

What the Regulator Looks for and Regulatory Advocacy

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A. Overview

- The focus is now on presenting the application for relief at a hearing.
- All materials are filing guideline compliant; discovery is complete; issues have been identified and approved; a settlement conference has concluded and issues remain unresolved.
- Witness preparation has concluded, witness panel composition and witness responsibility has been determined, identity of the tribunal members who will preside at the hearing is known.
- You are now in a hearing room before one or more adjudicators who are to determine the unresolved issues.
- How do you present the case in a manner that will persuade the adjudicators to grant the relief that you seek and reject the forms of relief proposed by others?
- How do you make the best use of the available case presentation tools to support the outcome that best serves the interest that you represent?
- This presentation will cover some, but not all of the points in Gordon Kaiser's "Advocacy Before Energy Regulators" paper. Keep this paper for future reference because the articles attached to it provide the principles that guide a determination of the complete range of process- related issues that might arise in a particular case.

B. What the Regulator Looks for

- The Regulator looks for assistance.
- What are all of the relevant facts?
- What are the material issues?
- What are the principles that we are to apply to the facts to guide our determination of the issues?
- What is the range of outcomes supported by the facts and applicable principles?
- What is the outcome within that range that appropriately balances the interests of the utility and its customers?
- Continuity-where are we coming from and where is this case taking us?
- Best practices- have such practices been followed in planning, budgeting, work execution and cost control?
- Full disclosure.
- Integrity.
- Civility.

C. Regulatory Advocacy

- Regulatory advocacy consists of making the best use of available case presentation tools to persuade the Regulator to adopt the outcome that is most favourable to the interest that you represent.
- Pre-hearing activities such as well-written application materials and pre-filed evidence, along with straight-forward and non-argumentative interrogatory responses have a persuasive impact on the regulator.
- The advocacy tool kit includes: the effective use of an opening statement; and a concise and focussed direct examination of one's witnesses; the constructive use of objections; a targeted and easy to follow cross-examination; and a well-reasoned argument.

Regulatory Advocacy (cont'd)

- THE OPENING

- Use It.
- Do not assume that the panel knows what the case is about.
- Explain what the issues are, what you have to prove and how you intend to do it.
- Do not read.
- Get the facts right. Forget the law. It will take care of itself. If some facts go against you , tell the panel. Do not assume that they will go away.
- Do not start with procedural crap.
- The opening is a huge opportunity. Do not waste it.

Regulatory Advocacy(Cont'd)

DIRECT EXAMINATION

- Use direct. Do not dump and run. Get your witnesses comfortable.
- Pick a quarterback for the panel. And a cleanup batter.
- Expert Evidence.

WITNESS CONDUCT

- Answer the question. Do not be evasive.
- Do not argue. Leave argument to the lawyers.
- Use your own words. Do not read something that others have written.
- Know what issues you are responsible for and stick to them.
- Do not guess.
- Be familiar with your prior testimony and avoid contradictions.
- Avoid conflicts of interest.

Regulatory Advocacy (Cont'd)

CROSS EXAMINATION

- Use the Technical Conference to get the facts.
- Use a compendium.
- Do not ambush.
- Keep it short.
- Do not argue.
- Ask for Undertakings. But be clear what you want, And follow up when you get it.
- Be polite. No one likes a jerk. Particularly panel members who are non lawyers.
- Remember the Rules of professional Conduct.

Regulatory Advocacy (Cont'd)

- FINAL ARGUMENT

- If oral, provide an outline.

- Use a Compendium. Include copies of relevant transcript pages and authorities.

- If written, remember this is what is on the panel members desk when they are writing the decision

- Use a red pen. Often.

- Be fair. Do not misstate.

- Do not go down with the ship. Recognize a stupid argument.

- Remember reputation is everything. This is not a judge that you will never see again. You will be back before these panel members many times over the next few years.

- Pay attention to onus but make sure that it is the law and not just convention.

- Remember these proceedings have a strong public interest component.

Regulatory Advocacy (Cont'd)

REPLY

- Keep it short
- Do not read.
- Use a Compendium.
- Have answers to questions ready. You know the questions by now.
- If the members do not ask you the question, answer it anyway.

D. Desired End-State

An adjudicative determination of matters in issue in a manner that is favourable to the interest that you represent and within the range of reasonable outcomes supported by the record.