

Regulatory Literacy: A Seasonal Self-Assessment

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Surely this instruction which I enjoin upon you is not too baffling for you, nor is it beyond reach. It is not in the heavens, that you should say, 'Who among us can go up to the heavens and get it for us and impart it to us, that we may observe it?' Neither is it beyond the sea, that you should say, 'Who among us can cross to the other side of the sea and get it for us and impart it to us, that we may observe it?' No, the thing is very close to you, in your mouth and in your heart.

— Deuteronomy 30:11-14 (translation from W.G. Plaut, *The Torah: A Modern Commentary*).

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In 2010 I taught regulatory professionals in Arkansas, Hawaii, Idaho, Louisiana, Maryland, Montana, New York, North Dakota, Oklahoma, South Carolina, and West Virginia; and in Canada, India, Jamaica, and Nigeria. Common to every audience, from beginners to veterans, is this: People hunger for mastery. They sense that their grasps are soft and slipping; that on the highway of change, traffic is accelerating even as the curves get sharper and the swerves come sooner. And they see their decisions affecting not only trillions of consumer and investor dollars, but also non-financial values—privacy, reliability, the environment and health, even connectedness to democratic processes.

Each seminar segment opens with a general question, acting as both subject heading and probe: How much do people know? Often, even basic questions produce awkward silences. Allowing for shyness and modesty, their current knowledge leaves few with comfort.

This being the season for self-assessment, here are 30 questions any regulatory professional should be able to answer. See how you do. It's less important to have the right answer (of which there are few) than to have some answer.

Regulatory Substance: Its Purposes and Techniques

1. What is the purpose of regulation?
2. In seeking regulatory outcomes, when is it best to (a) prescribe utility actions? vs. (b) set standards (leaving it to the utility to choose the actions)?
3. What are the purposes of rate-setting? What are the main methods? Which methods best achieve which purposes? For example, what are the relative merits of setting rates based on cost vs. based on market value? As to cost, how about embedded cost vs. marginal cost? As to marginal cost, short run or long run?

4. What are the alternative ways to cause customers to bear the cost of pollution caused by their consumption?

5. For proposed large capital projects, what are the key sources of uncertainty and risk? What are the ways to allocate those risks?

6. For utility purchase contracts, such as purchases of coal, gas, or renewable energy: What are the alternative ways to mix short-term, medium-term, and long term arrangements? What are their merits?

7. What are the pros and cons of utility self-build as compared to utility purchases?

Utility's Responsibilities

8. For each industry, what products and services should make up the utility's obligation to serve?

9. What is the utility's performance obligation—average, above average, state of the art?

10. What are appropriate ways to assign consequences to a utility whose performance falls below its obligation?

Markets: Their Purposes and Oversight

11. What is a market? (In the 1988 FERC hearing on the PacifiCorp-Utah Power & Light merger, this question, by an artful cross-examiner, completely tripped up a Ph.D. economist. In Lexis, search for the words "baffling w/15 annihilating." Unfortunately, that was the day the witness brought his children to see him perform.)

12. How can markets help the mission of regulation?

13. What are the features of a market that is effectively competitive?

14. When should a regulator rely on markets rather than on regulation?

15. For each of electricity, gas, telecommunications, and water, what is the optimal market structure for providing each of the essential retail products? What data must we gather to answer the question?

16. Of the present components of service required by customers, which are better provided by the incumbent utility and which by non-utility companies?

Regulatory Administration and Procedure

17. What are the best ways to organize a hearing to ensure airing of all relevant facts?
18. When is it better to accept a settlement than to induce litigation?
19. What contributions to regulation are made by each of the major professional disciplines—law, engineering, finance, accounting, economics, management, politics?
20. What are the skill sets, experiences, and knowledge necessary to have within a commission?
21. What are the relative merits of organizing a commission staff by industry (electricity, gas, telecommunications, water) vs. professional discipline?
22. Should commissions issue press releases or speak only through their orders? What is the role and purpose of a commission’s public relations person?
23. When is it useful, and appropriate, to communicate with utility officials, and others with interests before the commission, informally and privately?
24. What are examples of good commission-legislative relations?

Technology’s Role

25. For each of the regulated industries, what are the existing technologies at each stage of production?
26. What technological developments will change the answer to the preceding question?

Law’s Role

27. What constraints are imposed on regulators by the U.S. Constitution’s five relevant clauses: Commerce Clause, Supremacy Clause, Contract Clause, Due Process Clause, and Takings Clause?
28. What duties are imposed on regulators by these common state statutory phrases: “just and reasonable,” “non-discriminatory,” “public convenience and necessity,” “public interest”?

Commission Relations with Other Government Bodies

29. For each industry—electricity, gas, telecommunications, water—who should be responsible for which elements of policy—Congress, state legislatures, the FCC, or FERC?

30. What principles determine the appropriate level of prescriptiveness in legislation? That is, when is it better for a legislature to grant the commission discretion, as opposed to prescribing a result?

And those are the easier ones. Up one notch are technical questions like: (a) What are the relative strengths of three ways to estimate return on equity—discounted cash flow, capital asset pricing model, and risk premium? or (b) What are the components of long-run marginal cost? Then there are the central but unanswerable questions, like (a) When comparing coal, gas, and nuclear construction options, what price should we assume for carbon? or (b) What will it cost to bring broadband to every citizen? Yet the decisive regulator must master these questions also.

While only skimming regulation's surface, these questions are essential to effectiveness. Why are so many of us so readily stumped? Each of regulation's traditional professions—law, economics, engineering, accounting, and finance—has a credentials process (bar exams, masters theses, Ph.D. dissertations, licensing tests). But none of these screens addresses these 31 questions. There is literally no official obligation to know the basics. Imagine: What if your orthopedist could not describe the bones and their purposes, your family lawyer could not draw up a will, your airline pilot could not explain all those dials and switches, your cab driver could not get from airport to downtown, or your daycare professional did not know CPR? Any of them would lose their licenses and their jobs. Our profession lacks these measures of mastery.

Like Deuteronomy says, it's all within our grasp. With mastery, we maintain regulation's unique attributes: expertise and objectivity. Without it, regulation risks becoming just another governmental body to be lobbied.