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

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Background

- 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

- 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

**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

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

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

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

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

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

- **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

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

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

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

- Enhanced Opportunity for Demand Side Responses
- Congestion Management in Transmission
Market Operations and Functions

Monitoring Committee

- Extensive and Transparent Use of Advisory Committees and Consultancies
Market Operations and Functions

Planning

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

Synergistic Evolution of Natural Gas and Electricity Markets

- Merger of ANEEL and ANP
Interface with Judiciary/Appeals

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

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

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