UNIVERSITY OF CALGARY

THE SCHOOL OF PUBLIC POLICY
SPP Communiqué

Volume 8 • Issue 7
March 2016

SPP Communiqués are brief articles that deal with a singular public policy issue and are intended to provide the reader with a focused, concise critical analysis of a specific policy issue.

The University of Calgary is home to scholars in 16 faculties (offering more than 80 academic programs) and 36 Research Institutes and Centres including *The School of Public Policy*. Founded by Jack Mintz, now President's Fellow, and supported by more than 100 academics and researchers, the work of The School of Public Policy and its students contributes to a more meaningful and informed public debate on fiscal, social, energy, environmental and international issues to improve Canada's and Alberta's economic and social performance.

THE QUESTION OF SOCIAL LICENCE AND REGULATORY RESPONSIBILITY*

A summary of discussions regarding the emergence of an alternative participation role in regulatory hearings

Michal C. Moore

EXECUTIVE SUMMARY

The School of Public Policy convened a roundtable with former energy regulators to discuss the impact and implications of broader use of the term social licence. This report offers a summary of recommendations from that meeting that highlight conclusions regarding needed legislative clarity on the relevance and role of the term in the future.

Energy in a variety of forms from liquid hydrocarbons to electricity is vital for modern society. Useful, affordable and dependable energy in turn, is entirely dependent on the technology to convert it's potential and the necessary infrastructure for delivery to consumers. Consequently, in developed countries, a working relationship and authority will exist between policy-makers and regulators; regulators typically approve or deny project permits, establish and enforce rules and set standards for the development and operation of these systems.

The public is technically represented in this process by elected policy-makers and then in turn by appointed regulators who monitor day-to-day operations in the energy sector. Since energy systems are highly technical, the process of hearings, evidence submittal and evaluation of performance is usually dominated by testimony and submittals that are based on scientific, engineering or economic calculations. As a practical matter, however, public interest especially in areas of environmental impact or rate changes can be high, even in the absence of technical expertise or experience.

Determining how to integrate public involvement in the hearing process as a consequence can pose a dilemma for regulators, both in terms of testimony or

* This research was financially supported by the Government of Canada via a partnership with Western Economic Diversification.

submittals or a perception on the part of the public that regulatory forums are appropriate to discuss or even demand changes in policy prescriptions for energy issues.

One consequence of this is a collision of the public's interest and desire to understand or be involved in those regulatory processes and hearings normally reserved for applicants and experts. An example of the resultant conflict between some members of the public and regulators is a tension emanating from insistence that a so-called "social license" be perfected before permits or permission are granted. This term of art is not provided for in current law or practice. Consequently, it is more a reflection of changeable public opinion than the underlying authority, structure and evidence in the regulatory process itself. In short, the term social license becomes shorthand for a demand from self-defined interest groups to be consulted and granted effective veto power over regulatory approvals or mitigation conditions prior to any final project approval.

There is no precedent to guide regulators who are faced with this type of request or demand. Ultimately, they must decide how to include or not include testimony, data or other submittals as a part of a quasi-judicial hearing or case. The result is a challenge to regulatory procedures designed to focus on proposed projects or to interpret the value of any given infrastructure project in satisfying future supply and demand needs. Absent new judicial and policy prescriptions, the matter can only be incompletely and inconsistently dealt with when approached from the regulatory side alone.

UNIVERSITY OF CALGARY

THE SCHOOL OF PUBLIC POLICY
SPP Communiqué

Volume 8 • Numéro 7
Mars 2016

Les communiqués de l'École de politique publique sont de courts articles portant sur une question particulière de politique publique et visent à fournir au lecteur une analyse concise, critique et ciblée.

L'Université de Calgary regroupe des chercheurs dans 16 facultés (et proposent plus de 80 programmes d'études) et 36 instituts et centres de recherche, notamment l'École de politique publique. Fondée par Jack Mintz, maintenant President's Fellow, et avec la collaboration de plus de 100 enseignants et chercheurs, les travaux de l'École de politique publique et de ses étudiants contribuent à un débat public étayé sur les questions financières, sociales, énergétiques, environnementales et internationales, pour améliorer le rendement économique et social du Canada et de l'Alberta.

LA QUESTION DU CONTRAT SOCIAL ET DE LA RESPONSABILITÉ RÉGLEMENTAIRE*

Sommaire de discussions concernant l'émergence d'un rôle de participation différent aux audiences réglementaires

Michal C. Moore

SOMMAIRE

La School of Public Policy a convoqué une table ronde avec d'anciens régulateurs du secteur de l'énergie afin de discuter de l'incidence et des implications d'un usage élargi du terme « contrat social ». Le présent rapport constitue un sommaire de recommandations émanant de cette réunion qui mettent en évidence les conclusions relatives à la clarté législative nécessaire quant à la pertinence et au rôle de ce terme dans l'avenir.

L'énergie dans ses diverses formes, des hydrocarbures liquides à l'électricité, est essentielle à une société moderne. Une énergie utilisable, abordable et fiable dépend quant à elle entièrement de la technologie nécessaire à la conversion de son potentiel et de l'infrastructure requise pour la distribuer aux consommateurs. Par conséquent, dans les pays développés, une relation de travail et un pouvoir d'autorisation existent entre les décideurs et les régulateurs. En général, les régulateurs approuvent ou rejettent les permis de projets, déterminent et mettent en application les règles et établissent des normes pour le développement et l'exploitation de ces systèmes.

Techniquement, le public est représenté dans ce processus par des décideurs élus, ainsi que par des régulateurs désignés qui supervisent les activités quotidiennes dans le secteur de l'énergie. Étant donné que les systèmes énergétiques sont hautement techniques, le processus d'audience, de présentation d'éléments de preuves et d'évaluation du rendement est en général dominé par des témoignages et des présentations qui sont basés sur des calculs scientifiques, techniques ou économiques. En pratique, toutefois, l'intérêt du public peut être vif, en particulier dans les domaines de l'incidence environnementale ou des changements de tarif, même en l'absence d'expertise ou d'expérience technique.

* Cette recherche a été soutenue financièrement en partie par le gouvernement du Canada via Diversification de l'économie de l'Ouest Canada.

La détermination de la manière d'intégrer la participation du public dans le processus d'audience en raison de cet intérêt peut constituer un dilemme pour les régulateurs, tant à l'égard des témoignages ou des présentations que d'une perception de la part du public que les forums de réglementation sont appropriés pour discuter de changements dans les recommandations politiques pour les questions énergétiques ou même pour demander de tels changements.

Une conséquence de cette situation est un conflit avec l'intérêt du public et son désir de comprendre et d'être impliqué dans ces processus et audiences réglementaires qui sont normalement réservés aux postulants et aux experts. Un exemple du conflit résultant entre certains membres du public et les régulateurs est la tension qui émane de l'insistance que ce que l'on appelle un « contrat social » soit mis au point avant qu'on n'accorde des permis ou des autorisions. Ce terme technique n'est pas prévu dans le droit ou la pratique actuels. Par conséquent, il s'agit plutôt du reflet d'une opinion publique changeante que de l'autorité, de la structure et de la présentation de preuves qui sous-tendent le processus réglementaire lui-même. En bref, le terme « contrat social » devient une expression abrégée pour désigner une demande de groupes d'intérêts auto-désignés qu'on doit consulter et auxquels on accorde un droit de veto sur des autorisations réglementaires ou des mesures d'atténuation avant l'approbation finale de tout projet.

Il n'existe pas de précédent pour guider les régulateurs qui font face à ce type de requête ou de demande. Au bout du compte, ils doivent décider de la manière d'inclure ou de ne pas inclure les témoignages, les données ou d'autres présentations dans le cadre d'une audience ou d'un cas quasi-judiciaire. Le résultat représente un défi pour des procédures réglementaires conçues pour cibler des projets proposés ou interpréter la valeur d'un projet d'infrastructure donné pour ce qui est de son adéquation avec les futures conditions de l'offre et de la demande. En l'absence de nouvelles prescriptions judiciaires ou politiques, cette question ne peut qu'être traitée de manière incomplète et incohérente si on l'aborde uniquement sous l'angle réglementaire.

INTRODUCTION

"Social licence" is a phrase appearing with increased frequency in petitions, briefs and information concerning energy systems and infrastructure. Given its increased visibility and apparent importance in public discourse, the School of Public Policy gathered together former regulators and policy experts to discuss the issue of social licence. This document is a summary of the discussion and the thoughts that emerged.

The term "social licence to operate" can be traced back to 1970s' mining operations, where operating projects maintained their ability to operate by co-operating with local communities that were affected by their activities. More recently, the Australian Centre for Corporate Social Responsibility (ACCSR)[1] suggested a broad definition for the term as "the level of acceptance or approval continually granted to an organization's operations or project by local community and other stakeholders." They suggest that social licence has four levels of impact and influence: withdrawal, acceptance, approval and psychological identification. They point out that most companies or projects are in the acceptance or approval range most of the time, a circumstance that can vary over time in response to actions or perceptions of impact by developers, the public or concerned stakeholders.

In a recent blog post, Nigel Bankes of the University of Calgary Faculty of Law[2] pointed out that in general, use of the term "social licence" concerns four issue areas. These include the fact that the term itself is normative in the context of operations; that there are differing motivations for using the term depending on whether the developer or the opponent side is using it; that there is a distinction between a legal licence and the idea of a social licence; and the social and financial implications of allowing the social licence to function as a veto.

In the interest of exploring this issue, in June of 2014 the School of Public Policy at the University of Calgary invited a small group of people with backgrounds in energy regulation and regulatory systems to participate in a roundtable addressing the topic of social licence in the regulatory process. This short forum[3] acknowledged the role of issues such as those cited above, but focused on the much narrower context of energy system operations and investment, and more specifically, the impact and influence of the broad use of this term in the operations of the regulatory system.

The regulator for energy projects plays a critical role in oversight, control and when necessary, expansion, upgrade or improvement to the overall energy system. That this role and process are important is true by inspection. Access to a fully functional, cost-effective and reliable energy system (this includes electric as well as transportation fuels) is not an option in modern society. Stated another way, there are no viable and useful alternatives for an inclusive, often redundant and reliable energy system, and the operating process via regulatory institutions is critical as well.

---

1 Leeora Black, *Defining the Elusive and Essential Social Licence to Operate,* http://accsr.com.au/news/defining-the-elusive-and-essential-social-licence-to-operate/

2 Nigel Bankes, *The Social Licence to Operate: Mind the Gap*, http://ablawg.ca/2015/06/24/the-social-licence-to-operate-mind-the-gap/

3 Participants agreed to the Chatham House Rule for attribution; this summary reflects the tone and content, however, of the comments and discussion(s) that transpired.

Regulators and the hearings they conduct represent a critical element of the process that assures stability of the energy system. Their responsibilities include permission to locate and construct infrastructure, conduct resource assessments and determine rates and tariffs for consumers. In the hearing process, regulators apply rules and regulations established under their charter and mandate; their decisions are typically only subject to challenge or review within the judicial system. A key characteristic of regulatory institutions is that they are nominally or legally independent of policy-makers, with terms that either extend beyond those in the executive or other policy branch, or in some way are limited in the direct influence of those who appoint them.

With this caveat in mind, the focus of this roundtable was to identify the likely impacts of various interpretations and use of the term "social licence" on the ongoing and unique processes of energy regulatory operations.[4]

THE "SPECIAL" CIRCUMSTANCES OF ENERGY PROJECTS

Since most energy infrastructure decisions are made following regulatory or other public hearings, regulators are faced with responding to calls to somehow address concerns in this area.

Energy infrastructure applications and hearings have become more visibly contentious of late,[5] in part due to increased awareness of the linkage of energy generation and consumption with negative impacts on climate and environmental quality. The question or issue of environmental and social justice has entered the ongoing discussion of energy systems recently and illustrates a desire not only to bound or limit expansion of energy systems, but also to achieve some broader redistributive wealth objectives.

All energy systems, from fuels to consumption, are complex, capital-intensive and alter or impact landscapes for long periods of time. Consumers depend on energy to support their comfort and commerce, but as a general rule are not involved in decisions regarding the types of systems which provide that energy. Connecting the dots among energy development, power generation and environmental impacts has been undertaken in regulatory hearings with low but specialized audience participation. Recent events suggest this paradigm is changing, with increased interest in regulatory processes and outcomes. Along with this trend is the call for increased acquiescence to what is termed "social licence."

Social licence is not a term used in most regulatory hearings unless cited by advocates of a particular position being debated by the regulatory or permitting body. Depending on the speaker, the phrase can be interpreted as a proper noun, an illustrative adverb or a political compact. The term, however, lacks historical precedent, and typically includes a demand for action(s) claimed to be missing from the regulatory process. The roundtable participants

---

[4] An obvious alternative category that influences energy regulatory hearings and processes entails the land use decisions made by local or regional agencies that may overlap but not substitute for specialized regulatory processes.

[5] The contentious nature that we refer to includes disruption of meetings, demands to be included as stakeholders of record for a much broader cross-section of the populace, judicial filings, protests and appeals of decisions as well as procedural process.

chose to use the term as one involving the permit or approval process, as opposed to an after-the-approval maintenance-of-public-trust element commonly referred to as the social licence to operate.[6]

This roundtable allowed participants to address the issue of whether or not the term "social licence" implied a compromise of or improved the regulatory process; they also debated whether the term served de facto as an indictment of policy-makers who indirectly failed to protect the public via the design and authority represented by the hearing process itself.

ROUNDTABLE OBJECTIVES

All invited participants[7] shared a common background; they have worked in and around the issue(s) of how to manage, oversee, permit and regulate the infrastructure that enables the energy system.

Roundtable participants were asked to discuss the assertion that the current regulatory process violates or ignores a critical requirement to obtain social licence from the public prior to acting or granting permission for energy system expansion or change. In the context of this question, they were asked to discuss the ramifications of such a term being used to challenge or redirect current common hearing processes by including a separate consideration of demonstrating that social licence had been addressed.

Throughout the discussion, there was broad agreement that the term "social licence" has a limited historical context; when known as the social licence to operate, it provided a broad and informal charter to project, gain and keep trust support with members of the communities affected by a project, process or activity. This in turn provided a broad understanding but not a precise definition of the term "social licence." Ultimately, however, this common view of what constitutes social licence differs fundamentally with some interest groups' conception of the process for obtaining a so-called social licence for permits and permission for projects prior to regulatory approval. In this preferred system, obtaining social licence would be necessary for any project approval, and the claimed zone of impact could be expanded to global dimensions.

Many regulatory institutions operate with the understanding that democratic systems confer authority to act on behalf of the public to a regulatory body via the legislative process, the police or specific delegations of power. A challenge or, conversely, a re-affirmation of this authority is typically outside the scope of regulatory hearings.[8]

As a consequence, citing a source or basis of authority for a grant of social licence must be by definition vague and imprecise; notwithstanding this, stakeholders increasingly suggest or

---

[6] The concept of SLO is often attributed to James Cooney of Placer Dome Petroleum, who used the term in 1994 in the context of risk assessment for mining companies operating in developing countries that operated without the authority of rule of law or permits.

[7] There are other groups that are intricately involved in the outcome of the regulatory process, including policy-makers, project-proximate stakeholders, special-interest groups and the public at large, although none of them specifically has a role in regulatory decision-making or managing the hearing process.

[8] Although it restates the obvious, regulators do not create policy, they implement it via decisions, rules and the imposition of standards in specialized areas.

demand recognition of their claims for consideration of social licence in a range of forums. This happens often enough that policy-makers and regulators have begun to refer to the term as if it had legislative standing, without a clear history or role for including it in proceedings or decisions. As a matter of fact, proposals that require permission to locate, operate or change landscapes or other environments, need a permit or approval from a regulatory body. The public, in this case, is usually represented by a regulatory body. While the public associates the authority or often the decision-maker with the legislature, actual rule making, standards and decisions originate with the regulator.

The roundtable participants sided with the view that by definition, the concept of social licence is embedded in, and reflects and represents the collective public good. In reality, it is effectively granted every time a project is reviewed by and acted upon by the public regulator or decision-maker. The new view or alternative premise of social licence suggests the grant of authority to regulators is not complete. The advocates of this alternative (or parallel) process contend smaller affected groups should be directly involved in decision-making even if they don't qualify as traditional stakeholders.

A term like social licence embodies an inherent contradiction such as that where a consensus might be sought and obtained by a subset of the public, one where they convince the regulator that they speak for the public at large, and the regulatory body does not.

Under these circumstances, such a parallel definition or substitute process becomes difficult operationally and almost impossible to integrate functionally in the project review process. Nonetheless, energy regulators, and to some degree legislators, now face the dilemma of a widespread use of a term that lacks a standard or history by which to judge or apply it.

The regulatory roundtable explored the issue of whether the concept of including a new definition of, or including the calculating of, social licence might compromise or interrupt the existing regulatory process. The roundtable participants explored several themes, some of which emerged organically from the discussion and some of which arose from specific questions posed during the roundtable.

THEMES AND CONCLUSIONS

Energy regulators are critical to the performance and stability of the energy system. In the case of regulated utilities, they oversee rates and tariffs and determine the structure and needed capacity additions to match load requirements.

Seven key themes emerged from the roundtable discussions:

1. The term "social licence" is being used more and more frequently by minority or special-interest groups, purporting to speak for the public, whom they claim are inadequately represented by the current process. However, there is no useful or widely accepted working definition of the term "social licence"; the term or phrase does not mean the same thing as the greater public interest. Representing or protecting the public interest is the job for regulators when making their decisions.

2. This can be a serious issue for regulators, (the risk of so-called tyranny of the minority[9]), a source of disruption for sequential and appropriate public investment and operation of critical infrastructure. It is also an opportunity, if it enables the regulator to be as inclusive as possible in the regulatory process, especially in terms of getting the "right" people (i.e. the 80-per-cent majority willing to compromise and reach consensus) inside the consensus tent. Ultimately, it will be a problem if people perceive that it means including virtually everybody's views in a regulatory decision or making everybody happy with that decision. The risk is that the 80-per-cent majority who are willing to compromise and reach consensus will dwindle, while the marginal or narrow interest views will increase.

3. The "community" involved with or concerned with regulatory decisions is, by definition, the broader public that typically coincides with the appointing jurisdiction served by the regulator or the legislators who appointed them. There is also a more narrow definition; that is, those individuals and communities who are most directly and adversely affected by the proposed project.

4. The emergence of the term "social licence" has begun to pose a serious procedural and administrative challenge for regulators. Hearings are delayed, decisions are being challenged on grounds not anticipated in the regulatory organizational structure, groups not represented in the process (i.e. those who don't speak up) may be increasingly disenfranchised and timely investments may be deferred or experience additional costs.

   The process is not necessarily destructive, but it has the potential to upset protocols and process on critical systems. However, until society gets to a point where there's a direct impact on people, the public will tolerate delays in building projects. The loss or impact from this negative process is that part of it will be investment and innovation potentially forestalled, delayed or driven to other sectors.

   A positive impact of the insistence of various groups to use this term may be revisions and updating of regulatory processes, the clarification of definitions of standing and stakeholder responsibilities and greater public awareness of the role and importance of the regulatory and energy systems.

5. The concept of social licence is likely to be very different for regulators and legislators or policy-makers. While the jobs, authority and responsibilities are functionally different, these groups also exist in different time relationships or regimes. (Discount rates, decision horizons, time focused on single events etc.).

6. Consequently, there is a key need for regulators, in making their decisions, to understand and integrate the new world of energy with the old views of how an energy system should be configured and operated, especially if the dissatisfaction with the current system continues to grow, and potentially thwarts the operation and maintenance of the critical infrastructure system.

---

[9] Tyranny of the minority, the obverse of tyranny of the majority, is oppression by the minority, perhaps less popular, or influential point of view.

Available approaches include creating novel legislation, forming unusual alliances of politicians, non-governmental organizations and other stakeholders, and novel public input/consultation approaches that are alternatives to the inherently adversarial regulatory hearing. It may also be possible to add a complementary informal process to address the issue of social licence prior to planning, resource assessment or formal process.

7. It is critical to insist that the system be transparent, reliable and inclusive, literally bounded by the truth. This means as well that the definition of community and affected groups must be defined and clearly expressed to the public. Other critical tests of a proper and useful regulatory decision include:

    - Ultimately, it must withstand court challenge for procedure, evidence and fairness;
    - It must be testable and represent a reasonable, clear and fair process without hearsay;
    - All the published rules of filing must prevail;
    - It must represent independent judgment of the regulators.

CONCLUSIONS

Roundtable participants concluded that this issue is important and worthy of future policy and judicial review with clarification by both bodies in order to avoid a breakdown of the system that oversees energy systems.

Participants in the roundtable concluded that the most appropriate characterization of social licence is as a process rather than a product. This process must reflect rules and standards that are unique to the agency in control, while taking into account general issues of health, safety and public convenience. Social licence becomes in effect synonymous with the charter granted to the regulator to consider all relevant issues (with regard to projects) concerning service levels, economic returns and impacts on the community and/or the environment. In other words, social licence is included when public officials act with authority derived from a constitution or enabling act, and determine the fate of a project, set limitations on its design or use, or direct mitigation or compensation for expected harm.

Use of the term "social licence" outside this understanding, however, represents a serious commentary on a potential limitation of or compromise of the functional capability of regulatory agencies. It implies a new (growing) lack of trust in terms of outcomes or even opportunities for public participation in hearings or evidentiary processes; ultimately, it challenges the notion of fair distribution of benefits. In some cases, the use of social licence as a demand or plea may also act to proxy perceived unequal impacts and assignment of costs on individuals or communities. It can reflect a growing frustration[10] of those outside the decision process (both policy and regulatory) and their ability to de facto alter project behaviour or approval process.

[10] This is perhaps most clearly associated with the recent Occupy Wall Street protests.

The result has been a growing phenomenon of intervention and protest by small subsets of the overall population who protest projects, decisions, programs and plans that affect them directly or indirectly.

The participants concluded this issue is worthy of special concern, given the critical nature of energy systems and infrastructure. Broad and potentially inconsistent adoption of norms or standards for the inclusion of social licence in the regulatory process poses challenges and threats for permits already issued for projects and consistent application of rules and procedures for hearings that involve both stakeholders and the general public. It can insert an element of uncertainty in the process as well as the outcome(s) in terms of system design, cost and reliability; and, ultimately, questions of liability and control of what is effectively a common good that society depends on to manage commerce, health and safety, and comfort.

The roundtable participants concluded this was a timely issue that is likely to grow in importance and impact, and urged that both the legislative and judicial communities convene similar forums in the future to more fully understand and devise systems, policies and procedures that take this phenomenon under consideration, and proactively deal with it. This step alone will respect much of the public dissatisfaction and mistrust of current process, standing and even outcomes.

About the Author

Michal C. Moore is a Professor and Distinguished Fellow in the Energy and Environmental Policy Area at The School of Public Policy at the University of Calgary. He is also a Professor of Economics and Systems Engineering at Cornell University in New York where he teaches courses in energy systems and economics. Dr. Moore's research is focused on energy regulatory and market oversight issues including the externalities of unconventional fuel development.

A native of California, Dr. Moore is a former regulator in the energy industry in California and served as the Chief Economist for the United States National Renewable Energy Laboratory in Golden, Colorado. He served as an elected County Supervisor in Monterey County, California for two terms. He read for his PhD at the University of Cambridge in the U.K. and is a member of Darwin College.