Rosemarie T. Leclair
Chair & CEO
Ontario Energy Board

Session 7

The Regulatory Process: Is It Broken?

CAMPUT Conference 2015
Calgary, Alberta
May 12, 2015

CHECK AGAINST DELIVERY

The Regulatory Process – Is It Broken?

Thank you, Peter. It is a pleasure to be at CAMPUT once again.

I'd like to congratulate this year's organizers for putting together a very interesting and forward-looking program that really touches on a number of challenges energy regulators are grappling with as we try and deliver effectively on our mandates in a rapidly changing environment.

I am particularly pleased to have the opportunity to participate in this panel. The topic is extremely relevant and one that is very much top of mind at the OEB.

So, I very much welcome the opportunity to share our perspectives on whether the regulatory process is in fact broken or not. And, more importantly, what we at the OEB are doing to improve upon it.

The Ontario Energy Board (OEB)

Although most of you are very familiar with the OEB, let me take a moment to provide a brief overview of our mandate and existing processes to help set a bit of context for my remarks on today's topic.

The OEB is, of course, an administrative tribunal.

In addition to our licensing authority our primary task is to regulate rates in both the natural gas and electricity sectors.

In natural gas, we regulate the rates of 3 gas distribution companies.

Together, these rates represent about 50% of a residential customer bill.

In the electricity sector, we regulate the rates of more than 70 distributors, and 5 transmission companies that operate Ontario's electricity delivery network. We also regulate the rates for the provincially owned generation company.

Together, these rates represent more than 65% of a residential customer bill.

Combined – in gas and electricity – we approve close to $11B in revenue recovery.

Suffice it to say that the impact of our decisions on applicants and their customers are significant.

Like most economic regulators, our primary objective is to protect consumer interests with respect to price, quality and reliability of service, and to maintain a financially viable, sustainable and efficient energy sector – all the while facilitating the achievement of public policy objectives as established by government.

The Court of Rate Setting

Our mandate, and much of the underlying framework for how we deliver on that mandate, is enshrined in our enabling legislation, the *Ontario Energy Board Act, 1998,* and the principles of administrative law.

And while it is true that we do have broad authority to establish our own processes like most other energy regulators in North

America, the OEB's processes have evolved over our history to largely replicate the processes used in the adversarial adjudicative model.

Administrative tribunals like the OEB were intended to provide a forum to bring together experts, those impacted by the matters at issue (not necessarily in dispute), and impartial decision makers to arrive at pragmatic solutions to those matters; solutions that align, as far as practical, the interests of all.

However, in practice, at least on this continent, most energy regulators have adopted a court-like model using an adversarial approach to decision making and the OEB is no exception.

Here is a snap shot of our typical rate-setting process:

- Rate application filed
- Legal Notice published in newspapers of highest circulation
- Parties apply for standing
- Issues list developed
- Discovery process through extensive interrogatories
- Settlement conference
- Hearing
- Witnesses with cross-examination

- Written submissions or oral arguments
- Decision with reasons
- Order of the Board

Of course, certain aspects of the process come with the required court-like ceremony.

The process is transcribed, witnesses are sworn, parties are represented by lawyers, procedural orders are issued, and procedural motions are debated. And a panel of OEB adjudicators sits on the dais with gravitas weighing the matter before them.

And – some 250 days after it all began – a decision is issued.

But the OEB is not a court. We are not dispensing justice in that manner.

As an economic regulator we are making decisions about rates and service. How much money is needed to deliver a quality service that meets customers' expectations of value for money, ensures a viable network for the long term and allows the monopoly provider to earn a fair return.

And while we have all become very comfortable and familiar with it, we really must ask ourselves whether the process adopted by North American regulators to arrive at that decision continues to be fit for purpose.

Are we really having the kinds of discussions needed to get the complete picture and the best information to enable us as rate regulators to make the best decisions and get the best outcomes for customers?

Are the “parties” in the hearing room really representative of the broad interests of those impacted by our decisions?

Or has our process evolved to exclude those who matter most – the customers directly affected – those who use the service and pay the bills?

The Adjudicative Model – Is it Fit for Purpose?

The existing process clearly has its strengths. It was designed and adheres to the concepts of natural justice and to the principles of procedural fairness.

It is based on an exchange of information through a structured process. It relies on an impartial decision maker. And decisions are made in a timely and largely predictable way.

But its effectiveness in my view may well be constrained by the very legal framework we point to as its strength.

While there are extensive data filing requirements and formal Q and A's between the "parties," there is not enough of a free-flowing exchange of information and direct discussion with the regulator – the actual decision maker – which would facilitate better understanding of business and customer needs, consideration of alternatives and informed assessment of impacts, and would result in a much better alignment of interests.

While we have "parties" to the proceeding, the views and interests of those who pay the bill, particularly the average residential consumer, are not sufficiently represented in our adjudicative process which relies primarily on self-identified institutional intervenors to challenge the application.

And there is our mandate. Our context is broader than today's bill impacts.

Our decisions go beyond individual customers, and different customer classes. We must also consider the long-term benefit of investments, the need to innovate and respond to a changing environment, and to respond to the evolving demands of customers and public policy expectations in a responsible, and sustainable, manner.

It’s about assessing the value proposition. And that involves much more than just challenging the documentary evidence.

This thoughtful review and assessment, ensuring that the right decisions are made in the public interest, can sometimes get lost in our court-like approach.

So, we can definitely say that our process is legally sound and relatively efficient, but are we serving the public interest and delivering on our mandate as well as we could be?

In my view, our adversarial, procedurally based process, which has come to rely more and more on lawyers from utilities negotiating settlements behind closed doors with lawyers representing institutional intervenors, falls short of the type of review that consumers should expect from their energy regulator.

Maintaining and enhancing consumer confidence and investor trust in the regulator and our decisions, requires a better process based on expertise and understanding, as well as a process that is much more accessible and inclusive.

It requires a process that enables the regulator to better ensure that the interests of consumers of today and tomorrow, on matters of importance to them, are properly considered and well represented – particularly on behalf of the consumer that will never be directly involved, while also making meaningful space for those who want to be.

Perhaps it's my public service background, but I would venture to say that the vast majority of decisions that impact the general public, or large groups such as ratepayers – decisions that relate to the provision of a public or essential service, which most would argue captures electricity and gas – are made in a forum that is very different than the court-like setting of the OEB.

Fortunately, there are many models even in energy regulation that we can draw upon to build on the strengths of our existing process and enhance its effectiveness.

One need only look to the UK or Australia where OFGEM and the Australian Energy Regulator have adopted much different models than ours, relying largely on expert internal staff to complete detailed technical reviews of applications and engaging a broader representation of consumers on matters of significance to them using a variety of models.

The OEB Model – Under Renovation

At the OEB, we've been working hard over the last several years to improve our decision-making processes to ensure that they are effective in delivering on our mandate. We're learning from our own experience, and drawing on the experiences of others, where appropriate.

We have adopted a strong customer focus in our regulatory approach, attempting to look at everything we do – the way that we do it and the impact that it has – through a consumer-centric lens that focuses on value and outcomes.

We want to better understand the views of customers on issues of importance to them, and the trade offs they are willing to consider. And we want to better understand the business context within which we are making our decisions; the technical and operational

challenges, the implications over the short and long term, applying our public interest lens in this broad context.

We have already made some significant strides to open up our consultations on regulatory policy development. We now directly and proactively solicit consumer input through focus groups, surveys and online tools.

And we are taking that one step further by establishing a Consumer Panel – a cross-section of residential and business consumers from across Ontario – to improve the connection between the regulator and those on whose behalf we regulate.

This diverse group will be used to discuss issues of importance to consumers, gather ideas and provide feedback on the solutions and tools we are developing. And they will act as our “sounding board” to help assess the effectiveness of our consumer-centric approach.

Gone are the days of relying exclusively on utilities and institutional stakeholdering to inform our decision making.

Similarly, we are taking some important but modest first steps to improve our adjudicative processes as well allowing for more meaningful dialogue between parties and the regulator, more direct engagement with consumers and greater reliance on our staff to bring expertise and represent the public interest.

Let me expand just a bit with some examples.

First, allowing for more meaningful dialogue between utilities, regulatory staff and OEB decision makers:

- We are introducing what we call “Present the application day.” It’s an opportunity for utility executives to come in and speak directly to the panel and other participants in the hearing, in a less formal setting, to describe their business strategy and identify the unique aspects of their application. We are trying to move from merely considering an application to an approach which allows the utility to present its business plan, an approach that allows the decision maker to better understand the context behind the utility’s ask.
- The issues list is another important part of the dialogue between the decision maker, staff and the parties. While not new, we’ve moved the development of the list to a later

stage in the process. It allows the panel to focus the review on the matters that the OEB believes are of greatest impact and frame the discussion to the specific issues of the application.

- “Hot Tubbing” – also called “concurrent expert evidence” – where we bring together the experts, retained by the parties, to present their views together and discuss areas of divergence, and, hopefully, move to areas of agreement. While it is not a perfect tool, for the right cases (those with very technical issues) it does help decision makers make better sense of conflicting views by allowing the experts themselves to explain the reasons for their differences.

Let me move now to a few examples of how we are encouraging better engagement and more direct involvement of customers in our decision-making process:

- The OEB now requires utilities to consult broadly with their customers as part of the development of their applications and, more importantly, to demonstrate how customer concerns and priorities have been reflected.
- We have also simplified our Public Notice, moving from a legal notice which is difficult to understand to providing more understandable information and broadening the publication

to reach more customers. And, importantly, giving effect to that outreach by allowing individuals to participate without having to formally register as a party.

- We have also piloted, and will continue to do so, having hearings in the communities being served or impacted by our decisions rather than downtown Toronto, improving both accessibility and visibility of our hearing process.
- And this year we are undertaking a broad review to assess ways that we can better represent consumer interests in our proceedings, ensuring that consumers have an effective voice in the regulatory approval process.

And lastly, a word on improving on the way the OEB itself ensures the effective exercise of our public interest mandate:

- While we continue to allow for settlements between “the parties,” OEB staff now actively participate in the settlement process, are required to sign off with a supporting submission, and, if needed, prepare their recommendations to the panel.
- And when a matter goes to hearing, not only do staff participate in testing the evidence, they are now required to provide their own submissions to the panel on every

application and how it meets or falls short of the public interest.

As I said, these are modest first steps, but they have not always been easy or well received.

But I believe they are important first steps that must be continued and expanded upon.

The Regulatory Process – Is It Broken?

Let me close by saying that the existing regulatory process has served the Ontario Energy Board well over the past 55 years and there is comfort in the tried and true.

But the time has come for us as decision-maker to take a closer look.

The energy sector and its business models are becoming more complex. Consumers are much more aware, and involved.

And the issues that regulators must decide on are perhaps not quite as straightforward as they once were.

Our regulatory decision-making framework has to continue to evolve and support the effective discharge of our mandate.

The adversarial court-like model of the past, at least in its present format, may no longer be up to that task.

Regulators are, as I said at the outset, creatures of our enabling legislation. Fortunately within that context, we are also masters of our decision-making process.

This freedom is deliberate. It allows our processes to adapt and evolve to changing circumstances.

I am pleased to say that that evolution is now underway at the OEB.

Thank you.