

"Regulatory Capture" I — Is It Real?

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September 2012

Three recent conversations about "regulatory capture" produced three different decisions.

"We'll Lose Our Jobs"

A group of commissioners and staff felt frustrated by their utility's unresponsiveness. The company would invoke "federal preemption" to oppose commission preferences. The commission wasn't the parent setting the rules; it was in family counseling at FERC.

The short-term strategies were the old and familiar—more meetings and more pleadings. So we looked at the long term. A utility's franchise comes with no lifetime lock. Why not let other, more responsive companies compete for the role? Or a partial role—as Hawaii, Maine, Oregon, and Vermont have done, moving the utility's energy efficiency functions to an independent, commission-regulated entity, selected competitively. The risk of losing a century of steady income would jolt any incumbent into responsiveness.

"Not while I'm here," the Chairman said. "We'd all lose our jobs."

Finding the best company for the job would cost the commissioners their jobs? That conceded a lot. And it conflicted with what is now almost routine: merger approvals. How's that? When a utility wants to change the franchisee (as when an outside holding company acquires the local utility), commissions routinely approve with no commissioner job loss. But if the commission considers changing the franchisee, the matter becomes too hot to handle.

When the motivation for regulatory action—or inaction—becomes job-saving rather than customer-serving, we are headed toward "regulatory capture."

"They're Captured; There's No Rescue"

In another state, legislators dismayed by the utility's outage performance are blaming the commission for failing to set standards and punish shortcomings. I suggested they give the commission more support: more staff, more expertise, better salaries, more political cover for its tougher decisions.

A state legislator had three responses, two negative and one positive. More resources were not "politically possible"; the legislature won't spend the money. Yet moments before, he'd produced back-of-envelope estimates that the summer's outages had cost his constituents hundreds of millions in lost business and freezer spoilage alone. How was it not "politically possible"—with patient leadership, albeit risk-taking leadership—to spend, say, 5% of that

amount to reduce the probability of recurrence by half? It's all from the same pockets. Why give ground to the short-term cost-cutters where spending saves long-term money?

Strengthening the commission was useless, he said next, because the commission was "captured." They weren't "tough enough." This was less than convincing. It's easy for an outsider, unschooled in the law and procedure of regulation, to want a commission to be more "tough," to demand more performance, to punish more assertively. But "tough" is not a statutory term; "tough" turns off capital, and commissions don't control capital.

And the reasoning had a hole. He'd voted to raise the per-day penalty for outages, but the discretion to impose the penalty remained with the commission he'd said was "captured." The solution, I suggested, was strengthening the commission, so that its credibility could create a culture of performance. That credibility would be even higher if the commission had the option of replacing a non-performing utility. (See above.) This brought us back to "it's useless, they're captured." It seemed that to concede "capture" was itself a form of capture.

Having dismissed the legislature and the commission, he turned to the citizens. He would create citizens corps to remove downed wires, cut away fallen trees, and hook things back up. "How hard can it be?" he said. But (a) dangerous work was best left to the professionally trained; and (b) dispersing these activities to citizen teams would blur the utility's responsibility, when we needed to make clearer its accountability.

"We'll Prevent Capture Through Continuous Improvement"

The third encounter was much more promising. Recognizing that the risk of capture is real, this group of commissioners stared it down. To the entire staff, from the thirty-year veterans to the six-month novices, they delivered this message: "We will leverage our statutory authority and our professional ability to create an insistence on excellence, within our organization and within the utilities. We will do this by putting ourselves on a path to self-improvement so rigorous, so disciplined, so transparent, so determined, and so optimistic that we will persuade the utilities, the legislators, and the courts that we deserve not only their respect but their deference."

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From these three conversations, we can develop a definition of "regulatory capture," recognize its warning signs, and work to resist it.

What is Regulatory Capture?

"Regulatory capture" is a ringing phrase, too casually used. But because it is a hyperbolic phrase, it is too readily dismissed. Here's an attempt to define it, so it can be detected, measured, and avoided.

"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": persuaded based on the persuader's identity rather than the argument's merits.

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

Regulatory capture is neither corruption nor control. Regulatory capture is a surplus of passivity and reactivity, and a 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. 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" 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.

If regulatory capture is a state of being, assisted and sustained by the captive, what roles are played by others? Plenty. Regulatory capture is enabled by those who ignore it, tolerate it, accept it or encourage it: legislators who under-fund the commission or restrict its authority, governors who appoint commissioners unprepared for the job, human resource officials who classify staff jobs and salaries 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. These actions and inactions feed a forest where private-interest trees grow tall, while the public's needs stay small.

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Regulatory capture is real. This essay described three conversations, each dealing differently with the challenge. These conversations helped to define regulatory capture in a way that helps detect its presence and its sources.