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Are Utility Workforces Prepared for New Demands? Recommendations for State Commission Inquiries

**Scott H. Strauss, Esq.
Jeffrey A. Schwarz, Esq.
Elaine Lippmann, Esq.**

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Scott H. Strauss, Jeffrey A. Schwarz, and Elaine C. Lippmann are attorneys at the Washington, DC law firm of Spiegel & McDiarmid LLP.

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Executive Summary

The energy industry is facing an impending workforce shortage. The shortage reflects an unprecedented number of retirements expected to occur in the next decade, coupled with increasing energy demand and changes in the skill sets needed to support shifts toward “greener” energy technologies. The U.S. Department of Labor predicts that 500,000 energy industry workers will retire over the next five to ten years, a turnover rate of 50 percent. Both the Department and the North American Electric Reliability Corporation have expressed concerns that the anticipated workforce shortfall threatens the reliability, efficiency, and security of utility services. This so-called “graying of the workforce” suggests that state commissions should allocate resources to investigate the current and future staffing of the utilities they regulate, and should be prepared to encourage solutions where appropriate and mandate them where necessary.

Every state commission has some form of statutory authority to address workforce graying issues. Many have governing statutes that explicitly authorize inquiry into utility staffing, including through investigations or management audits. Other statutes are less specific. Some grant authority to review utility business practices (which include staffing decisions), while other statutes simply require the commission to ensure that jurisdictional utilities provide safe, reliable, and quality service to the public. As adequate staffing directly affects a utility’s ability to provide such services, even the most generally worded statutes give commissions some authority to investigate staffing issues and to work with regulated utilities in crafting solutions.

Commissions that initiate staffing investigations face threshold questions regarding timing and scope. Commissions must decide whether to commence an investigation on their own or await a triggering event, such as a utility-initiated proceeding (*e.g.*, a rate hike request), a complaint brought by a third party, or an external event (*e.g.*, a lengthy service outage accompanied by negative customer reaction). Commissions can avoid statutory deadlines or other time constraints by initiating their own investigations rather than waiting for triggering events. The scope of a commission-initiated investigation can be broadened to include all utilities in a jurisdiction, rather than limiting the evaluation to just one utility. A more “global” proceeding facilitates making educated comparisons and identifying best practices.

In any staffing investigation, the commission will need to obtain and evaluate detailed data. Commissions have broad authority to require utilities to provide documents and reports regarding their staffing practices. At a minimum, commissions should seek the following types of information:

- Staffing-related service quality data (*e.g.*, call center response times);
- Current staffing levels;
- Recruitment and hiring plans;
- Anticipated retirements;
- Anticipated skill set needs;
- Retention plans;
- Succession plans; and
- Efforts to capture knowledge from retiring personnel.

Evaluating the data will require the assistance of experts in human resources, corporate management, internal controls and business/planning policies, and forecasting and planning.

Commission investigations will benefit by being informed by all entities with interests in, and relevant information concerning, utility staffing issues. Involving parties with different perspectives will promote “buy-in” and minimize the likelihood of later litigation. We suggest that commissions seek input from at least the following constituencies, each of which can provide valuable information and, equally important, a unique viewpoint on the issues:

- Regulated utilities;
- Other (unregulated) utilities;
- Labor representatives;
- State ratepayer advocate organizations;
- Industrial customers or other large users;
- Other state agencies;
- Non-government organizations; and
- Local educational institutions.

From the outset of any investigation, commissions should be focused on the role they will play in fashioning whatever solutions may be warranted. A commission may need to assess efforts already underway to address graying problems or mandate that action be taken if no efforts are already underway (but should be). Commissions can consider a number of methods for ensuring adequate solutions, including:

- Directing the utility to review and respond to information about approaches taken by other utilities or in other industries;
- Instructing the utility to make a compliance filing explaining whether taking similar steps would be sensible, whether the utility plans to pursue them, or detailing other measures that the utility intends to implement;
- Directing the utility to retain an independent expert to conduct a staffing audit, following which the utility can be given a period of time to review the results and prepare and submit action recommendations; and
- Establishing a working group to review the audit results and provide input on appropriate solutions.

Commissions should seek to ensure that the utilities take the lead in addressing staffing issues, rather than having solutions imposed on them by regulators. This will avoid claims that a commission has overstepped its customary and accepted role as “regulator” and impinged upon perceived “management prerogatives.” Where commission action to address staffing issues is needed, tying that action as closely as possible to the language of the commission’s authorizing statute will minimize the probability of successful challenges. For example, commissions can influence the implementation of staffing actions through their authority over rates or service terms and conditions. To the extent that more direct action is needed, commissions should attempt to frame their actions within the scope of their statutory powers—for example, by demonstrating that the action is needed to ensure the provision of safe and reliable service.

Moreover, while commissions should take an active role in scoping out potential staffing problems and ensuring that utilities are addressing them adequately, they should avoid being overly prescriptive as to the precise steps that the utilities should take to solve them.

This paper concludes with a summary of findings and a list of recommendations about when and how to address workforce graying issues. In addition, an Appendix to the paper includes a “generic” list of potential data requests that can be utilized as part of any investigation.

Finally, while framed in terms of the energy industry and inspired by the demographic changes it faces, the analysis and recommendations set forth in the paper are not unique to that context. Graying issues are a subset of general utility staffing concerns, and the ideas presented here can be applied to investigations of other staffing issues, such as workforce diversity or the degree to which workforce composition and skills are keeping up with the industry’s changing needs—not only in the energy industry, but in water, telecommunications, and other regulated industries as well.

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Introduction

The energy industry has an employment problem: it possesses an aging workforce, but confronts demands for an increasing number of utility workers. The gap between worker supply and demand appears not only in traditional trades but also in new ones necessitated by changing priorities. Skills in energy efficiency, renewable energy, and “smart grid” design and implementation will be increasingly important but hard to come by in an industry that faces large-scale retirements from the Baby Boomer generation and has had difficulty recruiting new workers in sufficient numbers. This paper helps state commissions assess the extent of the problem and induce utilities to move toward constructive solutions. It advises commissions on (a) how to investigate the magnitude, contours, and impacts on utility performance of workforce issues in their jurisdictions; and (b) how to assess the quality of utility management’s efforts to close this gap. The paper then recommends actions that commissions can take to induce utilities to meet staffing challenges, and reviews commissions’ legal authority to take such steps.

To set the context, the paper begins with an overview of recent, authoritative analyses of the workforce “graying” concerns facing the energy industry. These analyses demonstrate the need for commissions at least to consider whether to take action. The paper then addresses, sequentially:

- threshold issues in determining whether to investigate workforce graying concerns;
- the statutory authorities on which commissions can rely in initiating investigations and taking responsive action;
- options for structuring an investigation, with a focus on the use of broader, “global” proceedings, rather than utility-specific ones;
- suggestions on compiling data on workforce issues, including sample data requests;
- examples from around the country of the types of activities that energy utilities and others are taking to address staffing concerns; and
- issues that commissions may confront in fashioning solutions.

We conclude with a summary of our recommendations.

Although this paper is inspired by demographic changes facing the energy industry, its analysis and recommendations are not unique to that context. “Graying” issues are a subset of general utility staffing concerns, and use of the terms “graying” or “staffing” (they are used here

interchangeably) is not meant to limit the following discussion to issues arising from the energy industry's changing demographics. The ideas presented here can be applied to investigations of other staffing issues, such as workforce diversity or the degree to which workforce composition and skills are keeping up with the industry's changing needs—not only in the energy industry, but in water, telecommunications, and other regulated industries as well.

I. Workforce Graying Concerns in the Utility Industry

There should be no dispute about the need for utilities and commissions to pay attention to graying issues. Among other authorities, the North American Electric Reliability Corporation (“NERC”) and the U.S. Department of Labor (“DOL”) have reported concerns about staffing trends.

In its “2007 Long-Term Reliability Assessment,” NERC observed that “[t]he loss of industry workers and their years of accumulated expertise due to retirements is a serious threat to the bulk power system reliability, exacerbated by the lack of new recruits entering the field.”¹ NERC noted the need not just to maintain existing bulk power facilities but also to “rejuvenat[e] the bulk power system” with “[n]ew construction” and the use of “a variety of new technologies.”² NERC’s survey of the industry (the results of which were reviewed in the same 2007 Assessment) suggested that workforce graying concerns were among the “highest likelihood and highest severity of all business issues the power industry faces.”³ NERC’s concerns remained the following year, as its 2008 Assessment again referred to the “[a]ging [w]orkforce” as “a [g]rowing [c]hallenge.”⁴

NERC has identified several factors as contributing to the emergence of workforce aging issues, including:

- Demographics (baby boomers reaching retirement age, reduced birthrate, and lower immigration);
- Utility cost-cutting in recent years, which resulted in more early retirements of engineers, supervisors and line-workers; and
- Outsourcing of activities traditionally performed by in-house staff, leading to the loss of in-house expertise.⁵

¹ N. Am. Elec. Reliability Corp., 2007 Long-Term Reliability Assessment: 2007-2016, at 20 (2007) (“2007 Assessment”), *available at* <http://www.nerc.com/files/LTRA2007.pdf> (italics omitted).

² *Id.*

³ *Id.* at 60.

⁴ N. Am. Elec. Reliability Corp., 2008 Long-Term Reliability Assessment: 2008-2017, at 5 (2008) (“2008 Assessment”), *available at* <http://www.nerc.com/files/LTRA2008.pdf> (italics omitted).

⁵ 2007 Assessment at 20.

NERC recommended (among other things) that the industry “should aggressively recruit and retain talent.”⁶

Similarly, the DOL reported in March 2007 that 500,000 energy industry workers are expected to retire over the next 5 to 10 years, a turnover rate of 50 percent.⁷ The DOL paints a picture of an industry faced with significant and growing workforce concerns:

Perhaps the most complex and pressing challenge facing the energy industry is the retirement of incumbent workers. The average age of workers currently employed in the energy industry is near 50, and the average age at which most workers retire is 55. Within the next 5 to 10 years, many companies will need to replace a huge portion of their workforce. This demographic phenomenon presents the energy industry with the succession planning challenge of losing critical institutional knowledge in occupations for which replacements are often most difficult to find: supervisors and management. The industry lacks a pipeline of new workers large enough to replace retiring workers while also meeting employers’ growing need for additional personnel.

Id. at 12.

The DOL predicted that the impact of this turnover would be greatest among “utilities,” a class in which the DOL included “Fossil and Nuclear Power Generation and Natural Gas Distribution” companies and which collectively employs more than half of the current energy workforce. However, the impending retirements are being felt across the spectrum of the “energy industries.” A 2007 study by the Center for Energy and Workforce Development (“CEWD”)⁸ predicted that, over the ensuing five years, retirements would result in the loss of between 40 and 50 percent of the current the electric and natural gas industry employee workforces.⁹ The Nuclear Energy Institute reported in 2009 that as much as 35 percent of the

⁶ *Id.* at 21.

⁷ U.S. Dep’t of Labor, Employment & Training Admin., Identifying and Addressing Workforce Challenges in America’s Energy Industry 4 (2007) (“Workforce Challenges”), available at www.doleta.gov/BRG/pdf/Energy%20Report_final.pdf. This report reviews efforts by DOL’s Employment and Training Administration to gain a handle on energy industry workforce issues and potential solutions, in part through a series of “executive forums” with energy company executives. *Id.* at 11.

⁸ According to its website (www.cewd.org), CEWD was formed in March 2006, and is a non-profit consortium of electric natural gas and nuclear utilities and their associations—Edison Electric Institute, American Gas Association, Nuclear Energy Institute, and National Rural Electric Cooperative Association.

incumbent work force will be eligible to retire within five years, with another 11 percent lost through other attrition over the same period.¹⁰ There are also indications that the petroleum sector faces significant retirement-related turnover.¹¹

These trends have not gone unnoticed by energy industry employers. According to the DOL, employers are reporting “that they will need to hire well above replacement levels as new power plants are constructed, new technologies are adopted, mines are opened, and new oil and gas wells are tapped to keep pace with the nation’s need for energy.”¹² Specifically, the DOL report found that:

Much will depend on whether new power plants are approved. When those plants are approved, the industry estimates it will need at least 21,000 new workers to build them and another 5,000 workers to operate them. Also, the industry expects it will need to replace approximately 25,000 workers nearing retirement.

Id. at 5.

The DOL further observed that utility executives had identified needs to develop new training programs, to improve existing programs, and to replicate successful training models to improve the capacity to meet “rapidly evolving workforce needs.”¹³ As the DOL explained:

⁹ Ctr. for Energy Workforce Dev., Gaps in the Energy Workforce Pipeline: 2007 Workforce Survey Report from the Center for Energy Workforce Development, Executive Summary (2007), *available at* www.cewd.org/surveyreport/execsummary_cewdreport_oct07.pdf.

¹⁰ Nuclear Energy Inst., Nuclear Industry’s Comprehensive Approach Develops Skilled Work Force for the Future 1 (2009); Domestic Energy Industry: Hearing before the S. Comm. on Energy & Natural Res., 110th Cong. 57 (2007) (prepared statement of Carol L. Berrigan, Director, Industry Infrastructure, Nuclear Energy Institute).

¹¹ In November 2007, the President and CEO of Colonial Pipeline Company testified before Congress that nearly one in five of its pipeline operation employees are eligible to retire within two years. *Id.* at 42 (prepared Statement of Norma Szydlowski, President & CEO, Colonial Pipeline Co.). It was further reported that of the four most critical positions, 35 percent of Senior Operators/Lead Operators and 29 percent of Inspectors are within two years of retiring. Moreover, while the U.S. Bureau of Labor Statistics puts the average age of the U.S. worker at 39 years, Colonial’s company-wide average age is just under 44 years, and more than one-half of the Company’s workers are over the age of 40. *Id.* at 40 (prepared statement of Norm Szydlowski).

¹² Workforce Challenges at 4.

¹³ *Id.* at 13.

The rapid advancement of technology has added a new challenge to education and training programs, because employers in all sectors of the industry need new workers who are more proficient in math, science, and especially technology than their predecessors.

Id. at 4.

The prospect of significant, retirement-related losses of both expertise and manpower has elicited statements of concern about the ability of energy utilities to continue to supply safe and reliable services. In August 2006, the U.S. Department of Energy (“DOE”) issued a report to Congress entitled “Workforce Trends in the Electric Utility Industry.”¹⁴ The DOE noted that for “electric utilities, whose service quality and reliability depends on maintaining an adequate, knowledgeable workforce, managing the upcoming retirement transition is a particular challenge.”¹⁵ The DOE went on to state that, “[d]espite the growth in training institutions, retirements outpace the supply of new lineworkers.”¹⁶ According to the DOE (*id.* at 3), an increase in lineworker hiring since 2000 had not made up for the decline that occurred during the preceding decade:

From the early 1990s into the early 2000s, electric power utilities experienced a general steady and overall decline in workforce levels. That trend may have been largely due to restructuring of the industry, which began in the early 1990s. The introduction of

¹⁴ U.S. Dep’t of Energy, Workforce Trends in the Electric Utility Industry: A Report to the United States Congress Pursuant to Section 1101 of the Energy Policy Act of 2005 (2006) (“Workforce Trends”), *available at* http://www.oe.energy.gov/DocumentsandMedia/Workforce_Trends_Report_090706_FINAL.pdf. The report was prepared in response to a mandate in Section 1101 of the Energy Policy Act of 2005, which required the Secretary of Energy to monitor “trends in the workforce” with respect to “skilled technical personnel that support energy technology industries.” Workforce Trends at iii (Energy Policy Act of 2005, Section 1101(b)(1)(A)). Along with requiring a report on these “trends” within one year, the statute goes on to state (in Section 1101(b)(3)):

As soon as practicable after the date on which the Secretary identifies or predicts a significant national shortage of skilled technical personnel in 1 or more energy technology industries, the Secretary shall submit to Congress a report describing the shortage.

Id. The passage of the statute and subsequent preparation of the DOE report reflects Congressional concern over potential utility industry workforce shortages.

¹⁵ *Id.* at xi.

¹⁶ *Id.* at 10. This finding assumed a “base case,” in which “apprenticeship, training program, and retirement numbers remaining consistent with the current situation.” *Id.*

deregulation created a competitive utility market prompting electric utilities to downsize in an effort to reduce operating costs.

Id. at 3. Since 2000, the DOE found that:

the electric utility industry's employment level for lineworkers has been steadily increasing. This hiring trend is driven by utilities' anticipation of increased demand, and is a response to the long periods of little or no capital investment. Utilities, concerned with the prospect of meeting the rising demand for energy using the existing transmission lines, embarked upon a hiring trend focused on employment to maintain, upgrade, and expand the electric utility system.

*Id.*¹⁷

These trends notwithstanding, the DOE concluded that¹⁸

[t]he percentage of the lineworker workforce expected to retire within the next five to ten years could approach 50% in some organizations. The loss of institutional knowledge is a critical concern, especially for a profession heavily dependent on mentoring and on the job training. Although the number of lineworker training institutions has grown considerably, analysis indicates a significant forecasted shortage in the availability of qualified candidates by as many as 10,000 lineworkers, or nearly 20% of the current workforce. This could eventually limit the nation's ability to maintain and/or increase electricity supply, potentially impacting the economic and national security of the United States.

Utility labor organizations have likewise expressed concerns that the quality of services provided to customers has suffered as a result of staffing deficiencies. James L. Hunter, Director of the Utility Department of the International Brotherhood of Electrical Workers, addressed the issue in 2007 congressional testimony:¹⁹

¹⁷ In terms of retirement trends, DOE reports (*id.* at 5) the example of the Tennessee Valley Authority ("TVA"), which has "already turned over a quarter of its workforce in the past 5 years and expects at least another third to retire in the next 5 years." DOE goes on to note that the TVA experience "is not atypical of the industry." *Id.*

¹⁸ *Id.* at xi (footnote omitted) (Executive Summary).

¹⁹ Domestic Energy Industry 84 (testimony of James L. Hunter, Director, International Brotherhood of Electrical Workers).

We have 40% less workers than in 1990 and the system has increased in size by 30% during that period [between 1990 and 2007]. When major storms hit the utilities do not have enough trained workers to assist the out of state help that is sent in by reciprocity agreements. One scenario congress should remember is the major storm in 2003 that hit the DC area. Customers were out of service for over 8 days. . . . Customer hookup times and service complaints have steadily increased over the last few years across the U.S.

Nor are utility staffing concerns limited to lower-level utility employees. A Hay Group study reported that more than two-thirds of utility companies surveyed had no succession plan for supervisors and 44 percent have no plans for vice presidents.²⁰ An Energy Central study reported on potential obstacles to measures aimed at addressing workforce shortages, including (1) increased levels of executive turnover due to merger and consolidation activity, which could lead to changing corporate objectives and priorities; and (2) declining numbers of technical graduates producing fewer replacement workers. The study also noted that traditional approaches such as succession planning, career path programs, mentoring, on-the-job training, apprenticeships and management trainee programs, while helpful, seem fragmented and lack the continuity of a corporate level workforce planning initiative.²¹

While this review is by no means exhaustive, the findings set forth above indisputably raise concern about workforce staffing issues. These studies show that the combination of workforce demographics and utility cost-cutting measures has created a gap between the industry's complement of skilled employees and the anticipated demand for them. The problems are apparent across energy industry sectors, and have implications for the safety, reliability, and quality of utility services. These concerns should prompt state commissions to ask whether they should allocate administrative resources to investigating graying or related workforce staffing issues among the regulated utilities in their jurisdictions. The easy answer is "yes." Adequate staffing bears directly on the ability of jurisdictional utilities to provide safe and reliable services, which goes to the heart of the statutory mandate imposed on state commissions and their jurisdictional utilities.

But a decision to "become involved" in utility staffing issues also raises concerns, including the obvious points that getting involved means doing the job right, which in turn requires sufficient resources—whether time, expertise, or money. Considered sequentially, the questions to be addressed at the outset include whether the commission has statutory authority to investigate and act on graying issues on its own initiative. Assuming the requisite authority, the

²⁰ Hay Group, Inc., *Workforce Trends to Deliver Utility Industry a Knock-out Blow: How Smart Firms Can Beat Demographics to the Punch* 1 (2005); N. Am. Elec. Reliability Corp., *2006 Long-Term Reliability Assessment: The Reliability of the Bulk Power Systems in North America* 26 (2006), available at <http://www.nerc.com/files/LTRA2006.pdf>.

²¹ Energy Cent., Research & Analysis Div., White Paper: "The High Cost of Losing Intellectual Capital" 7 (2006).

commission will need to determine the scope of any such investigation, the resources necessary to investigate effectively, and the timing of commission action. We turn now to these important, threshold considerations.

II. Regulatory Authority to Investigate Utility Staffing Issues

Every state commission has some authority to address workforce graying issues, the scope of which turns on statutory language and judicial interpretations of that language. Commissions with specific legislative authority or with expansively-interpreted general statutory authority should be able to take on staffing issues without concern that their ability to do so will be seriously challenged.²² The ability to investigate also implies the authority to take action to address identified problems. We address below (in Section V.C) concerns that commission efforts to address staffing issues may be met with claims that they infringe impermissibly upon management “prerogatives.”

Many state commissions have explicit statutory authority to conduct investigations or management audits to determine whether utilities are adequately staffed. For example, an Alaska statute authorizes the Commission to “investigate the management of a public utility, including but not limited to staffing patterns, . . . for the purpose of determining inefficient or unreasonable practices that adversely affect the cost or quality of service of the public utility.” Alaska Stat. § 42.05.511(a). Similarly, while the word “staffing” does not appear, the investigatory powers of the Hawaii Public Utilities Commission expressly extend to “the manner in which [a utility] is operated,” including with respect to “the safety, working hours, and wages of its employees.” Haw. Rev. Stat. § 269-7(a). Moreover, commissions generally have broad authority to require utilities to produce documents and reports in the context of investigatory proceedings.²³

In other instances, the state statute does not mention staffing specifically, but instructs the Commission to oversee utility business practices more generally. Nevada’s statute, for example, requires its Public Utilities Commission to ensure that providers of electric service “engage in prudent business management, effective long-term planning, responsible decision making, sound

²² Where a commission’s authority to address these issues is in doubt, one option is to seek an express authorization from the legislature. Consideration of that option is beyond the scope of this paper.

²³ *See, e.g.*, Haw. Rev. Stat. § 269-8 (“Every public utility or other person subject to investigation by the commission, shall at all times, upon request, furnish to the public utilities commission all information that it may require respecting any of the matters concerning which it is given power to investigate”); Alaska Stat. § 42.05.141(a)(5) (“The Regulatory Commission of Alaska may. . . require a public utility to file reports and other information and data”); Conn. Gen. Stat. § 16-8(a) (“The department, or any commissioner thereof . . . may direct the production of, and examine or cause to be produced and examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to the affairs of any public service company as it may find advisable. . .”). In addition, commissions generally can, and in some cases must, hold hearings at which they can examine witnesses. *See e.g.*, Conn. Gen. Stat. § 16-8 (“The Department of Public Utility Control may, in its discretion, delegate its powers, in specific cases, to one or more of its commissioners or to a hearing examiner to ascertain the facts and report thereon to the department.”).

fiscal strategies and efficient operations.” Nev. Rev. Stat. § 703.151. A Connecticut statute instructs the state’s Department of Public Utility Control to “keep fully informed as to the condition of the plant, equipment and manner of operation of all public service companies in respect to their adequacy and suitability to accomplish the duties imposed upon such companies by law. . .” Conn. Gen. Stat. § 16-11.²⁴ In Oregon, the Public Utility Commission “may inquire into the management of the business of all public utilities and telecommunications utilities and shall keep informed as to the manner and method in which they are conducted. . .” Or. Rev. Stat. § 756.070. Oklahoma law gives the Corporation Commission’s Public Utility Division “general supervision over all public utilities, with power to fix and establish rates and to prescribe and promulgate rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted.” Okla. Stat. tit. 17, § 152(A). Similarly, Vermont law charges the state’s Public Service Board with jurisdiction to hear, determine, render judgment and make orders and decrees in all matters concerning:

[t]he manner of operating and conducting any business subject to supervision under this chapter, so as to be reasonable and expedient, and to promote the safety, convenience and accommodation of the public. . .

Vt. Stat. Ann. tit. 30, § 209(a)(3).²⁵

By contrast, in some instances the legislation simply requires the commission to ensure the provision of safe, reliable, and quality service to the public. The Public Utilities Commission of Ohio, for example, is charged with “[e]nsur[ing] the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service,” Ohio Rev. Code Ann. § 4928.02(A), while New Hampshire law requires that “Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable,” N.H. Rev. Stat. Ann. § 374:1.

Other statutes are even more general and arguably more expansive. In Delaware, the Public Service Commission has statutory authority to “investigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility. Del. Code Ann. tit. 26,

²⁴ In September 2009, the Connecticut Department of Public Utility Control temporarily stayed 67 proposed layoffs at Connecticut Natural Gas Corporation and Southern Connecticut Gas Company, ordering an investigation of the impact of the action on service to consumers. The move was considered by some to be an unprecedented intrusion into utility management prerogatives. Eric Gershon, *DPUC’s Unprecedented Move Questioned by Some: Employer Backlash*, Hartford Courant, Oct. 5, 2009.

²⁵ Further, the Vermont Supreme Court has recognized the Board’s broad statutory authority to exercise jurisdiction over a utility to ensure that its operations are “reasonable and expedient,” *In re Verizon New England*, 795 A.2d 1196, 1201 (Vt. 2002), and, more specifically, to ensure that personnel costs borne by ratepayers are set at levels that result in just and reasonable rates. *In re Green Mountain Power Corp.*, 648 A.2d 374, 380 (Vt. 1994).

§ 206. Similarly, the North Dakota Public Service Commission has statutory authority to “[i]nvestigate all methods and practices of public utilities. . .” N.D. Cent. Code § 49-02-02. Although these statutes do not expressly authorize Commission oversight of utility staffing or business practices, nor do they dictate the specific measures that the utilities should be pursuing, they provide at least implicit or indirect authority to address utility workforce graying issues as a means of ensuring the provision of safe, reliable and high quality utility service.²⁶

²⁶ As discussed in Section V, below, this tension between effective regulatory oversight and transgressing management prerogatives is a common theme in cases addressing utility staffing issues.

III. Options for Structuring an Investigation of Utility Staffing Issues

Assuming authority is not an issue, a commission that wants to investigate utility staffing must address two threshold questions: *when* to begin an investigation and *what* the scope of the investigation should be. Timing will depend on perceived priorities, resource limitations, and external circumstances. A commission may choose to begin an investigation on its own accord, because of a utility filing, or in response to a “triggering” event. These “events” can include an inexplicably lengthy outage, perhaps followed by assertions (by news organizations, labor unions, politicians, or others) that the utility lacks the staff needed to restore service quickly. Potential triggers also include a filing by a regulated utility (or by a third party complainant) that raises workforce issues. The scope of any investigation will depend on whether a commission chooses to focus on one utility at a time or to act through a broader, more “global” investigation of all of the regulated utilities in a particular industry (such as all electric distribution companies or all local distribution gas companies) or even of all utilities in the state.

For ease of presentation, we address questions of timing and scope separately below, but note that in the “real world” these considerations are not so distinct. A commission may decline to address staffing issues on a single-utility basis now because it intends shortly to examine those issues on a more global, multi-utility basis in a broader proceeding. Alternatively, a commission that questions whether it can or should devote the resources to a broad investigation may prefer to wait for a triggering event that raises the issue in the context of a single utility. In some cases, as will be shown, multiple approaches can be pursued in parallel; the administrative process is intended to be flexible, and choosing one procedural path to address staffing issues need not foreclose others.

A. **Timing: Commissions can wait for utilities to act, or can initiate action on their own.**

Commissions can investigate graying issues in proceedings initiated by a utility, by a third party, or by the commission itself. The first two categories include cases in which a utility raises the workforce issue (*e.g.*, by seeking rate relief that includes dollars to fund new recruitment or training programs), proceedings in which a third party raises a staffing issue by filing a complaint, and cases where neither the utility nor another party raises staffing issues but the commission does so on its own initiative through an existing proceeding. The category of commission-initiated proceedings includes everything from utility-specific investigations (perhaps in response to the review of service quality survey results), to the imposition upon one or more utilities of ongoing reporting requirements, to the initiation of multiple-utility investigations or rulemaking proceedings.

As noted, utility-initiated proceedings can raise workforce staffing issues. Alternatively, even if the utility does not raise graying workforce issues in its filing, other parties—or the commission itself—might raise them where they are relevant to the issues the utility has raised.²⁷

²⁷ See, *e.g.*, *In re Interstate Power & Light Co.*, No. RPU-05-1, 2005 Iowa PUC LEXIS 389 (Iowa Utils. Bd. Sept. 23, 2005) (settlement approved following review of utility’s responses to commission questions concerning plans to address aging workforce issues).

For example, a 2006 rate hike request filed by United Illuminating Company (“UI”) included the addition of 31 full time equivalent employees and the institution of workforce recruitment and training programs to address anticipated retirements.²⁸ UI asserted that the expenditures were needed because: 40% of its workforce would be eligible for retirement by 2009; 33% of the eligible employees were expected to retire; and the Company contended that the failure to maintain its employment levels would “almost certainly result in declines in service whether in the average duration of outages, frequency of occurrence, or other customer service indicators.”²⁹ On review of UI’s request, the Connecticut Department of Public Utility Control encouraged UI to proceed, noting the need “to avoid a future adverse impact on customer service by a shortage of Electric System workers,” and characterizing its approval “as a compact between the Department and the Company to carry out the forecasted level of hiring.” The Department also ordered UI to report annually on the actual hiring levels.³⁰

Similarly, as part of its 2005 rate plan, New York State Electric & Gas Corporation (“NYSEG”) requested New York Public Service Commission (“NYPSC”) approval of \$1.175 million associated with the addition of 30 apprentices (including 15 additional line workers and 15 construction and maintenance workers).³¹ The Commission approved the request, rejecting protests about the size of the group and complaints that NYSEG had been slow to fill new positions. The Commission found that “the apprentice program is a laudable program and a useful device to maintain a skilled workforce that is fully capable of sustaining electric system reliability and on-going service quality,” and recognized that additional workers must be trained in time “to replace the seasoned employees who are reaching the time of their potential retirement.”³² To assure that the funds provided for the additional apprentices were put to that use, NYSEG was required to provide a status report on the apprentice program.³³

²⁸ *In re United Illuminating Co.*, 246 P.U.R.4th 357 (2006).

²⁹ Applicant’s Br., No. 05-06-04, at 44 (Conn. Dep’t of Pub. Util. Control filed Nov. 18, 2005).

³⁰ *In re United Illuminating Co.*, 246 P.U.R. 4th at 408.

³¹ *In re N.Y. State Elec. & Gas Corp.*, 252 P.U.R. 4th 165, *on reh’g*, No. 05-E-1222, 2006 WL 3733240 (N.Y. Pub. Serv. Comm’n Dec. 15, 2006).

³² *Id.* at 195.

³³ *Id.* Other utilities across the country have made similar rate increase requests premised on aging workforce concerns. *E.g.*, *In re S. Ind. Gas & Elec. Co.*, Cause No. 43111, 2007 Ind. PUC LEXIS 243, *93-94 (Ind. Util. Regulatory Comm’n 2007) (Approving of the company’s proactive plan to address “its aging workforce by recruiting, training and developing replacements for the skilled workers who are expected to retire in upcoming years.”); *In re Union Elec. Co.*, Case No. ER-2008-0318, Tariff Nos. YE-2008-0605, 2009 Mo. PSC LEXIS 71, *188 (Mo. Pub. Serv. Comm’n Jan. 27, 2009) (Recognizing the “need for improved training to replace skilled workers nearing retirement age” and adding \$1,410,000 to AmerenUE’s cost of service to fund increased training staff and \$1,800,000 for additional training equipment and materials); *In re Orange & Rockland Utils., Inc.*, Case No. 06-E-1433, 2007 N.Y. PSC LEXIS

While some utility-initiated proceedings provide focused opportunities to consider staffing issues, proceeding in this manner can be inefficient. Acting only when a request is made, and acting only within the requestor's proposed subject matter scope, can create inadvertent limits on a commission's investigation. Where graying workforce issues are raised only by an intervenor or the Commission, the utility may object that the issue is outside the scope of the proceeding,³⁴ and the Commission will need to resolve the objection. Also, utility-initiated cases are often subject to statutory time limits that make it difficult to explore graying workforce issues in depth. Many state laws require commissions to rule on utility rate filings within a specific period of time.³⁵ Even where no deadline is dictated by law, practical considerations can force the pace. For example, staffing issues sometimes arise in the context of utility mergers, in which merging parties generally propose a "deadline" by which approval must be received or the deal (and its asserted economic benefits) will vanish.

Whatever the source, such time constraints exacerbate another problem inherent in relying on utility-initiated cases to address graying issues: in such cases, graying issues will be one part of a potentially large and complicated case, diminishing the attention that can be paid to them.

B. Scope: Commissions can initiate investigations that are generic rather than single-utility-specific.

Another question to be considered when contemplating an inquiry into workforce graying issues is the scope of the investigation—in particular, whether to focus on one utility at a time or undertake a multi-utility investigation. Even where a utility provides detailed staffing and service quality records covering a significant time period, evaluation of the data could prove difficult because the information lacks context. Single-utility data can show trends within that utility, but will not show how that utility compares to its peers. Nor can single-utility data highlight specific companies or industry segments where workforce graying issues are

366, *27-28 (N.Y. Pub. Serv. Comm'n Oct. 18, 2007) ("The phenomenon of an aging workforce pervades the electric utility industry. Orange and Rockland appears to be taking proactive steps to ensure an appropriate transfer of knowledge to newer employees before its most experienced linemen retire. If, in the short term, this necessitates an increase above of what otherwise would be optimum staffing levels, we are supportive of those levels at this time to encourage appropriate training."); *In re Pub. Serv. Co. of Okla.*, Cause No. PUD 200800144, Order No. 564437, 2009 Okla. PUC LEXIS 20 (Okla. Corp. Comm'n Jan. 14, 2009); *In re Cent. Vt. Pub. Serv. Corp.*, Nos. 6946, 6988, 2005 Vt. PUC LEXIS 65, 235-36 (Vt. Pub. Serv. Bd. Mar. 29, 2005).

³⁴ See e.g., the discussion *infra* of *In re N. Shore Gas Co.*, Nos. 07-0241, 07-0242, 2008 WL 631214 (Ill. Commerce Comm'n Feb. 5, 2008).

³⁵ E.g., Fla. Stat. § 368.106 (requiring commission action within eight months to decide a utility rate filing); Mass. Gen. Laws ch. 164, § 94 (requiring commission action within ten months to rule on a utility rate filing).

particularly imminent or problematic. Examining individual utilities in isolation also makes it harder to draw accurate conclusions about the relationships between staffing and service-quality indicators. On an individual company basis, apparent correlations between staffing and service quality can be the result of another company-specific variable (such as managerial changes or policy changes).

These shortcomings can be addressed through broader, multi-utility investigations. Initiating a more “generic” proceeding facilitates comparisons (or “benchmarking”) among utilities in the same industries because all of the requisite data will be before the Commission in single proceeding. Comparative data should help to provide the “context” lacking in a single utility evaluation.³⁶ A broader investigation also may create inter-utility dynamics that favor the development of solutions, as utilities presumably do not want to appear to be doing less than others before the same commission. On the other hand, while broader investigations offer economies of scale, the resources needed to conduct a broader investigation likely will exceed the resources needed to proceed on a single-utility basis, one utility at a time.

Although the distinction between single-utility and multi-utility investigations is analytically useful to highlight respective pros and cons, in reality this distinction is not clear-cut.³⁷ A commission can undertake the same sorts of “global” comparisons that characterize a multi-utility inquiry even in the context of a specific utility investigation. For example, in 2009 the Vermont Public Service Board opened an investigation into whether Central Vermont Public Service Company was maintaining an appropriate staffing level for an electric utility of its size. The Board was concerned that the utility was *over-staffed*, noting that, “[c]ompared to GMP [Green Mountain Power] and VEC [Vermont Electric Cooperative], CVPS appears to employ significantly more personnel to conduct its business.”³⁸ Testimony from the Vermont Department of Public Service supported this concern, contending that a “benchmarking” analysis of the three utilities showed that CVPS had more employees than either

³⁶ NRRI is planning to issue a paper on the use of benchmarking techniques for evaluating utility performance. The paper, tentatively titled “Measuring Utility Performance: Indexing, Econometrics, Data Envelopment Analysis,” is being prepared by Evgenia Shumilkina, an NRRI research analyst; NRRI is planning to release it in the first quarter of 2010.

³⁷ For example, if one utility has made a filing that presents a graying issue, the commission will need to consider whether it should address one utility’s concern while not addressing the same issue as to others. If the issue is posed as part of a rate filing, the commission can act on the request or defer action on it in favor of a generic investigation.

³⁸ *Investigation into Cent. Vt. Pub. Serv. Corporation’s staffing levels*, Docket No. 7496, at 10 (Order entered Aug. 20, 2009) (“VPSB August 2009 Order”), *available at* http://psb.vermont.gov/sites/psb/files/orders/2009/7496_final.pdf. The investigation was an outgrowth of a rate increase filing by CVPS. The VPSB resolved the rate increase while opening a separate investigation to consider the Company’s staffing levels. *Investigation into Cent. Vt. Pub. Serv. Corporation’s staffing levels*, Order Opening Investigation and Notice of Hearing, Docket No. 7496 (Order entered Feb. 13, 2009), *available at* <http://www.state.vt.us/psb/orders/2009/files/7496orderopeninginvestigation.pdf>.

of the other two utilities when considered against their respective square miles of territory served, net utility plant in service and revenue generated (for 2008), and number of customers served.³⁹ CVPS disputed the validity of the comparison, but the Vermont Board found it appropriate “because all three companies operate in similar geographical territory, are regulated in like fashion and participate in the same power market to purchase power.”⁴⁰ The investigation was subsequently resolved by a settlement that specified staffing levels for several years into the future.

The CVPS proceeding highlights a commission’s ability to sever staffing issues from utility-initiated proceedings and to address them in a different context. If a utility files for a rate increase, the commission can act on the request or defer action in favor of a single-utility, staffing-related investigation or a multi-utility one.

In sum, commissions that decide to investigate staffing issues must consider the optimal timing and scope for their actions. In considering timing, commissions must decide whether they want to initiate an investigation on their own or wait for a triggering event such as a proceeding brought by a utility or another party. Workforce issues can arise in proceedings initiated by utilities (*e.g.*, rate hike requests) or by other parties (*e.g.*, complaints regarding outages). However, waiting for such filings can be inefficient and inherently limiting. Utility-initiated proceedings can place limitations on the scope of the investigation by tying the commission to the subject matter being raised, and often impose either statutory or practical time constraints. Commissions must also decide whether to investigate a single utility or to conduct a broader, multi-utility investigation. Although the latter requires relatively more resources, its advantages over the former include creating an opportunity for benchmarking and, potentially, an environment in which utilities are motivated to find solutions because they are being considered one against the other.

³⁹ VPSB August 2009 Order at 3-4. The Department of Public Service is an agency within the executive branch of Vermont state government that serves as the public’s advocate in matters regarding energy, telecommunications, water, and wastewater. <http://www.publicservice.vermont.gov>.

⁴⁰ *Id.* at 4.

IV. Data Development in Workforce Investigations

In any investigation, the commission will have to identify the types of information needed and the most efficient way to obtain it. Certain types of potentially relevant information will likely already be in Commission files, including data on average outage times and duration, on storm restoration efforts, or on call center responsiveness. This information can provide indications as to whether the utility is properly staffed. However, at most these data enable a commission to make preliminary or tentative findings; absent some type of “root cause” analysis, service quality data alone does not establish a link to staffing levels.

More detailed analyses can be provided by at least three entities: the utility or utilities under investigation, the commission itself, or an independent consultant (with expertise in both human resource and utility matters) operating at the behest of either the commission or the utility. Of course, data and analyses can come from all of those sources—for example, through an initial assessment provided by the utility and a review of that presentation by a commission or consulting expert. There is no downside to asking the utility to conduct its own assessment, assuming the report is subject to scrutiny by the commission and interested members of the public.

Regardless of which party furnishes the analysis, the necessary raw data includes information on:

- a) Staffing-related service quality data (*e.g.*, call center response times);
- b) Current staffing levels;
- c) Recruitment and hiring plans;
- d) Anticipated retirements;
- e) Anticipated skill set needs;
- f) Retention plans;
- g) Succession plans; and
- h) Efforts to capture knowledge from retiring personnel.

Any request should specify the periods of time over which the information is sought and, regardless of scope, utilities should be required to produce equivalent data. The Appendix to this paper contains a set of generic data requests that can be customized for individual circumstances.

Evaluating the data will require expert assistance, which will require separate resource commitments (unless the expertise is already on staff). The areas in which expert assistance is needed will include: human resources (to assess training, apprenticeship, succession, and

retention programs); corporate management, internal controls and business/planning policies (to assess management's processes for following industry and utility-specific staffing issues); and forecasting and planning (to meet skill set changes). The experts should have access to all needed data and personnel.

There are many entities with an interest in and information concerning utility staffing issues, and commission investigations will benefit by including all relevant perspectives. Involving parties with different viewpoints will promote "buy-in" and minimize the likelihood of later litigation.⁴¹ We suggest that commissions seek input from at least the following constituencies, each of which can provide valuable information and, equally important, a unique perspective on the issues:

- **Regulated utilities** are presumably in control of the facts, and may have already undertaken analyses of staffing issues or even begun to implement corrective actions.
- **Other (unregulated) utilities**, such as municipally-owned companies, can be a separate source of data and a potential point of contrast. While unregulated in most states, these utilities could choose to participate in a broad investigation on the theory that whatever outcome is reached will effectively set a standard against which consumers will measure their performance.⁴² Further, if they are wholesale purchasers from state-jurisdictional utilities, they will benefit from any increased performance affecting power supply sales.
- **Labor representatives** will have unique knowledge with respect to "facts on the ground," as well as ideas about training, apprenticeship and recruitment programs.⁴³
- **State ratepayer advocate organizations** (such as offices of people's counsel or consumer counsel) can offer a consumers viewpoint and potentially validate decisions to require utilities to expend customer funds on new programs.

⁴¹ This process is similar to the Federal Government's endorsement of the use of "negotiated rulemaking," in which representatives from a government agency and affected interest groups negotiate the terms of a proposed administrative rule. *See* Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-570.

⁴² Municipally owned utilities are thinking about these issues. *See e.g.*, the American Public Power Association's Work Force Planning for Public Power Utilities: Ensuring Resources to Meet Projected Needs (2005), *available at* <http://www.appanet.org/files/PDFs/WorkForcePlanningforPublicPowerUtilities.pdf>. The report details the results of a membership survey, noting the finding that "most significant challenges created will be the loss of knowledge due to retirements, the difficulty finding replacements, and the lack of bench strength within the organization." *Id.* at 2.

⁴³ *See* the discussion *infra* of *In re N. Shore Gas Co.*, Nos. 07-0241, 07-0242, 2008 WL 631214 (Ill. Commerce Comm'n Feb. 5, 2008).

- **Industrial customers or other large end users** can provide information on what larger loads need their service provider to be doing, both to meet customer requirements and to retain jobs in the jurisdiction. Some industrial customers may themselves be facing graying issues, and can provide insight into steps that they have taken—or that others in their industries have taken.
- **Other state agencies**, such as state OSHAs or departments of labor, can be a source of statewide workforce demographic information and may have begun investigating workforce graying issues themselves.
- **Non-government organizations** can provide a national perspective on utility staffing/graying issues, including what other jurisdictions are doing to address it; and
- **Educational institutions** can provide information about the programs they offer to assist in recruiting and preparing new energy industry workers and about opportunities for collaboration with utilities in the form of scholarships or apprenticeship programs.⁴⁴

Information from these disparate sources need not be obtained all at the same time or in the same way. Where there are resource or time constraints, commissions should consider taking preliminary information-gathering steps ahead of an anticipated investigation. Information from many of the sources listed above may be obtained efficiently by informal means, including written information requests or meetings.⁴⁵ Alternatively, commissions can add staffing-related information to the body of data (such as financial information or service quality statistics) that they require regulated utilities to report on a periodic basis.⁴⁶ Educating themselves ahead of time will help commissions conduct later investigations more efficiently, aiding them in asking the right questions, interpreting the answers, and developing workable solutions together with the utilities.

⁴⁴ We review certain of these collaborative efforts below, in Section V.

⁴⁵ These efforts should not raise *ex parte* communication concerns unless they relate to pending, litigated proceedings (such as a utility rate request).

⁴⁶ As mentioned earlier, the Connecticut DPUC required United Illuminating to report hiring data annually as a condition of granting rate relief. *In re United Illuminating Co.*, 246 P.U.R.4th 357 (2006).

V. Fashioning Solutions: Issues to Consider

At the outset of any investigation, commissions should be looking ahead to the conclusion of the process and the role they plan to play in ensuring that, where necessary, appropriate solutions are crafted and implemented, either by the utility, the commission, or a combination of the two. Depending upon what is uncovered about a particular utility, a commission may find itself with the job of reviewing the efficacy of efforts that are already underway or—where efforts have been lagging or non-existent—of mandating that action be taken. Commissions should seek to ensure that utilities take the lead in addressing staffing issues. State commissions regulate utility operations, but they do not manage utilities. Staffing is the province of utility management; the commissions must ensure that management does its job, but should strive not to end up in the position of both regulator and manager.

A. Developing programs to address staffing issues

Perhaps the most productive (and direct) means to resolve whatever staffing issues are uncovered is for utility management to design and implement responsive actions. This is hardly surprising: the utility has access to the most comprehensive and timely data, and is responsible for providing safe and reliable service at the lowest reasonable cost.

However, that does not mean that the commission's role should be passive. For example, where a commission has compiled information about approaches taken by other utilities or in other industries, the commission can require the utility to review and respond to that information. The utility should be directed to make a compliance filing explaining whether taking similar steps would be sensible, whether the utility plans to pursue them, and what other measures will be implemented. (We review below some of the efforts that are going on around the country to address graying and other staffing deficiencies.)

The commission also can facilitate the crafting of solutions by directing the utility to retain an independent expert to conduct a staffing audit, following which the utility can be given a period of time to review the results and to submit action recommendations. Alternatively, and to promote the development of actions that will be broadly supported, the same set of players convened for purposes of conducting the legislative-style investigation can be established as a working group to review the audit results and provide input on appropriate solutions. The obligation to file and support the proposed recommendations, however, remains with the utility. Following receipt of the recommendations and comments from stakeholders, the commission can determine whether to accept those recommendations, hold additional hearings, or convene a different process before taking action. Regardless of what is proposed, the commission must ultimately assess the utility's corrective measures and determine whether they are appropriate. Where these measures involve expenditures that will be recovered from ratepayers, the commission will need to consider whether to provide rate support.

The Vermont Public Service Board followed this process in the Central Vermont Public Service proceeding referenced earlier. The Board directed CVPS to hire an independent consultant that would “undertake a comprehensive review of its organizational structure and staffing levels and costs to determine the appropriate structure and number of staff the Company

should employ at ratepayer expense.” VPSB August 2009 Order at 1-2, 11, 15. The Board retained oversight of the selection process, requiring CVPS to allow the Vermont Department of Public Service to review a draft of the request for proposals (“RFP”) for the consulting services, with any disputes about the scope or terms of the RFP to be resolved by the Board. The Board also required the Company to submit the consultant’s completed report to the Department of Public Service for comments. *Id.* at 16. The matter was resolved by a settlement agreement reached in December 2009, the terms of which will govern the level of company staffing included in rates over the next five years.

B. Examples of potential staffing solutions

The measures that utilities undertake to address staffing questions can involve internal changes (*e.g.*, a simple decision to fill more positions over a period of time) or steps taken in partnership with external entities. We provide examples of both types of actions, though we focus primarily on the latter, as individual utility decisions to hire additional staff or to develop internal training programs depend largely on the specific facts of a particular case.

American Electric Power (“AEP”) has several programs in place to address “Aging work force — retention, recruitment issues,” which AEP has identified as a priority.⁴⁷ The programs include the “Legacy of Knowledge Program,” the purpose of which is to “allow[] critical retirement-age employees to continue working part-time with full-time benefits while they share their invaluable knowledge and experience with their successors.” Corporate Sustainability Report at 26.⁴⁸ AEP also references the importance of utility commission support for its efforts:

AEP’s Indiana Michigan Power received rate support for work force development at the Cook Nuclear Plant. The money will be used to hire additional fire and security personnel required by new Nuclear Regulatory Commission regulations and also help the plant tackle aging work force issues in engineering and operations. This type of rate recovery can be a model for other states and illustrates that customers are willing to pay for reliability and a skilled work force.

Id. at 29.

⁴⁷ Information on this program can be found in AEP’s 2009 Corporate Sustainability Report, which can be accessed at http://www.aep.com/citizenship/crreport/docs/CS_Report_2009_web.pdf (“Corporate Sustainability Report”). The program is described at 21.

⁴⁸ In the same vein, AEP notes as a “potential recruiting barrier” the “negative perception many people have about coal, especially today when the general push is for ‘green’ jobs.” *Id.* at 28. The Company’s response has been to “enhance [its] recruiting efforts to highlight AEP’s standing as an innovative company, including our leadership in pushing advanced coal technologies.” *Id.*

Universities and community colleges are addressing the need for a larger and differently-skilled utility workforce through the development of new training curriculums,⁴⁹ at times with the direct involvement of utilities and others. Utilities around the country have partnered with educational institutions to establish pipelines to prepare new energy workers. For example:

- In 1999 Georgia Power approached the Central Georgia Technical College with ideas for an apprenticeship program and a set of standards it would want its apprentices to meet. The school and the utility formed a partnership and the college has been training Georgia Power recruits ever since.⁵⁰
- Pacific Gas & Electric has established a program called “PowerPathway,” which consists of a “[p]ortfolio of programs aimed at building capacity within the state of California to produce the skilled workers needed by PG&E and the energy and utility industry.”⁵¹ PG&E describes the program as consisting of four interrelated efforts: career preparation collaborations with educational institutions, participation in and leadership of industry efforts to jointly address workforce challenges, efforts to generate early interest in Science/Technology/English and Math pathways and career technical education, and provision of expertise to cities, municipalities, and educational institutions on best practices to develop a green workforce.
- New Jersey’s Public Service Enterprises Group (the holding company that owns Public Service Electric and Gas, New Jersey’s largest investor-owned utility) recently won Workforce Management’s 2009 Optimas Award for Partnership, in recognition of the company’s innovative collaboration with local community colleges and high schools since 2002 to establish a program of in-class instruction, internships and on-the-job training in utility work.⁵²

⁴⁹ For example, in February 2009, Arizona State University launched a graduate-level program in nuclear power generation, noting that both the NRC and the American Nuclear Society predict a growing need for nuclear power plants. April Murelio, *ASU News: Workforce Education Will Staff Jobs For The Nuclear Power Rebirth*, Nuclear Street (Feb. 27, 2009), available at http://nuclearstreet.com/blogs/nuclear_power_news/archive/2009/02.aspx.

⁵⁰ See Central Georgia Technical College, News Release, Georgia Power Employees Graduate from CGTC (June 4, 2009), available at http://www.centralgatech.edu/general/press_releases/release2.cfm?auto_number=395; see also Jeff Wilson, Georgia Power, Co-op program preps students for technical jobs (Sept. 6, 2006), available at http://www.centralgatech.edu/general/press_releases/release2.cfm?auto_number=134.

⁵¹ Pacific Gas and Electric Company, Welcome to PowerPathway™, <http://www.pge.com/about/careers/powerpathway> (last visited Dec. 30, 2009).

⁵² Workforce Management, 2009 *Optimas Award* Winners, <http://www.workforce.com/section/15/feature/26/76/97/index.html> (last visited Dec. 30, 2009).

- A wide range of utilities has established the Energy Providers Coalition for Education (“EPCE”),⁵³ a program “open to any energy industry-related company or organization” and whose membership currently includes “investor-owned utilities, national and regional associations representing co-operative and municipal utilities, industry contractors, government agencies, professional associations and local unions.”⁵⁴ EPCE “develops, sponsors, and promotes industry-driven, standardized, quality online learning programs to meet the workforce needs of the energy industry.”⁵⁵
- AEP’s Corporate Sustainability Report touts the company’s having “recognized the aging work force issue several years ago” and, as a consequence, has been “aggressively recruiting and establishing alliances with two- and four-year colleges.”⁵⁶ AEP asserts that this has “resulted in more qualified job applicants with greater technical knowledge, which allows them to be productive employees sooner.” *Id.*
- In other instances, labor unions are collaborating with employers and colleges to address staffing needs and implement needed worker training. The “UWUA Power for America Training Trust Fund” is a program pioneered by Local 223 of the Utility Workers of America, AFL-CIO (“UWUA”), under which the local union is working work with electric utility employers and certain Michigan community colleges. The “Trust” is funded by utility employers and managed by a set of labor and management trustees. The trustees develop a set of curricula in several trades, and provide training to union members. The purpose of the training is to enable employees to develop the skills needed both to staff existing operations and address emerging technologies. The training curricula include high voltage transmission, substation operation and maintenance, relay-system equipment, and underground line splicer and cable technician. The trust program is now being administered by the UWUA national union, and has programs operating in Michigan, Iowa, and Minnesota.⁵⁷

Other interesting examples of public/private partnerships to promote workforce development likewise grow out of efforts to build a “greener” energy industry. One such partnership opportunity arose from the NYPSC’s efforts to implement statewide energy efficiency portfolio standards. In June 2008, the Commission adopted targets for electric use reductions through 2011, approved certain programs to help achieve those ends, and established

⁵³ The EPCE website can be accessed at <http://www.epceonline.org/index.html>.

⁵⁴ *Id.* (follow “About EPCE,” then “EPCE member list”).

⁵⁵ *Id.*

⁵⁶ Corporate Sustainability Report at 28.

⁵⁷ Information on the UWUA program can be accessed at www.power4america.org

a process for consideration and approval of additional programs to meet the targets.⁵⁸ In addition, two commission administrative law judges identified critical-path items, and convened working groups to address them. One critical-path item was workforce development. On this subject, the administrative law judges found:⁵⁹

Workforce Development. This category encompasses rapid development and expansion of the energy efficiency workforce, and of apprenticeship programs, higher education curricula, and related measures. This is a critical path issue because these programs' rapid development and expansion is the foundation on which all programs will be built. A trained workforce is essential to ensure New York has the capacity to implement and sustain the state's energy efficiency initiatives. Expanded efforts should build upon existing [New York State Energy Research and Development Authority ("NYSERDA")] programs and other state efforts in this field. We will immediately convene a working group to review current efforts and develop and propose programs.

The working group "contained representatives of fourteen entities including utilities, customer advocates, efficiency providers, workforce development professionals, and government agencies and authorities." NYPSC Workforce Development Initiative Order at 2. In October 2008 the working group recommended approval of an earlier NYSERDA proposal to spend approximately \$5.4 million per year to support workforce development strategies, plus an additional \$2 million per year for three years to provide energy efficiency skills training to low-income populations. *Id.*

The NYPSC declined to authorize the entire funding request, but found it reasonable to authorize a total of \$6.6 million on a one-year basis, *id.* at 10, with the expectation that other funding sources (including federal stimulus funds) would become available for NYSERDA's proposed programs, *id.* at 9-10. The programs included (among other things):

⁵⁸ *Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard*, Order Authorizing Workforce Development Initiatives, Case No. 07-M-0548, at 1 (N.Y. Pub. Serv. Comm'n June 22, 2009) ("NYPSC Workforce Development Initiative Order"), available at http://www.dps.state.ny.us/07M0548/ORDER_AUTHORIZING_WORKFORCE_DEVELOPMENT_INITIATIVE_June-22-2009.pdf.

⁵⁹ *Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard*, Procedural Ruling Concerning EEPS Design Issues, Case No. 07-M-0548, at 4 (N.Y. Pub. Serv. Comm'n Jul. 3, 2008), available at <http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId={FF69344F-1747-4559-8AAB-BE86D2AB994B}>.

1. Comprehensive Training Initiatives

NYSERDA proposes the following immediate actions:

- a. Expand the Center of Energy Efficiency and Building Science (CEEBS) Network which currently comprises 10 learning centers at community colleges. Expansion would consist of adding training locations, particularly in New York City, and developing additional courses and curriculum.
- b. Expand commercial and industrial efficiency training for contractors, providers, architects and engineers, building operators, and facility managers, with partners such as the City University of New York and the Lighting Research Center.
- c. Develop on-line courses and distance learning.
- d. Deploy “train-the-trainer” programs to support statewide building performance benchmarking.
- e. Work with manufacturers to develop supplemental curriculum.

2. Internships and Apprenticeships

NYSERDA would work with New York State Department of Labor (DOL) and the Workforce Development Institute to expand on-the-job training opportunities during profession development and continuing education.

3. Promoting National Certifications and Standards

Some EEPS-funded programs may require that individuals are able to demonstrate a specific competency level in order to achieve desired levels of quality assurance. NYSERDA, in conjunction with other program administrators, would evaluate existing certification requirements and develop new certifications as needed. Existing certifications would also be evaluated.

4. Career Pathways in Energy Efficiency and Engaging Disadvantaged Communities

NYSERDA would cooperate with New York State Department of Labor’s One-Stop Workforce Development System which targets workers to participate in training and certification programs. DOL

programs would focus on training in the entry-level skills necessary for entry-level employment in the energy efficiency sector. These efforts would be focused on individuals in economically and environmentally disadvantaged communities. NYSERDA would target \$2 million per year to provide basic skills training, in cooperation with state agencies and community-based organizations, to prepare participants for more specialized training related to energy efficiency programs.

* * *

6. Professional Development and Continuing Education

NYSERDA will support curriculum development for courses offered through various organizations, and will administer continuing education unit credits for courses in High-Performance Design, Effective Lighting, Green Building Operations and Maintenance, and other efficiency technologies.

Id. at 3-5.

The Commission order notes that the working group unanimously supported “both the general principle that workforce development should be addressed through a statewide strategy, and NYSERDA’s funding proposal in particular,” while “[o]ther detailed recommendations of the working group were supported by a majority, but opposed by one or more utility parties.”⁶⁰ In approving funding for the NYSERDA programs, the Commission required NYSERDA to incorporate reports on the program’s progress in the monthly, quarterly, and annual reports already required for the other Energy Efficiency Portfolio Standard (EEPS) SBC programs being administered by NYSERDA. *Id.* at 13.

⁶⁰ *Id.* at 5. The recommendations supported by a majority but opposed by some utility parties were that:

1. Efficiency programs evaluations should assess the impacts of workforce development and training on energy performance and operation, over the life of the systems and measures funded through the EEPS.

2. Efficiency program evaluations should assess the degree to which the “low-bid” process may cause the use of unskilled workers, and result in inferior work quality.

3. Contractors, system designers, and building operators should be able to demonstrate that they have the technical knowledge and skills to properly design and install systems and measures to meet manufacturer specifications and industry “best practices.”

Id. at 5 n.4.

Another statewide, energy workforce-focused initiative has taken root in Florida. In 2006, the Florida Governor’s workforce investment board, Workforce Florida, Inc., established an energy-focused off-shoot: the Florida Energy Workforce Consortium, which “includes representatives from major electric utilities and associations, contractors, organized labor, state economic development, workforce development, and education.”⁶¹ The group’s goals are “to develop accurate projections of future energy industry workforce needs detailed by occupation, and to prioritize those needs for focused educational and recruiting efforts.”⁶² This effort dovetails with those of the “Employ Florida Banner Center for Energy,” which is a “statewide, industry-driven resource for energy workforce education and training” funded in part by state general revenues and in part through education and industry partnerships.⁶³

These partnerships and statewide efforts help to ensure that utilities in a given jurisdiction are not simply competing with each other to hire scarce qualified candidates, but are cooperating with each other, as well as with a state’s educational institutions and other interested parties, to expand the pool of qualified candidates.

C. In crafting solutions to staffing issues, commissions should be cognizant of possible limits to their authority based on utility “management prerogatives.”

Commissions seeking to develop solutions to staffing concerns should be aware of possible limits on their authority arising from court decisions that address the boundary between permissible regulation and impermissible intrusion on “management prerogatives.”⁶⁴ Tension exists between the State’s power to regulate aspects of the utility business and the rights of private enterprises to control their operations and business strategies.⁶⁵ While the balance has

⁶¹ Florida Energy Workforce Consortium, <http://www.fewc.org/wiki>.

⁶² *Id.* According to the consortium, its “Top Occupations of Concern” are Line Installers and Repairers, Plumbers, Pipefitters & Steamfitters, Welders, Maintenance and Repair Workers, Electricians, Engineering Technicians, Instrumentation & Control Technicians, and Power Plant Operators. *Id.*

⁶³ Employ Florida Banner Center, Our Mission, <http://bannercenterforenergy.com/mission.html>.

⁶⁴ We refer to the “management prerogatives doctrine” for brevity, but courts have not tended to use this formulation, and in practice no such standardized phrasing exists.

⁶⁵ *See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. R.R. Comm’n of Cal.*, 283 U.S. 380, 395-96 (1931) (The state “may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business.” (quoting *Norfolk & W. Ry. Co. v. Pub. Serv. Comm’n of W. Va.*, 265 U.S. 70, 74 (1924))); *see also In re Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm’n of Wyo.*, 745 P.2d 563, 568 (Wyo. 1987) (Public utility commissions are “not in a position to take on any aspect of utility management. [They] must restrict [their] position to ‘regulation’ with management decisions being entirely that of the

tipped in recent years toward permitting more extensive regulation, courts still sometimes overturn commission actions that they deem to intrude impermissibly on management decisionmaking.⁶⁶

As we discuss below, commissions can limit the likelihood of claims of intrusion by linking their actions to address graying and other staffing issues as closely as possible to the language of their authorizing statutes. A commission's exercise of its unchallenged authority over rates or service terms and conditions can impact staffing, but should not engender a successful "prerogative-based" challenge.

Commissions also can minimize the chance of disputes by taking actions on graying issues that do not dictate the precise steps that the utilities should be taking to solve them. For example, rather than requiring utilities to employ a specific number of line workers per customers served, commissions should consider establishing service-quality benchmarks that utilities must meet and requiring the utilities to explain how they will continue to meet those standards despite expected workforce changes. Most courts will uphold regulations that focus on the quality or cost of service that a utility provides to customers without dictating the means by which utilities reach that end.

1. The management prerogatives doctrine's roots and apparent curtailment

The general rule is simple:⁶⁷

The commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.

A seminal case on the subject is *Pacific Telephone & Telegraph Co. v. Public Utilities Comm'n*, 215 P.2d 441 (1950) ("*Pac. Tel.*"), in which the California Supreme Court addressed a California Public Service Commission order directing the terms of a contract between the utility

utility." (quoting *Pac. Power & Light Co. v. Pub. Serv. Comm'n of Wyo.*, 677 P.2d 799, 807 (1984)).

⁶⁶ See, e.g., *Pub. Serv. Co. of Okla. v. State ex rel. Corp. Comm'n ex rel. Loving*, 918 P.2d 733, 740 (Okla. 1996) (rejecting Oklahoma Corporation Commission rule requiring that supplier "changeover" costs be passed directly on to consumers, noting that "[h]ow and who should absorb the cost of a change in electric suppliers is not within the realm of the Commission's authority, absent some public effect," and finding that the rule "clearly interferes with internal management decisions of the utility companies.")

⁶⁷ *Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 289 (1923) (quoting *State Pub. Utils. Comm'n v. Springfield Gas & Elec. Co.*, 291 Ill. 209, 234 (1919)).

and its parent. The court found that, while the legislature had given the Commission “broad powers to regulate the relationship of the utility to the consumer,” it had not granted the “power to regulate the contracts by which the utility secures the labor, materials, and services necessary for the conduct of its business, whether such contracts are made with affiliated corporations or others.” *Id.* at 444. Elaborating that “[t]he determination of what is reasonable in conducting the business of the utility is the primary responsibility of management,”⁶⁸ *Pac. Tel.* went on to find that such regulation would be outside the scope of permissible government action even with specific statutory authorization:⁶⁹

[I]t may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would be better served thereby, or that the owners themselves have proven false or derelict in the performance of their public duty. Any law or order seeking to do this passes beyond the ultimate limits of the police power, however vague and undefined those limits may be.

While *Pac. Tel.* demonstrates that the core of the management prerogatives doctrine is a distinction between “regulation” left to a commission and “management” left to the utility,⁷⁰ the line between the two is blurry. As the Wyoming Supreme Court has pointed out, “[r]egulation by means of setting rates and determining the factors controlling such by necessity prescribes the ‘management’ domain.”⁷¹ Several states have acknowledged that utility regulation necessarily

⁶⁸ *Id.* at 445.

⁶⁹ *Pac. Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 665 (1913).

⁷⁰ “[The] distinction between the function of management and that of the regulatory authority has been succinctly stated by the Maryland court of appeals in a recent decision [*C. & P. Tel. Co. v. Public Service*, 230 Md. 395, 187 A.2d 475 (1963)] wherein it was said that the owners and management of a utility have the right to determine what the debt-equity ratio should be, but they may not always make the ratepayers foot the bill resulting from the choice.” *Sekan Elec. Coop. Ass’n, Inc. v. State Corp. Comm’n of Kan.*, 609 P.2d 188, 191 (1980) (quoting E. Nichols & F. Welsh, *Ruling Principles of Utility Regulation: Rate of Return Supplement A* 157 (1964) (second alteration in *Sekan*)).

⁷¹ *Pac. Power & Light Co. v. Pub. Serv. Comm’n of Wyo.*, 677 P.2d 799, 807 (Wyo. 1984). The Wyoming Supreme Court went on to find that “management control” by the state’s Public Service Commission in utility operations was a “necessary adjunct” to regulation. *Id.* at 808. In that case, the utility appealed a ruling by the PSC denying recovery of expenses and obligations relating to three abandoned nuclear plant construction projects. The Supreme Court upheld the PSC’s order, finding that where no commission authorization had been obtained prior

restricts what would be purely management prerogatives in an unregulated market, but have nonetheless upheld the actions taken by commission. For example, in 1983 the Pennsylvania Supreme Court found proper an order by the state's Public Utility Commission denying approval of additional securities needed to be issued in connection with the construction of a nuclear power plant.⁷² That same year, the California Supreme Court (which decided *Pac. Tel.* in 1950) reached a similar conclusion,⁷³ and other states' courts have followed suit.⁷⁴

to making an investment in the projects "the onus of the failure" of the projects fell upon the utility alone. *Id.* at 809.

⁷² *Penn. Pub. Util. Comm'n v. Phila. Elec. Co.*, 460 A.2d 734, 738-39 (Pa. 1983). The court acknowledged that the commission's action was "a severe intrusion upon matters that, in an unfettered, competitive, free enterprise economy, would normally be within management's dominion," but noted that "public utilities are not models of competitive behavior, and, as monopolies, have been subjected to a uniquely comprehensive regulatory scheme." *Id.* This does not mean that all utility decisions are subject to commission intercession, however. The court went on to note that "[r]outine day-to-day management decisions, which bear lesser risk to the utility as an ongoing concern . . . have traditionally been beyond the ambit of the PUC's control." *Id.* at 738. By contrast, in *Public Service Co. of Oklahoma v. State*, 645 P.2d 465 (Okla. 1982), the court overturned a Commission effort to regulate the utility's construction of a plant by refusing to permit the issuance of securities on the ground that the state constitution did not permit Commission interference with internal utility business decisions.

⁷³ In *Gen. Tel. Co. of Cal. v. Pub. Utils. Comm'n*, 670 P.2d 349, 353-54 (Cal. 1983) ("*Gen. Tel.*") (quoting *Pac. Tel.*, 215 P.2d at 267-68), the California Supreme Court observed that:

In exercising the powers . . . granted [by the Legislature] it may not be disputed that the commission to some extent invades the functions of management. But they are not necessarily unlawfully invaded. They are subjected to the exercise of the police power of the state in the regulation of the public utility. It is undoubtedly true that for the most part all lawful regulations of a public utility in the exercise of the police power are to some degree an invasion of the managerial functions of the utility Without question the order of substitution of one equipment for another by a transportation company is within the field of management; but it does not follow that as such it is necessarily outside of the field of an appropriate regulatory order.

Upon discovering that it could find no case since *Pac. Tel.* in 1950 in which it "annulled a commission order based on" management prerogatives, the California Supreme Court noted that "the 'invasion of management' rationale now appears to be disfavored." *Id.* at 354 n.10; *see also*, *PNM Elec. Servs. v. N.M. Pub. Util. Comm'n*, 961 P.2d 147, 152 (N.M. 1998) ("The 'invasion of management' prohibition upon which PNM relies has waned." (internal citation omitted)).

⁷⁴ *E.g.*, *Ariz. Corp. Comm'n v. State ex rel. Woods*, 830 P.2d 807, 817 (Ariz. 1992) ("The invasion of management arguments fail[ed] to recognize the special relationship between affiliated companies and the strong potential that transactions between affiliates will affect rates."). In that case, the Arizona Supreme Court acknowledged that it was departing from

Even if a court acknowledges the legislature’s power to authorize commissions to act in ways that impinge on management prerogatives, however, it is unlikely to uphold such actions if they seem distant from the authority the legislature expressly granted. For this reason, and as we explain below, we advise commissions to frame any actions they take to address workforce graying issues in terms of the authority granted to them by statute.

2. The relationship among staffing initiatives, commission regulation, and management prerogatives

To illustrate these dynamics, we highlight two spheres of traditional regulatory action that relate to workforce staffing concerns, discuss possible actions that commissions may take within those spheres to address graying issues, and consider the degree to which such actions can be viewed as treading upon management prerogatives. Thereafter, we discuss the California experience, where the state legislature has permitted the Public Utilities Commission to intercede in utility staffing decisions. These discussions illustrate why commission actions to address staffing issues should be linked to a regulator’s core functions: ensuring just and reasonable rates and safe, reliable, and high-quality utility services.

a. Ratemaking authority

Commissions will be able to use their rate-regulation authority at least to encourage utilities to increase hiring and to institute or increase training programs.⁷⁵ To the extent a commission approves a utility’s staffing-related request (such as a requested rate increase to fund additional hiring), there is obviously no conflict between the commission action and any management prerogative. Signaling a willingness to look favorably on rate-increase requests made in connection with well-conceived plans to address graying concerns can provide the impetus (or remove a potential disincentive) for management to undertake such efforts.⁷⁶

historical precedent, but concluded that “current events in this state and others prove the wisdom and necessity of a broader view of what is involving in ratemaking.” *Id.* (citing Joan G. Fickinger, Comment, *Jurisdiction of State Regulatory Commissions Over Public Utility Holding Company Diversification*, 15 Loy.U.Chi.L.J. 87 (1983) (discussing efforts of commissions in Michigan, Illinois, New York, and Connecticut to regulate utility diversification)). At least one court has characterized this modern trend as “permit[ing] commissions substantial latitude in protecting the public.” *PNM Elec. Servs.*, 961 P.2d at 152.

⁷⁵ As noted by the Pennsylvania Supreme Court, “[a]buses of managerial discretion may be buffered against consumer impact through exercise of the PUC’s rate-setting powers, disallowing rate increases which would reimburse utilities for expenditures imprudently made.” *Penn. Pub. Util. Comm’n v. Phila. Elec. Co.*, 460 A.2d at 738. The court went on to note that the PUC’s authority extended not simply to the assurance of just and reasonable rates, but that the Commission was also responsible for “overseeing maintenance of adequate, efficient, and continuous utility service,” *id.* (citation omitted), a subject to which we turn immediately below.

⁷⁶ Similarly, and as mentioned earlier in Section V.B, “rate support” and “rate recovery” have been noted as essential to encouraging the implementation of staffing initiatives.

Tensions arise, however, when commissions make rate decisions that affect staffing matters (or other issues normally committed to management discretion) in ways that management considers inappropriate or that are based on implicit determinations that the utility should operate differently than management proposes. Such decisions could include the rejection or reduction of a utility-requested rate increase premised on the need to hire staff or invest in programs to address anticipated graying problems. Whether such decisions would be upheld depends on several facts, including the basis for the commission's decision, the relevant statute's language (*i.e.*, whether the commission's rate-regulation authority is coupled with other, more directly-related authority over staffing issues), the strength of the evidence presented in a given case (*e.g.*, whether the utility's proposed expenditures could be shown to be imprudent), and the relevant reviewing court's precedent.

In general, a rejection based on lack of evidentiary support for a requested increase raises fewer management prerogative concerns than a rejection based on a commission's determination that the utility's proposal was not the best approach to addressing graying issues. A commission risks being overturned if its rate determination directs utility management too closely or dictates too many details concerning how the company should operate,⁷⁷ particularly where a commission lacks specific statutory authority for the particular incentive or disincentive it wishes to implement.

b. Authority over service quality

Commissions can address workforce issues more directly through their power to regulate quality of service, as a relatively recent Illinois Commerce Commission ("ICC") case demonstrates. The ICC, acting in the context of a requested rate hike by a gas company,

⁷⁷ For instance, the Oklahoma Supreme Court concluded that a rule that would give the Corporation Commission authority to "require an acquiring electric supplier to pass the costs of changing suppliers on to the consumer or user of the electricity" impermissibly "interfere[d] with the internal management decisions of the acquiring supplier." *Pub. Serv. Co. of Okla. v. State ex rel. Corp. Comm'n ex rel. Loving*, 918 P.2d 733, 740 (Okla. 1996). A Michigan court similarly overturned that state commission's approval of Detroit Edison's demand-side management ("DSM") program because it modified the company's proposed program to such an extent that it essentially "imposed a DSM program of the PSC's own design." *Ford Motor Co. v. Mich. Pub. Serv. Comm'n*, 562 N.W.2d 224, 234 (Mich. App. 1997); *see also Consumers Power Co. v. Pub. Serv. Comm'n*, 472 N.W.2d 77, 91 (Mich. App. 1991) (the PSC could not control what "qualifying facilities" a utility transacted business with under a federal statute and the PSC could not require a utility to enter into any particular contract); *Gen. Tel. Co. v. Pub. Serv. Comm'n*, 67 N.W.2d 882 (Mich. 1954) (the PSC exceeded its jurisdiction in requiring a telephone company to reduce the number of subscribers attached to a single line). Also instructive is *Union Carbide Corp. v. Public Service Commission*, 428 N.W.2d 322, 328 (Mich. 1988), in which the Michigan Supreme Court ruled that "the commission acted properly in preventing Consumers from passing on to ratepayers any additional fuel expenses incurred while operating the Karn units out of economic order," but "by ordering Consumers to cease certain noneconomic management practices, the commission exceeded its ratemaking authority."

addressed the question of whether its consideration of utility “staffing and repair” practices was barred on the ground that it would require the Commission to cross the boundary into utility management, including the state of relations between a utility and its represented workforce.⁷⁸ UWUA Local 18007, the labor representative of the company’s workforce, argued that years of staffing reductions and the utility’s failure to promote junior workers into more senior positions had left the utility unable to fulfill basic responsibilities to its customers. The Company responded that the commission lacked authority to involve itself in what was a labor-management and collective bargaining matter.

The ICC rejected these arguments, finding that:⁷⁹

Illinois precedent on this point is not recent, but that is because the applicable law is clear and settled. The General Assembly has given the Commission general authority over public utilities and – at multiple places in the Act – the specific authority to ensure the health and safety of utility employees and customers. That authority was upheld by the Illinois Supreme Court in *Brotherhood of Railway Trainmen v Elgin, Joliet & Eastern Railway Co.*, 382 Ill. 5, 46 N.E.2d 932 (1943). . . .

Ultimately the ICC concluded that, while the exercise of this authority might impinge in some fashion on matters falling within the realm of labor-management relations, that concern was insufficient to preclude action:⁸⁰

The critical question, therefore, is whether the Commission has authority, when enforcing those health and safety provisions, to touch upon matters that might also be reasonably characterized as labor-management relations matters. We conclude that we have the requisite authority. To hold otherwise would be to end the regulation of public utilities. Every act of a public utility is performed by *someone*, and in countless instances that person is managed by another *someone*. While it is certain that the Commission’s power to regulate the relationship between and conduct of those persons [is] not unlimited, it is equally certain that we can exercise some degree of control over those relationships and conduct, in order to fulfill our unambiguous mandate to require public utilities to promote the health and safety of employees and customers.

⁷⁸ *In re N. Shore Gas Co.*, Nos. 07-0241, 07-0242, 2008 WL 631214, slip op. at *290 (Ill. Commerce Comm’n Feb. 5, 2008).

⁷⁹ *Id.* slip op. at *290.

⁸⁰ *Id.* (emphasis added).

Although the ICC did not decide “the exact contours of the relief we can or would require,” it did find that it is “authorized by the Act to regulate utility staffing and repair practices that are proven to impact the health and safety of public utility employees and customers.”⁸¹

The broad scope of commission authority over utility services was likewise at issue in a dispute over a gas company’s decision to close a community-based payment center. In late 2002, Washington Gas Light Company (“WGL”) announced its intention to close a payment center in Anacostia, a poorer section of the Nation’s Capital.⁸² The District of Columbia Public Service Commission (“DCPSC”) initiated an investigation, and directed the Company to keep the payment center open while the investigation was pending. Washington Gas objected, arguing that the Commission’s action was an impermissible interference with management’s decision. The DCPSC disagreed, finding that its involvement was appropriate because payment centers and the number of payment options available to ratepayers are integral to the provision of utility services. The District of Columbia Court of Appeals sided with the Commission, ruling that it had statutory authority to investigate and regulate WGL’s decision to close its Anacostia customer service center. In support of its ruling, the Court noted the Commission’s broad authority over all aspects of utility rates and services.⁸³

These cases support the conclusion that commission actions to address graying concerns are more likely to be upheld against claims of infringement upon management prerogatives where the commission can link its actions to its authority over the quality, safety, or reliability of utility services.

c. The case of California

Notwithstanding the California Supreme Court’s initial adherence to the strong management prerogatives doctrine in *Pac. Tel.*, the state has had a long history of allowing direct regulation by its utility commission where the action was related to service quality. As far back as 1954,⁸⁴ the California Supreme Court upheld a commission order requiring a railroad to continue its midday service from Sacramento to Oakland and to modernize the equipment on that route.⁸⁵ Thirty years later, after the *Gen. Tel.* court noted the absence of support for *Pac. Tel.*, the California Supreme Court confirmed the commission’s authority to order a telecommunications utility to obtain certain equipment through competitive bidding rather than

⁸¹ *Id.* slip op. at *291.

⁸² *Wash. Gas Light Co. v. D.C. Pub. Serv. Comm’n*, 856 A.2d 1098, 1101 (D.C. App. 2004).

⁸³ *Id.* at 1105.

⁸⁴ This was, of course, only a year after the management prerogative defense’s arguable high water mark in *Pac. Tel.*

⁸⁵ *S. Pac. Co. v. Pub. Utils. Comm’n.*, 260 P.2d 70 (Cal. 1953).

from its affiliate, on the grounds that purchasing the equipment from its affiliate was both uneconomic and (because the affiliate's equipment was sub-standard) detrimental to service quality.⁸⁶ Most dramatically, however, in recent years, the California Public Utilities Commission has ordered a utility to replace a nominally qualified manager,⁸⁷ and it has required utilities to rescind layoffs that would harm service quality.⁸⁸ In the former of these cases, the California PUC required a utility to "hire a qualified system operator within 60 days of the effective date of the decision."⁸⁹ The PUC rejected a challenge to this decision based on *Pac. Tel.*, concluding that the invasion of management prerogatives defense "is long outdated."⁹⁰ The Commission explained further: "we have the power to order a utility to hire qualified personnel, and to order the replacement of nominally qualified personnel who are not performing adequately, even where such actions essentially substitute for the judgment of utility management."⁹¹

While these cases have cut back substantially on the management prerogatives doctrine in California, we note that the doctrine may not be dead. In *Gen. Tel.*, the court suggested that if the commission could have achieved its consumer-protection objective by disallowing costs for rate recovery rather than "dictat[ing] the terms of a contract between the utility and its parent," then "unnecessary intermeddling" in the terms of those contracts might still have been prohibited.⁹² The *Gen. Tel.* court upheld the PUC's imposition of a competitive bidding requirement because the commission reasonably believed it would lead to better customer service and provide a needed baseline for determining reasonable rates; no such finding was made in *Pac. Tel.*⁹³

⁸⁶ *Gen. Tel.*, 670 P.2d 349. The commission contended, and the Court did not dispute, that the reasonable cost of the equipment properly includable in rates could only be determined through a competitive bidding process.

⁸⁷ *Strawberry Prop. Owners Ass'n v. Conlin-Strawberry Water Co., Inc.*, 76 C.P.U.C.2d 46, at 52-53 (1997).

⁸⁸ *In re S. Cal. Edison Co.*, 2001 Cal. PUC LEXIS 1024, at *17 (Cal. Pub. Utils. Comm'n Nov. 8, 2001).

⁸⁹ *Strawberry Prop. Owners Ass'n*, 76 C.P.U.C.2d at 51.

⁹⁰ *Id.*

⁹¹ *Id.* at 52.

⁹² *Gen. Tel.*, 670 P.2d at 355. The court noted that disallowing rate recovery was a possibility in *Pac. Tel.*, but not in *Gen. Tel.*

⁹³ *Id.*

d. Conclusion

The lessons of these management prerogative cases are threefold. First, while the doctrine is clearly on the decline, commissions seeking to implement staffing solutions should remain aware of the possibility of challenges where the commission's findings and utility management's plans differ. Second, even if a commission's action implicates management prerogatives, it is less likely to be challenged successfully where the commission can articulate a link between its directive and potential improvements in or the preservation of service quality or reliability. Third, the probability of a successful challenge will be reduced where a commission can achieve its objectives by exercising traditional forms of authority, *e.g.*, rate disallowances or the authorization of rate recovery, rather than by imposing more prescriptive or direct solutions.

VI. Summary of Findings and Recommendations

This paper has sought to address the need for and authority of state commissions to consider and seek to resolve workforce graying concerns. There is a demonstrated need for commission attention to these issues, authority to investigate them, and initiatives in place across the country to consider. We have explained that:

- Recent authoritative analyses demonstrate the existence of an energy utility workforce “graying” problem, with respect to both workforce size and skill set sufficiency.
- Commissions need to consider whether to take action with respect to the graying issues and, if so, when to act. Even if the outcome is simply an acknowledgement that the utility has matters well in hand, the issue should be addressed because adequate staffing (both employee numbers and skill sets) directly affects the current and future delivery of high quality, safe, and reliable utility services.
- Commissions possess adequate legal authority to address the issues, although the contours of that authority (including the degree to which the commission can address staffing issues directly) turns on the language and judicial interpretations of each statute.
- Commissions need to consider both the scope and timing of staffing investigations. If one utility has made a filing that presents a graying issue, the Commission should consider whether to address that issue in the pending proceeding or defer action on it in favor of a broad-based, “global” investigation of graying concerns.
- There are economies of scale in a broader investigation, and it allows for benchmarking utilities against each other. However, the resources needed to process a broader investigation may be more substantial than those associated with a utility-specific evaluation.
- Various types of data should be evaluated in considering graying issues, and the Commission can require that each utility present information, including with respect to hiring, recruitment, retention, succession, and training/apprenticeship programs.
- A broad investigation allows for the consideration of a wide range of viewpoints, including those of utilities (both regulated and unregulated), labor representatives, customer representatives (both retail and commercial/industrial), state and non-governmental entities, and educational institutes. A broad investigation also facilitates benchmarking as among regulated (and, potentially, non-regulated) entities.
- Commissions have many options in structuring solutions, and there are informative examples from all over the nation as to the types of initiatives that utilities and other partners are undertaking. However, commissions should bear in mind concerns that mandated solutions to staffing issues arguably impinge upon perceived utility

“management prerogatives.” Commissions should attempt to ensure that workforce graying issues are addressed, in the first instance, by utility management, subject to commission review. Where commissions need to mandate steps different from those proposed by the utility, they can limit the likelihood of disputes by ensuring that actions to address staffing issues are tied clearly to the language of the commission’s authorizing statutes.

Appendix

Potential Staffing Data Requests

[If respondents object that particular data are commercially sensitive or proprietary (e.g., because they would signal the company's competitive business strategies or weaknesses), the commission will need to consider whether to require submission of the data on a confidential basis and the terms on which other entities may be permitted to have access to that data.]

Questions Regarding Staffing Levels:

1. Provide an organizational chart showing all non-clerical positions in the company, and the number of full-time or part-time employees in each such position.
2. State, by department:
 - a. The number of new employees hired in each of the past 5 years;
 - b. The range and median lengths of time taken to fill open positions;
 - c. The number of existing employees who have retired in each of the past 5 years;
 - d. The range and median ages of retiring employees;
 - e. The number of employees who have transferred or have been promoted into the department in each of the past 5 years;
 - f. The number of employees who have transferred or have been promoted out of the department in each of the past 5 years; and
 - g. The number of positions filled in each of the past 5 years by contractors rather than company employees.
3. Provide the following data as of the end of the last calendar year:
 - a. Square miles of territory served;
 - b. Net utility plant in service;
 - c. Revenue generated in the last year;
 - d. Number of customers served.
4. State the number of employees, by department, in each of the following age groups:
 - a. Under 30
 - b. 30 – 40
 - c. 40 – 45
 - d. 45 – 50
 - e. 50 – 55
 - f. 55 – 60
 - g. Over 60

5. During the past three years, has the company performed or commissioned any assessments of its current staffing levels or future needs? If so, please provide a copy of the assessment.
6. Provide information regarding anticipated retirements in each department for the next five years, including the number of expected retirements and the positions that would be left vacant by those retirements.
7. Provide information regarding any anticipated reductions in employment levels due to causes other than retirements, such as layoffs or attrition.
8. Explain how anticipated retirements or other employment level reductions would affect the following functions in the next two years [list functions relevant to the utility in question, for example, maintenance, tree trimming/vegetation management, storm restoration, customer service, sales and marketing, the schedule of new business construction, meter services and regular installations.]
9. For each position anticipated to be vacated by retirement, layoff or attrition, state the title, duties and responsibilities and explain how these duties will be completed after that employee has left.
10. Describe, by department, whether and how the company will be able to provide adequate staffing and sufficient crews to meet regulatory requirements if, in any such department, one in seven (approximately 15%) of the employees in such department is sick, injured, on vacation, or otherwise unavailable for work.
11. Do any of the anticipated retirements or other employment level reductions relate either directly or indirectly to reliability, safety, or service quality of the company? If so, how?
12. Provide any studies or analyses that have been performed in the last five years of the company's organizational structure to determine whether the structure is cost-effective.

Questions Regarding Recruitment and Retention

13. Describe in detail the efforts being made to recruit new, younger, workers to replace those nearing retirement?
14. Provide any status reports prepared by or for the utility concerning the recruitment efforts described in the prior response.
15. Describe in detail your retention programs or other efforts being made to retain existing workforce.

16. Describe in detail any succession planning the company has engaged in, or plans to engage in, for management or leadership positions.
17. Describe in detail any steps the company has taken to capture the knowledge from retiring personnel.
18. Provide information regarding the number of positions that are filled by contractors, rather than company employees.
19. Describe in detail and provide documentation of any of the company's employee training programs. If no formal programs exist, describe how employee training takes place.
20. Provide information regarding the company's salaries and employee benefits.
21. What new or emerging occupation skill sets are you anticipating requiring in the next 10 years?
22. Describe in detail the efforts being made to recruit and hire employees with the new or emerging occupation skill sets you anticipate requiring in the next 10 years.

Questions Regarding Service Quality

23. Provide telephone statistics for each month over the last five years reflecting reported emergencies and outages.
24. State the average call center response time for each of the last five years.
25. State the average length of call center calls for each of the last five years.
26. State the average outage duration for each of the last five years.
27. State the number of customer complaints received for each of the last five years.
28. Provide statistics regarding overtime hours worked over the last five years by department. Include information about the company's overtime policy, if any.
29. Provide information regarding employee work-related accidents or injuries for the last five years.