Interconnection Animus:
Do Regulatory Procedures Create a "Tragedy of the Commons"?

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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.

— Garret Hardin, "The Tragedy of the Commons," *Science* (Dec. 13, 1968)

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No one disputes the benefits of interconnectedness: accessible air travel, job mobility, telecommuting, economies from interregional trade. Yet regulatory efforts to increase electrical interconnectedness draw opposition, seemingly reflexive, always intense. Embedded in regulatory practice and culture, this behavior is not cost-free; public benefits are delayed and diminished. Can we make adjustments, or is opposition inevitable?

Procedural Narrowness Yields Zero-Sum Relationships

Consider the battle over new, extra-high-voltage electric transmission facilities. In the Virginia-to-Ohio region, FERC allocated their costs on a postage-stamp basis (all users pay the same rate regardless of location or specific benefit, on the grounds that everyone benefits somehow). Challenged in the Seventh Circuit by Ohio, Illinois, and other Midwestern interests, FERC lost. The Court found insufficient evidentiary support and inconsistent FERC reasoning. *Illinois Commerce Commission, et al. v. FERC*, Nos. 08 1306, et al. (7th Cir. Aug. 6, 2009).

The case is but one of many cost allocation battles, state against state, producer against consumer, utility against independent, east against west. Despite the national benefits of new infrastructure, controversy persists over who pays for it. Two reasons are statutory and cultural. Regulatory statutes—in this case the Federal Power Act—always grant opportunities to litigate: New facilities require new costs; new costs require rate filings; rate filings attract proponents and opponents. Our litigation culture adds the sharp edges: Victory-seeking clients hire victory-promising lawyers; these party-pairs join the battle if the litigation cost is below the value of winning multiplied by the probability of winning.

One more ingredient makes conflict inevitable: the narrowness of the typical proceeding. A 500-kV transmission facility is a "big project." But for a nation with 300 million citizens who rely on electricity for everything from incubators to funeral homes, a single transmission facility is a small contributor to life's daily costs. Yet that facility gets its own proceeding, in which participants then focus on winning benefits and avoiding costs associated with that single facility. Procedural narrowness is therefore the key ingredient in the recipe for a zero-sum culture. By isolating each proposal from its benefits context, our procedures promise a showdown between win seekers and loss avoiders.

Facility-Specific, Party-Centric Litigation Produces a Procedural "Tragedy of the Commons"

Once a proposal reaches the cost allocation stage, its prudence is presumed. Prudence means that over a time horizon sufficiently long, or over a geographic territory sufficiently wide, the benefit-cost ratio is sufficiently positive to justify the investment relative to alternatives. The only question remaining should be, "How do we allocate the net benefits so that no one is worse off and everyone is better off?"

In Litigation Land, that optimistic approach is a rarity. Narrow, proposal-specific proceedings mean that even if the proposal is part of a net-benefits package, a party has a right to oppose it if, for that project and that party, the benefit-cost ratio is negative.

This right to a hearing, project-by-project, causes waste and distraction. There is an expectation that every proposal must have a positive outcome for every party, that a proposal is "bad" if it makes anyone worse off. How logical is it, how useful, to slice-and-dice regulatory decisions into a series of win-lose polarities? No clear-thinking citizen (i.e., one uninfected with regulatory experience) would insist that every public policy benefit him personally. Otherwise, we would:

- cease funding for multiple sclerosis because not everyone contracts it;
- eliminate the local crossing guard because not everyone crosses there;
- eliminate the Air and Space Museum because not everyone goes there;
- eliminate every program for which the cost bearers differ from the benefit receivers.

Oddball examples? They do not differ logically from oppositional responses to cost allocation proposals for utility infrastructure. These oppositions, each one rational individually, 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.

Welcome to regulation's "tragedy of the commons," where the commons is not Garrett Hardin's pasture, but the "right to a hearing" for every cost-causing project. We slice proposals

so narrowly that someone always has a reason—and a right—to oppose. The sum of all these individual rights, vigorously and expensively exercised, creates policy gridlock and Hatfield-versus-McCoy animus. (*See* Mark Twain, *The Adventures of Huckleberry Finn*: "A feud is this way: A man has a quarrel with another man, and kills him; then that other man's brother kills him; then the other brothers, on both sides, goes for one another; then the cousins chip in—and by and by everybody's killed off, and there ain't no more feud. But it's kind of slow, and takes a long time.")

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 regulatory procedure. When administrative litigation was simple—buyer and seller arguing over rate levels—there was sufficient aural and temporal space to air all concerns. That simplicity is gone. A typical transmission case can have a dozen parties, arguing about total cost, allocated cost, need, alternatives, rate design, intergenerational equity, environmental effects, and more. As with Hardin's pasture, the problem grows geometrically, because (a) there are multiple cases simultaneously and (b) every party's "right to be heard" begets a counter-right in that party's opponents. These factors shrink the supply of problem-solving resources: time, money, and goodwill. The result is Hardin's tragedy of the commons.

So regulators call for "consensus" and "cooperation." This reliance on voluntary restraint, on what Hardin calls "conscience," produces a Darwinian result: The victorious are the holdouts— the ones who resist consensus and cooperation. As Hardin concludes, "Conscience is self-eliminating."

Solution: Broaden Proceedings' Scope So That Benefits Exceed Costs

To save our regulatory commons, we must break out of zero-sumsmanship. We need proceedings whose substantive scope ensures that total benefits exceed total costs.

A transmission system benefits not only the generation and loads it connects, but also the regional economy it supports. "Just and reasonable" ratemaking does not always count that broader benefit. Ratemaking merely identifies a revenue requirement and the rate levels necessary to produce it. There is no mention of employment growth, industrial location attractiveness, or environmental values, even though the right transmission proposal can enhance all three. It is this singular focus on revenue requirement and rate levels that produces zero-sum thinking. As any attendee of multistate, multiparty regional transmission "settlement" discussions will testify, calls for "consensus" do not work well in a zero-sum context.

Ratemaking's confines need not condemn us to endless cost allocation disputes. The key is to broaden the decisional context. There is usually some combination of transmission proposals, covering broader geographic areas or long time horizons, for which total benefit exceeds total cost. By replacing zero-sum proceedings with positive benefits proceedings, the parties can fight over benefits rather than cost. The result: more cooperation, more speed, more results.