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Ontario Energy Board
27th Floor
2300 Yonge Street
Toronto, Ontario
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November 17, 2006

ATT: E. Kirsten Walli, Board Secretary

Dear Ms Walli,

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c.15, Schedule B;

IN THE MATTER OF a generic proceeding initiated by the Ontario Energy Board pursuant to section 74 of the *Ontario Energy Board Act, 1998* to amend the licenses of electricity distributors to make provision for methods and techniques to be applied by the Board in determining distribution rates for licensed electricity distributors.

EB-2006-0087

In accordance with the Procedural Order No 2 dated November 8 2006 ECMI submits its comments with respect to the above noted matter.

Ten paper copies are enclosed and electronic copies in both Adobe Acrobat and Word have been sent this date by email to Boardsec@oeb.gov.on.ca.

ECMI considers it inappropriate to utilise a Code process to determine whether Codes are an appropriate way for the Board (Ontario Energy Board) to fulfil its regulatory functions.

Further it is inappropriate to determine whether a Code is an appropriate process when the Codes have not been developed. The current process is such a fundamental departure from generally accepted regulatory processes that it requires a more substantive process than the one currently offered by the Board.

The expertise and the witnesses required to support or refute the process are so fundamentally different from those required to comment on the cost of capital proposal that the current process is not sufficient to permit a proper examination.

The submissions under the current process are not evidence. They are neither provided under oath nor subject to cross examination under oath. Such cross examination permits examination of not only real evidence submitted but examination of the reasons for the stated evidence and the validity of those reasons.

What this process needs to determine is not whether or not the Board has the right to do something but whether the proposed process mitigates the ability of the Board through the process to fulfil its obligations under the law. If it does, then it is a flawed process and should not be pursued. Even if the Board has the legal right to use such a process, it should not do so.

It is ECMI's view that at the very least the current process requires a hearing to determine whether the proposed codification itself is outside the law. Such a hearing would permit the creation of evidence that is sufficiently transparent as to permit an evaluation which might permit a determination of the validity of the process.

In examining the Board proposed process, it is apparent that a systemic bias on the part of the Board should not exist unless there is a robust statutory underpinning of that bias and in fact for a fundamental bias to exist, ECMI would submit that there needs to be a clear and irrefutable statutory duty for such a bias.

ECMI continues in the following view:

It is recognised that the desire of the Board is to streamline the process and this is appropriate. However, this current proposed process or processes may be so fundamentally flawed that all parties should consider a joint submission to Divisional Court seeking Divisional Court rejection or acceptance of the process. If Divisional Court rejects the current proposed process, it will permit the OEB to get on with its fundamental duties in a more timely process than if the Board proceeds and ultimately ends up with a Divisional court challenge at a later time.

Board Staff seem to out of hand reject the PBR 1 process which did not require a code to implement. After a thorough evidentiary and hearing process, PBR 1 was implemented and created an efficient process to the benefit of those regulated and other interested parties. The PBR 1 process dealt with in the order of 180 LDC applications and seemed to deal with them in an efficient fashion.

The current proposed process seems to insert Board staff in the place of the Board. This undermines the credibility of the administrative tribunal process. This apparent insertion fails to recognise that it is the Board members who are the administrative tribunal not the Board staff.

ECMI does not think the process is legal within the jurisdiction of the Board If the statute is not explicit, it should not be assumed the process is legal for the purpose of establishing rates. Even if the Board does have the legal right, they don't have the legal right to use the proposed process for the purpose of establishing rates.

In ECMI's view, one of the reasons the Board does not have the right to use the proposed codification process for the purpose of establishing rates in the suggested way is that they have not been providing sufficient explanation to provide a reasonable

transparency of the process. The term “Consider” in the statute should not be interpreted to imply that consideration can occur in an *other than public* process. It is the statement of reasons that underpin the ultimate decision or code which provides a meaningful explanation to both the parties regulated and the parties on whose behalf the regulation is performed.

Any administrative tribunal can not legally so fetter itself with rules that it precludes a robust consideration of the specifics of any situation and any resultant regulatory decision which stems from that situation. Any notion “that a code used to establish rates is not a regulatory decision” does a disservice to customers and those regulated. The decision with reasons which underpin current rate approvals is fundamental to the demonstration that the decisions are reasonable and that the rates so created are reasonable and just. The simplistic approach to universal risk factors and capital costs is such a fettering of the process that ECMI would suggest it is outside of the jurisdiction of the Board.

The proposed use of universal productivity factors, cost of capital and risk factors is also an unreasonable fettering of the process. In particular the universality of the productivity factors precludes the reasonable consideration warranted of an LDC’s application.

If, in an effort to appear to be making the proposed code process more responsive, the Board broadens the acceptance of Z *factor adjustments* then the resultant outcome may defeat any benefits that would flow from a more streamlined codification process.

ECMI encourages the Board to consider all of its previous submissions on Cost of Capital and the proposed codification process. The proposed separation of the process from the context and content of the proposed code ignores the clear intent of the statute that codes are intended for day to day activities while a hearing provides the opportunity for consideration of the merits of each individual LDC’s circumstances and the individual customer’s perspectives in the establishment of fair and reasonable rates.

The Board appears to be experimenting with the *codification of rate regulation*, a new process that seems to be a first for Canada This approach appears to attempt to establish rates through a purely mechanical process. Given the new terrain, it is not surprising that most parties including Board staff seem to be struggling with how to effectively deal with the current experiment. Regulatory experiments are risky for regulators, for those who are regulated by them and for the customers the regulator is charged with protecting. What is apparently lacking is the establishment of priorities by the Board which are clearly focussed on customers.

Respectfully submitted.

Original signed by R. White

Roger White
President