Effective Regulatory Procedures: Purposes, Practices and Paths

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> [*T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission*.[2]
>
> *I have never pretended to play the role of a passive receiver of evidence*.[3]

Having worked at all stages of the litigation process-as a litigator, expert witness, decisional advisor, opinion-writer, and appellate lawyer-I have observed and experienced procedural excellence, and its opposites, from diverse perspectives. Based on this experience, I wish to address three main questions:

1. ***What are the purposes of regulatory procedure?***
2. ***How well do our procedural practices achieve our purposes?***
3. ***What are paths from ineffectiveness to effectiveness, from presiding to leading?***

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[2] *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965).

[3] Alfred Kahn (rejecting a motion for his recusal as Chair of the New York Public Service Commission, filed by intervenors complaining about his active questioning). Quoted in Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn*.

Table of Contents

I. What are the purposes of regulatory procedure?

Regulatory procedures must serve regulatory purposes. So before we discuss the purposes of procedure, we first must discuss the purposes of regulation.

A. Purposes of regulation

Despite decades of regulation, we have is no consensus on the purpose of regulation. Consider this range of opinions:

1. Regulation's purposes vary with one's perspective.

a. ***Economists:*** Regulation allows us to exploit economies of scale from natural monopolies while reducing economic loss from market imperfections—imperfections like high entry barriers and asymmetric information.

b. ***Interest groups***

(1) consumers ("Protect us from abuse of monopoly power")

(2) utility shareholders ("Set rates that allow us to earn a fair return on investment")

(3) lenders ("Ensure cash flow sufficient to pay down debt")

(4) competitors of the incumbent utility ("Create conditions allowing new entrants to compete and win on the merits")

(5) low-income advocates ("Make essential services affordable")

(6) environmental advocates ("Minimize environmental damage associated with production and consumption")

(7) rural residents ("Ensure universal service")

(8) large industrial customers ("Set rates that allow us to compete globally").

c. Assorted political perspectives

Depending on one's views, regulation can—

(1) reduce inequities in wealth;

(2) protect the vulnerable from deceptive sales practices and price-gouging;

(3) "eliminat[e] price as the basis of exchange" in resources that have special societal value (such as worker safety, cultural treasures and endangered species);[4] or

(4) respond when people "demand more for society than any individual will seek for herself as a consumer."[5]

2. For the decisionmaker, the lodestar for regulatory purpose is the statutory language.

a. Regulatory statutes commonly direct regulators to act "in the public interest." The statutory presumption is that private interests, absent regulation's constraints and inducements, will diverge from the public interest. Universal, reliable, safe service at reasonable rates doesn't happen by itself. Without the discipline of regulation we would have suboptimal service at supracompetitive prices.

b. So regulation defines standards for performance, then assigns consequences, positive and negative, based on performance. The purpose of regulation is performance.

c. To produce performance, regulation aligns private behavior with the public interest.

For the regulated utility, regulation—

(1) aligns price with prudent cost,

(2) aligns compensation with compliance,

(3) aligns compensation with performance,

(4) aligns corporate structure with a public service focus, and

[4] Sidney A. Shapiro & Joseph P. Tomain, *Regulatory Law and Policy: Cases and Materials* 58-62 (2003).

[5] Lisa Bressman, Edward Rubin & Kevin Stack, *The Regulatory State* 62, 79-87 (2010).

(5) aligns shareholder interest with consumer interest.

For the market at large, regulation—

(6) aligns consumption patterns with our climate's need for restraint, and

(7) aligns resources with demands.

Having described the varied purposes of regulation, we can now discuss the purposes of regulatory procedure.

B. Purposes of regulatory procedure

1. If the primary purpose of regulation is to align private behavior with the public interest, the purpose of regulatory procedure is to align parties' proposals, and the inquiry into those proposals, with the purpose of regulation.

2. The purpose of procedure, then, is to enlighten; to—

   a. gather facts,

   b. collect and compare expert opinions,

   c. study causes and effects,

   d. weigh options according to transparent criteria,

   e. deliberate and draw conclusions, and

   f. explain the facts and logic underlying those conclusions, so that the public, and appellate courts, can trace the reasoning.

3. The purpose of procedure, then, is to empower the tribunal to carry out the purpose of regulation, by making the best possible decisions, and by making decisionmakers accountable for their decisions.

4. Regulatory procedure takes multiple forms: information-gathering, legislating, rulemaking, adjudication, enforcement, and judicial review. All these forms—

a. induce accountability, by empowering the public to observe and influence the process, and by authorizing courts to review the results; and

b. protect against arbitrariness—actions lacking in fact, logic or legal authority.

II. How well do our procedural practices achieve our purposes?

Every administrative proceeding must solve a legal equation:

Facts + law + judgment = a decision sustainable in court.

The default approach is to create a contest among adversaries, with the regulator as umpire. More enlightened—and enlightening—approaches use procedure to create a seminar, with the regulators creating the curriculum and giving out the grades.

A. Default approach: A contest among adversaries

Most regulatory hearings are a cross between boxing and ping pong. Questions and answers fly between lawyer and witness, each trying to out-hit, out-fake, out-spin and occasionally out-smart the other. Based on parties' positions rather than the public's needs, the verbal friction produces more heat than light, the ratio of useful information to hours consumed always low. Through most of this counterpunching, the commissioners are spectators. This approach induces a host of suboptimal behaviors, as discussed next.

1. The parties frame the issues to reflect their interests

a. *"[D]escription is prescription. If you can get people to see the world as you do, you have unwittingly framed every subsequent choice*."[6] When a regulatory proceeding is initiated by an applicant seeking a government benefit, the applicant's profit motive induces it to frame the issues in pecuniary terms; *i.e.*, "what I need" rather than "what the public interest requires."

b. Private interest framing can induce wrong answers. Consider this psychology study done in the 1970s. The subjects had to spin a wheel, then guess what percentage of African countries were

[6] D. Brooks, "Description is Prescription," *The New York Times* (Nov. 26, 2010) (discussing Leo Tolstoy).

members of the United Nations. The subjects assumed the wheel was neutral, but it was rigged: For one group of subjects it always stopped on 10, for the other group it always stopped on 65. On average, the first group guessed that the percentage of African countries in the UN was 25 percent; the second group guessed 45 percent. The irrelevant wheel influenced judgment. The psychologists concluded, in a 1981 paper, that framing a decision appropriately is an "ethically significant act."[7]

c. Drafting an application for a government-granted benefit is an exercise in framing—framing a private interest quest (profitability, market share maintenance) as a public interest question (viability, reliability, jobs). As with the wheel-spinning experiment, private interest framing inevitably influences regulators' decisions about what problems and solutions will gain their attention.

d. Framing happens routinely. And it works (for the framer, that is), for two reasons. First, framing relies on emphasis rather than deception. Framers don't get sued for fraud. Second, every framed proposal has some public interest component; *e.g.*, cost recovery shouldn't lag expenditures, mergers can improve efficiencies, new power plants can avoid blackouts. Unlike the psychologists' wheel, the utility's frame is rarely irrelevant.

e. Framing works. Consider these typical examples:

(1) Rate cases focus on recovering costs rather than producing performance.

(2) Utility acquisition cases focus on ratifying the target company's selection of the highest offer, rather finding the most cost-effective coupling.

(3) Project approval cases focus on an isolated, incumbent-favored project rather than an integrated long-term plan.

(4) For most decisionmakers, the continuous constraint is the incumbent's survival. The incumbent act as if, and is treated as if, it is the permanent, entitled holder of the government-granted concession, rather as a lucky tenant replaceable by a better performer.

[7] R. Frank, "The Impact of the Irrelevant," *The New York Times* (May 30, 2010).

2. Testimony is filed by a predictable team of position-players

a. In the default approach to procedure, what passes for "expert testimony" is submissions by company spokespersons supported by experts-for-hire.

(1) The ***chief executive officer*** praises the company and its accomplishments. Her submission substitutes adjectives and aspirations for facts and commitments. The application's self-interest strategy is hidden behind a cloak of public interest platitudes.

(2) The ***chief financial officer*** cites unnamed members of "the financial community" as supportive of—indeed insistent on—the company's request for new funds.

(3) The ***operational officials*** assert how performance excellence is just around the corner, if only the regulator will approve more funds—yet they rarely volunteer to make their receipt of funds contingent on performance.

(4) ***"Outside experts"*** are walked in by their lawyers, racehorses led by their jockeys, always working for the same side. They confirm with their advanced equations the positions asserted by the adjectivally advanced CEO. (Their C.V.s all list the many times they have given similar testimony elsewhere—as if repetition equals erudition).

b. All this prefiled testimony reads like a lawyer's brief. It is argumentative and one-sided. Every question has only one possible answer; there are never two sides to an issue, no options with "pros" and "cons," no possibility of the other side having a point. The testimony advocates rather than educates. Indeed testimony is often written by the lawyers.

c. The testimony makes claims that range from the unverifiable (*e.g.*, "An authorized return on equity below 14% will cripple us") to the irrelevant (*e.g.*, "We need this merger to remain competitive"). It employs stock phrases aimed more at emotions than intellect (*e.g.*, "chilling effect," "rate shock," "rate relief"). When there is a gap in facts or logic, the spot is filled with an adjective.

(For more on adjectives, consider Mark Twain's comment: "*God only exhibits his thunder and lightning at intervals, and so they always command attention. These are God's adjectives. You thunder and lightning too much; the reader ceases to get under the bed, by and by*." From Twain's letter to his brother Orion Clemens, 3/23/1878.)

3. The evidentiary hearing is organized to invite advocacy rather than education

a. In the default approach, the agency organizes the evidentiary around parties. Each party presents its witnesses, one at a time, for cross-examination. Each adversarial party's lawyer takes a turn cross-examining each witness, each lawyer pursuing matters only important to him, each lawyer picking over his predecessor's leftovers. These lawyers' genetic self-regard prevents them from dividing up areas or coordinating their questions.

b. Such cross-examination can score only narrow points. The cross-examiner pokes holes, gathering what she can to win her case. This type of questioning does not produce what the tribunal needs to master the case.

c. During the lawyers' questioning, commissioners act like captives, as if they have no choice but to give the lawyers the time they want. Hearings drag on, as if lawyers' questions were more important than the many other things commissioners need to do.

d. Hours later, after the last lawyer has asked the last repetitive question, just when everyone would rather go to lunch, the tribunal might—and I emphasize "might"—ask questions. Disappointingly often, the tribunal asks no questions—thus confirming that hearing was designed for the parties, not for the tribunal.

e. I have even seen some commissioners apologize for interrupting with a question, as if the hearing was a performance directed by the parties. Other commissioners avoid asking questions for fear of betraying bias. But good questions come from hunches. A hunch is not a bias. A bias is an inability or unwillingness to examine facts and reason objectively. A hunch is a tentative conclusion, based on education, observation, experience. Hunches are unavoidable and useful. They display the active mind that is a prerequisite for effective decisionmaking.

f. This traditional approach—party-by-party, witness-by-witness, lawyer-by-lawyer—elevates parties over issues. It scatters discussion of a particular issue over disparate parts of the transcript. It makes the tribunal passive. And it wastes time.

g. Indeed, look what happens when a party chooses not to cross-examine a witness, or examines the witness only briefly on irrelevant matters; say, because the party does not want to give the witness a chance to educate or persuade the tribunal. It often happens then that the tribunal asks no questions either. The witness returns home unexamined. Lawyer strategy thus prevails over tribunal curiosity. The hearing is for the lawyers rather than the tribunal.

4. Result: A procedural "tragedy of the commons"

> *Picture a pasture open to all.... As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility to me of adding one more animal to my herd?" ... [T]he rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another... But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.*[8]

a. Party-oriented procedures yield zero-sum solutions

(1) Consider the battles over new, extra high voltage electric transmission facilities

(a) In each such proceeding, the question is always: "Who pays for what share?" A 500 kV transmission facility is, inarguably, a "big project." But for a nation with 300 million citizens, who rely

[8] Garret Hardin, "The Tragedy of the Commons," *Science* (Dec. 13, 1968), available at http://www.garretthardinsociety.org/articles/art_tragedy_of_the_commons.html.

on electricity for everything from incubators to funeral homes, a single transmission facility is a small contributor to life's daily costs. Yet under our statutes it has its own proceeding.

(b) And then our litigation culture takes over. Victory-seeking clients hire victory-promising lawyers. Those lawyers (and their witnesses) focus on winning benefits, and avoiding costs, associated with that single facility.

(2) The problem: A proceeding that isolates one transaction from its context necessarily yields only winners and losers. Procedural narrowness induces zero-sumsmanship. We slice-and-dice regulatory decisions into a series of win-lose polarities.

(3) But no thoughtful citizen (*i.e.*, one not infected with regulatory experience) expects to challenge every public policy whose costs exceed benefits for that citizen. Otherwise, we would—

(a) cease funding for multiple sclerosis because not everyone suffers from it;

(b) eliminate the traffic light at the corner of State and Main because not everyone crosses there;

(c) close the schools in Northeast Milwaukee because not everyone attends there:

(d) eliminate the Air and Space Museum because not everyone goes there; and, while we're at it,

(e) eliminate every program for which the cost-bearers differ from the benefit-receivers.

(4) These examples do not differ logically from oppositional responses to cost allocation proposals for utility infrastructure. These examples of oppositions, each one individually rational, draw out regulatory proceedings, delay benefits, add costs and kill projects. Under our regulatory procedures, the sum of individually rational litigation decisions yields a societally irrational result.

b. The "commons" degraded: Narrow focus displaces wide-angle lens

(1) Welcome to regulation's "tragedy of the commons", where the commons is not Garrett Hardin's pasture, but the quality of our evidentiary hearings. And where the tragedy-inducing actor is not the herdsman adding his animal, but the party pressing his position. Our procedures slice every issue so narrowly, one proposal at a time, that someone always has reason—and a right—to oppose. The sum of all these individual rights, vigorously and expensively exercised, creates policy gridlock, *Hadley v. McCoy* animus ("you won last time so I need to beat you this time"), and lost opportunities.

(2) Hardin points out that "the commons, if justifiable at all, is justifiable only under conditions of low-population density. As the human population has increased, the commons has had to be abandoned in one aspect after another." This reasoning applies to regulation. When administrative litigation was simple—buyer and seller arguing over rate levels—there was sufficient aural and temporal space to air concerns. That simplicity is gone. A typical transmission case has over a dozen parties, all arguing about total cost, allocated cost, need, alternatives, rate design, intergenerational equity, environmental effects. As with Hardin's pasture, the problem grows geometrically, because (a) there are multiple cases simultaneously and (b) every party's insistence on its "right to be heard" produces a counter-right in that party's opponents. The resulting loss of limited resources—time, money and problem-solving cooperation—is our "tragedy of the commons."

(3) There are the frequent calls for "consensus" and "cooperation." But relying on voluntary restraint, relying on "conscience," produces a Darwinian result: the victorious, surviving parties are those who resist consensus and cooperation. As Hardin concludes, "Conscience is self-eliminating."

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The adversarial system has its upsides. It can induce parties to trim their subjective sails and tack toward objectivity. But it cannot, by itself, produce public interest outcomes. Opposing positions do not comprise the universe of all possible positions; nor is the midpoint between two wrong answers necessarily the right answer. A hearing is not a boxing match where the judge's job is to pick a winner. A hearing is an effort to illuminate—to help the decision-makers master the issues so they can make a public interest decision.

B. Enlightened approach: A seminar for the regulators

1. Frame the case as a public interest inquiry

a. Act rather than react

In the default approach, parties frame the case so as to make their priorities the Commission's priorities. It doesn't have to be that way. The agency should do the framing: by defining the proceeding's purpose, and by identifying questions for the parties to address.

b. State the issues precisely

Detail matters. The more precision in the agency's statement of issues, the more likely parties will address those issues in the necessary detail. Vague categories of inquiry like "effect on competition" or "effect on rates" leave the parties free to omit those facts and analyses they find inconvenient. Instead ask; "Will the vertical joining of production and transmission affect entry barriers in the product and geographic markets defined as XYZ; and if so, how?" and, "To what extent will the merger acquisition premium affect the merged entity's finances, cost structure, and rates in each of the first five years after the merger?"

c. Remember the unrepresented

Typically, the agency asks the parties for an issue list. Predictably, the parties list the issues important to them. Missing are broader public interest components—economic efficiency, consumer empowerment, environmental protection, quality of service. When issues are missing, it means that parties are missing. The agency needs to fill

that gap by raising the issues the missing parties would have raised.

d. Make the parties teach the issues

> *I don't understand [lawyers'] inability to see their cases from the judges' perspective. If they could do that they might realize that they are not giving the judges what they need-the full context of the case, both factual and legal, making no unrealistic assumptions about the extent of judicial preparation and depth of judicial understanding of novel cases. Lawyers who can imagine themselves as judges would understand the importance of visual aids, the importance of scene setting, the necessity of radical simplification, and the acute judicial need for patient explanation of the mysteries of modern technology, an ever more salient element of modern litigation.*[9]

2. Demand high quality testimony

Pre-filed testimony is effective if it integrates the commission's goals, the expert's technical knowledge, the facts, and the law into cost-effective options for solving the statutory equation.

Testimony is most successful, therefore, when drafted with this question in mind: "***What facts, reasoning, and language does the agency need to write an opinion that will persuade the public and be sustained on appeal?"*** Testimony should be so objectively written that it can be copied into the agency's decision. That is the mark of testimonial success.

a. Effective testimony is educational testimony. It makes the technical comprehensible, so that non-technical decision-makers can absorb the witness' knowledge, ask intelligent questions at hearing, and use the results to support their decisions. It also educates the opposing parties and their lawyers, causing them to sharpen their positions or seek settlement.

Pre-filed testimony should not merely state the party's position. An agency is not a supermarket where parties shop for private benefits. It is an expert tribunal charged with promoting the public interest. Successful testimony doesn't lobby for an outcome; it

[9] Posner, REFLECTIONS ON JUDGING 357 (2013).

offers expertise and education. It offers perspectives, not positions.[10]

b. ***Have the agency's own experts testify.*** Doing so not only enhances the record; it pulls the parties' witnesses toward objectivity.[11]

c. Make experts affordable to the under-resourced. When parties have differential access to experts, and when experts differ in their quality, the record is left lopsided. Some regulatory agencies have statutory authority to award funds to under-resourced parties with proven histories of offering high-quality expert testimony. The funds can come from taxpayer-funded agency budgets, or fees imposed on regulated entities (which, in the case of regulated companies, can be recovered from customers).[12]

3. Organize the evidentiary hearing around issues, not parties

a. Effective hearings organize around issues rather than parties. The hearing days are divided into issue segments. For each issue

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[10] *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 141 F.E.R.C. 63,014 at P 1316 n.116 (2012) ("The undersigned finds the testimony in the latter stages of this proceeding increasingly became repetitive and resorted to personal attacks among the expert witnesses. Accordingly, much of the testimony is irrelevant, repetitive, and immaterial."); *BP Pipelines (Alaska) Inc.*, 146 F.E.R.C. 63,009 at P 2, 4 (2014) ("Conclusory expert witness opinions/statements lacking evidentiary support would be accorded little or no weight . . . . It is the responsibility of an expert witness in the first instance, and, ultimately, of reviewing/filing counsel, to ensure that any pre-filed narrative testimony is accompanied by appropriate supporting evidence.").

[11] POSNER, *super*, at 293-301 (providing an argument for court appointed witnesses along with a discussion of why adversarial lawyers dislike them). For further readings on the subject of partisan experts vs. neutral experts, see generally Carl B. Meyer, Science of Law: The Quest for the Neutral Expert Witness: A View from the Trenches, 12 J. NAT. RESOURCES & ENVTL. L. 35 (1997); Jeffry L. Harrison, Reconceptualizing the Expert Witness: Social Costs, Current Control and Proposed Responses, 18 YALE J. ON REG. 253 (2001); David Sonenshein & Charles Fitzpatrick, The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence, 32 REV. LITIG. 1 (2013).

[12] *See, e.g.*, CAL. PUB. UTIL. CODE 1801-1812 (providing for "compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the commission").

segment, all parties' witnesses who address that issue appear on a panel simultaneously.

b. The tribunal, directly or through staff, are the primary questioners. They ask the questions they deem necessary to help the tribunal understand the case and reach a decision. Their questions cause the expert to debate—not over whose client is right or wrong, but over the best ways to achieve the agency's objectives.

c. Only when the tribunal's questions are complete do the parties' lawyers get their chance to question. At that point, most of the necessary questions have been asked. Their questions move more quickly because they have seen what subjects are important to the tribunal.

d. This approach raises the value-per-minute ratio for at least three reasons: (1) the witnesses are debating their positions with each other; (2) a full discussion of a particular issue occurs in one place in the transcript; and (3) the majority of questions reflect the commission's needs rather than the parties' strategic goals.

e. The Hawaii Commission used this approach in a series of proceedings organized to address renewable portfolio standards, third-party administrator for energy efficiency programs, competitive bidding requirements, distributed generation, feed-in-tariffs, decoupling, renewable energy surcharges, and other issues relating to the need to reduce the state's dependence on fossil fuels. According to Carlito Caliboso, Chairman of the Commission during that period (2003-2011), this hearing format was "helpful and effective," as it caused the many expert witnesses retained by diverse parties to address common questions productively. Differences got exposed earlier and with more clarity. Because that exposure occurred not through adversarial cross-examination but through Commission-led questioning, it was easier to test solutions and discover commonalities. Correspondence with author, October 2014. (I participated in these proceedings as the Commission's moderator.)

f. Judge Richard Posner Circuit makes a similar recommendation. POSNER, supra at 311. In a subchapter on juries' difficulty dealing with complex issues, he suggests having opposing witnesses testify in pairs, back-to-back. This variation on the aforementioned "panel" approach hosts opposing views on an issue in real time.

III. What are the paths from ineffectiveness to effectiveness, from presiding to leading?

A. Replace "balancing" with "aligning"

1. The default approach to hearing procedures reflects a misunderstanding of the regulatory purpose. That purpose is not to "balance" the interests of shareholders and consumers. A balance presumes opposition of interests. But customers' and shareholders' *legitimate* interests—reasonable prices, reasonable returns, satisfied customers and satisfied shareholders—are consistent and mutually reinforcing. High-quality performance and efficient consumption benefit multiple interests: consumers, shareholders, bondholders, employees, the environment and the nation's infrastructure.

2. What regulation must "balance" are not competing private interests but competing components of the public interest—*e.g.*, long-term versus short term needs, affordable rates vs. efficient price signals, environmental values vs. global competitiveness.[13]

3. If we are busy "balancing" the parties' interests, we allowing the hearing to be controlled by the parties. But if we focus on balancing components of the public interest, we induce the parties to educate us about those components.

B. Avoid capture

1. Regulatory capture defined

a. "Capture" is an extreme form of persuasion. To achieve persuasion is to obtain what the persuader wants. To be persuaded is to give what the persuader wants. To be captured, then, is to be in a constant state of "being persuaded"—based on the persuader's identity rather than an argument's merits.

b. Regulatory capture is not persuasion in its illicit forms—financial bribery, threats to deny reappointment, promises of future employment. These things all have occurred, but they are forms of

[13] *Cf. Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (interpreting statute to mean that "Commission is vested with wide discretion to balance competing equities against the backdrop of the public interest").

corruption, not capture. Nor is regulatory capture a state of being controlled, where regulators are robots executing commands issued by interest groups.

c. Regulatory capture is neither corruption nor control. Regulatory capture is evidenced by is a surplus of passivity and reactivity, along with deficit of curiosity and creativity. It is a body of commission decisions, or non-decisions, about resources, procedures, priorities and policies, where what the utility wants has more influence than what the public interest requires.

d. Regulatory capture is defined by the regulator's attitude, not by the utility's actions. The active verb "capture" signals an affirmative effort, to take someone captive. But the noun "capture," and the passive verb "to be captured"—they signal a state of being. One can enter that state through one's own actions or inactions. One can allow oneself to be captured. One can assist, and sustain, one's own captivity.

e. If regulatory capture is a state of being, assisted and sustained by the captive, what roles are played by others? Plenty. Capture is enabled by those who ignore it, tolerate it, accept it or even encourage it: legislators who under-fund the commission or restrict its authority, governors and ministers who appoint commissioners unprepared for the job, human resource officials who classify commission jobs and pay based on decades-old criteria unrelated to current needs, intervenors who treat proceedings like win-loss contests rather than building blocks in a policy edifice.

2. Warning signs

a. The commission's leaders don't ask the big questions: What products best serve the public? What performance standards must utilities meet to deliver those products? What price levels are necessary, and sufficient, to support those standards? What market structures will yield these products, performance and prices? Within those market structures, what corporate structures will induce the utility's executives, managers and professionals to produce those results?

b. The commission's resources are over-allocated to processing parties' petitions, and under-allocated to pursuing the commission's priorities. (This is not necessarily the commission's fault. When

legislative deadlines combine with legislative under-funding, a commission's workload often is dominated by what others want rather than by what the public needs. See the next point.)

c. Statutory deadlines are asymmetrical: On deadline day, no action on a utility's request means auto-approval; no action on a customer's complaint means auto-rejection.

d. The commission lacks a program of continuous self-improvement: a program that has for each department, department head, and employee a specific plan for professional advancement; a program whose resources and momentum are not compromised by the commission's other work load.

e. The commission does not regularly recommend legislative changes to strengthen its ability to improve industry performance.

f. Procedures represent the default approach rather than the enlightened approach.

3. Strategies for avoiding or escaping capture

a. ***Go back to the big questions.*** "Ask and you shall receive" (Luke 11:9-12) works as biblical reassurance, but as a commission's implicit mission statement it is a recipe for regulatory somnabulance. The utility's legal right to seek a benefit is not a right to frame the case. The awake commission will reframe the utility's request as a public interest quest: Products, prices, performance: What do customers deserve? Market structures and corporate structures: Which ones produce the best performance? Reframing means the public interest dog wags the utility's tail, not the other way around.

b. ***Connect commission performance to industry performance.*** "What is `measured, improves." (Peter Drucker). Regulation works when we link inputs to outputs; when we tie commission actions to industry performance. This chain has four links: (a) Describe a public interest vision, measured in results (investment, innovation, prices, service quality, safety); (b) shape internal commission actions (budgeting, staffing, education) to prepare for external actions (orders aimed at performance); (c) design and external actions to induce utilities and consumers to produce that performance; and (d) evaluate and revise.

c. ***Insist on resources.*** A captured commission's resources are over-allocated to processing parties' petitions, and under-allocated to pursuing the commission's priorities. The legislative habit is to cap the commission's resources arbitrarily, basing next year's budget on last year's, regardless of new demands. Instead, allow the commission to set and fund its own budget. For example: When a utility proposes a conglomerate merger lacking a public interest purpose, the cost of regulatory review belongs with the merging parties, not the taxpayers. Utilities recover their legitimate regulatory costs through rates; so should the regulator.

d. Make hearings issue-centric and commission-centric, not party-centric and lawyer-centric. As noted above. This approach causes the commission to enter the room with a goal and a plan—to lead rather than to preside. That's what avoids capture.

* * *

"Regulatory capture" is too frequently attempted, too readily accepted. The attempts are not preventable, but acceptance is not inevitable. To avoid and escape capture, focus on the big questions, on planning for performance. Acquire the resources and shape the procedures that make the commission central rather than marginal.