

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board proposing to make a Rule under section 44 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 Sch. B., relating to gas distributors and access to distribution services.

PROPOSED GAS DISTRIBUTION ACCESS RULE
SUBMISSIONS OF
THE COALITION FOR EFFICIENT ENERGY DISTRIBUTION
("CEED")
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INTRODUCTION

1. This submission is made by the Coalition for Efficient Energy Distribution ("CEED") (currently comprised of Suncor Energy Inc./Sunoco Inc., TransCanada Energy Ltd., Dynegy Canada Inc., and PanCanadian Petroleum Limited). CEED participated in the Distribution Access Rule Task Force, which produced the *Final Report of the Distribution Access Rule Task Force* to the Ontario Energy Board on June 8, 2000. On October 26, 2000, Ontario Energy Board Staff issued the *Draft Gas Distributor Access Rule* ("Draft DAR") for review and comment by interested parties. Following the submission of comments by interested parties, on February 6, 2001, the Board issued the *Proposed Gas Distribution Access Rule* ("Proposed DAR") for review and comment.
2. There were many contentious issues addressed in the DAR Report. As the Director of Licensing noted in her letter accompanying the Draft DAR, the draft proposals resolve the contentious issues by reflecting "enhanced levels of consumer protection and parity with the Board's requirements for the electricity industry". The Proposed DAR appears to follow the same approach. CEED commends the Board for keeping with this vision.
3. CEED has been an active participant in the DAR development process by supporting the creation and implementation of fair and effective rules to foster enhanced competition and efficiency in Ontario's natural gas market. In these submissions, CEED seeks to reiterate its strong support for the Proposed DAR. While the Proposed DAR embodies the fundamental principles of equal access and fair play, CEED has several comments, largely in the form of non-material changes, which will enhance certainty and clarity in the Proposed DAR.
4. These submissions are organized as follows:
 - Background;
 - Service Transaction Requests;
 - Customer Information Provisions;
 - Billing Options;
 - Billing Inserts;
 - Enforcement Mechanisms;

- Exemption Applications; and
- Additional Miscellaneous Changes.

BACKGROUND

5. Consistent with CEED's position throughout the DAR development process, CEED reiterates that fair and transparent access rules, which are applied equally to all market participants, are the cornerstone of a healthy competitive market. The Board has indicated on several occasions that the DAR is a necessary condition to effective competition in Ontario. It has also been treated by the Board and the industry as a threshold issue that must be resolved to facilitate unbundling. The DAR will therefore play an integral role in the development of a competitive retail gas market in Ontario.
6. Section 2 of the *Ontario Energy Board Act, 1998* ("OEB Act") states that "[facilitating] competition in the sale of natural gas" is among the fundamental objectives of the Board. A competitive market requires structures, such as the Proposed DAR, which foster fairness, transparency and equal access to monopoly services.
7. Consistency in the rules across the energy sector is also fundamental to the successful development of a truly competitive market for natural gas in Ontario. In this regard, the DAR should be comparable to the rules developed for the restructured electricity sector. Parity between electricity and gas will minimize confusion in customers' minds when exercising choice in the competitive energy market. Furthermore, parity will facilitate convergence among the different sectors of the energy market. The result will be greater customer choice in terms of price and products.
8. CEED submits that the Board has the jurisdiction to develop, implement and enforce the DAR under its authority granted by section 44 of the OEB Act. Most notably, section 44 (1)(d) grants the Board authority to make rules "establishing conditions of access to transmission, distribution and storage services provided by a gas transmitter, gas distribution or storage company".

SERVICE TRANSACTION REQUESTS (“STR”)

Customer mobility is a necessary condition for competition.

9. The Board has recognized the need for customer mobility on a number of occasions. Thus, for example, in its September 27, 1996 *Report on the Ten Year Market Review* ("Ten Year Market Review"), the Board included the "ability to switch suppliers" as one of the "necessary conditions to allow for development of a fully competitive market for natural gas in Ontario."¹ Similarly, in its December 16, 1997 *Report on Legislative Change*, the Board acknowledged that "customer mobility" was a necessary element of an effectively competitive market.² The Board now has a historic opportunity to give force to these pronouncements by endorsing the customer mobility rules in Proposed DAR.
10. Under the current system, distributors do not facilitate the movement of consumers between retailers. The distributors' refusal to transfer consumers is often characterized as the "enforcement" of an existing contract between a consumer and a gas vendor. CEED submits that this type of "enforcement" is inappropriate and unauthorized. The distributor does not have the jurisdiction to act in this role and provide a contractual remedy that is far greater than what the courts will generally allow.
11. Currently, gas distributors' refusal to facilitate consumers' change of retailers amounts to the use of monopoly distribution services as a means of preventing consumers from freely choosing their suppliers. In effect, the distributor is using access to distribution services as a means of preventing consumer mobility. The absence of customer mobility prevents customer choice of competitive service options and thereby frustrates the end goal of facilitating competition in the sale of gas to users as required by section 2 (1) of the OEB Act. Section 6.5 of the DAR requires distributors to facilitate changes in retailers. This promotes

¹ At page 9.

² At page 29.

customer mobility and, as a consequence, competition in the sale of gas to end users as required by the OEB Act.

12. The gas distributors' refusal to transfer customers essentially penalizes customers who initially choose a gas vendor and then wish to switch to another competitive service supplier. Customers who are not satisfied with their initial choice of gas vendor essentially have no choice and are enjoined from firing their current gas vendor. The resulting lesson learned by customers will taint their attitude toward, and instill fear of, competition, rather than contribute to consumer education, informed choices and equitable development of the marketplace.
13. Forcing a consumer to stay with a gas vendor that is not meeting their needs also provides signals to the gas vendor that are contrary to what the market would otherwise dictate. If the gas vendor's service is inadequate for, or unresponsive to, the customer's needs, a competitive market would dictate that the gas vendor should lose the customer, not gain a distributor imposed strong hold on them.

Facilitating customer mobility avoids unnecessary litigation.

14. Moreover, by formulating section 6.5 in a fashion that facilitates the transfer of customers between retailers, the Proposed DAR has avoids unnecessary interference with the consumer's right to exercise common law and contractual remedies by preventing consumers from "firing" a retailer. The rule, as written, avoids unnecessary litigation that would most certainly arise if consumers were left with no choice regarding their ability to replace their supplier.
15. In addition, section 6.5 also rejects the suggestion that the restrictions on current customers to transfer from a retailer be grandfathered. Grandfathering is unthinkable: it creates two classes of consumers – those that are free to choose their suppliers and those who are not. Such a distinction results in unauthorized and illegal discrimination among customers which would be virtually impossible to enforce. CEED submits that the Board should continue to reject any suggestion that would lead the creation of second class customers.

Electricity distributors are also required to facilitate customer transfers.

16. Section 6.5 of the Proposed DAR is analogous to section 10.5.4 of the Retail Settlements Code for electricity distributors ("RSC"). Both provisions require distributors to facilitate customer transfers from one retailer to another. This similarity is absolutely necessary to ensure that customers have the freedom to manage their energy portfolio by choosing alternate energy service providers. Section 6.5 of the Proposed DAR requires less administrative action, however, on the part of the distributor and thereby decreases the distributor's efforts and costs in facilitating customer transfers.
17. CEED submits that it is essential that: (i) the customer mobility options given to electricity consumers are also given to gas consumers; and (ii) the electricity distributor obligations required to facilitate customer mobility are also required of gas distributors. Parity in customer mobility provisions between the gas and electricity industries facilitates symmetry in the gas and electricity markets which, in turn, will increase customer awareness and decrease customer confusion resulting from the transition to competition in both sectors of the energy market.
18. In addition, CEED submits that failure to provide parallel customer mobility rights in the gas and electricity sectors will seriously impede the efficient and intended convergence of those sectors.
19. It is worth noting in this regard that the negative experience with the lack of customer mobility in the gas industry contributed to the positive customer mobility provisions in the RSC. The minutes from the RSC Task Force's treatment of this issue records the following advice from Board Staff.

the right of customers to choose their electricity supplier ... is one of the *Act's* primary goals and the most important responsibility of the Board. Board staff advised the Task Force that electricity supply and delivery are separate businesses and that LDCs should not be allowed to use control of the delivery business to deny customers access to supply. In the opinion of Board Staff, customer mobility is fundamental to a successful market. The Board has made

its opinion clear on this issue in recent decisions in the gas industry and there is little reason to believe that their opinions will differ in electricity. Furthermore, Board staff feels that it is inappropriate to design a market around the belief that customers will break contracts. In the opinion of Board staff, most customers will not, without just cause, knowingly break a contract and if they do, the appropriate remedy is through the courts, not through a refusal by LDCs to transfer a customer to another supplier upon request.³

20. The Board, and the industry, thus have experience with a lack of customer mobility in the gas sector, and learned from that experience to create more positive rules for electricity. It would be a perverse irony if the Board does not apply the same learning to gas. Failure to apply the electricity customer mobility rules in the gas sector will perpetuate a major obstacle to the development of a competitive retail gas sector.

Other jurisdictions facilitate customer mobility.

21. Other jurisdictions have rules that address customer choice and distributor obligations to facilitate transfers between gas vendors.
22. In Pennsylvania, the Pennsylvania Public Utilities Commission has promulgated standards for changing a customer's natural gas supplier, which also require natural gas distributors to facilitate the transfer. The process is as follows:
 - customers are required to contact a gas vendor to request change
 - when new gas vendor receives direct oral confirmation or written authorization from the customer, new gas vendor required to: notify distributor of customer's choice by end of next business day following completion of application process.
 - distributor required to: verify accuracy of information provided by gas vendor and match 2 data elements with distributor's records; send customer a letter

³ RSC Task Force Final Recommendations at page 1-17.

confirming proposed change and 10 day waiting period during which transfer order may be changed.

- distributor must make change at the beginning of the first feasible billing period following the 10 day waiting period

23. In Ohio where several natural gas choice programs are being piloted, standards to facilitate customer transfers between gas vendors have yet to be formulated. Staff of the Public Utilities Commission ("PUC") of Ohio notes concerns related to the need for such standards in the *Customer Choice Status Report*. Specifically the PUC of Ohio Staff indicates:

The methods and responsibilities to accomplish the transfers have been varied among the CG&E, EOG, and the CGO gas choice programs ... If you suppose that a customer is enrolled with Marketer A, the pertinent issues with customer transfers are: should the LDC transfer a customer from Marketer A to marketer B upon receipt of that customer's enrollment from marketer B without the "release" of the customer from Marketer A? Should the LDC transfer a customer from Marketer A to its own sales service upon the request of the customer without the "release" of Marketer A?...

Staff's concern with these issues is the implication of each method on true customer choice, free market development, increased reliance on early cancellation penalties by marketers, LDC "policing" of a customer's choice and the potential for slamming.⁴

24. It is noteworthy that the Alberta Government has recently proposed to repeal the Gas Utilities Core Market Regulation (GUCMR) which contained provisions limit customer mobility following a return to utility supply (Alberta Resources Development Notice, September 26, 2000). The Alberta government is proposing to repeal the regulation on the basis that: (i) the stringent regulatory requirements and the regulation are outdated and create unnecessary barriers to entry; and (ii) it is not warranted for consumer protection. Ontario has been a leader in the development of gas competition. It should maintain that leadership role by not permitting marketers and utilities to prevent customers from changing suppliers.

25. The existence of regulatory standards to facilitate the transfer of customers between marketers in other jurisdictions which are in the transition to a competitive gas market illustrates the importance of such customer mobility provisions to the development of true customer choice and competition.

Miscellaneous changes to STR provisions.

26. Paragraphs 6.3.3.1 and 6.3.3.2 allow for 60 day and 14 day periods respectively to verify information relating to STRs. Where those time periods expire, the distributor must cease processing the STR. CEED submits that prior to ceasing the processing of a STR, distributors should be required, as part of the required due diligence in these sections, to inform gas vendors of deficiencies in information or data which may prevent a STR from being processed. This would prevent the unnecessary resubmission of STRs in their entirety based solely on minor errors in data, thereby making the customer transfer process more efficient and less costly. CEED therefore recommends that the final sentence in each of these sections be revised to read as follows (changes emphasized): "...having exercised due diligence, including contacting the gas vendor in a timely manner to obtain additional or accurate information, cannot verify the customer information fields, the distributor shall cease processing the STR."
27. Furthermore, CEED reluctantly accepts the delayed introduction (*i.e.* January 1, 2002) of the 14 day STR processing period as outlined in section 1.5.2 of the Proposed DAR. CEED's reluctant acceptance of the delayed introduction date is conditional upon the fact that the delayed introduction deadline is a binding deadline, not a guideline, and that distributors shall act in good faith and in a timely manner to meet that deadline. Where the deadline is not met, CEED submits that distributors must face penalties in the form of service quality indicators as provided in performance based regulation.

⁴ PUC of Ohio, *Customer Choice Status Report* at page 2-9.

28. Section 6.4.4 allows alternatives to special meter readings. However, the last sentence provides that STR processing shall cease if a meter read cannot be performed. This appears to be inconsistent. The last sentence should therefore read as follows (changes emphasized): "If a meter read or alternate arrangements cannot be performed STR processing shall cease." In section 6.4.4, insert "or alternate arrangements" following "If a meter read..." in the last sentence.
29. Section 6.5.2 should be amended to include a provision requiring new gas vendors to copy customers on STR notifications which are sent to the customers' existing gas vendor. Such a provision will create transparency for all parties involved in customer transfers, especially the customers who are being transferred, by removing the possibility of confusion and unauthorized transfers.
30. Section 6.8.2 should be amended to provide a 5-day timeframe within which the distributor must inform a gas vendor of a customer initiated STR relating to the change of the customer's in-franchise service address. This timing is consistent with the distributor's obligations to update gas vendor records.

CUSTOMER INFORMATION PROVISIONS

31. CEED supports the spirit of the limitations with respect to the use of customer data or information. However, CEED submits that section 7.1.1 of the Proposed DAR should be amended to provide greater clarity with respect to the intended prohibition. In this regard, the first line of section 7.1.1 should read as follows (changes emphasized): "Distributors may only collect and use customer data or information necessary:". Furthermore, the section should be clarified to separate "and for no other reason" into a discrete final bullet point so that its application to the entire section is clear.
32. CEED supports the limitations placed on the collection and use of customer information and data because it ensures that distributors use customer information only to provide regulated utility services, and not for ulterior commercial purposes. Such a clarification would provide parity to the rules respecting the use of customer information in the electricity sector. For example, section 16.5 of the

Generic Electricity Distributor's licence provides: "The Licencee shall not use consumer information obtained for one purpose from a consumer for any other purpose without the consent of the consumer in writing." Protecting a gas distribution customer from unauthorized use of customer information would put this customer in the same position as an electricity distribution customer. As a corollary to this, the term "distribution services" should be more clearly defined in section 1.2 of the Proposed DAR. CEED suggests that the definition of "distribution services" should be replaced with the following definition, which is similar to the definition for "utility services" found in the Affiliate Relationships Code for Gas Utilities:

the services provided by a distribution for which a regulated rate, charge or range rate has been approved by the Board or, where the distributor is not subject to section 36 of the Act, the relevant rate making authority.

33. Substituting this definition for the existing definition in the Proposed DAR will result in consistency within the rules relating to the natural gas sector in Ontario.

BILLING OPTIONS

34. Section 8.3.1 of the DAR provides that distributors must offer customers three billing options, one of which is marketer consolidated billing. Marketer consolidated billing allows customers to receive only one gas bill that is issued by the marketer. The bill will indicate both the distribution service and the gas commodity charges.

Marketer consolidated billing increases customer choice and competition.

35. Section 2(1) of the OEB Act stipulates that one of the Board's objectives is to facilitate competition in the sale of gas to customers. In order to achieve competition, customers must be provided with a meaningful choice of competitive energy service providers. True customer choice of energy service provider must not be encumbered or constrained by Board rules that impose a single billing

- entity and/or billing format. In choosing an alternate energy service provider customers should also be provided with a reasonable choice of billing options.
36. CEED submits that the billing options outlined in s. 8.3 of the Proposed DAR provide reasonable and practical choices for customers seeking to have gas supplied by a competitive supplier. Specifically, customers choosing to access distribution services through a gas vendor must also have the ability to choose whether or not their gas bill should be solely or partially provided by that gas vendor.
 37. In this regard, in order to ensure that customers have choice and without mandating gas vendors to offer a variety of billing options, section 8.1.1 of the Proposed DAR should be revised as follows (changes emphasized): "Where gas vendors offer alternative billing options, the distributor shall take direction from the customer, or the gas vendor, with respect to the option governing the rendering of the bill for distribution service."
 38. By providing billing options, the Proposed DAR has crystallized the paramount importance of customer choice in gas distribution access. Neither the distributor nor the gas vendor may impose a billing relationship on customers as a condition of access to monopoly distribution services. Rather, in the vein of true competition, customers must be left with the ultimate choice of which billing option is best suited to their choice of gas supply arrangement. In doing so, customers must have the choice of having both the distribution service and commodity costs reported on one bill and the choice of having that bill delivered by either the distributor or the retailer. To do otherwise would frustrate the goals of achieving full competition through informed customer choice.
 39. Until quite recently, offering customers these choices was unanimously agreed to in the gas sector of the energy industry. The ability of consumers to choose their billing option in the market was addressed in the Ten Year Market Review. Similarly, in the *Market Design Task Force Report*, it was contemplated that wholesale service would allow marketers to include billing and collection of

distribution services no later than April 1, 2000. Furthermore, Enbridge Consumer Gas' May 1999 Discussion Paper⁵ filed with the Board in RP-1999-0001, stated the following:

"In keeping with the Company's customer-driven approach to unbundling of rates and services, the Company believes that the customer should determine from which party they prefer to receive their gas bill(s). As such, the Company envisions three billing options:

1. one bill – ABM bills the commodity and utility distribution charge;
2. two bills – ABM bills commodity and utility bills the distribution charge; and
3. one bill – the Company renders a single bill for both the commodity and its distribution charge (similar to ABC Service)." (Emphasis added)

40. Similarly, in RP-1999-0017, Union Gas' original evidence, filed December 10, 1999, was that it proposed to file for a wholesale billing service that would allow marketers to issue a consolidated bill for September 1, 2000. As a result, although positions may have changed over time, it is clear that marketer consolidated billing is a practical and manageable option.

Billing options are also provided to competitive electricity customers.

41. Section 7 of the RSC requires electricity distributors to accommodate customer choice of three billing options. Electricity consumers are thus provided with the choice of having both the electricity distribution service and commodity costs reported on one bill, and the choice of having that bill delivered by either the distributor or the retailer.
42. CEED submits that it is essential that the billing options given to electricity consumers to also be given to gas consumers. Parity in customer choice of billing

⁵ Exhibit D2, Tab 5, Schedule 1, page 25.

options between the gas and electricity industries facilitates symmetry in the gas and electricity markets which, in turn, will increase customer awareness and decrease customer confusion resulting from the transition to competition in both sectors of the energy market.

43. In addition, CEED submits that failure to provide parallel billing options in the gas and electricity sectors will seriously impede the efficient and intended convergence of those sectors. Specifically, if marketer consolidated billing is not permitted in the gas sector, then the convergence of the gas and electricity sectors will be frustrated because gas distribution will be immune from customer choice in the billing context. It will mean that customers can choose to have a retailer bill for electricity commodity and distribution, but have no choice when it comes to gas distribution.

The Board has authority to provide customers with billing options.

44. The Board is statutorily empowered to provide customers with a choice of billing options by sections 44(1)(b), (d), and (f) of the OEB Act.
45. Section 44(1)(b) provides the OEB with jurisdiction to pass rules relating to the conduct of distributors as it relates to gas vendors. A distributor's provision of billing information to gas vendors and willingness to allow gas vendors to bill for distribution services is clearly part of a distributor's conduct relating to gas vendors.
46. Section 44(1)(d) of the OEB Act provides the Board with jurisdiction to pass rules relating to the conditions of access to distribution services. Billing information, and willingness (or lack thereof) to allow gas vendors to bill for distribution services falls within the terms of access to distribution services to both end-use customers and other customers including gas vendors. Furthermore, if customers are not given choice over their billing arrangements, then distributor billing is effectively being imposed as a condition of access for gas distribution services.

47. Section 44(1)(f) provides the Board with jurisdiction to require statements or reports by distributors relating to transmission, distribution, storage or sale of gas. Such statements could be in the form of a billing statement to a retailer to facilitate retailer consolidated billing.
48. Those opposed to giving customers the option of gas vendor consolidated billing indicate that a rule which permits such a billing option constitutes a prohibition on distributor billing. CEED submits that allowing customers to have a choice of billing options where the distributor may, or may not, be required to bill directly for distribution services clearly constitutes a prescriptive and clear rule allowing customers the ultimate choice of how the bill will be provided – and not a prohibition imposed on distributors to prevent them from billing for the services which they provide.
49. Under any option that the customer ultimately chooses, it is clear that the distributor will have the opportunity or be required to bill for the services that they provide. The only distinction is the entity that is billed. Under distributor consolidated and split billing, the distributor will bill the ultimate customer for those services; under retail consolidated billing, the distributor will bill the gas vendor for the distribution services.
50. It is noteworthy that the jurisdiction of the New York Public Utility Commission ("NYPSC") was also challenged when it set rules requiring billing options that included marketer consolidated billing. When faced with this challenge earlier this year, the NYPSC ruled that gas and electric customers in New York that choose an alternative supplier must be provided with the option of receiving one bill to cover both the commodity and delivery charges. The NYPSC indicated that:

...key benefits of competitive markets including customer choice and the ability to meet and respond to customers needs and concerns, ... Our staff's research on the ESCOs' (*i.e.* "Energy Service Companies") experience in the market

to date have shown a strong preference for a single bill for electric or natural gas service.⁶

51. A New York distribution utility also attempted to claim that allowing retailer consolidated billing constituted a prohibition that decreases customer choice. The NYPSC, however, found that:

Because we are only requiring that utilities allow customers a choice of their billing entity, the remaining legal issues raised by Niagara Mohawk are almost completely besides the point; we are not precluding customers from choosing service from a utility, but are giving customers a choice between either their utility or ESCOs that might offer billing services. Contrary to Niagara Mohawk's claims, we are not restricting competition or denying it a chance to market its billing services. We are responding to customers' expressed preferences for a single bill and encouraging development of the energy services market by giving customers other options in addition to the choice of energy supplier.

52. Further in response to a challenge to the NYPSC's jurisdiction to impose such a billing option the Commission found:

There is also no statutory bar to enabling customers to choose their billing entity. Power to set "just and reasonable" rates includes setting delivery charges that do not include a cost for non-existing utility billing and allows us to preclude utilities from subjecting customers to "any undue and unreasonable prejudice" in the form of a denial of customers choices of billing providers.

53. CEED submits that the situation in Ontario is an entirely analogous to that faced by the NYPSC. Consequently, the Ontario Energy Board:

- (a) is not precluding gas distributors from providing billing services;

⁶ NYPSC Chairman, Maureen Helmer, as quoted in Gas Utility Report, 03-10-2000, New York PUC allows one bill option, orders EDI for transactions by 2001.

- (b) is not barred from providing this option to customers wishing to seek services from alternate energy service provider; and
- (c) is well within its jurisdiction to provide such a billing option as within the ambit of its power enumerated above and its power to set just and reasonable rates.

Many other jurisdictions provide customers with marketer consolidated billing options.

- 54. Several other jurisdictions including Ohio, Maryland⁷, California⁸ and Alberta⁹ support the necessary competitive practice of providing customers with a range of billing options that includes marketer consolidated billing.
- 55. When the PUC of Ohio reviewed the natural gas choice programs of Cincinnati Gas and Electric Company, Columbia Gas of Ohio and the East Ohio Gas Company, the PUC of Ohio Staff specifically recommend that marketers be permitted the option of providing a single bill for the commodity and distribution services. In the PUC of Ohio's order dated June 18, 1998 the Commission adopted a staff recommendation permitting marketers to issue a single bill to customers for both the commodity and distribution services on a trial basis. Further, on April 15, 1999, it was reported that the "marketer one bill" trial was working well and it was recommended that the option should continue.¹⁰
- 56. In light of the considerable support for customer billing options including marketer consolidated billing, CEED submits that section 8.3 of the Proposed DAR is well founded and consistent with the ultimate goal of facilitating competition. Taking this choice away from customers would be unduly restrictive, lead to customer confusion, and frustrate informed customer choice, and thereby hinder the development of competition in the gas industry.

⁷ PSC Order No. 76180, Case No. 8794, May 17, 2000 (Md. PSC) [As reported in Public Utilities Fortnightly, July 15, 2000].

⁸ Decision 99-07-015 (July 8, 1999).

⁹ Draft Billing Regulation proposed under the *Gas Utilities Act*.

¹⁰ PUC Ohio, *Customer Choice Status Report*, at page 2-12.

BILLING INSERTS

57. Section 8.5 of the Proposed DAR outlines restrictions with respect to the material that may be included with system gas bills. CEED supports the spirit of the prohibition against including any marketing or promotional material by a gas vendor in system gas bills. The rationale behind such a prohibition is based on the principle that a distributor should not use its default supply position as leverage for commercial marketing opportunities for third parties.
58. CEED is concerned that the current provision, as drafted in the Proposed DAR, may not fully achieve the spirit of the rule. The major specific concern with the proposal as currently drafted is with respect to the second bullet point. As CEED understands it, the second bullet point is meant to prevent distributors from providing different promotional materials to different system gas customers. In other words, the second bullet point is meant to be an additional restriction on the general prohibition on providing third party marketing material. However, as drafted, the second bullet point may be interpreted as an exception to the general prohibition. In other words, it is arguable that a distributor may comply with the second bullet point if it provides third party promotional material to all system gas customers. This is clearly not the intention. In CEED's view, the Board should follow the model it has applied in the electricity sector. Section 2.7.3 of the Standard Supply Service Code ("SSS Code") for electricity is much more definitive. It provides that bills for SSS customers "shall only include the distributor's marketing information or promotional materials, and any materials or information that the distributor is obligated to send as part of its regulated distribution function".
59. The SSS Code language is preferable because it (i) applies to all bills, whether those bills are directly issued by a distributor or technically issued by a third party; and (ii) clearly limits the type of material which may be disseminated, and therefore does not invite debates over the types of materials which *may not* be disseminated (*i.e.* in this case, whether materials are, in fact, "promotional material provided by a marketer").

60. In the alternative, if the Board does not adopt the SSS Code language, the language in the Proposed DAR should be clarified to read as follows:

When a distributor issues a bill to a customer for system gas, either directly or through another entity, the distributor or other entity shall not convey any material with the bill other than:

- material which the distributor is obligated to send to customers as part of its regulated function; and
- the distributor's marketing or promotional material.

61. The foregoing captures, in a more precise way, the spirit underlying the prohibition embodied in section 8.5. It ensures that no loopholes are left open that would allow the substance of the prohibition to be avoided through creative interpretation, novel billing practices, or imaginative corporate structures.

ENFORCEMENT MECHANISMS

62. CEED is concerned that the Complaint Procedures provided in the Proposed DAR are not sufficient to ensure compliance by distributors. Although CEED supports the essence of the complaint process in the Proposed DAR, an explicit enforcement mechanism must be included to create transparency within the DAR's processes and confidence in the DAR itself. Without an explicit enforcement process the DAR is vulnerable to becoming merely a hollow statement of lofty principles and platitudes. To be effective and useful the DAR must include an enforcement mechanism.
63. CEED submits that the Proposed DAR should include an enforcement provision that outlines the process for resolving matters before the Board regarding breach of the DAR. In this regard, section 11.7 of the Proposed DAR should be amended to read as follows:

If the complaint is not resolved it may be referred to the Board. Any complaint referred to the Board must be sent to the Registrar of the Board, be in writing and shall include the response of the distributor to the complaint. Following the receipt of complaints, the Board shall, in a timely manner, issue a notice of a preliminary hearing to all interested parties and the distributor to determine

whether a hearing should be convened to determine issues arising from the complaint. If, following a hearing, the Board determines that the distributor has breached the DAR, the Board may order the distributor to comply with the DAR, to cease the action or omission giving rise to such breach, and may order any additional or other remedies.

64. The Board's authority to design and implement an enforcement mechanism for the Proposed DAR is derived from its jurisdiction to make rules relating to the natural gas sector in Ontario. Section 44(1)(j) of the OEB Act grants the Board the authority to issue the DAR. Rules, by their very nature imply that they are enforceable. In fact, by allowing for exemption provisions from rules¹¹ the OEB Act necessarily contemplates that the Board's rules require compliance. Consequently, it is clear that compliance requires enforcement. To suggest otherwise would make redundant the exemption provisions of section 44 and defy the rules of statutory construction.
65. Section 11 of the Proposed DAR provides that parties may complain about non-compliance, first to the distributor, and then to the Board. However, as noted above, it contains no remedies for non-compliance. This is a serious inadequacy that must be addressed before the DAR is finalized. The DAR Task Force unanimously agreed that the rule should (i) include a provision which authorizes the Board to order the distributor to comply with the Rule; and (ii) require distributors to subscribe to a Board approved third party complaints resolution agency.¹² It is not clear why these recommendations are not included in the Proposed DAR.
66. In addition, the lack of any penalties for non-compliance could seriously frustrate the effectiveness of the rules in the Proposed DAR. In CEED's submission, penalties for non-compliance must be specifically set out in, and have sufficient impact to deter non-compliance with the Code.

¹¹ See sections 44(5) and 44(6) of the OEB Act.

¹² Recommendation 9.3.

67. Penalties for non-compliance are particularly important here because, unlike consuming customers, gas vendors do not have specific entitlements for service quality indicators ("SQIs"). In this regard, Union Gas' Final Argument in RP-1999-0017, stated that it was fair to allow parties to ask for penalties if they are not satisfied with Union's ability to meet SQI's. It also stated that it was premature to begin developing SQIs for gas vendors until the Board has set the rules governing utility conduct as it relates to gas vendors. As a result, even according to Union Gas, the time is ripe to implement penalties for failure to comply with the DAR. CEED therefore submits that the Proposed DAR is incomplete without penalties that will provide an effective deterrent against non-compliance.
68. In addition to the foregoing amendment to the Complaint Procedures provision, the final sentence of section 11.2 should be replaced with the following: "Documentation and all other materials related to complaints shall be available for public inspection and reproduction at the distributor's offices during normal business hours."

EXEMPTION APPLICATIONS

69. While CEED does not object to the provision for exemptions from the DAR¹³, for greater certainty, transparency and fairness, all applications for exemption from the DAR should be posted on the Board's Internet site in a timely manner. In addition, all interested parties must be given notice of exemption applications and be allowed an opportunity to make representations to the Board regarding those applications. No exemptions should be granted until all interested parties have had an opportunity to make full representations to the Board. Perhaps most importantly, the clause should also make clear that distributors must comply with the DAR unless and until they are expressly exempted from doing so by an

¹³ See section 1.6 of the Proposed DAR.

authorized decision of the Board. Otherwise, distributors may ask for forgiveness and not permission.

ADDITIONAL MISCELLANEOUS CHANGES

Service Level Agreement

70. Section 5.3.1 of the Proposed DAR outlines the general requirements of the Service Level Agreement (“SLA”) which distributors are required to enter into with gas vendors seeking to provide services within the distributor’s franchise area. CEED submits that, for greater clarity, the final sentence of section 5.3.1 should read as follows (changes emphasized): “The standard Service Level Agreement shall include, among other things, provisions regarding: (i) nomination volumes and delivery points; (ii) terms of Gas Transportation Agreements; (iii) arrangements necessary to facilitate marketer consolidated billing; (iv) processing of Service Transaction Requests; and (v) a dispute resolution process.”

71. Section 5.3.4 allows for alternate terms and conditions to govern the relationship between distributors and gas vendors, stating that the "Board may review and issue directions" with respect to the terms of the SLA. As currently drafted, it is not clear whether Board approval is required for revisions to the SLA or where alternate terms and conditions are substituted. For greater clarity, CEED submits that the following sentence be added to section 5.3.4: "The Board shall review and approve revisions to Service Level Agreements and alternate terms and conditions. Such revisions and or alternate terms and conditions shall come into force upon Board approval."