

**ONTARIO ENERGY BOARD**  
**IN THE MATTER OF THE DRAFT DISTRIBUTOR ACCESS RULE**  
**SUBMISSIONS**  
**OF ONTARIO ENERGY SAVINGS CORPORATION**

**Introduction**

Ontario Energy Savings Corporation's (OESC's) primary concerns relate to service transfer requests. We will, therefore, be focussing our comments on Section 7 of the Draft Rule and, more specifically, the legal and practical ramifications of the customer mobility provisions contained in Sections 7.5 and 7.6 on OESC's existing contracts with gas customers, distributors and suppliers.

**Jurisdiction of the Board**

Our analysis of the Draft Rule begins with consideration of the jurisdiction of the Ontario Energy Board (the Board) to make the Draft Rule. Section 2 of the *Ontario Energy Board Act*, S.O. 1998, c.15 (the Act) sets out the objectives of the Board with respect to the gas industry. Section 2 reads as follows:

2. *The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:*
  1. To facilitate competition in the sale of gas to users.
  2. To maintain just and reasonable rates for the transmission, distribution and storage of gas.
  3. To facilitate rational expansion of transmission and distribution systems.
  4. To facilitate rational development and safe operation of gas storage.

5. To facilitate opportunities for energy efficiency consistent with the policies of the Ontario government.

While consumer protection is not expressly stated to be an objective of the Board in regulating the gas industry, references in Section 2 to *competition in the sale of gas to users* and maintaining *just and reasonable rates* are explicit references to important consumer interests that the Board is required to consider.

Section 44 of the Act provides the Board with the power to make rules relating to the gas industry.

Section 44 reads, in part:

*44(1) The Board may make rules,*

- (1) governing the conduct of a gas transmitter, gas distributor or storage company as such conduct relates to its affiliates;
- (2) governing the conduct of a gas distributor as such conduct relates to any person,
  - (i) selling or offering to sell gas to a consumer,
  - (ii) acting as agent or broker for a seller of gas to a consumer, or
  - (iii) acting or offering to act as the agent or broker of a consumer in the purchase of gas; . . .
- (4) establishing conditions of access to transmission, distribution, and storage services provided by a gas transmitter, gas distributor or storage company;

The rule-making power conferred on the Board by the Act is quite broad. The wording of Section 44, together with the general mandate set out in Section 2, are arguably broad enough to confer jurisdiction on the Board to make rules covering the subject matter of the Draft Rule. However, that ostensible jurisdiction might be successfully challenged in Court on the following grounds:

1. Requiring a gas distributor to breach its contract with an agent is not *governing the conduct of a gas distributor* as contemplated by Subsection 44(1)(b); and
2. Establishing conditions of access on existing relationships on a retroactive basis may not be

within the scope of Subsection 44(1)(d).

The underlying factual basis of both of these arguments is more fully described below within the context of our analysis of Sections 7.5 and 7.6 of the Draft Rule.

Additional arguments challenging the Board's jurisdiction could be made. For example, historically Courts have been very reluctant to enforce legislation with retroactive effect. Such legislation can have significant public policy ramifications and may result in negative consequences to, among other things, investor confidence. Unfortunately, time constraints for making this submission prevent us from developing those arguments at this time.

### **Customer Mobility Provisions of the Draft Rule**

The Draft Rule provides for specific customer mobility rules which gas distributors must follow upon receiving a service transfer request (An STR) from a customer. Section 7.5 contains the procedures to be followed by a distributor when a customer requests a change from one agent to another agent.

Section 7.5.1 reads:

*An STR involving a transfer from one marketer to another shall be submitted to a distributor by a customer or by the marketer who proposes to supply the customer. 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. If no response is received from the current marketer, the request shall be processed. The current marketer may request that the distributor delay processing the STR for an additional ten business days, commencing from the conclusion of the initial ten day period, to allow time for the current marketer to verify that the customer wishes to be released from his current contract. If, at the end of the second ten-business day period, the distributor has not received written authorization from the customer to cease processing, the transfer request shall be completed. If the customer, the new marketer, or the current marketer acting upon specific written authorization from the customer, notifies the distributor in writing that the transfer should be terminated the distributor shall cease transfer processing.*

*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. The party that submits the termination request shall notify the other two parties that processing has been terminated. [emphasis added]*

Section 7.6 contains the procedures to be followed when a customer requests a change from an agent to a gas distributor system supply. Section 7.6.3 reads:

*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 the processing the customer must give direction to do so in writing, and the STR shall not be processed.*

Section 7.6.4 reads:

*If the STR is submitted by a customer, the distributor shall notify the affected marketer and delay processing for ten business days, unless the marketer responds that no delay is necessary. If, during the ten day waiting period, the distributor is notified in writing by the customer or the marketer that processing should be terminated, the distributor shall cease processing the STR. If the request to cease processing is received from a marketer, it must be accompanied by specific written authorization from the customer dated no earlier than the date that the current marketer is informed of the transfer request. The distributor shall notify the marketer, and confirm to the customer, that the transfer will not be completed. If no notification to terminate processing is received by the distributor, the STR shall be processed. [emphasis added]*

Sections 7.5 and 7.6 direct distributors to process customer-initiated transfer requests regardless of the contracts that are in place between agents and customers. These sections (wrongly) assume that distributors are disinterested, third parties having no legal or economic interest in the contracts that exist between agents and customers. Put another way, Sections 7.5 and 7.6 require distributors to process transfer requests from customers without any recognition being given to the fact that gas distributors are themselves also parties to certain contracts directly affected by the decision of a customer to breach an existing contract with an agent.

Gas distributors are an integral part of the contractual arrangements established by agents with their customers. Gas distributors have contractual obligations which will be breached by processing the transfer requests. By mandating that gas distributors process STRs initiated by customers (or confirmed by customers where necessary), the Draft Rule effectively sanctions breaches of contract by distributors - namely, those contracts among the customer, the agent and the distributor which are entered into as a direct consequence of a customer appointing a party such as OESC as their agent, as more fully described below.

Under the existing regime, the customer seeking to displace their agent has the onus of effecting such displacement. The combined effect of Sections 7.5 and 7.6 is that the existing agent will have the onus of retaining the customer. In order to be successful in that regard, the agent will be required to get the customer to execute a second document indicating that the customer has changed their mind (again). On the other hand, if the agent wishes to return the customer to system supply, the agent must notify the distributor who, in turn, notifies the customer of the request. The customer can nullify the request by giving notice to the distributor. In practical effect, the customer can walk away at any time but the agent is virtually captive.

### **OESC's Customer Contracts**

Under OESC's Natural Gas Fixed Price Program, OESC is appointed by the customer as the customer's sole and exclusive agent and supplier of natural gas for a fixed term as chosen by the customer. As part of the Customer Registration Agreement signed by each customer, there is a section entitled "Natural Gas Fixed Price Agreement Notice of Appointment of Agent and Appointment of Agent" which is addressed to Enbridge. The integral part played by Enbridge in the contractual relationships established by OESC as agent for a customer is expressly recognized by providing notice of the Customer Agreement and the Notice of Appointment of Agent to Enbridge.

The salient portions of the Notice of Appointment read as follows:

*I hereby appointment OESC as my sole and exclusive agent and supplier for all purposes relating to the supply of natural gas to my location(s) from any source.*

*This may include direct purchase gas, system gas or transportation services as well as delivery, and billing, on my behalf for the chosen term for the Natural Gas Fixed Price Program. This agreement may automatically renew for successive terms, unless the customer or OESC give the other party notice in writing at least 90 days prior to the end of such term. OESC will provide 120 days written notice of the terms and conditions of the renewal. The customer will have 30 days from the receipt of the renewal notice to cancel the agreement or accept an alternative arrangement. . . .*

*My agent is authorized to enter into agreements with Enbridge Consumers Gas and other third parties relating to gas supply, volume load balancing, transportation, purchasing, and billing on my behalf as though I had entered into the agreements myself. This Agreement is the entire agreement between the parties and shall not be amended unless done so in writing by OESC and agreed to by the Customer. To allow the greatest flexibility for my Agent, this authority includes negotiating, committing to, amending or terminating all aspects of such agreements.*

*. . . Enbridge Consumers Gas is entitled to rely upon anything done, or any document signed by my Agent relating to the supply, volume load balancing, transportation, delivery, purchasing and billing of natural gas as though I had performed the action or signed the document.*

*I understand as a gas user I am responsible for the purchase of, and payment in full, of gas delivered to the locations identified and related transportation charges. . .*

*The Customer shall have the right to rescind this Agreement within ten (10) days of signing the Agreement without liability. The Customer shall deliver a written notice of rescission to OESC by personal delivery, registered mail or telephone transmission of a facsimile of the written notice within ten (10) days.*

*This offer is consistent with current market conditions and may be rescinded by OESC at any time. [emphasis added]*

The Customer Agreement contains a **four corners** clause which provides, among other things, that the agreement cannot be amended unless done so in writing by OESC and agreed to by the customer.

In other words, the contract cannot be terminated unilaterally by either party during the term of the contract. The only exception is that customers have a ten-day **cooling off** period after signing the

contract in which to revoke the Agreement without liability. Although OESC is entitled to withdraw its offer of the Customer Agreement to the public at any time, once a customer has signed the Customer Agreement, OESC does not have the right to terminate the Agreement during its term.

On the basis of the agency appointment, OESC has entered into various related agreements on behalf of its customers with distributors, suppliers and other third parties relating to gas supply, volume load balancing, transportation, purchasing and billing. OESC has signed various agreements on behalf of the customer. Taken as a whole, all of the contractual arrangements established by OESC as agent for the customer create a "tied house" arrangement in which the gas distributor is, by necessity, an integral part, both directly and indirectly. The primary example of this contractual interrelationship is the Gas Transportation Agreement which OESC has entered into with Enbridge, described below.

### **The Gas Transportation Agreement**

OESC as agent for individual customers has entered into gas transportation agreements with distributors. For purposes of our analysis and by way of illustration, we will focus on OESC's Gas Transportation Agreement with Enbridge. (Similar provisions are contained in agreements between OESC and the Westcoast companies). Enbridge, OESC and each customer whose name is listed in Column I of Appendix B to the Agreement are parties to the Gas Transportation Agreement. The Gas Transportation Agreement provides that neither Enbridge (defined in the Agreement as the "Company") nor OESC, as agent for the customers, can make additions or deletions to Appendix B unless such changes are agreed to by all parties in writing. Paragraph 1.6 reads, in part:

*No additions, deletions or modifications of this Agreement shall be binding on any party unless made in writing and signed by or on behalf of such party.*

OESC is identified in the preamble as the "Agent . . . duly constituted by each Customer to act on its behalf in respect of its rights and obligations under this Agreement." A number of other sections

relate to the agency status of OESC. Under the heading **Representations and Warranties of Agent@**, paragraph 8.2 reads as follows:

*The Agent hereby represents and warrants to the Company as follows:*

*(a) the Agent is the duly appointed agent of each Customer and, in such capacity, is entitled to enter into this Agreement on behalf of the Customer and to act on its behalf hereunder; and*

*(b) the Company is entitled to rely on anything done or any document signed by the Agent in respect of this Agreement as if the action had been taken or the document had been signed by the Customers individually or collectively.*

Under the heading **Dealings with Agent@**, paragraph 8.3 reads as follows:

*The Company shall be entitled to deal exclusively with the Agent in respect of the rights and obligations of the Customers (individually or collectively) under this Agreement.*

The Gas Transportation Agreement contains save harmless and indemnity provisions. Under the heading **Agent=s Indemnity to Company@**, paragraph 8.4 reads:

*The Agent hereby saves harmless and indemnifies the Company from any and all losses, costs, damages, claims, suits or actions that the Company may suffer or incur as a consequence of the negligence or wilful misconduct of the Agent, the failure of the Agent to perform its obligations under this Agreement or the failure of the Customers to perform their obligations under this Agreement by reason of the act or inaction of the Agent. [emphasis added]*

Under the heading **Company=s Indemnity to Agent@**, paragraph 8.5 reads:

*The Company hereby saves harmless and indemnifies the Agent from any and all losses, costs, damages, claims, suits or actions that the Agent may suffer or incur as a consequence of the negligence or wilful misconduct of the Company, the failure of the Company to perform its obligations under this Agreement or the failure of the Customers to perform their obligations under this Agreement by reason of the act or inaction of the Company. [emphasis added]*



The decision by a customer to breach its contract with OESC and transfer to another agent could trigger both of these indemnity provisions. As agent for the customer, a customer's breach could directly result in OESC's failing to perform its obligations under the Agreement, giving rise to possible OESC liability to Enbridge. Similarly, the processing of an STR of a former OESC customer would be an act by Enbridge permitting the customer to fail to perform their obligations under the Agreement, thereby giving rise to possible Enbridge liability to OESC.

Whether or not Enbridge would have a defence to a claim from OESC based on the processing of an STR is unclear. On the one hand, Enbridge would be following a Rule promulgated by the Board.

However, a Rule does not have the same legal status as an Order made by the Board. Abiding by orders of the Board are, by virtue of Section 25 of the Act, a full and complete defence to any claim.

The Act does not provide equivalent liability protection to a party abiding by a Rule made by the Board. Section 46 of the Act merely provides that Courts shall take judicial notice of the content of any rule made by the Board which is published in the *Ontario Gazette*.

Further, processing a customer STR would have the effect of amending Appendix B to the Agreement by deleting the customer's name without either Enbridge or OESC having provided their consent to such an amendment in writing as required by paragraph 1.6 of the Agreement. Thus, the effect of the customer mobility sections of the Draft Rule directly affect contracts such as the Gas Transportation Agreement by retroactively re-writing provisions such as paragraph 1.6.

### **Natural Gas Sale Agreements**

OESC has entered into long-term contracts for the purchase of natural gas in reliance upon its fixed term Customer Agreements. The decision by a customer to breach its contract with OESC and ability to transfer to another agent or to system supply could directly affect the underlying basis upon which OESC had entered into these purchase agreements (i.e. as agent for the customer to obtain a supply of natural gas). If a large number of customers transfer to other agents or to system supply, OESC

could find itself in the position of being unable to accept the supply of natural gas for which it has contracted, thereby exposing OESC to claims from its suppliers for substantial penalties pursuant to the terms of the agreements.

Those agreements provide that the loss of customers is not a Force Majeure which would entitle OESC to suspend payments. For example, one such agreement provides, in part:

*It is expressly agreed that none of the following shall constitute Force Majeure hereunder: (i) Buyer's inability to economically use or resell gas purchased under this Agreement . . .*

As a result, the loss of a number of customers due to the customers' inability to transfer to other agents or gas suppliers could directly affect OESC's contracts with gas suppliers forcing OESC to incur substantial penalties or breach its contractual obligations to those suppliers.

### **Legal Effects of Sections 7.5 and 7.6 of the Draft Rule**

Sections 7.5 and 7.6 of the Draft Rule do not expressly sanction customer breaches of their contracts with agents such as OESC. Presumably, OESC can bring a legal action against a customer who decides to breach its Customer Agreement with OESC in order to contract with another agent or directly with a gas distributor.

However, Sections 7.5 and 7.6 do expressly provide that gas distributors must process a service transfer request if such request is confirmed by the customer. By requiring the distributor to process the request, Sections 7.5 and 7.6 force a distributor to breach its contractual obligations in contracts such as the Gas Transportation Agreement between OESC and Enbridge. In this way, customer mobility sections of the Draft Rule have the effect of re-writing existing contracts and/or creating

potential liability problems for agents and gas distributors by breaking contracts that depend on the existence of underlying fixed term agreements between customers and agents.

The Draft Rule simply does not recognize that gas distributors are an integral part of the existing long term contractual arrangements established by agents with their customers, thereby giving rise to serious and complicated contractual issues among agents, gas distributors and customers. Ironically, although the Draft Rule purports to be a consumer benefit, it may in fact result in a plethora of litigation among customers, agents and distributors.

### **Existing Consumer Protection Measures**

As noted in the discussion of Alternative B in the Final Report of the Distribution Access Rule Task Force (the Report) (para. 226, p. 38), existing low-volume customers are protected by the following rights with respect to natural gas contracting:

- \$ a customer, having accepted a gas marketer supply contract, has a ten-day rescission right from the signing of any contract;
- \$ many consumers receive a letter from the distributor which seek to confirm that the consumer wishes to switch its gas supply from the distributor to the gas marketer, giving him added understanding and an opportunity to reconsider his or her decision; and
- \$ upon receiving his first bill setting out the new supply arrangements, the consumer has a second right to cancel the contract within thirty days of receipt of the bill, without any damages;
- \$ consumers have rights by virtue of legislation under the Consumer Protection Act (Ontario), the Business Practices Act (Ontario), the Competition Act (Canada) and government orders.

The Report also notes that the above rights have been developed and codified over the last decade. Those rights were carefully considered by industry players, Board Staff and the Board itself and are now reflected in the Code for Gas Marketers of March 2, 1999.

In the discussion of Alternative B, the Report highlights the benefits to low-volume customers from the existing transfer rules (p. 38-39, para. 228). Those benefits are as follows:

- \$ The consumer has a stable contract of supply (for a variety of terms of up to five years). A stable contract for supply is a benefit to the consumer creating stability in a broad market.
- \$ Stable prices over fixed contract periods benefit not only the consumer, but also the marketers, the utilities, the Board and the government by avoiding short-term price fluctuation for low-volume consumers. This is a highly desirable principle in a partially-regulated marketplace.
- \$ The consumer has the right to cancel the contact at the early stages and continues to have the right to call on the distributor as the supplier of last resort, adding to his security.
- \$ Price competition remains a marketplace fact at the end of each contract period and a consumer has the ability to assume more risk by contracting for shorter periods and increasing his opportunity for competitive prices.
- \$ The rules for transfer are simple and they avoid the unnecessary and unreasonable competition for customers that is inherent in Section 10 of the Retail Settlement Code for Electricity.

In OESC's submission, the low-volume customer has a number of benefits from existing consumer protection measures and the implementation of Section 7 of the Draft Rule would unnecessarily destabilize and complicate the market for natural gas sales.

### **Staff's Questions**

The following section responds, seriatim, to the questions raised in Ms. Powell's letter of June 26, 2000.

3. OESC has no comment with respect to the clarity of Section 7 of the Draft Rule.

4. By reason of our above analysis, one can expect that any of the parties to the **Atied house@** arrangement might seek to challenge the Draft Rule in Court on jurisdictional or other grounds. Any such challenge could delay the implementation of the Draft Rule. In addition, the Board should be mindful of the potentially significant administrative (and therefore financial) burden which will be placed on distributors and agents in the event of implementation of the Draft Rule. For example, each time there is a **Acontest@** for a customer, it will impose a tracking and notification process on the distributor and the affected agents. The additional service burden will be intensified by reason of the strict time limits prescribed in the Draft Rule.
5. The Draft Rule ostensibly serves only the needs of the customers and works to the disservice of the other stakeholders (e.g., agents, distributors, transporters and suppliers) all of whom who have relied, either directly or indirectly, on the agency appointment executed by the customer. As noted above, if the Draft Rule leads to a plethora of litigation among all stakeholders (including customers), it could hardly be called a **Aconsumer benefit@**
6. OESC has no comment with respect to whether the standards are adequately prescriptive.
7. For the reasons set out above, OESC doubts that the Draft Rule will be capable of being easily facilitated. In addition and in any event, OESC sees no reason why a new marketer should have the obligation to notify the existing marketer of an STR. OESC submits that any such obligation should be borne by the distributor which, presumably, is possessed of greater information than either marketer and is, from a competitive perspective, neutral. OESC further submits that if customer authorization is to be required (e.g. Section 7.5.1), such should not be restricted to written authorizations. For example, E-mailing or completing an electronic authorization should be sufficient to confirm customer intentions.
8. OESC has no comment with respect to the adequacy of the expansion of service.

9. For the reasons set out above, OESC is strongly of the view that the conditions surrounding STRs are not reasonable. As noted in the discussion of Alternative B in the Report (paras. 220 and 221, p. 37), over the last 15 years a successful balance has been achieved between the competing interests of the various market participants, including low-volume customers. The present balance for existing customers and REMs is efficient, fair and effective in the broad public interest and therefore in the interests of the various market players, especially the low-volume customers. OESC sees no reason to jeopardize that balance through the implementation of retroactive rules which may have significant and unintended negative impacts on many market participants.
  
10. If the Board promulgates the Draft Rule, OESC sees no reason why small distributors should be treated differently than the large distributors. Presumably, if small distributors can demonstrate that, on a per customer basis, they bear a significantly higher burden than large distributors, the Board is in a position to amend the application of the Rule or a portion thereof to small distributors.

### **Procedure**

We understand that the above comments, along with the comments of all other interested parties, will be made available to the Board for its consideration. We also understand that the Board, pursuant to Sections 45 and 46 of the Act, will engage in a consultation procedure as part of its consideration of the Draft Rule. We look forward to taking part in that procedure.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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