

Drafting a Code of Ethics for Regulators

Executive summary

Electricity regulatory commissions have a delicate task of balancing different and sometimes, conflicting interests of various stakeholders. Regulators have to maintain their credibility and stakeholders must perceive them to be fair and impartial. The faintest suspicion of regulatory capture by any stakeholder group (including the government) could significantly erode confidence in this newly-formed institution.

The members of the Electricity Regulatory Commissions, therefore, have to conduct themselves in such a manner as to elicit the greatest respect. They have to observe certain standards of propriety involving impartiality, integrity and objectivity in relation to stewardship of public funds and have to be accountable to the users of the services.

In India, the concept of 'Independent regulation' is still relatively new and the success of this new institution and, in fact, the entire reform process is contingent on the credibility of these institutions and their perceived effectiveness in handling situations. Therefore, there is an urgent need to develop a Code of Ethics for the Electricity Regulatory Commissions that would set certain standards for 'ethical behaviour'.

The Forum of Regulators proposes to develop such a Code of Ethics for regulators, particularly for members of the commission. The Energy Resources Institute (TERI) was asked to undertake a study of national as well as international experience on the Code of Ethics for the Regulatory Commission, seek views from regulators in India (particularly from the electricity sector) through questionnaire survey and consultation meetings on the need and contents of the code; and to draft it.

Key finding of literature survey

The study examined the code of conduct/ethics for members of the following regulators:

- United Kingdom: Office of Telecommunication (Ofcom), Office of Gas & Electricity Markets (Ofgem), Competition Commission & Pension Regulator;

- United States of America: Federal Energy Regulatory Commission (FERC) & Commission of Judicial Conduct;
- Ireland: Commission for Energy Regulation;
- New South Wales (Australia): Independent Pricing and Regulatory Tribunal (IPART);
- India: Judicial Authorities.

International experience shows that regulators in some country (for certain sectors) have framed guidelines on the Code of Conduct/Code of Ethics for their staff and members. In other countries, the general ethical code for the public service sector, serves as an ethical guideline for all government agencies, including independent regulatory entities.

The common principles, which almost all regulators cover in the Code of Ethics are:

- public service values;
- confidentiality of information;
- criminal and civil liability;
- relationship with government;
- accountability of public funds/accountability to government;
- role of chairman and members;
- conflict of interest;
- gifts and hospitality;
- interaction with media;
- political activity.

Some of the important aspects that emerge from the detailed study of the principles of Code of Ethics of various countries are discussed below:

- all regulators comprehensively discuss issues of Conflict of Interest and Guidelines for Gifts & Hospitality. Some of the commissions such as the Competition Commission of the UK has separate guidelines on these two principles (separate from the Code of Conduct);
- on the principle of Confidentiality of Information, some commissions (such as the Ofcom) have stated that disclosure of confidential information is a criminal offence, which is subject to imprisonment of up to two years and/or fine. Some other commissions such as the FERC only impose restriction on

providing confidential information but have not stated any penalties for it;

- it is generally a practice with regulators that the communication between the commission and the government or the concerned ministry is through the chairman of the commission;
- depending on the circumstance, sector regulators in the case of UK (such as for telecom and pension) are also subject to civil (or criminal) liability in legal proceedings. While mostly such legal proceedings would be directed towards the commission, in exceptional cases, it can be directed towards individual members and chairman. The Code of Ethics for the Pensions Regulator of the UK says that a 'board member may be personally liable if he or she makes a fraudulent or negligent statement that results in loss to a third party';
- most regulators prescribe accountability through publication of the commission's annual report and the same being presented to the Parliament. The accounts of the commission should also be audited by an external agency;
- Most regulators have fairly detailed guidelines on Conflict of Interest. Some regulators have a provision wherein a Register of the Interests of the members is maintained. The Competition Commission of UK, for instance, states that it would maintain a 'Register of Interest' on its website. More specifically it states, "the register would identify each member, and list each member's current offices, employment, appointments, and other similar outside interests". The Pensions Regulator of UK also mentions that it would maintain a Register of Interest "which would list direct or indirect pecuniary interests, which members of the public might reasonably think could influence board members judgement".

The OFGEM has separate guidelines on Conflict of Interest, which are extremely comprehensive. It states that before a member becomes involved in any decision-making, he should ensure that there is no conflict of interest. If he has an interest, it should be disclosed and he should not vote at the meeting. The guidelines, however, have a provision that authority can suspend or relax this rule prohibiting members from participating in a decision. The chairman will be

the authority to decide the right of a member to participate in any discussion or vote;

- since it is difficult for any code to actually state upfront what could tantamount to a conflict of interest, some commissions such as the Competition Commission of UK, states that interests should be declared by members to the chief executive who can, where necessary, seek legal advice on whether the interest would give rise to conflict;
- most regulators discourage acceptance of gifts (specially above a nominal amount). Some regulators such as Ofcom of UK states that it would keep an Internal Register of Hospitality. The Competition Commission of UK states that the “Member has to disclose any non-trivial gift or hospitality in the previous twelve months from any party which is closely involved in any investigation”;
- on ‘interaction with the media’, regulators state that members should ensure that their views are not in variance with that of the commission;
- all regulators have restriction on the involvement of members in political activity.

Key findings of the questionnaire survey

A questionnaire-based survey on the need and important principles was undertaken and responses were sought from all the Electricity Regulatory Commissions in India. The questionnaire sought views broadly on the following aspects:

- need, objective and content of code;
- role of the chairman and members of the commission;
- communication between the commission and the government;
- issues of conflict of interest, declaration of interest;
- day-to-day functioning of the commission;
- accountability of commission and compliance mechanism.

The main observations emerging from the questionnaire survey responses¹ are summarised below:

¹ Questionnaires were sent to all Regulatory Commissions. However, only six responses were received till March 22, 2007.

Majority of the respondents agreed that there is a need for developing a Code of Ethics for members of Electricity Regulatory Commissions. Majority of them also agreed that the chairman and members should declare personal or business interests which may conflict with their responsibilities as commission members. Further, respondents mostly agreed that chairman and members should declare their assets and liabilities.

On the aspect of delegation of responsibility, all respondents agreed that the responsibility for day-to-day management matters should be delegated to the staff as far as practicable. All respondents also agreed that the decision of individual members under delegated power be recorded in written minutes available to the commission as a whole. This latter provision would ensure greater transparency within the commission.

All respondents agreed that the members of the commission should abstain from taking part or engaging in political activity. All the respondents also agreed that members should not occupy any paid or unpaid posts in any political party.

Notably, a lot of respondents did not agree on certain provisions for accountability and greater transparency. For instance, majority of the respondents did not agree with a proposed suggestion that the commission should release minutes or summary reports of meetings. Majority of the respondents also did not agree that the expenses of the commission be annually audited by any outside auditors. All respondents disagreed with setting up of a panel to oversee compliance of the code of ethics provisions.

Draft Code of Ethics

A presentation on the findings of the literature survey and inputs of the electricity regulatory commissions was made before the members of the FOR at Raipur on March 1, 2007.

Based on this consultation process, the Code of Ethics has been drafted by TERI. This code comprises ten principles and is intended to “state basic standards that should govern the conduct of all Commission Members”. The principles are discussed in brief:

Role of the Commission Chairman

The chairman has to provide effective leadership on matters including the formulation of commission's strategy for discharging its statutory duties, encouragement of high standards of propriety amongst the staff, ensuring that policies of government are taken into account in making decisions, representation of views of commission to the public.

The chairman also has to ensure that the commission meets at regular intervals throughout the year and the minutes of the meetings are recorded. The communication with the ministry will also be through the chairman unless an individual from the commission is nominated for the purpose.

Responsibilities of individual commission members²

Members have to comply with the Code of Ethics at all times and must act in the best interest of the public. They should not misuse information gained in their official capacity for private interest and must follow the essential rules of transparency and consultation. Members must also follow the Principles of Public Life (Appendix A).

Guidelines on acceptance of gifts

Receipt of gifts by commission members should be guided by the highest standards and should not give rise to any suspicion of conflict of interest. Gifts of modest values, however, would be exempted under this principle.

Handling Conflict of interests

This principle broadly requires the commission members to declare, annually, any personal or business interests which may conflict with their responsibilities as commission members. They should also declare their assets with the commission.

It is also required that no single member, unless authorized by the commission, should meet any government officials, ministers and petitioners. There should also be minutes for such discussions, and these should be made available in the public domain.

Personal liability of Commission Members

Although legal proceedings are generally brought against the commission, in exceptional cases, proceedings can also be brought against the chairman or individual members. However, normally commission members do not need to meet the expenses of any personal civil liability, which is incurred in execution of their commission functions.

² Includes the chairman

Delegation

It is stated that to the extent permitted by the Business Regulations, responsibility for day-to-day management matters should be delegated to the staff. Further, this principle adds that the decisions taken by individual members under delegated powers will be recorded in written minutes available to the commission as a whole.

Openness and responsiveness

The commission members are expected to conduct all their dealing with the public in an open and responsible way. They should ensure that all documents of the commission are publicly available, open meetings are held and reasoned orders are issued in a specific time frame.

Interaction with the media

Care should be taken in interaction with the media. Members should consult the chairman when required and in all cases views should not be at variance from agreed commission policy.

Political activity

The members of the commission shall abstain from taking part or engaging in political activities. They should also not occupy and paid or unpaid posts in political party.

Annual reports and Accounts

The commission should adhere to the statutory provision under the Electricity Act 2003, for preparation of the reports and accounts and should timely submit the same to the government.