

# **NOTES FOR A PRESENTATION TO CAMPUT**

## **Robert B. Warren**

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### **I – INTRODUCTION**

The topic for this panel is the impact of rates on consumers. The issue is how to mitigate the effect of increasing rates on consumers. The particular focus is on low-income consumers.

This presentation will canvass two models for mitigating the impact of high energy rates on low-income consumers. The first model might be described as the regulatory model, by which a public utility regulator would use its rate-making authority to devise special rates for low-income consumers. The other model might be described as the government model, by which the provincial government would use its public welfare authority to provide subsidies for energy rates to low-income consumers.

This presentation will put the discussion of those models in the broader context of how consumers, and in particular residential consumers, can best protect their interests. The consideration of the broader context involves an analysis, in turn, of three different regulatory models.

The gravamen of this presentation is that regulators should not attempt to devise special rates to protect the interests of low-income consumers. If subsidies are to be provided, they should be provided by the provincial government, as a matter of public policy. What regulators can and should do is to employ decision-making processes that ensure that the interests of all ratepayers, including low-income ratepayers, are fully and adequately represented.

### **II – REGULATORY MODELS**

#### **A – The Standard Model**

Under the standard model of regulatory decision-making, regulators play a largely adjudicative role in applying a statutory standard to found facts. Utilities file applications for approval of rates. Consumer interests may intervene in the applications. Staff of the regulator typically take a neutral position on the application, simply ensuring that all relevant information is presented. The regulator ultimately makes the decision, applying the statutory standard, for example just and reasonable rates, to the evidence that is presented.

The operation of the standard model is premised on the understanding that regulators must balance the interests of ratepayers and utilities, while ensuring that the policies of the government of the day are respected. The need to balance those interests means that the regulators cannot, and cannot be seen to, protect the interests of one constituency over those of another.

Under the standard model, the staff of the regulator may, at least in theory, take an active role in protecting the interests of unrepresented constituencies. They may do so in the

guise of ensuring that the appropriate balance is maintained between ratepayers and utilities. However, problems of the perception of fairness arise when the staff appears to be taking too aggressive a role in protecting the interests of one constituency. A more appropriate, and frankly safer, role for regulatory staff is to ensure that regulators have all of the information, and the best expert advice, on which to make decisions.

Under the standard model, the ability of consumers to adequately protect their interests is a function of, first, the availability of adequate resources and, second, their access to information about the rates the utilities propose to charge. In the absence of either adequate resources to fund their participation or access to adequate information, the ability of consumers to protect their own interests is limited.

The standard model relies, for its effectiveness, on the operation of the adversarial system. From the consumers' perspective, the key to the effective functioning of the model is, as noted above, the access by consumers to adequate information and resources. Absent those things, the protection of the interests of the ratepayers is left largely in the hands of the regulator and its staff, both of which have, as noted above, conflicting obligations.

## **B – The Regulator as Policy Maker Model**

The discussion of this model arises from a position paper published by the Ontario Energy Board (“OEB”) in October of 2006<sup>1</sup>. In that paper, the OEB proposed a different role for itself, and its staff. Instead of relying principally on the adjudicative model, the OEB would rely, first, on policies, rules, and guidelines which it developed. Applications for rates would be decided less by the adversarial system than by the application of those pre-determined policies and rules. OEB staff would play a more central role in the development of the policies and rules, and a more aggressive role in determining whether rate applications conformed to those policies and rules.

A principal objective of the model described in the OEB's position paper was to reduce reliance on the adversary system. In its place, and in order to allow consumers some input into the formulation of rules and policies, the OEB proposed to engage in consultation processes. For example, OEB staff would prepare discussion papers, setting out a proposed rule or policy, and consumers would be allowed to comment on it.

However, commenting on a position paper, without being able to examine the information on which it is based, and without being able to develop and present a different position, is a far less effective way of protecting consumer interests. The reality is that, under the decision-making model which emerges from the OEB position paper, consumers would, at best, play a subsidiary role.

Some eight months after the paper's publication, it is unclear how useful or effective the model it proposes can or will be. Debates continue about whether the new model is consistent with the OEB's jurisdiction, and whether it is consistent with the rules of natural

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<sup>1</sup> *A Report with Respect to the Decision-Making Processes at the OEB*, September, 2006

justice. In addition, there continues to be a substantial measure of uncertainty about, and unease over, the appropriate role of OEB staff as both advocate and adviser.

There have been, to date, two proceedings in which the OEB's new role is reflected. The first is the Natural Gas Electricity Interface Review ("NGEIR") and the Natural Gas Incentive Regulation proceeding. Since the decision in the NGEIR matter is under appeal, and since the latter proceeding is just getting started, with ongoing debates about the form and content of the decision-making process, I will not comment on either, beyond observing that the decision-making processes in both have been, or are proposed to be, based on the model described in the Board's position paper.

As noted above, opposition to the decision-making model which arises from the OEB's position paper has been based on a number of considerations. One is that it is inconsistent with the OEB's jurisdiction, as set out in section 36 of the *Ontario Energy Board Act* (the "Act"), which prescribes for the OEB a purely adjudicative function in considering rate applications. Concerns have also been expressed about the fairness of the process, given that it apparently relies more heavily on the predetermination of issues rather than an open-minded consideration of evidence produced at a hearing. Finally, concerns have been expressed about its effectiveness, concerns based on the perception, among ratepayers, that they are in the best position to protect their own interests, if allowed to do so effectively.

### **C – The Consultative Model**

What I describe as the consultative model results from an experiment, conducted by Enbridge Gas Distribution Inc. ("EGD") and its ratepayers, over the course of the past year. It may well be premature to describe this experience as a model for regulatory decision-making. Having said that, the success of the consultative process suggests that it may provide the basis for a transformed decision-making process.

By way of background, there have been years of acrimonious dispute between EGD and its ratepayers over EGD's arrangements for customer care, including CIS, services. EGD had outsourced those services in a way that, according to ratepayers, resulted in ratepayers paying an inflated price intended to profit EGD's parent at the expense of ratepayers. The debate about the appropriateness of these arrangements played out in a series of OEB decisions, stretching over some five years. Over the course of those decisions, the OEB had been critical of EGD for not securing its customer care services using market mechanisms, and for failing to disclose the full details, including the costs, of those arrangements. The OEB's consideration of EGD's customer care arrangements culminated in a decision, in EGD's 2006 rates case, rejecting EGD's proposals to acquire new CIS and customer care services, and in the process expressing its preference that EGD both secure those services using market mechanisms and consult with its ratepayers in the process<sup>2</sup>.

As a result of that decision, EGD proposed to acquire new CIS and customer care services in a consultative arrangement with its ratepayers. Under that arrangement, EGD would fund independent experts, who would have access to all aspects of the acquisition processes,

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<sup>2</sup> *Decision With Reasons*, February 9, 2006, EB-2009-0001/EB-2005-0937 at 39-62

including proposed contracts, but who would report to a group of ratepayers. Concerns raised by the experts, and conveyed by them to the ratepayers would, in turn, be conveyed by the ratepayers to EGD. EGD would respond to any concerns thus raised by the experts and the ratepayers, either by adjusting the acquisition process, or by providing an explanation as to why it refused to do so.

The objective of the consultative process was to try to secure an agreement, between EGD and its ratepayers, on the appropriateness, and therefore the end result, of the processes used to acquire a new CIS and new customer care services. To the extent that an agreement could not be reached, the objective was to define the differences between EGD and its ratepayers with sufficient precision that the differences could be resolved by the OEB quickly and efficiently.

The practical results of the operation of the consultative process were, first, a reduction in the acquisition cost of the new CIS of about \$40 million. Second, both EGD and its ratepayers were satisfied that the new customer care services had been acquired through a legitimate market process. Finally, the two issues were settled without the need for a long, and acrimonious, hearing before the OEB.

This consultative process worked for several reasons, as follows:

1. There was a recognition by EGD that securing the cooperation of its ratepayers throughout the acquisition process was more cost-effective and far less risky than relying on an adversarial hearing;
2. There was a recognition by the ratepayers that they could accomplish more in protecting their own interests if they had access to complete information about the acquisition processes, access to expert advice about those processes, and an opportunity to affect the decision-making processes;
3. EGD was prepared to provide the resources necessary for independent experts to advise the ratepayers, and funding to support the participation of ratepayer representatives themselves;
4. Both sides agreed on the value of transparency, with EGD providing the ratepayers and their expert with access to all aspects of the acquisition process, while the ratepayers provided EGD with prompt and candid observations on any defects which they and their expert found in the acquisition processes.

In sum, the key to the success of the consultative process was that the consumer interests were, effectively for the first time, placed in a position equal to that of the utility, measured in terms of knowledge, information, expertise, and resources.

Neither OEB Staff nor the OEB itself played any role in the consultative process until the parties sought approval of a settlement proposal.

It is unclear whether the acknowledged success of the consultative process can serve as a basis for a new regulatory decision-making model for all aspects of the rate-setting

process. However, the evident success of the consultative model suggests that the question of whether it can serve as a model, in whole or in part, should be explored.

As an aside, the most important features of the consultative process, and the ones critical to its success, namely transparency, the full disclosure of relevant information, and access to expert advice for ratepayers, are all features absent from incentive regulation schemes. Based on the experience of the consultative process, ratepayers may be better off with a cost-of-service regime which employs a consultative mechanism rather than with the black hole of an IR regime.

The irony of both the OEB position paper and of the consultative process is that they have their origins in the same background. That background was the history of long and acrimonious debate about the CIS and customer care acquisition processes that the OEB, through a series of decisions, had been unable to resolve. OEB Staff's position paper concluded from that history that the adversarial system was to blame. What the consultative process demonstrates is that what was wrong was that the adversarial system was not allowed to work as effectively as it might.

### **III – THE INTERESTS OF LOW-INCOME CONSUMERS**

Even the best regulatory model will not necessary result in rates which all consumers can bear. The question is whether extraordinary measures are required to mitigate rate impacts on low-income consumers and, if so, what those measures should consist of.

There are two models by which the interests of low-income consumers might be protected. The first is what I will describe as a regulatory model. The second is what I will describe as the government model.

In describing the regulatory model, I will use as the basis for the analysis a proposal advanced by Roger Colton, on behalf of the Low Income Energy Network, in Ontario. A similar proposal has been made by Mr. Colton in Nova Scotia. It is a proposal based on Mr. Colton's experience in a number of jurisdictions in the United States.

Mr. Colton's proposal in Ontario was for a rate affordability program that would have five basic elements, as follows:

1. The first is the determination of eligibility. A "low-income consumer" would be defined as a consumer with a gross household income at or below the "low income cut-off";
2. The educating of low-income consumers as to the existence of the program and how to enrol in it;
3. The enrolling of customers, something which would require matching electronic lists of residential customers with lists of social assistance programs obtained from federal and provincial agencies;
4. The distribution of the rate assistance benefits on a fixed credit basis;

5. The verification of those whose income cannot reasonably be determined to be non-variable. That verification process would take place annually.

Of those five components, the most important is the determination of eligibility. That determination has two components. The first is the determination that the household income is at or below the low income cut-off. The second is the determination that the household energy “burden” exceeds the burden which is deemed to be affordable. This latter determination would calculate a percentage of income that the regulator would deem affordable.

Under the fixed credit approach, the utility would have to calculate what bill credit would need to be provided to a household in order to reduce that household’s energy bill to the designated percentage of income. The utility would calculate the amount of the fixed credit to be paid to each household. Doing so would allow the utility to develop a budget for how much it would need to pay in credits. To this amount would be added the administrative costs of the program. The total cost of the program would be recovered from other ratepayers.

The rate affordability program, as described by Mr. Colton, is a mechanism by which the rates which are paid by one group of ratepayers would be subsidized by other ratepayers, not because the former’s rates bear a disproportionate share of utility cost, but because the rates impose what the program determines is an undue burden on that group. A determination of those who are to receive the benefit, or subsidy, would be based on considerations of ability to pay rather than on the equitable allocation of the utility’s costs of distributing the gas.

The proposal for a rate affordability program, to protect the interests of low-income consumers, raises two questions. The first is whether the regulator, which for the purpose of this discussion, is the OEB, has the jurisdiction to create a special rate for low-income consumers. The second is whether, even if the regulator has the jurisdiction, it should exercise it.

With respect to the question of jurisdiction, the Supreme Court of Canada, in the *ATCO*<sup>3</sup> decision, confirmed that administrative tribunals obtain their jurisdiction from one of two sources, either express grants of jurisdiction by statute, or by the application of the common law doctrine of necessary implication.

Section 36 of the Act empowers the OEB to approve or fix rates which are “just and reasonable”. In exercising its power under section 36 of the Act, the OEB must take into consideration the objectives which are set out in section 2 of the Act. Those objectives are the following:

1. To facilitate competition in the sale of gas to users.
2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

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<sup>3</sup> *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)* [2006] 1 S.C.R. 140, at 164

3. To facilitate rational expansion of transmission and distribution systems.
4. To facilitate rational development and safe operation of gas storage.
5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.
  - 5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
6. To promote communication within the gas industry and the education of consumers.

None of the objectives set out in section 2 of the Act addresses, directly or by necessary implication, determining rates or prices according to the ability to pay or the provision of subsidies from one group of ratepayers to another. None of the objectives set out in section 2 of the Act addresses, directly or by necessary implication, social welfare considerations.

The question, then, is whether the words “just and reasonable” in section 36 of the Act allow the OEB to do two things: First, assess the ability of consumers to pay the rates it has approved and, second, decide which groups of consumers should subsidize other groups of consumers.

In my view, the object of the Act, and the intention of the legislature in enacting it, is to empower the OEB to regulate natural gas utilities to ensure that those utilities do not abuse their monopoly powers, and to strike the appropriate balance between the interests of consumers in obtaining access to service and fair prices, while also ensuring that the utility obtains a fair return on its investment.

The balance which the OEB must strike, in establishing fair and reasonable rates, was described in the Supreme Court of Canada in the *Northwestern Utilities et al. and the City of Edmonton*<sup>4</sup> case, in the following terms:

The duty of the Board is to fix fair and reasonable rates; rates which, under the circumstances would be fair to the consumer on the one hand and which, on the other hand, would secure the company a fair return for the capital invested.

In the *ATCO*<sup>5</sup> decision, the Supreme Court of Canada described the regulatory compact, created by the Act, as one which ensures that all customers have access to the utility at a fair price. In that case, the Supreme Court of Canada put the interest of utility customers in this way:

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<sup>4</sup> *Northwestern Utilities Limited et al. and The City of Edmonton* [1929] 1 S.C.R. 684, at 692

<sup>5</sup> *ATCO, ibid.*, p.

Through their rates, customers pay an amount for the regulated service which equals the cost of service and the necessary resources to provide that service.

In my view, considerations of fairness and equity, in the setting of rates, are those between the consumers and the utility, and not those among consumers. The courts in various Canadian jurisdictions, and over many years, have expressed the principle that a public utility is required to provide service without discrimination. One of the implications of the common law principle against discrimination is that customers of a public utility must be treated equally insofar as the rate of a particular service or class of service is concerned. In the case of *St. Lawrence Rendering Co. Ltd. v. Cornwall*<sup>6</sup>, the court expressed the principle in the following terms:

That a public utility was at common law compelled to treat all customers alike, to charge one no more than the others, and to supply the utility as a matter of duty, not as a result of contract, seems clear.

There is nothing in the Act which directly, or by necessary implication, allows the OEB to reverse that common law principle.

It has been argued, in support of the proposition that the OEB has the jurisdiction to devise special rates for low-income consumers, that the word “just” in section 36 of the OEB Act has a moral component. That moral component, so the argument runs, grants the OEB the authority to protect the public interest and, in particular, the interests of low-income consumers.

This line of analysis is, in my view, wrong. As noted above, the courts have consistently held that the OEB’s mandate is to maintain the appropriate balance between the interests of the utilities and their ratepayers, and not to discriminate among classes of ratepayers.

It has also been argued that, if the meaning of the word “just” in section 36 is ambiguous, it should be interpreted in light of section 15 of the *Charter* in a way which protects the particular rights of low-income consumers. The argument relies on the decision of the Supreme Court of Canada in *R. v. Rogers*<sup>7</sup>.

However, as that decision makes clear, section 15 is not some universal *deus ex machine* which transforms every piece of regulatory legislation into social welfare legislation. Section 15 is only brought to bear in circumstances where the legislation is ambiguous, as the following observation of Madam Justice Charron, for the majority, makes clear:

It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the *Charter*; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 517 at 603, *Cloutier v. Langois*, [1991] S.C.R. 158 at 184;

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<sup>6</sup> *St. Lawrence Rendering Co. Ltd. v. Cornwall* [1951] O.R. 669, at 683

<sup>7</sup> *R. v. Rogers* [2006] 1 S.C.R. 554

*R. v. Salituro* [1991] 3 S.C.R. 654, at 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 S.C.C. 83, at p. 86; *R. v. Mann* [2004] 3 S.C.R. 59, 2004 S.C.C. 52, at paragraph 17-19. However, it is equally well settled that, in the interpretation of a statute, *Charter* values as an interpretive tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles. However, where a statute is not ambiguous, the court must give effect to the clearly-expressed legislative intent and not use the *Charter* to achieve a different result. (*R. v. Rogers*, p. 572)

Section 36 of the OEB Act does not permit two different, yet equally plausible, interpretations. The argument that the word “just” imparts a moral or broad public interest mandate is not consistent with the purpose of the Act. Given those things, section 15 of the *Charter* is of no assistance in interpreting the OEB’s powers under section 36 of the Act.

As noted above, the *ATCO* decision reviewed the doctrine of jurisdiction by necessary implication. That doctrine, in the words of the *ATCO*<sup>8</sup> decision, holds that :

The powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.

In my view, the OEB does not require the power to set rates according to the income of consumers in order to accomplish the objectives intended to be secured by the Act. The power which the OEB would have to exercise in order to authorize a rate affordability program, is in essence the power to create a social welfare scheme. It is not a power necessarily incidental to the exercise of its rate-making power.

The OEB itself has rejected a number of applications for the approval of special rates.<sup>9</sup> For example, in EBRO 493, the OEB was faced by an application by the Ontario Native Alliance (“ONA”) for an order that the OEB require the utility to “evaluate the establishment of a rate class for the purpose of providing redress for aboriginal peoples for historical grievances and to report thereon at the next rate hearing”. In rejecting the ONA’s application, the OEB held as follows:

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<sup>8</sup> *ATCO, ibid.*, p. 170

<sup>9</sup> After this paper was completed, the OEB issued its “*Decision- Rate Affordability Programs*”, in EB-2006-0034, which addresses the jurisdictional issues discussed in this paper. The majority of the three-person panel held that the OEB did not have the jurisdiction to order the implementation of a rate class based roughly on the model described in this paper.

The Board is required by its legislation to “fix just and reasonable rates”, and in doing so attempts to ensure that no undue discrimination occurs between rates classes, and that the principles of cost causality are followed in allocating underlying rates. While the Board recognizes ONA’s concerns, the Board finds that the establishment of a special rate class to provide redress for aboriginal consumers of Centra does not meet the above criteria and is not prepared to order the studies requested by ONA.

To like effect are decisions of the AEUB<sup>10</sup> and the NSURB<sup>11</sup>.

Even if the OEB did have the jurisdiction to approve a rate affordability program, in my view it should not. There are several reasons for saying that. The first is that the OEB would be creating a social welfare program, something which the legislature, not a regulator, should do.

The second is that structuring rates on the basis of the ability to pay would necessarily require the OEB to consider the special circumstances of classes of ratepayers. For example, industrial consumers in a depressed market might legitimately ask for reduced rates to enhance their competitive position. Hospitals and seniors’ homes might ask for rates to relieve the burden on them. In approving a rate affordability program, the OEB would be starting down a slippery slope which would lead inexorably to a hodgepodge of different rates, with the burden of the cost of service falling unequally on different classes of ratepayers.

Another, and equally important, consideration is that a subsidy for low-income consumers is in effect a regressive tax. It would be a subsidy of one class of ratepayers regardless of their particular means. If a subsidy is to be paid, the burden should fall, as all tax burdens fall, on those who are able to afford it.

An additional consideration is that the scheme for a subsidy to low-income consumers requires either the regulator, or more likely the utility, to assume the administrative burden of identifying a class of consumers eligible to receive a subsidy. That is a burden which properly falls on the provincial government.

A consideration of this issue should be distinguished from the circumstances where a regulator must ensure that low-income consumers get the benefit of services they pay for. An example of this is the treatment of DSM programs. All ratepayers pay for those programs. However, low-income consumers, for a variety of reasons, are less likely to be able to take advantage of DSM programs. The OEB has taken steps to ensure that DSM programs are available to low-income consumers. Doing so, however, does not involve the payment of a subsidy from one group of ratepayers to another.

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<sup>10</sup> AEUB Decision 2004-066 and AEUB Decision 2004-067

<sup>11</sup> 2005 NSURB 27 (CanL 11), dated March 31, 2005

#### **IV – CONCLUSION**

In the absence of a rate-affordability program, what, if anything, can a regulator do to ensure that the interests of low-income consumers are properly reflected in its decision-making process and, to the extent that the legislation allows, the interests of low-income consumers are protected? In my view, the most effective way to do that is to ensure, first, that all ratepayers are properly and effectively represented in the decision-making process. That proposition takes me back to a consideration of various models for regulatory decision-making. Based on the recent experience in Ontario, I suggest that the optimum model is one in which consumer interests are, to the extent reasonably possible, placed on an equal footing with the utilities in terms of knowledge, expertise, and resources.