

TRANSPARENCY AND GOOD
DECISION-MAKING:
IRRECONCILABLE DIFFERENCES
OR HAPPY BEDFELLOWS?

A Presentation to The Harvard
Electricity Policy Group

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San Diego, CA
March 3, 2005

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“My job as regulator is to
successfully feign ignorance
without actually being so”

-Charles Stalon

Nature of Regulatory Agencies

- Quasi Judicial
 - *ex post* evaluations
 - resolution of disputes binding participating parties
- Quasi Legislative
 - decisions for prospective application
 - decisions binding on all, not just participating parties
- Executive
 - makes administrative decisions like any executive agency

Constraints and Discretion in Decision-Making: Judicial

Constraints:

- exclusive reliance on “record” evidence
- ban on *ex parte* communications (scope of applicability?)
- filtered flow of information, e.g.
 - Rules of Evidence
 - Evidence parties choose to present
 - Lawyering skills
- Articulated reasoning

Discretion:

- Closed meetings
- Judicial notice
- Bench inquiries and questions

Constraints and Discretion in Decision-Making: Legislative

Constraints:

- Open Meeting (Sunshine) requirements
- Judicial review
- Making of legislative record

Discretion:

- Ability to speak with anyone (private or public)
- Unlimited opportunity for information gathering
- Use of staff
- No requirement to make formal record

Constraints and Discretion in Decision-Making: Executive

Constraints:

- Freedom of Information requirements
- Legislative oversight
- Judicial review

Discretion:

- Ability to speak with anyone (public or private)
- Unlimited opportunity for information gathering use of staff
- No requirement to make formal record

Where Do Regulators Stand?

Constraints:

- All Judicial Constraints Apply
- All Legislative Constraints Apply
- All Executive Constraints Apply

Discretion:

- Some Judicial (Administrative Notice, Bench Inquiries) – not closed meetings
- Little Legislative (Some Staff Use Permitted)
- Little Executive (Some Staff Use Permitted)

Summary: Regulator Status in Regard to Constraints and Discretion in Decision-Making

- All Constraints of All Branches Applicable
- Very Little of the Discretion of All Branches Applicable

Practical Adverse Effects of Key Constraints

Sunshine:

- Less Effective Communication Between Commissioners
- Greater Empowerment of Staff
- Constrained Flow of Information
 - Slows Down Flow (Effect of EPSA decision) – Not in Real Time
 - Less Information and Analysis May Actually Flow
- Slows Process Down
- Reduces Availability and Use of Resources (e.g. Talk With market Monitor)
- Who Benefits from Sunshine?

Practical Adverse Effects of Key Constraints (con't)

Ex Parte:

- Constrains Flow of Information
- Restricts Interface With Public Depending on Breadth of Application (EPSA Decision is Expansive of Definition)
- Slows Process Down

Practical Adverse Effects of Key Constraints (con't)

Freedom of Information:

- Constrains Flow of Information
- Ties Up Resources

Judicial Review:

- Can Elevate Form Over Substance
- Over Judicialization of Decision-Making Process

Practical Salutary Effects of Key Constraints

Sunshine:

- Allows for Public Debate (Cannot Require It)
- Contributes to Public Understanding (Dependent on Media Coverage)
- Can Provide Regulated Entities Added Perspective
- Can Discourage Arbitrariness and Expose Bias

Practical Salutary Effects of Key Constraints (con't)

Ex Parte:

- Contributes to a Level Playing Field in Decision-Making Process
- Inhibits Use of Untested Information
- Contributes to Openness of Process

Practical Salutary Effects of Key Constraints (con't)

Freedom of Information:

- Contributes to Openness of Process
- Inhibits Use of Untested Information
- Contributes to Public understanding
(Dependent on Media Coverage)

Practical Salutary Effects of Key Constraints (con't)

Judicial Review:

- Essential Element of Maintaining Regulatory Accountability
- Enforces Legal Requirements
- Contributes to Procedural Fairness

So, What's the Right Balance?

Regulatory Agencies are *Sui Generis*

- One Set of Constraints and Discretion Cannot Fit All Tasks
- Constraints and Discretion Should be Consistent With Task at hand
 - Legislative (e.g. Rate Cases, Rule Making)
 - Judicial (e.g. Dispute Resolution, Enforcement Actions)
 - Executive (e.g. Personnel, Procurement, Management)
 - Recognition of Need for Meaningful Flow of Information
 - Recognition of Real Time Nature of Markets

So, What's the Right Balance? (con't)

- Transparency and Effective Decision-Making Must Be Balanced in Context of Market Realities and Nature of the Regulatory Task