

The Effective Regulator: Decisiveness

Scott Hempling
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It has been a stereotype of political wisdom that the bureaucrat is ever ready to exercise authority arbitrarily. But there is the far greater danger that the second-rate, insecure personality who often finds his way into bureaucracy will become uncomfortable at having to exercise authority and will anxiously seek to placate as many interests as possible. This fear to offend, complaisance, and readiness to listen and be 'fair' and 'reasonable' clog the muscles of the will, and what begins in amiability can end in corruption.

— L. Jaffe, "The Scandal in TV Licensing," Copyright 1957, by Harper's Magazine, Inc. Quoted in A. Kahn, *The Economics of Regulation*, Vol. II at 88 n.122 (1988 ed.).

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The decisive regulator makes decisions (1) required by the public interest, (2) when the public interest requires it, (3) regardless of discomfort felt, (4) using a logical method and an active approach.

"Required by the public interest": Today's regulatory activities are predominantly docket-driven and stakeholder-driven: rate increases, capital expenditures, mergers, certificates, licenses, and sitings. Paying attention only to these private requests puts the public interest on the sidelines. The decisive regulator therefore asks not "What decisions do these parties want?" but "What decisions does the public interest require?" She identifies the questions no party has asked. She thus converts private pleadings into public-interest dockets: investigations, inquiries, and rulemakings.

"When the public interest requires it": Decision avoiders disguise their hesitance with the sounds of savvy—"We have to be cautious....We don't want to box ourselves in....Let's not get ahead of the other states." These statements lack substance. My firsthand experience: When I ask commissioners why they have no merger policy, I get one of two answers: "We have no merger pending, so we don't care about it" or "We have a merger pending, so we can't talk about it." Twenty-six years and three dozen mergers later, regulatory "caution" has produced more opportunistic transactions than competitive market structures.

Like geological sediments, today's regulatory procedures comprise layer upon layer of historic habit. The decisive regulator questions the status quo. She asks continuously, "Why do we do things the way we do?" and "Why not try another way?" Decisiveness is not impulsiveness. It includes deciding not to decide immediately, but to probe: "It has been 10 years since anyone examined the mix of competition and regulation. We should be re-examining continuously. Let's begin." (But do complete what you begin. See Mark Twain, *Innocents*

Abroad: "I must have a prodigious quantity of mind; it takes me as much as a week sometimes to make it up.").

"Regardless of discomfort felt": I recall a state legislature in 1999 that was asked by interest groups to replace a monopoly electricity market structure with retail competition. Tight term limits meant that one-third of the State House was new. Their leader complained, "Making these new legislators address an issue so complicated is unfair." Unfair to whom? Inexperience cannot excuse indecisiveness. Decisiveness attaches to the oath of office. Discomfort with decisiveness does have honest roots. Most new regulators lack regulatory experience. Even the most experienced face challenges without precedent. For conscientious regulators, inexperience breeds humility; humility breeds caution; but caution, unguided, becomes indecisiveness. And in a docket-driven environment, indecisiveness leads to reactivity. Policymaking becomes the sum of approvals and disapprovals of private-interest requests. That is not a public-interest result.

So what does the inexperienced regulator do? Decide only what one is competent to decide; for the remaining issues, put them on a timeline. Instead of the platitudinous "now is not the time," try "We will master this issue and decide by April."

"Using a logical method and an active approach": A decisive regulator decides the right things at the right time. She uses a logical method, five steps in logical sequence: (1) determine the industry structure that best aligns private behavior with public interest; (2) establish performance standards for producers and consumers; (3) establish financial consequences for performance that meets, exceeds, or falls below those standards; (4) create processes for evaluating performance and assigning the consequences; and (5) establish procedures for the periodic re-examination of the foregoing four steps. The decisive regulator constantly organizes her work life to complete this sequence.

As for active approach, consider regulatory legend Peter Bradford's hierarchy of regulatory decisiveness based on boxing: Rocky, Rope-a-Hope, and Canvasback. See Bradford's article, "Gorillas in the Mist: Electric Utility Mergers in Light of State Restructuring Goals," *NRRI Quarterly Bulletin*, Vol. 18, No. 1 (1997). Lacking Bradford's metaphorical gifts, I will call these decisionmaking styles active, reactive, and passive.

The active decisionmaker directs parties to the commission's questions, organized according to the above five sequential steps. This approach converts private-interest applications into public-interest inquiries. She requires current filings to address future consequences. She critiques present practices (those of producers, consumers, and the regulators), then realigns them with the public interest.

The reactive regulator answers the parties' questions, but omits her own questions. Reactive decisionmaking involves some thoughtfulness, but is bounded by the parties' requests. The five steps toward effective regulation are absent. Consider mergers

again. Reactive regulators ask, "Is there any harm?" Active regulators ask, "What industry structure most likely will align private behavior with public interest? Is this merger consistent with that industry structure?"

The passive regulator accepts parties' requests without independent thought. One can cloak passivity in wig-and-scepter sentences like "We find that the opponents' speculation does not satisfy their burden of proof." But the real burden of public interest promotion belongs with the regulator, not with the opponent.

Why are regulators so often in "reactive" rather than "active" mode? State statutes usually entitle private requestors to answers within a specified time. Commissions then allocate scarce resources to these deadlined (reactive) proceedings first, leaving insufficient resources for commission-initiated (active) proceedings. These pressures undermine purposefulness. The commissioner coming to work without her own purpose finds her day filled with other people's purposes.

Recommendations for Regulators

For those seeking an active approach, John F. Kennedy's inaugural speech, paraphrased, remains a reasonable guide. The active regulator tells parties: Ask not how regulation can advance your private interest; ask how your private behavior can serve the public interest. Require private requests to address public-interest questions by establishing advance expectations in all substantive areas. Examples:

- 1. For rate increase filings, require the utility to demonstrate consistency with optimal practices in all major areas of its business.*
- 2. For rate decrease filings, require the consumer advocate to propose programs by which consumers will use service efficiently.*
- 3. For merger applications, require the utilities to show that (a) they are already achieving all economies of scale and scope available to them as separate entities, (b) the merger's purpose and result are improved efficiency and service quality, and (c) the merger will not reduce competitors' access to "bottleneck facilities."*