



On the
Grid

Representing Consumers' Interests In Ontario's Energy Sector

BY PAUL SOMMERVILLE & ROBERT B. WARREN

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1 Introduction

The prospect of significant changes in the province’s energy sector provides the occasion for a consideration of the representation of consumer interests in that sector.

Consumers already face the certainty of increasing costs for electricity, largely as a result of initiatives beyond their control. These costs may be further increased by the province’s Climate Change Action Plan (“CCAP”), and in particular its cap and trade program. The increasing availability of distributed energy resources (“DERs”) offers consumers the opportunity to control their use of electricity, and therefore their overall energy costs. The implementation of DER will also have a material impact on the allocation of costs among ratepayer classes. How the implementation of DER is managed by the provincial government, its regulators, and the local electricity distribution utilities (“LDCs”), will have major impacts on consumers’ access to and the costs they pay for energy.¹ LDCs, and their municipal owners, are addressing questions about the structure and direction of the electricity distribution business. How those questions are answered, and by whom, will have a material impact on the interests of consumers.

Given their impact, it is perhaps self-evident that consumer interests should be represented in the decisions affecting the nature and pace of the changes. Energy is an essential commodity, providing light and heat to consumers, and for the functioning of the economy on which consumers depend. Provincial governments, past and present, have invariably maintained that their decisions on energy issues are either driven by a concern for the interests of consumers or have a minimal effect on the prices paid by consumers for energy. That is the position with respect to all decisions which directly affect the rates which

¹ For a discussion of the impact of DER on the distribution sector, and in particular its variable impact on consumers, see Paul Sommerville, Richard Carlson and Petar Prazic, *Emerging Energy Trends: Regulatory Responses to Ontario’s Energy Future* (Toronto: Mowat Centre, 2016), https://mowatcentre.ca/wp-content/uploads/publications/141_emerging_energy_trends.pdf.

consumers pay for, in particular, electricity. The most recent example of that is the government's decision to rebate the equivalent of the provincial portion of the GST on electricity bills. Ontario's position is also reflected in policy decisions about what the government maintains are the long-term interests of consumers, for example, the province's CCAP.

The starting point for the analysis and the recommendations in this paper is what we believe is the almost complete absence of consumer representation, particularly with respect to the decisions which have the greatest impact on consumer interests.

We will begin with an overview of the energy sector, examining how, and by whom, decisions are made and how information about those decisions is provided to consumers. We will then set out the principles which we believe should inform consumer representation, together with a description of the matters which we believe consumer representation should cover. We examine the existing mechanism for consumer representation, the cost award system for Ontario Energy Board ("OEB") proceedings. We then examine a recent proposal from the OEB for changes in that system. We examine alternative models for the representation of consumer interests, particularly those involving an Energy Consumer Advocate. We conclude by suggesting that what is required is a legislatively-authorized office for the representation of consumers' interests in the energy sector.

2 The Energy Sector

In this section we will describe what the energy sector consists of, how decisions in that sector are made and by whom, and what information is provided, and by whom, to consumers about the effect on them of those decisions.

For the purposes of this paper, we will define the energy sector as including the entities which generate, transmit, and distribute electricity and natural gas, the regulatory agencies which oversee the generation, transmission and distribution of electricity and natural gas, and the purchase of electricity, and the provincial and municipal governments to the extent of their involvement in energy issues.

The regulatory agencies are, first, the OEB, the principal function of which is to approve the rates charged by government-owned electricity generators, and for the transmission and distribution of both electricity and natural gas. The other regulator is the Independent Electricity System Operator (“IESO”) which acquires the electricity used by consumers.

As noted in the preceding paragraph, the principal function of the OEB is to approve the rates which the generators, transmitters and distributors of electricity charge for those services, and the rates which the distributors of natural gas charge for that service. The OEB is required, by its empowering statute, the *Ontario Energy Board Act* (“OEBA”), to hold a hearing before approving rates. Over the years the OEB has made material changes in how it approves rates, developing and relying on policies which determine how rates are set. As discussed in the following section, consumers are represented in the OEB’s rate setting and policy-making processes. The efficacy, as well as the limited scope, of that representation is however an issue.

The IESO is empowered by the *Electricity Act* to direct and maintain the reliability of the province’s electricity grid. It is also responsible for ensuring the adequacy and reliability of electricity resources.

That responsibility includes contracting for the supply of electricity. Consumers are not represented in the IESO's supply acquisition processes.

Both the OEB and the IESO are subject to directives from the Minister of Energy. The Minister's powers and authority to issue these directives is provided for in the OEBA and the *Electricity Act*, respectively. Consumers at present have no involvement in the development of those directives.

The role of the provincial government in the energy sector is confined, principally, to electricity, though its policies may have an impact in other areas, for example the supply of natural gas. It owns Ontario Power Generation (OPG), the largest nuclear and hydro-electric generating facilities, and is the majority owner of Hydro One Networks Inc., the largest transmitter and distributor of electricity. The Minister promulgates the Long Term Energy Plan ("LTEP"), which has a major impact on the price of electricity. It has the power to issue directives to the IESO, a power it has used to determine the price paid for electricity from, in particular, renewable energy services. It has the power to issue directives to the OEB, a power it has used to set targets for conservation, something which, in turn, has affected the price of electricity. It can, through legislation, set the prices paid for electricity.

Consumers are not adequately represented in the development and implementation of the policies of the Ontario government which have the greatest impact on the prices which consumers pay for energy.

The critical role of the province in determining, among other things, the prices consumers pay for electricity is best illustrated by the Green Energy initiative. The province directed the predecessor to the IESO to acquire a percentage of the electricity supply from renewable energy

sources, for example, wind and solar. The contracts for the acquisition of that supply have had a material impact on the price consumers pay for electricity. The province's CCAP, chiefly through the cap and trade system will also have an impact on any prices.

Although municipalities play, notionally, a significant role in the sector, in that they own most of the LDCs, in reality their role is limited. The prices paid for local distribution are approved by the OEB. Municipalities may play a more significant role in the sector depending on how they respond, or are required to respond, to changes in the electricity distribution system, through consolidation, experimental business models, and the potentially significant implications arising from the adoption and implementation of DER.²

The consumer interest in the energy sector is typically defined as the "prices and the adequacy, reliability and quality of electricity and natural gas service".³ The prices which consumers pay for electricity and natural gas are, in part, the endpoint or the result of decisions which are made by the utilities which generate, transmit, or distribute electricity and natural gas. Some of those decisions are subject to regulatory oversight. However, the greatest impact on the prices paid by consumers arises from decisions made by the provincial government, decisions which are not subject to regulatory oversight, and which are not effectively informed by consumer engagement.

One of the principal arguments of this paper is that consumers are not adequately represented in the development and implementation of the policies of the Ontario government which have the greatest impact on the prices which consumers pay for energy.

Information about the energy sector is provided to consumers in part by the media, in part by regulatory agencies, and in part by the government. For reasons largely related to the complexity of the energy sector and the technical nature of information about it, the media has not done an effective job in providing information to consumers about the energy

2 For a fuller analysis see "Paul Sommerville, Richard Carlson and Petar Prazic, "Emerging Energy Trends: Regulatory Responses to Ontario's Energy Future" (Toronto: Mowat Centre, 2016), https://mowatcentre.ca/wp-content/uploads/publications/141_emerging_energy_trends.pdf.

3 See, for example, *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B., sections 1 and 2.

sector. What information the media does provide is largely after-the-fact, when the impact of utility, regulatory or government decisions is apparent in increases in energy prices. While the regulatory agencies, the OEB and the IESO, provide, in their publications and on their websites, information for consumers, that information characteristically has a narrow focus derived from the limited jurisdiction of those agencies. Finally, information provided by the government itself tends to be biased in favour of the particular narrative the government of the day wants to tell. Perhaps the best example of that phenomenon was the assertion, by the then Minister of Energy and Infrastructure, that the Green Energy initiative would increase the cost of energy for consumers by about 1 per cent. The actual increases have been higher.

Some of the most detailed information about developments in the energy sector, and the impact of those developments on consumers, has come from the Auditor General (“AG”) in his or her annual reports. Over the course of the past five years, the AG has reported on the following developments in the sector:

» **Renewable energy initiatives in the electricity sector**

Office of the Auditor General of Ontario, *2011 Annual Report*, Toronto: Queen’s Printer for Ontario, 2011

» **Human resources spending at Ontario Power Generation**

Office of the Auditor General of Ontario, *2013 Annual Report*, Toronto: Queen’s Printer for Ontario, 2013

» **Regulatory oversight in the electricity sector**

Office of the Auditor General of Ontario, *2013 Annual Report*, Toronto: Queen’s Printer for Ontario, 2013

» **Natural gas regulation by the Ontario Energy Board**

Office of the Auditor General of Ontario, *2014 Annual Report*, Toronto: Queen’s Printer for Ontario, 2014

» **The Smart Metering Initiative**

Office of the Auditor General of Ontario, *2014 Annual Report*, Toronto: Queen’s Printer for Ontario, 2014

» **Electricity Power System Planning**

Office of the Auditor General of Ontario, *2015 Annual Report*, Toronto:
Queen's Printer for Ontario, 2015

» **The Management of Electricity Transmission and Distribution
Assets by Hydro One**

Office of the Auditor General of Ontario, *2015 Annual Report*, Toronto:
Queen's Printer for Ontario, 2015

» **Climate Change**

Office of the Auditor General of Ontario, *2016 Annual Report*, Toronto:
Queen's Printer for Ontario, 2016

These reports have provided information about, in particular, how decisions are made in the energy sector, by whom the decisions are made, and what effect those decisions have had on, among other things, the prices consumers pay for electricity.

The AG's mandate is to conduct value-for-money, financial, information technology, governance and special audits, reviews and investigations to assess, among other things, the level of service being delivered to the public and the relative cost-effectiveness of the service. The AG has the power to require the production of information from government ministries, government agencies and Crown-controlled corporations.

The AG's reports have provided information about decision-making in the energy sector, but they are by their nature after-the-fact. There are also concerns respecting the ability of the AG to fully appreciate key nuances, and the very technical aspects of an energy system that is exceedingly complex.

It would not be the AG's role, for example, to examine the policies underlying the CCAP as they are being developed and make representations to the government or the legislature about the impact of those policies.

In addition, while those reports may result in changes in the government's, and the OEB's, management of their roles in the energy sector, changes which benefit consumers, it is outside the legislated

role and professional expertise of the AG office to intercede on behalf of consumers in regulatory processes as a consumer advocate. In addition, there is no assurance that the AG will, in any given year, elect to examine and report on some aspect of the energy sector.

Another source of information on developments in the energy sector are the annual reports of the Environmental Commissioner of Ontario (“ECO”). The ECO is required, by its empowering statute, to report annually on “the progress of activities in Ontario to reduce or make more efficient use of electricity, natural gas, propane, oil and transportation fuels”.⁴ Pursuant to that mandate, the ECO has for several years produced reports on conservation measures in the energy sector and on climate change activities. As these matters have an impact on, among other things, the prices consumers pay for energy, they are relevant to consumer interests in the energy sector.

But, like the AG, the ECO is not a consumer advocate, and its reports are after-the-fact. Indeed, the ECO is empowered by its enabling statute to address a relatively narrow band of issues, namely related to compliance with the Environmental Bill of Rights. Neither the AG nor the ECO represent the interests of consumers in, for example, taking positions on government policies and legislation as they are being developed.

Much of the focus of the representation of consumer interest has been on the activities of the OEB. However, OEB decisions have an impact on only 20 to 25 percent of the prices paid by consumers for electricity. It is unfortunately the case that, by focussing consumer interests on the OEB’s decisions, and the processes by which those decisions are made, attention is diverted from government policies and decisions which have a far greater impact on the prices which consumers pay.

The OEB’s decision-making processes, whether for the approval of rates or the development of policies, include participation by stakeholders. Whether that participation in the rate-making process is effective is a matter we discuss below. In addition, there are growing concerns respecting the nature of and the effectiveness of the processes used by the OEB to develop its implementation policies. Many observers consider

⁴ *Environmental Bill of Rights, 1993, SO 1993, c. 28*

the Board's consultation processes to be deficient, inadequate as to process, accountability and content.

The legislature, which is ultimately responsible for protecting the public interest, including consumer interests, in the energy sector, has in our view done a very poor job in fulfilling that role. The examples of its failure are many. While opposition parties paid a great deal of attention to the economic consequences of the government's decisions about the location of certain gas plants, little attention seems to have been paid, at a time when such attention might have had an impact on the government's decisions, to the Green Energy initiative. The OEB is required to provide the responsible Minister, and through the Minister the legislature, an annual report on its activities. There are serious questions about the adequacy of those reports.⁵ As far as we have been able to determine, not a single question has been asked in the legislature about those reports.

The issue is not whether any of the decisions taken and implemented are inherently right or wrong. Responsible people can differ. The issue is the extent to which consumer interests have been effectively represented in the policy development and implementation processes. The fact is that there is no reliable or effective mechanism in Ontario that mandates or facilitates that engagement.

Decisions of the OEB may be appealed to the Divisional Court. The superior courts have, by relying on the principal of judicial deference to the decisions of regulatory agencies, played an increasingly limited role in the oversight of those agencies.

The retreat of the Superior Courts from the oversight of regulatory decision-making increases the importance of regulatory governance, and in particular of oversight by the legislature. Unfortunately, as noted above, the legislature's role in the oversight of regulatory decisions and practices made in the energy sector has been limited and ineffective.

5 Robert B. Warren, "Governance of Regulatory Agencies: Case Study of the Ontario Energy Board", January 2015 <http://www.thinkingpower.ca/CCRECaseStudy/CCRE%20-%20The%20Governance%20of%20Regulatory%20Agencies%20-%20A%20Case%20Study%20of%20the%20Ontario%20Energy%20Board%20by%20Robert%20B.%20Warren%20-%20January%202015.pdf>

We have referred earlier to the potential impact on consumers of the deployment of DER. Decisions about how it is deployed, by whom, by what processes and at what cost will have a material impact on consumers. The deployment of DER has the potential to have a significant effect on how the electricity distribution system is structured. Decisions about the deployment and accommodation of DER will involve the government, the OEB, the IESO, the electricity distributors and their municipal owners.⁶ We suggest that it is essential that the interests of consumers be effectively represented in how those decisions are made.

The consumer interest in the energy sector is of such importance that it requires effective representation in the development of the policies and decisions of the government, and its regulatory agencies, that will have an impact on the prices which consumers pay for energy. Of equal importance is the very positive role that such representation could have in the avoidance of unintended consequences arising from policy and regulatory measures that are not effectively informed from a consumer perspective.

We believe that the existence of a responsible process for consumer representation fundamentally improves the quality of the processes, and the credibility of their outcomes.

We turn, now, to a discussion of the principles which should inform that representation, and the areas in which that representation should take place.

⁶ For a full discussion see "Paul Sommerville, Richard Carlson and Petar Prazic, "Emerging Energy Trends: Regulatory Responses to Ontario's Energy Future" (Toronto: Mowat Centre, 2016), https://mowatcentre.ca/wp-content/uploads/publications/141_emerging_energy_trends.pdf.

3 Principles

Before examining the existing system for consumer representation in the energy sector, and the proposal for improving that system, we will set out the principles which we believe should inform consumer representation. We do so in part so that the material we use to assess the adequacy of the existing system, and of the proposed change to that system, are apparent.

We begin with an examination of what we suggest are the principles which should inform any mechanism for the representation of consumer interests in the energy sector. Those principles are:

1. Mandate

The representation of consumer interests should be based on a broadly-defined mandate, one which covers all of the decisions of the governments, the utilities, the regulators, and the courts which may have an impact on consumer interests. This mandate should be accompanied by powers sufficient to effectively fulfil the mandate.

2. Independence

To be effective, any mechanism for the representation of consumer interest must be, and be seen to be, independent of the government, of energy sector regulators, of utilities, and of any particular commercial interest.

3. Range of Activities

As discussed in the following section, effective consumer representation requires engagement in the full range of activities that affect the consumer interest.

4. Resources

A mechanism for the representation of consumer interests in the energy sector should have funding sufficient to represent those interests, effectively, in all of the relevant decision-making processes. The spectrum of processes where consumer representation is required is broad, and is described in the next section of this paper. It is not limited to OEB rate hearings. The examples of government decisions which affect prices consumers pay, particularly for electricity, are legion. The programs that flowed from the Green Energy legislation have had a very significant impact on electricity prices. The repeated changes in the structure of the electricity sector, over the past 15 years, have also had a material impact on prices of electricity. Government's repeated intrusions into the pricing mechanism for electricity have had an indirect impact on the real cost of electricity. As we have stated, it is our view that, in none of those initiatives, have the interests of consumers been effectively represented.

In the following section of this paper we list the areas in which we believe consumer representation is required. The resources required to achieve effective representation will be substantial. A report from the Ivey Energy Policy and Management Centre,⁷ discussed further below, lists the annual budgets of energy consumer advocacy groups in several US states. While caution is required in assessing whether comparably-sized budgets will be required for effective consumer representation in Ontario, we think it reasonable to conclude that they provide a rough guide to the level of resources that will be required in Ontario. What we do know, again as set out in the Ivey Report, is that the annual cost of the OEB's intervenor funding system is approximately \$4.7 million. We note, in passing, that that amount has been expended largely without any assessment of whether it is cost effective, and certainly without any assessment of whether some, or all, of that amount could be more effectively used for the representation of consumer interests in other areas of the energy sector.

We return, in the concluding section of the paper, to the question of whether the costs of an Energy Consumer Advocate office are justified.

⁷ Ivey Energy Policy and Management Centre Policy Brief *Consumer Advocacy in Ontario's Energy Sector*, July, 2016 (the "Ivey Report")

Any mechanism for the representation of consumer interests must be accountable, not to the government or a regulatory agency, but to consumers themselves.

5. Accountability and Transparency

To be effective, any mechanism for the representation of consumer interests must include a requirement that all of the reports prepared, positions taken in regulatory and court proceedings, submissions made on government policies and legislation, and so forth, be posted so that consumers are aware of what is being done in their interest. Any mechanism for the representation of consumer interests must be accountable, not to the government or a regulatory agency but to consumers themselves, both directly and through the legislature.

4 The Matters That Consumer Representation Should Address

As we will discuss in the next section of this paper, the only existing mechanism for consumer representation in the energy sector is the intervenor funding system for OEB proceedings. While the decisions of the OEB approving rates for natural gas and electricity transmission are important for consumers, their impact on the overall cost of energy is relatively limited. Consumers are more affected by decisions made in many other parts of the energy sector.

The range of decisions in, or related to, the energy sector which have effects, direct or indirect, on consumers is broad. For example, two reports of the AG have demonstrated that the causes of increases in electricity prices are not regulated distribution rates but rather decisions made by the government and also by the predecessor to the IESO. The analysis and decisions underlying the province's CCAP, and in particular its cap and trade system, is a very current example of a policy initiative that will have an impact on energy prices for consumers, but which has had scant, if any, input from consumers.

At the moment there is no consistent, reliable, disinterested source of information for consumers about the impact on them of developments in the energy sector. We have referred, above, to the example of the development and deployment of DERs. DERs can provide consumers with a substantial measure of control over their own energy use and cost. At the same time, the widespread deployment of DERs will cause shifts in the allocation of costs for the operation of existing distribution options. At this point, information about DERs is provided in bits and pieces by utilities, the OEB, and the provincial government.

We believe consumer representation is required in all of the following areas:

- » OEB rate and policy proceedings;
- » Court proceedings arising from OEB decisions;
- » Monitoring, commenting on, and engaging in IESO policy development and implementation;
- » Monitoring, responding to, and engaging in provincial policy development processes in the energy sector, including the development of directives issued to the IESO and the OEB;
- » Monitoring and responding to proposed provincial legislation and regulations affecting the energy sector;
- » Monitoring, responding to, municipal policy development and implementation in the energy sector, including decisions by municipalities to sell, merge or acquire LDCs;
- » Monitoring utility activities, beyond rate applications which may affect consumer interests, for example proposed mergers and acquisitions;
- » Undertaking consumer education and outreach on energy issues;
- » Monitoring and commenting on private sector and utility retail practices;
- » Initiating policy development; and
- » Advising consumers on the implementation of DERs, and on their own participation in the DER market.

5 The Existing Mechanism for Consumer Representation

The only formal mechanism for the representation of consumer interests in the energy sector is that provided by the OEB through its intervenor funding system. Groups and individuals representing interests affected by OEB decisions and policies may participate in OEB proceedings and claim their costs for doing so. The costs are awarded by the OEB, according to a fixed tariff, and are paid, in most cases by utilities although in some cases by the OEB itself. In all cases the costs awarded are recovered, in rates, from ratepayers.⁸

The OEB's cost award system was originally intended to ensure that those affected by, in particular, rate decisions, could participate in the proceedings leading to those decisions. The cost award system has been successful, at least on the surface, in achieving that goal.

There are, however, deficiencies in the OEB's cost award system that make it inadequate as a mechanism for the representation of consumer interests in the energy sector.

To begin with, the cost award system applies only to OEB proceedings. Since the principal focus of the OEB's decision-making is the approval of distribution and transmission rates, which combined amount for approximately 20-25 per cent of a consumer's overall electricity bill, the impact of participation in OEB rate proceedings is necessarily limited. In addition, the cost award system does not cover participation in appeals from OEB decisions.

In the recent decision of the Supreme Court of Canada in the OPG⁹ case, discussed further in the next section of this paper, the Court had to

⁸ The OEB's cost award system is authorized by section 30 of the OEBA. The rules governing the system are found in the OEB's Rules of Practice and Procedure and in the various guidelines on cost awards.

⁹ *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 2 S.C.R. 147, paras 54 and 60.

allow the OEB itself to defend its decision in the absence of an advocate representing consumer interests. Had the Supreme Court of Canada upheld OPG's appeal, it would have had a material adverse impact on the ability of the OEB to mitigate rate increases. The fact that the OEB's cost award system could not support the participation of consumers in the OPG appeal was, therefore, a material gap in the representation of consumer interests. The OEB costs awards process also extends to OEB "consultation" processes which often involve key and impactful aspects of OEB implementation policies. Unfortunately OEB consultation processes are not themselves predictable as to process, and are subject to serious criticism respecting their conformity with regulatory norms.

More importantly, the OEB's cost award system does not cover activities in other areas where the representation of consumer interests is, arguably more important. It does not cover the preparation of submissions on proposed policies, draft regulations, or legislation. It does not, for example, provide funding for research on energy issues. It does not provide funding for research into consumer interests, or consumer education.

There has been little or no analysis of whether the existing OEB cost award system is cost effective, and whether the benefits achieved are justified by the costs. There have also been questions, some posed by the OEB itself, about how representative and accountable some of the intervenor groups are. Those questions are particularly important in light of the significant amount of ratepayer funds paid annually to support intervenor participation, as set out in the Ivey Report.

Particularly in light of the narrow scope of consumer interests that the OEB's intervenor funding system addresses, it is in our view inadequate and should be replaced.

6 The OEB's Proposed Framework for Consumer Representation

The OEB has proposed what it calls a “new consumer engagement framework”. The stated purpose of the proposal is to “remove barriers to consumer participation in the OEB’s adjudicative processes”.¹⁰

The consumers which the framework deals with are residential and small business consumers.

The stated “deliverables” of the new framework are the following:

- » That the OEB’s regulatory process is easily understood by Ontario electricity and natural gas consumers;
- » That residential and small business consumers have access to and can meaningfully participate in OEB proceedings;
- » That the OEB has effective mechanisms to ensure the voice of the consumer is heard;
- » OEB decisions consider the views of the consumers’ impact.

To achieve the “deliverables” the framework proposes the following:

- » The provision of more information, in more simplified forms and using a wider variety of media, about the OEB’s processes;
- » The use of community meetings to obtain local input from consumers on pending applications;
- » The creation of a “process” counsel at the OEB to provide information to consumers about OEB processes;
- » The selection of local, community-based representatives to gather information for, and advocate on behalf of local consumers.

¹⁰ “Giving Energy Consumers a Stronger Voice in OEB Adjudicative Processes”, May 13, 2016.

The local representatives are to be selected, presumably by the OEB itself, based on the following criteria:

- » Experience in hearing advocacy;
- » Familiarity with regional/local energy issues;
- » Knowledge of energy matters; and
- » Community-based engagement and consultation skills.

The local representatives are expected to do the following:

- » Coordinate and facilitate effective engagement with local residential and small business customers;
- » Record and report the views, comments, questions and positions of local consumers; and
- » Advocate for local customer interests as informed by those customers in the OEB's hearing process.

Finally, the OEB states that the new framework is intended to allow for greater involvement by consumers in the OEB's process and to allow the OEB to hear the views, concerns and questions of local, directly impacted consumers. The framework promises that the OEB will take those concerns into account in deciding whether the rates the applicant utility wants to charge are just and reasonable.

It is unclear what some form of enhanced involvement by residential consumers in OEB proceedings would do to either increase the awareness of the OEB about those concerns or result in a decrease in the rates paid by consumers.

That the OEB would propose the new framework might create the impression that consumer interests are not now being represented in OEB proceedings. That is not the case. The interests of residential consumers have been represented in those proceedings for at least the last quarter century. That small businesses have not participated in OEB proceedings is a matter of choice, and not the result of any barriers to their ability to do so.

That the OEB would propose the new framework might also create the impression that consumer interests are not now being reflected in the OEB's decisions. Again, that is not the case. A review of those decisions indicates that the OEB's principal focus is often the impact of its decisions on consumer interests. Their decisions canvass, extensively, considerations of the impact of utility rates on consumers.

As noted above, the OEB's jurisdiction, with respect to the prices consumers pay for natural gas and electricity, is limited to matters of distribution and transmission. Again as noted above, those categories account for somewhere in the range of 20-25 percent of the natural gas and electricity bills that consumers pay. Over the course of the past several years, and as a result of the incentive rate-making regimes under which the natural gas and electricity utilities operate, annual increases in transmission and distribution rates have been kept at approximately the rate of inflation.

It is unclear what some form of enhanced involvement by residential consumers in OEB proceedings would do to either increase the awareness of the OEB about those concerns or result in a decrease in the rates paid by consumers.

The OEB has made efforts to educate consumers about its processes and about its relatively limited role in determining the total prices which consumers pay for natural gas and electricity.

Beyond disseminating information about its processes, the OEB has put in place policies which require electricity distributors applying for rate increases to include information about what it calls their "customer engagement activities". Distributors are required to provide evidence on the following:

...how they [i.e. the utility] informed their customers of the proposals being considered for inclusion in the application, and the value of those proposals to customers (i.e. costs, benefits and the impact on rates that customers would face). The application should discuss any feedback provided by customers and how this feedback shaped the final application.¹¹

It is beyond the scope of this paper to assess whether the requirement makes sense, whether the significant expense imposed on utilities, and so ultimately on ratepayers, to comply with it is justified, and whether the policy represents an inappropriate fettering of the OEB's discretion. The point is that the OEB already requires the provision of ratepayer information as part of the application process. What the new proposal would add to that information base is unclear. The OEB consumer representation proposal would seem to be substantially redundant in light of the filing guideline requirement

It should also be noted that the OEB takes this requirement for the provision of customer information very seriously. One of the principal reasons for denying the recent application of PowerStream Inc. for distribution rates was PowerStream's failure to provide adequate evidence of balancing its customers' concerns with cost and reliability¹² as expected by OEB policies. In the words of the Decision and Order:

Customer engagement should clearly articulate the value proposition of a proposal in real terms so that customers can give informed feedback on the proposal before a distributor decides whether to proceed with the proposal.¹³

It is also unclear why the OEB proposes a system that focuses on local, community-based considerations. Natural gas rates are based on the "postage stamp" principle, by which the rates paid by consumers throughout the utility's franchise territory are equalized. Unless the OEB intends to abandon the concept of "postage stamp" rates, creating a structure designed to elicit local concerns would seem to be at best, meaningless, and likely misleading.

11 Ontario Energy Board "Filing requirements for electricity distribution companies' cost of service rate applications based on a forecast test year" July 14, 2016, p. 13.

12 *Ibid.*, p. 14.

13 Ontario Energy Board *Decision and Order*, EB-2015-0003 August 4, 2016, p. 12.

Electricity distribution rates are based on the costs of local distribution utilities. The consideration of the rates for those distribution utilities must, by definition, be based in substantial measure on local considerations. Again, it is unclear how the proposed framework would change the range of considerations which the OEB now addresses in setting the rates of distribution utilities.

It is, thus, unclear whether the new framework actually addresses any real concerns. What the new framework does do, however, is create a number of new concerns.

Some of those concerns are practical ones. They include the following:

- » What is the relationship between community meetings and hearings?
If the information obtained in the community meetings is to be used to inform OEB rate decisions, how will the interests of the utilities, and of other classes of ratepayers, be protected?
- » How are the “local representatives” to be selected? The stated criteria, namely familiarity with regional/local energy issues and knowledge of energy matters, require specialized knowledge of the regulatory economics that underlie rate-making. It also requires an understanding of the systemic issues that have evolved, and been considered, in rate decisions over many years. That specialized knowledge and that understanding are difficult and time consuming to obtain. Absent that specialized knowledge, the interests of consumers would not be adequately represented;
- » How will the OEB assess whether the “local representatives” have fulfilled the expectations of recording and reporting the views, comments, questions and positions of local consumers without involving itself in the solicitor/client relationship which must underlie effective, and responsible, representation?

Some of these questions raise the larger public policy issue of whether what the OEB proposes is consistent with its obligations as an independent, quasi-judicial decision maker. It is difficult to know how the public policy concerns raised by the proposed framework, particularly those that go to the root of the OEB’s basic legal obligations, can be resolved.

As the proposal now stands, the OEB would select the local consumer representatives (who would necessarily be reliant on the Board for the required knowledge and expertise), describe the obligations of those representatives, assess the extent to which the representatives had fulfilled their obligations, and then pay their fees. That would seem to be an inappropriate intrusion by the independent regulator into the operation of the adversary process on which the effective operation of the rules of natural justice applies. All of that would be on top of the undertaking of community meetings and the use of the information obtained at those meetings in rate-making decisions, all apparently outside the operation of the rules protecting the interests of utilities and other classes of ratepayers and in apparent violation of the rules of natural justice.

It is important to emphasize that the OEB is not a consumer protection agency. It is authorized by its statute to set just and reasonable rates. Its statutory objectives, as the courts have repeatedly said, require the OEB to balance the interests of different classes of ratepayers and the interests of the utilities themselves.¹⁴ The OEBA lists the objectives which the OEB is required to consider when carrying out its obligations under that Act.¹⁵ One of those obligations is to protect the interests of consumers with respect to prices. But that is not the only, or the primary objective. There are other objectives, the consideration of which might have an adverse impact on the prices which consumers pay.

Balancing the interests of different classes of ratepayers and of the utilities may well, and often does, require the OEB to make decisions which are not in the full interest of consumers. To the extent that the OEB seeks to actively involve itself in the processes by which the interests of consumers are protected, it risks undermining its ability to function, and to be seen to function, as an independent, quasi-judicial decision maker, one able to independently and responsibly balance competing interests to make decisions in the public interest.

¹⁴ See, for example, the decision of the Supreme Court of Canada in the foundational case of *Northwestern Utilities Ltd v Edmonton (City)*, [1929] SCR 186, where the Court said, at 192, “fixing rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested”.

¹⁵ *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B., section 1.

The OEB's proposal for a new customer engagement framework does not even address the most important gaps in the representation of consumer interests in its own proceedings.

The recent decision of the Supreme Court of Canada, in the appeals by OPG and two of its unions,¹⁶ dealt with issues that would have a major impact, not just on OPG's rates in the near term, but, more fundamentally, on the extent of the OEB's jurisdiction to protect the interests of residential consumers. The Supreme Court of Canada accepted the status of the OEB to itself participate in the appeal because, in the Court's words, "...the Board was the only respondent in the initial review of its decision. Thus, it had no alternative but to step in if the decision was to be defended on the merits".¹⁷ In other words, the Court had to accept the Board's status in part because consumer interests were not represented in the appeals. The OEB's proposed framework provides no mechanism whereby the interests of residential consumers could be represented in appeals from OEB decisions.

It is important to note that the Supreme Court of Canada, following the observation cited in the preceding paragraph about the Board being the only respondent in that case, made the following observation:

*Unlike some other provinces, Ontario has no designated utility consumer advocate, which left the Board – tasked by statute with acting to safeguard the public interest – with few alternatives but to participate as a party.*¹⁸

Because the OEB only deals with the rates for the distribution and transmission of electricity and natural gas, and with the rates for some of the province's electricity generating facilities, its ability to protect the interests of consumers, with respect to energy prices, is limited. Its proposal does not change that. The more significant impact on the prices consumers pay comes from decisions made by the government, in decision-making processes where consumer interests are neither effectively represented nor protected.

¹⁶ *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 2 S.C.R. 147, paras 54 and 60.

¹⁷ *Ibid.*, para 60b.

¹⁸ *Ibid.*, para 60.

The OEB's proposal for enhanced consumer engagement does not satisfy three of the principles we believe should inform the representation of consumer interests. It lacks independence, it fails to address most of the important activities affecting consumer interests, and lacks accountability and transparency.

The OEB's proposal for a new customer engagement framework does not even address the most important gaps in the representation of consumer interests in its own proceedings.

We have noted, above, that OEB decision-making deals with a relatively narrow band of consumer interests. In light of that, it might at first seem puzzling to focus attention on the OEB's proposal to enhance consumer engagement in its processes. After all, what harm can it do?

We think the harm is two-fold.

First, the proposal is, for the reasons we have stated, materially flawed. Second, it is a distraction from the real issues, namely consumer representation in the decision-making processes that have a material impact on consumers.

7 Alternative Models

For the reasons discussed in the preceding sections of this paper, we do not believe that the existing system of consumer representation is adequate. It is too narrowly focussed on OEB proceedings, and does not allow representation in any of the many areas where consumer interests are affected but in which consumers are not represented. Over the years there have been numerous commentaries highlighting this deficiency.

The OEB's proposals for a new customer engagement framework cure none of the deficiencies in the existing system. It creates a number of new concerns, the principal one being the erosion of the independence required of the regulatory agency. The proposal also violates what we believe is a central principle of effective consumer representation, namely the independence of consumer representatives.

In this section of the paper we consider alternative models for consumer representation. One is the Energy Consumer Advocate. The second is a consumer representative modelled on Ontario's AG.

Several US states, and one Canadian province, have created an Energy Consumer Advocate.¹⁹ How this office was created, the powers it exercises, and the roles it plays, vary depending on the jurisdictions. What follows is a consideration of this office in three jurisdictions.

1. The New Jersey Division of Rate Counsel ("DRC")

The DRC was created by statute.²⁰ In compliance with New Jersey's Constitution, it was allocated to a department, specifically the Department of the Treasury. However, the empowering statute provides that "the Division shall be independent of any supervision or control by the Department or by any Board or officer thereof"

19 For previous Mowat Energy work on consumer issues in the Ontario energy sector see: Richard Carlson and Eric Martin, Re-energizing the Conversation: Engaging the Ontario Public on Energy Issues, Mowat Research #99, October 17, 2014. At <https://mowatcentre.ca/re-energizing-the-conversation/>; Paul Sommerville, Richard Carlson and Petar Prazic, Energizing Consumers: A Proactive Energy Consumer Charter for Ontario, Mowat Research #127, September 22, 2016. At <https://mowatcentre.ca/energizing-consumers/>.

20 N.J. Stat 52:27 EE-46 (2016) and N.J. Stat 52:27 EE-48 (2016).

The empowering statute provides that the DRC has “the authority to conduct investigations, initiate studies, conduct research, present comments and testimony before governmental bodies, issue reports, and produce and disseminate consumer guides upon any matters that fall within the Rate Council’s jurisdiction”.

The empowering statute further provides that the DRC may “represent and protect the public interest.... in proceedings before or appeals from any state department, commission, authority, council, agency, or board charged with the regulation or control of any business, industry, or utility regarding a requirement that the business, industry, or utility provide a service or regarding the fixing, toll, fare, or charge for a product or service.”

The scope of the DRC’s responsibility extends beyond energy rates, and includes insurance, telecommunications, and water rates. Although it is apparent, from its statutory mandate, that the focus is principally on rates, it is apparent from the range of submissions made to the state assembly or committees thereof, that the DRC makes submissions on policies and legislation which, if implemented, would have an impact on rates.

2. The California Office of Ratepayer Advocates (“CORA”)

Like its counterpart in New Jersey, the CORA was created by statute, the California Public Utilities Code.²¹ While the CORA is a division of the Public Utilities Commission, it is designated as independent. The stated goal of the office is to “obtain the lowest possible rate for service consistent with reliable and safe service levels”. For revenue and rate design matters, CORA is primarily concerned with the interests of residential and small commercial customers. CORA may compel the production or disclosure of any information it deems necessary to perform its duties from any utility regulated by the Public Utilities Commission.

From its 2015 annual report, it is apparent that CORA frames its mandate broadly. The report indicates that the office examines and makes recommendations on many complex issues of utility service, including, but not limited to, the safety of generation facilities and the environmental effects of energy production and use. While its principal

²¹ California *Public Utilities Code* Section 309.5(a).

activity is involvement in Public Utilities Commission proceedings, the large majority of which deal with electricity and gas matters, CORA makes submissions with respect to policy matters. The resources available to CORA are substantial.²² Although the scope of its mandate is broad, it is limited to matters that are within the scope of the California Public Utilities jurisdiction and relate to rates.

3. The Alberta Utility Consumer Advocate (“UCA”)

This office was created by the *Government Organization Act*²³ as a department of the Ministry of Energy. The expressed responsibilities of the UCA are the following:

- » To represent the interests of Alberta’s residential, farm, and small business consumers of electricity and natural gas before proceedings of the Alberta Utilities Commission and other bodies whose decisions may affect the interests of those consumers;
- » To disseminate independent and impartial information about the regulatory process relating to electricity and natural gas, including an analysis of the impact of decisions of the Alberta Utilities Commission, other bodies and the courts relating to electricity and natural gas;
- » To inform and educate consumers about electricity and natural gas issues;
- » To carry out such other responsibilities relating to electricity and natural gas as the responsible Minister determines.

The principal focus of the UCA appears to be rate proceedings before the Alberta Utilities Commission. However, it also provides a mediation function for complaints which consumers file with respect to the services provided by utilities.

It is not apparent that the UCA takes positions with respect to the development and implementation of government policies and legislation.

²² The Ivey Report indicates that the 2015 budget for CORA was \$16.2 million.

²³ *Government Organization Act*, R.S.A. 2000, Chapter G-10, Schedule 13.1.

An Energy Consumer Advocate, if adopted in Ontario, should have some of the characteristics of that office in New Jersey and California. In particular, the office should be created by statute, should be independent of the government and any regulatory agency, should have sufficient resources to carry out its functions, and should be authorized to obtain any information it requires to carry out its functions. We believe, however, that the mandate of such an office should be broader than a focus on ratemaking processes or on the activities of any particular regulatory agency. The office should be given the authority to comment on government policies and legislation wherever such policies and legislation, or their implementation, might have a direct or indirect impact on the consumer interest, namely “prices and the adequacy, reliability and quality of electricity and natural gas service.”

The virtue of the Alberta model is that it mandates the dissemination of information about energy matters to consumers. In addition, the Alberta model has the virtue of transparency, in that all positions taken by the UCA, including the positions taken in rate proceedings, are published on the UCA’s website. The defect of the Alberta model is that the UCA is not independent of the government. That independence, as we have suggested above, is critical to the ultimate success of any consumer representative.

We discussed, above, the roles which the AG and the ECO have in preparing reports on matters within the energy sector. We suggest that a similar responsibility, dealing with government actions which affect the consumer interest in the energy sector, should be granted to a new office, that of the Energy Consumer Advocate for Ontario.

The new office should be created by statute and be responsible to, and report to, the legislature. It should have a mandate to represent the consumer interest in all matters related to the production, transmission and distribution of energy. It should be authorized to represent consumers in regulatory and court proceedings on matters related to energy and should have the power to require the production of information from any government body, regulatory agency, or utility. It should be required to undertake consumer education and outreach on all energy matters that may affect the consumer interest. Its annual budget should be approved by the legislature.

Effective representation of consumer interests requires much more than interventions in OEB rate proceedings. Consumers are, as we have noted, affected by a wide range of, in particular, government policy initiatives. Governments can impose policies on consumers in part because energy issues are complex and difficult to understand, but also in part because there is no body with the information, the resources and the mandate to examine and, where appropriate, properly inform government policy development from a consumer point of view. What is needed, in other words, is effective advocacy from a consumer point of view, to the government on energy issues. At the same time, the creation of an Energy Consumer Advocate would have the effect of sharply enhancing the credibility of outcomes and would displace, to some extent, the sole responsibility for policy development from the government of the day to a transparent, consumer-informed process.

Subjecting government decision-making to independent, rigorous, and transparent analysis would provide consumers with the benefit of knowing that their interests were being protected.

In making the recommendation that the office of Energy Consumer Advocate be created we are sensitive to the cost of doing so at a time when consumers are already burdened by high electricity prices. As an inherent component of the energy system, standard practice would dictate that the cost of this new office be borne by the energy system, that is by energy consumers. Part of this cost could be offset by terminating the OEB's cost award system, thus requiring organizations with a commercial or other interest in the outcome of OEB proceedings to pay their own costs. But, to be effective, the Energy Consumer Advocate would likely require more funding than the \$5 million now spent on the OEB's program. The question, then, is whether the additional cost burden would be justified.

In our view, the additional cost burden would be justified by the benefits this office would provide. Some of those benefits might be readily quantified, for example in the form of lower distribution rates. But some benefits would be significant even if they were not immediately quantifiable. Government programs and policies that were subject to rigorous, independent cost/benefit and impact analyses would almost certainly result in cost savings, whether in the short or long term. And beyond quantifiable benefits, subjecting government decision-making to independent, rigorous, and transparent analysis would provide consumers with the benefit of knowing that their interests were being protected, a benefit not available under existing arrangements.

Mowat Centre

ONTARIO'S VOICE ON PUBLIC POLICY

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