WHAT WE HEARD: A summary report of an October 2020 workshop on regulatory independence

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TABLE OF CONTENTS

INTRODUCTION AND WORKSHOP OVERVIEW

This document reports on a virtual workshop hosted by Positive Energy on October 28, 2020. The workshop brought together over 25 senior and emerging energy leaders in Canada to discuss a Positive Energy research project examining regulatory independence – specifically, how various actors and decision-makers in the Canadian energy system understand regulatory independence and its evolution over time. This report provides an overview of the workshop and 'What We Heard' from participants in the session.

The event was chaired by Positive Energy Executive-in-Residence Michael Cleland with introductory remarks by Positive Energy Chair Monica Gattinger. Participants were given two papers to review prior to the workshop: a discussion paper authored by Michael Cleland and Ian T.D. Thomson with Monica Gattinger, and a literature review on regulatory independence, authored by Ian T.D. Thomson. The workshop brought together senior and emerging energy leaders from various groups including executives from government, regulatory agencies, academia, regulatory law practices, industry associations and environmental advocacy groups.

The goal of the workshop was to identify gaps and areas of further study for the discussion paper, as well as to host high-level discussion amongst Canada's energy leaders. Following a brief presentation on the discussion paper by Michael Cleland, participants were placed into smaller, pre-determined groups to discuss one of four questions related to the project. Each group was moderated and animated by a member of the Positive Energy team. Following discussion, each rapporteur presented the key ideas discussed in their respective breakout group to the aggregate workshop. The workshop concluded with a plenary discussion by participants of the questions discussed, as well as the discussion paper as a whole. Given the purpose of the workshop and the executive level of the participants, the event observed the Chatham House Rule.

WHAT WE HEARD IN BREAKOUT GROUPS

The following sections present the question each of the breakout groups was asked to address as well as ideas shared by participants. The views expressed do not necessarily reflect those of Positive Energy.

ACCOUNTING FOR DIVERSE DECISION VARIABLES

Group One was asked the following question:

Given a well-established trend, especially over the past two or three decades, toward an ever more complex and shifting set of variables that bear on regulatory decisions such as environment, climate, social questions and the urge for more holistic and systemic approaches, how can these factors best be accounted for in effective decision systems?

Participants noted that regulatory spaces provide the platform to engage in the government decision-making process and that those opposed to oil and gas projects often have no place to go to express their views but the regulatory process. However, regulators are often limited in how they can listen to their concerns. People noted that the absence of policy (as seen in a gap like climate change direction) can "frustrate" the regulatory system. They suggested that governments ultimately need to develop a forum for informed policy debate amongst stakeholders.

Participants observed that there is a paradigm shift occurring from that of a tribunal resolving disputes between an incumbent utility and a disruptive innovator, to a paradigm where the regulator is being called on to solve different worldviews (as they pertain to matters such as climate change and Indigenous reconciliation). There is a culture in Canada where regulators are used as the "fall guy" when governments do not want to take the "heat" for a decision, which leads to pressure to revamp the regulator. "Political regulation" has occurred more often with governments reforming energy decision systems in an attempt to improve timeliness, independence and economic growth, but these reforms are often antithetical to independence. Ultimately, in light of this shift in paradigm, regulators need a longer leash to enter into specific issues concerning the public interest.

Additionally, participants observed areas where change must occur in the energy system. Foremost, many believed that governance needs to change. In particular, the mandate, structure and procedure for regulators must change with governments needing to play a larger role with regards to these elements. Governments can provide a clearer mandate to regulators, outlining to agencies a concrete problem they must solve. If there is no concrete mandate for the regulator to follow, it will default to cost-effectiveness. It is essential to ask how to give the mandate to regulators to facilitate low-emissions energy transition. When it comes to structure, while it is difficult to change and shift the culture of large organizations, building capability, capacity, knowledge, focus and professionalism of individuals in the regulatory body is vital. In regards to procedure, regulators must be more innovative with respect to accommodating rights holders and stakeholders and be flexible with hearing different groups, including Indigenous communities.

Participants also discussed the role of the regulator with the general public. One participant was not surprised that regulatory decisions have become contentious given the lack of shared consensus over what the public interest actually is. Regulators have an obligation to inform and educate the public on their operations, including how they make decisions and weigh factors.

SUSTAINING PUBLIC AND INVESTOR CONFIDENCE

Group Two was asked the following question:

Given a parallel trend that creates a more complex problem of accounting for a more fragmented or polarized opinion environment and the need to balance openness, fairness, expeditiousness, expert opinion, non-expert opinion, and the need for decision stability, how can decision systems be structured so as to sustain both public and investor confidence?

Participants in Group Two acknowledged the role of polarization and fragmentation in Canadian energy issues. They noted what while there has always been fragmentation in the system, people now are more vocal, with social media allowing them to share and express opinions easily. One contributor noted that with the ease of expressing an opinion comes an expectation that the opinion will be heard and incorporated into the decision-making process. Additionally, an individual's assessment of the decision-making process tends to be linked with whether or not they like the outcome of the process.

Participants observed that regulators can help address challenges of public and investor confidence through improving the transparency and inclusivity of processes and the accessibility of information. The regulator should improve the process through which stakeholders can provide input, as well as document how their input ultimately impacts decision-making; people want to know how their contributions impact the process and outcome. Regulators should grant citizens as much information as possible, with the regulator making the decision process traceable and understandable, and evidence accessible. However, participants acknowledged that these actions may only mitigate and not solve for a lack of public and investor confidence. Larger issues of polarization and the lack of a stable policy environment still present a problem for the current Canadian regulatory context.

Participants compared public and investor confidence and the notion of trying to improve both at the same time. Ultimately, there may be trade-offs between the two. For example, providing greater inclusion for citizens may increase public confidence, but may make processes lengthier and less predictable, thus decreasing investor confidence.

The relationship between regulator and policymaker was also discussed, specifically how improving the relationship may resolve issues in the decision-making system. Individuals in the Group believed that policymakers need to provide guidance, but not pre-empt regulatory decision-making and procedure. One contributor noted that their provincial regulator was becoming an instrument for government policy through the use of directives.

Questions of who the regulator is accountable to (government or the public) arose. Group Two members discussed the idea of having regulatory members elected versus appointed, however, this was not viewed as viable: elected individuals might resolve the accountability issue but would create new problems by more explicitly introducing partisan politics into the regulatory process. Participants agreed that having well-designed institutions was important and that clear mandates should be provided to regulators; within those mandates regulatory independence should be maximized. However, priorities in the mandate and in regulatory-decision-making (e.g., climate change versus economic objectives) still need to be addressed.

ACHIEVING POLITICAL ACCOUNTABILITY

Group Three was asked the following question:

Where the need for political accountability grows ever larger, how can that be balanced with the need for longer term system thinking, fact-based decisions and stable decisions?

Participants believed that in order to address matters such as Canada's climate commitments, a "re-think" on what the regulator can and cannot do, as well as its relationship with policymakers, must occur. What this could look like differed in solution and scope. One contributor suggested giving greater flexibility and authority to the regulator to work with industry and come back to government with new ideas to address issues, as utilities and industry have a long-term perspective as well as a wealth of expertise to offer. This could be in the form of a working group between industry and regulator with the mandate to address long-term policy goals (such as reaching net-zero emissions by 2050) and how utilities can contribute to these goals. Others in Group Three supported this idea of a "re-think" between the government and regulator and the development of a working group to address long-term goals. They added that utilities are reluctant to enter into a competitive environment as they may disclose their future plans if they are too proactive in their approach. Incentivizing good behaviors from them – such as developing a carbon-emissions framework– would be beneficial. Others suggested that this could address system barriers in energy and take the form of an annual update.

Additionally, to address cutting carbon emissions, one participant believed that Canada's regulators need a robust, inclusive approach and a declared expectation for the pursuit of excellence. This would include regulators learning about best practices in the field, observing better metrics and becoming more performance-based, undertaking stakeholder engagement with clear priorities, and (most importantly) understanding where the systemic challenges lie.

However, while supportive of the need to reassess the relationship with government, some in the Group expressed skepticism over how giving greater powers to regulators would work. Participants agreed that regulators draw their authority from legislation and legal precedents. They noted that while politicians may be ill-equipped to make decisions, establishing policy and setting goals must ultimately be in the hands of democratically-elected officials. That said, regulators should assist in informing ministers and those in government on how to enable/enforce policy.

Others thought that the challenge of ensuring political accountability itself was due to a lack of policy clarity from government, noting that some regulators do possess extensive authority already. Regulators are hesitant: they don't want to bias policy or political judgments or overstep their authority, nor do they want to embarrass the government to which they are beholden. There is also often incongruence between competing policy objectives from government. Regulators must be given policy clarity on their mandate. Additionally, any "re-think" on the relationship needs to involve and get the attention of politicians. Politicians need to be asked to develop a regulatory framework and have a plan that is published, verified and based on performance excellence.

Lastly, one participant encouraged the Group to conceive more broadly of this "re-think". In the context of COVID-19, Canada not only needs a reconsideration of the regulatory relationship, but a coalescence of new ideas from regulators, investors and businesses for a plan for Canada's oil and gas sector. This could include an outline of energy priorities building on Canadian regulatory credibility (for which the country does not get enough credit, in the views of some participants). Additionally, this solution might be best taken on as a project outside of government; that is, proposing to government what this "New Deal" should look like.

SHARING BEST PRACTICES

Group Four was asked the following question:

Energy decision-makers across Canada have developed and are currently developing and implementing innovative approaches to address the identified challenges to effective decision-making. What mechanisms currently exist to foster collective learning and sharing of best practices within and across jurisdictions? What new mechanisms might be useful to avoid duplicating efforts? What international examples might Canada look to for guidance?

Some participants believed that there are challenges in sharing lessons and best practices amongst regulators: regulators vary and have different backgrounds, structures and mandates. Collaboration is possible but limited as there is often a culture of silos between organizations that wish to have expertise exclusively in-house. While participants agreed there should be more collaboration and collective learning, there is not enough time or money to do it independently.

That said, some contributors noted that regulators are getting better at providing more transparent decisions through web-based information portals. Additionally, while the capacity to train staff is constrained, there is a huge opportunity to share and collaborate in developing regulatory competencies. This may be through regulatory associations like CAMPUT, or practices from other sectors/tribunals/agencies. For instance, environmental tribunals can help to show how to incorporate important factors into decisions, such as the effects of climate change. Places to share information may include academic journals, such as *Environmental Law and Practice*, or organizations such as the Society of Ontario Adjudicators and Regulators. Lastly, academic research programs, such as Positive Energy, can be good sources for discourse and erudition as they are viewed as neutral by groups with different interests.

Participants believed that practices in the regulatory process should embody (as well as be perceived to embody) inclusiveness. There is ambiguity in how energy decision-makers incorporate public input into their decisions. Contributors noted that the modernization of the National Energy Board framework was triggered by frustration and a negative perception by segments of the public. Inclusive practices may include greater opportunities during the pre-hearing stage for funding to citizens, Indigenous communities and smaller groups for legal advice to present their perspectives. Early input from these groups may help the process before a hearing gets underway.

Group Four contributors discussed the relationship between regulators and policymakers, noting that while regulators can deal with evolving adjudication approaches, in terms of overarching policy for hearings, regulators need more guidance from policymakers through legislation. Dialogue is more difficult in a policy vacuum and a context of uncertainty. Industry becomes concerned when project applications debate policy instead of the project under consideration. To some participants, problems arise when policy issues get tossed into the context of regulatory decision-making. Regulators are in much more control when operating in defined boxes and they should have greater decision-making flexibility within that defined box. Best practices include policymakers giving direction to regulators: if governments want something specific done in the regulatory process, they must put it into law.

Some participants noted that for stakeholders, parties look to the regulatory process for policy answers, as there are no other forums to express their points of view. However, participants believed that the more the regulatory processes becomes a policy forum, the more harmful it is to stakeholders in the system.

In terms of other ideas, participants called for greater innovation in the regulator's mandate and structure, and for a more adaptable decision-making framework. There is arguably room for regulatory innovation in the public interest. Lastly, participants recommended engaging with the work and research of third party actors, such as NGOs and academics, examining what works with respect to initiating change that benefits stakeholders and citizens.

WHAT WE HEARD IN THE PLENARY DISCUSSION

Following a brief report from the rapporteurs on the ideas expressed in each of the four groups, general discussion amongst all workshop participants on the questions and discussion paper took place.

Participants noted that the ideas featured in the discussion paper were very relevant to the issues facing Canadian energy regulatory systems. This includes current demand destruction (through distributed energy resources) in Ontario and the need to revise the energy regulatory structure to include addressing affordability issues. There is a policy gap in energy; the regulatory process needs more substance on regulatory issues and needs to be adaptable to challenges like climate demands in real time.

Others raised the ongoing energy transition and noted that the urgency of this change can be seen through shifts in investor confidence. Ultimately, Canada cannot afford not to innovate and lead on certain policy drivers. Other participants added that equity must also be considered alongside innovation. Regulators need to think about how to introduce equity into the decision-making process to avoid unintended consequences that could affect Canada's vulnerable populations. There needs to be greater access and openness in the process to these groups, as well as Canadians of all demographics.

Additionally, participants noted that there is an opportunity to improve stakeholder engagement by providing stakeholders with more clarity on project processes. A "safe space" must be created to talk about regulatory processes. Others agreed that there must be a new inclusive conversation that engages regulatory stakeholders and members of society.

Lastly, some participants reiterated the role of industry expertise in the system. Specifically, is there a way for those outside of government to come to government with business plans or frameworks to address long-term energy and climate issues? An outside-of-government perspective and plan could help address these matters without succumbing to short-term political pressures.

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