Ontario Energy Board

ADVISORY REPORT ON LICENCE REQUIREMENTS FOR THE MARKETING OF NATURAL GAS AND ELECTRICITY TO RESIDENTIAL AND SMALL COMMERCIAL CONSUMERS

REPORT TO THE MINISTRY OF ENERGY, SCIENCE AND TECHNOLOGY

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INTRODUCTION

On July 10, 1998 the Board received a letter from the Deputy Minister of Energy, Science and Technology asking the Board to consult informally with stakeholders on the appropriate content of regulations that could be made under the proposed *Ontario Energy Board Act, 1998* ("the OEB Act, 1998" or "Act"), which forms part of Bill 35, which is currently before the Legislature. The proposed Act, if passed by the Legislature, would allow the Lieutenant Governor in Council to make regulations prescribing licence requirements and conditions for sellers of natural gas and electricity to residential and small commercial users.

To help focus the consultation, Board Staff prepared a discussion paper, which the Board sent to all interested parties. The discussion paper included draft consumer protection guidelines, questions regarding possible regulations, possible licence conditions, and a code of conduct that energy marketers might have to adhere to as a condition of a licence.

The Board received responses to the discussion paper, from the following 23 parties:

- A.E. Sharp Limited ("AESL")
- CENGAS
- Chatham-Kent Public Utilities Commission ("Chatham-Kent PUC")
- Competition Bureau
- Consumers Association of Canada ("CAC")
- Consumersfirst
- The Consumers Gas Company Ltd. and Union Gas Limited ("the Utilities")
- Enron Capital & Trade Resources Canada Corp. ("Enron")
- Mr. Peter Gilchrist, of Blake, Cassels & Graydon
- Green Energy Coalition (comprised of Energy Action Council of Toronto, Greenpeace Canada, Nuclear Awareness/Energy Action Project, and Sierra Club of Canada)
- Industrial Gas Users Association ("IGUA")
- City of Kitchener
- Municipal Electric Association ("The MEA")
- Ontario Energy Savings Corporation ("OESC")
- Ontario Hydro

- Port Hope Hydro
- Public Interest Advocacy Centre ("PIAC")
- The Restructuring Group (consisting of London Hydro, Lindsay Hydro Electric Commission, Sudbury Hydro Electric Commission, Collingwood Public Utilities Commission, and Flamborough Hydro Electric Commission)
- Sunoco Inc. ("Sunoco")
- Toronto Hydro-Electric Commission ("Toronto Hydro")
- TransCanada PipeLines
- TransCanada Gas Services ("TransCanada")
- Union Energy

Following the summary of stakeholders submissions the Board has provided its own comments. The Board has considered the arguments of stakeholders and has drawn on its observations of the natural gas retail sales market over the past ten years.

The Board wishes to thank all parties who have taken the time and effort to provide their input.

PART I: STAKEHOLDER COMMENTS

1. GENERAL ISSUES

In general terms, this summary closely follows staff's discussion paper. Nevertheless, a number of parties noted overarching concerns, which are addressed here.

CENGAS has raised a concern about the Board's jurisdiction. Specifically, CENGAS submits that licence conditions should not affect contract terms. Any regulatory conditions of licence made under s. 54(1) and s. 87(1) of the *Ontario Energy Board Act, 1998* should deal with the *qualifications* of an energy marketer to obtain a licence to carry on business. Conditions of licence should not intrude into the commercial terms upon which a qualified and licensed energy marketer offers services or commodities to the public. CENGAS also argues that if the Board makes rules under s. 43(1)(c) which purport to regulate the

commercial terms on which an energy marketer could offer products to consumers, the Board would be overstepping its jurisdiction.

The Restructuring Group points out that consumer protection must be carried out within a legislative framework that includes the following:

- The distinction between requirements, conditions and rules.
- The distinction between conditions which may be imposed by regulation and which may be imposed without regulations.
- Powers which may be delegated to a self-regulatory organization ("SRO").

In this regard, the Restructuring Group and others emphasized the importance of ensuring that consumer protection regulations give the Board and the SRO sufficient and clear authority to carry out the mandate in this area. For example, the Director's powers respecting gas and electricity marketing licences can be delegated to an SRO, but the enforcement of requirements prescribed by a regulation under s. 106(1)(j) of the proposed *Electricity Act, 1998*, cannot apparently be delegated to an SRO. According to the Restructuring Group, licensing conditions should be enforced under those sections that allow delegation.

TransCanada expresses concern about the ability of the proposed regulatory scheme to respond quickly to changing market conditions. TransCanada states that the body charged with establishing and maintaining the regulatory regime must be in a position to understand in detail the market environment, and react quickly to changes in it. That expertise, in TransCanada's view, is primarily the Board's, and the regulations should recognize that by giving the Board primary responsibility for making determinations with respect to eligibility for, and conditions to be included in, marketer licences. TransCanada states that the regulations should give the Board broad discretion to impose whatever conditions are necessary and appropriate and should not pre-determine conditions that the Board must impose.

2. POSSIBLE REGULATIONS

As noted in the discussion paper, Sections 54, 87(1)(a) and 126(1)(f) of the proposed OEB Act, 1998 allow the prescription by regulation of specific provisions, other than licence conditions, related to energy marketing. The following are proposals for regulations

specifically mentioned in these sections, together with the corresponding responses of interested parties.

2.1 Prescribing required definitions

Section 54(1)(d):
"low volume consumer" means a person who annually uses less than 50,000 m³ of gas for his or her own consumption and not for resale;

AESL states that the definition of "low volume consumer" is appropriate; however, the aggregated load of corporately related customers should be considered as the volume applying to the customer load.

Consumersfirst submits that the volume threshold should be customers with annual consumption of less than 50 000 m^3, with equivalent levels for electricity consumption.

CENGAS states that the definition should refer only to "natural persons". In light of their commercial sophistication, small corporations do not require the same degree of consumer protection as individuals.

Enron submits that the proposed definition of "low volume customer" is reasonable.

The City of Kitchener states that the definition of "low volume consumer" is appropriate.

Section 87(1)(a):
"residential or small business consumer" means a person who uses electricity at a demand of not more than 50 Kw, for his or her own consumption and not for resale;

Enron submits that the proposed definition of "residential or small business consumer" is reasonable.

Chatham-Kent PUC submits that while the 50 kW demand is a recognized break in current rate schedules for commercial loads, it does not reflect a level below which you would find all small consumers. It states that it is more appropriate for the qualification to be an annual consumption as with the one proposed for gas.

The MEA submits that the definition of "residential or small business customers" is reasonable. The MEA submits, however, that since demands vary from month to month, it is better to define a small commercial customer by the annual consumption. The MEA recommends that the annual consumption of 150,000 kWh be used to demarcate small customers from the larger customers.

Port Hope Hydro states that the above definition raises numerous questions. For instance, is the 50 kW referred to an average monthly demand, a monthly peak demand or an instantaneous demand? It cites the example of a spot welding operation that could register a peak load of 30 kW and have an instantaneous load of 100 - 200 kW. It notes that traditionally this facility would be classified as a General Service, but that under the proposed definition this type of customer may fall into the residential/small commercial class. To establish a cut-off point for consumer protection, Port Hope Hydro suggests ranges of 500 Kw, 1, 3 or 5 Mw, based on maintaining a minimum monthly peak over twelve consecutive months.

Sunoco submits that the regulations should be clarified in order to restrict their application to low volume consumers and residential or small business customers.

TransCanada accepts the proposed definitions of "low volume customer" and "residential or small business consumer"

2.2 Prescribing classes of gas marketer licences, section 54(1)(c)

Board Staff asked whether there is a need for different classes of marketer licences. The responses are as follows.

AESL suggests that there should be two classes of licences:

- "corporate" - any corporation selling to low volume customers with exception of Class "A" utilities which are already covered under legislation; and
- "individual" - any person selling to low volume customers.

AESL also states, however, that the requirements for electricity retail licences should include all the requirements imposed for obtaining a natural gas marketing licence.

CENGAS submits that all gas marketers should be subject to the same conditions of licence since they are all engaged in the same activity. Creating different classes of licences could impair the development of a competitive market.

Chatham-Kent PUC sees no need for different classes of marketer licences.

Consumersfirst sees little merit in, or need for, the establishment of different categories of gas marketer licences, and states that it would be appropriate to establish a licence category for combining gas and electricity marketing.

Enron stated that all entities competing in retail natural gas and electricity markets should be subject to the same licensing requirements.

The City of Kitchener submits that municipal gas utilities ("MGU") will require special regulations. Specifically, the main difference respecting the MGU marketing is the fact that the same entity provides a monopoly delivery service. Accordingly the Director will want to impose conditions on the MGU that will protect against cross-subsidization from the delivery operation. The City of Kitchener points out that its operation is controlled by the municipal authority and not the OEB, and that a municipal corporation cannot incorporate an affiliate. The City suggests that the regulation should enable the Director to impose conditions on the MGU to provide sufficient accounting statements to show that the gas marketing program is self-sustaining.

The City of Kitchener also notes that should an MGU market outside its municipal borders, the non-municipal customers will not have the same direct political influence on the municipal council as those customers within the municipality. Therefore, it may be necessary to impose different conditions on an MGU marketing outside of its borders.

The MEA supports the use of provisions that allow marketers to apply for licences based on geographic boundaries and customer classification (e.g. industrial, commercial and residential). The MEA also holds that for reasons of consumer education, it is necessary to differentiate marketers on the basis of whether or not they take title to the commodity. Accordingly, the MEA recommends expanding the definitions of marketer and broker as follows:

> "marketer" - an entity that takes title to commodity and acts as an intermediary for sale to retail customers.

"broker" - an entity that acts as an agent for a customer or groups of customers in the sale or purchase of the commodity but does not take title to the commodity.

OESC submits that there should be one class of marketers. However, if restrictions or classes are deemed necessary, affiliates or regulated utilities and municipal utilities should not be permitted to use the monopoly company's name in any form.

Ontario Hydro states that a different class of licence may be needed for parties providing default supply, particularly if the default supply is to be provided by the regulated delivery utility. Also, licences for affiliates of local distributing companies (or other regulated network services in Ontario) would likely require sections addressing the required code of conduct between the two and any other special issues or circumstances.

PIAC states that classes of marketer licences would be useful. PIAC lists the following examples:

- Low volume gas marketers licence.
- Large volume only gas marketers licence.
- Low demand electricity marketers licence.
- A special licence for applicants of an LDC and municipal utilities who wish to serve low or large volume consumers, such licences should require that the director be satisfied that cross-subsidization would not occur.

The Restructuring Group submits that the licensing requirements should apply to both gas and electricity marketers, and that one licence should be available for both gas and electricity should a marketer propose to provide both services.

Sunoco believes that there should not be separate classes of gas marketer licences, and further, that s. 35(8) of the proposed *Ontario Energy Board Act, 1998* be deleted.

Toronto Hydro holds that brokers and marketers who participate in a number of different capacities covering various customer classes, should not be required to obtain several different licences through multiple applications, and states that one consolidated licence would be most appropriate and effective.

TransCanada is prepared to accept that unregulated municipal gas utilities may need to be treated as a separate class from private marketing companies, but at this point has no firm

views on what rules or conditions would be appropriate for such a class. TransCanada submits that any special rules applicable to municipal gas utilities should not provide such entities with a competitive advantage over commercial marketers when the municipal utilities are operating outside of their own franchise areas. Apart from the special case of municipal gas utilities, TransCanada sees no need to establish separate classes of gas marketer licences.

The Utilities believe that different classes of marketer licences are not necessary. The only class of licence required would be for: "Any party selling natural gas to end users consuming 50,000 m^3 or less with or without other components of burner-tip delivery services on an unregulated basis." However, some clarification is needed as to whether municipal gas utilities need a licence to sell gas within and/or outside their franchise areas.

The Utilities also submit that a licence should be required for each ABM as well as for individual salespeople, operating in the retail and small commercial sector. Sunoco concurs, stating that all salespeople, agents or contractors having contact with customers should be licensed.

2.3 Prescribing requirements for a licence, sections 54(1)(e) and 87(1)(a)

As indicated by Board Staff, section 50 lists grounds for the refusal of a gas marketer's licence, and contemplates in subsection (e) that further requirements may be imposed by regulation. Board Staff asked what further requirements, if any, should be required by a regulation passed under section 54(1)(e). It should be noted that these sections appear to deal with prerequisites for a licence and grounds for refusal, not actual licence conditions. Section 54(2) lists some examples of requirements that might be made by regulation. The responses are as follows:

Chatham-Kent PUC suggests the following requirements:

- Proof of financial viability, in the form of audited financial statements and credit ratings.
- A statement of operating experience, which would indicate qualifications of senior management.
- A statement as to jurisdictions in which the licence applicant is already operating.
- Details of staff training, and methods of monitoring field performance.

The Competition Bureau noted that minimizing any licensing related barriers to entering electricity or natural gas sales in Ontario will be important both for promoting entry, or the threat of it, as a competitive discipline on market incumbents, and for ensuring the efficient allocation of demand among market participants.

Consumersfirst proposes the following additional licensing requirements:

- The marketer must be in good standing with licensing entities in other (Canadian and/or U.S.) jurisdictions.
- The marketer must provide all information reasonably required by the Director to establish licence entitlement.
- The marketer has dedicated resources sufficient to manage and resolve customer complaints.
- The marketer should maintain a list of all third party subcontractors or independent agents marketing on their behalf.

Enron states that no further requirements should be imposed by regulation.

The City of Kitchener indicates that additional regulations prescribing full, unambiguous disclosure of all documented communication to prospective customers would be beneficial.

The MEA submits that the requirements for gas and electricity marketers should be the same, and that grounds for refusal of a licence should relate to the past activities or practices of an entity applying for a licence. Examples of such conditions include financial performance, questionable or unethical marketing practices and/or past indiscretions of the directors or officers of the applicant entity. The MEA believes that the single most important requirement that must be added to this section is the refusal of a licence based on the inability of an entity (gas or electric) to meet the requirements of the licensing condition section. The MEA states that more rigorous licensing conditions should be established that focus on providing proof of financial fitness, credit worthiness, capitalization and history of financial performance (i.e. past bankruptcies).

Ontario Hydro lists the following licensing considerations: billing and settlements capability, certified sales professionals, customer service capability, financial strength and appropriate capitalization.

Port Hope Hydro suggests the following prerequisites to licensing: reasonably sound financial status; past conduct affording reasonable grounds for the belief that the licence applicant will carry on business with integrity and honesty.
PIAC suggests the following conditions for issuing licences:

- Evaluation of proposed media and promotional material in regard to clarity and honesty
- Requirement to notify director on an agreed regular basis regarding complaints received and handling thereof
- Declaration to abide by Code of Conduct
- Details of employees and hiring standards
- Ability to fulfil all terms of contracts entered into with consumers
- No track record of failures to serve the public adequately in regard to supply, fulfillment of contract terms, adequate communication with customers
- Signed affidavit accepting all conditions of the licence
- Additional contract terms should be required concerning the roll-over of the contract term by which customers are given written notice of the expiry of the contract 3 months prior to such expiry. There should be no automatic renewal of existing terms. The renewal notice should indicate other renewal options available at the time in question.
- Code of Conduct must apply and be enforced retroactively to existing contracts.

Sunoco submits that an Ontario Energy Marketing Association ("OEMA") membership in good standing should be a prerequisite for securing a licence.

TransCanada does not believe that further requirements for licences need to be prescribed by legislation.

Union Energy states that the conditions specified in section 50(a) through (d) are sufficient to manage the issuance and renewal of licences.

As noted in the discussion paper, section 87(1)(a) allows for the prescription of requirements for an electricity retailer's licence if the retailer is to retail to residential or small business consumers. Such a regulation may only prescribe the requirements listed under section 50 or those prescribed by regulation under section 54(1)(e). Board Staff asked whether the requirements for electricity retail licences include all the requirements imposed for obtaining a gas marketer licence?

Chatham-Kent PUC states that it makes sense to have a single set of consumer protection requirements for electricity and gas.

CAC believes that there should be only one class of marketer licence.

Consumersfirst strongly supports the development of a single set of consumer protection requirements for the marketing of electricity and natural gas to low volume consumers.

Port Hope Hydro submits that natural gas and electricity licences should be considered separate entities with different requirements for acquisition, but does not specify what those different requirements would be.

PIAC would like to see, as much as possible, regulations that apply to both gas and electricity marketers.

The Restructuring Group submits that compliance with the code of conduct should be a licence requirement. The establishment of a code of conduct as a Rule of the Board is insufficient, as the Rules apply to gas marketers (s. 43(1)(c)), not electricity participants.

According to Sunoco, the requirements for electricity retail licences and gas marketing licences should be equivalent.

2.4 Prescribing the form of security, section 54(1)(f)

Board Staff asked what form of security, if any, should be filed with the Director? The following was suggested:

"An energy marketer may be required to post a bond which provides for the forfeiture to the Director of the amount named in the bond. The amount of the bond shall not exceed $250,000."

AESL states that each marketer should be required to post a bond, the value of which shall be dependent upon the volume flowing to Ontario customers.

CENGAS opposes such a licensing requirement as unnecessary and as constituting a potential barrier to entry into the market. CENGAS submits that the requirement contained

in section 50(a) of the OEB Act that an applicant for a licence "reasonably be expected to be financially responsible in the conduct of business" can be satisfied by requiring the disclosure of audited financial information.

Chatham-Kent PUC states that the intent of the bond is not clear, noting that it must made clear whether the intent is to make this amount available to the consumer as security for non-performance.

CAC submits that the requirement that licencees post some form of security is essential; the amount of any bond should be, at minimum, the equivalent in value of two months of any marketer's contract obligations.

While Consumersfirst believes that posting some form of security to cover the financial risk of the Director would not be unreasonable, it stated that it could not assess the reasonableness of the proposed limit of $250,000. Consumersfirst also made the following recommendations:

- A prohibition against claims by marketers to low volume customers that the Government has bonded the marketer.
- Clear procedures with respect to forfeiture.
- Clear guidelines regarding the basis for the initial assessment of the magnitude of the bond.
- Consideration given to alternative forms of security.
- Clear rules for a notice period, if it is contemplated that the Director can request a bond or increase the dollar amount of the bond.

Enron states that parties need a clear understanding of which obligations of a retailer the proposed bond would secure. Until that issue is clarified, a retailer should not be obliged to comply with any bonding/security arrangements over and above the credit requirements set forth in the tariffs of natural gas and electricity distributors and in the IMO accreditation requirements.

The MEA submits that all energy marketers and brokers should be required to post a bond of a specific dollar amount of $250,000, in order to protect the market from being saturated by marketers who may not have the financial wherewithal to sustain a viable operation.

OESC holds that all energy marketers to the retail sector should be required to post a bond in a reasonable amount.

Port Hope Hydro states that security in the form of bonds should be inverse to the size or class of customer, sufficient in amount but not debilitating. The regulated distribution company would not be required to post bonds for selling to customers in their franchise area, but would be required to do so if it competed outside the franchise area with its regular rate structure.

PIAC submits that bonding is unnecessary if licence and penalty provisions are sufficient and acted upon. Also, a bond requirement can be a barrier to the entry of small, but possibly innovative, new players.

The Restructuring Group states that bonding requirements may be a condition of licensing, but electricity distributors should not be precluded from taking whatever steps they consider necessary to require retailers to meet their financial and supply obligations as a precondition to allowing access to distribution systems.

Sunoco holds that all natural gas marketers and electricity marketers should be required to post a surety bond for the same, reasonable amount. The conditions of forfeiture of this security should be clearly set out in the bond documentation and the regulations, and should essentially relate to supply failure.

Toronto Hydro states that posting a bond would serve to prevent "fly by night" marketers from entering the market. It should reflect the size of the market in which the marketer will be operating, and the potential size of default. The amount should cover the cost of damages to consumers, other marketers and the Director. Toronto Hydro recommends security of no less than $1 million for the Toronto market.

TransCanada is satisfied with the proposal set out in the Staff Discussion Paper with respect to form of security.

Union Energy states that the use of a bond as a form of security may create a barrier to entry for smaller marketers. The amount of the bond should be directly related to the number of customers the marketer is serving at the beginning of any licensing period, revisited annually. This would ensure that small marketers are not restricted from entering

the market. Also, the amount of the bond that must be posted should take into consideration the possibility of a supply failure.

The Utilities recommend that the performance bond should be a variable rate.

2.5 Exemptions, section 126(1)(f)

Board Staff asked whether any person or class of persons be made exempt from the requirement to obtain a licence to carry on the business of gas marketing or electricity retailing to residential and small commercial consumers. In other words, should any person or class of persons be exempt from some of the requirements for obtaining a licence or the conditions attached thereto?

AESL, CENGAS, CAC, Enron, MEA, OEMA, Sunoco, Port Hope Hydro, the Restructuring Group, Toronto Hydro, and TransCanada all essentially hold that there is no need to exempt any persons or classes of persons from the requirement to obtain a marketing licence.

Consumersfirst submits that exemptions should be avoided to ensure the development of a level playing field.

Chatham-Kent submits that the only exemption from a marketing licence for the sale of electricity or gas would be the sale of a regulated standard system offering. This would be applicable to the distribution company, an affiliate, or another person that meets the requirements of section 28 of the *Electricity Act, 1998*. Any affiliate or another person would require a marketing licence for sale of any unregulated retail offering.

The City of Kitchener states that if separate classes of license are provided for in section 54(1)(c), there does not appear to be a need for exemptions from licensing or specific requirements.

Port Hope Hydro states that regulated distribution companies should be required to be licensed as well, in order to maintain a level playing field.

Union Energy submits that there may be situations where several end use locations that consume less than 50,000 m^3. It would seem that individuals who own several properties and wish to purchase gas on a combined basis should not be required to have a licence. Buying groups may represent a class of persons that require some exemption from licensing.

The Utilities state that no person or class of persons should be exempt from any licensing requirements/conditions in order to carry on the business of gas marketing or electricity retailing to residential and small commercial customers, except for those providing regulated supply.

3. POSSIBLE LICENCE CONDITIONS

Board Staff suggested the following items as conditions attached to marketer licences. For gas marketing licences, the ability of the Board or the Director to impose these conditions may need to be authorized by regulation, due to sections 49(3) and 52(6) of the proposed OEB Act, 1998. Section 54(1)(a) allows for the prescription of optional types of conditions that may be imposed, and subsection 54(1)(b) allows for the prescription of mandatory conditions. Board Staff asked which conditions should be optional and which mandatory. For electricity retailers, consumer protection provisions may be passed by regulation under section 106(1)(j) of the proposed Electricity Act, 1998, or may be imposed as a condition of a licence under section 69.

Consumersfirst states that all of the proposed licence conditions set out in the Discussion Paper, if implemented, should be mandatory and imposed on all licence holders. Consumersfirst also submits, however, that the Director should have broad flexibility to impose specific conditions on individual marketers in response to past conduct, as an alternative to non-renewal, revocation or suspension of a licence.

TransCanada states that generally applicable licence conditions should be established by the Board through a rulemaking proceeding or other generic process. TransCanada submitted that in order to meet the requirement of section 49(3), the regulations should simply authorize the Board to impose any conditions it considers necessary in order to protect the public interest.

3.1 Term

- *A licence issued by the Director or the Board shall not exceed a period of five years.*

Consumersfirst submits that a maximum term of 5 years appears reasonable, but recommends that consideration be given to the impact on a marketer's customers if a licence is revoked, suspended, or not renewed.

The Municipality of Chatham-Kent PUC states that it is unclear why the term would be for five years, and suggests that the licence revocation process could take the place of the licence renewal process.

The MEA submits that a licensing term of five years is reasonable, provided that the licences to the marketers can be revoked at any time by the regulator.

OESC states that the licence term should not be specific, but rather subject to annual review.

Sunoco states that the proposed five-year term for the marketing licence is problematic, in that it could mean that a marketer is restricted from contracting beyond the term of its current licence. Sunoco submits that a licence of an indefinite duration which could be revoked for non-payment of annual fees or non-compliance with the Act or the regulations would be more appropriate.

TransCanada submits that there is no clear basis for limiting the term of marketer licences to five years. It believes that as long as there is an ongoing requirement to pay an annual fee, and jurisdiction to suspend or revoke an existing licence as provided in s. 51(2), there would not appear to be any real need to require marketers to reapply for licences at five-year intervals.

3.2 Fees

- *The licence holder shall pay to the Director the annual fee or assessment as prescribed by regulation or set by the Board*

Chatham-Kent states that it may be appropriate to have a variable fee reflecting the business activity, and that fees collected could cover the cost of licensing.

Consumersfirst recommends that the licence fee should cover the costs of licence administration and compliance. A fee structure should take into account those gas marketers whose activities result in increased customer complaints that result in higher administrative costs.

The MEA recommends that the costs of administering the licensing system be recovered from the licence holders through an annual fee.
PIAC suggests that the fees should cover the cost of administration of private sector marketing activities.

TransCanada has no comment on the requirement to pay an annual fee or assessment, assuming that such an assessment will be reasonable, and not so high that it would create a barrier to entry for gas marketers.

The Utilities submit that the licensing fees should cover the costs of the licensing regime. A variable fee schedule based on size or number of customers, may be appropriate.

3.3 Information and identification

- *Every energy marketer and salesperson shall, when marketing, use the name under which the energy marketer is licensed, and any reference to the name of a salesperson in any advertisement of the energy marketer shall clearly indicate the marketer for whom that salesperson acts.*

Port Hope Hydro would add the following provision: "Every energy marketer and sales person shall be licensed."

- *Every energy marketer shall maintain a list of salespersons who act for that energy marketer, and this list shall be filed with the Director and updated forthwith to reflect any changes.*

CENGAS submits that it would be more efficient to require energy marketers simply to keep on file much of the information that the Director could then request to see when the need arose.

Enron states that this requirement is unnecessarily burdensome.

The MEA submits that the marketer should be obliged to keep a record of their salespersons' training and sales for audit purposes, and should submit the information on the regulator's request. As well, the name of the salesperson should be printed on the contracts he or she obtained. The marketer should keep track of who signed up what customers.

Toronto Hydro would replace "and updated forthwith to reflect any changes" with "at the time of licence renewal", stating that the list of sales persons will always be in flux, and that annual filing should suffice.

TransCanada submits that obtaining and filing the information referred to in this section could represent a significant administrative burden, and that the benefits of having this information would be outweighed by the costs imposed on marketers.

Union Energy states that the requirement to provide a list of salespersons will invariably result in the submission of a company directory. Union Energy feels that this level of detail would not be helpful to the Director and would provide for an additional layer of administration when managing turnover in an organization. Union Energy recommends that the Director have the power and authority to verify if any particular salesperson acted for any energy marketer.

- *The Director may approve a standard form of identification and require that an energy marketer, or an energy marketer's salesperson, provide such identification when retailing.*

CAC submits that the word "retailing" should be defined.

Toronto Hydro states that this requirement should be limited to the specific type of information the Director requires, such as the name of the company, name of the salesperson, photograph of the salesperson, etc., as opposed to specifying the exact configuration and presentation of that information.

- *Every energy marketer shall conduct the business of retailing energy from an address in Ontario and shall have a telephone number listed in Ontario which may be reached by the general public.*

Enron is opposed to the requirement that small volume energy marketers conduct the business of retailing from an address in Ontario.

The Restructuring Group submits that marketing from places outside Ontario should not be prohibited.

Sunoco believes that the requirement of conducting the business of retailing energy from Ontario is unnecessarily prohibitive and would prevent, for example, telephone marketing from New Brunswick to Ontario.

The Utilities agree with the above provision.

- *Every energy marketer shall keep a list of its customers, a signed copy of the contract with each customer, and a list of customer complaints including the nature of the complaint and its resolution.*

AESL is opposed to the above provision.

Consumersfirst supports the requirement that each energy marketer maintain a list of customer complaints, but recommends that the Director develop a standard complaint code.

The Restructuring Group points out that many MEUs do not have written contracts with their existing customers and MEUs may provide the standard service offering pursuant to statutory, not contractual, obligations. The Restructuring Group submits that licensing conditions respecting distribution companies should not impose rules regarding contractual terms for the Standard Service Offering ("SSO").

Sunoco believes that a copy of the customer contract is sufficient, rather than a "signed" copy of the contract, in light of possible future contracts concluded through the Internet.

Toronto Hydro would delete the requirement of a list of customer complaints, noting that a less burdensome approach would be to require all energy marketers to provide information on the level of customer satisfaction based on standard surveys.

Union Energy is not certain as to the intent or goal of ensuring that each energy marketer have a signed copy of the contract with each customer. Union Energy states that it is likely that some marketers will choose to conduct business using methods that will not result in a

signed contract, i.e. Internet commerce and verbal contracts. Union Energy referred to item 11 of the sample Code of Conduct which states that consumers must be provided with a copy of any signed contract or agency agreement or any agreed upon offer.

Union Energy also stated that it would be impractical to document each inquiry and its resolution and certainly inefficient to store this information either electronically or as a hard copy. Union Energy noted that the discussion paper does not define what a customer complaint is and that its opinion would vary depending on the definition.

The Utilities agree with the above provision.

- *An energy marketer shall, on the request of the Director, provide the information required in order to investigate whether the energy marketer is entitled to renewal of the licence and whether the energy marketer is in compliance with licence conditions. Such information may be filed in confidence, and may be subject to audit.*

The Restructuring Group submits that the type of information to be filed should be more clearly specified.

3.4 Contracts

Ontario Hydro states that where marketers are licensed to sell more than one commodity, a separate contract should be required for each commodity and there should be no tied selling or cross-referencing between contracts.

- *Every contract offered for the sale of natural gas or electricity by an energy marketer shall contain a provision that allows a customer to void the contract or agency agreement within 30 days of signing.*

CENGAS and the Restructuring Group submit that the regulatory "cooling off" period for the rescission of a consumer energy contract should remain at the two days set out in s.21 of the *Consumer Protection Act*.

The Competition Bureau submits that restrictions on contractual relations should be minimal. The Bureau points out that the 30 day opt out period is in excess of the period normally required in other consumer statutes. Implementing this longer period may increase

the costs to energy marketers who will be required to provide a firm offer which may be repudiated anytime over an ensuing one month period. These costs may be passed on to consumers.

The MEA believes that a window of 30 days is too long, and recommends the following provisions:

- Within the first five working days of signing, a customer can void the contract. After the 5-day period has expired, a customer should be required to remain with their supplier of choice for a minimum of 30 days.
- Within the first thirty days, a customer can choose to leave at the end of the first 30 days and there should be no penalty for the cancellation.
- After the first 30 days, cancellation terms and conditions in the contract will apply.

OESC states that the ability to cancel a contract should be uniform throughout the province.

Toronto Hydro states that the period in which customers can terminate agreements should be limited to 48 hours after the initial execution of the contract, noting that once a consumer makes an informed decision to enter into a contract he/she should be held responsible for decisions.

According to TransCanada, roughly the same requirement is currently in effect for all small volume gas customers. TransCanada does not object to the continuation of this requirement as a condition of marketer licences. At the same time, however, TransCanada believes that the Board should retain the ability to revisit this requirement in the event that market conditions change, and, in particular, if the provision becomes unworkable through overuse.

- *Every contract offered for the sale of natural gas or electricity by an energy marketer shall contain a provision allowing for a customer to cancel that contract upon payment of a reasonable fee.*

AESL is opposed to the above provision.

The Competition Bureau submits that guaranteeing consumers the ability to opt out of contracts subject to the payment of a fee could distort the development and pricing of longer term supply offerings to the detriment of consumers and marketers.

CENGAS is opposed to this provision, which it regards as a fundamental deviation from the principles of the common law of contract. CENGAS submits that valid energy consumer contracts should stand on no different footing than any other kind of contract, and that the retail energy market should be left free to develop its own diversity of contractual "products" in response to market and consumer forces.

Chatham-Kent PUC states that the above provision is reasonable. It submitted that the marketer should have the right to negotiate this with the consumer to the limits prescribed by a formula that would be established by the OEB.

Consumersfirst strongly supports the concept of an "exit fee" and recommends that a dollar limit be established by the LGIC on the size of that fee, which should be set as low as possible to encourage customer mobility.

Mr. Peter Gilchrist, of Blake, Cassels & Graydon, on his own behalf, states that a rule like this is a direct abrogation of the principles of freedom of contract and that the waiving of lost profits is a political decision. Mr. Gilchrist maintains that if it is to be implemented, the right to cancel ought to be reciprocal. Mr. Gilchrist notes that if a marketer knows its contract with the consumer can be terminated without notice, it will be reluctant to make the long-term commitment for energy supply that is often necessary to get the best price. Taken to an extreme, it means that customers will be serviced off the spot market.

The MEA submits that energy marketers or brokers should not be forced to include a cancellation fee in the terms and conditions of their agreement. The MEA recommends that any fees or penalty assessed by the marketer for early termination of the contract by the customer should be required to be specific and clearly stated in the contract.

Ontario Energy Savings Corporation states that customers should not be allowed to cancel contracts mid-term upon payment of a fee.

The Restructuring Group states that if cancellation fees are to be addressed in licences, they should reflect a supplier's actual financial loss that it incurs when a customer breaks a contract. The same principle should apply where customers leave the SSO. The Group also submits that if a retailer is entitled to be reimbursed for its costs of losing a customer, a distribution company should as well. Otherwise, the costs to a distribution company are passed on to customers who remain on the SSO option.

Sunoco states that this section is unwarranted, since most responsible energy marketers will not be prepared to sign a five year supply commitment with a customer who is able to cancel the contract upon payment of a fee. Sunoco submits that the only fee that will adequately compensate the marketer in the event of contract cancellation is the cost incurred by the energy marketer to cancel any natural gas and pipeline supply commitments, the marketing costs to acquire the customers, plus reasonable profit. Also, Sunoco holds that if this section is included in the regulations:

- It should be restricted to offers to low volume consumers and should not extend to large industrial or commercial customers.

- It should be limited to contracts for over one year (excluding renewals) since it is not reasonable to permit contract cancellation for a contract which is less than one year.

- The definition of reasonable fees should include the cost incurred by the energy marketer to cancel any natural gas and pipeline supply commitments, the marketing costs to acquire the customer, plus a reasonable profit.

Toronto Hydro submits that the word "reasonable" should be deleted, and that an appropriate cancellation process would include both the requirement for adequate notice to the marketer (at least 2 months) and the payment of some percentage of the balance owing under the contract (e.g. at least 5% of the contract balance).

TransCanada states that it does not believe that such "exit fees" are an appropriate mechanism for achieving the goal of enhanced customer mobility. In TransCanada's view, the proper result is that customers should be free to switch suppliers at any time they choose, even if that would amount to a breach of contract vis-à-vis the existing supplier. The supplier could then choose whether to pursue remedies for breach of contract.

TransCanada submits that this complex and economically important debate should be resolved through various ongoing Board-sponsored consultative processes or, if those processes fail, through a formal adjudicative procedure. TransCanada does not believe that the government regulation-making process, or an informal comment procedure associated with that process, are appropriate mechanisms for resolving these issues.

Union Energy states that a provision allowing a customer to cancel a contract upon payment of a reasonable fee would enable customers to decide for themselves who they want to deal with, and as a result, create discipline in the marketplace. Marketers will compete on service to try to retain customers rather than binding customers to long term contracts with no way to exit.

- *No energy marketer shall transfer a contract or agency agreement to another person who is not an energy marketer.*

OESC submits that the requirements regarding the assignment of contracts seem overly restrictive.

Sunoco states that the proposed restrictions on assignment of customer contracts are unreasonable, and that there is no good reason for limiting or restricting assignment, as long as contracts or agency agreements are transferred to a licensed energy marketer.

- *An energy marketer who transfers a contract or an agency agreement to another energy marketer shall notify the Director in writing 5 days before the transfer is to take place.*

CENGAS regards this provision as "another example of undue regulatory intrusion into the realm of contract."

Chatham-Kent PUC states that distribution company must be notified in addition to the Director.

Enron submits that retailers should not be obligated, as a matter of course, to advise the Director in advance of any transfer of customers between retailers. Enron states that the only notification required in respect of customer transfers should be to the distributors affected in order that they may update their customer databases.

Toronto Hydro states that there is no need to inform the Director of such a transfer.

- *No energy marketer shall transfer a contract or an agency agreement without reasonable prior notice in writing to the customer named in the contract.*

The MEA believes that contracts should be transferable to another licensed marketer provided that the customers are given prior notice in writing and the option to cancel the contract.

Port Hope Hydro states that contracts should be non-transferable except with the written consent of all parties to that contract and such transfers should not be a requirement in establishing those contracts.
Toronto Hydro submits that consumers may object strongly to being the customer of an energy marketer they did not choose, and suggested the following wording:

> "Before transferring a contract or an agency agreement to another energy marketer, the original energy marketer shall provide 60 days notice in writing to the customer named in the contract. Consumers who do not want to be transferred to a new energy marketer shall have 90 days after they received notice to advise the original energy marketer in writing [of] their intention to end the contract with obligation to pay the stipulated fee."

- *A contract for natural gas or electricity shall not exceed a period of five years.*

Consumersfirst supports a licence condition and code of conduct that explicitly state that the maximum term of a contract is 5 years and that a negative option renewal is not permitted.

Consumersfirst states that it does not understand the distinction being made between an Agency Appointment Letter ("AAL") and contract with respect to term and renewal rights. Consumersfirst understands that as a matter of law a party can change agent at any time, although any gas purchase arrangements, which the agent has entered into with third parties on behalf of the customer, remain valid until their expiry date.

The MEA states that contract term requirements should be considered, that prevent marketers from contracting with customers for an extended period of time (e.g. 3 - 5 years).

The Restructuring Group submits that the length of contracts should be left to the parties.

Toronto Hydro states that there is no need to limit the length of a contract with all the other protections and exit provisions provided to the consumer, and other protection in contract law, noting that the market place will determine whether a contract is too long.

3.5 Code of conduct

- *The Director or the Board may/shall impose, as a condition of the licence issued to an energy marketer, a requirement that the energy marketer adhere to a code of conduct established as a rule of the Board.*

The MEA recommends that the following point be added:

> "The Director or the Board may impose penalties on, or revoke the licence of, a marketer that violates the code of conduct."

PIAC suggests that contracts that are obtained in a manner that contravenes the Code of Conduct or other licence requirements should be void.

Toronto Hydro states that the redress process and possible penalties should be specified.

The Utilities believe that compliance with a code of conduct should be a requirement for maintaining a licence in good standing.

- *The Director or the Board may/shall impose, as a condition of a licence issued to an energy marketer, a procedure for the resolution of customer complaints.*

Chatham-Kent PUC supports the above condition, and notes that market responsibility may be enhanced if an independent market organization is empowered to establish a self-governing body. It also suggests that there should be a mechanism for a consumer to access a register to investigate any past performance issues.

Consumersfirst does not support a complaint procedure imposed by the Director as a licence condition, but proposes that as a condition of licence the energy marketer be obligated to have procedures for resolving customer complaints, and be obligated to resolve such customer complaints. Also, customers should be made aware of alternative avenues available to pursue their complaints.

Consumersfirst submits that another objective of a licensing regime should be to protect consumers from poor or non-performance by marketers during the term of their contract. The Director should monitor and investigate customer complaints and take appropriate steps if the marketer has failed to live up to its obligations.

Consumersfirst submits that another objective of a licensing regime should be to protect consumers from poor or non-performance by marketers during the term of their contract. The Director should monitor and investigate customer complaints and take appropriate steps if the marketer has failed to live up to its obligations.

Enron submitted that issues relating to marketing and advertising practices should be addressed under the body of law (including the *Consumer Protection Act* and the *Business Practices Act*) generally applicable to retail markets rather than in a code of conduct.

Port Hope submitted that the Board must establish and impose a procedure for the resolution of customer complaints, which would resolve issues between customer and energy supplier, as well as between energy supplier and distribution company where the distribution company is not the energy supplier.

PIAC suggests failure to deliver gas to the LDC or to adhere to contractual terms on a repeated basis should constitute grounds for suspension or withdrawal of a licence.

The Utilities believe there is a need for a complaint registry, and that a distinction should be made between complaints "made", and complaints "proven to be valid". Also, ABMs should provide annually to the Director of Licensing a summary of the number of complaints, the number resolved and the average timelines to resolution. A third party verification process might assist in minimizing customer complaints.

CAC submits that the regulations should provide that every licence must contain a condition that the licence holder is required to comply with the Board's rules and any code of conduct.

OESC states that it may be appropriate to consider whether some conditions of a licence and an applicable code of conduct should apply to the market as a whole.

3.6 Other licence conditions

CAC notes that:

- energy marketers should be required to provide the Director with certain minimum information about all complaints made against it;
- information provided to the Director or the Board should not be confidential;

- all contracts should be required to contain the minimum information prescribed by the Board.

Consumersfirst recommends as licence conditions, that each energy marketer:

- Maintain records of the time frame required to resolve customer complaints.
- Advise the customer of the alternative avenues available to seek recourse, if a complaint cannot be resolved in a reasonable time frame.
- Provide with each offer a customer bill of rights.
- Comply with a code of conduct established as a rule of the Board and enforced by the Director.

The MEA stated that the contract should provide a clear explanation of the customer's financial obligations as well as the procedure regarding past due payments, discontinuance of service, billing disputes, and service complaints. The MEA also submitted that to avoid expenses for special final meter reading and bills, customers should be encouraged to have their switches of suppliers occur at the end of a billing cycle. The MEA recommends that automatic renewal of a contract be allowed only if the marketer provides clear advance renewal notice to the customer and the customer is given the option to cancel the contract within thirty days after the renewal date.

OESC states that the licence should require that the seller be a member in good standing of the Ontario Energy Marketers Association; also, all salespersons of licensed companies should be licensed by OEMA.

Port Hope Hydro submitted that there should be a standard system of "on-ramps" and "off-ramps" that will apply to all customers and will override any provision contained within signed agreements. In addition, there should be common remedies for breach on behalf of both buyer and seller, force majeure, etc.

4. OTHER ISSUES

Board Staff raised two questions in the paper which were addressed by stakeholders.

- *Should all marketers be required to be suppliers and/or should all marketers be required to show that they have a supplier who will meet the conditions of any contracts offered to residential and small commercial consumers?*

AESL believes that energy marketers should not be required to be suppliers, and should not be required to demonstrate that they have a supplier who will meet the conditions of any contracts offered to low volume consumers.

Chatham-Kent PUC submits that a marketer should provide evidence that it has adequate and appropriate supply to meet the retail contract conditions.

CENGAS states that there should not be any licensing condition requiring proof of security of supply. The best indicator of an energy marketer's ability to perform is its financial position, which is dealt with under s.50(a) of the *OEB Act*.

Enron states that neither the Board nor the Director should be put in the position of reviewing the adequacy of retailers' supply arrangements.

The MEA holds that marketers should not be required as a condition of licensing to provide proof of supply sources.

PIAC suggests that marketers need not be suppliers, but that any breach (e.g. inappropriate charges made or non-delivery leading to cost consequences for the customer) should entitle the customer to seek damages and/or termination of the contract.

The Restructuring Group submits that distributors should be entitled to require marketers to demonstrate supply arrangements and financial soundness.

Sunoco believes that all marketers should either be required to show that they have supply to meet their supply commitments or the ability to meet their supply commitment as demonstrated by their financial statements.

Toronto Hydro states that all marketers should be required to provide to the consumer information from the IMO certifying that they are a licensed electricity provider and able to meet all of the terms of the contract.

TransCanada does not believe that such requirements are necessary or appropriate. It states that in the modern gas market, it is common for marketers to "take positions", where they agree to sell gas that they have not yet purchased. Where there is sufficient market liquidity, as there is across North America, the only risk this presents is a financial one for the marketer itself. Although the new regulatory regime that will emerge in Ontario will need to address issues related to the allocation of those types of financial risks, imposing contractual requirements related to supply are not an appropriate or effective approach of doing that.

Union Energy notes that a requirement to prove that there is a supply arrangement will limit the ability to maximize the gas supply portfolio as well as increase the cost of providing certain flexibility to customers.

- *If a condition of licensing affects a pre-existing contract condition how should this be addressed? Is there a need to treat pre-existing contracts for electricity differently than those for natural gas?*

AESL submits that existing natural gas contracts should be grandfathered to the later of the end of the original term of the contract, or the end of the current renewal term. But in either case, the contract should not be grandfathered for more than five years.

AESL also holds that all contracts signed by low volume consumers for the purchase of electricity prior to these licensing requirements being enacted, and prior to customer education regarding electricity deregulation, should be null and void.

CAC states that any code of conduct for natural gas marketers should govern existing contracts. Also, whatever rules are established permitting customers to change their suppliers should apply to existing contracts.

CENGAS submits that where energy marketers have entered into valid, existing contracts with their customers, subsequently enacted licence conditions cannot retroactively interfere with the terms of valid contracts. The terms of pre-existing contracts could only be changed by statutory provisions that expressly require such changes. CENGAS is also opposed to the requirement that energy marketers, once licensed, reconfirm all pre-existing contracts.

Chatham-Kent PUC submits that contracts where gas is already flowing are different than any new contract or any electricity contract. Any signed agreement for electricity (including those where gas and electricity have been combined) must be renegotiated following the marketer receiving licence approval to ensure the contract complies with the terms of the licence.

Consumersfirst has concluded that licence conditions imposed on gas marketers should be equally applicable to pre-existing and post-implementation contracts, and submits that no exceptions should be made in licence conditions for pre-existing arrangements. If the Government fails to address the needs of customers tied to existing contracts that resulted from past inappropriate marketing, it will be abandoning half the constituency it is endeavouring to protect.

Consumersfirst recommends that all energy marketers with pre-existing arrangements, as a condition of their licence, be required to send written communications to all pre-existing customers, within 30 days of the granting of the licence, to inform them of their supply arrangements and the change in circumstances resulting from licensing. Consumersfirst submits that with respect to pre-existing electricity arrangements, energy marketers should be required to resign these customers because the arrangements were marketed prior to the establishment of a competitive electricity market.

Consumersfirst notes that the current practice in Ontario is to allow the customer to void ABC-T contracts (either new or positive selection from buy-sell) within 30 days of receipt of the first ABC bill. New buy/sell contracts and T-service contracts which do not make use of the utility's ABC-T billing service (i.e. an ABM which direct bills the customer) are not captured by this provision.

Mr. Peter Gilchrist states that it is difficult to see how new licensing conditions could be permitted to affect existing contracts. According to Mr. Gilchrist, sheer practicality would appear to dictate that the conditions not affect existing contracts.

The City of Kitchener states that extending the time allowed for the customer to void the contract would likely be unfair to the marketer.

The MEA submits that since deregulation of gas markets in Ontario started a few years ago, pre-existing contracts for gas should not be rescinded, but that electricity contracts with residential and small business customers should be rescinded.

Ontario Hydro supports the voiding of existing retail residential contracts that are not consistent with the new licensing rules for gas and electricity marketers. As an alternative, Ontario Hydro submits that marketers should be required, as a condition of their licence, to contact customers with pre-existing contracts that conflict with current licensing provisions and offer to void the contract, if the customer chooses.

Port Hope Hydro submits that all existing contracts should be extinguished as of a certain start date, so that no pre-existing contract condition will affect licensing.

PIAC notes that pre-existing contracts raise the following questions: Will new provisions apply to all existing contracts? If they do not, can a customer legally cancel within one year of the introduction of licensing?

The Restructuring Group points out a basic rule of law that existing contracts should not be retroactively affected by legislation unless the legislation specifically so provides. Existing contracts should be grandfathered if they were legally entered into.

Toronto Hydro states that only residential and small commercial electricity supply contracts entered into after the *Energy Competition Act, 1998* is proclaimed in force should be valid to ensure that all electricity marketers have the same ability, in starting at the same time, to secure binding supply agreements with customers. All residential or small commercial contracts entered into prior to the Act coming into force should therefore be declared invalid.

TransCanada holds that licence conditions, particularly conditions that require certain contract provisions, should apply equally to pre-existing contracts and new contracts.

Union Energy submits that any pre-existing electricity contracts should be deemed invalid.

The Utilities state that with respect to existing contracts (both gas and electric) that do not conform to the licensing requirements, marketers should be encouraged to extend access to the conforming terms and conditions to the maximum extent practical. Also, any renewal or substantive amendments to the terms and conditions of existing contracts, including pricing mechanisms, must be in compliance with the licensing requirements. In the case of substantive amendments to existing contracts, a positive election by the customer accepting the amendments is necessary.

5. ENVIRONMENTAL ISSUES

GEC and MEA raised some environmental concerns. Specifically, GEC submits that five environmentally significant matters need to be addressed in the regulations and conditions:

- A requirement for disclosure of environmental and fuels source information to electricity consumers as envisioned in ss. 69(2)(i) and 87(f).

- A definition of green or environmentally preferred power sources.
- A requirement of separate records for all green marketing transactions, to aid in verification and limit the potential for consumer fraud.

- A requirement that retailers may not market energy-using appliances to their retail customers unless such appliances bear a label approved by a recognized industry standards organization.

- An obligation on retailers to cooperate with government agencies and with distribution and transmission companies in energy-efficiency programs.

The MEA recommends that marketers who make any claims on energy sources or characteristics such as "made in Ontario" or "environmentally friendly" be obligated to provide evidence to substantiate their claims upon request by a customer.

6. GENERAL COMMENTS

The Competition Bureau refers to the "regulated conduct defence", which provides that activity which is specifically authorized pursuant to a valid scheme of provincial or federal legislation may be exempt from the application of the coinciding provisions of the *Competition Act*. The Bureau noted that because of this defence, the code may have the unintended effect of ousting the jurisdiction of the *Competition Act*. To avoid this possibility, the Bureau recommends the addition of the following provision:

> "Nothing in or done under the authority of this code of conduct affects the operation of the *Competition Act*."

CAC makes a number of general comments. Among other things, CAC states that:

- The regulatory system should be sufficiently flexible to adapt to changing circumstances.

- There should be one comprehensive code for the protection of consumer interests; consumers should not have to resort to other legislation to ensure that their interests are protected.

- Consumers must know the price they are to pay for electricity or natural gas over the entire term of the contract.
- Consumers must have a basis upon which they can compare the price they are going to pay to the price available from other sources.

- Consumers must know how disputes about the contract may be resolved.

In addition, CAC submits that consumers must have the following rights, among others:

- The right to be released from a contract which they were induced to sign on the basis of misleading or unfair practices.
- The right to have complaints about contracts resolved by an independent adjudicator.
- The right to consent to any assignment of a contract.
- The right to be told when a contract is to be renewed, and the requirement for their written consent to that renewal.
- The right to reasonable mobility, that is, the right to switch suppliers.

Enron states that a retailer should be required to satisfy the credit requirements set forth in the applicable distributor tariffs and maintain a dispute resolution process for complaints made by customers.

The Restructuring Group submits that where possible, consumer protection licensing conditions should be set out in regulations which provide the Board with discretion to allow exemptions in the public interest, and that licensing conditions should be open to being delegated to a self-regulatory organization.

Port Hope Hydro submits that a government agency (OEB or IMO) should have the regulatory powers to issue cease and desist orders and/or issue fines where there is failure to comply with mandatory standards.

The MEA agrees with provisions that afford smaller customers a higher level of protection

through a special licensing infrastructure. However, the MEA anticipates that some larger customers might wish to have access to some of the protection infrastructure for small customers, such as dispute resolution mechanisms. The MEA recommends that these customers be allowed to do so on a fee-for-service basis.

Toronto Hydro recommends that energy brokers and marketers serving larger customers must also maintain and adhere to consumer protection standards as part of their licensing agreements.

The Utilities noted that the issue of the procedures to apply for shut-off was not discussed in Board Staff's paper. The most expeditious way to develop shut-off and related procedures may be through the LDC/Gas Marketer Code of Conduct. The Utilities believe that failure to comply with required shut-off procedures should be grounds for potential licence revocation.

7. SAMPLE CODE OF CONDUCT

Board Staff included a sample code of conduct in their Discussion Paper, and several parties commented on it.

7.1 Training

- *Marketers shall ensure that their salespersons are fully informed as to the characteristics of their offers and/or services so as to enable them to explain the offer and accurately respond to consumer questions.*

The MEA suggests the following wording:

> "Marketers shall insure that their salespersons are legally qualified and trained to execute lawful binding contracts, and are fully informed as to the characteristics of their offers and/or services so as to enable them to explain the offer and accurately respond to customer questions."

The MEA states that if it is proven in the future that marketers cannot effectively control

the actions of their salespersons, a system to register energy salespersons might be necessary to require them to go through prescribed training and to act in accordance with a code of conduct.

Port Hope Hydro would modify the above provision to require that salespersons be licensed in accordance with the Act, and be able to engage lawful binding contracts.

Toronto Hydro states that salespersons should also be trained on the code of conduct.

7.2 Conditions to be included in offers

- *All offers shall clearly state the price and terms of payment and interest provisions, including any deposits required and the nature and amount of any charges.*

CAC states that this requirement should be more detailed.

Chatham-Kent PUC submits that all offers should also reflect the exit fees and provisions.

- *All offers must indicate the time period and the price of the offer, and all such terms of the offer shall be clear.*

- *All offers shall contain clear statements as to the intended start date for any service provided.*

Chatham-Kent PUC states that the consumer should be notified if the intended start date is missed by 30 days.

Union Energy notes that the intended start dates for offers are dependent on factors that are not always under the marketer's control. Until the utilities develop policies and procedures that would allow for immediate processing and customer mobility it would be difficult to commit to a start date.

- *No offer shall exceed a time period of 5 years.*

Sunoco submits that it is unclear whether renewals are permitted by this section, and suggests the following wording:

> "No offer shall be for a term which exceeds a period of five years, not including renewals. All consumers should be given at least ninety (90) days advance written notice of the price for any renewal term and shall have at least sixty (60) days from the date of receipt of such notice to give notice that the renewal is not desired."

Toronto Hydro states that this condition should be deleted, noting that there is no need to limit the length of a contract with all the other protections and exit provisions provided to the consumer, and in contract law.

- *All offers must allow for cancellation within 30 days of the offer being made.*

CAC supports this provision.

Sunoco states that Item 7 needs to be reconciled with a consumer's right under ABC-T service to cancel their contract within thirty days of receipt of the first bill.

Toronto Hydro states that the cooling off period should be limited to 48 hours as mentioned above.

- *Any offer must be accompanied by a disclosure statement as approved by the Board and issued by the Director.*

- *If an offer includes an agency agreement then the offer must indicate that the agent is obliged to notify the customer in advance of the termination date of the original offer to supply, and any proposed terms of renewal.*

The MEA and Port Hope Hydro recommend the following wording:

If an offer includes an agency agreement, then the offer must include that the agent is obligated [obliged] to notify the customer in no less than sixty (60) days and no more than ninety (90) days in advance of the termination date of the original offer to supply, and any proposed terms of renewal.

AESL suggests the addition of a condition that requires each energy marketer to provide reasonable notice to the customer of the terms and conditions of renewal, and recommends that the word "may" be removed from each of the two provisions of the code that contain it [provisions 10 and 14].

CAC states that when a contract is for an agency agreement, the contract should set out specifically what the powers of the agent are.

- *Offers may contain the words "guarantee," "guaranteed," "warranty" or "warranteed," or words having the same or similar meanings, only if the terms of the guarantee as well as the remedial action open to the consumer are clearly set out in the offer.*

- *Consumers must be provided with a copy of any signed contract or agency agreement or any agreed upon offer.*

- Port Hope Hydro suggests that the Director and the distribution company also should receive the documentation, and that such information should be confidential.

7.3 Disclosure of customer information

- *No energy marketer shall disclose consumer information to a third party without the express permission of that consumer.*

The MEA agrees that customer information should not be disclosed without that customer's expressed permission. Nevertheless, it submits that distributing utilities should have access to customer information in order to carry out their functions in settlement of contracts and to operate and plan their distribution system. The MEA recommends adding an exception to cover "data required for settlement and distribution purposes."

Toronto Hydro suggests the use of the Canadian Direct Marketing Association (CDMA) Guidelines.

The Restructuring Group states that the Code of Conduct should not prevent the Standard Service Offering ("SSO") from being identified as an offer from a distribution company.

CAC believes that the Board should have the power to establish a system for the publication of basic pricing information and the power to impose the requirement that any licencee participate in that system.

7.4 Complaints / breach of the code

- *Should any consumer complain that a marketer has engaged in any improper course of conduct pertaining to the retail of energy, the marketer shall promptly investigate the complaint and take all appropriate and necessary steps in the circumstances to redress any and all wrongs disclosed by such investigation.*

The Restructuring Group submits that the Code of Conduct should require marketers to inform customers of the remedies that are available to them.

Union Energy is concerned that there may be parallel Codes of Conduct and complaint procedures as between the Ontario Energy Marketers Association and the OEB. Union Energy submits that the role of the OEB as a licensing body relative to any industry association should be clearly defined. It should be made clear that a marketer holding a valid licence is permitted to conduct business regardless of membership in a voluntary organization.

The Utilities state that the objective of minimizing customer complaints can be expedited by a third party verification process

The Municipality of Chatham-Kent suggests that there be a provision regarding a mechanism for complaint management.

- *A breach of this code may occur in the course of inducing a person to enter into an offer, contract or agency agreement even if an agreement is not completed.*

The MEA recommends adding the following provision:

> "Breach of this code can result in appropriate fines being levied and/or the revocation of the licence(s)."

Toronto Hydro also proposes that the following additional disclosure conditions be added to the Code of Conduct/licensing requirements:

- Electricity marketers and brokers be required to disclose how their commodity price differs from the "default supply" price pursuant to section 28 of the *Electricity Act, 1998.*
- Marketers and brokers be required to disclose the minimum term of the proposed agreement.

- Marketers and brokers who offer discounts or rebate cheques be required to indicate what commodity price the discount or rebate is based upon and what specific conditions the customer is agreeing to in order to receive the discount/rebate.
- Marketers and brokers be required to explain how the customer will be affected if the price of the commodity increases or decreases over the term of the agreement.
- Marketers and brokers be required to explain whether the contract renews automatically at the end of the term indicated, whether the customer needs to resign the agreement, and whether the customer has to take any steps to ensure that the agreement does not continue beyond its term.

Port Hope Hydro submits that the Board should be able to levy fines and/or revoke the licence of a marketer or energy supplier who violates this and any other code of conduct.

Port Hope Hydro would add the following provision:

- Breach of this code and other rules of conduct can result in appropriate fines being levied and/or the revocation of licence(s).

PART II: BOARD COMMENTS

1. SYMMETRY OF LICENSING REQUIREMENTS

The Board notes that the definition of a "gas marketer" at s. 46 and an "electricity retailer" under s. 55 in the *Ontario Energy Board Act, 1998* ("OEB Act 1998), are substantially the same. One notable difference is that gas marketers are defined as those making sales to "low-volume consumers" whereas an electricity retailer is not defined in terms of customer demands.

Section 87(1)(a) allows for the prescription of requirements for an electricity retailer's licence if retailing to residential or small commercial customers is undertaken. There was broad consensus among stakeholders that sellers of natural gas and retailers of electricity should be subject to the same rules and requirements for marketing to low volume consumers. The Board agrees that the same requirements should apply to applicants for both gas and electricity marketer licences. Having regard to s. 87(2), the Board recommends that if a regulation is made setting out requirements for electricity licences it should include all the requirements implied by s. 50 (i.e., the absence of these requirements is grounds for refusal under s. 50), and all requirements prescribed for gas marketers by any regulation made under s.54(1) (e).

Sections 49(2) and 69(1) allow the imposition of conditions in gas and electricity marketing licences. Sections 49(3) and 52(6) prohibit the Director and the Board from imposing any condition in gas marketer licences that is not authorized by regulation. No regulation is necessary to authorize conditions for electricity licences. However, the Board recommends that the Ministry include in regulations under subsections 54(1)(a) and (b) sufficient authority for the Board to impose the conditions in gas marketer licences that are necessary to ensure consumer protection. As stated above, the Board agrees with stakeholders that the same licence conditions related to consumer protection should apply to both gas and electricity marketers. It would be unfortunate if such symmetry were prevented by the inadequacy of the scope of regulations made under section 54.

In the Board's comments which follow, the recommendations regarding regulations are made in light of the need for regulations to create a framework for licensing of gas marketers. The Board is not advocating parallel regulations for electricity retailers. In designing licence conditions for electricity retailers, the Board will give recognition to the provisions in gas marketing regulations under s. 54.

2. DEFINITIONS

2.1 Definition of a low-volume gas consumer

Section 54(1)(d) contemplates a regulation defining a "low-volume consumer" of natural gas. Parties generally agreed that a "low-volume consumer" of natural gas should be defined as a customer consuming no more than 50,000 m^3 per annum. The Board believes this to be an appropriate definition.

2.2 Definition of a residential and small commercial electricity consumer

Section 87(1) (a) allows for a regulation to be passed defining "residential and small business consumers" of electricity.

Parties generally agreed that a "residential or small business consumer" of electricity should be defined as a customer with demand of no more than 50 kW. However, Ontario Hydro and the MEA noted that total annual consumption was easier to measure and more meaningful, and suggested a level of 150,000 kWh per annum.

The Board recommends that "residential or small business consumer" for the purposes of a regulation under s. 87(1)(a) be defined as a consumer consuming a demand of no more than 50 kW and/or with an annual consumption of no more than 150,000 kWh per annum.

2.3 Definition of a consumer

A number of stakeholders discussed the merit of refining the above definitions by a customer's location or meter. In this regard the Board notes that s. 46 of the act defines a "low-volume consumer" as a person who annually uses the amounts of gas prescribed by regulation. Section 55 defines a "consumer" as a person who uses, for the person's own personal consumption, electricity that the person did not generate." Since a "person" is already defined in law as a natural person or a corporation, the Board does not see the need to prescribe in regulation a more specific description of a low-volume gas consumer or a residential or small commercial electricity consumer.

3. CLASSES OF LICENCES

3.1 An Unregulated Municipal Gas Utility Marketer's Licence

Most stakeholders submitted, and the Board agrees, that there should be only one class of licence for the marketing of natural gas and the retailing of electricity to the residential and small commercial market. A notable exception to this consensus was the response from the City of Kitchener, who submitted that a separate class of gas marketer's licence should be required for an unregulated municipal gas utility (MGU) which sells natural gas. The City of Kitchener states that such a class of licence would "enable the Director to impose conditions on the MGU to provide sufficient accounting statements to show that the gas marketing program is self-sustaining."

The City of Kitchener noted that "[W]hile the Board will not regulate the delivery function, it will need to ensure that there is no cross-subsidization from the delivery function" and therefore "the Director will want to impose conditions on the MGU which will protect against cross-subsidization from the delivery operation."

The Board believes the class of licence suggested by the City of Kitchener would in practice be very difficult to monitor for compliance. In the Board's experience, preventing cross-subsidization is a complex exercise which demands many decisions as to the nature and allocation of costs. It is also not readily apparent to the Board what action, if any, might be taken in cases of non-compliance against an entity who is both the non-regulated distribution company and the seller of the default supply of gas to ratepayers.

If the Board were required to issue the type of licence suggested by the City of Kitchener, it would need to have the ability to examine not only the marketing arm of the MGU, but in fact the costs of service and cost allocations of the MGU. It would not, the Board suggests, be reasonable to expect a regulator to monitor and prevent cross-subsidization from monopoly services through a licence designed to capture the activities of marketers of energy. The Board does not believe that a gas marketer's licence should be used to regulate indirectly the MGU delivery business, and therefore recommends only one class of licence for gas marketers including MGU gas marketers.

3.2 Exemptions under section 126(1)(f)

Stakeholders generally argued that there is no need to exempt any natural gas marketers or electricity retailers selling to the residential and small commercial market from the licence

requirements. The Board does not have at this time sufficient information to determine if there is any class of gas marketers or electricity retailers which should be exempt from licensing requirements.

4. PREREQUISITES FOR A LICENCE

Section 50 lists grounds for the refusal to issue or renew a licence, and it would appear that no regulation needs to include the prerequisites specifically listed in this section for gas marketer licences. Stakeholders provided a number of additional prerequisites for approval of a gas marketer's or electricity retailer's licence. Some parties noted that s. 54(1)(e) and s. 87(1)(a) should deal only with the qualifications of an energy marketer to obtain a licence to carry on business.

The Board notes that section 51(2) indicates that any grounds for a refusal of a gas marketer's licence as listed in section 50 may also provide a basis for revocation or suspension of a licence. In the Board's view a similar principle should hold for regulations made under s. 54(1)(e). That is, the Board believes that if a qualification is required in order for a licence to be granted, the maintenance of that qualification should be necessary in order to avoid revocation or suspension of the licence. If a condition of eligibility is one that is required at the time of application, but is not required to be maintained (as for example, in asking for proof of financial responsibility) then there seems little point in imposing such a prerequisite.

5. LICENCE CONDITIONS

A number of consumer protection issues were raised in the submissions of stakeholders. Not all of these require, or lend themselves to, regulations setting out conditions of licences. The Board has commented below on those which it views as being particularly important to the sound administration of the licensing regime. These are: financial security; the term of the licence; complaints and enquiry handling; fees; licencee information and identification; information disclosure to consumers; standards of business practice; and code(s) of conduct.

5.1 Financial security, section 54(1)(f)

Section 50(a) states that one of the grounds for refusal of a licence is the financial responsibility of the applicant. This subsection implies that the Director must inquire into the financial position of a licence applicant. Section 54(1)(f) allows for the prescription by regulation of the form of security that the Director may require of a licence applicant. It is not clear what purpose this security is intended to serve. Having reviewed stakeholders' submissions the

Board has identified three possible objectives for any regulation made under s. 54(1)(f): proof of the financial capacity of the licencee; compensation for customers in case of failure of the marketer; and assurance of payment of the Director's cost of investigations as assessed against a licencee. Each one of these objectives would determine a different set of forfeiture rules which would, in turn, be key in determining the form and level of security required by the Director or Board.

If the purpose of 54(1)(f) is proof of financial soundness then, as some stakeholders have noted, the limited value of this form of bonding is to establish a minimum level of financial capacity of applicants, and its negative impact is to make it more difficult for small and perhaps innovative marketer participation. The Board does not believe that comprehensive financial filing requirements with the aim of demonstrating the applicant's financial wherewithal are appropriate. In any event, there is limited value in demanding as part of the application proof of financial soundness when no ongoing supervision of that soundness is undertaken. A surety bond not exceeding a reasonable amount is one means of achieving the objective of demonstrating ongoing financial capacity of a licensee. However, the size of such a security bond would have to be set so as to not create unnecessary barriers to entry.

As noted by some stakeholders, if the objective of the security contemplated at 54(1)(f) is to hold a consumer whole in the event of a contract failure then the form of security would need to be directly related to the perceived risk (including number of customers served and conditions of supply). In this case the form of security would likely need to be much larger and the licencee would be required, possibly through regulation, to file with the Director risk factor data (customer numbers, audited financial statements etc.). In effect what would be required of the Director is to develop an insurance scheme. In the Board's view, as long as the natural gas and electricity residential and small commercial consumer market is characterized by monthly payments for past supply of the commodity, there would appear to be only a small financial risk to the customer in the case of a gas marketer or electricity retailer failure.

The Board is also concerned that such a default insurance scheme is not consistent with the objective of competition in energy markets. However, it should be clear that these comments are based on the premise that the supply of physical commodity continues to be delivered to the consumer in case of failure and that what is visited upon parties to a failure is only a financial penalty.

Finally, the security may be required to prevent taxpayers from being burdened by the costs of investigations resulting from alleged breaches of licence conditions.

The Board favours regulations which allow the Director to require a licencee to post a bond up to an amount determined by the Director. The regulation should also provide guidance as to the amount of the security by specifying which of the above objectives is being sought. As noted by many stakeholders, no appropriate determination of the form of security can be made without a prior determination of the rules of forfeiture.

5.2 Term of the licence and reviewing licence conditions

Stakeholders provided a variety of opinions on whether a gas marketer licence should be for a fixed, indefinite or renewable term. The views of the Board on the setting of the term of a licence is necessarily informed by the regulations and other conditions that might determine the form of the licence. For example, to the extent that the Director has the ability to suspend or revoke a licence for violation of a condition or provision of a code of conduct there is less need for renewals as a means of reviewing the behaviour of a licensee.

The Board notes that short licence terms may introduce market uncertainty and risk. If there is a risk, perceived or otherwise, associated with a licensing regime this may increase costs to all consumers. Since it is the expectation of the Board that the Director will have the authority to investigate alleged misbehaviour of the licencee and to suspend or revoke a licence for serious violations of the licensing conditions, then frequent term renewals would appear to have limited value. The Board would recommend that the regulation simply indicate that a term of the licence may be set by the Director and that it is renewable.

In the Board's view a more pressing consideration is the application of new or revised conditions to gas marketer or electricity retailer licences. For example, should experience indicate that a new condition is required, or that a condition is no longer required, then the Director should have the ability to make this change and have it apply uniformly to both new applicants and existing licence holders. Were this not the case it would be difficult for the Director to ensure that a "level playing field" is maintained. The Board is aware that s. 73 of the proposed Act gives the Board authority to amend, "on the application of any person", or in other restricted circumstances, any electricity licence under s. 56.

The Board recommends that the Director have the necessary authority to amend gas marketer licences so as to have any new or revised condition(s) apply equally to all licence holders. One way to accomplish this would be to provide in the regulation that the Director or the Board may impose a condition that the licensee will comply with all changes to the conditions made after the issuance of that licence. In such instance a notice of change would be issued to ensure all market participants are able to comment on the proposed changes.

5.3 Dealing with consumer complaints and enquiries

In its Discussion Paper, Board Staff provided as a guideline in determining appropriate regulations that "consumers should be able to have complaints resolved in an efficient and timely manner." The Municipality of Chatham-Kent suggested provisions for a complaints management mechanism. The Consumers Association of Canada noted that it should not be costly for consumers to pursue and resolve complaints. Other stakeholders held that an energy marketer should simply be required to have a complaints resolution process. The Restructuring Group submitted that there should be requirements to advise consumers of the remedies available to them.

The Board believes that there is benefit in having all gas marketers and electricity retailers subscribe to an "arms-length" complaints resolution process. The experience of the Board in natural gas small volume retail sales has shown that during periods of market transition there are a large number of complaints and information demands from consumers. Many of these consumer concerns may be addressed and resolved relatively easily and at low cost. However, consumers must see the complaints forum to be unbiased. Ultimately, it will remain the responsibility of the Board or Director to arbitrate complaints until such time as this function is delegated to a self regulating organization. However, the administration of the "front-line" of consumer complaints by a third party will allow gas marketers and electricity retailers to find the most cost efficient means of having consumer enquiries answered and complaints investigated.

The Board sees merit in requiring, as a condition of licensing, gas marketers and electricity retailers to subscribe to an agency which has been certified by the Director as an arms-length complaints body/agency and to make the complaints procedure known to their customers. The regulation should also allow the Board or Director to determine the certification requirements of an eligible complaints agency and to have the agency provide reports regarding enquiries and complaints of consumers. The reports of such a complaints agency might also inform the Director in carrying out his or her responsibility under s. 50 including the need for investigation of an existing licence holder.

5.4 Fees

Board Staff notes that both s. 12 and s. 25 of the proposed OEB Act, 1998 provide for the assessment of fees and the Board's costs to be paid by licensees. These sections provide that different fees or assessments can be made for different classes of persons. The establishment of fees is subject to the approval of the Minister, or prescribed by regulation. In the Board's

view it may be prudent to explicitly provide through regulations that the Board or Director may suspend or revoke a licence if an assessed fee is not paid in a timely manner.

5.5 Information and identification requirements

Stakeholders provided a number of recommendations within the ambit of "information and identification" requirements. Among the types of information suggested by stakeholders were:

- the applicant's legal name, address and other information that identifies the applicant; and

- the applicant to indicate whether they have ever been prohibited to market in another jurisdiction.

In the Board's view it is not possible to anticipate all the information requirements that might be needed to ensure effective administration of licences. Certainly all applicants will be required to provide corporate names and address. In addition, since s. 50(c) references the past conduct of a corporation's officers or directors as grounds for rejecting a licence, the names of the principals of a corporation will also be required.

The Board notes that a number of stakeholders raised concern with Staff's suggestion that an Ontario address be required. The principal objection to this suggestion was the potential for limiting out-of-province marketing activities (e.g. telemarketing, Internet sales, etc.,). The Board is sympathetic to the concern of limiting out-of-province marketing activities and believes that any regulation should not prohibit innovative and cost effective means of marketing. However, the Board is also of the view that an Ontario address for the service of legal documents should be a minimum requirement of the licence. The Board expects that every licenced gas marketer and/or electricity retailer will be subject to the laws of the Province. The Board also believes it is good practice for the Director and Ontario consumers to have a single and certain Ontario address at which all documents may be served.

Beyond these simple requirements, the Board is not in a position to determine what information requirements are necessary as these would depend in large part on other conditions provided for in regulations. For example, obtaining information on whether a marketer has ever been prohibited to market in another jurisdiction is useful only in so far as it allows the Director to determine if an applicant may be rejected for a licence under s. 50(c) for this reason.

Therefore, the Board recommends that a regulation be passed which allows the Director to

collect such information as is necessary to carry out his or her responsibilities under Part IV of the OEB Act, or enforce any licence condition.

5.6 Disclosure to consumers

In the Discussion Paper, Board Staff raised a number of issues (some in the sample code of conduct) related to information that should be disclosed to customers. The Board believes that it would be useful to have a regulation that allows the Director, as a condition of the licence, to require a gas marketer or electricity retailer to disclose information specified by the Director to consumers. Such information might include, for example, contact information on a complaints resolution agency, whether the marketer was both a supplier and an aggregator, and other information the Director thought relevant to ensuring that consumers are properly informed.

5.7 Standards of Business Practice

Many respondents provided comments on the issues raised by the Board Staff paper in the area of mandatory provisions in contracts between marketers and their customers. The Board considers these issues as "standards of business practice" since they relate in large part to changes or amendments to what would be normally addressed in either the *Business Practices Act* ("BPA") or the *Consumer Protection Act* ("CPA"). Three of the most contentious standard of business practice issues addressed by stakeholders were: the length of the contract; the proposed 30 day "cooling off" period; and provisions for the customer exiting the contract on payment of a fee.

While both the BPA and CPA will apply to gas marketers and electricity retailers, the general provisions for licensing in the OEB Act 1998 seem to indicate an intention to add to the protections provided for consumers under these other statutes. What is less clear to the Board is the extent to which it is intended that licensing provisions are to supercede specific provisions in other pieces of legislation. For example, is it the intent of the new legislation to provide the Board or Director with the ability to extend the general 48 hour "cooling off" provisions of the CPA?

In the Board's view, competition flourishes where buyers and sellers are left to determine which arrangements best suit their needs. While s. 54 and s. 69 may give the Director some ability to set terms and conditions of a licensee's consumer contracts, such interference with the contractual arrangements between the sellers of electricity and natural gas and their customers may not be desirable in a fully competitive market. Nevertheless, in a monopolistic market in

transition to a more competitive form there may be a temporary need to stipulate minimum standards of contracting.

Should the Government believe it necessary for the protection of the residential and small commercial consumer to impose such minimum standards of contracting, the Board is of the view that the nature of these standards should be articulated in the regulations.

The question of the effect of the new legislation and regulations on pre-existing contracts was also addressed by respondents. An amendment has been proposed to Bill 35 which would invalidate (unless reconfirmed by the customer) any contract for the purchase of electricity that a residential or small commercial consumer entered into with a seller prior to that seller obtaining an electricity retailers licence. Almost all stakeholders supported such restrictions on pre-existing electricity contracts. The Board also supports this amendment and believes that it will allow a level playing field for the start-up of electricity retailing to residential and small commercial consumers.

Pre-existing natural gas contracts present a more complicated dilemma. The Board believes these contracts should be brought into conformity with any licence conditions, including any new standards of business practice. Should the Government believe it to be in the public interest, for example, to pass regulations regarding minimum contract standards, these should apply to both new and old contracts. If such changes are contemplated, parties to existing natural gas contracts should be provided reasonable notice and time in which to make these contracts conform to the new standards.

5.8 Code of conduct

Section 43(1)(c) allows the Board to make rules governing the conduct of gas marketers. Section 69(2)(d) as amended provides the same as a condition of a licence for electricity retailers. Board Staff, in their Discussion Paper, provided a sample of what such a code of conduct might include. Some of the concerns of stakeholders could be dealt with in a code of conduct rather than as conditions of a licence. In the Board's view it is important to limit requirements in codes of conduct to matters that are not conditions of licensing specifically authorized by regulation. Such codes of conduct should deal with the relationship between the marketer and the customer rather than the relationship between the marketer and the regulator.

The Board believes that a regulation is required which would allow the Director to impose as

a condition of licensing for gas marketers adherence to a code of conduct developed under s. 43(1). The Board expects that adherence to a code of conduct would also be a condition of an electricity retailer's licence. In the Board's view the breach of an approved code of conduct should provide grounds for revocation or suspension of a licence.

5.9 Regulated conduct defence - Competition Issues

The Competition Bureau expressed a concern that a licence condition that requires adherence to a code of conduct may lead to application of the "regulated conduct defence." The Board notes that s. 28 of the OEB Act 1998 makes reference to the *Competition Act*'s application should the Board "forbear" from regulation. The Board agrees that the design of all regulations or conditions of licences should take account of the effect of other legislation such as the *Competition Act*.

5. 10 Conditions that the Director may or must impose

Subsections 54(1)(a) and 54(1)(b) make a distinction between those conditions that the Board or Director may impose and those that they must impose. Having reviewed the comments of stakeholders the Board is unaware of any condition that "must" be imposed through a regulation. In fact, many stakeholders argued for regulatory flexibility.

In the Board's view, regulations should allow for the fact that some conditions of licencing or conditions of codes of conduct may be transitory and reflective of the comfort level of consumers with these deregulating markets. However, the Board does agrees with stakeholders that all conditions of licensing relating to marketing practices and consumer protections must be applied equally to all gas marketers and electricity retailers.

6. SUPPLY CONDITIONS

The Board specifically did not solicit comment related to the supply of the energy commodity. These are the issues related to the technical requirements of providing natural gas and electricity and involve metering, commodity quality and other such matters.

Board Staff did, however, ask stakeholders if all marketers should be required to be suppliers. There was no consensus among stakeholders on this issue. In the Board's view such diversity of responses is to be expected since there are really two issues to be addressed in Staff's questions. First, should one be required to be a supplier in order to be a gas marketer or electricity retailer, that is can a licensee be only a retail customer aggregator and have supply

provided by another party? Second, should a supplier of commodity be required to show proof of his or her ability to meet supply obligations?

Since both gas marketing and electricity retailing may be done through an "agent" or "broker" there does not appear to be a requirement that a licenced gas marketer or electricity retailer need be a supplier of the commodity to the distribution utility. Brokerage and agency provisions may recognize that the aggregation of the small residential and commercial market is, in and of itself, a valued economic activity.

Section 43(1)(b) allows the Board to make rules governing the conduct of a gas distributor as it relates to a gas marketer and s. 43(1)(d) allows for rules to be made governing access to distribution services of the gas distributor. For electricity all such regulatory provisions are achieved through the regulatory instrument of a licence. Sections 69(c) and (d) allow for licence conditions to be included which would in effect allow for conditions governing the conduct of an electricity distributor as it relates to an electricity retailer and for conditions governing access to electricity distribution services. It may be, therefore, that, in addition to the consumer protection issues addressed in the Board's comments, there may be a need for further requirements as they relate to the actual provision of the commodity via the regulated distributor.

7. ELECTRICITY RETAILING - UNIQUE REQUIREMENTS

In addition to regulations related to general consumer protection, s. 87 outlines a number of issues unique to the retailing of electricity. The Board notes that a number of regulations may be made under sections 87(1) (b) and (d). Some stakeholders made submissions on the type of regulations that might be included under these sections. Many of these relate to the reporting of environmental data. The Board has not commented on the position of stakeholders on these issues as the Ministry of the Environment is in a better position to assess what conditions might apply.

Further, the Board recognizes that the development of the electricity marketplace is still ongoing and other conditions of electricity retailer licences may be necessary, including adherence to an approved settlement process.