

1998

Introductory Remarks and Keynote Speaker Address

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Recommended Citation

Edward L. Flippen & Derek R. Bevan, *Introductory Remarks and Keynote Speaker Address*, 5 Rich. J.L. & Tech 1 (1998).

Available at: <http://scholarship.richmond.edu/jolt/vol5/iss1/4>

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Cite as: Edward L. Flippen & Derek R.B. Bevan, *Introductory Remarks and Keynote Speaker Address*, 5 RICH. J. L. & TECH. 1 (Fall 1998), <<http://www.richmond.edu/jolt/v5i1/speech1.html>>. **[**]**

I. Edward L. Flippen, Mays & Valentine, L.L.P.

II. Derek R. B. Bevan, U.K. Electric Utility Regulators Legal Advisor, Keynote Address Speaker

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Edward L. Flippen & Derek R.B. Bevan, *Introductory Remarks and Keynote Speaker Address*, 5 RICH. J. L. & TECH. 1 (Fall 1998), at <http://www.richmond.edu/jolt/v5i1/speech1.html>.

I. Edward L. Flippen
Mays & Valentine, L.L.P.

A. Introduction to the Conference

{1}In other industries, experts may see up to four issues a day, but for us, the Conference is an opportunity to share ideas with colleagues, regulators, and others who shape national regulatory policy. For that reason, we have built into our schedule a formal gathering to discuss these issues, and we trust that all of you will take advantage of this meaningful opportunity. Of course, we have to thank Tony Gambardella and his committee for putting on such a wonderful program today, and I am pleasantly surprised that this conference is a joint-venture opportunity with the State Corporation Commission ("Commission") and The College of William and Mary. Maintaining a special relationship with the Commission is very important to us, to our bar group, and to practitioners who appear before the Commission. This Conference allows members of this Virginia State Bar Administrative Law Section ("Section") and others, like veteran practitioners to better represent our clients before the Commission. This Conference will help the Commission to make decisions that will ultimately result in appropriate regulations to benefit Virginia consumers. We appreciate our relationship with the Virginia Commission, and its importance to the Conference.

{2}Finally, I would like to invite any of the members, and lawyers in the audience who are not members, to join the Virginia State Bar Administrative Law Section. I have put some flyers out on the desk in front of the room along with a copy of our most recent newsletter. The dues are fifteen dollars annually, and with the dues, you get a fifteen-dollar discount off the registration for next year's national conference. On behalf of those organizations, and all who worked to plan this event, I would like to welcome you to the Sixteenth National Regulatory Conference.

B. Introduction of the Keynote Speaker, Mr. Bevan

{3}I am Jeff Flippen and it is my pleasure this morning to introduce our speaker, Mr. Derek Bevan. Mr. Bevan received his legal education from the University of Wales, where he earned a Bachelor of Law Degree in 1959. In 1962, he qualified as a Solicitor and began his career as a prosecutor. He later practiced with a commercial law firm and in 1967, he joined the Legal Department of the British Coal Corporation ("British Coal"), the organization that ran the coal industry in Great Britain at that time. In 1988, he was appointed head of the Property Group of British Coal and after the passage of the U.K. Electricity Act, he joined the Office of Electricity Regulation in 1991. In 1995, he was appointed legal advisor for the U.K. Electric Utility Regulators. He currently serves on the Editorial Board of the Utility Law Review.

{4}Last March, my wife and I traveled to Birmingham, England to meet with Mr. Bevan about the project I have been working on this summer. Mr. Bevan's secretary served us tea immediately upon our arrival, and shortly thereafter, she presented us with a delicious lunch of fresh fruit, sandwiches, and dessert, the type of treatment you normally get when you are royalty. They were, indeed, a most gracious host and hostess. Mr. Bevan's wife, Jill, is here for the first time in the United States. I would ask you to join me in giving them a warm welcome.

II. Derek R. B. Bevan

U.K. Electric Utility Regulators Legal Advisor

Keynote Address

{6}Thank you very much. It is an honor to be invited to a gathering like this and it is a pleasure to be with you in such an attractive town as Williamsburg, Virginia. If I come with some diffidence, recall with me that it was George Bernard Shaw who said we represent two countries separated by the same language. I am here to say that the separation of language is not really a barrier. Before I begin, in earnest, I would like to say one or two things within the greater global context.

{7}I have put up a map, which you will note depicts two sovereign nations, the Republic of Ireland and the United Kingdom. The U.K., as you know, is more than Ireland, Scotland, Wales, and England. I mention this particularly to say that the population of the United Kingdom is something just under sixty-million inhabitants. Of that number, the population of England is about forty-eight million. If you cut out the top portion of the country, where there are not many people, and this peninsula where we do not have very many people living either, then in the area remaining, we have around forty-eight million people. Bear in mind, that the size of England is some 50,000 square miles, and I gather that the Virginia is just under 40,000, so the two are about the same size. But, in that same size area, we have about eight times the population that you have here. So, keep that thought in mind as we compare our systems.

{8}Now, what happened in Britain is what happened I suspect the world over, and certainly what must have happened in the United States as well. We originally had little municipalities, with commercial manufacturing companies building their own little systems in localities, and as time went on, their production items would

have been joined collectively with those of the greater island, comprising Scotland, England and Wales. Then, came the time when Scotland and England, in the northern part of the island, were linked to the Irish Republic. That alliance is something which is the subject of the attention of the men of violence today, and that has come and gone, as peace has left, and then returned. At the moment, that link is back and running. We also have a link from here into France, and there is a proposed link into Scotland and Old Ireland that is not yet developed. I mention this link particularly because it is the propensity of most to define the area.

{9}So, when we privatized our system in Britain, we ended up with one market here in England and Wales, a differently constituted market in Scotland, and a different market again in Northern Ireland. Let me make it quite clear that my office covers only Great Britain, that is to say "The Big Island," and we do not extend to Northern Ireland, which has a carbon copy of my office of its own. For that reason, my Director General has no jurisdiction there. I mention all this particularly because the remarks I will be making are remarks that are important in the system of England, and Wales, rather than that of the whole country.

{10}What I proposed to do is speak for a little while of our reevaluation of our system, and perhaps I can stop a little early, and give you the opportunity of choosing your own agenda, and questioning me at the conclusion of my remarks. What I want to look at during this time, is not the rules that we have to regulate Britain because they are perhaps, of little interest to you. Instead I look to see what it is that lawyers can contribute to regulation. It seems to me that regulation, certainly regulation in Britain, is primarily a colonist task. It may be even more of a colonist task in Britain than it is here. I regret to tell you the very sad news that the industry in Britain does not support anything near the number of clients that you do. Additionally, I have to say it is a very rare day when I am actually with a real-life lawyer, face-to-face in my office, and that I was so overjoyed when it finally happened.

{11}But, we are standing back from our system at the moment, and looking at what we have achieved, and in my own case, what I think we can do to help the colonists to regulate. It is some of those thoughts I want to share with you. The reason why we are standing back looking at our modern story begins with the 1989 Electricity Act ("Act"). That Act had two objectives. One objective was to transfer a state-owned industry into the private sector, and since its enactment, that goal has been achieved. The second objective was to introduce competition into what was then a monopoly industry. We introduced competition when it became possible to do so, and it was thought possible in two areas, electricity generation and supply to the ultimate consumer. As far as generation was concerned, competition was introduced immediately in 1990. There has been consistent complaint that the market in generation is not proper competition, because it is dominated by two particular friends. Be that as it may, there are still competition, new interests, and indeed companies from the United States who come over and start to generate electricity, while making a nice profit at it.

{12}As far as supply is concerned, the intention was that the very knowledge of customers could prove significant, if they were given a choice of supplier. In 1990, some 5,000 people were eligible to choose their supplier. In 1994, that choice was extended from, at the largest, 5,000 people to the later, bigger figure of 50,000. These biggest 50,000 customers account for large amount of the quality electricity consumed in our country. That 50,000 have again increased in number, and consumer power. There are in total, some twenty-six million customers in Britain today. The intention was that they be given choice of electric supplier in April 1998. That opportunity was a new advancement. We were covering ground that had never been covered before, and the task of introducing competition has turned out to be more complicated, and time-consuming than we had hoped. We have missed the deadline of April, so we are on target now for a revised deadline of September this year. As part of the first competition, the best of the customers, for example, are due to start in September in quite a small way, but it will spread rapidly, and this time next year, we should have competition for everyone.

{13}The second reason why we are looking at things to reevaluate is that, we have, as you well know, a new government. In May of last year when we had a general election, after eighteen years of the reign of a

conservative government, a new government was elected. This marks the beginning of government moving to the left. The Labor Party, in opposition, had said terrible things about the privatization process. They said it ought never to have taken place, and that they were opposed to it. So, it was with something a bit more than casual interest, that we waited to see what they were going to do when they came to power as the leading political party.

{14}Well, despite all the words in opposition, the worst thing they have done so far is to produce this green paper, a consultation policy paper called the "Fair Deal for Consumers." I believe there may be some reference to that in the pack which you received. That again, is asking questions which cause us to step back and ask, "what can they do for regulation?"

{15}Now, when our industry was privatized, the most use for something like this forum, was to rollback the frontiers of the state, and that has been achieved. There was a desire to make what was feared to be an inefficient state of industry, into an efficient, private one. That has been achieved as well. Prices have been reduced. It was the desire to give customers choice, and as competition has been introduced, that choice is coming of age. During that time, there was a desire to establish a process. It was early in that creation of a process that we learned the future of electricity generation lay in nuclear generation, as the cheapest alternative. Therefore, the sentiment was that the government should invest money in new nuclear plants. That goal went unchallenged until the nuclear plant was put up for sale in 1990. When the government offered it for sale, the banks and financial institutions told the government in simpler terms, that if they put the nuclear plant up for sale, that privatization would not appear, because the industry would not make accommodation for it. And overnight, the truth emerged that nuclear was no longer the cheapest alternative, but was in fact, the most expensive.

{16}So, you would think that having set objectives, and not having fully achieved these objectives, addresses what would be seen as an unqualified failure. It is seen as a failure because of regulation, and it seemed a failure of regulation because prices have come down. What is said now, however, is that since privatization the salaries of the chief executives and senior officials of the companies have gone up enormously. That disproportionate raise in salaries is considered unnecessary, unfair and immoral. It is said that the shareholders' share of government has increased enormously, but the management's shares have never been increased. Yet they have profited generously, and that is unfair, unreasonable and immoral. In that context, a reduction of prices to customers has been out-of-state, and the benefits in terms of salary, and those benefits in terms of shareholders have been local. The root of the trouble in all of this is that, the government is setting things on the cheek of the precipice, the regulators are not doing their job properly, and that it is said to be not surprising, because regulators are people who are unelected and unaccountable.

{17}I therefore, propose to look for a few minutes at this phase of the story to see where lawyers can offer guidance as to whether we have got it right, or whether we could get it better. As far as an elected in-service is concerned, what has happened in our country is that a regulator is appointed to serve a period the following year, and is appointed by the government as a government appointee. But, once elected, the government cannot remove him from office except for extreme abuses or misconduct. You cannot remove him from office for a mistaken purpose, and you cannot remove him from office if he follows a policy which is not to your liking. That is quite deliberate job security because it is an attempt to distance regulation from day-to-day political pressures. So, it is said that if regulators have got it wrong, and we should do it differently, this document asks whether the pattern of deliberation should be lifted from what we have had so far. They ask if we should have a single regulator, or a commission of three to five people. If we have three to five people, do we not reduce the risk of their being a chance to make errors? Do we not reduce the risk of there perhaps being a mistake, if you appoint another regulator, who is like every single once of us, just a layman who has a basic set of values or basic set of prejudices? And, if you have a commission of three to five individuals, then do you have a mix of values or prejudices which will give you a more balanced fit? Should you, in fact have more than one regulatory body, so as to avoid what the Soviet Union calls the cult of personality? Is this

avoiding the risk of the regulator getting into a relationship of being too friendly or of behaving too antagonistically?

{18} Should you perhaps consider questioning the appropriateness of this decision, as this is something that I have also doubted is so simple? Perhaps you should have an arrangement whereby, at times when there are terrible decisions to be made, you should have the opportunity to allow a regulator not to have to make that decision on his own, but to share in the responsibility with others. Unless of course, you consider the role of the advisers, the staff can talk to and take advice from the advisor. He is the one man that we cannot absolve from the responsibility of the decision itself. I wonder about this, and you would know more about this, if you have a commissioner who could be free from assuming accountability, and receive anonymity for his decisions. If you cannot always center on identity, then you have to couch your decision somehow. In some way, you are trying to get it across to them. If you have one man assuming this responsibility, do you have a greater opportunity for consistency when things have to be done quickly? If you have a single regulator, a decision can be taken within the time it takes to say yes or no.

{19} So, that is one area where we are looking to the United States for guidance. There is also the suggestion that regulators' decisions should be appealed, and we know, there is always an attraction for a lawyer in having an appeals system. But, I wonder in terms of principle, if you have a price control, should we follow the argument, that it should not be based on kilowatt hours? I wonder whether you have an appeals system about that here? You are not transferring the focus of regulation away from the regulator to the appellate body. You are, in fact, creating a new regulator in place of the one you already appointed. Is that what is intended?

{20} There is another thought we have here too. Certainly, in ordinary civil courts, the opportunity of appeal is there, and the judge sometimes gets the law wrong, but you think there is not normally a pattern of appeal open. Particularly, if the judge concludes that the facts were not as you wish them to be. There is usually an appeal of fact then. I wonder whether there is an analogy there. For instance, when, in economic terms, is it best to have a system of economic judgment, and not subject to sort of appeal that lawyers contemplate? Unelected and not unaccountable. What is unaccountable? Well, it seems to me, there are two things that are unaccountable, depending upon final standing. It means perhaps that the regulator should be called upon to stand accountable, while he is saying what it is he is about to do - whether he is embarking upon a new plan and its pattern for our office or anything else.

{21} The consultation paper invited such comments, saying this is what we did last time, this is the place it is now, these are the things we want to think about, and these are some of the choices we are facing. What if we issue that sort of government consultation process once, twice, three or four times? We will want to come to the conclusion that it is reasoned, logical, and intellectually robust. We will want to have reasons, which are put in writing, and within the public domain. And, in our own case, accountability goes one stage further, in that, from time to time, the regulator is called upon to appear before our national government in Westminster, and to be subject to questions. He is tested about his achievements and proposals. The accountability is sometimes used, in the sense of having the desire for some mechanism that stops the regulator when he is doing something of which the complainant was not in approval. I wonder, ladies and gentlemen, whether that sort of thing is ever possible without turning to government intervention. If it turns out that government intervention results, then it undermines stability, and it does things like increase the cost of capital, which will ultimately increase the cost to the customer.

{22} The other way in which the regulator can be controlled, is through the duties that are imposed upon him. These are the duties which are imposed upon my office. First, the duty to secure a reasonable amount of electricity to satisfy demand, and to secure enough money. That means not to guarantee you will make a profit, instead, it means that all of you are ensured a well-run, well-managed company, by which you can make a profit. Second, if your family's household supply is working badly, do not say that it is not our

concern. And finally, there is the duty to promote competition in generation. Those are the duties that my regulator is required to take into contemplation every time he discharges one of his official duties. I have to say that those duties may provoke outrage. They provoke outrage, because you will see, I have only listed the primary roles, but amongst the primary duties, there is one omission. There is no mention of the interest of the consumer.

{23} Now, you may well wonder whether the interests of the consumer are well served, and whether those principles are being followed. But, the fact that they are not mentioned has caused outrage - no more outrage than in the Labor Party, which constitutes our government party now in power. The reason for the Commission is that in 1990, there was no competition, and there were those who said that the introduction of competition was an extravagance, a disruption, and against the best interest of the consumer's pursuits. The Conservative Government had the opposite view, that of ensuring the prevailing of the duty to promote competition, and a duty to protect customs.

{24} We now have this document, which suggests that the duties be changed to exercise the functions, in the best-calculated manner to protect the interest of consumers, and that it is good to get at the top of the list. I see that as a significant cosmetic change. I wonder whether there is any substantial, non-superficial change at all. In addition to that, the new government in this document is suggesting that the regulators should have other duties beyond the purely economic ones. There are social duties, and duties to the environment as well. Perhaps, I should explain this further, as we are two nations separated by the same language. Certain duties are short in form. Such duties may be translated as meaning some of the competition should be available for poor customers, as well as wealthy ones. When the poor cannot pay their debts, the electricity bills remain unpaid, as disconnection of supply is something which is carefully regulated. Those who are required to take their electricity to reaches are forced to pay in advance to continue their power supply. Those meters are not significantly more expensive, and the greater expense which now is probably, in general reduced.

{25} As far as the environment is concerned, the issues are the emissions from power stations, and the impact of electricity on the landscape. Interestingly, that is primarily the question of the countryside, because I notice that in the urban areas, there is almost universal underground wiring, whereas, that is not the situation elsewhere. Concern for the environment rests in the pressure to find ways to use energy more efficiently, and in finding a solution. Now, the intention is that these issues should be addressed by government, and should be the same subject matter or directions given to the private sector, and for a set period of time. Now, here is a challenge for us. This is a challenge for lawyers; find a way of allowing this degree of government intervention which does not count as intervention explicitly, but which will destabilize the system, and will undermine the stability that has been produced by having a regulator who serves independently of the state.

{26} That is what I wanted to say about electing unaccountable regulators. There are a few other thoughts on the general way in which the election should be done. The first thing I wanted to say is that we are reviewing the Act, and they are expecting to be amending the legislation. Our experience has worked this way. The less you put in the Act, and the more you put in supporting documents, the better. Our Act is ten years of age, and it is already feeling obsolescent, and it very soon will become impossibly obsolete. Any amendment which includes the rules of the day may prove to be curtailing. The rules themselves will need to go into subordinating documents, which will be changed more easily. The pattern of regulation is by controlling the licensing process. You cannot generate at a utility plant without a license to sell that power to customers. What the Act does not say, however, is what a license is for. You see, for example, in Russia, the number of people who can generate is regulated, so that you can do something to assist those involved in the power generation and supply process.

{27} Well, in our own case in the U.K., the obligation to promote competition may not be quite as difficult. Here in the U.S. do you, for example, use your licenses to test the property of those who want to join the market? For example, if you are introducing competition and supply, do you want to test the property of those

beings who are elderly ladies who live on their own? Would you do this to protect them from the sharper end of commercial power generation and industry competition? Well, it may be, but let us pause for a moment. If the regulator is to take their case upon himself, it seems to me, he takes on a very onerous burden by himself.

{28}It is just that his great investigation is done in order to come up with a satisfactory solution that somebody passed the health check. And, it is not just a health check that you have to pass if the title of license is granted. I think it might be done presumably on the narrow basis to determine whether they are satisfactory to pass the regulatory checks. Or, do you use your license to impose traditions? That reason was originally the purpose for which we could use licenses. Now, let me just commend to you one tradition in our legislation. I do not know how far the persuasion could go, but if you had a Parliament that could be persuaded to do the same, I commend it to you. For instance, you could make the license subject to conditions whether or not they relate to certain activities or whatever else you like. That is to say, you can put in anything into the licensing requirements you like. You could put in for instance, a decision to impose controls over the colors of the licensee's seals and logos. Maybe there will be time to return to this theme later.

{29}The final thing I wanted to leave you with, is the area of interest which the regulator seeks to regulate. You may think that is not a very profound thing. I have to say that sitting in my office, it took me a long time to get to that point of understanding. But then, of course, I am not an expert. We are concerned with what goes from the generation set to the consumer. I think where this relationship concerns a part in the physical transport over the generation set, the transport over a transmission set at high voltage to the consumer, we do not even license the consumer. You do not have to have a license in order to receive electricity. That seems self-evident here. But, does it mean this or does it not? It means that the system is geared to save resources, that you do not have to limit your demand to what generators can manage to generate. The system has to ensure that generation is co-generation, and not to satisfy whatever the demand happens to be. And, that is a very basic principle.

{30}The other thing I would mention is the significance of transmission, the significance is in the role of transmission to define the market at the transmission level of supply and demand, as they are kept in balance. At the transmission level, the decisions are made, at least in our own case, as to who can generate and who cannot generate.

{31}In addition to that physical line, there is a commercial line which is of concern to the regulator as well. Concern over the sale by the generator, the trading in the market - a curious expression in Britain- as well as supply. Let me say that supplier in our context requires very limited resources. You need a desk, a telephone, a computer, and you need a large flask of strong coffee. That is all that is required. The supplier buys the electricity, arranges its transport, finds the customer, sells it to the customer, and collects the proceeds. And, that is all he does. He is a broker, a finance man. He is not a man with a screwdriver, or an engineer who deals with the watts.

{32}The other thing I wanted to mention is shipping, because that is a phrase whose name is designed to confuse, and not to illuminate. I just wonder how many people came here this morning, and paused to get petrol on the way? When you did so at the filling station, were you able to buy electricity at the same time? And, if not, why not? When you go out with the family to do your week's shopping, to buy bread, meat, and coffee, was there - among all the other things you could buy in that shop - electricity? Why can you not buy electricity there? There, the people who are used to dealing with a large number of ordinary domestic foods, are used to conducting a large number of small transactions. Of course, people who run filling stations, who run shops, may not want to get involved in the horrendously complicated, wholesale trading process for electricity. Now, in Britain, there is no chance. If you want to see to the customer, you have got to buy at wholesale market and sell, in order to do it.

{33}That brings me to my final thought: shipping. If we are restructuring the system, what we might really like to do, is to say that light represents the totality of what regulation is concerned with. So, Parliament could be safe in saying that this is where you are entitled to act, but no further. The way in which that line is chopped up, between distribution, supply and so on, is something which is not set in stone, nothing which is changed as we go along, and allowed to evolve as the industry evolves. We do not, at the moment, in Britain, have a license for distribution. We would like it, and we would like freedom to be able to change the requirements, as these needs emerge. So, as we chop that line up, it may become apparent that there is a need to be regulated by license for some, and for some, you do not have that need. Bits of activity come in and out of regulation as things change.

{34}I will leave with you one final thought. I have not mentioned anywhere, the question of metering. Particularly, the installation of meters, the reading of meters, and so on. At the moment, this is part of the monopoly of distribution. Why does metering have to be a monopoly? Why can that not go out to competition? In the provision of metering, what sensitivity do you have to the interests of the needs of the customer himself? I can recall in Britain, the introduction of choice, intelligence. The first thing is intelligence. The first thing that happened in metering, you will be proud to know, is the development of a meter in the shape of Mickey Mouse. Why can you not have a meter in the shape of Mickey Mouse? You laugh, but is that the monopolistic logic? Who knows best how to make the choice for the customer? Ladies and gentlemen, these are not matters of policy, they are not views of our Director General, they are not even necessarily my own. Perhaps, you would find it helpful to think about how best to tackle these matters.