Intelligence MEMOS

From: Aleck Dadson and Ed Waitzer

To: Canadian Regulatory Agency Observers

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Re: WHO SHOULD SET PROVINCIAL ENERGY POLICY?

Who gets to decide the direction of energy policy in Ontario? The Ontario government itself, led by the Minister of Energy? Or the specialized regulatory agencies that adjudicate rate setting and establish rules about more technical issues? Or is it the task of both?

Those questions arose in stark relief just before Christmas when an Ontario Energy Board panel voted 2-1 to require Enbridge to charge developers upfront for the cost of building-out projects using natural gas, rather than follow the long-standing policy of amortizing the cost over the life of the project.

The panel's concern?

As the two-person majority wrote, "The OEB is not satisfied that Enbridge Gas's proposal will not lead to an overbuilt, underutilized gas system in the face of the energy transition." The panel feels a strong price signal upfront is needed to warn developers from investment in potentially stranded infrastructure if a wholesale switchover to heat pumps and electricity eventually takes place.

Of course, in addition to shutting down gas for new residential development a steeper upfront cost may also mean higher building costs just as governments are trying to deal with a perceived housing crisis by encouraging more building. So it was little surprise the panel decision got a stern public rebuke from Minister of Energy Todd Smith, who accused the panel of straying "out of their lane" and in effect making provincial energy policy. He committed to legislation to reverse the decision to "keep shovels in the ground" for new housing.

Smith's annoyance was understandable. His ministry was just days away from releasing a report from the Electrification and Energy Transition Panel (EETP) that includes specific recommendations about the need for policy direction from the ministry on the future role of natural gas in Ontario, including the cost of gas connections and infrastructure investment, the very issues into which the OEB panel had strayed.

Who's right? Who should do what? And what lessons can be learned from this dust-up?

Answers start with understanding the roles and responsibilities of the government and its agencies and the need for co-ordination. Such co-ordination was the hallmark of past transformative plans in the Ontario energy sector – the restructuring of Ontario Power Generation and the distribution sector in the late 1990s and the implementation of the Green Energy Plan almost 15 years ago. The EETP is right to emphasize the need for even stronger co-ordination going forward.

During periods of transformational change, the relationship with government is particularly sensitive for tribunals such as the OEB, whose mandate includes adjudication. In our view, adjudicators should focus on deciding specific matters in a transparent, fair and non-partisan manner. They should do so by applying a legal and regulatory framework to findings based on evidence and arguments presented in an adversarial process. And they should avoid trying to resolve complex policy issues, in which any decision will affect unrepresented stakeholders and other areas of concern. In short, adjudicative panels shouldn't stray.

That said, pivoting from strict adjudication into policymaking is not uncommon with regulatory agencies and there are ways of dealing with it that don't require public ministerial intervention. The OEB could have initiated its own review of the panel's decision – sticking with the existing policy on the amortization of connection costs for now and deferring consideration of any changes pending ministerial direction or a wider consultation by the OEB itself. Internal protocols, such as peer review of draft decisions, can serve as a check against error by adjudicators and should also be strengthened. And there should be clearer guidance about the types of issues that need to be left to government or to broader consultations.

Other checks are found in the existing Memorandum of Understanding (MoU) between the ministry and the OEB, which outlines ministerial responsibility for developing policy priorities and direction and the OEB role in implementing those policies and programs. It stresses the need for timely communication between the two.

The MoU, however, contains no dispute resolution process. A comparable framework agreement between the UK government and its energy regulator calls for "a pragmatic and issue-based approach" to resolving disputes in a manner that is timely, limits potential disruption and provides an opportunity for the parties to "learn the lessons" from the dispute. Similar language should be included in the OEB's MoU.

Enbridge has now appealed the OEB panel's decision to the Ontario courts. All the more reason to hope the OEB and the ministry can "learn the lessons" here: first, by fine-tuning existing checks and balances to help avoid future conflicts; and second, by resolving the amortization issue in a way that respects both the government's responsibility to set the policy framework and the expertise the OEB should contribute.

The lessons learned have application beyond this episode, especially given the complexities of the energy transition being managed by governments and agencies across Canada. And they extend to the agency-government relationships in other economic sectors including finance, telecom and transportation. We hope this piece will spark a dialogue to help inform such relationships and ensure better outcomes.

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