Accountability: The Real Crisis in the Power Sector Left Un-addressed

That the Indian power sector is undergoing a crisis is an understatement. The diagnoses of the crisis usually include: lack of rational tariff, excessive government interference, lack of competition, lack of incentives for performance, etc.. Privatization, unbundling (a-la-Orissa), or setting up tariff boards (obviously to increase tariff) are the oft-suggested remedies. It needs to be understood that both the diagnoses and the prescriptions completely ignore the fundamental malady that besets the Indian power sector--the crisis of accountability of the decision-makers toward the public (or people) at large. Hence, the currently fashionable solutions may succeed in providing some symptomatic relief but are bound to entail a new and severe crisis.

The Fundamental Malady: The Crisis of Accountability

In the present structure, theoretically, the state electric boards (SEBs) are expected to be quasi-autonomous bodies while the central and, primarily, the state governments are to provide policy directions to SEBs for running the power sector. Both SEBs and the governments are expected to act within the framework of the Indian Electricity (Supply) Act, 1948. Further, both the SEBs and the state governments, in the context of their respective responsibilities and duties, are accountable to the respective state legislatures. There are various legislative mechanisms (ranging from 'starred' questions to the Public Accounts Committee) for this legislative oversight and for ensuring this accountability. Underlying all this is the fundamental assumption that the legislatures are accountable to people through the mechanism of general election.

However, in practice, the state energy minister becomes the de-facto boss of the SEB. The minister exercises enormous control not just over policies but also over administrative, financial, technical decisions and even over day-to-day functioning of the SEBs. These decisions include decisions over critical matters such as tariff setting, investments and loans, writing-off of dues, transfer of officers, priority to certain connections, etc.. The decisions of the energy minister are largely prompted by the pressures exerted by the influential economic interests and by the vote banks nurtured by the political grouping to which the minister belongs. Effectively, the only accountability the minister cares for is accountability towards these two influential sections. As a result, the interests of the two sections are protected even by sacrificing the long term interests of the SEB and of the state power sector. This is obviously done under the guise of some politically palatable rhetoric. For example, even though the SEBs are on the brink of financial disaster, in most states, the tariff for agricultural consumers are kept at absurdly low levels in order to protect the interests of the middle and big farmers from rich and irrigated areas in the state. These farmers, in turn, provide the minister and his political grouping with the economic, political, and physical muscle that enables them to occupy the seat of power. This 'quid-pro-quo' is disguised under the rhetoric of providing badly needed subsidy to the poor rural farmers. As our detailed study of this issue has established, contrary to the prevailing understanding, most of the power subsidy to agricultural consumers is usurped by big and middle level farmers drawing huge waters for cash crops and, often. small farmers using small amounts of electricity and water for grain crops end up paying much more (Economic and Political Weekly, December 21, 1996, Pp. 3315-3321)

Such disastrous practice is allowed to continue simply because all the accountability mechanisms governing the conduct of the minister either fail or are sabotaged. The legislature fails to arrest these trends and tendencies because even the opposition political groupings, in the pursuit of power, adopt the same rhetoric and fervently seek blessings of the same influential sections. The legislature, as a whole, can escape its obligation toward the public at large because the elections are never fought on specific sectoral or policy issues.

The enormous authority without any accountability enjoyed by the minister also allows him to flout the legal guidelines and by-pass the regulatory and other central agencies such as the Central Electricity Authority (CEA) or Power Finance Corporation (PFC). This pathetic situation is exacerbated further due to the peculiar approach of the judiciary which considers these matters beyond its purview. The final result is autonomy and authority in the hands of those whose responsibility is not articulated and who can successfully by-pass the accountability procedures designed to counter-balance their authority and autonomy. This crisis of accountability, precisely, is at the root of the disastrous situation faced by the SEBs and the Indian power sector and, hence, called here the fundamental malady.

The Lessons of the Past Experience

The lessons we can draw from this experience in this regard are extremely valuable in designing our response to the crisis situation we are facing. They, in sum, are as follows: (a) Autonomy and authority by themselves are not adequate to ensure rational decision-making, however independent the concerned agencies may appear on paper. Both these need to be counter-balanced with equally effective accountability procedures. (b) In order to be effective, the accountability procedures and mechanisms should be sabotage-proof, i.e. they should be mandatory, well-articulated, multiple, and making the decision-makers accountable directly to the public.

The current efforts to reform the Indian power sector need to be judged in this context. There is a great danger that the new system, however economically-sound and independent it may be, would lead us to a new and possibly irreversible crisis if these fundamental lessons are not heeded to.

Examining the Ideal Reform Model

The state of Orissa has undertaken the process of reforms of the power sector as designed by the experts and consultants of the World Bank (WB). The restructuring implemented in Orissa, known often as the WB-Orissa model, is being cited as the ideal for the other Indian states to follow. The reform process in Orissa started with enacting of the Orissa Electricity Reforms (OER) Act in 1995. The Act created a quasi-judicial body called regulatory commission (RC) to undertake functions such as tariff setting, utilities licensing, and monitoring performance of power utilities. The Act also split the erstwhile Orissa State Electricity Board (OSEB) in Orissa Hydro Power Corporation (OHPC) and GRIDCO. OSEB's hydel generation is transferred to OHPC and its transmission and distribution functions are transferred to GRIDCO. In the next few months, GRIDCO will sell its distribution related business to four private companies. With this, the WB-conceived restructuring involving creation of independent regulation and un-bundlled private utilities will be fully implemented. In this model, the residual GRIDCO, i.e. the transmission company will buy power from the generation company and other independent power producers (IPPs) and will transmit and sell power to distribution companies. Many other states such as Harayana and Andhra Pradesh (AP) are also taking the same route.

It needs to be clearly understood that, for addressing a majority of problems in the present structure, the new model is heavily dependent on the RC. Unbundling is expected to increase scope for privatization while privatization is expected to improve efficiency of operations. But, it is accepted that these advantages are realizable only if effective regulation to ensure rational decision-making is in place. Thus, in other words, most of the claimed benefits of the reforms would arise from "good regulation" i.e. rational decisions made by the RC. For example, the RC has to ensure that utilities charge adequate tariffs so that their financial viability is ensured, but, at the same time, see to it that tariffs remain non-exploitative. To ensure this, the RC will fix the tariff at a point at which utilities will have sufficient financial resources to meet the growing demand and provide good quality power but the tariff will not hide their inefficiency. The RC is also expected to ensure that the utilities will perform efficiently. For

this, the RC has been given authority to reduce utilities' profits if performance norms are not met, or, in the extreme situations, the RC can appoint an administrator on the utilities. Further, the RC has to approve the demand forecast and then it has to also ensure that the GRIDCO purchases power in the most economical manner. In short, most of the responsibilities and authority vested with the state government in the present set up are transferred to the RC in new set up. However, it is expected that the RC will be free from shortcomings of the present decision-makers which cause enormous inefficiency, wastage, and plunder.

This belief arises from the expectation that the measures directed at ensuring autonomy of the RC will ensure professional and rational decision making that is free from interference of partisan and vested interests unlike in the case of the earlier structure. To ensure RC's autonomy, the OER Act has following provisions:

- The RC members (total three in number) would be selected from a panel of two names for each post suggested by the selection committee comprising of (i) Secretary of Power, Orissa, (ii) Chairman, Orissa Public Service Commission, and (iii) Chairman of the Central Electricity Authority (CEA) or his representative
- Once selected, the members cannot be removed for 5 years (or till they complete 62 years of age) unless a sitting high court judge conducts investigations and submits report proving misuse of authority.
- The Act also clearly lays down the authority of the RC and limits government's role only to policy guidelines. Any dispute over the 'policy' nature of the government directives can be appealed against to CEA.

Thus, once the RC members are selected they can function without any influence or interference. The RC's decisions are final and cannot be challenged in courts or before any other appellate body on techno-economic grounds.

But the question is, can we depend solely on the procedures for selection of the to ensure rational decisions? Consider these facts: the RC will be controlling revenue of utilities worth thousands of crores of rupees per year or in other words profits of private utilities worth hundreds of cores of rupees per year. Coupled with such an enormous influence is the provision of the Act (that the RC's decisions cannot be challenged except on procedural grounds) which makes the RC effectively invincible. The RC, wielding such enormous and unassailable powers, will surely be a prime target for private parties which will make all-out efforts to influence the RC's decisions on various matters including tariff. For these parties, earning profits by influencing the RC's decision (for example, decisions on increasing tariff) is far easier than by improving performance and efficiency of their operations. As the RC's decisions will involve extremely high stakes, to prevent any influence of the private parties on the RC requires extremely effective and elaborate accountability procedures and mechanisms.

It is argued that the Orissa model is 'sabotage-proof' as the RC is made accountable through provisions which require it to conduct public hearings, to support its decisions by reasons, and to publish its decisions in writing. But our analysis of the Orissa Act and other regulations shows that the RC's accountability to public is just cosmetic and the decision-making process does not offer real avenues for public intervention. For example, the analysis of regulations governing RC's conduct makes it clear that major decisions such as approval of demand forecast and contracts with private power generators would be taken internally without any public scrutiny, i.e. neither the public will be given information nor public hearing will be conducted. For any person familiar with the power sector, it would be clear that such decisions account for nearly 60 % of the cost of power to consumers. Once such decisions are made, the so-called public hearings will have little meaning as the RC will be bound to pass on these costs in

tariff, whatever may be the objections from the public. This needs to be seen on the backdrop of our past experience of such contracts with private companies (such as Enron and Cogentrix) in similar secretive manner. Moreover, as the first tariff hearing conducted by the Orissa RC demonstrates, even the so-called public hearings during tariff amendment case would be cosmetic. In the first ever tariff hearing, the public was given only ten days to file objections (instead of thirty days mentioned in regulations) and the public was asked to collect information from the utility against whose proposal the information was to be used! The RC in Orissa could make such decisions using wide discretionary powers that enable it to completely by-pass the provisions requiring public scrutiny of its own decisions.

Thus, on the one hand, the decision-making process in the Orissa model is highly concentrated in the hands of the RC (with RC having only 3 member), while, on the other hand, the RC's decisions cannot be challenged and the RC can easily avoid the public scrutiny of its decisions. This makes the RC, the regulation, and, hence, the Orissa model highly sabotage-prone.

Let us see the WB-Orissa model in somewhat details from the perspective of accountability. First of all, at conceptual level, the Orissa Electricity Regulatory (OER) Act and the Conduct of Business Rules (CBR) framed by the Orissa RC, both, betray complete lack of understanding of the concept of accountability to people as a political necessity in the system of democratic governance. Both fail to acknowledge that people are the fountain-head of the sovereign powers and legitimacy enjoyed not only by the state, the legislature, and various acts passed by the legislature but also by the institutions (such as the RC) created by these acts. At best, both the documents talk about the aggrieved parties and hearing of the grievances.

At theoretical level, there are some avenues in the OER Act and the CBR for ensuring accountability of the RC. They include the provisions that require: supply of information to the public, conducting public hearings, justification by the RC of its decisions, seeking of approval by the RC from the legislature for framing and changing the CBR. But, practically, the CBR framed by the Orissa RC and accepted by the Orissa legislature make all these provisions highly sabotage-prone by delegating wide discretionary powers to the RC in enforcing the provisions which are aimed at ensuring its own accountability. The most fascinating is the Article 134 of the CBR which empowers the RC to exempt itself from the rules governing its own conduct even without going back to the legislature for its approval as specified in the OER Act.

Mandatory and Direct Public Accountability

In this context, our suggestions for sabotage-proof, mandatory, and elaborate procedures and mechanisms for ensuring accountability to the public include: unassailable rights to the public to get information, to invoke proceedings against the RC, to appeal against the decisions of the RC both on procedural and substantive grounds, as well as mandatory public hearings with opportunities for meaningful and effective public participation, etc. Mere delegation of authority and autonomy to regulatory bodies or mere transfer of ownership to private sector cannot automatically guarantee rational decision-making. There is no alternative to sabotage-proof accountability procedures. In fact, autonomy and authority without effective accountability procedures would cause more regulatory problems.

However, as pointed by many, the mandatory, elaborate, and direct public accountability procedures do involve some time and financial costs. But, as the recent CAG report on the Enron-MSEB agreement confirms, the costs involved in accountability procedures will be far less compared to the benefits of the reduced scope for blatant misuse of authority. It also needs to be noted that such accountability procedures, by themselves, cannot resolve the crisis. They, at best, can create the badly-needed spaces, avenues, and opportunities. Developing civil society institutions with adequate technical capabilities,

legal skills, financial and other resources, and political backing to utilize these spaces, avenues, opportunities is a different and unavoidable task.

And, finally the most important element in accountable regulation is the timing of its institution. Sabotage-proof regulation with mandatory, elaborate, and direct public accountability measures cannot be brought into being after implementing unbundling and privatization. The private interests who would secure a firm hold on the sector once privatization and unbundling are implemented will not allow this to happen. In fact, installing sabotage-proof and accountable regulatory system need to precede unbundling and privatization for two reasons. Such a regulatory system will be the most impartial mechanism to judge whether, in the first place, measures such as unbundling and privatization would really be beneficial for the sector. If either of these measures is found to be beneficial, then it would be advisable to undertake the transition under the watchful eye of a sabotage-proof regulatory body to avoid wastage and plunder.

To sum up, the power sector reforms are critical for the economy of this country and hence for the future of the society. And such a critical issue cannot be dealt simply by wielding the magic wands of unbundling and privatization, even though they are designed and sponsored by the World Bank. There is no substitute to the hard decisions and painful changes which can be brought about only through effective, sabotage-proof, and truly accountable regulation.

Dr. Subodh Wagle
Indian School of Political Economy, Pune

Girish Sant and Shantanu Dixit
Prayas , Pune

For Private Circulation 5th May 1998
Contact Address: Prayas, Amrita Clinic, Athavale Corner, Karve Road, Deccan Gymkhana, Pune 411-004. India. Phone: (212) 341230, 230337 Fax: (212) 331250
e-mail: <prayas@vsnl.com>