ONTARIO ENERGY BOARD

IN THE MATTER OF a Notice of Proposal to Make a Rule:

Gas Distribution Access Rule

SUBMISSIONS OF
DIRECT ENERGY MARKETING LIMITED

I. Introduction

1. Direct Energy Marketing Limited ("Direct Energy") wishes to make three submissions on the draft Gas Distribution Access Rule (hereafter referred to as the "DAR"). The first submission deals with the very important subject of certainty of contract while the second and third submissions deal with points to maintain the consistency of similar rules for gas and electricity marketing.

(i) **Section 6.5:** This subsection governs Service Transfer Requests from one gas vendor to another and in the opinion of Direct Energy the proposed rule should only apply to contracts signed after the DAR comes into force. The rule should not apply to contracts which have already been signed and gas is flowing.

(ii) **Section 6.5.2:** This section should be amended so that it is consistent with section 10.5.4 of the Retail Settlement Code which requires the *distributor* to notify the existing retailer of a STR submitted by a new retailer.

(iii) **Section 1.2:** The definition of "in writing" in section 1.2 of the proposed DAR should recognize the changes to the law made by Bill 88, the *Electronic Commerce Act, 2000.*

II. DAR Section 6.5

2. Section 6.5 of the DAR establishes rules for the processing of STRs involving a customer switching from an existing gas vendor to a new gas vendor. Direct Energy does not object to these procedures contracts entered into or renewed after the DAR comes into force. However, Direct Energy is of the view that these procedures should not apply to contracts which were signed under existing rules.

3. Board Staff takes the view that:

   a) applying section 6.5 of the DAR to existing contracts will not interfere with or alter the terms of existing contracts between marketers and customers;

   b) that the Board is not the proper forum to enforce commercial contracts; and

   c) that competition demands that customers be mobile

4. Direct Energy agrees that these three principles have an important part to play in the final make-up of the rules. However, it would be a improper exercise in public policy to begin the transition to the new rules by reversing the long-standing practices governing residential gas purchase contracts. To tell some marketers that the principles upon which they have based their contractual obligations for the past decade are now invalid, is not the proper way to inspire confidence in the Board's rules.

5. Take the situation where marketer A has signed customer C to a three-year energy supply contract starting in 1999. One year into the contract customer C signs a new supply contract with marketer B. Under the existing rules the gas utility will not switch customer C to the new marketer without the consent of the existing marketer. From about 1993 to today more than a million residential gas supply contracts have been entered into following these rules.

6. If section 6.5 of the DAR is implemented those million plus contracts will be subject to different rules. Under the new rules marketer B is free to sign up customer C before its contract with marketer A expires and the distributor is obligated to process that contract unless the customer asks for the processing to be terminated.

7. To argue that the proposed changes do not affect the one million existing contracts is simply wrong and for a regulator to reverse such a long-standing practice that, for all practical purposes, assists one party to breach a contract, is a poor application of public policy.

8. The Board should not forget that for almost 10 years it has been part of the process that accepted these rules. For ten years the Board has been aware that existing residential gas supply contracts were honoured by the province's gas utilities and that a customer was never switched to a new marketer if an existing contract was in place.

9. During all this time the Board made no substantive effort to discourage the practice:

   (i) not once did the Board state a contrary policy;

   (ii) not once did the Board require retailers to amend their contracting procedures; and

   (iii) not once did the Board issue a cautionary notice to the utilities to base their commercial dealings with retailers on different principles.

10. The reason the Board did nothing during all those years was because most customers were satisfied with their contractual arrangements and those who were not and who complained to their retailer, were normally released from their contract. The theory was that customer satisfaction is always easier than customer litigation. However, because the issue was not front and centre with customers did not mean that it was not front and centre with Direct's competitors and those who saw themselves as consumer advocates.

11. For the past decade, most retailers depended on the Board's silence on this issue as confirmation that their contracting practices met with the Board's approval and they arranged their commercial and financial affairs on that understanding. The retailers 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. Debentures were issued, assets purchases were made and other financial decisions were consummated on the basis of these rules.

12. To alter the rules under which this marketplace has operated for almost a decade is not a decision the Board should take lightly. It should not disavow existing practices unless it finds as a question of fact, that the

current rules impose a gross injustice on the marketplace. As an issue of fairness, the Board should not be quick to abandon these practices which were accepted by parties who were faithful to and depended upon the rules of the marketplace as they existed at the time of contracting.

13. In the submission of Direct Energy, the Board is required to weigh the exigencies of making such a drastic change against the effect of not making the change. The Board should keep in mind that:

a) there is no evidence that customers are clamouring for the change which the Board is proposing;

b) there is no evidence that the marketplace is demanding the rules;

c) there is no evidence before the Board that customers are being disadvantaged; and,

d) there is no evidence that the practice has hindered the growth of competition.

14. Direct Energy agrees that when drafting the new rules, the Board should make every effort to encourage competition and absent itself from the enforcement of private commercial contracts. However, by so doing, the Board should not diminish the results of ten years of competition. The proposed transfer rules for electricity customers will apply ***prospectively*** whereas the rules for gas customers will apply ***retroactively*.**

15. By not applying section 6.5 of the proposed DAR to existing gas contracts, the Board would acknowledge that commercial decisions made in good faith and based on existing rules should be honoured until they expire over the next five years.

16. Direct Energy has a substantial stake in the Province's competitive energy market and takes exception to any attempt to change the rules and an established practice retrospectively and it trusts that the Board respects this sentiment and agrees with the principle.

17. If, on the other hand, the Board is intent on applying the new DAR rules to existing contracts, Direct Energy urges it to be absolutely certain that it has the legal authority to do so. Direct Energy is of the opinion that it may not and its legal analysis in this regard is attached as Appendix "A". The conclusion is that Direct Energy, as a major market participant, assumes

that if the Board approves the proposed DAR rules, that it has satisfied itself that it has the full and proper legal authority to do so.

III. DAR Section 6.5.2: Obligation to Notify of an STR

18. Section 6.5.2 of the proposed DAR 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 new gas vendor of the identity of any current gas vendor and wait ten days (the "initial waiting period") before continuing STR processing. During the initial waiting period the new gas vendor shall notify the current gas vendor that it has submitted an STR to become the customer's supplier of natural gas..."

19. This proposed provision is inconsistent with the equivalent provision in section 10.5.4 of the Retail Settlement Code places the obligation to notify the current retailer on the *distributor*:

> "10.5.4 A distributor shall notify the current retailer that a transfer request has been received and wait ten business days before continuing transfer processing."

20. 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.

21. Further, 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.

22. 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.

23. If the Board were to adopt this suggestion it would not mean an inordinate burden on the distributor nor would it entail the distributor getting involved in the dispute. In fact, this suggestion would reduce the

administrative workload of a distributor by minimizing the potential for mischief and the number of complaints to the Board.

24. Direct Energy therefore submits that section 6.5.2 of the proposed DAR be amended by deleting the second sentence and replacing it with the following:

> "*During the initial waiting period the distributor shall also notify the current gas vendor that it has received an STR from a new gas vendor*."

IV. DAR section 1.2: The definition of "in writing" in section 1.2 of the proposed DAR should recognize the changes to the law made by Bill 88, the Electronic Commerce Act, 2000.

25. Section 1.2 of the proposed DAR defines "in writing" (or "written") as including "facsimile, electronic transmission or any other similar technology but does not include verbal communications". This definition is not the same as that used in the RSC[1], or the one used in the Code of Conduct for Gas Marketers and Electricity Retailer Code of Conduct.[2] Direct Energy submits that the same definition of "in writing" should be used in the proposed DAR, the RSC and both Codes of Conduct.

26. The *Electronic Commerce Act, 2000* provides that any legal requirement that information be in writing is satisfied by information that is in electronic form.[3] The act defines "electronic" as follows:

> "Electronic" includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means and "electronically" has a corresponding meaning."[4]

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1 "Written authorisation" includes authorisation given by electronic mail or any other similar technology, but does not include authorisation given verbally." (RSC, section 1.2)

2 "In writing" means communication through writing, facsimile, or any other means of communication considered legally binding in the Province of Ontario." (CCGM, section 1.1; Electricity Retailer Code of Conduct, section 1.1)

3 Electronic Commerce Act, 2000, S.O. 2000, c. 17, s. 5

4 Electronic Commerce Act, 2000, s. 1(1)

27. Direct Energy submits that the definition of "in writing" in the proposed DAR should reflect the changes to the law made by the *Electronic Commerce Act, 2000*. The definition in section 1.2 of the proposed DAR should therefore read as follows:

> "1.2 "In writing" or "written" means communication through writing, facsimile, electronic form as that term is defined in the *Electronic Commerce Act, 2000* or any other means of documentary communication considered legally binding in the Province of Ontario."

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Appendix "A"

1. Canadian common law has long recognized the existence of the tort of intentionally inducing or procuring the breach of contract where B (the new gas vendor), without legal justification, induces a person (customer C) to breach his contract with A (the current gas vendor).[5] Reckless indifference or wilful blindness by a party as to whether its conduct will result in an interference with existing contractual relations will result in liability.[6]

2. How section 6.5 will facilitate new gas vendors in inducing the breach of existing contracts can be seen by the following illustration. Take the situation where the current gas vendor, A, has signed-up a customer, C, to a three-year energy supply contract in 1999 which does not expire until 2002. The DAR comes into force, say, in May, 2001. In June, 2001 new gas vendor B approaches customer C in an effort to sign him up and the new gas vendor is aware, or becomes aware, that C already has an energy supply contract with A which has not yet expired. Under section 6.5 of the proposed DAR, new gas vendor B is free to sign up customer C and the distributor is obligated to process Retailer B's customer contract unless the customer asks for the processing to be terminated. Under these sets of facts, Retailer B clearly would be liable to Retailer A for inducing C to breach its contract with A before it expired in 2002 and customer C would be liable to Retailer A for breaching its contract. *The only reason B is able to start flowing gas to C is that the proposed DAR allows the distributor to facilitate and support B's conduct in inducing breach of the existing contract and C's conduct in breaching the contract. Section 6.5 of the proposed DAR therefore directly facilitates the tortious conduct by B and has the effect of interfering with the contract between A and C by facilitating C from walking away from its contract before it expires.* This effectively amounts to the OEB sanctioning unlawful conduct through the DAR.

3. The *Ontario Energy Board Act, 1998* does not empower the Board to condone or justify the breach of any contractual obligations which are freely entered into by market participants. As a general principle of interpretation, a statute will not be construed to affect rights enjoyed under contracts unless the statute *contains clear and*

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5 L. Klar, *Tort Law* (Toronto: Carswell, 1991) at 436; *Merkur Island Shipping Corp. v. Laughton*, [1983] A.C. 570

6 *Anand* et al. "The Law of Intentional Torts" (Toronto: Scott & Aylen, 1997)(Presentation to Lawyer's Professional Indemnity Company, February 6, 1997) at 42-3.

express language evidencing an intention to do so.[7] As put in the leading Canadian text on statutory interpretation, *Driedger, On the Construction of Statutes*:

> "As explained in *Halsbury* in a formulation adopted by Canadian courts:
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> > Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law."[8]

Or, as stated by one Canadian court:

> "For the statute law to alter any clearly established principle of the common law, that statute must be clear and distinct in the matter.[9] Neither is there any presumption that a statute is intended to override the common law.[10]
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> In *Leach v. The King*[11] a judgment of the Privy Council, Lord Atkinson stated:
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> > The principle… is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite, and positive enactment, not by an ambiguous one such as the section relied upon in this case."[12]

Further, as a general rule courts have required legislatures to employ clear statutory language when they seek to have legislation applied to contracts. [13] Ambiguities in statutory language generally will be resolved in favour of the contracting party or property owner.[14] Therefore, these principles of statutory interpretation would require the Ontario Legislature to use the clearest of language to intend that a provision in the *Ontario Energy Board Act, 1998* could interfere with existing contractual obligations owed by parties under the common law of contract.

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7 Driedger, *On the Construction of Statutes, supra* note 38 at 298.
8 *Ibid.* at 299.
9 *Craies on Statute Law*, 5th e. (1952), 114-5
10 *Ibid.* at 310.
11 [1912] A.C. 305 at 311.
12 *Coles* v. *Roach* (1980), 112 D.L.R. (3d) 101 (P.E.I.S.C.), at .103
13 See for instance, statutory interpretation professor, D. Gifford, *Statutory Interpretation* (Agincourt: Carswell, 1990) at 180. At 181 who argues that since common law rights are vested rights and these are contractual rights, they should be applied narrowly. See *Muirfield Properties Pty Ltd.* v. *Hanson & Yougham Ptd. Ltd.* [1987] VR 615 at 621.
14 *Re Ontario Medical Association and Workers' Compensation Board* (1985), 52 O.R. (2d) 617 (H.C.J.)

4. In fact, the *Ontario Energy Board Act, 1998*, including section 44, does not contain any language expressly authorizing the Board to allow parties to breach their contracts. Consequently, the proposed DAR cannot and should not condone or facilitate breaches of contracts because, as subordinate legislation, the DAR cannot exceed or contradict the statutory authority contained in the parent statute under which it is made.[15]

[15] See, for example, David Mullan, *Administrative Law* (1996), at p. 442, para. 512. See also *Regina v. Bermuda Holdings Ltd.* (1969), 9 D.L.R. (3d) 595 (B.C.S.C.), in which the Court held that delegated authority must be exercised strictly in accordance with the power creating it, and that a regulation that exceeded the power granted by its enabling statute was void. In *Re Metropolitan Toronto School Board and Minister of Education* (1986), 54 O.R. (2d) 458, the Ontario Divisional Court held that subordinate legislation cannot amend or alter its enabling statute, and is invalid if it conflicts with an explicit provision of any applicable statute.