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News and Commentary

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Advocacy and the Public Advocate

by Ralph E. Townsend

As Richard Silkman and Charles Colgan make clear in their comments in this issue, Maine's telecommunications policy has been surprisingly clear and consistent in the post-AT&T divestiture period. And Governor McKernan chose a specialist in telecommunications policy, Kenneth Gordon, as his first appointment to the Public Utilities Commission (PUC) chair. Yet telecommunications policy in Maine has gone nowhere in the past five years. Why has this happened? And why during this same period did a state like Vermont, which is very similar to Maine in many important ways, strike out on a fundamental revision of its telecommunications regulatory structure?

Let me suggest that it is not coincidental that Vermont has a different regulatory structure and that Vermont has a more progressive telecommunications policy. In Vermont, the public utilities advocacy role (*e.g.*, the role of opposing rate increase requests) is within the Department of Public Service, an executive agency. In Maine, the advocacy role is within the PUC itself. Fundamental changes in regulatory policy, such as shifts to some form of incentive regulation for telecommunications, have broad policy implications that should involve broad political constituencies. When the advocacy role is held by the executive branch, the Governor and her administration become intimately involved in the policy and politics that surround such important questions.

In Maine, on the other hand, the advocacy staff reports to no politically accountable person. Maine's telecommunications advocacy staff are personally very skeptical about the need to move from traditional rate-of-return regulation, and that their skepticism has been an obstacle to telecommunications reform. Faced with staff whose views are different from those of the PUC commissioners, the regulated utilities have increasingly decided to litigate issues before the commission. But the adversarial context of the regulatory hearing room may not be the right framework in which to devise new regulatory incentives and new regulatory protections. In virtually every state that has adopted alternative regulatory approaches for telecommunications, that alternative was the result of either negotiated settlements or specific legislative mandate. Regulatory hearings are structured around who wins and loses on particular points. Negotiated settlements tend to focus on assignment of risks and responsibilities in the new and unpredictable environment.

Moving the advocacy staff from the PUC to the Public Advocate's office would be an easy and obvious transition. The Public Advocate's office already exists with a mandate for advocacy. The advocacy staff and the Public Advocate's office have taken very similar positions on

virtually all regulatory matters, so the move will not involve insurmountable immediate policy differences. As the prominence of the Public Advocate's role increases, we can expect the Governor to take a more active interest in that office.

Moving the advocacy staff from the PUC to the Public Advocate's office will also resolve a built-in conflict of interest within the PUC. At present, the staff of the PUC acts as both advocacy staff and hearing examiner staff. While the PUC has tried to adopt procedures to minimize this conflict, conflicts are inherent in this structure. For example, Lawyer Smith may be the hearing examiner on a telecommunications case in which Lawyer Jones serves as advocate. In a subsequent electric case, Lawyer Jones may be the hearing examiner while Lawyer Smith is the advocate. Such reversal of roles would be unacceptable in any judicial process. (Or imagine letting Central Maine Power advocacy lawyers act as hearing examiners for telecommunications cases!) And the confusion of roles also exists for other PUC staff. Hearing examiner staff routinely prepare independent analyses that are not based specifically upon the hearing record and are not subject to rebuttal.

The new commission chair, Thomas Welch, may well provide the leadership that will put telecommunications policy back on the agenda. But effective, long-run policy institutions cannot be built around personalities. When structures are clearly a contributing factor to policy inaction, we need to review and revise those institutions to serve the public interest.

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