



**COLORADO**

**Department of  
Regulatory Agencies**

Colorado Office of Policy, Research &  
Regulatory Reform

# 2020 Sunset Review

Office of Consumer Counsel and the Utility Consumers'  
Board



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October 15, 2020



**COLORADO**

**Department of  
Regulatory Agencies**

Executive Director's Office

October 15, 2020

Members of the Colorado General Assembly  
c/o the Office of Legislative Legal Services  
State Capitol Building  
Denver, Colorado 80203

Dear Members of the General Assembly:

The Colorado General Assembly established the sunset review process in 1976 as a way to analyze and evaluate regulatory programs and determine the least restrictive regulation consistent with the public interest. Pursuant to section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) at the Department of Regulatory Agencies (DORA) undertakes a robust review process culminating in the release of multiple reports each year on October 15.

A national leader in regulatory reform, COPRRR takes the vision of their office, DORA and more broadly of our state government seriously. Specifically, COPRRR contributes to the strong economic landscape in Colorado by ensuring that we have thoughtful, efficient and inclusive regulations that reduce barriers to entry into various professions, and that open doors of opportunity for all Coloradans.

As part of this year's review, COPRRR has completed an evaluation of the Office of Consumer Counsel and Utility Consumers' Board. I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2021 legislative committee of reference.

The report discusses the question of whether there is a need for the program provided under Article 6.5 of Title 40, C.R.S. The report also discusses the effectiveness of the OCC staff in carrying out the intent of the statutes and makes recommendations for statutory and administrative changes for the review and discussion of the General Assembly.

To learn more about the sunset review process, among COPRRR's other functions, visit [coprrr.colorado.gov](http://coprrr.colorado.gov).

Sincerely,

Patty Salazar  
Executive Director





**COLORADO**

Department of  
Regulatory Agencies

Colorado Office of Policy, Research &  
Regulatory Reform

October 15, 2020

# FACT SHEET

## Sunset Review: Office of Consumer Counsel and the Utility Consumers' Board

### Background

#### *What is the Office of Consumer Counsel?*

The Office of Consumer Counsel (OCC), located in the Department of Regulatory Agencies, is charged with representing the interests of consumers in investor-owned electric and natural gas utility matters before the Public Utilities Commission (PUC), federal regulatory agencies and in the courts.

#### *What is the Utility Consumers' Board?*

The Utility Consumers Board (UCB) is an 11-member board that provides policy guidance to the OCC.

#### *How is it administered?*

Generally, the OCC seeks to act in the public interest and to save consumers money by intervening in investor-owned electric and natural gas utility proceedings in which, among other things, the utilities seek to obtain the highest possible return on equity. OCC staff must examine technical evidence, provide expert testimony, cross-examine witnesses, make legal arguments and represent consumers in settlement negotiations.

#### *Who is served by the OCC?*

The OCC advocates on behalf of residential, small business and agricultural consumers in electric and natural gas matters pertaining to investor-owned utilities. In fiscal year 18-19, the OCC's activities helped to save consumers approximately \$139 million.

#### *What does it cost?*

In fiscal year 18-19, the OCC's expenditures totaled approximately \$1.9 million, and there were 7.0 full-time equivalent employees associated with the program.

### Key Recommendations

- Continue the OCC and UCB for seven years, until 2028.
- Clarify that the OCC is authorized to appear before and participate in the proceedings of entities other than those enumerated in statute.
- Change the name of the OCC to the Office of the Utility Consumer Advocate, and change the name of the head of that office from Consumer Counsel to Director.
- Clarify the role of the UCB and make it a Type 2 entity.
- Repeal the statutory requirements surrounding the UCB's role regarding certain personnel matters.
- Repeal the requirement that one member of the UCB come from each Colorado congressional district, and instead require all appointing authorities to seek to ensure the greatest degree of diversity possible in making such appointments.

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## Background

### Sunset Criteria

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria<sup>1</sup> and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are guided by statutory criteria and sunset reports are organized so that a reader may consider these criteria while reading. While not all criteria are applicable to all sunset reviews, the various sections of a sunset report generally call attention to the relevant criteria. For example,

- In order to address the first criterion and determine whether a particular regulatory program is necessary to protect the public, it is necessary to understand the details of the profession or industry at issue. The Profile section of a sunset report typically describes the profession or industry at issue and addresses the current environment, which may include economic data, to aid in this analysis.
- To ascertain a second aspect of the first sunset criterion--whether conditions that led to initial regulation have changed--the History of Regulation section of a sunset report explores any relevant changes that have occurred over time in the regulatory environment. The remainder of the Legal Framework section addresses the third sunset criterion by summarizing the organic statute and rules of the program, as well as relevant federal, state and local laws to aid in the exploration of whether the program's operations are impeded or enhanced by existing statutes or rules.
- The Program Description section of a sunset report addresses several of the sunset criteria, including those inquiring whether the agency operates in the public interest and whether its operations are impeded or enhanced by existing statutes, rules, procedures and practices; whether the agency performs efficiently and effectively and whether the board, if applicable, represents the public interest.
- The Analysis and Recommendations section of a sunset report, while generally applying multiple criteria, is specifically designed in response to the tenth

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<sup>1</sup> Criteria may be found at § 24-34-104, C.R.S.

criterion, which asks whether administrative or statutory changes are necessary to improve agency operations to enhance the public interest.

These are but a few examples of how the various sections of a sunset report provide the information and, where appropriate, analysis required by the sunset criteria. Just as not all criteria are applicable to every sunset review, not all criteria are specifically highlighted as they are applied throughout a sunset review. While not necessarily exhaustive, the table below indicates where these criteria are applied in this sunset report.

Sunset Criteria	Where Applied
(I) Whether regulation by the agency is necessary to protect the public health, safety, and welfare; whether the conditions that led to the initial regulation have changed; and whether other conditions have arisen that would warrant more, less, or the same degree of regulation;	<ul style="list-style-type: none"> <li>• Profile.</li> <li>• Legal Framework: History of Regulation.</li> <li>• Recommendation 1.</li> </ul>
(II) If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms, and whether agency rules enhance the public interest and are within the scope of legislative intent;	<ul style="list-style-type: none"> <li>• Legal Framework: Legal Summary.</li> </ul>
(III) Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters;	<ul style="list-style-type: none"> <li>• Legal Framework: Legal Summary.</li> <li>• Program Description and Administration.</li> <li>• Program Description and Administration: Interventions &amp; Cost Savings.</li> <li>• Program Description and Administration: Outreach.</li> <li>• Recommendation 4.</li> <li>• Administrative Recommendation 2.</li> </ul>
(IV) Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;	<ul style="list-style-type: none"> <li>• Program Description and Administration.</li> <li>• Program Description and Administration: Interventions &amp; Cost Savings.</li> <li>• Recommendations 1 and 2.</li> </ul>

(V) Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;	<ul style="list-style-type: none"> <li>• Legal Framework: Legal Summary.</li> <li>• Program Description and Administration: Utility Consumers' Board.</li> <li>• Recommendation 6.</li> <li>• Administrative Recommendation 1.</li> </ul>
(VI) The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;	<ul style="list-style-type: none"> <li>• Profile.</li> </ul>
(VII) Whether complaint, investigation, and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;	<ul style="list-style-type: none"> <li>• The OCC does not receive or investigate complaints or take disciplinary action.</li> </ul>
(VIII) Whether the scope of practice of the regulated occupation contributes to the optimum use of personnel and whether entry requirements encourage affirmative action;	<ul style="list-style-type: none"> <li>• The OCC does not regulate an occupation or profession with a scope of practice.</li> </ul>
(IX) Whether the agency through its licensing or certification process imposes any sanctions or disqualifications on applicants based on past criminal history and, if so, whether the sanctions or disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subsection (5)(a) of this section must include data on the number of licenses or certifications that the agency denied based on the applicant's criminal history, the number of conditional licenses or certifications issued based upon the applicant's criminal history, and the number of licenses or certifications revoked or suspended based on an individual's criminal conduct. For each set of data, the analysis must include the criminal offenses that led to the sanction or disqualification.	<ul style="list-style-type: none"> <li>• The OCC does not regulate an occupation or profession.</li> </ul>
(X) Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.	<ul style="list-style-type: none"> <li>• Analysis and Recommendations.</li> <li>• Recommendations 3 and 5.</li> </ul>

## Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review on COPRRR's website at: [coprrr.colorado.gov](http://coprrr.colorado.gov).

The functions of the Office of Consumer Counsel (OCC), as enumerated in Article 6.5 of Title 40, Colorado Revised Statutes (C.R.S.), shall terminate on September 1, 2021, unless continued by the General Assembly. During the year prior to this date, it is the duty of COPRRR to conduct an analysis and evaluation of the OCC pursuant to section 24-34-104, C.R.S.

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The purpose of this review is to determine whether the currently prescribed program should be continued and to evaluate the performance of the OCC. During this review, the OCC must demonstrate that the program serves the public interest. COPRRR's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

## Methodology

As part of this review, COPRRR staff attended meetings of the Utility Consumers' Board (UCB); interviewed staff of the OCC, members of the UCB, private individuals and stakeholders representing other state agencies, utilities, consumer advocates and other interest groups; and reviewed decisions of the Colorado Public Utilities Commission, UCB minutes, Colorado statutes and rules, and the laws of other states.

Major contacts made during this review include, but are not limited to:

- AARP
- AFL-CIO
- Atmos Gas
- Black Hills Energy
- Clean Energy Action
- Colorado Association of Municipal Utilities
- Colorado Attorney General's Office
- Colorado Cable Television Association
- Colorado Cross Disability Coalition
- Colorado Energy Group
- Colorado Energy Office
- Colorado Farm Bureau
- Colorado Department of Public Health and Environment
- Colorado Natural Gas
- Colorado Public Interest Research Group
- Colorado Public Utilities Commission
- Colorado Rural Electric Association
- Colorado Senior Lobby
- Colorado Solar and Storage Association
- Colorado Telecommunications Association
- Communications Workers of America
- Conservation Colorado
- Energy Outreach Colorado
- GRID Alternatives Colorado
- Independence Institute



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- National Association of Utility Consumer Advocates
  - National Federation of Independent Business
  - Natural Resources Defense Council
  - Office of Consumer Counsel
  - Pueblo Chamber of Commerce
  - Sierra Club
  - Utility Consumers' Board
  - Western Resource Advocates
  - Xcel Energy

### Profile of Utility Consumer Advocates

In a sunset review, COPRRR is guided by the sunset criteria located in section 24-34-104(6)(b), C.R.S. The first criterion asks whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation.

In order to understand the need for regulation, or in this case, the OCC, it is first necessary to understand what the OCC does, who it serves and why.

A public utility is a company that provides essential public services, such as electricity, natural gas, water, waste management, transportation or telecommunications services. Many public utilities operate as monopolies, particularly in those instances when the costs to build and maintain infrastructure, or to deliver services, are not competitively feasible.

Public utilities in the United States came under state control in the early 20<sup>th</sup> Century, and many fell under the jurisdiction of state public utilities commissions. These commissions customarily issue certificates of public convenience and necessity to regulated utilities. In exchange for an opportunity to earn a reasonable rate of return, a regulated utility consents to the state's oversight of many aspects of its business, particularly its allowable return on equity, its rates and its service quality.

In response to the energy crisis of the 1970s and a general public sentiment that the average utility consumer did not have a meaningful voice in the utility rate setting process, states began to create state utility consumer advocates. These advocates were, in general, empowered to represent consumers in the complex utility regulatory environment, where utilities frequently employ teams of lawyers, economists, engineers and other experts. In such circumstances, it is generally recognized as impracticable for a single consumer to adequately advocate for himself or herself. The

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utility consumer advocate is intended to fill this void and act as a counter to the relative power of the utility before the regulator.

Today, consumer advocates may intervene in regulatory proceedings involving rates, service quality issues, resource planning, applications for new power generation or transmission facilities and many others. In some instances, the consumer advocate may be the only voice of the consumer in a particular proceeding, while in others, the consumer advocate may be one of several.

Some common attributes of utility consumer advocates include:

- Consumers are represented as a class, not as individuals, though certain groups of consumers, such as residential, small business and agricultural consumers may be the focus of the advocate's work;
- An automatic right to participate as a party before the regulator (public utilities commission);
- Independence from the regulator; and
- The ability to appeal decisions of the regulator to a court.

Since the structure of utility consumer advocates vary from state to state, it can be difficult to ascertain their exact number. However, as of 2016, at least 40 states had such advocates, with 21 structured as independent agencies (which includes those administratively attached to a parent department), 17 housed within the state's attorney general's office and two located in the legislative branch.<sup>2</sup> In addition to these, some states have non-profit citizen utility boards (CUBs), some of which are created in statute, and some not. In the end,

There is nothing homogeneous about the way advocates approach their jobs. Every state and every geographic region faces different issues, and the offices vary in terms of staff and budget, few of which have seen increased resources as the workload rises.<sup>3</sup>

The sixth sunset criterion requires COPRRR to evaluate the economic impact of regulation. Consumer advocates routinely measure their success in a variety of ways. Most state consumer advocates,

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<sup>2</sup> *An Evaluation of Ratepayer Advocate Structures Pursuant to Act 56, Section 21b—A Report to the Vermont House Committee on Commerce and Economic Development and the Senate Committee on Finance*, Vermont Public Service Department, February 22, 2016, pp. 14-16. Retrieved June 1, 2020, from <https://publicservice.vermont.gov/sites/dps/files/documents/Act%2056%20Public%20Advocate%20Report%20to%20the%20Legislature.pdf>

<sup>3</sup> Rod Kuckro, "Utilities: Consumer advocates dogged in fight against higher rates," *E&E News*. January 22, 2014. Retrieved December 13, 2019, from [www.eenews.net/stories/1059993263](http://www.eenews.net/stories/1059993263)

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have saved utility consumers billions of dollars, helped preserve adequate levels of service quality, and made these needed services more accessible to lower-income consumers.<sup>4</sup>

Indeed, Colorado's consumer advocate, the OCC, and the subject of this sunset review, has saved Colorado consumers approximately \$1.7 billion over the last 30 years.<sup>5</sup>

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<sup>4</sup> Stephen Brobeck, "State Utility Advocacy," *Watchdogs and Whistleblowers: A Reference Guide to Consumer Activism*, S. Brobeck and R. Mayer, eds., Greenwood (2015), p. 445.

<sup>5</sup> Colorado Department of Regulatory Agencies, Office of Consumer Counsel. *Welcome to the Colorado Office of Consumer Counsel*. Retrieved August 13, 2020, from <https://occ.colorado.gov>

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## Legal Framework

### History of the Office of Consumer Counsel

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by the sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The first sunset criterion questions whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen that would warrant more, less or the same degree of regulation.

One way that COPRRR addresses this is by examining why the program was established and how it has evolved over time.

The General Assembly created the Office of Consumer Counsel (OCC) in the Attorney General's Office (AGO) in 1984 as part of a national effort to create similar offices that began in the 1970s. The culmination of a decade of extensive efforts, the OCC was created as a Type 2 agency, to provide quality representation for agricultural, residential and small business utility consumers as classes of ratepayers, not as individuals, in proceedings before the Colorado Public Utilities Commission (PUC) related to natural gas, electric and telephone utilities.

While still housed at the AGO, the Consumer Counsel convened a Utility Consumer Advocacy Board.

During the sunset hearings regarding the continuation of the PUC and the OCC in 1992, issues were raised regarding the structure and placement of the OCC. As a result of this process, in 1993, the OCC was transferred to the Department of Regulatory Agencies (DORA) through a Type 1 transfer, while attorneys for the OCC remained with the AGO.

At the same time, the General Assembly created the Utility Consumers' Board (UCB) as a Type 1 body, comprising representatives from around the state whose interests and backgrounds reflected the diversity of Colorado's utility consumers, to assist the OCC.

Since that time, the OCC and UCB have undergone three sunset reviews (1997, 2005 and 2014), and each review recognized the necessity and the effectiveness of the OCC in protecting the interests of utility consumers and recommended continuation.

When involved in proceedings before the PUC, OCC staff is prohibited from *ex parte* communications with PUC Commissioners; however, in 2008, the General Assembly excluded rulemaking and discussions on pending legislation from this prohibition.

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Additionally, Senate Bill 15-271 removed telephone utilities from the OCC's jurisdiction and changed the composition, as well as the appointing authorities, of the UCB.

Finally, Senate Bill 19-236, the PUC Sunset Bill, added significant responsibilities to the PUC's portfolio without directly addressing the role of the OCC in such matters. Some of these areas include reducing utilities' carbon dioxide emissions, establishing clean energy targets, and others.

## Legal Summary

The second and third sunset criteria question:

Whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms, and whether agency rules enhance the public interest and are within the scope of legislative intent; and

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters.

A summary of the current statutes and rules is necessary to understand whether regulation is set at the appropriate level and whether the current laws are impeding or enhancing the agency's ability to operate in the public interest.

The OCC is a Type 1 division of DORA, and is headed by the Consumer Counsel.<sup>6</sup> The Consumer Counsel must have five years of experience in consumer-related utility issues or in the operation, management or regulation of utilities as an:<sup>7</sup>

- Attorney,
- Engineer,
- Economist,
- Accountant,
- Financial Analyst,
- Administrator, or
- Any combination of the above.

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<sup>6</sup> §§ 40-6.5-102(1 and 2), C.R.S.

<sup>7</sup> § 40-6.5-103, C.R.S.

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The Consumer Counsel must not own stocks or bonds in a corporation that is subject to regulation by the PUC, and is prohibited from having any pecuniary interest in such a corporation.<sup>8</sup>

For purposes of the OCC and the Consumer Counsel, a public utility is an investor-owned natural gas or electric utility.<sup>9</sup>

A residential consumer is a customer whose utility service is limited to his or her residence.<sup>10</sup>

An agricultural consumer, generally, is a customer whose utility service is classified as agricultural or irrigation use pursuant to a utility tariff established by the PUC.<sup>11</sup>

A small business consumer, generally, is a customer whose utility service is classified as a small business or small commercial user pursuant to a utility tariff established by the PUC.<sup>12</sup>

The Consumer Counsel is required to “represent the public interest, and to the extent consistent therewith, the specific interests” of residential, agricultural and small business consumers in proceedings before the PUC and appeals therefrom.<sup>13</sup> The Consumer Counsel may appear and intervene as a party in any PUC proceeding and any appeal therefrom concerning:<sup>14</sup>

- Rate changes,
- Rulemaking,
- Charges,
- Tariffs,
- Modifications of service, and
- Matters involving certificates of public convenience and necessity.

The Consumer Counsel is further required to give due consideration to the short- and long-term impact of proceedings on the various classes of consumers, so as not to jeopardize the interest of one class in an action by another.<sup>15</sup>

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<sup>8</sup> § 40-6.5-103, C.R.S.

<sup>9</sup> § 40-6.5-101(3), C.R.S.

<sup>10</sup> § 40-6.5-101(4), C.R.S.

<sup>11</sup> § 40-6.5-101(1), C.R.S.

<sup>12</sup> § 40-6.5-101(5), C.R.S.

<sup>13</sup> § 40-6.5-104(1), C.R.S.

<sup>14</sup> §§ 40-6.5-104(1) and -106(2), C.R.S.

<sup>15</sup> § 40-6.5-104(2), C.R.S.

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The PUC must grant the Consumer Counsel leave to intervene in all cases where the Consumer Counsel makes such a request, so long as that request conforms with PUC rules.<sup>16</sup>

The Consumer Counsel may also intervene in any proceeding before a federal agency that regulates utility rates or service or a federal court in a matter that will affect a rate, charge or term of service for residential, small business or agricultural consumers.<sup>17</sup>

The Consumer Counsel is prohibited from becoming a party to any complaint between an individual and a utility.<sup>18</sup>

The Attorney General is required to advise the OCC in all legal matters and to represent the OCC in proceedings in which the OCC participates.<sup>19</sup>

The Consumer Counsel and OCC staff must refrain from *ex parte* communications with PUC Commissioners when directly involved in any adjudicatory proceeding before the PUC.<sup>20</sup>

The Consumer Counsel may:<sup>21</sup>

- Employ attorneys, engineers, economists, accountants and other employees to carry out his or her duties and may not employ more than 16 full-time equivalent employees;
- Contract with experts to perform research and to appear as witnesses before the PUC; and
- Have access to the PUC's files when conducting research.

The fifth sunset criterion asks,

Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions . . .

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<sup>16</sup> § 40-6.5-106(1)(b), C.R.S.

<sup>17</sup> § 40-6.5-106(2.5), C.R.S.

<sup>18</sup> § 40-6.5-106(2), C.R.S.

<sup>19</sup> § 40-6.5-102(4), C.R.S.

<sup>20</sup> § 40-6.5-106(3)(a), C.R.S.

<sup>21</sup> § 40-6.5-106(1)(a, c and d), C.R.S.

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The Utility Consumers' Board (UCB) is a Type 1 entity that is directed to “guide the policy of the [OCC].”<sup>22</sup> The UCB comprises 11 members, seven of whom are appointed by the Governor according to the following requirements:<sup>23</sup>

- At least one member who is actively engaged in agriculture as a business,
- At least two members who are owners of small businesses with 100 or fewer employees,
- At least one member from each of the state’s seven congressional districts, and
- No more than four members may be affiliated with the same political party.

The remaining four members are appointed by the legislative branch; one member is appointed by each of the following:<sup>24</sup>

- The President of the Senate,
- The Minority Leader of the Senate,
- The Speaker of the House of Representatives, and
- The Minority Leader of the House of Representatives.

The UCB must meet at least six times per year. Its members are appointed to four-year terms and serve without compensation, although members who reside outside of the Denver Metro Area may be reimbursed for reasonable travel expenses. A member may be removed by his or her appointing authority for misconduct, incompetence or neglect of duty.<sup>25</sup>

Although the UCB is required to represent the public interest of Colorado utility users, it is specifically required to represent the interests of residential, small business and agricultural consumers by providing “general policy guidance and oversight for the [OCC] and the Consumer Counsel” in the performance of their duties.<sup>26</sup>

The powers and duties of the UCB include:<sup>27</sup>

- Providing general policy guidance to the OCC regarding rulemaking matters, legislative projects, general activities and priorities of the OCC;
- Gathering data and information and formulating policy positions to advise the OCC in preparing analysis and testimony in legislative hearings on proposed legislation impacting residential, small business and agricultural utility consumers; and

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<sup>22</sup> § 40-6.5-102(3)(a), C.R.S.

<sup>23</sup> § 40-6.5-102(3)(b), C.R.S.

<sup>24</sup> § 40-6.5-102(3)(b), C.R.S.

<sup>25</sup> § 40-6.5-102(3)(b), C.R.S.

<sup>26</sup> § 40-6.5-102(3)(c), C.R.S.

<sup>27</sup> § 40-6.5-102(3)(c)(I through III), C.R.S.



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- Reviewing and consulting with the Executive Director of DORA on the annual evaluations of the OCC and the Consumer Counsel.

Additionally, the UCB is to confer with the Executive Director of DORA on the hiring of the Consumer Counsel.<sup>28</sup>

To fund the OCC, the General Assembly is prohibited from appropriating any General Fund dollars, and instead is required to appropriate funds from the PUC's Fixed Utility Fund for the direct and indirect costs of the OCC.<sup>29</sup>

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<sup>28</sup> § 40-6.5-102(3)(c)(IV), C.R.S.

<sup>29</sup> § 40-6.5-107, C.R.S.

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## Program Description and Administration

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The third, fourth and fifth sunset criteria question:

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures practices and any other circumstances, including budgetary, resource and personnel matters;

Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively; and

Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates.

In part, COPRRR utilizes this section of the report to evaluate the agency according to these criteria.

The Office of Consumer Counsel (OCC) is a division of the Department of Regulatory Agencies (DORA).<sup>30</sup> The OCC exercises its powers and performs its duties as a Type 1 agency. It is primarily responsible for representing residential, small business and agricultural consumers in proceedings before the Colorado Public Utilities Commission (PUC) and appeals therefrom, federal agencies that regulate utility rates or service and the courts<sup>31</sup> in matters involving investor-owned natural gas and electric utilities.

The OCC is charged with representing the interests of the above-referenced consumer classes, as classes, in cases such as rate changes, charges, tariffs, service modifications, rulemaking and certificates of public convenience and necessity. OCC staff examines technical evidence filed by utilities and other witnesses, provides expert testimony, cross-examines witnesses, makes legal arguments and represents consumers in settlement negotiations.

The OCC is prohibited from representing individuals in their complaints against utilities.<sup>32</sup>

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<sup>30</sup> § 40-6.5-102(1), C.R.S.

<sup>31</sup> § 40-6.5-106(2.5), C.R.S.

<sup>32</sup> § 40-6.5-106(2), C.R.S.

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The OCC is funded entirely by General Assembly appropriations from the PUC’s Fixed Utility Fund,<sup>33</sup> which is funded by assessments on state-regulated utilities.

Table 1 illustrates, for the fiscal years indicated, the OCC’s total expenditures and staffing levels.

**Table 1**  
**Agency Fiscal Information**

Fiscal Year	FTE	Total Expenditures
14-15	7.0	\$1,735,576
15-16	7.0	\$1,725,475
16-17	7.0	\$1,688,038
17-18	7.0	\$1,856,034
18-19	7.0	\$1,968,269

Included in the expenditures in Table 1 are funds expended by the OCC for contract consultants. The need for such experts, as well as the funds to pay them, fluctuates from year to year depending on the number and nature of the cases before the PUC in which the OCC participates, which explains the fluctuations in expenditures.

Staffing in the OCC has remained constant during the period reviewed at 7.0 full-time equivalent (FTE) employees:

1.0 FTE Management (Director). The OCC is headed by the Consumer Counsel,<sup>34</sup> who is often referred to as the Director. This position establishes the policy goals of the OCC and determines, after consultation with staff and counsel, the positions the OCC will take in cases. The Director supervises the OCC staff and guides its work. The Director leads the OCC’s work within DORA, the General Assembly and with stakeholders. The Director facilitates the work of the Utility Consumers’ Board (UCB) and promotes consumer interests through media and outreach.

1.0 FTE Program Management II (Deputy Director). This position directs the budget and administrative activities of the OCC, including personnel matters, supervision of clerical staff, budget and fiscal management. The Deputy Director designs and implements financial procedures as well as the administrative and docket management in the OCC. The Deputy Director represents the OCC at the

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<sup>33</sup> § 40-6.5-107, C.R.S.

<sup>34</sup> § 40-6.5-102(1), C.R.S.

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PUC and within DORA, as well as with other state agencies regarding the OCC's budget, administration and docket management matters.

1.0 FTE Program Assistant I. This position provides administrative, technical and office support to the OCC, administers and supports the UCB, facilitates UCB meetings, processes accounting transactions, serves as a liaison with DORA administrative services personnel, manages the OCC's website and coordinates the OCC's education and outreach endeavors.

4.0 FTE Rate/Financial Analyst V. These positions analyze and evaluate public policy issues for regulated utilities in the areas of natural gas and electricity. They also advocate for OCC policy and recommendations on regulated utility rate and tariff filings before the PUC.

Additionally, three attorneys and one paralegal (4.0 FTE) in the Attorney General's Office are assigned to the OCC for legal representation in its various regulatory proceedings. The OCC also contracts with experts to perform research and to appear as expert witnesses. These expenditures are all reflected in the Total Expenditures expressed in Table 1.

## **Interventions & Cost Savings**

The third and fourth sunset criteria question:

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures practices and any other circumstances, including budgetary, resource and personnel matters; and

Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively.

In part, COPRRR utilizes this section of the report to evaluate the agency according to these criteria.

The OCC represents residential, small business and agricultural consumers of investor-owned electric and natural gas utilities in matters before the PUC.

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The PUC performs the following regulatory activities as they relate to investor-owned electric and natural gas utilities:<sup>35</sup>

- Establishing rates;
- Establishing service standards;
- Issuing certificates of public convenience and necessity;
- Ensuring compliance with PUC decisions, rules and safety standards;
- Initiating enforcement actions to correct non-compliance; and
- Processing complaints from consumers.

To accomplish these tasks, the PUC has several types of proceedings ranging from highly complex rate cases and energy resource plans, to rulemakings and evaluating applications. The OCC may intervene, as a matter of right, in any of these proceedings on behalf of its constituent consumer classes.

When the PUC receives a new filing or initiates a proceeding on its own, PUC staff creates a docket. When a new docket is created, an OCC analyst will review any submitted documentation and present it to the entire OCC staff, as well as the assistant attorneys general who work with the OCC, at a weekly case review meeting. In deciding whether to intervene in a particular docket, or portion thereof, OCC staff and its attorneys consider why the filing was made or the proceeding initiated, what the utility is asking for, whether anything seems overstated and the veracity of the utility's stated reasons and assumptions. While the answers to many of these questions are not immediately apparent, OCC staff will utilize the PUC's discovery process to ascertain those answers over the course of the proceeding and to develop its positions on the various issues presented.

As a matter of course, the OCC intervenes in most energy-related dockets. Table 2 illustrates, for the fiscal years indicated, the number and types of cases in which the OCC participated before the PUC.

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<sup>35</sup> Colorado Public Utilities Commission. *About Electric*. Retrieved June 1, 2020, from <https://puc.colorado.gov/aboutelectric>; and Colorado Public Utilities Commission. *About Natural Gas*. Retrieved June 1, 2020, from <https://puc.colorado.gov/aboutnaturalgas>

**Table 2**  
**OCC Involvement in Natural Gas and Electric Cases**

Fiscal Year	Natural Gas	Electric	E&G	Utility Filings Reviewed	Utility Case Interventions	Rate Cases	Rulemaking Participation (# of Cases)
14-15	109	114	17	240	16	3	1
15-16	112	102	14	228	37	6	4
16-17	87	72	15	174	17	4	3
17-18	103	77	11	191	22	6	5
18-19	119	106	8	233	34	8	5

“Utility Case Interventions” are cases in which the OCC formally petitioned the PUC for intervention by right in a non-rate case docket. These cases include resource planning, applications for Certificates of Public Convenience and Necessity, strategic issues filings, rate design, tax application and the like. These come in the form of applications, advice letters, petitions, variances, and miscellaneous dockets. These are cases focused on ongoing utility operations, policy implementation and legislative direction. This category does not include rate cases and rulemakings.

As the data in Table 2 illustrate, the number of cases in which the OCC has intervened during the five years reviewed has fluctuated considerably. Since the OCC’s participation in PUC proceedings is almost exclusively reactive, the fluctuations can largely be attributed to fluctuations in utilities’ filings at the PUC.

The OCC routinely calculates savings to consumers based on the difference between the PUC’s final order and the amount sought by the utility. The OCC characterizes its role in influencing those savings in one of three ways:

- “Solely responsible” indicates that the OCC considers that it alone raised an issue, took a position or settled a case that resulted in consumer savings.
- “Primarily responsible” indicates that the OCC considers that it played a lead role in securing the savings.
- “Jointly responsible” indicates that the OCC considers that it and other parties raised the same or similar issues that resulted in consumer savings.

Table 3 illustrates these cost savings for the five-year period indicated.

**Table 3**  
**Return on Investment**  
**Expenditures vs. Consumer Savings**

Fiscal Year	Solely Responsible	Primarily Responsible	Jointly Responsible	Total Savings	Total Expenditures	Savings Per Dollar Spent
14-15	\$ 28,732,109	\$0	\$102,013,424	\$130,745,533	\$1,735,576	\$75
15-16	\$ 28,761,124	\$0	\$84,860,792	\$113,621,916	\$1,725,475	\$66
16-17	\$15,965,261	\$0	\$81,749,973	\$97,715,234	\$1,688,038	\$58
17-18	\$21,215,261	\$0	\$63,219,870	\$84,435,131	\$1,856,034	\$45
18-19	\$14,886,340	\$851,458	\$123,046,924	\$138,784,722	\$1,968,269	\$71

Fluctuations from one year to the next, and indeed, over the entire five-year period, can be attributed to the nature of the particular cases involved each year.

The \$851,458 characterized as “Primarily Responsible” in fiscal year 18-19 can be attributed to a single rate case involving a natural gas utility in which the OCC advocated for eight distinct positions.

Overall, however, according to the savings reported in Table 3, total consumer savings per dollar spent by the OCC over the five-year period was \$63.

Additionally, the OCC’s activities often result in consumer benefits that are not so easily quantifiable. These types of efforts include participating in resource planning, striving to maintain transparency and balance in regulatory proceedings and issues pertaining to utility operations and data collection. Further, in one case in which a utility proposed to build certain facilities, the PUC adopted an OCC position that it would no longer allow the utility a rebuttable presumption that certain costs would be allowed. Rather, those costs will now have to be proven in a future cost recovery proceeding.

The OCC may also appeal PUC decisions to Colorado’s courts. In deciding whether to appeal a PUC decision, OCC staff considers first and foremost the likelihood of success, and it also considers whether any other parties are appealing and their grounds for doing so. Since the courts tend to defer to the PUC on utility matters, the OCC does not typically appeal PUC decisions based purely on principle. The issue must be of sufficient magnitude to justify the expenditure of resources necessary to mount an appeal. The OCC did not appeal any PUC decisions to the courts during the five-year period examined for this sunset review.

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More typical, however, is the case where the utility appeals the PUC decision, or portions thereof. The OCC may opt to participate in these appeals as a party. This happened twice during the five years examined for this sunset review. On both occasions, the OCC was on the prevailing side.

Finally, the OCC may also participate in proceedings before federal regulators, but it did not do so during the five-year period considered as part of this sunset review.

## Utility Consumers' Board

The fifth sunset criterion questions whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates. This section of the report is intended to address this criterion.

The UCB is a Type 1 entity that is directed to “guide the policy of the [OCC].”<sup>36</sup> The UCB comprises 11 members, seven of whom are appointed by the Governor according to the following requirements:<sup>37</sup>

- At least one member who is actively engaged in agriculture as a business,
- At least two members who are owners of small businesses with 100 or fewer employees,
- At least one member from each of the state’s seven congressional districts, and
- No more than four members may be affiliated with the same political party.

The remaining four members are appointed by the legislative branch, one member is appointed by each of the following:<sup>38</sup>

- The President of the Senate,
- The Minority Leader of the Senate,
- The Speaker of the House of Representatives, and
- The Minority Leader of the House of Representatives.

Given this patchwork of appointing authorities and membership requirements, the UCB had a high number of vacancies through the beginning of 2020. However, as of this writing, all but one of those vacancies had been filled.

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<sup>36</sup> § 40-6.5-102(3)(a), C.R.S.

<sup>37</sup> § 40-6.5-102(3)(b), C.R.S.

<sup>38</sup> § 40-6.5-102(3)(b), C.R.S.



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Statute requires the UCB to meet at least six times per year. As a matter of practice, the UCB generally meets monthly during the legislative session and every other month the rest of the year, for a typical total of eight meetings per year.

Meetings typically last two and a half hours and entail a presentation by a guest speaker (who is often requested by the UCB) and then a discussion of some of the higher profile PUC proceedings in which the OCC is participating. Although the OCC does not specifically ask the UCB for guidance during these discussions, the conversations can, on occasion, be robust, thereby fleshing out many issues that the OCC can then incorporate into its work.

Members of the public who are not guest speakers rarely attend UCB meetings.

Average annual expenditures on the UCB for fiscal years 14-15 through 18-19 were \$6,122, or roughly 0.34 percent of the OCC's total expenditures.

## Outreach

The third sunset criterion asks, among other things, whether the agency acts in the public interest. Although the OCC has no statutory mandate to conduct consumer outreach or education, which could be considered as enhancing the public interest, it regularly does so.

The OCC's outreach initiatives include activities such as social media posts and maintaining a booth or table at larger events such as the Colorado State Fair. The OCC participated in 22 distinct events in fiscal year 17-18, and 20 events in fiscal year 18-19. Although similar types of activities were conducted in fiscal year 19-20, they amounted to just eight distinct events, due, in large part, to the COVID-19 pandemic. Most of these efforts have concentrated on consumer education, such as providing information on how to read a utility bill and tips on how to lower those bills.

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## Analysis and Recommendations

The final sunset criterion questions whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest. The recommendations that follow are offered in consideration of this criterion, in general, and any criteria specifically referenced in those recommendations.

### **Recommendation 1 - Continue the Office of Consumer Counsel and the Utility Consumers' Board for seven years, until 2028.**

Utilities regulation is a highly technical, complicated endeavor. The Colorado Public Utilities Commission (PUC) is the organ of state government with primary responsibility to regulate, among other things, investor-owned natural gas and electric utilities. One of the ways in which it accomplishes this task is through a system that very closely resembles litigation. When a regulated utility seeks to do something—raise rates, build a new power plant or acquire energy from a new source, for example—it files certain documents with the PUC, which then opens a docket. Multiple interested parties then will typically seek to intervene in the proceeding to ensure that interests other than the utility's are represented before the PUC.

In these proceedings, the utility often dedicates a tremendous amount of resources in terms of documentation, attorneys, accountants and technical experts to support its application. The other parties that intervene typically, though not always, represent non-profit special interest groups with more limited resources. Some may represent consumers as rate payers, although they tend to be more focused on things like the environmental impact of the utility's actions or low-income consumers.

Thus, the role of the Office of Consumer Counsel (OCC) is to represent residential, small business and agricultural consumers, as classes, in proceedings involving investor-owned gas and electric utilities. While the OCC's focus is on proceedings before the PUC, statute authorizes the OCC to participate in proceedings before the courts as well as federal regulatory agencies.

The first sunset criterion asks, in short, whether regulation is necessary to protect the public health, safety and welfare. Since the OCC is not a regulatory body, it is fair to alter this criterion to ask whether the OCC is necessary to protect the public health, safety and welfare.

While the OCC is tasked with representing the public interest generally,<sup>39</sup> it is more specifically tasked with representing its constituent classes of consumers with respect to rates, charges and tariffs,<sup>40</sup> as well as service.<sup>41</sup>

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<sup>39</sup> See §§ 40-6.5-104(1 and 2), C.R.S.

<sup>40</sup> See §§ 40-6.5-104(1 and 3) and -106(2 and 2.5), C.R.S.

<sup>41</sup> See §§ 40-6.5-104(1) and -106(2 and 2.5), C.R.S.

To ascertain the extent to which the OCC has succeeded in fulfilling these missions, it is legitimate to examine the extent to which the OCC’s efforts have kept utilities consumers’ rates fair and reasonable. The OCC routinely calculates savings to consumers based on the difference between the PUC’s final order and the amount sought by the utility. The OCC characterizes its role in influencing those savings in one of three ways:

- “Solely responsible” indicates that the OCC considers that it alone raised an issue, took a position or settled a case that resulted in consumer savings.
- “Primarily responsible” indicates that the OCC considers that it played a lead role in securing the savings.
- “Jointly responsible” indicates that the OCC considers that it and other parties raised the same or similar issues that resulted in consumer savings.

Table 3, reproduced below, compares the OCC’s total expenditures to the savings realized.

**Table 3  
Return on Investment  
Expenditures vs. Consumer Savings**

Fiscal Year	Solely Responsible	Primarily Responsible	Jointly Responsible	Total Savings	Total Expenditures	Savings Per Dollar Spent
14-15	\$ 28,732,109	\$0	\$102,013,424	\$130,745,533	\$1,735,576	\$75
15-16	\$ 28,761,124	\$0	\$84,860,792	\$113,621,916	\$1,725,475	\$66
16-17	\$15,965,261	\$0	\$81,749,973	\$97,715,234	\$1,688,038	\$58
17-18	\$21,215,261	\$0	\$63,219,870	\$84,435,131	\$1,856,034	\$45
18-19	\$14,886,340	\$851,458	\$123,046,924	\$138,784,722	\$1,968,269	\$71

During the course of the five fiscal years represented in Table 3, the OCC spent just under \$9 million. The savings realized by consumers during this timeframe is approximately \$565 million. In other words, total consumer savings per dollar spent by the OCC over the five-year period was \$63.

Therefore, it is reasonable to conclude that the OCC is necessary to protect the public health, safety and welfare in proceedings before the PUC, as evidenced by the cost savings to consumers which have been realized by the OCC’s efforts.

As Table 3 and the preceding narrative illustrate, the OCC does not always work alone. Indeed, the positions taken by the OCC in various PUC proceedings are quite often aligned with the positions taken by other parties to a particular docket, and the OCC often works collaboratively with other parties.

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The fourth sunset criterion questions whether the agency under review performs its duties efficiently and effectively. A return on investment of \$63 for every dollar spent indicates that the OCC certainly performs its duties efficiently.

To determine the OCC's effectiveness, it is therefore reasonable to explore not just the savings realized by the OCC's efforts, but the extent to which it prevails on the various positions it takes.

As part of this sunset review, staff in the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) reviewed 49 PUC decisions involving 104 distinct positions taken by the OCC and spanning the course of five years (fiscal years 14-15 through 18-19). Cases were selected by both COPRRR staff and OCC staff.

The results of this exercise are revealing. In the cases examined, the OCC took a particular position by itself 54 percent of the time. In such instances, the PUC adopted the OCC position 50 percent of the time. However, when the OCC's positions aligned with those of other parties, the PUC adopted that position 89 percent of the time.

These figures are subject to interpretation. On the one hand, it could be argued that the OCC is ineffective when acting alone, as it is successful about half the time. On the other hand, it could be argued that the OCC, with its limited staff and resources, wisely takes positions in which other parties will assist in carrying the burden, and when it does so, it prevails almost all the time. Regardless, it is difficult to ascertain, with certainty, success based purely on who prevailed because of the diverse nature of the issues involved in each particular case.

Still, with a cost savings ratio of 63:1 and an overall success rate of over 50 percent, it is reasonable to conclude that the OCC performs its duties both efficiently and effectively.

The first sunset criterion also asks whether the conditions that led to the initial creation of the program have changed and whether other conditions have arisen that would warrant more, less or the same degree of regulation.

The OCC was created in 1984, at a time when many similar types of offices were created across the United States, all in response to a confluence of efforts to increase competition, ballooning costs related to nuclear generation and the energy crises of the 1970s which caused sharp and more frequent rate increases by electric utilities.<sup>42</sup> Consumer advocates such as the OCC

were created in order to remedy the perceived unfairness of a regulatory system in which utilities were well-represented by lawyers, experts, and utility personnel in matters such as rate increase requests before state

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<sup>42</sup> Elin Katz and Tim Schneider, "The Increasingly Complex Role of the Utility Consumer Advocate," *Energy Law Journal*, Vol. 41, No. 1 (2020), p. 6.

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public utility commissions, but consumers who paid the utility bills were not.<sup>43</sup>

Many of these factors remain today, though perhaps more nuanced. The general desire to see increased competition seems to remain, although California's experiment in the 1990s demonstrated that such efforts must still be tempered by legislators and regulators. While nuclear power may no longer be the power source *de jour*—at least not in all circles—alternative and renewable energy certainly is, along with issues such as climate change and reduced carbon footprints. Finally, the shift away from the finite resource of fossil fuel—whether coal or natural gas—is somewhat reminiscent of the 1970s energy crises.

All of this is to say, that although much has changed, much remains the same. In fact, some argue that utilities regulation has become more complex, not less so, driving the need for the consumer's voice to continue to be heard.

The rise of new technologies has also changed the landscape. Technologies such as distributed generation, smart grids and smart meters, electric vehicle charging stations and the like continue to involve the lawyers and experts of the utilities. Yet, consumers will be impacted, too. Questions surrounding who should pay for these new technologies and how much will have a direct impact on consumers in terms of the air they breathe, the world in which they raise their families and the rates they pay.

Thus, the OCC remains necessary to present the consumer voice in regulatory proceedings as much today as in 1984.

So, too, is the Utility Consumers' Board (UCB). As a consumer advocate, the OCC must keep its finger on the pulse of its constituencies. The UCB affords the OCC an efficient mechanism for doing so.

When the OCC was created, telecommunications was still a regulated utility and the OCC had the ability to participate in proceedings involving that sector, just as it does with investor-owned natural gas and electric utilities today. The OCC's authority in the realm of telecommunications was repealed in 2015 and some maintain that it should be restored. This sunset review, however, concludes the opposite. Although telecommunications remains a vital service—perhaps now more than ever—the sector is highly competitive. Perhaps more importantly, or perhaps because of the highly competitive nature of the sector, the PUC's jurisdiction has also been substantially curtailed. Thus, it makes little sense to task the OCC with a mission in which the PUC itself has limited activity.

Similarly, some argue that the OCC should have the ability to intervene in proceedings before municipal and cooperative utilities. The customers of these utilities, proponents maintain, also need their voices heard.

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<sup>43</sup> Elin Katz and Tim Schneider, "The Increasingly Complex Role of the Utility Consumer Advocate," *Energy Law Journal*, Vol. 41, No. 1 (2020), p. 7.

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However, the governance structures of these types of utilities are sufficiently different from those of investor-owned utilities. Cooperative and municipal utilities are beholden to their members and voters, respectively, whereas investor-owned utilities are ultimately beholden to their shareholder investors. Cooperative and municipal utilities lack the inherent profit motive of an investor-owned utility. Thus, any role that the OCC could play regarding such utilities would be severely limited and the advocacy the OCC is intended to bring when dealing with investor-owned utilities is not needed.

Some also question whether the OCC has the resources required to fulfill its statutory mandates. Procedures currently exist by which the Consumer Counsel can request any additional resources deemed necessary, but such requests, as always, must be approved and appropriated by the General Assembly.

Finally, a topic of discussion throughout this sunset review pertained to whether the OCC should remain in DORA, or whether it should be transferred to the Attorney General's Office (AGO). Recall that the OCC was housed in the AGO from the time of its creation in 1984 until its transfer to DORA in 1993. Since that time, the question has been raised whether to transfer the OCC back to the AGO.

Some cite to the fact that many states house their consumer advocate in their attorney general's office, but not all do. There is no consistent, national model to follow.

The reason most often cited as justification for such a transfer, however, is one of independence. So long as the OCC and the PUC are both housed in DORA, many question how independent the OCC can truly be.

While this argument may have merit, an obstacle to such a transfer relates to funding. Both the OCC and the PUC are funded through the Fixed Utility Fund. The transfer of the OCC to the AGO would create a situation where two agencies in two departments under two elected officials would draw funding from the same, finite source. Unless the OCC were funded in some other way, or some mechanism could be developed to resolve any funding conflicts, and that would avoid fiscal insolvency, the OCC should remain in DORA.

Many other issues were raised during the course of this sunset review, more than can be succinctly discussed here. However, the issues raised by stakeholders were heard and given due consideration. The fact that this sunset report contains more than just this one recommendation to continue the OCC bears evidence to the fact that changes are warranted.

In the end, the OCC, and the UCB, are necessary to protect the public health, safety and welfare, and the OCC performs its duties both efficiently and effectively, as evidenced by the savings realized by consumers and the OCC's adjudicatory success rate. While the regulatory landscape in which the OCC primarily operates has changed, the need for the consumer voice offered by the OCC is more necessary than ever. For

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all these reasons, the General Assembly should continue the OCC for seven years, until 2028.

Seven years is justified based on the substance of the recommendations that follow, some of which will need sufficient time to implement before their full effect will be felt. Seven years will allow for such implementation.

**Recommendation 2 - Clarify that the OCC is authorized to appear before and participate in the proceedings of entities other than those enumerated in statute.**

The universe of entities before which the OCC may appear has been interpreted narrowly. This is, most likely, due to a matter of statutory construction under which the OCC is clearly authorized to appear in proceedings before the PUC, federal regulators and the courts. However, nothing in the OCC's organic statute suggests that it is barred from appearing before other entities. Regardless, the statute has historically been interpreted narrowly, and so that is the position in which the OCC finds itself.

Until the last few years, this has not been particularly problematic, as the vast majority of matters impacting the OCC's ratepayer constituency groups occurred at the PUC. However, other proceedings, regarding climate change, clean air and clean energy, proceedings that will likely impact the natural gas and electric rates charged by the utilities regulated by the PUC, are becoming increasingly common. Understandably, these proceedings are taking place in agencies and forums other than the PUC, although decisions made elsewhere will likely result in rate cases and other types of filings at the PUC.

Indeed, section 25-7-105(1)(e)(VIII), Colorado Revised Statutes (C.R.S.), requires the Air Quality Control Commission to consult with the PUC on issues such as the cost of electricity, the reliability of electric service, technology developments in electricity production and beneficial electrification. Thus, it is clear that the General Assembly intended the AQCC to participate in matters involving the core mission of the OCC—rates and service. However, there is no explicit provision for the OCC to participate in those proceedings. Rather, the OCC must wait until a matter reaches the PUC.

While it is clear that the OCC could participate in those proceedings once begun at the PUC, it is less clear, due to the narrow interpretation of the OCC's statute, as to whether the OCC can, or indeed should, participate in those proceedings before decisions are made and before they result in regulatory filings at the PUC.

To be sure, stakeholders are far from agreed as to the necessity or desirability of this Recommendation 2. Some maintain that the OCC's near singular focus on keeping rates low in the short-term, at the expense of any other long-term benefits, would only delay proceedings in these other forums. Still others maintain that while the OCC voice may

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be a benefit outside of the PUC, they question whether the OCC has the resources and expertise to effectively participate in such non-litigious proceedings.

The OCC's representation of the rate-paying consumer in such proceedings and in such forums could serve to benefit not only consumers, but those making the decisions that result in filings before the PUC. It is undoubtedly more efficient for the ratepayer voice to be heard while decisions are being made, than afterward.

This situation is not unique to Colorado. One recent study noted:

the work of setting policy, and by extension rates, was increasingly happening outside of the traditional forum of the litigated PUC proceeding. More and more often, the decisions that would have the biggest impacts on customers' rates were happening not in formal rate cases or adversarial proceedings, but in Commission-led working groups, formal inquiries, and stakeholder groups, or often state legislatures themselves. *Advocates who waited until the traditional rate case or other litigated proceeding to fight would find the battle already lost.*<sup>44</sup> [emphasis added]

The fourth sunset criterion asks whether the agency performs its statutory duties efficiently and effectively. Clarifying that the OCC may participate in proceedings at agencies and in forums other than the PUC is not only more efficient for all involved, it will result in more effective advocacy on the part of the OCC, as it will be part of the discussions from the very beginning, rather than reacting at the very end.

For all these reasons, the General Assembly should clarify that the OCC is authorized to appear before and participate in proceedings of entities other than those specifically enumerated in statute.

**Recommendation 3 - Change the name of the Office of Consumer Counsel to the Office of the Utility Consumer Advocate, and change the name of the head of that office from Consumer Counsel to Director.**

Few outside of the world of Colorado utilities regulation have heard of the OCC, let alone understand what it does and does not do. While the former may be an indication that the OCC staff performs its function without drawing attention to itself, the latter can be problematic and may stem from the very name itself: "Office of Consumer Counsel."

First, the name implies that the office counsels or represents all consumers. This manifests in multiple, misplaced calls and inquiries to the OCC on a regular basis. For example, between December 2019 and February 2020, inclusive, the OCC received no

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<sup>44</sup> Elin Katz and Tim Schneider, "The Increasingly Complex Role of the Utility Consumer Advocate," *Energy Law Journal*, Vol. 41, No. 1 (2020), p. 17.



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fewer than 28 inquiries that had nothing to do with the OCC’s statutory functions. Examples include complaints regarding insurance, automobile dealerships, legal advice and credit reporting. Staff resources were diverted from the OCC’s core mission to field these inquiries and route them to the appropriate resources. Consumers were likely irritated at being sent to yet another state agency.

Therefore, the name “Office of Consumer Counsel” is confusing and should be changed to something that more closely aligns with what the office actually does, advocate for utility consumers.

Second, the term “counsel” is misleading because the Consumer Counsel need not be an attorney. The statute provides that the Consumer Counsel have experience in utility-related issues or in the operation, management or regulation of utilities as an attorney, an engineer, an economist, an accountant, a financial analyst or an administrator.<sup>45</sup> Therefore, it would be appropriate to rename the head of the newly named office “Director,” as that title more accurately represents not only what the position does, but allows for someone other than an attorney to fill the role, as statute envisions.

The tenth sunset criterion asks whether changes are necessary to improve agency operations and to enhance the public interest. Since the current name of the office impedes staff from performing mission-specific tasks and causes confusion among the public, the General Assembly should change the name of the OCC to “Office of Utility Consumer Advocate,” and change the name of the Consumer Counsel to “Director.”

#### **Recommendation 4 - Clarify the role of the UCB and make it a Type 2 entity.**

The statutorily created relationship between the OCC and the UCB is relatively unique. Both are Type 1 entities.<sup>46</sup> A Type 1 entity, exercises its “statutory powers, duties, and functions, including . . . adjudication, independently of the head of the principal department.”<sup>47</sup>

In short, this means that both are, technically, co-equal, policy autonomous and independent of the Executive Director of DORA. The OCC statute goes on to cloud this relationship even further by spelling out specific duties of the UCB:<sup>48</sup>

- Provide general policy guidance and oversight of the OCC and the Consumer Counsel in the performance of their statutory duties;
- Provide general policy guidance to the OCC regarding rulemaking matters, legislative projects, general activities and the priorities of the OCC;
- Gather data and information and formulate policy positions to advise the OCC;

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<sup>45</sup> § 40-6.5-103, C.R.S.

<sup>46</sup> §§ 40-6.5-102(2)(a) and (3)(a), C.R.S.

<sup>47</sup> § 24-1-105(1), C.R.S.

<sup>48</sup> § 40-6.5-102(3)(c), C.R.S.

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- Review the performance of the OCC annually; and
  - Confer with the Executive Director of DORA on the hiring of the Consumer Counsel and consulting with the Executive Director on the annual performance evaluation of the OCC and the Consumer Counsel.

Terms such as “oversight” and tasks such as performance evaluations tend to indicate an intention that the UCB act as a Type 1 governing entity. Yet terms such as “general policy guidance” and “advise” tend to indicate a more advisory role. Or perhaps the role shifts depending on the particular task.

Adding to the confusion are the statutory powers of the Consumer Counsel. The Consumer Counsel, not the UCB,

shall represent the public interest and . . . the interests of residential consumers, agricultural consumers, and small business consumers by appearing in proceedings before the [PUC] and appeals therefrom . . .<sup>49</sup>

The statute goes on to provide:

In exercising *his discretion* whether or not to appear in a proceeding, the *Consumer Counsel shall consider* the importance and the extent of the public interest involved. In evaluating the public interest, the *Consumer Counsel shall give due consideration* to the short- and long-term impact of the proceedings upon various classes of consumers . . . If the *Consumer Counsel determines* that there may be inconsistent interests among the various classes of consumers he represents in a particular matter, *he may choose* to represent one of the interests or to represent no interest.<sup>50</sup>  
{emphasis added}

The emphasized language from this statutory excerpt highlights the considerable amount of discretion the Consumer Counsel, and thus the OCC, has in fulfilling his or her statutory duties, regardless of the UCB’s oversight, advice or performance evaluation.

Although the UCB has traditionally been treated as an advisory body, more akin to a Type 2 entity than the Type 1 entity that it is, the statute has caused confusion, and thus tension, as of late. As the statutory provisions discussed above illustrate, it is not at all clear on whether or when the Consumer Counsel is required to seek the input of the UCB or whether or when the Consumer Counsel is required to implement that input. Clarity of roles is necessary to maintain the important working relationship between the Consumer Counsel, the OCC and the UCB.

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<sup>49</sup> § 40-6.5-104(1), C.R.S.

<sup>50</sup> § 40-6.5-104(2), C.R.S.

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While most agree that clarification is necessary, not all agree on the approach recommended here. Some argue that the UCB was created as a governing body and that its role should be clarified to enhance that role. After all, this argument goes, the UCB is the voice of the consumer within the OCC.

Several points argue against this position. First, consider the UCB's composition. It comprises 11 members, seven of whom are appointed by the Governor according to the following requirements:<sup>51</sup>

- At least one member who is actively engaged in agriculture as a business,
- At least two members who are owners of small businesses with 100 or fewer employees,
- At least one member from each of the state's seven congressional districts, and
- No more than four members may be affiliated with the same political party.

The remaining four members of the UCB are appointed by the legislative branch; one member is appointed by each of the following:<sup>52</sup>

- The President of the Senate,
- The Minority Leader of the Senate,
- The Speaker of the House of Representatives, and
- The Minority Leader of the House of Representatives.

This structure contains within it inherent conflicts of interest. While three of the seven gubernatorial appointments must meet the enumerated qualifications, the remaining four do not. The same can be said for the legislative appointments. In the end, 8 of the 11 members of the UCB must meet no requirements other than political affiliation and residence in the appropriate congressional district.

While there is nothing inherently wrong with this arrangement, one must consider those who might be willing to serve on a body such as the UCB. The most likely slate of candidates would be those who are already familiar with the PUC and its regulatory proceedings, and who may already be involved, in a professional capacity, in such proceedings. Indeed, it is not uncommon for UCB members to be employees of or otherwise affiliated with organizations that themselves intervene in PUC proceedings, sometimes aligned with the OCC and sometimes adverse to it. It is reasonable to question the ability of such individuals to separate their professional positions, or those of their employers, from those that are required of UCB membership.

This situation would be particularly concerning if the UCB acted in an oversight capacity and were a governing body. However, as an advisory body, such conflicts of interest can be mitigated, if they exist, because the UCB offers only advice and the source of that advice can be weighed as appropriate by the Consumer Counsel.

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<sup>51</sup> § 40-6.5-102(3)(b), C.R.S.

<sup>52</sup> § 40-6.5-102(3)(b), C.R.S.

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Second, consider the technical complexity of the filings in which the OCC participates. Such proceedings involve highly technical engineering matters, economic modeling and forecasts, and intricate legal matters. As highlighted above, the qualifications to sit on the UCB are minimal and in no way require any sort of technical expertise. Thus, it is reasonable to question whether the UCB possess the technical expertise to direct the OCC's positions before the PUC.

Further, UCB members are volunteers and receive no compensation for their service as such. It is unreasonable to ask them to dedicate the hours upon hours of work that would be needed to acquire the technical expertise that could direct the OCC's positions before the PUC. It is simply not practical.

The third sunset criterion questions whether the agency's operations are impeded or enhanced by existing statutes, rules, procedures and practices. The lack of clarity surrounding the proper role of the UCB has impeded the OCC's operations.

All of this tends to support the historical notion that the UCB is an advisory body. As such, the General Assembly should clarify that role by making it a Type 2 entity.

**Recommendation 5 - Repeal the statutory requirements surrounding the UCB's role regarding certain personnel matters.**

Among the UCB's statutory duties are:<sup>53</sup>

- Reviewing the performance of the OCC annually,
- Conferring with the Executive Director of DORA on the hiring of the Consumer Counsel, and
- Consulting with the Executive Director on the annual performance evaluation of the OCC and the Consumer Counsel.

While these duties may all represent best practices, some are arguably inappropriate and some have simply not been performed consistently.

The UCB is a body representing multiple stakeholders of the OCC. As such, it is, perhaps, in an ideal situation to review the performance of the OCC. The UCB's members are, or should be, familiar with the positions taken by the OCC and the policies represented by those positions.

However, there is scant evidence to suggest that the UCB actually performs this function. Some can recall a few instances over the years when a member of the UCB met with DORA's Executive Director to discuss the OCC's, or the Consumer Counsel's, performance.

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<sup>53</sup> § 40-6.5-102(3)(c), C.R.S.

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The UCB's duties with respect to the hiring and review of the Consumer Counsel are not only arguably inappropriate, but possibly unconstitutional. The UCB is a body consisting of volunteers. They meet periodically, but have no knowledge of the day-to-day operations of the OCC or of the Consumer Counsel. As such, it is inappropriate to expect such a body to render a performance evaluation of the Consumer Counsel. Indeed, as with the UCB's evaluation of the OCC, there is scant evidence to suggest that this happens on a regular basis.

Under the state's constitution, the head of the principal department is the appointing authority for the heads of divisions.<sup>54</sup> This means that DORA's Executive Director is the appointing authority for the Consumer Counsel. Indeed, this is reinforced by the OCC's organic statute itself in section 40-6.5-102(1), C.R.S.

Further, the state's constitution provides that those in the state personnel system, such as the Consumer Counsel, "shall be graded and compensated according to standards of efficient service which shall be the same for all persons having like duties." In addition, the appointing authority, such as DORA's Executive Director, is vested with the authority to dismiss, suspend or otherwise discipline those appointed by such person.<sup>55</sup> Thus, the constitution vests the authority to hire, fire and evaluate the Consumer Counsel in the Executive Director of DORA, not the UCB.

Admittedly, the OCC's organic statute does not vest such authority in the UCB. However, by statutorily requiring the UCB to evaluate the Consumer Counsel and to confer with DORA's Executive Director when hiring the Consumer Counsel, these constitutional authorities are compromised, if not diminished.

While these may all represent best practices and should be followed, ensconcing them in statute is entirely inappropriate.

The tenth sunset criterion questions whether statutory changes are necessary to improve agency operations. Clarity around issues such as those raised here would aid in the more efficient operation of the OCC.

For all of these reasons, the General Assembly should clarify that the UCB has neither the authority nor obligation to evaluate either the OCC or the Consumer Counsel and that DORA's Executive Director need not confer with the UCB when hiring the Consumer Counsel.

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<sup>54</sup> Colo. Const. Art. XII, §13(7).

<sup>55</sup> Colo. Const. Art. XII, §13(8).

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**Recommendation 6 - Repeal the requirement that one member of the UCB come from each of the state’s congressional districts, and instead require all appointing authorities to seek to ensure the greatest degree of diversity possible in making such appointments.**

The UCB comprises 11 members, seven of whom are appointed by the Governor according to the following requirements:<sup>56</sup>

- At least one member who is actively engaged in agriculture as a business,
- At least two members who are owners of small businesses with 100 or fewer employees,
- At least one member from each of the state’s seven congressional districts, and
- No more than four members may be affiliated with the same political party.

The remaining four members are appointed by the legislative branch, one member is appointed by each of the following:<sup>57</sup>

- The President of the Senate,
- The Minority Leader of the Senate,
- The Speaker of the House of Representatives, and
- The Minority Leader of the House of Representatives.

The composition of the UCB was a matter of considerable discussion during the course of this sunset review. Some questioned the wisdom of retaining legislative appointments, arguing that only the Governor is elected to represent the entire state and so all appointments should rest with that office. However, retaining these legislative appointments ensures that the legislative branch retains some mechanism to provide input in the development of OCC policy and deliberations.

Another subject of discussion arose around the statutory requirement that each of Colorado’s seven congressional districts be represented on the UCB. While some argue that since the PUC has jurisdiction over only investor-owned utilities, the majority of whose customers reside along the Front Range, this representation provides an outsized voice to consumers of utilities other than those that are investor-owned.

Indeed, the apparent goal in establishing this requirement is to ensure that the UCB’s membership represents the geographic diversity of the entire state. However, in establishing congressional districts as the benchmark, the statute has made it more difficult to fill vacancies and has not actually accomplished its presumed goal.

Throughout much of this sunset review period (late fall 2019 through summer 2020), there were several vacancies on the UCB, as the Governor’s Office struggled to find

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<sup>56</sup> § 40-6.5-102(3)(b), C.R.S.

<sup>57</sup> § 40-6.5-102(3)(b), C.R.S.

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individuals having the necessary political affiliations, professional backgrounds and who lived in the required congressional districts. Thus, the OCC was deprived of the input of a full UCB during this period.

Additionally, the Fourth Congressional District covers a wide swath of Colorado, much of it rural, but some of it urban. Thus, an appointee from this district might not represent the Eastern Plains, for example, but may come from along the I-25 corridor, thus defeating the intent of this provision.

Similarly, the Third Congressional District, while encompassing all of the Western Slope, also includes areas east of the Continental Divide, such as Pueblo and Walsenburg.

The more statutory requirements that are placed on UCB or any board's membership, the more difficult it is to fill those vacancies. While it is very likely quite helpful to the OCC to ensure that certain UCB seats are reserved for the OCC's core constituencies, it is unnecessarily burdensome to also require members to come from certain congressional districts. This not only limits the geographic diversity of the UCB, but may also limit the demographic, ethnic and socio-economic diversity as well, since the multitude of requirements limits the pool of potential candidates.

The fifth sunset criterion asks whether the composition of the board adequately represents the public interest. In this case the public interest is better served by a more relaxed statutory provision surrounding who may serve on the UCB.

For all these reasons, the General Assembly should repeal the requirement that one member of the of the UCB come from each of the state's congressional districts, and instead require all appointing authorities to seek to ensure the greatest degree of diversity possible in making such appointments.

### **Administrative Recommendation 1 - The OCC should expand its outreach efforts.**

Although not statutorily required to do so, the OCC conducts a considerable amount of outreach. These initiatives include activities such as social media posts and maintaining a booth or table at larger events such as the Colorado State Fair. The OCC participated in 22 distinct events in fiscal year 17-18, and 20 events in fiscal year 18-19. Although similar types of activities were conducted in fiscal year 19-20, they amounted to just eight distinct events due, in large part, to the COVID-19 pandemic.

Most of the OCC's outreach efforts have concentrated on consumer education, such as providing information on how to read a utility bill and tips on how to lower those bills. While such efforts are vital and should be continued, more could be done.

The OCC has a statutory mandate to represent residential, small business and agricultural consumers of natural gas and electric investor-owned utilities. While many

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stakeholders concur that the OCC adequately represents residential consumers, and to a somewhat lesser degree, small business consumers, most agree that its representation of agricultural consumers represents an opportunity for improvement. Indeed, many stakeholders could not recall an instance in which an OCC filing specifically referenced this class of consumer.

This is not to say that the OCC necessarily should specifically reference any particular class of consumer in its filings. Such is up to the discretion and strategy of the Consumer Counsel and staff of the OCC. However, the fact that so few even realize that the OCC has a statutory mandate to represent agricultural consumers is concerning.

On the other hand, not all consumer groups necessarily see the value in engaging with governmental agencies such as the OCC. As part of this sunset review, COPRRR staff attempted to solicit input from the agricultural community, but with limited success. Some speculate that this is due to the agricultural community's lack of understanding as to how the OCC and the proceedings in which it participates impacts their utility rates. Some also question the relative importance of the OCC to agriculture, given that the OCC's focus is on investor-owned utilities and many in the agricultural community receive their electricity from cooperative associations.

Regardless, the OCC has a statutory mandate to represent agricultural consumers, and thus has a duty to better understand the needs of this community. This may become even more important if Recommendation 2 of this sunset report is adopted, as most agree that agriculture will be heavily impacted by decisions made around clean air and clean energy. Therefore, the OCC should work to identify ways to more effectively engage with the agricultural community.

One way to possibly accomplish this is to utilize the UCB more intentionally. Statute requires one member to be actively engaged in agriculture as a business. This represents an ideal avenue within which to engage the agricultural community.

Further, to the extent that UCB members come from rural areas with heavy agricultural interests, they, too, could be utilized to ascertain the needs of the agricultural community.

Finally, the OCC could raise the profile of the UCB itself, which would allow all consumers, regardless of class, to more fully participate in the process and provide the OCC and the Consumer Counsel with valuable insights. The OCC recently revised its website to more prominently feature the UCB. This could be leveraged by the OCC in its outreach efforts to solicit more input from all of its statutory constituencies.

The fifth sunset criterion asks whether the agency encourages public participation in its decisions. One way to expand public participation is through outreach.

For all these reasons, the OCC should expand its outreach efforts.



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## **Administrative Recommendation 2 - The OCC should embark on a comprehensive review of its vision and mission.**

Throughout the course of this sunset review, one of the more consistent criticisms raised by stakeholders was the OCC's near singular focus on keeping consumer natural gas and electric rates low. While the OCC's statutory charge is certainly focused on rates and charges, the General Assembly also tasked the OCC with the more nebulous task of representing the public interest.

The public interest, many argue, entails more than just low utility bills. The public interest, many posit, includes clean air, environmental protection and public health, all of which are impacted by the actions of PUC-regulated utilities.

Many of the efforts now under way to address climate change will, undoubtedly, result in higher utility bills for consumers, at least in the short term. But in the long term, many argue, consumers will benefit from cleaner air, improved health and a cleaner environment. It is not clear what the OCC's vision is regarding such matters.

The more clearly the OCC can articulate its vision, the more readily utilities and other parties can anticipate the OCC's position on various matters and take them into account before making any regulatory filings. This could help to reduce the number of cases in which the OCC intervenes, as well as reduce the overall number of intervenors.

Having a clear vision will also serve to guide the OCC in determining whether and when to participate in proceedings outside of the PUC, as is advocated in Recommendation 2 of this sunset report.

But developing a clear vision is not, necessarily, an easy task. The OCC should engage with the UCB and its various statutory constituencies to ascertain their priorities. Those priorities, in turn, could help to inform the OCC's vision going forward.

The third sunset criterion asks whether the agency operates in the public interest. One way to ensure that the OCC operates in the public interest is to develop a clear vision of what constitutes the public interest.

For all these reasons, the OCC should work to develop a clear vision of its role and priorities in the regulatory sphere.