EB-2006-0087

IN THE MATTER OF a process initiated by the Ontario Energy Board to amend the licences of electricity distributors to make provision for methods and techniques to be applied in determining distribution rates.

WRITTEN SUBMISSIONS

OF THE

SCHOOL ENERGY COALITION

Background

1. The Board on its own motion initiated a proceeding under section 74 of the OEB Act to amend the licences of electricity distributors to "make provision for methods and techniques to be applied by the Board in determining rates for licensed electricity distributors". A Notice of Proceeding was published July 7, 2006, and Procedural Order No. 1 was issued October 6, 2006.

2. The School Energy Coalition ("SEC") has been accepted as an intervenor in this proceeding. Pursuant to Procedural Order No. 1, SEC provides herein its written submissions on the issues being addressed in this proceeding. These submissions will deal with the following questions:

    a. ***Whether the Board has jurisdiction to make the proposed licence amendments.***

    b. ***Whether the proposed licence amendments are appropriate in substance and as a matter of regulatory policy and efficiency.***

    c. ***What course of action the Board should take in light of the live question of the Board's jurisdiction in this case, and the substance of the proposed amendments.***

    d. ***What procedures, if any, should the Board undertake by way of oral hearing or otherwise to consider the issues set forth in this proceeding.***

Jurisdiction

3. It is the opinion of SEC that, as a matter of law, the Board does not have jurisdiction to make the proposed licence amendments in the manner contemplated by its current plans. Further, it is the opinion of SEC that, if the Board asserts jurisdiction in this matter, it runs the risk that the resulting judicial review will in fact limit the Board's jurisdiction more so than the jurisdiction routinely being exercised by the Board today, and may cause other negative impacts on the Board that are not in the public interest. This section of these submissions will deal with the first of these opinions. Later in these submissions, we will turn to the second of these opinions.

4. The OEB Act contains two provisions relating to electricity distribution rates that are potentially inconsistent. The first provision (herein the "Rate Order Power"), in section 78(3), says:

"The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity…"

5. The Rate Order Power is a statutory power of decision governed by the Statutory Powers Procedures Act ("SPPA"), in that pursuant to section 21(2) of the OEB Act it may not be exercised except after holding a hearing. The requirement to hold a hearing therefore imports the provisions of the Statutory Powers Procedure Act ("SPPA") into the setting of just and reasonable rates. Thus, the Rate Order Power is in all respects treated in law as an adjudicative power.

6. Under section 33 of the OEB Act, an order under the Rate Order Power is appealable to Divisional Court, and under section 34 such an order may be the subject of a petition to the Lieutenant Governor in Council.

7. The OEB Act also provides in section 57(a) that owners and operators of an electricity distribution system must have a licence, and further provides, in section 70(2)(e) (the "Licence Condition Power") as follows:

"The conditions of a licence may include provisions…(e) specifying methods or techniques to be applied in determining the licensee's rates"

8. The Licence Condition Power is not implemented by order, and a hearing is not required.

9. The Board is empowered, under section 70.1(1), to issue codes, and may require that codes be incorporated by reference as conditions of a licence to distribute electricity. Like rules under the gas distribution provisions, codes are much like regulations, and thus under section 70.2 there are notice and public review requirements before a code may be issued. Since codes are not issued by order, a hearing is not required, although it is of course allowed. However, the provisions of sections 33 and 34 relating to appeals and petitions apply equally to codes as to orders.

10. Under section 70.1(4) of the OEB Act, a code may include by reference "any standard, procedure or guideline". Thus, by a combination of the above provisions, prima facie the Board may enact a guideline (for which there are no procedural requirements), incorporate it into a code, and make that code a condition of a distribution licence.

11. With respect to two important aspects of distribution rates – the cost of capital and the rules respecting annual rate adjustments – the Board proposes in this proceeding to enact codes mandating those amounts by way of formula, and to incorporate those codes by reference into the distribution licences of electricity distributors. Cost of capital represents 40-50% of the distribution rates of electricity distributors, and the annual adjustment formula would apply to most or all of distribution rates. Under the Board's proposed procedure, the distribution rates of electricity distributors would be entirely set each year by formula, and without the Board or any other impartial adjudicator exercising any judgment as to whether those rates are just and reasonable. The Board would issue orders each year under section 78, but those orders would not be the result of any adjudicative process, and any hearing would be entirely circumscribed by the licence conditions.

12. The Board's proposed approach raises the question of whether the Licence Condition Power can be exercised in such a manner that the Rate Order Power is rendered wholly or largely inoperative, either legally or practically. The question arises because, depending on the interpretation given to respective

statutory provisions, there may be either an overlap or an inconsistency between the Licence Condition Power and the Rate Order Power.

13. It is trite law that the Board is not empowered to fetter its own discretion. For example, *Jones and de Villars (Principles of Administrative Law, 3rd Ed, p.177),* quote *Wade and Forsyth, 7th Ed,* as follows:

"It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case; each one must be considered on its own merits and decided as the public interest requires at the time."

While it is accepted that a tribunal can establish non-binding guidelines and rules of thumb, it cannot go the next step and make rules that are legally or practically binding unless the legislature grants it the express power to do so. While the Licence Condition Power may allow binding rules, it is not apparent from the legislation that the Board is authorized to fetter its own discretion under section 78. The potential for conflict between the Licence Condition Power and the Rate Order Power thus arises.

14. It is submitted that there are only two ways to resolve the potential for conflict between the Licence Condition Power and the Rate Order Power:

a. If there is an apparent inconsistency between them, this is resolved by construing the provisions so that they are consistent.

b. If there is an overlap between them, this is resolved by ensuring that the requirements of both provisions are met.

SEC believes that, whether (a) or (b) is correct, no resolution of the potential for conflict exists that will allow the Board to proceed with the proposed procedure set forth in paragraph 11 above.

15. One way the Board can resolve the existence of the two rate-related powers is by interpreting them so that they are consistent. *Sullivan and Dreidger (4th Edition, page 285)*, for example, cites as a basic rule of statutory interpretation that provisions must be interpreted to *"harmonize the components of legislation inasmuch as is possible in order to minimize internal inconsistency"*.

16. In this case, it is reasonably straightforward to construe the Licence Condition Power so that it does not interfere with the Rate Order Power. The power to stipulate "methods or techniques" for setting rates could could be construed to mean and be limited to establishing procedures or setting forth ratemaking principles. A method could include the historical year method, or the forward test year method, for example. The old approach of establishing the rate base first, then return, then operating costs, to build up to revenue requirement, could be stipulated. Principles such as utility tax accounting could be established. None of these would predetermine the outcome of any exercise of the Rate Order Power, yet they still provide meaningful ways in which a code relating to rates could be incorporated into a distribution licence.

17. Any interpretation of the Licence Condition Power that limits it sufficiently to prevent any inconsistency with the Rate Order Power, though, would clearly make the Licence Condition Power too narrow to support the Board's proposed approach to cost of capital and formula based rates. Every interpretation of the Licence Condition Power that would allow the Board's proposed approach would wholly or largely predetermine the outcome of the Rate Order Power, and thus be inconsistent with it existing as a separate power in the OEB Act.

18. The alternative to narrowly construing the Licence Condition Power is to accept that there is overlap between the two provisions. Unless the OEB Act specifically deals with the overlap, the Board must then comply with the requirements of both.

19. This resolution of the problem would allow the Board to proceed as it has proposed, but only if it also complied with section 78 in the issuance of the code and incorporation of the code into the distribution licences. All distributors would be required to have notice, and in turn give public notice, and full procedural safeguards including a hearing would be required. In effect, the code-making proceeding would be converted into a generic rate proceeding, in much the same manner as would be the case if this were the regulation of gas distributors. We note that this is consistent with the Explanatory Guide to the *Ontario Energy Board Consumer Protection and Governance Act, 2003, S.O. 2003, c.3,* which states that the sections of the OEB Act dealing with electricity codes are based on sections 44, 45, and 46 dealing with setting rules for gas distributors.

20. Under this view of the legislative framework, the Board lacks jurisdiction to proceed with its proposed approach, because that approach would not comply with the requirements of section 78, the Rate Order Power. (It could, however, proceed with the modified approach we recommend later in these submissions, because that expressly complies with section 78.)

21. Thus, whether the tension between the two rate-related powers is resolved by precise construction, or by overlapping compliance, in neither case is the Board's proposed approach within its jurisdiction.

22. That leaves the question of the *Capital Cities* case (*Capital Cities v. CRTC [1978] 2 SCR 141*), cited by Board in its recently published paper on the Board's procedures (*A Report with Respect to Decision-Making Processes at the OEB,* Ontario Energy Board, September, 2006 at page 9). In *Capital Cities*, the CRTC developed policy guidelines for cable television operators after a lengthy a detailed hearing process. Certain affected parties challenged the CRTC's jurisdiction to develop and promulgate such guidelines, and to follow them in issuing orders. The majority of the Court, in a decision written by then Chief Justice Bora Laskin, pointed out that the guidelines "were arrived at after extensive hearings at which interested parties were present and made submissions". The Court then went on to find that it was in the public interest that members of the public and prospective licencees know the policies of the Commission, and the development of guidelines was an efficient way of achieving that result. It was therefore implicitly part of the CRTC's jurisdiction.

23. The *Capital Cities* decision, by itself, might be interpreted in a manner that would give the Board lattitude to carry out its proposed approach in this case. However, it has subsequently been clearly and pointedly distinguished by the Ontario Court of Appeal in *Ainsley Financial* (*Ainsley Financial Corp. v. OSC 21 OR (3d) 104 (1994)*). There, the Court had to consider a Policy Statement purporting to set out binding guidelines relating to penny stock dealers. The OSC argued that the Policy Statement was not legally binding, so was within its jurisdiction. The Court disagreed, saying (at page 110):

> "*There is no bright line which always separates a guideline from a mandatory provision having the effect of law. At the centre of the regulatory continuum one shades into the other."*

The Court went on to find that the Policy Statement was in substance binding, and therefore the decision in *Capital Cities* was not applicable. Since clearly the proposed codes in this case are intended to be made binding through insertion into distribution licences, *Capital Cities* is not applicable in this case either.

24. This leads to the second possible argument supporting the Board's jurisdiction in this case, ie. that the Board's power to enact codes is a rule-making power, and by section 70.1(1) of the OEB Act the

Board is expressly empowered to make codes binding. This would imply that, while *Capital Cities* is not applicable to support the Board's jurisdiction, neither would *Ainsley Financial* be applicable to deny the Board's jurisdiction.

25. It is submitted that the legislature, in enacting section 70.1 and 70.2 of the OEB Act, intended to grant to the Board a legislative power to enact binding rules having a character similar to regulations. Therefore, neither the *Capital Cities* nor the *Ainsley Financial* decisions are applicable to the proposed codes in this case.

26. That, though, is not the end of the matter, because once the case law dealing with non-binding guidelines is excluded from consideration, the Board's jurisdiction rests on how to deal with two powers to make binding decisions that purportedly apply to the same thing but require different procedural safeguards. This leads inexorably back to the possible resolutions set forth in paragraph 14 above, and the conclusion, previously discussed, that any resolution of this situation results in the Board lacking jurisdiction to proceed with licence amendments in the manner proposed in this case.

27. This conclusion can also be tested by common sense, in this case a *reductio ad absurdem.* If it is accepted that the Licence Condition Power extends to setting formulae for rates, and that it can be exercised without also complying with the procedural requirements in the Rate Order Power, then the necessary effect is that the Board can completely oust the application of the SPPA to electricity distribution rates through codes and licence conditions. While it is undoubtedly within the power of the legislature to authorize such a result, it would be unusual, perhaps even unprecedented. A court would look for unequivocal language to that effect in the statute before accepting an interpretation producing that surprising result.

Proposed Licence Amendments

28. The previous section of these submissions deals with the legal barriers to the Board's proposed course of action in setting electricity rates. The other question, though, is: Even if it is within the Board's jurisdiction, is it a good idea as a matter of policy, and is it in the public interest? This requires consideration of the specific licence amendments being proposed, and the role of the Board in setting electricity rates.

29. The essence of the proposed licence amendments is to incorporate by reference detailed formulae – currently unknown - that, together, set the distribution rates for each electricity distributor without any evidentiary basis and in the absence of any public participation or compliance with the rules of natural justice.

30. The Board has already seen, in the EB-2006-0088/89 proceedings, that there is a substantial quantity of information and evidence that is required in order to make decisions about cost of capital and the components of an IRM. Because of the nature of those proceedings, the Board has indicated that it is unwilling to compel the electricity distributors who have that information to provide it, and in answers to written questions filed last week most distributors have declined to file all but the most basic of that information.

31. For example, cost of capital is informed (as all experts appear to agree) by the decisions of electricity distributors relating to the purchase of other distributors, or sale to other distributors. Not only the purchase price paid, but also the internal analysis of effective returns on the acquisitions, would tell the Board what the actual market believes is the risk/reward balance in electricity distribution investments. We are in the unusual position where there is in fact a market for the very investment we are considering, but we cannot use the market data to determine return because those with the market data

refuse to reveal it. That would itself be a concern. It is even more of a concern when those with the market data are the very people who are being regulated by this Board, and when the Board is not demanding that data only because it has elected to proceed in this matter by way of section 70.1(1) of the OEB Act rather than section 78.

32. The market data is but one category of information required. The question of debt covenants (and their potential breach due to changes in the capital structure or cost of capital) is another, and there are more relating to cost of capital. In the area of incentive regulation, information concerning capital renewal plans, and comparison to past capital expenditures, is also relevant and material. So too is information about inter-utility productivity comparisons, rate increase histories, asset condition assessments, and other data. The Board is currently proposing to make decisions about cost of capital and annual rate adjustments without any of this information or, if it has some of it, with limited information that is not available to the public.

33. It is submitted that it is not good regulatory policy to make decisions without the relevant information when that information is readily available and could be compelled by the Board. These matters are empirical by nature, and thus can only be decided on a solid evidentiary base. Further, it is central to the Board's mandate that it apply its specialized expertise to the relevant information available to it and thus reach decisions that are solid and technically sound. If the Board declines to consider relevant and material evidence – particularly when the evidence is available to it – it is essentially rejecting its responsibility and mandate to be a specialized regulator.

34. It is also not good regulatory policy to make decisions based on secret information that is not available to the public, who are paying the bills, or to the regulated entities. Not only is it patently unfair to both ratepayers and LDCs, but it is a rejection by the Board of its fundamental role in setting rates.

35. This is really part of a larger issue, and one that the OEB paper, cited earlier, fails to recognize. The Board, unlike the OSC and some other regulatory bodies, is in the case of rate-setting an economic regulator. While the Board certainly has some of the consumer protection and other "policing" powers common to regulators like the OSC, its primary role is quite different: acting as a proxy for competitive markets in setting the rates of regulated monopoly companies.

36. There are two reasons why the legislature gave the power to set electricity rates (or gas rates, for that matter) to the Board. First, the Board has a specialized expertise that allows it to make decisions that are technically stronger than would be the case with a general-purpose adjudicator. Second, assigning the rate-making power to the Board imports a set of formalized procedures that ensure fairness and allow affected parties – primarily distributors and their ratepayers – to participate fully and publicly in the rate-setting process.

37. The first of these two reasons – specialized expertise – is undoubtedly important, but the history suggests that it is of secondary relevance in the case of the Board. Prior to the legislature assigning the rate-setting power to the Board, that power was allocated to Ontario Hydro. Electricity distributors interacted on a regular basis with a highly skilled group of Ontario Hydro employees. Those individuals made decisions on electricity distribution rates in private, and without any involvement by the public. Even the electricity distributors had only a limited ability to influence their decisions. However, arguably these decision-makers were as skilled, or even more skilled, than the Board is today, since they were electricity distribution rate specialists.

38. Further, if the question was just expertise, then the legislature could just as easily have assigned the rate-making power to the Minister of Energy or his department. Again, there would have been at least as much expertise as the Board could bring to bear, and the processes would have been quicker and

easier. (Consider, for example, the situation of automobile insurance rates, which are approved by a government official with a special expertise in the field, but without any public consultation or hearing.)

39. It is submitted that the legislature did not leave the rate-making power with those who had it, nor pass it on to the Ministry, because the second reason – public review and participation including normal SPPA protections – was of overriding concern. At that time (1998), the Board was regulating the gas distribution companies, and the public had full participation and protection in those proceedings. When the legislature decided to move electricity distribution to the same conceptual basis – cost of service plus market rate of return, in essence – it determined that the same regulatory paradigm was also appropriate. The ratepayers needed to have the same rights to protect their interests in electricity distribution rates as they did in gas distribution rates.

40. Now, the Board is proposing to set rates in a manner that denies the ratepayers the right to participate fully in the rate-making process. It is submitted that, if the Board proceeds along that path, it will be rejecting the very purpose for which itwas granted the rate-making power just eight years ago. This is not good regulatory policy, and it is wrong.

41. As SEC has noted on numerous occasions in the past, rejecting ratepayer participation is also impractical. Electricity distribution rates total billions of dollars every year, and thus there are significant economic interests at play in the setting of those rates: the distributors themselves, their municipal shareholders, unions, industrial and commercial customers, institutions, and individual consumers of various types, among others. As long as the Board provides for an appropriate, complete and fair forum for consideration of electricity distribution rates, those interests can participate and, unless the decisions of the Board are completely unreasonable, accept the result.

42. Conversely, if the Board elects not to provide the appropriate forum for those parties, they need to find an alternative way of having their voices heard. Some, of course, would be silenced by the Board's refusal to hear them. Others would presumably voice their concerns through the press. Many would also turn to the government and the Ministry, who are in any case the source of the power to set rates and thus the next logical place to go. None of these results are appropriate, nor should they be acceptable to the Board or to the government. Once the Board is given the responsibility and mandate to set rates in a proper manner, any circumstance in which the government, Ministry, or press is inundated with the concerns of disenfranchised ratepayers and others is implicitly a failure on the part of the Board.

43. In short, the Board has not done its job if it simply sets electricity distribution rates. Ontario Hydro did that. The Board's job includes an appropriate process to get to just and reasonable rates, in which those whose interests are affected are fully engaged and participating. The Board does not have to re-invent that process. The government has provided a long-established and well-understood set of rules for that process, the SPPA. The Board can, within the framework of the SPPA, maximize the efficiency of its decision-making, but it cannot and should not reject that framework, because in so doing it is by definition rejecting the very core of its rate-making mandate.

Board's Possible Courses of Action

44. This section of these submissions deals with *realpolitik*. The Board has essentially three choices to deal with this process:

a. Decide that it has jurisdiction to proceed with the licence amendments and codes as is currently proposed.

b. Alter the code-making component of the process so that it includes as a matter of substance the evidentiary and hearing procedures that are currently lacking, and thus imports the principles and procedures set forth in the SPPA.

c. Restructure the process for EB-2006-0087/88/89 so that it is carried out under section 78 and, even if it results in codes and licence conditions, the Rate Order Power has been complied with in full.

45. ***Insisting on Broader Jurisdiction.*** If the Board insists that it has the broader jurisdiction proposed under section 70.1(1) and thus can effectively set rates through codes and licence conditions, in our submission there are three potential consequences of that.

46. First, as the Board is already aware, many stakeholders, both distributors and ratepayer groups, believe that the Board lacks this jurisdiction. It would be surprising if one or more of those stakeholders did not challenge the Board's claim of jurisdiction by way of application for judicial review. This would not be the first time that the Board's jurisdiction had been challenged, of course, and the Board has a pretty good record of winning those challenges. Also, the fact that there may be an application for judicial review is not a reason for the Board to shy away from asserting a jurisdiction that it has, legally, and it is appropriate to exercise. However, many issues of jurisdiction can be avoided, and one appropriate consideration for the Board to consider is whether a challenge to its jurisdiction is in the public interest. Sometimes it will be, as where there is a confusion or general disagreement with respect to jurisdiction, and in order to allow the Board to operate effectively in the future it is in everyone's interest to have it resolved clearly by a court. Other times, the Board may consider whether a particular case is the best one to have before a court when the boundaries of the Board's jurisdiction are potentially being redrawn.

47. In this case, even if the Board believes that it has the broader jurisdiction under section 70.1(1) that is here in dispute, it may not be in the public interest to have that tested in this particular case, for the following reasons:

a. There is here, as there almost never is, a downside risk to the Board. The Board currently has an accepted and quite broad jurisdiction that has withstood challenges. In particular, right now the Board can set rates pretty well as it sees fit, as long as it complies procedurally with sections 78 and 21. Once the Rate Order Power is "put in play", ie. a court is asked to interpret section 78, it may be less likely that the scope of the power will be broadened, than that it could be narrowed or given more precision. The same is true, to a lesser degree, with respect to the powers under section 70.1. This is an unusual situation in this respect.

b. Unlike most judicial review applications, this is one that would likely be supported by both distributors and ratepayers, as well as other stakeholders. The Board could be standing alone in court against both those it regulates and those it is mandated to protect.

c. The essence of the Board's argument would be assertion of a right to restrict public participation in the rate-making process. Even if the court concluded that the Board did have that right, such a public position by the Board could be an embarrassment to both the Board and the government.

48. Second, a court battle between the Board and essentially all of its constituency could raise the public question of whether the Board has lost touch with its stakeholders and its mandate. It could be a situation in which the government would have to ask, and many stakeholders may even seek the government's involvement in asking, whether it is appropriate for the Board to reject public participation in the regulatory process. This is especially problematic when it comes in the context of the Board refusing to consider evidence that is clearly relevant and material to major rate issues. Further, if the Board were to win the jurisdiction dispute, the implications may cause the government to re-think the Board's legislative framework, and bring it under closer control so that ratepayer participation cannot be excluded in the future. None of these potential outcomes are in the public interest, and they could have the effect of derailing or undermining the many positive changes that have taken place in the Board in the last few years.

49. Third, and perhaps most important, the Board would be setting rates without key information and without the active participation of stakeholders. It would, in effect, be an acid test of whether the Board has, internally, such a substantial font of specialized knowledge that it can set rates in a vacuum. Inevitably, the decisions will dissatisfy one or more constituencies – distributors, ratepayers, unions, or others – and will be criticized by those who are dissatisfied. The Board, having made the decisions with one hand tied behind their backs, in effect, will find that the decisions are not perfect for precisely those reasons. The criticisms, then, would not be ones of legitimate disagreement, but rather ones in which the Board is accused of excess of hubris. This could have the effect of undermining the credibility and authority of the Board. Again, this is not in the public interest.

50. For these three reasons, we believe that, entirely aside from our submissions that the Board lacks jurisdiction to proceed as currently proposed in this matter, and our submissions that it would not be good regulatory policy to assert the jurisdiction in this case, we also submit that to do so would be contrary to the public interest to assert that jurisdiction because of the potential negative impacts on the Board, its credibility, authority, and mandate.

51. ***Add Procedural Safeguards to Code/Licence Process.*** If, instead of asserting this expanded jurisdiction, the Board elects to deal with these procedural questions by adding SPPA protections into the current process, the downsides for the Board are more limited, but they still exist.

52. In this scenario, the likelihood of a successful judicial review application is much less, because the substance of SPPA compliance will lessen the aggressiveness of stakeholders. However, it does not go away entirely, since inevitably someone's ox will be gored by all or some part of the codes proposed. One option for someone in that situation will be to apply for judicial review, since the technical rules relating to jurisdiction remain as we described them earlier, and there is still a good argument that section 70.1(1) cannot supplant section 78. It is not as much of a "slam-dunk" as might be the case with the current process, but the potential is still there.

53. In our view, though, the more dangerous situation for the Board in this case is that one or more distributors will challenge, at the time of their rate application, the ability of the Board to follow the codes in their consideration of the distributors' applications for new rates. The Board is then caught in a dilemna. If the Board accepts that argument, and exercises its discretion fully in that distributor's application, then it opens the floodgates for distributors and ratepayers to treat every distribution rate application as a blank page, unaffected by the codes. The purpose of the generic codes woyuld be completely defeated, and each application would have the potential to become a full cost of service inquiry. Conversely, if the Board rejects that argument, and applies the codes without consideration of the issues in the specific case, it would be inviting a judicial review application on that rate case, since it is pretty clear law that the Board cannot close its eyes to relevant facts, code or no code. It would appear to be a no-win situation.

54. Even though the risk of challenge and unproductive conflict is reduced in this scenario, it is not eliminated, and in our view it is not worth the risk when there is a largely identical solution that produces a better result.

55. ***Restructure Process Under Section 78.*** In our view, the better approach is to restructure EB-2006-0087/88/89 so that collectively they comply with section 78.

56. In this scenario, the Board would initiate a generic rate proceeding, much like the generic cost of capital proceeding for gas distributors a few years ago, in which all electricity distributors would be deemed to be applicants. The proceeding, which would take place under section 78, would be to set rates for 2007 and beyond. It would be structured so that the Board would propose a Cost of Capital Code and an Incentive Regulation Mechanism Code for determining rates. It would also propose that its decision in the case be implemented (probably through a phase two distributor-specific proceeding) by way of rate orders that would incorporate the final approved codes by reference, and perhaps incorporate those final approved codes into the licences of the distributors as well.

57. This generic proceeding, because it would be a rate proceeding, would have full SPPA compliance, and so would include evidence by distributors (as applicants) and intervenors, discovery processes, ADR, and an oral or written hearing. To be efficient, it could probably deem all expert filings in the EB-2006-0088/89 process to be evidence in the generic proceeding, and all questions in that process to be interrogatories in the generic proceeding. Obviously further evidence and interrogatory answers would follow, but this could conceivably make the initial part of the generic proceeding more efficient.

58. Because these decisions on electricity distribution rates involve many billions of dollars, and are thus generally larger than most other Board decisions, the Board may wish to consider an expanded Board panel (five members, for example), to hear the generic proceeding. This would also allow the larger panel to split up into smaller (two members, for example) sub-panels to deal with phase two and the individual distributor issues, while still having all participate in the generic decision.

59. In our view, proceeding under section 78 is not likely to be subject to challenge by way of judicial review, nor would it be reasonable to criticize the process if public participation is fully engaged.

Recommendation and Costs

60. We therefore submit as follows:

a. The Board does not have jurisdiction to proceed with the licence amendments and codes as currently proposed.

b. Whether or not the Board has the requisite jurisdiction, it is not good regulatory policy to proceed with the licence amendments and codes, since the process necessarily involves major decisions based on inadequate information and without proper public participation.

c. It is not in the public interest, nor is it good energy regulation, to assert the broad jurisdiction implied by the current process, because that implies that the Board rejects its mandate to act as a forum for parties affected by energy rates.

d. Amending the current process to provide further procedural safeguards is not a good solution, because it maintains a risk of unnecessary conflict without any substantial benefit to the Board or the public.

e. Restructuring the current EB-2006-0087/88/89 so that it proceeds under section 78 of the OEB Act would ensure procedural fairness and improve the ability of the Board to make appropriate rate decisions for electricity distributors.

61. The School Energy Coalition believes that it has participated responsibly in this process with a view to maximizing its assistance to the Board, and therefore requests that the Board order payment of 100% of its reasonably incurred costs in this matter.

Respectfully submitted on behalf of the School Energy Coalition this 20th day of October, 2006.

SHIBLEY RIGHTON LLP

Per: _____
Jay Shepherd