

ONTARIO ENERGY BOARD

IN THE MATTER OF the Draft Gas Distributor Access Rule

SUBMISSIONS of DIRECT ENERGY MARKETING LIMITED

EXECUTIVE SUMMARY

Grandfathering existing contracts

Direct Energy submits that contracts between natural gas marketers and their customers which were entered into before the date the Gas Distributor Access Rule (the “Rule”) comes into force should be exempted from sections 7.5 and 7.6 of the Rule for the following reasons:

- a. If this Rule only applies to contracts signed after the Retail Settlement Code comes into force, it will create symmetry between natural gas and electricity marketing;
- b. Grandfathering existing gas contracts supports business certainty in the contractual chain between marketers, their producers and shareholders;
- c. Grandfathering upholds the principle of freedom from undue regulatory interference with existing contracts;
- d. The Board’s precedent of allowing grandfathering in previous situations has historically provided a smooth transition between old contracts and new rules. For example: 1) Enbridge was permitted to grandfather its existing practice of billing for hot water tanks supplied by its affiliate; and 2) Ontario Regulation 318/00 grandfathered certain electricity rate options even after market opening; and,
- e. Exempting existing gas contracts from sections 7.5 and 7.6 of the draft Rule would not prejudice consumer interests.

Accordingly, section 1.5 of the draft Rule, *“To Whom this Rule Applies”*, should be amended by adding a new section, 1.5.2, which would read:

“1.5.2 Sections 7.5 and 7.6 do not apply to any contract entered into between a marketer and a customer before this Rule came into force.”

Notifying the new marketer of an STR

The distributor, not the new marketer, should notify the current marketer of an STR. Further, a distributor must allow the existing marketer a minimum of ten business days notice before processing an STR from that marketer to another.

Section 7.5.1 of the draft Rule should therefore be amended by deleting the third sentence and replacing it with the following:

“The distributor shall notify the current marketer that an STR has been received and wait ten business days before continuing to process the STR.”

Customer confirmation – STR from marketer to marketer

Customers should be allowed to confirm their intentions to remain with their existing marketer by means of the marketer’s recorded telephone conversation.

The second to last sentence of section 7.5.1 should therefore be deleted and replaced by the following language:

“If the customer requests that processing be terminated, the customer shall provide the current marketer with written or oral authorization obtained or confirmed no earlier than the date that the current marketer is informed of the transfer request.”

Customer termination of a STR from Marketer to SSO

In order to maintain symmetry between the rules for electricity and gas marketing, a gas customer should not be permitted to stop a transfer request by a gas marketer to return a customer to Standard System Offering unilaterally. There is no such rule for a electricity customers being returned to Standard System Supply by their marketer.

Section 7.6.3 of the draft Rule should be consistent with the RSC and be amended to read as follows:

“If the STR is submitted by a current marketer, the distributor shall notify the customer that a transfer is taking place and of the scheduled transfer date, but the consumer may not unilaterally terminate this request.”

Billing

Direct Energy strongly supports section 9.3 of the draft Rule which requires gas distributors to offer marketers and their customers three billing options. This mirrors the three billing options which electricity distributors must offer to electricity retailers and their customers (Electricity RSC, section 7) and thereby maintains consistencies between the natural gas and electricity markets.

Distributor complaints

The draft Rule should be amended to make clear that Section 12.2 does not refer to the established complaint procedure for customers and their marketers. Section 12.2 of the draft Rule should therefore be amended to read as follows:

“Complaints against a distributor concerning the implementation of a distributor’s responsibilities under this Rule or the compliance of a distributor with this Rule shall be submitted to the distributor in writing. Documentation of complaints shall be available for public inspection at the distributor’s offices during normal business hours.”

ONTARIO ENERGY BOARD

IN THE MATTER OF the Draft Gas Distributor Access Rule

SUBMISSIONS of DIRECT ENERGY MARKETING LIMITED

I. Introduction

1. Direct Energy Marketing Limited (“Direct Energy”) wishes to respond to the request of the Ontario Energy Board (the “Board”) dated September 26, 2000 for comments on the Draft Gas Distributor Access Rule (the “draft Rule”).

2. Subject to Direct Energy’s submissions on sections 7 and 12 of the draft Rule, Direct Energy supports the principles incorporated into the draft Rule. In particular, Direct Energy strongly supports the convergence between the electricity and natural gas markets which is reflected in the adoption in section 9.3 of the draft Rule of the three billing options which gas distributors must offer marketers. This approach is consistent with the billing options available in the electricity market through section 7 of the Retail Settlement Code; its implementation in the draft Rule will give natural gas customers the same degree of choice regarding their bills as electricity customers.

II. Section 7: Service Transfer Requests

(a) General Comments

3. Direct Energy submits that sections 7.5 and 7.6 of the draft Rule should not apply to contracts between natural gas marketers and customers which have been entered into before the date upon which the draft Rule comes into force.

4. Sections 7.5 and 7.6 of the draft Rule require a gas distributor to process a Service Transfer Request (“STR”) which would result in a natural gas customer changing its supplier from its current marketer to another marketer or a gas distributor providing the Standard Supply Offering (“SSO”). The proposed STR process is similar to that contained in the Electricity Retail Settlement Code (“RSC”) (sections 10.5.4 and 10.5.5). Direct Energy agrees, subject to the changes requested below, that this STR transfer process is acceptable for contracts entered into between a gas customer and marketer **after** the draft Rule comes into force; however, Direct Energy submits that applying the STR process set out in sections 7.5 and 7.6 of the draft Rule to **existing** contracts will be detrimental to the gas market for the following reasons:

- (1) Since most gas marketers made decisions and assumed financial risks based on the current set of rules, to change the transfer rules for existing customer contracts would be arbitrary and unfair and would interfere, retroactively, with the business decisions already made and the risks assumed by marketers;
- (2) Applying sections 7.5 and 7.6 of the draft Rules to existing contracts would represent undue regulatory interference in existing private commercial relations;
- (3) There is ample precedent for grandfathering existing contracts from new rules, orders or policies of the OEB;
- (4) Grandfathering existing natural gas retail contracts would not create inconsistencies between the natural gas and electricity markets; and,
- (5) Exempting existing gas contracts from sections 7.5 and 7.6 of the draft Rule would not prejudice consumer interests.

FIRST REASON: Since most gas marketers made decisions and assumed financial risks based on the current set of rules, to change the transfer rules for existing customer contracts

would be arbitrary and unfair and would interfere, retroactively, with the business decisions already made and the risks assumed by most marketers.

5. At present, gas distributors will not process requests for a change in service by a gas customer where the customer is party to an existing contract with a marketer. Most marketers have arranged their commercial and financial affairs on this basis and have entered into long-term gas supply contracts and hedging arrangements on the basis that customers will purchase gas from the marketer until the end of the multi-year contract. Financial decisions have also been made on the basis of these rules.

6. If sections 7.5 and 7.6 of the draft Rule are applied to existing contracts, they would jeopardize those past financial decisions by changing the rules of the game mid-stream during the term of current contracts. This is both arbitrary and unfair. It would retroactively undermine financial decisions already taken and effectively operate as a financial penalty against all marketers who have existing contracts.

7. There is a very important distinction between the conditions in the electricity retail market covered by the Electricity RSC and those in the natural gas retail market which this draft Rule proposes to govern. The customer transfer rules in the Electricity RSC will apply *prospectively* to retail contracts written for a market which has not yet opened. At the time the RSC was adopted, no electricity was flowing under electricity retail contracts, so there was no need to grandfather any existing contracts. In fact, section 1.7 of the Electricity RSC specifically provides that “no STR related to a change in competitive electricity service provider shall take effect until subsection 26(1) of the *Electricity Act* has come into force” by proclamation of the Minister of Energy, Science and Technology. By contrast, Ontario has enjoyed a robust and highly competitive retail market for natural gas since the mid-1980’s. Currently, close to 50% of Ontario natural gas customers purchase their gas through or from gas marketers. As a result, the implementation of the draft Rule will impact on hundreds of thousands of existing retail contracts for natural gas. The Electricity RSC had no impact because no electricity is flowing under existing electricity retail contracts.

8. The customer transfer rules for the natural gas market must realistically take into account this significant difference between the natural gas and electricity markets. By grandfathering existing natural gas retail contracts from sections 7.5 and 7.6 of the draft Rule, commercial decisions made in good faith in the past, in reliance on existing rules, will not be arbitrarily overturned.

9. Applying sections 7.5 and 7.6 of the draft Rule to existing gas retail contracts will affect not only the “downstream”, or retail, end of the natural gas industry, but will also affect the “upstream”, or production, segment of the business. For every natural gas marketer who has a long-term gas supply contract, there is a natural gas producer on the other side of the contract. Typically, producers who have five-year contracts to sell their natural gas will use those contracts to raise money for further natural gas exploration and development. Altering the retail customer transfer rules at this time would undermine the integrity of those long-term gas supply contracts and could affect the financial stability of upstream producers.

SECOND REASON: Applying sections 7.5 and 7.6 of the draft Rules to existing contracts would represent undue regulatory interference in existing private commercial relations.

10. Bill 100 recently attracted considerable criticism in Ontario because it has been perceived as an attempt by the Ontario legislature to change in mid-course the financial rules of the game relating to municipal electric utilities. Direct Energy submits that a similar criticism could be made of sections 7.5 and 7.6 of the draft Rule if they apply to existing gas contracts. While marketers must abide by new rules when entering into new contracts, Direct Energy respectfully submits that applying new rules to existing contracts would represent undue and unwarranted regulatory interference in existing financial arrangements.

11. Direct Energy submits that applying sections 7.5 and 7.6 of the draft Rule to existing contracts would make these customers contestable during the term of existing contracts, thereby offering a business advantage to one set of gas marketers at the expense of others. While Direct Energy supports a vigorously competitive retail market, it submits that market share should result from efforts in the marketplace and not by changing regulatory rules mid-stream.

THIRD REASON: There is ample precedent for grandfathering existing contracts from new rules, orders or policies of the OEB.

12. Grandfathering existing contracts from changes in regulatory rules has occurred several times in recent years. On the gas side of the business, the Ontario Energy Board allowed Enbridge Consumers Gas (“ECG”) to permit Enbridge Home Services to continue billing its hot-water tanks on ECG’s bill even though ECG was not required to offer this billing service to other hot-water tank retailers. On the electricity side of the market, the Ontario government recently passed a regulation (Ont. Reg. 318/00) which grandfathered certain electricity rate options for up to four years after market opening.

FOURTH REASON: Grandfathering existing natural gas retail contracts would not create inconsistencies between the natural gas and electricity markets.

13. As mentioned in paragraph 7 above, STRs relating to electricity customers will not take effect until the date of open access proclaimed by the Minister of Energy, Science and Technology. Direct Energy submits that the draft Rule, and its provisions relating to STRs, should also come into effect on the same date. Grandfathering existing natural gas contracts from sections 7.5 and 7.6 of the draft Rule would not create inconsistencies because no electricity is flowing under competitive retail contracts and none will flow under such contracts until the date of open access.

FIFTH REASON: Exempting existing gas contracts from sections 7.5 and 7.6 of the draft Rule would not prejudice consumer interests.

14. The arguments which Direct Energy has made above in support of grandfathering existing retail gas contracts from sections 7.5 and 7.6 of the draft Rule have focused on the effect which those sections would have on the commercial interests of gas marketers. However, an equally important point must be made regarding the effect of the draft Rule on consumers' interests. Simply put, Direct Energy is not aware of any demand by direct purchase customers to exit their existing gas supply contracts. There is an obvious reason why there has not been any such demand – consumers have enjoyed huge benefits under current fixed-price gas retail contracts. With the implementation several years ago of ABC-T services, most existing contracts between customers and marketers became based on fixed price gas offerings. Over the past few years thousands of Ontario consumers have entered into multi-year contracts at fixed prices which are now proving highly advantageous as a result of the recent significant increases in natural gas prices.

15. Given the above scenario, consumer interests would not be prejudiced by applying sections 7.5 and 7.6 of the draft Rule only to contracts which are entered into after the draft Rule comes into force.

16. For these reasons, Direct Energy submits that section 1.5 of the draft Rule, *"To Whom this Rule Applies"*, should be amended by adding a new section, 1.5.2, which would read:

"1.5.2 Sections 7.5 and 7.6 do not apply to any contract entered into between a marketer and a customer before this Rule came into force."

(b) Section 7.5.1: Change From One Marketer to Another Marketer

17. Section 7.5.1 of the draft Rule contemplates that the new marketer, not the distributor, will have the obligation to notify the current marketer of an STR:

"A distributor shall notify the marketer of the identity of the current marketer and wait ten business days before continuing transfer processing. During the ten day waiting period the marketer who proposes to supply the customer shall notify the

current marketer that it has submitted an STR to become the customer's supplier of natural gas.”

By contrast, section 10.5.4 of the Retail Settlement Code places the obligation to notify the current retailer on the *distributor*:

“A distributor shall notify the current retailer that a transfer request has been received and wait ten business days before continuing transfer processing.”

Direct Energy submits that there is no reason why the obligation to notify a current marketer should be different in the electricity and natural gas markets. The procedure in the Electricity Retail Settlement Code is more practical because it leaves the obligation to notify the current retailer in the hands of a disinterested party, the distributor, thereby minimizing the possibility for abuse of the transfer process. While a gas distributor would not benefit from a delay in giving notice of an STR to a current retailer, a new marketer, who is competing with the current marketer, could wait until the last day before notifying the current marketer of an STR. This would not be in the spirit of the proposed rule, but would still follow the letter.

18. Direct Energy therefore submits that section 7.5.1 of the draft Rule be amended by deleting the third sentence and replacing it with the following:

“The distributor shall notify the current marketer that an STR has been received and wait ten business days before continuing to process the STR.”

19. Section 7.5.1 also provides that a current marketer, acting upon specific written authorization from the customer, may notify the distributor to terminate a transfer. The section then continues:

“If the customer requests that processing be terminated the customer shall provide the current marketer with written authorization dated no earlier than the date that the current marketer is informed of the transfer request.”

Direct Energy submits that this language unduly restricts the methods by which an authorization can be obtained from a customer. Direct Energy agrees that a request to cease a transfer must be supported by an authorisation obtained from or confirmed by a customer

after the date that the current marketer is informed of the transfer request and that the Rule should contain such a requirement. However, in a day and age when consumer commerce is carried out by a variety of methods – paper offerings, email, fax, internet, telemarketing – the Rule should not impose restrictions on the methods by which the authorisation is obtained. After being informed of an STR, a marketer could use many means to obtain a customer's authorisation during the waiting period:

- mailing out a form and asking for its signature and return;
- sending someone to the customer's door to obtain a written signature;
- e-mailing the customer and receiving an authorisation by return e-mail;
- e-mailing a customer and asking him to visit the marketer's website to fill out an electronic authorisation form;
- phoning the customer and asking the customer to fax a written authorisation to the marketer;
- or securing authorisation from the customer by a telephone conversation with the customer which is recorded and preserved.

All of these methods achieve the same result – securing an authorisation from the customer after the current marketer has been notified of an STR, and creating a record of the authorisation for future reference. Direct Energy submits that the Rule should permit the use of any or all of these methods.

20. Direct Energy therefore submits that the second to last sentence of section 7.5.1 should be deleted and replaced by the following:

“If the customer requests that processing be terminated, the customer shall provide the current marketer with written or oral authorization obtained or confirmed no earlier than the date that the current marketer is informed of the transfer request.”

(c) Section 7.6.3: Change from a marketer to Standard Supply Offering

21. Section 7.6.3 of the draft Rule allows a customer to unilaterally terminate an STR submitted by a gas marketer to transfer the customer to SSO:

“If the STR is submitted by a marketer, the distributor shall notify the customer that a transfer is taking place and of the scheduled transfer date. If the customer wishes to terminate processing the customer must give direction to do so in writing, and the STR shall not be processed.”

By contrast, the Electricity Retail Settlement Code does not give a customer the right to terminate unilaterally such an STR. Section 10.5.5 of the Electricity RSC provides:

“If the STR is submitted by the current retailer, a distributor shall notify the consumer that a transfer is taking place and the scheduled transfer date but the consumer may not unilaterally terminate this request.”

Direct Energy submits that there is no reason why the procedures in transferring a customer to the distributors default supply should be different in the electricity and natural gas markets.

22. Direct Energy therefore submits that section 7.6.3 of the draft Rule should be amended to read as follows:

“If the STR is submitted by a current marketer, the distributor shall notify the customer that a transfer is taking place and of the scheduled transfer date, but the consumer may not unilaterally terminate this request.”

III. Section 9: Billing

23. Direct Energy strongly supports section 9.3 of the draft Rule which requires gas distributors to offer marketers and their customers three billing options. This mirrors the three billing options which electricity distributors must offer to electricity retailers and their customers (Electricity RSC, section 7) and thereby maintains consistencies between the natural gas and electricity markets.

IV. Sections 12: Complaint Procedures

24. Section 12.2 of the draft Rule, in its reference to “complaints regarding the application of this Rule”, creates an ambiguity as to whether the complaint procedures would apply to a complaint by a customer against a marketer. Existing procedures are in place to deal with such complaints, and Direct Energy submits that section 12 should be clarified to state that it does not cover complaints by a customer against a marketer. Direct Energy therefore proposes that section 12.2 be amended to read as follows:

“Complaints *against a distributor* concerning the implementation of a distributor’s responsibilities under this Rule or the compliance of a distributor with this Rule shall be submitted to the distributor in writing. Documentation of complaints shall be available for public inspection at the distributor’s offices during normal business hours.”

V. Summary

25. In conclusion, Direct Energy submits that:

(1) sections 7.5 and 7.6 of the draft Rule should not apply to contracts between natural gas marketers and customers which were entered into before the date upon which the draft Rule comes into force. Accordingly, section 1.5 of the draft Rule, “*To Whom this Rule Applies*”, should be amended by adding a new section, 1.5.2, which would read:

“1.5.2 Sections 7.5 and 7.6 do not apply to any contract entered into between a marketer and a customer before this Rule came into force.”

(2) section 7.5.1 of the draft Rule should be amended by deleting the third sentence and replacing it with the following:

“The distributor shall notify the current marketer that an STR has been received and wait ten business days before continuing to process the STR.”

(3) the second to last sentence of section 7.5.1 should be deleted and replaced by the following language:

“If the customer requests that processing be terminated, the customer shall provide the current marketer with written or oral authorization obtained or confirmed no earlier than the date that the current marketer is informed of the transfer request.”

- (4) section 7.6.3 of the draft Rule should be amended to read as follows:

“If the STR is submitted by a current marketer, the distributor shall notify the customer that a transfer is taking place and of the scheduled transfer date, but the consumer may not unilaterally terminate this request.”

- (5) section 12.2 of the draft Rule should be amended to read as follows:

“Complaints against a distributor concerning the implementation of a distributor’s responsibilities under this Rule or the compliance of a distributor with this Rule shall be submitted to the distributor in writing. Documentation of complaints shall be available for public inspection at the distributor’s offices during normal business hours.”

ALL OF WHICH IS RESPECTFULLY SUBMITTED

David M. Brown

Stikeman Elliott

Counsel to Direct Energy

Marketing Limited