

January 8, 2003

The Honourable Mr. John Baird
Minister of Energy
900 Bay Street
Hearst Block, 4th Floor
Toronto, ON
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Dear Mr. Baird:

On behalf of OPSEU and the 50,000 public servants it represents, we are pleased to be able to make submissions concerning your Consultation Paper entitled "Review of Ontario Energy Board's Mandate."

Yours very truly,

Leah Casselman
President

LC/l
encl.

- c. Howard Hampton, NDP Energy Critic
- Sean Conway, Liberal Energy Critic
- Gary Gannage, President, AMAPCEO
- Don MacKinnon, President, Power Workers' Union
- Andrew Müller, President, The Society of Energy Professionals

Response to the Consultation Paper **“Review of Ontario Energy Board’s Mandate”**

Introduction

The Ontario Public Service Employees Union (OPSEU) represents about a third of the employees of the Ontario Energy Board (the “OEB”). OPSEU members serve in the areas of administration, customer service, and technical and information technology support. The OEB presently constitutes a part of the Ontario Public Service, and OEB staff are employees of the Government of Ontario, governed by the *Public Service Act*.

Administrative agencies and tribunals (such as the OEB) constitute an important element of the governance structure in Ontario and in other democratic jurisdictions. That is, they play an important role in developing and administering the legal rules by which citizens, and their collective endeavours, are governed. As “agents” of democratically-elected governments, agencies and tribunals must exercise their authority for the ultimate benefit of the broad public which the government has been duly empowered to serve. This “public interest” aspect of an agency’s role should be preserved in any effort to restructure the working of the agency.

The Consultation Paper proposes, among other things, changes to the governance, organizational structure and human resources practices of the OEB. OPSEU submits that these proposed changes will ultimately have the effect of reducing the accountability of the OEB to citizens of the Province and making the OEB susceptible to capture by the very parties whose activities it is intended to regulate.

Response to Governance and Organizational Structure Proposals

The Consultation Paper proposes a governance model that would make the OEB “fully accountable for its efficient operations to energy sector stakeholders”. Elsewhere, the Consultation Paper proposes an organizational structure that provides for “an independent Board accountable to the Minister of Energy”. It is OPSEU’s submission that these conceptions of the OEB are at odds with each other. Conflict between the Minister and energy sector stakeholders over the proper functioning of the OEB would result in a Board that is neither efficient, nor effective and, even more importantly, lacks a clear mandate. In these circumstances, there is reason to be concerned that energy sector stakeholders’ interests would ultimately prevail over the general public good.

The phenomenon of “regulatory capture” has been widely noted and commented upon by observers of regulatory agency behaviour. Briefly stated, regulatory capture occurs where an agency becomes closely identified with and dependent upon the industry it is charged with regulating. The agency loses or becomes distracted from its “public interest” focus – its vision of itself as an instrument of the public, regulating industry conduct for the broader public good. Ultimately, the proper public policy agenda of the regulating agency is supplanted by the regulated industry’s own agenda. The capture of the regulatory agency by the regulated industry results, effectively, in the “privatization” of law-making. There is good reason for the government to be concerned about the effective privatization of its law-making functions. Private law-makers cannot be held accountable by the public for the laws they make. Furthermore, as law-making is removed further and further from democratic institutions and the practice of democratic politics, legal rules will tend more and more to coincide with the interests of the stronger parties to their development.

The process of capture can be slowed, and the extent of capture reduced, through a steadfast effort to uphold the vision of the agency as guardian of public interest objectives. However, the Ministry’s proposals, rather than equipping the OEB to defend public interest objectives, would have the opposite effect.

The Ministry suggests that “stakeholder review of the Board’s budget – linked to performance measures – may be appropriate”. “Performance measures”, the Ministry proposes, should be determined “in consultation with stakeholders”. OPSEU submits that making the OEB “fully accountable for its efficient operations to energy sector stakeholders” and rendering it subject to performance measures “determined in consultation with stakeholders” will reduce rather than strengthen the Board’s ability to maintain its public interest focus. A regulator so closely scrutinized by the very parties it is charged with regulating cannot help but lose sight of its public interest mandate. Ultimately, these measures will facilitate the alignment of agency objectives with those of the regulated industry.

One particularly alarming “potential performance measure” is that of assessing the OEB’s annual budget as a percentage of industry revenue. Clearly, this measure would give the industry considerable leverage against the regulator, both in the exercise of its decision-making powers and in its determination of its human resource requirements.

Response to Human Resources Proposals

The Consultation Paper notes that OEB staff are employees of the Government of Ontario under the *Public Service Act*. It is contended, however, that “in the new, more open environment for energy, the Board may need to respond quickly to sudden changes in resource requirements”. This, the Ministry further contends, “will require more flexibility than is possible under public service rules”. While the Consultation Paper does not explicitly say so, the implication appears to be that the Ministry would remove the OEB from the Ontario Public Service (OPS) and reconstitute it as a “stand-alone” regulatory agency outside of the OPS.

It is OPSEU’s submission that this course of action would jeopardize the OEB’s ability to act as a “regulator” in the broader public interest. This loss of a public interest focus within the OEB would, in turn, hasten the process of capture of the OEB by the energy industry.

The current structure of the OPS, as created under the *Public Service Act*, fosters in public servants a perception of themselves as actors for, and defenders of, the broader public good. In order to serve in the OPS, public servants must be expressly appointed to their positions by the Cabinet, by a minister, or by the Civil Service Commission. Appointment as a public servant cannot be easily inferred from the fact that an individual is employed in the service of the Crown.

Once appointed to the public service, public servants are subject to appropriate restrictions on their conduct. Public servants are required to take oaths of allegiance and secrecy, and are prohibited from using their status as Crown employees to obtain a benefit for themselves or their families. They are also prohibited from giving preferential treatment to any person with whom they deal in the course of their duties, and from engaging in any outside employment that would interfere with or conflict with the carrying out of their duties to the Crown. Furthermore, public servants may not associate their position with political activity or engage in political activity that would place them in conflict with the interests of the Crown.

Taken together, these aspects of employment in the OPS engender in public servants a profound sense that they are, in the conduct of their duties, serving the broader public good. This sense of “public service” would be reduced in a regulatory agency created outside of the OPS. A new stand-alone agency may eventually lose any public interest focus it has at its inception, and become captive to the interests of the parties it was designed to regulate.

Conclusion

The Ministry is proposing significant changes to the OEB in the name of efficiency and accountability. These include changes to the organizational structure, accountability mechanisms, and human resources practices of the OEB (the last appearing to include the removal of the OEB from the Ontario Public Service). It is OPSEU's submission that the measures the Ministry is proposing will undermine the conception the OEB has of itself as a "public interest" regulator, and will facilitate its capture by the regulated entities. The course of action proposed by the Ministry will, we suggest, result in the dilution of effective public oversight of the energy industry.

OPSEU respectfully submits that the Ministry should consider carefully the potential effect of the measures contained (or alluded to) in its Consultation Paper before making any move to implement them. The Minister should instead focus on improvements to the OEB within the Ontario Public Service. The capacity of the OPS to engage in improvement and change is often underrated. However, major improvements in the performance of adjudicative tribunals have been achieved by tribunals that remain part of the OPS. In our submission, this is the most productive avenue for consideration.

Thank you for your attention,

Leah Casselman
President