Regulation in the WB-Orissa Model : Cure Worse Than Disease

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Abstract

The WB-Orissa model of power sector reform is considered by many as an ideal. Many other states such as Harayana and Andhra Pradesh (AP) are planning to copy the same. In this model, a three member regulatory commission (RC) is expected to play a crucial role of deciding capacity additions, bulk and retail tariffs, utility performance benchmarks, etc. Coupled with this enormous and wide authority to make and implement decisions (through license conditions, tariff etc.), the RC is given near total autonomy. The RC members are selected by a selection committee, and their tenure and service conditions are fixed by law. The government cannot interfere in the RC's functioning or decisions. The RC's decisions are final and can not be challenged. Mandatory provision to support decisions by reasons, making these decisions available to public and the public hearing (such as the conducted in March 1997 tariff case) are considered to be major improvements in terms of transparency and public accountability in this model.

However, analysis shows that the provisions related to transparency and direct public accountability of the RC are non mandatory and can be easily by-passed. The signs indicating that the process has already started are visible in the first tariff judgement. A combination of enormous authority (to control public expenditure of thousands of crore Rupees) without corresponding accountability is a sure recipe for disaster. Such a "sabotage prone" model, can at best succeed in helping overcome the immediate crisis of low tariff and theft / T&D loss, but, cannot ensure effective social control or efficiency of the power sector in the long term.

As such, rather than rushing through reforms by simply duplicating the Orissa Act in other states, we need a radical but cautious approach. The important element in this approach would be to install a sabotage-proof regulatory structure, involving mandatory provisions for ensuring direct public accountability, transparency and spirited efforts to build the capability of the civil society (to ensure it's effective participation). Installing these features may need somewhat complex and rigid procedures and involve some costs in terms of time and money. But we should realise that such fundamental changes in the structure of the sector should not be tied with limited and short term objectives such as attracting international capital but should be geared to achieve long term social objectives of development and equity. Unfortunately, there are no short cuts in this.

1. Introduction

A radical restructuring of the entire power sector is a major effort undertaken by the Orissa state government to address the ills besetting the state's power sector. The Orissa government is essentially implementing the model of power sector restructuring conceived by the World Bank. Many other states such as Harayana, Rajasthan, and Andhra Pradesh are also accepting the same model. In fact, the reform bill of Harayana is a near photocopy of the Orissa Electricity Reform (OER) Act. Thus, in a short period, nearly half of the Indian power sector seems to be adopting the WB - Orissa model. The World Bank, being the main advisor and financier for the project, is closely monitoring the restructuring process in Orissa[1]. This paper analyses suitability of the WB-Orissa model to address the basic problems faced by the power sector and its ability to protect the long term societal interests. The paper briefly reviews the crisis situation faced by most Indian states and

[1] As per the Staff Appraisal Report (SAR, 1996) of the World Bank, the total project cost is equivalent to 1 billion US $, with the WB providing $ 350 million, i.e., 57 % of the foreign exchange component.

the underlying causes and then presents a detailed analyses of decision making processes in the Orissa model.

2. The Present Crisis :

In most Indian states, including Orissa, irrational tariffs and poor performance of SEBs in terms of large T&D losses (technical and commercial), inadequate investments, and high receivables have been the major problems faced by the power sector. These problems have led to poor power quality, power shortages, and worsening financial situation of the SEBs. Theft reduction, tariff rationalisation, adequate investments in T&D, improved recoveries, and cost control are some of the urgent actions needed for improving the situation.

Main responsibility for creating such a crisis situation lies with the state governments. The state governments, being the owners and operators of the sector, had the responsibility of ensuring smooth, efficient, and viable functioning of the sector. The governments were also the regulators of the power sector and were expected to monitor and control (or oversee) the affairs of the power sector in order to ensure adherence to the legal and policy framework governing the sector. Thus, it was expected to act as a custodian of the public interest. Even in this role, the governments were expected to take actions to prevent state power sectors from drifting into crisis situation. The legal framework did contain clear instructions and bestowed sufficient powers to the state government to take appropriate actions in order to avoid such crisis situation. For example, the Indian Electricity Supply Act, 1948, clearly mentioned that SEBs are to be treated as semi-autonomous bodies and be run on quasi-commercial principles. It also required that SEBs should earn a 3% rate of return on net fixed assets. Further, it gave wider powers to the state governments, including power to make appointment of senior management positions in SEBs. If the state governments had followed these directions and had used these powers in a rational manner, they could have ensured efficient and professional operation of the SEBs. In such a situation, crisis conditions precipitated by outside factors could have been handled without any radical structural or institutional changes. With measures such as tariff rationalisation, theft control, and incentive to management / workers, the SEBs could have easily weathered any crisis and have earned the stipulated profits of 3% return. For such financially viable SEBs, it would have been feasible to meet the power demand by attracting the private capital (if needed) in the form of commercial loans and government guaranteed bonds. In short, the governments which were the owner, the policy maker and the regulator had the authority, autonomy, as well as responsibility to take needed actions to avert the crisis.

But the state governments did not act in a rational manner. Over the years, small sections of politicians, bureaucrats, SEB staff, and consumers have succeeded in taking control of the sector. This coalition of sections of vested interests exploited the sector to further their narrow individual goals at the cost of the long-term health of the sector and that of the larger public interest. For example, in states such as Maharashtra, a strong lobby of affluent farmers, having access to abundant water, succeeded in pressuring the government for keeping the agricultural power tariffs at ridiculously low levels and for continuing un-metered supply.[2] The ruling politicians found that offering such populist concessions was an easy way to develop and protect their vote banks. Obviously, the victim was the long-term financial viability of the sector.

This abuse of powers by a coalition of the vested interests could continue for many years, and almost across the country, because the checks and balances in the system for avoiding such "hijack" proved ineffective. The legislative oversight proved ineffective because the charter of the

[2] In case of Maharashtra, primary beneficiary of agricultural power subsidy (worth over Rs 2,000 crores p.a.) are the 5% of affluent farmers growing cash crops such as sugar cane (Sant, Dixit 1996).

accountability of legislature towards the people was non-specific, covering much more than power sector policies, and also because legislators behaved in a short-sighted manner. Contrary to the enormous authority possessed by the state governments, the other regulatory agencies such as Central Electricity Authority (CEA) did not have adequate authority to enforce rational tariff policies, complete metering, or energy audit for theft control.[3] The courts often refused to evaluate the techno-economic rationale of government decisions, which they considered beyond their purview.

Non-availability or denial of information to the public was also instrumental in allowing this drift into crisis situation. In none of the states, the government or the SEB disclosed information about implications of their decisions for the future of the sector, about the real beneficiaries of huge subsidies, or even about the fact that they are not sure as to exactly where half of the electricity produced goes. As a result, people had no avenues to make the SEB officials accountable for high T&D losses, theft, and the resultant high cost of power. The situation could never have come to such a sorry state if the public had right to have this information, right to ask questions, get answers (before the decisions were made), and had avenues to hold the decision-makers accountable. In sum the politicians or SEB management have not been accountable to the public for their decisions. Only accountability that was perceived by politician-rulers was to their respective vote-banks and the response was to keep the tariffs low.

In short, the real problem has been the lack of appropriate provisions to ensure accountability of the decision-makers to balance the enormous authority and complete autonomy they possessed in governing the affairs of the power sector. The consequent hijacking is nothing else but a form of regulatory sabotage that was possible because of the three distinct shortcomings in the accountability procedures. First, the procedures are aimed at accountability to public in the indirect manner i.e. through an institution within the executive (such as CEA or CAG) or the legislature, or through an independent agency (such as judiciary). Often the mediating agency is burdened with a variety of tasks and issues. These agencies had their own logic and procedures and individuals manning them have their own priorities and agendas. As a result, it has been possible to subvert the regulatory process by manipulating individuals working in these agencies and hence the agencies. This could be avoided by substituting or supplementing the indirect accountability procedures with procedures to ensure accountability directly to the public, which would allow any member of the public to invoke accountability procedures. The possibility of such invocation itself is a major deterrent to the regulatory sabotage. Second, most accountability provisions in the current design are discretionary in nature, instead of being mandatory. The coalition ruling the state government exploit this shortcomings and often compel the government to invoke discretionary powers to circumvent the accountability procedures when they are needed to expose the wrong doings. Thus the discretionary accountability is a negation of accountability in itself. Third, the accountability procedures are not coupled with appropriate procedures to ensure transparency and participation. Without transparency and participation it is impossible to effectively ensure accountability. This is because, if one does not have the necessary information and has no avenue to participate in the process, one cannot effectively expose any wrong-doing. The much talked about ‘excessive government control / interference’ in the power sector affairs has been a tool that was used for the regulatory hijack. And the severe problems such as irrational tariffs and poor financial health of the SEBs are only symptoms of this hijack.

[3] Inspite of repeated attempts by CEA and Power Finance Corporation (PFC); SEBs have not implemented energy audit schemes.

We need to view the radical institutional and structural changes proposed by the WB in Orissa and other states in this light. It is essential to see whether the new system is more sabotage-proof than the present system. In this paper, we restrict ourselves only to the evaluation of the WB-Orissa model in this limited perspective. The other equally important issues such as examination of the professed merits of privatisation-unbundling, examination of certain myths governing the current thinking (such as privatisation = competition = efficiency), essential precautions during privatising vis-à-vis the precautions inbuilt in the WB model are not covered in this paper.

3. The WB-Orissa Model

The Orissa model has three major components : un-bundling of the vertically integrated public utility, privatisation of it's components, and distancing the state government from the power sector. (1) Un-bundling : The Orissa SEB has been split up in three companies looking after three major activities of the sector, viz. generation, transmission, and distribution (with proposed break-up of distribution functions among four distribution licensees). (2) Privatisation : These companies are being privatised. (3) Erecting a barrier between the government and the power sector : A separate body, consisting of three experts, called the regulatory commission (RC) has been created. Many of the responsibilities and powers vested earlier with the state government have been delegated to this body. As per section 11 of the Orissa Electricity Reforms Act (OER Act, 1995) these include:

- To issue licences and stipulate licence conditions for all power utilities,
- To regulate the working of the licensees and to promote their working in an efficient, economical, and equitable manner;
- To promote efficiency, economy, and safety;
- To regulate the purchase, distribution, supply, and utilisation of electricity, the quality of service, the tariff and charges payable keeping in view both the interests of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for electricity supplied are reasonably levied and duly collected;
- To promote competitiveness and progressively involve the participation of the private sector, while ensuring a fare deal for the consumers.

Thus, in the Orissa model, the RC is expected to monitor performance of private utilities, ensure them reasonable profits, and at the same time, act as a custodian of the public interest. Given the mandate and powers of the RC, the consumers and society at large will be heavily dependent on the decisions of the RC to protect their interests. The importance of the RC's decisions can be seen from the fact that through tariff setting, performance monitoring , and regulation of power purchases, it will be controlling revenues of the utilities which would be more than Rs. 1,000 crore p.a. in case of Orissa or to the tune of Rs. 12,000 crore p.a. in states like Maharashtra. Lack of sufficient authority and autonomy or any distortion in the balance of authority and autonomy vis-à-vis accountability can be very dangerous and prove very costly for consumers and the society at large. As explained earlier, we have faced many problems due to such distortions in the past. In the new structure , with such a concentrated authority and autonomy, even a small error or bias on the part of the RC (such as inflated demand forecast and capital costs) can lead to loss of crores of rupees for the society in the form of unfair tariffs/ stranded investments or poor power quality.

This point can be further elaborated using some example. If such a regulatory body has authority and responsibility to decide appropriate and just tariff for consumers but has no authority to enforce it's decisions regarding utility performance (i.e. theft reduction, cost control, etc.), then this may result in exploitation of consumers to support inefficiencies and theft or in poor financial health of

utilities.[4] Similarly, such a body should have sufficient autonomy and freedom of functioning to prevent vested interests from influencing it's own decisions.[5] Moreover, it is perfectly justified to expect that such a body, exercising such wide and enormous powers on behalf of society, should be accountable for it's decisions to society. This accountability should be directly to the people as it would be erroneous to assume that indirect and generalised mechanisms for ensuring accountability in the legislature and government can always represent the entire range of public view-points in the specific matters such as power sector policies. Devising such a regulatory structure is a major challenge for country like ours which, unfortunately, is still languishing in the colonial hang-over in terms of absence of institutions and capabilities to enforce rights of civil society and to ensure its ability to influence decisions of the legislature and executive. Thus, it is important to see whether the Orissa Model has sufficient improvements in term of autonomy, authority and direct public accountability of the RC, so as to make the system "effective" and "sabotage-proof".

The Orissa Electricity Reforms Act, 1995 (OER Act), provides the framework for reforms by defining the structure of the Orissa power sector as well as powers, responsibilities and decision-making process of various institutions such as state government and the RC. The Act has certain broad provisions regarding the functioning of the RC and it empowered the RC to prepare detailed procedures for its own functioning. The Act mandates that the rules and regulations for the RC's functioning should be laid before the Assembly and be suitably modified if Assembly so decides. In this regard, the RC has prepared "Conduct of Business Regulations" (CBR) to spell out how it will function. The CBR were notified (after an approval by the assembly) on 28th November 1996. The following sections review the OER Act and the CBR to examine the balance between autonomy, authority and accountability of the RC.

4. Autonomy and Authority of the RC

To ensure autonomy of the RC and to delegate sufficient authority to the RC for making it effective the OER Act has following provisions :

- The members are selected by a "Selection Committee" consisting of ; Secretary of Power, Orissa ; Chairman, Public Service Commission, Orissa ; and Chairman of the Central Electricity Authority or his representative. The committee would suggest two names for each vacancy and the state government will have to appoint any one person suggested by the Committee on the RC.
- Appointments of members will be for a fixed term of five years. A member can only be removed after a sitting high court judge (nominated by the Chief Justice) conducts an investigation and submits his report substantiating charges such as corruption. The remuneration and allowances of the Chairman and the members of the RC cannot be inferior to that of the Chairman and the members of the Orissa Public Service Commission respectively. Combination of these two provisions is expected to ensure reduced government interference in actions of the RC.
- The Act clearly defines the RC's functions (described earlier) and the state government is allowed to issue only policy guidelines. In case of dispute about the policy nature of the guidelines, the Act provides for CEA to act as arbitrator.
- Importantly, if the state government wants to subsidise certain consumers over and above those allowed as per the tariff directed by the RC, it will have to compensate the utility for financial implications of such decisions. These provisions clearly restrict the authority of government vis-à-vis that of the RC.

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[4] This problem exists in most proposals for sectoral reforms that envisage independent tariff boards with powers limited to deciding tariffs.

[5] For example, the State / Central Regulatory Commissions being envisaged under the proposed Electricity Regulatory Commissions Bill has left many and wide avenues open for the governments to indirectly influence the RCs. The so-called independence of RCs (SERC and CERC) will only be notional.

- The Orissa model has very strict conditions to ensure that members of the RC do not have "conflict of interest" while performing their duties. The members of the RC cannot have any direct or indirect financial interest in any business activity related to the power sector, neither can they hold shares of power companies. The RC members also have to declare financial interests of their relatives in the power sector activities. The RC members cannot be re-appointed, nor can they take-up any government or even private job or consultancy assignments related to the power sector after retirement.
- The RC is expected to decide power tariffs and thereby control the profits of private utilities as well as the extent and the nature of the cross-subsidy to rural and poor consumers. The RC is expected to link utility profits to efficiency of utilities. Moreover, the RC has powers to decide licence conditions, set and upgrade norms for service quality and grid extension.
- The RC has powers of a Civil Court, vested by the Code of Civil Procedure (1908) for trying a suit. It also has same powers as of an Inspector under the Companies Act (section 240 and 240-A) to conduct search and seizure operations for collection of information and evidence etc. The orders of the RC have to be enforced by law as a decree passed by a Civil Court. These provisions greatly enhance the RC's ability to collect information and evidence as well as to enforce it's decisions.
- The RC has the responsibility to make decisions in a time-bound manner. This can bring in the much-needed clarity for approvals and reduce delays in sanctions or in tariff hike.

These provisions in the OER Act, provide autonomy to the RC to work in an independent manner while substantially limiting the possibilities of government interference or influence by vested interests. Under these circumstances, well-intentioned regulators can be substantially effective in discharging their responsibility of protecting long-term interests of consumers and society at large. However, there is one major area that needs further improvement.[6] The RC has to take approval of the Government for staff and budget. This lack of financial independence can substantially limit the RC's autonomy and effectively in the long run. In fact, in the past some important institutions have been made ineffective by limiting their budgets. To avoid such situation the RC should be allowed to charge a small cess on the electricity sold and this cess should be directly available to the RC. Apart from this, after the structure of power sector is decided the RC is effectively 'the king'.

5. Accountability of the RC

As explained earlier, the RC has enormous powers in terms of it's ability to decide the flow of large amounts of public money, through it's decisions on various aspects including the power tariffs. In addition, it's decisions are final and cannot be challenged on the techno-economic grounds. This is the crux of autonomous nature of regulation. In this light we cannot solely depend on selection of good and honest people on the body for protecting the public interest. Such a mighty combination of enormous authority and complete autonomy should necessarily be matched by the most stringent , thorough, mandatory and direct procedures and mechanisms for ensuring accountability. As seen earlier, even the failure of the earlier structure was result of the lack of rigorous and direct public accountability. Hence, in the WB-Orissa model, the accountability of the RC is extremely critical.

Major improvements in this kind of accountability in the form of transparency and openness is considered to be a positive feature in the WB model. For example, during the first tariff judgement in March 1997, a public hearing was conducted by the RC following a public notice inviting

[6] Other small issues are not taken up here. These include (a) state government's authority to lay down terms and conditions while providing subventions for compensating subsidy to utilities can be mis-used, or (b) state government can delay appointment on RC after a vacancy arises.

objections. As mandated by the existing legal provisions the RC has to give all decisions in writing (supported by reasons). The first tariff judgement of the RC included the calculations presented by the utility supporting its claim for tariff increase, the objections raised by people, the RC's comments on these objections, the tariff hike allowed, and the RC's rationale for the same, alongwith the expected levels of performance and operating efficiency. The Act requires that judgements given by the RC are to be made available to public at a nominal cost. The CBR goes one step ahead and says that all records of the RC, except the ones that are declared confidential or privileged by the RC, would also be open for public. This is a major improvement over the present situation, wherein all records are secret unless made public by the SEBs or governments, and can have enormous positive impact on the decisions making. These are certainly major improvements compared to the existing decision-making processes in other states (SEBs). The following section elaborates the procedures developed by RC to achieve an open and participatory decision making.

5.1 Example of Tariff Amendment Case through the "Proceedings" Route

Most of the provisions regarding information sharing and public participation are articulated in the CBR. These provisions called "Proceedings" route, are similar to those applied in a Judicial case, i.e., all the information submitted to the RC is available to all parties and one party can question other party or comment on any filings. The important issues in these provisions are briefly described below by separating process in four stages for ease of understanding (Chapter II, and V of CBR and 'Procedure for Tariff', OERC).

Stage I : Filling of Application and Issue of Notice

A utility can file an application with the RC for tariff hike, at most once a year. The RC can prescribe application format and information to be submitted by the utility. This may include data such as proposed tariff, expected revenue, expected expenses (for next three years), capital base, expected profits, and the related justifications. The utility can propose a cross subsidy but has to specify how it will affect different consumers. The RC can ask for any additional information. After receiving all the information, the RC may order utility to publish a notice (in one English and one Oria daily for two consecutive days) inviting public comments and objections to be filed with the RC. Any person can then raise objection, and make comment within 30 days from date of notice.

Stage II :Information Sharing and Filing of Objections

The public has a right to review and make copies of application and other information filed by the utility. The public can file objections / comments with the RC and also request for a hearing in person. Copies of public comments are available to the utility and the RC can allow utility to reply to these. If utility sends reply it is available to the public and the public can send rejoinders. This process may continue for 30 days.

The RC can appoint consultants to study various issues such as to examine utility's books of accounts, to estimate T&D loss reduction potential, or the potential for end use efficiency improvements, billing / recovery situation, etc. Such reports by consultants would also be made available to the public. In the mean while, the RC may also consult the Commission Advisory Committee.[7]

Stage III : Public Hearing and Cross Questioning

The RC can conduct a "public hearing", where it can allow public to raise questions and seek answers from the utility. Anybody can attend these hearings, subject to limitations of physical arrangements decided by the RC.

[7] This advisory committee is to be appointed by the RC in consultation with the state government.

Stage IV : Judgement and Implementation of Order
Based on the information available with the RC, in the form of pleadings, consultant reports and public hearings, the RC would take a decision. The decision would be arrived at by the majority vote. The decision would be in writing and supported by reasons. If a member of the RC does not agree with the judgement, his/her dissent note has to be attached to the judgement. Copies of this judgement are available for the public at a reasonable cost and all records of the "proceedings" are open for inspection to the public.

The RC has to finish this process and give a judgement within 90 days from submission of all information by the utility. The utility has to abide by the RC's judgement.

Advantages of This Process :
Such a decision-making process, when followed rigorously, can certainly have many advantages. It is **transparent** as it allows the public access to all records of the case including the calculations provided by the utility. The process allows **public intervention** in the form of filing of objections and questioning the utility or the RC. The public has a right to seek answers to their questions. The utility cannot get away with arbitrary and unreasonable assumptions, it has to project implications of the proposed tariff hike and the likely tariff for next three years.[8] Irrationality and discrepancies in calculation or in positions taken by different actors can be pointed out by consumers and the public[9]. They can also provide alternative proposals for say minimising the tariff hike or to reduce its impact on vulnerable groups. In such a situation, it will be inconvenient for the utility or for the RC to arbitrarily inflate the demand forecasts or accommodate favoured projects. The utilities will not be able to sign the PPAs without disclosing it's impact on tariff and utility finances.

Thus an open and accountable decision making process can provide many powerful weapons in the hands of the public to defend mis-use of power by authorities or exploitation by the utilities and to protect the public interest.

6. Avenues to Limit Transparency and Public Participation

If the above procedure is followed rigorously then it will be a major improvement over the present state of affairs and the RC will be compelled to take rational decisions, without succumbing to any pressure or influence. But as our analysis points out there are critical gaps in the entire design that may undo it's gains. One such pitfall is in the form of enormous discretionary powers vested in the RC that can be used to nullify the provisions that bring in the above-said transparency and the RC's accountability to the public.

In fact, the process of withdrawing these weapons in the hands of public has already begin. During the very first tariff judgement, the RC reduced the notice period for raising objections against the utility proposal from 30 to just 10 days. The RC also asked the public to collect the information from the utility (rather than providing it at it's own office). The RC also refused to allow more time for this process, when one party objected that the required information was not given by the utility.[10] The RC not just went ahead with the proceedings but in its very first tariff judgement also said that :

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[8] We have seen many cases of mis-leading and unreasonable calculations / assumptions by SEBs to facilitate clearance for some favoured IPP projects or to hide their inefficiency. These include unreasonable forecasts for Rs/$ exchange rates, highly inflated estimates of agricultural power consumption, etc.

[9] For example, the expert committee appointed by the GoM to renegotiate the Enron project has relied on improper comparisons and has done even an arithmetical mistake of $ 145 million, but there was no forum to examine and challenge.

[10] It is not intended to say that request for all the information was justified.

> "Hearing was neither a pre-requisite nor was it contemplated in the OER Act. The Act at section 10(5) enabled the commission to consult affected groups "*to the extent the Commission considers appropriate*" ...." (OERC Order No. 009, March 1997)

This justification has cited expediency as the reason, but has set a bad precedence. It is important to examine the powers of the RC that allowed it take such a position on the critical issues of transparency and accountability.

At the first level, even in the "proceedings route" (which is designed for public participation), most provisions related to transparency and public intervention are not mandatory and can be by-passed by the RC. The RC has wide discretionary powers while applying provisions of "proceedings route". For example, the RC can deny to the public the access to tariff application or allied information submitted by the utility or it may decide not to hold public hearings. As a result, the RC will simply invite comments from the public on the proposal for tariff hike from the utility. In such a situation, the "proceedings route" of the WB-Orissa model will be no different from mandatory provisions prescribed by the Electricity Acts which require CEA to invite and consider objections from the public, and which has been proved utterly useless in protecting the public interest[11].

At the second level, the RC may choose not to opt for "proceedings route" at all. The CBR authorises the RC to use its discretion and decide to settle matters "administratively". For matters settled "administratively", no public notice or sharing of information is required and matters can be decided in internal meeting of the RC members or even by the officers authorised by the RC. The CBR does recommend that the matters such as "grant of licence", "amendment of licence", and "tariff" may be settled through "proceedings" route <u>as far as applicable</u>. But, it does not even mention how other equally important matters such as approval of demand forecast, approval of PPAs, approval of investment schemes will be decided. The implicit indication is that the RC intends to settle these matters "administratively". This would result in complete lack of transparency in arriving at decisions regarding important matters on which more than 60% of the cost of power supply depends, and which have the potential to affect financial viability of the entire sector. Once such decisions are made in non-transparent manner, the process of tariff adjustment, however elaborate it may be, will have little meaning as the RC is bound to pass on these costs to the consumers through the tariff.

At the third level, none of the provisions from the CBR are mandatory for the RC. The CBR regulation no. 134 reads as below :

> "134. The Commission shall have the power, for reasons to be recorded in writing and with notice to the affected parties, (to) dispense with the requirements of any of the regulations in a specific case or cases subject to such terms and conditions as may be specified."

This is a very serious matter considering that the OER Act required the RC to take approval of the Assembly to change the CBR. By getting approval for this regulation, the RC, in the very first approach to the Assembly has sought and obtained it's signature on a blank check. This will allow the RC to circumvent even the procedural accountability to the Assembly and to the judiciary, contrary to what was envisaged in the OER Act.

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[11] For example, in case of Enron's Dabhol Project, the public notice asked objections to be submitted to the office of DPC. The DPC informed CEA that it has received no objections one day before last date of submitting the objections. Whereas in fact, DPC had received more than 30 representations, seeking more information and objecting the project !

Thus, it can be seen that at the most provisions of the OER Act would remain binding for the RC. In fact, as illustrated in the very fist tariff judgement, the RC has already taken recourse to this escape route and is already invoking the OER Act and not the CBR. Hence, all the praiseworthy provisions elaborated in the CBR such as records of the RC being open and available to the public or detailed procedure for information sharing and public participation remain non mandatory and, effectively, cosmetic.

Public Accountability as per the OER Act

Thus, in light of this analysis, it is essential to evaluate the accountability procedures in the OER Act which the RC cannot escape. To elaborate these provisions the example of passage of a tariff amendment case is used again.

If the utility desires a tariff hike, it will file an application with the RC. The application would have to be in the format prescribed by the RC and supported by the information requested by the RC. Based on this information, the RC would take decision by majority within 90 days. As per the Act, the judgement would be supported by reasons and would be available to the public at a cost. Thus, neither information sharing nor public hearing would be conducted.

In the OER Act, there are two other provisions relating to accountability of the RC that become important in this context. First, the Act states that all information related to tariff would be treated as non-confidential. However, it is up to the RC to interpret this. It is possible that the RC may not disclose the PPAs (until they are signed) or the demand forecasts, making this provision ineffective. The second provision, in the OER Act, compels the RC to make its decision in writing and supported by reasons. Considering the fact that the RC's decision cannot be challenged on techno-economic ground or on the grounds of use of its discretionary powers related to the procedures, this provision is too weak to be effective. In any case, we know how decisions can be justified with "reasons" wherever and whenever needed.

Effectively, the only way to challenge any improper decision by the ill-intentioned RC would be on the suspicion of bribery. We all know that the chances of establishing such charges in the current legal framework are too slim to be being perceived as a threat. Rather, any such effort will be interpreted as a malicious attempt by an ill-intentioned petitioners. As a result, the mandatory provisions regarding accountability prescribed in the OER Act are no better than those elaborated in the current Acts. Unfortunately, most probably, the RC is going to vouch and work by the provisions in the OER Act only.

7. In a Nut shell

The lack of accountability of the RC (which is effective king of the power sector) can be described as follows : By design RC's decisions cannot be challenged on techno-economic grounds. Through the peculiar design of CBR, the RC has bypassed its accountability in terms of procedures, that was envisaged in the OER Act. The RC being autonomous body , its is not accountable to any other government institution or even to the elected government. The only accountability that remains is directly to the people in the form of transparency and allowing public participation. These weapons in the form of right to information and intervention, vested in people through the CBR can be easily made ineffective and, in fact, the process of making them ineffective has already begun. More dangerous are efforts to create a false sense of security on the part of the promoters of the model (including the WB) by citing these weapons for ensuring accountability. People have these weapons to control the RC but the RC itself has the powers to disarm people. It is a paradoxical situation. When the RC is manned by well-intentioned persons these weapons will rarely be needed and when

the weapons are most needed to fight against the biased or incapable RC, they will be taken away by the RC !

More worrisome is the attitude of the RC in this context. We wrote to the RC, offering help in establishing procedures to streamline public interaction with the RC. We were volunteering for this with the hope that a procedure could be established wherein all concerned citizens could participate in the decision-making processes such as tariff revision, gain easy and assured access to the required information. And all this needs to be done without delaying the decision making process. We think this is the key to RC's public accountability. The response from RC was startling. After acknowledging our good intentions, the RC said that

> *".. Commission is a quasi-judicial body. The commission is of the view that any intermediation between the utilities and the Commission should be of greater concern to the utilities and the Commission should not be directly involved."* (OERC Letter no. Secy/025/97/516 dated 17/3/98).

Leave aside being accountable to the public, the RC does not even consider that public participation is some thing that it needs to worry about.

8. Other Issues

There are several other issues that make the WB-Orissa model and it's clones (i.e. models including un-bundling, privatisation) highly susceptible to failure in the longer term.

For instance, using budgetary controls the government can substantially reduce the effectiveness of the RC's functioning. Among other things, it may limit the RC's ability to obtain analytical help or to reach out to people. This may lead to decreasing public confidence in the RC and increasing suspicion and criticism of the RC (for say allowing tariff hike). To shelter itself, the RC may then be driven (or tempted) to use its discretionary powers more widely and more often and take away people's weapons.

Another issue is the RC's capability to deal with powerful private interests, especially large MNCs, and handle complexity and intricacies involved in the functioning of the un-bundled power sector. Most of the RC's decisions depend critically on the information and analytical inputs it can secure. Further the RC has a tough task of judging whether the utility is divulging all the necessary information and data in an honest manner. The information asymmetry between the RC and the powerful private utility is a difficult problem to solve in absence of budgetary independence and high level of public participation, among other things.

Third issue relates to opening up of electricity sector to the powerful players representing the international finance capital. The RC cannot match their proclivity and ability to say, to make use of every legal loophole available for maximising their profits. For example, cross holding between generation, transmission and distribution companies is prohibited in Orissa, but the RC has no backup of "anti-trust" laws or monitoring mechanisms to prevent creation of indirect monopolies (such as cross-holding through multiple layers, benami shares, etc.)

Without fully analysing such issues or having an open (and informed) public debate about these issues our nation is preparing to jump on the band-wagon of the WB conceived model of power sector restructuring.

9. What is Needed

Rather than rushing through such reforms and simply duplicating the OER Act in other states, what is needed is a radical but cautious approach. The important step in this direction would be to install a sabotage-proof regulatory structure and to test to see whether it can achieve our aim of bringing in rational decision-making in the functioning of the power sector by eliminating government

interference and influence of vested interests. A blind rush to privatisation and unbundling, with a naive belief that this is the time to remove the government and we can sort out all other problems latter will only further aggravate the current crisis situation. We would end-up with a sell-off of public assets worth thousands of crores of rupees to private parties and with disastrous long-term, irreversible contracts with private utilities to honour. The cost of such eventualities will be far higher than the costs due to the delays involved in a cautious or "test and improve" approach.

The desired radical regulatory reforms should have two critical elements : a) mandatory provisions for ensuring direct public accountability, transparency and b) adequate efforts to build the capability of the civil society to monitor and participate in the regulatory process effectively and ably. This may need introduction of somewhat complex, rigid procedures involving some costs in terms of time and money. But we should realise that such fundamental changes in the structure of the sector should not be tied with limited and short term objectives such as attracting international capital but should be geared to achieve long term social objectives of development and equity. Unfortunately, there are no short cuts in this.

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