

Background:

NAFTA, GATS, and Ontario's electricity industry

On April 15th, in an announcement to the Empire Club, the Minister of Energy outlined a number of policy objectives the government wishes to achieve in its upcoming legislation. While the Society of Energy Professionals agrees with many of his objectives, and is greatly encouraged that he is setting out to accomplish so much, we are concerned that he intends to, as he stated:

- ◆ “[maintain] a combination of a fully regulated and a competitive electricity sector”

Canada is a signatory to the North American Free Trade Agreement (NAFTA), and a member of the General Agreement on Trade in Services (GATS). These agreements *strictly limit* the kinds of things governments can do to regulate trade and services, once a given trade or service has been "liberalized," that is, opened up to the private sector.

Currently, the electricity industry in Ontario is almost entirely a public one. (Bruce Power is a private operator of a publicly-owned nuclear generating station, and operates within a publicly-regulated system.) While vertically-integrated public monopolies are protected against NAFTA and GATS complaints, as soon as a government opens its electricity sector to private enterprise, NAFTA and GATS rules give the private sector the tools to constrain government behaviour. Under these agreements:

- ◆ Governments *must* allow foreign service providers full access to the market
- ◆ Governments *cannot* favour domestic providers (or consumers!) or discriminate against foreign providers *in any way*
- ◆ Governments *cannot* limit the number of service providers in a given market
- ◆ Governments *cannot* limit the scope or size of the activities in a given market
- ◆ Governments cannot limit the amounts of individual or aggregate foreign investments
- ◆ Governments cannot limit exports or imports
- ◆ Governments are *severely* limited in the actions they can take to achieve public purposes (for example, environmental ones, such as emissions limits) if those actions impinge on the freedom of service providers to operate
- ◆ Foreign firms can complain if NAFTA/GATS rules are violated, but Canadian ones can't

(Environmental regulations are often the focus of NAFTA complaints. In one such complaint, it was ruled that a city in Mexico had no right to

deny a U.S. company a permit to build a hazardous wastes facility over environmental concerns. The Courts refused to overturn the ruling, even though one court found the municipal bylaw involved to be a "reasonable rezoning.")

In other words, if the Government of Ontario leaves the electricity system open to privately constructed and owned generation, as it appears to be doing with Bill 100, it may *unintentionally lose much of its ability to achieve the objectives it set out for itself in formulating the Act!* The requirement for close regulation of Ontario's electricity sector in the public interest will be lost on the altar of the rights of foreign investors.

While there has historically been a modicum of private participation in the Ontario electricity sector, NAFTA and GATS don't allow a "hybrid" market. The only way to maintain control of the sector is to keep it public.