

Consumer Advocacy in Ontario's Energy Sector

EXECUTIVE SUMMARY

- Recent legislation requires the Ontario Energy Board to establish a new process for the interests of consumers to be represented in its proceedings. The current approach to consumer representation is dominated by large industrial and commercial consumer organizations.
- Independent public consumer advocates exist in most U.S. states, with mandates and resources to represent residential and other consumers in regulatory proceedings.
- Academic research finds that utility regulators in U.S. states with public consumer advocates tend to establish lower residential rates relative to other consumer classes, and lower allowed returns-on-equity for utilities.

CONSUMER REPRESENTATION IN REGULATORY HEARINGS IN ONTARIO

As energy costs in Ontario have continued to rise, the effective representation of consumers in regulatory rate-setting procedures and other hearings has become increasingly important. This Policy Brief reviews recent developments in the representation of consumer interests in regulatory procedures in Ontario, and contrasts new proposals with approaches to consumer advocacy in other jurisdictions.

In December 2015 the Government of Ontario passed Bill 112, titled "Strengthening Consumer Protection and Electricity System Oversight". An important component of the Act requires the Ontario Energy Board (OEB) to assume responsibility for consumer representation, stating that "The Board shall establish one or more processes by which the interests of consumers may be represented in proceedings before the Board, through advocacy and through any other modes of representation provided for by the Board." This new requirement is consistent with the OEB's fundamental mandate to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity services" (Energy Board Act, 1998, SO 1998, c 15, s 1).

In executing its role, the OEB both adjudicates on contested policy issues and participates as a party in hearings representing consumer interests, posing a potential conflict. OEB staff represent consumers in rate proceedings by submitting evidence, cross-examining witnesses, and making submissions. The dual set of responsibilities for the OEB came to attention in a 2013 Supreme Court Case (*Ontario Energy Board v. Ontario Power Generation Inc., et al.*)

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where Ontario Power Generation (OPG) appealed an OEB ruling that reduced allowed expenses relating to compensation and staffing at nuclear facilities. One element of the case hinged upon the tension between maintaining a tribunal's impartiality and having a fully informed adjudication of the issues, particularly in the case of judicial review. The OEB argued that, unlike in other jurisdictions that have an independent public consumer advocate with a legislated mandate, consumers in Ontario may not be adequately represented should it discontinue its advocacy role. Relying on prior jurisprudence, the Court provided guidance on striking the right balance between impartiality and informed adjudication. Of particular relevance for the OEB was the recognition by the Court that such impartiality concerns may weigh more heavily for adjudicatory tribunals (*para 59*). While the Supreme Court upheld the OEB's ruling, it brought to the forefront the challenges for consumer representation in Ontario's energy sector.

While Ontario does not have a public consumer advocate, energy consumer organizations are still active in OEB hearings. The OEB Act (1998) provides an opportunity for interested parties to participate in administrative hearings and processes by presenting arguments and evidence, providing expert witnesses, and by challenging utility arguments. The OEB compensates such intervenors, funded through assessments levied on utilities, for expenses and professional fees. From April 2014 to March 2015 intervenor cost awards totaled \$5.25 million, funded through regulated rates. **Table 1** lists the most active intervenors in order of cost awards received. They are mainly large purchasers of electricity or natural gas, power producers, environmental groups, vulnerable customer advocates, and commercial/rental property owners. Intervenors representing residential consumers account for a minority of overall intervenor cost awards.

Table 1: Intervenors in Ontario Energy Board Hearings (April 2014 – March 2015)

Intervenor	Number of Awards	Total Cost Awards
School Energy Coalition	27	\$933,125.36
Vulnerable Energy Consumers Coalition	60	\$701,177.58
Canadian Manufacturers & Exporters	25	\$691,782.82
Energy Probe Research Foundation	38	\$610,690.70
Building Owners & Managers Association	17	\$438,548.66
Consumers Council of Canada	16	\$328,779.15
Association of Major Power Consumers in Ontario	7	\$285,982.09
Association of Power Producers of Ontario	8	\$270,447.80
Federation of Rental-Housing Providers of Ontario	11	\$227,440.12
Industrial Gas Users Association	15	\$186,111.45
	Total	\$4,674,085.73

Source: Ontario Energy Board. Cost Awards by Intervenor – April 1, 2014 – March 31, 2015. http://www.ontarioenergyboard.ca/html/costawards/costawards_intervenor_2014.cfm . Accessed: July 18 2016.

Intervenors have argued that their involvement in regulatory procedures ensures utilities remain accountable to consumers, and that intervenor costs awards are needed to support engagement. The Public Interest Advocacy Centre (PIAC) states that the “current OEB regulatory process has saved millions of dollars for Ontario ratepayers by making the electricity distribution companies (EDCs) justify their claims for operating and capital expenses.” PIAC claims that intervenors reduce utility rates by 3.8% on average, and argues that intervenor costs are minimal relative to the overall OEB budget.¹

On the other hand, utilities have questioned the materiality of some intervenors’ arguments and also whether they truly represent claimed constituent interests. In filings with the OEB for its review of the intervention process, Hydro One highlighted concern over a possible disconnect between some intervenors seeking awards and their constituents’ objectives. Hydro One sought documented filings (including policy statements, surveys, and minutes of consultation meetings) from intervening groups that demonstrated an intervenor understood the objectives of its constituency and was receiving direction from it.² Large electricity distributors have expressed particular concern with intervenors’ duplication of positions, especially with that of OEB staff, arguing that cost awards should be directed only to intervenors who focus on issues with substantive implications for the case.³

CONSUMER ADVOCACY IN THE UNITED STATES AND IN CANADA

Other jurisdictions in the U.S. and elsewhere in Canada have adopted different approaches from Ontario to consumer representation in utility regulation. Since the early 1970s, 31 U.S. states and five Canadian provinces (Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, and Nova Scotia) have created publicly-funded consumer advocates with mandates defined in legislation.⁴ Common to these advocates is the mandate to represent residential or household consumers. **Table 2** presents the list of U.S. states with consumer advocates along with information on budgets and staff. The typical state consumer advocacy office has a budget of \$2.0 million and a staff of 15 employees.

Naturally there is considerable variation among consumer advocates in terms of their specific mandates, scope of authority, industries covered, and administrative resources. New Jersey and Alberta provide contrasting case study examples.

¹ Public Interest Advocacy Centre. 2013. Review of Framework Governing the Participation of Intervenors in Board Proceedings – Board File No. EB-2013-0301. In 2013 the OEB initiated a formal review of intervenor participation in regulatory proceedings (EB-2013-0301).

² Hydro One Networks. 2013. Review of Framework Governing the Participation of Intervenors in Board Proceedings – Board File No. EB-2013-0301.

³ Large Electricity Distributors 2013. Summary of Position of Large Distributors – Board File No. EB-2013-0301.

⁴ The states of Georgia, New York, and Wisconsin have dismantled utility consumer advocate institutions, while legislation has been proposed in Idaho but not yet passed into law. Other states and provinces offer consumer representation on an ad hoc basis through the Office of the Attorney General, consumer services offices, or by the staff of the regulatory commission.

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Table 2: U.S. States with Public Consumer Advocates

State	Office	Budget	Budget per State Capita	Full-Time Employees
Alabama	Consumer Interest Division	NA	NA	NA
Arizona	Residential Utility Consumer Office	1,335,000	0.196	8
Arkansas	Consumer Utility Rate Advocacy Division	419,129	NA	4
California	Office of Ratepayer Advocates	16,230,000	0.415	86
Colorado	Office of Consumer Council	1,735,576	0.318	7
Connecticut	Office of Consumer Counsel	2,618,000	0.729	13
Delaware	Division of Public Advocate	991,200	1.048	6
Florida	Office of Public Counsel	2,433,792	0.120	16.5
Hawaii	Consumer Advocate	3,031,508	2.118	23
Illinois	Citizens Utility Board	1,595,775	0.124	38
Indiana	Office of Utility Consumer Counsel	5,600,000	0.846	23
Iowa	Office of Consumer Advocate	3,137,588	1.004	16
Kansas	Citizens' Utility Ratepayer Board	876,129	0.301	6
Kentucky	Office of Rate Intervention	1,000,000	0.023	6
Maine	Office of the Public Advocate	1,676,000	1.261	8
Maryland	Office of Peoples' Counsel	3,793,805	0.632	19
Massachusetts	Office of Ratepayer Advocacy	2,353,721	0.346	19
Missouri	Office of Public Counsel	1,012,057	0.166	23
Montana	Montana Consumer Counsel	1,320,650	1.279	6
Nevada	Bureau of Consumer Protection	3,454,304	1.195	27
New Hampshire	Office of Consumer Advocate	700,789	0.527	5
New Jersey	Division of Rate Counsel	7,826,000	0.874	34
North Carolina	Division of the Public Staff	8,810,000	0.877	71
Ohio	Consumers' Counsel	5,600,000	0.482	35
Pennsylvania	Office of Consumer Advocate	5,533,000	0.432	28
Tennessee	Consumer Advocate and Protection Division	701,400	0.106	7
Texas	Office of Public Utility Counsel	2,201,622	0.080	25.5
Utah	Office of Consumer Services	1,000,200	0.334	8
Vermont	Public Advocacy Division	NA	NA	10
West Virginia	Consumer Advocate Division	1,034,376	0.561	6
Wyoming	Office of Consumer Advocate	2,038,778	3.479	5
Average		3,105,531	0.690	19.4
Median		2,038,778	0.482	14.5

Source: Agency websites and communications, state budget documents.
NA – Not Available

New Jersey Division of Rate Counsel

One of the strongest forms of public consumer advocate is found in New Jersey where the Division of Rate Counsel (DRC) advocates on behalf of ratepayers before the New Jersey Board of Public Utilities (BPU), the legislature, federal regulatory agencies and the courts. Consumer advocacy in the state dates back to the 1974 Department of the Public Advocate Act (*N.J.S.A. 52:27E*), but the role has been broadened and empowered significantly since then. Its mission is to serve as an independent advocate and ensure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory. In addition, it works to ensure that consumers are knowledgeable about their ability to choose among utilities in a competitive power generation market.⁵ New Jersey has a population of almost nine million, served by seven major electric and gas utilities.

The Director of the DRC is appointed by the state governor and operates within the Department of Treasury (*N.J.S.A. 52:27E-47*). The current Director was appointed in 2007. The DRC budget, which is approved by the state legislature, is supported by annual assessments levied on utilities equal to a percentage of utilities' gross operating revenues. The 2015 budget was \$7.8 million (18% increase from 2014), with a staff of 34 full-time employees, making it one of the largest state consumer advocacy organizations in the U.S.

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 (*N.J.S.A. 52:27E-48*). It has the explicit authority to intervene in BPU rate hearings, and it automatically receives any petitions or filings that utilities submit to the BPU. When intervening in rate hearings, the DRC can access confidential utility or BPU information and employ the necessary resources to argue its position (*N.J.S.A. 52:27E-50*).

The DRC has represented consumer interests in all 24 major electricity sector rate cases since 1990. The DRC was also involved in settlement negotiations in 17 cases that led to stipulated agreements, working with the BPU and other intervenors (who do not receive compensation from the BPU for their participation).

Unlike many other consumer advocates, the DRC has the authority to require the BPU to initiate rate proceedings for a utility when it "determines that a discontinuance or change in a required service or a rate, toll, fare, or charge for a product or service is in the public interest" (*N.J.S.A. 52:27E-48*). The DRC acted on this authority in September 2011 when it requested that the BPU initiate a case to investigate the possibility of overearnings by Jersey Central Power & Light (BPU Docket D-EO-11090528). In its petition for the rate case, the DRC argued that the utility had earned 3.9 percentage points in excess of its allowed rate of return. Ultimately, the BPU ordered a 20% decrease in the utility's allowed revenues, which lowered the average customer's monthly bill by \$5.74 (BPU Docket D-ER-12111052).

Alberta Utility Consumer Advocate

The Alberta Utility Consumer Advocate (UCA) is a weaker form institution than the New Jersey Division of Rate Counsel. It operates within a government department and does not have the same degree of arm's length independence as the DRC. As a result, the Director of the UCA responds to direction from, and reports to,

⁵ See <http://www.nj.gov/rpa/about/>

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a Deputy Minister. The UCA's powers are not clearly defined in legislation nor is it empowered to automatically access records or intervene in hearings. Legislative proposals and recommendations to strengthen the UCA have arisen several times but have not been implemented.⁶

The UCA represents consumer interests before the Alberta Utilities Commission (AUC) and other bodies. It was established by regulation in 2003 in response to a report by a government appointed advisory council that studied the state of electricity deregulation in the province, which highlighted how anticipated savings had not realized and how customer complaints had increased.⁷ The UCA's responsibilities were statutorily defined in 2007 (Schedule 13.1 of the Government Organization Act). Its mission since inception has been to ensure residential, farm and small business consumers have information and representation in the regulation of Alberta's electricity and natural gas energy industries.⁸

The UCA is situated in Service Alberta, whose Minister is responsible for appointing and overseeing the advocate. Its statutory responsibilities are sparsely defined, with few legislated details on its objectives, powers, access to necessary resources, or budget. The 2007 legislation, however, enables the Lieutenant Governor in Council to make regulations through Ministerial Orders that direct the activities of the UCA. Unlike the New Jersey DRC, the UCA is limited in its ability to participate in AUC hearings. For instance, it does not have the authority to obtain utility or regulatory information⁹, nor is it granted automatic intervenor status in AUC hearings, which it must petition for. Further, the 2007 Alberta Utilities Commission Act and a 2008 rule by the AUC limit the ability for interested parties, such as municipalities and consumer groups, to intervene and claim compensation for their expenses in AUC hearings.¹⁰

Legislative proposals to clarify the UCA's duties and empower it to more effectively represent consumer interests have failed to be enacted several times.¹¹ A 2012 study by an independent committee established by the Alberta Department of Energy recommended that the UCA be strengthened and re-established as an independent, arm's length agency, similar to that of the Alberta Utilities Commission or the Alberta Electric System Operator.¹²

Despite these structural limitations, the UCA has been active in its advocacy work. In 2015/16 it participated in 44 AUC proceedings and responded to over 30,000 inquiries from customers regarding their utility service.¹³ It has also been active in appellate cases at the Alberta Court of Appeal and the Supreme Court of Canada.

⁶ In earlier versions of the 2007 Alberta Utilities Commission Act there were significant details outlining the responsibilities and administration of the UCA that were stripped away by amendments to the Act. A later attempt in 2010 to pass a Utilities Consumer Advocate Act that would have significantly empowered and insulated the UCA was defeated after the 2nd reading.

⁷ Alberta Advisory Council on Electricity. 2002. Report to the Alberta Minister of Energy.

⁸ The original incarnation of the UCA was enacted without legislation by the Premier's office. At the time, the UCA was housed within the Ministry of Government Services and the head advocate held a deputy minister role.

⁹ Utilities Consumer Advocate Regulation. Alberta Regulation 190/2014.

¹⁰ The Alberta Utilities Commission Act limited compensation for intervention to a "local intervenor" who (a) has an interest in, and (b) is in actual occupation of or is entitled to occupy land that is or may be directly and adversely affected by a decision or order of the Commission in or as a result of a hearing or other proceeding of the Commission on an application to construct or operate a hydro development, power plant or transmission line under the Hydro and Electric Energy Act or a gas utility pipeline under the Gas Utilities Act, but unless otherwise authorized by the Commission does not include a person or group or association of persons whose business interest may include a hydro development, power plant or transmission line or a gas utility pipeline.

¹¹ In 2007 amendments to the Alberta Utilities Commission Act stripped out an entire section that would have detailed the responsibilities and administration of the UCA. A later attempt in 2010 to pass a Utilities Consumer Advocate Act that would significantly empower and insulate the UCA was defeated after the 2nd Reading.

¹² Retail Market Review Committee. 2012. Power for the people. <http://www.energy.alberta.ca/Electricity/pdfs/RMRCreport.pdf>.

¹³ Service Alberta Annual Report 2014/2015. https://www.servicealberta.ca/pdf/annual/SA_Annual_Report_14-15.pdf.

It is supported by a \$7.6M budget, which is funded through government collection of fees included in electric and gas distribution rates.

THE IMPACT OF INDEPENDENT CONSUMER ADVOCATES

Consumer advocates often claim that they cause regulators to establish lower rates than otherwise, though evidence is typically anecdotal and difficult to verify in the absence of a well defined counterfactual. For instance, the Alberta Utility Consumer Advocate argued that their interventions in 2013 led to \$38.3M in savings, equivalent to a 400% return on investment on their annual budget. Similarly, the advocate in the state of Illinois has claimed that since its inception in 1984 it has saved ratepayers more than \$20 billion, yielding a 300% return on investment.¹⁴ A study by the American Association of Retired Persons (AARP) asserts even larger returns of several thousand percent to the budgets of consumer advocates in Maryland, Maine, Ohio and Pennsylvania.¹⁵

Academic research on the impact of consumer advocates provides some independent support for such claims, although on a more modest scale. An early study of a cross section of 12 U.S. states suggested that consumer advocates were more effective than grass roots citizen groups in providing representation at regulatory hearings.¹⁶ A later study of regulatory rulings in Florida between 1972-2002 found that consumer advocates have been instrumental in driving innovation in regulatory processes, such as the adoption of negotiated or stipulated settlements.¹⁷

A 2014 academic study co-authored by Ivey Business School faculty provides the first large scale statistical analysis assessing the impact of consumer advocates on regulatory policy decisions for U.S. utilities.¹⁸ Using data on all rate reviews conducted for U.S. utilities from 1980 to 2007, the paper finds that regulators in states with independent consumer advocates established allowed financial rates of return that were on average 0.45 percentage points lower than utilities in states without advocates. For the average utility this effect equates to about a 0.56% decrease in revenue. The study also demonstrates that utilities in states with consumer advocates had substantially lower residential rates relative to commercial and industrial rates. On average, the residential to non-residential rate ratio was 0.12 percentage points lower for utilities in states with consumer advocates. Overall, the authors find that states that helped organize residential consumers by creating publicly funded consumer advocates led regulators to weigh consumer interests, and especially residential consumers, more heavily in policy decisions.

¹⁴ See the Illinois Citizens Utility Board website: <http://www.citizensutilityboard.org/accompfull.html>.

¹⁵ AARP. 2013. David v. Goliath: Why Consumers are losing New York's utility game. <http://states.aarp.org/aarp-report-why-new-york-consumers-are-losing-the-utility-rate-hike-game/>

¹⁶ Gormley, W.T. 1981. Public advocacy in public utility commission proceedings. *The Journal of Applied Behavioral Science*, 17(4): 446-462.

¹⁷ Littlechild, S. 2009. Stipulated settlements, the consumer advocate, and utility regulation in Florida. *Journal of Regulatory economics*, 35: 96-109.

¹⁸ Fremeth, A., Holburn, G. and Spiller, P. 2014. The impact of consumer advocates on regulatory policy in the electric utility sector. *Public Choice*, 161(1): 157-181.

CONCLUSION

For governments reviewing their approach to consumer representation in utility regulation, the various experiences of states and provinces in the U.S. and Canada over the last forty years can provide valuable guidance. The accumulated evidence from experience and academic research suggests that consumer interests can be robustly safeguarded in regulatory procedures when governments institutionalize independent consumer advocates with clear mandates, resources, and jurisdictional authority. The ability of advocates to effectively represent consumer interests and to shape policy depends on several elements:

- Institutional autonomy from ministries or other agencies, as established in legislation.
- A specific mandate to represent consumers in agency hearings, legislative forums, and before the courts, by presenting testimony and calling expert witnesses; the authority to obtain utility or agency documents and filings, and to cross examine other intervenors
- Sufficient budget to fund all activities of the consumer advocate office; the ability to hire independent staff and experts.
- The authority to initiate investigations or reviews of utility practices.
- A professional process for selection and appointment of the director of the office.

ABOUT THE IVEY ENERGY POLICY AND MANAGEMENT CENTRE

The Ivey Energy Policy and Management Centre is the centre of expertise at the Ivey Business School focused on national energy business issues and public policies. It conducts and disseminates first class research on energy policy; and promotes informed debate on public policy in the sector through supporting conferences and workshops that bring together industry, government, academia and other stakeholders in a neutral forum. The Centre draws on leading edge research by Ivey faculty as well as by faculty within Western University.

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