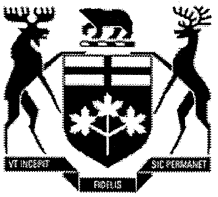
TAB 8



Ontario Energy Board | Commission de l'énergie de l'Ontario

A Report with Respect to Decision-Making Processes at the OEB

September 2006

Introduction

Over the past year the Board has set itself on a course of achieving an efficiency agenda – one that is focused on improving efficiency in the Board's:

- Operational Performance – through business planning and performance metrics;
- Regulatory Outcomes – through performance and incentive mechanisms for the gas and electricity sectors; and
- Decision-making processes – through improving the Board's practices as they relate to hearings.

This paper focuses on reviewing the Board's decision-making process, specifically around the Board's current hearing practices and procedures, and considers how the Board's decision-making processes may respect the need for transparency and openness while at the same time be made more:

- focused on relevant issues;
- timely; and
- results oriented (as opposed to process oriented).

In short, the purpose of this review is to facilitate better decision making by the Board. This review was directed and guided by George Vegh, then OEB General Counsel, with the assistance of two external advisors, Lorne Sossin, of University of Toronto, and Ken Rosenberg, of Paliare Roland Rosenberg Rothstein. Input was obtained from members of the energy regulatory bar and other stakeholders. This report considers how the Board's processes may be improved and how these changes may be implemented. The categories under consideration were adjudicative hearings, the role of staff, the role of parties, and pre-hearing processes.

Summary

Adjudicative Hearings

- Adjudicative hearings should be largely restricted to circumstances where fact finding is required to support an order. Where possible, policy matters should be addressed in codes, rules or guidelines.

- The scope of hearings should be constrained by detailed and clear issues development as early as possible in the proceeding, and prior to the commencement of the pre-hearing processes.

Role of Staff

- Board staff should participate in hearings with the objectives of identifying and evaluating options for the Board's consideration in a proceeding by reference to the public interest. Staff should be required to present its view of the public interest on the record so that parties may respond to it. In very rare cases, staff's participation in a proceeding in this role may be incompatible with its ability to assist the panel in its deliberative process. An example of this is where staff is in a prosecutorial role in a compliance proceeding in Part VII.1 of the Act.

Role of Parties

- Parties to a proceeding should be required to demonstrate how their participation relates to the specific and particular interest of their constituency. This can be achieved through various methods, including asking parties at the commencement of a hearing to indicate which issues they have an interest in and how the issue affects their constituency, and querying an intervenor representative if that representative's participation in cross-examination or argument does not appear to relate to the intervenor's constituency. This requirement can be expressed through greater engagement by the panel in supervising the questions and submissions of parties.

Pre-Hearing Processes

- The Board should make more use of technical conferences and less use of written interrogatories. Board members (who may or may not be members of the panel hearing the proceeding) may attend at technical conferences and make rulings on the relevance of questions, responsiveness of answers, and the need for undertakings;
- The Board should make greater use of written transcripts as a full or partial alternative to oral testimony;
- The Board's expectations for settlement should be identified in a proceeding. Specifically, the Board should, prior to settlement discussions, advise parties which issues the Board believes should be settled and which issues the Board believes should go to a hearing;
- Board Members (other than the panel) should be made available to participate in the settlement of selected issues, such as through an in-chambers settlement conference or to review proposed settlement options and provide insight and perspective on the reasonableness of parties' positions; and
- Parties may be required to file their final offer on issues that the Board identifies should be settled. The panel may review these offers after releasing its substantive decision and may consider it in making cost awards and determining whether all of a utility's regulatory costs may be recovered from customers.

These matters are cumulative in that as a threshold matter, the Board should exercise greater control over the identification of issues that should be addressed in a hearing. After this is in place, staff should be responsible to ensure that the Board has a thorough evidentiary basis to address these issues and clearly address the public interest aspect of these issues. Staff positions should be stated clearly on the public record so that parties may respond to them. Clear issue identification and development is also required to assist parties in their preparation of their cases and, in particular, will allow them to identify clearly how their constituency is impacted by the issues in a proceeding. Parties can then be expected to confine their participation to the issues that directly impact their specific constituency both in the pre-hearing processes (discovery and settlement) and at the

hearing itself. Finally, by the time of settlement discussions, the Board should be in a position to identify which issues are appropriate for a settlement. The expectations of parties with respect to settlement should be made clear and reinforced with incentives and consequences.

Part I -- Adjudicative Hearings

The key focus of this review is oral hearings. It is important to put the role of oral hearings at the OEB in context. This is because oral hearings are only one of a number of ways that the Board makes decisions and pursues its regulatory mandates. For example, in the 2004-2005 year, the Board issued approximately 700 decisions, of which less than five per cent resulted from oral hearings.[1] The remainder resulted from written proceedings or proceeded without a hearing. As well, there are many Board issuances which do not require any type of order or any sort of written or oral hearing. Some of these cover very important parts of the Board's mandate. For example, the Board's 2006 Electricity Distribution Rates Handbook, Natural Gas Forum Report, Smart Meter Report, and Regulated Price Plan Handbook were all developed outside of the adjudicative process.

As a result, an oral hearing is only one of many instruments that the Board has available to implement its mandate. A key challenge for the Board is to choose the best instrument in light of the type of direction that is required by the Board.

In this context, it is helpful to consider the nature of the Board's instruments in more detail.

Under the OEB Act, the Board has the power to make orders, rules, codes and policy directions. The key differences between these instruments relate both to their functions and the process by which they are developed.

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[1] Ontario Energy Board, 2004-2005 Annual Report, p. 29.

Orders are used to:

- approve rates for services charged by the utility components of the gas and electricity sector;
- approve gas and electric infrastructure facilities;
- issue and amend licences in the electricity sector; and
- make compliance orders.

On the whole, orders may only be issued after a hearing. Hearings may be oral or in writing. The difference between the two largely turns on the minimum legal rights provided to the participants in a hearing. In oral hearings, parties have the right to file evidence, challenge the evidence of other parties, and make oral submissions.[2] In written hearings, parties are entitled to file written materials and have access to all written materials considered by the Board in making its decision.[3] Orders are made by panels on the basis of an evidentiary record.[4]

The Board may also issue Rules (in the gas sector) and Codes (in the electricity sector). Codes/Rules are fundamentally different from orders; as Evans, Janisch, Mullan and Risk state in *Administrative Law: Cases, Text and Materials*, "The essence of a rule, as opposed to an adjudication, is that the former lays down a norm of conduct of general application while the latter deals only with the immediate parties to a particular dispute."[5] As a result, Codes/Rules are useful tools for implementing policy.

In the Gas Sector the Board has issued the following Rules:

- The Affiliate Relationships Code for Gas Utilities;
- The Code of Conduct for Gas Marketers; and
- The Gas Distribution Access Rule.

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[2] *Statutory Powers Procedure Act*, R.S.O. 1990, C. 22, ("*S.P.P.A*") s. 10.1
[3] *S.P.P.A.*, 5(3). It should be noted that these are the minimum statutory requirements; the Board may also make orders respecting additional disclosure requirements as the circumstances require.
[4] *Ontario Energy Board Act, 1998* ("*OEB Act*"), s. 4.3.
[5] J.M. Evans, H.N. Janisch, David J. Mullan and R.C.B. Risk, *Administrative Law: Cases, Text and Materials* (Toronto: Emond Montgomery, 2003), at 675. See Chapter 8 for a discussion of rule making.

In the Electricity Sector, the Board has issued the following Codes:

- The Affiliate Relationships Code for Electricity Distributors and Transmitters;
- The Code of Conduct for Electricity Retailers;
- The Distribution System Code;
- The Retail Settlement Code;
- The Standard Supply Service Code; and
- The Transmission System Code.

Proposed Codes/Rules are circulated for notice and comment, which may be received in writing or through oral submissions. They are often developed through a consultation process where Board staff issue a paper and a proposed rule and meet with stakeholders to collect comments and perspectives. These materials may be issued prior to, during or after the public meetings. Codes/Rules are made by the Board, not panels of the Board.[6]

Finally, the Board may issue policy directions which set out the general approach that the Board plans to take in exercising its statutory powers. Guidelines do not necessarily have a statutory basis, nor are they established through a statutory process. Like rules, guidelines are also concerned with conduct. However, unlike rules, guidelines are not binding. As Professor Hudson Janisch states in the work cited above:

> Terminology here is very fluid as "policy" may include "manuals," "guidelines," "standards" and the like. Nothing turns on the precise term employed. The important thing is that unless an agency is given legislative authority to make binding rules, it must always consider exceptions to its general approach. [7]

The courts have encouraged agencies to adopt policy guidelines in the absence of express statutory authority to bring about greater predictability in decision making. The Supreme Court of Canada upheld the authority of the Canadian Radio-television and Telecommunications Commission to issue policy guidelines, despite the lack of specific statutory authority, as part of its role in implementing the Government of Canada's

[6] *OEB Act, 1998*, ss. 4.3, 44, and 70.1.
[7] Ibid., at 266.

broadcasting policy. According to Chief Justice Laskin: "An overall policy is demanded in the interests of prospective licensees and of the public under such a public regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance."[8]

Other agencies have also adopted policy guidelines without specific statutory authority, the most well-known of which are the guidelines issued under the *Competition Act (Canada)* respecting matters such as mergers, predatory pricing and price discrimination. Again, these guidelines are not legally binding, but a regulatory innovation that serves the goals of clarity and predictability. As the Federal Court of Appeal put it in reviewing these guidelines:

> In addition, the possibility that a reviewing court may not agree with an agency's view of the law is an inevitable risk associated with the administrative practice of issuing non-binding guidelines and other policy documents to shed light on agency thinking and to assist those subject to the regulatory regime it administers. The risk should deter neither the courts from deciding what the law is, nor the agencies from engaging in the often useful exercise of administrative rule making.[9]

The following are examples of policy directions issued by the Board:

- Environmental Guidelines for Hydrocarbon Pipelines and Facilities in Ontario;
- The Report on the Natural Gas Forum; and
- The 2006 Electricity Distribution Rates Handbook

As indicated, there is no specific legislative basis for policy directions or the process to be used to develop them. The Board's practice has been to consult on these directions through a notice and comment process much like that followed for Codes/Rules.

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[8] *Capital Cities Communications Inc.* v. *Canadian Radio-television and Telecommunications Commission*, [1978] 2 S.C.R. 141 at 171.
[9] *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, [2001] 3 F.C. 185, para. 146.

The legal processes for orders, Codes/Rules and guidelines are thus quite different. These differences can also be viewed from a functional perspective. From a functional perspective, the Board's key output is a decision, rule, etc. that provides direction to individual parties and the energy sector as a whole. The key inputs consist of information provided by parties and from other sources. The legal processes differ largely on how that information is collected, processed and ultimately reflected in a decision. This is reflected in the following table.

Type of Decision	Information Collection	Information Processing	Decision
Order	Attested Materials Filed by Parties Precisely Described Relevance Criteria	Focus on Creating Evidentiary Record (intense scrutiny through highly formal rules) Labour intensive for Applicants, Intervenors and Board Staff	Enforceable Remedy aimed at Identified parties; not binding on other parties. Issued by Panel.
Code/Rule	General experience in sector Sectoral Technical Working Groups Driven by Operational Needs of Market Participants	Notice and comment provided either in writing, consultative working groups and/or oral submissions directly to Board members.	Creates generic rights and obligations to guide future behaviour of sector participants. Issued by Board.
Policy Directions	Same	Few Formal Restrictions. Public consultation and stakeholdering through a number of forums.	Provides Direction, Advice, Information or Guidance, does not Bind Board or Parties. Issued by Board.

As is illustrated in this table, the key difference between hearings and other initiatives is that hearings involve intense scrutiny of evidence for the purpose of creating a record upon which a Board panel may make a decision. It has been an effective tool for the Board to find facts that are relevant to support an order aimed at an identifiable company. It is also resource intensive, as the Board and the parties before it aim at ensuring the record is thoroughly and intensively scrutinized.

In other circumstances, where the Board is more concerned with directing outcomes for the sector on a prospective basis, the intensive hearing approach to building a record may not be appropriate. In these circumstances, the Board may be better to draw on its expertise in the area as well as from a range of other sources. That information is not collected through cross-examination, but from broader sources, without the need to have it formally introduced through sworn testimony.

The distinction between these two forms of evidence collection is sometimes referred to as the difference between adjudicative facts and legislative facts. Professor Davis has provided the following seminal description of this distinction:

> "Adjudicative facts are the facts about the parties and their activities, businesses and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why and with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion."[10]

Using this broad (and perhaps over general) distinction between adjudicative and legislative facts, it could be argued that adjudicative facts are best uncovered through hearings in support of party specific findings, and legislative facts are best determined

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[10] K. Davis, *Administrative LawTreatise* (1958) at 702. For a discussion of this distinction in the Canadian legal context, see: H.N. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada" (1979), 17 Osgoode Hall Law Journal 46 at 76-77.

through non-adjudicative processes in support of general sectoral policy. Most commentators who have considered this issue have argued that the hearing process is severely restricted when it comes to developing policy.

For example, the *Final Report of the Ontario Task Force on Securities Regulation,* which made recommendations about the role of rule making in the context of securities regulation, expressly stated that hearings should not be a mandatory component of the notice-and-comment procedure. Professor Ron Daniels, who authored the report, would only go so far as to endorse "the use of public hearings to the extent they may enhance the development of certain policy instruments in appropriate circumstances."[11]

Others have been more critical of the use of public hearings in rule making. Professor David Mullan, commenting on the history in the United States, where rule making is used much more extensively than in Canada,[12] stated:

> The anxious experimentation with more detailed procedures by Congress and the agencies themselves has demonstrated that the rule-making process should seldom, if ever, be surrounded by all the procedural requirements which attend a court-like adjudication.[13]

Similarly, Professor Hudson Janisch has identified and analyzed the following reasons why rule making (whether through binding rules or through non-binding guidelines) is preferable to an "*ad hoc* order":[14]

- public participation
- legitimacy

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[11] Ontario Task Force on Securities Regulation, *Responsibility and Responsiveness: Final Report of the Ontario Task Force on Securities Regulation* (Toronto: Queen's Printer for Ontario, 1994), at 36.
[12] For a discussion of the American experience, see K.C. Davis, *Administrative Law of the Seventies* (Rochester and San Francisco: LCP BW Publishing, 1976).
[13] D.M. Mullan, "Rule-Making Hearings: A General Statute for Ontario?" prepared for the Commission of Freedom of Information and Individual Privacy, 1979, at 11. See also the discussion at 156–157, where Professor Mullan quotes from the Administrative Conference's recommendation that it "emphatically believes that trial-type procedures should never be required for rule-making except to resolve issues of specific fact."
[14] H. Janisch, "The Choice of Decision-Making Method: Adjudication, Policies and Rule Making" (1992), *Law Society of Upper Canada Lectures* 259 at 266. Professor Janisch is referencing A.E. Bonfield, "State Administrative Policy Formulation and the Choice of Law Making Methodology" (1990), 42 Admin L.R. 121 at 122–131.

- visibility
- comprehensibility
- efficiency
- abstraction
- appropriate factual basis
- initiative
- easier participation
- prospective application
- consistency

The point here is not to criticize the adjudicative process generally or how it has operated at the Board. The hearing process is legally and practically necessary for the Board to determine adjudicative facts. However, it is inappropriate and largely ineffective at developing policy. The limitations in the hearing process in developing policy are demonstrated by the findings in the Board's Natural Gas Forum Report (the "NGF Report"). The NGF Report was a policy exercise aimed at laying out the regulatory framework for the natural gas sector. It identified several issues that contain important policy questions that required resolution. Most of those issues had been identified in adjudicative hearings but could not be pushed to resolution simply through the adjudicative process. Greater direction was required than could be provided by the adjudicative process.

It is also important to bear in mind that the different statutory instruments can and should be used together as part of a comprehensive and coherent approach to energy regulatory issues. In this way, non-adjudicative policy instruments may be used to set the context, framework and policy goals of a given proceeding and the adjudicative process may then be used to identify the adjudicative facts that must be established to make a specific order. A recent example of where the Board has proceeded in this manner is the York Region proceeding.

In the York Region proceeding, the Board identified that there was a serious issue respecting the adequacy of electricity supply to York Region. This determination was made through a non-adjudicative process – by reference to reports and forecasts from the Independent Electricity System Operator and the Board's collection of other publicly available information. The Board then structured a proceeding so that it could determine whether and how to exercise its statutory powers. In doing so, the Board clearly identified the issues it was going to address and the type of evidence it considered necessary to support an ultimate order. This was done through non-adjudicative processes. The Board also used an adjudicative process (in that case a written hearing) to establish the adjudicative facts that identified the specific cause and optimal solutions to the York Region supply situation. It relied upon these facts to order a specific remedy that certain licence holders implement infrastructure solutions to address the issue.

This example demonstrates how the Board may use its adjudicative and non-adjudicative functions in a coordinated and coherent way to produce decisions that are relevant and focussed on key issues. Seen this way, the adjudicative process is used for what it does best – adjudicative fact finding; and the non-adjudicative process is used for what it does best – establishing factual and legal context and issues development.

It is therefore recommended that these practices be more firmly and consistently used by the Board as follows:

- Adjudicative hearings should be largely restricted to circumstances where fact finding is required to support an order. Where possible, policy matters should be addressed in codes, rules or guidelines.

- Hearings should be constrained by detailed and clear issues development prior to the commencement of discovery processes, such as technical conferences and written interrogatories.