Submission to the OEB Modernization Review Panel
By
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Thank you very much for the opportunity to meet with the Ontario Energy Board Modernization Review Panel as part of a delegation from the Council for Clean & Reliable Energy (CCRE) on April 18. As you know, the CCRE's mandate is to facilitate discussion, broaden public knowledge and understanding of the full range of available solutions on particular energy issues. CCRE does not advocate a position on energy issues. As such, the comments to the issues identified by the Panel represent my own views as an individual with financial, capital markets, regulatory and governance expertise and a deep understanding of the Ontario energy industry. Thank you for the opportunity to submit my thoughts on the issues identified by the Panel.

Issue #1 – Mandate and Activities: The Ontario Energy Board (OEB) is a creature of statute, with its objects and mandate established in various pieces of legislation, notably the OEB Act. The OEB only has the authority to decide matters delegated to it by the Provincial legislature, using the tools and processes available to it via the same governing statutes. Bill 135 changed the role of the OEB from deciding how to achieve government policy in the public interest to implementing binding government plans and directives. This is a step too far. The OEB needs to be given the authority to decide how an articulated energy policy should be implemented in the public interest.

The OEB is first and foremost an economic regulator – aligning costs (prices) with other policy goals. Specific decrees that the OEB enable innovation, be modern, implement conservation first, and connect green energy should be reconsidered, as they are overly intrusive and prejudicial to a public interest mandate by limiting the OEB's discretion to decide how to align competing objectives to achieve policy. The OEB needs the latitude to balance competing interests in an objective, fact-based manner. Similarly, no procurement contracts or other programs that are charged to customers via the Electricity Act (Global Adjustment) should proceed without an OEB public interest review.

Issue #2 – Disruption and Innovation: What do "support modernization" and "encourage innovation" really mean? The OEB is not an advocate for innovation and modernization, the same way it is not an advocate for the customer. It must ensure that its processes and approaches do not create barriers to modernization and innovation, in the public interest. The OEB needs clear jurisdiction and the tools to monitor the "seams" – where the rate regulated entity ends and the non-regulated service providers

reside to ensure there is no cross-subsidization, discriminatory action by monopolistic incumbents, and so on.

The OEB must understand how new technology will enable the democratization of the electricity system (presumably shrinking or slowing the growth of the centralized distribution, transmission, and large-scale generation resources) enabling customer choice, and managing the financial risk to the legacy system which will continue to be used (if somewhat differently than in the past). The OEB must ensure there are no market failures that require regulatory intervention, as the inability to understand the nature of the market failure and the inability to act is inconsistent with the public interest. Bill 112 repealed Section 73 of the OEB Act, which listed the businesses permitted for LDC affiliates.

The perceived lack of innovation in the sector is not an OEB problem. It arises fundamentally from the following: (i) municipal ownership and the limited willingness and ability to bear risk; (ii) management of LDCs who are used to the presence of a regulator (a safety net) and are therefore inexperienced at identifying, pricing, and managing risk; (iii) lack of market signals that help determine the "value" of new technology, as opposed to its "cost"; and (iv) lack of an effective business model or revenue model, other than "put it in rate base". These issues require longer term, structural solutions that are external to the OEB.

Issue #3 – Governance Framework: What is a "modern" energy regulator? Some framework to establish what "modern" means is needed in order to make recommendations or draw conclusions. As discussed in our meeting, the OEB is a self-funding corporation without share capital and is an agent of the crown. It is classified by the Management Board of Cabinet as a provincial agency with a governing board. The Management Committee of the OEB, comprised of the Chair and two Vice Chairs acts as a "board of directors".

The Role of the OEB and how it is to conduct its affairs is contained in: The Electricity Act, the OEB Act, the Consumer Protection Act, the Statutory Powers Procedures Act, the Public Service of Ontario Act, the Agencies and Appointments Directive, the MOU between the Minister of Energy, and the Chair of the OEB, three MOU By-laws, Directives, and letters. These documents are largely consistent and speak to

the OEB's role as an independent adjudicative body. Over the last half decade, there has simply been a failure by government (Treasury Board, Management Board of Cabinet, Minister/Deputy Minister of Energy) and the Chair of the OEB to respect these governance structures and allow the OEB governance structure to perform as intended.

The potential addition of a Board of Directors is not likely to resolve the politicization of the OEB; it simply adds another body that could be politicized. Who will select the members? How will conflict of interest be managed? Is a corporate governance standard consistent with a public interest mandate? Would the Chair preside over both the adjudicative and governance boards? How long would it be after each governance board meeting that a report makes its way back to government – can this board truly be de-politized? Can the adjudicative role be separate from the administrative? What if decisions by one are in conflict with the other? Would this governance board be "nose in and fingers out"?

If respected, the present governance framework is functional. It might be worthwhile to have the Chair of the OEB report to the Minister of Finance, to sever the Minister of Energy's ongoing incentives to treat the OEB like an extension of the Ministry of Energy. It may also be necessary to rescind the government's directive authority. Finally, the term of the Chair should be 5 years, and be renewable for a further 5. It is an "at the pleasure of" cabinet appointment. A "best behaviour appointment" consistent with that of a judge is not appropriate. Regulatory independence is not an absolute; it appropriately varies across a spectrum, somewhat like the public interest standard, which aligns competing interests. The additional protections of the best behaviour standard are not consistent with administrative bodies in Canada broadly, although the Nova Scotia Utility Review Board is a counter to this argument.

Issue #4 – Stakeholder Relationship: The OEB has an effective stakeholder model that is well developed (OEB Practice Direction – Cost Awards). It has long provided intervenor groups with funding to participate in various consultations, hearings, and other processes. The OEB has also initiated more aggressive customer engagement relating to specific utility applications for rates. Publication documents, including Notice, are now written in less formal, more accessible language. No stakeholder process is perfect – Ofgem, Alberta Utility Commission, Nova Scotia Utility and Review Board all have different stakeholder and customer engagement mechanisms and all grapple with effective customer and stakeholder

engagement. Participation in OEB processes is encouraged. Recent moves by the OEB to adopt delegated processes where OEB Staff make decisions without calling a hearing are counterproductive to effective stakeholder relations and an open and transparent process.

Issue #5 – Relationship to Government: Please see the totality of the comments above.

Issue #6 – Regulatory Excellence and Benchmarking: It is appropriate for the OEB Act to contain the time within which all decisions should be rendered by the OEB; 60 days after the receipt of reply is adequate for most cases. Importantly, the OEB has wide latitude to design its processes. Effective process design and management is appropriately dealt with by the OEB's Management Committee and implemented by senior staff, perhaps via an Executive Committee (which is analogous to an operations committee in many organizations). Removing bottlenecks and ensuring the availability of Board Members for timely, efficient, and cost-effective adjudication is an internal matter.

Under the previous Chair, there was comprehensive tracking and reporting on the status of cases and effective process management. Full-time Board Members who were expert and empowered to decide, ensured timely and proportionate decision making. Regulatory policy development was achieved through public consultations with stakeholder funding and timelines were established and followed. In any year, the OEB handles more applications than all of the other regulators in Canada, combined. Effective process is essential.

Finally, it is important to note that simply because a utility is undersized does not mean that its customers should pay rates that are not just and reasonable or that the OEB is inefficient (with the corollary that its reporting requirements and review processes are too onerous). The OEB regulates in a standard manner – indifferent to size and ownership. It has pioneered the use of a 5-year incentive rate regime and comprehensive rates models to drive down the cost of regulation and to mitigate the lack of capacity (for even basic accounting) at many small utilities.

Many Ontario LDCs remain hostile to the legitimate role of the OEB to regulate and the regulatory "IQ" throughout the industry is inconsistent. The quality of filed applications can also materially affect the

efficiency of process. It is clear that the quest for effective regulation and optimal process is an ongoing challenge, with shared responsibility between the OEB and the rate regulated community.

Issue #7 – Resourcing: The OEB is funded by Section 30 (Recovery of Proceedings Costs) and Section 79.2 (OESP Cost Recovery). Together these two sections recover OEB process costs. General cost recovery is also derived from Section 26 – to the extent that OEB costs are in excess of costs arising from OEB processes. This funding approach works well and is a constant "reminder" for the OEB to be judicious with expenses and process design.

Sourcing some or all of the OEB's operating budget from General Revenue of Government would undermine the OEB's self-funding status, expose the organization to even more political involvement and cause volatility in its total funding, as governments look to manage budget deficits and allocate monies to different priorities. In short, the OEB would be more vulnerable to political interference than it is now. It is entirely appropriate that monies received by the OEB pursuant to Section 112.5 (Penalties) not be used to fund or supplement OEB revenues, to avoid a conflict of interest and incentives to fine industry participants as a "revenue centre"-type activity.

The OEB should have a full complement of staff – a chief operating officer, financial officer, human resource coordinator, skilled regulatory policy staff and case management expertise, and full-time board members to enable the adjudicative processes core to the OEB's mandate.

All of which I respectfully submit.

Thank you for opportunity to make the foregoing comments and meet with the Panel.