

“Regulatory Capture” III — Avoiding and Escaping

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The two preceding essays defined regulatory capture and described the warning signs. A commission is “captured” if it exists in a persistent state of “being persuaded,” based on the persuader’s identity rather than an argument’s merits. Capture’s warning signs include (a) a void where vision should lie, (b) priorities and procedures that react to parties’ requests rather than promote the public interest, (c) a chronic resource differential between the regulator and regulated, and (d) fair-weather politicians whose support for regulation sags when pressured by those who would weaken it.

The bad news is that regulatory capture is always a risk and is always present. The good news is that many in our community embody capture-resistance. Their common characteristics include long tenure, expertise (if not in utilities, then in government operations), confidence in their future employability regardless of whom they irritate, and the ear and respect of the governor and legislature: former commissioners like Peter Bradford, Sam Bratton, Ashley Brown, Carl Caliboso, Paul Centolella, Rich Cowart, Mike Dworkin, Dave Hadley, the late Brian Moline, Judy Sheldrew, and Charles Stalon; current commissioners like Susan Ackerman, Bob Anthony, Mike Florio, Jeanne Fox, Brandon Presley, Paul Roberti, and Cheryl Roberto. (Some have been clients.) How can we replicate their characteristics in our commissions?

First, a word on where to aim the effort: at helping commissions avoid or escape capture, not at preventing parties from attempting it. Attempts are unavoidable. As Cole Porter’s song *Let’s Do It, Let’s Fall in Love* says (“Birds do it, bees do it, even educated fleas do it...Some Argentines without means do it; I hear even Boston beans do it”), everyone does it. Utilities, consumers, environmentalists, workers: Everyone tries to capture the commission. Besides being unavoidable, these attempts at capture are non-preventable. Once we prohibit actual crimes, like dollar-filled shoeboxes and jobs-for-votes trading, the First Amendment kicks in; persuasion is constitutionally protected. But capture -- the “state of being persuaded” -- is not. The aim is to shrink the susceptibility to capture. That is what we can do something about.

“Captured” can describe both a person and an institution, so the solutions are both personal and institutional. The personal protection is the armor of attributes described in my first four essay series on “The Effective Regulator:” “Purposefulness,” “Education,” “Decisiveness,” and “Independence.” I’ll focus here on five institutional elements.

Go back to the big questions: “Ask and you shall receive” (Luke 11:9-12) works as biblical reassurance, but it is a recipe for regulatory somnambulance. The utility’s legal right to seek a benefit is not a right to frame the case. (See the essay “Framing”: *Does It Divert Regulatory Attention?*) The wide-awake commission will reframe the utility’s request as a public interest question: 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.

Connect commission performance to industry performance: 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) take external actions to induce utilities and consumers to produce that performance; and (d) evaluate and revise. “What is measured, improves” (Peter Drucker).

To professionals, offer indispensability and advancement: Once the wages are sufficient, professionals crave achievement. Connect professional achievement to industry performance, and you have a commission culture of self-perpetuating self-advancement. Each department should have, for each department head and employee, a work plan that recognizes their indispensability, propels them to achieve, and expects them to advance. That work plan must be backed by an education plan. Instead of budgeting for undefined “training,” design individual plans that, according to accountable schedules, grow juniors into seniors -- leaders in the regulatory profession. And pay them the utility equivalent in salaries. Professional staff being the commission's core, these education plans deserve resources and momentum uncompromised by arbitrary budget caps, or by overwork caused by staff shortages. Developing professionals, and paying them their worth, is more cost-effective than wishing and watching: wishing utilities would perform better, and watching the best commission employees migrate to private-sector jobs.

Insist on resources: A captured commission's resources are “over-allocated to processing parties' petitions, and under-allocated to pursuing the commission's priorities.” A cause of this sad state is “legislative deadlines combin[ing] with legislative under-funding.” (See “Regulatory Capture” II — What Are The Warning Signs?) The 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. The funding source can vary with the activity. Charging fees for utility requests, the fee levels depending on case complexity, ensures sufficient resources while assigning costs to the cost-causer. 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. For commission-initiated work, the revenue source can be general fees charged to the utilities based on some combination of revenues, profits, and assets, with these fees recoverable through ratepayer charges, since ratepayers are the beneficiaries. This approach produces symmetry: Utilities recover their legitimate regulatory costs through rates; so should the regulator.

Yes, the commission could over-fund itself, and there are agencies that lag in cost-effectiveness. But until we hear of commissions with surplus, we can assume that the risk of over-funding is lower than the risk of under-regulating. For commissions that spend inefficiently (which is different from over-regulating), the solution is not to cut their staff but to help them spend wisely. A regular assist from independent experts in commission management, coupled with supportive legislative and executive oversight, should be par for all state agencies inside

and outside regulation, given the quadrennial changes in agency leadership whose experience varies.

Make hearings issue-centric and commission-centric, not party-centric and lawyer-centric: 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 outsmart 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 is always low. Through most of this counterpunching, the commissioners are spectators, occasionally interrupting to separate the combatants from their clinches or to ask a few "follow-ups." Try reversing the order and the priority: The main questioners should be the commissioners, and they should go first. Organize the hearings by issue, not parties. For each issue, put all opposing witnesses on a panel. Then, cause them to compete for the commission's favor by helping solve the commission's problems rather than defending their clients' interests. Once the commission has extracted the value it wants, the parties' lawyers can cross-examine -- if any need remains. This approach emphasizes commission goals over private-party strategies, and it reverses the ratio of commissioner questions to cross-examiner questions from 5:95 to 95:5. Most importantly, it causes the commission to enter the room with a goal and a plan -- to lead rather than to preside. Everyone still gets his or her say, but everyone learns multiples more.

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"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.