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October 18, 2000

BY E-MAIL

Kathi Litt
ONTARIO ENERGY BOARD
2300 Yonge Street, 26th Floor
Toronto, Ontario, M4P 1E4

Dear Ms. Litt:

Re: Comments on Staff's Draft of the Gas Distributor Access Rule.

Attached to this letter please find comments on the draft DAR, submitted on behalf of HVAC Coalition.

HVAC Coalition appreciate the opportunity to provide these comments, and hopes that they are of assistance to Staff in its review of draft rule.

Yours truly,
WILSON, VUKELICH
Per:

"IAN A. MONDROW"

Ian A. Mondrow
Attachment
c. Martin Luymes, HVAC COALITION Case Manager
Paul Messenger, HVAC COALITION Chair

October 18, 2000

ONTARIO ENERGY BOARD STAFF DRAFT GAS DISTRIBUTOR ACCESS RULE

HVAC Coalition Comments

These comments on Ontario Energy Board Staff's draft Gas Distributor Access Rule ("DAR") are submitted on behalf of HVAC Coalition in response to the September 26, 2000 memo to interested parties from the Board's Director of Licensing.

Consideration of the draft DAR raises jurisdictional issues, including:

- The jurisdiction of the Board to require gas distributors to afford a third party consolidated billing option.
- The jurisdiction of the Board to enforce the rule.

The DAR Task Force Report (the "Report") also raises questions about the interpretive value of a purpose section for the rule.

The Board is considering general issues in the nature of those just mentioned in the extant RP-1999-0058 proceeding (HVAC Coalition complaint under the *Affiliate Relationships Code for Gas Utilities*). Detailed argument in respect of aspects of the Board's rule-making and enforcement powers were made by HVAC Coalition, Enbridge Consumers Gas and others in that proceeding. A ruling by the Board in that case is expected imminently. Rather than re-embark on those arguments again in these comments, HVAC Coalition will offer further submission on these and any related issues as may be appropriate once the RP-1999-0058 decision is released.

The topic numbering used below corresponds to the section numbering of the draft DAR.

Section 1. Purposes of the Gas Distributor Access Rule.

HVAC Coalition generally endorses the use of a well crafted "purpose" section in Board rules as a guide to interpretation and implementation. However, this result is achieved only if the purposes are clearly delineated.

HVAC Coalition has a number of concerns with the proposed purposes provisions of the draft DAR:

- 1.1.2: This provision as currently drafted understates the mandate provided to the Board by section 44(1)(b) of the *OEBA* Act. The act mandates "*governing the conduct of a gas distributor*", and is not limited to providing principles or to addressing business dealings (a potentially narrower scope of activities than that indicated by the term "conduct").

- 1.1.3: The provision as drafted is undefined. Presumably the intended reference is to standards and protocols to be adhered to in dealings by regulated distributors with marketers and customers, but there is no clarification of the objective(s) that such standards and protocols are intended to achieve.
- 1.1.4: The implication of this statement is that the dispute resolution process is under the auspices of the distributor. HVAC Coalition is of the view that the dispute resolution process is, and should remain, under the auspices of the Board. The Board may direct that the initial stages of that process be undertaken by the distributors, but must retain authority and control over the disposition of disputes arising under its rules.
- 1.1.5: Of the 4 statements of purpose in the draft rule, only this one provides a statement of the intended normative effect of the rule. Such a statement is central to a useful statement of purpose.
- 1.2.1: The relationship between this provision and those contained in section 1.1 is not made clear. There is, however, a second and useful normative statement embedded in this provision addressing the principle of customer protection.

To address these concerns, HVAC Coalition suggests that staff reconsider its description of the normative intent of the rule. In the Board's *Affiliate Relationships Code for Gas Utilities* ("Affiliate Code") made under section 44(1)(a) of the *OEBA* Act, for example, the Board clearly stated that the purpose of that rule "is to enhance a competitive market while saving ratepayers harmless from the actions of gas distributors". The purpose section of the *Affiliate Code* goes on to provide 3 normative standards to guide the interpretation of the practices and protocols dictated by the rule itself.

Referencing the normative principles embedded in draft DAR section 1 and adopting a format such as that used in the *Affiliate Code* could produce a purpose section for the DAR along the following lines:

"The purpose of the Distributor Access Rule is to set out standards and protocols for:

- a. The conduct of gas distributors as such conduct relates to marketers and customers.*
- b. Access to distribution services.*

The principal objects of the DAR are:

- a. To ensure that the conduct of gas distributors in relation to marketers and customers does not result in an actual or perceived preference for any particular gas marketer.*
- b. To ensure that access to distribution services is provided in a non-discriminatory manner.*
- c. To facilitate competition in the sale of gas while saving ratepayers harmless in respect of distribution service access and the market conduct of gas distributors."*

Reference to the dispute resolution process could be made in the enumeration of objects as well, though HVAC Coalition suggests that this is a protocol for achieving the objects rather than an object itself. In any event, the main points are to ensure that:

1. The draft DAR does not inadvertently narrow the jurisdiction afforded to the Board under the relevant legislative provisions.
2. The normative function of the rule is clearly addressed, in order to fulfill the function of a purpose section in providing guidance to interpretation and implementation.

Section 1.3 Definitions.

“emergency gas leak response”: It is important, for consistency with recent Board decisions in respect of ancillary business activities of gas distributors, that this definition retain the exclusion of diagnosis or repair from the scope of appropriate emergency response.

“safety information service”: Maintenance of the detail included in the draft is also important in this definition, for the same reasons as set out above in respect of *“emergency gas leak response”*.

Section 1.7 Exemptions.

It is important that the ability of the Board to make any exemption subject to conditions or restrictions be expressly stated. The current wording to this effect in the draft should be retained.

Section 2.2.2 Distributor Provided Services – Appliance inspection service.

The HVACR (heating, ventilation, air conditioning and refrigeration) industry and the distribution utilities are exploring with the Technical Safety and Standards Authority (“TSSA”) potential programs for streamlining the provision of inspection services for both natural gas and electrical appliance installations. To ensure that any regulatory amendments or changes in this respect are easily adopted under the DAR as promulgated, the allocation to distributors of appliance inspection service should be cross-referenced to statutory requirements. Wording along the following lines should be considered:

- *appliance inspections in its franchise area required by legislation/ regulation to be undertaken by a distributor;*

6.3.1 Co-operative Marketing Programs.

Clarification should be added to this provision to ensure that the terms offered by the distributor do not have the effect of discriminating in favour of any particular gas marketer. The concern is that the terms for a joint promotion not be scoped so that in the result the program is accessible only to an LDC affiliate or other preferred marketer (for example, a high minimum threshold of rental water heaters in service).

The analogous requirement adopted in the Board's *Interim LDC Code of Conduct* (May 1997) was that participation in any utility marketing program be offered "on proportionate terms" to all gas marketers (Part IV, Standard No. 8, Principle 3). HVAC Coalition endorses this type of formulation for the DAR.

9.3 Billing Options.

HVAC Coalition endorses Board Staff's adoption in the draft DAR of the principle that distribution customers should be able to choose who they wish to deal with in respect of distribution services. If customers wish to have a marketer procure all gas related services and send one bill, they should have that option.

Leaving aside arguments in respect of the Board's jurisdiction to require distributors to facilitate the retailer-consolidated billing option for gas consumers¹, the Report does not elucidate any rationale for objection by the gas distributors to retailer-consolidated billing. In respect of the statement in the Report adopted by the utilities that "[c]oerced retailer-consolidated billing would mean that the distributors would be the only commercial entities not allowed to bill for the services which they provide", the Board has recognized that regulated distributors are natural monopolies, and are conceptually different from other "commercial entities". [See the Board's *Report on Utility Diversification*, May 15, 1996, para. 2.3.9] In any event, no prejudice to the distributors is identified in conjunction with this proposition.

HVAC Coalition does agree with the position of the utilities that consumers should be given the choice of which of the 3 billing options they wish to be served with.

9.4 Standard Supply Service ("SSO") Billing.

The general principle adopted in section 9.4.1 that a distributor's bill should not convey any marketing or promotional material provided by a marketer is sound, and should be retained. In HVAC Coalition's view this restriction is consistent not only with the electricity distribution code, but with sections 2.5.1 and 2.5.2 of the *Affiliate Code* as well.

The contrary view in the Report, adopted by the utilities, asserts that the analogous rule in respect of electricity distribution is aimed at third party SSO (in electricity referred to as Standard Supply Service, or "SSS") providers, to preclude them from gaining a marketing

¹ As noted at the outset of these comments, the Board is considering in depth arguments in respect of its rule-making jurisdiction in the RP-1999-0058 proceeding, the ruling in which is expected imminently. HVAC Coalition will review that decision when it is issued and provide any further comments in respect of jurisdiction that might be helpful to further consideration of the draft DAR.

advantage through access to customers of regulated default service. The utilities argue that in the case of gas SSO the distributors themselves are the providers of default service, so the precise harm feared and addressed by the electricity distribution rule is not relevant to gas. What the Report does not address, however, is why the regulated monopoly should be permitted to promote any particular marketer. In HVAC Coalition's view they should not, and the express restriction included in the draft DAR is appropriate.

The draft section also contains a "carve out" from the general restriction, permitting "*only the marketing and promotional material which [the distributor] makes available to any or all other prospective customers of SSO service*". Neither the wording nor the intent of this carve out is clear, and it is not explained in the Report. HVAC Coalition suggests that the bullet point be removed, or, in the alternative, that it be clarified. In the latter event, HVAC Coalition may make further submissions on this aspect of the rule in the next round of comment.

12. Complaint Procedures.

The Report discusses [pp. 68 to 75] the various dispute resolution models extant in various Board regulatory vehicles. The two main models in use are represented by:

1. That found in licensing related to dealings with consumers, such as gas marketer licencing. This model requires the licensee to have an established dispute resolution process, which utilizes a third party dispute resolution agency approved by the Board.
2. That found in the *Affiliate Code*. This model requires the regulated entity subject to the code to first address the complaint, with recourse to the Board in the event that the complainant is not thereby satisfied.

While the Report participants endorsed the former model for the DAR, Board Staff has adopted the latter in its draft. HVAC Coalition supports Staff's position. Unlike marketer licensing, which is concerned primarily with interaction between retailers and consumers, the DAR, like the *Affiliate Code*, is primarily concerned with the conduct of regulated utilities *vis a vis* competitive market participants. It remains appropriate that the Board retain oversight in respect of governance of the activities of monopolies.

Further, as a result of its experience in argument of the RP-1999-0058 proceeding regarding complaint under the *Affiliate Code*, HVAC Coalition suggests that the absence of articulated types of remedies is a significant flaw in the draft rule, and would ultimately weaken its efficacy. HVAC Coalition believes that the articulation of remedies for complaints ultimately found to be meritorious should be revisited once the Board issues its decision in RP-1999-0058.

Finally on this topic, the Report discusses a requirement that complaints be posted on the OEB website, for the sake of public information and accessibility to the regulatory process. Again, if lessons are to be learned from the RP-1999-0058 proceeding and its prelude, this suggestion is a good one. In that case there were a number of parties interested in the issues raised in HVAC Coalition's complaint who ultimately became parties to the proceeding struck to consider the complaint and made informative submissions on general issues raised by the complaint and Enbridge Consumers Gas' response thereto. However, the process of keeping these parties informed in the early stages of the process (prior to the convening of a hearing) was ad hoc, with HVAC Coalition receiving and responding to inquiries from time to time on the status of the

matter. Public access to the regulatory process would be more consistently and appropriately afforded through adoption of a public posting of issues raised under the complaint protocols in the DAR. HVAC Coalition makes this recommendation in keeping with its view that this rule, as distinct from marketer licensing for example, is to govern regulated monopolies, and the issues potentially raised are thus of broader public interest than would be the case in disputes particular to an end user and their marketer.

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