

ONTARIO ENERGY BOARD

NOTICE OF PROCEEDING TO AMEND THE DISTRIBUTION

SYSTEM CODE AND RETAIL SETTLEMENT CODE

CONSUMER SECURITY DEPOSIT POLICIES

July 10, 2003

**Submissions of the Vulnerable Energy Consumers' Coalition ("VECC")
With Respect to the Notice of Proceeding Concerning Consumer
Security Deposit Policies**

Introduction

These submissions, made on behalf of the Vulnerable Energy Consumers' Coalition ("VECC") are in response to the Ontario Energy Board's own motion of June 10, 2003 to initiate a proceeding concerning proposed changes to the Distribution System Code (the "Code") to provide for rules with respect to the consumer security deposit policies of electricity distributors. The Board has also noted that consequential changes to the Retail Settlement Code are also being proposed, as a result of the changes to the Distribution System Code.

VECC has a particular interest in this proceeding because it touches on issues that are of concern to the groups that constitute this coalition. VECC represents the Ontario Coalition of Senior Citizens ("OCSCO"), the Ontario Coalition Against Poverty ("OCAP") and the Federation of Metro Tenants Association ("FMTA"). OCSCO is a coalition of over 120 senior groups, as well as individual members across Ontario and represents 500,000 senior citizens. OCSCO's objective is to improve the quality of life for Ontario Seniors. OCAP is an umbrella organization of regional and locally based anti-poverty groups throughout the province. The FMTA is a non-profit corporation composed of over ninety-two affiliated tenants associations, individual tenants, housing organizations, and members of non-profit housing co-ops.

These organizations have longstanding concerns associated with the provision of public services and utilities and their client groups, who are low income and fixed income consumers, are particularly affected by security deposit policies of utilities. VECC's submission, therefore, focuses on the proposed changes that will affect the residential customer rate class.

Argument

Overall, VECC supports the Board's proposal, following upon the recommendations of the working group, to standardize consumer security arrangements among electric Local Distribution Companies ("LDCs"). The current provision in the Retail Settlement Code places too much discretion in the hands of LDCs to impose security deposits on

consumers without any specific guidelines as to terms or amounts. This has resulted in inconsistent approaches, which has resulted in uncertainty and unfairness for residential consumers across the province. VECC therefore supports the requirement for LDCs to adhere to a set of minimum requirements in preparing their consumer security deposit policies.

VECC's concern, however is that even the adoption of uniform guidelines will have a disproportionate impact on low and fixed income consumers, given the maximum amount of security deposit that may be charged under the proposed amendments. VECC's position is that low-income residential customers should receive an exemption from LDC security deposit obligations, based on the definition of "low-income consumer", proposed by the Advocacy Centre for Tenants Ontario. It is VECC's submission that the Board has the authority under its enabling legislation, the *Ontario Energy Board Act*¹, to grant such an exemption.

The Board has the legislative authority to grant mandatory exemptions

The Board has a clear objective under Section 1 of the *Ontario Energy Board Act* to provide consumers with non-discriminatory access to electricity distribution systems in Ontario and to protect the interests of consumers with respect to prices.

The recent amendment to Section 88. (1) (z.4) of the *Ontario Energy Board Act* states that the Lieutenant Governor in Council may make regulations governing the amount of deposits charged by distributors as a condition of distributing electricity to consumers. We argue that this provision gives the authority to the Board, through the regulatory instrument of the Distribution System Code, to mandate exemptions to the requirement of a security deposit.

Residential customers do not present the greatest non-payment risk to LDCs

The Board has recognised that the residential customer rate class does not post the greatest degree of non-payment risk, as acknowledged in its June 10, 2003 Notice of

¹ *Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. A.*

Proceeding: "...large customers (> 50 kW), representing the greatest degree of non-payment risk, would have their deposit refunded after 7 years of GPH".

We also note that research on payment patterns of utility customers indicates that residential consumers tend to pay their utility bills before paying nearly any other obligation, other than rent or mortgage.² This supports the argument that distributors may exempt a certain portion of residential customers, without undue financial risk or risk of being held imprudent by the Board. The Board, in its August 14, 2002 letter reiterated that LDCs "are not intended to be held generally accountable or at risk for uncollected commodity costs from consumers."

The proposed formula for determining a consumer security deposit is prohibitive for low- income residential consumers

The proposed Code amendments set out a formula for calculating the maximum amounts of a security deposit which a distributor may require of a residential consumer, based on an average billing multiplied by a billing cycle factor. VECC's concern is that the formula allows maximum amounts that may be prohibitive for some consumers. For residential customers with an average monthly electricity bill of \$100, the maximum security deposit that could be charged would range from \$250 to \$450, depending upon the customer's billing cycle. These amounts could be prohibitive for many low and fixed income customers, as even a cursory analysis of income levels of those in the lower income brackets and the financial challenges they encounter reveals.

The overall impact of paying higher utility costs is much greater upon lower income residential consumers than any other class of consumers. The demand for utilities by residential consumers is virtually inelastic. A consumer's dependence upon these utilities is such that the consumer will continue to demand almost the same amount of service even if the price increases. Residential consumers who are also poor have an even more inelastic demand, being less able to choose between alternate suppliers of electricity than any other class of consumers.

² National Consumer Law Centre, *Access to Utility Service* (2nd ed. 2001) at 76

Statistics confirm this assertion. A recent Statistics Canada analysis of the widening gap between rich and poor Canadians strongly suggests the difficulties low-income families, who would not qualify for social assistance utility supports would face in having to pay a security deposit. The typical low-income family in 1999 had only \$300 in savings to protect it against unexpected financial hardships.³

In 1999, the lowest household income quintile (those earning less than \$20,520 per year) in Canada, spent, on average, more than twice the amount of their income on utilities (water, fuel and electricity) than the highest income quintile (those earning \$79,964 and over).⁴

There has been some judicial consideration of the constitutionality of charging security deposits to low-income residential consumers, which leaves open the possibility that the imposition of a security deposit on low-income customers may be found to be unconstitutional. Although the court in *Clark v. Peterborough Utilities Commission*⁵ found that the requirement of a security deposit upon the applicants, who were persons of limited income, was constitutional, we argue that the court was inconclusive on the issue of the constitutionality of effect of consumer security deposit policies on certain income groups.

We take issue with the working group's interpretation of this case, based on their meeting notes of October 9, 2002, page 3, which suggest that this case affirmed the legality of the requirement of a security deposit upon low income consumers by a distributor. It is our view that the decision cannot be so broadly interpreted and that it stands for the narrower proposition that, on the facts before this court, a constitutional argument could not be made. The court stated:

In conclusion, then, I find that the applicants have not proven that the P.U.C. policy violates s. 15(1). It may well be a provable proposition, using the P.U.C.'s records or

³ Statistics Canada, *The Daily* (July 18, 2002) at 13.

⁴ Statistics Canada, *Spending Patterns in Canada, 1999* (Ottawa: Industry Canada, August 2001) at 57.

⁵ 24 O.R. (3d) 7.

by a statistical survey of those of whom deposits are required or in other ways, but it has not been shown in close to any satisfactory way in this case. Strangely, the expert in utility practices retained by the applicants and the coalition, Roger Colton, was based in the United States...However, he did not analyze or have any knowledge of the Ontario or Peterborough situation nor did he have any knowledge of social welfare legislation in Ontario. Mr. Anand was unable to traverse the resulting evidentiary gap with law alone, impressive though the attempt was.⁶

The court's inconclusive approach to the issue of the legality of security deposits imposed by distributors upon low-income consumers in *Clark*, does not constrain the authority of the Board to exempt low income consumers from security deposit policies of LDCs.

The proposed amendments fail to address the relationship between non-payment of a security deposit and termination of service

The proposed amendments fail to address an important issue concerning consumer security deposits, whether non-payment of a security deposit is grounds for termination of service pursuant to section 31 of the *Electricity Act, 1998*. We note the comments by the Board in their August 14, 2002 letter regarding the co-ordination of a working group on consumer security deposits, that the Board had not “made a determination on whether non-payment of a consumer security deposit is grounds for termination of service pursuant to section 31 of the *Electricity Act, 1998*.” We are very concerned about this omission, particularly in light of the position taken by the working group in their Options Paper (April 10, 2003) that the LDC be given the ability to limit or disconnect service for a consumer's non-compliance with a security deposit requirement.

If the Board proceeds with the proposed amendments to the Code which would impose a security deposit requirement on all residential consumers, we propose that the Code be amended to state that non-payment of a consumer security deposit by a residential consumer be specifically exempted from distributor's power to terminate service under section 31 of the *Electricity Act, 1998*.

⁶ *Ibid.* per Howden J.

Conclusion

VECC recognizes that the rationale for applying a security deposit by a utility is to protect a utility from those customers who fail to pay their bills and protect other ratepayers who would be required to make up the loss of revenue from non-paying customers. This argument, however, must be weighed against other, equally compelling arguments. These include the actual financial capability of low and fixed income residential consumers to meet the obligation represented by a security deposit, the relatively low level of financial risk that would be posed by exempting consumers who met the required definition of low-income, and the ultimate impact of the inability to access electrical service by residential consumers.

Despite comments by some members of the working group that provided stakeholder input to the Board on this issue, that “Electricity is not defined as a necessity of life (not an essential service)”⁷ the provision of electrical service is well recognized as a necessity of modern urban life. In *Clark v. Peterborough Utilities Commission*, [1995] O.J. No. 1743 (Gen. Div.) the court, in considering the issues raised by the imposition of security deposits on low income customers, affirmed this:

“I recognize that the issues raised by these applications are of importance to all parties. They remain of importance to others in the position of these applicants in 1991, faced with a threatened denial of what is now a necessity of life in urban Canada.”

The U.S. Supreme Court has also affirmed this view by stating that “utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health or safety.”⁸

Recommendations

VECC recommends that the Board amend the Distribution System Code as follows:

⁷ Consumer Security Deposit Working Group, Meeting Notes - #3, (October 9, 2002) at 3.

⁸ *Memphis Gas Light and Water Division v. Craft*, 436 U.S. 1, 18 (1978).

Section 1.2 is amended to add the following definition: “low-income residential consumer” is a person with a household income level at or below the Low-Income Cut-offs (“LICOs”) defined by Statistics Canada, using pre-tax, post-transfer household income.

The proposed Section 2.4.6.1 is amended by adding after the last bullet “Where a security deposit is not paid by a residential consumer, a method of enforcement may not include termination of service.”

Add Section 2.4.6.1.1 - “A distributor shall waive all security deposit provisions of its Conditions of Service in favour of a low-income residential consumer.”

The proposed Section 2.4.11 is amended to add the following: - (c) verification that the consumer is a low-income residential consumer.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of July 2003.

Sue Lott, Counsel for
VULNERABLE ENERGY CONSUMERS’ COALITION (“VECC”)