



PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC

January 13, 2015

PIAC FILE # 6445

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
Suite 2700
2300 Yonge Street
27th floor
Toronto, ON
M4P 1E4

VIA E-Mail
12 pages

Dear Ms. Walli:

**Re: Consultation on the Effectiveness of Part II of the
Energy Consumer Protection Act, 2010
Board File No.: EB-2014-0158
Written Comments of Vulnerable Energy Consumers Coalition (VECC)**

On behalf of the Vulnerable Energy Consumers Coalition (VECC) we have attached their comments with respect to the above-noted proceeding. We apologize for our delay in filing of same but this was due to computer difficulties.

Thank you.

Yours truly,

A handwritten signature in black ink, appearing to be 'Michael Janigan', written in a cursive style.

Michael Janigan
Counsel for VECC

EB-2014-0158

In the Ontario Energy Board Consultation on the Effectiveness of Part II of the *Energy Consumer Protection Act* (ECPA)

Introduction

The Vulnerable Energy Consumers Coalition (VECC) appreciates the opportunity afforded by this proceeding to examine the protections offered to the Ontario residential consumer of energy commodity provided by Energy Consumer Protection Act (ECPA) of Ontario. Since 2001, VECC has attempted to monitor the conduct of independent energy retailers in the marketplace, largely on the basis of anecdotal evidence, and media coverage of the issue. VECC's over-arching concern has been that the entire retail market offering energy to residential consumers was of little economic benefit both to them as well as other non-retailer stakeholders

However, we made no initial submissions herein because we were hopeful that more substantive evidence of the success or failure of retail marketing including the extent of consumer satisfaction might be forthcoming. While any precise measure of the effect of the ECPA on the operation of this market may be impossible, there have been informative results derived from the analysis done by Professor Dewees that make it possible to put forward some comments that may be substantiated by the same. We have accordingly revisited the original request for comments to attempt to provide assistance to the Board associated with the package of issues engaged by the review. (A summary of answers to questions posed by Appendix A follows this submission)

Background

Professor Dewees' materials give a good summary of the steps taken by regulation and legislation to meet the challenges of the restructured energy markets and the desire to introduce competition therein. The current declining number of participants obscures the rather wild start associated with same. In particular, the sign up of retail customers was part circus, and part chicanery. In proceedings held in the OEB in September of 1993 to deal with a number of issues of concern in the direct purchase industry, there was much discussion of some of the abuses

occurring at the consumer level. At that time, in testimony, Mr. John Hunter, Vice-President of Gas Supplies for Union Gas outlined some of the concerns which had arisen as a result of the same, and that had led, in part, to a letter to the Minister of Energy by the three presidents of the Ontario LDC's in 1992.

“We said, Mr. Minister, are you aware of what is happening now in terms of business practices? Are you aware that people are going up to doorsteps sometimes holding clipboards with "Union Gas" or Consumers Gas" on them, saying, I'm from the gas company here to sign you up for the rebate program.

Are you aware they are inflating savings markedly; they are misrepresenting the identity of themselves as salesmen? They are giving complete falsehoods, not only regarding how LDC prices are set but regarding those prices. They are using high-pressure sales tactics.

In some cases they are going with people who have refused to sign up and forging their signatures on the sales documents.

Are you aware of schools in Toronto turning out several hundred people over short periods of time to go out and do more of this type of activity?

Are you aware, for example, in Chatham, we had somebody who got around about a dozen houses before he hit a Union Gas employee stating that I'm here to check the safety regulator on your furnace. And having finished that, they would go up to the householder and say: In order to thank you for letting us do this, we would like to sign you up for your Union Gas rebate. And these people did not know that they were not signing a rebate, they were signing a five-to-ten year gas purchase property.

Are you aware of gas for God and gj's for Jesus? The tax schemes, where by instead of putting your money in the collection plate in church on Sunday, you sign up with a certain broker who is here represented, and instead the proceeds go to the Church and you get the tax receipt, or at least a share of the proceeds go to the church. This became known as gas for God or gj's for Jesus.

Are you aware, Mr. Minister, of balls for gas? This is the one with the five-pin bowling league, where if you signed up with this particular broker, you could get a discount on joining the bowling league.

Are you aware of the Canada Gas sales pitch which were prepared to file, which is frankly probably the most disgusting piece of door-to-door salesmanship I have ever seen, which is a sheet to coach the broker, the broker's agent on how to fleece the customer.”

Even more troubling were the occasions when the customer's deal with the gas retailer was too beneficial to the customer, and/or the retailer simply could not deliver the gas supply required to the LDC. In that circumstance, customers had to take default gas supply from the LDC at a considerably greater cost. And given the high degree of misrepresentation to obtain the customer's business, there was often a good chance the customers did not know they were dealing with an entity other than their LDC.

As the Dewees materials note, there has been an escalating series of prohibitions against the misconduct of retailers, most often directed to ensuring transparency in the making of any agreement for supply with the residential customer. In general, VECC agrees with the observation of the Dewees presentation that the ECPA Part II is among the more extensive energy protection regimes.¹ A gauge of effectiveness of its provisions presents a different measurement challenge where we must look at other observable measures and estimate accordingly.

OECD 2006 Report

The problem of assessment of consumer protection regimes has vexed more jurisdictions than Ontario. The OECD in its 2006 published research paper, “Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes” tried to devise indicia to determine whether particular regimes of consumer protection that achieved a high degree of compliance were cost effective. As a result, the study approached this problem by looking at the adverse consequences of a particular policy option compared to the benefits accruing to a market miscreant's flouting of the law, as well as the chance that the conduct will

¹ December 8, 2014 presentation, p.23

remain undiscovered.² A theoretical framework of deterrence was thus adopted which assumes that, in general, merchants comply with the law when the costs that they will incur by acting unlawfully, if detected, will exceed the benefits that will accrue to them from the unlawful act. The study then took into account the costs associated with using a particular policy option.

The OECD Report acknowledged that an exact quantitative analysis for each of these dimensions was impossible and for the most part the researchers had to take “an intuitive appraisal of the relative costs and benefits of different options, fortified by such data as could be made available”.³

The OECD Report identified five principal models of enforcement⁴:

- i.* Those relying on the criminal justice system for penalties.
- ii.* Those in which the administrative agencies use primarily the civil justice system to obtain sanctions and remedies.
- iii.* Those in which the administrative agencies have power themselves to impose financial penalties.
- iv.* Those relying primarily on consumer complaints to an Ombudsman.
- v.* Those relying primarily on self-regulatory arrangements and on the enforcement of private rights

There is obviously an inverse ratcheting up of remedies involving state involvement ascending from “v” above to “i”. The key question that the OECD report tried to answer is what is the relationship between the costs of ratcheting up the state involvement as compared to the benefits associated with compliance.⁵

Not surprisingly, because of differences in conditions, and consumer culture in individual countries, the OECD report can only give the circumstances where escalating enforcement remedies are effective. In particular, it notes:

² “ Best Practices for Consumer Policy : Report on the Effectiveness of Enforcement Regimes” OECD, Directorate of Science and Technology, 2006, p.11

³ Ibid at p.12

⁴ Ibid at p 12.

⁵ The study proposes a formula where B , the benefits of compliance should be greater than C_a (the administrative costs of compliance) + C_e (the costs of mistakes in enforcement) p.47

1. Public authority intervention is needed and cost effective where there is not a significant culture of consumer activism and complaints
2. The consumer protection agencies themselves should have discretion with respect to the imposition of financial penalties
3. Criminal proceedings appropriate only in morally repugnant situations
4. Other remedies such as recovery of administrative costs and “naming and shaming” can be considered.
5. Private rights of enforcement may be approved and assisted by administrative findings.⁶

While in general terms, the ECPA appears to line up favourably with most of the OECD report’s observations on mechanisms required in a consumer culture that is largely not activist in nature (energy), there may be less of a fit with overall theme of cost effectiveness. As the OECD appears to emphasize the justification of enforcement expenditures by comparison to benefits derived, such an approach is less harmonious with the actual circumstances of retail marketing of energy in Ontario. A central operating premise of consumer protection is that the market activity in question is commerce that is broadly in the public interest. The MacDonald Commission Electricity that gave rise to the entrance of competition in commodity sales of energy in the province did not question the potential for greater efficiencies through competition. The analytical approach adopted by Professor Dewees and its findings belie the idea that the ECPA is protecting commerce in the public interest by shielding consumers from the abuses associated with suspect retailing practices. Rather, it seems to be sanitizing a largely non-beneficial service for residential consumers.

Dr. Dewees Approach

Dr. Dewees adopted four approaches to consider the effectiveness of the consumer protection. These were (paraphrasing):

1. Reduction in marketplace misconduct
2. Increase in compliance with marketplace requirements
3. Customer Satisfaction
4. Financial benefits to retail consumers

⁶ Ibid. p.59

Each of the findings from these approaches will be discussed below.

Reductions in Marketplace Misconduct

While there seems to be a reduction in complaints of misconduct made to the OEB since the onset of the ECPA, on the other hand, there has been a substantial drop in retail customers of gas and electricity (electricity is down 50% and gas down 60% in the low volume market)⁷. Moreover in a complaint driven system, it appears that one third of current and former contract holders were not familiar with retail contracts and 30% of current contract holders were unaware they had a contract. There can be little confidence in improvement in conduct based on a simple decline in complaints.

Increase in Compliance with Marketplace Requirements

While the data may also indicate recurring doorstep sales problems, the verification calls terminated by the OEB script are greater than 30% showing some gains for transparency envisioned in the legislation. There continue to be the appearance of misrepresentations primarily at the doorstep that show up in consumer allegations.

Customer Satisfaction

It is difficult to find anything favourable to the retail business in the metrics associated with customer satisfaction used in the Dewees materials. Aside from the dramatic decreases in retail customers of energy overall, 17% of contracts were cancelled within 10 days in 2013 and less than 40% of signed contracts flow commodity as per 2012 and 2013 results.⁸ Contract renewals in electricity and natural gas are below 50%.⁹ A reasonable supposition from these figures is that information is being received by residential customers that is contrary to the reality of the retail experience. This is also borne out by the fact that over 60% of former contract holders for energy were dissatisfied primarily as a result of the cost of the contract.¹⁰ While the decline in the number of retail customers shows a cause and

⁷ Dewees, p.11

⁸ Dewees, p.16

⁹ Dewees, p.17

¹⁰ Dewees p. 30

effect, there must still be some contrary source of favourable news about this product that is percolating through to new or renewed contract holders.

Financial Benefits

Dr. Dewees' research results are confirmatory as to the lack of benefits obtained by retail residential contract holders. For electricity the contract price was well above RPP energy cost in every month –some 72% over five years. The contract was still a bad deal compared to the prices paid by a peak user on RPP by 32%¹¹.

For natural gas, a five year contract priced at Energyshop was 180% more than the default price available at the LDC, while a three year contract in the same period would have cost a customer between 90% and 140% more than the default price.

An analysis of corollary benefits or competitive efficiencies gleaned by the presence of retailers in the market is beyond the scope of this proceeding and these submissions. It would seem that given the nature of the commodity markets in both natural gas and electricity that the benefits are likely small. Similarly, while residential customers appreciate and frequently pay for energy through bills calculated and smoothed over a twelve month equal-billing basis, the price to be paid for fixed price commodity under these contracts appears to be exorbitant.

Effectiveness of the ECPA

The OECD report referenced herein emphasizes clearly the need to match deterrent benefits associated with the regulation of marketplace conduct with the cost of so doing. As we have noted, the underlying assumption is that the activity being regulated is within the public interest of commerce, or would be so but for the misconduct of some stakeholders. Without the backdrop of the history of the development of competitive energy offerings, this looks like an elaborate administrative regime to sanitize the delivery of a product that doesn't work. The research shows that while a majority of current retail customers enter these contracts to save money, and think they are saving money, the reality is very much different.¹² There are millions of dollars being invested in the purchasing of commodity and the administrative regulation of the marketplace for the financial

¹¹ Dewees, p. 35

¹² Dewees p. 30

benefit of a handful of stakeholders. While this proceeding is not charged with the restructuring of retail competition, the results of the same should very much guide the recommendations flowing from the same.

VECC Recommendations

1. Door to Door Sales

Door to Door Sales should be prohibited. These sales have been long recognized to bring with it an additional degree of pressure and the possibility of misinformation. While some of this has been cured by the verification process, VECC does not understand why the plain facts about retail energy sales should have to be embellished. It is clear that changing your energy commodity supplier is a process that involves more study and information than can be conveyed by a doorstep pitch by canvassers- usually young recruits trained for sales without experience in the industry. The current system feeds the phenomenon of unreasonable expectations of contract holders when they are aware they have a contract.

2. Advertising Material

All advertising material should be approved by the Board. Given the track record, it is only reasonable that pre approval of public communication is warranted to prevent any misrepresentation or misunderstanding.

3. Financial Results for Customers

The retailer's record in delivering savings for customers should be included in any advertising or promotional material. A minimum of five years of history should be displayed or the industry's performance during that period in the case of newcomers. As well, retailers should periodically plainly show what the customer would have paid on RPP or by using the default natural gas supplier.

4. Sub-metered Tenants

Sub-metered tenants should not be responsible for commodity energy bills in excess of the RPP or default rate. A mandatory true-up for such captured customers should take place to ensure that these tenants are not paying for unwise choices they didn't make.

Conclusion

Any judgments on the effectiveness of the ECPA must take into account that it encompasses a set of provisions that are regulating businesses that are not delivering the expected goods for consumers. Tinkering with the rules and penalties associated with retailing practices may lessen some of the impact of misinformation or misunderstanding, but, in VECC's view, more purposeful action is necessary. The ECPA appears to have been successful in reducing the blatant misrepresentation and pressure tactics formerly in vogue. Its provisions must go further to prevent exploitation in a game where consumers cannot win.

Appendix A questions

1. What are the hallmarks of effective consumer protection legislation against which the ECPA should be assessed?

The primary hallmark is cost effective intervention that levels the playing field between seller and buyer and in so doing reduces or eliminates real and potential abuses.

2. Is the ECPA providing an appropriate level of protection for Ontario's low-volume energy consumers? Please explain why.

The ECPA's protections are extensive but are geared for remedial intervention to treat aspects of abuse of the consumer in the making or renewal of the contract. That includes misrepresentation of the parties involved and the overall competitiveness of the product. The retail market's current protection problem is that it is not beneficial for consumers

3. What specific aspects of the ECPA are working well in terms of consumer protection? Please explain why and in what way you believe they are working well.

It would appear that the verification of contracts is functioning effectively to counter a good proportion of either misrepresentation or misunderstanding at the doorstep.

4. What specific aspects of the ECPA are not working well in terms of consumer protection? Please explain why and in what way you believe they are not working well.

Basic elements of the contract such as identity of the parties, the fact of the contract and the financial results of the contract are clearly obscure to a far too high proportion of customers.

5. What changes do you think should be made to the ECPA at this time? For each change that is proposed, please identify the risks or benefits of making or not making the change at this time.

VECC's recommendations are set out above. They include, a ban on door-to-door sales, OEB approval of advertising, disclosure of previous contract results and protection of sub-metered tenants. These recommendations address the conclusion that the benefits of the retail market are not being shared with its customers.

6. What are the key aspects of the Ontario retail energy markets that the Board should consider in assessing how effective the ECPA has been in protecting the interests of Ontario's low volume energy consumers and in considering options for change? Please explain why these aspects are important considerations for the Board.

Professor Dewees' four point approach is sufficient to gauge the position of the low volume participant in the retail market and the effectiveness of the ECPA in ameliorating the same.

7. Are there lessons to be learned from experience with consumer protection in retail energy markets in other jurisdictions that can be applied to Ontario?

8. Are there lessons to be learned from experience with consumer protection in other markets that can be applied to the retail energy markets in Ontario?

Questions 7 and 8 are good ones but it would appear that while the ECPA has extensive curative provisions that are unable to bring about the sought after financial benefits of competition initially expected by the operation of the retail market.

9. What other questions should the Board consider including as points for discussion at the stakeholder forum?

Is this economic activity worth the investment of millions of dollars in customer money in excess of standard or default energy pricing offered by the utility as well as the millions of dollars invested in its policing? Are there other ways to stop gouging in an inefficient or failed market?