

Regulating Utility Governance: An Analysis of the Ontario Energy Board's Role

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By

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The Ontario Energy Board has announced its intention to conduct a consultation respecting its role in providing guidance to regulated entities with respect to corporate governance.

This paper examines the possible role of the Ontario Energy Board in the governance of rate-regulated utilities. The conclusion of the paper is that the Board should have no such role. To begin with, it serves no practical purpose. Beyond that, the paper highlights the fact that the OEB already has effective control over those activities. The paper asserts that for the OEB to exercise some form of oversight over corporate governance would serve no public policy objective, and would instead would represent a particularly intrusive form of regulatory over-reach.

Introduction

By letter dated June 22, 2016, the Ontario Energy Board (OEB) initiated a consultation to develop guidance on corporate governance for OEB rate regulated utilities¹. The OEB gave no indication of what it intends to do by way of "guidance." The Board-commissioned reports from consultants Elenchus and KPMG² on which the consultation will apparently be based suggest a range of possible "guidance mechanisms", ranging on a continuum from the issuing of standards for corporate governance, to periodic performance audits of compliance with those standards, to direct OEB engagement with utility boards.

This paper examines the possible role of the OEB in relation to the governance of rate-regulated utilities. It argues that the OEB should have no such role. The reasons for that are:

- + The OEB's jurisdiction with respect to guidance on governance is, at best, questionable. Prior to recent amendments to the *Ontario Energy Board Act* (OEBA), the OEB had neither explicit nor implicit jurisdiction with regard to governance. As a result of these recent amendments the OEB has, arguably, implicit jurisdiction, but only to a limited extent. Whether it should exercise that jurisdiction is questionable, based on the interpretation and application of similar provisions in other statutes.
- + At the most basic level, playing any role with respect to governance would serve no purpose. What is regarded as good governance practice is well known. It has been the subject of policies issued by securities regulators, rulings by the courts, academic commentary and writings in the business press. The OEB has no expertise in governance which would enable it to add anything useful to what is already well established.

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