

# **The New Brunswick Energy Regulatory Framework Options for Improvement**

June 15, 2010

*A dialogue with New Brunswickers*







Today, I announced a public consultation process to consider options for improving the regulatory framework for the Energy and Utilities Board (EUB), particularly as it relates to the regulation of electricity transmission and distribution.

Given the changes in international and domestic energy markets, it is important that New Brunswick's regulatory framework and general investment environment continue to evolve – standing still is simply not an option. This consultation is a critical step forward for New Brunswick's energy sector. By completing this timely and important consultation process, we are looking out for the economic, environmental and social future of the province while ensuring the best interests of all New Brunswickers are protected.

I invite you to review the options paper and provide your ideas and feedback via a written submission by July 23rd, 2010. Submission instructions are provided in the "options paper" and on line at <http://www.gnb.ca/Energy>.

Energy Minister Jack Keir



# The New Brunswick Energy Regulatory Framework Options for Improvements

## 1. Introduction to the Review Process

The Report of the Advisory Panel on the Proposed New Brunswick – Québec Electricity Transaction suggested that government commit to undertake a review of the current regulatory framework that exists in the Province of New Brunswick. Government agrees with the panel's recommendation and this paper represents the start of such a review process. The goal of this review is to provide more effective and independent oversight of energy utilities by the New Brunswick Energy and Utilities Board (EUB). The review is being led by the New Brunswick Department of Energy on behalf of government.

As part of the review process, the Department of Energy is inviting input and feedback from interested stakeholders and individuals on the changes that it is proposing to make concerning how the EUB operates. This paper has been prepared to provide an overview of the EUB and to give New Brunswickers information on the proposed changes. This paper provides background information concerning the EUB, its mandates, regulatory powers and its responsibility to serve the public interest. It also examines some alternative regulatory approaches in relation to the regulation of energy utilities and invites comments and feedback on suggested changes.

The options presented in this paper apply to the regulation of electricity rates and services specifically, although some proposed options may have a more general application.

## 2. An Overview of the New Brunswick Energy and Utilities Board

### The Role of Regulators

The EUB is an independent regulatory board established by provincial law. Agencies like the EUB are a common feature of government in Canada and elsewhere. These agencies are often established to regulate inefficient markets or those markets served by natural monopolies, such as electricity markets, to ensure that service providers do not charge higher rates than what would be charged if there were competing service providers in the market. The process of regulation can be complex; however, the ultimate goal of the EUB as a regulatory agency is quite simple - to serve the interests of New Brunswickers in its decision making process. This requires that the EUB achieve a balance between the interests of the utility and the interests of ratepayers in a manner that is fair and reasonable to both while ensuring that the utility is able to continue to provide a service that is beneficial to the public.

The functions and powers of a regulator are like that of a court; in fact, they are often referred to as “quasi-judicial” bodies. The EUB generally makes decisions by following a hearing process that is similar to that of a court hearing, ensuring that all interested parties have the opportunity to present evidence (much of it being expert testimony) and to cross-examine other parties. This process avoids political influence, removes the decision-making power from government departments and places it in the hands of a board whose members and staff have the independence, expertise, experience and discretion to make decisions in the interest of New Brunswickers.

## **Mandate and Structure**

The historical roots of the EUB go back to 1910, when the Board of Commissioners of Public Utilities was formed to regulate telephones, heat, light, water, power and street railways. It has gone through a number of changes in response to the evolution of technology and regulatory trends over the years. The former Public Utilities Board was dissolved in January 2007 and re-created under new legislation as the Energy and Utilities Board as of February 1, 2007. The EUB currently provides regulatory oversight of the transmission and distribution of electricity (except municipal distribution companies), natural gas distribution, pipelines and the motor coach industry. The EUB also administers the price regulation of petroleum products such as gasoline, diesel and furnace oil.

The EUB is made up of two full-time (Chair and Vice-Chair) and eight part-time members appointed by the Lieutenant-Governor in Council. The Chair is appointed for a term of 10 years and the Vice Chair is appointed for a term of 7 years. The other members are appointed for terms of between 2 and 5 years. The Board must have a panel of at least 3 of its members, including the Chair or Vice-Chair, in order to exercise its powers.

The Board is supported by 14 additional staff members and has general operating costs of approximately \$2 million per year. These costs are primarily funded by fees collected from the industries they regulate.

The Board must present an annual report to the Minister of Energy. The Minister of Energy is required to table that report before the Legislature. The report then becomes a public document.

## **3. Current Regulatory Framework**

The Board's energy-related mandate and powers come from the following legislation:

*Energy and Utilities Board Act;*  
*Electricity Act;*  
*Gas Distribution Act;*  
*Pipeline Act;* and  
*Petroleum Products Pricing Act.*

Although the *Energy and Utilities Board Act* (EUBA) governs the creation and general structure of the Board, its mandate, responsibilities and powers are found in all of the above statutes, depending on the subject matter. The *Electricity Act* (EA) contains most of the relevant information relating to regulation of the transmission and distribution of electricity. In addition to legislation, it is important to remember that, as with all regulatory agencies, the EUB's regulatory framework includes common law principles which govern the way in which it makes decisions. These principles have evolved over many years of court decisions and are the subject of a specialized area of law. There is no attempt to summarize those principles here.

## 4. Alternative Framework Elements

There is no standard energy regulatory framework in Canada. Each jurisdiction (federal, provincial and territorial) has unique characteristics and resources that shape the nature of its agency. This section will highlight elements from frameworks of other jurisdictions that may be both relevant and beneficial to New Brunswick, providing the Energy and Utilities Board with the mandate, powers and resources to more effectively regulate in the public interest.

Annex A contains a summary of the main aspects of the current regulatory framework, both generally (under the *EUB Act*) and particularly in relation to electricity rates (under the *Electricity Act*). For detailed wording of these elements, please review the statutory provisions as referenced.

### The 3 % Rate Increase Threshold

NB Power Customer Service and Distribution Corporation (NB Power Disco) currently does not have to apply to the EUB for electricity rate increases of 3 % or less (Annex A # 14). There are no other jurisdictions in Canada that permit a rate hearing to be avoided based on a maximum increase. Government proposes to eliminate this provision. All future rate increases, regardless of size, would be subject to the scrutiny and discretion of the EUB in a public hearing.

### Lieutenant-Governor in Council Override

The Lieutenant-Governor in Council may modify or reverse EUB orders in relation to distribution rates (Annex A, # 28). Although some regulatory frameworks provide for appeals to Cabinet, there does not appear to be any other jurisdiction in Canada that allows the government to overrule the rate decision of an independent regulatory agency. Government proposes to eliminate the provision allowing Cabinet to overrule a decision of the EUB regarding distribution rates.

### Regulation of Municipal Distribution Utilities

There are three municipal utilities that distribute electricity in New Brunswick, within the municipal boundaries of Saint John, Edmundston and Perth-Andover. They are owned and operated by their respective municipalities. Other than a filing requirement with the EUB, their rates are set without any formal regulatory process. NB Power serves all other areas of the province and its rates must be approved by the EUB following a public hearing (subject to the 3 % threshold discussed above).

Several provinces regulate all municipal utilities, while others exempt those serving customers within their own boundaries.

New Brunswick may consider regulating municipal distribution utilities in the same manner as NB Power to ensure all New Brunswick electricity customers are serviced in a fair and transparent manner. This may provide better regulatory oversight to ensure that costs are

properly incurred and allocated and may allow the EUB to better administer province-wide regulatory measures such as conservation and demand-side management programs.

### **Policy Objectives**

There are no overriding objectives for the EUB to consider in the exercise of its discretion, beyond the achievement of “just and reasonable” rates, with such conditions as it considers to be in the public interest (Annex A, # 16, 17, 24). Although the government may issue policy directives (Annex A, # 20), this has not happened to date and such directives are more likely to be issued in response to immediate policy concerns as opposed to general or strategic objectives.

Some regulators, in the exercise of their functions, are specifically required to reconcile the public interest, consumer protection, and the fair treatment of electric utilities, while also promoting sustainable development. In other cases, the regulator is directed by legislation to be guided by a set of defined objectives and to report on its own effectiveness.

New Brunswick may consider legislation of policy objectives that would direct and assist the Board in its determination of the “public interest”. These may require the Board to:

Reconcile the public interest, consumer protection and the fair treatment of the regulated utilities.

Promote the satisfaction of energy needs through sustainable development and with due regard for the individual and collective interests in relation to energy.

Protect the interests of consumers with respect to prices and the adequacy, reliability and quality of service.

Promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and facilitate the maintenance of a financially viable electricity industry.

Promote conservation and demand management.

Promote the use and sustainable development of generation of electricity from renewable energy sources.

### **Energy Efficiency and Conservation Mandates**

Although the Lieutenant-Governor in Council has the general ability to issue policy directives (Annex A, # 20), the EUB has no specific mandate to promote energy efficiency, conservation or demand management programs as part of a utility’s operations.

Some alternative frameworks provide details of how efficiency and conservation directives may be specified by government and implemented by the regulator. For example, the government may specify conservation targets to be apportioned among utilities and whether there should be a hearing. Such directives would be published. Other frameworks may require utilities to file annual energy efficiency plans with the regulator, which must ensure that those plans are met.

New Brunswick may provide, in addition to general objectives, a more detailed framework by which the government could ensure that the Board requires utilities to adopt efficiency and conservation measures according to principles that recognize a balancing of interests.

### **Capital Spending Plans**

There is currently no requirement for NB Power Disco to obtain pre-approval from the EUB for the purchase, disposition or construction of assets. Some jurisdictions require regulatory oversight of significant utility expenditures. The Province of New Brunswick may consider a requirement for the EUB to approve significant capital expenditures to ensure that all appropriate issues and rate impacts are fully reviewed before the investment is made.

### **Accountability and Performance Standards of the Board**

Although the Board is wholly independent of government and is not accountable for its operations, it must present an annual report to the Minister of Energy (See “Mandate and Structure” above). Ontario, for example, requires its energy board to enter into an agreement with the Minister of Energy every three years, covering such matters as accountability relationships, business plans, budgets and operational plans of the Board, including performance standards (OEB Act, s. 4.6). While this ensures that government does not govern its operations, it requires a level of collaboration to ensure that the OEB sets transparent performance standards.

New Brunswick may consider providing measures to establish a more transparent process for the Board to establish strategic plans and performance goals to be integrated with its annual reporting requirements.

### **Intervenor Costs**

Generally, those who wish to intervene in a hearing of the EUB do so at their own expense. In most cases, intervenors have the necessary economic interests and financial resources to cover their costs. The interests of the general public are currently represented by the appointment of a Public Intervenor, whose costs are ultimately paid by the utility (Annex A, #12). Several jurisdictions allow the regulator to award costs to an approved party, usually in accordance with defined rules, instead of appointing a public intervenor. Without reasonable restrictions on who may be entitled to costs however, regulatory proceedings have the potential to be extremely expensive for the utility, and since such costs are valid regulatory costs, the consumer ultimately pays through higher utility rates.

Government believes that the interests of the public are well served by a publicly appointed advocate whose role is to represent a broad range of interests of those who would otherwise not be represented at regulatory proceedings.

### **Consumer Complaints**

The EUB does not have a formal complaint process. Energy regulators in some other jurisdictions, however, are mandated to deal with consumer complaints. Such a function requires resources to come from taxpayers or be passed on to consumers as part of utility costs. Currently in New Brunswick, the Board may, in response to a complaint, inquire into any matter where there appears to be a failure to comply with legal requirements or an order of the Board, or where the Board believes that a Board order should be issued in the public interest (Annex A, # 24).

The Province does not propose to expand the role of the Board to deal with complaints that do not involve violations of Board orders or regulatory requirements. Such a mandate would require the Board to act as a mediator between consumers and utilities, a role that might better be fulfilled by an outside agency such as a consumer advocate.

## 5. Submission of Comments

All interested parties and individuals have the option of providing input by forwarding comments or briefs as indicated below, on or before July 23, 2010. Submissions should relate to specific proposals in this document or provide additional suggestions for improvements to the regulatory oversight of the EUB specific to the regulation of energy utilities.

Submissions received after the deadline or falling outside of the scope of this paper will not be considered. The regulation of pricing under the *Petroleum Products Pricing Act* is not within the scope of this review.

A document summarizing all comments received will be published on the Department of Energy website. A list of individuals and stakeholders who provided input to the process will also be published separate from the summary document.

Stakeholder input, as well as information collected from other jurisdictions, will be analyzed and recommendations put forward for consideration by government. It is expected that legislative changes resulting from this review will be considered in the fall of 2010.

The Department of Energy thanks all respondents in advance for submissions and may contact individual respondents at its discretion, if any follow up consultation is considered necessary.

Please forward comments to:

### By Mail

Regulatory Framework Options  
New Brunswick Department of Energy  
1 Germain Street, Suite M-100  
Saint John, NB E2L 4V1

### In Person

New Brunswick Department of Energy  
1 Germain Street  
Mezzanine Level  
Saint John, NB

### By E-Mail

[energ-consult@gnb.ca](mailto:energ-consult@gnb.ca)

## Annex A

### Energy and Utilities Board – Summary of Current Regulatory Framework

1. In addition to the functions laid out in other legislation, the Board shall perform such other duties and functions as required by the Lieutenant-Governor in Council and may exercise such other powers as may be conferred by the Lieutenant-Governor in Council (EUBA, s. 23(2)).
2. The Minister of Energy may direct the Board to investigate and report on any matter over which the Board exercises its powers (EUBA, s. 24(1)).
3. The Board generally has court-like powers in relation to compelling witnesses and evidence, enforcing its orders and carrying out inspections (EUBA, s.28).
4. The Board may, on its own initiative, inquire into or hear any matter over which it normally has jurisdiction (EUBA, s. 32).
5. Confidential information or evidence before the Board will not be published or revealed unless necessary in the public interest (EUBA, s. 34). The Board has a written policy on confidentiality issues, but may deviate from the policy as it deems necessary.
6. The Board is “the master of its own procedure” in relation to any of its proceedings, subject to its ensuring procedural fairness (EUBA, s. 38). The Board has a written Procedures Policy as a guide to parties. (see also item 21 below.)
7. The Board may make interim orders (for example, a temporary rate increase to have effect until a final rate decision is reached) (EUBA, s. 40).
8. The Board may make interim orders without hearing other interested parties (*ex parte*) only for as long as needed to determine the issue using normal procedures (EUBA, s. 41).
9. The Board may review, rescind or vary any order made by it, or may require a rehearing of an application before making a decision (EUBA, ss. 43-44).
10. The Board must publish its decisions within 30 days after being made (EUBA, s. 46(2)).
11. The Board recovers its annual expenses from the companies or utilities that it regulates. These may be “direct” costs attributable to specific persons (such as an applicant for regulated rates), or “common” costs of its daily operations (EUBA, s. 50).
12. The Board must notify the Attorney-General of any hearing, who may intervene in the public interest (EUBA, s.49; EA, s. 123)). The Attorney-General will often intervene by the appointment of a Public Intervenor, whose costs are recovered by the Board as a “direct” expense (EUBA, s. 51).
13. Orders of the Board are subject to judicial review by the Court of Appeal of New Brunswick. The Board may suspend the application of its order until the judicial review is complete (EUBA, s. 52; EA, s. 106).

14. Except for changes exceeding 3 % (or the change in consumer price index, if greater), NB Power Customer Service and Distribution Corporation (Disco) must apply to the Board for all rate changes and may not make any change until it receives Board approval (EA, ss. 99, 101). Disco cannot charge greater or less than the approved rates (EA, s. 102)
15. The Board must base its rate decisions on all of the applicable projected revenue requirements of Disco for the provision of services, taking into consideration accounting policies, customer class cost allocations, rate design, service policies and energy programs (EA, s. 101(4)).
16. The Board is required to set “just and reasonable” rates (EA, s. 101 (5)).
17. The Lieutenant-Governor in Council may request the Board to review Disco’s rates. Upon such a request, the Board will initiate a public rate hearing process for the confirmation or adjustment so that such rates are just and reasonable (EA, s. 103).
18. Notice of the hearing of a rate application must be advertised for at least 20 days, as the Board directs (EA, s. 123).
19. The Board may “forbear” from the exercise of any power or performance of any duty, where it believes it would be consistent with the purposes of the *Electricity Act* and may revert to a greater degree of regulation if forbearance is no longer required (EA, s. 118).
20. The Lieutenant-Governor in Council may regulate policies and rules to be observed by the Board in the exercise of its powers, except in relation to any specific matter then before the Board (EA, s. 119). There have been no such regulations issued under the current legislation.
21. The Board may make procedural rules which have the force of law when approved by the Lieutenant-Governor in Council (EA, s. 120; see also item 6 above).
22. The Board may adopt any method or technique it considers appropriate for the setting of just and reasonable rates, including an alternative form of regulation. The burden of proving that its proposed rates are just and reasonable is on the applicant (EA, s. 125).
23. The Board shall monitor the electricity sector and may report to the Minister of Energy on matters such as the efficiency, fairness, transparency and competitiveness of the sector. If requested by the Minister, the Board shall advise on any abuse of market power or circumstances contrary to the interests of competition (EA, s. 127).
24. The Board may, either on its own or in response to a complaint, inquire into any matter where there appears to be a failure to comply with legal requirements or an order of the Board, or where the Board believes that a Board order should be issued in the public interest (EA, s. 128).
25. The Board has the power to issue compliance orders. Anyone who violates or fails to comply with an order of the Board commits an offence, punishable by fine (EA, ss. 129; 146).

26. Any order of the Board is subject to such terms as it considers necessary in the public interest (EA, s. 130).
27. The Board may appoint inspectors to ensure compliance with any license conditions or Board orders. An inspector has the power to enter any place and require the production of documents or things relevant to the inspection, make copies, and require information from any person in relation to an inspection. The inspector may also bring an expert. It is a punishable offence to obstruct an inspector or falsify or withhold information required by the inspector (EA, ss. 140, 145, 146).
28. The Lieutenant-Governor in Council may modify or reverse an order of the EUB respecting electricity distribution rates (EA, s. 105).