

**THE ONTARIO ENERGY BOARD**

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

**AND 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 licences of electricity distributors to make provision for methods and techniques to be applied by the Board in determining distribution rates for licences electricity distributors.

**SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA**

**I Introduction**

1. These are the submissions of the Consumers Council of Canada (“Council”), delivered pursuant to Procedural Order No. 1, issued on October 6, 2006.
2. The Ontario Energy Board (“Board”) has commenced separate proceedings to develop two Codes, one that confirms the cost of capital to be used in adjusting annual revenue requirements for 2007, and the other that establishes a mechanistic incentive rate adjustment mechanism for the period covered by the Board’s proposed multi-year electricity distribution rate-setting plan. The Council will not, herein, comment on the substance of those two codes.
3. The proceedings to develop two Codes will consist of consultations, in which interested parties may file materials and make submissions as to the content of the Codes. For the reasons set out below, the Council is concerned that the process to develop the Codes is not sufficient, given the ultimate effect of the Codes on the interests of the parties, to meet the requirements of the duty of fairness. However, for the purpose of these submissions, the Council will address the larger issue of whether the Board has the jurisdiction to implement its proposed multi-year electricity distribution rate-setting plan.
4. Accordingly, the Council will, in these Submissions, confine itself to two matters, as follows:

1. Whether the Board has the jurisdiction to require that rates for electricity distributors be prescribed by a combination of Codes and conditions in their licences;
2. If the Board has the jurisdiction, whether it ought to exercise it.

## **II Background**

5. By notice dated July 7, 2006, the Board commenced a proceeding, pursuant to section 74 of the *Ontario Energy Board Act* (the “Act”), to amend the licences of distributors to make provision for methods and techniques to be applied by the Board in determining distribution rates for licenced electricity distributors.

6. As noted above, the Board’s expressed intention is to develop two Codes. The Board has commenced separate proceedings for the development of the Codes. One will “confirm” the cost of capital to be used in adjusting the annual revenue requirements for 2007 and beyond. The second will establish an incentive rate adjustment mechanism for the period covered by the multi-year electricity distribution rate-setting plan.

7. The Board is proposing an amendment, to the licences of all but two electricity distributors, to include the following provision:

The Board shall, in determining the Licencee’s rates for the distribution of electricity, apply the methods and techniques set out in the Incentive Regulation Mechanism Code and the Cost of Capital Code, whichever is applicable to the distributor in any given year. The Board should apply those methods and techniques in determining the Licencee’s rates for the distribution of electricity to become effective on or after May 1, 2007, and shall continue to apply those methods and techniques for such a further period of years as is determined by the Board as determined by the Incentive Regulation Mechanism Code and the Cost of Capital Code. (Emphasis added)

8. The separate, individual proceedings which the Board has commenced to develop the two Codes will consist of consultations rather than hearings. Although parties will be permitted to file material in those proceedings, the material is not given under oath and there will be no cross-examination on that material.

9. The Board will not conduct annual cost of service rate hearings for all distributors. It will, however, issue orders approving each utility's rates, pursuant to section 78 of the Act.

### **III The Scheme of the Act for Setting the Rates of Electricity Distributors**

10. The provisions of the Act relevant to the setting of rates for electricity distributors are summarized out below.

11. Subsection 78(2) of the Act provides that no distributor shall charge for the distribution of electricity except in accordance with an order of the Board. Subsection 78(6) of the Act provides that an order approving rates may include, among other things, rules respecting the calculation of rates.

12. Subsection 21(2) provides that, subject to any provision to the contrary in the Act or any other Act, the Board shall not make an order until it has held a hearing.

13. Subsection 1(1) of the Act provides that the Board, in carrying out its responsibilities under the Act in relation to electricity is to be guided by certain objectives, as follows:

1. To protect the interests of consumers with respect to prices, the adequacy, reliability and quality of electricity service;
2. To promote economic efficiency and cost-effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

14. Section 57 of the Act prohibits a person from, among other things, owning and operating a transmission system unless licenced to do so.

15. Subsection 70(1) of the Act authorizes the Board to prescribe conditions under which, among other things, a person may own and operate a transmission system. Section 70(2) of the Act gives examples of the conditions which the Board may impose on the licence. Included in the examples of conditions as provisions "specifying methods or techniques to be applied in determining the licensee's rates".

16. Subsection 70.1(1) authorizes the Board to issue Codes which may be incorporated by reference as conditions of a licence issued under section 70. Subsection 70.1(5) provides that the Code may be general or particular in its application.

#### **IV The Jurisdiction of the Board**

17. The Board proposes to set out, in two Codes, rules which prescribe how the rates of all electricity distributors will be calculated. The Codes will be adopted by reference in the licences of all electricity distributors. The rules will apply to all electricity distributors regardless of their circumstances. The Board will, as it must under section 78 of the Act, issue orders approving the rates of individual utilities, each order presumably approving the rates that are derived from the application of the formulae which are set out in the Codes and adopted by reference in the licences.

18. Section 70.2 of the Act requires that the Board give notice of a proposed Code, and allow representations with respect to the proposed Code. Section 70.2 does not require that the Board hold a hearing before approving a Code.

19. According to the Board's proposed plan, the Codes would effectively preclude utilities from applying for the approval of rates which are not derived from the application of the formulae, but which reflect the particular circumstance of the utilities. In addition, the Board's proposed plan, because it would preclude a true hearing of an application for approval of rates, would prevent ratepayers from making the case that the proposed rates are not just and reasonable.

20. Given the possible material adverse impact which rates set according to the formula may have on utilities and their ratepayers, it is an open question whether simply allowing parties to file material and make representations with respect to the Code is sufficient. The Council submits that, in the circumstances, the Board should require that the material be filed under oath and should allow parties to test the material filed by others, through cross-examination. Doing so would help to ensure that the parties have the fullest opportunity to protect their interests.

21. Pursuant to subsection 21(2) of the Act, the Board is required to hold a hearing before issuing any order. Accordingly, before the Board can issue any order, pursuant to section 78 of the Act, approving the rates of the distributor, it must hold a hearing. The council submits that

nothing in sections 70 or 70.1 directly or by necessary implication allows or directs the Board not to hold a hearing. To put the matter another way, the Council submits that neither section 70 nor 70.1 directly, or by necessary implication, overrides the Board's obligation to hold a hearing before issuing an order pursuant to section 78.

22. However, if the Board, through a combination of codes and licence amendments, requires that the rates of all electricity distributors be set according to a formula, then a hearing held pursuant to subsection 21(2) would be meaningless. The Board would not be considering an application for approval of rates on the merits of the application or with an open mind. The Board's function would be an administrative one only, limited to applying the formula to the data in the application. The assumption would have to be that the formulae, when applied to the data of the utility, would produce just and reasonable rates. The Board would have no evidence specific to the utility, to support that assumption. In addition, it would not be able to consider evidence to the contrary.

23. Put simply, the Board proposes, using a combination of sections 70 and 70.1 of the Act, to fetter its own discretion to consider each application for approval of rates on its merits. That the Board proposes to do so is clear from the language of the licence amendment, which is set out in paragraph 6 above. The proposed amendment provides that the Board "shall" apply the method or technique set out in the Codes. The use of the word "shall" evidences the Board's intention to limit its own discretion. The question, then, is, does the Board have the jurisdiction to do so?

24. That a regulatory agency cannot fetter its discretion by the formulation and adoption of general policy guidelines is clear. (See, for example, *Maple Lodge Farms v. Government of Canada* [1982 2 SCR 2]. The question, however, is whether the legislature, in enacting sections 70 and 70.1 of the Act, has authorized the Board to make rules which fetter its discretion.

25. The Council acknowledges that, in enacting sections 70 and 70.1, the legislature intended that the Board have the power to prescribe, in licences, the means by which rates were to be determined and the power to develop codes, which may be general in application and which may be incorporated by reference as conditions in licences. It is arguable, therefore, that the legislature intended to authorize the Board to develop codes having general application which, when incorporated in all licences, would have the effect of proscribing the rates for all

distribution utilities. It follows that it is arguable that the legislature intended to authorize the Board to limit its discretion to set rates based on the circumstances of individual utilities.

26. However, section 70 and 70.1 do not stand alone. In enacting those sections, the legislature did not repeal section 21, or make its operation subject to section 70 and 70.1, with the result that the Board continues to have an obligation to hold a hearing before making a decision to approve a utility's distribution rates. The Council submits that the legislature cannot be presumed to have intended an absurd result, namely that the operation of sections 70 and 70.1 would render the right to a hearing meaningless. The Council further submits that the legislature did not, and could not, delegate to the Board the power, through codes, to effectively amend section 21 of the Act by making it not apply, or apply in a severely limited way, in particular circumstances.

27. The Council submits that subsection 70.1(3) of the Act does not give the Board the power to use a provision in a code to negative, or derogate from, the obligation to hold a hearing granted by section 21 of the Act. Removing the right to a hearing, granted by section 21, would require clear and unambiguous language. Subsection 70.1(3) is not such clear and unambiguous language.

28. In enacting sections 70 and 70.1, the legislature addressed the problem identified by the Ontario Court of Appeal in *Ansley Financial Corp. v. Ontario Securities Commission*, 21 O.R. (3d) 104, in that it authorized the Board to enact codes which are to have binding effect. However, the sections do not get around the problems created by the combination of sections 78 and 21(2) of the Act.

29. The Council further submits that the right to a hearing must have a certain minimum content, consistent with the rules of natural justice and the requirements of the *Statutory Powers Procedure Act* (R.S.O. 1990, c S.22). That content would, at a minimum, require that each case be considered on its merits and by a tribunal with an open mind. The utility would be required to show that the rates it proposes to charge are consistent with the overall objectives of the Act. The Board, in turn, would have to satisfy itself that the rates were consistent with the objectives set out in section 1 of the Act.

30. Accordingly, the Council submits that, while the Board has the jurisdiction to make codes which are incorporated in the licences and which have the effect of prescribing the method by which rates are to be determined, it cannot fetter its own discretion in considering each application on its merits.

31. It should also be noted that fettering its discretion in the way proposed by the Board runs contrary to section 1 of the Act. The use of one formula, applicable to all distribution utilities regardless of their individual circumstances, would limit the Board's ability to protect the interests of consumers with respect to prices, the adequacy, reliability, and quality of electricity service. In addition, there is no evidence that using a formula to set rates promotes economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity, and the facilitating of the maintenance of a financially-viable electricity industry. On the contrary, by precluding a utility from leading evidence that the application of the prescribed formula would result in an ROE which undermines its financial viability, the Board would be acting contrary to the statutory objectives.

## **V Policy Considerations**

32. Even if the Board could set rates for each utility based solely on a formula set out in a code and incorporated by reference in a licence, the Council submits that it should not do so, as a matter of public policy.

33. The Council understands that the primary driver behind the Board's proposal for the rate setting plan is regulatory efficiency. Given the number of distribution utilities, the Board cannot consider annual cost of service applications by every distribution utility in the province.

34. The Council is sympathetic to the concerns about regulatory efficiency which lie behind the Board's proposal and is not opposed, *per se*, to some use of formulae as a shorthand way to fix rates. However, the Council believes that no formula can apply to all distribution utilities. Differences in size and circumstances mean that applying one formula will result, at best, in rates which are a crude reflection of the particular circumstances of a utility. The Council believes that the result of the application of one formula to all distribution utilities may be that rates, in some instances, will not be just and reasonable.

35. The Council assumes that the Board itself knows that the use of formulae is, at best, a short term solution to the problem of regulatory efficiency, given that the Board has expressed its intention to review the circumstances of individual utilities, in groups, beginning with the 2007 rate year. The Council assumes that is also reflected in the Board's expressed intention to provide that some utilities may seek an exemption from the application of the formula.

36. However, Council submits that the necessary balance would be achieved if the proposed policy were modified to allow any utility to apply for rates based on its individual circumstances, and not on the formula embedded in its licence. Doing so would be consistent with the Board's jurisdiction. It would also help to ensure, although not guarantee, that rates more clearly reflect the individual circumstances of the utility, and so have a better chance of being just and reasonable.

37. The Council believes that, since the vast majority of distribution utilities will not want to mount individual applications, they will seek to have their rates set by the formula embedded in their licences. The Council also believes that the vast majority of distribution utilities will be able to dispose of their applications by means of a written hearing only. The Council believes, accordingly, that the Board can achieve a substantial amount of regulatory efficiency while operating within the confines of its jurisdiction.

38. The Council submits that it is not a solution to the problem of the limits on the Board's jurisdiction, discussed above, to hold a generic hearing before deciding on the content of the Codes. The Act does not require the Board to hold a hearing before setting a Code. However, as noted above, if the Code is to be incorporated in licences, and to affect the level of ROE and the rates which distributors can charge, the Board must, at a minimum, afford each utility the minimum content of the rules fairness. In this context, that would require the parties to file material under oath and that parties be permitted to cross examine on the material which has been filed by other parties. However, while the Council submits that there ought to be a generic hearing before the Board fixes the content of the Codes, that hearing would not cure the problem created by the combination of sections 78 and 21 of the Act, discussed above. To put the matter another way, even if the Board were to hold a generic hearing before establishing the content of the Codes, it would have to consider applications by individual utilities, on their merits and with an open mind, before issuing an order under section 78 of the Act.



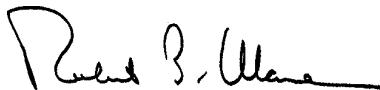
## **VI Conclusion**

39. The Council submits that the Board does not have the jurisdiction to carry out its proposed plan to have the rates of all distribution utilities set by formulae embedded in their licences. The Council submits that the Board must allow utilities to apply to have their rates set without reference to the formulae and on the basis of the evidence the utility chooses to file. Finally, the Council submits that, if a utility chooses to file such an application, it must be afforded a full hearing.

40. The Council submits that, as a matter of policy, if the Board does establish a formula by which rates are to be set, it should allow utilities the freedom to apply for rates which are not based on the formula approach and which reflect their individual circumstances.

41. Finally the Council submits that, if the Board is receiving legal advice on the question of its jurisdiction to fix rates through the combination of Codes and licence amendments, the nature of that advice should be disclosed to the parties, and the parties should be given an opportunity to comment on it.

**All of which is respectfully submitted.**



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