

The Fundamentals of Consultation in Utility Regulation¹

Consultation

Utility Regulator's Duty

Typically the functions of a Regulator are Rate & Tariff setting, Research and Review, Establishing Quality of Service Standards, Granting Licences, Hear Complaints, Conduct Studies of Efficiency, Encourage Competition, Monitor Compliance, and other functions provided for in the specific enabling legislation of the Utility Regulator in the Caribbean (the Regulator).

The Regulator's duty to consult when carrying out its functions is firstly a statutory duty under its enabling legislation and secondly as a public body its decision making process must be open, fair and accord with the principles of natural justice.

What is meant by consultation?

According to the Oxford Dictionary to consult is to "Have deliberations with persons; seek information or advice from persons and take into consideration feelings and interest"

"Where there is a statutory duty to consult persons affected, this must genuinely be done, and reasonable opportunity for comment must be given. Where a proposal or scheme is required to be published it must be accurately described ...it is imperative that the procedure laid down in the relevant statutes should be properly observed." (H.W.R. Wade & C.F Forsyth in their book on *Administrative Law* at page 229)

Nature of the obligation to consult

A distinction must be made between mandatory obligation to consult and discretionary consultation, the latter being a flexible process which need not conform with strict procedural requirements, the former is mandated by legislation and case law which if the procedural requirements are not adhered to, the consultation process can be challenged in a court of law.

The Regulator's enabling legislation while mandating consultation does not always provide procedures for implementation. The courts have considered the nature of the obligation to consult, but have not laid out any ironclad procedure for consultation, treating each case on its own merits because what may be essential in one context may be irrelevant or harmful in another.

¹ This paper was presented at the 3rd OOCUR Workshop held on May 29-31, 2005 in Bridgetown Barbados on the topic "Utility Regulatory Communications, Consumer Participation & the Consultation Process"

The courts however, have identified certain principles and procedural requirements of consultation which may be summarized as follows:

- ✚ The Regulator must consult in carrying out its functions where the law requires;
- ✚ All stakeholders must be consulted as specified by the enabling legislation;
- ✚ Enough and clear information on the purpose and the subject of the consultation must be provided to the consumers and other stakeholders so that they are adequately informed and able to make intelligent and useful contributions and responses;
- ✚ Adequate notice must be given when consulting, the notice must be received by the stakeholder to be valid, the notice must indicate what is proposed and supply sufficient information;
- ✚ Allow adequate time for consultation and reasonable timeline for receipt and response of views;
- ✚ Approach consultation with an open mind and be ready to change;
- ✚ provide an effective and appropriate avenue for stakeholders and public participation;
- ✚ Consultation includes listening to what stakeholders have to say and considering the responses, real dialoguing must be genuine and not a sham;
- ✚ Consultation is not to be equated with “negotiation” because negotiation implies a process that has as its objective arriving at an agreement and consultation may occur without those consulted agreeing with the outcome.

A consultation process which seeks principally to inform decision-making is different from one that seeks to promote consensus through an interactive process where issues are progressively narrowed, and compromise and trade-offs promoted among key participants. The Regulator must fulfill its mandate and cannot delegate its functions and decision making to the Stakeholders.

Stakeholders’ Participation

The Regulator has a mandatory duty to consult all stakeholders and typically the stakeholders are:

- ✚ Consumers & Consumer Advocates/Committees
- ✚ Utility Providers,

- ✚ Shareholders,
- ✚ Government and
- ✚ General public.

The Regulator's enabling legislation in the Caribbean typically provides for the appointment of Consumer Advocates and or Committees and such appointments are important to the consultation process.

If the rationale of economic regulation is to regulate the utility provided to ensure that the Consumer receives quality service at a reasonable price while ensuring that the Utility Provider receives a reasonable return on investment, the stakeholders participation in the regulatory process is of vital importance if the Regulator is to obtain a balanced view and make a reasoned decision, thereby fulfilling its mandate.

However, utility regulation is complex and multidisciplinary and while the Utility Provider can purchase the necessary expertise, the ordinary Consumer cannot do so. It is therefore incumbent on the Regulator and Consumer Advocates and Committees to ensure that the Consumers are adequately informed and that they express their views in particular during the conduct of a consultation.

Communication

Regulatory communication is a key factor in the conduct of consultation because consultation is a two-way communications process that provides opportunities for information exchange and for the stakeholders consulted to influence the making of a decision by the Regulator.

Communications may be:

- ✚ the disseminating of information to create awareness of the issues on the consultation subject;
- ✚ to elicit views from stakeholders;
- ✚ to interact, two-way between the Regulator and the stakeholders;
- ✚ to convey the Regulator's point of view and its decision when made.

Consultation Framework

In consequence a framework for utility regulatory conduct of consultation in the Caribbean is imperative. The consultation framework should focus not only on the policy guidelines but on the processes, the procedures and timelines for consultation in respect of each of the Regulators function which mandates that the Regulator arrives at its decision only after consultation with the stakeholders.

Almost all the Regulators in the Caribbean have established a Consultation Policy Document (by a consultation process which is not mandatory but desirable) and this document is in most cases on their respective website.

Each consultation is different from the other and each consultation process will be assessed on its own merits. Therefore a consultation plan is necessary for each new consultation whether on rate setting or establishing quality of service standards or carrying out any other function of the Regulator where the decision must be reached after consultation.

The selected consultation tools and processes must reflect the purpose of the consultation. Application for rate review is a proposal from the Utility Provider while establishing quality of service standards is a proposal from the Regulator. Therefore approaches to the consultation process on these functions may be different and the Regulator should set out the process that will be followed in conducting consultation on any of its given functions.

The consultation process and indeed the hearing process should ensure that stakeholders and all relevant parties are able to contribute effectively to the regulatory process. In short the Regulator must decide what, when, how and with whom to communicate.

Consultation and Communications plan, process and procedure

It follows that the Regulator must conduct consultation in a transparent manner and should have *a consultation and communications plan* in order to develop the consultation process and procedure and this would require answers to the following questions by each Regulator:

- ✚ Who will be consulted?
- ✚ What subject requires consultation?
- ✚ When will consultation start and end?
- ✚ Where will the consultation take place?
- ✚ How will the consultation be conducted?

How will consultations be conducted and determining the communication tools are choices each Regulator must make from a spectrum of communication methods some of which are:

- ✚ formal and informal hearings,
- ✚ public open house meetings, town hall meetings, seminars, workshops,
- ✚ roundtable-multi-stakeholder meetings/workshops, focus groups,
- ✚ consumer education,
- ✚ individual communications,
- ✚ research and surveys,
- ✚ receiving stakeholders feedback,
- ✚ responding to stakeholders on feedback received,
- ✚ media and electronic communications,
- ✚ final wrap –up sessions/meeting of the consultation process,

- ✚ funding to facilitate participation by consumers,
- ✚ Communication before, during and after the consultation processes.

The extent to which all or some of these tools and methods are used would depend on the subject that is being consulted on.

The Regulator is an adjudicator of various interests which in most cases are competing and the Regulator should expect conflicting points of view which must be given due consideration.

It must be demonstrated that the Regulator is unbiased, reasonable, open, fair, firm and free from stakeholder capture in the conduct of consultation. Therefore the Regulator must provide information and be prepared to make public, explanation why proposals are rejected, all responses received in the consultation process and must also be prepared to explain and justify principles, methodologies, processes and regulatory decisions to stakeholders subject only to claims for non-disclosure of confidential information if considered appropriate.

The outcome of a consultation is uncertain and the results may not always be directly linked to the effort, cost and care taken by the Regulator to communicate and consult with the stakeholders

The principle therefore is that if the stakeholders and the public whose rights are affected by the work of the Regulator is fully apprised, is genuinely consulted and is given a fair hearing before a decision is taken then there ought not to be any threat of appeals and judicial reviews.

The challenge for the Regulator is to conduct consultation for the purpose of arriving at a decision and to satisfy all the stakeholders in so doing, failing which and at the very least, to ensure genuine dialogue and satisfy the procedural requirements of consultation in carry out their functions under the respective enabling legislation.

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May 2005