BUSINESS STANDARD

"A stronger backbone for regulators

The Planning Commission's draft of a framework for infrastructure regulation deals with past infirmities but leaves major faults untouched"

by S L Rao (December 20 2013)

Statutory Regulators were first created in India in the financial sector. Reserve Bank, Forward markets Commission, Railway Rates Tribunal, were some of the regulators created before independence. SEBI and IRDA followed later. TRAI was created in 1997. Orissa Electricity Regulatory Commission, CERC, came in 1998, and later other state electricity regulatory commissions followed. In more recent years, the Petroleum and Natural Gas Electricity Board, the Information Commission at the Centre and states to implement the Right to Information Act, The Airport Economic regulator, Competition Commission, were created. Others in the offing are statutory regulators for Coal, Roads, real Estate, and others. Their decisions are subject to appeal to Appellate Tribunals headed by retired judges.

The functions, appointment, composition, terms of service, reporting relationships, of the various statutory regulators have varied with the willingness of the concerned Ministry to hand over its authority to an independent regulator. In the case of infrastructure (telecom and electricity), the intention was to encourage private investment (domestic and foreign), in capital intensive projects, stimulate competition and safeguard the consumer interest. External pressure from the World Bank that felt private investment required that decisions with major financial impact be taken independently, transparently and in consultation. The need for this was greater in India where most infrastructure was dominated by government owned enterprises. Given the multiplicity of ministries and the intense battle to protect turfs, each Ministry created its own statutory regulators. There was no coordination between them as there was not between Ministries.

Powers of each infrastructure regulator ranged from decision making on licensing entrants, determining tariffs, approving capital expenditures, settling consumer grievances, safety issues, encouraging competition at all levels (investment, tariffs, consumer choice), and stimulating investment. Government departments that had to notify the rules that activated the regulatory authority under the concerned Act, did so partially and/or after long periods of time. Some regulators could not exercise full authority for a long time. Many state governments instructed their enterprises not to implement the order of the Regulator. Penalties for non-compliance ranged from pittances to substantial ones.

Selection of regulators was by government functionaries. Tenures were sometimes very short, since the retirement age was 65. The Secretary of the Ministry was permitted to become a regulator. Selections almost always were confined to central service officers of government, and sometimes other services and government controlled enterprises. Government servants were paid the approved salary after deducting their pension from earlier service, thus demonstrating that their work as regulators was a continuation of their past government service. There is no provision for their oversight except by Courts on appeal against their Orders, and for an annual report tabled with the concerned legislature.

Since 2011, the Planning Commission has been unsuccessfully trying to put together a common framework for infrastructure regulation. The draft bill deals with soe infirmities of the past, but leaves untouched the major faults.

It gives tariff setting powers to all regulatory bodies. Governments have to explain to their legislature if they use their powers to overrule a Regulatory Commission's (RC) Orders. Government servants appointed to regulatory positions will retain their full pensions. No one from the concerned Ministry will be appointed to its Regulatory Commission for some time after he has left the Ministry.

Threre are lacunae that must be addressed. "Offices of profit" are forbidden to members. This is too vague and ignores newspaper columns, writers, adjunct professors, membership of Boards of companies in quite unrelated areas.

The Draft Bill does not provide overriding any conflicting provisions in existing legislation regarding any infrastructure regulatory body. It

still does not seek to rationalize the proliferation of regulators, with every Ministry creating one or more independent regulatory commissions. 'Regulatory diarrhoea' is not sought to be controlled. As an example, all Energy issues are not under one regulator, (Power, Oil and Natural Gas, Coal, Atomic energy, Renewable Energy), as must Transport (all Roads, Inland Waterways and Railways). Accountability of Regulators continues to be restricted to the annual reports they must submit to the legislatures, though never discussed by legislatures. There is no mechanism to discipline them and their Members. We should introduce the American system of independent regulatory bodies appearing regularly before a committee of the concerned legislature to answer its questions. The Commissions must not have to explain the rationale for their orders to the legislature committee. The fiction of "regulatory assets" introduced by some state electricity regulatory commissions, whereby legitimate expenses are kept aside and not given in tariffs, should have been specifically forbidden. All approved expenditures given in tariff submissions must be allowed in tariffs. Regulatory Commissions must either allow or disallow expenses of the regulated entities in determining their tariffs. The Draft must put a limit on cross-subsidies and its reduction each year. Penal powers for Regulatory Commissions to be imposed on the office-bearers and concerned functionaries of a utility, for non-compliance of orders, must be laid down. Petroleum and Natural Gas Regulatory Board, and Tamil Nadu Electricity Regulatory Commission were non-functioning for some time because the administration did not notify their powers. This should have been forbidden. Such a provision exists in The Right to Information Act.

The Selection Committees for regulators must make provision for non-bureaucrats from academia, Chambers of Commerce, the media, etc. The Bill must provide a penalty on the concerned official who delays completing the selection process in the stipulated time. There must be a numerical limit on present and former government servants appointed to any independent regulatory commission. An upper age limit for candidates above which they cannot be considered must be kept at age 62, so that the appointee can serve a full term of four years. Provision for termination of a Regulator must include provision for an investigating and penalizing agency, perhaps the Tribunal or High Court. Grounds for investigation must include allegations of

corruption or conflicts of interest. Consumer associations must be funded to appear knowledgeably before the regulatory commission. The minutes of meetings of the national and state advisory committees must be published and publicized.

Provision for all appointees submitting an asset list at the outset and thereafter every year includes spouse and children. What happens when the child is estranged or living abroad?

RC's must be required to ask utilities to submit a time-bound plan for implementing the RC's Orders, for example, reducing T & D losses. This will enable mid-course correction of tariffs or other matters, if the implementation is unsatisfactory. The RC's must have a regular monitoring over the year. Some directions of Appellate Tribunals should find place in the Draft. This could be about not allowing "regulatory assets", or not filing tariff requirements in time or at all.

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