

Utility Reconnection Services: A New Threat to Vulnerable Consumers?

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October 2002

With Funding from Industry Canada

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The Public Interest Advocacy Centre
(PIAC)
ONE Nicholas Street
Ottawa, ON
K1N 7B7

Canadian Cataloguing and Publication Data

Lott, Susan

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ISBN 1-895060-56-7

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Executive Summary

This report examines the current status of utility deregulation or restructuring in the energy and telecommunications sectors in Canada and the U.S. and its impact upon low-income consumers. It focuses on three major utility sectors that have the greatest impact on residential, low-income consumers: electricity, natural gas and telephone services. Specifically, the report examines to what extent reconnection services, or services targeted specifically to consumers who have lost service or have been unable to maintain utility service as a result of deregulation or restructuring, have emerged in Canada and the U.S.

The key characteristic of restructuring or deregulation is that investment and pricing decision-making are increasingly guided by market forces and competition. To enable this to occur, the core functions of the utility – the generation, transmission and distribution functions are separated or unbundled and a portion of these functions is subject to competition. The obvious and most significant impact upon the residential consumer is that their source of supply may change. It is no longer just the incumbent utility providing the service. The result has been the entry of reconnection companies into utility markets.

Utility restructuring in Canada has varied in its development and impact between utility sectors. Deregulation in the natural gas industry has been under way since the 1980s. There is some evidence that market segmentation has resulted as a result of restructuring in the gas industry. Market segmentation means that there is a differing impact of prices of natural gas upon different sectors of consumers, with higher prices for residential consumers than for other consumers, such as commercial or industrial consumers.

Deregulation in the electricity sector in Canada, has been a very recent development. It has mainly taken place in Alberta and Ontario. In those provinces, there is already some limited evidence of price increases for residential customers. In the telephone industry, the federal government has jurisdiction and has set out the framework for deregulation through its amendments to federal legislation, which took place in 1993. The major effect of deregulation of the telephone industry has been reductions in long distance rates but increases in local phone service. There is also some limited evidence of telephone reconnection services being offered in Canada.

A significant part of the report examines utility restructuring and its effects in some specific jurisdictions in the U.S. This emphasis comes because utility deregulation in certain U.S. jurisdictions has been significant in its scope and depth. As a result, there is more evidence of market segmentation and growth of reconnection services targeting vulnerable consumers. The report examines some of the regulatory responses to telephone reconnection services and the impact of market segmentation in the energy

sector creating the phenomenon of Providers of Last Resort Services.

With this background, the report offers some initial assessment of the overall impact of utility restructuring on vulnerable consumers in Canada and the U.S. Utility price increases have a greater impact on vulnerable consumers because a greater proportion of their income is spent on utilities.

The report assesses how the U.S. experience of deregulation may be relevant for Canada. It suggests that there may be a significant impact of Canada's increasing exports into U.S. energy markets. There may be strong pressure on Canada to conform to the U.S. deregulatory environment. The examination of the effect of utility deregulation in the U.S. also points up very clearly the information deficit in this area in Canada. We have very few government and non-governmental resources dedicated to tracking deregulation and its impact in Canada.

Finally, the report focuses on Canada's existing legal/legislative framework to protect vulnerable consumers. It looks briefly at the federal regulatory role in telecommunications and in energy and the provincial role, using Ontario as an example. It also looks at consumer protection legislation in Ontario and its applicability and the status of the common law notion of 'duty to serve' under deregulation. The report makes some specific recommendations concerning measures to assess status of restructuring, to address effects of restructuring on vulnerable consumers, and recommendations concerning utility reconnection services in the telephone and energy sectors.

Introduction

Utility reconnection services have emerged as a result of the general trend of utility restructuring that has taken place in Canada and the United States over the last twenty years. Restructuring is understood as regulatory reform at the federal or state/provincial/territorial level, which affects the structure and operation of an individual utility company or the industry as a whole.

Restructuring has affected a range of utility industries such as telephone service, natural gas and electricity. The terms restructuring and deregulation have been used interchangeably. The key characteristic of these concepts when applied to utilities is that investment and pricing decision-making is increasingly guided by market forces and competition. To enable this to occur, there is a separation of the generation, transmission and distribution functions of a utility, also called unbundling.

One of the effects of deregulation that is usually present in the energy industry is that often the transmission and distribution portion of the service remains price regulated but the generation service or supply is subject to competition with an unregulated price.¹ Similarly, in telecommunications, the core component of telephony, the local distribution service, has largely remained price regulated.

One of the obvious effects of restructuring has been a change or upheaval in the source of supply of utilities to consumers, who, prior to restructuring, traditionally relied on the incumbent utility to provide service.

Utility reconnection companies have entered the telephone market offering services to more vulnerable consumers, consumers who have lost services from the large or incumbent utility due to nonpayment, arrears or an inability to access service due to poor credit history.

In the energy sector, the related concept of default or provider of last resort service ("POLRs") have emerged who serves a similar market - the residential consumer who has a poor credit or payment history.

Important public policy issues and issues of equity have arisen with respect to low-income consumers as a result of these parallel developments of reconnection services and default services under utility restructuring. Telephone reconnection companies have emerged in some states and offer services at prices that are much higher than the legislated standard service phone rates, due to the 'captured' market they serve.

¹ US Energy Information Administration, *Natural Gas Monthly* (May 1997) at vii; National Consumer Law Centre, *Access to Utility Service* (2d ed. 2001) at 3; T.J. Brennan, *A Shock to the System: Restructuring America's Electricity Industry* (Washington: Resources for the Future, 1996) at 6.

In the energy field (specifically, electricity, and natural gas) default service providers or POLRs in some U.S. jurisdictions serve this 'captured' market of vulnerable consumers. Not only do they charge higher prices for utility services than the non-default service providers' do, but many are uniquely allowed to disconnect consumers for nonpayment. All of these activities have had a significantly negative impact on low-income consumers.

This report examines to what extent reconnection or default services targeting more vulnerable consumers have emerged in Canada and the United States, the utility sectors and specific jurisdictions in which they are most prevalent, and their overall impact on vulnerable consumers. It also assesses existing legal and legislative mechanisms to protect low-income consumers from the effects of restructuring, their effectiveness, and what further mechanisms need to be put in place.

Research Methodology of This Report

This report is a combination of oral interviews, Internet and written research. Given the relatively recent and developing nature of specific sectors of utility restructuring in Canada and the United States, systematic analysis of its impact on consumers and on vulnerable consumers in particular, is still in its early stages and very much a moving target. As a result, this research reflects the state of deregulation only at a particular point in time.

Utility Restructuring in Canada

Deregulation or restructuring of utilities in Canada has varied in its development and impact among the different utility sectors. Deregulation in the natural gas industry has been under way since mid-1980, while restructuring in the electricity industry is a relatively recent development. Restructuring initiatives have also varied greatly among provinces and territories, with Ontario and Alberta, to date the only jurisdictions to take the most significant steps toward deregulation/restructuring in the energy sector.

Restructuring in the telecommunications industry is a federal initiative and falls within federal jurisdiction, having been largely directed by the Canadian Radio-television and Telecommunications Commission ("CRTC"), the independent federal agency responsible for regulation and supervision of telecommunications and broadcasting services in Canada. The restructuring process within telecommunications began in the late 1970's, with major restructuring initiatives occurring in the early 1990's.

Natural Gas Industry

A 1998 study by PIAC found that although energy prices have on average decreased for Canadian consumers following deregulation of the natural gas industry, the more important statistic is the impact upon different segments of consumers.² Market segmentation is a by-product of deregulation. It refers to differing price impacts on differing classes of consumers. It can occur under utility deregulation due to the differing ability of small, lower income consumers (i.e. residential consumers) to respond to changes in utility prices versus larger, higher income consumers (such as industrial consumers).

Residential consumers are described as having inelastic demand for utilities. They are highly dependent on such services and are therefore less willing or able to reduce demand if the price increases. Industrial consumers have more elastic demand for utility services, usually having the ability to choose between utility options. As well, a large customer may arrange its utility needs to coincide with the lowest cost of service.

The result is that utilities may charge higher unit prices to consumers with inelastic demand than those with elastic demand, producing market segmentation.³ The PIAC study found that market segmentation has resulted in differing benefits from natural gas deregulation, with greater cost reductions between 1985 and 1996 for industrial users than for residential users.⁴

Electricity Industry

Restructuring initiatives in the electricity industry are a very recent phenomenon and have taken place in comparatively few jurisdictions, making it difficult to generalize about price impact on various classes of consumers. However, a 2001 PIAC study found that in June 2000, Alberta experienced the highest hydro rates since initiating deregulation in the electricity sector in 1996. The Alberta government was forced to set up a rebate program for consumers to assist them with rising electricity costs.⁵

Restructuring of the electricity industry was initiated in Ontario in 1999, but the electricity market was only opened up to private retail competition for the supply of commodity on May 1st, 2002.

This very recent development clearly makes it difficult to generalize about price impact upon consumers overall, much less upon different classes of consumers. However, an independent study commissioned

² H. Reid, *The Deregulation of the Canadian Natural Gas Market: A Consumer Progress Report* (Ottawa: Public Interest Advocacy Centre, 1998) at 43.

³ *Access to Utility Service*, *supra* note 1 at 14.

⁴ H. Reid, *supra* note 2 at 44.

⁵ G. Robertson, "Power Shift: A Look Back One Year after the Province Plugged into Electricity Deregulation" *Calgary Herald* (1 September 2001) C1.

by the Ontario government in 2000 (and only released to a national newspaper following a freedom of information request) suggests that electricity prices under a competitive market are likely to rise and be much more volatile than they were prior to deregulation. The report studied power price changes in areas of the United States that will affect Ontario's future electricity prices, since they are areas of transmission line connection. The study suggests that rates are likely to be driven up as Ontario electricity producers sell more power to the United States, where prices have historically been higher. There is further potential for price increases if there is less energy available for the domestic market.⁶

Telephone Industry

Canada's telecommunications industry, once characterized as a regulated monopoly, has gradually undergone deregulation over the last 20 years. Deregulation has occurred through a combination of federal government policy and regulatory decisions by the CRTC.

Deregulation of telecommunications accelerated with the opening up of the market for public long distance voice services to competition in 1992. This decision was consistent with the policy objectives of the *Telecommunications Act*⁷, the legislation introduced by the government in 1992 that was passed into law in 1993. The Act provided the legislative framework for future initiatives to introduce competition in the telecommunications market. In fact, the Act specifically states one of its objectives is "to foster increased reliance on market forces..."⁸

CRTC decisions deregulating long distance toll services and opening up services such as payphones to competition soon followed. In 1997 the CRTC announced the regulatory framework for competition in local phone service. Until sufficient competition developed for local services, the incumbent local telephone company's rates were subject to a price cap.

The overall impact of these regulatory changes over the past few years has been to effect reductions in long distance rates but increases in rates for local telephone service. PIAC has found that residential customers are paying on average twice what they were paying in 1992 for basic local phone service. Residential customers must also pay for services that were included in basic rates prior to restructuring, such as directory assistance and inside wire repair.⁹

Despite decreases to long distance rates, most customers are paying larger bills. Not surprisingly, increases in local phone rates have resulted in affordability problems for low-income consumers. Surveys show that 68% of those who don't subscribe to local phone service in Canada cite affordability as the

⁶ M. Mittelstaedt, "Power Prices could Skyrocket" *The Globe and Mail* (14 May 2002) A1.

⁷ *Telecommunications Act*, R.S. 1993, c. 38.

⁸ *Ibid.* s.7(f).

⁹ Public Interest Advocacy Centre, News Release, "Consumers Cheer Cap on Local Phone Rates" (30

reason and that the vast majority of households without phones also have incomes below the Statistics Canada Low-Income Cut Off.¹⁰

Utility Reconnection Services in Canada

There is not yet any substantial evidence of a widespread practice by utility resellers offering higher fees for reconnection services in the energy field in Canada. This may be due to the relatively recent nature of restructuring and open competition in the electricity and natural gas sectors and its development in only a limited number of jurisdictions in Canada. This restructuring is too early in its development and too limited yet in its scope for evidence of the market segmentation that may result from restructuring in the energy sectors.

There is some limited evidence of activity by Canadian telephone reconnection services targeting disconnected customers. Telephone reconnection companies, who specifically credit-challenged customers, have very recently begun to advertise on television and on billboards in some Canadian cities. Reconnection companies offer prepaid local phone service to customers who cannot afford the large security deposits required by their previous telephone company (usually the incumbent or former telephone monopoly) or who are in payment arrears and have therefore lost service. These companies, known as resellers, do not own or operate transmission facilities but rather lease them from Canadian telecommunications common carriers and then resell or lease these telecommunications services on a commercial basis. Resellers are not subject to direct regulation by the *Telecommunications Act*. Only Canadian telecommunications common carriers (those who own or operate a transmission facility) are directly regulated under the Act.¹¹

Agencies who assist low-income clients in the Ottawa area can provide limited anecdotal evidence of challenges faced by their clients in obtaining local phone service. Entraide budgetaire, a financial counseling service, indicated that some clients had budget difficulties as a result of using *Canada Reconnect*, a local call service that charges a flat monthly fee of \$74.95 and a reconnection fee which ranges from \$59 to \$19, depending upon the province.¹² Housing Help in Ottawa indicated that in its experience, clients who are unable to maintain line services due to poor credit histories seem to rely instead on cell phone services. These companies charge high rates for local phone service.¹³

May 2002).

¹⁰ P. Lawson, *Eliminating Phonelessness in Canada: Possible Approaches*, 2d ed. (Ottawa: Public Interest Advocacy Centre, 2002) at 5.

¹¹ Ottawa, Industry Canada, *Telecommunications Service in Canada: An Industry Overview, 1999-2000* (Ottawa: Industry Canada, 2001) at 6-3.

¹² March 18, 2002, telephone interviews with H el ene M enard of Entraide Budgetaire and Bob McDonald, Housing Help.

¹³ For example, Telus charges \$25 for an account set-up, monthly calling rates ranging from \$20-\$150, a

Utility Restructuring in the United States

The targeting of vulnerable consumers by utility reconnection services appears to be a much more prevalent practice in the United States than in Canada. The explanation likely lies in the earlier development of utility restructuring in a number of jurisdictions in the United States compared with Canada and the specific way in which deregulation has been legislatively structured or decided in some jurisdictions in the United States, specifically, the states of Texas and Georgia.

An examination of utility deregulation in these two states is beneficial because it provides a useful comparison to the way utility deregulation has been structured in Canada. It also provides some negative instruction for Canadian jurisdictions embarking on deregulation in terms of impacts on certain segments of residential consumers.

U.S. utility restructuring has taken place in telephone services as well as electricity and natural gas services, but seems to vary in its impact, partly due to differences in state practices in dealing with utility restructuring overall and the presence or absence of state legislation protecting vulnerable consumers.

The following is based on written or internet-based research, as well as contact with a number of consumer or advocacy organizations that focus on the impact of utility costs on low-income consumers. These contacts provided information directly and/or provided helpful referrals to print resources. The following three organizations are an important source for U.S. consumer-based utility information and advocacy:

The National Consumer Law Centre¹⁴ ("NCLC") is a national legal organization, which advocates for low-income consumer justice. It investigates issues related to utilities and vulnerable consumers, including utility terminations.

The Public Utility Law Project¹⁵ ("PULP") is a New York based legal centre, which represents low-income and rural consumers in utility, telecommunications and energy, related matters.

monthly system licensing charge of \$6.95, optional add-ons for long-distance and local evening and weekend calling (\$25/mth) plus the cost of the handset [source: telusmobility.com]. Another cellular company, Fido, has monthly calling rates ranging from \$20-\$100, a system access fee of \$6.95 per month, and similar optional fees for evening and weekend calling (\$25/mth.) and long distance calling (U.S. - \$15/mth.; international - \$5/mth) [source: fido.ca].

¹⁴ Online at: <http://www.consumerlaw.org/>

¹⁵ Online at: <http://www.pulp.tc/>

The Consumer's Union¹⁶ is a federal independent nonprofit consumer testing and information organization, which also does legal advocacy on behalf of consumers from its regional offices.

Telephone Reconnection Services

The state of New York, as a result of a billing and collection legal case, separated local phone service from long distance. Local phone service cannot be disconnected for non-payment of toll charges. Partial payments are credited *first* towards local service. As a result, fewer customers lose local service and when terminated, the cost of reconnecting is less.¹⁷

There are also provisions allowing a terminated customer to regain local service through a "deferred payment agreement". Low-income customers may also be eligible for the "Link-Up" program, which subsidizes the cost of new phone service, and/or the "Lifeline" program, which subsidizes the cost of basic local phone service. These programs, which are administered by the Federal Communications Commission ("FCC") in conjunction with state and local telephone companies, have protected consumers from telephone disconnection of basic local service and have therefore discouraged the proliferation of telephone reconnection companies.¹⁸

Despite the presence of these programs, prepaid dial tone providers have been active in some jurisdictions in the Bell South region, in particular, Texas. The principal or most aggressive companies providing telephone reconnection services are Comm South, Choctaw (owned by Vartec), NOW Communications and Reconex.¹⁹

Some jurisdictions such as Ohio and Colorado have responded aggressively to keep these providers out of the market. A recent (March 4, 2002) Colorado Supreme Court decision concerning one of these providers, NOW Communications affirmed that state's authority over basic telephone rates and disallowed rates set by a prepaid dial tone provider.

In *Colorado Office of Consumer Counsel v. Public Utilities Commission of the State of Colorado*²⁰ the Colorado Supreme Court, in a unanimous decision, overturned a district court and a Public Utilities Commission decision by stating that the rates offered by this company were subject to Colorado's statutory cap on rates.

¹⁶ Online at: <http://www.consumer.org/>

¹⁷ Information from Gerry Norlander, Executive Director, PULP (email March 5, 2002).

¹⁸ For detailed discussions of these programs see P. Lawson, *supra* note 10 at 11-19.

¹⁹ Information provided by Dian Callaghan, Chair of the Consumer Protection Committee of the National Association of State Utility Consumer Advocates ("NASUCA"), (email, March 5, 2002).

²⁰ *Colorado Office of Consumer Counsel v. Public Utilities Commission of the State of Colorado*, 00SA233 (Colorado Supreme Court, March 4, 2002.)

NOW Communications provided a residential basic local telephone exchange service, with limits on long distance calling, for a fee of \$45 for installation and \$36.50 as a monthly fee. The NOW plan was marketed to customers who were unable to obtain residential phone service from the incumbent local exchange provider (Qwest), due to credit problems or unemployment: “In contrast to Qwest...NOW Plan customers do not undergo a credit check or need to provide proof of employment.” Colorado’s statutory rate cap for residential telephone service is \$14.74 per month.

The issue before the Court was whether the NOW plan was residential basic local exchange service such that it was subject to the rate cap. The PUC argued that the toll restriction on long-distance calls and the bill payment option giving customers the ability to pay bills at service centres, moved the NOW plan beyond the definition of basic service to the provision of bundled services (defined simply as “services above and beyond the basic service package”). This would then allow the provider to recover costs associated with additional features under the Colorado Telecommunications Rate Cap Statute.

The Court held that these other services were non-telecommunications features or services and that they did not therefore change the nature of the basic service:

Thus, we conclude that the NOW Plan is residential basic local telecommunications service with a few extra items of business convenience for NOW and its customers. As such, NOW cannot circumvent the rate cap by labeling this product as bundled service. Accordingly, we hold that the NOW Plan is subject to the statutory rate cap for residential telephone exchange service.²¹

The case was remanded with directions to return it to the PUC for proceedings consistent with the Court’s opinion.

Electricity Restructuring and POLRs

By March 2002, twenty-four states plus the District of Columbia had enacted enabling legislation or issued a regulatory order to implement retail access. In these states the local distribution company continues to provide transmission and distribution services; retail access allows customers to choose their own supplier of energy services. Each state’s retail access is very much a function of that state’s legislative mandate or the nature of the regulatory order issued by the state utility commission.²²

The emergence of Default Service or Provider of Last Resort Service (“POLR”) for residential and small commercial customers is a direct result of the move to retail electric competition in these jurisdictions and the resulting market segmentation caused by deregulation.

Examining the emergence of POLRs is important because in some states such as Texas and Georgia,

²¹ *Ibid.* at 6.

²² U.S. Government, Department of Energy, Energy Information Administration <http://www.eia.doe.gov/>

they have had an inequitable and punitive impact on vulnerable consumers.

Recent research by Barbara Alexander²³ has documented the emergence of Default Providers or POLRs in certain jurisdictions. Alexander focused her initial analysis²⁴ on states that have taken recent steps to implement the policy decisions in their electric restructuring legislation: California, Pennsylvania, Massachusetts, Maine, New York, Connecticut, Nevada, Texas and Ohio.

Default service is defined as service made available to any residential customer: who chooses *not* to choose competitive electric service, who is unable to obtain competitive electric service, whose service has been cancelled or whose supplier is unable to provide service. Every state that has adopted electric restructuring has provided for this type of default service, without which, such customers would be physically disconnected from the distribution system.

Default service is also viewed as a regulated service, even if priced pursuant to the market, because its price, terms and conditions are subject to regulation by the state utility commission. In most states the price of the service is linked to rate decreases or price caps required by the restructuring legislation or as the result of a restructuring decision, perceived as the “price” for the move to retail competition.

Alexander found that default service has been provided mainly by the incumbent utility and that the utility is responsible for obtaining the generation service from its own generating facilities or through contracts in the wholesale market. Only in California and New York were the utilities required to provide this service by obtaining spot market power from the wholesale market.

Alexander also found that at that date (April 2001) most states had not isolated or segregated low-income or “payment troubled” customers compared to other residential customers:

As a result, the cost to serve, bill, collect and interact with payment troubled customers has been integrated into the rates charged for all residential customers. At least in the short run, the concern of many low income advocates that market segmentation would result in higher priced electric service for certain residential customers has not occurred...On the contrary, most states have significantly expanded universal service programs and targeted bill payment assistance and energy conservation/weatherization programs to low income customers.²⁵

The author noted that as long as there are a significant number of residential customers receiving the default service, the higher costs associated with serving customers with low incomes or poor payment histories will be spread out among all residential customers. However, if the size of the default pool

²³ The research is available through the National Centre for Appropriate Technology, (“NCAT”) online at: <http://www.ncat.org/>

²⁴ B. Alexander, “Default Service: Can Residential and Low Income Customers be Protected when the Experiment Goes Awry?” (April 2001).

diminishes to those who are unable to obtain service in the competitive market, the ability to create reasonably priced default service for these customers also diminishes.²⁶

The existence of legislative protections on rates during the transitional period in most states as well as the lack of development of a vigorous competitive market at that point, meant that the threat was not yet apparent.

Texas

In contrast to other jurisdictions, Alexander noted that Texas' restructuring model created the potential for very real problems with respect to electricity rates for vulnerable consumers. Under the Texas restructuring model, customers obtain electricity service from "retail electricity providers" or REPs. As of January 1, 2001, all customers were switched to the affiliate REP of their local electric utility or select an alternative REP. Thus the affiliate REP provides the default service. The REPs will have a direct relationship with customers and will obtain transmission and distribution services on a wholesale basis from the former public utilities. Customers transferred to the affiliate REP enter the competitive market, but at a regulated rate, called "The Price to Beat", in effect until 2007 or until 40% of the residential load served by the former utility is being served by a non-affiliate REP.²⁷

Customers who are terminated by the REP for failure to pay or maintain service conditions will be automatically transferred to the POLR service, which will provide service to all customers who, cannot maintain service in the competitive market by the end of the transition period.

It is not clear how the POLR rate will differ from the Price to Beat, because the bids for the service had not yet been made public. In the author's view, the POLR price will be ultimately be based on the development of the electricity market and will likely be higher than the Price to Beat or market rate:

...the POLR service will eventually serve a pool of customers who will not be able to maintain service from a REP or who has been refused service by a REP. This is likely to result in a service that will be somewhat higher than market rates or the Price to Beat. No other state has created a default service approach that will isolate payment troubled customers in such a fashion, although the ultimate impact of such an approach will be masked in the early years of the competition program due to the ability of customers to enter and leave the Price to Beat service.²⁸

In October 2001, Alexander provided an update to her report, noting that developments which had occurred with respect to default service in California, Massachusetts, New York, Pennsylvania and Texas suggested "serious concerns for residential customers in general and low-income customers in particular".²⁹

²⁵ *Ibid.* at 5.

²⁶ *Ibid.*

²⁷ *Ibid.* at 26.

²⁸ *Ibid.* at 27.

²⁹ B. Alexander, "Default Service: Can Residential and Low Income Customers be Protected when the

She concluded from the evidence, that low-income customers are much more at risk of paying higher rates in a system that adopts the Texas POLR model. This approach does not link this smaller group of customers who drop out of the competitive market due to their credit problems or inability to pay, with the larger group of residential customers who simply do not shop for electricity in the competitive market. The result is that POLR customers will pay higher rates due to the higher costs to respond to the customer service and payment needs of this smaller group of residential customers.

Under the restructuring legislation, the Texas PUC ruled that a REP, including an affiliated REP, cannot disconnect customers for nonpayment, but they can cancel the contract, thus triggering a transfer of these customers to the POLR. They also ruled that a POLR could disconnect a customer for nonpayment.

Alexander found that rates established by the PUC for the POLR customers when compared to those established for the REP customers, were significantly higher:

As a result, the POLR will charge an average of \$164 and \$134, respectively, for a customer using 1,000 kWh for POLR service. However, a residential customer of Reliant HL & P [an affiliated REP] paid out \$110 for 1,000 kWh in July 2001, resulting in a 50% rate increase for an customer who must use POLR service because the REP has cancelled the contract or stopped providing service for any reason.³⁰

In addition, Alexander found that the contracts with the POLRs contained additional fees and charges such as a \$12 account initiation fee and requirements for deposits or prepayments for service that must be paid within 10 days of initiating service, for customers with poor or no credit history.

Consumer organizations are concerned that the REPs, including the affiliated REP, will cancel contracts with much higher frequency in order to get rid of credit risky and payment troubled customers and to ensure that they will still make a profit even under the Price to Beat rates:

Consumer advocates argue that the affiliated REP or any REP will have no incentive to retain customers and work with them to avoid disconnection service when there is no risk to the REP by canceling the customer's contract and transferring the payment problem and the increased collection costs associated with such customers to the POLR. Will payment troubled customers be able to obtain lower priced service from alternative REPs or will the electric version of the "phone sharks" appear that promise payment troubled customers a lower rate than POLR, but a much higher rate than the Price to Beat service?³¹

The commission indicated that it would be reviewing the POLR rule in early 2002.

Experiment Goes Awry? An Update to the April 2001 Report" (October 2001).

³⁰ *Ibid.* at 8.

³¹ *Ibid.*

The Consumers Union Southwest Regional Office in Texas corroborated that the POLR issues raised by Alexander's analysis are still present in Texas and that the separation of the POLR from the default provider has been the source of the problem. Their position is that the default provider should also be the POLR, so that the price risk is spread widely and the price for POLR would not have to be as high. The PUC solicited bids on the POLR service and the prices that came back and were approved, were very high.³²

In March 2002, one of the incumbent utilities began switching customers who hadn't paid their bills, to the state-designated POLR. One of the POLRs indicated that its customers would be charged a monthly rate, which is higher than the incumbent utility and will require a deposit equal to two months' average bills or one-sixth of an annual charge. In response, consumer advocates pointed out the illogic of expecting a customer who is unable to meet his/her monthly bill to be able to pay a two months' deposit.³³

The process described by Alexander concerning cancellation of contracts by the REPS was also confirmed by the Consumers Union. The REPs, including the affiliate REP, will terminate a contract when a customer gets behind on their bill and send the customer to the POLR. The POLR asks for a sizeable deposit, based on its high prices, and eventually disconnects service when payment problems inevitably arise. She indicated that Georgia is the only other state that has separated the POLR from the default provider and allowed the non-default provider to disconnect service.³⁴

In May 2002 the Texas Public Utilities Commission published proposed POLR rules, pursuant to its promise to review the POLR rule. The rule that was finally adopted in September 2002 offers mixed results; greater protection in terms of price (depending upon how the service is established) but less protection from disconnection for all residential customers.

Residential customers (and small non-residential customers) of a competitive REP whose service is terminated for non-payment will be transferred to the affiliated REP for an area who will be the POLR. POLR service will also be provided to those customers who specifically request POLR service and those customers who lose service from their competitive REP for any reason other than non-payment and are automatically assigned to the POLR. Non-paying residential (or small non-residential) customers of an affiliated REP will not be transferred to the POLR.³⁵

The POLR must inform any customer transferred to it that it is now providing service and must disclose all

³² Email response from Janee Briesemeister, Consumers Union Southwest Regional Office, March 18, 2002.

³³ D. Piller, "Texas Utility Switches Customers Who Have Not Paid Bills" *Fort Worth Star-Telegram* (20 March 2002).

³⁴ *Ibid.*

³⁵ Public Utility Commission of Texas, *Chapter 25. Substantive Rules Applicable to Electric Service Providers* at 25.43-1,2.

charges for which the customer will be responsible. The service for the POLR will be bid out to REPs eligible to provide POLR service for two-year terms. The POLR rate for residential customers will be the Price to Beat rate (or a rate established according to specific criteria under the Rules). An affiliated REP may be eligible to bid to provide POLR service if it submits a bid at the Price to Beat rate. If there are no bidders, a POLR will be selected by lottery and will conform to an established POLR rate, which, for residential customers, will be 125% of the standard Price to Beat rate.³⁶ The rule also contains a provision for deferred payment, which allows a customer to pay an outstanding bill in installments.³⁷

With respect to disconnection, until October 1, 2004, only the affiliated REP or the POLR may authorize disconnection of residential customers. After that date, if the Commission determines it is in the public interest, all REPs, including the POLR will have the right to disconnect service (for non-payment, non-compliance with terms of a deferred payment plan, failure to pay a deposit) after a notification period.³⁸

What is the lesson for Canada from the Texas experience to date with respect to electricity deregulation? Under the initial POLR rules, consumer advocates had been concerned about the separation of the default provider from the POLR and the resulting high rates for those customers transferred to the POLR. The Texas Public Utilities Commission corrected this under the new POLR rule, and has set rates for vulnerable consumers that are either the standard rate or subject to a ceiling above the standard rate.

However, deregulation has also created other risks for consumer by granting all REPs the eventual power to disconnect customers for non-payment. Consumer groups are very concerned that the competitive retail providers, who already have a poor track record of complying with Commission's customer protection policies, are being given the authority to disconnect.³⁹ The concern raised by Alexander's research, that REPs will have no incentive to retain these more vulnerable customers and work with them to avoid disconnection is still valid.

The Texas experience with electricity deregulation to date suggests that those the least able to afford rate increases, may be most at risk of paying higher rates and losing service without regulators stepping in to set both the rates and terms of service.

In contrast, Canadian jurisdictions, at least in the short term, have ensured some regulatory protections for consumers. Ontario has structured electricity deregulation to ensure that the standard supply service is the default provider.

³⁶ *Ibid.* at 25.43-3,4,5,6,7,8.

³⁷ *Ibid.* at 25.480-2.

³⁸ *Ibid.* at 25.483-1.

³⁹ Texas Legal Services Center, "Comments on PUC Provider of Last Resort Rule Change" (22 August 2002).

In Alberta, the majority of customers have been given the option to remain on a regulated rate until December 31, 2005. Those customers who are not eligible for the regulated rate option and who have not chosen a retailer are transferred to a default supplier at a non-regulated rate.⁴⁰ As indicated above, the provincial government in Alberta intervened when electricity prices spiked following deregulation. In 2001, residential customers automatically received a rebate from the provincial government on their electricity bill. This rebate was not continued in 2002.

Gas Restructuring and POLRs

As of December 2001, six states had fully implemented retail unbundling while seven states (including Georgia) had entered the implementation phase. Twenty-eight states had not yet commenced unbundling, although ten of these states were considering unbundling (including Texas). Under complete unbundling consumers may choose their own gas supplier, usually along with other services such as gas storage (for industrial customers) while the local distribution company continues to provide local transportation and distribution services.

Georgia

Georgia initiated natural gas deregulation in 1997 by allowing choice to customers of the state's two largest investor-owned gas utilities. Gas marketers were allowed to compete for the sale of gas beginning in 1998. In 1999 another provision of the legislation came into force which allowed "random assignment" of customers. If customers did not select a marketer they were randomly assigned to a default marketer.

There have been numerous problems with gas deregulation in Georgia. Nineteen companies entered the field, but consumers were beset by problems, from late and/or erroneous billings, illegal practices such as slamming⁴¹, and huge price increases over the winter of 2001, from previously average ranges of \$20-\$60 per month to average charges of \$300 - \$400 per month.⁴²

Huge numbers of disconnections resulted. Approximately 124,000 customers had their gas disconnected after April 1, 2001, when a 90-day moratorium on shut-off for nonpayment expired. After the moratorium, it was reported by a local newspaper that one of the state's two largest utilities had asked and received permission from the Public Service Commission to increase the limit on disconnections from 2,000 a day,

⁴⁰ Alberta Energy and Utilities Board, *EnerFAQs No. 7* online at <http://www.eub.gov.ab.ca/BBS/public/utilities/FAQ-Electricity.htm>

⁴¹ Slamming refers to the unauthorized switching of a customer's utility supply service, without notice or customer approval.

⁴² U.S. Government, Energy Information Administration, Department of Energy <http://www.eia.doe.gov/>

four days a week, to 6,000 a day, five days a week.⁴³

By October 2001, many of the marketers had gone out of business and 64,000 natural gas customers remained disconnected due to arrears. As a result, in October 2001 the Governor of Georgia announced plans to establish a task force to assess gas deregulation in the state. He also proposed that the Public Service Commission designate a supplier of last resort for people whose service had been shut off.⁴⁴

In March 2002, the Georgia State legislature took steps to backtrack slightly from deregulation. It passed legislation to create a Provider of Last Resort for low-income and bad debt customers, a consumer bill of rights, and gave electric membership cooperatives⁴⁵ the authority to sell gas directly to customers. Amendments were also passed to fund the low-income energy assistance program (the universal service fund) by means of a surcharge on large industrial gas users.⁴⁶

The State of Georgia's website indicates that Georgia's POLR program for natural gas service applies to consumers whose service was turned off on or before December 31, 2001. However, the prices charged by the POLR are extremely high. Program participants are charged \$150 as a deposit, a \$11.95 monthly customer service charge, and the variable therm (refers to a unit of heat) rate plus \$.10 per therm as well as any applicable taxes and pass-through charges.⁴⁷

Impact of Utility Reconnection Services on Low-Income Consumers

The evidence to date clearly suggests that the effect of utility deregulation has been an overall increase in prices for residential consumers in Canada and the United States. The United States experience in some jurisdictions has been characterized by market segmentation with different results according to the size of the customer and their ability to alter demand. The legislative response has been to isolate payment troubled or poor customers and force them onto default service providers. These providers are allowed to charge marginally much higher prices for utilities than residential customers who have avoided being transferred to the default provider do.

and NCAT, online at: <http://www.ncat.org/neaap/>

⁴³ Low-Income Home Energy Assistance Program, *LIHEAP Networker* (October 2001).

<http://www.ncat.org/liheap/newslett/40net.htm>

⁴⁴ NCAT, online at: <http://www.ncat.org/neaap/news/ganews.htm>

⁴⁵ These cooperatives evolved from rural electric cooperatives, which were established in the 1930's to respond to the lack of access to utilities by citizens living in sparsely populated rural areas. Farmers were permitted to establish cooperatives and to obtain low-interest loans with which they could build power lines and purchase electricity from private electric companies at reduced wholesale rates. [source: NCLC, *supra* note 1 at 20]

⁴⁶ "Gas Deregulation Reform Passes in Georgia" *Gas Daily* (21 March 2002) 3.

⁴⁷ <http://www.psc.state.ga.us/gas/POLR/polrprogram.htm>

Clearly, the overall impact of paying higher utility costs is much greater upon lower income residential consumers than any other class of consumers. The demand for utilities by residential consumers is virtually inelastic. The provision of basic utilities such as heat and electricity is considered a basic need. Our dependence, as consumers, upon these utilities is such that we will continue to demand almost the same amount of service even if the price increases. Residential consumers who are also poor have an even more inelastic demand, being less able to choose between alternate suppliers of energy than any other group and class of consumers.

Statistics affirm this assertion. In 1999, the lowest household income quintile (those earning less than \$20,520 per year) in Canada, spent, on average, more than twice the amount of their income on utilities (water, fuel and electricity) than the highest income quintile (those earning \$79,964 and over).⁴⁸

In the United States, the effect of utility price rises has more serious impact on low-income consumers than in Canada, as low-income Americans pay much higher percentages of their household income in energy costs. Households with children receiving Temporary Aid to Needy Families (form of state or federal social assistance) on average spend one quarter or more of their monthly income on energy, compared to three to five percent for the average family. In those states with the lowest levels of public assistance, as much as two-thirds of family income may be spent on energy costs.⁴⁹

The inability to access energy at reasonable costs may have extremely serious consequences for all consumers. Weather extremes of cold or heat have had lethal consequences for vulnerable consumers in recent years. A severe ice storm, which battered southern Quebec, eastern Ontario and parts of New Brunswick in early 1998, has been attributed to approximately 30 deaths in Quebec alone, at least four of which were due to hypothermia affecting elderly persons.⁵⁰ There have also been fatal consequences of extreme heat:

A heat wave in 1998, for example, caused the death of more than 100 people, and another in 1999 caused more than seventy deaths, many of them elderly city-dwellers who “may not have had air conditioners on because they worried about electricity bills.”⁵¹

Implications of the U.S. Experience for Canada

Utility deregulation is a relatively recent phenomenon in Canada and the results have not been

⁴⁸ Statistics Canada, *Spending Patterns in Canada, 1999* (Ottawa: Industry Canada, August 2001) at 57.

⁴⁹ *Access to Utility Service*, *supra* note 1 at 155.

⁵⁰ “Ottawa Gives Quebec \$100 Million More” *The Gazette (Montreal)* (6 November 1999) A6; “List of Storm Victims Grows Despite Efforts to Clear Homes; Blackout Still Taking Toll” *The Edmonton Journal* (19 January 1998) A9.

⁵¹ *Access to Utility Service*, *supra* note 1.

extensively collected and analyzed. It is difficult, therefore, to predict whether vulnerable consumers will be affected in the same way that they have in certain U.S. jurisdictions.

There is, however, some evidence that low-income consumers are feeling some of the impact of rising utility costs. In Ontario, a non-profit charity that purchases heat and energy on behalf of low-income consumers has undergone a significant expansion of service in recent years. The charity, Share the Warmth, had a service area of 81 municipalities in 1999-2000. In 2000-2001 that service area had expanded to 400 municipalities.⁵²

However, there are significant problems confronting policy-makers and governments in Canada regarding harmonizing their public interest mandate with their initiatives to deregulate utilities. What are the legislative or regulatory mechanisms, if any, that protects the public interest and particularly, the interests of vulnerable consumers under restructuring?

There is also an important public policy issue that arises from the lack of information about utility restructuring in Canada. The U.S. has extensive information on and monitoring of the status and effects of utility restructuring in the energy sector by both governmental and non-governmental agencies. Canada does not. Therefore, there are no tools with which government or consumers may assess the effects of deregulation.

Finally, with the exception of provincial welfare program payments directed to assist with utility bills as part of shelter costs (and a special program initiated by Alberta to assist consumers with electricity costs under restructuring⁵³) there are no formal government programs in place in Canada to assist low or modest income consumers (who are not in receipt of social assistance) with energy costs.⁵⁴

Deregulation in the utility sector, in combination with an expansion in energy exports by Canada to the United States, has the potential for a significant impact on the Canadian utility industry and thus Canadian consumers. Canada exports approximately 59 percent of its natural gas and 30 percent of its oil supply, mostly to the United States.

The result has been, effectively, the integration of Canadian and U.S. oil and gas distribution and the creation of a common market for these forms of energy. Electricity remains an area where there is not yet common pricing and unrestricted access to Canadian markets.⁵⁵ However, this will change as Ontario

⁵² <http://www.sharethewarmth.org/>

⁵³ See above, p. 8 regarding Alberta's initiative.

⁵⁴ See discussion of universal access programs in the United States and social assistance programs in Canada in M. Janigan, *Keeping the Lights On: Maintaining Universal Access to Electricity* (Ottawa: Public Interest Advocacy Centre, April 2001) at 17-43.

⁵⁵ M. Cohen, "From Public Good to Private Exploitation: GATS and the Restructuring of Canadian Electric

begins to open market access and as other provinces move to export energy to the United States:

In exporting provinces the requirements of access to U.S. markets bring these jurisdictions under the aegis of the Federal Energy Regulatory Commission (FERC), the U.S. regulatory body. This in turn requires allowing specific kinds of access to private producers and traders to the infrastructure of the electricity system in Canada in order to ensure reciprocal access to markets. As the high prices of electricity in the U.S. make production for export increasingly attractive, more demands will be made on Canadian suppliers to conform to U.S. requirements.⁵⁶

The current lack of information or documentation about these critical changes to the provision of a fundamental need, energy, is cause for concern. It means that public bodies are unable to gauge the effect of utility restructuring on the public overall, much less upon the most vulnerable consumers. There are also broader public policy issues raised by this omission. Without information to assess the impact or progress of deregulation, there will be no focus on the effectiveness of the existing regulatory mechanisms that oversee the utility industry. Governments will also be less likely to create federal or provincial/territorial programs to assist with rising energy costs of vulnerable consumers.

Legal and Legislative Overview of Utility Deregulation

There are three critical questions or areas of examination relevant to the interests of low-income consumers under utility deregulation. First of all, what is the nature and extent of existing regulatory and legislative oversight of utilities and how effective are these current measures in protecting the interests of low-income consumers?

Secondly, what mechanisms are in place to allow regulators and the public to be able to assess the process of utility deregulation and its impact on the public interest?

Finally, what measures are in place and what is needed to address the harmful cost consequences of utility deregulation on low-income consumers?

Legislative Mechanisms - Energy

Both the federal and provincial governments have a role in overseeing Canada's energy industry. Under the *Constitution Act, 1867*⁵⁷ the development, conservation and management of both electrical energy and natural gas fall under the jurisdiction of provincial governments. The federal government regulates energy exports of natural gas, oil and electricity through the National Energy Board ("NEB") in the public

Utilities" (2001) 48 Canadian-American Public Policy 1.

⁵⁶ *Ibid.* at 2.

interest.⁵⁸

Provinces have energy regulatory bodies that are mandated to oversee the natural gas and electricity markets. For example, the Ontario Energy Board (“OEB”) is an independent, quasi-judicial tribunal, which performs regulatory functions on natural gas and electricity matters. Under its governing legislation it is required to protect the interests of consumers with respect to prices and with respect to the reliability and quality of electricity service. The OEB is also mandated to maintain just and reasonable rates for the transmission, distribution and storage of natural gas.⁵⁹

The powers of the OEB with respect to the former utilities have been shaped by the restructuring initiatives in the energy sector. Restructuring of the electricity industry was initiated under the *Energy Competition Act, 1998*. The Act required the separation or unbundling of electricity services in Ontario. All electricity utilities must separate their distribution businesses from their energy supply businesses. The resulting stand-alone distribution companies (Local Distribution Companies or “LDC”s) must incorporate. Each distributor must be licensed and have their distribution rates approved by the OEB.

Under the restructuring legislation, the competitive marketplace determines the commodity cost of electricity. The OEB simply licenses all electricity retailers (sellers of electricity) and monitors their compliance with a code of conduct established by the Board. However, if a consumer chooses not to sign with an electricity retailer (or the retailer fails to provide the service), the LDC is required to supply electricity at what is referred to as the Standard Supply Service rate which is set by the Board.

In the natural gas sector, private gas utilities that own transportation lines and are given a monopoly franchise, must have their rates approved by the OEB. The OEB only approves the passing on to ratepayers of the commodity cost of gas, which is included in the utility rates; it does not set the price at which the utility purchases its gas supply. The Board does set the rates that natural gas utilities can charge for selling, distributing, transporting and storing gas.

Gas consumers can purchase their gas supply either from the local utility or a competitive independent gas marketer. These marketers are licensed by the OEB and must comply with a code of conduct set by the Board. However, the prices charged by marketers for the commodity are not regulated.

There is a further piece of legislation in Ontario, which specifically regulates the relationship between

⁵⁷ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92A.

⁵⁸ *National Energy Board Act*, R.S. 1985, c. N-7, ss. 12, 26.

⁵⁹ *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Sched. B, ss. 1,2.

consumers and gas utilities. The *Public Utilities Act*⁶⁰ gives a gas utility the right to demand a security deposit, cut off service if a bill is not paid, and apply a reconnection fee.⁶¹

As discussed above, the progress of deregulation in the utility industry in Canada is still early in its development. There is not yet evidence of the kind of segmentation of the market that has taken place in some U.S. jurisdictions and the isolating of poor or credit challenged consumers onto unregulated POLRs. The Standard Supply Service rate applied to electricity distribution utilities by OEB ensures some protection for consumers. In the natural gas sector, the utility is the POLR, but the supply may be at a rate higher than under the previous retailer.

It is also important to note that the market monitoring function of the OEB and its licensing powers for gas and electricity marketers are potentially important levers to protect against abuses of market power.

However, there is also the potential for problems to arise where large utilities enact changes that place their activities beyond the scope of the regulator, particularly when there is no explicit public interest mandate given to the regulatory authority. For example, the legislation governing the OEB, the *Ontario Energy Board Act*⁶² gives no specific consumer protection mandate to the OEB concerning natural gas, unlike its objectives with respect to electricity.

Large incumbent gas utilities have recently begun to outsource some of their core utility functions in Ontario to affiliates, over whom the OEB has no direct oversight. There is also some indication that they have considered, although have not acted upon, transferring system gas customers (i.e. residential customers) to their gas marketing affiliates.⁶³

Legislative Mechanisms – Telecommunications

As discussed above, the CRTC's licensing powers only extend to Canadian common carriers as defined in the *Telecommunications Act*. It does not extend to resellers. It is only indirectly, through the conditions imposed on tariffs set by the CRTC with respect to Canadian common carriers that the CRTC would be able to exert any regulatory influence on the activities of telephone reconnection companies. However, such regulatory power is limited to privacy issues concerning the passing through of credit information where the common carrier provides billing and collection services to resellers. The rates charged by resellers or the terms of service are not subject to direct regulation by the CRTC.⁶⁴

⁶⁰ *Public Utilities Act*, R.S.O. 1990, c. P-52.

⁶¹ *Ibid.* at s.50(4) & s. 59.

⁶² *Ontario Energy Board Act*, S.O. 1998, c. 15, Sched. B.

⁶³ See transcripts of the OEB proceeding RP-2001-0032 in the matter of an application by Enbridge Consumers Gas for an order or orders approving or fixing rates for the sale, distribution, transmission and storage of gas for its 2002 fiscal year. Online at: <http://www.oeb.gov.on.ca/>

⁶⁴ Telephone interview with Suzanne Bédard, CRTC Telecommunications Division, July 2, 2002.

This means that consumers who have concerns with the rates charges by telephone reconnection companies or the conditions of service, have no regulatory protections but must look to consumer protection statutes or civil litigation in the courts to protect their interests.

Consumer Protection Legislation

In Ontario, the *Consumer Protection Act*⁶⁵ applies to sales by gas marketers and retailers of electricity but does not apply to any charge for the transmission, distribution or storage of gas approved by the OEB. The Act also contains regulations that specifically describe what is required to be included in a direct sales contract.⁶⁶

The Act would therefore be effective in protecting individual consumers entering into utility contracts with gas marketers or electricity retailers with respect to the terms and conditions of such contracts. It would not address the issue of the cost of gas, where those charges have been approved by the OEB. Could consumers have recourse to the Act with respect to the amount of electricity charges? It is also not clear whether the Act would apply to telephone services.

The Act's provisions around utility contracts raises a broader issue of the effectiveness of this kind of Act in dealing with remedies for the provision of a good or service that would be considered a necessity, such as energy. Being able to cancel a utility contract is only effective if there is a fallback provision for the consumer, such as standard offer service provided for in Ontario. Without this fallback, it would be of little value for a consumer to have the power to cancel a utility contract.

Common Law Protections

Prior to the existence of legislation creating regulatory obligations for public utilities, through a series of significant United States Supreme Court decisions in the early part of the twentieth century, the common law imposed standards of conduct on companies sufficiently affected with a public interest to justify government subjecting them to regulation.⁶⁷

One of these standards was that public utilities had an "obligation to serve". This means that all public utilities must provide service to any member of the public living within the utility's service area that has applied for service and is willing to pay for the service and its requirements. The utility is also required to give adequate and reasonably efficient service, on reasonable terms, impartially and at reasonable

⁶⁵ *Consumer Protection Act*, R.S.O. 1990, c. C. 31.

⁶⁶ O. Reg. 175/01.

⁶⁷ A.E. Kahn, *The Economics of Regulation: Principles and Institutions* (New York: John Wiley & Sons,

rates.⁶⁸

These standards were imposed by the courts on utilities to prevent the potential abuse by utilities of their monopoly power, for example, choosing to serve only those customers and areas which would enable them to realize a profit. They also arose because of the very public nature of the services provided by such utilities. These common law doctrines are generally enforceable by the courts, despite the presence of regulatory regimes.

In an era of deregulation, these standards become even more important for small volume customers such as residential customers and in particular, low-income customers. The question that arises is whether the duty to serve survives as utilities restructure and move towards competition. If large utilities begin to divest themselves of core utility functions, can they argue that an “obligation to serve” no longer applies to them? Consumer advocates argue that it is critical that regulators and regulatory legislation maintain a commitment to universal service and that in an era of deregulation, they continue to require utilities to offer standard offer or default service.⁶⁹

Recommendations and Conclusions

Measures to Assess the Status of Restructuring

Both the federal and provincial/territorial governments have an interest in ensuring that mechanisms are in place to monitor the progress and effects of deregulation and restructuring in the energy sector. As discussed above, federal and provincial regulators in the energy sector have an explicit public interest mandate. This means that they must consider the effects of decisions upon all elements of the public, which includes the industry and individual consumers.

As indicated above, the United States government and various consumer-based advocacy organizations in the United States have extensive information programs and resources devoted specifically to measuring the progress and effect of deregulation in the energy sector.⁷⁰ There is no similar source of information in Canada, neither by government, nor through public interest organizations.

1970) at 3–6.

⁶⁸ *Access to Utility Service*, *supra* note 1 at 53-55.

⁶⁹ *Ibid.* at 55-56.

⁷⁰ The Energy Information Administration, a branch of the U.S. federal government, produces official energy statistics, including monitoring deregulation in all states. The National Energy Affordability & Accessibility Project, a consumer-based resource, provides updated, state-by-state overviews of the

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How can tribunals such as the OEB effectively carry out their legislated mandate to protect the interests of consumers in relation to electricity and facilitate competition in the sale of gas, in the absence of any explicit information targeted to looking at the overall progress and effects of restructuring in these sectors and the impact on all classes of Ontario's energy consumers?

Similarly, how is the federal agency, the NEB, able to carry out its public interest objective without specific knowledge of how the interaction of deregulation and energy exports is, in fact, affecting all aspects of the public interest?

Both levels of government should make provision for funding independent research and monitoring of utility deregulation/restructuring in Canada. This function could be attached to the existing provincial energy regulatory agencies or under an independent agency.

Measures to Address Effects of Restructuring on Vulnerable Consumers

This report has suggested that there is some evidence of the inability of low-income consumers to meet their present utility costs. There is also evidence suggesting that utility costs in the short or medium term have been rising, not decreasing, under deregulation. Existing legislative measures to assist with utility costs are provincially or municipally determined, therefore, not consistent between jurisdictions and only those already in receipt of social assistance are eligible. The result is that the working poor or those who are not already receiving social assistance are unable to access government assistance for utility costs.

To meet this gap, the Canadian Council on Social Development has proposed that the federal government increase the GST tax credit by \$70 per adult and \$30 per child, to shield low-income families and individuals from the consequences of rising energy costs. This credit is already a targeted measure, introduced to protect low and modest income households from price increases caused by the introduction of the GST.⁷¹

This kind of measure would be an important step in addressing the adverse impact of energy utility restructuring upon vulnerable consumers.

Recommendations Concerning Utility Reconnection Services

status of restructuring.

⁷¹ A. Jackson, "Helping Low-Income Households Cope with Soaring Energy Prices" in S. Klein, ed., *Costly Energy: Why Oil and Gas Prices are Rising and What We Can Do About It* (Ottawa: Canadian Centre for Policy Alternatives, 2001) 30.

Telephone

Telephone reconnection services targeting vulnerable consumers are beginning to make some inroads in the Canadian telecommunications market, at the same time as there is no clear policy as to the source of consumer protection measures to deal with reconnection companies.

Consumers currently have little protection in their dealings with telephone reconnection services since, as discussed above, telephone reconnection services or resellers, are currently not directly regulated under the *Telecommunications Act*. It is also not clear if consumer protection statutes, such as Ontario's *Consumer Protection Act* apply to such services.

Regulate Resellers

Amendments to the *Telecommunications Act* should be put in place to ensure that resellers are subject to the Act, with respect to rates charged and conditions of service.

Ensure Applicability of Consumer Protection Statutes

In addition, consumer protection statutes should also be amended to ensure that they apply to telephone services, including telephone resellers.

Energy

Reasonable Rates

The critical issue for vulnerable consumers under utility restructuring is that they be ensured of receiving service at reasonable rates. Governments and regulators must ensure the obligation is met to continue to provide default or stand supply service at rates approved by regulators, for those who do not choose retailers or lose service due to credit history or inability to pay.

Expand Public Interest Mandate

Provincial energy regulatory acts such as the *Ontario Energy Board Act* and the *Alberta Energy and Utilities Board Act*⁷², should be amended to express an explicit public interest/consumer protection mandate for regulatory boards or tribunals in all areas of energy regulation. These acts currently confer very general protections. For example, the OEB Act states that natural gas rates should be “just and reasonable”⁷³ and one of the OEB objectives in relation to electricity is to “protect the interests of

⁷² *Alberta Energy and Utilities Board Act*, R.S.A. 2000 c. A-17.

⁷³ *Ontario Energy Board Act*, *supra* note 62 s.2.

consumers with respect to prices and the reliability and quality of electricity service”⁷⁴. These provisions need to convey a much clearer public interest and consumer protection philosophy.

Connecticut’s General Statutes contain a number of provisions in relation to utility services that provide a model of an explicit public interest/consumer protection mandate:

Sec. 16-244. (8) The assurance of safe, reliable and available electric service to all customers in a uniform and equitable manner is an essential governmental objective and a restructured electric market must provide adequate safeguards to assure universal service and customer service protections.

Sec. 16-244i. (b) Each electric distribution company shall have the obligation to connect all customers to the company’s distribution system, subject to rates, terms and conditions as may be approved by the Department of Public Utility Control...

Sec. 16-245r. No electric supplier, as defined in section 16-1, shall refuse to provide electric generation services to, or refuse to negotiate to provide such services to any customer because of age, race, creed, color, national origin, ancestry, sex, marital status, sexual orientation, lawful source of income, disability or familial status. No electric supplier shall decline to provide electric generation services to a customer for the sole reason that the customer is located in an economically distressed geographic area or the customer qualifies for hardship status under section 16-262c.⁷⁵

Prevent Circumvention of Regulatory Authority

As indicated above, a new concern has arisen from internal practices of large utility companies to outsource services to affiliated companies. Regulatory boards must also assert their jurisdiction to ensure that the large incumbent utilities do not outsource core utility functions to non-regulated affiliates, placing those services outside the mandate of regulatory boards.

Conclusion

The U.S. experience of market segmentation resulting from the speed and breadth of state governments’ embrace of utility deregulation and its negative impact on vulnerable consumers provides some important warnings for Canada.

Federal and provincial governments have already moved to deregulate in telecommunications and gas sectors and provincial governments are moving towards deregulation in the electricity sector. Without more attention to research and monitoring of deregulation and its effects on consumers, regulators and the public will be unable to effectively gauge the effects and outcomes of deregulation. In the absence of

⁷⁴ *Ibid.* s.1.

⁷⁵ Conn. Gen. Stat. Ann. §§ 16-244(8), 16-244(l), 16-245(r).

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this information, there can be no meaningful and realistic public debate about how and whether deregulation of utilities is in the public interest.

The regulation of utilities which took place in the early part of the twentieth century was rooted in a recognition that the provision of certain services were sufficiently affected with a public interest that they needed to be regulated to ensure that the utilities would not abuse their monopoly power and would continue to serve all sectors of the population. Without an active and explicit recognition of the continuing relevance of these regulatory principles, Canada could be moving towards the kind of market segmentation from which vulnerable consumers stand to lose the most.

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⁷⁶ Note that this bibliography is limited to publications and does not include the information referenced in the report, which was obtained from government or research institute websites or by interview.

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