

REWRITING THE "SOCIAL COMPACT":

A Competitive Electric Industry and its Core Customers

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Historically, the social compact to which electric utilities have been held involves what is called the public utility's common law "duty to serve." Pursuant to this duty, the fundamental "rule" requires a utility to serve on reasonable terms all those who desire the service it renders.¹ If a member of the public has applied for and made the necessary arrangements to receive service, and has paid for or offered to pay the price and abide by the reasonable rules of the company, it is the duty of the utility to provide the service. A public utility is under a legal obligation to render adequate and reasonably efficient service impartially, without unjust discrimination, and at reasonable rates. In short, under the duty to serve, a utility must make its service available to all members of the public to whom its public use and scope of operation extend, who apply for such service, and who comply with its reasonable rules and regulations.²

Permitting a move to a competitive, deregulated, electric industry provides an opportunity to explicitly rewrite this social compact.³ This rewrite would seek to ensure that the interests of the industry's core customer classes⁴ are placed on a level playing field with the interests of customers who are big

¹ 64 *Am.Jur.2d*, *Public Utilities*, §16 (1972).

² For excellent discussions of the scope and ramifications of this duty, see generally, Comment, "Liability of Public Utility for Temporary Interruption of Service," 1974 *Wash. L. Qtrly* 344, 346, n. 10 (1974); Gustavus Robinson, "The Public Utility Concept in American Law," 41 *Harv. L.Rev.* 277 (1928); Norman Arterburn, "The Origin and First Test of Public Callings," 75 *U.Penn. L.Rev.* 411 (1927); Charles Burdick, "The Origin of the Peculiar Duties of Public Service Companies," 11 *Columbia L.Rev.* 514 (1911).

³ It has been argued that parts of the "new" compact do, indeed, inhere in the existing compact. The opportunity should be taken, however, to make such requirements explicit.

enough, and powerful enough, to exercise both market and political power.

The terms of the new social compact should include several components. First, the compact should be based on the principle that, even if competitive, the electric industry has been granted the right of eminent domain and is, therefore, an industry that is subject to public control in certain respects. Private land, of course, cannot involuntarily be taken for private use. By definition, therefore, the exercise of the power of eminent domain by electric utilities must be for a "public use." The public thus has a right to ensure that the property so taken, and the industry so supported, is not operated strictly for private gain, with "the public good" flowing only as an incident therefrom.

Second, the compact should explicitly state that being the delegee of the *power* of the state,⁵ the electric industry carries with it certain *responsibilities* of the state as well. Primarily, just as the state may not deny the use of streets, the availability of fire and police protection, and the offer of public education based on ability-to-pay, a corporation, whose existence and prosperity depends on the private exercise of the power of the state, may not deny its service based on ability-to-pay either. The responsibilities of the electric industry, in other words, include as one of them the obligation to make special efforts to ensure that energy service is universally available.

Third, the delegation of some aspect of the power of the state (*i.e.*, eminent domain) carries with it the obligation of regulatory oversight to ensure that the power of the government is wielded for the *entire* public and not merely some fraction thereof. The electric industry, in other words, having been granted permission to exercise a power that may be exercised only for the public use, must subject itself to supervision in enforcement of the responsibilities in consideration of which the permission was granted.

Fourth, electric utilities should, within the context of this new social compact, be held to fiduciary duties to the public-at-large in pursuit of its public responsibilities. It has been proposed in other contexts that a fiduciary obligation is appropriately applied whenever, because of unequal bargaining relationships, one party has a specific vulnerability to another.⁶ The vulnerability of core electric utility consumers who are dependent for electric service necessary to life, itself, falls within this construct.

The scope of the "fiduciary duty" imposed on the electric industry has at least two components to it. On the one hand, the fiduciary obligation requires, at a minimum, a duty of competence in carrying out the utility's public responsibilities. This may imply an obligation to explore new technologies and modes of doing business that would accrue to the benefit of the industry and prevent hardship to

⁴ These "core" customer classes include residential customers generally, low-income residential customers in particular, and small business customers.

⁵ If the electric industry is granted the right to acquire property over the objection of the current fee holder, that grant is a delegation of the power of the state itself; only the state may take private property.

⁶ Ernest Weinrib, "The Fiduciary Obligation," 25 *U.Toronto L.J.* 1, 6 (1975).

individual consumers.⁷

On the other hand, within the law of fiduciary obligation, meeting a minimum level of competence may not be sufficient. Instead, fiduciary responsibilities may well require a standard higher than mere competence. In other fiduciary contexts, courts have required not merely a minimum competence, but rather a "best efforts" standard: a calling of diligence as well as competence in protecting the interests of the beneficiary of the fiduciary duty.⁸

This "best efforts" standard would govern any oversight of an electric utility's actions toward its core customer classes. Under this standard, for example, an electric utility may be required to investigate customer usage patterns and payment abilities to develop appropriate ameliorative programs in the event that high bills are placing service in jeopardy due to inability-to-pay. Each individual company may be required to be aware of, and implement, the most effective practices of other public utilities as a gauge of what is necessary regarding payment plans, notice requirements, and protections for the elderly, indigent and infirm.

In sum, a rewritten social compact between the electric industry and the core customer classes will place the industry in a more proactive position toward its core customer classes. The new compact would explicitly contain four components in addition to the traditional "duty to serve":

- o First, the compact would provide that electric utility property is not to be operated strictly for private gain, with the public good flowing only as an incident therefrom.
- o Second, the compact would provide that the electric industry has imposed upon it an obligation to make special efforts to ensure that electric service is universally available.
- o Third, the compact would provide that the electric industry would be subject to public enforcement of the industry's public responsibilities. The exercise of the power of eminent domain is permissive only, and the grant of permission is to be accompanied by public oversight of the accompanying responsibilities.
- o Fourth, the compact would provide that the electric industry owes the public at large a fiduciary obligation to adequately perform the industry's public duties. This fiduciary obligation requires, at a minimum, a duty of competence in carrying out its obligations. The duty would likely require, however, more than mere competence, but rather compliance with a "best efforts" standard.

⁷ Targeted payment plans and energy efficiency programs which may avert costly inability-to-pay problems may be two examples of new modes of doing business.

⁸ See generally, E. Allan Farnsworth, "On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law," 46 *U.Pitt. L.Rev.* 1 (1984).