

The New Regulatory Politics of Electricity in India: Independent, Embedded or Transcendent?

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Introduction

Electricity company trucks driving around New Delhi sport elegant new lettering along the side proclaiming the name of the new private electricity provider – “BSES Rajdhani”. On the back, however, in faded block letters, remain the words “Delhi government”. The electricity sector in Delhi, and more generally India, is in the midst of an institutional and political transition of sizeable proportions. Driven by financial hemorrhaging that accounts for an average of over 20% of states’ fiscal deficit, India’s states, urged on by the World Bank and more recently the central government, are frantically seeking an escape route. This route rests on shifting key decisions out of government hands, or appearing to do so, and in some cases, privatizing electricity. However, this is not a simple transition. For decades, governments in India and elsewhere have shouldered the task of turning on and keeping on the lights. For reasons both technical and political, electricity has become understood as a public need, and one to be safeguarded by (even if not directly provided by) the state. Donor agencies’ insistence the electricity be treated as a commodity like any other has not been credible. In India, as elsewhere, governments can fall based on their inability to safeguard this public service. Even in a context of greater private involvement in electricity, the public ultimately holds government accountable for electricity.

Straddling this ill-defined and new political terrain stand “independent” regulators. In India, electricity regulators have operated at both central and state levels, with the first state regulator opening its doors in 1997. As the term suggests, creation of this new institution presupposes the existence of an apolitical sphere from within which decisions can be made on their technocratic merits. But, as arbiters of the balance between profit and public interests, regulatory decisions reward and penalize constituencies, authorize and deny profits. In other words, regulation is inescapably political. While the rhetoric is one of regulatory independence, neither politicians nor bureaucrats in India are quite so hopelessly naive as to swallow the rhetoric. However, with their backs to the wall, they have embarked on a regulatory experiment without a firm grasp on the new politics of regulation in India.

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Electricity provides a useful lens onto the politics of an emergent regulatory state in India for several reasons. As with many other countries, India is grappling with a shift from a publicly owned and controlled sector to one that is increasingly open to private involvement. The transition involves however, addressing and undoing entrenched and path-dependent patterns of patronage and corrosive political arrangements. It also involves changing consumer mindsets on the nature of electricity – from public service to commodity. Reforming electricity, therefore, poses a stiff challenge to a nascent regulatory state. Finally, electricity is an interesting arena for study of regulation because electricity regulators have been established at the state level, allowing for comparative analysis of regulatory performance.

This paper is an initial and somewhat panoramic view of the electricity regulatory landscape.² The paper is organized around three contending narratives, each of which illuminates different dimensions of the political content of electricity regulation in India. The first narrative is the simplistic one of regulation as a sphere to be insulated from politics, a narrative introduced by donor agencies as a solution to entrenched political arrangements in the sector. I suggest the thinness of this apolitical narrative has rapidly been exposed and it has failed to serve even its minimal purpose of attracting investors. Second, I examine the risk and nature of regulatory capture in India, and find not only substantial evidence of state capture, but also a regulatory apparatus that is barely separable from larger state structures. Third, I turn to regulation as an arena for interaction and engagement between multiple and contending stakeholders, a perspective that explicitly allows for the reality of regulatory politics. While institutional arrangements for a stakeholder view of regulation do exist, they are weak. Despite this, I find the stakeholder view the only one that holds out the possibility for regulatory spaces to be new and open sites for political contest. I conclude that in the context of low levels of state legitimacy in India, regulation both risks easy contamination, but also provides a real opportunity to transcend politics as usual. To set the stage, I begin with a brief description of the recent past of electricity in India, which provides the context for the emergence of regulation.

The Context

The recent past of Indian electricity provides a story of lock-in to a cycle of destructive practice, a series of incomplete attempts at a quick fix, and a pervasive spiral into ever declining performance. For many observers of the sector, the problem is diagnosed simply as “politics” or political interference. The solution, equally simply, is politically independent regulation. To understand the nature of politics in the sector and the actual circumstances in which independent regulation was introduced it is necessary to briefly tour the recent past of India’s electricity sector.

Electricity is a “concurrent” subject under India’s constitution, which places it under both central government and state government control. In 1948, the sector was organized around state-level, publicly owned and controlled State Electricity Boards (SEBs). SEBs were crafted in the crucible of post-independence India, and strongly shaped by the idea that electricity was a tangible and realizable benefit that the state could demonstrate to its

²This overview will inform a detailed study of the electricity regulatory process in four states by the author, which has only just been initiated.

citizens as a gain from achieving independence. In particular, SEBs had a dual nature as commercial entities and as instruments of development policy.

Since the SEBs effectively operated as extensions of the state Energy Ministries, they have been prey to a range of garden-variety, but crippling, problems of government in India. These span everything from internal markets for staff promotion and placement, to graft for non-payment of bills, to incorporation into the election financing apparatus. Two particular decisions, however, accelerated what was a gradual slide into a disastrous downward spiral.

A decision to provide cheap electricity for agriculture (specifically for groundwater pumping) to stimulate India's Green Revolution quickly morphed into a highly successful populist political strategy in the late 1970s. By the mid-1980s, farmers in a variety of states received either free electricity, or electricity charged at a flat rate. In either case, meters were no longer required, which introduced an accounting black hole, abetting an institutional culture of non-accountability and bad management. Over time, it has become clear that some 50% of India's electricity is unaccounted for, less than half of which is actually used by farmers. The yawning maw of transmission and distribution losses (T&D) is now the single biggest obstacle to setting the sector right and arguably the biggest challenge facing regulators (Dubash 2005).

Second, SEBs financed the costs of agrarian electoral populism by raising tariffs to industrial consumers in order to cross-subsidize agricultural and household consumers. As a result, industry now pays a high tariff about 10 times that of farmers and almost twice the average electricity tariff to all consumers, which is increasing over time (Planning Commission 2002, p. 94). Many industries are now exiting the grid and setting up captive power plants, thereby placing even greater pressure on those industrial customers that remain. In 2001-2002, SEBs recovered, on average, only 69% of their costs. State governments have been forced to step in and provide some direct subsidies, which when taken together now account for some 20-30% of gross fiscal deficits.

The pressures acting on the political fault lines in the sector are enormous. Short term decisions over tariffs are stale-mated between the implacable force of industries seeking lower tariffs and the immovable force of politically mobilized farmers hanging on to subsidies. Meanwhile, finance ministries at state and central levels, backed by international donors, have given notice that budgetary subsidies to the sector must come to an end. State-level independent electricity regulatory commissions have been placed in the situation of untangling these knots.

Narrative One: Regulation as apolitical sphere

The introduction of independent regulation for public services in India occurred in the absence of any considered and deliberate public debate. Moreover, there was little apparent consideration of the long experience with regulation in countries such as the United States, nor deliberation of the various strands of writing on regulation, from public choice theory, to regulatory capture, to more recent efforts to embed regulation in the larger discourse on governance.

The genesis of state level electricity regulators can quite conclusively be traced back to a 1993 policy statement by the World Bank (1993). In that paper, the World Bank

announced a new policy of “commitment lending” that made further lending for the electric power sector in borrower countries conditional on a set of policy directions. First among these was that the “Bank will require countries to set up transparent regulatory processes that are clearly independent of power suppliers and that avoid government interference in day-to-day power company operations” (World Bank 1993, p. 14).³ This policy shift, which entirely reversed a several decade old approach of supporting state-owned monopoly power sectors, was driven by the undoubtedly declining performance of many state owned utilities, but also by the new market-oriented approach sweeping the staid electricity world, and by the prospect of dramatic capital flows to developing country energy sectors. As the 1993 document somewhat ominously put it, “the time of (sic) ‘business as usual’ is over” (World Bank 1993, p. 17).

Later the same year, the World Bank sponsored a conference in India to draw attention to the sorry state of the Indian sector, and to highlight market-based experiments in the UK, Argentina and other countries. More specifically, however, the Bank used the event to announce that the institution would no longer finance electricity projects in states that were not undertaking restructuring efforts along the lines of its new policy, but that it would mobilize funds to support bold and deserving state-level power sector reforms (Dubash and Chella Rajan 2000). Five state governments initially took up the offer, but only one state, Orissa, saw it through to implementation.⁴ In 1996, Orissa passed an electricity sector reform act which unbundled the State Electricity Board (SEB) with an intent to privatize components of the SEB. In order to lend investors confidence in tariff setting and other decisions, independent regulation was a key component of the package.

In addition to citing the Bank’s new policy direction for energy, World Bank staff invoke the then-much discussed example of India’s new Election Commission as a motivation for promoting the electricity regulatory experiment.⁵ Powered by a charismatic and forceful Chief Election Commissioner, the Election Commission had seemingly made great strides cleaned up the electoral process, and the Commission enjoyed high public approval ratings as among the most trusted public institution in India. The Election Commission seemed to suggest that independence, understood as the ability to stand up to politicians, could be more than wishful fiction. With no further thought given to the replicability of the Election Commission experience at the state level, and to the technical electricity sector, the Election Commission was read by the Bank as reinforcing its broader wisdom on the importance (and feasibility) of independence in regulation.

³ The other conditions -- commercialization and corporatization, importation of services, and encouragement of private investment – would soon become intertwined with the emergent model of competitive electricity markets emanating from the UK, to become a standard model of electricity restructuring applied to the developing world (Williams and Dubash 2004).

⁴ As a poor, relatively low profile state, Orissa was in many ways a strange choice. However, it had two overwhelming advantages. First, the political leadership of the state strongly supported electricity reforms, in part because the future of a hydroelectricity project favoured by the Chief Minister was implicitly tied to the future of reforms. Second, because farmers in Orissa accounted for an insignificant 6% of electricity consumption (not because there are no farmers in Orissa, but because most farmers were not connected to the grid!), the state had no farmer lobby that could act as a brake on reforms (Dubash and Chella Rajan 2000).

⁵ Personal communication, World Bank staff, March 2004.

This is not to say that electricity reform in Orissa is entirely a coercive exercise in policy transfer driven by international forces.⁶ Powerful forces within the state, not least the Chief Minister and technocrats in the sector saw the Bank's proposals as the only way out of looming bankruptcy of the sector, and came to be staunch votaries of electricity reform. However, beyond a broad belief in the need for reform, the intellectual content of the exercise was entirely imported and uninformed by local political knowledge.

Specifically, international reform consultants selected and paid for by the World Bank and the Department for International Development-UK (then ODA) took significant decisions including institutional design and drafting of a state law creating a regulator. Consultant reports were submitted to state level Working Groups for consideration. The extent to which these Working Groups actually modified consultant proposals must wait a more detailed documentary analysis. However, to expect state officials in one of India's poorest states to adequately examine a governance arrangement of which there was no prior national experience – regulation of a network industry – stretches credulity. As a subsequent independent enquiry into the Orissa experience noted, "Working Groups were required to deal in areas completely new to the state government" (Kanungo Committee 2001, p. 6).

As the World Bank (1996) notes in its appraisal report, Orissa "...sets a model for state-level regulatory framework ... which other states are already examining for possible adoption." As a result, the blue-print for a far reaching governance reform of electricity with implications beyond Orissa was reached through no national discussion and debate, and with little consideration of its viability and feasibility. No surprisingly, there was some consternation in New Delhi when confronted with a new regulatory act. The Home Ministry argued the Act was unconstitutional.⁷ The Ministry of Power and the Central Electricity Authority (a planning unit) foresaw erosion in their powers and were hostile. Only heavy lobbying by the Orissa Chief Minister saw the Act past central government objections. Following Orissa, a few other states enacted electricity regulation laws and in 1998, in an implicit acknowledgement of the importance of the Orissa experience, the central government passed an Electricity Regulatory Commission Act largely based on the Orissa Act, providing a framework for state regulators (Dubash and Chella Rajan 2000).

Once the Orissa Electricity Regulatory Commission began its work, the double-edged nature of regulatory independence quickly became apparent. Among reform insiders, it was clear that the Orissa effort was organized around demonstrating that electricity privatization in India was possible, even in a small state like Orissa.⁸ The regulator was a key part of this strategy. The World Bank and reform advocates within Orissa assumed that an independent regulator would quickly raise tariffs to cost recovery rates, in order to attract private investment. Ironically, however, an independent OERC decided only a moderate rise in tariffs, thereby placing the privatization effort in jeopardy and triggering an explicit request from the World Bank to further raise tariffs for investor comfort, a

⁶ See Dolowitz and Marsh (1998) for categories of coercive, normative, and mimetic forms of policy transfer.

⁷ I have not, as yet, ascertained the exact arguments.

⁸ Reform consultants candidly state their instructions were to promote privatisation and to create an irreversible process.

request the regulator denied. Even as the government lost control over use of tariff setting for populist and other political purposes, so too did reformers lose control over tariffs as a device to attract investors.

The World Bank interpreted OERC resistance to higher tariffs as a mis-guided over-emphasis on consumers, and perhaps even as evidence of capture by a segment of government. The regulator, by contrast, argued that there were no grounds for placing the cost of high (and unknown) transmission and distribution losses on consumers, and that the utility should bear the cost of these losses as an incentive to reduce them. Reasonable people could disagree on how the cost of losses should be divided between customers and the utilities, suggesting that the OERC was well within its mandate in exercising its own judgement in making the determination it did.

Stung by this experience, pro-privatisation advocates have been far more cautious in their advocacy of regulatory independence in other states. In Karnataka, for example, World Bank funded consultants advocated a multi-year tariff regime incorporating a “distribution margin” which would effectively insulate utilities from regulatory decisions by ensuring them a minimum profit level. The consultants also recommend that the Commissioners hold office only at the pleasure of the Governor of the state, and recommends removing the provision in the law that insulates regulatory functioning from policy directives, replacing it with one that makes policy directives non-appealable and binding on the commission (Prayas 2003, p. 36). In the face of protest, the government chose not to follow through on the consultant’s report. In Delhi, reform designers from the Delhi government sought pre-set “multi year tariffs” to reassure investors about possible regulatory surprises, which would have limited regulatory autonomy in a situation of high uncertainty, which arguably calls for regulatory flexibility.

The advent of independent electricity regulation in India has indeed changed the rules of the game in the sector. Friends and foes of regulators alike agree that the additional of a separate regulatory institution has forced a measure of transparency, particularly in the accounting of losses. What regulation was never likely to eliminate, however, was a need for political accommodation between different actors. The reform process may have introduced new actors seeking accommodation and new pressures, and changed the rules of bargaining. But from its early days, the Orissa regulatory experience reinforced the hollowness of the claim of an apolitical regulatory space. As the first OERC Commissioner put it: “There is not only one God in the Indian pantheon; any regulator who does not talk to the government is living in a fool’s paradise” (quoted in Dubash and Chella Rajan, 2000, p. 3380).

Narrative Two: Taken for granted state capture of regulators

If the Orissa regulatory could credibly lay claim to a measure of regulatory independence (or at least regulatory triangulation), the early impression from other states is that of a toothless regulatory structure on the brink of complete capture by the state. However the nature and motivation of regulatory capture in India is quite different from the classic articulations of capture theory.

Stigler’s (1971) articulation of capture theory and subsequent expositions such as Posner (1974) understand regulatory interaction as a relationship between regulator and regulated. In the resultant political market, “regulation is supplied in response to the

demands of interest groups struggling among themselves to maximize the income of their members” (Posner 1974, p. 335-336). Under these circumstances, the challenge of independence is to avoid capture by interest groups who stand to benefit from regulation.

In the Indian electricity context regulated entities are mostly state owned enterprises, with either an attenuated or only emergent profit motive and instinct. In a few post-reform states, such as Orissa and Delhi, private players have taken over the distribution business. Recent examples of political contention over electricity for agriculture and a price hike in Delhi help shed some light on the nature of the regulatory capture threat in the immediate aftermath of state ownership, a circumstance India shares with many other countries.

Business as Usual: Free Power to Farmers

As a senior regulatory official in one state writes, regulatory agencies were “meant primarily to insulate tariff determination and other such supposedly “economic” decisions from the political system” (Sridharan no date). Because of the history of the sector, described above, nowhere was this insulation more crucial than for agriculture. In the early years following the establishment of electricity regulators, populist politics of free farmer to powers appeared to have been muted. Chief Ministers restrained themselves from new subsidies, and a high profile reformist Chief Minister in the state of Andhra Pradesh was even re-elected after slightly raising agricultural tariffs. In reality, this development likely owed less to the advent of regulation than the fact that Chief Ministers are forced to tack back and forth between satisfying an urban and financial elite – including donors – for whom power subsidies are a litmus test of a true reformer, and their voting constituencies, of which farmers are a large part (Lal 2005).

In mid-2004, any expectations that regulation had put paid to business as usual were rapidly expunged. The reform oriented Chief Minister of Andhra Pradesh was swept out of power following a vigorous campaign by his opponent that included a promise of free power to farmers.⁹ Within days, the politically important states of Tamil Nadu followed suit, and months later, Maharashtra, Haryana and Punjab also instituted various sorts of electricity concessions for farmers.

How did regulatory agencies, under whose purview tariff setting is supposed to reside, react to these developments? Across the various states, regulators chose to interpret government action as a policy position over which they had no control. However, they also decided to ensure that the choice to provide a subsidy to farmers be backed by an actual transfer of funds to the utility. For example, the Maharashtra regulator insisted that the state government transfer cash to the utility before the utility sent out “zero bills” to the farmer instead of the usual practice of adjusting payment against arrears, which in reality are never settled (Business Line 2004; Economic Times 2004). The regulator also argued that other consumers could seek a reduction of their own bills to reflect the amount of cross subsidy to agriculture that was now paid as a direct subsidy. Thus, the regulator accomplished the not inconsequential task of making transparent the true cost of free power to farmers and forcing the state governments to pay this cost.

⁹ In reality, the challenger carried both rural and urban areas, suggesting that concessions to farmers were not a deciding factor. However, the perception of the political importance of farmer subsidies was firmly sealed.

The political dance between state and regulator also involves elaborate signalling and strategic feints. For example, the new Chief Minister of Andhra Pradesh announced a six point strategy of internal reforms and improvements for the sector that, in the view of the government, will make it unnecessary to hike tariffs the following year (Business Standard 2005). The article helpfully notes that the decision, however is “subject to the approval” of the regulatory commission.

Delhi: The Anatomy of a Tariff Hike

Does privatization modify the role of the state as the site for interest group politics on electricity? Does a change in ownership of a utility change the nature of electricity, from public good to commodity? The Delhi experience of a tariff hike in mid-2005 suggests the answer is “no” on both counts.

Delhi’s privatization was marked by an unusual contractual structure. Instead of soliciting financial bids, private companies were asked to pay a flat payment and bid instead on a schedule of transmission and distribution loss reduction targets. In this manner, privatization designers sought to place performance at the centre of the contract (Agarwal, Alexander, and Tenenbaum 2003). Two of India’s largest conglomerates, Tata and Reliance, won the contracts. The two companies have made progress toward these targets, with one company doing far better than the other, but amidst a swirl of debate about whether the targets were, in fact, too generous (Jain 2005). In addition, from a consumer perspective the outcomes have been decidedly mixed; consumers have complained about fast running meters, a lack of perceived improvement in customer service, continued black-outs and the like. Since privatization, the regulator has regularly hiked tariffs by 5-10%. While discontent has simmered since the privatization, it came to a boil in 2005.

As part of the annual review, the two distribution companies sought a massive hike of 30% for 2005 (Gayari 2004). The Delhi Electricity Regulatory Authority (DERC) authorized a hike of 10% (Financial Express 2004). Citing its stance as a pro-reform government, based on advice that reportedly came directly from the Prime Minister, the Delhi government publicly ruled out a subsidy to cover the tariff hike (Hindu Business Line 2004; Roy 2005). Meanwhile, consumers were increasingly irked by the prospect of a tariff hike without a corresponding improvement in performance. Reportedly irked by personal calls at midnight grumbling about the power situation, the Chief Minister publicly rebuked the two distribution companies, stating “...its not my job to listen to power complaints. I did it when DVB [the public company] existed. Now, its their [the private companies’] job....” (Indian Express 2005a).

As protests continued to mount, a mere two weeks later, the Congress party leadership quite bluntly disabused of the notion that she no longer was responsible for Delhi’s power situation, and given a month in which to improve performance (Shukla 2005). This led to another round of salvos aimed at the worse-performing distribution company - BSES. Shortly before the tariff increase was to come into force, the political stakes were raised by well-organized resident welfare associations, which threatened to urge their members to deduct 10% from their bills, arguing that they were being made to pay the cost of ill-performance of the utilities (Ghosh 2005; Indian Express 2005b). The political fall out from the tariff hike was threatening to spiral out of control. A statement by the Chief

Minister that a tariff hike today was a “bitter pill today for a better tomorrow” only fanned the flames (Times of India 2005). In a sign that the DERC was not immune from the pressure, the regulator rather unhelpfully suggested that if the distribution companies provided a “rebate” to consumers it would not be a violation of its order (Sinha 2005). Following another round of political meetings, the state government bowed under the pressure, and announced that the hike would be effectively repealed, as the state and the distribution companies would pick up in equal measure the cost of the tariff hike (Roy 2005).

Independent regulation notwithstanding, both consumers and the government see the state as occupying the driver’s seat when it comes to dividing up the spoils of the sector. Significantly, even a high profile privatization in the capital city has failed to shake this perception. Electricity continues to be an arena in which interest groups of various sorts can stake a claim and the response of the state to those claims can win and lose elections. In this sense, regulation has failed utterly, at least so far, in driving a wedge between the economic and political content of decisions in the sector. The Delhi experience also suggests that the regulator has by no means established the credibility necessary for citizens to feel that their interests are adequately expressed through the regulatory process instead of through direct action aimed at elected officials. However, the advent of regulation has placed bounds on state action, and arguably most important, forced transparency and broader debate over the consequences of state decisions.

*Everyday Forms of Regulatory Capture*¹⁰

As enormously high profile and politically charged events, the free power to farmer issue and the Delhi tariff hike are only the visible tip of the regulatory iceberg. Most of the regulators’ interactions with government and decisions are not media worthy and have been only thinly studied. The evidence of these below-the-surface regulatory events indicates substantial signs of highly corrosive and everyday forms of regulatory capture.

In a rapid assessment of regulation in five states, Mahalingam (2005) finds that state governments influence the regulatory process by simply asking state controlled utilities not to file for tariff revision at politically inconvenient moments. They also direct state-owned generating companies that sell power to the distribution companies to slash their rates even at the expense of incurring losses, so that no tariff revision at the distribution end is necessary.

Even more damaging, regulators may internalize the motives of their political masters. For example, following the decision to provide free power to farmers in Tamil Nadu in 2005, the state utility has not filed a statement of “Annual Revenue Requirement” meant to be filed each year, nor sought any tariff increase. Indeed, observers in the state say they are unlikely to file one until after the next election in 2006. For their part, the regulatory agency has stated its reluctance to query the utility on its failure to submit a statement for fear of embarrassing the state government (Electricity Governance Initiative-India 2005).

¹⁰I use a title with a nod to the insightful work of James Scott in the entirely different context of peasant resistance.

In other cases, the regulator may display some will for action, but may be impotent when it comes to enforcement. An intriguing study of several regulatory orders conducted by a public interest group provides several examples of state governments failing to comply with regulatory directives (Prayas 2003). In the state of Haryana, the government simply rolled back the tariff increase ordered by the regulator without consulting or informing the regulator. In several states, governments simply fail to pay the subsidy promised, and on the basis of which tariff orders are drawn up. In Madhya Pradesh, the utility implemented a tariff revision without regulatory oversight arguing that although the regulator had been legally constituted prior to the revision, not all the members had taken their oath of office. The casual attitude to the regulator extended to difficulties it faced in getting the state government to provide it necessary staff and infrastructure. In Uttar Pradesh, following a frustrating series of interactions with the utility, during which the utility repeatedly failed to collect or furnish necessary information, the regulator caustically noted that the utilities ...”have been functioning as administrations fulfilling the political and administrative agenda of the state government... the state government continues to approve major investments... decides on the location of substations and employment policies, including influencing transfers and promotions” (quoted in Prayas, 2003, p. 39).

Institutional Roots of Everyday Forms of Capture

Whether such examples of regulatory impotence are due to weaknesses in the law, or in regulatory capacity to enforce it need to be examined further. However, it is already apparent that at least a portion of regulatory weakness can be explained by the institutional roots of regulatory agencies themselves.

Regulators and their staff are largely drawn from government or from public utilities, an inescapable consequence of the state monopoly over the sector for five decades. Thus, in 2003, about half of the key posts in state regulatory agencies – chairman, member and secretary – were occupied by former members of the Indian Administrative Service (IAS) or employees of State Electricity Boards (Prayas 2003). The hold of the IAS, the vaunted “steel frame” of Indian governance is particularly tight – 10 of 21 Chairs and 10 of 14 Secretaries reviewed have an IAS background. Indeed, murmurs are growing about regulatory positions as IAS sinecures. The power sector establishment is also well represented – 20 of 31 members come from the state owned enterprises in the power sector.

Under these circumstances it would not be surprising if many regulators and their staff had a somewhat attenuated notion of independence from the state, and saw their autonomy, as the Tamil Nadu Secretary does, as “just that of any other government body” (Electricity Governance Initiative-India 2005). At the same time, timidity born of a career in the bureaucratic bosom is not a necessary outcome; some regulators, such as the first Orissa regulator, have certainly embraced the spirit of their new position with enthusiasm, embracing concepts such as public disclosure and transparency which belie the secrecy and paternalism associated with the IAS (Dubash and Chella Rajan 2000). Nonetheless, until a more robust culture of regulatory independence develops, electricity regulation is likely to be dominated by individual who see the world in the same hues as the state agencies they regulate.

It is perhaps in the hope of encouraging such a perspective that state governments take a keen interest in the appointments process. The law both allow for a selection committee to nominate two names for regulatory commission members, from which the government is obliged to pick one. In one case, again in Tamil Nadu, the government found the panel of names not to its liking, dismissed the selection committee, and constituted a new one (Electricity Governance Initiative-India 2005).

The problem of independence is, if anything, compounded at the staff level. Prayas (2003) found that on average two thirds of the technical staff in a sample of 13 regulators were on deputation from the regulated utility. With open channels of communication, shared interests, and inside knowledge of the regulated utility, it is hard to imagine such staff advocating measures that would adversely affect their home institution.

Aside from independence, regulators are hamstrung by a simple lack of personnel and resources. The thirteen regulatory agencies studied had between five and ten staff divided among the key posts of technical, financial and economic, and legal and administrative responsibilities. This strength is often inadequate to conduct the analysis and research necessary to scrutinize complex tariff filings, let alone to regulate proactively (Prayas 2003).

The solution to weak regulatory capacity is to hire consultants. Regulatory commissions spend between a modest 2% and 17% of their total expenditure on consultants (Prayas 2003) In a few cases, however, donor agencies have funded large programs of consultant support. In Andhra Pradesh for example, the World Bank paid Rs. 70 million for eleven months of consulting support for a regulatory commission whose annual budget was Rs. 35 million. Moreover, the choice of consultant reportedly rests entirely with the donor agency (Electricity Governance Initiative-India 2005). Beyond these sketchy details, the role that donor agencies actually play, the manner in which they shape regulatory culture, the extent to which they actually build regulatory capacity or simply play a regulatory sub-contracting role are all deserving of far greater exploration.

Commenting on the experience with regulatory independence from a perspective wider than that of electricity alone, a prominent Indian columnist suggests that genuinely independent regulatory authorities are only possible if politicians are willing to stand behind and accept responsibility for decisions of regulators they appoint. In his view, such a happy state would represent a maturation of India's democracy and economy. In the absence of such maturity, he suggests, regulatory authorities will be "independent only in name inasmuch as their ability to follow policies that may have an adverse impact on the electoral fortunes of incumbent governments will continue to be highly circumscribed" (Srinivas Raghavan 2001).

This rather gloomy picture of the future of regulation in India does appear to correspond well to the empirical nuggets described above, particularly the free power to farmers and Delhi tariff stories. But if state capture is indeed the dominant expression of regulatory politics, where does that leave the normative agenda of regulation? All that has been gained is some transparency and awkward question-asking by regulators, and an occasional maverick IAS officer who takes seriously rhetoric about independence, all embedded in an institutional substrate of domesticated and quiescent regulation. This hardly seems worth the fuss and the institutional costs of establishing state by state

electricity regulators. And it certainly is inadequate to solve the problems that motivated the establishment of regulatory agencies to begin with. If true and inescapable, the narrative of state capture is a deeply problematic one for the future of Indian regulation.

Fortunately for the future of regulation in India, “mature” politics as a precondition for effective regulation appears, on scrutiny, to be a somewhat false construct. Indeed, it slips back into the dichotomy between independence on the one hand, and capture on the other. In practice, in regulatory societies that by any measure must be counted as mature, such as the US, the tension between regulation and political outcomes is very present. Thus a paper by the head of the practitioner-oriented Public Utility Research Center which runs training programs for developing country regulators, starts with an anecdote about the Governor of Iowa’s first request to a newly appointed Chairperson of the Iowa Utilities Commission: don’t do anything that would cost the Governor the next election (Jamison 2004). The paper continues: “In developing or refining independence the regulator becomes a player, which compromises the very independence he or she is trying to create.” The paper goes on to spell out a personal toolkit through which regulators can become effective “players”. Maturity in regulation, this practitioner seems to argue, rests in accepting regulation as an inescapably political sphere, and learning to work most effectively within available political spaces.

Narrative Three: Regulation as Contested Political Space

Taking the stance that politics in regulation is to be managed rather than excluded opens the door to entirely new, and productive ways of viewing the regulatory process. Following Prosser (1999), regulation is inescapably political both because of the unavoidable politics around tariff setting and because of the social content embedded in economic regulation. But allowing regulators to internalize this insight in their decisions risks dissolving the separation between regulatory decisions and policy decisions. According to this distinction, the credibility of regulatory decisions is based on expertise, while policy decisions that are based on judgement should rightfully be the province of politicians who are regularly held to account by voters.

In practice this separation is untenable.¹¹ Policy decisions are seldom so tightly written as to leave room only for choices that can be decided exclusively on technical grounds. Indeed, the reality is more often that policy decisions are left deliberately vague so as to allow politicians to blame the regulator for a politically unpopular decision. For example, the Karnataka Act prohibits the regulator from showing preference to any consumer, but provides for an exception to allow for the paying capacity of consumers and the need for cross subsidization, which essentially leaves the task of political judgement with the regulator (Sridharan no date). In practice, regulators have a “variety of tasks which cannot be reduced to any single logic, economic or otherwise” (Prosser 1999, p. 199).

¹¹ Prosser suggests that the argument for strict separation that rests on political accountability is weak because elections are hardly likely to be decided on utility tariffs. In India there are sufficient cases where tariffs have swung elections, or have been perceived to do so, to take seriously the democratic accountability argument for strict separation of regulatory and policy roles. However, as suggested here, there are other reasons to discount the separation argument.

That regulators have to be “governments in miniature” does raise the problematic question of their democratic legitimacy. Prosser (1999) suggests one possible and viable answer to this question lies in proceduralism – regulatory legitimacy rests on procedures that ensure openness and participation to ensure as many views as possible are placed before the regulator – a stakeholder theory of regulation. He further suggests that proceduralism by itself is insufficient, given unequal bargaining powers between stakeholders, and advocates a “new proceduralism” which also includes measures to equalize the imbalance in bargaining power across stakeholders.

Proceduralism as a way of promoting legitimacy is particularly attractive in India, where other pathways to legitimacy are particularly unconvincing. Regulatory legitimacy through technical or economic expertise alone is unconvincing given the propensity of state governments to appoint cronies. In one notable case, a retired military Colonel with no expertise in electricity was appointed Chairperson (Electricity Governance Initiative-India 2005)! Second, legitimacy through effective political oversight is also ineffective. Prayas (2003) note that although regulators file annual reports with state legislative assemblies, there was not a single instance of a regulator having received any feedback or comment from legislators. Finally, as Prosser (1999) points out, through norms of openness and participation, the regulatory model theoretically, at least, builds in far greater scope for decision-to-decision accountability than the political process, an argument which certainly holds true in the context of weak political accountability in India.

The remainder of this section examines recent electricity regulatory practice through the lens of stakeholder theory. Specifically, I look at the nature of the political space established by regulation, its openness, the extent to which it provides space for participation, whether this space is occupied, and whether the manner of occupation suggests some measure of balance in power differentials.¹² Doing so requires some tedious sorting through legal provisions and some informed guess-work about the effectiveness of those provisions. The discussion below draws heavily on two preliminary efforts to gauge regulatory process, a mail-based survey of thirteen Commissions by the activist-research organization Prayas, and early results from an ongoing “Electricity Governance Initiative” which examined regulatory process in three states.¹³

The framework of central and state acts consistently includes provisions that support transparency in regulatory functioning. For example, under Section 86(3) of the Indian Electricity Act 2003, state commissions are enjoined to ensure transparency while exercising its powers. A number of procedural steps follow from this Section. A sample of “Conduct of Business” regulations in three states suggest that regulators do, in fact,

¹²There is an emergent interest in developing frameworks to understand and assess regulatory practice from a procedural perspective, with an emphasis on the democratic underpinnings of those procedures. Lodge (2003) examines regulatory transparency along four axes: voice, choice, representation, and information. Hira et. al. (2005) review various models of representation within six countries. Berg (2000) identified nine principles of best practice regulation from a practitioners perspective.

¹³ The Electricity Governance Initiative in India (2005) seeks to assess various arenas relevant to electricity governance – legislative, executive, and regulatory – using categories such as transparency, participation, accountability and capacity. The study, in which I am involved, will also be extended to Indonesia, Philippines and Thailand.

specify that any person shall be entitled to obtain copies of decisions and other records (Electricity Governance Initiative-India 2005). However, they also allow for the relevant commission to specify certain documents secret, although there is no good procedure for this specification. Moreover, the commissions do not have procedures that facilitate transparency, such as well-indexed databases, nor are there procedures to ensure wide dissemination of information. That these provisions for access to information are available is a necessary condition for an effective process of stakeholder engagement, but it is by no means sufficient. In their review of 13 Commissions, Prayas (2003) found that a meagre 10-20 people had visited the libraries of all the commissions over the course of a year.¹⁴

In the three Commissions sampled, procedures for regulatory process and decision making are well laid out and publicly available. In addition, public hearings are open although there is some discretion exercised in deciding which members of the public are allowed to participate. For example, in Delhi, only those members of the public who have sent in written representations in advance are allowed to participate. Hearings about tariff filings, in particular, were widely announced and well attended. However, Prayas (Prayas 2003) found that for the most part, Commissions did not have a procedure for informing the public about the lower profile, but critical, technical validation hearings at which issues such as the validity of the data, and procedure for disposing of issues are determined.

Hearings, by themselves, are however no guarantee that public input is considered. One important safeguard is a requirement in Conduct of Business Regulations that require orders to be reasoned. However, despite this safeguard, the Electricity Governance Initiative-India (2005) reports a notorious case where the Andhra Pradesh state regulator only reluctantly convened a hearing on an issue after civil society pressure, only to issue a sixty page order the very next day!

To assist the participatory process, the Electricity Act allows for formation of State Advisory Committees to represent stakeholders including commercial users, consumers, and academics. In only one state of the thirteen surveyed by Prayas (2003) had the Advisory Committee met the minimum number of times specified in the relevant law or regulations. Most had no documentation, such as an “action taken report” on the issues raised by the Advisory Committee.

Other than the Advisory Committees, institutional mechanisms for representation of consumers are almost non-existent. Indeed, regulators do not currently view proactive advancement of consumer representation as among their duties. In only one state, Karnataka, is there a formal office for representation of consumers. In a few other cases, such as Haryana and Andhra Pradesh, a regulatory staff member is appointed to voice consumer perspectives on an *ad hoc* basis (Electricity Governance Initiative-India 2005). None of the states has any explicit mechanism to identify and represent the views of particularly vulnerable populations, such as those recognized under the Indian

¹⁴ While many others may have obtained information from web sites, it is likely that for various issues requiring serious intervention, members of the public would have had to pay a personal visit to extract detailed documents.

Constitution in separate Schedules of Tribes and Castes who have suffered past discrimination.

In sum, the picture that emerges is one of a formal regulatory apparatus that creates conditions and space for the forms of voice and interaction on which a stakeholder theory of regulation rests, but that this vision of regulatory functioning has certainly not been internalized by regulators themselves. Instead, procedures are followed somewhat mechanically. Most problematic, the Indian electricity regulatory experiences suggests few efforts at what Prosser (1999, p. 211) calls “the development of structures for reflexion... including through compensation for inequalities in power and information.” Consequently, the current situation by no means meets the test of an open political space for effective and balanced articulation of multiple interests.

Nonetheless, there are at least two reasons why the regulatory process will continue to evolve, and most likely in the direction of a more explicitly open political space. First, the regulatory task and the legal requirements for transparency have put far greater information in the public domain than before, and forced efforts at closing what had been a vast information gap. In part, the magnitude of the gains are simply a reflection of the extremely sorry state of the pre-regulatory era. For example, the Delhi regulator found that the pre-privatization public utility had not prepared audited annual accounts for the prior eight years (Prayas, 2003). Regulation is, at minimum, likely to yield the baseline information for public debate about the sector.

Second, there is a small, but emergent core of public interest groups engaged in the regulatory process that combine technical expertise, a broad credibility with other actors in the sector, deep roots in civil society networks, and the strategic ability to act proactively (Electricity Governance Initiative-India 2005). For example, in Tamil Nadu, one such group filed a petition arguing that the state regulatory commission had unnecessarily excluded the possibility of examining decisions taken before the inception of the commission, thereby foreclosing the possibility of reviewing power purchase agreements which constitute the bulk of the cost of electricity to consumers. In another example, a group in Maharashtra successfully petitioned the state regulatory to make public key documents including all power purchase agreements, not a mean feat since one of those agreements was that of the highly sensitive and politically charged Dabhol project part-owned by Enron (Prayas 2003). These few groups are ever more tightly networked and intentionally engaged not only in regulatory intervention but in institutional analysis and scrutiny of regulatory process.

The vast majority of public interventions in the regulatory process, however, are of particular sets of consumers which focus more narrowly on the tariff revision process and the interests of the petitioning party. In Karnataka, for example, the previous two tariff revisions attracted 6000 and 8000 such petitions (Sridharan, no date).

These examples contrasting return us to a debate about whether the rise of a regulatory state signals an attenuation in the quality of citizenship and its replacement with a more narrow public political engagement by individuals in pursuit of consumer rights (Lodge 2004). The large number of petitions in response to a tariff filing in Karnataka does indeed suggest a vigorous call to arms by consumers, illustrated even more strongly by the earlier description of organized action by Resident Welfare Associations in Delhi in

response to a recent tariff hike. However, I suggest that the embryonic work of public interest groups that are engaging the details of the electricity regulatory process, and which fall squarely into the category of citizen rather than narrow consumer action, is a more potent indicator of whether the stakeholder perspective on regulation takes hold. Particularly impressive are the intentional efforts to seed similar public interest intervention in other states, and to deepen and strengthen the institutional mechanisms for stakeholder engagement within the regulatory process.¹⁵

Interestingly, these prototypical institutional features – access to information, hearings and so on – were somewhat mechanically written into the structure of regulatory bodies as part of the exercise of policy transplant. It is arguable whether they were salient to the somewhat simplistic idea of political independence that motivated the World Bank, the state officials they engaged and the consultants who drafted the legislation. However, if effectively activated through the efforts of public interest groups, these same institutional features could be the basis for a much more meaningful stakeholder engagement within the sector than occurred prior to regulation or in the early years of regulation.

Whether this presumptive mode of operation also serves the original purpose of providing predictability and stability to investors remains to be seen. By providing stable rules of engagement it may indeed enhance investor security. On the other hand, mechanisms for public interest intervention will also no doubt be used to ask awkward questions, for example, confronting regulatory short-cuts such as “multi-year-tariffs” aimed at investor comfort.

The current empirical record of electricity regulation in India by no means unambiguously supports an interpretation of regulation as well functioning sphere for stakeholder engagement. But it does hold out the promise of doing so, and of providing a new political space for articulation of citizen activism.

Conclusion

India, and the electricity sector in particular, was certainly swept up in the larger enthusiasm for demonstrating hospitality to foreign investors during what Stiglitz has called the “Roaring Nineties.” Nudged along with the help of both carrot and stick by the World Bank, independent regulation was injected into the Indian political lifestream without much fuss or debate, through its operationalization in one poor, and relatively off-the-beaten-path state. The attempt to displace historically embedded politic relationships around which the sector was organized simply by overlaying a new, and relatively weak, institution quickly proved unrealistic as regulators displayed minds of their own. Ironically, from an investor-first perspective, the ideal solution quickly morphed from regulatory independence to more thorough subjugation of regulators to explicitly investor-friendly policy directives. In other words, there was a “right” and a “wrong” form of state capture.

¹⁵These efforts are particularly relevant since, as Sridharan (no date) astutely notes, industrial users in India have opted to use exit rather than voice, which removes one large and highly resourced potential actor in the Indian regulatory process.

In reality, the weak institutional separation between regulators and state all but guaranteed a strong measure of state control over the regulatory process. While regulators may confront the government on high profile issues, much regulatory decision making takes place out of public scrutiny, transparency provisions withstanding. If anything, electricity regulation is characterized by what I have called “everyday forms of capture” to signify the small but significant decisions which are shaped by factors such as the socialization of staff shared with regulated entities, bureaucratic mindsets that have congealed over decades of government service and so on. So viewed, electricity regulation has become, or is becoming, just another part of the larger process of accommodating various interests within the sector, without providing scope for scrutiny, debate, or a change in direction.

The process of greater private participation in electricity, which has just started, is unlikely to change this underlying dynamic, although it may change the modes of accommodation. There is already some evidence that in the context of weak regulatory capacity, regulatory accommodation happens off site, through networks of consultants who do much of the day-to-day work of regulation, and at different times answer to government, regulator, or regulated. The role of consultants in the regulatory process, only briefly discussed in this paper, is certainly an area worthy of further study.

Against this larger backdrop of taken-for-granted regulatory capture, creating democratic space through regulatory proceduralism seems an uphill task, especially when the capacity to occupy that space is thin. The existence of a core of public interest groups determined to occupy, widen, and deepen democratic spaces provided by regulatory bodies, along with some internal ferment among regulators themselves, provide the only indications that electricity regulation may yet provide a genuinely new and more democratic forum for decision-making in the sector.

Locating regulatory politics within the larger crisis of democratic politics in India suggest an additional point. Regulatory proceduralism, it is often argued, is one possible bulwark necessary to defend regulatory legitimacy to take political decisions, particular as compared to the automatic legitimacy of elected representatives to take these decisions. However, in India today, politicians and their entrenched interests are far more likely to be seen as illegitimate than legitimate decision-makers. Hence illegitimacy by association is a far greater risk for regulators than concerns that they are unaccountable. On the other hand, for a frustrated public, regulatory procedural correctness, with all its inadequacies, may be an acceptable signal of legitimacy. In other words, in the current political context the bar to regulatory legitimacy is set quite low.

By practising regulatory proceduralism in a manner that truly engages stakeholders, regulators hold the potential to genuinely re-shape the politics of electricity in India. However, procedural correctness can only be a down-payment on legitimacy; it must sooner rather than later translate to improved outcomes for consumers. Given the relatively weak mechanisms of enforcement available to regulators, once again procedures of transparency and relentless exposure are the best means to achieving favourable outcomes.

Electricity regulation today is poised between being absorbed into the politics as usual of the electricity sector and creating a genuinely new space for open political engagement

on electricity. Although conceived as part of the neoliberal separation of politics and economics, and in the service of attracting capital, expansion of the democratic spaces within the regulatory framework may yet make regulatory agencies the best hope for a new, and more open politics of electricity in India.

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