven other states acted in 1907; since then, all but five states have established or up-graded their commissions into full-power status. Those five (Iowa, Minnesota, South Dakota, Texas, and Virginia) have commissions, with substantial authority --but not overall types of utilities. The Hawaii Commission is commonly rated as "full-powered" although, as will be indicated in this report, the

3

Legislature has not accorded it all the authority, or all the freedom, or all the staff provided for representative Mainland commission.

The state commissions differ, of course, in many details. In the number of members, they range from seven in Massachusetts to one in Rhode Island and Oregon. Most of the states --forty --have three-member commissions. Five is the most common other number. The terms of the commissioners range from ten years in New York and Pennsylvania to an indeterminate term, at the pleasure of the governor, in Rhode Island. Thirty-one states have six-year terms, and twelve have four years. The commonest method of selection is by gubernatorial appointment, in thirty-four states; with Senate confirmation required in sixteen and the approval of both houses required in Connecticut. Other states elect their commissioners, except that in Virginia and South Carolina they are elected by the legislatures. New Mexico and Kentucky have both appointive and elective commissions.

In almost all states the commissioners serve "full time;" but in some states they are free to engage in outside activities for compensation, and there is never any assurance that even a high-salaried "full time" commissioner devotes a full forty-hour week to his duties. Vermont has a full-time chairman and part-time commissioners. Kentucky, with two full-time commissions, has also a part-time railroad commission. Only Hawaii and Alaska have no full-time commissioners. In all but those two states, also, commissioners receive regular salaries. These range from \$22, 486 (with an added \$1, 000 for the chairman) in New York, to \$3, 000 for the part-time Kentucky railroad commissioners. Only Delaware and the two Dakotas pay less than \$7, 000 to their full-time commissioners. Hawaii, with its "compensation" of \$10 per diem, limited to \$1, 000 a year is unique -- except for Alaska, with its new and un-tried commission -- in receiving virtually uncompensated service from its

4

commissioners.

While commissions differ in these details. they are basically alike in three important respects. First -- and here, so far as internal administration is concerned. Hawaii is an exception --they are independent. Usually they have considerable security of tenure, and are insulated from domination by either the executive or the legislative branches of government. While there are those who favor making them directly accountable to the chief executive. as Dean Landis has proposed with respect to the federal commissions, neither the states nor the federal government have done so. They are charged with the duty of protecting the public interest in a specific and important field. and have been left free to do so.

Second, they combine, within their limited area and to a limited degree, a segment of all three of the basic functions of government: legislative. executive. and judicial. However objectionable this may be in theory -- and both our federal and our state constitutions adopt a tripartite division of power as a cardinal principle -- there appears to be no other effective way to get the regulatory job done. Commissions have recognized the dangers inherent in a situation in which the same men make the laws, interpret them, enforce them, and mete out penalties. They have sought diligently to avoid abuse of their authority; and they have. on the whole, succeeded admirably well.

Third, the commissions are set up at two levels. At the top are the commissioners themselves: appointed or elected government officials. They need have no special qualifications --except the knack of getting appointed or elected. But in their hands repos es all the authority and all the res ponsibility to exercis e whatever power is conferred on the commission. At the bottom is the commission staff. made up of qualified attorneys, accountants, engineers,

5

and rate experts, along with the necessary clerical and other assistants. All but a very few top staff positions have civil s ervice status. It is on the staff that the commission experience and expertise is commonly to be found; likewise, it is at the staff level that the great bulk of the work is done that leads to commission decisions that are in the public interest. The ultimate decisions, how- ever, are for the commissioners. and not the staff, to make.

Some of the general characteristics of the Hawaii Public Utilities Commission may be mentioned, without comment. at this point. \* along with some notice taken of the aspects in which it differs from typical Mainland commissions. Discussion of its strengths and weaknesses will be reserved. however. until the quality of its performance in safeguarding the public interest has been examined.

It is compos ed of five members: two from Oahu, one of whom is chairman, and one each from Hawaii, Maui, and Kauai. They are appointed by the Governor and confirmed by the Senate, for four-year terms, with the terms being staggered to assure a carry-over of experienced commissioners. Under the Hawaii State Government Reorganization Act of 1959, commissioners are limited to two consecutive terms. While it is not clear that this provision is retroactive, and it might be interpreted as beginning with Statehood. the one commissioner whose term has expired since its enactment has not been re-appointed but continues to serve on a pro tern basis. The commissioners serve, as has been noted, on a part-time and virtually gratuitous basis. One result is that since its inception it has been composed principally of active businessmen

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\* Report No. 6 of the Legislative Reference Bureau, prepared by Mr.

Tom Dinell. provides an excellent description of the structure of the Commission for one who wishes to examine this in greater detail.

6

and bankers. Lawyers are predominant on the Mainland commissions, although almost every occupational background, with the exception of top utility management, is represented.

The Commission's authority is coextensive with that of most Mainland commissions in most respects. Over the utilities proper -- the electric, gas, telephone, and privately-owned water companies -- it has jurisdiction over rates, service, securities issues, accounting practices, and safety. It has similar authority over passenger bus operations and, as of December, 1961, over for-hire trucks. It even has responsibility for the safety standards of proprietary trucks.

There are two respects, however, in which the Hawaii commission has not been accorded the full stature of Mainland commissions. It does not have the same degree of independence, for administrative purposes, being embraced within the Department of Treasury and Regulation. And it does not have the comprehensive certificate authority exercised by most of the Mainland commissions. There is a serious burden imposed on the commissioners. also. that is not the practice" on the Mainland: They are required to hear in person all matters on which formal decisions or orders are to issue. A majority of the commissioners must be present at all hearings, unless the utility involved agrees that a single commissioner may hear the case. The new truck regulations will provide. if the Legislature approves. for hearings before a single commissioner in truck cases. But even then, the time of one commissioner will be required; and the typical Mainland practice is to have hearings conducted by hearing officers with no member of the commission itself in attendance.

At the staff level. the most serious gap is the absence of a full-time

7

legal counsel. However competent the deputy assigned by the Attorney General to advise the commission, he cannot, on a part-time basis. be expected to develop the desirable expertise in the specialized field of public utility law. Nor can he find the time to fully organize and direct the staff presentation in major rate cases, where the staff makes the only effective showing on behalf of the utility customers. Another gap, is the absence of a hearing officer or officers . While the Commission probably has authority to appoint such officers. it could afford the commissioners themselves little relief in view of the requirement that commissioners themselves conduct every hearing.

Two staff positions are found on the Hawaii commission that are not customary on the Mainland. The first is that of the Director. While most commissions have a top staff member with some responsibility for directing the operations of the staff. that authority is more limited than in the case of the director of the Hawaii Commission. The reason is that with even the chairman of the commission serving on a part-time and essentially uncompensated basis. he cannot be expected to devote the time to internal staff operations that the chairmen--of Mainland commissions spend. The usual duties of the chairman. in this area, are therefore performed by the director in the Hawaiian practice. The second is the Consultant. While he is designated as consultant to the commission. he acts in practice as a part-time member of the staff; assisting principally in the preparation and presentation of the staff's showing in major rate cases.

The Effectiveness of Regulation in Hawaii

The "public interest" in utility service is primarily related to the quality of the service; the rates at which it is provided; and the degree to which the

8

companies that provide it are able to maintain, improve, and expand the service in tune with technological developments in the industry and the expanding needs of their service areas .

In the United States, we take excellent utility service for granted. No thought is given to it, except in those rare instances where it is unsatisfactory. In consequence, no very precise standards have been developed whereby the quality of the service rendered by one utility can be compared with that offered by another utility of the same type in a different service area. Certain conditions are recognized as making service unsatisfactory. If they do not exist, the service is termed satisfactory -- and no particular attention is given to whether it is eminently so, or just barely so.

With electric service, the principal questions are whether the voltage is constantly maintained, whether there are an undue number of outages, and whether installations to serve new customers are available expeditiously. With gas service, the principal questions are whether the Btu. content is adequate and uniform, and whether the pressure is reasonably constant. With telephone service, the questions are whether there are sufficient trunk lines and central office equipment so that "busy" signals do not come on after the first few numbers are dialed, whether the reception is clear, and whether the number of held orders --for new service or upgrading --is excessive. With water service, the questions concern the quality of the water, the adequacy of the supply, and the amount and constancy of the pressure under which it is delivered. Other minor questions, such as those involving the accuracy of meters, the promptness of service calls, and the like may arise; but these are the principal criteria by which good utility service is commonly distinguished from bad. And, judged by these standards, it can only be concluded that the utility

9

service provided in Hawaii is completely satisfactory. In fact, from the very small number of complaints received by the Public Utilities Commission, it might be concluded that it is very highly satisfactory to the customers. It is not possible --and probably not particularly useful --to be more precise than this on the matter of the quality of utility service. \*

The caliber of the utilities, and the effectiveness of their regulation, are commonly judged, therefore, by the rates they require and are allowed to charge for their services. But here, again, direct comparisons are of little value: No two utilities operate under identical conditions. Two utilities in the same line, operating in adjacent service areas under conditions apparently similar as to terrain, number of customers, and customer density, may have quite different costs. Real experts on a commission staff, with unlimited access to the books and records and first-name acquaintance with the personnel of each, may be unable to pinpoint the reasons why. Similar differences are found, of course, between companies in competitive industries. With utilities, however, the sharing of what might be "trade secrets" for a competing company, is common. Utilities do not compete in the same service areas; so, each is willing to give the others the benefits of any means it may discover for achieving economies. Still, their costs are not always the same for similar service; consequently, their rates cannot always be the same.

The California commission, probably for the purpose of demonstrating the undeniable fact that it keeps utility rates at "rock bottom, it makes a practice of including in its annual reports a comparison of utility rates in the country's

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\* More precise standards and measurements are available for testing the quality of bus and trucking service, but this report is confined to the public utilities proper.

10

twenty-five biggest cities. It compiles its data in the form of a "package" of utility service consisting of 100 kw-hs. of electricity, 50 therms of gas, and a two-party flat rate telephone. For such service, the San Francisco householder paid, as of June 30, 1960, \$11.43; the Boston householder, \$22.087. Why? No reason is suggested. The two cities are approximately equal in size and population density. All three services, in both, are provided by investor-owned, commission-regulated companies. Both use natural gas, and are about equi-distant from the major sources of supply. Some of San Francisco's electricity comes from economical hydro sources; but Boston has cheap coal, unavailable for use in San Francisco. Telephone service is provided in both cities by affiliates of AT&T. There is no immediately apparent reason why the Bostonian should have to pay twice as much for the same amount of service as the San Franciscan. And, actually, he doesn't get the same amount of service; for two-party flat rate telephone service is not available to him, and the rate used in compiling the figures is for a telephone on which only the first eighty-five calls a month are included; also, an extra charge is made for each additional call. Is it because utility management in Boston is less efficient than in San Francisco? There is no evidence of this; and it is questionable that the Boston owners would permit the condition to continue if there were. Is it, then, because the California commission is much more niggardly, and the Massachusetts commission much more generous toward the utilities? Here again, the answer is clearly in the negative. In the rate year for which these data were compiled, PG & E, supplying both gas and electricity in San Francisco, earned, at its low rates, 5.63 per cent on its investment. Boston Edison earned 5.33 per cent and Boston Gas 5.43 per cent. Pacific Tel. & Tel., supplying San Francisco, earned 7.04 per cent; New England Telephone, 7.52 per cent.

11