

Submission by Ag Energy Co-operative

Appendix A *Energy Consumer Protection Act, 2010* Review EB-2014-0158 Questions for Supplementary Written Comment

1. What standard(s) should the Board use to measure the effectiveness of Part II of the *Energy Consumer Protection Act, 2010* (the “ECPA”)?

- a. Which standard(s) proposed by Professor Dewees are most appropriate?
- b. Are there other standards that the Board should consider?

2. What features of the broader market evolution or market structure should the Board consider in its assessment of Part II of the ECPA and in making its recommendations to the Minister?

- a. Do you agree with the analyses conducted by Professor Dewees and Mr. Sharp regarding the economics of electricity and gas contracts? If so, why? If not, why not?

Professor Dewees included a standard to measure the effectiveness that he labelled “Economic Merit Retail Offerings”. In his analysis on this measure, he compared the price of three and five year retail contract offerings for a selected period to the default utility supply price that actually resulted over the selected period. His conclusion was that customers in retail contracts paid significant premiums to the default utility price.

However, as Mr. Sharp stated in his presentation, the selection of a retail contract at a fixed price is a hedge. Mr. Sharp went on to state that the goal of hedging is not to save money but rather “to reduce the exposure to upward movements in the underlying commodity price and/or to increase budget certainty”.

As Mr. Fraser pointed out in response to a question on the issue starting at page 155 of the transcript:

“I think what the retailer does provide is they provide stability in the price, and that stability could be, as Bruce alluded, to reduce risk of volatility. It could also be to meet a budget.

And so those are perhaps the most important objectives of a given customer segment.

A hospital, for example, might need to know its price with certainty, regardless of whether or not it has the lowest price over a certain period of time. So on that basis, they are making the choice that's best for them and they're getting the value of it.

Utilities are passing through their costs, that's true, but they're also passing them through in essentially real time. In the case of natural gas, it is on a quarterly basis. So

they have no ability to hedge their system price that they pass through to end-users. They're precluded from doing that.”

An appropriate analogy to the selection of a fixed price energy contract might be to the selection of a longer term fixed mortgage rate. Customers lock into fixed rate mortgages to protect themselves from possibly rises in interest rates and to provide budget certainty. At any point in time, the variable mortgage rate (analogous to the utility default price) is going to be lower than the fixed mortgage rate for a longer term. Does that mean that customers should not have the choice to lock into a higher rate for a longer term? Does that mean that since over the term of the fixed rate, customers might not “save” money on their mortgage payments, that there is no value for the customer in choosing a fixed rate mortgage? Clearly, customers see value and should have that choice. We believe the same principle applies to energy contracts and that consumer choice should be respected. If consumers want options or alternatives to the utility, they should have them.

b. Are there any other price analyses or comparisons that the Board should consider in addition to those provided by Professor Dewees and Mr. Sharp? If so, please provide.

In his price analyses for natural gas, Professor Dewees looked at prices for the period 2009 to 2013. Professor Dewees acknowledged that over that term, the market price for gas plunged. While customers with fixed price retail contracts paid more than the utility default price over that period, customer did have price and budget certainty and were protected from price volatility.

It is possible to choose a period where customers with a fixed price retail contract did in fact protect themselves from upward movements in the commodity price. According to Energy Shop, since July 1999, consumers who locked in 55 out of 149 months have realized a savings (36.9% of the time). Energy Shop lists the following factors included in their analysis.

- The lowest price available to the public on the first of the month was chosen.
- The selected price is either for a term of three or five years (they are most often chosen by consumers).
- The switch to the new supply occurred 60 days after the sign up date, unless the supplier set a date to switch.
- The average yearly use for a house in the Enbridge Gas Distribution area is used.
- Changes in use during the year are applied.
- Changes in utility price throughout the term are applied.

http://www.energyshop.com/es/homes/gas/historical_savings.cfm?page=ur

The analysis by Professor Dewees looked at only the pricing benefits to be realized with a retail contract. It makes sense that that was the only factor considered. The analysis did not include the additional value that a co-op approach used by Ag Energy can offer. In addition to offering competitive energy prices that suit our members’ risk tolerance, Ag Energy offers other products and services. These include:

- *Fixed prices for one or more years*
- *Floating prices*
- *Optimizing transportation and the associated savings*
- *Large and small volumes per member (currently non-ECPA)*
- *Possible multiple sites and meters per member*
- *Balancing volume variances*

Further to this, in a profitable year, members of Ag Energy benefit from additional funds provided back to them in the form of a patronage rebate which would be similar to a buying rebate as well as a dividend payment. In the event there is a contribution made to retained earnings, the valuation of the organization is also improved which means that the value to the Member-owner has appreciated.

c. What is the “value proposition”, if any, for retail electricity contracts in the current Ontario market? Is the value proposition different for non-residential consumers than it is for residential consumers?

Please see the discussion in a) and b) above.

d. What is the “value proposition”, if any, for retail natural gas contracts in the current Ontario market? Is the value proposition different for non-residential consumers than it is for residential consumers?

Please see the discussion in a) and b) above.

e. Should the Board look at natural gas contracts differently than electricity contracts? If so, why and in what respect(s)?

3. What guidance should the Board take from the qualitative and quantitative findings of the consumer research undertaken by Innovative Research Group in assessing the effectiveness of the ECPA and in making its recommendations to the Minister?

A large percentage of customers surveyed by the Innovative Research Group had a retail contract and were not aware that they had a contract. This is a troubling finding. However, this is not an issue which occurs when customers deal with an energy co-op. The consumer-members of an energy co-op have paid membership fees to join the co-op. Co-op members who have contracts are aware of their contractual relationships with the co-op. In addition, they receive regular communication from the co-op outlining price trends, industry updates and recommendations.

4. What recommendations should the Board consider making in relation to the current legal and regulatory regime applicable to retailers and marketers?

The following comments and recommendations include those made by Ag Energy in its initial submission and during the presentation at the December 8, 2014 session as well as additional comments at this time.

Exemption for Energy Co-operatives from the Regulations under the ECPA

The *Energy Consumer Protection Act* (ECPA) serves an important purpose by protecting small energy consumers from unfair and deceptive practices by energy marketers. The OEB's review of the ECPA should ensure that those consumer protections are maintained and, where appropriate, bolstered.

At the same time, the OEB should consider whether it is necessary or advantageous from the standpoint of consumer protection to require that consumer-owned energy co-operatives be subject to the same stringent licensing and oversight requirements as other energy retailers. While ensuring a level playing field for all entities in a sector is generally a required regulatory objective, it is also important to create an enabling regulatory framework for those entities specifically structured so as to advance the desired regulatory objective, which in the case of the ECPA is consumer protection.

As a consumer-member owned and controlled co-operative, Ag Energy Co-operative's primary purpose is to provide natural gas and electricity to its consumer members at the lowest possible price, taking into account the risk tolerance of its individual member consumers for price fluctuations. Unlike most regulated energy retailers which, like other shareholder-owned businesses, are ultimately in business to provide a return to their shareholders, co-operatives by their very nature are formed principally to provide a service to their members. In the case of Ag Energy Co-operative, this purpose is to provide its consumer members with the best energy prices available based upon their individual risk tolerance. An important ancillary objective of the Co-operative is to furnish its members with information about energy market trends and forecasts so as to enable them to make informed energy purchasing decisions. Fundamental to the Co-operative is its ability to provide flexibility in the services offered to consumers and to be responsive to the specific needs of its members.

Co-operatives are distinguished from other business structures by the "one member, one vote" rule which entitles every member to one vote at a meeting of members. This is obviously a very different model from that of other business entities in which "shareholder democracy" is the norm; for business corporations, every common share is generally entitled to one vote and the corporation is ultimately controlled by the shareholders owning a majority of the shares. Although for-profit co-operatives such as Ag Energy do issue preference shares as a means of capitalising the Co-operative, those preference shares do not carry any voting rights (except in the event of a fundamental change to the rights of those shares). Hence, irrespective of the number of shares held by a member, each member gets one vote at all meetings of a co-operative.

The directors of a co-operative are elected democratically by the members and the *Co-operative Corporations Act* (Ontario) requires that at least 80% of the Directors be members of the co-operative. This further reinforces the co-operative's commitment to its members inasmuch as the governance of the co-operative is in the hands of the very consumer members it serves.

For over a quarter century, Ag Energy Co-operative has delivered energy to its member customers and has a well-established track record of successful operations. Although the Co-operative generally seeks to operate on a break-even basis, when it does make profits it distributes them back to its members and/or retains its earnings which benefits all members by bolstering the Co-operative's financial stability. It is important to note that as a co-operative, profits are not distributed back to outside investors. Rather, all of the Co-operative's profits are either distributed back to its members in the form of patronage dividends based on the volume of energy purchased through the Co-operative, or are retained in the Co-operative to provide additional services to members such as market information, recommendations on energy purchasing strategies, etc. This is in keeping with the requirement under the *Co-operative Corporations Act* (Ontario) that co-operatives operate on a "co-operative basis" which, among other provisions, requires that

1(1) the enterprise of the corporation is operated as nearly as possible at cost after providing for reasonable reserves and the payment or crediting of interest on loan capital or dividends on share capital; and any surplus funds arising from the business of the organization, after providing for such reasonable reserves and interest or dividends, unless used to maintain or improve services of the organization for its members or donated for community welfare or the propagation of co-operative principles, are distributed in whole or in part among the members,

(i) in accordance with the by-laws of the co-operative if the corporation is a renewable energy co-operative, or

(ii) in proportion to the volume of business the members have done with or through the organization if the corporation is not a renewable energy co-operative;

It is important to note that Ag Energy is not a renewable energy co-operative as that term is defined under the *Co-operative Corporations Act* and is therefore subject to the requirement that its profits (or surplus) be distributed back to its member consumers on the basis of the volume of their business with the Co-operative. Since it is not a renewable energy co-operative, it is also subject to the requirement under Subsection 144(1) of the *Co-operative Corporations Act* that it conduct a minimum of 50% of its business with members of the Co-operative; in actual practice, Ag Energy conducts more than 80% of its business with members.

In addition to the democratic control consumer-members exercise, Co-operative members also enjoy statutory rights and protections under the *Co-operative*

Corporations Act which are not generally available to energy consumers purchasing from other energy marketers. These protections include the right to receive the audited annual financial statements of the Co-operative [Section 128(1)], the right to requisition special meetings of the Co-operative [subsection 70(1)], the right to remove Directors [Section 104], and, subject to certain specified statutory exceptions, the right to examine the records of the Co-operative [Subsection 119(1)]. Clearly these are rights which the customers of other regulated entities do not enjoy and which fundamentally sets Ag Energy apart from all other energy retailers.

The OEB has an important mandate under the ECPA to ensure consumer protection and the measures it has taken over the past three years have certainly enhanced protection for retail consumers. However, given the specific structure of consumer-owned co-operatives, the consumer protection concerns addressed by the ECPA really do not apply in the same way to such co-operatives. Moreover, in light of the important potential that such co-operatives play in ensuring greater consumer control over energy prices and the marketing of energy products, the OEB should encourage the growth of co-operatives in the natural gas and electricity markets because, over the long term, such co-operatives will help optimize consumers' energy costs consistent with their individual risk preferences and provide consumers with fair energy prices and direct accountability and transparency.

The current ECPA guidelines and regulations have proven disadvantageous to Ag Energy's low volume consumer membership base since the Co-operative has been unable to offer such consumers the benefits of co-operatively purchased natural gas and electricity. Because of the regulatory costs and complexity associated with compliance with the multiplicity of regulations and guidelines issued under the ECPA, Ag Energy has changed its business model so as not to provide energy services to low volume consumers. Ag Energy's withdrawal from this low volume consumer market has not only hindered the growth of the Co-operative but has forced consumers to procure their energy requirements solely from traditional marketers and retailers whose ultimate goal is to reward their shareholders, not their member consumers. We believe that the ECPA should provide incentives, not deterrents, to co-operative entities formed solely for the purpose of benefitting their consumer members.

For all of the reasons outlined above, we recommend that energy co-operatives be given an exemption from the regulations set out in the ECPA.

To prevent possible abuses of any exemptions for co-operatives under the ECPA, regulations could be established under the Act, and/or policies could be developed by the OEB, providing that for a co-operative to be exempt from certain provisions of the Act that co-operative must: (i) be incorporated under the *Co-operative Corporations Act* (Ontario) and in good standing under that Act; (ii) conduct a specified minimum percentage of its business with members, which the OEB might wish to set at a percentage higher than the 50% requirement set out under the *Co-operative Corporations Act*; (iii) have a capital structure and By-laws and/or Board policies which ensure that any surplus (profit) is primarily distributed to consumer members rather than

to investors; (iv) provide that a co-operative is eligible to enjoy specified exemptions under the ECPA only with respect to the low volume consumers who are members of that co-operative; and (v) further provide that if a co-operative does decide to market energy products to non-member low volume consumers, the co-operative would be subject to the full regulatory regime of the ECPA with respect to such non-members.

All energy marketing co-operatives should still be required to conduct their operations in accordance with fair business and marketing practices and to act transparently and in good faith in all their transactions.

Aggregation of Accounts Controlled by a Single Entity

In our submission to the Board on the ECPA review, we also asked the Board to consider allowing the aggregation of any and all accounts controlled by a single entity (including parent companies, subsidiaries, affiliates, and other related entities) to be used in calculating the volume threshold to determine whether or not the ECPA rules apply to the customer. We submit that if the aggregate volume of accounts for a given customer exceeds the volume threshold, the ECPA rules should not apply. The other situation that occurs is that a customer has one account that exceeds the volume threshold and has one or more additional accounts that do not exceed the volume threshold. If the customer is deemed to be sophisticated enough to enter into a high volume contract for one account without ECPA protection, then surely, they are sophisticated enough to enter into additional contracts for lower volume accounts without ECPA protection.

We recommend that the the aggregation of any and all accounts controlled by a single entity be used in calculating the volume threshold to determine whether or not the ECPA rules apply to the customer. This approach could be allowed with the following conditions:

- Apply to only non-residential customers or residential and business customer combined (i.e. farm house and business)
- All locations covered by same contract
- All terms and conditions are the same for all locations

Thank you for the opportunity to express our concerns and thoughts as it pertains to the Energy Consumer Protection Act. Should you have any further questions or need for clarification, please contact us.

Respectfully,

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