

Outline of James Lopach telephone comments to ETIC, Nov. 17, 2011

1. Governmental reorganization – always problematic because uncertain results, insiders will oppose, public support depends on perceived crisis being addressed by the reform
2. Need for expertise- a central point because of complexity of economic regulation; two possible sources of expertise: commissioners and/or staff
3. Gubernatorial appointment rather than election of commissioners – because excellence in regulation is dependent more on commissioners' analytical ability, good judgment, and professional expertise rather than the democratic values of representativeness or accountability
4. Qualifications of commissioners – should be individuals with solid professional credentials, sharp analytical ability, and good judgment; for technical expertise can look to both commissioners and staff; too narrow expertise on commission could give rise to conflicts leading to need to disqualify
5. Size of commission – regulatory commissions, state and federal, have run between 3 and 11; generally smaller is better because larger size leads to more divergence of views and more conflict
6. Overlapping terms – better than concurrent terms because guarantees continuity but still admits of new perspectives
7. Length of terms – not too long (i.e., more than six years); long terms could also stifle the supply of new perspectives
8. Reappointment of commissioners – should allow in order to retain competence
9. Commission chair – automatically rotate among commissioners as opposed to selection by commission itself or by executive and/or legislative branches
10. Salary – needs to be respectable, understanding it can't be equal to what a professionally credentialed person makes outside of government; possibly, tie it to what state supreme court associate justice makes
11. Removal of commissioner – by the governor, without any legislative involvement, for cause (e.g., nonfeasance, malfeasance, misfeasance)
12. Confirmation of appointment – always problematic: pro argument is it's a check on a bad nomination and interjects a quality of representativeness into the process; con argument is it can admit political maneuvering and posturing
13. Geographical representation – not applicable to the work of an expert quasi-judicial body and dangerous because creates an expectation that regulation is primarily political
14. Bipartisanship commission membership – because of today's situation, in Montana and nationally, of inordinately partisan public officials

Energy & Telecommunications Committee
November 17, 2011

Some Thoughts on the Organizational Structure of the Montana Public Service Commission

Jim Lopach, Professor, UM Department of Political Science

October 10, 2011

1. Probably the simplest and most accurate observation about organizing government is reflected in poet Alexander Pope's couplet: "For forms of government let fools contest. Whatever is best administered is best." Bright, talented, well-educated, experienced, and good people can make any government run well.
2. However, "form of government" might have something to do with who is attracted to serve in government. Another old saying is: "Appoint for expertise, elect for accountability." Both expertise and accountability are important in the area of economic regulation, and my present thinking is that both can be best secured through a system of appointed regulators.
3. The administrative part of government developed in our state and federal governments because of the inherent weaknesses of state legislatures and Congress. Regarding the development of expert and up-to-date regulatory policy, legislators lacked the time, experience, technical knowledge, a working majority, and, often, political will. The result was creation of administrative agencies whose personnel would have the characteristics the legislators lacked.
4. Heads of administrative agencies can be appointed or elected, but election seems to be the more problematic of the two. Regulation is the formulation and application of very technical and specific policies. Often the work of agencies is quasi-judicial, done on the record like a court. Many of the arguments against electing judges seem to apply here. Desirable would be as much independence as possible from district constituencies, campaign contributors, and informal consultation.
5. "Regulatory capture" – the situation where regulators begin to serve the interests of those being regulated rather than the public interest – can occur in either an appointed or elected system and certainly did occur in twentieth century Montana regarding the Public Service Commission. Those days, though, are no more: when the energy consuming Anaconda Company and the energy producing Montana Power Company linked up to dominate Montana politics to get favorable policies. I think, though, "capture" is more likely today under an elected system because of the desire of regulated companies for a predictable business environment and the need of regulators to rely on regulated parties for expertise, campaign contributions, and support before the public, press, and legislature.
6. My thinking right now is that Montana's best option is a three-person Commission that would be appointed by the Governor (no Senate confirmation), with six-year staggered terms and a rotating one-year chairmanship, a stipulated list of qualifying credentials and experiences, and a stipulated list of disqualifying credentials (e.g., not more than one Democrat and one Republican at any time). Accountability would be achieved by tying the Commissioners clearly and closely to the Governor; expertise would be achieved through qualifications and experience; and independence would be achieved through staggered terms, bi-partisanship, and professional ethics.