

## **Backgrounder – Part 1 The Impact of Bill 46**

### **History of the Consumers' Coalition and Utility Interventions**

#### **The Role of the Consumers' Association of Canada**

In the early 1990s, it became apparent to the Board of the Alberta Chapter of Consumers' Association of Canada that the absence of a strong voice for residential utility customers in public utility hearings had led to increasing costs for small residential customers and decreasing costs for large industrial consumers.

Prior to the early 1990s, members of the Association's Board occasionally attended hearings to question and speak on behalf of residential consumers, however the lack of access to legal and accounting expertise limited the effectiveness of these interventions.

#### **The importance of residential consumer voice in regulated utility-rate decisions**

One of the reasons behind the cost shift to small residential customers appeared to be the lack of interventions by an organization with a "pure" residential interest.

Other intervenors in public utility board rate-decisions, such as various municipal government bodies, often traded off the interests of residential customers against street lighting rates, increased local franchise fees and the benefits of attracting large industrial customers to their jurisdiction. The big industrial consumer groups also had a strong voice and tried to push costs onto the residential class.

The Public Utilities Board (PUB), the precursor to today's Alberta Energy and Utilities Board (AEUB) was guided by fairness to set rates that were "just and reasonable," but as a quasi-judicial tribunal they were only able to act on the submissions made to them. Therefore the lack of a residential intervenor limited their ability to act accordingly.

By 1993, the Consumers' Association was receiving many calls from the public and media across Alberta asking why the Association did not intervene as it did in many other provincial jurisdictions. The Board of the Association decided to explore all possibilities.

**Finding the expertise and gaining intervenor status**

Since the Association did not have adequate financial resources required to hire and pay experts to effectively make our case, we had to seek out experts willing to be compensated through the cost award process by the PUB. These cost awards (paid by the customers of the affected utility) are based on the value of the arguments made by specific intervenors in informing and influencing the Board's final decisions on a specific issue. It took the Association a year or more to find such expertise, given the risky nature of their compensation.

In addition, in order to be accepted as a proxy intervenor in regulatory hearings on behalf of residential consumers, we were required to have a *provincial* membership base. In order to strengthen this base, we formed a coalition with the Alberta Council on Aging and began intervening as the *Consumers' Coalition of Alberta (CCA)*.

**The value of a residential consumer voice in regulatory decisions**

The PUB welcomed diversity of views and notwithstanding our battles with the utilities and other intervenors who entered the arena, the Consumers' Coalition became recognized champions of householder interests inside and outside formal interventions.

From 1993 to 2007 the PUB / EUB approved our interventions and awarded the CCA recovery of its costs of intervention based on the value of our interventions to the Board's decision-making. It has also commented in a positive manner about the expertise of the CCA analysts, consultants, experts and counsel.

As the only consumer association championing only residential consumer interests in an increasingly complex and deregulated utilities environment, our ongoing efforts to inform the public has also been valued. In late 2000 or early 2001, opinion polling conducted by the City of Calgary showed "consumer associations" as the "**most trusted source of information regarding utility issues.**"

**The thrust and impact of Bill 46, the *Alberta Utilities Commission Act***

Bill 46 directly impacts the work of the Consumers' Coalition of Alberta in that it removes any discretion for the new utilities regulator (to be named the Alberta Utilities Commission) to determine who appears before it.

In doing so, Bill 46 ends the regulators' discretion to grant cost recovery for groups who participate as intervenors in utility rate hearings. For years the experts, technical and legal costs of the CCA interventions and many other important public voices such as urban and rural municipalities, natural gas co-ops, rural electrical associations, the public institutional sector, and aboriginal communities have been recovered through the utility hearing cost recovery process. All these intervenors have different perspectives and issues that they bring to the regulatory process. This cost recovery process allows **independent public participation** and **due process in the regulation** of monopoly public and private utilities.

Cost recovery strengthens participants' rights, and that has contributed significantly to the transparency of regulatory decisions and the ability of the regulator to make decisions in the overall public good. As Byron Williams, the Director of the Public Law Centre in Manitoba recently pointed out, the concept behind the creation of a Public Utilities Board and ensuring participation of independent intervenors for different customer classes and public interests "is based on the notion of taking politics out of rate setting, and ensuring the best possible decision in the public good." These processes, he argues, also provide an opportunity for debate and consideration, and create a "marketplace of ideas to strengthen regulatory regimes."

### **The government takes over interventions**

In the place of the regulator's discretion, Bill 46 mandates the Utilities Consumer Advocate (UCA) as the only funded intervenor in utility rate cases. As such, everyday Albertans who are directly impacted will now have to work through the government appointed Utility Advocate, including any organization representing the interests of municipalities, farms, small commercial interests and small business. The UCA will try to balance the positions it takes, but we fear once again residential customers may well be sacrificed on the altar of "other interests" and government policy.

As one observer pointed out, "there's an inherent conflict of interest" in having a government-appointed advocate represent consumers in front of a government-appointed board. It's not unlike somebody appointing the judge and prosecutor and deciding who the defence lawyer is going to be as well."

Jim Wachowich, legal counsel and head of the regulatory team for the Consumers' Coalition for over a decade says this model also raises serious questions about whether the Advocate's Office would ever intervene in the public interest against a government policy. "Government policy is not always in the public interest," he notes.

For example, there are a number of instances where government policies have adversely affected the ability of the Energy and Utility Board to act in the public interest. There are also instances where the government has overturned decisions of the Energy and Utility Board. One is a decision to overturn a decision of the Board related to who should be responsible for paying the costs of new transmission lines. While the Board determined these costs should be shared 50-50 by power generators and utility customers, the government interfered and ruled that utility customers are responsible for all transmission costs.

### **The government's rationale**

The stated rationale by the Minister of Energy, Mel Knight, for the substitution of a sole government-controlled intervenor in regulatory decisions is to reduce the duplication and growing costs of independent intervenors. However, both provincial government documents and the real life experience of the Consumers' Coalition and other public and consumer intervenors provide compelling evidence that other policy purposes and interests are driving this new model. Interestingly, no evidence has been produced (despite requests) that this substitution will decrease the industry costs for regulation that are passed on to utility customers through their natural gas and electricity bills.

Instead, this new model, which has been "in the wind" since the creation of the original government Utilities Consumer Advocate Office in 2003, appears to be driven more by a desire to get rid of any impediments to implementation of government energy policies. Many of these policies are directed towards increasing de-regulation in the utilities sector to the benefit of the utilities and energy industry, facilitating a captive market for

unregulated dual energy contracts, and attracting investors by removing barriers to the development of unconventional sources of energy – such as coal bed methane and rapid development of the oil sands.<sup>1</sup> Conveniently, this UCA only model will also dramatically decrease the transparency and public scrutiny of government policies.

As a March 30<sup>th</sup>, 2007 article in Mark Lisac's Insight into Government ("A Quiet but Major Tune-up for Power De-regulation") points out, the MLAs and Cabinet are interested in speeding up regulatory decisions to expand capacity in the system.<sup>2</sup> In addition, the article states:

*"The government is anxious for individual consumers to switch to contracts that lock in prices. Uptake has been slow. MLA Vandenburg conceded that may be in part because the government shielded consumers with billions in subsidies during the conversion to a deregulated system in 2001. He doesn't see the need for a repeat if prices soar again; 'Last time there was nobody offering contracts . . . There's no reason for the government to be stepping in.'"*

### **The boogeyman of the "high cost of regulation"**

Both Energy Minister Mel Knight and other government MLAs frequently talk about the "millions and millions" of unnecessary dollars spent each year on independent intervenor costs. They also like to point out that these costs are paid by affected utilities and passed on to consumers through their utility bills. They don't like to mention the far greater millions these interventions have saved utility customers.

According to Nancy MacKenzie, an experienced regulatory lawyer for the public institutional sector (schools, hospitals and universities), every dollar spent on interventions saves consumers \$10 dollars.<sup>3</sup> While the costs of intervenor experts for all the smallest volume consumers such as residential, farm and small commercial interests in a busy year (in aggregate) might total a few million dollars, these interventions have saved consumers in excess of two hundred million dollars of utility operating costs in the

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<sup>1</sup> Drawn from a two- page "DRAFT for discussion purposes only" document labeled "purpose of the Alberta Utilities Commission Act (AUC) dated July 13<sup>th</sup>, 2007, distributed by the Department of Energy at stakeholders meeting in Calgary in July.

<sup>2</sup> Problems with limited capacity are attributed in part to the de-regulation of this industry.

<sup>3</sup> Henton, Darcy, "Consumer groups fear new Tory bill", Edmonton Journal, June 28<sup>th</sup>, 2007

system.<sup>4</sup> The Utilities Consumer Advocate Office web site acknowledges the dramatic cost-savings to utility consumers from intervention in regulatory board decisions. Under “accomplishments,” the web site states that its Regulatory Affairs division “in collaboration with other intervenors” (including the CCA) had achieved more than 90 million in reductions to consumer utility billings for the 2005-2006 year.

Government representatives have also not been up front about the growing costs of the Utilities Consumer Advocate Office itself, which has shown an increase of 40% (from \$4.58 million to \$6.7 million) from 2005 to 2006.<sup>5</sup> Nor has the government been very public in the source of funding for this Office, 80% of which comes from the Alberta electrical balancing pool. (This pool was originally created from revenues from the forced sale of “already paid for” low-cost regulated electricity output of existing plants. Utility customers paid for these plants and the pool was the “stranded value” of the power plants). The remaining 20% comes from levies on regulated natural gas distributors, which in turn pass these costs on to utility customers in the regulated portion of their monthly bills.

In the May 1<sup>st</sup>, 2006 Hansard, then Minister of Service Alberta, the Ministry responsible for the Utilities Consumer Advocate Office, the Hon. George VanderBurg stated “It’s not our intention that we take over the [independent] intervenors that regularly attend [utility board hearings], and I can tell you there are lots of people that make a profession and a very good living intervening just for the sake of intervening.” No information was disclosed about the yearly salaries of an expanding cadre of bureaucrats and staff in the UCA office. Substitution is not savings.

### **What might be the price of the loss of independent intervenors?**

In 2007 the Consumers’ Coalition and its expert regulatory team intervened in more than 50 decisions of the Utilities Board to ask questions and advocate a fair cost of service and fair return to utilities companies without having consumers pay for excess profits of the industry or dysfunctional retail energy markets. These decisions included challenges to the identified revenue requirements charged by regulated utility companies and services

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<sup>4</sup> Refer to Alberta Government Services Annual Report 2005/2006, page 36;

(e.g. Direct Energy Regulated Services, Enmax, Epcor, Nova Gas Transmission, Atco Gas, Atco Electric, Fortis) and providing input on issues of rate redesign, codes of conduct and costs of the Alberta Electric System Operator. This is a challenging task as many new costs are being added to the still-regulated portion of customers' utility bills in order to support the unbundled and increasingly de-regulated wholesale and retail energy services. Yet these latter "unregulated" sectors do not fall under the jurisdiction of the utilities board. In addition, the number of regulatory hearings and decisions has increased significantly over the past decade due to the additional regulatory demands placed on the AEUB by government and often associated with de-regulation.

As previously identified, there have historically been a broad number of independent intervenors who appeared in utilities board/regulator rate hearings. For years, and especially over the last decade, these groups got along very well notwithstanding the adversarial nature of the process. This cooperation was maintained in the hearing process even though there were winners and losers as the regulator decided which rate classes bear or share which costs. All of this cooperation benefited consumers as the costs of regulation were better managed and regulatory outcomes were often favorable to consumers given the broad experience (and cooperative input) of many talented people. For example, in an important hearing related to the sale of extensive retail assets of Atco Electric and Atco Direct Energy in 2003,<sup>6</sup> the Consumers' Coalition joined forces with other intervenors as "The Consumer Group" to share the work load required to oppose this application and limit the harm to utility consumers from this sale. Once Bill 46 becomes law, all these independent intervenors and interventions will disappear.

### **Other hidden costs of the loss of independent intervenors**

Without the knowledge and awareness of the activities of this complex industry gained by traditional intervenors through participation in these hearings, there will be little transparency or public visibility of regulatory changes. In such an environment, there is a danger of quiet agreements being made between the industry and government without the benefit of the public airing through regulatory board decisions. One government document (July 13<sup>th</sup>, 2007) states one of the purposes of Bill 46 is to avoid hearings for "non-contentious" applications. Who defines "non-contentious," and how it is defined

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<sup>6</sup> Decision 2003 – 098 available on the web site of the Alberta Energy and Utilities Board

may well turn out to be a rather contentious issue for landowners, municipalities, rural electrical associations and urban utility consumers.

Over the past decade, the legal counsel for the CCA intervention team has also participated in a number of government advisory committees on behalf of the Consumers Coalition or the Consumers' Association. Through this means, the CCA and other independent public interests have been able to influence government policies outside the hearing room. If members of these organizations have no source of information other than government consultants, it will dramatically reduce their influence and the outcomes and recommendations of advisory councils. It will also reduce the quality of discussion and recommendations of a new hand-picked "governance board" of former intervenor groups which Bill 46 creates to guide a revamped Utilities Consumer Advocate Office.

### **Missing in Action**

If Bill 46 is passed into law, the CCA and other independent intervenors will be missing in action and no longer able to influence decisions on behalf of the public and consumers. The UCA as the only intervenor will have no scrutiny of its costs from its peers or from the regulator as we do and have done since 1993. As the only intervenor, the UCA will cost consumers as much or more than independent intervenors did on a yearly basis.

As the only intervenor, the UCA will be able to comment, likely in a way favourable to government, on emerging utility issues and costs such as:

- Scheduled RRT review as increased percentage of power pool flow through pricing is used – increased volatility
- Competitive household energy market – costly retail dysfunction
- Natural gas rebates - subject to future reconsideration
- Balancing pool – probably costs flowing to electric systems customers towards 2010 and beyond
- Transmission costs with new system additions – example, 500 KV line
- Some utilities (Enmax) are applying for longer rate periods - up to 10 years
- Rising energy prices after 2007 per AEUB forecast



- Location and type of new generating plants (including nuclear?)
- Promised review of deregulation made during leadership campaign

The above list is not exhaustive and every bulleted item potentially carries costs in the millions of dollars. So there are millions of reasons to want to silence independent intervenors and public voices like the CCA. Bill 46 is the tool to do it.

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