

It's April—Do You Know Where Your Legislatures Are?

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April brings showers, flowers—and legislative intervention. State legislatures want commissions out of wireline but into green power; they want electric rates lower but electric reliability higher; they want water rates stable but water quality better. They want utilities to improve outage performance, but they decline to fund enough commission staff to produce that performance. Regulators are suffering from whiplash. To solve the problem, consider three questions.

How Should We Allocate Decisions between Legislative and Regulatory Bodies?

Policymaking has five steps: (1) Define the problem, challenge, or goal; (2) identify, assess, and select solutions; (3) apply the solutions to specific problems; (4) create and sustain public support; and (5) evaluate, critique, and adjust. Now imagine a two-dimensional matrix: Make these five steps your rows; label your columns Legislature and Commission. Who does what? You would likely place a checkmark in every cell, with political and regulatory bodies overlapping on every step.

Without principles for sharing responsibility, these overlaps can cause confusion and conflict. Consider typical political management. Squeezing the problem into press-release format produces pressure to solve it by Election Day. Blaming the biggest target lets everyone else off the hook. A public led to expect easy answers won't want to pitch in. Politics favors those who oversimplify and sound certain. Effective regulators, in contrast, acknowledge complexity, uncertainty, and the need for humility. But they also need to make decisions in a timely manner and communicate them comprehensibly.

What Is the Right Mix of Predictability and Flexibility?

To attract serious investment dollars, policymakers must commit predictable constituent dollars. Exhibit A in the rogues' gallery of unpredictable policies is the production tax credit for U.S. wind, where investors suffer a biennial waiting game to see if PTC will survive another budget cycle.

While investors need predictability, regulators need flexibility. They need to adjust their bets with changes in facts: facts about cost structures, levels of competitive entry and exit, technological stumbles, customer resistance. A decade ago, retail electricity competition statutes failed the flexibility test. They (a) fixed the start dates, regardless of the market's readiness; and (b) gave non-shoppers a "default service" price that was artificially low, deterring competitive entry. Now a new set of legislators is repeating their predecessors' errors, enacting renewable purchase quotas regardless of prices, transmission capacity, or availability of lower-cost

alternatives. Encasing answers in concrete before facts are clear prevents regulators from doing what they do best: shaping options to reach goals cost-effectively.

Does Legislative Intervention Necessarily Undermine Regulatory “Independence”?

In the legislative–regulatory relationship, “independence” has multiple meanings. Some want independence to equal isolation: Regulators should wait while legislators legislate; the baton then passes to the regulator and the legislator retires; the regulator then carries out the legislature’s judgments without further political involvement.

Regulators who prefer isolation seek to avoid political interference. But there is a difference between interference and guidance. Isolation leaves the political body without objective advice on feasibility and cost, while the commission loses the political cooperation needed to re-calibrate statutes once experience reveals their inevitable imperfections.

Isolation also has political supporters. New policies have unknown effects: The incumbent could lose business, foreign investment could replace domestic investment, rates could rise. Given the possibilities of disruption, dislocation, and disappointment, some politicians will prefer that their constituents aim their irritation at the regulators and at regulation in general. So after enacting the statute, they move on.

Independence-as-isolation is unrealistic. No decisionmaker is truly independent—from the financial markets, from economic cycles, from citizen irritability, from judges who insist on facts, procedures, and rationality. Politics and regulation are not separate planetary systems whose only commonality is the big bang of national conception. Instead of conflating independence with purity, we might define independence differently: as avoidance of pressures to distort, deceive, or substitute political gain for professional judgment. This form of independence means aiming for the right answer first, then using politics to build support. Rather than asking “Whom do we need to please?” ask “How do we get this right?” With this definition of independence, there will be less need to interfere, distort, and deceive. Instead, legislature and regulator each sees and deploys its independent value. The political process can build solutions on technical foundations; the regulatory process can serve the political function of achieving legislators’ goals. Independence is not sacrificed; it is respected.

Recommendations for Regulators and Legislators

Legislatures and commissions differ in many ways: how their members are selected, how they make decisions, the boundaries on their discretion, how they communicate their decisions, how they are held accountable, the personality attributes that bring success. Despite these differences, a productive relationship is possible, if it emphasizes their commonality—their joint responsibility to serve the public. Here are three thoughts.

Consult continuously, from conception through implementation: While the legal relationship is delegator–delegatee, the practical relationship should be more like architect–

engineer or composer–soloist—one emphasizing grand design, the other making it work, both immersed in the other’s field. The baton may change hands, but the runners have a common plan.

Emulate each other’s best qualities: Politicians can think more like regulators by understanding the technical side, accepting constraints rooted in cost and technology, pressing position takers to use facts and logic, and proceeding incrementally until the factual fog clears. Regulators can think more like politicians, talking to the public in ways they can understand. On this latter point, see the extraordinary [opinion of the West Virginia Public Service Commission](#), explaining to recession-suffering citizens, in non-technical terms, the reasons and reasoning for a \$50 million rate increase. (Also eye-catching is the Commission’s decision to subject a unanimous “settlement” to a full evidentiary hearing, then to reduce the settlement revenue requirement by \$10 million. “Settlement” is the parties’ misnomer for their proposal to the Commission. See the essay on settlements.)

Take joint responsibility for results: Joint responsibility emphasizes results over roles, each party assisting the other’s success. It beats blame-shifting (“I’ve done my part; the failure is your fault.”). Because each party performs its legal role, independence remains relevant, but that role-independence is a contributor to the result; it is not its own result.