

# **A Model for Utility Regulatory Capacity Building in the Caribbean©<sup>1</sup>**

## **Introduction**

This paper proposes a model for capacity building in the Caribbean and focuses on the institutional and legal framework, organizational and human resource development, and good governance of regulators in the Caribbean (Regulator).

It is submitted that getting the organizational framework and the human resource development right is dependent on a clear understanding of the processes and procedures necessary to carry out the functions efficiently, effectively and sustainable and this in turn requires a clear understanding of the Regulator's legal framework as contained in the enabling legislation which created the Regulator and other laws and regulations governing the Regulator.

## **Capacity Building**

Capacity building is a much written about term with numerous different meanings and interpretations. The following two definitions are instructive.

“Capacity can be defined as the ability of individuals and organizations or organizational units to perform functions effectively, efficiently and sustainable.”<sup>2</sup>

“Capacity building is more than the acquisition of individual technical skills, strengthening internal operations, or institution building. Rather it is viewed as “a process by which individuals, groups, organizations, institutions and societies increase their abilities to: (i) perform core functions, solve problems, define and achieve objectives: and (ii) understand and deal with their development needs in a broad context and in a sustainable manner.”<sup>3</sup>

Capacity building for the Regulator should be internal by the development of human resource systems, organization structures, regulatory processes, procedures and instruments and by external factors such as the interaction with other entities and stakeholders participation.

Capacity building is therefore the total organized effort of the Regulator to fulfill its mandate at the following levels:

-Institutional & Legal Framework, the law which enables organizations and institutions to enhance their capabilities;

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<sup>1</sup> This paper was presented at the 2<sup>nd</sup> OOCUR Workshop held on 21-22 March 2005 in Belize City, Belize on the topic Utility Regulatory Institutional Development and Capacity Building

<sup>2</sup> “United Nations Guidelines for Developing Transition Strategies for Capacity Building...” October 2002

<sup>3</sup> “United Nations publication on Capacity Assessment and Development” (UNDP, 1998)

-Organizational Development, establishment of management structures, operating and regulatory processes and procedures both internally and externally;

-Human Resource Development, the process of individual education, training and access to information which would enable them to effectively perform.

Individuals when technically trained will have the necessary capacity to translate its learning into processes and procedures. However individuals leave and move on taking capacities with them. Therefore it is essential for the Regulator to institutionalize capacity and to retain 'institutional memory'.

It is important that Regulators address the matter of capacity building from inception in conjunction with the determination of its role, function and staff of the Regulator. Capacity building in a new institution is different from that of a pre-existing institution which have capacity, the former being capacity building and the latter being transformation.

It is submitted that it is not enough for the Regulator to recruit, train, retain, develop and provide working experience for their staff, the Regulator must if not before then simultaneously develop structured and documented regulatory processes, procedures and instruments particularly in an environment where expertise is mobile.

In particular the function (task) role and responsibilities of the Regulator must be defined in terms of the regulatory processes and procedures and this in turn would inform the process of recruitment, determining job description and setting remuneration for staff.

Where to start from, understanding the legal framework because utility regulation is 'economic regulation' within a legal framework and it must be noted that utility regulation is multi disciplinary and multi dimensional.

## **Legal & Institutional Framework**

### **Enabling legislation**

The Regulator in the Caribbean is a creature of statute, a statutory body having been established by legislation. VCRAC Crabbe in his book "*Understanding Statutes*"<sup>4</sup> said "A Statute is a formal act of the Legislature in written form" and that the term Act of Parliament is the law as enacted by the Parliament and in certain instances referred to as enabling Act or legislation."

Further he said "Law does not operate in a vacuum, and this is especially true of statute law. A statute is intended to guide, and regulate, the conduct and affairs of those to whom it is addressed. Its content thus takes cognizance of the cultural, economic, political and social conditions of the society within which it is intended to operate. A sound knowledge of these conditions is very necessary to a complete understanding of the statute."

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<sup>4</sup> VCRAC Crabbe, 1994 "Understanding Statutes" Cavendish Publishing Limited Great Britain.

Therefore interpretation and understanding of the enabling legislation of the Regulator in the Caribbean is one of the first tasks to be undertaken. Clear and unambiguous legislation makes the understanding of mandated provisions easier.

### **Subsidiary legislation**

Subsidiary legislation is any Proclamation, Regulations, Order, Legal Notice, or other instrument made under or by virtue of any Act and having legislative effect. Subsidiary legislation is also known as delegated legislation or subordinate legislation.

Key tools and techniques of effective utility regulation such as processes, procedures and instruments should be put into law by Regulations.

The benefit of Regulations is twofold as it gives the Regulators' processes and procedures the force of law and clarity which should stand the test of time and change of staff, while adding certainty and credibility to the Regulators' actions and hence good governance.

### **Statutory Compliance**

H.W.R. Wade & C.F Forsyth in their book on "*Administrative Law*"<sup>5</sup> said "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."

Mechanisms should therefore be put in place to ensure Regulators comply with mandatory requirements under the law. Failure to comply with mandatory provisions can give rise to an action for Judicial Review.

### **Judicial Review**

Professor Albert Fiadjoe in his book on *Commonwealth Caribbean Public Law*<sup>6</sup> said "The power of judicial review may be defined as the jurisdiction of the superior courts to review laws, decisions, acts and omissions of public authorities in order to ensure that they act within their given powers."

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<sup>5</sup> at page 229 H.W.R. Wade & C. F. Forsyth "Administrative Law" 2000 Oxford University Press 8<sup>th</sup> edition

<sup>6</sup> page 15 Professor Albert Fiadjoe 1999 "Commonwealth Caribbean Public Law" 2<sup>nd</sup> edition, Cavendish Publishing Limited

Under the laws in the various Caribbean territories the Regulator can be subject to an action for Judicial Review by the courts. If an individual or company brings an action for Judicial Review against the Regulator, the courts must determine whether the Regulator followed proper procedures in arriving at its decision.

De Smith, Woolf & Jowell's in their book *Principles of Judicial Review*<sup>7</sup> said "There is a presumption that procedural fairness is required whenever the exercise of a power adversely affects an individual's rights protected by common law or created by statute. These include rights in property...or other fiscal impositions."

Judicial Review is the only mechanism to ensure that the Regulator follows the procedure prescribed by law. But it should be noted that Judicial Review could also overrule the merits of the Regulator's decision if it could be shown that the decision was unreasonable.

### ***Ultra Vires***

Because the Regulator is a creature of Statute, its functions being prescribed by law, any other functions performed would be considered by the courts as *Ultra Vires* and void.

*Ultra Vires* is a Latin phrase which simply means acting beyond one's powers or authority. The general principle is that a decision or action of a functionary in this case a Regulator is *Ultra Vires* where the function performed is outside the ambit or scope of his authority granted by the enabling legislation.

### **Capacity Building Model**

The following is a proposed capacity building model for the Caribbean.

The Regulator should develop and implement written and documented Processes, Procedures and Instruments necessary to carrying out its mandate that is fulfill its role, discharge its responsibilities and carry out its functions by undertaking the following:

- Interpreting the Enabling Act(s)
- Understanding the Power, Function, Role and Responsibility
- Developing Regulatory Processes, Procedures and Instruments
- Mapping and documenting the Processes, Procedures and Instruments
- Implementation and Decision

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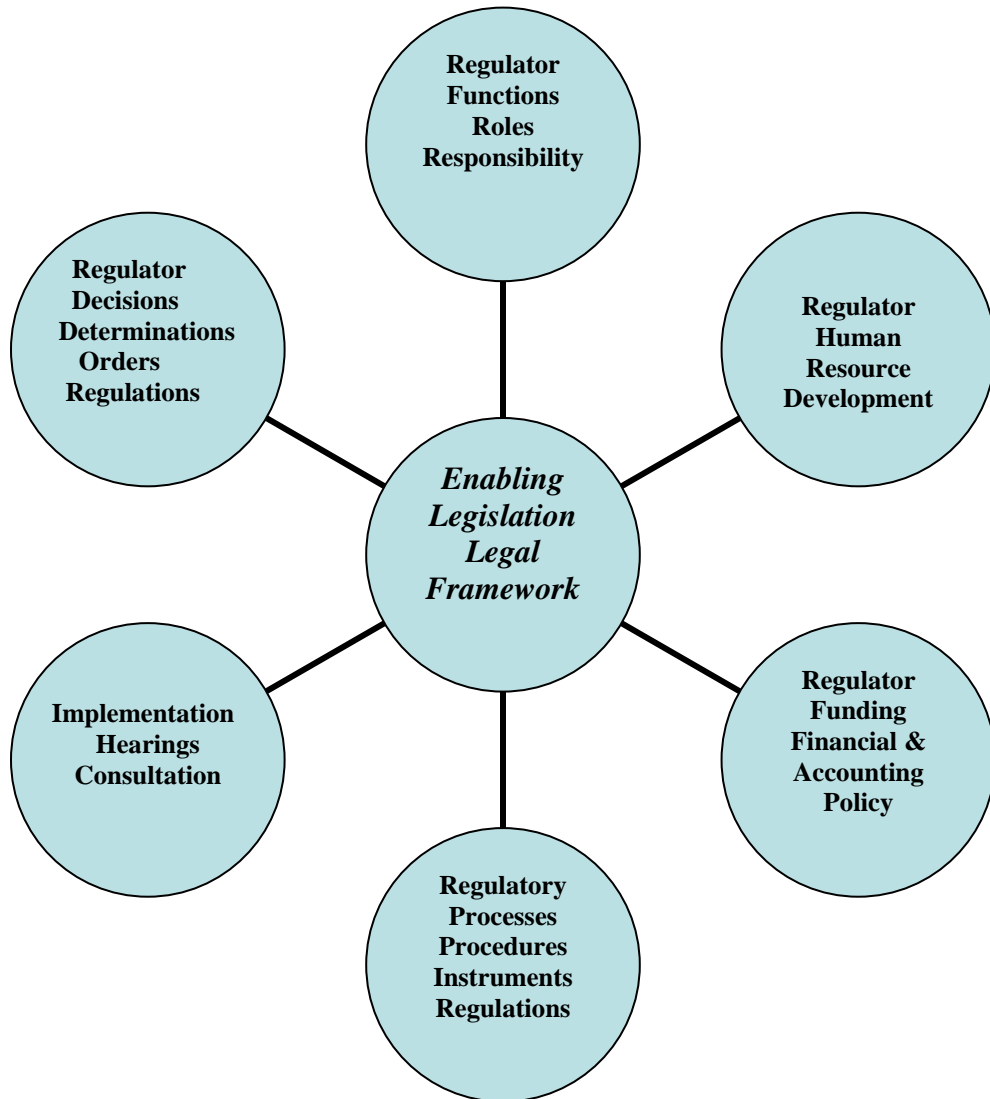
<sup>7</sup> at page 286 De Smith, Woolf & Jowell's 1999 "Principles of Judicial Review" London Sweet & Maxwell

## Interpreting the Enabling Act

Where the legal frameworks differ in the Caribbean are in the actual provisions of their enabling legislation. This is a task to be undertaken by the Legal staff of the Regulator on an ongoing basis and as the need arise.

Analysis and understanding of the legal framework and the enabling Act to determine the powers, functions, role and responsibilities and to determine the organizational structure and mandated processes and procedures necessary for the Regulator to fulfill its mandate, is very important to the sustainability of the Regulator.

Capacity building starts with the appointment of the Regulator whether an individual the Director General or a Commission or a Minister of Government.



### Radial Diagram:

Having bought or rented a building for office facilities, IT and equipment consider the functions /task of the Regulator and the disciplines required to carry out such tasks. Consider the various disciplines in theory and how they interact to come up with processes and procedures for regulation. Consider how the theory is implemented and implementation.

The diagram above indicates the typical organizational structures, processes, procedures and instruments provided for by the enabling Act of a Regulator.

Showing the relationship between the core –Legal Framework and the legislation which enables the development of the Regulator’s organizational structure

### **Function, Role and Responsibility**

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, Conduct Consultation, Conduct Hearings and other functions provided for in the specific enabling Act of the Regulator. In the case of Telecommunications such additional functions relating to Licencing, Spectrum Management, Interconnection, Numbering and Universal Service.

### **Developing the Processes, Procedures and Instruments**

No matter how complex the task for example setting price and establishing standards, it cannot be or remain a mystery to the consumer if the Regulator is to carry out these functions effectively and efficiently and if there is to be meaningful contribution from stakeholders.

Capacity building requires a multidisciplinary analysis and approach which links several components in the development of the processes, procedures and instruments necessary for the Regulator to carry out its mandate.

For example in developing the Quality of Service Standards of the Service Providers the processes may be identified as follows:

#### Technical Process

Inputs are from the Regulators’ Engineers, Economists, Accountants and other staff to develop the DRAFT Standards.

The processes and procedures for the development of this draft are not usually mandatory but it is desirable.

#### Administrative/Judicial Process

The consultation/hearing processes is conducted to obtain the inputs from stakeholders.

The process is mandatory and it is imperative to have in place documented procedures

for the conduct of this process.

Legal Process

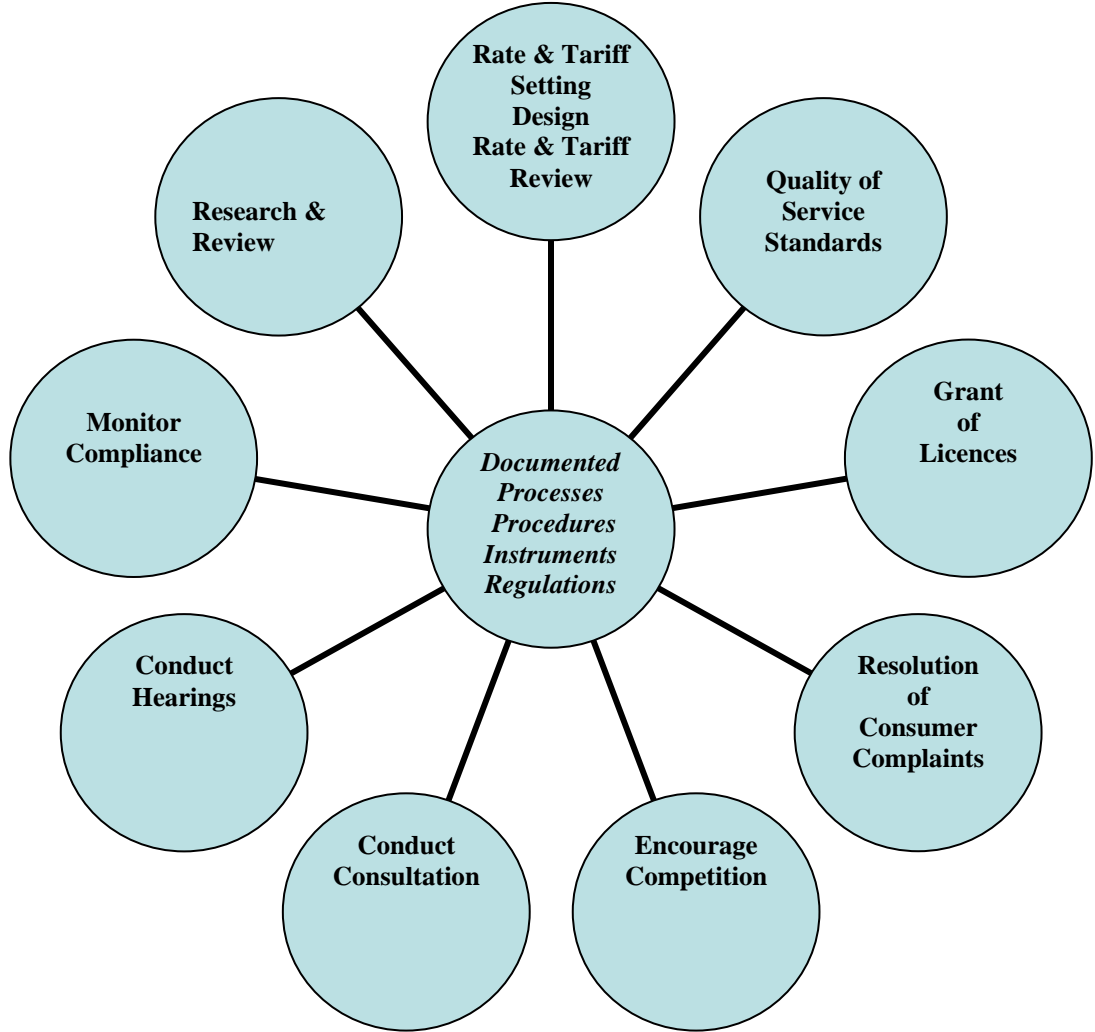
Promulgate Orders, Regulations, and Legal Notices for the establishment of the Standards to make it subsidiary legislation and law.

The Administrative/Judicial Process and the Legal Process above are mandated and typically procedures are mandated by the enabling Act and or Regulations. Therefore not to get it right is to be subject to actions for Judicial Review.

The fact that the Technical Process and Procedures of developing the DRAFT Quality of Service Standards are not mandatory means that the process and procedures are discretionary and the Regulator must be comprehensive, taking into account all relevant factors in arriving at its decision.

For example the standard for connection of utility say electricity to the consumer may be 14 working days. In arriving at this conclusion, did the Regulator follow other existing standards? Did the Regulator ask the service provider if they could accomplish the task in the proposed time? Did the Regulator request and obtain from the service provider their process and procedure for accomplishing the task? Does the service provider have a documented Operating Process and Procedure? Do the service providers comply with the request of the Regulator? How does the Regulator know that the service provider is operating efficiently and indeed could implement the standard when it becomes law?

These are all and more questions to be answered in mapping a process and procedure for the Regulator to establish Quality of Service Standards of performance of the service provider. The diagram below indicates some of the key processes and procedures which this model of capacity building requires the Regulator to develop.



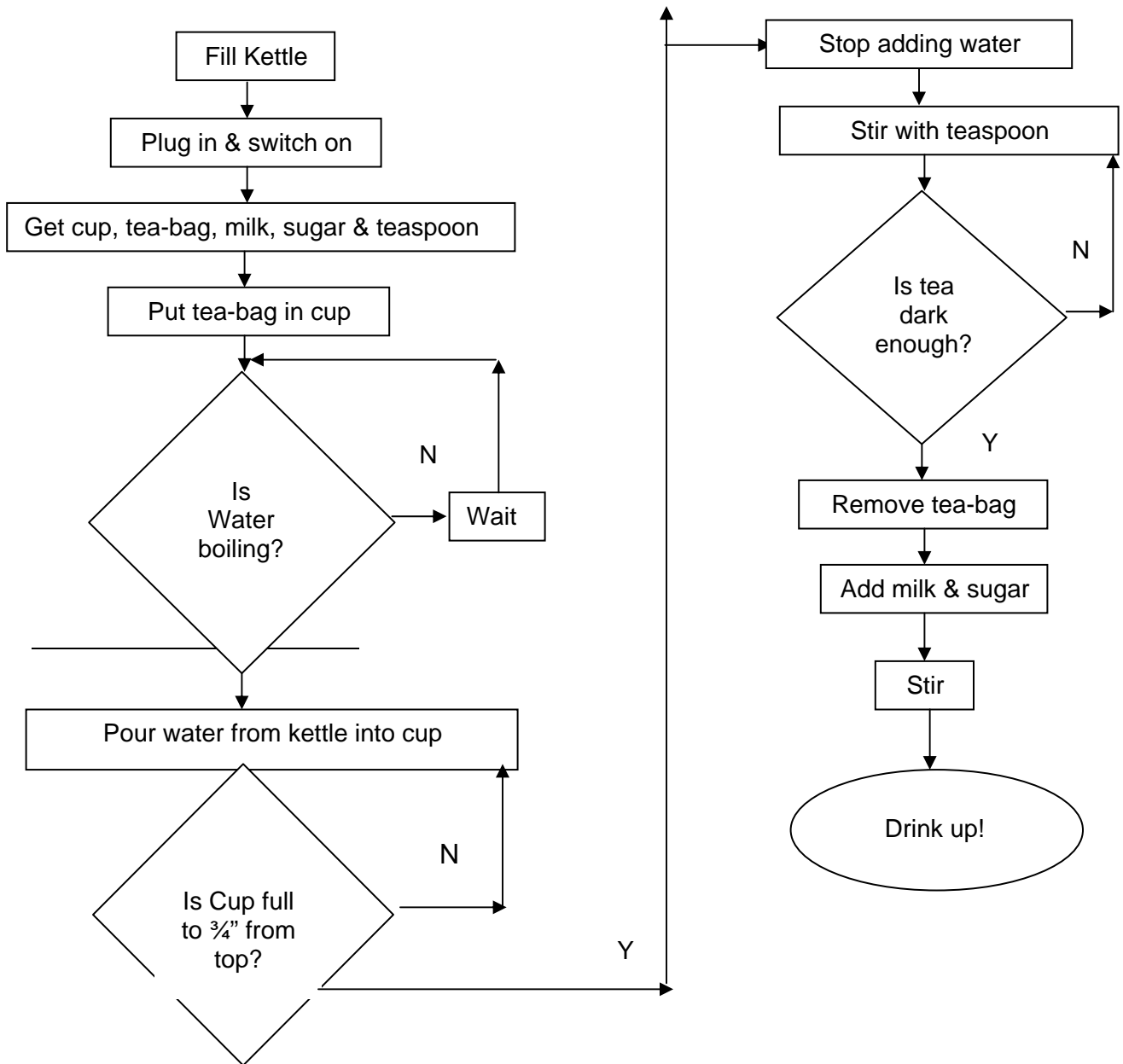
Radial Diagram:

Showing the mandatory Processes and Procedures of the Regulator

**Mapping and documenting Processes and Procedures**

Process mapping is therefore important in capacity building. Use a Process Flow Chart because this promotes understanding of the process, identifies problem areas and opportunities for process improvement and provides for training of staff.

However complex or simple the task of the Regulator there is always a process and for each process there is a procedure for implementation. Craig Klafter and Gordon Walker<sup>8</sup> gave as an example the following **Flow Chart** which describes the task of making a cup of tea.



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Craig Klafter and Gordon Walker 1995 “Legal Practice Management and Quality Standards” Blackstone Press Limited, at page 73

Basically to create a flow chart the process task /function of the Regulator must be identified and defined, persons with responsibility for the process must construct the chart and there must be agreement on the starting point, ending point and the level of detail of the process.

This simple task of making a cup of tea is used as an example to illustrate the benefits of following a documented process and procedure in accomplishing a task.

Well documented and clearly written processes and procedures make the evaluation of the performance of the institution much easier to monitor and evaluate and to identify training needs.

### **Implementation and Decision**

The Regulator, an administrative body is required to carry out its functions in a judicial manner but without the mantle of judicial legitimacy. Acceptance by the stakeholders of the Regulator must be dependent on how the Regulator conducts its own business and therefore the legitimacy of the Regulator may be in question if its own processes and procedures are opaque or non-existent.

Most decisions of the Regulator are based on an understanding of complex issues and even a decision to do nothing is a decision and to take no action is a decision. The Regulator should therefore focus on doing the right things, doing things right and doing things at the right time.

Effective capacity building can ensure good regulatory governance and inform the budgetary process and the funding requirements of the Regulator.

### **Good Governance**

Good governance in the area of utility regulation is assured where an appropriate capacity building model is in place and it may be considered in terms of clarity of function, role and responsibility, autonomy, transparency, accountability, credibility and predictability.

### **Clarity of function, role and responsibility**

Since the Regulator's function, role and responsibility in the Caribbean are mandated by Statute, clear and unambiguous legislation and an understanding in respect thereof are imperative to ensure good governance.

### **Autonomy**

The degree of independence of the Regulator in the performance of its functions free from political interference, the source of funding and remuneration of staff whether dependent on the approval of government and the appointment and removal of the Regulator by Government are all issues which could affect the legitimacy of the Regulator and could hinder good governance.

The Regulator is an adjudicator of various interests which in most cases are competing and whether it utilizes the adversarial hearing process or the consultation and consensus building process, the legality of the Regulator is not in question but what is usually debatable is the Regulator's legitimacy which has to be proved in practice. The Regulator must demonstrate that it is reasonable, fair, firm and free from stakeholder capture in the performance of its functions.

### **Transparency**

The Regulator has an obligation to be open, to consult, provide information, to explain and justify processes, methodologies, procedures and regulatory decisions to stakeholders. The hearing process and the consultation 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.

### **Accountability**

Areas of accountability are the Appeal and Judicial Review mechanisms and the submission of annual report to Parliament. So for example where the enabling Act mandates that the annual report of the Regulator must be laid in Parliament within a time frame and the Regulator complies, that is good governance.

### **Creditability**

Legal provisions that prevent conflict of interest of the Regulator and its staff, Regulator's code of ethics, integrity, fairness and consensus building creates trust and respect and ensure buy into the regulatory process and good governance.

### **Predictability**

The stakeholders need to have confidence that the Regulator will behave consistently, that the "rules of the game" will not suddenly change. So for example where the Regulator has established processes, procedures, instruments and Regulations this is good governance.

### **Conclusion**

Where an effective and appropriate capacity building model is put into place from inception, capacity building thereafter is lessons learned, monitoring and maintaining the process of capacity building.

If an appropriate model for capacity building is not in place then transformation through interventions is necessary. Interventions would include strengthening human resource development, mapping of processes, procedures and instruments for decision making and establishing governance mechanisms and systems.

The importance of a model for capacity building of the Regulator cannot be overemphasized and in particular the model should be developed and become a mainstream activity of the regulator if the Regulator is to perform efficiently, effectively and sustainably.

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