

Robert B. Warren

Regulatory Developments and the Impact on
Consumers, Business and the Environment

April 15, 2015

WeirFoulds^{LLP}

Regulatory Developments and the Impact on Consumers, Business and the Environment

Robert B. Warren

A. Introduction

The title for this session of the Conference is “Regulatory Developments and the Impact on Consumers, Business and the Environment”. For the purposes of this paper, I will focus on the operation of the Ontario Energy Board (the “OEB”).

The policies of the OEB, and in particular its approach to the setting of rates for the transmission and distribution of electricity and natural gas, have had an impact on those rates paid by consumers.¹ Rather than focus on those specific rate impacts, I propose to address issues related to the present and future role of the OEB in the energy sector. The broad questions I propose to address are whether the OEB is now protecting the interests of consumers and whether it can, or will, protect the interests of consumers in the face of the restructuring of the electricity sector and of the challenges facing local distribution electricity distributors (“LDCs”).

I will begin with a brief overview of what regulatory agencies are and the role they play in society. I will then analyse the current role of the OEB in the energy sector, particularly as it relates to the protection of the interests of consumers with respect to prices. In so doing, I will review the constraints on that role, imposed by the government and also by the OEB itself. I will examine whether, and if so to what extent, those constraints have effectively limited the ability of the OEB to protect the interests of consumers.

I will then address the possible role of the OEB in a restructured electricity sector. Finally, I will examine the challenges which are faced by LDCs. I will examine what role, if any, the OEB can play in assisting LDCs to address those challenges. In the process of so doing, I will contrast what the OEB has done, and can do, with respect to those challenges with what its counterpart in New York State has done.

Implicit in the analysis in this paper are the following questions:

1. Is the role now played by the OEB sufficient to protect the interests of consumers?
2. If not, why not?
3. Is there another role for the OEB and, if so, what is it?

¹ For purposes of this paper I will use the term “consumers” to include residential and business consumers.

4. If there is another role for the OEB, what is required to create it?

For a number of reasons which will become apparent in the paper, I will focus my comments on the role of the OEB in the regulation of the electricity sector.

B. Regulatory Agencies

Regulatory agencies exercise powers delegated to them by legislatures. Such delegation is necessary in a complex and highly-specialized economy. Legislatures do not have the expertise, the time or the information to apply detailed regulatory standards to individual circumstances.

Delegation entails carrying out the objectives of the legislation. It also entails carrying out the government policies that inform the legislation. To that extent, regulatory agencies are not independent of the government. At the same time, however, the proper exercise of delegated powers in some circumstances requires regulatory agencies to act as quasi-judicial decision-makers. Acting in that capacity requires regulatory agencies to have a substantial measure of independence.

Because regulators are created by statute, the powers they exercise are limited by what is granted to them in the statute. Some of the functions they perform are purely administrative, involving the exercise of little or no discretion. Some require the exercise of a broad discretion, in the exercise of which the regulator acts as a quasi-judicial decision-maker. When performing a quasi-judicial function, the regulator must adhere to the rules of natural justice. Those rules, reduced to their essence, require that the regulator be unbiased, that is free from outside influence, and that they afford the parties affected by the decision an opportunity to be heard.

At the same time, regulators are required to be sensitive to, and to implement, government policy. The policy may be expressed in the empowering statute or in directives issued pursuant to that statute. An example of the former would be the objectives, as set out in sections 1 and 2 of the *Ontario Energy Board Act, 1998* (the “OEB Act”).² An example of the latter would be the directives issued pursuant to the OEB Act.

There is a tension between the obligation to be independent and the obligation to implement government policy. How the OEB and the government have apparently elected to resolve that tension reveals a good deal about how they view the role of the OEB in the energy sector.

Regulators are subject to the oversight of the superior courts to ensure that they adhere to the principles of administrative law. It is beyond the scope of this paper to analyze in any detail the approach which the courts have recently taken to that oversight. As a general proposition,

² *Ontario Energy Board Act, 1998*, SO 1998, c 15, Schedule B.

however, the recent jurisprudence of the superior courts, including the Supreme Court of Canada, indicates that the courts are increasingly deferring to the decisions of expert agencies, and, in the process, enlarging the scope of the matters the regulatory agencies have the authority to decide. One of the principal reasons for judicial deference is that the legislature, in creating expert agencies and delegating significant decision-making power to them, intends those agencies, and not the courts, to make decisions in their areas of expertise.³

In my view, one of the implications of judicial deference is to increase the importance of other forms of governance of regulatory agencies. Regulatory agencies are subject to oversight, to varying degrees and in different ways, by the legislature and the government. The nature of that oversight, and its importance to the protection of the public interest generally, and in particular in its effectiveness in the case of the OEB, as matters which are discussed below.

C. The Role of the OEB in the Energy Sector

The regulation of the transmission and distribution of electricity and natural gas is required in order to protect consumers from the potential adverse effects of monopoly power. To fulfil that function, the legislature created the OEB, intending that it be an independent, expert tribunal. That the OEB is regarded as both independent and expert is one of the principal sources of the deference which courts have paid to its decisions. Since 1990, decisions of the OEB have been reviewed by the Divisional Court, and in some instances by the Ontario Court of Appeal, some 37 times. In many of those cases, the courts have premised their decision to defer to the OEB decision under review on the expertise and independence of the OEB.⁴

The OEB's legislated functions include the following:

- licencing electricity and natural gas distributors, transmitters and retailers
- approving the construction of natural gas and electricity transmission facilities

³ The Supreme Court of Canada, in the case of *Dunsmuir v. New Brunswick*, offered the following rationale for judicial deference: "In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system." (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at para 49).

⁴ Since 1990, decisions of the OEB have been reviewed by the Divisional Court, and in some instances by the Ontario Court of Appeal, some 37 times. In many of those cases, the courts have had occasion to comment on the expertise of the OEB and on the resulting deference to be paid to the OEB's decisions. The following citations are examples of the courts' statements to that effect:

- a) "Deference to the Board is not limited to matters involving fact finding, the exercise of discretion or policy making. As a statutory tribunal with exclusive jurisdiction to hear and determine all questions of law raised in matters properly before it, the Board has a long-recognized expertise in statutory interpretation when it involves interpreting its own statute." (*Union Gas Ltd. v. Ontario (Energy Board)* 2013 ONSC 7048, at para 23).
- b) "First, the OEB is a specialized and expert tribunal dealing with a complicated and multi-faceted industry. Its decisions are, therefore, entitled to substantial deference. (*Graywood Investments Ltd. v. Toronto Hydro Electric System Ltd.* [2006] OJ No. 2030, at para 24).

- approving rates for the distribution and transmission of electricity
- approving rates for the distribution and storage of natural gas
- establishing the codes that govern the activities of natural gas distributors and transmitters, and retailers;
- monitoring and ensuring compliance with those codes
- monitoring and ensuring compliance with the rules for the marketing of electricity

The OEB does not have a broad mandate to regulate the energy sector. The objectives which the OEB is required to consider, and which are set out in sections 1 and 2 of the OEB Act⁵, are limited in their application to what the OEB is otherwise authorized by that Act to do. This limited statutory mandate will be considered further in the context of the discussion, below, of the review by the New York State Public Utilities Commission (PUC) of the regulatory framework for the distribution of utilities.

Arguably the most important function which the OEB performs in fulfilling its objective to protect the interests of consumers with respect to prices is approving rates for the distribution and transmission of electricity, and for the distribution, transmission and storage of natural gas. In approving those rates, the OEB acts as a quasi-judicial decision-maker. It is required, in doing so, to act independently.

In addition to its relatively narrow statutory mandate, two forces have combined to limit the independence of the OEB. One is external, the other internal, that is self-imposed.

The first is the government's use of directives. The effect of the use of directives is best illustrated by the OEB's limited role in the oversight of the government's green energy initiatives.

Over the course of the past five years electricity prices have been increasing significantly. The increases, which are projected to continue for the next several years, are attributable in large measure to the effect of the government's green energy initiatives, including its smart meter initiative. Section 28.3 of the OEB Act⁶ required the OEB to implement cabinet directives relating to the government's smart-metering initiative. Section 28.6 of the OEB Act⁷ required the OEB to implement cabinet directives requiring the OEB to take specified steps relating to the connection of renewable energy facilities to a transmitter's transmission system or a distributor's distribution

⁵ OEB Act, *supra* note 2 at ss 1, 2.

⁶ OEB Act, *supra* note 2 at ss 28.3.

⁷ OEB Act, *supra* note 2 at ss 28.6.

system. Both the smart-metering initiative and the connection of renewable energy generation facilities would have material impacts on the price of electricity. The effect of the directives, however, was to preclude the OEB from examining those implications, let alone requiring that they be changed or curtailed in any way. With respect to the factors which have caused material increases in the price of electricity, the OEB's role has been to implement government's policies. It has not been able to have any impact on the resulting cost increases.

It is instructive, in this context, to recall the observations of Ontario's Auditor General on the role of the OEB in the province's renewable energy and smart metering initiatives. In his 2011 Report, the Auditor General observed that:

The ministerial direction-making authority has limited the OEB's ability to carry out its regulatory and oversight role on behalf of consumers with respect to renewable energy.⁸

In her 2014 Report, the Auditor General observed that the Minister again used the authority to set aside the regulatory role of the OEB to override its mandate to protect the interests of ratepayers with respect to electricity prices. In that 2014 Report, the Auditor General recommended a "review of the role of the Ontario Energy Board as an independent regulator when Ministerial Directives that impact electricity rates are issued".⁹

Common to the Auditor General's analysis in both the 2011 and 2014 reports is the observation that there were no cost/benefit analyses done of the green energy and smart-meter initiatives, something which the OEB might have done even if the government did not. Implicit in the Auditor General's comments about the failure of the OEB to provide a critique of the government's policies and implementation is the importance of having an independent body assess the government's actions.

That the OEB has not played an oversight role with respect to the most significant factors that have caused an increase in electricity prices, and that its role has been limited to implementing the government's green energy initiatives, is not entirely the OEB's choice. It has played the role that the government has required it to play as a result of both the limits on its legislative authority and of the directives issued to it under the OEB Act.

Because of its relatively limited statutory mandate, and because of the effect of the directives, the focus of the OEB has been on transmission and distribution rates. It has been successful, by and large, in limiting increases in rates in both the gas and electricity sectors to at, or slightly above, the rate of inflation.

⁸ Office of the Auditor General of Ontario, *Annual Report 2011*, by Jim McCarter, (Toronto: Queen's Printer for Ontario, 2011) at 101, online: http://www.auditor.on.ca/en/reports_en/en11/2011ar_en.pdf.

⁹ Office of the Auditor General of Ontario, *Annual Report 2014*, by Bonnie Lysyk (Toronto: Queen's Printer for Ontario, 2014) at 375, online: http://www.auditor.on.ca/en/reports_en/en14/2014AR_en_web.pdf.

It would be churlish to criticize the OEB in circumstances where it has been successful in limiting the increases in transmission and distribution rates. At the same time, however, it is important to examine, and understand the implications of, the things the OEB itself has done to limit its own independence and expertise.

In my view, the second force leading to a limitation on the OEB's independence has been its failure to adhere to the principles of good governance. In addition, the OEB has adopted policies that move the rate-approval process away from quasi-judicial decision-making and towards an administrative process. Those developments have been accompanied by an apparent erosion of the OEB's expertise, evidenced by the loss of long-time OEB members and senior staff, and the increasing reliance on part-time members.

At this point, I pause to consider what the governance of regulatory agencies consists of, why governance is important, and what the failure to adhere to the principles of good governance signifies.

The deference shown by the courts to the decisions of expert regulatory agencies has increased the importance of other forms of governance for those agencies. The Organization for Economic Cooperation and Development ("OECD") has issued what it describes as principles or standards for the governance of regulatory agencies. Those principles are premised on the proposition that the governance arrangements of regulatory agencies are critical. The OECD has put the proposition in the following words:

The legal remit of the regulator, the powers it is given, how it is funded and how it is held accountable are all key issues that should be carefully designed if the regulator is to succeed in combining effective regulation with high standards of integrity and trust. Regulators are pivotal in making regulatory regimes work for sustainable growth and equitable societies.¹⁰

As the OECD suggests, adherence to the principles or standards of good governance is essential to maintaining the independence and effectiveness of regulatory agencies, and to maintaining public confidence in both.

The Ontario government believes that the governance of regulatory agencies is important, something which is reflected in the *Adjudicative Tribunals Accountability, Governance, and Appointments Act, 2009* (the "Accountability Act").¹¹ The OEB is not subject to the Accountability

¹⁰ Organization for Economic Co-operation and Development, *The Governance of Regulators* (Paris: OECD Publishing, 2014) at 9.

¹¹ *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, SO 2009, c 33, Schedule 5.

Act. Instead, it is subject to a Memorandum of Understanding (“MOU”) between the Chair of the OEB and the Minister.¹²

Section 1.1 of the MOU provides that its purpose is to “establish the accountability relationships between the Minister of Energy and the Chair and the Management Committee”.¹³

The MOU is, thus, intended to be the principal external governance mechanism for the OEB. The fact that the MOU exists indicates that the government believes that a governance mechanism for the OEB is both necessary and appropriate.

Section 6 of the MOU establishes what it describes the “Accountability Relationships”.¹⁴ Reduced to their essence those relationships require the Minister to be responsible to the legislature for the OEB’s fulfillment of its mandate and the Chair and the management committee of the OEB to be accountable to the Minister for the performance of the OEB in fulfilling its mandate. The MOU provides that the OEB is to develop performance standards which are to be embodied in an annual business plan. The OEB is to provide an annual report to the Minister which is to include, among other things, a description of how the OEB has met its performance standards.

In a recent paper, I assessed the governance of the OEB against the standards used by the OECD and by the requirements of the MOU. I identified a number of areas where the OEB’s operations and processes do not comply with the OECD standards and with the requirements of the MOU. They include the following:

1. The absence of actual, as opposed to apparent, transparency in the relationship between the Minister and the Chair of the OEB. This violates the OECD’s principles dealing with role clarity and the prevention of undue influence;
2. The failure of the Minister and the Chair of the OEB to adhere to the requirements of the OEB Act, the Memorandum of Understanding between the Minister and the Chair and the OEB’s own Bylaw No. 1, with respect to the structure and role of the management committee of the OEB. That violates the OECD’s principles of role clarity and the prevention of undue influence;
3. The fact that the OEB’s performance evaluation is based on vague, self-created criteria, making it difficult to measure actual performance. This violates the

¹² Ontario Energy Board and Ontario Minister of Energy Bob Chiarelli, *Memorandum of Understanding Between the Minister of Energy and the Chair of the Ontario Energy Board* (Toronto: 2014), online: http://www.ontarioenergyboard.ca/oeb/_Documents/About%20the%20OEB/Memorandum_of_Understanding_OEB_Ministry.pdf.

¹³ *Ibid* at s 1.1.

¹⁴ *Ibid* at s 6.

OECD's principles of accountability and the importance of meaningful performance indicators;

4. The reliance on part-time members and the absence of training for OEB members, risking undermining the confidence in the quality of the OEB's decision making and the independence of part-time members; and
5. The absence of defined limits on policy-making processes combined with aggressive policy making, risking undermining confidence in the OEB's decision-making processes.

Over the course of the past two or three years, the OEB has made significant changes in its management structure and operations. It has not appointed a second member to the Management Committee, something which the OEB Act requires. That would seem to suggest that the role of the Management Committee has been diminished, even though the OEB Act and the MOU assign important responsibilities to the Management Committee.¹⁵ The OEB has eliminated the position of the Chief Operating Officer, notwithstanding that that position is specifically referred to in the MOU.¹⁶ The OEB has come to rely more heavily on part-time members and has not replaced experienced full-time members who have left. It has changed its organizational structure so that all senior management positions now report directly to the Chair. Finally, it has adopted a number of policies which, taken together, suggest that the approval of rates is moving from a quasi-judicial function to an administrative one.

It is striking to me that these changes have been disclosed if at all then only in vague and essentially meaningless terms in the annual reports of the OEB to the Minister. Were changes on that scale, and of that importance, made in a private sector corporation, they would have been the subject of vigorous oversight by the board of directors.

I believe that the cumulative effect of all of these changes has been to begin the transformation of the OEB from an independent, quasi-judicial body into an administrative body whose principal function is to implement the policies of the government. The price of that transformation is a loss of independence. That may well be what the government intends. If that is the case, however, then I suggest that it should be the subject of a public debate in which, among other things, two questions must be addressed. The first is whether the changed role is consistent with what the legislature originally intended when it created the OEB. The second, and larger, question is whether the adverse impact on the ability of the OEB to protect the interests of consumers is good public policy.

¹⁵ *Ibid.* at s 8.3.

¹⁶ *Ibid.* at s 8.5.

D. The OEB in a Restructured Energy Sector

I have suggested in the preceding section of this paper that the role of the OEB has been changed, perhaps fundamentally, and that in the process its independence and expertise have been eroded. These changes are important for the existing operations of the OEB. They are arguably even more important in the face of what would appear to be the forthcoming changes in the structure of the electricity sector and in the face of the challenges faced by LDCs. The question to be addressed is whether, in the face of those changes and those challenges, the interests of consumers would be better protected by a rigorously independent, expert OEB.

It would appear certain that, in its forthcoming budget, the Ontario government will embark, for the fourth or fifth time in the last decade, on a fundamental restructuring of the electricity sector. It may do so by beginning the privatization of all or a part of Hydro One Networks Inc. It may also effectively direct the consolidation of the LDCs. Whether it will go further, and embark upon an investigation of allowing LDCs to change the business models under which they operate is unknown.

I suggest that, in embarking upon those changes, the interests of all consumers, whether business or individual, would be better served if there were an independent regulator that could assess the costs of the restructuring, and ensure that the rates which flow from the restructuring are truly just and reasonable.

I believe that a restructuring of the electricity sector would be incomplete without a review of the role and the mandate of the OEB in a restructured electricity sector.

E. The OEB and the Challenges Facing LDCs

It is by now a commonplace that LDCs face numerous challenges, sometimes characterized in the literature as a “death spiral”. Some of these challenges are technological, in the form of advances in technology, distributed generation, storage and conservation, which provide consumers with the opportunity of not just reducing their electricity consumption, but of ultimately leaving the grid altogether.

Some of the challenges come from a variety of socio-economic and policy factors. The demand for reliable electricity service has increased, and will continue to increase, with the use of high-tech devices and electric vehicles. The increased demand requires the LDCs to bear the cost of renewing aging infrastructure. At the same time, government policies encouraging conservation and the deployment of distributed generation have added to the costs which LDCs must bear, while reducing the demand for electricity itself. Businesses are increasingly employing technology and conservation to reduce their load. Consumers are increasingly showing a preference for employing technology to reduce their demand for electricity. New service providers are entering the market to respond to that preference. As a result, LDCs are facing increasing levels of competition.

As consumers reduce their demand, the cost of maintaining the existing infrastructure falls on an increasingly smaller group of consumers, particularly low-income consumers. This shift in the cost burden raises questions of social justice. Declines in revenues create the risk that LDCs will have to bear the costs of stranded assets.

New York State has embarked upon a review of the structure and operation of its electricity distribution sector, in a process called “Reforming the Energy Vision”.¹⁷ The review process has been conducted by the State’s Public Utilities Commission (PUC). In describing the need for fundamental reform of the distribution sector, the PUC made the following observation:

Under a conventional regulatory regime, the trends toward declining cost of self-generation, and increasing need for reliability, combined with price pressure on regulated utilities, present the risk of an eroding customer base that could increase the utilities’ cost of capital and require those costs to be collected from a shrinking pool of customers. One concern under the status quo is that only businesses and more affluent residential consumers might have the capability of gaining the benefits of DER (distributed generation). Without the reforms we are enacting, the current trajectory of DER deployment could create unintended harm to lower income consumers, creating an unacceptable gap in the quality and price of electric service.¹⁸

These challenges raise a number of important questions. For purposes of this discussion, the question I want to address is whether the OEB can respond to the challenges and if so, how.

LDCs have operated under what is commonly referred to as the regulatory bargain, in which they are compensated for their obligation to serve by earning a fair return on their investment. The question is whether that bargain can, and indeed should, protect LDCs from the effects of shifts in government policy and consumer expectations. Should the regulatory system rely on traditional cost accounting tools, for example increasing fixed charges, to address the challenges? Are those regulatory tools effective in the long run? Are they appropriate as a response to technological, policy and cultural changes?

As noted above, New York State has embarked on a wide-ranging enquiry into how the regulatory system can be changed to both allow distribution utilities to adapt to the challenges and protect the interests of consumers. And again as noted above, the enquiry, and the consequent proposals for reform, are premised on the recognition that unless the regulatory structure is altered to allow distribution utilities to provide new services, the impact of, among

¹⁷ Reforming the Energy Vision: online:
<http://www3.dps.ny.gov/W/PSCWeb.nsf/All/26BE8A93967E604785257CC40066B91A?OpenDocument>.

¹⁸ State of New York Public Service Commission, *Order Adopting Regulatory Policy Framework and Implementation Plan* (14-M-0101) (26 February 2015) at p 28. online:
<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b0B599D87-445B-4197-9815-24C27623A6A0%7d>.

other things, distributed generation, will have an adverse impact on the distribution utilities and on low income consumers.

What the New York PUC proposes to do is to enable the utilities to act as what are called “Distributed System Platform (DSP) providers”. In that capacity, the PUC envisions that the DSP will provide “service products” which might include “value value-added electricity services, such as fixed commodity pricing, demand response and efficiency programs, or contracts for DER (distributed generation) maintenance and operations.”¹⁹ The PUC also proposes that the DSP “will also provide or sell a set of products and services to customer and service providers” which might include “transaction or usage fees, platform access, analytic services, interconnection services, pricing and billing, metering information services and data sharing and DER (distributed generation) maintenance, operation, and financing”.²⁰

In terms of the PUC’s regulatory role, the PUC states the following:

The Commission’s chief concerns with respect to DSP regulation will be to enable markets, ensure fair market practices, fair and transparent information, data and services to all providers and their customers, impose standards for business practices and other protections necessary to protect consumer interests, and ensure the continued reliability of the system.²¹

It would also seem sensible for Ontario to require its expert regulator, the OEB, to undertake the kind of review which the PUC has undertaken in New York State. It gives rise to the question, however, of whether the OEB can play that role. In my view, simply reducing the number of LDC’s and making the remaining LDC’s larger will not be sufficient to meet the many challenges which distribution utilities face. As the work of the PUC in New York State suggests, a change in the regulatory framework is required. I suggest that the interests of all consumers, whether individual or a business, would be better served if there were an independent regulator that assessed the costs of the contemplated restructuring, and determined what changes are required in the regulatory framework of the restructured sector.

It may be argued that the Minister of Energy should be the one to determine the structure for the sector to decide what changes are required in the regulatory framework. But the history of government involvement in the energy sector, particularly in the last two decades, does not suggest that leaving the tasks to the government would be a good idea. As the pointed observations of the Auditors General in the 2011 and 2014 Reports make clear, governments have consistently failed to do something as basic as assess the costs and benefits of their major energy initiatives. To properly protect the interests of consumers, an independent assessment

¹⁹ *Ibid*, at p 34.

²⁰ *Ibid*, at p 34.

²¹ *Ibid*, at p 31.

of what is required in the electricity sector is essential. For that to happen, I believe there have to be fundamental changes to the mandate, operations, and perhaps the culture of the OEB.

The threshold question is whether the OEB has the statutory authority to embark upon such an inquiry. Under New York State law, the PUC has, in its words, “the responsibility to adjust its regulatory framework in response to evolving circumstances and foreseeable trends, in order to meet customers’ needs”.²²

I do not believe the OEB has such a broad statutory mandate under the OEB Act. Accordingly, if the OEB is to conduct the required review, a specific mandate from the province would be required.

The OEB has just issued a Board Policy on “A New Distribution Rate Design for Residential Electricity Consumers”.²³ The OEB proposes to have electricity distributors structure residential rates so that all the costs for distribution services are collected through a fixed monthly charge. According to the Policy, the proposed change is motivated, in part, by a desire to allow electricity distributors to be able to respond more effectively to the challenges posed by new technologies, in particular distributed generation.

Whether the new policy accomplishes that latter goal is an open question. The change is not nearly as far-reaching as the changes proposed in New York State, nor does it address the full range of challenges faced by LDCs and the full range of options available to address those challenges. Instead, it relies on the limited tool kit of the traditional regulatory model, that is a change in rate design.²⁴ It may be all the OEB can do given its limited mandate.

Just as important, however, is the question of whether the OEB has the requisite independence and expertise to undertake the review. For the reasons discussed in the preceding sections of this paper, I believe there are grave doubts as to whether it continues to have the requisite independence and expertise.

²² *Ibid*, at p 8.

²³ Ontario Energy Board (2 April 2015), *Board Policy – A New Distribution Rate Design for Residential Electricity Customers*, OEB File No EB-2012-0410, online: http://www.ontarioenergyboard.ca/oeb/_Documents/EB-2012-0410/OEB_Distribution_Rate_Design_Policy_20150402.pdf.

²⁴ See, for example, the analysis in Graffy and Kihm, “Does Disruptive Competition Mean A Death Spiral For Electric Utilities?” *Energy Law Journal*, Vol 31, No 1 (2014) at pp 1, 8, 10 and 13. The authors argue, among other things, that utilities that rely on “on regulators to redesign rates or make other tariff changes to avoid stranded costs constitutes a doubling down on conventional cost-recovery tactics at a time when inventive adaptation and even creative leadership may be required.” (p 13).

F. Conclusion

It is in the interests of consumers, and indeed the interests of the economy of the province, that the restructuring of the electricity sector be done well, and that the challenges facing LDCs be managed effectively. Based on the record of the past decade, consumers can have little confidence that the government will do either of these things well. The Auditor General's 2011 Report on the government's green energy initiatives is a devastating, root and branch critique of the ability and willingness of the government to manage the energy sector in a way which protects the public interest. It is, I suggest, vital that there be an independent, expert body that can oversee the changes and insist that they be made in a way that represents good public policy and protects the interests of consumers.

The OEB is the agency which could fulfil that critically-important function. To be able to do so, however, the government must allow it to operate as an independent, expert regulatory agency. And, just as important, the OEB itself must once again embrace that role.

Robert B. Warren
April 15, 2015