

## **Commissions Are Not Courts; Regulators Are Not Judges**

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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.*

— *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965) (referring to the Federal Power Commission), *cert. denied sub nom., Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966).

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Newcomers to regulation are not newcomers to government. They understand “executive branch,” “legislative branch,” “judicial branch.” But they wonder, “What exactly are we?” Some respond by emulating the familiar: Judges sit on benches, await the parties’ disputes, use adversarial processes, find facts, then apply law to those facts; that seems straightforward enough; let’s make regulators like judges.

To view the commission as a court—to “preside” rather than lead—undermines regulatory effectiveness. Here’s why.

### **How Do Commissions Differ From Courts?**

A commission’s purpose derives from its origins. The legislature receives lawmaking powers from the state constitution. The legislature then creates a commission, delegating to it some substantive slice of those lawmaking powers. That delegation consists of commands coupled with standards; e.g., establish just and reasonable rates, ensure reliable service, allow mergers if consistent with the public interest.<sup>1</sup> Common to these commands and standards is a single legislative purpose: Within a defined substantive space (e.g., activities of electricity, gas, telecommunications and water utilities), make policy for the public. That is not what courts do.

Courts and commissions do have commonalities. Both make decisions that bind parties. Both base decisions on evidentiary records created through adversarial truth testing. Both exercise powers bounded by legislative line drawing. But courts do not seek problems to solve; they wait for parties’ complaints. In contrast, a commission’s public-interest mandate means it literally looks for trouble. Courts are confined to violations of law, but commissions are compelled to advance the public welfare. Even the narrowest of commission decisions—say, approving or disapproving a special contract between utility and industrial customer—affects a public interest larger than the parties: Will the low contract price shift costs

to other customers or weaken the utility's finances? Will the lucky buyer's competitors seek "me too" treatment? To what effect?

Like commissions, a court's decisions can have policymaking attributes affecting non-parties. A class action suit under the civil rights or securities laws, an antitrust suit against a Microsoft or an AT&T, can set policy for a generation. But consider this difference: In Court Land, the judge's power to act is confined to the issues stated by a plaintiff's complaint. In Commission Land, a party's filing is stimulation but not limitation. The commission can add issues, combine proceedings, invite the appearance of other parties, or convert a two-party complaint into multi party rulemaking, all as the public interest demands.

A commission does "look like" all three branches: like a legislature when promulgating rules; like an executive agency when enforcing those rules; like a court when deciding complaints. But utility commissions are not "like" anything; they are what they are: governmental units created to exercise powers delegated to the legislature by the Constitution, then re-delegated by the legislature to the commission. Commissions, like the legislatures whose powers they exercise, make policy for the public.

### **How Does "Acting Like a Judge" Undermine A Regulator's Effectiveness?**

A regulator acting as judge assumes that the parties, their interests, their arguments, and their legal citations comprise the full intellectual universe requiring regulatory attention. This assumption relies on one or more incorrect premises:

1. That the scatter plot of private interests appearing in a proceeding will display some pattern from which the commission can determine the public interest;
2. That the public interest is synonymous with satisfaction of the private interests;
3. That the private interests' evidentiary submissions will produce information sufficient in relevance and objectivity to discern the public interest;
4. That the opportunity for access equals the reality of access (i.e., that all possible private interests have hearing room resources sufficient to get the commission's ear); or
5. That through the *sturm und drang* of private-interest opposition, the "truth" will emerge.

Accepting any of these premises undermines effectiveness, by:

1. Inducing intellectual passivity, because the proceeding and the record become party centric rather than public centric ("What are the parties seeking?" instead of "How do I advance the public interest?");
2. Imposing the wrong time horizon (the parties' short term desires rather than the public's long term needs);

3. Reducing the regulator’s objectivity (because the regulator “learns” the issues from parties’ arguments rather than impartial sources);
4. Distorting the regulator’s personal time management (because as the parties load the record with conversation among themselves—testimony, cross examination and briefs exchanged four ways (direct, reply, answering and cross answering)—procedural law compels the regulator to peruse every page, leaving insufficient time and mental space to read and think on her own); or
5. Substituting private settlements for public-interest solutions (regulation, unlike marital dissolutions and fender benders, requires policymaking, not dispute resolution).

## **Why Do Some Regulators Prefer the Judicial Approach?**

*Ease of explanation:* In regulatory procedure, adjudication holds center stage. We use it in the “big cases”—rate increases, mergers, complaints. Its formality commands respect. Its familiarity defines the forum: Because we use judicial techniques, we are “quasi judicial.” The “quasi” prefix is the tipoff. There is nothing “quasi” about making policy for the public. Adjudication is but one procedural device for discerning and declaring the public interest. The procedural tail should not wag the purpose dog.

*Inexperience:* Most new regulators are generalists. Faced with regulation’s complexity, the generalist prefers to examine the arguments of the more experienced, rather than frame the arguments her own way.

*Overwork:* If one is overrun by paper, it is easier to preside than to lead.

*Aversion to risk:* Acting like a judge carries less risk, involves less responsibility. Politics punishes errors of omission less than errors of commission (pun unintended).

## **Recommendations for Regulators**

1. *Organize each proceeding by asking “How do we advance the public interest?” not “What do the parties want us to decide?”*
2. *Begin each proceeding with neutral tutorials, presented or vetted by an objective entity.*
3. *In major policy areas like performance standards, mergers, and rates, create substantive policies before proceedings occur, so that parties’ proposals track commission priorities, not the other way around.*

4. *Approve settlements only if they advance the public interest, not because they “buy peace” among opponents.*

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<sup>1</sup> In some states, the commission is created by the state’s constitution, not its legislature. But it still exercises powers defined by the legislature.