

# **A Regulacao No Mercado Brasileiro: Tendencias Do Poder Normativo Da Atividade Regulatoria No Brasil**

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Energy Summit  
Rio de Janeiro

July 28, 2004

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# Background

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- December 2002 Report
  - Motivated by *Apagao* and Related Controversies
  - Focused on Strengthening of Regulatory Institutions and Practices
  - Methodology: Reviewing Documents and Extensive Interviews
- New Government/New Model Necessitated New Study
- Updated Analysis and Revised Recommendations

## Categories of Issues

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- Human and Financial Resources and Ethics
- Accountability and Transparency
- Decentralization
- Market Operations and Functions
- Interface with Judiciary/Appeals
- Distribution Tariffs

# Human and Financial Resources and Ethics

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## Human Resources

- Regulatory Agencies Are Different from Other Agencies on Personnel Matters
  - Different Labor Market
  - Greater Opportunity for Conflicts of Interest and Other Ethical Problems
  
- ANEEL's Inability to Establish Competitive Personnel Practices
  - Not Competitive with Regulated Companies (Same Labor Market)
  - Entry Level Hires
  - Disparity at Senior Levels (20% Attrition Annually)
  - Recently Acquired Ability to Hire Permanent Staff
  
- Administrative Burden on Directors
  
- Professional Diversity of Directors

# Human and Financial Resources and Ethics

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## **Ethical Considerations**

- Link between Greater Ethical Restrictions and Levels of Compensation
  
- Code of Ethics Should Include:
  - One-Year Quarantine for All Directors and Staff
  - Lifetime Quarantine on Specific Matters Worked On
  - Conflict of Interests Prohibition Applicable to Entire Close Family
  - Mandatory Abstention Where Conflict Exists
  - Prohibition of All Gratuities
  - Financial Disclosure for Staff, Directors and Close Families
  - Avoiding Even the Appearance of Unethical Behavior
  - Mechanism for Enforcing Ethical Standards

# Human and Financial Resources and Ethics

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## Financial Resources

- Budget Accountability Should Be Identical with Other Agencies of the State
- Regulatory Fees (.5% of Revenues) Should Be Reserved for Regulatory Use
  - 60% Now Being Diverted
- Diversion of Regulatory Fees from ANEEL Should Be Refunded, Not used Elsewhere
- No Discriminatory Cuts in Agency Funding (Across-the-Board Only)
- Regulatory Fees Should Be Off Balance Sheet

# Accountability and Transparency

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## Accountability

- Oversight Hearings by Legislative and Executive Powers (Every 3 Years)
- Broad Regulatory Compact with Transparent Review and Public Participation
  - Performance Contract between Regulatory Agencies and Ministries Used Only in Peru and Tanzania
- *Ouvidor* Has No Supervisory Authority
- No Compromise on Independence
- Appellate Review
- *Tribuna de Contas*

# Accountability and Transparency

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## Transparency

- Communications between ANEEL and Government Should Be Public
- Regulatory Decisions Should Be Fully Explained in Writing, Including:
  - Description of Case and Background
  - Summary of Conflicting Views
  - Analysis of Relevant Facts, Law and Policy
  - Formal Statement of Decision and Rationale
- Decisions Taken by Public Vote of Directors
- Opportunities for Separate Opinions by Individual Directors
- Clarification of Roles of Policy-Makers, Adjudicators and Regulators
  - Primary Policy
  - Subsidiary Policy
  - Prospective/Retrospective Decision-Making



# Accountability and Transparency

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## Public Participation

- Create a Permanent, Sustainable Advocate for Small Consumers
  - Funding Mechanisms
- More Substantive Use of Public Hearings (e.g., Experts; Cross-Examination)
- Opportunity for Public Input at Board Meetings
- More Intellectual Infrastructure to Support/Enrich Regulation
  - Funding Mechanisms

# Decentralization

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- Current Roles For State Regulators
  - Consumer Complaints and Auditing
  
- Potential Roles for State Regulators in Regulation of Distribution Companies
  - Joint Hearings with State Agencies
  - Formal Role for State Agencies
  - Exchange of Personnel between Agencies
  - Joint Analyses and Work Efforts
  - Joint Training
  - Delegation of Tariff Setting on Experimental Basis

# Market Operations and Functions

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## Auctions

- ANEEL Should Have Little or No Role in Actually Conducting Auctions
  - Principle: Regulators Have Conflict of Interest in Choosing Winners and Losers
  - Any ANEEL Role Should Have Minimal Discretion
- ANEEL Should Have Input into Rules About Conduct and Transparency of Auctions

# Market Operations and Functions

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## Market Institutions

- *MAE (CCEE) and ONS*
  - More Transparency in Regulatory Oversight
  - Develop More Effective Incentives for Performance (e.g., Use of Budgetary Powers)
  - Expedited Dispute Resolution Mechanism

# Market Operations and Functions

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## **Collaborative Studies Recommended (ANEEL, MME, CCEE, ONS)**

- Enhanced Opportunity for Demand Side Responses
- Congestion Management in Transmission

# Market Operations and Functions

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## **Monitoring Committee**

- Extensive and Transparent Use of Advisory Committees and Consultancies

# Market Operations and Functions

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## Planning

- Only One Regulatory Role in Planning: Decide if Costs to be Passed on to Consumers

# Market Operations and Functions

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## **Synergistic Evolution of Natural Gas and Electricity Markets**

- Merger of ANEEL and ANP



# Interface with Judiciary/Appeals

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## Judicial Processing of Cases

- Request Creation of Specialized *Varas* for Regulatory Matters
- ANEEL's involvement in Regulatory Bypass Cases
- Regular Conferences on Electric and Regulatory Law Issues
  - Joint Efforts by ANEEL, MME and Judiciary
- Mere Existence of an Appeal Does Not Prevent Effect of Regulatory Decision
  - Need to Demonstrate Irreparable Injury to Avoid Immediate Effect

# Interface with Judiciary/Appeals

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## **Criteria for Judicial Review of Regulatory Appeals**

- Did Agency Exceed Its Legal Authority?
- Did Agency Act Arbitrarily or Unreasonably or Against the Evidence?
- Did Agency Fail to Follow Correct Procedures?

## **Remedy**

- If Court Reverses Regulatory Decision, It Should Not Impose Its Own Remedy

# Distribution Tariffs

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## **ANEEL Should Continue to Clearly Articulate Tariff Methodology**

- Technical Notes Are Useful

## **Areas for Future Study (Technical Notes)**

- Internalizing Mandated Electrification Programs into Tariffs
- Neutralizing Incentives between Demand and Supply Side Options