
The Creation of a Consumer Advocate Office for Puerto Rico

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THE CENTER FOR A NEW ECONOMY

March 2014



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INTRODUCTION

Puerto Rico is currently considering legislation on power sector reform that would create regulatory oversight of the Puerto Rico Electric Power Authority (PREPA) and any other energy service provider that is or would be engaged in any aspect of furnishing electric services. A comprehensive regulatory oversight package should be accompanied by the creation of a consumer advocate office in recognition of the essential role such an agency can play in advancing the public interest. An objective of sector reform should be more transparency and public awareness. A Consumer Advocate is an integral part in changing the paradigm from a closed system to an open and public process since information will be made available to a robust entity charged and truly empowered with protecting the public. This paper will discuss the role of the Consumer Advocate, the scope of its duties and responsibilities and how it is organized. We will discuss options that address many of the issues involved in setting up a vigorous entity. Puerto Rico policy makers will have to make choices and decisions about the direction to take in each of these aspects.

THE VALUE OF A CONSUMER ADVOCATE¹

Utility issues are complex, difficult to understand and it requires a great deal of expertise in order to challenge a utility company. Therefore, to enter this forum and be successful requires experience and knowledge in the subject matter. Only through the creation of a Consumer Advocate Office (CAO) can the necessary level of expertise be harnessed and available to represent consumer interests. Approximately 45 states have an independent agency that acts as a consumer advocate.² Consumer advocacy is important for several

¹ While Puerto Rico currently has an Office of the Ombudsman, the roles of that office and the Consumer Advocate are vastly different. While the Ombudsman may work on helping individual customers with disputes with PREPA, it does not have the authority, duty or capacity to intervene before the Regulatory Authority to represent the interests of all customers on complex matters involving rates, cost allocation, reliability and planning.

² National Research Regulatory Institute, "The Role of Utility Consumer Advocates in a Restructured Regulatory Environment," Michael Murphy, Esq. and Francine Sevel, Ph.D, September, 2004, p. 8.

reasons. Having a CAO assures the public that there is an entity looking out for its interests exclusively. The Advocate is the attorney for the public and as such, has a fiduciary duty to represent its clients zealously. Blending this duty of representation with the requisite knowledge and background is a powerful combination for the public benefit. It is not a task that any attorney without subject-matter expertise can easily undertake. Without the background, it would require an enormous amount of work to do one case. Thus a CAO is important to ensure that there is quality representation over time on the full range of matters.

Having this kind of quality representation will build public confidence in the package of reforms and in routine regulation, as the public will know there will be an entity exclusively dedicated to protecting its interests.

In any proceeding, it is important for the decision-maker - in this case the regulatory authority - ³ to have the perspective from at least two points of view which can provide contrasting evidence, as well as legal and policy arguments. A one-sided presentation may overlook valuable details or points of view and tends to result in a less than fully balanced decision. In this way, consumer advocates assist the oversight process by providing information the regulator might not otherwise have at its disposal. For example in a regulatory proceedings in which PREPA may claim it needs to raise rates by a certain amount, the Consumer Advocate could obtain through discovery information from PREPA, craft a consumer-focused technical and legal argument, present testimony, and argument to demonstrate why the total amount requested is more than what is actually needed. Having this information would be helpful to the regulator in setting the appropriate level of rates. The regulator would be able to cite the consumer advocate's position on the record to support its decision, both in its order and publicly.

The advocate would also add quality control and perspective to PREPA's proposals. By knowing that an advocate will be closely scrutinizing a proposal, a utility will tend to present a more credible and defensible case than it might have otherwise absent such close review. PREPA will understand that its statements will be subject to cross-examination so it (and its staff members, personally) will want to be sure that they are credible and defensible.

³ Because it is unclear whether there will be a regulatory board or commission, throughout this paper the term "commission" or "regulatory authority" are used interchangeably. The reference throughout the paper is to a statutorily created entity that has supervisory and decision-making authority regarding PREPA and any other electric service provider.

Beyond providing a layer of discipline into the process, it also contributes to the efficient execution of the case, which can be helpful to all parties, including the regulator.

THE STRUCTURE OF THE CONSUMER ADVOCATE OFFICE

There are a number of options with respect to how a Consumer Advocate Office can be structured. The key to any of these structures is that the CAO be entirely independent and not take instruction from any other official as to the positions it pursues in the representation of its clients. This is separate and distinguishable, however, from being accountable. It is important to recognize that the attorneys in a CAO have a fiduciary duty to their clients and cannot ethically take a position that they do not believe is in the best interests of that client. If they are getting instructions from a third party to stand down or advocate in a different direction than what is best for their clients, this could be seriously problematic. To create the separation between the commission and the advocate, the structure of the former should be considered in determining the structure of the latter so that the integrated regulatory reforms work well as a package.

There are four different structures that have been adopted in the U.S.:

- **Independent State Agency** – More than half the states (27) have a utility consumer advocate agency that operates as an independent state agency.⁴ Under this model, the Director is appointed by the Governor or Attorney General, and in one case, a Governing Board that meets regularly to oversee the operations of the CAO. From a good governance standpoint, the more degrees of separation from those that render decisions on utility matters the better as that will free the CAO to represent its clients vigorously. It may be preferable for the Attorney General (AG) to make the appointment as the AG is seen as representing the interests of the public. The benefit of an independent agency as opposed to one lodged in another agency is its ability to be less influenced by outside considerations that do not correlate with the client's best interests. The Director should be free from retribution for taking stances that may not be politically expedient. This includes the ability of the Director to speak out and educate the public on important issues through the media or other means. Because this position is not tied to an elected office, it can also insulate it from the concerns of campaign contributions, etc. A downside is that it does not have a strong elected office to protect it or assist it should it come under attack from PREPA

⁴ NRRI, Id. at 9.

or utility lobbyists, etc. However, if it has been doing a good job, it may have the support of other citizen's groups and the media.

- **Division of the Attorney General's Office** – The second most common method for structuring a CAO is to make it a division of the Attorney General, with the Director usually being a section chief that reports to the Attorney General. Fifteen states operate in this capacity.⁵ Since the Attorney General is often viewed as protecting and supporting the public interest, if the CAO is not established as a stand-alone entity, this could be another option. While this produces an extra layer of accountability, it does also subject the Director to the politics in which the AG may be engaged. An advantage of being part of the AG's office is that if the CAO comes under attack (which utilities have been known to do, such as lobbying for budget cuts), the CAO will not be alone to fight, but will have a powerful ally. Whether this is the best option is often fact specific and may vary based on the circumstances of each jurisdiction.
- **Division of the Governor's Office** – One advocate offices reside in the Governor's Office.⁶ This can be less ideal than the above two options. If the Governor is appointing both the Commission and the Director, there may be a concern regarding the ability of the Director to take appropriate action when its positions do not line with the Commission and by extension, the Governor. This is especially the case if the Commission is viewed as part of the Executive Branch. What does the CAO do, for example, if the Governor is seeking a compromise solution that the CAO does not believe is balanced fairly enough to account for the ratepayer's interests? However, as noted above in the case of the CAO coming under fire from powerful special interest groups, being part of the Governor's office could be an advantage.
- **Division of the Regulatory Commission** – Only one advocate office, California Division of the Ratepayer Advocate, resides within the Commission. The key question with this structure is the level of independence of the CAO from the Commission, including the ability to appeal decisions. Can one branch of an agency appeal a decision of another branch of that same agency? Ideally, the structure would allow all parties to a proceeding, including PREPA to appeal a decision of the Commission to the Court. This is a right that must remain unfettered for any CAO. Moreover, the ability of the public to separate and discern the two separate functions may become clouded. An advantage, however, is the ability to share resources and

⁵ Id.

⁶ Id.

perhaps the opportunity for the CAO and Commission to develop a better working relationship. It should be noted that where there is an affiliation with the Commission for advocacy offices, it is usually for the purpose of sharing the same office building or clerical staff, etc.

In deciding upon the appropriate structure the key questions that must be considered include:

- ✓ Is the CAO free to act independently to represent its clients zealously?
- ✓ Does the CAO have an independent right of appeal?
- ✓ Does the CAO have protection against special interest attacks on its budget or advocacy?

SCOPE OF REPRESENTATION OF THE CONSUMER ADVOCATE

Determining who would be the clients of the Consumer Advocate is another policy decision for consideration and many states handle it differently. In most states, the CAO represents only the residential customers under the theory that they are the most vulnerable and least able to represent themselves. Coalitions of business customers – usually manufacturers – have emerged in many states to represent the interests of their customer class. In other states, small commercial customers such as the “mom and pop” businesses have been added in because they too are frequently without resources to represent themselves. The third option in some jurisdictions does not make distinctions between customer classes and the CAO represents all customers, residential, commercial and industrial.

While at first blush, representation of all customers might appear to be the best route, it should be noted that there are issues in which the various consumer interests have different views and because of the multiclass representation of the Advocate and potential conflicts of interest, the CAO might be unable to participate in those issues. For example, all customer classes may generally agree that a rate request is too high, but when it comes to allocating PREPA’s revenue requirements, each customer class will want to argue that the other should pay more. If a utility wants to install certain technology to increase reliability, industrial customers who need a higher degree of reliability than residential customers, may support paying for the prudent costs of the system upgrade, whereas residential customers could potentially hold a different view. With energy efficiency, industrial customers may want the ability to opt out of the program, leaving the costs to residential

customers even though all customers benefit from decreased system costs. If it appears that large customers will have an independent means and intention of representing their interests, then perhaps the Advocate could represent only the residential and possibly small commercial customers. If, on the other hand, that does not appear likely, policymakers may want the advocate to represent all customer classes. Another way to look at the issue would be to empower the CAO to resolve these tensions in a manner that is fair to all customer classes and to reflect this in its advocacy.

A political consideration in having the advocate represent all interests is that if it is perceived that cutting the budget, duties or authority of the Consumer Advocate will be injurious to the business interests, it may be less likely that such an event would occur than if the Consumer Advocate was representing residential customer interests only.

In any event, under any of these scenarios it should be clear that the Consumer Advocate is charged with representing its clients with due consideration to public health and environmental concerns, and that these will be factored into the advocacy and decision-making.

POWERS OF THE CONSUMER ADVOCATE OFFICE

The powers of the Consumer Advocate Office define its future effectiveness in fulfilling its mission. The tools granted through legislation will define the scope and breadth of the advocacy of the agency. Broad authority to take measures to protect the public will ensure better, unfettered representation. The powers of the Consumer Advocate should include the essentials discussed below, but should be broad enough to encompass other powers that may be needed in the future.

- **Intervention Authority in Proceedings with Full Rights**

This is critical to the core mission of the CAO. Without full intervention authority and rights set forth in the law, the CAO could be denied intervention and the right to represent its clients.

- **Right to Appeal Decisions**

The right to represent a client also includes the right to appeal a case to a higher court. The knowledge that either party can appeal a decision serves to make the Regulatory Commission more careful in its decisions such that they are backed by the law and evidence in the case. If the Commission knows it is subject to appeal by only one party – PREPA, the

temptation to avoid that appeal may result in decisions that favor PREPA. Balance, fairness and justice requires that no limitations be placed on the right of an entity to pursue its judicial options by appealing to the Puerto Rico Court of Appeals.

- **Right to Appear before any Court or Agency**

There may be matters that impact the public interest that take place outside the Commission. For example, policy issues before the Federal Energy Regulatory Commission could require intervention or an appearance to set forth the position of the ratepayers in Puerto Rico. The discretion to appear before any court should therefore be preserved so as to not foreclose a venue where customers' interests are at stake.

- **Issue Reports on Relevant Topics**

The issuance of studies or reports can be a useful advocacy tool to support a position in legislation or commission regulatory policy making. It can also be helpful for the purpose of providing support for an initiative the Consumer Advocate wants to pursue in advancing the interests of its clients. Therefore, a simple line item, permitting the issuance of studies or reports should be included.

- **Testify/Lobby on Legislative Matters**

The power to represent clients should not be limited to judicial or administrative proceedings but should extend to legislative matters as well. The legislature should have the opportunity to hear from the Consumer Advocate Office on pending legislation and legislative proposals.

- **Hire Consultants**

Especially in the early years of the CAO as it is building its internal expertise, it will need the ability to hire expert consultants to assist it in complex proceedings which may be new for the Commonwealth of Puerto Rico. Without the ability to hire experts the CAO might be handicapped in its representation of its clients, creating an uneven playing field in terms of the presentation of its case in opposition to a PREPA filing.

DUTIES AND RESPONSIBILITIES OF THE CONSUMER ADVOCATE

- **Scope of Authority**

The first issue to tackle is whether the responsibilities of the CAO should be broad or narrowly tailored. Broader authority will allow the CAO more latitude to participate in electric matters affecting the public interest. It may be advisable to define the scope of duties and responsibilities in parallel with those of the Regulatory Authority. This will provide the CAO with the ability to address any and all issues that come before the Commission.

- **Authority to Intervene in Cases**

The Consumer Advocate should have the ability to intervene with full rights as a party in any proceeding it deems necessary without limitation. This is the only way to truly ensure that the Consumer Advocate has the ability to protect its clients' interests. This is generally how the advocate offices function; however, if the goal is to more narrowly define the role of the CAO, then the specific rights would need to be enumerated in statute. The danger of prescriptive statutory language is the inability to foresee at this time subject matters related to electricity which could develop in the future as this is an evolving industry.

The better policy however may be that cases in which the CAO intervenes should be at the discretion of the Director in order to enable the management of case load to staff resources and to allow the Director to determine the best uses of resources. Other criteria the Director might evaluate in deciding whether to intervene in a case include: the number of customers impacted; the potential size of the impact; the precedent that could be established (if it is a case of first impression); and, the likelihood that participation could have a positive impact on the outcome on the matter. One exception to that which should be considered is in the instance where the Commission requests comments from the Advocate or that the Advocate intervene and participate. If it was not the Advocate's intent to intervene due to resource constraints, then the Advocate should be able to request remuneration for the cost of that participation through the process described above.

- **Statement of Mission**

The goal for the CAO and its mission should be stated as part of the legislative intent so that the role of the CAO is clear. The mission should include representing exclusively, the best interests of customers in any or all matters pertaining to electric service. Some consumer advocacy offices have missions that focus solely on lower rates. The Directors of these consumer advocacy offices often interpret that as a mission to keep current rates as low as possible. Other Consumer Advocate Offices allow more latitude in terms of what is in the

best interests of their clients so as to consider environmental and health impacts, as well as a longer term horizon. For example, in a choice between a gas turbine and energy efficiency, customers may not pay for the turbine until it begins to generate electricity in a few years, whereas, with energy efficiency, they start paying immediately for a benefit that may come later. A gas fired unit emits pollution (which is not good for the environment or for the health – especially for those living near the plant - whereas energy efficiency does not have pollution considerations to worry about). A gas fired unit costs more in the long run. The mission statement should be broad so that the CAO can consider all of these factors in determining the best course of advocacy. A mission statement could require the CAO to provide excellent representation of customers taking into account rates and affordability, environmental impacts and health, economic development impacts and any other factors that CAO believes are relevant to best represent the interests of its clients.

- **Duties of the Consumer Advocate Office**

The legislature has the choice to enumerate the kinds of matters in which the CAO may be involved. As discussed above, providing broad authority allows the CAO to do what is necessary to represent its clients and is probably the best course of action for an effective advocate. It would be expected that by virtue of being appointed, there should be a certain level of confidence in the judgment of the Director to make the best decisions. Placing limitations could hinder the ability of the Director to fulfill the mission on behalf of customers.

Nevertheless, if limitations are to be placed on a CAO, below is a discussion of some of the key areas in which the CAO should have the right to be involved:

- ✓ Rates – With the advent of regulatory reform there are a number of different kinds of cases involving rates that will impact customers. Most obvious is a utility application to increase overall general rates. Another might be proceedings to recover costs for specific items that may not be included in base rates either because the cost fluctuates such as a fuel/purchased power cost; or, because there is a need to recover a particular expenditure in between rate cases. These “rider charges” which are added to base rates are usually determined in a hearing where there is an evaluation of the prudence of the costs incurred, followed by a reconciliation adjustment to recover or credit any differences between estimated and actual costs.

- ✓ Reliability and Quality of Service – The reliability of service and ensuring that there are sufficient standards in place so that the lights stay on is important to customers. The reliability of service can be with respect to having sufficient generating capacity so that if a unit goes off-line there are adequate reserve margins of capacity available to fill the need. Reliability can also refer to transmission and distribution outages in terms of frequency and duration of outages. For industrial customers, momentary outages can be a concern, because just a small outage can upset a manufacturing process.
- ✓ Consumer Protections – Regulatory reform should include the development of rules and regulations governing policies and procedures for handling such matters as service termination, notice, extended payment plans, late fees, security deposits, bill disputes and other matters which can impact a customer's ability to maintain service.
- ✓ Resource Planning – Regulatory reform should usher in a new era of system planning done in an open transparent proceeding. The Resource Planning will take a deeper look into PREPA's system to ensure that the best portfolio of options is selected to serve the Commonwealth over a twenty-year horizon.
- ✓ Commission Rules of Procedures – Establishing rules of procedure governing the activities of the new Commission are critical to ensure that there is real due process. This includes, for example, allowing parties to participate in a hearing, to conduct discovery, prepare testimony etc.
- ✓ Public and Advocate's Access to Information - Access to information for the CAO and also for the public is paramount to the ability to fully discharge the duties of the office and to create the kind of transparency that has been missing without regulatory oversight
- ✓ Sitting- Under new regulatory reform, there may be procedures put in place for the approval of generation and transmission lines of a specified size. Questions that will concern the public include if these facilities are needed and if so, are they the best alternative.
- ✓ Health and Environmental Concerns - Health and environmental concerns resulting from utility decisions raise costs for the consumers

affected, but they also raise costs for society. Increased absenteeism from school or work due to health issues has a price tag and should be considered. The CAO is probably in the best position to bring these issues to the table in hearings and negotiations.

- ✓ Fair, Transparent, and Efficient Process – This is a goal of new regulatory reform and how the process is established will impact how business is conducted for years to come. It will also set the tone for the new regulatory body, as one that is open and trying to provide equal access to stakeholders in a fair and transparent manner, or one that is closed and secretive.
- ✓ Other proceedings – As the new Commission tackles a host of issues that arise, such as interconnection and net-energy metering of rooftop photovoltaic's, or energy efficiency program designs, etc., it will be important for the CAO to have the ability to participate.
- ✓ Workshops and Collaborative – To the extent that the Commission establishes informal venues for discussing and reaching consensus such as a workshop on an issue or a collaborative to develop energy efficiency programs, the CAO should have the ability to participate.⁷

The above represent core duties for a Consumer Advocate, all of which revolve around matters before the Regulatory Authority and are legal in nature. At a minimum, the CAO should be empowered to intervene in any and all proceedings that involve the public interest. This is critical to the mission of the Agency.

ANCILLARY DUTIES OF THE CONSUMER ADVOCATE FOR CONSIDERATION

In addition to the core duties involved with participation and representation in Commission proceedings, there are a number of duties in which many but not all consumer advocates engage. If they do it is in varying degrees based on the size of their budget and other factors such as staffing and resources and the perception of public need. Below is a discussion of additional duties in which some CAO engage that should be given consideration by the legislature.

⁷ Informal venues would not include private conversations with commissioners that are deemed *ex parte*. See RAP/CNE, "The Role of a Power Sector Regulator to Strengthen Sector Performance in Puerto Rico, " Feb. 2014, p.38.

- **Represent Consumers in Individual Complaint Matters or Proceedings**

Most state commissions have call centers for consumers with bill disputes or questions that are unresolved between the utility and the customer. In some states, the consumer advocate may serve this function as well. The logic behind a Commission handling complaints is that it provides the Commission a window into how the utilities regulated by them are interacting with their customers. It is also viewed that the Commission has more authority than an advocate and so might be more inclined to cooperate with the Commission staff person assigned to helping a customer with a complaint. On the other hand the Consumer Advocate is the representative of the customer and may take a different approach. While the Commission may try to remain neutral and mediate, the Advocate will advocate and may be more creative in seeking resolution⁸. As with the Commission, it is also useful for the Consumer Advocate to track patterns of abuse so that if there is a repeated violation, they can file a generic complaint at the Commission to request that the offending utility cease and desist with the practice.

Having a call center (with a toll-free number) is an excellent tool to help customers. Bills and utility issues are usually very complex and not well understood by customers. Employees in a call center can help navigate the customer through their issues and questions. They also establish relationships with their counterparts at the utilities making it easier to resolve complaints on the customer's behalf. Most complaints are resolved at this informal level so the investment in staff to address these matters whether it be at the Commission, the CAO or both, is invaluable.

The more difficult question is what happens if the complaint cannot be resolved informally as happens from time to time. Filing a complaint on behalf of one customer can drain a lot of resources. Therefore, having a simple process in place to allow the customer to file his complaint with the Commission with guidance from the CAO is more practical. However, notwithstanding the above, the CAO should be able to file generic complaints where there are multiple customers similarly, adversely and unfairly impacted by a utility practice.

⁸ An example of this might be a rule providing that PREPA must offer a customer a three month extended payment plan to catch up on arrearages and avoid disconnection. A commission staff might feel constrained to stay within those bounds. On the other hand, if the payments (current bill plus one-third of the arrearages) are still too high for the customer, the Consumer Advocate might try to get the payment period extended from three months to six months because they feel less constrained by the rule and more inclined to negotiate further.

Wherever the complaint handling function resides, the Governor and the Legislature should assure that there is sufficient funding to staff the call center. In the event that the call center resides exclusively at the Commission, the CAO should be provided monthly or quarterly information at a minimum on the number of complaints, subject of the complaint and how it was resolved. It is likely that call center staff will have to keep records that can be provided. An advantage to this information is the ability to monitor utility activity and protect customers but also to be aware of issues that impact a proceeding before the Commission.⁹

While Puerto Rico does have an Office of the Ombudsman, that office is understaffed. Based on the number of complaints that a state agency typically receives, there is usually a full staff to work with consumers to resolve issues. Moreover, some of the complaints will require immediate attention if there is a threat of disconnection – especially if there are senior citizens, young children or household members with serious illnesses involved. An advocate office with subject matter expertise would be best suited to take on this task of helping individual customers.

- **Authority to Initiate Complaints or Request a Commission Investigation**

Most of the work of a Consumer Advocate is reactive as opposed to proactive. This is because it is responding to applications or filings by a utility company or being requested to file comments in a Commission-rulemaking or generic proceeding. The latter is usually welcomed by the Consumer Advocate as it gives them an opportunity to weigh in on policy matters.

The authority to initiate a proceeding provides the CAO with the opportunity to take the initiative on matters that might not otherwise be addressed or at least not imminently. These issues can run the gamut, from filing a case for a rate decrease if there is evidence that PREPA is over-earning and could cut rates, to requiring an investigation into expenditures for service quality when there are frequent extended outages, or, to challenging any inappropriate and/or unlawful action of PREPA. As a practical matter the initiation of these kinds of cases are few, but it is an important tool to have for when it might be needed.

⁹ An example would be if there were many complaints regarding extended outages. That might demonstrate that PREPA is not meeting its distribution reliability standards and should therefore be required to take steps to remedy the situation.

- **Provide Public Education**

It is important for the Consumer Advocate to have the ability and the tools to communicate with its clients – the customers of PREPA. Public communication is important for the Advocate because an informed public can participate in proceedings by providing public comment and helping strengthen the consumers' case. At the same time, communication provides more accountability and transparency for the Consumer Advocate Office, as it shows the public what it is doing to represent them. It keeps the Consumer Advocate watchful of the concerns of the public. Having an informed public keeps the Advocate on its toes, and has the same effect for the Commission and the regulated entity.

The communications portion of consumer advocacy can consist of informing the public regarding pending cases or decisions that will impact them and it can consist of helping customers make choices about their energy use. For example, the CAO may provide information on conservation tips to lower a customer's bill, or information regarding the availability of payment arrangements if a customer cannot pay the bill, or about federal government assistance programs. If PREPA rolls out new rate designs it can help educate the public about how they work. While PREPA and the commission may also provide this function, given the size of the population and the attention to these issues, having more than one voice can help significantly. Moreover, a good advocate will have the trust of the public and a message from the CAO might carry more weight. Below is a discussion of some of the tools that a Consumer Advocate might use.

- ✓ Newsletters and Brochures – Newsletters providing customers with information on current proceedings or issues affecting them is a good way to communicate. They can also provide energy savings information, communicate changes in rules or policies or alert customers regarding where they can get various types of assistance. These newsletters can be printed and mailed to consumers or sent via email for those with internet. They can also be distributed to libraries.
- ✓ Webpage – A webpage is an excellent way to promote transparency because it can provide the public with information on the activities of the CAO, including posting comments, filings, briefs and testimony in commission proceedings or before the legislature. It can provide information on the staff, its governance structure, links to other state agencies providing assistance to customers or other energy related services.

- ✓ Public forums – Outreach to the public by traveling to different municipalities outside San Juan will allow the CAO to provide information to a wider public, and will allow the public to ask questions and get answers. Furthermore, hearing from the customers can better inform the CAO regarding what is important to them which helps guide advocacy.
- ✓ Media – Media can be a good tool for an advocate to communicate information swiftly. It can be a tool for letting the public know when it believes that an action of PREPA or a regulator is unjust or unreasonable. The knowledge that actions or decisions will become publicized can work to the advantage of the public by providing an extra incentive to ensure that appropriate actions are being taken.

- **Respond to inquiries from other government officials or agencies, the media and the public**

The CAO should be provided with the resources to be responsive to other government officials, agencies and the public. As a public agency it is part of its duty to disclose information requested except such information that typically is exempted as discussed above with respect to public records requests. However, apart from that, often government agencies or the media or others are asking for information to help them understand issues or do their job. A legislator for example, may request the CAO to provide information, research or analysis that might assist in the preparation of proposed legislation. Within the ambit of a CAO, these are tasks that should be expected from time to time and it is important to account for this when considering staff size and budget.

- **File Annual Reports**

As a measure of accountability and to present to the Governor and the Legislature, the CAO should file an annual report detailing its work and accomplishments. As discussed above, this is important for accountability, but preparing a good and comprehensive report can require quite a bit of work depending on the granularity of the report. Thus, again staff resources and budget need to be considered as well. Consumer Advocates may welcome the opportunity to tell their story through an Annual Report to the Legislature as it can be used as a basis to justify its budget by demonstrating the value back to the public.

APPOINTMENT OF THE CONSUMER ADVOCATE

The selection of the appointing authority is important for the purposes of developing accountability. However, this can be a two-edged sword if the appointing party to whom the CAO is accountable also has a stake in the outcome of the proceedings in which the CAO will likely intervene and participate.

- **Appointment by the Governor** – As noted above, there could be some concerns if the Governor is appointing both the Commissioners and the Director of the Consumer Advocacy agency as there is a question as to independence and whether both organizations will be obligated to follow the Governor's direction. If the independence of each organization can be maintained, then having the Governor do the appointments could be positive as it assures that the highest levels of government are focused on this important work.
- **Appointment by the Attorney General** – The advantage of having the Commissioners and the Director of the CAO appointed separately is that it creates another degree of separation between the advocate and the decision-maker. Again too, this creates a level of oversight with an elected official who may be in a better position to engage.
- **Appointment by a Governing Board** – In Ohio, the Director is appointed by a Governing Board consisting of three members each representing unions, family farmers and residential customers who are appointed by the Attorney General. The goal here is to have the representative of the public interest appointed by the public. The Director is accountable to the Governing Board, but also meets with the AG creating two levels of accountability while preserving independence.
- **Senate Confirmation** – In some states legislative oversight is exerted through requiring that the Director be confirmed by the Senate. The benefit would be a check and balance in terms of an appointment by the Governor or Attorney General. In order to not impede the work of the CAO, the Director should be permitted to begin work upon appointment with the Senate having a limited time period to approve the appointment with the understanding that a failure to act within the specified timeframe serves as confirmation. It should be noted that in other states, Illinois, for example, if confirmation does not occur then the advocate is not able to continue. This is a less desirable outcome as it could result in losing a good advocate and have to start the process over due to the legislature not acting. It also impedes the continuity of the work and decisions of the CAO.

TERM OF THE CONSUMER ADVOCATE

There are basically two choices with respect to the term of the consumer advocate: either the Director serves at the pleasure of the appointing authority with no specific term; or there is a specified term of office. Advocate agencies across the United States operate both ways. The advantage of not having specific terms is that it does not create a distraction for the work of the Director. It also creates continuity. More importantly, it does not present an opportunity for utility interests to lobby against the re-appointment of a strong advocate in favor of a weaker one. On the other hand, having terms of office allows a new appointing authority with the opportunity to assemble a strong team of its choosing. A re-appointment process can also help keep the Director from becoming complacent in his/her role.

MINIMUM QUALIFICATIONS OF THE CONSUMER ADVOCATE

Choosing a Director is an important task to ensure that the public interest is well represented. One consideration is the profession of the Director. Should the Director be a lawyer, or is it acceptable to be an engineer, accountant, economist or some other profession is a question for consideration. While professionals in all of these fields may be capable of doing an excellent job, selecting a lawyer has a few distinct advantages. First, only the lawyer is bound by the code of professional responsibility to represent clients zealously. This fiduciary duty can help insulate the Director from political pressures to compromise when that is not in the best interests of the public. Second, the Director as a lawyer would understand legal procedures and could also personally intervene and represent its clients.

Another important criterion given the technical nature of the electric industry is that the Director possess a certain level of experience both in his/her profession and in the electric industry itself. A minimum of at least five years in each would be appropriate. Without a high degree of technical expertise it will be difficult for the Director to recognize gaps/disagreements with PREPA's argument or to develop the best arguments and strategies to prevail in its representation of consumers. The representation needs to be high quality.

Further, independence is an appropriate criterion. The Director should have no ties either financially or through family members with any utility entity in order to ensure that it is not subject to outside influences in deciding cases to pursue and positions to take.

ACCOUNTABILITY OF THE CONSUMER ADVOCATE

One clear way to guarantee accountability is for the appointing authority to have the ability to terminate the Director for cause. The circumstances for such termination should be clearly prescribed such as nonfeasance, malfeasance, conflict of interest, ethical violation or unlawful activity. Cause would not include taking a position in a matter with which the appointing authority did not agree.

Further, the CAO could be required to file an Annual Report with the legislature detailing its activities over the course of the year to demonstrate that it has been fulfilling its mission to represent the consumers of Puerto Rico. Another measure of transparency and accountability is that as a public agency the CAO should be subject to Freedom of Information Act or Public Records requests. The only exception would be those materials typically exempted under these kinds of laws, confidential information associated with case preparation that are privileged and other information the CAO receives under a protective/confidentiality agreement.

Just as the Regulators should be required to file financial disclosure statements, so too, should the Director and the top officers within the CAO file with the Office of Government Ethics of Puerto Rico. This will provide an ongoing check that the Director and the top employees and their immediate families do not have any financial interest in the outcome of any proceeding before the Regulatory Authority.

ETHICS ISSUES

The Consumer Advocate as the lawyer for the public should be held to a high ethical standard as the public is entrusting this individual and by extension, the office, to protect their interests zealously. Some of the ways to ensure this are discussed below.

- **No Investment or Interest in Any Electric Service Provider Company**

Neither the Consumer Advocate nor his/her family should have a personal interest in any electric service provided so as to avoid a conflict or interest or the appearance of such a conflict as discussed above. This would be verified through annual disclosure forms.

- **Revolving Door Limitations**

The revolving door limitation would prohibit a person holding an appointed position from accepting a position for one or two years with an entity they regulated or interacted with in

that position in a professional capacity. Under this provision the Director and perhaps ranking deputies would be prohibited from taking a position with PREPA or any other regulated entity operating in Puerto Rico for at least a year.

- **Ethics Disclosure Forms**

These forms, filed annually would require the Director and top staff to disclose if they accepted anything of value from any entity they do business with as part of their work at the CAO. They should be bound by the same ethical standards as other public officials.

THE STAFF OF THE CONSUMER ADVOCATE

This is one of the most crucial aspects that need to be taken into consideration in order to ensure an effective Consumer Advocate. In order to properly represent consumers, it is essential that the CAO be staffed with experienced professionals in the electric field with expertise as lawyers, accountants, engineers and economists. Each of these disciplines will be required depending on the matter before the Regulatory Authority. For example, lawyers will be needed to represent consumers in any case that is subject to a hearing. Accountants are needed to review the books and records of a utility requesting a rate increase. Economists are needed to review forecasting issues and determinations of least-cost options. Engineers are needed on transmission and distribution reliability issues. The goal should be to attract qualified individuals with years of experience that can step in and do the job with a minimal learning curve. Administrative staff to run the operations of the CAO will also be needed.

The size of the staff is also important to make sure there are a sufficient number of employees available to work on multiple proceedings at the same time. While Commission staffs tend to be larger than consumer offices, it is important to recognize that to the extent that the consumer advocate is involved in almost as many proceedings and issues, it will need a correctly-sized staff. Perhaps to begin, sizing the CAO at half the size of the Commission would make sense, with the option to adjust the budget after a year when there is a better sense of how much work there will be on a regular basis and what resources will be needed to meet that demand. Moreover, the size of the staff needed will also be a function of the tasks assigned to the CAO. For example, if the CAO handles consumer complaints or engages in public information communication activities, it will need the staffing to carry out those objectives.

Just as the Commission may use its budget to hire outside technical consultants to assist in complex case matters, especially as these agencies are staffing up and developing expertise, the CAO should have the ability to do so as well. Having experienced consultants can assist with ensuring that the consumer interests are well-protected and represented. Further, consultants can serve the dual function of training new staff by example and answering questions. As a check and balance for any single large expenditure, this could be subject to approval in the same fashion as other large budgetary expenditures of other state agencies are subject to approval.

FUNDING OF THE CONSUMER ADVOCATE OFFICE

The CAO should be funded in the same manner as the Regulatory Authority. In the U.S. most advocates, like most Commissions, are funded based on an assessment of the intrastate gross revenues of all entities subject to the Commission's jurisdiction. This can include suppliers and other third parties who are subject to any of the Commission's regulations. By assessing a fee that gets passed on to customers through their bills, this bypasses the General Revenue Fund and taxpayer dollars. Doing so alleviates the burden on the General Revenue Fund to try and find the revenues needed when there are so many competing demands on that budget. The cost of regulation becomes a cost of service because regulation is part of the service. Moreover, the impact on customer bills is minimal and would be half of what it would cost to fund the Commission.

The amount of the budget should be determined in the budget process in which the Governor presents the budget for the Commonwealth which is then presented to the legislature. Prior to the formal presentation of the budget, the Director of the CAO should have the opportunity to meet with the Governor or his/her staff to present the CAO's proposed budget for consideration. Based on the amount of the budget approved by the Legislature, the assessments to each regulated entity would then be set. That entity could then fold that amount into a rider for both the Commission and the CAO which would be added to base rates.

The budget should be built up based on requirements of the job. If the CAO is going to provide expert analysis and present testimony, it will need a staff capable of for delivering. Another option that could be considered as well is the opportunity to bill back for experts on big cases. Under this option, the CAO would be able to file at the Commission or with the Governor or Attorney General, a request to recover legal fees. While this creates the opportunity to supplement a budget, there is also the risk that not all of the funds requested

will be granted. Therefore, it might be better if the CAO was obligated to propose a budget and request funding based on the finding at the beginning of the case. This would also require that the approval process be completed expeditiously so that the CAO could begin case preparation. Further, it places the CAO in a somewhat uncomfortable position if they seek approval for recompense from the same entity whose decision they are considering appealing.

In addition to the amount in the budget, the CAO should be granted through legislation the opportunity to pursue with the legislature an additional assessment on the regulated entities for services outside normal staffing or for cases of extraordinary intensity. This would be a tool available for extraordinary circumstances in which the budget is inadequate.

Moreover, the CAO should have the authority to pursue grants for special projects that can supplement the budget. It should be stressed that these grants would not be intended to cover the day-to-day operations of the CAO which should be fully funded as discussed above. Rather grants could be used for special projects such as a study or consumer education, etc. The acceptance of grant funding should not be permitted if it comes from a source that could compromise the independence of the CAO's work.

CONCLUSION

As part of a new regulatory construct, the creation of a Consumer Advocate Office should be given very serious consideration. A Consumer Advocate can provide balance to the regulatory system by providing a viewpoint that will most often be different from that of PREPA. It can also help strengthen the regulatory structure through articulating the consumer interest. As has been discussed in the RAP/CNE white paper¹⁰, it is important to have a strong regulator. To complete the regulatory framework, it is also important to have a strong advocate. This is especially so if the Regulator is not as strong as it should be. The Consumer Advocate will be well positioned to recognize this and act as a watchdog. In fact, in the United States, Consumer Advocates are often referred to as “watchdogs” because they carefully monitor the activities of utilities and the regulator and call these parties out if their actions are not in the public interest. After years of closed door decision-making with little transparency or real opportunities for public input or comment or even knowledge for that matter, having a consumer advocate will, for the first time, create an entity with both the understanding of what is transpiring that will impact customers, and, importantly, the

¹⁰ The Role of a Power Sector Regulator to Strengthen Sector Performance in Puerto Rico, January, 2014

skills and ability to act for positive public interest outcomes. Providing the CAO therefore with broad authority in the representation of its clients along with the budget and resources to carry out its mission will in the short and long-run help protect the customers of Puerto Rico.