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ACCOUNTABILITY AND BENCHMARKING THE REGULATOR – THE CASE OF THE REGULATED INDUSTRIES COMMISSION OF TRINIDAD AND TOBAGO

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ABSTRACT

The establishment of formally independent regulatory body is not a guarantee for effective regulation. The key issue is rather one that Levy and Spiller (1996) call regulatory governance. Regulatory governance concerns the way in which a transparent and predictable regulatory system can be put in place and sustained over time, in different countries and for utilities in different industries. Transparency and predictability are in turn built on accountability.

This paper examines the importance of accountability in promoting effective regulation and identifies 'best practice' mechanisms. It also outlines the steps that have been taken by the Regulated Industries Commission (RIC) in Trinidad and Tobago to promote accountability and improve its regulatory effectiveness. It also provides recommendations for possible improvements.

* The views expressed therein are those of the author and not necessarily those of the RIC.

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1. INTRODUCTION

Since the mid 1980s governments across the globe have sought to involve the private sector in the provision of utility services and network industries because of the growing demands for infrastructure investment and increasing fiscal constraints. Spurred on by multi-national lending agencies and the needs of private investors in general, many governments have had to separate policy from regulation and to separate both from the commercial management of the utilities. This often meant the creation of formally independent, often specialist, regulatory bodies, which were seen as critical to protecting the interests of foreign private investors. Thus a formal independent regulator became synonymous with effective regulation[1].

Stern (1997), while acknowledging that the concept of regulatory independence involves a number of elements, notes that the establishment of formally independent regulatory body is not a guarantee for effective regulation. He argues further that the key issue is one that Levy and Spiller (1996) call regulatory governance. Regulatory governance concerns the way in which a transparent and predictable regulatory system can be put in place and sustained over time, in different countries and for utilities in different industries. Transparency and predictability are in turn built on accountability. Therefore effective utility regulatory institutions are ones that provide transparency and predictability in the regulatory process and which may or may not be formally independent regulators. The key according to Spiller and Tommasi is how to limit governmental opportunism, understood as the incentives politicians have to expropriate - once investments are made – the utilities quasi rents, whether under private or public ownership, so as to garner political support.

This paper examines the importance of accountability in promoting effective regulation and identifies 'best practice' mechanisms. It also outlines the steps that have been taken by the Regulated Industries Commission (RIC) in Trinidad and Tobago to promote accountability and improve its regulatory effectiveness. It also provides recommendations for possible improvements. The remaining sections of the paper are structured as follows:

- Section 2 defines Accountability and Benchmarking and identifies certain 'best practice' for improving accountability.
- Section 3 examines the experience of the RIC *vis a vis* Best Practice Mechanisms to promote accountability.
- Finally, Section 4 makes certain conclusions and recommendations for improved performance.

2. ACCOUNTABILITY AND BEST PRACTICE

2.1 What do we mean by accountability?

Accountability is generally viewed as the flip side of independence, and encompasses the checks and balances that limit regulatory discretion. It involves regulators taking responsibility for their regulatory actions. This requires that regulators establish clearly defined decision-making processes and provide reasons for decisions. Supporting the decision-making process should be effective appeal mechanisms. In essence the independent regulator must "answer" for the decisions it takes. The next logical question therefore is to whom is the regulator accountable? The Better Regulation Task Force[2] (BRTF) in its Report on Independent Regulators in the United Kingdom (2003) noted that whilst accountability to Ministers and Parliament was important, equally important was accountability to the regulated entities and those on whose behalf they were regulating. In short the regulator is accountable to the public at large and ultimately

[1] Stern (1997) suggests that an effective regulator is one that has a reputation for making fair and justifiable recommendations, using fair and acceptable procedures and operating in a transparent and predictable way.
[2] The Better Regulation Task Force was established in 1997, and is an independent body that advises the Government of the United Kingdom on action to ensure that regulation and its enforcement are in line with the five principles of good regulation, which include proportionality, accountability, consistency, transparency and targeting.

the entire country. In articulating its principles of good regulation the BRTF in its Report on the Economic Regulators in the United Kingdom (2001) notes that with respect to accountability the following should obtain:

- regulators and enforcers should be clearly accountable to government and citizens and to parliament and assemblies;
- those being regulated must understand their responsibility for their actions;
- there should be a well-publicised, accessible, fair and efficient appeals procedure; and
- enforcers should be given the powers to be effective but fair.

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In a draft document "Conducting Public Consultation" (2003), the RIC noted that as a public body, it has a duty to account for its activities. Moreover, it notes that the RIC considers transparency and openness of the regulatory process as the key to ensuring regulatory accountability and legitimacy of the regulatory regime in the eyes of stakeholders – customers, service providers and the State.

According to Stern (1997) accountability also operates at various levels. There is formal accountability, that is, the formal legal basis within which the regulator operates. This covers the powers and duties of the regulator, and any legal requirements on the regulatory process as well as appeals opportunities for producers and consumers. There is also informal accountability which refers to the degree to which the regulatory process:

- Encourages debate and open discussion
- Involves all relevant parties
- Leads to justification by the regulator of decisions and methodologies; and
- Generally leads to a clear understanding of the "rules of the game".

In practice the line between formal and informal accountability is not as well delineated as this definition may lead one to believe. Consider for instance that many regulators under their governing statue are required to consult before final decisions are made in respect of pricing, standards etc (formal accountability). However, the law is usually silent as to the mode (written/oral) the consultation should take, which impacts on informal accountability.

Finally, the importance of effective decision-making and the accountability of regulators in contributing to that cannot be underestimated. According to Oxera (2002) it is often the knowledge that regulators can be held accountable for their decisions that is an important backstop in ensuring sound decision making in line with the public interest objectives set for utilities. Since, as we are all aware the utility sector consists of vital infrastructure industries which contribute crucially to the functioning of the general economy, to public health and prosperity, and to the lifestyle of the public at large.

2.2 What do we mean by Benchmarking to improve accountability? The concept of best practice

Benchmarking essentially involves learning, sharing information and adopting best practices to bring about changes in performance. A benchmarking exercise is designed to help an organization identify, learn and adapt exceptional practices and processes from elsewhere in the world to help it improve its performance. It consists of two elements:

- The "measurement" side of benchmarking (called the metrics). This aspect concentrates on measurement and comparison within organizations and within industry by the use of techniques such as performance indicators, modeling and outcome measures.
- The "action" side of benchmarking (called the process). It deals with understanding current processes, comparing to "best in class" and changing the way things are done.

This paper is concerned with 'process' benchmarking. Most utility regulatory bodies in the Caribbean, with few exceptions, are in their infancy. Thus benchmarking to improve accountability in the regulatory process involves looking outside of the region to regulators in other countries for "best practice". In 1997 The BRTF devised five principles which are necessary for measuring and improving the quality of

regulation and its enforcement, included was the principle of accountability. With respect to accountability the Task Force noted that regulators must be able to justify decisions, and be subject to public scrutiny. Therefore the following should obtain:

- Proposals should be published and all those affected consulted before decisions are taken.
- Regulators should clearly explain how and why final decisions have been reached.
- Regulators and enforcers should establish clear standards and criteria against which they can be judged.
- There should be well-publicised, accessible, fair and effective complaints and appeals procedures.
- Regulators and enforcers should have clear lines of accountability to Ministers; Parliaments and assemblies; and the public.

In its report on Independent Regulators in 2003 the Task Force notes that in respect of accountability to Ministers and Parliament, independent regulators, especially where they are funded in part or wholly by public funds, generally:

- Have an accounting officer;
- Produce annual accounts;
- Can be audited by the National Audit Office/ and or be subject to value for money examinations; and
- Appear before the relevant Parliamentary Select Committees.

With respect to accountability to regulated entities and those on whose behalf they are regulating (stakeholders), the Task Force, drawing on its earlier work recommended, certain examples of good practice which all regulators could copy, such as:

- Corporate plans;
- Open meetings;
- An accessible and affordable appeals mechanism;
- Open consultation exercises and then open feedback;
- Publication of Board Agendas, papers and minutes (as appropriate);
- Regulatory Impact Assessments;
- Statements of proposed action;
- Comprehensive – but easy to use – websites; and
- Discussion fora on websites.

The Department of Trade and Industry (1998) in its Green Paper on reforming utility regulation in England and Wales, entitled 'A Fair Deal for Consumers –Modernising the Framework for Utility Regulation' notes that in respect of accountability, decisions should be reasoned and justified by reference to defined criteria (such as a list of regulatory objectives), so that they can be effectively challenged. Companies must have the right of appeal against the regulator and regulators must have a clear legislative framework within which to operate. They believe that with greater clarity of duties comes improved accountability for their delivery – to Parliament, to Ministers and consumers.

In a similar vein, Smith (1997) recommends the following measures to enhance accountability:

- mandating rigorous transparency, including open decision-making and publication of decisions and reasons for those decisions;
- prohibiting conflicts of interest;
- providing effective arrangements for appealing the agency's decisions;
- providing for scrutiny of the agency's decisions;
- subjecting the regulator's conduct and efficiency to scrutiny by external auditors or other public watch dogs;

- permitting the regulator's removal from office in cases of proven misconduct or incapacity.

Stewart-Smith (1995) notes that the regulator should operate under a procedural framework which allows any interested party, including the government or consumer groups, to provide inputs into the decision making process. The regulator should prepare a written statement of the reasons for its decisions, both to enhance public confidence in the transparency of the process and also to facilitate judicial review. The regulatory scheme should also include opportunities for review by the legislature of the work of the regulator. A useful approach is to require the regulator to submit a report, preferably annually, to the legislature on its activities and on any significant competition issues which may have been encountered and which require legislative action. In this way there is opportunity for public discussion on the performance of the regulator, while at the same time preserving the independence of the regulator on a day-to-day basis.

Another important mechanism that enhances accountability in countries which Spiller and Tommasi note have a unified form of government (the executive exercises considerable control over the legislature) such as the UK, Jamaica and other Caribbean territories, is that their regulatory governance structures are based on contract law, that is, in the licence, rather than the legislation or agency decision. This provides the regulated companies with some amount of veto power over regulatory decisions. Since, these agencies, while seemingly independent even in countries such as Canada, New Zealand and the UK, would not be able to stand in opposition to the executive, as by an Act of Parliament the executive could change their term, their nature or even eliminate them.

2.3 Best practice mechanisms

We can, from the foregoing, identify a number of recommendations for enhancing and promoting accountability that can be said to constitute 'best practice' mechanisms:

- Financial accountability:
  - have a designated accounting officer;
  - produce annual audited accounts; and
  - appear before (when/as necessary) appropriate Parliamentary Committees.

- Prepare Corporate/ Strategic Plans (Forward Programmes) – these generally outline the regulator's work plan for some specified period and are available to the public. In the UK for example both Ofwat and Ofgem prepare plans that are subject to public consultation before they are finalised. This allows for public scrutiny of plans and the costs of undertaking those plans. Moreover, they can be a useful tool against which the regulator's performance can be assessed at the end of the period.

- Conduct Regulatory Impact Assessments (RIA) – RIAs are a policy tool to assess the impact, in terms of costs, benefits and risks of any proposed legislation or regulatory action. The purpose of the RIA is to explain the objectives of a proposal, the risks to be addressed and the options for delivering the objectives. In doing so it makes transparent the expected costs and benefits of the options for the bodies involved, such as other parts of government and small businesses, and how compliance with regulatory options would be secured and enforced. RIAs are conducted in two phases; a partial RIA is initially conducted and included in the consultation document and a full RIA (accompanies final policy document). A full RIA is expected to cover:
  - Purpose and intended effect – identifies the objectives of the regulatory proposal;
  - Risks - Assesses the risks that the proposed regulations are addressing;
  - Benefits – Identifies the benefits of each option including the "do nothing" option
  - Costs – Looks at all costs including all indirect costs;
  - Securing compliance – Identifies options for action;
  - Public consultation – Takes the views of those affected, and is clear about assumptions and options for discussion;

- Monitoring and evaluation – establishes criteria for monitoring and evaluation; and
- Recommendations – Summarises and makes recommendations to Ministers/Boards, having regard to views expressed in public consultation.

The Office of Water Services (Ofwat) (2002) notes that when they consult on policies they include partial RIAs in the consultation paper. Stakeholders' responses to consultation help finalise RIAs. Full RIAs (Statements) are published in Ofwat decision documents. RIAs are used when a new policy will directly affect the water and sewerage companies and/or other stakeholders. However, they are not used when urgent issues are considered or are not prepared when only one company or a small number of companies /stakeholders are affected by the proposals. The process used for conducting RIAs by Ofwat is outlined in **Appendix 1**.

The Office of Gas and Electricity Markets (Ofgem) is under statutory obligation since December 2003 to carry out Impact Assessments where it is carrying out its functions under Parts 1 of the Gas or Electricity Acts and it appears that the proposal is important. If it chooses not to do an Impact Assessment it must issue a public statement setting out the reasons that it considers it unnecessary for it to carryout an Impact Assessment.

Overall, RIAs allows the regulator to make explicit the reasons for a regulatory decisions and consequently provide a basis for those affected to question the explanations/reasons put forward in support of a decision.

- Open Consultation (can be included as part of the process of conducting an RIA, although many regulators now have a statutory obligation to consult), which includes the following elements:
  - disseminate information (includes consultative documents) to all stakeholders on the proposed decision utilizing traditional and other means, including websites etc;
  - hold open meetings with stakeholders; and
  - issue statements of proposed action in respect of issues – an example of this is the framework/approach document commonly issued by regulators in respect of price reviews which generally outline the steps to be taken and the timeframes involved.

In some countries the regulatory framework also created consumer bodies to work with/advise the regulator on issues affecting customers. In the UK the UK the Water Industry Act 1991 created Customer service Committees at the regional level as part of the regulatory framework. These committees are now known as WaterVoice Committees. In 1993, the Director General established the Water Voice Council (a non-statutory body). It is comprised of the ten Chairmen of the WaterVoice Committees. The Chairman of the WaterVoice Council is appointed by the Director General in consultation with other Council members. As part of a Memorandum of Understanding Ofwat and WaterVoice have undertaken to consult on certain matters even before public consultation takes place. These include:

- Prices;
- Standards;
- Codes of Practice;
- Service for customers with special needs;
- Mergers, takeovers and industry restructuring proposals;
- Regulatory action on serious criticism of a company's performance;
- Formal investigations of serious incidents involving a water company; and
- Licence Modifications.

The Committees function as an important stakeholder in the regulatory process and provide important input that can for example, improve a consultation document before it is circulated to the wider public.

In a similar manner Ofwat and the Drinking Water Inspectorate under the terms of their Memorandum of Understanding consult with each other before public consultation on matters involving the exercise of their respective functions.

Overall, Open Consultation allows the regulator to provide stakeholders with information with respect to policies/decisions so they can better understand the reasoning behind actions and they in turn can provide suggestions for improvements.

- Scrutiny by external watchdogs – External Watchdogs provide an opportunity for the performance of the regulator to be assessed by an independent third party. These reviews can take the form of efficiency reviews[3] (inputs) or the reviews can assess regulatory effectiveness (outputs) which would encompass such things as the appropriateness of a particular methodology for setting prices etc. In the UK, Parliamentary Select Committees as well as bodies such as the National Audit Office and the HM Treasury perform this function. A Select Committee is comprised of about ten backbench members of Parliament (that is, MPs who are neither of the government, as ministers or in minor positions, nor of the opposition party's "shadow government") and can hold enquiries on any subject falling within a Ministry's purview[4]. When a Committee feels that a matter is worth investigating, the members set terms of reference for themselves and announce the inquiry so that interested parties can submit evidence. All substantive evidence is published in the Committee's reports except that submitted in confidence. The Committee takes oral evidence from witnesses in hearings lasting an hour or two, generally spread over several weeks. In an inquiry involving a regulated industry the witnesses might include the chief executives of some of the companies in the industry, consumer representatives, outside experts and the regulator. The Committees have no formal powers to order a regulator (or a company) to do anything, but they have a great deal of influence. Their reports almost always contain recommendations, and the regulators (and government departments) prepare formal responses to those that affect them. If the regulator rejects a recommendation, he must give reasons for doing so.

  In 2002 the National Audit Office (NAO), the equivalent of the Auditor General Department in Trinidad and Tobago, conducted an investigation into the effectiveness of the price setting methodology commonly referred to as RPI-X regulation used by the economic regulators of utility services. This report was laid in Parliament in accordance with the National Audit Act. In 2001 the HM Treasury also commissioned a study on the efficiency of economic regulators. The specific objectives of the report of the Treasury report were to:
  - To examine the way in which the regulators define, plan, and prioritise proposed areas of work from which programmes and projects are developed;
  - To evaluate the management of programmes and projects from inception to closure, and;
  - To assess the cost-efficiency of support functions such as human resources, finance, IT, communications and estates.

  Scrutiny by external watchdogs promotes financial accountability and also allows independent third parties to access whether or not the regulator is achieving regulatory objectives.

[3] The Efficiency Review is focused on inputs (procedures, processes and resources) rather than outputs (regulatory effectiveness).

[4] There is a Select Committee for each Ministry and though the Committee's party balance reflects the balance of the House of Commons, the Committees usually aim for unanimous reports and therefore seek consensus.

- Effective Appeals Mechanisms – Effective appeal mechanisms are important in providing the possibility for improving on the public interest outcomes of regulatory decisions, where these are believed to have fallen short. The possibility of effective challenge should also provide an important incentive to regulators for good decision-making. For example there are two bodies that are responsible for overseeing the appeals process in the UK. According to Green (1999) these bodies, in conjunction with Parliamentary Committees, are responsible for providing the checks and balances in the UK regulatory system in the oversight of the system. These are:
    - Competition Commission – The Competition Commission which was established under the Competition Act 1998, is the successor to the Monopolies and Mergers Commission and has as part of its general functions the role of examining disputed decisions of the utility regulators regarding price determinations and licence modification. The commission has about thirty part-time members- from business, academia, trade unions, the law and other professions- and a full time staff of civil servants. A small panel of commission members with relevant expertise is appointed specifically to serve in utility inquiries. A group of about four to six commission members are selected for each inquiry. Only these members are responsible for the report on the results of an inquiry. To launch an inquiry, the regulator makes a formal reference to the commission, asking it to determine whether the licence condition in question might be expected to operate against the public interest, and if so whether amendments to the licence could prevent this. The commission normally has six months for its inquiry, though this period could be extended. It asks interested parties (including the regulator, the company, and relevant branches of government) to appear as witnesses in these matters.
    - The Courts – Under English law any branch of government can be subject to the process known as judicial review. If an individual company brings a complaint about a government decision (including a decision by a regulator), the courts must determine whether proper procedures were followed in reaching that decision. Judicial review[5] does not concern itself with the substance of the decision unless it can be shown that the decision is unreasonable given the procedures that should have been followed and the evidence presented. The use of judicial review has generally made the regulators aware of the necessity of ensuring open and transparent process in decision making.

  The Current Appeals Mechanisms in the UK Water and Electricity Sectors can be summarized in Table 1:

  Table 1: The Current Appeals Mechanisms in the UK Water and Electricity Sectors

Decision Area	**Principal Avenue of Appeal**
Price Determination	Competition Commission
Licence condition amendments	Competition Commission
Financial penalties, enforcements orders	High Court (limited grounds of appeal, sector specific)
Changes to industry codes	Judicial Review only
Regulatory statements of methodology or policy	Judicial Review only
Other Regulatory decisions	Judicial Review only

  Source: Oxera 2000

[5] There are a number of grounds of challenge to a public body's decision by way of judicial review. Although there is no straightforward classification, these can in simple terms be grouped under three general headings: illegality; procedural impropriety; and irrationality.

Interestingly, however, the BRTF (2001) notes that none of the stakeholders were completely happy with the current system of appeals in the UK, which was described by companies and regulators as "the nuclear option", primarily because it is expensive and time consuming. The challenge therefore for any regulatory system is to ensure that there is an effective appeals process.

- Reliance on licence provisions - This is especially important in countries that have a unified form of government, as it provides the regulated entities with some amount of veto power.

Essentially, the 'best practice' measures for ensuring accountability involve ensuring that there are checks and balances in the regulatory process. Best Practice measures combine standard mechanisms for ensuring financial accountability that are found in most organizations, with ones that promote effective consultation and communication and aim as well to improve the predictability[6] of the regulatory regime, which in turn are the foundations of accountability and transparency[7]. Effective consultation allows all those interested in the outcome of a particular decision to have their say before a decision is made, while effective communication assists all stakeholders to understand regulatory initiatives and needs, and can help build commitment for regulatory initiatives through better understanding of regulatory objectives and rationales. Critical too are the mechanisms whereby parties can appeal the decisions of the regulators, so that in effect the regulator accounts to a neutral third party for its decisions.

3. BEST PRACTICE MECHANISMS TO PROMOTE ACCOUNTABILITY – THE CASE OF REGULATED INDUSTRIES COMMISSION

The RIC's experience *vis a vis* the best practice mechanisms is examined below. However, in order to fully appreciate this we need to first look at the provisions of the RIC Act that give life to some of the accountability mechanisms.

3.1 The Legal Mandate

The institutional framework established by the Regulated Industries Commission Act No 26 of 1998 incorporates a number of the mechanisms outlined in section 2 to enhance the RIC's accountability. Some of the provisions are outlined below:

- Submission to the Minister of a budget and a statement outlining the objectives and planned activities of the Commission for each financial year, to be laid in Parliament (Section 28);
- Audit of the accounts of the RIC by the Auditor General (or auditor approved by him) (Section 34);
- Submission of a copy of the Audited Statements of Accounts and the Annual Report to the Minister to be laid in Parliament (Section 34); and
- The annual report must be made available to the public as soon as possible after it has been laid in Parliament (Section 34).

Moreover, as a Statutory Board the Commission is also subject to the Exchequer and Audit Act.

[6] Key mechanisms for improving predictability include the establishment of decision-making criteria that are well defined and the provision of clear timetables for the review of standards and regulations.

[7] There are three central components to transparency in regulation, they are;

- Transparent Process – through stakeholder involvement (including consultation)
- Transparency of decision-making criteria – through detailed articulation and publication of decision making criteria
- Transparent decisions – transparent mechanisms for review of decisions (e.g. Appeals Body)

The Act also includes specific provisions that make the Commission (and in certain instances the Minister where he has regulatory powers such as the granting of licences) accountable to both consumers and investors. These are outlined below:

Consumers – appointment of Consumer Service Committees (Section 24)

- The appointment of Consumer Service Committees, with specific functions such as advising the Commission on matters relating to the type, level and quality of service provided by the service provider, participating, on request, in the proceedings of the Commission where the terms and conditions of the licences or the bases of tariffs or rates charged by a service provider are being considered.

Service Providers - Licences (Sections 73, 38, 39, 40, 41, 42, 43, 44, 45, 46)

- No entity can render a service that falls within the purview of the RIC without a licence.
- To publish in the Gazette and at least one daily newspaper circulating in Trinidad and Tobago a notice to the effect that it has received and is reviewing applications for new licences;
- Licences are required to have specific provisions in respect of the term of the licence, service governed by the licence, fees etc, the procedure for the enforcement of the terms and conditions of the licence, mechanisms relating the compensation of the service provider, and dispute resolution;
- No licence can be varied except by agreement between the licensee and the Minister, or if new circumstances arise that make it necessary in the public interest;
- Before the Minister varies a licence, he must circulate in the Gazette and one daily newspaper his intention to so vary and supply reasons for same;
- Before the Minister can cancel a licence, the Commission has to serve notice to the service provider;
- All licences are to be made available for public scrutiny at the office of the Commission;

The Act also contains an appeals mechanism whereby any party who is aggrieved by the decision of the Commission or the Minister in respect of licence conditions can appeal to the Fair Trading Tribunal of the Fair Trading Commission.

However, perhaps the most critical element of the Act which promotes accountability is the requirement that the Commission consult with service providers, consumer interest groups or any other party it considers as having an interest in matters pertaining to price setting and the establishment of standards.

Additionally, the RIC falls within the ambit of the Freedom of Information Act No. 26 of 1999. The Act seeks to promote accountability, transparency and increased public participation in the development of national policy by extending to members of the public a general right to assess official documents in the possession of public authorities.

3.2 The Experience of the RIC

The RIC has been able to implement a number of provisions in the Act that enhance accountability with varying degrees of success.

3.2.1 Financial Accountability

With respect to financial accountability the RIC has:

- An accounting officer i.e. the Executive Director;

- Submitted its budget and a statement (the RIC has a rolling Strategic Plan) outlining the objectives and planned activities of the Commission for each financial year, without fail, to the Minister; and
- Been audited by the Auditor's General Department (for each financial year)

However, no annual reports have been submitted to Parliament because the RIC, has to date, not obtained the final Audited Financial Statements from the Auditor General's Department for 2002 and 2003. Audited Financial Statements for 2001 were received at the end of July 2004.

3.2.2 Preparation of a Strategic/Corporate Plan/ Work Programme

The RIC consistently prepares/updates its Strategic Plan. However, the plan is not subject to a public consultation process.

3.2.3 Regulatory Impact Assessment

The RIC, in preparing its consultative documents and as part of the consultation process, undertakes many of the steps outlined for the conduct of an RIA. However, at this time the RIC does not publish RIA Statements with its decision documents.

3.2.4 Open Consultation

Perhaps the most critical measure currently utilized by the RIC to promote accountability and transparency is the consultative approach that has been taken in respect of the establishment of standards of service and the provisions for vulnerable groups through our Social Action Plan. The RIC intends to follow this process for all of its major decisions.

Our process for consultation is articulated in the draft document on public consultation. Therein the RIC notes that stakeholders must have confidence in the regulatory system if it is to survive. This does not mean that they must necessarily agree with every decision taken but they must believe that the regulatory decisions take their interests into account. The best way to achieve this is through openness and consultation. **Appendix 2** demonstrates how effective consultation improves decision-making. The consultation process is outlined below:

The Consultative Process
The stages that the RIC will typically follow in consulting on proposals is set out hereunder:

- **Pre-Consultation** – even before the formal consultation document is released, the RIC may discuss policy options with key audiences;

- **Initial Consultation (Formal Consultation Paper)** – releasing of a formal consultation paper and soliciting comments from the public. The consultation paper will clearly define all relevant issues that need to be addressed, provide background information on these issues, and set out the RIC's preliminary views on the issues;

- **Collecting input from the public (comment and reply comment period)** – the purpose at this stage is to gather all relevant information so that the RIC can make the most informed decision. This stage includes a formal reply comment stage. Additionally, during this stage, for consultations involving complex issues, the RIC may hold seminars/meetings and to obtain the broadest range of view points; and

- **Final decision** – after the conclusion of the consultation period, the RIC will release a final decision based on information collected. The RIC's final statement will present and

justify its conclusion on the issues identified in the consultation paper and comments received.

In order to promote the widest participation the RIC undertakes to:

- Publicise consultations by issuing press releases, public notices and media advertisements;
- Make every effort to bring the Consultative Document to the attention of anyone who may be interested;
- Make the Document readily available and free of charge;
- Place the Document on the RIC's website and in its library;
- Write interested parties (for major policy initiatives) enclosing a copy of the document; and
- Publish the final decisions, including the reasons for them.

The RIC is also aware that depending on the nature and the importance of an issue, written consultation needs to be supplemented by other means, including:

- Workshops, seminars and public meetings, sufficient advance notice will be given of such events to enable effective participation;
- Individual meetings with the RIC
- Working groups of representatives of service providers, customers and other interest groups
- Open dialogue with the private sector; and
- Consultation with independent advisors on matters of a technical nature.

The RIC also allows sufficient time for written responses, and notes that in most cases the consultation period will not be less than one month. Additionally, in order for public debate to be properly transparent, the responses are made publicly available unless respondents indicate that they wish their document remain confidential.

Every consultation document also includes a timetable. This timetable largely depends on the nature and complexity of the issues under consideration.

It has been noted that the RIC Act makes provision for the establishment of Consumer Service Committees. The CSCs in regulatory jurisdictions such as the UK provide important input into the decision making process. Unfortunately, the CSCs are to be appointed by the Minister and this has not been done to date.

The Consultation process in Action

RIC's commitment to the consultation process is amply demonstrated in the approach being taken with respect to our Social Action Plan.

As part of its consultative process the RIC undertook the following:

- Distributed the consultation document widely -
  - RIC held pre-consultation discussions with various groups.
  - The formal consultation document was published on March 23, 2004 and RIC sent a copy of the document directly to stakeholders (service providers, government ministries/agencies/boards, other regulators (local), organizations representing consumer interests, trade unions, trade bodies/organizations, local government corporations, educational institutes, media, individuals.
  - Advertised in the print media (daily newspapers – provided notices that indicated what the document was about and where copies of the document could be obtained).

  - Published document on Commission's website.
- Held public meetings/workshops around the country to discuss document – Conducted nineteen workshops at community centres around the country to discuss document and feedback – these sessions were videotaped and recorded.
- Appeared on television and radio talk shows.

The Consultation has generated considerable interest, and one of the daily newspapers made the Plan the subject of an editorial, cautioning the RIC '… whatever, its liberal inclinations… to be careful lest it succeed in perpetuating a certain recklessness with respect to citizens meeting their legitimate debts to agents of the State…" (Express, July 23, 2003). Additionally, the same newspaper featured a three part series on the Plan. The deadline for submission of responses was August 31, 2004, and the RIC expects to adhere to the following timetable for the rest of the process:

- Comments on Responses – September 30, 2004
- Responses to Consultation – October 29, 2004
- Statement by the RIC – November 26, 2004

3.2.5 Scrutiny by External Watchdogs

The RIC has, to date, not appeared before any Parliamentary Committees nor has it been the subject of an efficiency review and/or effectiveness review by the Auditor General Department or any other such department. However, the RIC annual budgetary submission has been subject to the approval of Cabinet. Hence, it is reviewed not only by the Ministry under whose purview the RIC falls, that is, the Ministry of Public Utilities and the Environment, but it has been subject to review by the Ministry of Finance.

3.2.6 Licences and Appeals Mechanism

Under the RIC Act the Minister is responsible for issuing licences on the advice of the Commission. The RIC has prepared draft licences for both WASA and T&TEC. However, the process has been stymied by the lack of an appeals mechanism. At the time of passage of the RIC Act plans were in train to establish the Fair Trading Commission (FTC). It was envisaged that for the utilities sector the FTC Tribunal would perform a role analogous to the Competition Commission in the UK setting. The FTC was never established. However, the Government is now seeking to have a Fair Trading Bill 2004 debated in Parliament.

Additionally, there is a Judicial Review Act No. 60 of 2000, which provides for an application to the High Court for relief by way of judicial review.

3.3 Overall Assessment of the level of accountability currently achieved by the RIC

If one is to rank the level of accountability achieved by the RIC, on a scale from A (best practice) to E (highly unfavourable), utilizing the best practice mechanisms outlined above the following results obtain:

Table 2: Measure of RIC's Accountability

Financial Accountability	B+
Preparation of a Strategic/Corporate Plan/ Work Programme	B+
Regulatory Impact Assessment	B
Open Consultation	B+
Scrutiny by External Watchdogs	C+
Licences	C+
Appeals Mechanism	C+

4. CONCLUSIONS AND RECOMMENDATIONS

Every regulator has to deal with a wide range of stakeholders (companies, government, consumers) and as such has to develop a deep understanding of the needs of these varied stakeholders. A regulatory body must therefore be a good listening organization, using a variety of techniques such as consultation and research to ascertain stakeholder's wants and views. It is crucial that the regulator's decisions be made in a way that is transparent and its accountability to the outside world to be effectively discharged. The regulator's decisions should be based on clearly articulated principles and ground rules. A high priority must therefore be placed on external communication and willingness to open up its work to the outside world.

The best practice mechanisms outlined in this paper promote transparency and enhance accountability.

In the case of the RIC, we have been able to utilize some of them to enhance our own accountability. However, much work still needs to be done in areas such as the Appeals mechanisms, the issuance of licences and strengthening the consultation process. The following recommendations need to be considered:

- In the RIC Act the Minister performs critical regulatory functions e.g. issuing licences on the advice of the Commission. However, he can choose to accept or reject this advice, but is under no obligation to provide reasons. The Act can be strengthened to make it a requirement for him to provide reasons in writing if he is in disagreement with the advice given.
- Although the RIC Act (Section 49) implies that the RIC should explain its decision in a written opinion setting forth its reasoning and its calculations, the Act does not explicitly foreclose the possibility of short conclusive decisions. The requirement to give written explanations for its decisions will support good decision-making.
- The RIC should include a full Regulatory Impact Statement when major decisions are under taken.

Finally, consideration can be given in Trinidad and Tobago to the establishment of an Advisory Council (an entity with representatives from civil society) or Ombudsman charged with the specific responsibility of reviewing the performance of independent regulators such as the RIC, the Telecommunications Authority of Trinidad and Tobago and the Environmental Management Authority.

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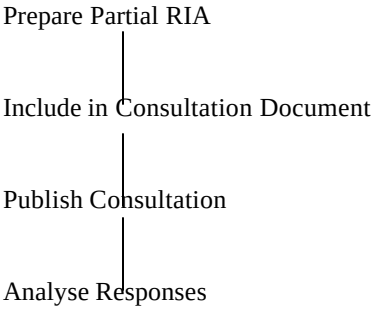
APPENDIX 1

Incorporating Regulatory Impact Assessment into the Consultation Process – the Ofwat Approach

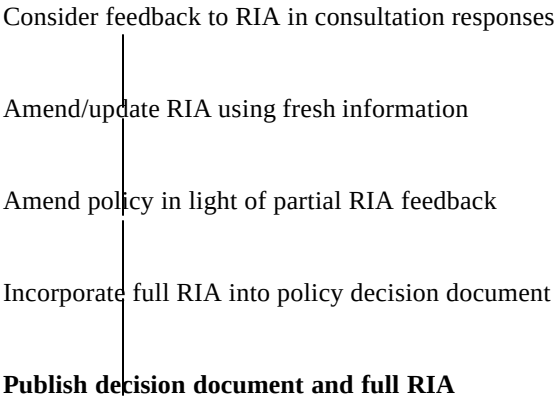
There are two stages:

Stage 1 Partial RIAs – Included in consultation document
Stage 2 Full RIAs – Included in policy decision document

Stage 1 – Partial RIAs



Stage 2 – Full RIAs



Stage 1 – Partial RIA

A partial RIA would normally cover the following:

- Purpose and intended effect of the policy and its timing
- Risk assessment
- Alternative approaches and the reasons for preferred action
- Benefits – direct and indirect
- Compliance – how compliance will be monitored, the costs of compliance and who will meet those costs.

Stage 2 – Full RIA

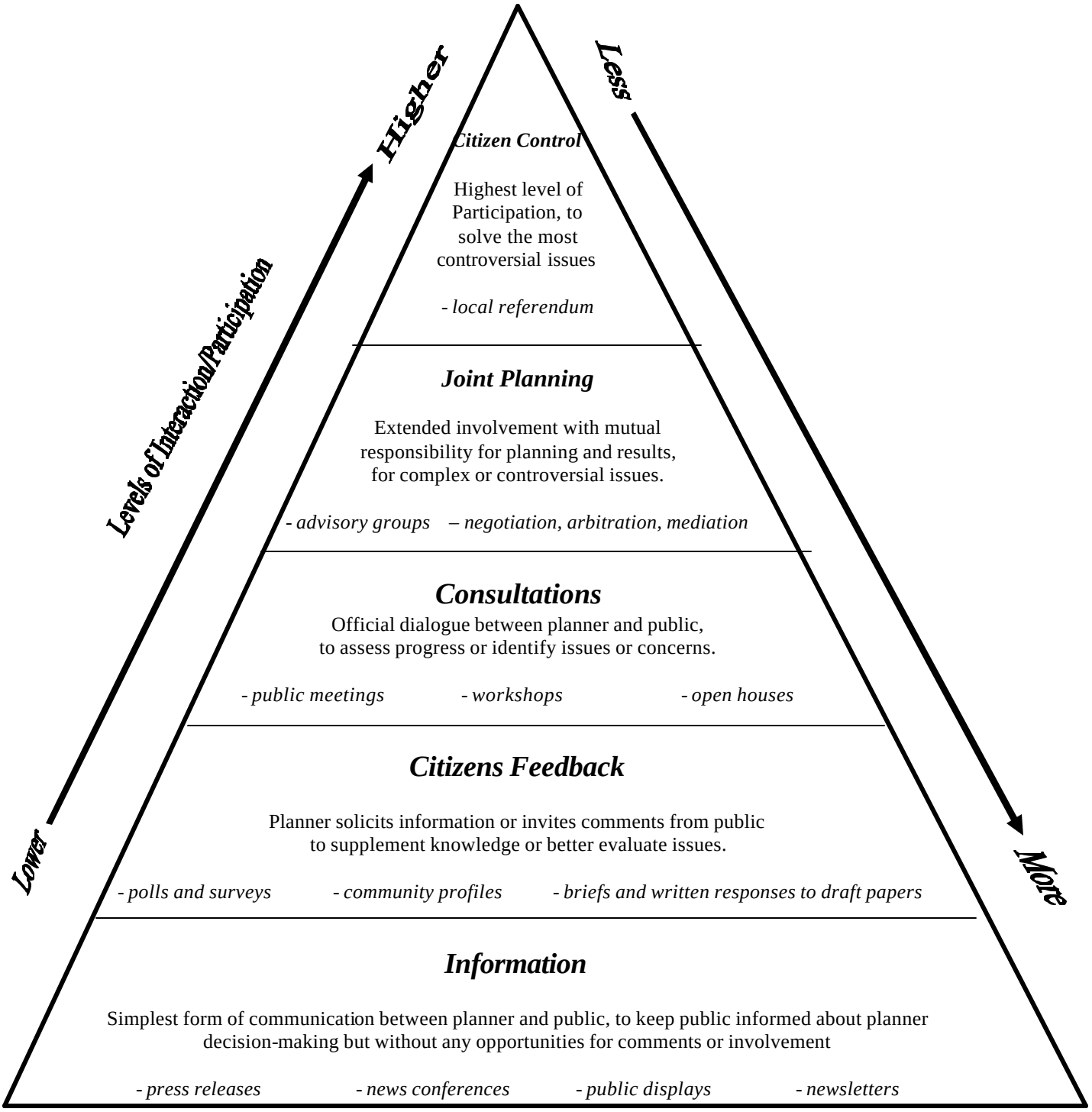
A Full RIA would be produced using the following format:

- Introduction and Summary
  - ✓ The aim of the RIA in assessing costs and benefits
  - ✓ The number of responses to the partial RIA
  - ✓ Where policy has changed as a result of the consultation
  - ✓ Summary of costs and benefits

- Benefits
  Who benefits and what are the benefits.
- Costs
  Who incurs costs, who is affected and what are the costs. Compliance costs are to be included as well.
- State how the policy will be reviewed and evaluated, including timetable.

APPENDIX 2

LEVELS OF PUBLIC PARTICIPATION



Source: Awakening Participation – Regional Environmental Centre for Central and Eastern Europe (appears in RIC document " Conducting Public Consultations")