

## When to intervene in state regulatory cases, and what to expect should you decide to do so

Scott H. Strauss and Ruben D. Gomez

Delegates to the Utility Workers 28th Constitutional Convention passed a resolution, "R-12, Regulation," staking out the union's position regarding utility regulation and guiding the union's activities in this very important arena. Below is an article based on a presentation made by Scott Strauss at this year's convention.



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The Nation's decade-long journey toward utility deregulation has resulted in massive industry consolidation, implemented mainly through utility mergers and acquisitions. Proposed gas, electric and water company mergers or acquisitions are evaluated by utility commissions in the states in which the transacting companies provide service. In general, these commissions can approve mergers or acquisitions that are found to be consistent with the "public interest." As staffing and related service quality issues are typically at the forefront of any merger or acquisition, the actions of a state public utility commission can have direct and far-reaching effects

on union members. Impacts can include: the elimination of union jobs; limitations on the ability of union members to perform their work in a safe and effective manner; the loss of job-related benefits; and a reduction in the quality and reliability of the essential services that utility workers provide to customers. Similarly, utility rate proceedings can

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involve service quality issues that, by extension, may implicate important utility worker interests.

Because of the strong link between utility worker concerns and the matters that come before state regulatory commissions, it has become increasingly important for utility worker local unions to participate actively in state utility commission proceedings. However, as resources are not unlimited, a union facing the possibility of intervening in a regulatory proceeding must decide whether to take advantage of that opportunity. Here is a set of fundamental questions the answers to which should help UWUA members to decide whether intervention in a state utility commission proceeding is in their local's best interest.

### What interests are at stake for your union?

Involvement in regulatory proceedings requires a significant commitment of time and resources. For this reason, it is important to "pick your spots." In other words, try to determine at the outset what is at stake for your local in a given regulatory proceeding. For example, will a merger mean the loss of jobs? Do the terms of a proposed acquisition threaten union pensions? Focus your efforts on those proceedings in which your union has the most at stake. Similarly, if you become a party to a regulatory case, you will want, to the greatest extent possible, to concentrate your resources on the matters that initially led the union to become involved in the case.

### Are you in a state with a favorable statutory scheme?

Utility commissions are creatures of state law, and the standards that merger or acquisition proponents must meet to gain approval will vary from state-to-state. Similarly, the treatment of worker issues in the merger or acquisition context will likewise differ depending on the state. Some statutes mention expressly the need for the commission to ensure that worker interests are taken into account in evaluating the impact of a merger or acquisition proposal. Other statutes are phrased more generally, referring to the need to ensure that a transaction is consistent with the "public interest" or is "fair and reasonable." If your state's regulatory statute mentions the importance of protecting utility employees, you are off to a potentially good start. However, do not abandon the effort if you are in one of several states where the commission's governing statute does not explicitly mention workers. In fact, a state commission's authority is often worded neutrally. General language does not preclude raising worker interests; indeed, such language may facilitate raising worker concerns and bringing them to the forefront.

### Is there potential for possible alliances?

State regulatory proceedings, especially those involving

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## LEGALLY SPEAKING

major mergers or acquisitions, typically involve lots of parties and a multitude of viewpoints. Whatever your reservations about a particular company or transaction, the chances are good that you are not alone. Allies can be of critical importance, providing you with added clout and credibility whether the case is in settlement discussions or litigation. Because most regulatory proceedings will involve settlement talks, it is especially useful to have "friends" to look to in such discussions. Keep in mind also that what may begin as an issue-specific partnership can develop into a broader alliance that reaches across more than one issue and, in some circumstances, more than one proceeding.

### **Are you prepared to become an active partner?**

Regardless of how you are represented in a regulatory proceeding, be prepared to play an active role in the development and presentation of case positions, and the crafting and implementation of litigation strategy. In other words, plan to be available – for meetings, telephone conferences and even travel. Local unions considering involvement in regulatory proceedings need to be prepared to have and to make available members with knowledge of the "facts on the ground." The individuals may well be required to testify during the proceedings. A principal strength of any local is the knowledge and understanding that its members have of the issues the utility is facing on a day-to-day basis. An experienced utility worker describing the inner workings of a grid or pipeline system will be more credible, accurate (and less expensive!) than a hired outside expert. Individuals with hands-on knowledge will likely be able to bring to light factual information of which other parties may be unaware, but will be unable to ignore. Utility workers know where the system problems are located, and can play an essential role in presenting enormously important information.

### **Is this the place to make an impact?**

The sum total of this advice boils down to the cautionary note sounded at the beginning of this article: pick and choose carefully from among your regulatory participation opportunities. If an opportunity to intervene in a regulatory case comes your way and you decide to participate, prepare to commit fully. Recognize that any success will depend on your engaging in this enterprise as an active partner. On the other hand, if the decision on participation is a close question, then err on the side of involvement. While no one can guarantee that participation in a regulatory proceeding will have a favorable outcome, there is no question that your interests will not be taken care of if you fail to raise them, and decide to sit on the sidelines.

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