

Is Regulatory Conflict Inevitable? A Seasonal Plea for Peace

Scott Hempling
December 2015

This is the season for seeking peace on earth. The prospects seem remote. People are paying with their lives for their beliefs, color, ethnicity, tribe and sexual orientation. National origin, too, as those trying to escape from terrorism and murder are blocked by kindergarten-level logic like "we got here first."

From our small world of utility regulation, we can do our part for peace, by finding ways to reduce if not the conflicts themselves, at least their frequency and harshness. First we have to get clear on what the conflicts are.

Industry conflicts are getting worse

Thirty years ago, regulatory conflict was contained: Municipal wholesale power systems fought incumbent utilities over access to generation and transmission; retail ratepayers fought shareholders over rate increases. In the ensuing three decades, regulatory maturation has solved some of these problems, with rules and procedures that make them more susceptible to settlement.

Yet today, new conflicts flare nearly everywhere. In the Supreme Court this year, demand resource providers are fighting generators over access to regional power supply markets, while New Jersey and Maryland are fighting generating companies over the states' wholesale price supports. In the courts of appeals, carbon emitters are (or will be) fighting the EPA's Clean Power Plan; Internet highway owners are fighting content providers over the FCC's net neutrality initiatives; incumbent transmission owners are fighting new transmission providers and FERC over FERC's removal of the incumbents' "right of first refusal" to build regional transmission facilities; and states are still fighting each other over transmission cost allocation. Before state commissions and state legislatures, solar companies are fighting incumbent utilities over costs avoided and incurred, while communities are fighting their local water companies when toxic waste penetrates their water systems.

Those conflicts are the ones above the surface—pending in courts and commissions and legislatures. They are the ones rooted in the friction between old statutes and new values, between old market structures and new technologies. Then there are the deeper conflicts, ones at the intersection of regulation and politics. Consider: Incumbent utilities want the security of a monopoly franchise, along with the financial assurances that their investments will be profitable. Consumers want low rates and high-quality service, along with tools to reduce their century-long dependency on the incumbents. Non-utility competitors want market entry and competitive success.

And there's more. Technology innovators want access to the interoperability "codes" so they can mesh new technologies with old world infrastructure. Labor wants sustained

employment and solid pensions. Environmentalists want emissions reduced and emitting infrastructure replaced. (And the environmentalist community gets fractured further, since wind can displace coal but turbine blades kill birds.) Industrial customers want rates lowered so they can compete with overseas firms. Charitable organizations want contributions. New employees want to rise on the career ladder; senior employees want to keep their current spots. Utility acquirers want more territory; utility acquirees want higher premiums. Executives want high compensation, guaranteed employment and appropriate parachutes. Minorities and the disadvantaged need a fair shot at utility employment. Legacy workers need retraining for the post-coal world. Low-income communities want their neighborhoods free of asthma-inducing generators.

Many of these new aspirations do not appear as bilateral conflicts; often there is no obvious X vs. Y. But like a nonpartisan school board election where seven candidates run for five places, satisfying all the aspirants is impossible. Every person runs for herself but some people have to lose. So the conflicts exist below the surface. We can reduce them in at least two ways: by avoiding undermining actions, and by calling attention to our commonalities.

Solution: Avoid undermining actions

Atop a long list of actions that undermine commonality are denigrating the "other," misstating benefits and using short-term dollars to divert attention from long term-consequences.

Denigrating the "other": Regulation has a rich history of incumbents denigrating newcomers. To stimulate renewable replacements for fossil-fueled electric generation, the Public Utility Regulatory Policies Act of 1978 directed incumbent utilities to buy renewable and cogenerated electricity from "qualifying facilities"—new companies whom utility incumbents quickly labeled "PURPA machines" and "fly-by-nighters." In the 1950s, "alien attachments" was the term used by Bell System lobbyists to describe customer equipment manufactured by companies other than Bell. This discriminated-against category included the "Hush-a-Phone," a "cup-like device" which "snaps on to a telephone instrument"; its only crime was to allow someone to speak into the receiver without being overhead by persons nearby. The FCC caved to Bell's monopolistic opposition, but the court of appeals reversed, exposing Bell's motive: "The mere fact that the [Bell] telephone companies can provide a rival device would seem to be a poor reason for disregarding Hush-A-Phone's value in assuring a quiet line." [1] Then there's "subsidies," the insult applied by the well-positioned to public funds that help victims of economic discrimination (whereas public funds that support the well-positioned are called "economic development").

Misstating benefits: In one of my current cases, a witness has testified that his company's corporate restructuring will, by attracting more investment dollars, "create 200 jobs." But the only effect, he later admitted, is to complete the same infrastructure projects in a shorter time period. So there is no increase in worker hours; there is only the need for more workers to complete the projects in a shorter amount of time. The "created jobs" would have existed anyway.

Using short-term dollars to divert attention from the long term: Merging companies now seek to convert each merger proceeding into a shopping mall, where parties bargain away permanent control of a government-granted franchise worth billions, in return for short-term dollars worth millions. Like Garrett Hardin's herdsmen, each of whom rationally grazes his flock without considering the cumulative effect on the others, each party seeks a benefit useful to himself, in return for supporting a transaction whose market-concentrating, diversity-diminishing effects lead to long-term loss. The commons—for Hardin, the pasture; for merger litigants, long-term market diversity—is damaged. "Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited." [2]

Solution: Call attention to our commonalities

Imagine taking a break from conflict, in favor of focusing on our common goals: markets that reward merit; toaster-to-generator protections against cyberattacks; air and water safe for the grandchildren of our grandchildren; and citizens who are informed, enabled and empowered to produce and consume energy efficiently, responsibly and affordably. If we all work on these causes, our patience, time and need for conflict will diminish.

* * *

Those are my hopes for this holiday season. Thank you for reading and commenting in 2015. I look forward to working with you in 2016.

1 Hush-a-Phone Corp. v. FCC, 238 F.2d 266, 269 n.9 (D.C. Cir. 1956)).

2 Garret Hardin, "[The Tragedy of the Commons](#)," Science (Dec. 13, 1968).