The Effective Regulator: Independence

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Independence . . . is loyalty to one's best self and principles,
and this is often disloyalty to the general idols and fetishes.

— Mark Twain

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The fourth attribute of effectiveness is independence. But independence from what? For what purpose? If we are casual with the concept we will not appreciate its power. I will distinguish literal independence (unachievable, undesirable) from effective independence (essential, but hard to achieve).

Literal Independence

Literal independence is unachievable. Court challenges, legislative overrides, financial markets, and public ire: These four pressures constrain independence, but they inject accountability.

Court challenges: To avoid judicial reversal, regulators must respect substantive and procedural statutes, root their decisions in the record, reason logically and clearly, and explain departures from precedent.

Legislative overrides: The commission is a delegatee of the legislature, never fully independent of it. The breadth of the delegation—the extent of commission discretion—depends on legislative trust: trust that the judgment, expertise, and speed necessary for regulatory decisions is achieved better by a commission than by a legislature.

Financial markets: Utilities are capital-intensive. Capital intensity means capital dependency. The suppliers of debt and equity do not always act rationally, patiently, farsightedly or public-spiritedly, but their confidence in commissions is essential to utility survival. The regulator cannot ignore them.

Public ire: The regulatory ideal of objectivity, merit, facts, and logic co-exists with an impatient public. My essay, *The Effective Regulator: Purposefulness*, pointed out that the public interest has many components: health, safety, economic survival, environment, long-term interests, and short-term interests. Regulators must seek the best resolution of these conflicting components at reasonable cost. Then they must defend their decisions before a public whose irritability exceeds its expertise. While obligated to lead the public, leaders need followers who share their goals. See Garry Wills, *Certain Trumpets: The Nature of Leadership* (2007). To attract those followers, the regulator must make compromises. Regulators are not independent of the public they serve.

Literal independence is unachievable because the regulator is only one of many actors. Courts overturn, legislatures change their laws (e.g., replacing "just and reasonable" with "rates shall be fixed for five years"), lenders lower bond ratings (e.g., because a commission disallows imprudent costs), large customers self-generate (a response to high rates, but resulting in higher rates for others). These forces make democracy work and the economy run. Effective regulation is accountable to them.

Effective Independence

Effective independence means independence from forces that undermine regulation's purposes. What are these forces that block alignment of private behavior with public interest? At minimum, a regulator must be independent of financial or employment inducements. But there is more. A regulator's decisionmaking should be independent of arguments that are unverifiable (e.g., "An authorized return on equity below 14% will cripple us") or legally irrelevant (e.g., "We need this merger to remain competitive"). Regulators also must be independent of adjectives, adverbs, and phrases aimed more at emotions than intellect (e.g., "chilling effect," "rate shock," "rate relief"). (For more on adjectives, consider Mark Twain's comment: "God only exhibits his thunder and lightning at intervals, and so they always command attention. These are God's adjectives. You thunder and lightning too much; the reader ceases to get under the bed, by and by." From his letter to Orion Clemens, 3/23/1878.)

Independence is assisted, paradoxically, by attentiveness to the forces that undermine independence. A colleague once advised me, "Keep your friends close and your enemies closer." Attentiveness does not mean selling out; it means studying and monitoring the parties' motivations so as to spot and exploit opportunities to align those motivations with regulatory purpose.

Independence does not mean independence from one's own pre-existing views. A hunch is not a bias. A bias is an inability or unwillingness to examine facts and reason objectively. A hunch is a tentative conclusion, based on education, observation, and experience. No one wants a regulatory bench whose mind is a complete blank. The regulatory mind is full of experiences, prior readings, and stray facts diligently and casually acquired, which together produce hunches. Hunches are unavoidable and useful—as long as the regulator establishes a systematic, objective method for testing them, on the record.

Effective independence is easier to describe than to achieve. The toughest regulatory decisions implicate at least five traditional tensions: technical (engineering, financial, economic, legal) versus policy (can the economy stomach higher rates?); short-term versus long-term (does today's rate freeze weaken tomorrow's infrastructure?); rural versus urban (uniform rates or distance-sensitive rates?); large customer versus small customer (industrial development or low-income protection?); and investor versus consumer (capital market confidence or customer satisfaction?). Regulation, unlike algebra, lacks clear lines between right and wrong. Statutory phrases like "just and reasonable" grant regulators great discretion, allowing for a multitude of sins. That range of discretion demands independence but invites pressures to give in.

Questions for Regulators

1. *Have you identified the forces that undermine independence, in the abstract and in your own commission context?*

2. *Can you tell when a party's presentation crosses the line between advocacy of policy and manipulation of emotions?*

3. *Are you prepared with verbal signals to move that party away from pecuniary presentation and back to the public-interest purpose?*

4. *Do you know the distinction between compromise and caving—compromise being concessions leaders make to ensure they have followers, caving being giving in to pressures that undermine regulatory purpose?*