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Regulatory Change in the Energy and Telecommunications Industries - Overview

Barry J. Waldman^[*]

{1} Recent changes in the telecommunications industry ^[1] and the emerging momentum for change in the regulation of the energy industry ^[2] have provided a unique opportunity to reevaluate the regulatory models that have predominated in these fields. As these proposed changes are promulgated and begin to take effect and find practical form, crucial questions of implementation become the focus of the debate and the practice of regulatory law. Basic questions are ripe for consideration, such as: Will the regulators be State or Federal Agencies? What form should this regulatory power take? Will legislators and regulators focus on new players in the industry as targets for regulation? The Sixteenth Annual National Regulatory Conference, *Regulating Change and Changing Regulation: Restructuring the Energy and Telecommunications Industries*,^[3] addressed many of these questions while also providing a technological analysis to explain the rising need for new regulatory approaches.

{2} Underlying the desire for regulatory change in the telecommunications and energy industries are remarkable technological advances which have changed the traditional models of industry players. The field of telecommunications has been virtually revolutionized since the first major steps toward regulation in 1967.^[4] The development of advances such as the Internet, cable television and wireless communication has necessitated different approaches to traditional regulatory policy. As these technologies begin to converge in the wake of advances in data transmission and inter-connectivity of media, regulation must provide either channels for allowing greater competition or, at the very least, not serve as an obstacle to such competition.^[5] Change in the energy industry is driven by a variety of factors, including a desire for competition and increased independence from governmental restrictions. These desires have the potential for reaching fruition with technological developments in transmission capacity and in distribution and demand controls.^[6]

{3} The telecommunications industry has already become subject to a new legislative approach to regulation. The Telecommunications Act of 1996 ^[7] ("Act") has developed an outline for deregulation that was intended to provide for greater choice for the consumer and some level of protection for service providers. The Act seeks to provide a means for the unbundling of services by providers, allowing smaller companies to provide competition for component parts of telecommunication services.^[8] Another important change is the availability of universal service for the consumer, which will allow the consumer to purchase multiple forms of telecommunication services from the same provider.^[9] Other provisions seek to change the relative protections afforded to both consumers and suppliers facing liability for their actions.^[10] The Act established new regulatory approaches by eliminating traditional bright lines that defined individual industries within the telecommunications field. In so doing, regulation was both expanded and contracted, with specific provisions made for private dispute resolution.^[11] Some commentators have questioned the effectiveness of the changes made, but most have agreed that the legislation marked a new direction for the field.^[12]

{4} Similarly, the energy industry is in the beginning stages of a push for legislative reform of the regulatory scheme which controls the industry.^[13] Much of the focus has been centered on the Public Utility Holding

Company Act of 1935 (PUHCA) [14] and the Public Utility Regulatory Policies Act (PURPA).[15] In order to accommodate the desire to increase local competition for energy, legislators have targeted these acts for repeal. Predominantly the proposed legislation calls for modification of the Federal Power Act [16] and the substitution of new legislative language to remove the barriers to competition established by PUHCA.[17] The underlying goal of these changes is to ensure greater competition by the year 2003 for the purposes of consumer choice. Secondary to this stated goal are other changes such as:

- 1) clearly defining state and federal jurisdiction over the industry,
- 2) protecting current players from losses under the Stranded Cost Principle [18] and
- 3) authorizing regulators to insist that the actual transmission of energy be placed in the hands of a third-party independent system operator.[19]

{5} These developments mark a new approach to energy delivery and consumption that should provide customers with greater choice and reduced rates.[20]

{6} In evaluating these changes, the most pivotal questions become what role regulators should play and what form the promulgated laws should take in practical application. Coupled with the concern for providing consumer choice are traditional regulatory concerns which must also be addressed. Properly addressing environmental concerns will provide a challenge for regulators who must accommodate the new goals enunciated in legislation.[21] Stranded cost recovery will also challenge regulators, by requiring that an appropriate balance be struck between encouraging competition without penalizing current players for their previous investments in such areas as distribution systems, which will become available to new producers. Another challenge facing regulators will be that of striking a balance between fair, natural market competition and imposed discriminatory policies to encourage competition.

{7} Each of these is a burgeoning area for discussion and review. The Sixteenth National Regulatory Conference addresses these issues, their technological underpinnings and much more. As discussion has focused on the effectiveness of the Telecommunications Act of 1996 and the imminent restructuring of the energy industry, the essential role of regulator and regulation has been called into question. In the speeches that follow, these regulatory issues are discussed along with explanations of the actual market players' needs and accomplishments in the rapidly changing fields of telecommunications and energy. By evaluating the changes that are occurring in telecommunications regulation, hopefully some insight will be shed upon the upcoming changes in energy regulation.

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[1] See Telecommunications Act of 1996, 47 U.S.C. § 151 *et. seq.* (Supp. 1998).

[2] See *e.g.* HR 1960, 105th Cong. (1997), S. 1401, 105th Cong.(1997)

[3] May 12-13, 1998, hosted by The Virginia State Corporation Commission, Administrative Law Section of the Virginia State Bar and the Marshall-Wythe School of Law.

[4] The Federal Communications Commission first licensed MCI in 1967 to provide telephone service between St. Louis and Chicago, marking the first major intrusion on Bell Telephone's monopoly in long distance telephone service. See <http://www.MCIWorldcom.com/about_worldcom/corporate_timeline/> (tracking the history of MCI from 1983 to present).

[5] This desire to create greater competition through non-traditional interconnections can be seen in a variety of regional test projects that have sprung up around the country. For example, Cox Communications and many of its competitors have begun providing telephone and Internet services through their traditional cable televisions connections. See <<http://www.Cox.com/services/>>.

[6] Collective organizations which provide information and electric pooling services have benefited from technological advances in computer technology which allow for greater retrieval of information and routing of power to need areas. See e.g. <<http://www.pjm.com>>.

[7] Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. (Supp. 1998).
<<http://www.fcc.gov/telecom.html>>.

[8] See e.g. Telecommunications Act of 1996, 47 U.S.C. § 251(c) (Supp. 1998).

[9] See e.g. *id.* § 254. For example some consumers are already able to purchase, cable television, telephone and Internet services all from the same provider.

[10] *But see*, *Reno v. ACLU*, 521 U.S. 844 (1997)(invalidating portions of the Telecommunications Act of 1996 as unconstitutional restraints on speech under the First Amendment).

[11] See e.g. 47 U.S.C. § 252 (Supp. 1998).

[12] See, e.g., Deonne L. Brunning, *The Telecommunications Act of 1996: The Challenges of Competition*, 30 CREIGHTON L. REV. 1255 (1997); Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 129, (1996); Monroe E. Price and John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976 (1997).

[13] See *supra* note 3.

[14] U.S.C. § 79a *et seq.*

[15] 16 U.S.C. § 2601 *et seq.*

[16] 16 U.S.C. § 791a *et seq.*

[17] See e.g. S. 621, 105th Cong. (1997).

[18] The Stranded Cost Principle, in general terms, is the hypothetical means of dealing with financial outlays previously made by current market participants in the form of support networks which allow for the delivery of services. For example, within the telecommunications industry one area where stranded costs might be found is in the expense one company may have incurred in laying down fibre optic cable within a community. Now, under current pro-competition laws, this market participant must share capacity on this cable network with competitors. The cost incurred by the company who purchased and installed the cable would traditionally be considered a stranded cost.

[19] See, Department of Energy News Release, Administration's Plan will Bring Competition to Electricity, Savings to Consumers (last modified March 25, 1998)
<<http://198.124.130.244/news/releases98/marpr/pr98035.htm>>.

[20] The Clinton Administration's plan claims that an average family of four will save over \$230 with the new scheme. See *id.*

[21] *See* The Telecommunications Act of 1996, 47 U.S.C. § 704 (discussing controls on facility location and on frequency emission standards); S 1401, 105th Cong. § 110 (1997)(requiring that an energy supplier maintain a minimum amount of renewable energy credits to offset energy sold).

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