

# ACCC/AER Regulatory Conference – A Case Study in Consumer Engagement

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July 25, 2013, Brisbane, Australia

# Why a Consumer Advocate for Utility Service?

- ▶ Traditionally, American utilities were well represented in regulatory proceedings by attorneys, utility officials, and expert witnesses who were able to present the basis for requested rate increases and other regulatory approvals on behalf of utility investors.
- ▶ State consumer advocate offices were established across the United States in order to provide a comparable level of legal argument and expert testimony on behalf of consumers.
- ▶ If prices for an essential public service are going to be set through a regulatory process, it is necessary for both sides in that process to be adequately represented. That is, the people who pay the bills as well as the people who send them out.
- ▶ It is extremely difficult, if not impossible, for individual residential consumers, or small groups of consumers, to provide this type of representation on their own behalf.

# Pennsylvania Office of Consumer Advocate

- ▶ The Pennsylvania Office of Consumer Advocate (PaOCA) was established in 1976 by the Pennsylvania General Assembly in order to represent the interests of utility consumers in matters before the Pennsylvania Public Utility Commission and other state and federal regulatory agencies and courts.
- ▶ Offices like the PaOCA have been established in more than 40 States and the District of Columbia.

# Why the PA Office of Consumer Advocate Was Created

- ▶ In September 1975, the Consumer Affairs Committee of the Pennsylvania Senate issued a report calling for the creation of a Consumer Advocate for utility service. The report concluded that:
  - “Public sentiment was clearly demanding direct consumer advocacy in rate regulation.”
  - “[D]irect participation of a Consumer Advocate in utility cases before the PUC, if it did nothing else, would be an important step in fortifying and re-establishing credibility in the regulatory process and further securing the adversary proceedings we seek.”

# What Happened?

- ▶ The PaOCA was initially established for a three year period. At the end of the three year period in January 1979, the Senate Committee on Consumer Affairs issued another report. The report recommended that the Office be extended and concluded that:
  - “The public perception of the Consumer Advocate is not just good; it is outstanding.”
  - “On a straight dollars and cents basis, alone, the Consumer Advocate has proven ... to be a good investment for the people of Pennsylvania.”
  - “But the value of the office goes beyond a pure dollar and cents analysis. There are the intangible elements introduced by the presence of the Consumer Advocate in major rate cases.”
  - “From the consumer point of view, the Office of Consumer Advocate was well worth the financial investment to set it in motion and keep it going.”

# Structure of the PaOCA

- ▶ The Pennsylvania OCA is a state office, funded by assessments on the utilities that are subject to regulation by the Pennsylvania Public Utility Commission (PUC).
- ▶ The Consumer Advocate is appointed by the elected Attorney General of Pennsylvania, subject to the consent of the Senate of Pennsylvania. The Consumer Advocate has no set term, but serves “at the pleasure” of the Attorney General.
- ▶ The PaOCA is administratively within the Office of Attorney General, but is independent for policy purposes. The policy positions taken by the PaOCA are determined by the Consumer Advocate.
- ▶ The PaOCA is wholly independent of the PUC and all other regulators before whom the PaOCA appears on behalf of consumers.
- ▶ The PaOCA must file a written Annual Report with the Governor, the Attorney General, and the General Assembly outlining its activities on behalf of Pennsylvania consumers each year.

# PaOCA Funding

- ▶ The PaOCA budget is funded entirely by assessments on the utilities that are regulated by the PUC, but the amount of the budget is determined annually by the Pennsylvania General Assembly.
- ▶ The PaOCA budget is wholly independent of all other state agencies, and funding cannot be transferred to or from the PaOCA budget for any other purpose.
- ▶ Under the PaOCA statute, the PaOCA budget may not exceed five one hundredths of one percent (0.05%) of the gross intrastate revenues of the utilities regulated by the PUC.
- ▶ In Fiscal Year 2013–14, the PaOCA budget is \$5,165,000 (or approximately 56% of the \$9.1 million statutory limit).

# PaOCA Budget

- ▶ Of the \$5,165,000 budget for the current fiscal year, \$3,264,000 is to cover the costs of the 31–person employee complement; \$1,080,000 is to cover the costs of outside expert witnesses; and \$831,000 is to cover other operating expenses. During the course of the year, the PaOCA is permitted to transfer expenditures across these categories.
- ▶ Of the PaOCA 31–person complement, 15 (including the Consumer Advocate) are attorneys. The complement also includes two financial/accounting experts, administrative and clerical employees, as well as a three–person call center headed by the OCA’s Consumer Liaison.
- ▶ The PaOCA is one of the larger and more well–funded state consumer advocate offices in the United States.

# Whom Do We Represent?

- ▶ Under its enabling statute, the PaOCA has broad authority to represent the interests of any and all consumers of utility services in Pennsylvania.
- ▶ In matters involving the overall interests of utility consumers – such as the total amount of a proposed rate increase by a utility – the PaOCA represents all consumers.
- ▶ In matters that affect specific customer classes differently – such as the allocation of any rate increase among customers – the OCA focuses on the interests of residential customers, including low-income consumers.

# Legal Role of the PaOCA -- Ratemaking

- ▶ The traditional utility rate-setting process in the United States is an adversarial process in which the public utility commission sits in a quasi-judicial role and must make determinations based on legal standards and record evidence.
- ▶ Historically, utilities presented their cases to the public utility commissions through attorneys, utility officials, and expert witnesses whose costs were included in the rates charged to consumers.
- ▶ Even though the impact of utility rate increases on residential and other small consumers could be substantial, those consumers were not in a position to mount a viable defense in complex regulatory proceedings on their own behalf. State consumer advocate offices like the PaOCA were created in order to “level the playing field” and provide a comparable level of legal argument and expert testimony on behalf of consumers.

# Legal Role of the PaOCA -- Appeals

- ▶ Importantly, the PaOCA's legal role includes the right to appeal to the Courts any decisions that we believe are adverse to consumers and are not consistent with the law or supported by the evidence in a proceeding.
- ▶ One of our appeals, Duquesne Light Company v. Barasch, ultimately reached the United States Supreme Court. In the decision in that case, written by Chief Justice William Rehnquist in 1989, the Supreme Court upheld the position of the PaOCA that two electric utilities did not have a constitutional right to charge Pennsylvania consumers for the costs of four cancelled nuclear power plants.

# Other Examples of PaOCA Legal Advocacy – Stranded Costs

- ▶ When Pennsylvania opened its electric generation markets to competition after 1996, electric utilities requested recovery of a total of \$18 billion in “stranded costs” reflecting the difference between what their power plants cost to build under regulation vs what they were expected to be worth in a competitive market. The PaOCA challenged the utilities’ calculation of stranded costs and presented expert testimony in opposition. In the Orders reviewing the utilities’ requests, the Public Utility Commission held:
  - “We adopt the testimony of OCA witness Smith as the most reasonable determination...”
  - “We are also convinced that witness Smith performed an objective analysis of the issues in this proceeding, a task that the Commission believes no other party truly performed...”
  - The complex computer model presented by the OCA to estimate stranded costs was “the most reasonable presented in the record of this proceeding...”

While these cases were ultimately settled on appeal, the adoption of the PaOCA recommendations resulted in reductions of more than five billion dollars in the stranded costs ultimately paid by Pennsylvania consumers.

# Other Examples of PaOCA Legal Advocacy – Retail Marketers

- ▶ When a Georgia-based competitive retail natural gas supplier declared bankruptcy, the PaOCA intervened in the Georgia bankruptcy proceeding and secured the recovery of \$281,000 in deposits that had been paid by 1500 Pennsylvania consumers for service they never received.
- ▶ After a California-based online competitive electricity supplier went out of business, PaOCA was able to secure \$322,000 in refunds for Pennsylvania consumers.

# Other Examples of PaOCA Legal Advocacy – Consumer Privacy

- ▶ When Bell Atlantic introduced Caller\*ID telephone service in Pennsylvania, the Company did not offer customers the ability to “block” their telephone numbers if they wished to do so.
- ▶ The PaOCA argued that unless customers could block their telephone numbers, the service was a violation of customers’ privacy rights and was illegal under the Pennsylvania wiretap law.
- ▶ When the Pennsylvania PUC approved the service, the PaOCA appealed.
- ▶ In 1992 the Pennsylvania Supreme Court adopted the PaOCA position that the proposed Caller\*ID service without blocking was unlawful. Bell Atlantic subsequently revised the service to include a free blocking option for all customers.

# Building a Record for the Decision-Maker

- ▶ It is not just the quantity of evidence presented, but the quality.
- ▶ Consumer advocates cannot (and typically should not) challenge every aspect of a utility's regulatory request.
- ▶ But consumer advocates can identify critical issues that have major impact on consumers and present expert testimony and legal arguments that provide regulators and appellate courts with a more complete record on which to base their decisions.

# Negotiated Settlements

- ▶ Not all utility cases are fully litigated and only a small percentage are appealed to the courts. The majority of cases, at least in Pennsylvania, are resolved through negotiated settlements among the parties.
- ▶ The need for strong consumer representation and advocacy at the negotiating table is just as important as it is in the hearing room.
- ▶ It is essential to have someone at the table whose sole concern is to advance the interests of consumers.
- ▶ As they enter negotiations, consumer representatives need reasonable access to information and the knowledge that they have the ability to litigate and appeal issues if an amicable settlement cannot be reached.

# Potential Benefits of Negotiated Settlements

- ▶ Appropriately negotiated settlements can reduce litigation costs and, in some cases, can produce results that are better suited to meet the needs of diverse parties.
- ▶ For example, when a major Pennsylvania electric utility required PUC approval to merge with an out-of-state utility, the multi-party settlement leading to approval of the merger included \$200 million in rate reductions, extensions of utility rate cap protections, improved reliability and customer service standards, increased funding for low-income universal service programs, and additional support for renewable energy projects.
- ▶ In some cases, a utility may voluntarily agree to settlement terms that the PUC could not order in the absence of such agreement.

# What Else Do We Do? -- Rulemakings and Policy Decisions

- ▶ Many important policy determinations are made by the PUC through generic rulemaking proceedings on the basis of comments filed by interested parties.
- ▶ The PaOCA files written comments on behalf of consumers in all relevant state utility rulemaking proceedings and generic policy statements.

# What Else Do We Do? -- Legislation

- ▶ The Pennsylvania Consumer Advocate participates in legislative debates before the Pennsylvania General Assembly – through formal testimony, meetings with legislators, and negotiations among interested stakeholders.
- ▶ State consumer advocates also testify regularly before the United States Congress on federal utility issues, either individually or through our participation in the National Association of State Utility Consumer Advocates (NASUCA).

# What Else Do We Do? --Consumer Education and Complaints

- ▶ The Consumer Advocate, Consumer Liaison, and other members of the PaOCA staff meet regularly with consumers and consumer groups across the state to inform and educate them about utility issues.
- ▶ The PaOCA also maintains its own Website ([www.oca.state.pa.us](http://www.oca.state.pa.us)), which includes a number of educational features including electric and natural gas shopping guides, which allow residential customers to compare prices for retail electric and natural gas service available to them in their areas.
- ▶ PaOCA also operates a toll-free telephone call center to provide information to Pennsylvania consumers and to assist them in resolving complaints and answering questions about their utility service.

# What Else Do We Do? --Working with Other Consumer Groups

- ▶ While the PaOCA is the sole (or “peak”) statutorily-funded advocate for residential utility consumers in Pennsylvania, we often work in coalition with other consumer groups and representatives in matters of mutual interest.
- ▶ These coalition partners may include large industrial customers as well as small business customers represented by the Office of Small Business Advocate (a state office that is unique to Pennsylvania).
- ▶ PaOCA also works closely with groups representing low-income consumers and seniors.

# What about Competition? Why Do We Still Regulate These Guys?

- ▶ In Pennsylvania and about 15 other American states, the electric utility industry has been restructured to permit competition in the generation and retail sale of electricity.
- ▶ In these restructured states, retail rates have been “unbundled” into distribution, transmission, and generation components.
- ▶ The distribution function remains a natural and legal monopoly and continues to be regulated on a cost of service basis by the state public utility commissions.
- ▶ Interstate transmission is regulated at the federal level by the Federal Energy Regulatory Commission (FERC). In addition, utilities in many states are part of voluntary Regional Transmission Organizations (RTOs), which are also subject to FERC regulation.

# What about Electric Generation?

- ▶ In restructured states, electric generation is bought and sold at market prices in competitive wholesale generation markets. This generation is then sold to retail consumers either by the electric distribution company (on a “default” or “standard offer” basis) or by unregulated retail marketers.
- ▶ In most restructured states, the majority of residential customers still purchase their generation in the form of default service through their electric distribution company. In Pennsylvania, about 35% of residential customers are currently served by competitive retail marketers (as compared to 87% of industrial customers, representing 95% of industrial load).
- ▶ The PaOCA seeks to ensure that utility default service is reasonably priced and that customers are protected from unlawful marketing practices by competitive suppliers.

# National Consumer Representation

- ▶ There is no single government or ratepayer funded utility consumer advocate at the federal level in the United States.
- ▶ Legislation to create an Office of Consumer Advocate at FERC passed the U.S. House of Representatives as a part of comprehensive energy and environmental legislation in 2009, but that Bill was never voted on in the Senate.
- ▶ To the extent permitted by their own statutory and funding constraints, state consumer advocates such as the PaOCA attempt to represent the consumers of their respective states in matters involving wholesale and interstate rates before the Federal Energy Regulatory Commission (FERC).

# Regional Consumer Representation

- ▶ A great deal of activity involving transmission and wholesale generation markets now occurs through utility participation in voluntary Regional Transmission Organizations (RTOs), such as the PJM Interconnection that serves Pennsylvania and 12 other states and the District of Columbia in the eastern United States.
- ▶ To the extent permitted by their statutes and funding constraints, PJM state consumer advocates have attempted to represent the interests of their state consumers on PJM Committees and working groups.
- ▶ In 2012, with funding from a FERC settlement intended to benefit PJM consumers, the PJM consumer advocates created CAPS – Consumer Advocates of PJM States. This new organization will enable the state consumer advocates to participate more fully in PJM activities that affect electric consumers in their states.

# The Role of the Public Utility Commission in Setting Rates

- ▶ The role of the Pennsylvania PUC (and other state and federal utility regulators in the United States) is to balance the interests of utility investors and consumers in determining rates that are “just and reasonable” to both the utility and its customers.
- ▶ Public utility commissioners serve in a quasi-judicial role in setting rates based on the evidence presented by the parties in formal rate-setting proceedings.
- ▶ Prior to the creation of consumer advocate offices, the regulatory litigation process was often one-sided. Consumer advocates can present evidence that enables regulators to make more informed decisions.
- ▶ Public utility commissioners are not advocates for either utilities or consumers, but must act in the broad overall public interest.

# The “Just and Reasonable” Rate Standard

- ▶ Rates are generally deemed just and reasonable from the investor standpoint if they allow the utility to recover its operating expenses and earn a sufficient return on investment to maintain its credit and attract capital. At the same time, rates may not be so excessive as to be “exploitative” of customers.
- ▶ Although segments of the Pennsylvania electric and natural gas industries have been opened to competition in recent years, the Pennsylvania public utility law has also been amended to include provisions that electric and natural gas rates should be “affordable” and promote “universal service.”
- ▶ While economic efficiency is an important element of utility ratemaking in the United States, it is generally not the sole or primary standard under which rates are measured.

# Critical Elements of a Successful Consumer Advocacy Office

- ▶ Expertise
- ▶ Funding
- ▶ Policy independence (from the regulatory decision-maker)
- ▶ Public trust

# Critical Elements -- Expertise

- ▶ In order to succeed in this highly technical and complex arena, consumer advocates must be able to operate at (or at least close to) a level of understanding and expertise that is comparable to that of the utilities.
- ▶ At PaOCA, we seek to provide this expertise through our in-house attorneys and professional staff as well as top-quality outside experts who provide consulting services and expert testimony on a wide range of economic, financial, accounting, engineering, and policy issues.
- ▶ For example, we cannot afford to hire our own nuclear engineers to serve on our staff, but when a series of major cases involving nuclear plant outages and construction cost overruns arose in the 1980's and 1990's, we were able to present testimony from a number of nuclear engineering experts who provide consulting services to state consumer advocates and other public interest organizations across the country.

# Critical Elements -- Funding

- ▶ In Pennsylvania, and most American states, utilities are allowed to charge their ratepayers for the costs that the utilities incur in regulatory proceedings, including rate increase requests.
- ▶ Even in states with relatively well-funded consumer advocate offices like Pennsylvania, the costs incurred in a rate proceeding by the consumer advocate office are typically a small fraction of the costs charged by the utilities for their own regulatory activities.
- ▶ It is essential that the consumer advocate have adequate funding to provide a credible evidence-based presentation, whether issues are decided through litigation, negotiation, or rulemaking.

# Critical Elements – Policy Independence

- ▶ The consumer advocate must be able to present policy recommendations in a manner that is independent of the regulatory decision-maker. The consumer advocate should not have to look over his or her shoulder for fear of taking a position that is not shared by a particular regulator.
- ▶ In America, this independence includes the right to appeal regulatory decisions to the courts.
- ▶ Note: An independent role does not equate to an adversarial role between the advocate and the regulator.

# Critical Elements – Public Trust

- ▶ Dating back to the establishment of the PaOCA in 1976, it was recognized that one of the most important roles of the Office was to ensure greater public confidence in the regulatory process and a recognition among consumers that there is someone whose sole objective is to represent their interests in that process.
- ▶ The PaOCA statute specifically prohibits the Consumer Advocate from working for a utility or running for political office for two years after serving as Consumer Advocate.
- ▶ The PaOCA has always sought to operate on a non-partisan basis. It is not a place for demagogues or ideologues.

# Questions?

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