ONTARIO ENERGY BOARD

IN THE MATTER OF THE PROPOSED GAS DISTRIBUTION ACCESS RULE

SUBMISSIONS

OF ONTARIO ENERGY SAVINGS CORPORATION

Introduction

Ontario Energy Savings Corporation's ("OESC") primary concerns with the Proposed Rule relate to service transfer requests and the possible exemption therefrom. We will, firstly, be focussing our comments on Section 6 of the Proposed Rule and, more specifically, the legal and practical ramifications of the customer mobility provisions contained in Sections 6.5 and 6.6 on OESC's existing contracts with gas customers, distributors and suppliers. We will then comment on the proposed exemptions provision contained in Section 1.6 of the Proposed Rule.

Jurisdiction of the Board

Our analysis of the Proposed Rule begins with consideration of the jurisdiction of the Ontario Energy Board (the "Board") to make the Proposed Rule.

Section 44 of the *Ontario Energy Board Act, S.O. 1998, c.15* ("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,*
>
> *(a) governing the conduct of a gas transmitter, gas distributor or storage company as such conduct relates to its affiliates;*
>
> *(b) 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; . . .

(d) 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 arguably broad enough to confer jurisdiction on the Board to make rules covering the subject matter of the Proposed Rule. However, that ostensible jurisdiction does not extend to the customer mobility provisions contemplated in Sections 6.5 and 6.6 on the following grounds:

1. Requiring a gas distributor to breach its contract with an agent or broker is not *"governing the conduct of a gas distributor"* as contemplated by Subsection 44(1)(b); and

2. Establishing conditions of access <u>on a retroactive basis</u> to existing contractual relationships is not 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 6.5 and 6.6 of the Proposed Rule.

Additional arguments challenging the Board's jurisdiction are available. 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.

<u>Customer Mobility Provisions of the Proposed Rule</u>

The Proposed Rule provides for specific customer mobility rules which gas distributors must follow upon receiving a service transfer request ("an STR") from a customer. Section 6.5 contains the procedures to be followed by a distributor when a customer requests a change from

one gas vendor to another gas vendor. For purposes of this Submission, the relevant portions of the Section are as follows:

> *6.5.1 An STR involving a transfer from one gas vendor to a new gas vendor shall be submitted to a distributor by a customer or by the new gas vendor.*
>
> *6.5.2 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 gas. The distributor shall waive the initial waiting period upon receipt of the authorization of the current gas vendor to proceed with processing the STR.*
>
> *6.5.3 The current gas vendor may request that the distributor delay processing the STR for an additional ten days (the "second waiting period"), commencing from the conclusion of the initial ten day period.*
>
> *6.5.4 If, at the end of the second waiting period, the customer, the new gas vendor, or the current gas vendor acting upon specific written authorization from the customer dated no earlier than the date that the current gas vendor is informed of the transfer request, notifies the distributor in writing that STR processing should be terminated, the distributor shall cease STR processing. The distributor shall notify the new gas vendor, and confirm with the customer, that the transfer will not be completed.*
>
> *6.5.5 Before processing the STR, the distributor may require proof of the notice provided to the current gas vendor by the new gas vendor; if proof of notice is not provided the distributor shall cease processing the STR. If the distributor does not receive notice to terminate STR processing, the STR shall be processed.*

Section 6.6 contains the procedures to be followed when a customer requests a change from a gas vendor to system gas supply. For purposes of this Submission, the relevant portions of the Section are as follows:

6.6.1 An STR involving a transfer of a customer from a gas vendor to system gas shall be submitted by the current gas vendor or by the customer.

6.6.2 A distributor shall not decline an STR of an existing customer to system gas for reasons of non-payment by the customer of commodity, distribution or other non-commodity services.

6.6.3 If the STR is submitted by a gas vendor, the distributor shall notify the customer that a transfer is taking place and of the scheduled transfer dated.

6.6.4 If the STR is submitted by a customer, the distributor shall notify the gas vendor and delay processing for ten days, unless the gas vendor responds that no delay is necessary.

6.6.5 If, during the ten day waiting period, the distributor is notified in writing by the gas vendor that processing should be terminated, and the request to cease processing is accompanied by specific written authorization from the customer dated no earlier than the date that the current gas vendor is informed of the transfer request, then the distributor shall cease processing the STR. The distributor shall confirm with the customer that the transfer will not be completed.

6.6.6 If no notification to terminate processing is received by the distributor, the STR shall be processed.

Sections 6.5 and 6.6 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 6.5 and 6.6 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 Proposed 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 6.5 and 6.6 is that the existing agent will have the onus of retaining the customer. In practical effect, the customer can "walk" 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. (OESC's agreements with customers on the Union system are virtually identical to those on the Enbridge system.) 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 an 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 Proposed 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' ability 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 6.5 and 6.6 of the Proposed Rule

Sections 6.5 and 6.6 of the Proposed Rule implicitly 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.

As well, Sections 6.5 and 6.6 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 6.5 and 6.6 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 Proposed 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 Proposed 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 Proposed Rule purports to be a "consumer benefit", it may in fact result in a plethora of litigation among customers, agents and distributors.

Exemptions Provision

Section 1.6 of the Proposed Rule empowers the Board to grant an exemption to the provisions set forth in the Proposed Rule. Section 1.6.1 reads as follows:

> *The Board may grant an exemption to the provisions set forth in this Rule. An exemption may be made in whole or in part and may be subject to conditions or restrictions. Persons seeking an exemption from a provision of this Rule shall apply in writing to the Board. In determining whether to grant an exemption, the Board may proceed without a hearing or by way of an oral, written, or electronic hearing.*

The above is a virtual repetition of the power provided to the Board under the Act. Specifically, Section 44(5) of the Act provides that "a Rule may provide for an exemption to it" and Section 44(6) of the Act provides that "an exemption may be made in whole or in part and may be subject to conditions or restrictions".

If the Board were to adopt the Proposed Rule without modification, presumably gas vendors, such as OESC, could apply to the Board to be relieved of the retroactive effect of the customer mobility provisions of the Proposed Rule. The gas vendors would, in all probability, argue that the "tied house" contractual relationships (as described above) should be "grandfathered" so as to avoid the kinds of consequences set out above. Again, presumably the Board would be sensitive to those concerns and look favourably upon the applications for "grandfathering". The submissions which follow are not intended to diminish the merits of any such applications but rather to focus on the "exemptions process" and the flaws inherent therein.

OESC submits that the exemptions process is objectionable on three grounds. First, the combined effect of Sections 6.5 and 6.6 of the Proposed Rule abrogates many of the contractual rights and obligations shared among the consumer, the gas vendor, the gas distributor, and the gas supplier. Those sections break the current "tied house" arrangement among the four parties thereby permitting the consumer to "walk" and the gas vendor to remain a "captive". In order to be relieved of the effect of the Sections, the gas vendor would be required to seek an order from the Board which order may be conditional or otherwise restrictive. Such process, OESC submits is contrary to the rule of law and the principles of natural justice. In effect, Sections 6.5 and 6.6 are a form of retroactive law-making and Section 1.6 then delegates to the Board the discretionary power to provide relief from the effect of that retroactive legislation. Through the exercise of the discretionary power, the Board becomes, in effect, the "master" of the contractual arrangements among the consumer, the gas vendor, the gas distributor, and the gas supplier.

In other words, the Board becomes possessed of the power to approve, either conditionally or unconditionally, otherwise amend or disapprove existing contractual relationships.

Secondly, OESC submits that the exemptions provision of the Proposed Rule is *ultra vires* the Board. The exemptions provision in effect repeats the power granted to the Board by the Act. The exemptions provision does not fix any standards. It does not seek to establish any commitment to certainty and predictability with respect to existing contractual rights. Instead, it vests with the Board arguably unfettered discretion.

That form of unfettered discretion was considered by the Supreme Court of Canada in *Brant Dairy Co. v. Milk Commission of Ontario [1973] SCR 131 (Ont.).* In that decision, Lakin J. (as he was then) noted (at 146-147):

> *What the Board has done has been to exercise the power in the very terms in which it was given. It has not established a quota system and allotted quotas, but has simply repeated the formula of the statute, specifying no standards and leaving everything in its discretion.*
>
> *I am of the opinion that s. 4 of O. Reg. 268 is ultra vires. The fact that the powers conferred are to be carried out on a basis that the Board deems proper does not entitle it to keep its standards out of the Regulation. The "deem proper" clause of the empowering statute gives the Board (as subdelegate) a wide scope in setting up a quota system and in fixing quotas but it does not allow the Board to escape its obligation, as I read the statute, to embody its policies in a Regulation.*
>
> *A statutory body which is empowered to do something by Regulation does not act within its authority by simply repeating the power in a Regulation in the words in which it was conferred. That evades exercise of the power and, indeed, turns a legislative power into an administrative one. It amounts to a redelegation by the Board to itself in a form different from that originally authorized; and that this is illegal is evident from the judgment of this Court in A.G. Can. v. Brent [1956] SCR 318. ...*
>
> *The principle is the same here. The Board was required to legislate by Regulation. Instead, it has purported to give itself random power to administer as it sees fit without any reference point in standards fixed by Regulation.* (emphasis added)

OESC submits that the presumed attempt to mitigate the effect of Sections 6.5 and 6.6 through the application of the exemptions provision is illegal in the sense described by the Supreme

Court.

Thirdly, OESC submits that the exemptions provision of the Proposed Rule is an unnecessarily broad and unstructured discretion and therefore fraught with the possibility of abuse. As noted by the authors of *Administrative Law* (Third Edition, 1989, Emond Montgomery Publications Limited, Toronto, Canada) the Courts in the United States are in the process of creating law which requires administrators to do as much as they reasonably can to clarify standards, to develop principles, to state policies, and to formulate rules. According to the authors (at p.783):

> *The best example is Environmental Defense Fund v. Ruckelshaus, 439 F 2nd 584 (DC Cir. CA 1971). The Court's purpose was to require administrators themselves to "provide a framework for principled decisionmaking" (at 598):*
>
> > *Judicial review must operate to ensure that the administrative process itself will confide and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.*

The authors of *Administrative Law* note that Canadian Courts are becoming more aware of the problems associated with unstructured discretion. They note (at p. 784):

> *This is to be seen in the fears expressed by the Divisional Court of Ontario with respect to the provision of "exemptions" to Toronto's 1973 holding by-law severely curtailing downtown development: Re Cogan and City of Toronto (1974) 46 DLR (3d), 481, 497-498 (Ont. HC Div. Ct.):*
>
> > *It may not be amiss however, to raise serious doubts as to the propriety of municipal legislation that openly invites uneven application to citizens, private or corporate. Such legislation would appear to fly in the face of a principle enshrined in the Canadian Bill of Rights, namely, that all citizens are equal before the law. This legislation openly provides for special treatment for some, who for reasons that can never be truly known, will obtain exemptions from By-law 348-73 or amendments to the zoning by-law and others will be refused. Apart from the objection that it is designed to be unequally applied, despite the declared benevolent intention of such legislation, it is fraught with obvious possibilities for abuse.*

OESC submits that the customer mobility provisions of the Proposed Rule should have no application to existing contractual arrangements. The Board may want to make rules governing access on a prospective basis but it must not do so on a retrospective basis. OESC further submits that the presumed intent of the exemptions provision to mitigate the objectionable effect of customer mobility provision is, in itself, objectionable. OESC submits that the Proposed Rule should clearly and unequivocally state that Sections 6.5 and 6.6 do not apply to existing contractual relationships. Finally, if an exemptions provision is to be incorporated in the Proposed Rule, it should clearly articulate a substantial structure of the Board's exercise of its discretion.

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 recission 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 non-regulated 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 6 of the Proposed Rule would unnecessarily destabilize and complicate the market for natural gas sales.

Conclusion

For the reasons set out above, OESC is strongly of the view that the conditions surrounding STR's 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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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