“Introduction of Competition in Regulated Markets: Analysis of Colombia’s Natural Gas Industry”

by

Luis Alejandro Pando Lopez

A thesis submitted in partial fulfillment of the requirements for the degree of

Master of Laws

Faculty of Law
University of Alberta

ABSTRACT

This dissertation deals with the introduction of competition in regulated industries such as natural gas. The thesis focuses on the recently developed Colombian natural gas market and uses a more mature market, the deregulated gas market existing in the province of Alberta, Canada, as a benchmark for comparison. First, this thesis analyzes and compares the civil law concept of service public and the common law concept of public utilities. In particular this thesis discusses the Colombian notion of domiciliary public service (SPD) that under Colombian law applies to the distribution of natural gas and the complementary activities of production, supply, transportation and retail. Second, it studies the theories and justifications for government regulation of public utilities and SPDs, mainly the public interest theory and the economic theory of regulation, as well as the main lines of criticism. Third, this dissertation analyzes natural gas markets from the viewpoint of competition law, applying the methods and concepts from this area of law. Through the methodology of market definition used by competition authorities, this thesis makes a diagnosis of the Colombian natural gas market, both in its product and geographic dimensions, reviewing the agents and activities involved in the natural gas fuel cycle, and discussing the main aspects of regulation of gas utilities and SPDs in Colombia. In this respect, the thesis focuses on the regulatory agency, the Colombian Energy and Gas Regulatory Commission (CREG), its mandate and statutory framework, and its main powers and duties regarding gas services. With respect to the introduction of competition into regulated industries such as natural gas, this dissertation discusses gas liberalization and the usage of instruments such as unbundling and open access. This thesis analyzes the gradual liberalization that has been occurring in Colombia's natural gas sector, and the competition issues that have been identified in a number of studies conducted for the Colombian Ministry of Mines and Energy. To provide context to these problems, this thesis discusses some problems identified during the deregulation of natural gas in Alberta, particularly at the distribution and retail level. This dissertation also discusses the new idea of competition advocacy as a tool to assess the impact of government regulation in the markets and a mechanism to create a culture of competition within the government. Finally, this thesis defends the idea that consumer protection is in the public interest, and that effective representation is a key aspect of consumer protection. As an example of effective representation, this

thesis analyzes the Utilities Consumer Advocate in Alberta and its mandate to represent residential, farm and small business consumers of electricity and natural gas, and reaches the conclusion that the current problems affecting SPD consumer protection in Colombia could be tackled with the implementation of either a government agency in charge of representing consumers or independent consumer organizations with the right to participate in regulatory proceedings and the ability to recoup the costs of intervention.

DEDICATION

I dedicate this thesis to my wife Angela, whose patience and comprehension were the pillars that gave me the strength to complete this important academic milestone. I also dedicate this dissertation to my family, particularly to my mother Maria Cristina, who always supported me no matter the adverse circumstances, and to the memory of my father Jose Luis, who encouraged me to always continue to improve my education and inculcated in me the fundamental values of respect, ethics, and good faith, which have always guided my actions.

I'm also grateful of the fundamental guidance given by my Supervisor, Professor David Percy, as his expert advice and recommendations were a light of wisdom in times of despair and confusion. I also wish to acknowledge the important contribution and support of my peers and colleagues at the Master in Regulation of Energy and Mining at the Universidad Externado de Colombia.

Finally, I dedicate this thesis to all of those who have devoted themselves to the protection and representation of consumers, with a special consideration to *"Tal Cual"*, the charismatic cartoon character that daily appears in the Consumer Bulletin, a one minute spot in Colombian prime time television, asking on behalf of citizens and consumers the most fundamental questions regarding their rights and duties before firms and organizations, producers of goods and services, as well as governmental bodies and utility providers, and who is leading the change in Colombia towards a more effective representation of consumers.

TABLE OF CONTENTS

INTRODUCTION

Natural gas supply, especially in the case of residential end-users, is a service rendered under the scope of both private and public law. Indeed, the contractual relations between distribution and/or retail supply utilities and their clients operate within a predominantly private law framework, while the activities directed to guarantee the provision of the service operate in a framework of public law and regulation. The recent liberalization process introduced into many countries' natural gas industries through deregulation, unbundling and open access schemes, and the introduction of competition in areas such as production and retail sales, along with regulation in those portions of the chain of supply with characteristics of natural monopoly, have created further interaction between these two different but complementary arms of the legal system.

The main purpose of this legal dissertation is to analyze the Colombian natural gas market. It is small in size and self-sufficient, with little capacity to export and contains structural market problems such as concentration (a market controlled by few agents) both on gas production and wholesale supply. However, the scope of this thesis does not include the supply of gas to large industrial customers and gas-fired electric plants, which account for 62% of Colombia's total demand. It focuses on the provision of distribution and retail services to residential and small commercial consumers. The thesis will use the mature Canadian gas market as a benchmark for comparison and employ the methodology of market definition used in competition law. The analysis will consider the important differences between both countries, particularly the fact that Canada is a federal state, and Colombia a unitary republic. In addition, the two countries have different legal systems and regulatory regimes. Canada has a long time tradition of legal knowledge based on the common law – known as Canadian Oil & Gas Law, an entire subject of legal study based upon the very rich jurisprudence of both the Federal and Provincial Superior Courts[1]. In contrast, Colombia relies on the relatively new Colombian Energy and Mining Law[2], as it is generally referred to, which is a mixture of legal regimes applicable to the different activities related to energy and mining. Its content is generally of a matter of public and administrative law, with only little and recent jurisprudence produced by the *"Consejo de Estado"*[3]. Some changes have been introduced through the decisions of the Consejo body, in particular with respect to concepts such as the provision by the State of industrial and commercial services, or the new domiciliary public services (SPDs) regime established

[1] See for example the fundamental case Borys v. Canadian Pacific Railway and Imperial Oil Limited [1953] 7 W.W.R. 546 (PC), Prism Petroleum Ltd. V. Omega Hydrocarbons Ltd [1994] 149 AR 177 (CA), discussed in "Basic Oil and Gas Law. Cases and Materials" prepared and edited by David R. Percy, Faculty of Law, University of Alberta, Edmonton 2011.

[2] An example of this new energy law is the Specialization program in Energy and Mining Law dictated at the Universidad Externado de Colombia in Bogotá, Colombia.

[3] The Consejo is the highest court for administrative law cases with a strong historical and doctrinal links to French administrative law - especially regarding the public service concept.

throughout Law 142, 1994[4], which covers much of the provision to end users of water, electricity, and gas services. In addition, Colombia's highest constitutional court - the *"Corte Constitucional",* charged with protecting the Colombian Constitution of 1991 and the so called "fundamental rights" of every Colombian citizen, has stated in several decisions that access to public services such as natural gas provision, is part of the fundamental rights to equality, health, and human dignity, and thus the object of special protection by the State.[5]

The important differences between Canada and Colombia mean that the task of comparing in a scholarly manner the legal and regulatory frameworks of the natural gas industries of the two countries requires an initial consideration of whether a useful comparison is even possible. It must be recognized that the important differences between the countries´ legal systems, resource ownership schemes, the concepts of public service and public utility, as well as the differences of the market size and structure and the institutional frameworks in which government intervenes in these markets, make this initial question vital.

The intention of this thesis is to contribute to the knowledge and discussion of fundamental normative questions applicable to the natural gas industry, especially related to the economics of this market and the means and the goals of governmental intervention in the industry. It will address, among other issues, the normative questions regarding the background justification for regulating natural gas markets in different legal systems and the impact of different traditions of Common Law and the Civil Law. In this respect, the thesis will address the typical justifications for regulation. Its main purpose is to deal with the justification for regulation in natural gas markets, particularly the public interest and the correction of market failures, considering the particular characteristics these industries. Economic aspects such as natural monopolies, information asymmetry and externalities are among the most important aspects which will be addressed, as well as price control, conduct and structural regulation. Issues relating government failure and the risk of regulators being captured will also be addressed. Regarding competition, the thesis will mainly consider aspects related to the legal treatment of the abuse of dominance, as well as anticompetitive behaviors such as unfair pricing and unjust or undue discrimination. The thesis will also consider liberalization, through unbundling and open access regimes, price deregulation, and vertical and horizontal disintegration, among other aspects of competition policy and regulation. Finally, regarding residential consumers, the thesis will address issues such as the need to protect residential end-users from abusive practices by gas utilities, especially regarding prices and quality of the service. It will consider the ability of consumers to organize themselves to participate in the decision-making process, the ability to request a change of supplier through the introduction of

[4] Also known as SPD Law

[5] See Corte Constitucional Decisions T-540 of 1992, C-663 of 2000, C-041 of 2003, C-060 of 2005, C-924 of 2007, C-378 of 2010, C-186 of 2011 and T-572 of 2011

competition among local distributors through organizations such as independent retailers and multiservice firms.

In essence the aim of the thesis is to answer problems currently affecting the Colombian natural gas industry in the downstream portion of the market (distribution and retail) by analyzing and comparing it with some of the legal and regulatory solutions applied in Canada. Therefore, the thesis will not deal with issues affecting the wholesale market and the problems affecting large industrial and thermoelectric customers. The main source of comparison is in the province of Alberta, which has a mature legal and regulatory system governing the oil and gas industry, and where gas markets were deregulated in 1985. In particular, it will consider the utility of the Office of the Utilities Consumers Advocate which exists in Alberta. In this comparison we will analyze whether the rules of private law and competition policy are sufficient to discipline the market and regulate the relationships between the different agents of the industry, whether contract law is sufficient to govern a utility's agreements with residential end-users, and the role of regulatory agencies.

In order to achieve these goals, the thesis will consist of five sections. The first chapter will justify the importance and applicability of a comparative legal work through analyzing the differences between the public utility concept applied in most of the common law countries and the French administrative law concept of "*service public*", which is almost identical to the Spanish version of "*servicio público"* found in Colombia and the majority of Latin American countries. The concept of *"servicio público"* is deeply rooted in the administrative law canon and the principles of the Civil Law tradition. The chapter will explore an intermediate legal concept that contains principles of both the public utility and the public service notions, by reference to the more recent European concept of *"services of general interest"*. Finally, the chapter will analyze the unique concept of *"domiciliary public service"* (SPD) created by the Colombian Constitution of 1991 and fully regulated by Law 142 of 1994, which applies to gas utilities.

The second chapter will review the framework by which the State intervenes in the utilities sector. The chapter will outline the legal issues and theories regarding regulation, following the distinction made by Anthony Ogus between social and economic regulation. It will analyze the theory of regulation based on the public interest, considering the main critics that come from the economic school of public choice and the works of Richard Posner, and aspects affecting regulation such as capture and government failure. The chapter will discuss the forms and instruments by which regulation of public utilities and SPDs is executed, and the economic and legal framework of the regulatory function.

The third chapter will analyze natural gas markets using the methodology of market definition applied worldwide by most competition authorities. Accordingly, we will discuss the natural gas fuel cycle and the different activities related to natural gas supply to end-users, as well as the institutions and regulatory framework. This account will present the structural characteristics of the natural gas markets,

the market failures they present, and the possible solutions to those failures at both the regulatory and the competition policy levels. The chapter will discuss the special rules pertaining to competition law and competition policy and their importance in gas utility markets.[6] It will analyze the most common legal instruments used to introduce competition in regulated industries,[7] including deregulation, liberalization, unbundling, and open access schemes. This chapter will discuss the special competition rules contained in the SPD law as well as the rules dictated by the Colombian Energy and Gas Regulatory Commission - CREG - regarding unbundling and open access in gas services. Finally, we will analyze the role played in Alberta by both the Alberta Utilities Commission and the Market Surveillance Administrator regarding competition in gas utilities.

The fourth chapter will analyze consumer protection in gas utility markets. We will compare Colombia's legal and regulatory framework with respect to consumer protection in SPDs with Alberta's, particularly the role of the Utility Consumer Advocate and other consumer groups, and the rules regarding the participation of consumers in administrative and regulatory proceedings. It will examine consumer representation, the role of consumers in the decision-making process, and the need for consumer organization and effective representation as a necessary condition in the liberalization and deregulation of natural gas markets.

The final chapter will present conclusions and recommendations. It will suggest that the concepts of public utilities and domiciliary public services are different, but they converge in matters such as the need for regulation, the promotion of competition and consumer protection. In particular, it will conclude that the regulation of gas utilities is in the public interest, especially when it comes to the protection of residential and small commercial consumers. Also, that the introduction of competition into gas industries must be done in a gradual and well-studied manner using instruments such as deregulation, unbundling, open access and competition advocacy. Finally, that granting consumers the right to participate in regulatory proceedings, and recognizing intervener costs to consumer organizations that advocate in favor of the consumer's interest during these proceedings, are legal instruments successfully applied in Alberta's deregulated natural gas market that could be replicated in Colombia in order to provide residential and small consumers with effective representation, always taking into consideration the special characteristics applicable to SPDs.

[6] Anthony Ogus, *Regulation. Legal Form and Economic Theory*, (Oxford: Clarendon Express, 1994) especially at ch. 1 [OGUS].

[7] J. J. Laffont and J. Tirole, "Creating competition through interconnection: Theory and Practice" (1996) 10 Journal of Regulatory Economics

CHAPTER ONE:

PUBLIC UTILITIES IN CIVIL LAW AND COMMON LAW

INTRODUCTION

In this chapter I will analyze and compare the common law notion of public utility with the civil law concept of *"service public"* or *"servicio público"*, particularly the Colombian variation of *"Servicio Público Domiciliario"* (SPD)[8] that was first mentioned in the Colombian Constitution of 1991 and further regulated by Law 142 of 1994 also known as the SPD Law. In conducting this comparative analysis, I will also review the European Union concept of *"services of economic general interest"* which lies somewhere in the middle between the traditional notion of "service public" and a more market-oriented approach consistent with the European Union law and jurisprudence. My main goal is to establish the similarities and differences between SPDs and public utilities, considering that the activity of distribution of natural gas to residential and small consumers is considered an SPD in Colombia and a public utility in Canada.

I will demonstrate that SPDs remain different from public utilities. Many aspects of the traditional notion of "*service public"* or "*servicio público*" are still present in this new category of services particular to Colombian law, although with a more market-oriented approach and with many similarities with the concept of public utility. However, the Colombian variation of SPD has particularities that makes it unique.

After reviewing and comparing the concepts of public utilities and SPDs I will conclude that the public interest is present in both concepts, although in a different manner. I will show that the public interest appears more clearly in SPDs because they are rooted in the French notion of "*service public",* which in turn is founded in the notion of public and basic needs that are considered essential and fundamental rights of every citizen and call for government intervention in order to guarantee their satisfaction.

However, one aspect in which public utilities and SPDs converge is that they are both subject to regulation based on considerations of public interest. For example, in both systems regulation is present to guarantee an adequate service at fair and reasonable rates, to set standards of quality of service, to grant access to the service, and to guarantee continuity and regularity of the service. Regulation is also used as a substitute for competition, creating competitive conditions in regulated activities through open access and unbundling rules to protect the market structure and free competition. Finally, regulation balances the interests of the operators and their customers, guaranteeing the former a fair return for their investments in order to maintain expansion of the service, while protecting consumers from abusive practices of operators. Even though a number of justifications for regulation exist, this thesis focuses on

[8] Spanish for Domiciliary Public Service

two: (i) the protection of free market and competition, and (ii) consumer protection, more specifically residential and small commercial consumers of natural gas.

1. THE CONCEPT OF PUBLIC SERVICE

In civil law, the concept of public service[9] is treated differently according to the field of law. For example, administrative law considers public services a fundamental, to the point that in France the concept of "*service public*" was confused with the concept of administrative law, as it encompassed all administrative action.[10]

Public finance law on the other hand, considers public services from the point of view of the public needs system which classifies them depending on the type of public need they look to satisfy, and the means and type of funding used in their provision. Also, public finance law applies a non-exclusion principle which differentiates between first and second degree public services according to whether or not it is possible to exclude an individual from their scope. From this perspective, first degree public services satisfy collective public needs that are deeply related to the most important functions of the State, such as defense or the administration of justice, and no individual can be excluded from them, even if they are not willing to contribute to their funding. On the contrary, second degree public services satisfy collective and individual public needs, such as electricity or gas distribution, and those unwilling to pay for the service can be excluded from their provision. However, the State must always guarantee that the infrastructure and networks required for the provision of second degree public services is available.

1.1. Public Services in Administrative Law

Colombian author Libardo Rodríguez refers extensively to the concept of public services in administrative law.[11] When discussing administrative actions or activities, he reminds us that the notion of public services has paid a fundamental role in the history of administrative law, particularly in countries such as France and Spain between the second half of the nineteenth century and the first half of the twentieth century, where the concept was considered the basis for the application of administrative law and jurisdiction. During this period of time administrative law was only applied to activities considered public services and controversies derived from these activities were in the exclusive competence of administrative jurisdiction.[12]

As explained by Rodríguez, the notion of public service first appeared in France after a series of important decisions taken by the French higher courts. Rodríguez explains that the most important

[9] In French "service public" and in Spanish "servicio público"

[10] See Georges Vedel y Pierre Delvolvé, "Derecho Administrativo", traducción de la 6ª edición francesa, Madrid, Biblioteca Jurídica Aguilar, 1980 [VEDEL]

[11] See Libardo Rodríguez R., "Derecho Administrativo General y Colombiano", Decimoctava edición, Editorial Temis, 2013 [RODRIGUEZ]

[12] Ibid, at page 661

decisions were the *Fallo Blanco* of 1873 taken by the *Tribunal de Conflictos* and the *Fallo Terrier* of 1903 taken by the *Conseil d' Etat*[13]*,* which determined that the new key notion that defined administrative activity was the concept of *"service public"* characterized by a fundamental element: **the pursuit of the public interest**.[14]

This new theory was defended by eminent French scholars such as Léon Duguit, Gastón Jéze, Roger Bonnard and Louis Rolland who created, as explained by Georges Vedel, the new school of *service public*.[15] According to this school, "*service public"* was all activity of a public organization looking to satisfy a public interest need. Whenever the administration developed activities considered "*service public"*, administrative law and administrative jurisdiction applied. On the contrary, if the administration developed activities that were not considered "*service public"*, ordinary law and jurisdiction was applicable.

As Professor Vedel instructs us, under this new notion "*service public*" was defined in two ways. In the organic sense, a "*service public*" is characterized by a certain type of organization, an entity or enterprise regulated by the administration. In the material sense, "*service public"* refers to an activity that looks to satisfy a public interest need.[16]

According to Rodríguez, the traditional notion of public services presented the following characteristics:

(i) It was an activity exclusively reserved to the administration.

(ii) Its end was to satisfy a public interest need, in other words, a collective need, in opposition to individual needs.

(iii) The consequence of this notion was that whenever public service was present, administrative law and jurisdiction applied.[17]

In practice, both the organic and material notions converged when applied to the administration. However, the crisis of this theory came precisely because the material and organic notions started to separate. On the one hand, not all public service activities were rendered by the administration. On the other hand, not all activities of the administration were public services in the traditional sense. Vedel argues that the consequence of this division is that the scope of the concept became too ample, to the point that anything related to the public interest or the administration tended be considered a public service. This circumstance implied that public services were not always ruled by administrative law. However, the main consequence of this separation is that today the material notion prevails, because

---

[13] See *"Les grandes arrëts de la jurisprudence administrative",* 18éme ed. Paris, Editions Dalloz, 2011, at pages 1 to 7 and 68 to 69.

[14] See André de Laubadére et Yves Gaudemet, "Droit Administratif général", 16éme éd., Paris, Librairie Générale de Droit et de Jurisprudence, 2001, at page 34, quoted by Rodríguez, supra at note 11

[15] Vedel, supra at note 10, at p. 688

[16] Vedel, supra at note 10, at p. 688

[17] Rodríguez, supra at note 11, at p. 664

"*service public*" is mainly an activity in the public interest, although not necessarily rendered by a public organization.[18]

Colombian author Luis Ignacio Betancur criticizes the ample scope given to the notion of the public interest. He considers that this exaggerated notion is due to the French legal tradition, which considers the State as an omnipresent provider of services that is not confident of the profit motive of the private sector. He argues that under this notion private entrepreneurs are only considered "collaborators" of the administration, which is the only body with the knowledge of when or how to provide a service. Therefore, the administration will always guide the activity of the private sector. Betancur highlights that efficiency is part of the public interest, particularly regarding the administrative function and public services. Therefore, the notion of public interest constitutes a limit for the administration because its activity must prove to be economically rational.[19]

According to the French legal tradition, efficiency is not one of the basic principles of public services. These basic principles were created by doctrine and jurisprudence, and they apply to all public services although not in the same proportion. The most common principles are the following:

a. Continuity: Public services must function permanently. One particular aspect of continuity is the prohibition of strikes in essential public services defined as so by the Law.

b. Adaptability: Public services must adapt to changes in the public interest.

c. Neutrality: Public services must function according to the requirements of the public interest and not to favor private or particular interests.

d. Equality: Derives from the general principle of "equality before the law" and mandates for equal treatment without discrimination.

e. Duty of the administration to make public services function properly. It is the State's duty to make public services function correctly and ultimately to provide them. [20]

Regarding Colombian administrative law, Rodríguez instructs us about the two key elements of the prevailing concept of public service: (i) The public interest; and (ii) The participation of the Administration.[21]According to the first key element, for an activity to be considered a public service it must look to satisfy collective needs, not merely individual needs. This element has also lost precision due to the fact that the concept of public interest has become too wide and undefined. However, this element is essential to every public service because this type of services cannot exist only to satisfy private needs. With respect to the second key element, some degree of participation of the administration is required.

---

[18] See Jean Rivero, "¿Existe un criterio de derecho administrativo?" in "Páginas de derecho administrativo", Bogotá, Editorial Temis – Universidad del Rosario, 2002, at page 27

[19] Luis Ignacio Betancur, "La contratación estatal" in Superintendencia de Servicios Públicos Domiciliarios, "Servicios Públicos Domiciliarios. Actualidad Jurídica", Tomo IV, at page 70

[20] Rodríguez, supra at note 11, at p. 688. Other principles are objectivity, universality, proportionality, and the compulsory provision of services

[21] Rodríguez, supra note 11, at p. 665 to 667

This participation may be direct, as when the administration develops the activity, or indirect, as when it doesn't render the activity but exerts a permanent influence over it.

The main point is whether the administration wants a particular activity to be considered a public service. This is known as the "subjective notion of public services", also referred to as "*publicatio*". The State expressly determines which activities are considered public services. However, sometimes the State's intention is not express or clear. The question that follows is how we can determine the intention of the State.[22]In this regard, Rodríguez instructs about the so-called theory of the public service indicators developed by jurisprudence according to which, if the intention of the State is not clear or express, some indicators or exterior facts help to determine whether its intention was to consider a particular activity as a public service. For example, if the service was given public prerogatives such as the right to expropriate, the right of way or the right to charge public prices or fix tariffs, impose prohibitions to individuals, apply exceptions to private law, or if the activity is controlled by the administration.[23]

The legal regime of public services was traditionally provided by administrative law; today it is a mixture of legal regimes. However, as explained by French scholar Jean Rivero, in the presence of a public service, the portion of the service related to the public interest is subject to public law.[24] According to Rodríguez, the legal regime of a public service depends on the type of operation, which in turn has to do with the legal treatment given to the acts, the contracts, the labor relationships and the goods of the entity rendering the service. Thus, the legal regime will depend in the first place, on the nature of the legal person that produces the act, formalizes the contract, acts as employer, or is the owner of the goods. In the case of public services, the operator may be a public, a private, or a mixed entity. Accordingly, the legal regime may vary depending on the type of operator rendering the service.[25]

Rodríguez highlights that in practice, the notion of public service still remains important, to the point that many authors consider that the main activity and purpose of the administration must consist in assuring a better functioning of public services. This statement becomes even clearer with the incorporation by Colombia of the model of "*Estado Social de Derecho"* or Social State of Law, because it appears evident that better and wider provision of public services is the best mechanism for the State to guarantee the so-called "social rights" of citizens.[26]Indeed, Chapter 5 of Title XII (articles 365 to 370) of

[22] See Consejo de Estado, Ruling of March 20 of 2003, Sección 1a, Expediente AG-065, and Ruling of February 17 of 2005, Sección 3a, Expediente 27.673. Also see Corte Constitucional Decisions T-540 of 1992, C-037 of 2002, SU-1010 of 2008 and C-378 of 2010

[23] Rodríguez, supra at note 11, at p. 667. Also see Vedel, supra at note 10, at p. 688

[24] Jean Rivero, "Derecho administrativo", novena edición, Instituto de derecho público, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, Caracas, 1984, págs. 471 y ss., quoted by Rodríguez, at pages 674 to 676

[25] Rodríguez, supra at note 11 at page 677

[26] Rodríguez, supra at note 11 at page 661

the Colombian Constitution of 1991 is devoted to "The Social Ends of the State and Public Services", establishing the following constitutional principles:[27]

a. Public services are inherent to the social ends of the State.[28]

b. It is the duty of the State to guarantee the efficient provision of public services to all inhabitants of the national territory.[29]

c. The State will maintain regulation, control and surveillance over public services.[30]

d. For reasons of sovereignty or public interest, the State may reserve to itself certain activities considered strategic or public services but must repair damages to those persons that are affected by this decision.

e. General welfare and better quality of life of the population are social ends of the State.

f. A fundamental goal of the State's activity is the solution of unsatisfied basic needs of health, education, environmental protection and potable water. Social public expenditure will have priority over other types of expenditure.[31]

g. Public services are subject to the legal regime determined by the law, and may be rendered by the State, directly or indirectly, by organized communities, or by the private sector.[32]

h. The law will determine the powers and duties regarding the provision of domiciliary public services (SPDs), their coverage, quality and funding, and the tariff regime which must take into consideration not only costs but the principles of solidarity and income redistribution.[33]

i. SPDs will be rendered directly by municipalities when the technical and economic characteristics of the service and the general conditions are preferable and allow it. Departments[34] will give support and advice to municipalities in this matter.

j. The law will determine the competent authorities to establish tariffs.[35]

k. The Nation, as well as the departments, municipalities, and decentralized entities may grant subsidies to low income population so they can afford SPD tariffs that cover their basic needs.

l. The law will establish the rights and duties of consumers, their protection regime, and the ways in which they can participate in the management and control of State companies rendering SPDs.[36]

m. The President of Colombia is in charge of determining the general policies of management and efficiency control of SPDs, and will exert control, inspection and surveillance over these services throughout the Superintendence of Domiciliary Public Services (SSPD).[37]

---

[27] Rodríguez, supra at note 11 pages 662 to 664. Also see Luis Pando, "Solución a los problemas de la regulación de los servicios públicos domiciliarios en Colombia", Tesis, Universidad del Rosario, 1999 [PANDO]

[28] See Corte Constitucional Decisions T-540 of 1992, C-663 of 2000, C-041 of 2003, C-060 of 2005, C-924 of 2007, C-378 of 2010, C-186 of 2011 and T-572 of 2011

[29] See Corte Constitucional Decisions C-041 of 2003, T-408 of 2008, T-055 of 2011 and T-572 of 2011

[30] See Consejo de Estado Decision of March 31st of 2005, Sección 3a, Expediente 2004-1617, and Corte Constitucional Decisions C-041 of 2003, C-741 of 2003, C-150 of 2003, C-095 of 2007 and C-186 of 2011

[31] See Corte Constitucional Decision C-037 of 2003

[32] See Consejo de Estado Decision of March 31st of 2005, Sección 3a, Expediente 2004-1617, and Corte Constitucional Decisions C-389 of 2002, C-741 of 2003, T-408 of 2008 and SU-1010 of 2008

[33] See Corte Constitucional Decisions C-1371 of 2000, C-558 of 2001, C-150 of 2003, C-060 of 2005 and C-739 of 2008

[34] In Colombia departments are political and geographic circumscriptions similar to a province.

[35] See Corte Constitucional Decision C-389 of 2002

[36] See Corte Constitucional Decisions C-493 of 1997, C-558 of 2001, C-690 of 2002, C-060 of 2005, T-890 of 2008, T-546 of 2009 and T-279 of 2011

n. Strikes are forbidden in all essential public services defined by the law.[38]

o. By mandate of the law, the State shall intervene in public and private services to rationalize the economy in order to obtain a better quality of life, an equitable distribution of opportunities and the benefits of development, and to preserve a healthy environment.[39]

p. The State will intervene to guarantee that all persons, particularly those of low income, have effective access to basic goods and services.[40]

The Colombian Constitution expressly defines certain activities as public services. Some examples are social security,[41] health and environmental protection,[42] education,[43] notary and public registry.[44]The law has also determined that certain activities are considered public services. That is the case of the functions for the Central Bank,[45]social security (health and pensions),[46]domiciliary public services,[47] administration of justice,[48]public transportation,[49]fire control and prevention,[50]and the activities of the National Tax and Customs Direction (DIAN).[51]Finally, the Corte Constitucional has interpreted that the following activities are essential public services:[52]all activities of any branch of the State; transportation by air, water or land; electricity and telecommunications; activities of hospitals and clinics; activities of social assistance, charity and welfare; waste; exploitation and distribution of salt; exploitation, refining, transport and distribution of petroleum and related products; social security; justice; public transportation; activities of banks and financial institutions.[53]

1.2. Public Services in Public Finance Law

---

[37] See Consejo de Estado Decision of March 29 of 2012, Sección 3a, Expediente 25.693 and Corte Constitucional Decisions C-389 of 2002, C-617 of 2002 and C-305 of 2004

[38] See article 56 of the Colombian Constitution and article 430 of the Colombian Labor Code that prohibits strikes in public services which are "*all organized activity that looks to satisfy public interest needs in a regular and continuous manner, according to a special legal regime, either rendered by the State, directly or indirectly, or by private persons*".

[39] See article 334 of the Colombian Constitution. Regarding State intervention in public services see Corte Constitucional Decisions C-389 of 2002, C-150 of 2003, C-578 of 2004 and C-1189 of 2008

[40] See article 334 of the Colombian Constitution

[41] Article 48 of the Colombian Constitution

[42] Article 49 of the Colombian Constitution

[43] Article 67 of the Colombian Constitution

[44] Article 131 of the Colombian Constitution

[45] Law 31 of 1992

[46] Law 100 of 1993

[47] Law 142 of 1994

[48] Law 270 of 1996

[49] Law 336 of 1996

[50] Law 322 of 1996

[51] Law 633 of 2000

[52] Corte Constitucional Decisions C-450 of 1995, S-473 of 1996 and T-423 of 1996

[53] See Rodríguez, supra at note 11 p 669 and 670

One particular deficiency of the definition of public services by administrative law is that it has disregarded the finality principle[54] based on the public needs system, which is a construction of public finance law. We can argue that the scope of public services is founded in the finality principle. To understand who has the responsibility of providing public services to the public it is essential to understand the finality or ends of the activity. The teleological relationships between means and ends becomes fundamental, especially regarding public services that require a particular infrastructure, because only when this infrastructure exists does the activity become possible, thus accomplishing the proposed purpose of satisfying a public need.[55]

Public services are the consequence of the previous existence of constitutional and legal rules that prescribe the imperative satisfaction of unsatisfied public needs. From a finality point of view, the existence of an unsatisfied public need is the reason why an activity is considered a public service. The goal of public services is to satisfy public and basic needs which are considered of public interest. A public service may also satisfy private needs, but that is not its goal. Therefore, as we explain further, the notion of public services is founded on the public needs system.

1.2.1. The public needs system

The concept of public needs is relevant not only to economics and public finance law, but also to political science and philosophy because of its relationship to justice and freedom. Ever since the origins of the State, the basic needs of individuals have been studied. First in a primitive form such as food or shelter, and as society evolves, development has brought more and new needs for the people such as justice, defense, education or health.

Colombian professor of public finance law Alejandro Ramírez[56] has studied the public needs system, first formulated by German scholars such as Schaffle, Gerloff, Dietzel and Liefman. According to Ramírez, public expenditure is directed towards the satisfaction of basic needs of people. These needs can be individual or collective, public or private. Private needs only satisfy individuals, and eventually, they can become collective. On the other hand, public needs are destined immediately to the public in general, or both to an individual and the collectivity.[57]

The public needs systems applies a non-exclusion principle according to which public needs are divided into essential or absolute public needs, and general or relative public needs. Essential public

[54] According to Nicolai Hartmann, from a philosophical perspective, the finality principle is based on the theory of causation. The end may be considered as the object of a particular action. It can also be considered as the purpose or motivation of that action, therefore, its determinant cause. The study of the finality of public services is important because it defines which means are necessary to obtain a particular end. Nicolai Hartmann, "Ethik", 2nd edition, Berlin, 1935, at page 171.

[55] Pando, supra at note 27

[56] Ramírez Cardona, Alejandro, "Sistema de Hacienda Pública", Bogotá, Editorial Temis, 1980 [RAMIREZ]

[57] Ramírez, supra at note 56 at p. 29

needs include activities that are considered first degree public services such as national security, police, and the administration of justice. Under no circumstance may these activities be disregarded by the State. Their provision is mandatory to avoid chaos, disorder and anarchy. They are essential to the existence of the State of Law. As essential public needs, they are usually financed by taxes and must comply with the principles of sufficiency, opportunity, universality and consolidation.[58]

General public needs have both individuals and the collective as main recipients. It is the duty of the State to set the conditions and the infrastructure required to make possible the satisfaction of the needs. They include activities considered second degree public services such as telecommunications, water and sewerage, waste, electricity, natural gas, postal services and transportation. General public needs look to satisfy individual needs which become collective due to the fact that their proper functioning and management is of interest to the public in general. The simultaneous condition of being public and individual explains why it is possible to exclude from their provision those individuals who are not willing to pay for the service. However, it is the State's duty to guarantee that the required infrastructure is built, maintained and operated in order for these individual needs to be satisfied. Therefore, the satisfaction of this type of public needs does not depend exclusively on the payment of taxes but also requires end users to pay a price, generally known as tariff, in return for the service provided.[59]

1.2.2. Public needs and public services

Ramírez considers that public services are the way in which collective needs are satisfied because the State is in charge of organizing their provision. Ramírez argues that the State can organize the provision of public services depending on the type of collective need and by dividing them into essential or general needs.[60]However, Ramírez considers valid the concept of public services only in a political-financial sense. He argues that the crisis of the notion was only from the legal point of view. The fact that certain activities developed by the private sector have been considered of a public nature by the law is explained by the legal desire to control the prices and tariffs according to the predominant interest. Ramírez argues that what determines whether an activity is or is not oriented to satisfy a collective need is clearly not who develops it, but the fact that its goal is to satisfy and unsatisfied public need. Thus, public finance law looks at public services from the perspective of public needs and public expenditure.

Ramírez states that depending on the type of public need we will talk of first or second degree public services. Notwithstanding, he argues that three fundamental elements are present in all public

[58] Ramírez, supra at note 56 at p. 44 to 46

[59] Ramírez, supra at note 56 at p. 44 to 46

[60] Ramírez, supra at note 56 at p. 40

services: a) a public end (satisfaction of a public or essential need); b) a public financial means (taxes or tariffs); and c) a public management (direct or indirect).[61]

Finally, Ramírez points out that the distinction between essential and general public services is based on the non-exclusion principle. First degree public services are essential because the non-exclusion principle is absolute. Nobody can be excluded from the service and the financial means is generally a tax. On the other hand, second degree public services are based on relative application of the non-exclusion principle because individuals not willing to pay for the service may be excluded from its provision. The importance of relative non-exclusion in second degree public services has to do with matters such as the application of subsidies for a low income population that cannot pay for the cost of the service. The State sometimes renders the service directly through public corporations. In other occasions it grants the authority to private operators through concessions or franchises, reserving itself the power to control and regulate the activity.[62]

2. THE CONCEPT OF PUBLIC UTILITIES

The Corpus Juris Secundum contains the following definition of public utility:

"A public utility is a business organization regularly supplying the public with some commodity or service which is of public consequence and need. A distinguishing characteristic of a public utility is a devotion of private property by the owner to service useful to the public, which has a right to demand such service so long it is continued with reasonable efficiency under proper charges".[63]

According to the common law, the property of a public utility is private property devoted to the public service, and is impressed with a public interest. However, properly used, the term "public utility" designates the owner or person in control of property devoted to the public service, rather than the physical property or equipment. The term may also characterize the business being carried on, and it has also been used to mean the physical property and plant being used in the service of the public. Notwithstanding, in this latter sense it must be understood as the complete system of works devoted to the public rather than any particular item of property.[64]

Generally speaking, the term "public utility" refers to the entity that provides essential services to the public at large. However, this characterization is only appropriate if the nature of the entity's operation is a matter of public concern, and if this operation is made available to the general public without discrimination. In an extended sense, the term "public utility" is sometimes used to include many matters

[61] Ramírez, supra at note 56 at p. 43-46

[62] Ramírez, supra at note 56 at p. 43-46

[63] CORPUS JURIS SECUNDUM, Vol. 73 B, 2004, Thomson West at p. 272. [CORPUS JURIS SECUNDUM]

[64] Corpus Juris Secundum, supra at note 63, at p. 272

of general welfare to the state and its communities.[65] The definition of public utility is flexible but in order to be applied to an entity, certain attributes must be present; the mere fact that the commodity sold by a company is a product such as water, electricity or gas, which normally are sold by public utilities companies, does not itself render the seller a "public utility".

Nevertheless, the determination that an operator or enterprise is a public utility ultimately depends on whether the service rendered by it is of a public character and of public consequence and concern. It is essential to the concept of public utility that the business or enterprise is in some way impressed with a public interest. In the United States it is commonly agreed that this determination will necessarily depend on the facts of the particular case. Thus, the determination of whether a particular entity is a public utility is a mixed question of law and fact. However, according to the Corpus Juris Secundum the main criterion is whether the public may enjoy the public utility as a matter of right:

"*It is the duty which the purveyor or producer of the service or commodity has undertaken to perform on behalf of the public generally, or of any defined portion of it, which stamps him as a public utility, and not the use which the consumer makes of the service or commodity furnished".*[66]

Another criterion used to establish whether a public utility exists depends upon whether its business or enterprise is subject to public regulation. This criterion does not mean the mere declaration by legislation or a regulatory order by itself converts a private business or enterprise into a public utility, because a public utility does not depend on legislative definition, but on the nature of the business or service rendered. However, the fact that a particular business is subject to regulation must be given weight because the public policy of the State is involved, and because the public welfare is dependent on the proper conduct of the business and on its regulation.

As a general rule, a public utility has a duty to give the public reasonable and adequate service at reasonable rates and without delay. The utility is generally liable in tort for damages caused to consumers because of unjust discrimination and it may be liable for damage caused by its failure to maintain uninterrupted service, where it was negligent. Wrongful termination of service to consumers normally results in and liability on the part of the public utility.

2.1. Public Utilities in Canada

Authors such as Gordon Kaiser and Bob Heggie have referred to the subject of Public Utility Law in Canada, indicating that:

"Public Utility law is an unruly blend of administrative law and common law principles that developed over the 150 years, starting with railway regulation in Canada and the United States. Much of the early law results from the

[65] See for example *Turner v. North Carolina Public Service Co.*, 170 N.C. 172, 86 S.E. 1033 (1915) cited in Corpus Juris Secundum, supra at note 63 at p. 272

[66] Ibid, supra at note 63, at p. 275

decisions of the Board of Railway Commissioners in Canada and the Interstate Commerce Commission in the United States. In time, the principles of railway law moved to telephony and telecommunications and then to energy".[67]

According to these authors, the fundamental principles that govern monopoly utilities remain unchanged, in particular the principles related to one of the most fundamental functions of public utilities commissions, rate-making, which include retroactivity, the requirement that property of the utility is both used and useful, prudence, the duty to serve, and prevention of discrimination. They also refer to the influence of other areas of law such as competition law, both in terms of the common law doctrine of unfair competition and the statutory requirements of the Competition Act in Canada, that govern the conduct of monopoly utilities when they enter into competitive markets as well as the deregulation of markets.[68]

In a thesis presented at the University of British Columbia, Alexander J. Black makes a thorough examination of the nature of public utilities in Canada and states:

"… A preliminary characteristic of a public utility has been described as the established right of the public to provide a special regulatory scheme for particular industries… Public utilities involve necessary public services which often result in a monopoly of the particular enterprise".[69]

From Black's analysis we can conclude that two particular aspects of public utilities in Canada are: (i) they are subject to a "special regulatory scheme", and (ii) they involve "necessary public services". As previously discussed, these two characteristics of public utilities are similar to those applicable to the French notion of "service public" (and by extension to the Colombian concept of SPDs), and are deeply related to the public interest. However, as we will discuss further, the nature and scope of regulation seems to be different.

Kaiser and Heggie refer to a decision of the Supreme Court of Canada in *ATCO Gas v. Alberta (Energy & Utilities Board)*[70] which analyzes the jurisdiction of the Alberta Energy & Utilities Board to allocate the proceeds of the sale of a utility's asset. In this case, also known as the *Stores Block* case, the Court made a very complete analysis of public utilities in Canada and highlighted two important features: they are subject to regulation, and have a public interest aspect associated with the provision to the public of a necessary service. Regarding the first aspect – regulation – the Court said at para. 3:

"The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the sole owner of the

---

[67] Gordon Kaiser and Bob Heggie, Developments in Public Utility Law, in "Energy Law and Policy" eds Gordon Kaiser and Bob Heggie (Carswell: Toronto 2011) [KAISER AND HEGGIE]

[68] Kaiser and Heggie, supra at note 67 at p 93

[69] Joseph A. Black, "Canadian Gas Deregulation", Faculty of Law, University of British Columbia, at p. 27. Black quotes E.W. Clemens, "Economics and Public Utilities" (Appleton-Century-Crofts, New York, 1950) at p. 25. [BLACK]

[70] ATCO *Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board),* 2006 SCC 4, [2006] 1 S.C.R. 140, CarswellAlta 139, 2006 CarswellAlta 140 (S.C.C.), at para. 3, quoted by Kaiser and Heggie, supra at note 67

resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board (…)

That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment"

With respect to the second aspect – the provision of a necessary service –, the Court states at para. 70:

"Utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a 'public interest' aspect which is to supply the public with a necessary service (in the present case, the provision of natural gas)".[71]

However, in this decision the Court recognizes the private nature of most public utilities although subject to regulatory constraints when it states at para. 78:

"A public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes".[72]

2.1.1. Public utility law principles

Kaiser and Heggie refer to one of the most fundamental principles underlying public utility regulation: **the social contract or regulatory compact**. In particular, these authors state that due to the importance of electricity and natural gas for the Canadian economy, governments have recognized that these industries were infused with the public interest and their development required a unique approach.

"Governments developed an approach where one company would operate a utility in a specified area. Due to the immense investment required, competition for this type of infrastructure represents an inefficient allocation of society's resources. The approach typically involved a legislative assignment of a franchise area to a utility, whether Crown or privately owned. In return for this exclusive right, the utility assumes certain responsibilities. This arrangement of rights and responsibilities between a utility and its customers, typically found in legislation and regulations, is termed the 'social contract' or 'regulatory compact'".[73]

One of the most important responsibilities assumed by public utilities is the duty to serve. However, these authors also refer to other public utility law principles, such as unjust discrimination, retroactivity, and the fair rate of return.[74] Also they refer to concepts related to rate making, such as that costs that are recovered in rates must be prudent, and that where there are capital costs, the assets must be "used and useful".[75]

a. Duty to serve

[71] Ibid. at para 70

[72] Ibid at para. 78

[73] Kaiser and Heggie, supra at note 67 at p. 180

[74] Kaiser and Heggie, supra at note 67 at p. 175-197

[75] Kaiser and Heggie, supra at note 67 at p. 197-205

A refusal to connect by a public utility on fair and reasonable grounds violates one of the most basic principles of public utility law. This principal underlies all public utility law in North America and dates from early railroad and telecommunications regulation. Where a railroad or telephone company refuses to connect, it has an onus to establish that there are reasonable grounds for the refusal. That is because the utility has a monopoly.[76]This principle extended to other sectors such as electricity and natural gas and establishes that when a company is a sole supplier of an essential product, such as electricity or natural gas, it faces special responsibility in terms of supplying customers.

The prohibition against refusals to connect was set out by the British Columbia Supreme Court in *Chastain v. British Columbia Hydro and Power Authority* as follows:

"The obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public has long been clear. It is to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers. The great utility systems supplying power, telephone and transportation services now so familiar may be of relatively recent origin, but special obligations to supply service have been imposed from the very earliest days of the common law upon bodies in like cases, such as carriers, innkeepers, wharfingers and ferry operators".[77]

However, as Kaiser and Heggie highlight, the duty to serve is not limitless. Based on a decision taken by the Alberta Energy and Utilities Board[78] they state:

"Utilities have had provisions in their tariffs, terms and conditions, or franchise agreements that require customers to contribute to the cost of infrastructure extension. Policies vary depending on the jurisdiction and could differ depending on, for example, whether the proposed addition is an incremental extension or a replacement of existing infrastructure".[79]

These authors also quote Willie A. Grieve and Stanford L. Levin[80] to highlight that in restructured jurisdictions where competition has been introduced in some portions of the sector (e.g. Alberta's electric wholesale and retail sectors) regulators were faced with determining how to reconcile competitive principles with the obligation to serve. Regarding this point Kaiser and Heggie also quote various decisions of the Alberta Energy and Utility Board[81] to say:

"The obligation of a distribution utility in a restructured market is to provide distribution service that is reliable and safe. The obligation to serve electric energy has been replaced with a market mechanism where market prices will stimulate new generation plant additions. The system operator was also considered to have an obligation to provide system access service to those wishing to access transmission facilities. The obligation did not differentiate between load and supply customers, however, it was not considered firm".[82]

---

[76] Section 321, Railway Act, R.S.C. 1970, c. R-2; s. 27 (2), *Telecommunications Act,* S.C. 1993, c. 38.

[77] *Chastain v. British Columbia Hydro & Power Authority* (1972), 32 D.L.R. (3D) 443, 1972 CarswellBC 287 (B.C. S.C.) at 454 [D.L.R.].

[78] Alberta Energy and Utilities Board, Decision 2007-107.

[79] Kaiser and Heggie, supra at note 67at p. 183

[80] Grieve, Willie A. and Stanford L. Levin, "Common Carriers, Public Utilities and Competition", *Industrial and Corporate Change*, vol. 5(4) (Oxford University Press, 1996), quoted by Kaiser and Heggie, supra at note 67 at p. 183-184.

[81] Alberta Energy and Utilities Board, Decisions U97065, U99034, U99099 and 2000-1

[82] Kaiser and Heggie, supra at note 67 at p. 184

Kaiser and Heggie also explain that the duty to serve is deeply related to the prohibition against unjust discrimination. These authors quote the Alberta Supreme Court in the *Western General Electric Company* case as follows:

"…there is an implied obligation upon the franchise holder to render such services or supply such commodities on request and without unfair discrimination to every inhabitant who is ready and willing to pay in advance therefore, and whose place at which the obligation is required to be performed lies along the line of the franchise holder's operation, and to accord to the franchise holder all reasonable facilities to admit of the convenient performance of the obligation. That, in my opinion is the obligation in general terms".[83]

Kaiser and Heggie clarify that the principle against unjust discrimination is not restricted to rates; the monopoly utility cannot refuse access to essential facilities. They argue that this principle was formulated by the United States Supreme Court in the *Houston E. & W. Tex. Ry. Co. v. United States* case, which was reflected in a decision of the Ontario Energy Board regarding an application by the Cable Television Association, where power poles were considered essential facilities whose duplication was neither viable nor in the public interest.[84]

b. Unjust discrimination

Kaiser and Heggie explain that the common law principle against unjust discrimination has been enshrined in public utility statutes for decades, starting with section 321 of the *Railway Act* and section 27(2) of the *Telecommunications Act* which prohibited unjust discrimination or undue preference by railroads as well as telecommunication companies. Nowadays, they explain, most public utilities statutes in Canada contain similar provisions prohibiting unjust discrimination. However, these authors point out that the common law principle does not stand for no discrimination; the prohibition is against unjust discrimination or undue preference. In this respect they quote *St. Lawrence Rendering Co. v. Cornwall (City)* as follows:

"That a public utility was at common law compelled to treat all consumers alike, to charge one no more than the other and to supply the utility as a matter of duty and not as a result of a contract, seems clear".[85]

Kaiser and Heggie explain that the prohibition against unjust discrimination has often been used to ensure access to a monopoly utility's facilities. This principle was clearly applied in the *Challenge Communications* case[86] in response to Bell Canada's refusal to interconnect its mobile telephone system with the network. Challenge Communications was successful before the Canadian Radio-Television &

---

[83] *Red Deer (Town) v. Western General Electric Co.* (1910), 3 Alta L.R. 145, 1910 CarswellAlta 28 (Alta S.C.) [*Western General Electric Company*] at 152 [Alta L.R.].

[84] Ontario Energy Board, *Re Application pursuant to section 74 of the Ontario Energy Board Act, 1998 by the Canadian Cable Television Association for and Order or Orders to amend the licenses of electricity distributors* (March 7, 2005), OEB File No. RP-2003-0249. Quoted by Kaiser and Heggie, supra at note 67 at p. 183

[85] *St. Lawrence Rendering Co. v. Cornwall (City)* (1951), [1951] O.R. 669, 1951 CarswellOnt 74 (Ont. H.C.). Quoted by Kaiser and Heggie, op. cit. at p. 196

[86] *Challenge Communications Ltd. v. Bell Canada* (1978), [1979] 1 F.C. 857, 1978 CarswellNat 129 (Fed. C.A.); leave to appeal refused [1978] 2 S.C.R. v. [*Challenge*]

Telecommunications Commission (CRTC), and the decision was upheld by the Federal Court of Appeal. These authors highlight that the CRTC recently established a two-phase process to determine the existence of unjust discrimination. First, the Commission must determine whether the conduct in question is discriminatory. Second, it must then decide if the discrimination is unjust.[87]

c. Retroactivity

The Supreme Court of Canada recognized in *ATCO*[88] and numerous other earlier decisions,[89] that retroactive rate-making is improper. The general principle is that when a regulatory board establishes a final order setting rates, the rate is in effect until replaced either by an interim rate or a new final rate order in a subsequent proceeding. In *Northwestern Utilities Ltd. v. Edmonton (City)* the Court stated at para. 9:

"It is clear from the many provisions of the Gas Utilities Act that the board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods".[90]

As Kaiser and Heggie explain, rates are not to be made retroactive because the regulatory compact assumes that between hearings there will always be over-earnings or under-earnings, but the utility must accept the consequences. Rates are to be corrected at the time of the next hearing on a going-forward basis, allowing the utility to finance its operation on a predictable basis while providing finality to the proceeding.[91]

"The overriding responsibility of the Board is to set just and reasonable rates. That principle applies to the actual level of the rates as well as the time period during which the rates are in effect".[92]

According to Kaiser and Heggie, the retroactivity principle in public utility law is a rule based on two fundamental principles. The first principle is that a utility must be able to rely on decisions to have revenue certainty in order to plan investments. The second principle - also known as the intergenerational equity problem -, is that future customers should not pay for services consumed by past consumers.[93]

These authors highlight that the retroactivity principle has three qualifications. The first qualification was outlined in *Bell Canada v. Canadian Radio-Television & Telecommunications*

---

[87] See *Call-Net Enterprises Inc. – Request to lift restrictions on the retail digital subscriber line Internet service,* Decision 2003-49, at para. 60.

[88] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board),* 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140 (S.C.C.). [ATCO],

[89] *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (sub nom. Northwestern Utilities Ltd., Re) 1978 CarswellAlta 141, 1978 CarswellAlta 303 (S.C.C.); *Coseka Resources Ltd. v. Saratoga Processing Co.* (1980), 126 D.L.R. (3d) 705, 1980 CarswellAlta 136 (Alta C.A.); leave to appeal refused [1981] 2 S.C.R. vii (S.C.C.); *Dow Chemical Canada Inc. v. Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, 1982 CarswellOnt 753; affirmed (1983), 42 O.R. (2d) 731, 1983 CarswellOnt 785 (Ont. C.A.).

[90] *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (sub nom. Northwestern Utilities Ltd., Re) 1978 CarswellAlta 141, 1978 CarswellAlta 303 (S.C.C.)

[91] Kaiser and Heggie, supra at note 67 at p. 175-176

[92] Kaiser and Heggie, supra at note 67 at p. 177

[93] These two principles behind the retroactivity rule were set out by the Newfoundland Court of Appeal in *Newfoundland (Board of Commissioners of Public Utilities), Re* (1998), 1998 CarswellNfld 150, (sub nom. *Reference re s. 101 of the Public Utilities Act (Nfld.))* 164 Nfld.& P.E.I.R. 60, (sub nom. *Reference re s. 101 of the Public Utilities Act (Nfld.))* 507 A.P.R. 60 (Nfld. C.A.)

Commission[94] and establishes that where rates have been set on an interim basis only, the regulator may subsequently adjust the rates that commence at the date of the interim order. The second exception was stated in *Edmonton (City) v. Northwestern Utilities Ltd.*[95] and in *Dow Chemical Canada Inc. v. Union Gas Ltd.*[96], and provides that an energy board can establish deferral accounts, which allows the correct amount of costs to be captured when it is crystallized. Finally, the third qualification concerns billing errors, and was established in the *Brant County*[97] case.

d. The fair rate of return

This principle is related to utility profitability and the establishment of just and reasonable rates. Kaiser and Heggie state as follows:

"At both the federal and provincial level where private ownership policies were adopted, regulators were delegated authority to establish just and reasonable rates. This was achieved, at least historically, through cost-of-service regulation, which included a fair return on investment. In public ownership jurisdictions, regulators are charged with establishing just and reasonable rates except for the cost of the utility's capital including a return on equity. This is because most publicly owned utilities are financed by government guaranteed debt.

(…)

"Price regulation (whether cost-of-service or more market influenced models like incentive tolling or price caps) is used as a surrogate for competition and requires the determination of just and reasonable rates, including a fair return".

Kaiser and Heggie explain that no legislative guidance is provided as to what a regulator is to take into account in determining a fair return. However, United States and Canadian courts have listed factors that regulatory tribunals should consider for calculating a fair return. According to the courts in determining returns the following principles or standards should be considered:

(i) The comparable investment or earning principle: The return must be comparable to the return available in the market on an investment of similar risk.

(ii) The capital attraction principle: The return must be sufficient to attract new utility capital investment.

(iii) The financial integrity principle: The return must be sufficient to maintain the financial integrity of the utility.[98]

Neither legislation nor the courts prescribe methods to determine fair returns, so this matter is left to the regulators judgment. Kaiser and Heggie present the following methods as the most commonly used: Discounted cash flow; capital asset pricing model; equity risk premium; comparable earnings; and

---

[94] *Bell Canada v. Canadian Radio-Television & Telecommunications Commission,* [1989] 1 S.C.R. 1722, 1989 CarswellNat 586, 1989 CarswellNat 697 (S.C.C.)

[95] *Edmonton (City) v. Northwestern Utilities Ltd.* (No. 2), [1961] S.C.R. 392, 34 W.W.R. 600, 82 C.R.T.C. 129, 28 D.L.R. (2d) 125, 1961 CarswellAlta 25 (S.C.C.)

[96] *Dow Chemical Canada Inc. v. Union Gas Ltd.* (1983), 42 O.R. (2d) 731, 3 Admin. L.R. 314, 150 D.L.R. (3d) 267, 1983 CarswellOnt 785 (Ont. C.A.)

[97] Ontario Energy Board, *Re Brant Power Inc.,* OEB File No. EB-2009-0063 (August 10, 2010)

[98] Kaiser and Heggie, supra at note 67 at p. 188 quote the following cases: *Edmonton (City) v. Northwestern Utilities Ltd.* (1929), [1929] S.C.R. 186, 1929 CarswellAlta 114 (S.C.C.); *Bluefield Waterworks & Improvements Co. v. Public Service Commission of West Virginia* (1923), 262 U.S. 679 (U.S. W. Va.); *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U.S. 591 (U.S. Sup. Ct.); and *TransCanada Pipelines Ltd. v. Canada (National Energy Board),* 2004 FCA 149, 2004 CarswellNat 987, 2004 CarswellNat 2545 (F.C.A.).

after tax weighted average cost of capital (ATWACC).[99]These authors also explain that most Canadian regulators have adopted a formula or automatic adjustment approach to return awards based on long-term bonds, without a requirement for further regulatory process. However, this generic formulaic approach adopted by most Canadian regulators has come under considerable criticism by rate agencies and regulated utilities because they argue it is understating the required rate or return.[100]

Kaiser and Heggie highlight that an important point regarding the establishment of a fair return has to do with the consumers' interest. They show that in *TransCanada Pipelines Ltd. v. Canada (National Energy Board)*[101] the Court clarified that impact on customers is irrelevant in determining the required rate of return. Customer impact, however, is relevant for determining the ultimate toll customers pay. Agencies such as the NEB have confirmed that in determining a fair return, the customer and investor interests are not balanced. The fair return must be based solely on the basis of the utility's cost of equity capital and any resulting rate impact is irrelevant.[102]In 2009 the Alberta Utilities Commission also discontinued use of the automatic adjustment formula to set Alberta utility returns on equity.[103]

3. THE EUROPEAN CONCEPT OF SERVICES OF GENERAL INTEREST.

The notion of services of general interest is a creation of European Community Law that comes from the consideration that some services are essential for engagement in society. Traditionally, access to water, electricity and gas utilities, postal and telecommunications and public transport, were seen as universal rights. In the words of Peter Rott and Chris Willet:

"There has long been a general idea within different legal systems that certain facilities and services are of particular importance to the public, which means that the public has some special interest in these being available and easily accessible and possibly in other issues such as the affordability and quality of these services. Views as to which services fall into this category may differ from country to country; as will views as to the way in which those services regarded as falling into the category should be provided (private or public or some mix), the precise values thought to be important and the way in which these values should be guaranteed in law"[104].

The European Community (EC) has developed the theory of services of general interest, a concept that lies between the French concept of public service that was formerly considered to be the foundation of all public and administrative law[105], and the more market-based concept of public utilities that has its origin in the UK and was adopted by other common law countries such as the United States and Canada. The EC chose this term intentionally in order to avoid associations with the concept of

---

[99] Kaiser and Heggie, supra at note 67 at p. 189

[100] Kaiser and Heggie, supra at note 67 at p. 189-190

[101] *TransCanada Pipelines Ltd. v. Canada (National Energy Board),* 2004 FCA 149, 2004 CarswellNat 987, 2004 CarswellNat 2545 (F.C.A.)

[102] National Energy Board, RH-1-2008

[103] Alberta Utilities Commission, Decision 2009-216

[104] Peter Rott and Chris Willett, "Consumers and services of general interest", in Handbook of Research on International Consumer Law, (2010), page 295 [ROTT AND WILLETT]

[105] See Rodriguez, supra at note 11

service public (France), *servicio público (Spain)*, *servizzio pubblico (Italy)* or *Daseinsvorsorge (Germany)* that are used at the national level, but represent a variety of different concepts.[106]The omission of any reference to "public" also clarifies that is irrelevant whether the provider is a public entity or a private enterprise, avoiding any possible application of the subjective approach that prevailed in the early twentieth century.

Services of general interest are important in EC law partly because of certain aspects in their mode of delivery and partly because State support can raise competition law issues. These issues create a need for balance with the "general interest" nature of the services provided on. According to Rott and Willet, the EC approach involves a combination of (i) rules giving a degree of recognition to the general interest element in the application of competition law to State support for or provision of the service, and (ii) rules placing obligations on the State and on other providers, which are designed to protect consumers as market actors and also to enhance a broader agenda of universal service.[107]

With respect to consumers, a key question has to do with defining which services are considered to be of general interest. Generally speaking, there is no clear delineation between services that are of general interest and services that are not. Although Member States have always disagreed over this issue, there is consensus on that water supply and treatment services, waste collection, natural gas and electricity supply services, public telecommunication services, postal services, and transport services, are services of general interest. Other services recognized by the European Court of Justice as being "services or general interest" include a variety of TV programs, air transport on unattractive routes and mooring services for vessels in ports.[108]

Within the EC, a common definition of services of general interest is increasingly required, as a result of a movement towards more intensive regulation of other services.[109] In particular, Directive 2006/123/EC on services in the internal market[110] has introduced a number of rules that apply to services, but which explicitly exclude services of general interest. The need to distinguish between ordinary services and services of general interest suggests that the latter notion is no longer within the complete discretion of the Member State, but it is now a part of EC law. In broad terms, the result of this development is that public law principles related to the old concept of public service, such as the principles of objectivity, equality, proportionality, neutrality and the compulsory provision of services no

[106] See the EC Commission's Green Paper on Services of General Interest, COM (2003) 270 final.

[107] ROTT AND WILLET, supra at note 104 at p. 296

[108] EC Commission, Green Paper on Services of General Interest

[109] Regarding the requirement for more regulation in the European energy markets see Peter Cameron, "Aspectos actuales de la regulación energética Europea", Conference presented at VII Congreso Iberoamericano de Regulación: Energía, Minería, Petróleo, Gas y Otros Sectores Regulados, ASIER, Universidad Externado de Colombia, Bogotá, November 7, 2012. Also see, Antón Costas, "El paradigma de la liberalización", Conference presented at Master en Economía y Regulación de Servicios Públicos, Universidad de Barcelona, Barcelona, February 2004.

[110] OJ 2006, L376/36

longer apply automatically. The new approach is that these public law principles do not apply where there is an open market system and the rules of competition prevail. However, the problems of market failure and the universal service interests of users still call for the application of regulatory schemes to the supply of services of general interest. Thus, there is a continued recognition of the limits of competition rules in protecting consumers.

The notion of services of general interest thus recognizes that competition by itself is not enough. A number of consumer interests that relate, for example, to increasing prices of electricity and gas, delays in public transport services, inaccurate telephone bills and reduced postal services, show that competition is not a sufficient tool to discipline the market and its agents. Although many of these services are based on bilateral contracts, generally these agreements are created by the providers and imposed on all consumers. As a result, rules providing for more accountability on the part of the provider firms are constantly enacted on subjects such as the mandatory provision of information, default rules, and right to compensation. In addition, the EC's Commission's White Paper on services of general interest[111]establishes that access to affordable high-quality services of general interest is an essential component of European citizenship and necessary in order to allow citizens to fully enjoy their fundamental rights. Thus, by providing rules regarding the availability and access by consumers to such services, the European concept includes certain principles of public law that may be associated with the regulatory approach.

According to T. Prosser, the subject of public service is still present in many European countries legal traditions, and has important connections to the notion of public utilities. In particular, Prosser states that public service law *"is based on egalitarian rights derived from citizenship rather than an ability to bid in the marketplace"*.[112]Prosser considers that such an egalitarian approach is well-established in the French concept of "*service public"* or the Italian equivalent of "*servizzio publico",* as they provide a strong base for social regulation. The same can be said of the Spanish concept of "*servicio público"* that has been replicated in the vast majority of Latin American countries – including Colombia, which have embodied the principles of both the Spanish and French tradition.

However, as we describe in the following section, in Colombia, most of the activities considered public utilities by the common law, or services of general interest by EC law, pertain to a special category of *"servicio público"* known as *"servicios públicos domiciliarios"* (SPDs)*,* a unique concept that embodies many aspects of the common law notion of public utility while maintaining principles of the civil law notion of public service.

[111] European Commission, White Paper on Services of General Interest, COM (2004) 374, at p. 4

[112] T. Prosser, "Public Service Law: Privatization's Unexpected Offspring", (2000), Law and Contemporary Problems, 63/4, 6.

4. THE CONCEPT OF DOMICILIARY PUBLIC SERVICES

4.1. The Constitutional Framework

As previously mentioned, the Colombian Constitution of 1991 refers to a special kind of public services known as "*servicio público domiciliario*" or SPD.[113]Articles 365 to 370 of the Constitution establish the constitutional framework for the provision of SPDs as well as for their regulation and control. The Corte Constitucional has referred to the subject of SPDs in several occasions, particularly in appeal decisions regarding the constitutional protection of fundamental rights through *"tutela"* actions.[114] The most important remark of the Court is that it considers access to SPDs as part of the catalog of fundamental rights which are subject of special protection by the State throughout *"tutela"* actions. This special kind of action is preferential and subsidiary, meaning that it can be presented before any judge or court when fundamental rights of citizens are breached or threaten to be breached, but only when no other action or judicial remedy is available. Regarding SPDs, the Court has stated in several *"tutela"* decisions that they can be protected through this mechanism since they are deeply related to the fundamental rights of health and human dignity. As we will discuss further in chapter four of this thesis when we refer to consumer protection, the Court's jurisprudence has served the purpose of clarifying the constitutional mandate regarding SPDs, highlighting their deep relationship with the rights of citizens and the social ends of the State.

In one of its earliest tutela decisions[115]the Court determined that the provision of SPDs is a fundamental right when it is destined to satisfy a citizen's basic needs. The Court considered that article 367 of the Colombian Constitution created a special category of public services characterized by its relationship with the home and workplace. The Court applied a "finalistic" or purposive approach to determine the existence of SPDs and considered that their most relevant characteristics are that these services are rendered through a system of physical or human networks with connecting or "terminal" points to the homes or labor sites of end users and comply with the specific purpose of satisfying essential needs of people.

The Superintendence of Domiciliary Public Services (SSPD)[116] initially adopted the definition of SPDs given by Hugo Palacios. According to this author, SPDs are destined to satisfy the needs of individuals with respect to their home or workplaces, on a regular basis, and payment for these services

[113] Article 367 of the Colombian Constitution of 1991

[114] The Colombian Constitution of 1991 created a special type of action for the protection of constitutional fundamental rights known as "acción de tutela".

[115] Corte Constitucional, Decision T-578 of Nov. 3/ 1992.

[116] SSPD is an entity pertaining to the executive branch in charge of exerting control over public utilities and protecting consumers' rights.

is made through tariffs paid by the end user.[117]Palacios highlights that the *"domiciliary"* aspect gives these type of public service a new conception. He argues that SPDs are those linked to the notion of domicile understood in its civilian connotation of attribute of the personality. In that sense, the provision of SPDs contributes in an essential way to the substantial development of the personality of every inhabitant of the national territory. Palacios presents the following fundamental characteristics of SPDs:

a) The provision of the service depends on its physical coverage which the Constitution recognizes as limited and expandable.

b) SPDs are susceptible to objective quality and efficiency controls. For instance, the purity of water or the profitability of an operator can be measured.

c) SPDs can offer goods and services to the population through a tariff regime.

d) The tariff regime can be established by any entity established by the legislator. Therefore, they don't have a tributary nature.

e) SPDs can be rendered directly by municipalities with the support and coordination of the Departments.

f) Goods and services provided by SPDs can be used in different quantities, but the use or consumption of certain minimal quantities are indispensable to meet unsatisfied basic needs. Also, these goods and services have a massive and homogeneous nature.

g) SPDs can also be rendered by enterprises.

h) Goods and services provided by SPDs must be able to be rendered in the domicile, but not necessary be received there.[118]

Palacios – who was in charge of presenting a draft of the SPD Law to the Colombian Congress –, has stated that this special kind of public services have a more entrepreneurial and decentralized approach than the former traditional concept of *"servicio público"* which was rooted in the French notion discussed before. Palacios argues that privatization and competition in SPDs generates more efficiency in their provision, which in turn benefits consumers.[119]

However, following the jurisprudence of the Corte Constitucional and the Consejo de Estado, the SSPD has produced its own doctrine regarding SPDs. According to Sánchez et al[120]SPDs are the most authentic and concrete expression of the Colombian model of "*Estado Social de Derecho"* (Social State of Law).*[121]* First, because it is contained in a specific chapter of the Constitution devoted to the social ends of the State. Second, because article 365 of the Constitution clearly establishes that public services are inherent to the social ends of the State, which in turn are related to the supreme values of human

[117] Superintendencia de Servicios Públicos, "Actualidad Jurídica en Servicios Públicos", T. II, Bogotá, marzo de 1997, at p. 95.

[118] Hugo Palacios Mejía, "Los Servicios Públicos Domiciliarios en la Constitución", Concept prepared for the CREG, February 1, 1994

[119] See Hugo Palacios Mejía, "El derecho de los servicios públicos domiciliarios", Editorial Derecho Vigente, Bogotá, 1999 [PALACIOS]

[120] Guillermo Sánchez, Hugo Pacheco, Guillermo Obregón, Yesid Alvarado, "Del carácter singular del derecho de la competencia en los servicios públicos domiciliarios", in "Actualidad Jurídica", Tomo IV, at p. 120-145 [SSPD]

[121] The model of "Social State of Law" is a variation of the modern constitutional model of State of Law that gives more importance to the social goals of the State, and is one of the main aspects of the Colombian Constitution of 1991.

dignity,[122] a better quality of life, and the solution to the unsatisfied needs of the population.[123]According to SSPD's doctrine, under the conception of a Social State of Law, the end of the State's action is to create more fair and just conditions in order to guarantee human dignity.[124]About this matter, the Corte Constitucional has stated:

"The Social and Democratic State of Law has its foundation in the notion of public service".[125]

In other decisions the court has clarified that the social ends of the State are not mere promises but an express obligation:

"Public services are the mean by which the State complies with its essential ends".[126]

However, the SSPD also recognizes that the Colombian Constitution of 1991 created a new legal regime for SPDs which applies principles of free market and competition while maintaining two peculiar forms of State intervention, both in the control of the President: control and regulation.[127]According to the SSPD, the Constitution leaves behind the traditional notion of public services that equates them to public functions and creates a new concept based on a model of *"competitive public services"* where free market and government intervention coexist.[128]Under this new model, the State becomes a regulator instead of a monopolistic provider, and regulation and control is exerted for the benefit of the market and the individuals.[129]The SSPD also highlights that article 365 of the Constitution includes efficiency as part of the new model of public services. The SSPD quotes Alfonso Miranda to say:

"The legal value protected by competition in public services is the provision of efficient and quality services, either by a monopolistic firm or by competitors, without the abuse of market power".[130]

In previous academic work,[131] I have defended a thesis similar to the jurisprudence of the Corte Constitucional and the new doctrinal approach of the SSPD. Notwithstanding the efficiency principle that is present in SPDs, the need for government intervention is proof that the public interest is always present in them. Regulation and control are instruments of State intervention which are fundamental for the compliance of the social ends of the State expressly contemplated in article 365 of the Colombian

---

[122] The Corte Constitucional has stated in numerous occasions that human dignity is a supreme legal value stated throughout the entire Constitution. See Decisions T-002/1992, C-004/1992, T-406/1992, T-411/1992, T-426/1992, T-462/1992, T-505/1992, T-571/1992, C-543/1992, C-556/1992, and C-561/1992.

[123] Article 366 of the Colombian Constitution of 1991.

[124] Corte Constitucional, Decision T-540/1992.

[125] Corte Constitucional, Decision T-563/1994.

[126] Corte Constitucional, Decisions T-540/1992 and T-380/1994.

[127] SSPD, supra at note 120, at pages 123 and 124.

[128] The SSPD follows the definition of "competitive public services" given by Spanish author Gaspar Ariño in "El Nuevo servicio público", Editorial Marcial Pons, Universidad Autónoma de Madrid, Programa de estudios de regulación económica – P.E.R.E., Madrid, 1997, at p. 24

[129] Jorge Muratorio, "La regulación constitucional de los servicios públicos en la reforma de 1994" in VVAA Estudios sobre la reforma constitucional, Editorial Depalma, Buenos Aires, 1995, at p. 112.

[130] SSPD, supra at note 120, at p. 126

[131] PANDO, supra at note 27

Constitution which establishes the *"Public services are inherent to the social ends of the State. It is the duty of the State to guarantee their efficient provision to all the inhabitants of the national territory".*[132]

Therefore, the Constitutional mandate clearly establishes that all public services, including SPDs, are considered part of the fundamental social ends of the State. They are inherent to the concept of Social State of Law that characterizes Colombia as a nation. However, the inclusion of the word "efficient", together with other constitutional rules such as the promotion of free market and free competition contained in article 333 of the Colombian Constitution, has created the false assumption that SPDs are not public services in the traditional sense. Such an interpretation does not recognize the general criteria of public interest and the satisfaction of basic needs which applies to **all** types of public services, including SPDs.[133]The Corte Constitucional has interpreted articles 365 to 370 of the Colombian Constitution to establish the following principles of SPDs in a manner consistent with this interpretation:

- Private law regime for the operation and management of the service, and for the rules regarding contracts and incorporation.

- Public law regime for anything related with the social ends of the State such as the regular and efficient provision of public services to all inhabitants, general welfare and better quality of life of the population, priority of social public expenditure, public functions of surveillance, control and regulation of the service, as well as for the special protection of consumers and their relationship with SPD operators.

- Solidarity, which derives from the conception of Colombia as Social State of Law.

- Universal service, which means a service of quality available for every person at reasonable and affordable prices.

- Proportionality, which means that the consumers' capacity to pay for the service must be consulted, which in turns allows for the establishment of subsidies.

- Equality, which must be real and effective.[134]

In conclusion, the new concept of SPDs differs from the traditional conception of public service based on the French administrative law notion and brings it closer to the more recent Anglo-Saxon and common law notion of public utilities. Under this new conception, the rules of the market and private law are more likely to apply to these activities instead of the traditional rules of administrative law and public finance. However, many of the principles and obligations pertaining to the traditional concept of public service still remain, which makes it impossible to fully identify SPDs with public utilities.

4.2. The legal framework

[132] Article 365 of the Colombian Constitution of 1991. Translation of the author.

[133] PANDO supra at note 27

[134] See Corte Constitucional, Decision C-043/1998

The Colombian Constitution gave an express mandate to the Congress ordering the promulgation of a law containing the basic regime of SPDs in Colombia. Following this mandate, the Colombian Congress passed Law 142 of 1994 better known as SPD Law. This law, together with further modifications[135], contains the legal framework of SPDs. Law 142 of 1994 expressly defines which activities are considered SPDs (article 1), and states that they are considered *"essential public services"* (article 4).[136]The consideration of a public service as *"essential"* has been defined by the Corte Constitucional in several decisions.[137] In Decision C-450 of 1995 the Court stated that this characteristic applies to activities that contribute, in a direct and concrete way, to the protection of goods, or the satisfaction of interests, or the realization of values, which are linked to the respect, validity, exercise and effectiveness of the fundamental rights and freedoms. This is due to the preeminence granted to the fundamental rights of people and the guarantees created for their defense. In the Court's view, the essential nature of a public service is determined considering the material content of a particular activity, that is, whether the activity is a necessary mean for the exercise or protection of a fundamental right.[138]

Article 2 of the SPD Law establishes that the State will intervene in SPDs according to the rules of competition contained in the law and subject to the framework determined by articles 334, 336, and 365 to 370 of the Colombian Constitution. The ends of State intervention in SPDs are:

- To guarantee the quality of the goods provided by SPDs and their final disposal.
- The permanent extension of coverage through systems that accommodate the inability of some consumers to pay for services.
- To give priority to unsatisfied basic needs of potable water and waste.
- To ensure the regular and uninterrupted provision of the service, also known as the "guarantee of supply" obligation.[139]
- To ensure the efficient provision of the service.
- To maintain free competition and prevent the abuse of dominance.
- To obtain economies of scale.
- To establish mechanisms that guarantee consumers' access to services and their participation in the operation and control of the service.
- To establish a proportional tariff regime for low income population in accordance with the principles of solidarity and equality.

[135] In particular Law 689 of 2001

[136] Also Article 14 of Law 142 of 1994

[137] See Corte Constitucional, Decisions C-473/1994, C-521/1994, C-450/1995, C-075/1997, C-663/2000, C-691/2008 and C-122/2012

[138] Corte Constitucional, Decision C-450/1995

[139] The guarantee of supply obligation is similar to the duty to serve principle of public utilities law

The SPD Law refers to a variety of instruments of State intervention including the promotion and support of SPD providers, incentives for investments by the private sector, organization of information systems, protection against unjust or unfair discrimination, and subsidies for the low income population. However, the most important instruments are regulation, surveillance and control of SPDs throughout all powers and functions of government authorities.[140]The SPD Law also contains a freedom of enterprise principle according to which every person has the right to organize and operate companies for the provision of SPDs. Together with this principle, the law establishes a *"social function"* of property used for the provision of SPDs which entail the following obligations for the operators:

- Assure the regular and efficient provision of the service, without abuse of dominance before consumers or third parties.
- Refrain from entering into monopolistic or anticompetitive practices.
- Facilitate low income consumers access to subsidies.
- Inform consumers about the efficient and safe use of the service.
- Comply with an ecological function by protecting the environment.
- Facilitate access and interconnection to other operators or great customers.
- Collaborate with the authorities in emergencies or public calamities.
- Inform the SSPD and the regulatory commissions about the start of operations.
- SPD operators are liable in torts for damages caused to their customers.

The SPD Law determines who can provide SPDs and establishes special corporate and tax rules for SPD operators. All SPD operators must organize as a corporation and include the letters "E.S.P." in their corporate name. They must have as a corporate purpose the provision of one or more SPDs or related activities. The regulatory commission may order an SPD operator to have an exclusive purpose if it considers that multiple corporate purposes may affect competition or does not produce economies of scale. SPD operators may operate in any geographic location and do not require authorization to develop their subject matter but must obtain all licenses and permits required by municipalities in order to operate. SPDs have a right of way to install networks in roads, bridges and other public use lands. They have the right to build, operate and modify networks subject to the compliance with technical rules. Regarding acts and contracts of SPD operators, the general rule is that they are governed by private law and the rules of free competition. However, the regulatory commissions may establish special contractual rules. Article 34 of the SPD Law expressly prohibits discriminatory or abusive practices such as predatory tariffs, collusion, unfair competition and abuse of contractual dominant position.

[140] Article 3 of Law 142 of 1994

With respect to consumers, the SPD Law establishes the rights of consumers and prohibits regulatory commissions from undermining them. These consumer rights include the right to adequate measurement, to have free choice of supplier, to obtain goods and services of a higher quality, and to request and obtain complete, precise and timely information regarding the provision of the service. The SPD Law also refers to a special type of agreement known as the SPD contract, which has uniform conditions set out by the SPD operator for all of its end users and that must be previously assessed and authorized by the regulatory commission. This uniform agreement governs the relationship between the SPD operator and the individual consumer, and is subject to the provisions contained in the SPD Law and to the special rules dictated by the regulatory commission. Notwithstanding the private law framework that applies to most of the acts and contracts of SPDs, regarding consumers, the SPD Law established an administrative law regime for claims and appeals filed by consumers before the SPD operator or the SSPD.[141]

CONCLUSION

As demonstrated by the development of new approaches to public services such as the European concept of service of general interest, public law principles related to the old concept of public service no longer apply automatically, particularly where there is an open market system and the rules of competition prevail. However, the problems of market failure and the universal service interests of consumers still call for the application of regulatory schemes to the supply of services of general interest, thus recognizing the limits of competition rules in protecting consumers. As a result, rules providing for more accountability on the part of the provider firms are constantly enacted on subjects such as the mandatory provision of information, default rules, and right to compensation. In addition, the European approach establishes that access to services of general interest is an essential component of European citizenship and necessary in order to allow citizens to fully enjoy their fundamental rights. As highlighted by Prosser, the subject of public service is still present in many European countries legal traditions, and has important connections to the notion of public utilities. In particular, public service law is based on egalitarian rights derived from citizenship rather than an ability to bid in the marketplace. Such an egalitarian approach is well-established in the French concept of "*service public"* and the Spanish concept of "*servicio público"* that has been replicated in the vast majority of Latin American countries – including Colombia, as it provides a strong base for social regulation.

In Colombia, the constitutional rules regarding SPDs refer to the social ends of the State and expressly determine the role of the State in their provision, surveillance, control and regulation. These rules also include principles regarding tariffs and subsidies, and the goal of satisfaction of unsatisfied basic needs of the population. The Colombian SPD Law seems to lean towards a more market-oriented

[141] The issue of consumer protection in SPDs will be discussed thoroughly in chapter 4.

approach, trying to put principles of economic efficiency above other principles of social nature such as solidarity and income redistribution, universal service, proportionality and equality. This explains in part why many authors consider that SPDs have departed from the traditional notion of public services to resemble foreign notions such as the Anglo-Saxon concept of public utilities or the European concept of services of general interest. According to some authors, to obtain efficiency the Colombian SPD Law focuses in the promotion of competition. That's why, they argue, the law establishes a regulatory and control system over situations of monopoly or abuse of dominance. Competition is seen not only as a benefit for operators but also for consumers who will have access to services at lower prices. Under this view, allocative efficiency and competition guarantee that resources are put to the best use for the benefit of the community.[142]However, according to the constitutional mandate the State must guarantee the regular and efficient provision of SPDs to all inhabitants without regard of their location and socio-economic condition, looking that their provision is consistent with its social end, and that consumers actively participate in their control and regulation.

Notwithstanding the clarity of the constitutional mandate, some authors, such as Palacios and Betancur, argue that the SPD law has an orientation that resembles the provision of goods and services in the market. However, if the intention of the Colombian Constitution of 1991 was to merely create a free market regime for SPDs that only promoted economic efficiency and competition, then the vast majority of consumers would have been affected because of the logic of profit maximization of private operators and the economic phenomenon of cream-skimming. In particular, the logic of efficiency would make unprofitable the provision of SPDs to low income consumers or to those located in distant and poor geographic populations. Clearly, this situation is precisely what the Constitution wants to prevent. Indeed, the constitutional mandate establishes limits to the efficiency principle, particularly by introducing the principles of solidarity and distributional justice. Efficiency is paired with the social ends of the State and the duty to provide the service to all inhabitants of the national territory. These two elements of the constitutional mandate categorically maintain the public nature of these services. The State has the duty to guarantee the regular provision of public and basic services in reasonable conditions of price and quality to all citizens. The SPD law seems to ignore the need to control and monitor the possible conflicts between the social ends of the State and the goal of profit that drives the action of the private operators. This is of particular importance after the privatization process, because foreign investors have obtained control over the operation of the most important SPD companies, and they base their profitability on standards set by the international financial markets. This creates a constant risk of the possible flight of foreign capital, which the regulators must control.[143]

[142] Palacios, supra at note 119, at p. 44

[143] Alexander, I et al, op. cit., ch. II

From the administrative law perspective, we have shown that all public services, must, above all, satisfy a collective need in the public interest. This element also applies to SPDs because it cannot be argued that these services can exist only to satisfy private and individual needs. The argument that aligns SPDs with private goods and services ruled by market forces that renounce to the public interest is therefore unacceptable. Administrative law also states that all public services require, in addition to the public interest element, some degree of participation by the Administration. Regarding SPDs the Colombian Constitution of 1991 clearly states that this participation can be direct (the State directly renders the service) or indirect (the State doesn't render the service but exerts surveillance, control and regulation over it).

In the public finance law perspective and the public needs system, SPDs are considered second degree public services. Thus, a relative non-exclusion criterion applies to them, which means that an individual not willing to pay for the service may be excluded from its provision or the service interrupted. However, as the Corte Constitucional has clearly stated, the constitutional mandate regarding SPDs includes the establishment of subsidies that cover the cost of service for low income population, as it is clearly established in articles 365 to 370 of the Constitution. The argument that puts efficiency above other principles has created opposition against subsidies in SPDs because of their alleged inefficiency.[144]However, as we have clearly demonstrated, as part of its social ends, the State must give priority to social public expenditure in order to satisfy basic needs of the population, and apply, together with the efficiency principle, the public service principles of solidarity and income redistribution, universal service, proportionality and equality.

The comparative analysis that we conducted has shown similarities and differences between public services and public utilities. In first place, public utilities law and regulation is based on the regulatory compact and has elements of public interest and applies principles that are similar to those applicable to SPDs such as the duty to serve, unjust discrimination, the provision of adequate services at just and reasonable rates, and the balance between interests of the utilities and consumers. In the second place, the assimilation of SPDs and public utilities with private goods and services in the market is wrong because of the particular characteristics of these industries. They involve a supply chain, portions of which are considered natural monopolies where competition is not always possible or even desirable. They are tied with specific social ends attached to the consumers because they relate to the most fundamental basic needs, all of which are considerations of public interest. Finally, both the civil law notion of SPDs and the common law notion of public utilities recognize that these services are subject to regulation. As we will demonstrate in the following chapter, regulation has become the most important form of government intervention in these industries, justified not only in economic considerations such as

[144]See Hugo Palacios Mejía, "La suspensión de servicios públicos en caso de incumplimiento de los pagos" in Superintendencia de Servicios Públicos, "Actualidad Jurídica en Servicios Públicos", T. II, Bogotá, marzo de 1997

the existence of market failures or the promotion of competition, but also in legal, social and non-economic considerations such as the protection of consumers, which is fundamentally justified in the public interest.

CHAPTER TWO

REGULATION OF PUBLIC UTILITIES AND SPDS

INTRODUCTION

Having reviewed and compared the concepts of SPDs and public utilities, we have established that a common feature is that they are both subject to regulation. Now we need to determine whether regulation of SPDs and public utilities is based on the public interest or the private interest. Our goal is to demonstrate that regulation of public utilities and SPDs is based on considerations of public interest, even though some aspects of the private interest theory are relevant, such as those regarding capture of regulators. For that purpose, in this chapter we will start by discussing the different theories of regulation, mainly the public interest theory and the private interest theory. We will also present the main alternatives and criticisms of these theories, which mainly come from the works of George J. Stigler and the economic school of Public Choice - with James Buchanan and Gordon Tullock as principal exponents, and from the works of one of the most influential scholars in the field of Law and Economics, Richard A. Posner.

We will show that most criticisms of the public interest theory come from the assumption that regulation may be responding both to private interests and to the self-interest of regulators. Under this assumption regulators may be easily "captured" to favor private interests or they may be acting selfishly to secure their positions in the agency. Therefore critics ask whether regulators are protecting or acting on behalf of the public interest. Critics also focus on the concept of public interest and the way it is determined. They consider that it is impossible to establish the so called "Spirit of the Law", to justify the ends and goals of a particular law or regulation. Finally, some critics rely on political science and economic doctrines that call for less intervention by the State, or even an absence of intervention, because they consider market forces and competition to be more efficient in regulating the interaction between agents. These critics consider government regulation inefficient because of the high transaction costs involved in regulatory activity, such as maintaining government agencies and bureaucracy that are generally funded with taxes and other fees paid by the public.

After a thorough analysis of regulation of both public utilities and SPDs, our goal is to demonstrate that regarding residential and small commercial consumers, regulation ensures they have access to a public good or an essential service, which is a consideration related to the public interest. Also, that most of the critics of the public interest theory of regulation have been challenged by the evolution of regulatory and administrative law, and also by crucial decisions of the higher courts which have defined the scope and limits of regulatory activity. Regulatory agencies work not only under the control of the judiciary but are subject to all kinds of legislated rules concerning proceedings, evidence, accountability, etc. After this review of the theories of regulation and their application to public utilities and SPDs, we will present our main conclusions: (i) that regulation of both public utilities and SPDs is either

present to protect the market and promote competition or it looks to protect consumers from abusive practices or breaches of the service standards by utilities, and these two goals provide the justification for regulation based on the public interest; and (ii) that regulation should be assessed based on the particular features of regulatory proceedings and the advancements of regulatory law and policy, and not only on economic efficiency considerations.

1. THE CONCEPT AND THEORIES OF REGULATION

As explained by Anthony Ogus, the term "regulation" is used in both legal and non-legal contexts and has a variety of meanings.[145]Ogus seems to rely on the definition of regulation provided by P. Selznick: a "sustained and focused control exercised by a public agency over activities that are valued by a community".[146] In Ogus' view, regulation is a political-economic concept that can best be understood by reference to the different systems of economic organization and the legal forms which maintain them. Under the **market system**, individuals and groups are left free to pursue their own welfare goals, subject only to certain basic restraints. Private law is sufficient to underpin arrangements and regulation has no significant role. Under the **collectivist system**, the State seeks to direct or encourage behavior that would not occur without intervention. The market fails to meet collective or public interest goals and therefore intervention aims to correct the perceived failures of the market system.[147] According to Ogus, regulation is therefore associated with the collectivist system and operates in a legal framework that differs from the market system. Indeed, Ogus concludes as follows:

"First, regulation contains the idea of control by a superior; it has a directive function. To achieve the desired ends, individuals are compelled by a superior authority – the state – to behave in particular ways with the threat of sanctions if they do not comply. Secondly, it is public law in the sense that in general it is for the state (or its agents) to enforce the obligations which cannot be overreached by private agreement between the parties concerned. Thirdly, because the state plays a fundamental role in the formulation, as well as the enforcement, of the law, it is typically centralized."[148]

However, Ogus recognizes that regulation is not always directive, public, and centralized, and that in some industries it is formulated and enforced by independent regulatory bodies rather than a public body such as a ministerial office. Also private law instruments such as franchise contracts are commonly used by regulators. Regarding the theories of regulation, Ogus explains that the **public interest theory** attributes to legislators and regulators a natural desire to pursue collective goals. The problem, Ogus states, is that it is extremely difficult to identify the public goals of the law, and the extent

[145] Anthony Ogus, "Regulation. Legal Form and Economic Theory", Clarendon Express, Oxford 1994) [OGUS]

[146] P. Selznick, "Focusing Organizational Research on Regulation" in R. Noll (ed.), Regulatory Policy and the Social Sciences (1985), p. 363, quoted by Anthony Ogus, at p. 1

[147] Ogus, supra at note 145 p. 1-2

[148] Ibid

to which it might have been inspired by private motives. In opposition to this theory, the **private interest theory** argues that regulation typically benefits particular groups. This theory is fundamentally based on the famous article produced by the economist George J. Stigler[149] that explains how interest groups have the incentive to "capture" the regulator in order to assure for them the benefits of regulation.

Following Ogus, it may be helpful to consider separately the main forms of regulation: **social regulation**, which deals with such matters as health and safety, environmental protection and consumer protection, and tends to be justified by reference to market failures such as externalities and asymmetric information; and **economic regulation**, which is invoked where there is insufficient competition, particularly in cases of natural monopoly and the existence of networks and essential infrastructure.[150]

Another author who refers to the theoretical context of regulation is Professor Barry Barton.[151]. By following the definition of regulation made by Julia Black[152], Barton looks to establish the meaning of regulation and who should regulate. He concludes:

"Regulation is a process intended to alter activity or behaviour or to carry out an ordering, often by restricting behaviour, but at times enabling or facilitating behaviour that would otherwise not be possible".[153]

According to Barton, regulation is "systematic and intentional" as well as "goal-oriented" and "institutionalized". It involves "discretionary judgment" in making rules, in deciding cases, and in enforcement. He also argues that regulation often targets "economic activity" by bringing markets into existence and maintaining them. Finally, Barton states that regulation is in the "public sphere", but is not only carried out by the state or by public agencies. Barton highlights that regulation includes self-regulation and participation of different stakeholders such as industry and consumers.[154]

One of the main aspects considered by Barton has to do with the justification and criticism of regulation. Following Baldwin and Cave[155]he instructs us about the public interest theories (democratic rationale), interest group theories (pluralist or corporatist explanation), private interest theories (public choice), force of ideas explanations, and institutional theories that focus more on institutional arrangements, rules, and systems rather than individuals.[156]

---

[149] George Stigler, "The Theory of Economic Regulation" (1971) 2 Bell J of Econ 3; [STIGLER]

[150] Ogus, supra at note 145 at p. 4-5.

[151] Barry Barton, "The Theoretical Context of Regulation" in "Regulating Energy and Natural Resources" eds. Barry Barton et al, (Oxford University Press: New York, 2006) [BARTON]

[152] J. Black, "Critical Reflections on Regulation" (2002) 27 Aust J Leg Phil 1, cited by Barton, supra at note 151 at p. 13

[153] Barton, supra at note 151 at p. 18

[154] Ibid at p 14

[155] R. Baldwin and M. Cave, "Understanding Regulation: Theory, Structure and Practice" (Oxford: Oxford University Press, 1999), cited by Barton, supra at note 151 at p. 15 to 18

[156] Barton, supra at note 151 at p 16

For the purpose of this thesis, I will focus on the two main justifications for regulation as explained by both Ogus and Barton: (i) the public interest, which will be discussed together with opposed theories - such as the capture theory or the economic theory of regulation, and its main critics - such as the public choice school and Posner; and (ii) market failure, which will focus mainly on natural monopolies, which provide the most common justification for regulation.

1.1. The Public Interest

According to Richard A. Posner, one of the most influential scholars on the field of law and economics, government intervention in the market or what he calls "economic regulation", refers to taxes and subsidies of all sorts as well as to explicit legislative and administrative controls over rates, entry, and other facets of economic activity. In Posner's view the public interest theory holds that regulation is imposed in response to the demand of the public for the correction of inefficient or inequitable market practices. In contrast, the "capture" theory holds that regulation is supplied in response to the demands of interest groups struggling among themselves to maximize the incomes of their members.[157]

Posner alleges that government intervention in general, and regulatory agencies in particular, will not fare better in the event of the competitive market failure. Further, Posner suggests that the detriments of a natural monopoly are exaggerated and that regulation has an adverse social and economic impact.[158]In his analysis, Posner criticizes both the public interest theory and the more refined version of the "interest group" or "capture" theory. Posner concludes:

"Neither theory can be said to have, as yet, substantial empirical support. Indeed, neither theory has been refined to the point where it can generate hypothesis sufficiently precise to be verified empirically. However, the success of economic theory in illuminating other areas of nonmarket behavior leads one to be somewhat optimistic that the economic theory will eventually jell: the general assumption of economics that human behavior can best be understood as the response of rational self-interested beings to their environment must have extensive application to the political process".[159]

Posner points out that a serious problem with any version of the public interest theory is that the theory contains no linkage as to what legislative policies or arrangements would maximize public welfare and how the public interest is translated into legislative action. Posner refers to Stigler's economic theory of regulation. Stigler is very critical of State intervention and cautious of its true intentions and beneficiaries, when it asserts:

---

[157] Richard A. Posner, "Theories of Economic regulation", in "The Economics of Public Law. The Collected Economic Essays of Richard A. Posner, Volume Three", edited by Francesco Parisi, Economists of the Twentieth Century, Edward Elgar Publishing Limited, 2001, at page 218.[POSNER]

[158] R.A. Posner, "Natural Monopoly and Its Regulation", (1969), 21 Stan. L. Rev. 548 at 635-636

[159] POSNER, supra note 157, at page 239.

"The state – the machinery and power of the state – is a potential resource or threat to every industry in the society. With its power to prohibit or compel, to take or give money the state can and does selectively help or hurt a vast number of industries" [160]

Posner considers the economic theory of regulation a refined version of the capture theory. According to Posner, the theory states that the coercive power of government can be used to give valuable benefits to particular individuals or groups; economic regulation - the expression of that power in the economic sphere - can be viewed as a product whose allocation is governed by laws of supply and demand. Viewing regulation as a product allocated by the principles of demand and supply, directs attention to the factors bearing on the cost of obtaining regulation to particular individuals or groups since, other things being equal, we can expect a product to be supplied to those who value it the most. It also directs our attention to the factors bearing on the cost of obtaining regulation.[161]

According to Posner, the essential deficiency of the economic theory of regulation is that, at best, it provides a list of criteria relevant to predicting whether an industry will obtain favorable legislation. It is not a coherent theory yielding unambiguous and therefore testable hypotheses. Another sort of weakness is that the theory, pushed to its logical extreme, becomes rather incredible, because it excludes the possibility that a society concerned with the ability of interest groups to manipulate the political process in their favor might establish institutions that enabled genuine interest considerations to influence the formation of policy. In this respect, Posner highlights the fundamental role of the courts, as well as many features of law and public policy designed to maintain a market system.[162]

Posner argues that typical regulatory agencies operate with reasonable efficiency to attain deliberately inefficient or inequitable goals set by the legislature that created them. He submits that no persuasive theory has yet been proposed as to why agencies should be expected to be less efficient than other organizations. Posner goes beyond the evidence traditionally adduced to show that regulatory agencies are inefficient and notes some general features of the regulatory process that suggest it is well designed to achieve the ends posited by the economic theory of regulation. One of these features is delegation of regulatory authority by legislatures. The legislative branch delegates much of the regulatory function either to the courts or to administrative agencies. In the area of economic regulation the legislative choice has generally been the administrative agency rather than the court. Posner states that lawyers defend this choice on the ground that the public interest purposes assumed to lie behind the legislation can be achieved more efficiently due to the agency's specialization and its independence from political control. In Posner's view, the first reason seems specious. He states that courts have long

---

[160] Stigler, G. J. "The Theory of Economic Regulation", quoted by POSNER ibid.

[161] Stigler has suggested that the role of the "outsider" (e.g. the consumer) is greater in the public regulation than in the private cartelization. See STIGLER, at p 16. In this respect, Posner states that is not clear why a cohesive group of customers would not be equally effective in exacting concessions from a private cartel.

[162] The role of legal institutions in supporting the market system is a major role in Posner, "Economic Analysis of Law". New York. Little, Brown and Co.,1973

handled highly complex economic questions, such as those which arise in antitrust cases, no less efficiently (or more inefficiently) than the agencies.[163]The second reason is illogical, he purports. Posner notes that the choice is not between agency and direct legislative regulation, but between agency and court, and he argues that the courts are more insulated from political control than the agencies.

"The terminal character of many judicial appointments, the general jurisdiction of most courts, the procedural characteristics of the judicial process, and the freedom of judges from close annual supervision by appropriations committees, all operate to make them freer from the interest group pressures operating through the legislative process, and more disposed to decide issues of policy on grounds of efficiency, than any other institution of government – specifically the administrative agency, where this features are absent or attenuated".[164]

Based on empirical evidence, Posner states that there are a fair number of case studies - of trucking, airlines, railroads and many other industries – that support the view that economic regulation is better explained as a product supplied to interest groups than as an expression of the social interest in efficiency and justice. Posner also states that evidence concerning the procedures employed in the regulatory process provide additional support for the economic interest group approach. A corollary of the economic theory of regulation is that the regulatory process can be expected to operate with reasonable efficiency to achieve its ends. The ends are the products of a struggle between interest groups.[165]

Even though Posner presents important arguments in defense of the economic theory of regulation, and seems to question the validity of the public interest theory, he recognizes that the empirical evidence does not show that all regulatory agencies are inefficient and subject to capture by interest groups. He also accepts that the legislative action regarding regulation may be founded in common interests such as the provision of basic services or the protection of consumers and therefore somehow justified on considerations of public interest. The main point that Posner highlights is the lack of effective independence of regulatory agencies from political and economic control, making them subject to some form of capture or influence by interest groups. In this respect he argues that courts are more independent and insulated from external influence, and have better capacity to comply with the regulatory mandate.

---

[163] For more evidence see Richard A. Posner, "Oligopoly and the Antitrust Laws: A Suggested Approach" Stanford Law Review, Vol. 21, (June 1969), pp 1562-1527)

[164] See Posner "Economic Analysis of Law", supra at note 162.

[165] In Posner's article "Taxation by regulation" he presents some additional evidence of the influence of the interests groups pressures on the structure and procedures (as distinct of the substantive outcomes) of the regulatory process. The article suggests that a number of standard features of public utility and common carrier regulation, including controls over construction of new plant and over abandonment of service, the duty of the common carrier to serve all comers, and the tendency to impose public utility and common carrier controls on industries that sell services rather than goods, are best explained on the theory that regulation is designed in significant part to confer benefits on politically effective customer groups. Much regulation, Posner argues, may be the product of coalitions between the regulated industry and customer groups, the former obtaining some monopoly profits from regulation, the latter obtaining lower prices (or better service) than they would in an unregulated market – all at the expense of unorganized, mostly consumer, groups. See Richard A. Posner, "Taxation by regulation", The Bell Journal of Economics and Management Science Vol.2, No. 1 (Spring 1971), pp 22-50.

A more benevolent view of regulation is presented by Steven Croley in his book "Regulation and Public Interests".[166] Croley analyzes regulation from the legal point of view, particularly from the perspective of administrative law which governs regulatory agencies in the performance of their functions. Throughout his legal assessment of regulation Croley opposes the principal critics of regulatory government. These critics, he argues, are typically economists who eagerly follow the public choice theory[167]and do not have a proper knowledge of the complex rules and legal-procedural mechanisms by which regulatory agencies produce authoritative regulatory decisions. By reviewing the arguments of the principal critics of the public interest theory of regulation, and by highlighting what he calls "the cynical view of regulation", Croley presents his central argument: that their view is narrow and wrong because it gives far too little attention to the actual processes through which administrative bodies regulate. In his opinion such inattention "is largely responsible for the dominant, jaundiced view of regulation".

Croley highlights that one common failure arises from the erroneous view that the public interest and the public choice theories are similar. Essentially public choice theory assumes that people are guided chiefly by their own self-interest, and therefore it is the opposite of the public interest theory. The public choice is more of a "private interest" theory because it considers that regulatory systems are seen to be dominated by prevalent private interests which subvert regulation to their private ends.[168]The use of the term "public choice" ends up being misleading because it tends to suggest choices made for the interest of the general public, when in fact, "public choice" analyzes mainly the pursuit and exercise of individual and private interests as means to maximize general welfare.[169]

As James Buchanan defined it, public choice is *"politics without romance"*. The wishful thinking it displaced presumes that participants in the political sphere aspire to promote the common good. In the conventional "public interest" view, public officials are portrayed as benevolent "public servants" who faithfully carry out the "will of the people". In tending to the public's business, voters, politicians, and policymakers are supposed somehow to rise above their own parochial concerns.[170]Some authors pertaining to the public choice, like the economic model of rational behavior on which it rests, assume that people are guided chiefly by their own self-interests and, more important, that the motivations of people in

---

[166] Steven P. Croley "*Regulation and Public Interests. The Possibility of Good Regulatory Government"* (Princeton University Press, 2008) at p. 4. [CROLEY]

[167] Public choice originated as a distinctive field of specialization a half century ago in the works of its founding fathers, Kenneth Arrow, Duncan Black, James Buchanan, Gordon Tullock, Anthony Downs, William Niskanen, Mancur Olson, and William Riker.

[168] George Stigler, Sam Peltzman, Gary Becker, and others used the same reasoning of the public choice theory to model the decisions of regulatory agencies as being influenced by special-interest groups' relative effectiveness in applying political pressure.

[169]Feintuck, op. cit., page 8

[170] Gordon Tullock, "From the New Palgrave Dictionary of Economics", Second Edition, 2008. Edited by Steven N. Durlauf and Lawrence E. Blume. Alternate versions available: 1987 Edition.
Online:http://www.dictionaryofeconomics.com/article?id=pde2008_P000240&q=rational%20choice&topicid=&result_number=10

the political process are no different from those of people in the housing or car market. As such, voters *"vote their pocketbooks"* supporting candidates and ballot propositions they think will make them personally better off; bureaucrats strive to advance their own careers; and politicians seek election or reelection to office. According to these authors, public choice simply transfers the rational actor model of economic theory to the realm of politics.

Two insights follow immediately from the economists' study of collective choice processes. First, the individual becomes the fundamental unit of analysis. Some public choice theorists reject the construction of organic decision-making units, such as "the people," "the community," or "society". Groups do not make choices; only individuals do. The problem then becomes how to model the ways in which the diverse and often conflicting preferences of self-interested individuals get expressed and collated when decisions are made collectively. Second, public and private choice processes differ, not because the motivations of actors are different, but because of stark differences in the incentives and constraints that channel the pursuit of self-interest in the two settings. Unless the voting rule requires unanimous consent, which allows any individual to veto a proposal that would harm him, or unless those harmed can relocate easily to another political jurisdiction, collective decision-making processes allow the majority to impose its preferences on the minority. However, Buchanan and Tullock themselves outline methodological qualifications of the approach:

"Even if the model [with its rational self-interest assumptions] proves to be useful in explaining an important element of politics, it does not imply that all individuals act in accordance with the behavioral assumption made or that any one individual acts in this way at all times… the theory of collective choice can explain only some undetermined fraction of collective action. However, so long as some part of all individual behavior… is, in fact, motivated by utility maximization, and so long as the identification of the individual with the group does not extend to the point of making all individual utility functions identical, an economic-individualist model of political activity should be of some positive worth".[171]

Regarding the theory of collective choice, Mancur Olson challenges the modern democratic thought that groups would tend to form and take collective action whenever members jointly benefitted. This author concludes that no self-interested person would contribute to the production of a public good:

"[U]nless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests".[172]

However, other public choice theorists also consider socially sensitive or collectivist considerations. Author Elinor Ostrom presents a revised theory of collective action based on social norms and highlights recent developments in game theory that focuses on individual behavior, and empirical studies that look to identify the key factors that affect the likelihood of successful collective action.

---

[171] James Buchanan and Gordon Tullock, "The Calculus of Consent", (1962) at p. 30

[172] Mancur Olson, M. "The Logic of Collective Action, Public Goods and the Theory of Groups", Cambridge, Mass., Harvard University Press, 1971 (1965) at p. 2

"A substantial gap exists between the theoretical prediction that self-interested individuals will have extreme difficulty in coordinating collective action and the reality that such cooperative behavior is widespread, although far from inevitable".[173]

In my opinion, the criticisms of both Posner's and the public choice of the regulatory process do not recognize the advancements of regulatory law with respect to the transparency and effectiveness of regulatory proceedings. As stated by Croley, the reasoning of these critics seems to disregard the way regulatory agencies actually function. Indeed, once the regulatory activity is considered in the light of its legal and procedural constraints it is possible to have a more optimistic view on the ability of regulators to address important social and economic problems in the public interest. To fully understand regulation, it is fundamental to consider its legal backdrop, including the institutional framework, the legal procedures, and the legal instruments, through which regulatory agencies translate legislative and constitutional mandates into individual decisions.

As Croley clearly highlights, most critics of regulatory government downplay or simply disregard administrative law. This is not to say that regulatory government works well always, or even most of the time. This claim simply states that even though regulatory failure is not inevitable, under certain plausible conditions given the legal-institutional environment in which administrative agencies operate, regulatory outcomes can achieve positive gains for society and increase social welfare. In the economic jargon, in terms of Pareto Efficiency regulation appears as a second best solution: While regulation may fail, at the same time reliance upon regulatory institutions as the least-worst solution to pressing social and economic problems in a complex world is not misplaced.[174]

According to Croley, economists and political scientists don't consider the particular rules and principles of regulatory and administrative law when criticizing the public interest theory of regulation. Barton points out that they also fail to consider the continuous development of regulation. Not only have new and more advanced instruments of policy and decision-making emerged, but the increasing participation of the regulated agents and other interest groups, such as consumers, have refined and perfected regulatory activity. New concepts have emerged such as "Smart Regulation" or "Self-Regulation" and we constantly acknowledge the creation of "Codes of Conduct" incorporated by both agents and agencies.[175] We also learn about new kinds of regulation such as "Market-Based Regulation" or "Regulation for Competition" which are nothing different than regulators acting according to market rules and competition.[176]

---

[173] Elinor Ostrom, "Collective Action and the Evolution of Social Norms", Journal of Economic Perspectives, Volume 14, Number 3 (Summer 2000) at p. 138. Also see Charles Tiebout, "A pure theory of local expenditures". The Journal of Political Economy, Vol. 64, No. 5 (The University of Chicago Press, Oct. 1956), at pp. 416-424.

[174] Croley, supra at note 166 at p. 5

[175] See BARTON, supra at note 151

[176] Authors such as Peter Cameron and Gaspar Ariño have referred to this new approach.

In addition, regulatory activity is under constant scrutiny through regulatory impact analysis, and government intervention is questioned from within through figures such as "Competition Advocacy"[177] where competition authorities - which are part of the government - are asked to review regulatory activity and to promote a "competition culture" within government agencies. Also, regulatory agencies are asked to assess in advance the potential negative aspects that their decisions or rules may have on the market or its agents and to take a decision or implement a rule only after close and careful consideration of the potential impact and the justification for a particular regulatory measure.

The fact remains that regulation is always based, in one way or another, on some consideration of public interest. This could be the guaranteed provision of basic needs to the population, health, safety, quality or access to certain goods and services, or the need to protect the environment or the conservation of natural resources that are deemed of special importance for the State or the public in general. However, regulation may be also justified in economic and non-economic considerations such as the free market, the promotion of competition, and the protection of consumers or, as we will pass to explain in the next section, the correction of market failures such as a natural monopoly, asymmetric information or externalities.

1.2. Market Failure

Joseph Tomain[178]explains that when a market imperfection is recognized policy makers can choose to correct the imperfection through regulation. When competition is imperfect, government may intervene in order to remedy a market failure and move that market toward competition. A market failure is thus defined as occurring when market operations fail to achieve the alleged virtues of the market. Tomain states that there are two effects of recognizing a market failure.

"The first effect is descriptive. The identification of the failure points out the inefficiency or unfairness of the market. The second effect is prescriptive. Once a market failure is identified, then this identified defect becomes a justification for government intervention, and helps indicate what sort of regulatory tool is appropriate".[179]

Two different, but sometimes complementary, approaches must be considered here. Although not generally considered to be "regulation", competition law is the primary instrument for proscribing anti-competitive practices and thereby preserving or enhancing the competitiveness of markets. The institutions and principles of competition law are basically developed to identify and control the phenomena of market power and the merger of competitors. However, competition is not, in all circumstances, the panacea for economic welfare. In some circumstances it is preferable that production is undertaken by one firm, rather than by several or many. This phenomenon is known as natural

[177] Competition advocacy is discussed further in Chapter 3. In Colombia, article 7 of Law 1340/2009 created this figure.

[178] Joseph P. Tomain, "Energy Economics", in "Energy Law in a Nutshell", Chapter 1, at page 10 [TOMAIN]

[179] Tomain supra at note 176 at p. 39

monopoly where economies of scales and where the marginal costs - and hence also average costs - of a single firm's production continue in the long run to decline, typically because fixed costs are high relative to demand. Although the undesirable consequences of such a "natural" monopoly may persist (overpricing and underproduction; productive inefficiency), the remedy does not lie in competition. Where it is deemed appropriate for there to be a single supplier, legal measures must be introduced to control the price and quality of products and services. Rather the monopoly is allowed to prevail and some form of regulation is necessary to control those consequences. These forms of economic regulation go from public ownership to price and quality regulation, and public franchising.[180]

With respect to public utilities Posner states that the law's traditional answer to the problem of natural monopoly was public utility or common carrier regulation:

"This type of regulation has three primary elements: (1) profit control (the regulated firm's rates are not to exceed the level necessary to enable the firm to cover its cost of service, including a reasonable return on invested capital); (2) entry control (a firm may not provide a regulated service without first obtaining a certificate of public convenience and necessity from the regulatory agency); (3) control over price structure (the firm may not discriminate in its rates)".[181]

In this respect Tomain states as follows:

"Some industries, e.g., public utilities and railroads, are so structured in a manner that only a small number of firms or only one firm may enter the market. The entry costs are high and viable alternatives are not available. These industries tend towards exercising monopoly or oligopoly power. Because there is an absence of competition, firms need not set prices according to the laws of supply and demand, or according to their costs. Rather, firms in a monopoly position can restrict output, increase profits, and consequently, impose a social welfare loss by charging higher than competitive prices thus reducing the range of choices available to consumers".[182]

He explains that the exercise of monopoly power has been found inconsistent with the public interest because prices are higher, quantity is lower, and consumer surplus is less than in a competitive market. Regulation is therefore required to set prices at competitive levels.[183]With respect to public utilities, Tomain presents examples of natural monopolies such as the transmission systems for electricity and natural gas.

"According to theory, because of large capital costs of entry (e.g. costs of land acquisition and capital construction), it would be economically wasteful to have two or more utilities attempt to serve the same area. Society can be better served with a single electricity transmission line than several because it is wasteful to build more when one will satisfy demand. To avoid waste and monopoly profits, rates (prices) are set by government".[184]

---

[180] See Ogus supra at note 145

[181] Richard A. Posner, *Economic Analysis of Law*, 5th ed. (New York: Aspen Law & Business, 1998), supra at note 162, at p 380.

[182] Tomain, supra at note 176 at p 39-40

[183] Tomain, supra at note 176 at p. 42

[184] Tomain, supra at note 176 at p. 42

However, regulation of a natural monopoly is not free of problems. In a study conducted by Rodolfo León[185]regarding the regulation of the Chilean electricity sector, this author considers that there are three types of problems related to regulation of a natural monopoly. The first problem is asymmetric information. The monopolist controls information such as the cost of service, demand information or information regarding the most efficient technology to provide the service. This situation creates an obstacle for the regulator to obtain relevant information which is essential to calculate efficient prices. The second problem is the risk of regulatory capture. Usually, in the regulatory process there are three actors involved; the regulator, the regulated utility, and the consumers. The industry has high incentives to capture the regulator in order to obtain favorable decisions that will maximize their profits. For that purpose they organize themselves in strong associations with great lobbying power capable of influencing the regulatory process. On the contrary, consumers usually lack resources and act individually which makes them a weak interest group with minimal power to influence the regulatory decision-making process.[186]Finally, the third problem is the need for incentives that promote investments and the need for a consistent time frame. In a regulated industry the private sector is called to make important investments which are considered sunk costs. This creates a risk of these costs being passed through to consumers.

The combination of these elements shows the imbalance of the regulatory process. On one side, the investor trying to maximize its profit, and on the other side the mass of consumers with no incentives to invest in information about the operator. In the middle we find the regulator, trying to establish basic parameters that allow the operation of monopolistic companies without affecting the consumers in their standard of consumption. This demonstrates that optimal regulation is extremely difficult to obtain. However, a fundamental principle that must be considered in every regulatory process is the need to promote investments in order to seek levels of real competition.

As Tomain clearly highlights, rate-setting has been used to set prices for electricity, natural gas, telephone, and cable television. The licensing process is another form of regulation used for power plants, pharmaceuticals, and radio stations.[187]Ogus instruct us about other forms of regulation such as standard setting or the traditional command and control measures.[188]

With respect to public ownership, Ogus explains that until recently, in many countries the most widely used mechanism to control natural monopoly power has been public ownership. The expectation is that regulatory and collective goals can be met by means of combining political control and accountability, administrative rules, and legal framework. As Ogus highlights, it is also often assumed that public

[185] Rodolfo León Cano Blandón "La regulación del sector eléctrico en Chile", in Lecturas de Economía No. 46, Medellín, en-jun 1997

[186] Posner argues that it is not clear why a cohesive group of customers would not be equally effective in obtaining favorable regulation. However, Posner highlights the reluctance of the courts to grant standing to consumer groups. See POSNER, supra at note 157at p 228 and 234.

[187] Tomain supra at note 176 at p. 47-48

[188] Ogus, supra at note 145

ownership is the appropriate regulatory form to accomplish objectives which are not economic, such as subsidization of portions of the cost of the services to low-income population on distributional grounds.[189]However, as shown by Prichard and Trebilcock[190], industrial organization theory predicts that public corporations will have difficulty in achieving the same levels of efficiency as private corporations. They argue that there are no shareholders (residual owners) who are financially interested in the profitability of the public firm other than general taxpayers. Furthermore, in the absence of profit-making incentives, the motivation of the managers of public corporations to meet consumer demand may be dulled.

On the grounds of this alleged inefficiency, many countries have decided to privatize vertically integrated monopolies in charge of providing utility services, unbundling transportation and distribution from production and gas marketing, and subjecting the privatized monopoly to government regulation (e.g. the case of British Gas in the UK).[191]In cases where the supplying public monopolist firm is transferred into private ownership, there is a need to control both the prices set by the private firm and the quality of the service provided. In this case, the regulatory system can be viewed as a long-term contract between the regulatory agency and the monopolistic firm in which the latter agrees to meet the demands from customers of a service of quality at minimum cost, in return for the agency allowing it to charge reasonable and non-discriminatory prices that are sufficient to cover the cost of service.[192] The primary aim is for the terms of this "agreement" to resemble what would have occurred in an unregulated competitive market.[193]

However, difficulties arise from the fact that access to information concerning the firm's activities is limited. Regulatory agencies will not always be sufficiently informed to make decisions on whether the costs incurred by the firm were reasonable and prudent. In addition, although it may be desirable to ensure that the utility is available to all members of the community at a price which they will be able to afford, given that the cost of service will often vary significantly according to the location and other circumstances of the customers, without regulation cream-skimming may occur.[194]

---

[189] Ogus, supra at note 145

[190] Prichard J.R. and Trebilcock M. 1983 "Crown Corporations in Canada: The Choice of Instrument" in Prichard J (ed.) Crown Corporations in Canada, Butterworths. Prichard and Trebilcock instruct us about the following key components of the legal framework which is most likely to ensure that the public corporation performs satisfactorily its given role: explicit legislative statements on objectives, powers and duties; clarification of the role (if any) of ministers in influencing the corporation's policy; systems of budgetary control exercised through independent public audit institutions; and accountability by means of residual powers of judicial review.

[191] See Catherine Price Adams, Competition in Gas"

[192] The "regulatory compact" that exists in Canada is a good example of this trade-off between the public utility and the regulator.

[193] See, Kahn, A.E. 1988. *The Economics of Regulation: Principles and Institutions*, MIT Press.

[194] Ogus, supra at note 145 especially at ch. 15 p. 318. One possible solution to cream skimming lies in cross-subsidization: a uniform price can be charged which enables the surplus of revenue from low-cost areas to finance supply in high-cost areas. However, economists tend to suggest that it is preferable to charge customers according to cost, and fulfill the distributional aims by other means, for example, through social security payments.

An alternative method of regulating private monopolists is for the right to supply to be governed by a public franchise contract, which results from competitive bidding to acquire the right. The rights of supply are often referred to as "licenses", which are significantly different from the prior-approval mechanism proper of social regulation. The type of licenses we are referring to impose conditions regarding the quality and price of the service to be supplied. The terms of the successful bid, particularly those affecting price and quality, then become conditions of the franchise which, like any other contract, governs the on-going behavior of the supplier. Contract thus replaces conventional regulation as the instrument of legal control and, unlike regulation which typically involves resort to, or a threat of, the criminal process, it relies on termination or non-renewal of the franchise as the principal sanction for inadequate performance. The franchise typically grants monopoly rights that are invariably accompanied by an elaborate regulatory regime which often includes rate-setting.

An example of this approach is found in Colombia. Article 40 of the SPD Law provides for the creation of *"exclusive service areas"* in locations with a high rate of low-income population, which entails the right for the operator to exclusively render the service in the geographic scope determined in the concession agreement. The Colombian Ministry of Mines and Energy (MME), following the criteria and recommendations of the Energy and Gas Regulatory Commission (CREG), created five exclusive service areas for the provision of gas distribution services, where the number of potentially subsidized customers from low-income socio-economic strata exceeded customers paying a surplus, which is a tax called the "solidarity" contribution created to subsidize low income customers.[195] After a public franchise tender, five SPD operators entered into concession agreements with the MME. Therefore, throughout ex-ante competition for the monopoly right and the grant of franchise agreements, the MME forced firms to supply their services on terms which are consistent with economic efficiency and at the same time obviated the difficulties encountered by regulatory agencies in fixing appropriate prices.[196] Under this system, the agency must still be confident that the financial structure of the firm is adequate to supply services at the price bid recognized but the problem of quality of the service must still be addressed. The public bidding document must define the qualitative aspects of the service or goods supplied and the agency, in determining the outcome of the competition, should select the package of quality and price which, in its view, will best meet consumer preferences. Accordingly, these agreements contain special tariff rules and express obligations regarding the expansion of coverage.

[195] The operators attending these areas are Alcanos de Colombia S.A. ESP, Gases del Oriente S.A. ESP, Gas Natural del Centro S.A. ESP, Gases de Risaralda S.A. ESP and Gases del Norte del Valle S.A. ESP.

[196] However, these "Exclusive Service Areas" concession agreements have presented problems regarding the distribution tariff which, the operators argue, does not reimburse them the cost of providing the service.

In conclusion, following the work of Ogus[197], we can present a non-exhaustive list of the justifications most often cited by the economic literature, which are divided into *economic* and *non-economic.* The main economic instances of market-failure are:

- **Monopolies** or a significant impediment to a competitive market.
- **Inadequate or asymmetrical information** affecting the relationship between suppliers and consumers.
- **Externalities** (spillover effects) whereby activities such as pollution affect third parties in ways not reflected in the prices set by producers.
- **Co-ordination problems** though desired outcomes can in principle be achieved by private transactions the costs of co-ordination are so high that it is cheaper for the law to prescribe conduct.

Among the most important non-economic justifications are:

- **Distributional justice**: the unregulated market leads to outcomes which do not accord with what is a perceived just distribution of resources
- **Paternalism**: individuals are (in relation to the particular area of intervention) assumed not to be the good judges of, or are not trusted to act in accordance with, what is in their own best interest.

Notwithstanding the various justifications for regulation, in this thesis we focus on two that relate to gas utility markets: competition and consumer protection.

2. REGULATION OF PUBLIC UTILITIES:

Under the common law tradition, one of the main goals of regulation of public utilities is the promotion of efficiency. Also, regulation insures continuity of the service to the public with reasonable efficiency, at fair rates, and without discrimination. For those purposes, the government has inherent power, within reasonable limits, to regulate and control public utilities. Regulation of public utilities is founded on the police power, and bounded by the principle of limited intervention. Regulation entails the power to protect, foster, promote, preserve, and control with due regard for the interests of the utility and the public. Accordingly, regulation must not be extended to the extreme of abrogating the right of management or operation of the utility. A utility, like any corporation, should be allowed to operate consistent with free enterprise principles, although subject to regulation by government. Therefore, regulation should not be confiscatory, arbitrary or unreasonable. The theory behind regulation is mainly the protection of the public interest and the assurance of an adequate service. But regulation must also provide fair opportunity to the utility to secure a reasonable return from the provision of such services.

"Generally, every point of contact between the public and a utility which relates to the performance by the latter of its public duties is subject to regulation by the state".[198]

According to S.B. Bryer and R.B. Stewart, public utilities regulation is thought to be a substitute for competitive process of the free market. The regulatory process normally achieves this goal by

[197] See Ogus, supra at note 145

[198] Corpus Juris Secundum, supra at note 63 at p 293

determining the cost of the service to be provided by the regulated firm. These costs are estimated for a particular period and they usually comprise the expenses inherent in running the business, such as depreciation, plant, financing, labor and other operating costs. A maximum rate scale is then set which simultaneously allows enough revenue to be generated from the utilities' customers plus a reasonable profit.[199]

Although related to the public interest, regulation of public utilities in Canada seems to be entirely based on the existence of a natural monopoly, and therefore its fundamental purpose is rate-setting. Rate-setting is the main function of public utility regulators. As explained in chapter one, the Supreme Court of Canada stated in *ATCO v Alberta* that rate-setting is the most fundamental function of agencies that regulate public utilities. With respect to regulation of public utilities in the public interest, the court in ATCO v. Alberta said in para. 28:

"The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with the primary tool being rate setting".[200]

In ATCO the court referred to the legislative and statutory framework of gas utilities in Alberta contained in the Alberta Energy and Utilities Board Act (AEUBA), the Public Utilities Board Act (PUBA) and the Gas Utilities Act (GUA), and stated at para. 60:

"…it is manifest from the reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates".[201]

To support this argument the court quotes Estey J. in *ATCO v. City of Calgary* at para. 576:

"It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, 'the union' of existing systems and facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board."[202]

Furthermore, the Court considers that rate regulation serves several aims such as sustainability, equity and efficiency. Quoting R. Green and M. Rodríguez the court states:

"The regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future… Equity is related to the distribution of welfare among members of society. The object of sustainability already implies that shareholders should not receive 'too low' a return (and defines this in terms of the rewards necessary to ensure continued investment in the utility), while equity implies that the return should not be 'too high'". [203]

---

[199] S.B. Bryer & R.B. Stewart, "Administrative Law and Regulatory Policy", (2nd ed., Little, Brown & Co.: Boston, 1985) at 223-224.

[200] Cited by Kaiser and Heggie, supra at note 67, ATCO at para. 28

[201] Ibid. at para. 60

[202] Ibid. at para. 60

[203] The court quotes R. Green and M. Rodríguez P., "Resetting Price Controls for Privatized Utilities: A Manual for Regulators", (1999), at p. 5

According to the Court, this only means that the "regulatory compact" ensures that all customers have access to the utility at a fair price. The goals of sustainability, equity and efficiency resulted in an economic and social arrangement dubbed the regulatory compact. Under the regulatory compact, utilities are given exclusive rights to sell their services within a specific area at rates that will provide them the opportunity to earn a fair return for their investors.

"In return for this right, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated".[204]

The Court points out that the statutory mandate of the Alberta Energy & Utilities Board is to protect both the customer and the investor, basically by fixing "just and reasonable" rates. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility. This does not transfer any property right to customers. The Court states at para. 68:

"Through rates customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors"[205]

Notwithstanding, the Court recognizes the role of the regulator to protect customers through rate-setting. It says at para. 81:

"Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination".[206]

The Court also recognizes that the protection of consumers is in the public interest when it states at para. 83:

"… It is recognized that the role of the Board to protect the customers is in the public interest…

However, the discretionary power of the regulator to act in the public interest has limits, as the Court clearly highlights at para. 84:

"The Board should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm".

"…The Board has considerable discretion in setting of future rates in order to protect the public interest".[207]

According to the Court, this discretion must meet a reasonable standard:

"The Board's decision to exercise its discretion to protect the public interest must meet a reasonable standard".[208]

---

[204] ATCO at para. 63

[205] Ibid. at para. 68

[206] Ibid. at para. 81

[207] Ibid. at para. 84

[208] Ibid. at para. 85

In conclusion, the primary purpose of ratemaking is to provide uniform adequate service at uniform rates, and to secure equality in rates for all who need or desire the services of the utility and who are in a similar condition. The right to propose rates for approval by the regulator belongs primarily to the utility itself, but this right is always subject to the requirement that the rates must be reasonable and non-discriminatory. In addition, a public utility must make reasonable attempts to minimize costs through prudent decision making, especially when it holds monopolistic power. In this respect, the Corpus Juris Secundum states as follows:

"Statutes providing for the regulation of rates constitute a declaration of public interest in every rate charged by a public utility company".[209]

L. Reid and J. Todd state that rates for regulated utilities must be designed in accordance with the legal framework established by a regulator's empowering legislation.[210]Public utility rates have several important functions such as: (i) Setting charges that allow a fair rate of return from the venture so that the company is in position to attract further capital for expansion; (ii) The design of rates may influence consumer demand; (iii) Compliance with the objective to economically provide a community with adequate utility service; and (iv) Achieving the goal of transferring purchasing power or redistribution income from consumers to the utility company.

However, as highlighted in Alexander J. Black's thesis on Canadian Gas deregulation, one of the leading problems with public utility regulation lies in its attempt to levy equitable prices on customers for services rendered.[211]In order to calculate the maximum rate that a utility may levy, it is necessary to first determine its operating expenses and rate base. The other factor considered is the rate of return. Thus, a major issue in regulatory hearings is the equitable evaluation of the capital used in the venture.[212]As Black points out, public utility rates are considered to cover the cost of the service. However, this value is established in public regulatory hearings where interveners regularly utilize complex socio-economic and financial data to advocate the position of their respective interest group. Even though it is the duty of the regulator to maintain a balance between the utility and its customers, it is argued that in this process the regulated firm has an advantage due to asymmetric information.[213]

Indeed, setting individual rates involves the subject of microeconomics and the relationship between marginal cost and price. As explained by A. E. Kahn, a rate structure should reflect marginal costs if consumers are to make intelligent purchase decisions.[214]Even though marginal cost rate setting

---

[209] CORPUS JURIS SECUNDUM, supra at note 63 at p 298

[210] Laurie Reid and John Todd, "New Developments in Rate Design for Electricity Distributors", in "Energy Law and Policy", Gordon Kaiser and Bob Heggie eds., Carswell.

[211] Black, supra at note 69 at p. 35

[212] Black, supra at note 69 at p. 38

[213] Black, supra at note 69 at p. 42

[214] A.E. Kahn, "The Economics of Regulation: Principles and Institutions", (John Wiley & Sons: New York, 1970) Vol. 1 at 65-66

appears to be more desirable due to allocative efficiency, it is difficult to apply to a regulated natural monopoly because it is argued that it doesn't allow for the recovery of fixed costs when these are high and marginal costs are very small. Also, marginal costs are not easy to calculate since regulated firms usually set different prices for different classes of customers, different amounts of service purchased and different time periods.

In this respect Tomain[215]argues that when setting rates, regulatory agencies have the duty to determine whether price discrimination or cross-subsidization constitutes undue or unjust discrimination. Tomain explains that rate structure or rate design apportions the specific rates that are chargeable to various categories of customers. The objective of a utility's rate structure is to meet its financial needs, yet distribute this burden equitably amongst its customers, while discouraging waste of the service and encouraging optimal use. Other criteria include rates that are simple, understandable, and publicly acceptable, and that eschew undue discrimination.

Therefore, in order to pay the so-called wages of capital, and to minimize inefficiency, regulators often advocate a process that discriminates among various customer classes according to a structure that is the inverse of the normal elasticity curve. For example, natural gas utilities might set low rates for industrial users because such customers may switch to alternative competing fuels if gas is priced at a high rate. Despite making an allowance for the actual costs in serving divergent classes of customers, higher rates are usually charged to residential and commercial customers because their demand is less elastic. Since these classes of consumers place a greater value on gas service, they pay a higher share of the fixed costs than do the industrial users who place a lesser value on the service.

As Tomain states, public utilities are often in an environment of economy of scale that fosters long-run decreasing costs, with the unit cost decreasing as total output increases. Declining block rate is designed to pay for the entire service cost by small and large users, yet it encourages greater consumption by lowering the rates as more of the commodity is used.[216]

Black argues that rate discrimination between classes of customers is justified in many instances due to the economic exigencies of the natural monopoly. However, when analyzing the Canadian gas deregulation process, Black states that regulators have a duty to identify and prohibit undue or unjust discrimination, and therefore clarifies that not all forms of discrimination applied by Canadian energy regulators are acceptable, mainly because some types of discrimination may be "*patently unfair to certain classes of customers while unjustly benefitting others*". Black alleges that the deregulatory process created a situation of undue discrimination in the Canadian natural gas industry:

[215] J.P. Tomain, "Energy Law in a Nutshell", 2012

[216] Tomain, supra at note 213

"*Unfortunately, such instances may have been inadvertently exacerbated by the Canadian deregulation of prices for the commodity".*[217]

As previously explained in Chapter One when analyzing the concept of public utilities in Canada, empowering legislation typically instructs decision makers to establish rates that are just and reasonable. However, the legislation is silent on how to set rates. As a consequence, through various regulatory decisions regulators have developed non-mandatory conventions or principles such as the matching principle, the intergenerational principle, the no-harm principle, the rate stability principle, and the stand-alone principle.[218]

Kaiser and Heggie state that in virtually all regulatory applications, the burden of proof that rates are just and reasonable lies on the utility. The principle was established in early railway and telephone laws, and is generally set out for energy regulators in their governing statutes. Robert Macaulay & James Sprague[219] argue that an applicant must demonstrate that the rates are just and reasonable, and that if it were shown that the company makes any discrimination or gives any preference or advantage, the burden in proving that discrimination is not unjust lies upon the company:

"Absent an expressed statutory provision to the contrary, the standard of proof is the balance of probabilities. Under that standard, the decision-maker must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

Because the utilities are in a special position not only with respect to their monopoly but also with respect to their control of information, there is often a reverse onus".[220]

Regarding the stand-alone principle, Kaiser and Heggie state as follows:

"*The stand-alone principle, also known as the separate entity principle, holds that a utility's cost of service should be determined as if the utility were a separate or stand-alone entity so that utility ratepayers do not bear the burden of costs or losses attributable to an affiliate or parent company. Regulated entities are often part of a larger organization. Consistent with the cost-of-service standard, an entity's investors should have the opportunity to recover the costs of regulated operations and no more. No additional benefit, or cost, should accrue as a result of owning the regulated operations".*[221]

For rate-making purposes, the stand-alone principle allows regulators to segregate the regulated utility from its affiliates and to determine the cost of service specifically attributable to the utility's jurisdictional activities, taking into consideration only those expenses incurred by the utility in providing service to its customers. In the context of capital structure issues this principle holds that just and

---

[217] Black, supra at note 69 at p. 45

[218] Kaiser and Heggie, supra at note 67 at p. 193. Other principles have been codified depending on the jurisdiction. These include the fair return principle, the prudence principle, the cost-of-service principle, and the used and required to be used principle, among others.

[219] Robert Macaulay & James Sprague, "Practice and Procedure Before Administrative Tribunals" (Toronto: Carswell, 2004) at 17-8

[220] Kaiser and Heggie, supra at note 67 at p. 184-185.

[221] Kaiser and Heggie, supra at note 67 at p. 193

reasonable rates should be set to cover the cost of operating and financing the utility without cross-subsidization of non-utility operations by parent companies.[222]

In the United States, the prevailing rule regarding rate-setting was established in *FPC. V Hope Natural Gas Co.*[223] and states that it "is the result reached and not the method employed" that is the main factor in determining "just and reasonable rates". Kaiser and Heggie instruct us about the major challenges that energy regulators face, which most commonly relate to the scope of their remedies and their constitutional or territorial jurisdiction. Citing a number of decisions of the Alberta Utilities Commission (AUC)[224] they provide information about challenges of this nature in the Province of Alberta:

"In Alberta, the courts have questioned the jurisdiction of the regulator to impose costs penalties on applicants who receive significantly reduced amounts at the end of the hearings compared to what they were offered during negotiations, to order disclosure from parties other than the public utility, to restrict the transfer of any shares of the utility, to allocate to consumers proceeds from the sale of utility assets, and to appropriate the proceeds of sale from lands not used or required to be used to provide services to customers".[225]

In most cases, the courts have given a broad interpretation to the statutory provisions governing public utility commissions.[226]For example, in *Union Gas Ltd. v. Dawn (Township)* the Ontario Divisional Court considered that the Legislature intended to vest the Ontario Energy Board with the widest powers to control the supply and distribution of natural gas to the people of Ontario "*in the public interest*".[227]A similar conclusion was reached by the Supreme Court of Canada in *ATCO Ltd. v. Calgary Power Ltd.*:

"In the discharge of its varied functions it is difficult to appreciate how the board can maintain a sound and comprehensive regulatory position so as to discharge its duty to the public at large in the regulation of public utilities and their owners, unless a broad interpretation is accorded to the words adopted by the legislature…"[228]

However, as Kaiser and Heggie highlight, in the recent years the courts have questioned the actions of boards with respect to the issues such as utility asset disposition; restriction on payment of dividends; jurisdiction regarding low income rates; and jurisdiction based on bias.[229]

---

[222] Kaiser and Heggie, supra at note 67 at p. 195

[223] FPC. V. Hope Natural Gas Co. 320 U.S. 591, 601-603 (1944)

[224] Alberta Utilities Commission, *Re Westridge Utilities* (October 1, 2007) and Decision 2009-139; *Westridge Utilities Inc. v. Alberta (Energy & Utilities Board)*, 2009 ABCA 313, [2009] A.J. No. 1029, 2009 CarswellAlta 1493 (Alta. C.A. [In Chambers]; *ATCO Gas & Pipelines Ltd. V. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, 2006 CarswellAlta 139, 2006 CarswellAlta 140 (S.C.C.); AltaGas Utilities Inc., Re (2009), [2009] A.J. No. 489, 454 A.R. 176, 2009 CarswellAlta 673 (Alta. C.A.); leave to appeal refused 2010 CarswellAlta 140, 2010 CarswellAlta 141 (S.C.C.).

[225] Kaiser and Heggie, supra at note 67 at p 94

[226] In *ATCO Gas & Pipelines v. Alberta (Energy & Utilities Board) [2006]* the Supreme Court of Canada stated that administrative tribunals and boards obtain their jurisdiction from statutory law (explicit powers granted by various statutes), and the common law (implicit powers derived from the application of the doctrine of jurisdiction by necessary implication).

[227] (1977), 76 D.L.R. (3d) 613, 1977 CarswellOnt 328 (Ont. Div. Ct.), at para. 42

[228] (1982), 140 D.L.R. (3d) 193, 1982 CarswellAlta 205, 1982 CarswellAlta 557 (S.C.C.) at 201 [D.L.R.].

[229] Kaiser and Heggie, supra at note 67 at p. 95

3. REGULATION OF SPDs

As explained in chapter one, SPDs are a special kind of public services that involve activities related to the provision of electricity, natural gas, waste, water and sewerage to end-users. From the perspective of public finance law, these activities are considered second degree public services. With the exception of public corporations directly rendering the service, the main role of the State with respect to SPDs is regulation.

Argentinian author Ismael Mata states that with the reform of the State and the development of the privatization policies in most countries of Latin America – such as Chile, Argentina and Colombia -, following the Anglo-Saxon model, government intervention has emphasized the regulation of public services. [230] The privatization policy included the separation of the provision of the service from its control. Control was given to regulatory authorities created simultaneously with the privatization of State-owned monopolies. These regulatory agencies have the main purpose of regulating and controlling the service, and normally have independence and financial and technical autonomy. Usually they are governed by a collective organ or board of directors. Their main purpose is to dictate technical rules related to the services they regulate, particularly those concerning rates and tariffs of monopolistic operators. Even though sometimes these agencies may have some quasi-judicial functions, this does not change their administrative nature.

In Mata's view, the regulation of public services constitutes a modality of state intervention in a particular activity that looks to discipline the behavior of the agents operating that activity. According to Mata, with this development, the traditional concept of public service under the French and German legal doctrine has evolved so that it now resembles the Anglo-Saxon notion of *public utilities* governed by the rules of the market and private law, rather than the public norms of administrative law and public finance. As a result of this evolution, the principal element of public intervention is **regulation**. The rules of the market system and private law are considered insufficient to regulate the development of certain activities and agents and State intervention is required to correct market failures through regulation. In absence of market failures there would be no justification for regulation, principally because the economic laws of supply and demand and the rules of competition law would assure allocative efficiency in these services, as reflected in the Anglo-Saxon concept of public utilities.[231]

Mata highlights that even though the common law lacks a legal concept that resembles the French notion of "service public", many of the activities considered industrial or commercial public services in civil law countries such as France, Spain or Italy, are considered public utilities by the common

[230] See Ismael Mata, "El Servicio Público frente a la Privatización y la Regulación", in Revista Supervisión, No. 1, 1995. [MATA]

[231] According to Mata supra at note 230, from the economic perspective, regulation is a public policy consisting in the establishment of a restrictive rule for an activity or an agent subjecting the control of the fulfillment of this restrictive rule to an independent and autonomous regulator that does not develop the regulated activity, it does not replace it, is an external phenomenon of the activity.

law. As explained in chapter one, public services and public utilities have in common that they are somehow related to the public interest and are subject to some form of regulation. However, Mata states that the main difference between regulation of public services and regulation of public utilities has to do with entitlement to the service. Under the civil law notion, public services are mandatory and ultimately the State has the duty to provide the service. This characteristic doesn't exist in public utilities.

Even though the State has ultimate ownership of the public service, it usually grants authorization to private or mixed entities to provide the service. Authorization may come in different forms such as licenses, concessions or permits. In general, the authorization is an act of the administration which allows a particular agent to develop a certain activity subject to its control or surveillance. Maintaining a free market view, the authorization also creates a negative duty for the administration not to create obstacles for the rightful development of the activity.[232]

3.1. Constitutional framework in Colombia

In Colombia, the goal of regulation is the efficient provision of goods and services, in a free market environment, to assure that all consumers have access to them in the best conditions of quality and price. In the first place, article 78 of the Constitution states the following:

- The law will regulate the quality control of goods and services provided to the community, as well as the information that must be presented to the public when marketing such goods and services.
- The law will establish the accountability of those who affect the health, security and adequate supply of consumers.
- The State will guarantee the participation of consumer organizations in all matters that affect them.

Article 333 of the Constitution refers to economic freedom and free competition, but clearly states that these rights are subordinated to the public interest:

- Economic activity is free within the limits of the public interest.
- Free competition is a right that entails responsibilities.
- Enterprises are the basis of economic development and have a social duty.
- The State will impede the obstruction or restriction of economic freedom, and will control the abuse of dominant position in the market.
- The law will establish the limits to economic freedom when required by the public interest, the environment or the cultural heritage of the nation.

Finally, article 334 of the Constitution establishes:

- The State is in charge of directing the economy.
- By mandate of the law, the State will intervene in the exploitation of natural resources, the land use, the production, distribution, use and consumption of goods, and in public and private services, to rationalize the economy with the purpose of creating a better quality of life for the population, a fair distribution of opportunities and resources, and the preservation of a healthy environment.

[232] Ismael Mata, supra at note 228 at p. 23

- The State will intervene to guarantee full employment and to assure that all people, particularly those of low income, have effective access to basic goods and services, and to promote productivity, competitiveness and harmonic development of the regions.

These articles contain aspects of both social and economic regulation. According to the Colombian Constitution of 1991, social and economic regulation are inseparable and must be considered together. Although economic freedom and free competition are constitutional rights, the Constitution clearly states that these rights are limited by the public interest. In situations where economic freedom is in conflict with the public interest, the State must intervene, by mandate of the law, and this intervention is usually done throughout regulation. Therefore, the constitutional mandate regarding regulation is that it must pursue economic efficiency and operate in an environment of free market and competition to assure the population equal access to goods and services, regardless of their socio-economic level or their location. However, whenever economic freedom is in conflict with the public interest, the State must intervene to solve this conflict looking always to comply with its social ends.[233]

Apart from these general rules regarding regulation, the Colombian Constitution contains rules relating to the regulation of particular sectors.[234]Regarding public services, as explained in the previous chapter, articles 365 and 366 of the Colombian Constitution refer to the social ends of the State and public services, and establish that the State will reserve the power to regulate and control public services. Accordingly, the constitutional mandate regarding public services is founded on three pillars:

(i) **Social ends of the State.** As a consequence of the organization of Colombia as a "Social State of Law",[235] public services are part or the social ends of the State. These social ends are based on the public interest and the recipient is the entire society, not a particular individual.

(ii) **Efficiency in the provision of public services.** Although many authors such as Palacios and Betancur have considered that the efficiency principle implies a new approach that differs from the traditional French notion of public service, equaling them to the Anglo-Saxon concept of public utilities, this assumption is wrong because it only considers allocative efficiency without recognizing other principles such as solidarity and income redistribution which are also contained in the constitutional mandate. Article 365 of the Constitution talks about efficiency in the provision of public services, and this efficiency must be considered in both its economic and social meaning.

---

[233] Pando supra at note 27

[234] This is the case of regulation of television and the electromagnetic spectrum (articles 75, 76 and 77 of the Colombian Constitution of 1991) which is head of a public regulatory agency, the National Television Commission. Another example is regulation of money, foreign exchange and credit, in charge of the Central Bank (article 335 of the Colombian Constitution of 1991).

[235] A variation of the traditional notion of "State of Law" that includes a number of social duties of the State such as those related to the provision of public services.

(iii) **Regular provision of quality services to all the inhabitants of the national territory.** Again, authors such as Palacios and Betancur have wrongly interpreted the constitutional mandate by giving priority to efficiency over coverage or quality. Under their assumption, the mandate only applies if the provision of the service complies with standards of efficiency. Therefore, the State would be exempted from its duty if it proved to be inefficient to provide services in certain geographic locations. The constitutional mandate is completely the opposite. The State must do all in its power to provide the service to all the inhabitants of the national territory. It must use all means and funding to comply with the social end of providing regular and efficient public services to all the population. State intervention is required to avoid cream skimming in public services. Otherwise, public services will only be rendered in locations where it is considered profitable, leaving distant locations or low income population without access to these services. In these situations the State may decide to render the service directly or to create subsidies that cover the cost of the service for low income populations.[236]

With respect to SPDs, the general rules contained in articles 365 and 366 encompass the special rules contained in articles 367 to 370 which are particular to SPDs. These rules state as follows:

- The law must establish the powers and responsibilities regarding the provision, coverage, quality, funding, and the tariff regime of SPDs.
- The tariff regime must consider the criteria of cost, solidarity and income redistribution. The law will determine the competent entities with power to fix tariffs.
- Whenever the economic and technical conditions allow, the provision of SPDs will be in the charge of the municipalities.
- The Nation, Departments and Municipalities may grant subsidies to low income population in order for them to pay SPDs that cover their basic needs.
- The law will determine the legal regime for SPD consumers, establishing their rights and duties, their protection regime, and the way in which they can participate in the management and control of SPDs.
- The President will determine the general policy for the administration and efficiency control of SPDs.
- The President will exert the powers of control, inspection and surveillance of SPD throughout the Superintendence of Domiciliary Public Services (SSPD)

These articles do not refer expressly to regulation of SPDs, as occurs with television or financial activities, but defer the definition of the regulatory framework to the law. Notwithstanding, the constitutional mandate is clear that regulation and control of SPDs are functions reserved to the State, and also mentions some aspects deeply related to regulation that must be developed by the law, such as rules regarding the fixing of tariffs, subsidies, coverage, quality, consumer rights and duties, and the establishment of general policies of administering and controlling the efficiency of SPDs. We can conclude that the Colombian Constitution establishes a clear mandate for the Colombian legislator to enact the general rules regarding regulation of SPDs. This enactment constitutes a sort of *prima facie* legislative regulation, setting out the general principles by which regulatory agencies must develop their function.

[236] PANDO, supra at note 27

3.2. Regulation in the SPD Law

The constitutional mandate regarding SPDs was developed by the Colombian Congress through the enactment of Law 142 in July, 1994 (known as the SPD law). In the debates prior to the promulgation of the SPD law, many references were made to the regulatory function. Indeed, in the debates it was argued that the State needed to redefine its role by empowering regulatory agencies by assigning them functions other than just fixing tariffs.

"Regulatory function must not be interpreted as a form of intervention that tackles free enterprise. In its modern vision, regulation is an activity developed by the State that promotes competition wherever is possible, impedes the abuse of monopolies when they are inevitable, deregulates to eliminate artificial barriers to competition and, finally, calibrates the different areas of a service to impede discriminatory or disloyal practices against competitors."[237]

Colombia's Superintendence of SPDs – the SSPD – has defined the regulation of SPDs as secondary legislation produced by special regulatory agencies. According to the SSPD, this implies that regulatory agencies, based on social, economic, or technical considerations, can dictate general rules to adjust the conduct of agents operating in the regulated sector, in order to create more transparency and to promote competition. The SSPD has adopted the definition presented by author Hugo Palacios, according to which, the regulation of SPDs includes the power to dictate general rules that are mandatory for all agents.[238]

With respect to the regulation of SPDs, Article 73 of the SPD Law states that the main objective of the regulatory commissions is to regulate monopolies whenever competition is not possible, and to promote competition among service providers. The regulatory agency must ensure that operators are economically efficient, do not abuse their dominant position, and produce services of quality. For that purpose, the regulatory commissions have administrative functions, quasi-judicial functions, and regulatory functions.[239]

The first administrative functions are concerned with internal rules of operation and administration of the commissions. An example is the definition of their own bylaws. The quasi-judicial functions cover activities such as deciding conflicts between operators, providing expert opinion and legal concepts, or requesting the SSPD to initiate investigations to impose sanctions on operators. However, these quasi-judicial functions differ from those assigned to regulatory agencies in countries such as Canada (e.g. the Alberta Utilities Commission in Alberta). In Colombia, regulatory agencies such as the CREG lack the power to investigate or impose fines on agents for violating the statutory regime. This function is assigned to the SSPD. All of the regulatory functions are subject to judicial control, and the proceedings are

[237] Statement of motivation of Law 142/1994. See Pando, supra at note 27, chapter 1.

[238] Superintendencia de servicios Públicos, "Compra de Energía", en Actualidad Jurídica en Servicios Públicos, T. II., marzo de 1997, at p. 255. (Palacios Mejía, H., "Servicios Públicos Domiciliarios en la Constitución, p. 20)

[239] For a more complete explanation on the concept of regulation of domiciliary public services see Pando, supra at note 27

governed by administrative law rules. Finally, Colombian regulatory agencies have typical regulatory functions such as rate-setting, establishing quality standards and technical rules of operation. The enactment of rules regarding anticompetitive practices and the abuse of a dominant position also fall into this category.

As for the activities of the SPD companies and the services they provide, the regulatory commissions may require them to demonstrate technical and financial capacity, and exert a strict control over the quality of the service, safety and health issues, customer services and types of contracts, and in general over the commercial relationships between the end-user and the company.

With respect to competition, Article 73 of the SPD law establishes the following specific functions of regulatory agencies:

- Subject non-SPD operators to its regulation and to the surveillance of the SSPD when they compete with SPDs.
- Order the spinoff of an SPD operator when it finds that it limits or restricts competition.
- Order the merger of operators to lower costs and extend coverage.
- Order the dissolution of monopolistic companies when they do not comply with the efficiency standards.
- Impede anticompetitive practices that affect distributors.
- Establish the mechanisms to avoid the concentration of ownership of companies with complementary activities operating in the same sector.

With respect to consumers, article 73 of the SPD Law includes the following functions:

- Provides for the uniform conditions of SPD agreements.
- Establishes the units of quantity and time required to measure consumption.
- Establishes general criteria of contractual abuse of dominant position, and of consumer rights protection regarding invoicing, marketing, and other aspects related to the relationship between the SPD operator and the end user.
- Defines the factors used to grant subsidies to lower income consumers.

A general principle that derives from article 73 is that no authorization is required from the regulatory commissions to provide SPDs. However, the commissions have the discretionary power to request information from all operators, and to impose sanctions on those who fail to do so. In Decision C-150/2003, the Corte Constitucional analyzed the regulatory function of the State regarding SPDs, and for the first time made reference to the legal definition of regulation, the legal and economic instruments of the regulatory process, and its objectives and justifications, giving special consideration to both the efficiency and the distributional principles as main drivers of the decision-making process that must be followed by the regulator in order to comply with the constitutional mandate to protect free market and competition, and to guarantee the continuous and efficient provision of public services to all citizens in the Colombian territory.[240]

[240] Corte Constitucional Decision C-150/2003

3.2.1. Tariffs in the SPD Law.

According to article 73 of the SPD law, rate setting is a function of the regulatory commissions (section 73.20). The SPD law establishes three different tariff schemes which are defined in articles 14 and 88 as follows:

- Section 14.10 defines Regulated Freedom as the tariff scheme in which the regulatory commissions establish the criteria and methods according to which the SPD operators may set or modify the maximum prices charged for the services they provide to consumers.

- Section 14.11 defines Controlled Freedom as the tariff scheme according to which the SPD operators may freely determine the tariffs they charge to medium and small consumers, with the duty to inform the regulatory commissions about such tariffs.

- Article 88 establishes that, when setting rates, SPD operators will subject to a regulated or free tariff scheme, according to the following rules:

    (i) 88.1. When setting tariffs, operators must follow the formulas periodically defined by the regulatory commission. Based on costs, the commission may establish maximum and minimum price caps which are mandatory for the operators. Also, when the commission decides to establish a Regulated or Controlled Freedom tariff scheme, it may set the methodology to set tariffs.

    (ii) 88.2. Without a previous determination by the regulatory commission, SPD operators are free to set tariffs if it is established that they do not have a dominant position in the market.

    (iii) Without a previous determination by the regulatory commission, SPD operators are free to set tariffs when sufficient competition between operators exists.

According to article 86 of the SPD law, the tariff regime in SPDs is composed of rules regarding: (i) the regulated or freedom tariff schemes; (ii) subsidies; (iii) rules regarding restrictive anti-competitive practices and abuse of dominance; and (iv) rules regarding proceedings, methods, formulas, rate structure, stratification, and all other aspects related to tariffs.

The tariff regime is governed by a set of criteria established in article 87 of the SPD law. These criteria are as follows:

- 87.1. Economic efficiency: Tariffs must resemble prices in a competitive market. Tariff formulas must consider not only costs but productivity gains which must be distributed between the operator and the consumers. Tariff formulas cannot pass through to consumers the costs of inefficient management nor allow operators to appropriate profits from restrictive anti-competitive practices.

- 87.2. Neutrality: Consumers in the same situation must be treated equally. Tariffs must not be unjustly discriminatory.

- 87.3. Solidarity and redistribution: The tariff regime will assign resources to “solidarity and redistribution funds” so that high income, commercial and industrial consumers help low income consumers to pay tariffs that cover their basic needs.

- 87.4. Financial sufficiency: Tariff formulas will guarantee that SPD operators to recover the costs and expenses of their operation, including expansion, replacement and maintenance. The rate of return on capital will be established according to the operation of an efficient company in a sector of similar risk.

- 87.5. Simplicity: Tariff formulas must be easy to understand, apply and control.

- 87.6. Transparency: The tariff regime must be explicit and public.

According to section 87.7 of article 87 of the SPD law, the efficiency and financial sufficiency criteria will have priority over the rest. However, the application of these criteria must be consistent with the economic and social ends of the State, and take into account not only the financial conditions of the operators but the payment capacity of the consumers in general.[241]Tariffs must reflect both the level and structure of the economic costs of the service, as well as the demand for the service (section 87.1). All tariffs are unique and complete, in the sense that they must reflect a particular quality and level of coverage of the service, characteristics that are defined by the regulatory commissions (section 87.8). Accordingly, article 90 of the SPD law states that tariffs may include a consumption charge that reflects the structure of costs of the service which varies according to the level of consumption and the demand for the service (section 90.1); a fixed charge that reflects the costs involved in guaranteeing the availability of the service with independence of its use (section 90.2); and a connection charge related to the costs of connecting a consumer to the service (section 90.3).

3.2.2. Subsidies.

A main concern of the Colombian Constitution of 1991 is to better the quality of life of all citizens, and to guarantee the regular and efficient provision of public services. According to the SSPD, the Colombian State has adopted the model of “Social State of Law” which gives priority to social public expenditure directed towards the satisfaction of basic needs of the population, and mandates State intervention to guarantee the provision of public services in conditions of universality and accessibility.[242]Accordingly the constitutional mandate regarding SPDs states that the legislator has the authority to establish rules regarding subsidies that cover the basic needs of low income population.

Therefore, it appears that subsidies are not mandatory but optional. However, the social end of the State directly related to the provision of SPDs seems to dictate the contrary. Indeed, only by applying the narrow view that favors the efficiency principle over others supports the view that subsidies are optional. On the contrary, the priority of social public expenditure directed towards the satisfaction of basic needs, as well as the application of the principles of solidarity and income redistribution, clearly determine the mandatory nature of subsidies that cover the basic consumption of low income population.

[241]José Joaquín Bernal R., "Nuevo régimen tarifario y capacidad de pago de los usuarios", in Revista Supervisión, T.1 1996.

[242]Superintendencia de Servicios Públicos, Actualidad Jurídica en Servicios Públicos, Tomo II, 1997, pág. 175

The notion of subsidy established in article 368 of the Colombian Constitution is an economic grant that helps low income population to pay the tariffs of SPDs. Subsidies only cover a portion of the cost of the service which is related to concept of basic need. In Decision C-566 of 1995, the Corte Constitucional has determined that subsidies in SPDs are a consequence of the model of Social State of Law, which does not imply total subsidization because this will constitute a great sacrifice of the efficiency principle in the provision of public services that allows for the recovery of costs and certain margin of profit for the operators. The Court also considered that total subsidization would be an excessive application of the income redistribution principle because the main source of public expenditure on subsidies are the contributions imposed on higher income end users whose financial capacity has a rational limit.[243].

Thus, the SPD law created a cross-subsidy scheme by establishing a mandatory contribution equal to 20% of the cost of service to be paid by residential consumers of higher socio-economic strata and all non-residential consumers (commercial and industrial consumers). These contributions are considered public resources and must be used entirely to grant subsidies to residential consumers of the lower socio-economic strata. The SPD operators must include in the respective invoices of their end users either the contribution or the subsidy. However, the subsidies will only cover a portion of the cost of service and will apply only to basic consumption. In the case of natural gas, this basic consumption accounts for 20 to25 cubic meters of gas per month.

CONCLUSION:

Having reviewed the theories of regulation and its application to public utilities and SPDs, we can conclude that regulation of both public utilities and SPDs is justified by considerations of public interest. Regulation is also present to correct market failures, and to resemble the competitive market when situations of natural monopolies exist. In carrying out these functions, regulation looks to protect consumers from abusive practices of operators or utilities and this goal is a justification for regulation based on the public interest.

Although it is clear that there is no commonly held definition of the concept of *"public interest"*, due to the difficulties in determining that concept noted by Ogus,[244] most of the critics of the public interest theory fail in their attempts to undermine the evident relationship between the aims of regulation and of the public in general. In his book "The Public Interest in Regulation"[245] Mike Feintuck addresses the fundamental question of the public interest theory by asking how the public interest is determined. After a thorough examination of the different theories of regulation, including both the French concept of *service public* and the Italian concept of *servizzio publico*, as well as reviews of the social and economic

[243] Corte Constitucional, Decision No. C-566 Nov, 30, 1995. M.P. Eduardo Cifuentes

[244] OGUS, supra at note 145

[245] Mike Feintuck, "*The Public Interest' in Regulation"*, (New York: Oxford University Press Inc., 2004). [FEINTUCK]

theories of regulation, Feintuck concludes that the public interest of regulation may be explained and justified, through the perspective of public service law.[246]

I agree with this conclusion. As we established in the previous chapter, the elements of the notion of public service and the principles on which it relies are deeply related to the concept of public interest. Public services are mainly subject to regulation due to their relationship with fundamental rights of citizens and the provision of basic goods and services to people. We have shown that one fundamental feature of public services is that government is always present, either through direct provision of the service, or indirectly through regulation and control. We have also demonstrated that from a public finance perspective, public services are present to satisfy public needs, and therefore, government regulation is justified.

Finally, following Croley's approach, regulation should be assessed considering the particular features and complexities of regulatory proceedings and the advance of administrative and regulatory law. The alleged inefficiency of regulatory agencies suggested by the economic theory of regulation is not supported by empirical evidence. However, as Posner highlights, careful consideration must be given to the risk of regulators being captured to favor private interest instead of the public interest inherent to their mandate. Also, following Barton and Cameron, the evolution of regulation to self-regulation and market-based regulation schemes should be considered as a step forward in the road to achieve more effective and efficient regulation, which in turn serves as further justification of regulation based on the public interest.

[246] Feintuck based his analysis of the concepts of public service and *servizzio publico* on the works of T. Prosser, *Law and the Regulator* (Oxford, Clarendon, 1997).

CHAPTER THREE

COMPETITION IN NATURAL GAS MARKETS

INTRODUCTION

Having discussed the concepts of public utilities and SPDs and the main justifications for their regulation, I will now proceed to analyze natural gas markets, particularly the distribution and retail sectors, and the application of competition law rules to these markets. We will first refer to basic concepts and methodologies of competition law and policy such as market definition, market power, abuse of dominance, and anticompetitive effects. Next, through the methodology of market definition, we will address both the product market and geographic market dimensions of natural gas, paying close attention to the particularities of Colombia's gas market and making reference to Alberta's gas market as a benchmark for comparison. We will analyze the Colombian natural gas fuel cycle, describing the main activities and market participants, and the territory in which they operate. We will differentiate between regulated and competitive activities considering the fact that certain portions of the fuel cycle have characteristics of natural monopoly and therefore are subject to regulation – particularly network infrastructure related to the transportation and delivery of services while other activities such as production and marketing are considered competitive activities.

Secondly, we will analyze the means by which competition is introduced to regulated industries such as natural gas. We will analyze Colombia's gas liberalization process, focusing on the main policy and regulatory decisions regarding price deregulation, unbundling and open access, as well as the application of competition law and policy when anticompetitive behaviors emerge. We will discuss gas deregulation in Alberta, focusing on the main problems and complications that Alberta regulators had to face after deregulation, such as situations of unjust and unfair discrimination and locked-up contracts affecting residential customers, or the delay in the development of a competitive retail market, among others. A particular aspect of this analysis has to do with the role of the regulatory agencies with respect to competition in natural gas markets. In this respect we will pay close consideration to the role of government agencies such as the MSA and the AUC in Alberta, and the SSPD, the SIC and the CREG in Colombia.

Finally, we will discuss the idea of competition as a mean to protect consumers in natural gas markets, and the shift to a model of market-based regulation, or paraphrasing Professor Peter Cameron, to a model of "regulation for competition".[247]This analysis will include a review of Competition Advocacy as a tool to assess the impact of government regulation in the market, and to introduce a "competition

[247] Cameron, P. "Gas Regulation in Europe", Financial Times Energy Publishing, Pearson Professional Ltd. London, 1995

culture" within government agencies. In this respect we will discuss the implementation of Competition Advocacy in Colombia through article 7 of Law 1340 of 2009, the new competition statute.

1. BASIC CONCEPTS OF COMPETITION LAW AND POLICY

1.1. Market Definition

The methodology of market definition used by most competition authorities throughout the world, mainly in merger reviews, is also important when analyzing regulated markets such as gas utilities. Energy regulators often use market definition whenever they review a proposed merger between regulated firms or investigate anticompetitive practices in the regulated market. In Alberta, the province relies upon federal legislation, the Competition Act, to apply both of these concepts.

Canada's competition authority, the Competition Bureau, has issued its Merger Enforcement Guidelines[248] which apply to proceedings where the Bureau conducts an analysis that looks to determine whether a merger is likely to create, maintain or enhance market power. This exercise generally involves the definition of the relevant markets and assessing the competitive effects of the merger in those markets.[249]Regulatory agencies such as the AUC have also applied concepts of competition law in regulatory proceedings.[250]In this respect, Kaiser and Heggie point out that competition law has impacted the principles that govern monopoly utilities, both in terms of the common law doctrine of unfair competition as well as the statutory requirements of both the Sherman Act in the United States and the Competition Act in Canada. As these authors explain, these principles govern the conduct of monopoly utilities when they enter into competitive markets as well as the deregulation of markets.[251]

The Competition Bureau typically considers product[252] and geographic[253] substitutes that are included in a single relevant market to be "acceptable" within the meaning of section 93(c) of the Act.[254] When products within a relevant market are differentiated, some may be closer substitutes than others.

---

[248] Competition Bureau, Merger Enforcement Guidelines, Ottawa, 2011 www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html [MERGER GUIDELINES]

[249] According to the Merger Enforcement Guidelines, conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price above levels that would likely exist in the absence of the merger.

[250] Alberta Utilities Commission, Decision 3110-D01-2015

[251] Kaiser and Heggie, supra at note 67, at p. 93

[252] According to the Merger Guidelines, the product market includes the goods or services provided by the companies involved in the merger, and the nearest substitutes of this product or service. The competition authorities consider factors that provide evidence of substitutability, including evidence from market participants and various functional indicators that help to determine what products are considered substitutes, including cross-price and demand elasticity, end use, physical and technical characteristics, price relationships and relative price levels, as well as buyer switching costs.

[253] The geographic market includes the scope in which the involved agents operate, or the territory that would be affected by the merger. For the purpose of geographic market definition, what matters is not the identity of the sellers, but buyers' ability or willingness to switch their purchases in sufficient quantity from suppliers in one location to suppliers in another, in response to changes in relative prices. When defining the boundaries of geographic markets competition authorities generally rely on evidence of substitutability and various functional indicators

"Market definition is based on substitutability, and focuses on demand responses to changes in relative prices after the merger. The ability of a firm or group of firms to raise prices without losing sufficient sales to make the price increase unprofitable ultimately depends on buyers' willingness to pay the higher price. The ability of competitive suppliers to respond to a price increase is also important when assessing the potential for the exercise of market power, but the Bureau examines such responses later in the analysis—either when identifying the participants in the relevant market or when examining entry into the relevant market".[255]

In Colombia, market definition allows for a clear differentiation of the activities and agents involved in the provision of SPDs, distinguishing between those portions with characteristics of natural monopoly from those open to competition. This becomes more evident when it comes to State intervention regarding infrastructure and facilities involved with SPDs. Most SPDs require networks and other infrastructure which are considered "essential facilities" and, as we will discuss further in this chapter, are subject to rules of open access and unbundling, in order to create more competition and guarantee allocative efficiency. Also, various statutes relate to the promotion and protection of competition. Together, Law 155 of 1959, Decree 1982 of 1992 and Law 1340 of 2009 contain Colombia's general competition regime. These statutes contain rules regarding monopolization, anticompetitive practices, mergers & acquisitions, as well as the organizational and functional framework in which the Superintendence of Industry and Commerce (SIC) - the Colombian Competition Authority - operates and complies with its public interest mandate of promoting and defending competition.[256]

In Colombia, the relevant market is determined considering both its product and geographical dimensions, and considering the responses of consumers and other agents to price increases and the effect of potential competition. Agents operating in Colombia's natural gas market have been the object of both merger review proceedings and anticompetitive practices investigations conducted by the SIC.[257]In 2011, several local gas distribution companies were the subject of investigations by the SIC with respect to allegations of abuse of dominance in the markets of construction and maintenance of end users' gas installations and connections.[258]Following these investigations the Colombian energy regulator enacted regulations to guarantee competition in these markets, removing the privilege that LDCs used to have in charging a regulated price for conducting inspections to end users installations and, in selecting the

---

including particular characteristics of the product, switching costs, transportation costs, price relationships and relative price levels, shipment patterns and foreign competition.

[254]Section 93 of Canada's Competition Act sets out a non-exhaustive list of discretionary factors that the Competition Tribunal may consider when determining whether a merger prevents or lessens competition substantially, or is likely to do so. These factors, which are largely qualitative, may be relevant to the Bureau's assessment of market definition or of the competitive effects of a merger, or both. The Bureau may also assess competitive effects from a quantitative perspective using various economic tools.

[255] MERGER GUIDELINES, supra at note 246

[256] With respect to mergers, Colombia's competition watchdog has issued General Rule 001 which regulates merger approval proceedings and expressly refers to the methodology of market definition. Colombia's competition authority also applies the substitutability principle to determine the relevant market, differentiating between supply and demand substitutions.

[257] See Proceeding 09-99186 Merger ALCANOS-TRANSGASTOL (May 11, 2011), Proceeding 10-146981 Merger PROMIGAS-TRANSORIENTE (June 14, 2012).

[258]See SIC Resolutions 13759/2011, 32505/2011, 36446/2011 and 8796/2012, regarding abuse of dominance in connected markets, particularly by major gas distributor GAS NATURAL S.A. ESP.

contractors that would conduct the construction, maintenance and revision of end users installations and connections.[259]

1.2. Market power, anticompetitive effects and abuse of dominance

Market power is generally defined as the ability to set prices above competitive levels. Market power typically arises in markets characterized by concentration and high barriers to entry. Firms in a concentrated market typically find it easier and less costly to engage in coordinated behavior because it is easier for members of a small group of firms to recognize terms of coordination, and to monitor one another's conduct and detect and respond to deviations. Barriers to entry are also relevant, since coordinated behaviour among competitors in a concentrated market would likely be unsustainable if raising prices were to lead to significant effective entry.[260]To determine the ability and effectiveness of remaining competitors to constrain an exercise of market power by the merged firm, competition authorities examine existing factors such as forms of rivalry, whether the market shares of firms are stable or fluctuate over time, and the extent to which product differentiation affects the degree of direct competition among firms. Further, competition authorities assess whether competitors are likely to remain as vigorous and effective as they were prior to the merger.[261]

In Canada, the assessment of anti-competitive effects falls under the broad categories of unilateral effects and coordinated effects. A unilateral exercise of market power occurs when the merged firm can profitably sustain a material price increase without effective discipline from competitive responses by rivals.[262] With respect to coordinated effects, a merger may prevent or lessen competition substantially when it facilitates or encourages coordinated behaviour among firms after the merger.[263] With respect to abuse of dominance, the Competition Act states that it occurs when a dominant firm or a dominant group of firms engages in anticompetitive acts, with the result that competition has been, is being, or is likely to be prevented or lessened substantially. According to the Competition Act, abuse of dominance could happen if, as a result of anticompetitive acts, prices are substantially higher, or product quality, choice or innovation are substantially lower. If all elements are met, the Commissioner may apply

[259] CREG Resolution 059/2013

[260] The Merger Guidelines supra at note 246 refers to market definition and competitive effects concurrently in a dynamic and iterative analytical process. When the market share and concentration thresholds are exceeded or when other information suggests that a merger may prevent or lessen competition substantially, the assessment of competitive effects based on quantitative analysis and the application of relevant factors takes on greater importance.

[261] A merger may facilitate the exercise of market power by impeding the process of change and innovation. For example, when a merger eliminates an innovative firm that presents a serious threat to incumbents, the merger may hinder or delay the introduction of new products, processes, marketing approaches, and aggressive research and development initiatives or business methods.

[262] Unilateral effects can occur in various market environments, defined by the primary characteristics that distinguish the firms within those markets and determine the nature of their competition.

[263] When making this assessment, competition authorities consider a number of factors, including those necessary for successful coordination and those that are conducive to coordination.

to the Competition Tribunal for a remedial order, including payment of an administrative monetary penalty.

In Colombia, the concept of abuse of dominance emerged as a legal answer to the phenomenon of market power, to control its use and abuse, and to regulate its effects over the market structures and the dynamics of free competition. Almonacid and Garcia explain that in Colombia the abuse of dominant position in the market can be explained, from a civil law perspective, as a variation of the general theory of abuse of law, in concrete terms, the abuse of the right to free competition.[264]Indeed, abuse of dominance is considered a type of anticompetitive conduct prohibited by the general competition law regime. The concept of abuse of a dominant position in the market was first established in article 333 of the Colombian Constitution of 1991 according to which the State, by mandate of the law, will prevent the obstruction or restriction of economic freedom and will avoid or control the abuse of a dominant position in the market by any person or enterprise.[265]The constitutional mandate was developed by Decree 2153 of 1992, particularly section 5 of article 45 which defined dominant position as the possibility to determine, directly or indirectly, the conditions of a market.[266] Article 50 of Decree 2153 of 1992 includes situations of abuse of a dominant position such as predatory prices, vertical or horizontal discrimination, and tied sales.[267]

2. THE NATURAL GAS FUEL CYCLE

Regarding the natural gas fuel cycle, Suedeen Kelly[268]explains that even though production and retail sales are considered competitive activities, pipelines and local distribution companies still have a monopoly on the transportation of gas, and remain subject to economic regulation. Notwithstanding, Kelly highlights that in the United States the Federal and State governments are moving from traditional rate of return regulation, with its comprehensive price control, to greater reliance on market mechanisms and

---

[264] Juan J. Almonacid Sierra y Nelson G. García Lozada, "Derecho de la competencia", Legis, 1st. ed., Bogotá, 1998. [ALMONACID]. Indeed, before the Treaty of Rome, abuses of the right to free competition were reprehended based on civil law rules. Thus, in Germany, since the beginning of the twentieth century, the rules of the Civil Code regarding the abuse of the law were used to rule the figure of competition. As Almonacid and Garcia explain, Order of November 2 of 1923 sanctioned conducts where market power was used to obtain contractual conditions, particularly with respect to prices, that may affect the economy or public goods. A similar approach was taken by Order of July 26 of 1930, *Kartell Not Verordnung*, under the figure of abuse of dominant position still in force.

[265] Gaceta Constitucional. 80, May 23, 1991, p. 20. Even though this article doesn't define what a dominant position is, the debates of the National Constitutional Assembly, previous to the promulgation of the Constitution of 1991, defined it as the power that allows an economic entity to subtract itself from effective competition in an important part of the market, affecting economic freedom and the interests of consumers. Also, the debates were clear in stating that only the abuse of a dominant position in the market was prohibited. This decision was based on two factors: the developments of European law, and the requirements of the worldwide economic system.

[266] Almonacid, supra note 262

[267] In addition, in Colombia it is possible to sanction other forms of abuse of a dominant position not expressly contemplated in Decree 2153, such as denial of contract, infringement of copyright, situations of control or takeover, and the access to privileged or confidential information.

[268] Suedeen Kelly, "Natural Gas", in Rocky Mountain Mineral Law Foundation, "Energy Law for the 21st Century", ch. 8 [KELLY]

alternative regulation.[269] Concomitantly, the natural gas industry has evolved into one with four phases in its fuel cycle: production[270], pipeline transportation[271], local distribution[272], and marketing[273].

In a study of the British privatization process, Mark Armstrong point outs that utilities usually combine two types of activities: the so-called "regulated" activities, which are naturally monopolistic activities, and "non-regulated" activities which are *potentially* competitive activities. For instance, in natural gas, regulated activities include transportation and distribution, and non-regulated activities include production (exploration and exploitation) and retail supply. For a long time, gas utilities have been characterized as *natural monopolies* because the presence of increasing returns resulting from economies of scale in the production process (e.g. unit costs decline as production increases) was detrimental to competition. Also, the production of these services entailed *sunk costs,* which made it difficult for new suppliers to enter the market.[274]

According to Armstrong, Cowan and Vickers, before privatization of these sectors authorities should first determine the industry structure in order to set the privatization and the regulation policy. These questions concern: (i) Vertical integration -- is the firm operating both monopolistic activities and competitive activities? (ii) Free entry -- are sunk costs important? (iii) Vertical separation -- is the firm

---

[269] According to Kelly supra at note 266, the gas industry in the United States was restructured in the mid-1980s by Congressional and regulatory actions. The US Congress eliminated price controls on gas at the wellhead while the Federal Energy Regulatory Commission – FERC – required interstate pipelines to sell transportation of gas separately from the sale of gas itself (a phenomenon known as "unbundling" of services), transforming pipeline companies into common carriers. Many states followed the federal lead and required their local distribution companies to unbundle distribution and gas sales services. As a result, many wholesale and large retail gas consumers started buying gas directly from producers or gas marketers.

[270] According to Kelly, supra at note 266, in the United States, the major gas-producing states are Texas, Louisiana, New Mexico, Kansas, and Alaska. Three states, Texas, Oklahoma, and Louisiana, account for over half of the total natural gas produced in the U.S. Texas itself produced about 37% of total U.S. Production in 1998. More recently the Marcellus basin near Pennsylvania has been regarded as one of the biggest natural gas production sites in North America.

[271] About fifty major pipeline companies move most of the interstate gas in the U.S. Traditionally, a single pipeline, owned by one company, linked a producing field with a city gate. Today, pipeline companies have evolved into a highly connected network. The interstate pipeline network has grown primarily through greater interconnection, allowing for smoother operation and greater competition. Market centers have grown up at points where multiple pipelines intersect and are supported by access to underground storage. This makes multiple routing of gas possible. Today, at least 39 market centers operate as pipeline hubs in the U.S. and Canada. The Henry Hub in Louisiana is the major gas market center in the U.S. Others such as the Chicago Hub are growing.

[272] There are 1400 local distribution companies (LDCs) in the U.S.

[273] As Kelly supra at note 266 explains, with the advent of regulatory reform and increased competition in the price and sources of natural gas, the gas marketer has emerged as a new member of the natural gas industry. To date, marketers have primarily served large customers with fuel-switching capability. Independent marketers are able to procure gas and ship it because federal regulatory reform that required interstate pipeline to open access to their transportation service separately from their gas service. However, Kelly highlights that not all states have required their LDCs to unbundle their services and to operate as open access transporters. Even so, most city gates are now open to at least some bypass of the LDC as merchant; however, most small gas consumers still use their LDC to sell them both transportation and the gas itself. Gas marketers are not subject to economic regulation by the federal government or the states. However, the FERC does impose standards of conduct on interstate pipelines with marketing affiliates to ensure that they do not unfairly advantage their affiliates with transportation rates or services.

[274] Waddams Price, C. and R. Hancock *Welfare Effects of Liberalizing UK Residential Utility Markets.* Center for Management under Regulation Warwick Business School. Research Paper 97/2. Sunk costs distinguish from fixed costs in that the former are costs that cannot be recouped while the latter can be recovered.

undertaking only monopolistic activities and is competition allowed elsewhere? and (iv) Regional structure -- is there just one nationwide monopoly or are there regional monopolies? [275]

In his thesis on Canadian Gas Deregulation, Alexander J. Black highlights that the notion of natural monopolies is present in most of the activities related to natural gas supply, particularly in network industries. Indeed, natural gas pipelines are frequently affected by technical exigencies that would induce economic inefficiency if it were not for a monopoly of the market.

"Although Canada does not have many natural monopolies, the downstream natural gas industry forms part of this category, at both the local distribution level and at the long distance pipeline level… Therefore, direct governmental regulation of natural gas distribution and transportation industries appears necessary for a variety of reasons:

(i) Regulation can inhibit the excess profits of a monopolist by providing a mechanism of restraint on the rates that it charges, as well as the type of activities in which it engages. Without regulation, an inefficient allocation of resources could result from the higher prices paid by consumers to the monopolist.

(ii) Most public utilities are monopolies or partial monopolies which are controlled by statutory regulatory bodies that determine inter alia, charges for services as well as the type of services to be available.

(iii) Regulation of public utilities tends to require "non-discriminatory" contractual provisions with customers and that the rates charged be "just and reasonable".

(iv) One of the most compelling reasons in support of utilities regulation is the prevention of discrimination in pricing and provision of services. Social norms of fairness may be violated when individuals are subject to discriminatory treatment. Price discrimination is a form of income redistribution resulting from the ability of the seller to separate consumers into different classes based on different intensities of preference (elasticity of demand).

(v) Another rationale for regulation is its use as a proxy for fiscal policy. This frequently occurs in the cross-subsidization of services where regulators allow certain prices to be offered below their actual cost, only to be offset by other services provided above cost.[276]

However, with the advent of new technologies and legal and economic instruments, markets for gas utilities are becoming contestable.[277] Innovation and technology allow the disaggregation of one sector into a wide range of activities some of which offer greater possibilities for other agents to enter into the market through the reduction or elimination of the problem of sunk costs.[278]

3. COLOMBIA'S NATURAL GAS INDUSTRY

According to Frontier Economics, the Colombian regulatory model for natural gas is known as "Wholesale Competition" which has the following main characteristics: (i) Competition in the activities of production and gas marketing; (ii) Network activities, such as transport and distribution, are considered regulated activities; (iii) Open access to third parties' infrastructure; and (iv) Retail competition limited to

[275] Armstrong, M., S. Cowan and J. Vickers, *Regulatory Reform: Economic Analysis and British Experience,* (The MIT Press, 1995).

[276] Black, Alexander J., "Canadian Natural Gas Deregulation", LLM Thesis, University of British Columbia, July 1988, [BLACK]

[277] Helm, D. y Jenkinson, T., "The Assessment: Introducing Competition into Regulated Industries" (1997) 13:1 Oxford Review of Economic Policy 4.

[278] Vickers J. and G. K. Yarrow, *Privatization: An Economic Analysis,* (Cambridge: MIT Press, 1988).

large customers. In turn, this model presents three sub-markets: the gas supply market; the transport of gas market; and the sale of gas to the final user market.[279]

3.1. Supply

According to statistics recently presented by the Energy and Mining Planning Unit (UPME)[280]gas reserves in Colombia have grown from 3,895 Giga Cubic Meters in 1990 to 4,736.8 Giga Cubic Meters in 2009.[281] All natural gas sold in Colombia is domestically produced with roughly 90% coming from two main fields: the Guajira fields on the Caribbean coast (Ballena and Chuchupa), and the Cusiana fields in the interior (Cusiana and Cupiagua). Several minor fields account for the remaining 10%.[282] Data from UPME's Statistical Bulletin of Mines and Energy[283]show a total production of 1027 million cubic feet per day (MCFD) of natural gas in 2010. As shown in UPME's report, natural gas production almost doubled between 1997 and 2010, increasing from 576 MCFD to 1027 MCFD.

The Guajira fields account for about 50% of Colombia's total reserves and currently provide 65% of production. In 2010, the average production of the La Guajira field was approximately 726 MCFD per day. Gas from this field is delivered to the entry point of Ballena, and is shipped to the inland part of the country, the Atlantic/Caribbean coast, and to Venezuela. The Cusiana field accounts for most of the remaining half of total Colombian gas reserves and currently provides approximately 25% of production. The field is operated jointly by Ecopetrol, Talisman, and Total, and produces approximately 245 MCFD. Other minor fields such as La Creciente (40 MCFD), Gibraltar (30 MCFD), Payoa (20 MCFD), and others (20 MCFD) produce approximately 110 MCFD per day. In addition, it was recently announced that coal-bed methane reserves could also be developed in the near future. There is also off-shore exploration activity in the Caribbean that appears to have significant potential for future gas production.[284]

3.2. Demand

Natural Gas has become one of Colombia's most important energy sources, increasing from 5.7% of total energy consumption in 1990 to 16.4% in 2009. However, as the demand grows, particularly in the industrial, natural gas for vehicles (NGV)[285] and residential sectors, some voices have questioned

---

[279] Frontier Economics "Diagnostic of Natural Gas Market Failures in Colombia", Ministerio de Minas y Energía, March, 2010 [FRONTIER]

[280] UPME stands for Spanish "Unidad de Planeación Energética" an entity related to the MME in charge of making energy supply and demand projections and planning of new energy infrastructure.

[281] GSm3 Giga Standard Cubic Meter, Volume unit for gas that equals 1 billion cubic meters of gas at an air pressure of 1.01325 bar and 15° C.

[282] According to data from Market Analysis, Frontier Economics, and CREG Document 095 of 2005 upstream gas production in Colombia is highly concentrated. The Herfindahl-Hirschman Index (HHI) for gas supply is 4529, and the degree of concentration is set to increase when ECOPETROL acquires complete control over the Cusiana fields by 2019

[283] UPME, "Boletín Estadístico de Minas y Energía", at page 212

[284] For a detailed description of the Colombian gas market see Luis Pando, "Regulatory Framework Concerning Gas" Part II, in "Energy Law in Colombia", Kluwer Law International BV, The Netherlands, 2013, at pages 83 to 91

[285] NGV is compressed natural gas used for transportation. Vehicles that run with natural gas benefit from lower prices compared to gasoline.

whether the existing gas reserves are sufficient to meet the demand in the medium term.[286]The main consumption points are located in the major urban centers (e.g. Bogotá, Cali, Barranquilla, and Medellin among others), and where gas-fired power plants and refineries are located, mostly in the northern part of the country near to Barranquilla, and in the central region near to Barrancabermeja.[287]According to the data of the UPME [288], in 2010, the total demand for natural gas in Colombia was of 860 MCFD. The thermoelectric and industrial sectors are by far the largest consumers of natural gas in Colombia, accounting for 34% and 28% respectively. Residential and commercial users account for about 17%; refineries 12%; NGV 8%; and the petrochemical industry accounts for the remaining 1%. It is important to highlight that together, large industrial customers and thermoelectric plants account for 62% of total demand. However, this agents are able to purchase gas directly from producers or marketers in the wholesale market, and usually have the ability to change the fuel source, all of which contributes to a higher bargaining power. The analysis of these agents and the gas wholesale market are out of the scope of this dissertation. Our main concern is residential and small commercial demand, as the provision of gas distribution and retail services are of increasing importance for these type of consumers. In this respect, in order to guarantee the supply of gas to the so-called "essential demand", which includes regulated users supplied by local distribution companies, the MME created a priority order according to which residential consumers would be the last to be disconnected in cases of gas shortages.

According to data from UPME, in 2010 there were 5,763,746 connected users of natural gas, of which 98.22% are residential users, 1.72% commercial users, and only 0.06% industrial users. The most important feature of the Colombian natural gas market is the remarkable growth of residential demand together with the rapid development of Natural Gas for Vehicles (NGV).[289] Considering the socio-

[286] UPME's demand projections in its high scenario indicate that by mid-2017 the total consumption of gas will be of 1.100 MCFD, rising up to 1.200 MCFD in 2020, exceeding the ceiling of 1.500 MCFD in 2028. According to MME's Communication 18054 of December 29, 2009, the Reserve/Production ratio factor for the year 2009 was of 7 years of proven reserves. Notwithstanding, according to the UPME Colombia has the potential to double its gas reserves with unconventional sources such as Coal Bed Methane (CBM) and shale gas that can account for up to 4 TPC additional reserves.

[287] The market is not concentrated on the demand side. The market HHI's for the years 2008 to 2010 are 793, 931 and 914, respectively. The vast majority of Colombia's gas is sold via firm contracts with durations from three to five years, although some contracts are longer. Current gas contracts are mostly take-or-pay with a high minimum percentage of "take" over the month or year.

[288] UPME, "Boletín Estadístico de Minas y Energía" at page 218

[289] Since the "*Mass Use of Gas*" program began in the early 1990s, both the NGV and the residential sectors have presented the highest rates of new connections, demonstrating the benefits of natural gas for purposes such as heating, air conditioning, cooking, and transportation. In the NGV sector, reality exceeded expectations. In 2002, 18,369 vehicles converted to natural gas in 2002 compared with 324,515 vehicles in December, 2010. Between January and July of 2010 an average of 1,580 vehicles converted to gas each month. The policy of vehicle conversion was encouraged by considerable tax incentives such a VAT exemption for the import of the conversion kit. Further development was encouraged by the construction of natural gas station services and points of natural gas service in existing stations. The Ministry of Environment also assigned an import quota of 100 hybrids, electric and natural gas-powered vehicles for 2010. See UPME, "La Cadena del Gas Natural en Colombia", Bogotá 2005.

economic level of residential consumers connected to natural gas, 85% belong to low income groups, showing that natural gas is highly appreciated for its social benefits.[290]

3.3. Product Market

Natural gas can be seen both as a hydrocarbon resource[291] and as a domiciliary public service. From a legal perspective, the Colombian constitution provides that gas resources located in the sub-surface are the property of the State and, as a result, its exploration and exploitation are defined by the National Hydrocarbons Agency (ANH).[292]Once gas reaches the wellhead, it is considered a private good. Also, the SPD Law defines gas SPD as the conjunction of activities involved in the distribution of combustible gas, through pipelines or other means, from a production site or a central pipeline to the connection of the end-user.[293]According to this definition, gas distribution is the activity considered to be a domiciliary public service, although the law also applies to the complementary activities of production, transportation and marketing. It is worth noticing that distribution of propane gas and complementary activities are also considered a domiciliary public service, and therefore compete with natural gas, particularly in the residential and small commercial sectors.

In several investigations regarding abuse of dominance by gas distributors[294]the SIC has determined that the Colombian natural gas fuel cycle is composed of the following activities: production (including the sale and supply of gas in the wholesale market), transportation, distribution, and retail. The Colombian natural gas chain of supply consists of the following agents: producer/wholesale marketer; transporter; local distributor; and retailer. In the case of transportation or distribution of gas, it is argued that it is inefficient to serve two populations located in the same territory using two separate networks. In contrast, production and marketing are generally considered as competitive activities. The concepts of third party open access and unbundling allow the separation of these activities from those related to

[290] In the XV Naturgas Annual Congress held in Cartagena on March 28, 2012, the Colombian Ministry of Mines and Minerals announced important achievements such as the growth of the residential demand reaching a total of 6.345.470 end users, the connection of 224.158 new residential and commercial users of natural gas. See Pando, "Energy Law in Colombia", op. cit. at pages 100-101

[291] The CREG has defined natural gas as a mixture of gases of great caloric power that was formed throughout the years in the sub-surface of the Earth. The principal component of this mixture is methane. The other components - in small quantities – are mainly other gases such as ethane, carbon dioxide (CO2) and vapor. It can be measured in volume units (cubic meters m3 or cubic feet ft3) or energy units (kilowatt hour kWh or caloric units BTU. Online at:
http://www.creg.gov.co/html/i_portals/index.php?p_origin=internal&p_name=content&p_id=MI-66&p_options= (Visited November 30, 2015)

[292] Decree 1760 of 2003 unbundled from ECOPETROL the administration of gas reserves property of the State coming from royalties and shares in the exploitation agreement. In that way, ECOPETROL becomes another agent that competes in the upstream business leaving regulatory functions and bidding processes to the ANH.

[293] Article 14.28 of Law 142 of 1994

[294] See SIC Resolutions 13759/2011, 32505/2011, 36446/2011 and 8796/2012

infrastructure and networks (transportation and distribution), making it possible for producers or marketers to sell their product or service directly to their customers.[295]

3.3.1. Producer or Gas Marketer

The Producer or Gas Marketer produces and extracts natural gas from gas wells to sell it to large consumers such as industrial users, thermoelectric companies, and local distribution companies (LDCs) in the Wholesale Market, also known as the primary market[296]. From the legal perspective, gas marketing[297] is considered complementary to gas distribution, and a domiciliary public service subject to CREG's regulations, orders and directives, as well as to SSPD's oversight. However, gas marketing in the wholesale market is different from the retail activity or gas supply to small consumers (residential, small commercial and industrial), which is developed by LDCs and independent retailers.

The production or exploitation of gas can be done directly by Ecopetrol (the state-owned Oil and Gas Company), or by private investors solely or in association with Ecopetrol. Due to the ownership regime applicable to hydrocarbons and the prevailing Association Agreement[298]scheme where Ecopetrol acts as partner in most production sites, Ecopetrol is the leading producer of gas in Colombia, with a share in all the major production fields. Chevron, associate producer with Ecopetrol of La Guajira fields, is the second largest producer, followed by Talisman, Total and Tepma, associate producers with Ecopetrol of the Casanare fields. As a consequence, Ecopetrol and its associates maintain a dominant position in the gas production and supply market, a situation that is expected to change with the recently introduced rules to promote competition in this portion of the supply chain.[299]

Even though gas marketing is considered a competitive activity, due to the problems of concentration in production/supply highlighted above, it is also partially regulated. In general the rules of private law and the principles of free market and competition apply to prices, contracts and negotiations. Notwithstanding the competitive nature of production and marketing, government intervention has been

---

[295] Ricardo Gutiérrez Velásquez, "Doctrina de la infraestructura vital para la prestación de un servicio público domiciliario: un análisis comparativo del modelo colombiano con las tendencias conceptuales y aproximaciones de la Unión Europea", en Revista Supervisión, Tomo 4, dic. 1997

[296] The formerly State-owned oil company ECOPETROL is the major producer and has a share of the majority of natural gas association agreements. Other major producers are CHEVRON PETROLEUM COMPANY, EQUION, PACIFIC RUBIALES, TALISMAN ENERGY, SANTIAGO OIL COMPANY, GRUPO PETROTESTING COLOMBIA S.A., HOCOL S.A., MERCANTILE COLOMBIA OIL AND GAS, PACIFIC STRATUS ENERGY COLOMBIA LTD., PETROBRAS COLOMBIA LIMITED, PETROBRAS INTERNATIONAL BRASPETRO BV and TEPMA

[297] CREG Resolution 057 of 1996 defines gas marketing as an activity consisting of the sale and purchase of gas in the wholesale market or destined to end users.

[298] The first contractual scheme for the exploration and exploitation of gas was the concession agreement. Later with the reform of Law 20 of 1969, the new concept of association agreement was introduced, with a term of 27 years, where ECOPETROL had a 40% share of production, and received a royalty of 20% of production paid by the Oil & Gas Company. This system exists since 1974 and is determined by the legal regime applicable in Colombia to the property of the subsurface and of non-renewable resources such as oil and gas. In broad terms, ECOPETROL enters into an association agreement with the Oil & Gas Company having right to a share of production, bearing no risk of exploration, and also receiving gas or money as royalty during the exploitation of the field. This Joint Operation Agreement (JOA) has changed during the years, particularly regarding royalties and taxes to introduce incentives for more exploratory activity.

[299] The government's aim is not only to guarantee internal supply but to introduce competition into the highly concentrated gas supply market.

required in the Colombian upstream market to correct the market failures identified in several studies.[300]For example CREG recently introduced rules regarding the obligation of producers/marketers to declare and offer the total available production through an auction scheme. In addition, CREG began to regulate certain aspects of marketing procedures, gas supply contract models, and the functions of the Technical System Operator (GTS). [301] Moreover, CREG Resolution 089 of 2013 established the procedures for the sale of gas, distinguished between the Primary and Secondary Gas Markets,[302] and determined which agents can participate as sellers or buyers of gas and transport capacity in each market. It also determines the different types of contractual schemes and the options available to producers, transporters and marketers to offer available supply and transport capacity.

3.3.2. Transporter

In Colombia pipeline transportation companies[303] are in charge of moving gas through a number of major pipelines that together form what is known as the National Transport System (SNT).[304] Natural gas is taken from the point of entry to the SNT - located at the production sites - to the city gates,[305] where gas is injected into the distribution systems of the LDCs. Alternatively, natural gas can be transported directly through investor-owned facilities of thermoelectric or industrial companies. Also, transporters sell transport capacity in the Wholesale Market and participate in the supply and transportation secondary market. Transport of gas is considered complementary to gas SPD and therefore is subject to CREG's

[300] See David Hardbord of Market Analysis "Upstream Issues in Colombian Gas Supply" a report commissioned by the CREG, Bogota April (2010) [MARKET ANALYSIS] Indeed, the study on the Colombian Upstream Gas Supply conducted by David Hardbord of Market Analysis, concluded that a clear pattern emerges in La Guajira and Cusiana fields: An unwillingness to offer significant quantities of firm gas contracts to the market, especially after 2012/13. The study also shows a tendency, particularly on the part of ECOPETROL, to offer less than the total gas production available as either firm or interruptible gas contracts.

[301] According to Ministerial Decrees 2687 of 2008 and 2100 of 2100 gas producers are required to submit annual declarations of production to the MME which must include: (i) the potential production available from each field and the amount of committed production for each field; (ii) the total potential production the company offers as firm and non-firm supply (interruptible gas). Decree 2100 of 2011 also provides for the creation of an Independent Market Operator in charge of settling supply and transportation agreements, monitoring the correct functioning of the market, and providing timely and relevant information to agents regarding production, prices and contractual schemes.

[302] The secondary market is defined by CREG Resolutions 033 and 071 of 1999 as the market for natural gas supply and transportation capacity where shippers with secondary available transportation capacity and/or agents with gas supply rights can freely negotiate their contractual rights. Holders of excess firm transportation capacity can sell capacity outright, thus creating a "capacity release market". Capacity and commodity charges are negotiated between TSOs and pipeline users, and subject to arbitration. The capacity release market is a way for shippers to change their transportation portfolios. It provides a mechanism to improve transportation flexibility to meet changing gas supply and demand conditions. Because LDCs have traditionally served all consumers in their distribution area, they typically reserve enough capacity to ensure they can meet their obligation on days of peak demand. Because of this contracting practice, LDCs tend to have a lower rate of utilization of their capacity than other shippers.

[303] The two major transportation companies operating in Colombia are PROMIGAS S.A. E.S.P., operator of the Atlantic Coast Transport System, and TGI S.A. E.S.P., operator of the Interior Transport System. Other minor transport systems are operated by PROMOTORA DE GASES DEL SUR S.A. E.S.P., SOCIEDAD TRANSPORTADORA DE GAS DEL ORIENTE S.A. E.S.P., TRANSPORTADORA COLOMBIANA DE GAS S.A. E.S.P, TRANSPORTADORA DE GAS DEL INTERIOR S.A. E.S.P. and TRANSPORTADORA DE METANO S.A. E.S.P.

[304] SNT (Sistema Nacional de Transporte) is defined in CREG Resolution 033/1999

[305] City Gate is defined in CREG Resolution 011/2003 as the regulatory station from which a distribution system or a transportation sub-system may derive.

regulation.[306]Article 5 of CREG Resolution 057 of 1996 established unbundling rules to guarantee open access to the SNT and to prevent discrimination or unfair pricing. In particular, this article states that transportation is independent from production, distribution and retail activities, and that TSOs shall not discriminate between shippers.

The terms and costs of pipeline transportation are regulated by CREG and specified in contracts between pipeline companies and shippers. Shippers include LDCs (which supply gas to the majority of the residential and small commercial sectors), producers, and the large consumers of gas. In the Primary Transport Market, TSOs enter into transport agreements with shippers to grant access and capacity. According to CREG Resolution 001 of 2000 these contracts can be for firm or interruptible transportation capacity. The transportation market runs through a nomination procedure that consists of the daily request for gas from shippers to the TSO, specifying the quantity of gas to be transported and the points of entry and exit. These requests are the basis of the Transport Program, and are fundamental to comply with the operational and commercial processes established in the Transportation Code.[307]

3.3.3. Local Distribution Company (LDC)

The term LDC refers to the company that transports gas through a distribution system[308], from the city gates to the end-users' point of connection. LDCs buy gas in the Wholesale Market and also participate in the secondary or spot market where they can sell or buy excess supply and transportation capacity. From the legal perspective, natural gas distribution is a domiciliary public service governed by the special rules contained in Law 142 of 1994 (the SPD Law). Natural gas as a public service involves social ends from the view point of the State and consumers. Also, the public interest implies duties that operators must comply with, such as special corporate rules, licenses and prior approvals, registry and information reporting requirements, universal service obligations, as well as regulation by the CREG and permanent control and inspection from the Superintendence of Public Services (SSPD).[309]

---

[306] CREG Resolution 057 of 1996 defines the transport activity as the operation, management, maintenance and expansion of the pipeline system, including activities related to storage, compression and measuring. A Transporter or Transport System Operator (TSO) is the person or company that transports gas from the point of entry to the transport system to the point of delivery.

[307] The transportation tariff is also regulated by CREG. According to the current methodology transport charges are set according to distance, something that reflects the actual cost of rendering the service and resembles what occurs in a competitive market. As a consequence, gas prices are higher when consumption centers are located at greater distances from the production sites. This methodology makes transport capacity negotiations more flexible by introducing a dual-charge concept, which allows the shipper to propose a combination of fixed and variable charges that best suits its load curve.

[308] Distribution System is defined in CREG Resolution 011/2003 as a pipeline system that transports gas from the city gate or other distribution system to the point of connection to real estate properties, without including its connection and measuring"

[309] CREG Resolution 067 de 1995 or Distribution Code contains technical rules that all LDCs must comply regarding different aspects of the distribution system, the connection to end-user installations, quality of internal installations, health and safety, attention to emergencies, metering and invoicing, technical revisions, suspension and reconnection of the service, and in general, every aspect involved with the operation, administration and maintenance of the distribution network.

The local distribution market is divided into exclusive[310]and non-exclusive service areas.[311]Although these two different types of service areas exist, in practice all Colombian municipalities with natural gas distribution have a sole distributor, a situation justified in terms of economic efficiency as provided by CREG Resolution 112 of 2007 that considers natural gas distribution a natural monopoly.[312]The current regulation allows LDCs to purchase gas using different schemes but always looking for the best supply conditions.[313] CREG's regulation also obliges LDCs to have firm supply capacity to meet the demand of their regulated market. With respect to the non-regulated market, prices are set freely in bilateral agreements which may provide for firm or interruptible gas supply.[314]

LDCs are free to enter bilateral agreements with non-regulated users which are not subject to CREG's regulation. With respect to the regulated market, LDCs are subject to a regulated-freedom tariff scheme.[315]Under this scheme, CREG defines the general tariff formula and each LDC calculates its own tariff and submits it for approval. CREG conducts individual tariff proceedings for each LDC and distribution system. According to CREG's regulation, the current general tariff methodology applicable to the distribution and retail activities destined for the regulated market provides for each LDC to set a price cap for the service provided to regulated users based on the general criteria defined by CREG. When setting these general criteria CREG considers elements such as the base investment for distribution systems, the cost of capital, administration, operation and maintenance expenses (AOM), and demand projections.[316]In the case of LDCs operating in Exclusive Service Areas, the maximum cost of service is set forth in the particular concession contract after a public bidding process.

3.3.4. Retailer or Marketer:

This term describes the company that purchases or sales gas for profit. Also, companies that purchase gas to develop their own activities have the possibility to sell the gas that the company has not

[310] According to CREG Resolution 051 of 1996 a Non-exclusive Service Area is the geographic area corresponding to the municipalities and other urban areas in which natural gas is distributed and marketed without a concession contract, therefore allowing for other distributors to provide the service. Exclusive Service Area: Is the geographic area corresponding to the municipalities and other urban areas in which natural gas is distributed and marketed with exclusive rights granted to an ESP over this area by means of a concession contract that doesn't allow other distributors to provide the service in the exclusive area.

[311] Exclusive service areas are granted by the MME through special concession agreements for natural gas distribution. These contracts contain exclusivity clauses and special rules for rendering the service, prices and coverage. Currently 6 Exclusive Service Areas exist in the regions of Quindío, Caldas, Pereira, Risaralda, Valle and Tolima.

[312] According to CREG Resolution 112 of 2007 natural gas distribution is a natural monopoly with important economies of scale and in consequence it is efficient for a sole agent to provide the service in each relevant distribution market.

[313] Article 100 of CREG Resolution 057 of 1996 clearly determines the way LDCs must purchase gas to serve its market in the best conditions, through an open, transparent, equal and competitive process.

[314] Pando, "Energy Law in Colombia", at pages 96 to 99

[315] Art. 88 of Law 142 of 1994

[316] According to CREG Resolution 057 of 1996, the maximum cost of service (MST) formulae is: MST=G+T+D+C+Kst. That is to say, the maximum cost of gas (MST) is the sum of the costs of all the activities related to natural gas supply to the end-user including a conversion factor (Kst): the cost of gas (G), plus the cost of transport (T), plus the cost of distribution (D) and the cost of retail (C)

used[317] in the supply and transportation secondary market. In that sense, LDCs and large consumers can also be retailers. Decree 3429/2003 used to mandate that LDCs must also conduct the retail activity when rendering the service to "regulated users".[318]Retail includes activities such as billing, collection, and customer services. However, in 2013 the CREG ended the vertical integration of distribution and retail in order to develop a competitive retail market. Notwithstanding, this development has not occurred as expected, mainly due to the dominant position the LDCs still hold in their geographic markets.

3.3.5. End-Users:

Consumers are divided into two classes: regulated and non-regulated users. Regulated users are small commercial and residential customers with a low monthly consumption. They are generally supplied by LDCs and subject to a regulated tariff. Non-regulated users are large consumers such as thermoelectric companies and industrial customers which are not subject to a regulated tariff and therefore may enter into freely-agreed contracts with marketers. LDCs provide natural gas service to regulated and non-regulated end-users, mainly residential, commercial, industrial, and NGV stations.[319]

3.4. Geographic Market

In Colombia, the gas transport infrastructure connects the production sites with the main cities and consumption centers, excluding distribution systems, non-regulated users' connections, international interconnections and storage facilities.[320]It is a transport system with charges by distance, and as a consequence, the gas supply market is defined by the location of the production sites and the transportation costs associated with supply. In Colombia, considering the concentration of production in two geographic zones (La Guajira and Casanare have around 90% of total production), and the distance between the gas fields and the main consumption centers, transportation costs create natural markets for each field. According to CREG, this situation reduces the possibility of competition between the different sources of sites of production in the wholesale-retail market.[321]

According to CREG Resolution 057 of 1996, the National Transport System is composed of two separate, operational transportation systems: the Atlantic Coast Transport System, and the Interior

[317] According to CREG Resolution 033/1999, this remaining gas is also known as Secondary Available Capacity and/or Gas Supply Rights.

[318] According to CREG Resolution 057 of 1996 the Regulated Users are those with consumption equal or less than 100.000 cubic feet per day. Consumers of more than 100.000 cubic feet per day are Non-Regulated Users.

[319] Regulated users have a consumption that is less than 100 KPCD (thousand cubic feet per day) or the equivalent in cubic meters. Residential consumers and small industrial and commercial consumers fall under this category. Non-regulated users have a consumption that is higher than 100 KPCD. Large industrial and commercial consumers, thermo-electric companies and NGV distributors fall under this category.

[320] CREG Resolution 001 of 2000

[321] Document CREG 057 of June 2005. According to CREG's analysis, gas transportation costs gas from La Guajira fields is less competitive in interior regions such as Bogotá, Boyacá and Santander. Likewise, gas from the Casanare fields in the eastern part of Colombia could not compete in the Atlantic Coast region. Competition between fields is more likely to occur in other regions of the country. In any case, competition between gas producing regions will depend on the degree of congestion of the respective transportation systems.

Transport System.[322]Each of these systems are operated by two large Transportation System Operators (TSOs): Promigas on the Atlantic/Caribbean coast,[323] and TGI in the interior part of the country.[324]Other minor TSOs operate pipeline networks that have been developed under private ownership[325] to deliver gas from the TGI system to local markets such as Medellin and Bucaramanga. More recently, through the allocation of resources coming from contributions to the Special Development Fund created by Law 401 of 1997, new secondary pipelines have been constructed to supply gas to the Cauca department and to interconnect new distribution markets.[326]

Local distribution is a service rendered at a municipal level to both the regulated and the non-regulated market. LDCs have a natural monopoly over local distribution systems and in some regions they have exclusive rights that have been awarded through concession contracts.

3.5. Regulatory framework

The regulation of electricity and natural gas SPDs is done by the Regulatory Commission of Energy and Gas (CREG). [327]The Commission's Board is composed of the Executive Director who is also an expert, three expert commissioners, and representatives of the Ministry of Mines and Energy,[328] the Ministry of Public Finance, the Director of the National Planning Department (DNP)[329] and the Superintendent of the SSPD.[330]In contrast to most North American public utilities commissions, the CREG is not a tribunal with quasi-judicial powers. It does not conduct hearings or proceedings of a judicial nature.

With respect to electricity and gas utilities, article 74 of Law 142 of 1994 establishes the following special functions for the CREG: (i) Regulating agents and activities of the natural gas sectors to assure

[322] In Colombia several differences still remain between the Atlantic Coast and the Interior market. It is well known that gas markets tend to develop by regions. This was the case of the Atlantic Coast and the more developed markets of the interior, such as Bucaramanga and Neiva. However, the Government program for the mass use of gas along with the construction of pipelines in the interior changed this traditional pattern of industry development. The location of the modern thermo-electric generators followed the electricity demand and the creation of gas transportation. Consequently, an important number of electric generators set their thermo-electric plants in the Mid-Magdalena region, near the Opón gas field, while others located them in the Atlantic Coast near the electricity and gas consumption centers of La Guajira fields.

[323] The Promigas system includes the Ballena-Barranquilla-Cartagena-Jobo network, and is 590 kilometers long with a capacity of 540 GBTUD.

[324] The TGI system has two interconnected pipelines networks: the Ballena-Barrancabermeja pipeline which runs for 580 kilometers and has a capacity of 190 GBTUD, and the Cusiana-Bogota-Vasconia-Cali-Neiva pipeline that is 1700 kilometers long with a capacity of 220 GBTUD.TGI purchased its pipeline network from the state-owned ECOGAS in an auction in 2006 for $1.4 (US) billion.

[325] Usually through B.O.M.T. agreements (Build, Operate, Maintain and Transfer)

[326] 17.697 new users were connected in Cauca due to the successful construction and operation of the secondary pipeline between Pradera-Jamundí-Popayán.

[327] The CREG is a special administrative unit that is tied to the Ministry of Mines and Energy, but with independence and autonomy. The President granted their regulatory function through Decree 1894 of 1999.

[328] According to article 68 of Law 142 of 1994, the CREG is the recipient of the presidential function of setting the administration and efficiency criteria for public utilities contained in article 370 of the Colombian Constitution.

[329] The National Planning Department is in charge of policy and planning recommendations usually issued by means of National Policy Documents known as CONPES.

[330] The Superintendent of SPDs participates in board meetings but does not vote in CREG's decisions.

the availability of an efficient energy supply, to assure competition in the mines and energy sector, to propose the adoption of the necessary measures to avoid abuses of market power, and to prepare for the gradual liberalization of the markets with the goal of establishing free competition; (ii) Promulgating specific regulations for the efficient use of natural gas; (iii) Regulating the operation of the Natural Gas Wholesale Market; (iv) Establishing gas tariffs, or delegating this function to the LDCs whenever it considers it convenient within the rules and methodologies previously established by the commission.

One important aspect of SPD regulation has to do with the promotion of competition and the control of abusive market practices. According to article 73 of the SPD law, regulatory commissions can subject non SPD operators to the regulation and the surveillance of the SSPD if the commission finds that these operators are conducting practices that reduce competition between SPD operators or that constitute abuse of a dominant position in the provision of goods or services which are similar to those provided by SPD operators. Also, regulatory commissions have express power to establish the legal principles required in SPD agreements and to establish when SPD operators have abused their dominant position in respect of consumers. Article 133 of the SPD law establishes categories of conduct considered contractual abuse of a dominant position because they abuse or restrict competition in a way that directly affects end users.

In addition, sections 73.13, 73.14 and 73.15 of article 73 of the SPD law refer to the spinoff, merger or dissolution of SPD operators when the commission finds situations of abuse of dominant position (spinoff), or when it looks to amplify coverage or lower costs for consumers (merger), or when the operator is inefficient (dissolution). The SSPD has considered these functions as "regulatory functions that affect the agent per se" in contrast to quasi-judicial functions that look to resolve controversies between agents, and regulatory functions with a view to normalizing contractual relationships, such as access to networks. According to the SSPD, the order to merge, spinoff or dissolve is aimed at organizing particular markets through a better allocation of resources. This function traditionally belonged to the SSPD but since the enactment of the new competition law, all functions related to merger control were assigned to the Superintendence of Industry and Commerce.[331]Section 73.25 of the SPD Law also contains a regulatory function regarding competition as it refers to the establishment of mechanisms that avoid the concentration of ownership of stocks in companies with complementary activities that operate in the same sector. This is a rule against vertical integration, a situation that creates a dominant position. Finally, section 73.16 establishes a regulatory function related to competition consisting in the prohibition for those who produce a good that is distributed through an SPD operator against the adoption of anticompetitive agreements in prejudice of distributors.

[331]Regarding the regulatory functions which look to normalize contractual relationships, the SSPD considers that the establishment of a series of minimum conditions in interconnection agreements is a form of regulation that has the sole purpose to regulate the use of existing infrastructure. Superintendencia de Servicios Públicos, at p. 241.

The Frontier Economics' study concluded that the Colombian market has two structural characteristics that affect competition. According to Frontier, compared with international markets, the Colombian natural gas market is small, and the short history of gas exploration in the country has created a tendency to concentration in production. Also, the load factor of the thermo-electrical demand contributes to create problems of cycles of increased consumption and decreased capacity, especially during drought periods.[332]During long drought periods caused by the climate phenomenon known as "El Niño", natural gas consumption reaches its peak due to low hydroelectric power capacity, which necessitates full capacity production from thermoelectric gas-fired plants to produce electricity. This creates problems with long term supply because of the lack flexibility in the gas market, which has little supply capacity to adjust to variations between average and maximum demand in times of shortage caused by reduced hydroelectric supply.[333]

The diagnosis made by Frontier Economics points out that competition law is not sufficient to deal with concentration in supply or to deter gas producers from entering into strategic behaviors. Some groups of consumers may be particularly affected in the absence of regulation, as is the case of small residential and commercial consumers. Therefore, any measures aiming to introduce competition into Colombia's natural gas market must be accompanied by regulation by the CREG and oversight by the SSPD.

Another study conducted by Market Analysis for the CREG confirmed the conclusions reached by Frontier Economics that the lack of competition in production and supply creates incentives for strategic behavior by producers such as restricting the offer of firm supply contracts, and price discrimination between customers. This has resulted in complaints by many large consumers of gas and local distribution companies (LDCs), while gas producers argue that regulatory failures, along with the lack of incentives to increase production and existing contractual obligations, are responsible for the shortage of firm gas.

Following the recommendations of these studies, in the past years the Ministry of Mines and Energy – MME - promulgated a series of Ministerial Decrees aiming at guaranteeing the security of internal supply and promoting competition, creating new rules for the sale and offering of gas by producers together with incentives for more exploration and development of gas resources. Key reforms were recently introduced by Ministerial Decrees 2730 of 2010 and 2100 of 2011 that created rules to guarantee the internal supply of gas, promoted exploration and exploitation activities, obliged producers to declare their available production capacity, introduced changes to the operation of transport systems,

[332] Frontier, supra at note 277. Colombia suffered a 13 months electricity rationing program between 1991 and 1992 and more recently suffered gas shortages that triggered a gas rationing program between 2009 and 2010, and 2015-2016.
[333] Frontier, supra at note 277

created incentives for gas imports and LNG projects, implemented unregulated gas prices for exports, enforced control over supply contracts, and established rules regarding essential demand and a priority attention order. Overall, these new rules introduce competition in the Colombian natural gas market, especially in production and supply, aiming to solve the low flexibility problem while giving incentives for new investments in all the activities of the natural gas fuel cycle, including new activities such as storage and regasification.

These decrees also create the position of the Technical System Operator (GTS) as an independent agent in charge of guaranteeing the reliability and security of supply, the correct functioning of the transport system, and the administration of the Gas Wholesale Market and the Secondary and Spot markets. The decrees also promote the development of gas hubs to coordinate upstream and downstream activities and to encourage competition between regions and geographic markets.[334]The new rules and instruments for gas transportation introduced by Ministerial Decree 2100 of 2011 have not yet demonstrated whether they can solve the problem of lack of coordination between the gas supply and transport sub-markets, and create the expected incentives for investments in new transport infrastructure. In particular, the industry is awaiting CREG's regulation regarding the functions and activities of the new Technical System Operator (GTS) and the definition by the National Gas Operation Council (CNO) of the commercial and operational protocols for the reliable operation of the National Transport System.[335]

3.6. Natural gas in Alberta

In the previous chapters we compared the concepts of public utilities and SPDs and established that a common point of these two notions is that they require regulation. We also determined that regulation is typically justified on economic grounds, such as the existence of market failures, and on non-economic grounds, such as distributional justice. In this chapter we now continue our comparative work by presenting the main characteristics of the natural gas market in Alberta, highlighting some of the challenges faced by Alberta regulators following deregulation.

---

[334] Overall, these government measures look to introduce reforms to the gas sector in order to incentivize the development of the supply and transport infrastructure, obtain new sources of gas, promote the reliability of the gas system and a more efficient use of the supply and transport infrastructure. Decree 2100 of 2011 aims to stimulate Colombia's self-sufficiency in gas by increasing exploration and exploitation activities, promoting gas exports and imports, and incentivizing unconventional gas exploration and development. To achieve these goals the Decree establishes freedom of prices for gas exports and imports, as long as the internal or "essential demand" of gas is guaranteed. A very important aspect contemplated in article 6 of Decree 2100 of 2011 is the express obligation for the National Hydrocarbon Agency not to contribute to increase concentration in the gas supply sub-market when entering into agreements related to the administration or marketing of gas property of the State.

[335] Market Analysis, supra at note 298. The report points out the following issues in the Colombian natural gas transport sector: (i) Most market participants have not requested large-scale changes to the regulatory regime; (ii) Some strongly oppose abrupt changes in a regime in which they are already making large, risky investments; (iii) There have been proposals to adopt a "reliability charge" & "common carriage" or "centralized planning" regime for gas networks similar to the electricity system; (iv) Commodity/capacity charges may not remunerate TSOs' investment costs as intended, especially for gas-fired power plants; (v) Utilization Factor should be changed to reduce the risk of stranded investments; (vi) Commodity charges, average cost prices and other features of the current regime may not be providing adequate investment signals;(vii) More transparent and open procedures for allocating firm pipeline contracts; (viii) Relaxation of some vertical integration rules to streamline coordination of new gas field and pipeline developments; and (ix) to allow distribution companies to undertake secondary pipeline construction and operation.

About 67% of Canada's natural gas production is from Alberta. Alberta produces approximately five trillion cubic feet of natural gas a year which is enough natural gas to heat every Albertan home for 35 years.[336]Almost 70% of natural gas produced in Alberta is exported to other provinces and the United States.[337]According to Alberta's Department of Energy, the Province has a large natural resource base, with remaining estimated established reserves of 36 trillion cubic feet.[338] Alberta's coal bed methane resource is estimated to contain up to 500 trillion cubic feet, and shale gas up to 1,000 trillion cubic feet. In addition, there are extensive tight gas resources that have yet to be developed. Alberta's total marketable natural gas production, including coal bed methane, was 3.72 trillion cubic feet in 2014.[339]Alberta's marketable consumption for the year 2014 was of 1.8 trillion cubic feet. The average Albertan household uses about 120 gigajoules of natural gas a year. Natural gas in Alberta is used primarily for industrial use, electricity generation and residential and commercial heating.[340]

With over 392,000 kilometres of energy-related pipelines (including oil and natural gas), as well as extensive storage facilities in Alberta, the Alberta Hub plays a vital role in North America's natural gas supply. The Alberta Hub efficiently transports approximately 15 billion cubic feet per day of natural gas to markets across North America. Alberta's natural gas pipeline infrastructure may facilitate northern gas development by providing pipeline access to markets across the continent. TransCanada's Alberta System (also known as the Alberta Hub, NOVA or AECO) is extensive and covers most of the province.[341] In addition, the AECO spot price – the Alberta gas trading price – has become one of North America's leading spot price references.[342]The Alberta hub and the intra-Alberta market are among the most important natural gas hubs/markets in North America, on account of the large volume of natural gas flowing through the hub every day, and the large volume of natural gas exchanged at this location. The importance of the hub is also enhanced by the large volume of underground natural gas storage

[336] According to data of the Canadian Association of Petroleum Producers, Alberta has well developed and effective regulatory processes, a highly skilled workforce, and world class natural gas processing, transporting and marketing infrastructure. Alberta's natural gas supplies are developed in some of the most varied conditions on the globe. Alberta's highly competitive industry is skilled in dealing with temperature extremes and vast distances and is a world leader in many aspects of natural gas development.

[337] Disposition of Alberta's natural gas production in 2011 was approximately: 42% to the United States; 31% within Alberta, and 27% to the rest of Canada. US exports 1,603 Billion cubic feet per year. Alberta 1,206 Billion cubic feet per year. Rest of Canada 1,048 Billion cubic feet per year. Total of 3,857 Billion cubic feet per year. (Source ERCB ST-3 Report)

[338] Government of Alberta, "Alberta's Energy Industry. An Overview", June 2012

[339] Alberta's non-conventional natural gas resources include coal bed methane, tight gas (natural gas trapped in low-permeability sedimentary rocks such as sandstone or limestone) and shale gas (trapped in shale rock). Alberta's coal bed methane resource is estimated to contain up to 500 Tcf of natural gas.

[340] In 2014 there were 1,300 successful natural gas well connections in Alberta. Alberta consumed 48% (1.8 Tcf) of its marketable gas, with the remaining 52% (1.9 Tcf) being delivered to other Canadian provinces and the United States.

[341] The Alberta System is a 23 500 km pipeline network that gathers natural gas for use both in Alberta and for delivery to provincial border points for export to North American markets. It is one of the largest systems in North America and gathers 66% of the natural gas produced in Western Canada.

[342] In February 2009, the NEB granted TransCanada's application recognizing that the Alberta System is under federal jurisdiction. According to the NEB, the decision was taken on the ground that the Alberta System is part of TransCanada's extensive pipeline system already under federal jurisdiction. This regulatory change recognizes the interprovincial nature of TransCanada's existing pipelines, and allows NGTL to expand its pipeline network outside Alberta for the first time in over 50 years, subject to regulatory approval.

connected to the hub in Alberta, and the extensive connections to other pipelines, which lead to domestic and export markets outside Alberta. The importance of the Alberta hub is reflected in the fact that the intra-Alberta natural gas spot price is one of North America's leading natural gas price-setting benchmarks.

In Alberta, the price of natural gas is based on supply and demand. Natural gas prices have tended to follow the North American wholesale market since 1985. Natural gas prices are set in an open and competitive market and are influenced by many variables throughout North America. These variables include supply and demand, production and exploration levels, storage injections and withdrawals, weather patterns, pricing and availability of competing energy sources and market participants' views of future trends in any of these or other variables.[343]

Regarding distribution and retail, gas utility companies provide a service that combines the purchase of natural gas on behalf of regulated consumers, and its delivery to the end users point of consumption through the pipeline system. In Alberta, natural gas service may be provided by: (i) investor-owned gas utility companies regulated by the Alberta Utilities Commission (AUC);[344](ii) municipally-owned gas utilities owned and regulated by the municipality; (iii) rural gas co-operatives owned by the members they serve and regulated by the elected co-op board members; and (iv) competitive retailers offering natural gas contracts.[345]Typically, a natural gas bill includes meter reading,[346] delivery charges,[347] rate riders,[348] and energy charges.[349] In the case of competitive retailers, they offer contracts with a variety of

[343] The New York Mercantile Exchange (NYMEX) natural gas futures contract is widely used as an international benchmark price, including in Alberta. The futures contract trades in units of 10,000 million British thermal units (MMBtu). The price is based on delivery at the Henry Hub in Louisiana, the centre of 16 intra- and interstate natural gas pipeline systems that draw supplies from the region's prolific gas deposits. The pipelines serve markets throughout the US East Coast, Gulf Coast and Midwestern US. It is important to realise that the NYMEX does not set the prices of the traded commodities. Market forces determine the prices through an open and continuous auction on the exchange floor. The AECO-C spot price, which is the Alberta gas trading price, has become one of North America's leading price-setting benchmarks.. The Alberta Natural Gas Reference Price (ARP) is a monthly weighted average field price of all Alberta gas sales, as determined by the Alberta Department of Energy through a survey of actual sales transactions. This price is used for royalty purposes.

[344] For example, ATCO Gas North, ATCO Gas South, AltaGas Utilities. As of June 2004, consumers served by ATCO receive their AUC-regulated gas supply service and billing from Direct Energy Regulated Services

[345] Examples of competitive retailers are ENMAX and Direct Energy Essential Services. Service Alberta licenses retailers under the Fair Trading Act. The terms and conditions of the sale are set in the contract. If a customer purchases gas from a competitive retailer, the gas is still delivered by the gas distribution company who owns the pipeline system that delivers the natural gas to your house.

[346] Estimated or actual meters record how much natural gas you used during the billing period and are read at regular intervals, usually every second month. For months that your meter is not read, monthly consumption is estimated. Estimates are allowed, provided they are reconciled to actual consumption as soon as possible. Your bill will state whether the current charges are based on an estimate of your consumption or an actual meter reading.

[347] These charges are the regulated cost of transporting natural gas to consumers. Consumers have always paid for the costs of receiving natural gas from the distribution system. These systems are fully regulated by their regulator, which approves their tariffs. Some rural gas co-operatives and municipally owned gas utilities combine the delivery charges with the energy charges in their bills. More detailed de-livery charges may be shown on your bill as: **Fixed delivery charge** - This delivery charge covers the costs of building and maintaining the distribution system to deliver natural gas to consumers. It is not based on consumption and is typically charged at a fixed monthly rate. **Variable delivery charge** - This delivery charge covers the cost for the operation of the distribution system, and is based on the amount of energy consumed.

[348] A rider is a temporary credit or charge approved by the regulator of the gas company. Riders occur when the actual costs incurred by a gas company to provide natural gas service to their customers differs from the rates approved by their regulator. Energy rate riders are associated with the cost of the actual energy, and delivery rate riders are associated with distribution costs.

terms, typically at fixed prices. Fixed prices make budgeting easier and provide certainty with regard to prices.[350] Retailers typically offer a number of standard purchase options for consumers. For example, retailers offer a fixed rate for terms ranging from one to five years, as well as offering customized contracts for specific client needs. Regardless of what price option applies, charges for delivering the natural gas are fully regulated.

Regulated monthly natural gas rates are based on expected natural gas prices for the month and any balances or credits carried forward from prior months. It is a flow-through cost that is passed on directly to consumers. As Alberta's natural gas rates are set on a monthly basis they are responsive to changes in market prices. While rates can rise when natural gas prices are high, they also respond quickly to falling market prices. Natural gas prices tend to be higher in the fall and winter months when colder weather increases demand and prices tend to fall in the summer months when demand decreases. The AUC regulates investor-owned natural gas utilities in Alberta, ensuring that the rates consumers pay are just and reasonable and that the service provided is safe and adequate. The AUC is also required to regulate these utilities in ways that allow them to earn sufficient revenues to recover their costs, which includes a fair return on their investments. As discussed in the previous chapters, in setting rates the AUC must balance the needs of consumers along with the needs of utility companies. A utility company must apply to the AUC on a regular basis for approval of its distribution rates. Distribution costs are approved either through General Rate Applications, a thorough review which involves many financial aspects of the company, or through a negotiated settlement process.

Even though Alberta's gas market has been deregulated since 1985, the development of a retail competitive market has only started recently. In Decision 2001-75[351] the Alberta Energy and Utilities Board (EUB), the AUC's predecessor, made a diagnosis of gas utilities in Alberta and concluded that, despite deregulation, by the year 2001 the Alberta Gas Retail Market was still dominated by regulated utilities. The Board stated that the Gas Utilities Act (GUA) gave all consumers the right to choose their gas suppliers, and that the Core Market Regulation contained rules regarding direct sales by gas marketers. Accordingly, the Board concluded that the development of a competitive retail market was in the public interest. In summary, the Board considered that the interests of consumers will be served by providing a reasonable opportunity for retail competition to develop. The Board also found that certain

---

[349] This is the cost of natural gas consumed during the billing period, typically expressed in dollars per gigajoule ($/GJ). Since 1985, wholesale prices for natural gas in Alberta have been set in the North American marketplace by market forces, not the government. Differences can occur between the rates set by regulators, reflecting variations in transportation costs, gas management costs, storage and other factors.

[350] In Alberta, the default regulated rate that consumers pay for their natural gas is called the gas cost flow-through rate (GCFR) for Direct Energy Regulated Services North and South, and the gas cost recovery rate (GCRR) for AltaGas Utilities Inc. The AUC regulates these rates. Direct Energy Regulated Services North and South, and AltaGas Utilities Inc. are investor-owned. The AUC does not set rates for municipally owned gas utilities, rural gas co-ops, or competitive natural gas retailers.

[351] EUB Decision 2001-75 (October 30, 2001) PART A: GCRR METHODOLOGY AND GAS RATE UNBUNDLING GCRR Methodology Proceeding and Gas Rate Unbundling Proceeding

aspects of utilities' tariff design may be have hindered the entrance of participants to the competitive market. The Board concluded that reasonable opportunities should be provided to gas marketers to compete in Alberta, while ensuring that utility customers are protected and utilities are treated fairly.

"*Ultimately, striking a balance between these objectives will provide consumers with the benefits of competitive gas services, while safeguarding against market problems during the transition away from fully regulated gas service"*[352]

The Board was persuaded that, ultimately, robust retail competition in the Alberta gas market will provide for greater economic efficiency for consumers.

"The Board expects that retail competition for gas will provide consumers with benefits in terms of price, choice as to price stability, billing options, cross-provision of services, and convenience (…) the Board is of the view that there is a continuing need for utilities to provide the regulated gas supply and merchant functions".

3.6.1. Natural gas deregulation in Alberta:

Alexander J. Black analyzes how natural gas deregulation process took place in Alberta. He refers to the Halloween Accord[353] and the provisions pertaining to competitive gas pricing:

"Two salient provisions include the bypass and direct sale concepts. The former refers to the ability of certain end-users to sever connections to the local distribution companies (LDC) and obtain cheaper service from the main trunk line. Even though this downstream competition appears prudent, its effect will actually be discriminatory to the remaining LDC users who will have to absorb higher rates. Concern over the effect of bypass on the public interest has been intense. Appellate decisions against the federal government confirm provincial jurisdiction over the enterprise yet an interesting constitutional battle for legislative competence continues en route to the Supreme Court of Canada.

The latter concept refers to the ability of end-users to negotiate less expensive commodity sales directly from producers. Although direct sales dispense with the broker functions of TCPL and the LDC's, it is nevertheless thought that these companies could profit with fair carriage charges. They could adjust to the new competitive environment in their brokerage capacity by renegotiating existing contracts to reflect changed commercial conditions. Furthermore, this could promote a healthy upstream competition. In Manitoba a direct sale initiative that might have brought lower gas prices to residential and commercial users has been rebuked by the federal National Energy Board. Since direct sales have only been allowed to industrial concerns, allegations have surfaced that the Board has unduly discriminated between customer classes."[354]

Black questions whether the transition to deregulation followed the legal principles underlying public utility regulation. One of these principles is that while regulatory law allows certain forms of discrimination in the setting of rates and the provision of services, it prohibits undue or unjust discrimination. Black argues that this rule is related to the promotion of the public interest, and may have been disregarded by Canadian regulatory authorities such as the National Energy Board by authorizing "direct sale" contracts involving the commodity as well as the "bypass" of the local distribution systems.

---

[352] Ibid. at page 19

[353] October 31, 1985 intergovernmental agreement that commenced the deregulation process

[354] Black, supra at note 274 at p 2-3

According to Black, deregulation may create incentives for undue discrimination. This can occur when discounts are given in the industrial sector which are subsidized by unjustifiably high prices in the residential and commercial markets. Black presents the example of TransCanada Pipelines (TCPL) which at the time was the monopolistic interprovincial carrier and which also acted as a broker of the commodity. Supply contracts negotiated by TCPL had inordinately high prices and consumers were locked in because the distribution systems were fully contracted. This created an undue discrimination against consumers serviced by those LDCs locked with TCPL higher prices because they couldn't benefit from lower prices set by market forces. Black argues that this happens because of the inherent tendency of a monopolistic marketer - such as TransCanada Pipelines Ltd. -, to charge as much as possible in those sectors of the market, such as the residential and commercial sectors, where no effective competition exists. Furthermore, Black points out that legislation regarding conservation and exports of natural gas enacted by producing provinces such as Alberta (i.e. the Gas Resources Preservation Act), ended having a discriminatory effect on consumer provinces. Black argues that Alberta's conservation scheme, which protected long-term contracts, may have been resulted in discrimination in the consuming provinces.

"Deregulation was supposed to let market forces determine the commodity's price, presumably lowering the cost to Canadian consumers while defraying the producer's lost revenue with increased exports to the United States. But these expected exports did not materialize due to an oversupply situation, more colloquially known as the "gas bubble". Thus, the removal conditions seek to protect Alberta producers by inhibiting distributors from abrogating the long-term TCPL contracts and entering into cheaper agreements"[355]

As shown by Black, deregulation of natural gas markets may come with troubles associated with the structure of the market. According to Black, the problems of deregulating the commodity price of natural gas have been exacerbated by an interprovincial pipeline transportation system that remained regulated and that was tied up with long-term contracts.

"In fact, it seems that the policy of deregulation was strongly influenced by the lobbying of the oil and gas industry, a powerful western Canadian interest group. Thus, any attacks upon the alleged discrimination in natural gas prices that may be attributable to hiccups in the deregulation process appear to be based upon traditional public utility concepts of discrimination. While discrimination in the broad constitutional sense remains a possible cause of action, those claiming unjustified differential treatment are thought to have a more immediate probable cause of action in the public utility sense of the word."[356]

Therefore, government authorities must be cognizant of the potential problems that arise after deregulation of natural gas prices, particularly the possibility of unjust discrimination against regulated end users that have inelastic demand and lack the ability to effectively participate in the wholesale and secondary gas markets. One particular aspect of deregulation of electricity and gas utilities has to do with the ability of the market and its agents, including the government and customers, to react against

[355] Black, supra at note 274 at p. 9-10

[356] Black, supra at note 274 at p. 14

behaviors that lessen or restrict competition, or to deal with structural problems of the market that prevent the normal development of competition. In this respect, it is important to take into consideration the conclusion reached by Frontier regarding the Colombian natural gas market that competition law is not sufficient to deter anticompetitive behaviors.

In Alberta, the Market Surveillance Administrator (MSA) plays a fundamental role with respect to competition in Alberta's electricity and gas markets. The MSA ensures the fair, efficient, and openly competitive functioning of these markets. This includes the power to investigate the conducts of agents and to initiate proceedings before the AUC. The existence of an independent competition watchdog in charge of monitoring the electricity and natural gas markets is a key factor of deregulation, as it creates an effective instrument to protect the market and enforce competition, and serves as a mechanism to deter agents from entering into anticompetitive behaviors. This was the case of a recent investigation initiated by the MSA for anticompetitive conduct against TransAlta Corporation Inc. (TransAlta), an electricity generator which had entered into long-term power purchase agreements (PPAs) and programmed outages of its power plants during times of peak demand, which artificially increased the prices of electricity, and used non-public information to enable it to benefit in the electricity forward market.

In Decision 3110-D01-2015,[357] after an investigation that involved the discussion of complex matters of competition law such as the concept of "market participants" and the application of certain rules of the Competition Act to the investigation, the AUC concluded that TransAlta's conduct lessened competition in Alberta's electricity market and therefore breached both the Electric Utilities Act and the Fair, Efficient and Open Competition Regulations. After this first decision the AUC initiated Phase 2 of the proceeding looking to impose an administrative penalty to TransAlta. Consumer representatives such as the Office of the Utilities Consumer Advocate (UCA)[358] sought intervener status but were denied standing by the Commission. The UCA in support of its application in Phase 2 argued that consumers might be directly and adversely affected by the Commission's decision if the Commission has the authority to order restitution, pursuant to the broad powers and authority conferred on it under the *Alberta Utilities Commission Act*.[359] The UCA asserted that it was clear that the statutory scheme imbues the Commission

[357] Decision 3110-D01-2015 Sept 22, 2015

[358] The position of the UCA will be discussed in Chapter Four as part of the analysis of consumer protection.

[359] In particular sections 8, 11, 23, 56(4) and 63(1)(b) of the AUC Act. The UCA submitted that the Commission's authority to issue orders associated with a proceeding initiated by the MSA under Section 51 of the *Alberta Utilities Commission Act* is found in sections 56, 63 and 66 of the *Alberta Utilities Commission Act*. However, it argued that sections 8, 11 and 23 of that act also provide context when considering the scope of the Commission's authority under sections 56 and 63.

with a "broad and flexible authority to craft appropriate remedies." The UCA argued that this authority includes the ability to order restitution to consumers harmed by TransAlta's anti-competitive conduct.[360]

However, the Commission denied standing to the UCA using its general approach to assessing standing for enforcement matters established in Bulletin 2010-17. The Commission stated that for hearings resulting in an administrative penalty, "the nature of this type of a proceeding is such that the only parties directly impacted by the outcome of the Commission's finding are the MSA who had brought the alleged contravention before the Commission and the alleged contravener."[361] The Commission questioned its own jurisdiction to apply a penalty. The Commission has limited remedial options which consist only of administrative penalties. Any penalty it imposes must go into the general revenue fund. A particular aspect of the Commission's analysis had to do with its interpretation of the UCA's mandate which, according to the Commission's reasoning, does not include any authority to investigate instances of non-compliance or to take enforcement steps. The Commission interpreted the UCA's role as protecting rates specifically and not the best interest of consumers. The AUC gave a very narrow interpretation of the UCA's mandate and the difference between the MSA and the UCA in regard to the protection of consumers. In this regard the AUC believes that the MSA is better suited to handle the dispute as the UCA does not have investigative powers.

Following the decision on standing, the Market Surveillance Administrator (MSA) filed a submission with the AUC requesting the Commission to approve a Consent Order to resolve the issues in Phase 2 (Penalty Phase) of AUC Proceeding 3110. The Consent Order outlined the terms of an agreed settlement between the MSA and TransAlta to the issues outstanding in Phase 2 of Proceeding 3110. The Consent Order sought by the MSA had the effect of bringing Proceeding 3110 to a final and binding resolution, without further appeals, or reviews. As part of the Consent Order, TransAlta agreed to pay in excess of $56 million, comprised of the following components: (i) Disgorgement of Profits in the amount of $26,920,814.31; (ii) Administrative Monetary Penalty in the amount of $25,000,000.00; and (iii) MSA Costs in the amount of $4,327,542.97.[362]

In its submission, the MSA stated that the monetary penalty was demonstrably fair and reasonable in all of the circumstances, and was not punitive. The MSA also maintained that the

[360] The UCA observed that Sections 56(4)(a)(iii) and 63(1)(b) and (3) of the *Alberta Utilities Commission Act* allow the Commission to impose any terms and conditions it considers appropriate, including a prohibition against specified conduct or a direction to take specified actions. The UCA argued that these provisions give the Commission considerable discretion when deciding on an appropriate order for a contravention of the statutory scheme. The UCA submitted that the authority granted in the above sections is analogous to the authority to grant a mandatory and prohibitive injunction. The UCA argued that mandatory injunctions may be restorative in nature.

[361] Decision 3110-D02-2015

[362] Under the Consent Order, TransAlta agreed to discontinue its application for leave to appeal the Decision and therefore the Commission's Decision will be final and binding. TransAlta will make the Payments in staged fashion, with the Disgorgement and Costs due within 30 days, and the Administrative Penalty due with 395 days. TransAlta states that the magnitude of a single payment would risk the downgrade of its debt instruments by credit rating agencies to below investment grade.

magnitude of the administrative penalty underscored that penalties are not just a cost of doing business, amounted to an effective specific and general deterrent. The Consent Order also contained an acknowledgment by TransAlta that the MSA carried out its mandate in a fair and responsible manner. Even though the Consent Order provided for full disgorgement of the estimated economic benefit, neither the disgorgement of profits, nor the administrative penalty amounts, can be refunded directly to customers. In addition, nowhere in the consent order application, did TransAlta admit guilt or culpability for its actions. Notwithstanding, the Consent Order was approved as filed.[363]

4. COMPETITION IN NATURAL GAS INDUSTRIES

The introduction and promotion of competition in regulated industries, such as natural gas markets, is usually in the charge of independent regulatory agencies which operate with respect to the industries they regulate (e.g. the AUC and the MSA in Alberta, or the CREG and the SSPD in Colombia). However, with respect to the market in general, competition policy is entrusted to competition authorities, such as the Competition Bureau in Canada, or the SIC in Colombia, which are empowered to investigate and sanction anti-competitive behaviors and practices that lessen or restrain competition, as well as to conduct merger control and other forms of market structure controls.

As explained by the author,[364]one of the principles in the introduction of competition law in the public utilities and energy sectors requires a consideration of the special characteristics of network industries. Such industries generally justify government regulation because of network externalities, cost effectiveness, information asymmetries, and economies of scale, market power and natural monopolies. Another general principle requires that in competitive activities the rules of competition law must prevail and that regulation must be in place only where it is necessary and only to the extent that is needed. In order to reduce the transaction costs involved with government intervention, decision-makers must avoid duplication of functions and generation of conflicts between the competition authority and independent regulators. Policy makers must also consider the risk of agency capture by industry and implement strict rules that control the so-called “revolving door” where former commissioners or board members are hired by regulated firms. It is often necessary to create legal instruments related to the introduction of competition in regulated industries exist, such as Competition Advocacy, which relates to the establishment of a competition culture within regulatory institutions and the need for agencies to assess in advance the effects that their decisions and regulations may have on competition, the agents and the consumers.

[363] Decision 3110-D03-2015

[364] See Luis Pando, “Regulación y Competencia en el Servicio Público de Gas Natural. Visión Crítica del Caso Colombiano”, in “Regulación de energía eléctrica y gas: estudio jurídico y económico”, 1 Colección de Regulación Minera y Energética, Luis Ferney Moreno compilador, Universidad Externado de Colombia, 1st. ed. December 2010, at pages 123-184.

Economists such as Jean-Jacques Laffont and Jean Tirole instruct us about the most commonly used instruments to introduce competition into regulated industries.[365] They discuss liberalization and deregulation as the main policies in this respect, the former generally related to the privatization of state-owned monopolies and the entry of new agents into the industry, and the latter regarding the gradual withdrawal of government intervention due to regulatory failure and high transactions costs. With respect to network industries where situations of natural monopoly prevail, economic literature deals with instruments to introduce competition such as unbundling (the legal or functional separation between competitive and regulated activities) and open access to essential infrastructure (the possibility for third-parties to access in transparent and non-discriminatory conditions to the network).

4.1. Gas Liberalization

According to Gao[366]four types of legal control mechanisms were adopted under the first regulatory model: entry, price, service, and exit control. In addition, the creation of national natural gas enterprises after World War II reflected a public-ownership regime of government regulation that was applied to most utilities and other strategic sectors (railways, water and sewerage, electricity, gas, telecommunications, postal service, etc.).[367]However, as Gao explains, since the 1970s a shift in the paradigm of economic thought required a review of this regime. A reviewed awareness of the importance of the free market occurred and a new regime emerged that favored privatization and liberalization. In 1978, the US government pioneered regulatory reform in the gas sector through the promulgation of the Natural Gas Policy Act of 1978.[368]In 1986, the United Kingdom also embraced regulatory reform with the Gas Act of 1986, and ten years later the gas liberalization process started in the European Community, particularly with the First Gas Directive 98/30/EC.[369]Since then, gas liberalization has undoubtedly become a global trend[370].

According to Gao, despite slight differences in the gas markets of different countries, three common development trends are found in the development of liberalization: (i) the ownership of gas

[365] J. J. Laffont and J. Tirole, "Creating competition through interconnection: Theory and Practice", Journal of Regulatory Economics, 10, 1996

[366]Anton Ming-Zhi Gao "Regulating Gas Liberalization: A Comparative Study on Unbundling and Open Access Regimes in the US, Europe, Japan, South Korea and Taiwan", 2010 Kluwer Law International BV, The Netherlands. [GAO]

[367] For a more detailed study on Nationalization and State Monopolies in the electricity and natural gas markets see: "The Liberalization of State Monopolies in the European Union and Beyond" edited by D. Geradin (The Hague: Kluwer Law International, 2000), particularly the chapter by P. J. Slot "Energy (Electricity and Natural Gas)" and the chapter by D. Geradin "The Opening of State Monopolies to Competition: Main Issues of the Liberalization Process".

[368] See EIA "U.S. Natural Gas Markets: Recent Trends and Prospects for the Future" available at: http://www.eia.gov/oiaf/servicerpt/naturalgas/chapter_1.html

[369] For the development of the gas market in the United Kingdom, see C. Waddams Price "Competition and Regulation in the UK Gas Industry" (New York: Oxford University Press, 1997). For a more detailed analysis on gas liberalization in Europe see: "Natural Gas in the Internal Market" edited by E.J. Mestmäcker (London: Kluwer Law International, 1993) particularly chapter 3. Also see P. Cameron "Competition in Energy Markets: Law and Regulation in the European Union" (New York: Oxford University Press, 2002).

[370]Helm, D. and Jenkinson, T., "The Assessment: Introducing Competition into Regulated Industries", in Oxford Review of Economic Policy, vol. 13, n. 1, 1997, p. 2.

companies has evolved from more public ownership before gas liberalization to more private ownership after liberalization; (ii) gas companies have evolved from more vertical integration to less vertical integration or an unbundled structure after liberalization; and (iii) the extent of government intervention has evolved from a higher degree of intervention to a lesser degree of intervention.[371]As Gao points out, liberalization in the gas market has taken two primary forms: the removal of entry barriers in competitive sectors; and the regulation of infrastructure sectors. As a condition for liberalization of the natural gas industry, by transforming its monopolistic characteristic through the introduction of competition in portions of the industry where conditions of natural monopoly exist, regulation has adopted new institutions and legal techniques. Some of these techniques and institutions are:

- Legal unbundling of the different activities by means of vertical disintegration (economic separation of competitive and infrastructure sectors).

- Open access of third-parties to network facilities under objective and non-discriminatory conditions (requiring gas infrastructure owners and operators to allow competitors to access their facilities on commercial terms comparable to those that would apply in a competitive market).

Gao argues that well-formulated and comprehensive liberalization in the gas markets can bring about more advantages than disadvantages. In particular, well-designed unbundling and open access regimes may accomplish the following: (i) Inject much-needed competition into gas industries; (ii) Reform and re-regulate non-competitive sectors such as transportation, distribution, and storage; (iii) Balance potential conflicts between energy security and competition; and (iv) Support interests such as environmental protection, energy rights, safety and consumer protection.[372]According to Gao, a successful open access regime not only relies on a non-discriminatory and transparent open access regime, but also on a sufficient gas infrastructure in the gas market. Therefore, in order to encourage market competition and liberalization, incentives to encourage the development of new gas infrastructure must be established.[373]

4.2. Unbundling regimes

According to Gao[374]the unbundling regimes in the United States and Europe are quite similar. They include different types of unbundling such as service, accounting, functional, legal and ownership unbundling, as well as rules regarding the Independent System Operator (ISO). The most basic form of unbundling usually combines the separation of services and account unbundling. More advanced forms of unbundling combination include functional aspects (unbundling of functions or activities) and legal

[371] GAO, supra at note 365 at p 2-3

[372] Gao, supra at note 365

[373] For example, exemptions from the rigid open access regime to encourage the investment in gas infrastructure (Europe and the United States); a preferential rate of returns for newly constructed gas infrastructure (Europe); expansion of the use of gas in the domestic market opportunity for investment in gas infrastructure (Japan, South Korea and Taiwan).

[374] Gao, supra at note 365 Also see Kim Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, (The Netherlands: Kluwer Law International, 2011).

aspects (separate legal entities), ISO schemes or ownership unbundling (restricts ownership of entities providing separate activities). However, there are also important differences in the unbundling regimes adopted in the United States and Europe. The unbundling regime in Europe was typically developed for different sectors of the natural gas industry including transportation, distribution, LNG facilities and storage sectors. In the United States, the focus of the unbundling regime targets only two groups: (i) interstate pipelines, LNG infrastructure and underground storage facilities, owned by interstate companies, and (ii) intrastate pipelines, distribution pipelines, LNG infrastructure and underground storage, owned by intrastate companies or local distribution companies.[375]

With respect to unbundling in distribution sectors, Gao points out that many similarities can be found between the United States and Europe. Even if certain distribution companies are not subject to an open access regime, they are required to adopt an account unbundling regime after gas liberalization. However, mandatory service unbundling comes together with the Regulated Third Party Access (RTPA) scheme in the United States and Europe. The authority determining the detailed regime lies with the state governments in the United States, whereas the authority in Europe lies either with Member States or local governments.[376]

In Canada, the regulator has discussed the issue of unbundling, in particular the proper allocation of costs between utilities' transportation and gas procurement functions. According to the EUB, the purpose of reviewing this allocation was to ensure that independent gas marketing companies were provided a fair opportunity to provide alternative service to gas customers. The Board discussed unbundling of gas utility rates and separating the various functions performed by the utility into individual service options. The Board concluded that rate unbundling presents no undue difficulties. The Board further considered that customer care functions such as billing, customer information services, call centres, and credit and collections, are available in the retail competitive market. Therefore the Board directed the utilities to separate the costs associated with retail billing and customer service (including distribution service) from the base rate, and to subsequently levy charges related to those costs only to regulated service customers. The Board also directed the utilities to unbundle credit and collection costs for inclusion in the base rates of utility supply customers only.[377]

4.3. Open access regime: lessons from the United States and Europe

In order to facilitate the implementation of non-discriminatory and transparent open access regimes to gas infrastructure, different open access regimes and detailed measures have been introduced in the United States and Europe. The basic types of open access regimes are similar, and

[375] However, it should be noted that the FERC Order 436 treats pipelines and underground storages differently.

[376] Recent research in Europe and the United States has focused on the substantial implementation of service, account, functional and legal unbundling, instead of adoption of further unbundling regimes, such as ISO and ownership unbundling.

[377] Decision 2001-075 at page 86

they include negotiated third party access (NTPA), regulated third party access (RTPA), and mixed RTPA and NTPA regimes. The preferred form of open access regime is RTPA. Many similarities can also be found between the United States and Europe in their open access regimes in the distribution sectors. An RTPA regime is favored by the states when adopting retail access programs in the United States and by the 2nd Gas Directive in Europe. The detailed rules of open access regimes of LDCs in the United States are determined by the States (instead of the FERC), whereas those of Distribution System Operators in Europe are proposed by the national energy authority or local or regional governments rather than the European Commission. The eligible thresholds are gradually reduced to open the retail markets in Europe and the United States. Finally, the current regulatory priorities in Europe and the United States both focus on the adoption of further measures, such as transparency rules and codes of conduct, in order to ensure the actual implementation of an RTPA regime.

However, there are also differences in the open access regimes of the United States and Europe. Distribution System Operators in Europe are currently subject to an open access regime under the European 2nd and 3rd Gas Directives. The situation of LDC open access regimes differs from state to state in the United States.[378]There is no freedom to determine whether to introduce open access regimes to distribution sectors under the European 2nd Gas Directive, but the states retain that discretion in the United States. Finally, in the United States, in those states adopting a retail access regime, the implementation of an RTPA regime is guaranteed by the intense supervision of state Public Utilities Commissions. This is not the case in Europe, because the national regulators focus on the implementation of open access regimes to TSOs instead of DSOs.

In Colombia, the general rule is negotiated third party access but in case of conflict the CREG has the authority to solve the conflict by imposing conditions of access on the parties, thus resembling a regulated third party access. However, due to the recent unbundling of distribution and retail activities, the type of open access regime that will apply for access to distribution systems by retailers remains unclear.

4.4. Standards of Conduct

In general, standards of conduct play an important role in facilitating the implementation of unbundling and open access regimes. They improve the unbundling regime and ensure non-discriminatory access by reinforcing the behavior of gas incumbents. In addition, they provide guidelines for the design of open access regimes, particularly in respect to measures relating to implementing non-discriminatory and transparency requirements. In the United States and Europe, gas companies are required to follow guidelines, create their own codes of conduct and to adopt compliance programs to ensure the implementation of functional unbundling. Both the standards of conduct enacted by

[378] Some LDCs are required to provide open access service to all gas customers in certain states, such as New York and Pennsylvania; some LDCs are only required to provide open access service to gas customers meeting eligible thresholds in certain states, such a Georgia and Ohio; and some LDCs are not subject to open access regimes in certain states /such as Alaska o Alabama).

governments and those created by the gas companies in the United States and Europe focus on the implementation of unbundling as well as open access regimes. On the one hand they deal with unbundling issues, such as account and functional unbundling, independent decision making, independent organization, rules prohibiting the transfer of information, etc. On the other hand, they deal with open access issues, particularly with measures to ensure non-discriminatory and transparent open access. Alberta has also a Code of Conduct and regulations in place that deal with the relationship between utilities and affiliated retailers

In the United States recent rules reformed the rules relating to standards of conduct.[379]There have been more developments in Europe, where a binding code of conduct has been applied to transportation sectors since 2005, and a Code of Conduct applied to storage and LNG companies has taken effect. The code of conduct is presently voluntary but will become binding under the 3rd Gas Directive.[380]However, in order to control behavior of gas incumbents, certain additional measures are needed to fully implement these rules. Gas infrastructure companies both in the United States and Europe are usually required to create their own detailed standards of conduct to guide them and their staff in ensuring non-discriminatory and transparent access.[381]

4.5. Monitoring Mechanisms

The development of regular and intensive monitoring mechanisms is very important. In general, the implementation of an unbundling regime is better in gas sectors with detailed, regular and comprehensive monitoring reports. For instance, in the United States the FERC, the EIA and state Public Utilities Commissions have conducted many monitoring reports on the implementation of an unbundling regime. In spite of the different extents of market competition in the United States, the unbundling rules are well implemented. The same occurs for transportation sectors in Europe, where a large number of monitoring reports are conducted by the EC, ERGEG, GTE, etc. Because these reports are usually available to the general public, they can lead to better monitoring by the general public.

4.6. Transparency

The main purpose of the transparency requirement is to facilitate an open access regime. However, the transparency requirement may also contribute to the implementation of unbundling. With respect to account unbundling, the regulatory accounts of gas companies in the United States and Europe are available for public scrutiny. In the area of functional unbundling and transparency, certain

[379] See FERC Orders 2004 and 717

[380] See Regulation 1775/2005/EC of the European Parliament and the Council on conditions for Access to the natural gas transmission networks. Also see ERGEG Guidelines for Good TPA Practice for Storage System Operators (Nov. 2004); ERGEG Guidelines for Good TPA Practice for LNG System Operators (May 2008).

[381] For instance, in the US El Paso Natural Gas Company has adopted a very comprehensive code of conduct. In Europe, TIGF in France has created a detailed code of conduct.

information relating to the location of Market affiliates, company logos and the functions of different staffs, is available in the United States and Europe. With regards to legal unbundling, information provided by gas companies regarding their organization charts allows verification of compliance with legal unbundling rules. The provision of necessary information will definitely contribute to the implementation of overall unbundling, because otherwise, it is very difficult to check compliance with account unbundling rules. The transparency requirement also plays a vital role in facilitating the implementation of open access regime. In recent times a more strict transparency requirement has been developed. The US adopted a more rigid transparency requirement by requiring a systematic real-time electronic bulletin board.[382] In Europe, there is a move to increase transparency requirements by establishing more standardized and transparent information systems.

5. COMPETITION RULES IN COLOMBIA'S NATURAL GAS MARKET

Through a thorough analysis and definition of each of the activities and the different economic stages related to the provision of SPDs, distinguishing between competitive and regulated activities, as well as the application of legal instruments such as interconnection and third party access, the regulatory process creates new elements of government intervention in the economy that also look to introduce competition. These instruments are usually complemented with "unbundling" or strategic disintegration of the different economic activities of the service, with the objective of preventing monopolization, and maximization in resource allocation (allocative efficiency). As mentioned before, following this free market and pro-competition approach, Law 142 of 1994 has specific rules regarding open access to networks, spin-offs, mergers and acquisitions of SPD companies, situations of control and linkage between companies, and special definitions of market power and dominant position, anti-competitive acts, and contractual abuse of dominance against consumers or end-users. With respect to competition, article 14 of Law 142 of 1994 is of particular importance as it establishes a special rule with respect to the definition of a dominant position in the market, which is different from the general rule contained in Decree 2153 of 1992. This rule establishes in the first place that a SPD company has a dominant position over all of its customers. Secondly, this rule states that, with respect to the market of the services they provide, and of its close substitutes, SPD operators are considered to have a dominant position when they serve more than 25% of the total end-users of such market.

With respect to open access, the "essential facility" doctrine[383] has been applied in Colombia in matters such as interconnection between operators, as part of constitutional mandates related to the social function of property, the prevalence of the public interest, and free competition. In Colombia's SPD

[382] See FERC Order 717

[383] The legal doctrine adopted in the UK and the European Community has determined that an "essential facility" is a system or infrastructure access to which is a determinant factor for competitors to be able to supply goods or services to their clients. From a negative perspective, is the denial of access to a system or infrastructure that restricts, or makes it even impossible, for competitors to supply their goods and services to their customers in a particular market

sector, interconnection is viewed as a fundamental tool to allow the regulatory commissions to introduce competition in these markets. Many articles of the SPD law refer to interconnection. Of particular importance is article 11 of the SPD law regarding the social function of property of SPD operators. To comply with this social function, section 11.6 establishes the obligation of SPD operators to give access and interconnection to other operators and large consumers. Article 28 of the SPD law also refers to interconnection to networks. According to this article, the regulatory commissions have the power to impose the interconnection of networks, when it is indispensable to protect consumers, to guarantee the quality of the service, or to promote competition. Article 39 refers to special interconnection agreements with new operators or large consumers. As mentioned above, this article gives authority to the regulatory commissions to impose access or interconnection on terms imposed by the Commission whenever the parties are not able to reach an agreement, which resemble a regulated third party access regime.[384]

The Colombian regulatory scheme regarding interconnection and essentiality gives the regulatory commissions a fundamental role. For example, the interconnection price or toll is always fixed by the regulatory commission. According to article 73 of the SPD law, one of the functions of the regulatory commissions is to determine tariff formulas to set interconnection prices or tolls. Therefore, for the purpose of granting interconnection, the regulatory commissions must be thorough and rigorous when determining whether a particular infrastructure associated with the provision of SPDs is to be considered essential, and consequently, accessible.

A key point regarding regulation of LDCs has to do with open access to the distribution system. Most gas distributors have networks with significant characteristics of natural monopoly. Considering that not all portions of the natural gas fuel cycle (supply chain) are open to competition, access to networks and infrastructure is considered essential to introduce competition, allowing producers to deliver the service to end-users so that the retail activity operates in a liberalized market. Therefore, the function of the regulatory commission focuses in aspects related with the introduction of competition into the regulated portions of the chain of supply, via unbundling and open access schemes. The existence of legal and natural monopolies requires the government to enforce measures that allow more transparency in the activity of the monopolistic entity. Accordingly, CREG established the following unbundling rules for the gas market:

(i) Gas producers may not own more than 25% of transporters or distribution companies.
(ii) Gas transporters may not own more than 25% of gas production companies or distribution companies.
(iii) Gas distributors may not own more than 25% of gas transport companies.
(iv) Gas distributors and retailers must be integrated for the purposes of selling gas to the regulated market (below 0.1 GBTUD).[385]

[384] Regulatory commissions must be cautious when applying the doctrine of interconnection to essential facilities, in order to create a balance between the introduction of competition in regulated portions of the chain of supply and the need for investment, and not to fall into expropriation.

[385] Recently, the Corte Constitucional declared that mandatory vertical integration of distribution and retail was against the constitution

(v) Distributors must provide third-party access for shippers selling to non-regulated market.[386]

6. COMPETITION AND REGULATION

The relationship between regulation and competition is unquestionable, especially after the liberalization process that introduced more competition into heavily regulated industries such as natural gas. As previously explained, when conducting regulatory proceedings, regulatory agencies often use concepts and methods of competition law and competition policy such as the notions of market power and market definition. Also, in the application of a Competition Advocacy policy, government regulators are asked to assess, prior to dictating general regulations, the potential negative impacts that the proposed regulation may have on competition, the market and its agents. Under this pro-competition policy, after scrutinizing the competition effects of the proposed regulation and prior to its enactment, the agency must request the Competition Authority to approve a concept in principle. This is a non-binding concept and therefore the agency may still decide to enact the regulation even if the Competition Authority has recommends against it.

Most competition law regimes include instruments that promote competition within the government. For example, in the UK, section 7 of the Enterprise Act, 2002 creates the function in the Office of Fair Trade (OFT) of providing information and advice to the government in matters related to competition and consumer protection. For this purpose, the OFT has an advocacy team whose main roles are to strengthen the relationship with other government agencies and to promote competition in the markets. The International Competition Network defines Competition advocacy as follows:

"Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition".[387]

As explained by UNCTAD[388] Competition Advocacy has proven to be an effective instrument to introduce competition into regulated markets throughout the promotion of competition culture in the interior workings of regulatory bodies. Its main goal is to discipline government intervention in the economy and to avoid transaction costs arising from it. It also looks to unify the criteria of government institutions towards competition issues such as monopolization, abuse of market power, mergers and acquisitions, rules for vertical and horizontal integration, separation of activities, access to networks, prices and tariffs, essential infrastructure and finally, consumer protection. According to the Office of Fair

[386] See CREG Concept 6587 of 1998 rendered to the SSPD in relation to the scope of the general exception contained in CREG Resolutions 057 of 1996 and 071 of 1998. Also see CREG Concept 3-2010-00551 of 2010. It is important to highlight that Law 142 of 1994 provides that companies created prior to 1994 are exempt from these unbundling rules and may continue to be vertically integrated

[387] International Competition Network, Advocacy Working Group. "Advocacy and Competition Policy", Naples, 2002. Available online: http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf

[388] UNCTAD, "Designing of Competition Advocacy model for Latin-American Competition Policy", G.E.99-53500-April 2000-305

Trade and the best practices of the OCDE, the main topics of study of a Competition Advocacy Office are the following:

- Competition authorities controlling government intervention in the economy and regulation.
- Address the question of how to apply competition policy in regulated markets.
- Prevent duplication of functions between regulatory agencies and competition authorities.
- Obtain balance between competition and regulation: same objective different instruments.
- Avoid high transaction costs arising from government intervention, especially costs related with control and vigilance activities[389]

In Colombia, Competition Advocacy was implemented through article 7 of Law 1340 of 2009, the so-called new competition law.[390]The Competition Authority produced the Competition Advocacy Guidelines[391] which outline the steps that regulatory agencies must take in order to comply with the duty to consult. The guidelines are directed to regulatory agencies and instruct them about the competition assessment process. Through a number of questions related to competition, regulators are able to determine whether a proposed regulation may negatively affect the market or its agents.[392]

In addition to the undeniable relationship between regulation and competition, traditional public utility or public service regulation has evolved into new forms of government intervention, such as "market-based regulation" or "regulation for competition",[393] which recognize the benefits of competition together with more involvement of the various agents in the regulatory process and the recognition of industry standards and codes of conduct as powerful tools of self-regulation. Under this new concept, not only is the principle of less intervention applied, but a sort of principle of regulation by and for the market is recognized by governments, which basically means that the rules of the market and competition are more efficient in dealing with these markets even though regulation should still be in place whenever required, but only in the least intrusive way. Finally, regulatory agencies recognize that by enforcing competition they directly benefit consumers by ensuring efficiency, lower prices and high quality of goods and services.

In this respect, Barry Barton refers to market-based alternatives to conventional regulation that have been recently explored which use market forces and economic instruments in order to pursue public policy objectives. He presents examples such as measures requiring publication of market price information with the purpose of improving the functioning of the market, or actions under competition or antitrust law, aimed at preventing misuse of dominance in a market and other anticompetitive practices.

---

[389] Office of Fair Trade. "Government in Market. Why competition matter – A guide for policy makers", 2009. OCDE, "Competition Assessment Toolkit. Vol. 1, Version 2.0 at p. 8. Also see Comision Nacional de Competencia, "Guía para la elaboración de memorias de competencia de los proyectos normativos", June, 2008.

[390] See article 7 of Law 1340/2009 by which Colombia adopted the Competition Advocacy policy following UNCTAD Guidelines.

[391] Ministerio de Industria, Comercio y Turismo, "Guía para el ejercicio de la abogacía de la competencia", 2011

[392] Article 5 of Decree 2897 of 2010 and SIC Resolution 44649 of 2010.

[393] See Peter Cameron, Congreso Iberoamericano de Regulación, ASIER, Universidad Externado de Colombia, Bogotá, Noviembre 2012.

Barton highlights that in these cases, it is assumed that competition in a functioning market is producing the results that policy-makers seek. However, as Barton points out, a different case arises after privatization or restructuring of a state-owned monopoly utility, or where there is no market and there is no tradable commodity like natural gas or electricity. In these cases, considerable regulatory action is often needed to bring novel markets into being, and high levels of legal components are required for enforcement of market-based alternatives. That is why, Barton argues, we see market activity and regulatory activity operating in tandem.

"Indeed the distinction between 'conventional' and 'market-based' regulation is not as simple as one might assume from its frequent employment. All the attributes of conventional regulation (rules, agency discretion, enforcement, and the like) may be present in price information disclosure requirements, competition law, taxes, and subsidies; and in the framework for new rights and a novel market".[394]

CONCLUSION:

In natural gas industries, even in highly deregulated markets such as the one existing in Alberta, some degree of government regulation and market surveillance is required, and this requirement is justified by considerations of public interest. Regulatory agencies such as the CREG in Colombia are also often required to apply competition law principles and methods, and competition authorities (such as the SIC) pay close consideration to the special characteristics of regulated industries such as gas utilities when conducting merger reviews or investigations of anticompetitive behaviors in these markets.

As a general principle, regulation must be in place only where it is necessary and to the extent that it is required. However, whenever competitive activities coexist with regulated activities, the rules of competition law must prevail. Deregulation must be accompanied by an adequate statutory and institutional framework for the competition authority to be able to react effectively against monopolization, the abuse of market power and unfair competition.[395]

Ultimately, regulators and competition authorities are required to work together in a coordinated way, avoiding duplication of functions, regulatory inefficiency and higher administrative costs. In considering whether to liberalize and deregulate public utilities, it is critical to first assess the influence of government intervention in these markets to reduce the costs of intervention. Through competition advocacy antitrust law principles and a competition "culture" are introduced into regulatory agencies.

However, as we discuss in the following chapter, competition may not be sufficient to protect the interests of consumers. Consumer protection as a background justification for regulation in the public

[394] BARTON supra note 151 at p. 23

[395] See Paulina Beato and J. J. Laffont "Competition Policy in Public Utilities in Developing Countries" in Inter-American Developing Bank, Sustainable Developing Department Technical Papers Series (IFM Publications: Washington, 2002);

interest is usually based upon distributional considerations and due to the essential nature of gas distribution services.

CHAPTER FOUR

CONSUMER PROTECTION AND PUBLIC UTILITIES

INTRODUCTION

In this chapter I will demonstrate that consumer protection is a fundamental aspect of both regulation and competition in the public interest, particularly in public utilities and SPDs. We will start with a discussion of the general aspects of consumer protection policy, consumer law and the principles of distributive justice. We will argue that consumer protection is in the public interest and, therefore, is protected by the mandate of regulators such as the CREG in Colombia, and the AUC in Alberta. We will show that, as recommended by the United Nations Guidelines, consumer protection is typically a function of the State that aims to protect consumers from issues such as unfair and discriminatory practices by firms, misleading information, as well as matters regarding quality, reliability, safety and health. One particular aspect of our analysis deals with the question of whether effective competition is sufficient to guarantee consumers the provision of essential services such as electricity or natural gas, at reasonable prices and levels of quality, or some sort of regulation is required to achieve an outcome that benefits consumers, particularly because of the natural monopoly that occurs in distribution and transport networks.

We will then discuss consumer protection in Colombia, particularly the constitutional and legal rules applicable to SPDs. In this respect, we will analyze the rules regarding customers' claims against the SPD operator and the appeal process before the SSPD, highlighting the high volume of consumer claims that arise without effective solution. We will analyze the abuse of contractual dominance, which is a unique concept created to protect SPD consumers from abusive behavior by SPD operators under the SPD agreement. We will also refer to legal mechanisms such as the *"tutela"* action, the main judicial instrument for SPD consumer protection, particularly regarding aspects of procedural fairness and access to SPDs, which are considered fundamental rights of citizens protected by the Colombian Constitution. We will also discuss the rules created by the Consumer Statute arguing that SPD consumers could benefit from the use of judicial mechanisms provided by this statute against SPD operators.

Finally, we will review consumer advocacy and the role that the Office of the Utility Consumers Advocate (UCA) plays in Alberta. In this respect, we will discuss the UCA's mandate to represent the interest of residential, farm and small business consumers of electricity and natural gas in Alberta, and the main challenges that it must overcome in order to effectively comply with this mandate. In particular, we will discuss the ability of consumer representatives to effectively intervene in regulatory proceedings before the AUC and to be granted standing, as well as some aspects of the regulatory framework applicable to gas utilities in Alberta, focusing on those issues that affect residential and small commercial consumers of electricity and natural gas.

1. CONSUMER PROTECTION AND CONSUMER LAW

Anthony Kronman has defended the idea that contract law plays an important role in terms of distributive justice, by creating laws with distributional effects (i.e. usury laws, minimum wage laws, warranties of quality, etc.).[396] More particularly, Thomas Wilhemsson focuses on the potential impact that consumer law may have in social justice. He argues that the role of consumer law with respect to distributive justice is ambivalent:

"Seen from this perspective, some aspects of consumer law may even have a negative impact: consumer law may help make invisible or even reproduce existing injustice. There are other cases, however, where consumer law clearly is used as a tool against particular forms of injustice. Sometimes the law goes further, explicitly promoting the interests of disadvantaged consumers". [397]

A particular aspect of Wilhemsson's analysis is the distinction between corrective or commutative justice, and distributive justice. Corrective justice he states, is characterized by actions taken to correct a situation of wrongdoing (e.g. payment of compensation after breach of a contract). On the other hand, distributive justice is connected with the concept of allocation of resources and has diverse interpretations, like when we talk about allocating new resources to a certain population, or when we speak about reallocation of existing resources or "redistributive justice". According to Wilhemsson, consumer law may be connected with both forms of justice, corrective and distributive. However, this author argues that corrective justice has to do with the individual contractual relation between a consumer and an enterprise, and therefore it cannot serve as background justification for consumer law in terms of social justice:

"Corrective justice is concerned with a just sanction for a specific wrong, a balanced outcome in the individual case. The search for social justice cannot have its main focus on rules of this case. Social justice is concerned with the distribution of entitlements within a social system. The question concerning consumer law and social justice, therefore, has to be approached from the point of view of distributive justice. The focus is on consumer law as a means of distributive justice".[398]

Wilhemsson states that a measure which results in a more equal distribution of benefits is said to be in line with distributive justice, and a measure which results in less equality is called negative from the point of view of distributive justice.[399]This author states that consumer law may have positive functions from the point of view of distributive justice because it can help eliminate special unfavorable markets for the poor, and stop discrimination against disadvantaged groups of consumers. He argues that it is even possible to go further and design special mechanisms for favoring weak consumer groups.[400]Wilhemsson also states that every rule of consumer law clearly has some distributive effect in the relationship between

---

[396] Kronman, A.T., "Contract Law and Distributive Justice" (1980) 89 Yale L. J. at p. 473

[397] Thomas Wilhemsson ,"Consumer Law and Social Justice" in "Consumer Law in the global economy: national and international dimensions" ed by Iain Ramsay, Dartmouth Publishing Company Limited & Ashgate Publishing Limited, Aldershot, England, 1997 at p 217 [WILHEMSSON]

[398] Ibid at p 218

[399] Ibid at p 219

[400] Ibid at p 227

the two parties to a contract. He argues that when speaking about social justice we should not confine ourselves to the individual relationship of a consumer with a producer/supplier of a good or service, but should look at the distributive effects on various groups of members of society. According to Wilhemsson, the basic aim of consumer law is the protection of consumers in their relationship with enterprises. The problems to be regulated are defined within this relationship. Consumer protection on the other hand is protection of consumers against enterprises. The consumer is regarded as the weak party in relation to the enterprise. The application of protective measures does not require that the consumer be given specific characteristics.

Finally, authors such as Ramsay and Williams address the issue of inequality and discrimination as a major theme of consumer protection law and policy. These authors argue that problems of discrimination exist in consumer markets, affecting particularly low-income consumers, which are more exposed to hazardous products, have limited access to services, and unequal access to the justice system. They highlight that most of the studies in this issue have focused on income as main driver of inequality and have not incorporated other factors such as gender or race which in their view are equally important.

"Consumer protection emerged as a new form of law that would address problems in market relationships, and has traditionally conceptualized such problems in terms of inequalities between producers/suppliers and consumers of goods, services, and marketing. Although the growth of the 'market failure' framework of analysis has to some extent shifted the discourse away from general notions about exploitation of unequal power relations, it has not eliminated concerns about 'imbalances' or 'differentials' (i.e., inequalities) between producers/suppliers and consumers as a class". [401]

Regarding gas utilities, consumer law and consumer protection as a mean of distributive justice applies to situations such as the application of subsidies to low income population in order to provide them with access to a public good, the enactment of rules against inequality and discrimination, and rules regarding the protection of consumers against utilities with market power.

6.1. Consumer protection policies

The United Nations Guidelines on Consumer Protection provide a framework of principles for the development of consumer protection policies. The guidelines encourage countries to design their consumer protection policies in accordance with the needs of their own populations and economic, social and environmental circumstances, rather than a universal approach based on harmonization of laws and policies across all countries. They assist countries in the development of their legislation and policies and are intended to meet the following key legitimate needs of consumers:

1. Protection of consumers from hazards to their health and safety.
2. The promotion and protection of the economic interests of consumers.

[401] Iain Ramsay and Toni Williams, "Inequality, Market Discrimination, and Credit Markets" in "Consumer Law in the global economy: national and international dimensions" ed by Iain Ramsay, Dartmouth Publishing Company Limited & Ashgate Publishing Limited, Aldershot, England, 1997, at p 233

3. Access of consumers to adequate information to enable them to take informed choices according to individual wishes and needs.
4. Consumer education including education on the environmental, social and economic impacts of consumer choice.
5. Availability of effective consumer redress.
6. Freedom to form consumer groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them.
7. Promotion of sustainable consumption patterns. [402]

Specifically, the guidelines encourage governments to provide for mechanisms for information exchange on consumer protection, cooperate in implementing consumer protection policies, and improve the conditions under which essential goods and services are offered to consumers, giving due regard to both price and quality. In accordance to the UN Guidelines, the main objectives of government regulation with respect to consumers have to do with issues such as: raising awareness on consumer protection issues; preparing consumer protection legislation and setting up institutions for its enforcement; assisting institutions in curbing abusive business practices by all enterprises which adversely affect consumers; encouraging the development of market conditions which provide consumers with greater choice at lower prices; facilitating production and distribution patterns responsive to the needs and desires of consumers; promoting high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers; facilitating the development of independent consumer groups; and promoting sustainable consumption.

Many of the key needs identified in the UN Guidelines apply to public utilities or SPD consumers. In the first place, the promotion and protection of the economic interests of consumers, who will benefit from the fair, efficient and openly competitive functioning of the market, whenever competition is possible, and from effective regulation, whenever government intervention is required to protect the consumer interest. In the second place, access to adequate and timely information is a key need of utility consumers, not only because it allows them to make informed choices, but due to the problem of asymmetric information that makes it difficult for consumers to test the prudency of the costs claimed by the utilities in rate setting proceedings. In the third place, education is a key need of utility consumers, particularly where independent retailers exist, as educated consumers are able to choose between different providers, or between a number of options such as fixed-term contracts or regulated rates. Finally, the ability to create consumer groups or organizations, and the opportunity for these groups to effectively participate in the decision-making process, is a key need of utility consumers.

1. CONSUMER PROTECTION AND COMPETITION

Economic theory defends the idea that competition is beneficial for consumers given certain circumstances: when competition provide incentives to economic agents in the search of efficiency, which in turn, increases the possibilities of survival and commercial success; and, when competition guarantees

[402] UNCTAD "Manual on Consumer Protection" online at: http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0026_en.pdf. [UNCTAD]

that scarce economic resources are used to their maximum potential. Monopoly reduces production and elevates prices; it may hide inefficiency. On the contrary, competition gives consumers choices, more production and better prices. The ultimate goal of competition is the social conglomerate formed by consumers. In this respect, we can ascertain that free competition is regarded not only as a right of those who participate in the market as producers of goods and services, but also as a fundamental and essential right of the consumers that purchase those goods and services. The protection of economic freedom is not just a duty of the State, who must prevent the obstruction or restriction of competition, but a responsibility of the entire society. Economic freedom and competition contribute in an efficient manner to elevate the welfare of society and to satisfy in good portion its economic needs. Conversely, when competition is not free, or when it is disloyal or unfair, it damages not only the producers and consumers of certain goods and services, but all the society.[403]

As Colombian author Margarita Alarcon[404]explains, the debate still remains over the question of whether the purpose of competition policy is simply to protect free market and competition, or whether it includes other social purposes. Under the first assumption, the only purpose of competition policy is economic efficiency. The second assumption asserts that competition policy is founded in multiple values that most not be ignored even if they are not easily measured, which include welfare, culture, history, and other relevant institutions. In any case, Alarcon argues that the State must actively participate in maintaining full employment and eradicating poverty, and that the private sector must develop a more important role in the economy. As Alarcon explains, the consumer is the ultimate recipient of the benefits promoted by free competition and these benefits must be protected by an adequate policy which fundamentally consists in guaranteeing that the different modes of production and distribution answer to the needs of consumers, and that producers of goods and services act ethically and avoid entering into abusive market practices.[405]Alarcon highlights that competition does not mean the absence of government intervention in economic activity, or that enterprises must compete without any rules or limitations. This author states that government intervention is required to establish objective rules and to control that they are applied, in order to protect the public interest represented in the correct functioning of markets. This means that competition does not entail inattention to the public or social ends of the State; or that liberalization implies absence of regulation. Sometimes it implies quite the opposite: re-regulation

[403] Guillermo Perry Rubio, "Libertad económica. Los servicios públicos" Universidad Externado de Colombia, Revista Jurídica, Vol. 6, número 1, En-Jun 1992, at p. 4

[404] Margarita Alarcón Castillo, "Libre competencia y derechos del consumidor", Superintendencia de Industria y Comercio, Memorias del Seminario Internacional sobre Aplicación de la política de competencia a nivel internacional y su desarrollo en el ámbito nacional, Cartagena, Marzo 1998, at p. 242 [ALARCON]

[405] Ibid at p. 242

which means more intervention through additional regulation to protect public interests such as health, the environment, or even effective competition.[406]

Authors such as Gordon Kaiser point out that competition may act as a complement rather than a replacement of a regulated system.[407] Kaiser refers to a case where the Ontario Energy Board (OEB) conducted a "Natural Gas Electricity Interface Review" (NGEIR). In the NGEIR, the OEB decision dealt with whether regulation of the gas market was required, or if there was sufficient competition to protect consumers. The decision hinged upon whether or not there was a gas monopoly in Ontario. Consumer groups argued that there was a monopoly on gas distribution and storage while the gas utilities contended that there was no monopoly because they operated in a larger geographic area than Ontario. The analysis of the geographic scope of the gas market in Ontario determined that there was sufficient competition to protect consumers and thus the Board could refrain from regulating gas storage as long as competition existed.

2. CONSUMER PROTECTION AND REGULATION

Spanish legal academic Luis Macho argues that in a deregulated market of public services, public law elements still remain which are external to the contractual relationship that remains essentially of private nature.[408]These public law elements are the main justification for government regulation, and include the duty to protect consumers. As Barton explains, regulation often protects collective goals and aspirations, by rejecting the choices of private consumers in favour of public values.

"In addition, regulation sometimes addresses the formation of the preferences that are then reflected in private transactions. Thus regulation can be justified and explained outside of economic analysis; market failure is not the only reason for regulation. Many regulatory statutes have goals other than economic efficiency".[409]

In this respect, Barton refers to the work of Sunstein,[410] Prosser[411] and Feintuck[412] to defend his argument for a democratic rationale for regulation:

"As Sunstein insists, achievement of social justice is a higher value than the protection of free markets; markets are mere instruments to be evaluated by their effects. Government action is often the best way to solve difficulties of coordination of the private desires of large number of individuals, and difficulties of collective action. Likewise, Prosser has argued that in utility regulation the most successful theoretical approach is to return to political and constitutional theory and adopt a rights-based approach to regulation. Feintuck argues that the concept of regulation

---

406 Ibid at p. 243

407 Gordon Kaiser, "Competition as Regulation", presentation at the 2011 Energy Regulatory Forum, notes by Patrick Edgerton-Mcghan, law student, University of Alberta.

408 Luis Miguel Macho, "Los Servicios Públicos y el Régimen Jurídico de los Usuarios", CEDECS Editorial S.L., Barcelona 1999

409 BARTON, supra at note 151 at p. 18

410 C. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State (Cambridge, Mass: Harvard University Press, 1990) quoted by BARTON supra note 151 at p. 18

411 T. Prosser, "Theorizing Utility Regulation" (1999) 62 Mod L Rev 196, quoted by BARTON supra note 151 at p. 18

412 M. Feintuck, "The Public Interest in Regulation" (Oxford: Oxford University Press, 2004) quoted by BARTON supra note 151 at p. 19.

in the public interest can and should be reinvigorated around ideas of equality of citizenship for the protection of democratic values".[413]

Consumer protection as a background justification for regulation of public utilities has been a subject of important debate after most of the liberalization process that took place in Europe and Latin America. Germá Bel, Professor of Economics at the University of Barcelona, Spain, argues that after privatization and deregulation of public service industries, consumers are in a situation of economic disequilibrium with respect to utilities which continue to have market power. Bel points out that in most countries of Latin America, the privatization and deregulation process was justified by the need of resources to accomplish political agendas. This public finance justification was usually accompanied by a political justification that referred to the need for more economic efficiency. However, as Bel states, the simple transformation of a public monopoly into a private one does not alter the problem of allocative inefficiency associated with a natural monopoly. Without regulation, he argues, private monopolies have market power that allows them to engage in strategic behaviors such as abuse of dominance and the creation of barriers to entry. Even though competition law exists to tackle these problems, in regulated industries such as public utilities, it is not enough.[414]In addition, deregulation and privatization have created new problems, calling for new regulatory measures.[415]

Bel argues that in a deregulated market, the inequality of consumers in respect to utilities together with the absence of government authorities that represent the interests of consumers, must be counterbalanced with the creation of consumer organizations that effectively represent their interests in the decision-making process.[416] As explained by Bel, consumers as an interest group can only obtain effective participation in the decision-making process through collective action exercised by organizations that properly represent their interests. The underlining idea presented by Bel is that consumers as an interest group lack the sufficient incentives as they are subject to a problem of "free riding", an idea that was first presented by Olson[417]and is highlighted by Trebilcock when it states that *"…consumers may find it increasingly difficult to cohere as a single interest group, marching to a single drum beat, when the question of non-market distribution of economic output is required to be urgently addressed*."[418]

---

[413] BARTON supra note 151 at p. 18-19

[414] Germá Bel, *"Privatización y desregulación: Cuándo la liberalización no basta para aumentar la competencia"* in Bel, G. (1996) *"Privatización, desregulación y ¿Competencia?"* Madrid: Ed. Civitas. In the same sense see the presentation by Luis Pando *"La teoría del usuario responsable"* in "*Segundo Foro de Regulación de Servicios Públicos Domiciliarios"*, Hotel Sheraton Four Points, Bogotá, Octubre 26, 2004

[415] Vickers and Jarrows, "Privatization: An Economic Analysis" (1988) London, MIT Press; "Economic Perspectives on Privatization" (1991) Journal of Economic Perspectives, Vol. 5, num. 2 (Spring) at p 111- 132. Also see: J.A. Kay and Vickers, "Regulatory reform in Britain" Economic Policy, num. 7, at p. 285-351.

[416] Gary Becker, "A Theory of Competition among Pressure Groups for Political Influence", (1983)

[417] Mancur Olson, "The Logic of Collective Action, Public Goods and the Theory of Groups", Cambridge, Mass., Harvard University Press, 1971 (1965)

[418] Trebilcock, M.J., "Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?" (1975) 13 Osgoode Hall Law Journal 619 at page 624

To solve this problem, as recommended by the UN Guidelines, governments should encourage the creation of consumer organizations that represent consumers in the decision-making process as individual consumers lack the knowledge and the resources to effectively represent their interests. A fundamental aspect of this key principle of the UN Guidelines is that consumer groups must have the right to directly represent the interests of consumers in the decision-making process, which in the case of SPD consumers entails the right to participate in regulatory rate setting proceedings in order to test the prudence and reasonableness of the costs presented by utilities, which typically includes their revenue requirement plus a fair return on the capital invested.

3. CONSUMER PROTECTION IN COLOMBIA

3.1. Consumer protection in the Colombian Constitution

As discussed in Chapter 1, the Colombian constitution refers to both social and economic regulation, as well as to free competition, as instruments of government intervention in SPDs. Regarding consumer protection, article 78 of the Colombian Constitution refers to the regulation of the quality of goods and services provided to the public, and establishes the right of consumers to organize and participate in the decisions that affect them. Article 333 establishes that economic competition is a collective right of consumers. Finally, article 334 dictates that State intervention in the production, distribution, use, and consumption of goods and public and private services, is justified to rationalize the economy and to increase the quality of life of the population. With respect to public services, articles 365 and 366 state that the regular and efficient provision of public services, and the general welfare and a better quality of life of all population, are all social ends of the State. Articles 367 to 370 refer in particular to SPD consumers and establish that the law will determine the duties and rights of consumers, the consumer protection regime, the forms of participation of consumers in the management and control of State companies providing SPDs, and the role of the SSPD with respect to consumer protection.

As explained by Colombian administrative law scholar Jaime Santofimio,[419] the Colombian constitution identifies ample authority to deal with the “users” or “consumers” who are the beneficiaries of public services. According to Santofimio, “users” or “consumers” are the immediate and permanent objective of all the other subjects of the system, including the regulatory agencies and other government bodies in charge of the planning, regulation, control and surveillance of these services, and the operators who have the duty to provide the service in an effective and efficient way.[420]As Santofimio points out, this teleological scheme determines that public services are part of the general interest which must satisfy, in an effective and efficient manner, the essential public needs of the population. Thus, the concept of user or consumer has a finalistic nature. Santofimio highlights that in a number of decisions, the Corte

[419] Corte Constitucional, Decisions T-540/1992, C-263/1996, C-242/1997, C-493/1997, C-444/1998, C-066/1997.

[420] Jaime Orlando Santofimio G., “El concepto de usuario en el régimen de los servicios públicos domiciliarios” in Temas de Derecho Público No. 57, Instituto de Estudios Constitucionales Carlos Restrepo Piedrahita, Universidad Externado de Colombia, Bogotá, Julio, 1999

Constitucional has established sufficient elements to determine this finalistic approach, highlighting the role of the "person" as the ultimate and natural beneficiary of public services.

According to the Colombian Constitution of 1991, the most fundamental right of SPD consumers is access to the service. From a constitutional perspective, access to SPDs is considered a fundamental right of citizens deeply related with human dignity and health. It is also considered a social end of the State.

3.2. Consumer protection in the SPD Law

The SPD Law[421] established the legal regime of SPD consumers and prohibited regulatory commissions from undermining their rights. Article 9 includes the following SPD consumer rights:

- To obtain real measurement of their consumption through appropriate instruments.
- Free choice of supplier.
- To obtain goods and services of a higher quality than those generally provided to all consumers.
- To request and obtain complete, precise and timely information regarding all activities and operations directly or indirectly related to the provision of the service.

From the legal perspective, article 14.33 of the SPD Law defines user or consumer as the natural or juridical[422] person that benefits from the provision of an SPD, either as the owner of the property where the service is provided or as the direct beneficiary of the service. Article 134 of the SPD Law states that any person permanently using or living in a property shall have the right to the receive service from a SPD operator, providing that it enters into a contract with the SPD operator. According to article 129, this agreement contains the uniform terms and conditions of service applicable to all end-users, and is approved by the regulatory commission. The SPD Law also refers to rules regarding billing, metering, abuse of contractual dominance, termination or suspension of service, and reconnection of the service. [423] The SPD Law contains special rules regarding claims of individual consumers regarding SPDs.

Consumers must file any complaint directly with the SPD operator, who has 15 business days to respond. After this period of time, if the operator remains silent, the concept of "positive administrative silence" (SAP) applies. SAP was originally established by French administrative law that applies to SPDS, where the silence of the administration (in this case the SPD operator) is presumed to be a positive response to the claim filed by the citizen (in this case the customer). However, the customer must file an application with the SPD operator requesting the registration of his claim. Even though the SPD Law

[421] Corte Constitucional, Decision C-493/1997. With respect to consumers in general, article 1.c of Decree 3466/1982 defines them as all natural or juridical person that contracts the acquisition, use or disposition of a good or the provision of a service, to satisfy one or more needs.

[422] Juridical person means a moral entity such as a corporation, a non-for-profit organization or even a government organization.

[423] CREG Resolution 108 of 1997 established rules regarding the protection of electricity and natural gas consumers, all of which must be contained in the operator's uniform terms and conditions of service. The CREG recognizes that non-regulated users such as large industrial customers or gas-fired power plants are subject to a free market and competition scheme, and therefore established certain rules only applicable to regulated users such as residential and small commercial consumers. For example, following article 9 of the SPD Law, CREG Resolution 108 states that metering and separated invoicing are special rights of consumers, and that meters shall comply with technical rules and standards that guarantee consumers their correct functioning.

provides that the SAP operates automatically, SPD operators continuously disregard this mandate, obligating consumers to initiate an appeal process before the SSPD.[424]The appeal process also operates in cases where the operator does answer in time and decides not to accept the customer's claim. The decision of the SSPD is final. Both the customer and the utility have the right to present evidence during the proceedings although no hearings are conducted as the law specifies a written process. The final decision is mandatory and administrative in nature. This means that, due to its nature as an "administrative act", the decision of the SSPD is subject to judicial review through an annulment action that must be filed before an administrative judge within four months of the decision, based on special grounds defined in the Administrative Code such as errors of law, fact or jurisdiction, abuse of power, or unreasonableness.

Colombian author Alberto Montaña has stated that a number of defects affect the legal regime for consumer protection established in the SPD Law.[425]This author states that the SPD Law is an incomplete legal regime as it does not fully and comprehensively develops the constitutional mandate regarding SPDs. In particular, this author argues that the SPD Law failed to comply with the mandate contained in article 369 of the Colombian Constitution which states that the legislator must establish a consumer protection regime applicable to SPDs. According to this author, the Constitution recognizes the disparity between SPD consumers and the utilities, and as a consequence ordered the enactment of a consumer protection regime. He argues that the inclusion in the SPD Law of a number of articles that refer to the rights of consumers does not constitute a consumer protection regime as ordered by the Constitution, especially because most of these articles are isolated norms, mostly in reference to procedural matter, scattered through the law. This author argues that the normative instruments related to consumer protection are insufficient, and only refers to procedural matters. This creates serious problems for SPD consumers who find a lack of substantive law to defend their interests, and have no clarity about the procedures they must follow or the entities empowered to enforce their rights.

Montaña also states that the division of powers and duties between the SPD regulatory commissions and the SSPD contradicts the philosophical and logical foundations of a consumer protection regime. In particular, he argues that the multiplicity of functions given to the SSPD in the SPD Law and further in Law 689 of 2001 entails conflicting interests which ultimately diminish the position of consumers. The role of the regulator with respect to consumers is uncertain, particularly with respect to technical and economic issues that affect consumers. According to this author, the special technical and economic knowledge possessed by SPD regulators should be directed towards the protection of

[424] Following the mandate of article 370 of the Colombian Constitution, the SPD Law established the mandate, duties and functions of the SSPD, basically to enforce the SPD Law and the regulations of the regulatory commissions, and to control and monitor the activity of SPD operators.

[425] Alberto Montaña, "Sintomatología en diez puntos del régimen jurídico de los usuarios de los servicios públicos domiciliarios", in Revista Contexto, No. 19, Universidad Externado de Colombia, 2004, at p. 51-58 [MONTAÑA]

consumers. However, article 370 of the Constitution creates an obstacle as it ties the regulatory function with the function of establishing the general policies of management and efficiency control of SPDs, which rests with the President of Colombia. In this respect, Montaña mentions a number of decisions of the Corte Constitucional[426]which seem to clarify the scope of the presidential powers and their relationship with the regulatory functions of the SPD regulatory commissions contemplated in the SPD Law. In particular, Decision C-150/2003 gives an ample scope to the regulatory function as an instrument of state intervention in the economy, which includes the achievement of the social ends of the state regarding public services and the protection of fundamental rights of citizens.

Montaña presents the argument that the special category of SPDs affects consumers. He argues that the connection of SPDs to the civil concept of domicile has created problems analogous to those that exist between tenants and landlords as both are tied to the SPD agreement, a situation that ends up benefiting the operator. He also argues that the nature of the contractual relationship between the SPD operator and the end-user is unclear, particularly with respect to state intervention. This author argues that before the enactment of the SPD Law this relationship was governed by administrative law. The SPD Law created a mixed legal regime in which elements of private and public law both apply, creating confusion about the applicable legal rules, particularly with respect to questions of jurisdiction, which often result in the inability of consumers to act effectively against potential breaches of contract committed by the SPD operators.

Montaña highlights that the SPD Law focuses on procedural matters instead of substantive rules regarding the SPD agreement. This author argues that the fundamental objective of the state's intervention in SPDs should be the SPD agreement. The lack of control over this agreement, the failure to define the situations of abuse of contractual dominance contained in article 133 of the SPD Law, and the need for a judicial review to obtain effective protection, are only some of the problems affecting consumers. Montaña states that the ineffectiveness of the administrative controls over the claim procedure has resulted in consumers increasingly using mechanisms of judicial protection, particularly the "tutela" action, to enforce or overturn administrative decisions taken by the SSPD. Even though the confidence of consumers in the judicial system should be regarded as positive, this author argues that in practical terms this translates into higher costs and a lengthier process which ultimately discourage consumers.

In Chapter One we discussed many of these problems and stated that the SPD Law was insufficient to fulfil the constitutional mandate regarding SPDs. We also argued that the SPD Law elevates economic efficiency above other goals of State action regarding SPDs. As we highlighted in

[426] Corte Constitucional, Decision C-1162/2000, M.P. José Gregorio Hernández. Also see Decision C-150/2003, M.P. Manuel José Cepeda, "Los servicios públicos domiciliarios como instrumento del Estado Social de Derecho. Analisis Jurisprudencial", in Anuario de Jurisprudencia Constitucional, quoted by Montaña

Chapter One, the goal of government intervention throughout regulation is not just economic efficiency but also the social ends deeply related to democratic values and distributional justice. We showed that the jurisprudence of the higher courts has interpreted several norms of the SPD Law in order to make this statute more consistent with the constitutional mandate. However, as pointed out by Montaña, the need for judicial actions instead of effective administrative controls ultimately affects consumers due to the higher costs and the length of a judicial process.

The "tutela" action is a special constitutional action created to protect the fundamental rights of citizens. In respect to SPDs, it has been typically used as a mean to protect the right of consumers to access SPDs, and their right to a fair process when dealing with both the SPD operators and the SSPD. To a lesser extent, consumers are also using class actions designed to protect the collective rights of individuals. Thus, consumers have recognized the important role of judges and courts in providing solutions to consumer issues, and that a judicial process may be more effective than an administrative process, an aspect that has been defended by Posner, as highlighted in chapter two of this thesis.

Another apparent failure of SPD consumer protection derives from the exemption of SPDs from the general protection regime established in Law 1480 of 2011, also known as "The Consumer Statute".[427]The SPD regime establishes only an administrative process before the SSPD regarding the consumer issues expressly contemplated in the SPD Law, while the general regime establishes an administrative process for a wider number of consumer issues (i.e. misleading advertisements, unfair business practices, and product failure) together with a judicial action before the Superintendent of Industry and Commerce (SIC).[428]It is unclear why SPD consumers were exempted from this general regime of consumer protection, particularly because the Consumer Statute contains more effective and expeditious remedies for consumers. One possible solution would be to give the SSPD judicial powers, similar to those given to the SIC, allowing SPD consumers to use the judicial actions contemplated in the Consumer Statute. However, some may argue that granting judicial powers to the SSPD may undermine its ability to control SPD operators and enforce the SPD Law. To deal with this problem, an alternative solution would be to remove the exemption that prohibits SPD consumers from filing a judicial action before the SIC for issues contemplated in the Consumer Statute.

Finally, the SPD Law is silent with respect to the intervention of consumers in regulatory proceedings. With respect to tariffs the SPD Law determines that the regulatory commission must initiate the general tariff proceedings one year before the ending of the tariff period. This type of administrative proceeding is regulated by the Administrative Code and the special rules contemplated in the SPD Law. As a general rule, consumer groups do not have the right to intervene in administrative proceedings. Only

[427] Articles 2, 56 and 59 Law 1480/2011

[428] Title VIII of Law 1480/2011 contemplates class actions, liability actions, and the so called consumer actions.

individual consumers directly interested in the administrative proceeding are given notice and the right to intervene, with no recognition by the regulatory agency of the costs of intervention. The SPD Law provides no exception to this rule. Even though regulatory commissions have the duty to conduct general public hearings with industry and consumers where the proposed regulation is explained and where participants are given the opportunity to present commentaries, in practice these public hearings are considered only a procedural step as there is no rule that requires the regulatory commission to follow any recommendation or take into account any comments presented by participants or interveners.

The reality remains that under the Colombian SPD Law, consumers lack the ability to effectively participate in regulatory proceedings, and must rely entirely on the regulator when for the protection of their interests. On the contrary, as discussed in chapter two of this thesis, SPD operators actively participate in regulatory proceedings, particularly in rate setting proceedings, as they are required to file rate applications with the regulatory commission to obtain approval of their rates for five-year periods.

A possible solution to this lack of representation of consumers is competition advocacy. As discussed in Chapter Three, Colombia's new Competition Law adopted the recommendations of international organizations and created the concept of competition advocacy which establishes the duty for agencies to send regulatory projects to the competition authority, which will approve the proposed regulation or recommend changes to avoid the potential negative effects of the proposed regulation on the market or its agents, or in lessening or restricting competition. Article 7 established a mandatory consultation process before the SIC but also established that the recommendations of the Competition Authority are not binding, meaning that the regulatory commissions may choose not to follow the SIC's recommendations provided that they express their reasons in the enacted regulation. Regulators such as the CREG are reluctant to follow the competition advocacy scheme, arguing that it diminishes their independence and autonomy. One possible remedy to correct this situation would be to file an annulment against a regulation arguing a case of breach of a mandatory consultation process, seeking a judicial decision that declares the regulation void and orders the regulatory commission to follow the consultation process. Notwithstanding the existence of this legal remedy, the SIC has decided to follow a non-adversarial approach by embarking on an educational crusade to create a "competition culture" within government agencies, pointing out the benefits of competition and highlighting the risks created by excessive and inefficient government action.

4. CONSUMER PROTECTION IN ALBERTA

Section 17(1) of the Alberta Utilities Commission Act recognizes that the protection of utility consumers is in the public interest. It also implies a so called "regulatory compact", which calls for the regulator to balance the interests of a monopoly utility with those of the consumers. Alberta adopted this approach by granting monopolistic rights to an individual company through the assignment of a franchise

area. In return for this exclusive right, the utility assumes certain responsibilities. As explained in chapter one of this thesis, this arrangement of rights and responsibilities between a utility and its customers is termed the "social contract" or "regulatory compact". This is one of the most fundamental principles underlying public utilities law and regulation in Canada. When a company is a sole supplier of an essential product, such as natural gas, it faces the "duty to serve" customers, the main obligation to connect and not to refuse connection to a customer, another key principle of Canadian public utilities law and regulation.[429]In this respect, Kaiser and Heggie point out that in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* the Supreme Court of Canada said that under the regulatory compact, customers are protected through the rate-setting making process, under which the Board is required to make balanced determination.[430]

However, as reflected in a decision taken of the OEB with respect to Toronto Hydro's payment of dividends to the City of Toronto, the balance of interests under the regulatory compact requires close examination. In this case, the OEB was concerned with Toronto Hydro's under-investment in capital expenditures and potential consequences for system reliability, and decided to impose conditions on dividend payouts by Toronto Hydro. Toronto Hydro appealed the conditions imposed by the OEB and the decision was overturned by the Divisional Court, using the same reasoning as the Supreme Court in ATCO.[431]The Ontario Court of Appeal reviewed the decision of the Divisional Court and supported the condition imposed by the OEB. The Court stated that the Board's imposition of a condition it considered proper under section 23 (1) of the Ontario Energy Board Act, 1998, was guided by its mandate to protect the interest of consumers with respect to process and the adequacy, reliability and quality of electricity service. The Court pointed out that the OEB Act requires the Board to protect both the customer and the utility. The Court referred to the unique nature of the regulatory compact as a principle of public utility law and rate-making:

"The principles that govern a regulated utility that operates as a monopoly differ from those that apply to private sector companies, which operate in a competitive market. The directors and officers of unregulated companies have a fiduciary obligation to act in the best interests of the company (which is often interpreted to mean in the best interests of the shareholders) while a regulated utility must operate in a manner that balances the interests of the utility's shareholders against those of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of ratepayers"[432]

The regulatory compact however, does not apply to services provided in a competitive market. This is the case in natural gas retail services in Alberta, where independent retailers offer consumers a number of options of competitive contracts which are not subject to regulatory oversight. With respect to

[429]Not only does a utility have an obligation to serve, but it is also prohibited from engaging in unjust discrimination and unfair rating.

[430] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140 (S.C.C.) at para. 81

[431] Toronto Hydro-Electric System Ltd. V. Ontario (Energy Board) (2008), 93 O.R. (3d) 380 (Ont. Div. Ct.), at para. 58-59

[432] Toronto Hydro-Electric System Ltd. V. Ontario (Energy Board) [2010] O.J. No. 1594, 2010 CarswellOnt 2353 (Ont. C.A.), at para. 50

competitive retailers, Service Alberta licenses retailers under the Fair Trading Act. The terms and conditions of the sale are set by the contract. The Fair Trading Act and the Fair Trading Regulations establish a set of rules regarding consumer protection, particularly those referring to unfair practices, and contemplate administrative penalties and other remedies that may be imposed on independent retailers by the Director of Consumer Investigations.[433]In addition and in line with other North American jurisdictions,[434] one of the most important aspects of the protection of utility consumers protection in Alberta is found in the creation of a specialized government agency to represent the interest of consumers. In the following section we will analyze the Office of the Utilities Consumer Advocate and the main challenges it faces when exercising its mandate.

5. THE UTILITIES CONSUMER ADVOCATE

In Alberta, consumer protection is regulated under Schedule 13 of the Government Organization Act.[435]Schedule 13.1 of the Act establishes the Office of the Utilities Consumer Advocate (UCA), which establishes in section 2 the following mandate:

(a) to represent the interests of Alberta residential, farm and small business consumers of electricity and natural gas before proceedings of the Alberta Utilities Commission and other bodies whose decisions may affect the interests of those consumers;

(b) to disseminate independent and impartial information about the regulatory process relating to electricity and natural gas, including an analysis of the impact of decisions of the Alberta Utilities Commission, other bodies and the courts relating to electricity and natural gas;

(c) to inform and educate consumers about electricity and natural gas issues;

(d) to carry out such other responsibilities relating to electricity and natural gas as the responsible Minister determines.

The three core functions of the UCA as highlighted in the annual report to the Minister presented by the UCA are: (i) representing the interests of utilities' consumers in regulatory proceedings; (ii) mediation; and (iii) consumer education and awareness.[436]The 2014 report of the UCA highlights the participation in a number of proceedings before the AUC related to rates in which the UCA obtained favorable responses on 58.7% of the issues presented and obtained important cost disallowances.[437] The

[433] Recently, following a large number of claims filed by consumers related to errors in billing and invoicing, Service Alberta initiated an investigation against Direct Energy Services Ltd.

[434] RAP, Electricity Regula0tion In the US: A Guide, March 2011

[435] RSA 2000, Chapter G-10. In October 15, 2014 the Utilities Consumer Advocate Regulation was approved (Alberta Regulation 190/2014). The regulations give the UCA ongoing authority to indirectly collect, use and disclose customer information to retain or restores utility service, or resolve disputes.

[436]Report to the Minister of October 29, 2014, Office of the Utilities Consumer Advocate http://www.ucahelps.alberta.ca/gas-bills.aspx

[437] The report indicates that the UCA initiated participation in 60 AUC proceedings and intervened in 115 issues. The UCA obtained total cost disallowances from regulatory proceedings in the amount of $48 million. Examples of these proceedings are Decision 2013-137 (Epcor Distribution and Transmission Inc. – Phase I and II, Distribution and Transmission Tariff), Decision 2013-297 (Direct Energy Regulated Services –

report also highlights the reconnection of services, particularly for low income consumers during winter time[438], and the recommendations made by the Retail Market Review Committee (RMRC) regarding consumer education and awareness.[439]With respect to mediation, the report indicates that UCA offers mediation services to consumers regarding billing issues, misrepresentation and sales tactics, early exit fees, and disconnection for non-payment or non-application. UCA's mediation officers investigate concerns raised by consumers and attempts to resolve their concerns with utility companies.[440]With respect to consumer education and awareness, the UCA has developed a communications plan and created a rate comparison tool listing all available options offered by retailers, including prices and terms to a customer based on the town or city they live in.

The UCA has a mandate to advocate for cost effective, reasonable, and safe utility services. The UCA primary goal in regulatory hearings is to ensure that consumers receive their utility service at the lowest possible cost consistent with reasonable levels of service. It seeks to ensure that rates paid by each customer class reflect the cost of serving them and that no class is unduly subsidizing or being subsidized by other classes. Accordingly, the UCA has participated in regulatory proceedings related to debt and equity issues, changes to distribution tariffs (including changes to the terms and conditions of service), and the conditions for purchasing energy for regulated rate option customers, among others. The UCA is concerned with the way rates are set and how the utility's revenues are allocated to customer classes. The UCA tests the prudence of the costs claimed by the utilities and tries to ensure that the rates approved by the Commission are just and reasonable. The AUC's hearing process reviews the utility's actual and forecast expenses and sales volumes, determining the total amount of revenue required by the utility to provide service, including the cost of capital. The revenue requirement is then allocated into customer classes.

Notwithstanding the express requirement contained in section 13.1 of the Government Organization Act that the UCA must represent its constituents in regulatory proceedings before the AUC that may affect their interests, the regulator has interpreted this mandate restrictively by denying standing to the UCA in proceedings that clearly affect residential, farm and small business consumers of electricity and natural gas in Alberta. As mentioned in Chapter 3, this was the approach recently taken by the AUC in the MSA-TransAlta case, where the Commission denied standing to the UCA and other consumer groups. However, it is important to point out that the decision taken by the AUC was based on the scope of the proceeding and the fact that the UCA's request for standing was based on an interpretation of the powers of the AUC under the Alberta Utilities Commission Act. Therefore, the decision to deny standing

---

Energy Price Setting Plan), Decision 2013-351 (ENMAX - Energy Price Setting Plan), Decision 2013-407 (AltaLink General Tariff Application), and Decision 2013-430 (ATCO Pipelines – General Rate Application).

[438] The UCA facilitated the reconnection of 112 customers.

[439] Retail Market Review Committee, "Power to the People", January 2013

[440] The UCA assisted 31,869 Albertans looking for information or assistance

in this case should not be regarded as a limitation to the UCA's ability to represent consumers. Notwithstanding, the question of market harms and whether consumers were directly and adversely affected by TransAlta's conduct remains unanswered.

In a presentation given at the 2012 Energy Regulatory Forum,[441] Richard Secord refers to the question of standing before agencies such as the Energy Resource and Conservation Board (ERCB) and the National Energy Board (NEB). He points out that the NEB has a broader approach while the ERCB requires a person to show that it is directly and adversely affected, which usually requires to show an interest in land and more harm that the one caused to the public in general. This author notes that this difference is particularly notable in the case of environmental groups and aboriginal groups, which normally find more resistance in ERCB proceedings.

Secord also referred to a 2011 negotiated settlement between the MSA and TransAlta[442], where there was intensive debate in relation to whether consumer groups could participate in such proceeding. The case had to do with aspects under the scope of functions of the MSA, and therefore the AUC concluded that consumer groups, including the UCA, had the right to standing. However, the AUC granted standing to generators and consumer groups argued that they should have the same right. The AUC considered that, although it was not satisfied that any of the parties were directly and adversely affected, because this was a case of special consideration, it was reasonable to hear those parties, and thus granted limited scope to participate. Secord argues that the AUC may apply section 11 of the AUC Act, which states that the Commission has the powers of the Queen's Bench, to grant intervener status to consumer groups. In this respect, he shows that the AUC has founded its decision to grant the right to participate to consumer groups such as the Industrial Power Consumers of Alberta, by applying sections 7 and 17 of the AUC Act.

Kaiser and Heggie[443]explain that the Alberta Court of Appeal has interpreted in a restrictive way the language used in section 9(2) of the Alberta Utilities Commission Act.[444]They argue that the approach taken by the Alberta regulator emphasizes the need for interested parties to meet a higher evidentiary threshold when establishing their genuine interest in a proceeding. They explain that the Court of Appeal dealt with the evidentiary burden by holding that the question of whether a person is "direct and adversely" affected is one of fact or at the most a mixed question of fact and law and hence there is less

[441] Richard Secord, "ENGO Standing at the ERCB and NEB, Third Annual Energy Regulatory Forum, Calgary, Alberta, May 4, 2012.

[442] Proceeding ID No. 1553

[443] Kaiser and Heggie, supra at note 67 at p 129

[444] The appellants in *Cheyne v. Alberta* were landowners seeking intervener status in a proceeding where the Board was considering granting a license to Enmax for the construction of a new electrical substation. The appellants argued that the language of section 9 of the AUC Act, specifically the use of the word "may", only required them to present evidence that their legal rights would be affected by the granting of the license. The Court rejected this argument arguing that a minimum of evidence required was to avoid a non-suit was not enough to establish that a party was directly and adversely affected.

scope for judicial review. In this respect they quote the case *Dene Tha' v. Alberta*, where the Court established a two-stage test for standing at para. 10:

"…First is a legal test, and second is a factual one. The legal test asks whether the claim right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual."[445]

Authors Kaiser and Heggie point out that most energy regulators have rules that clearly set out the basis by which interested persons or groups may intervene and become parties to a proceeding, often providing different levels of participation. They explain that most regulatory proceedings are more inclusive and democratic than courts when it comes to this matter. That is largely because most of their statutes invariably provide an obligation to consider the public interest. For example, section 17(1) of the AUC Act expressly refers to the public interest and states:

Where the Commission conducts a hearing or other proceeding on an application to construct or operate a hydro development, power plant or transmission line under the Hydro and Electric Energy Act or a gas utility pipeline under the Gas Utilities Act, it shall, in addition to any other matters it may or must consider in conducting the hearing or other proceeding, give consideration to whether construction or operation of the proposed hydro development, power plant, transmission line or gas utility pipeline ***is in the public interest****, having regard to the social and economic effects of the development, plant, line or pipeline and the effects of the development, plant, line or pipeline on the environment.*

(Emphasis added)

With respect to individual consumers, the fundamental question is whether they should have the right to participate in regulatory proceedings. According to the AUC Act, consumers must formalize their participation through filing of an application before the Commission seeking intervener status in a proceeding. In the application they must satisfy the Commission that they have a substantial interest and that they intend to participate actively and responsibly in the proceeding by submitting evidence, argument, interrogatories or by cross-examining a witness. Moreover, under section 9(2) of the AUC Act, it is the Commission's obligation to give notice to a person, provide a reasonable opportunity to learn the facts, and hold a hearing, if it appears "that its decision or order on an application may directly and adversely affect the rights of a person".

The restrictive interpretation of these provisions by the Alberta Court of Appeal, which requires interested parties to meet a higher evidentiary threshold when establishing a direct and adverse effect, and also is supplemented by the statement that the principle of public interest standing does not apply to administrative tribunals, which remain bound by their mandating statutes.[446]Therefore, the rule stated in section 9(2) of the AUC Act appears to apply only to individual consumers who are directly and adversely affected and not to consumers as an interest group. Considering that section 9(2) expressly establishes

[445] 2005 ABCA 68, 2005 CarswellAlta 203 (Alta. C.A.); leave to appeal refused 2005 CarswellAlta 1133, 2005 CarswellAlta 1134 (S.C.C.) [Dene Tha']

[446] See for example Athabasca Environmental Assn. v Alberta (Public Health Advisory & Appeal Board)

the obligation for the AUC to give notice to any person that may be directly and adversely affected by any decision or order it may make, individual consumers in this category should be able to act directly in any such proceeding.

Another argument in favor of the application of the principle of public interest is that the AUC has expressly established that consumer groups are entitled to intervener funding. When a person or group has been accepted as an intervener in a hearing or a proceeding, in many cases they are entitled to funding throughout the awarding of intervener costs. As Kaiser and Heggie explain:

"Generally, most utility regulatory tribunals in Canada, with the exception of the National Energy Board, have the power to award costs. For our purposes, costs are the professional fees of lawyers and experts as well as any other incidental costs required to participate in a hearing. Costs have also been awarded to individuals not represented by counsel and to representatives that are not counsel. Costs are awarded to an intervener upon application, and the tribunal normally directs the utility to pay the approved costs. These costs are then collected from customers through the utility's rates. The purpose of cost regimes is to encourage effective intervention so that all public interest aspects of a matter are considered, thereby promoting informed decisions by regulators. The factor that causes considerable debate is eligibility and criteria for cost awards."[447]

In 2008, the AUC undertook a review of its costs rules through a Consultation Bulletin[448]and amended the eligibility criteria by adding a financial means test. Eligible parties include those customers, or customer associations that have a substantial interest in the matter and do not have the financial means to present their case.[449]As a result of this consultation process, eligibility was limited to consumer groups that are broad based and that might represent residential consumers, farmers and small business consumers. Notwithstanding the fact that Alberta has a public interest advocate responsible for intervening on behalf of small customers, the AUC has recognized that other consumer groups or individuals can still participate on their own and become eligible to intervener costs provided they do not duplicating the efforts of the consumer advocate.[450]A very important aspect of independent consumer advocacy is carried out by the Consumer Coalition of Alberta (CCA), which has the possibility of participating as an intervener in hearings and proceedings before the AUC and to be eligible to receive costs of such intervention.

Therefore, we can conclude that there are three ways in which the Alberta process takes into account consumer interest: (i) the UCA, which is a government agency with a legislative mandate to represent consumers in regulatory proceedings; (ii) individual consumers who must file an application for intervener status and show a substantial interest (the "directly and adversely affected" test); and (iii) non-government consumer groups such as the Consumer Coalition of Alberta, who must demonstrate that they do not duplicate the UCA. Under section 9 of the AUC Act, individual consumers and consumer

[447] Kaiser and Heggie, supra at note 67 at p. 150

[448] Alberta Utilities Commission, Bulletin 2008-01 Consultation-Review of Rule 022, Rules on Intervener Costs. March 20, 2008

[449] Alberta Utilities Commission, Rule 022, Rules on Intervener Costs in Utility Rate Proceedings. September 30, 2008, s.3

[450] Ibid at p. 4

groups must all meet the same standard to obtain intervener status, and show a substantial interest. However, both the UCA and the Consumer Coalition of Alberta are typically granted the right to participate on behalf of consumers, when it comes to rate proceedings where a hearing must be conducted. Also, as highlighted by Secord, as opposed to individual customers, consumer groups may be granted the right to participate based on sections 7, 11 and 17 of the AUC Act and the principle of public interest standing.

In terms of effective representation, the question of independence of the UCA from the government is crucial. Because the same Minister appoints both the members of the AUC and the Utility Consumer Advocate, and has the power to affect the functions and responsibilities of both agencies, the UCA can be seen as part of the government. Independence and autonomy are fundamental elements of both regulatory activity and consumer advocacy, and the fact that the Minister has the power to select and dismiss members, assign new functions and generally give orders and directives, has always being considered as a limit to this independence. In many jurisdictions, this problem has been addressed throughout direct and express functions assigned by legislation, which also establishes fixed terms of office that do not depend on the Minister's discretion. Other means to achieve more independence and give authority to a governmental office representing consumers include granting them financial autonomy and establishing shared responsibility between the government and judicial organs in the selection and control of this office. Any sort of political interference should be avoided by establishing penalties and sanctions that act as deterrents. Also, accountability rules should be granted to these offices, especially regarding the exercise of their statutory functions, in the sense that the consumers' interest should always be considered when assessing the validity of the consumer advocacy's actions. Finally, consumers should be granted some form of participation in such offices, both to exert some form of control over the activities of the office and to participate in boards meetings where rules and guidelines are reviewed and implemented.

CONCLUSION

Many of the key needs identified in the UN Guidelines apply to public utilities or SPD consumers. In the first place, the promotion and protection of the economic interests of consumers, who will benefit from a fair, efficient and openly competitive market, whenever competition is possible, and from effective regulation, whenever government intervention is required to protect the consumer interest. Second, access to adequate and timely information is a key need of utility consumers, not only because it allows them to make informed choices, but also because the problem of asymmetric information makes it difficult for consumers to test the prudency of the costs claimed by the utilities in rate setting proceedings. Third, education is a key need of utility consumers, particularly where independent retailers exist, as educated consumers are able to choose between different providers, or between a number of options such as

fixed-term contracts or regulated rates. Finally, the ability to create consumer groups or organizations and the opportunity for these groups to effectively participate in the decision-making process, meets a key need of utility consumers.

As recommended by the UN Guidelines, governments should encourage the creation of organizations that represent consumers in the decision-making process as individual consumers lack the knowledge and the resources to effectively represent their interests. Consumer groups must also have the right to directly represent their interests in the decision-making process, which in the case of SPD consumers entails the right to participate in regulatory rate setting proceedings in order to test the prudence and reasonableness of the costs presented by utilities.

We have shown that in Colombia, a problem of lack of representation of SPD consumers in regulatory proceedings exists. Colombia could learn from Alberta by giving consumers the right to participate in regulatory proceedings. However, the current rules of the SPD Law regarding rate proceedings do not contemplate a quasi-judicial process where hearings are conducted, and the participation of consumers and other parties is not contemplated. Therefore, the implementation of a similar approach to Alberta requires a close consideration of the particular procedural rules that govern regulatory proceedings, as well as major changes to administrative law rules. Also Colombia could adopt the UCA model to deal with the problem of lack of consumer representation. The consumer advocate could work as a government agency or an arm's length organization, but one of the key factors for an effective representation will be the funding of consumer groups by granting intervener costs.

We have also demonstrated that consumer protection in the SPD Law has important defects that affect the ability of SPD consumers to effectively represent their interests before utilities. In this respect, alternatives are to apply the rules and proceedings of the Consumer Statute to SPD consumers or to give judicial powers to the SSPD. The Consumer Statute provides for a wider list of conducts that affect consumers and therefore, extending its application to SPD consumers will provide more defenses against abusive practices by utilities. It also establishes a judicial action which is more expedite than the administrative process SPD consumers currently follow. The alternative of giving judicial powers to the SSPD could create conflicts with its other core functions, and is much more difficult to implement as major changes to the SPD Law must be introduced. In both cases, the application of the Consumer Statute will benefit not only individual consumers but also consumer groups, and thus, will not entail duplication of efforts. However, clarification regarding the right to participate and the inclusion of provisions regarding intervener funding should be included.

CHAPTER FIVE

CONCLUSIONS

1. As demonstrated by the development of new approaches to public services such as the European concept of service of general interest, public law principles related to the old concept of public service no longer apply automatically, particularly where there is an open market system and the rules of competition prevail. However, the problems of market failure and the universal service interests of consumers still call for the application of regulatory schemes to the supply of services of general interest, thus recognizing the limits of competition rules in protecting consumers. As a result, rules providing for more accountability on the part of the provider firms are constantly enacted on subjects such as the mandatory provision of information, default rules, and right to compensation.

2. The European approach establishes that access to services of general interest is an essential component of European citizenship and necessary in order to allow citizens to fully enjoy the fundamental rights. As highlighted by Prosser, the subject of public service is still present in the legal traditions of many European countries, and has important connections to the notion of public utilities. In particular, public service law is based on egalitarian rights derived from citizenship rather than an ability to bid in the marketplace. Such an egalitarian approach is well-established in the French concept of "*service public"* and the Spanish concept of "*servicio público"* that has been replicated in the vast majority of Latin American countries – including Colombia, as it provides a strong base for social regulation.

3. In Colombia, the constitutional rules regarding SPDs refer to the social ends of the State and expressly determine the role of the State in their provision, surveillance, control and regulation. These rules also include principles regarding tariffs and subsidies, and the goal of satisfaction of the basic needs of the population. The SPD Law seems to lean towards a more market-oriented approach, trying to put principles of economic efficiency above other principles of a social nature, such as solidarity and income redistribution, universal service, proportionality and equality. This explains in part why many authors consider that SPDs have departed from the traditional notion of public services to resemble foreign notions such as the Anglo-Saxon concept of public utilities or the European concept of services of general interest. According to some authors, to obtain efficiency the Colombian SPD Law focuses in the promotion of competition. That's why, they argue, the law establishes a regulatory and control system over situations of monopoly or abuse of dominance. Competition is seen not only as a benefit for operators but also for consumers who will have access to services at lower prices. Under this view, allocative efficiency and competition

guarantee that resources are put to the best use for the benefit of the community. However, according to the constitutional mandate, the State must also guarantee the regular and efficient provision of SPDs to all inhabitants without regard to their location and socio-economic condition, looking that their provision is consistent with its social end, and that consumers actively participate in their control and regulation. The constitutional mandate establishes limits to the efficiency principle, particularly by introducing the principles of solidarity and distributional justice. Efficiency is paired with the social ends of the State and the duty to provide the service to all inhabitants of the national territory. These two elements of the constitutional mandate categorically maintain the public nature of SPDs. The State has the duty to all citizens to guarantee the regular provision of public and basic services on reasonable conditions of price and quality to all citizens.

4. From the administrative law perspective, we have shown that all public services must, above all, satisfy a collective need in the public interest. This element also applies to SPDs because it cannot be defended that these services can exist only to satisfy private and individual needs. The argument that aligns SPDs with private goods and services ruled by market forces that renounce the public interest is therefore unacceptable. Administrative law also states that all public services require, in addition to the public interest element, some degree of participation by the Administration. Regarding SPDs the Colombian Constitution of 1991 clearly states that this participation can be direct (the State directly renders the service) or indirect (the State doesn't render the service but exercise surveillance, control and regulation over it).

5. From the perspective of public finance law perspective and the public needs system, SPDs are considered second degree public services. Thus, a relative non-exclusion criterion applies to them, which means that an individual not willing to pay for the service may be excluded from their provision or their service may be interrupted. However, as the Corte Constitucional has clearly stated, the constitutional mandate regarding SPDs includes the establishment of subsidies that cover the cost of service for low income population, as clearly established in articles 365 to 370 of the Constitution. The argument that puts efficiency above other principles has created opposition to subsidies in SPDs because of their alleged inefficiency. However, as we have clearly demonstrated, as part of its social purposes, the State must give priority to social public expenditure in order to satisfy basic needs of the population, and apply, together with the efficiency principle, the public service principles of solidarity and income redistribution, universal service, proportionality and equality.

6. The comparative analysis that we conducted has shown similarities and differences between public services and public utilities. In first place, public utilities law and regulation is based on the regulatory compact. It has elements of public interest and applies principles that are similar to those applicable to SPDs, such as the duty to serve, avoidance of unjust discrimination, the provision of adequate services at just and reasonable rates, and the balance between the utilities and consumers' interests. In the second place, the assimilation of SPDs and public utilities with private goods and services in the market is wrong because of the particular characteristics of these industries. They involve a supply chain, portions of which are considered natural monopolies where competition is not always possible or even desirable. They are tied with specific social ends attached to the consumers because they relate to the most fundamental basic needs, all of which are considerations of public interest. Finally, both the civil law notion of SPDs and the common law notion of public utilities recognize that these services are subject to regulation.

7. Having reviewed the theories of regulation and their application to public utilities and SPDs, we can conclude that the regulation of both public utilities and SPDs is justified by considerations of public interest. Regulation is also present to correct market failures, to resemble the competitive market when natural monopolies exist. In carrying out these functions, regulation looks to protect consumers from the abusive practices of operators or utilities and this goal is a justification for regulation based on the public interest.

8. Although it is clear that there is no commonly held definition of the concept of *"public interest"*, due to the difficulties in determining the concept that Ogus clearly states, most of the critics of the public interest theory fail in their attempts to undermine the evident relationship between the aims of regulation and of the public in general. Feintuck concludes that the public interest of regulation may be explained and justified, through the perspective of public service law. I agree with this conclusion. We have established that the elements of the notion of public service and the principles on which it relies are deeply related to the concept of public interest. Public services are mainly subject to regulation due to their relationship with fundamental rights of citizens and the provision of basic goods and services to people. We have shown that one fundamental feature of public services is that government is always present, either through direct provision of the service or indirectly, through regulation and control. We have also demonstrated that from a public finance perspective, public services are present to satisfy public needs, and therefore, that government regulation is justified.

9. Regulation should be assessed considering the particular features and complexities of regulatory proceedings and advances in administrative and regulatory law. The alleged inefficiency of regulatory agencies suggested by the economic theory of regulation is not supported on empirical evidence. However, as Posner highlights, careful consideration must be given to the risk of regulators being captured to favor private interest instead of the public interest inherent in their mandate. Also, following Barton and Cameron, the evolution towards self-regulation and market-based regulation schemes should be considered as a step forward in the road to achieve more effective and efficient regulation, which in turn serves as further justification of regulation based on the public interest.

10. In natural gas industries, even in highly deregulated markets such as the one existing in Alberta, some degree of government regulation and market surveillance is required, and this requirement is justified by considerations of public interest. Regulatory agencies such as the CREG in Colombia are also often required to apply competition law principles and methods and competition authorities (such as the SIC) pay close consideration to the special characteristics of regulated industries such as gas utilities when conducting merger reviews or investigations of anticompetitive behaviors in these markets.

11. As a general principle, regulation must be in place only where it is necessary and to the extent that it is required. However, whenever competitive activities coexist with regulated activities, the rules of competition law must prevail. Deregulation must be accompanied by an adequate statutory and institutional framework to enable the competition authority to react effectively against monopolization, the abuse of market power and unfair competition. Regulators and competition authorities are required to work together in a coordinated way, avoiding duplicity of functions, regulatory inefficiency and higher administrative costs. In considering whether to liberalize and deregulate public utilities, it is critical to first assess the influence of government intervention in these markets to reduce the costs of intervention. Through competition advocacy and antitrust law principles competition “culture” is introduced into regulatory agencies.

12. From the experience in Europe, the Gas Directives guides the introduction of both wholesale and retail competition. Yet, this is not the case in the United States, where the introduction of retail unbundling and access is determined by the discretion of the state governments. Not all states have adopted retail unbundling thus far. However, from the experience in Europe, we learn that retail competition plays a potential role in facilitating market competition and improving the efficiency of distribution companies. In this regard, governments should evaluate the potential benefits from retail unbundling and access, study the experience of Distribution System Operator

in unbundling and creating third-party access in Europe and propose further unbundling and open access regimes to the LDCs.

13. The regulatory agencies and competition authorities constitute the institutional capacity of the State to react against market failures. Therefore, competition and regulation can have the same objectives but for different reasons: control of monopolization and market concentration, repression of anti-competitive behavior and control over market power. Under this institutional scheme, consumers depend on the regulator. The regulator ends up representing the consumers' interest in the negotiation of the terms of provision with the utility company. Matters such as tariffs, quality standards, the number of suppliers, the possibility of changing supplier, the control of the abuse of a dominant position, to mention only some examples, are established after a process of direct negotiation between the utility companies and the regulatory body, a process in which consumers rarely participate. Thus, the State looks to guarantee the inherent public interest related to gas supply and in parallel to guarantee utility companies their profit.

14. A diagnosis of the Colombian market shows that the small size of the market hinders competition in supply and that the rules of competition law may not be sufficient to protect the interests of consumers. Consumer protection as a background justification for regulation in the public interest is usually based upon distributional considerations and due to the essential nature of gas distribution services. Many of the key needs identified in the UNCTAD Guidelines on Consumer Protection apply to public utilities or SPD consumers. In the first place, the promotion and protection of the economic interests of consumers, who will benefit from the fair, efficient and openly competitive functioning of the market, whenever competition is possible, and from effective regulation, whenever government intervention is required to protect the consumer interest. In the second place, access to adequate and timely information is a key need of utility consumers, not only because it allows them to make informed choices, but due to the problem of asymmetric information that makes it difficult for consumers to test the prudency of the costs claimed by the utilities in rate setting proceedings. In the third place, education is a key need of utility consumers, particularly where independent retailers exist, as educated consumers are able to choose between different providers, or between a number of options such as fixed-term contracts or regulated rates. Finally, the ability to create consumer groups or organizations, and the opportunity for these groups to effectively participate in the decision-making process, is a key need of utility consumers.

15. As recommended by the UNCTAD Guidelines, governments should encourage the creation of consumer organizations that represent consumers in the decision-making process as individual

consumers lack the knowledge and the resources to effectively represent their own interests. Consumer groups must have the right to directly represent their interests in the decision-making process, which, in the case of SPD consumers, entails the right to participate in regulatory rate setting proceedings in order to test the prudence and reasonableness of the costs presented by utilities. In Alberta where gas is fully deregulated, independent consumer organizations and consumer advocacy offices have been created to assume the representation of consumers directly, although the problem of free riding along with the lack of technical knowledge have undermined the effectiveness of such representation. Colombia should implement a similar scheme to deal with the problem of lack of consumer representation. The consumer advocate could work as a government agency or an arm's length organization, but one of the key factors for an effective representation will be the funding of consumer groups by granting intervener costs. Colombia could learn from Alberta by giving SPD consumers the right to participate in regulatory proceedings. Alternatives are to apply the rules and proceedings of the Consumer Statute to SPD consumers or to give judicial powers to the SSPD.

BIBLIOGRAPHY

- Alarcón, M., "Libre competencia y derechos del consumidor", Superintendencia de Industria y Comercio, Memorias del Seminario Internacional sobre Aplicación de la política de competencia a nivel internacional y su desarrollo en el ámbito nacional, Cartagena, Marzo 1998
- Alberta Utilities Commission, Bulletin 2008-01 Consultation-Review of Rule 022, Rules on Intervener Costs. March 20, 2008
- Alberta Utilities Commission, Rule 022, Rules on Intervener Costs in Utility Rate Proceedings. September 30, 2008, s.3
- Alexander, I., C. Mayer, & H. Weeds, "Regulatory Structure and Risk and Infrastructure Firms. An International Comparison", The World Bank – Private Sector Development Department, Private Participation in Infrastructure Group
- Almonacid, J. and N. García, "Derecho de la competencia", Legis, 1st. ed., Bogotá, 1998
- Anuario de Jurisprudencia Constitucional "Los servicios públicos domiciliarios como instrumento del Estado Social de Derecho. Análisis Jurisprudencial"
- Ariño, G., "El Nuevo servicio público", Editorial Marcial Pons, Universidad Autónoma de Madrid, Programa de estudios de regulación económica – P.E.R.E., Madrid, 1997
- Armstrong, M., S. Cowan and J. Vickers, "Regulatory Reform: Economic Analysis and British Experience", (The MIT Press, 1995)
- Barton, B., "The Theoretical Context of Regulation" in "Regulating Energy and Natural Resources" eds. Barry Barton et al, (Oxford University Press: New York, 2006)
- Baldwin, R. and M. Cave, "Understanding Regulation: Theory, Structure and Practice" (Oxford: Oxford University Press, 1999)
- Beato. P. and J. J. Laffont, "Competition Policy in Public Utilities in Developing Countries" in Inter-American Developing Bank, Sustainable Developing Department Technical Papers Series (IFM Publications: Washington, 2002)
- Becker, G., "A Theory of Competition among Pressure Groups for Political Influence", (1983)
- Bel, G., "Privatización y desregulación: Cuándo la liberalización no basta para aumentar la competencia" in Bel, G. (1996) "Privatización, desregulación y ¿Competencia?" Madrid: Ed. Civitas.
- Bernal, J., "Nuevo régimen tarifario y capacidad de pago de los usuarios", in Revista Supervisión, T.1 1996
- Betancur, L., "La contratación estatal" in Superintendencia de Servicios Públicos Domiciliarios, "Servicios Públicos Domiciliarios. Actualidad Jurídica", Tomo IV
- Black, A.J., "Canadian Gas Deregulation", Faculty of Law, University of British Columbia
- Black, J., "Critical Reflections on Regulation" (2002) 27 Aust J Leg Phil 1

- Bryer, S.B. and R.B. Stewart, “Administrative Law and Regulatory Policy”, (2nd ed., Little, Brown & Co.: Boston, 1985)
- Buchanan, J. and G. Tullock, “The Calculus of Consent”, (1962)
- Cameron, P. “Competition in Energy Markets: Law and Regulation in the European Union”, (2002), Oxford University Press, Oxford;
- Cameron, P. “Gas Regulation in Europe”, Financial Times Energy Publishing, Pearson Professional Ltd. London, 1995
- Cameron, P. “Aspectos actuales de la regulación energética Europea”, VII Congreso Iberoamericano de Regulación: Energía, Minería, Petróleo, Gas y Otros Sectores Regulados, ASIER, Universidad Externado de Colombia, Bogotá, Noviembre 7, 2012.
- Cano, R. “La regulación del sector eléctrico en Chile”, in Lecturas de Economía No. 46, Medellín, en-jun 1997
- Clemens, E.W., “Economics and Public Utilities” (Appleton-Century-Crofts, New York, 1950)
- Comisión Nacional de Competencia, “Guía para la elaboración de memorias de competencia de los proyectos normativos”, June, 2008.
- Competition Bureau, Merger Enforcement Guidelines, Ottawa, 2011
- CORPUS JURIS SECUNDUM, Vol. 73 B, 2004, Thomson West
- Costas, A., “El paradigma de la liberalización”, Master en Economía y Regulación de Servicios Públicos, Universidad de Barcelona, Barcelona, Febrero 2004.
- CREG Document 057 of June 2005
- CREG Concept 6587 of 1998 and CREG Concept 3-2010-00551 of 2010
- Croley, S.P., “Regulation and Public Interests. The Possibility of Good Regulatory Government”, Princeton University Press, 2008
- De Laubadére, A. et Y. Gaudemet, “Droit Administratif général”, 16éme éd., Paris, Librairie Générale de Droit et de Jurisprudence, 2001
- De Laubadére, A. et Y. Gaudemet *“Les grandes arrêts de la jurisprudence administrative”,* 18éme ed. Paris, Editions Dalloz, 2011
- EIA “U.S. Natural Gas Markets: Recent Trends and Prospects for the Future”
- ERGEG Guidelines for Good TPA Practice for Storage System Operators (Nov. 2004)
- ERGEG Guidelines for Good TPA Practice for LNG System Operators (May 2008)
- EUB Decision 2001-75 (October 30, 2001) PART A: GCRR METHODOLOGY AND GAS RATE UNBUNDLING GCRR Methodology Proceeding and Gas Rate Unbundling Proceeding
- European Commission, Regulation 1775/2005/EC of the European Parliament and the Council on conditions for Access to the natural gas transmission networks
- European Commission, Green Paper on Services of General Interest, COM (2003) 270.
- European Commission, White Paper on Services of General Interest, COM (2004) 374.

- European Commission, Energy Market Directives 2003/54/EC and 2003/55/EC
- Feintuck, M., "'The Public Interest' in Regulation", (2004), Oxford University Press Inc., New York
- Frontier Economics, "Diagnostic of Natural Gas Market Failures in Colombia", Ministerio de Minas y Energía, March, 2010
- Gao, A.M.Z., "Regulating Gas Liberalization: A Comparative Study on Unbundling and Open Access Regimes in the US, Europe, Japan, South Korea and Taiwan", 2010 Kluwer Law International BV, The Netherlands.
- Geradin, D. "The Opening of State Monopolies to Competition: Main Issues of the Liberalization Process". "The Liberalization of State Monopolies in the European Union and Beyond" edited by D. Geradin (The Hague: Kluwer Law International, 2000
- Graham, C. "Regulating Public Utilities: a Constitutional Approach", (2000), Hart Publishing, Oxford
- Green, R. and M. Rodríguez Pardina, "Resetting Price Controls for Privatized Utilities: A Manual for Regulators", (1999) Hartmann, N. "Ethik", 2nd edition, Berlin, 1935.
- Grieve, W.A. and S.L. Levin, "Common Carriers, Public Utilities and Competition", Industrial and Corporate Change, vol. 5(4) (Oxford University Press, 1996)
- Gutiérrez, R. "Doctrina de la infraestructura vital para la prestación de un servicio público domiciliario: un análisis comparativo del modelo colombiano con las tendencias conceptuales y aproximaciones de la Unión Europea", en Revista Supervisión, Tomo 4, Dic. 1997
- Helm, D. and T. Jenkinson, "The Assessment: Introducing Competition into Regulated Industries" (1997) 13:1 Oxford Review of Economic Policy 4
- International Competition Network, Advocacy Working Group. "Advocacy and Competition Policy", Naples, 2002.
- Kahn, A.E. "The Economics of Regulation: Principles and Institutions", (John Wiley & Sons: New York, 1970) Vol. 1
- Kaiser, G. "Competition as Regulation", 2011 Energy Regulatory Forum Kronman, A.T., "Contract Law and Distributive Justice" (1980) 89 Yale L. J.
- Kaiser, G. and B. Heggie, Developments in Public Utility Law, in "Energy Law and Policy" eds. Gordon Kaiser and Bob Heggie (Carswell: Toronto 2011)
- Kelly, S. "Natural Gas", in Rocky Mountain Mineral Law Foundation, "Energy Law for the 21st Century", ch. 8
- Laffont, J. J. and J. Tirole, "Creating competition through interconnection: Theory and Practice", Journal of Regulatory Economics, 10, 1996
- Lucas, A. and C.D. Hunt, "Oil and Gas in Canada" Carswell Toronto, 1990
- Macaulay, R. and J. Sprague, "Practice and Procedure Before Administrative Tribunals" (Toronto: Carswell, 2004)

- Macho, L.M. “Los Servicios Públicos y el Régimen Jurídico de los Usuarios”, CEDECS Editorial S.L., Barcelona 1999
- Majone, G. “The Rise of the Regulatory State in Europe”, (1994) West European Politics, 17
- Market Analysis, “Upstream Issues in Colombian Gas Supply” a report commissioned by the CREG, Bogota, April (2010)
- Mata, I. “El Servicio Público frente a la Privatización y la Regulación”, in Revista Supervisión, No. 1, 1995
- Mestmäcker, E.J. “Natural Gas in the Internal Market”, (London: Kluwer Law International, 1993)
- Ministerio de Industria, Comercio y Turismo, “Guía para el ejercicio de la abogacía de la competencia”, 2011
- Montaña, A. “Sintomatología en diez puntos del régimen jurídico de los usuarios de los servicios públicos domiciliarios”, in Revista Contexto, No. 19, Universidad Externado de Colombia, 2004
- Muratorio, J., “La regulación constitucional de los servicios públicos en la reforma de 1994” in VVAA Estudios sobre la reforma constitucional, Editorial Depalma, Buenos Aires, 1995
- Office of Fair Trade. “Government in Market. Why competition matter – A guide for policy makers”, 2009. OCDE, “Competition Assessment Toolkit. Vol. 1, Version 2.0
- Office of the Utilities Consumer Advocate, Report to the Minister of October 29, 2014
- Ogus, A., “Regulation. Legal Form and Economic Theory”, Clarendon Express, Oxford 1994
- Ogus, A., “Regulation: The Public Interest and the Private Interest” in The Economics of Legal Relationships, Volume 6, “Law and Economics in Civil Law Countries” edited by Bruno Deffains & Thierry Kirat, Elsevier Science B.V., 2001
- Olson, M. “The Logic of Collective Action, Public Goods and the Theory of Groups”, Cambridge, Mass., Harvard University Press, 1971 (1965)
- Palacios, H., “Los Servicios Públicos Domiciliarios en la Constitución”, Concept prepared for the CREG, February 1, 1994, Palacios Mejía, H., "Servicios Públicos Domiciliarios en la Constitución”
- Palacios, H., “El derecho de los servicios públicos domiciliarios”, Editorial Derecho Vigente, Bogotá, 1999
- Palacios, H., "La suspensión de servicios públicos en caso de incumplimiento de los pagos" in Superintendencia de Servicios Públicos, “Actualidad Jurídica en Servicios Públicos”, T. II, Bogotá, marzo de 1997
- Pando, L., “Solución a los problemas de la regulación de los servicios públicos domiciliarios en Colombia”, Tesis, Universidad del Rosario, 1999
- Pando, L. “Regulatory Framework Concerning Gas” Part II, in “Energy Law in Colombia”, Kluwer Law International BV, The Netherlands, 2013

- Pando, L. “Regulación y Competencia en el Servicio Público de Gas Natural. Visión Crítica del Caso Colombiano”, in “Regulación de energía eléctrica y gas: estudio jurídico y económico”, 1 Colección de Regulación Minera y Energética, Luis Ferney Moreno compilador, Universidad Externado de Colombia, 1st. ed. Diciembre 2010
- Pando, L. *“La teoría del usuario responsable”*, Segundo Foro de Regulación de Servicios Públicos Domiciliarios, Bogotá, Octubre 26, 2004
- Percy, D.R., “Basic Oil and Gas Law. Cases and Materials”, Faculty of Law, University of Alberta, Edmonton 2011.
- Perry, G. "Libertad económica. Los servicios públicos" Universidad Externado de Colombia, Revista Jurídica, Vol. 6, número 1, En-Jun 1992
- Posner, R.A. “Theories of Economic regulation”, in “The Economics of Public Law. The Collected Economic Essays of Richard A. Posner, Volume Three”, edited by Francesco Parisi, Economists of the Twentieth Century, Edward Elgar Publishing Limited, 2001
- Posner, R.A. “Natural Monopoly and Its Regulation”, (1969), 21 Stan. L. Rev. 548
- Posner, R.A. “Oligopoly and the Antitrust Laws: A Suggested Approach” Stanford Law Review, Vol. 21, (June 1969)
- Posner, R.A. “Taxation by regulation“, The Bell Journal of Economics and Management Science Vol.2, No. 1 (Spring 1971)
- Posner, R.A., “Economic Analysis of Law”, (New York: Aspen Law & Business, 1998) 5 ed.
- Prichard, J.R. and M. Trebilcock, “Crown Corporations in Canada: The Choice of Instrument” in Prichard J (ed.) Crown Corporations in Canada, Butterworths 1983.
- Prosser, T., “Law and the Regulator”, (1997) Oxford, Clarendon
- Prosser, T., “Competition, Regulators and Public Service”, (2000), B.J. Rodger and A. MacCulloch eds.
- Prosser, T., “Public Service Law: Privatization’s Unexpected Offspring”, (2000), Law and Contemporary Problems, 63/4, 63
- Prosser, T., “The Limits of Competition Law: Markets and Public Services”, (2005), Oxford University Press
- Prosser, T. “Theorizing Utility Regulation” (1999) 62 Mod L Rev 196
- Ramírez, A., “Sistema de Hacienda Pública”, Bogotá, Editorial Temis, 1980
- Ramsay, I. and T. Williams, “Inequality, Market Discrimination, and Credit Markets” in “Consumer Law in the global economy: national and international dimensions” ed by Iain Ramsay, Dartmouth Publishing Company Limited & Ashgate Publishing Limited, Aldershot, England, 1997
- RAP, Electricity Regula0tion In the US: A Guide, March 2011
- Reid, L. and J. Todd, “New Developments in Rate Design for Electricity Distributors”, in “Energy Law and Policy”, Gordon Kaiser and Bob Heggie eds., Carswell

- Retail Market Review Committee, “Power to the People”, January 2013
- Rivero, J. “¿Existe un criterio de derecho administrativo?” in “Páginas de derecho administrativo”, Bogotá, Editorial Temis – Universidad del Rosario, 2002
- Rivero, J. “Derecho administrativo”, novena edición, Instituto de derecho público, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, Caracas, 1984
- Rodríguez, L., “Derecho Administrativo General y Colombiano”, Decimoctava edición, Editorial Temis, 2013
- Rott, P. “Consumers and Services of General Interest: Is EC Consumer Law the Future?”, (2007), Journal of Consumer Policy
- Rott, P. and C. Willett, “Consumers and services of general interest”, in Handbook of Research on International Consumer Law, (2010)
- Sánchez, G., H. Pacheco, G. Obregón and Y. Alvarado, “Del carácter singular del derecho de la competencia en los servicios públicos domiciliarios”, in “Actualidad Jurídica”, Tomo IV
- Santofimio, J. “El concepto de usuario en el régimen de los servicios públicos domiciliarios” in Temas de Derecho Público No. 57, Instituto de Estudios Constitucionales Carlos Restrepo Piedrahita, Universidad Externado de Colombia, Bogotá, Julio, 1999
- Selznick, P. “Focusing Organizational Research on Regulation” in R. Noll (ed.), Regulatory Policy and the Social Sciences (1985)
- Slot, P.J. “Energy (Electricity and Natural Gas)”, “The Liberalization of State Monopolies in the European Union and Beyond” edited by D. Geradin (The Hague: Kluwer Law International, 2000
- Stigler, G., “The Theory of Economic Regulation” (1971) 2 Bell J of Econ 3
- Sunstein, C. “After the Rights Revolution: Reconceiving the Regulatory State (Cambridge, Mass: Harvard University Press, 1990)
- Superintendencia de Servicios Públicos, “Actualidad Jurídica en Servicios Públicos”, T. II, Bogotá, marzo de 1997
- Superintendencia de servicios Públicos, "Compra de Energía", en Actualidad Jurídica en Servicios Públicos, T. II., marzo de 1997
- Superintendencia de Servicios Públicos, Actualidad Jurídica en Servicios Públicos, Tomo II, 1997
- Szyszczak, E. “Public Service Provision in Competitive Markets”, (2001), Yearbook of European Law, 3
- Szyszczak, E. “The Regulation of the State in Competitive Markets in the EU”, (2007), Hart, Oxford
- Talus, K., Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law, (The Netherlands: Kluwer Law International, 2011)
- Tomain, J. “Energy Economics”, in “Energy Law in a Nutshell”, Chapter 1

- Trebilcock, M.J., “Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?” (1975) 13 Osgoode Hall Law Journal 619
- Tullock, G. “From the New Palgrave Dictionary of Economics”, Second Edition, 2008. Edited by Steven N. Durlauf and Lawrence E. Blume
- UNCTAD, “Designing of Competition Advocacy model for Latin-American Competition Policy”, G.E.99-53500-April 2000-305
- UNCTAD “Manual on Consumer Protection”
- UPME, “Boletín Estadístico de Minas y Energía”
- UPME, “La Cadena del Gas Natural en Colombia”, Bogotá 2005.
- Vedel, G. “Derecho Administrativo”, Madrid, 1980
- Vedel, G. and P. Delvolvé, “Derecho Administrativo”, traducción de la 6ª edición francesa, Madrid, Biblioteca Jurídica Aguilar, 1980
- Vickers, J. “Regulation, competition, and the structure of prices”, Oxford Review of Economic Policy, Vol. 13, No. 1, 1997
- Vickers J. and G. K. Yarrow. “Privatization: An Economic Analysis”, Cambridge MIT Press 1988
- Vickers, J. and G. K. Yarrow, “Economic Perspectives on Privatization” (1991) Journal of Economic Perspectives, Vol. 5, num. 2 (Spring) at p 111- 132.
- Vickers, J. and J. A. Kay, “Regulatory reform in Britain” Economic Policy, num. 7
- Waddams Price, C. and R. Hancock, “Welfare Effects of Liberalizing UK Residential Utility Markets”. Center for Management under Regulation Warwick Business School. Research Paper 97/2
- Waddams Price, C., “Competition and Regulation in the UK Gas Industry” (New York: Oxford University Press, 1997)
- Wilhemsson, T., “Services of General Interest and European Private Law”, (2003), Cambridge University Press, International Perspectives on Consumers’ Access to Justice, Cambridge
- Wilhemsson, T., “Consumer Law and Social Justice” in “Consumer Law in the global economy: national and international dimensions” ed. by Iain Ramsay, Dartmouth Publishing Company Limited & Ashgate Publishing Limited, Aldershot, England, 1997