

BECOMING AN EFFECTIVE REGULATORY REFEREE

***Fred G. Bigham
Senior Regulatory Consultant
Loba Limited
Ottawa Canada***

A skilled referee for a soccer game understands and carries out a regulatory function. A well regulated game is one in which the referee is virtually unnoticed — but more of this later. In what follows, the focus is on telecommunications regulatory agencies with the discussion organized around seven questions:

- (1) What prompted a few countries to establish regulatory agencies in the early twentieth century?
- (2) Why have many countries established regulatory agencies late in the twentieth century?
- (3) What then is at issue if a country decides to establish a regulatory agency?
- (4) What agenda must be addressed by regulatory agencies?
- (5) What assistance is available to a country to establish its Agency and begin addressing its regulatory agenda?
- (6) What assistance has Canada provided in the 1995-2000 period?
- (7) Based on these Canadian assistance programs, what observations and lessons can be drawn?

(1) What prompted a few countries to establish regulatory agencies in the early twentieth century?

The call for the creation of regulatory arrangements, it could be argued, dates from 1670 with Lord Matthew Hale's judgement that facilitates designated to serve the public cease to be private and are "affected with the public interest". Late in the nineteenth century, enterprises fitting this description were more numerous, most notably the companies providing electricity and telephones in North America and Europe. European countries opted for government owned and operated "public" utilities — a pattern generally adopted throughout the world other than in the United States and Canada. These two countries, with some exceptions, opted for privately owned and operated utilities. They often operated as monopolies and in fact, found themselves characterized as "natural" monopolies.

How then did governments of the day address the potential abuse of market power by such monopolies "affected with the public interest"? In Canada in 1905 there was an intense Commons debate on whether The Bell Telephone Company should be publicly or privately owned. Private ownership was maintained but supplemented with the creation of a public regulatory agency. Similarly, both federal and state regulatory agencies were introduced in the United States. Broadly speaking, such agencies were given a mandate to ensure that rates charged were "just and reasonable" and this evolved into a revenue requirement standard that included the utility's operating expenses, depreciation, taxes

and a reasonable rate of return on a defined capital base. This era of “natural” monopolies with the requisite regulatory scrutiny and approval of prices and profits lasted for approximately 80 to 90 years.

(2) Why have many countries established regulatory agencies late in the twentieth century?

A confluence of factors has resulted in the formation of regulatory agencies throughout the world particularly in the last ten years. Two patterns have predominated. Firstly, dissatisfaction with both teledensity levels and the quality of existing telephone services in many countries prompted privatization initiatives as the means to garner both capital for network extensions and management and operational expertise. Secondly, the demonstrated and ever-improving capabilities of wireless technologies, coupled with government policies that favoured the entry of competing carriers, has put interconnection disputes between the existing and emerging networks on the regulatory agenda in many countries.

Prior to these developments there was no need for a regulatory referee in most countries as the mandate of the government owned and operated utility subsumed policy, regulatory and operational functions. The game changed in the late twentieth century. The need for a new government institution, the public utility regulatory agency, was definitively acknowledged in the WTO's Regulatory Reference Paper. Meanwhile, the United States, Canada, Great Britain, and Australia had begun their transition from monopoly to competitive market structures, which called for adaptations in each country's regulatory arrangements. Whether the task is one of establishing a regulatory agency for the first time or adapting an existing agency, the call for skilled and flexible “regulatory referees” was clearly evident around the world throughout the 1990's.

(3) What then is at issue if a country decides to establish a regulatory agency?

The decision to establish a distinct regulatory agency is usually taken in the context of other initiatives. The sequence of these initiatives may vary from country to country and certainly there will be differences in their detailed features of each step but they likely include some of all of the following:

- Delineation of the country's telecommunications policy framework and objectives;
- Separation of the postal and telecommunications operations;
- Separation of the telecommunications policy making and regulatory functions;
- Corporatization of the telecommunications operations;
- Privatization of the telecommunications operations;

- Passage of national telecommunications legislation which sets out the policy objectives and mandates a separate regulatory agency with its associated powers;
- Passage of supplementary legislation to establish the regulatory agency including the number of appointed Commissioners or Members with their associated qualifications and terms of office; the mechanisms to fund the Agency; and, the processes, if any, to be used to appeal decisions taken by the Agency.

(4) **What agenda must be addressed by the Regulatory Agency?**

Once these steps are taken the actual formation of a distinct Regulatory Agency can proceed. In my recent presentations for international delegations investigating the Canadian regulatory arrangements I have used the analogy of a theatrical event. Hence, the features of becoming and being a regulator are highlighted as “The Script, The Stage and The Performance”.

The Script includes the passage of legislation with the requisite policy objectives and regulatory powers; the reporting relationships of the Agency; the funding mechanisms; the rules of procedure for the disposition of regulatory decisions including alternative dispute resolution methods designed to reach consensual and timely decisions in a competitive industry framework; and finally, the detailed processes to be followed should a stakeholder wish to appeal a formal decision of the Agency.

The Stage includes further details of the Agency’s organizational structure with separate divisions, for instance, for technical, economic, spectrum management, legal and standard organizational matters (e.g. personnel, finance); specification of the staff competencies required to meet the various regulatory functions to be carried out by the Agency; the physical accommodations and equipment (e.g. furniture and computers) requirements; and, the internal decision making processes and structures.

Once the Script and the Stage are in place then **the Performance** may proceed and it includes the ongoing processes and proceedings whereby the Agency considers and makes decisions with respect to licensing entry into the telecommunications sector including the associated licensing for the use of the radio spectrum; the terms and conditions for the interconnection of separate networks (e.g. wireline vs. wireless); the pricing of telecommunications services, particularly those provided under market conditions with limited competitors; the costing approaches to be used to support price levels and structures, the establishment and monitoring of network quality standards; and the roll-out of a universal access policy framework. This list is not exhaustive and indeed within each of these “performances” there are a multitude of subsidiary matters to be addressed.

(5) What assistance is available to a country to establish its Agency and to begin addressing its regulatory agenda?

This question may be broken down into three aspects:

Where does a country search for appropriate assistance?

What options exist to fund access to such assistance?

What approaches or venues exist to convey such assistance?

Brief answers to these three aspects are set out below based on the author's own experience. Discussions at this ITU Symposium, November 20-22 will, no doubt, add to and revise these notes.

Where does a country search for appropriate assistance?

Those countries with a telecommunications regulatory history include Australia, Great Britain, Canada and the United States. Therefore, in those countries one may contact the Government Ministry responsible for the telecommunications sector, the Regulatory Agencies, consultants (i.e. firms and individuals) and academic centres. The breadth and depth of expertise is considerable but as the question suggests the client country must endeavour to clearly identify its needs in order to seek and find the "appropriate" assistance.

What options exist to fund access to such assistance?

Funding is available from the World Bank under various programs; the regional Development Banks (e.g. Asian Development Bank); the foreign aid agencies (e.g. in Canada, the Canadian International Development Agency (CIDA) and the International Development Research Centre (IDRC); and the ITU.

There are other sources which may be considered such as the Commonwealth Telecommunications Organization which runs multilateral programs and provides bilateral assistance with funding coming from the member countries.

In Canada, there is the Telecommunication Executive Management Institute (TEMIC) which for over twelve years has offered training programs for senior telecommunications staff from operating companies as well as government departments and regulatory agencies. Funding, in this case, comes from both Canada's public sector (e.g. CIDA and Industry Canada) and many private sector companies.

In the United States, there are three regulatory study programs, one conducted by the United States Technical Training Institute, a second program at Michigan State University which is marking its forty-second year and a third at the Public Utility Research Centre at the University of Florida.

What approaches or venues exist to convey such assistance?

Regulatory delegations have been visiting Canada throughout the 1990's but the volume of delegations increased markedly around 1995. Many such delegations request a one to three day visit with a combination Canadian Radio-television and Telecommunications Commission (CRTC), Industry Canada and private sector representatives (i.e. Industry Canada includes a large division responsible for all aspects of spectrum regulation and has the responsibility to establish and revise the country's telecommunications policy framework). These visits are usually fully funded by the visiting delegation and the advisory services of the Canadian officials are provided without charge.

Some delegations request a two to three week regulatory training program. In the last three years, a number of these programs have been provided in the country or region making the request. Again, these programs have been funded by CIDA or World Bank with payment of fees and expenses for any consultants on the teaching team and recovery of salaries and expenses for any Canadian government officials on the team (e.g. examples of such training programs is provided in Appendix A).

As already noted TEMIC continues to provide a set of regular training programs in Canada for private and public sector telecommunications officials. Travel, accommodation and related expenses are funded by TEMIC's Canadian sponsors (see www.temic.ca).

Approaches and venues in other countries include the multilateral and bilateral events organized by the Commonwealth Telecommunications Organization (see www.cto.int). Delegations may arrange visits with regulatory agencies in Britain, Office of Telecommunications (OFTEL www.oftel.gov.uk) and in Australia, Australian Telecommunications Authority (ACA).

In the United States, at the Federal Communications Commission (F.C.C.) there is an international assistance program initiated in the last two years by Chairman Kennard (see www.fcc.gov); numerous international conferences, particularly those with a focus on regulatory matters and issues; and, regulatory training programs organized by academic institutions such as Michigan State and University of Florida (see www.bus.msu.edu/ipu and www.cba.ufl.edu/eco/purc).

Last but not least, there is the initiative taken by ITU to assist in the establishment of Centres of Excellence (i.e. two in Africa, one in the Americas and one in Asia) aimed at linking existing training and research institutes in the respective regions. The African Centres are being implemented by the ITU under a formal agreement with Nortel Networks and Canada's Acacia Initiative of the International Development Research Centre. The initial mandate of these Centres will be to train public officials in policy and regulatory issues as well as provide specific advisory services.

(6) What assistance has Canada provided in the 1995-2000 period?

Beginning in June 1995, among other matters, the author's responsibilities included:

- Co-ordinating and responding to numerous requests for presentations and training of international delegations made directly to the CRTC or through other government officials, (i.e. Department of Foreign Affairs and International Trade (DFAIT), Industry Canada, CIDA, IDRC); private sector, (e.g. Nortel); and other organizations (e.g. TEMIC, Universities, Law firms).
- Delivering one to three day custom-designed short programs focussed on the Canadian telecommunications regulatory framework usually with a team of government and private sector representatives.
- Delivering one to three week custom-designed seminars with workshops involving a selected team of instructors either in Canada or increasingly in the host country (funding agencies are usually CIDA or World Bank)
- Delivering presentations, workshops and lectures in Canada at conferences and universities.

Over the period 1995-2000, there has been an average of twenty delegations visiting Ottawa each year for the one to three day regulatory programs hosted by CRTC. There were numerous other delegations, not included in this total, hosted by the private sector and Industry Canada (e.g. interested in spectrum policy and regulation).

The more extensive one to three week regulatory programs run either in Canada or the host country jumped from an average of two per year in 1995 and 1996 to an average of six per year over the 1997-2000 period.

Other training programs which have required CRTC staff participation include TEMIC courses and trade missions organized by DFAIT. These programs have averaged four per year over the 1995-2000 period.

Appendix A provides examples of Canadian Regulatory Programs provided in the 1995-2000 period. Further details regarding such programs are available upon request.

Experience with such programs in the past five years suggests the following:

- Requests for assistance range from comprehensive introductions to what is required to establish a Regulatory Agency to more specific issue oriented seminars (e.g. Costing, Pricing and Interconnection Seminars).
- Preparation of a custom-designed program requires considerable preliminary dialogue with the client country with the intention that programs meet the expectations of most of the seminar participants.

- Experience suggests that particularly for the more issue-oriented seminars having both a Canadian instruction team and a host country audience with representatives from both the regulatory agency and the operating companies is an effective approach. It recognizes that the task of telecommunications regulation in any country requires that there be a professional respect and appropriate Cupertino between the Agency and the Companies subject to regulation.
- There is an inherent dilemma in any regulatory training program as examples and illustrations are drawn from the experience in Canada but the audience, for example, is from India or Colombia. We continue to learn how to deal with this dilemma primarily through dialogue sessions during the seminar possibly others at this ITU Symposium will have constructive observations to make in this regard.

(7) Based on these Canadian assistance programs, what observations and lessons can be drawn?

The essential ingredients required to produce a successful Regulatory Agency include:

- Clear and well-articulated national priorities and policy objectives.
- The political will in government to make it work.
- Strong regulatory leadership with a commitment to serve the public interest.
- Qualified professional regulatory staff with the appropriate competencies.
- Good management of the regulatory process with fair and open decision-making mechanisms accessible to all affected parties.
- Regulatory decisions that reflect the policy objectives in the enabling legislative and take into account the broad political goals of the government.

These ingredients represent a “cookbook” recipe but based on my experience and reflections during the last five years, may I offer these additional observations on what it’s like “to prepare a real meal in the kitchen”.

- Making the transition to an institutional arrangement which clearly separates the stewardship over the provision of telecommunications services; the formation and declaration of telecommunications policy; and, the identification and adjudication of regulatory matters is a trip fraught with delays, detours and dead-ends.

- Old patterns and habits are deeply ingrained with the result that the incumbent carrier(s) can forestall the effective entry of competing carriers.
- The government department(s) responsible for telecommunications policy, even after announcing a pro-competitive stance, can find themselves siding with the established carriers and through their interventions seriously weaken the credibility of the Regulatory Agency.
- Timely and effective implementation of network interconnection arrangements are of paramount importance to secure both the benefits of competition in the provision of telecommunications services and the establishment of a credible Regulatory Agency.
- There is a continuing need to squarely face the challenge of providing meaningful “universal access” just to ordinary telephone service let alone the provision of internet access — the last ten years have yielded many real stories of successes and failures in the roll-out of universal access — these stories must be told, reviewed, adapted and applied.
- There will be a temptation for new Regulatory Agencies to adopt rules of procedures consistent with conventional administrative experience and law. But, Regulatory Agencies should consider the adoption of alternative dispute resolution procedures (i.e. various combinations of mediation, negotiation and arbitration methods) particularly for interconnection and other issues arising in a competitive market.

Conclusion

Now back to that soccer game I mentioned at the beginning. A skilled referee knows the standard rule book but how many of us have watched a game in which the referee becomes too tight in his application of the rules with the result that the flow and excitement of the game is lost. Worse still is the game in which the referee reads the rule book tightly for one side and casually for the other. The biased calls seriously erode both the enjoyment and the integrity of the game.

We could go on with this analogy and, as with any analogy, some parallels are instructive and others are less so. Suffice to say that the task of effective regulation, whether it be a soccer game or your country’s telecommunications sector, is a demanding but essentially a thankless task because if done well you will not be noticed but if done poorly you will be noticed only as a poor referee.

Finally may I offer a concluding word to those governing officials who write and revise the rule book (i.e. telecommunications legislation) to be followed by the assigned referees. Interventions and dare I say reversals of the referees calls must be kept to an absolute

minimum and if carried out must be and must be seen to be thoughtful and reasoned changes. To do otherwise not only erodes the referee's credibility but also may ultimately impact on the willingness of the players to play the game and the spectators desire to attend the game. Surely that is an outcome that is not in the interest of anyone.