

**Ontario Energy
Board**

**Commission de l'Énergie
de l'Ontario**



RP-2003-0213

PROPOSED CHANGES TO

**THE OCTOBER 8, 2003 PROPOSED ELECTRICITY
RETAILER CODE OF CONDUCT**

AND

**THE OCTOBER 8, 2003 CODE OF CONDUCT FOR GAS
MARKETERS**

SUMMARY REPORT

2004 June 2

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BACKGROUND AND REPORT OVERVIEW

Background

On October 23, 2003, the Board issued a “Notice of Proposal to Issue a Code” and the Proposed Electricity Retailer Code of Conduct (attached in Appendix A), and a “Notice of Proposal to Make a Rule” and the Proposed Code of Conduct for Gas Marketers (also attached in Appendix A). Interested parties were asked to provide written comments to the Board by November 20, 2003. The following parties responded:

- Coral Energy Canada Inc. (Coral);
- Direct Energy Marketing Limited (Direct Energy);
- EPCOR Merchant & Capital L.P. (EPCOR);
- Hydro One Networks Inc. (Hydro One);
- Hydro Ottawa Limited (Hydro Ottawa);
- Kitchener Utilities;
- Ontario Energy Savings Corp. (OESC); and
- Ontario Power Generation Inc. (OPG).

The written representations received by the Board from these stakeholders are available on the Board's website at www.oeb.gov.on.ca, and at the offices of the Board during normal business hours.

Overview of this Report

Each section of the chapter entitled “Issues Raised by the Parties and Proposed Changes to the Codes” of this report deals with a corresponding chapter in the October 8, 2003 Proposed Codes, and is comprised of three subsections: The first briefly describes what was in the October 8, 2003 Proposed Codes; the second summarizes parties’ comments; and the third outlines the Board’s comments and proposed changes to the October 8, 2003 Proposed Codes.

For the remainder of this report, the revised codes proposed by the Board in this report (attached as Appendix B) are referred to as the “Codes” collectively, and the “Retailer Code” or “Gas Marketer Code” individually where necessary.

ISSUES RAISED BY THE PARTIES AND PROPOSED CHANGES TO THE CODES

1 General Provisions

Chapter 1 of the October 8, 2003 Proposed Codes set out the purpose of the code, included a list of definitions used, set out compliance obligations, and stated the date on which the code would come into force.

Stakeholders' Comments

Coral sought clarification that the October 8, 2003 Proposed Gas Marketer Code applies only to gas marketer activities with small volume consumers.

Hydro Ottawa noted that the October 8, 2003 Proposed Codes no longer duplicate legislation. However, it also commented that a draw-back to this is that consumers' rights are now contained in many different documents; i.e., some are in the various statutes and regulations, others are in the Board's October 8, 2003 Proposed Codes. Hydro Ottawa suggested that the Board create a summary document to make it easier for a consumer to see a complete list of his/her rights.

Hydro One commented that the term "residential or small business consumer" defined in section 1.2 of the October 8, 2003 Proposed Retailer Code is confusing since the legislation and regulations use the term "low volume consumer" instead. Both are defined in regulation to mean the same thing.

OESC commented that section 1.5 of the October 8, 2003 Proposed Codes, which obligates gas marketers and retailers to ensure that their sales persons comply with the code, is unreasonable stating that a company cannot "ensure" an individual acts in a specific manner. OESC submitted that the section be changed to read "take all reasonable steps to ensure".

Direct Energy noted that Licence Bulletin 200303, dealing with telephone reaffirmation of energy contracts, would have to be revised to reflect the time frames in the October 8, 2003 Proposed Codes.

Board Comments and Proposed Changes

In gas, the Board only licenses gas marketers to market to small consumers, therefore the Gas Marketer Code focuses on provisions to protect low volume consumers.

The Board shares stakeholder concern that it may be becoming more and more difficult for a consumer to understand his or her rights because the body of law and regulation containing those rights is so fragmented. Therefore, the Board has asked Board staff to prepare a document for consumers which would provide a list of that consumer's rights vis a vis the purchase of gas or electricity in Ontario.

The Board agrees that the Codes should use comparable terminology where possible to make the Codes easier to understand by consumers. Since the Gas Marketer Code uses the term "low volume consumer", the Retailer Code should also use "low volume consumer" rather than "residential or small business consumer". Since "residential or small business consumer" and "low volume consumer" are defined in the legislation and regulations to mean the same thing, the Retailer Code should make clear reference to that definition, consistent with section 56 of the Act, as follows:

“Low volume consumer means a person who uses, for the person's own consumption, electricity that the person did not generate and who annually uses less than 150,000 kilowatt hours of electricity.”

In response to the comment that retailers and gas marketers should only be obligated to “best efforts” at ensuring their employees abide by the Codes, the Board is of the view that companies are responsible for the conduct of their employees as they conduct business for that company. The Codes should be clear that retailers and gas marketers must ensure that their salespersons comply with the Codes.

The Board notes stakeholder comment on the need to amend and reissue Licence Bulletin 200303 and have asked Board staff to review the bulletin and revise it as necessary when the amended Codes are in force.

2 Fair Marketing Practices

Chapter 2 of the October 8, 2003 Proposed Codes set out rules pertaining to fair marketing practices of retailers and gas marketers in their dealings with consumers including direct interactions, transfer requests, and contractual requirements.

Stakeholders' Comments

OPG commented that the October 8, 2003 Proposed Retailer Code lacks provision to require that the retailer provide the consumer with a copy of any contract signed by that consumer.

Kitchener Utilities submitted that new provisions need to be added to section 2.1 of the October 8, 2003 Proposed Gas Marketer Code to address transportation services and any other charges that may be included in the supply or transportation price, such as administrative fees, penalties, etc. Kitchener Utilities also suggested stronger wording in subsection 2.1(c) to discourage continued gas marketer contact with a consumer if that consumer has decided not to continue with changing their supplier.

OPG commented that subsections 2.1(a) and (g) of the October 8, 2003 Proposed Retailer Code appear to be duplicates.

Coral submitted that subsection 2.1(b) of the October 8, 2003 Proposed Retailer Code needs to be clear that it applies only to low volume consumers because more complex pricing and volume structures are used with large consumers.

OESC submitted that subsection 2.1(f) of the October 8, 2003 Proposed Codes should be deleted because requirement to inform a consumer if their voice is recorded is provided for in the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA). OESC further comments that the subsection effectively removes the exception provided for in PIPEDA. Coral also expressed concern over subsection 2.1(f) in the October 8, 2003 Proposed Retailer Code conflicting with existing law. Coral submitted that the provision should only apply to low volume consumers.

With regard to section 2.2 of the October 8, 2003 Proposed Codes, Direct Energy commented that paper, internet and door-to-door sales would be burdened and the company may be unable to comply with a requirement to give notice at time of signing. Therefore, Direct Energy submitted that the provision should be restricted to giving notice on reaffirmation, not when entering into a new contract. Direct Energy commented that some door-to-door sales are not targeted, and agents do not have information about existing contracts. There is no system in place at present to give agents this information. Even if agents had the information, they would have to complete blank notice forms at the door, which practice is difficult to control and monitor. The best efforts of an agent may be insufficient to obtain from the customer accurate information about existing contracts - some customers don't know their situation. With inbound customer sign-ups, a customer may return a mail or internet application and not disclose (or not know) they are flowing with a given marketer. This would be discovered by the marketer before reaffirmation. If the section remains as proposed, the marketer would have to contact the customer twice, once to give notice and again at reaffirmation. This would increase transaction costs and customer effort.

EPCOR submitted that sections 2.2, 2.5, and 2.6 of the October 8, 2003 Proposed Codes should refer to customers, not consumers.

Coral commented that section 2.2 of the October 8, 2003 Proposed Retailer Code should only apply when retailing to low volume consumers.

Direct Energy submitted that section 2.3 of the October 8, 2003 Proposed Code that restricts a retailer or a gas marketer from requesting a distributor to allow the retailer or gas marketer to supply commodity to a consumer until certain conditions are met will add significant delay and cost in processing contracts without adding significant consumer protection benefit. Direct Energy commented that there is presently about a three-month delay between sign-up and flow to a consumer, and estimated that this code provision could add up to two more months delay.

EPCOR requested clarification on the need to immediately act to cancel a service transaction request if it discovers that it was submitted to a distributor

without support of a valid contract. OESC also commented on this requirement and submitted that the provision should be changed to only require cancellation of the service transaction request where a consumer has made a complaint and the contract is discovered to be non-compliant. OESC commented that the current wording of this provision may have the unintended consequence of requiring cancellation against a consumer's wishes.

Board Comments and Proposed Changes

Retailers and gas marketers are required by paragraph 88.9(1) of the Act to provide a consumer with a copy of any contract signed by that consumer.

The Board is not convinced that transportation services and charges should be addressed by the Gas Marketer Code. The prices to be paid for transportation services are regulated charges and may change over the life of a contract. Further, it is the Board's understanding that standard contracts do indicate that such charges will be applied, and will be in addition to the amount charged for the commodity.

Subsection 2.1(c) of the Codes is clear that gas marketers and retailers are not to exert undue pressure on a consumer regardless of the circumstance.

Subsection 2.1(b) of the Retailer Code should be changed to recognize that only low volume consumers are subject to pricing based on kWh.

The Board notes that the requirement in paragraph 2.1(f) of the Codes to immediately inform a consumer if, for any reason, their voice is being recorded does coincide with PIPEDA requirements. PIPEDA provides some protection for consumers in that it requires notification if personal information is being collected, including by phone. The Board also notes that the practice of informing a consumer is now becoming a generally accepted retail service practice. Therefore, paragraph 2.1(f) should be removed from the Codes.

The stipulation that it must be clear that a retailer's offer of a contract for the supply of electricity is not from the consumer's local electricity distributor is provided for in subsections 2.1(a) and (g) of the Retailer Code. The Board notes

that this requirement is provided for in subsection 2.1(a) of the Gas Marketer Code. The Retailer Code should be streamlined to make it similar to the Gas Marketer Code by broadening the meaning of subsection 2.1(h) of the Retailer Code so that subsections 2.1(g), (i) and (j) would no longer be specifically required.

While no party commented on subsection 2.1(h) of the October 8, 2003 Proposed Retailer Code, which states that a retailer shall “not make any representation or statement or give any answer or take any measure that is false or is likely to mislead a consumer with regard to any term in an offer”, the Board is of the view that this provision may be too narrow. To discourage retailers and gas marketers from using any statements that may mislead consumers (e.g., verbal messages that do not relate to an offer; confuse a consumer about the identity of the retailer or gas marketer, its promotion campaigns or trade marks, or those of competitors or the regulated distribution company; unsubstantiated comparisons; regarding contracts, rights or obligations unless in the written offer; etc), the phrase “with regard to any term in an offer” should be deleted from the subsection in order to widen the effect of the provision. With this revision, subsections 2.1(g), (i) and (j) should be removed from the Retailer Code. These provisions were intended to protect large consumers, and given the broadening of subsection 2.1(h), the Board does not think that they provide sufficient additional protection to warrant keeping them in the Retailer Code. Finally, the revised 2.1(h) provision in the Retailer Code should be added to the Gas Marketer Code. All of these changes would bring the Retailer Code and Gas Marketer Code closer together.

The Board appreciates stakeholder comment that section 2.2, which requires under certain circumstances that a retailer or gas marketer inform a consumer twice of an existing contract when selling and reaffirming a new contract with that consumer, may create business process inefficiencies and increase transaction costs and customer effort. The Board is of the view that one notification is sufficient and that the section be changed to require the retailer or gas marketer to inform the consumer of the existing contract at the time of reaffirmation.

The Board agrees that the term “consumer” in section 2.2 of the Codes should be changed to refer to customers, not consumers. Further, this section in the

Retailer Code should only apply to low volume consumers. Sections 2.5 and 2.6 of the Codes should not be changed because a contract between the retailer or gas marketer and the consumer may not yet exist.

The Board is concerned that section 2.3 of the Codes, as currently worded, could cause undue delay in processing contracts. However, this consideration needs to be balanced against the need to ensure that the underlying contract has been reaffirmed by the consumer. The Board recalls the general concern raised by parties in the Board's process for developing the Gas Distribution Access Rule (GDAR) that distributors should not be required to "police" the relationship between retailers or gas marketers and consumers. Consequently, section 2.3 of the Codes should be re-worded to clarify retailer and gas marketer obligations in processing contracts as follows. To be consistent, the Board notes that the language in paragraph (a) below should be reflected in similar sections of the Codes.

A retailer/gas marketer shall not:

- (a) submit a request to a distributor for a change of gas supply for a consumer to that retailer/gas marketer unless that retailer/gas marketer has the permission of the consumer in writing to do so; or
- (b) supply electricity/gas to a consumer unless the retailer/gas marketer has the permission of the consumer in writing to do so, and has received the notice of reaffirmation from the consumer, where reaffirmation is required.

The Board appreciates stakeholder concern that section 2.4 of the Codes, which requires the immediate withdrawal of a transfer request if it is discovered that the underlying contract is not compliant, could result in premature cancellations. The provision should be changed to require the retailer or gas marketer to contact the affected consumer to replace the contract. Further, the retailer or gas marketer should be required to immediately cancel the transfer request if the consumer does not accept the compliant contract. Finally, retailers and gas marketers should be required to provide a copy of the compliant contract to the consumer within 14 days of acceptance by that consumer.

With regards to comment on contract renewal (section 2.7), the Board is of the view that the Codes need to address the renewal process in situations where a customer has previously notified the retailer or gas marketer that they do not wish to renew. Therefore, the provision should be changed to require that the retailer or gas marketer remind the customer of his or her prior notice and obtain positive acceptance of the renewed contract from that customer. Getting a customer to sign a new contract without an explicit acknowledgment that the customer forfeits his or her earlier notice not to renew is not sufficient. In addition, a standard, preprinted paragraph on every contract that states that the contract overrides any previous instruction by the customer is not sufficient. The acceptance of the renewed contract from the customer should reference the customer's prior notice to the retailer or gas marketer (e.g. date, form of instruction).

While no party commented on section 2.8 of the October 8, 2003 Proposed Codes, which specifically states that a retailer or gas marketer "shall not engage in any unfair practice, as defined by the Act", the Board notes that this requirement is clear in subsection 88.4 of the Act. Therefore, section 2.8 should be deleted from the Codes to further reduce duplication with the legislation.

3 Consumer Complaints

Chapter 3 of the October 8, 2003 Proposed Codes set out the administrative procedures that retailers and gas marketers would be required to put in place for resolving complaints. It included key elements of the process to be followed in resolving complaints, and a provision for escalating unresolved complaints to the Board's Customer Service Centre.

Stakeholders' Comments

OESC expressed concern that the complaint resolution process outlined in section 3.2 of the October 8, 2003 Proposed Codes will require the company to resolve unfounded complaints by consumers, and suggested that the words "and necessary" be deleted from the section. In addition, OESC submitted that a retailer or gas marketer should be required to provide a consumer the Board's Customer Service Centre phone number only if that consumer expresses dissatisfaction with the company's resolution of the complaint.

Direct Energy commented that the requirement to notify the Board's Customer Service Centre of complaint resolutions in Section 3.3 of the October 8, 2003 Proposed Codes should only apply to those situations where the Board has sent notice to the marketer of the complaint (which was subsequently resolved). Direct Energy commented that the retailer or gas marketer may not know whether a customer has complained to the Board, and so may inadvertently not comply with the requirement as written.

Board Comments and Proposed Changes

The Board is not convinced that consumers, retailers or gas marketers will benefit from the suggested changes to the provisions set out in section 3.2 of the Codes. The Board notes that it is in the business interest of any retailer or gas marketer to resolve consumer complaints made to the company about its business.

The Board is concerned that section 3.3, as written, may inadvertently impose non-compliance on a retailer or gas marketer. The section should be changed to apply to only those complaints that have been forwarded to the retailer or gas marketer from the Board.

4 Services and Information to be Maintained

Chapter 4 of the October 8, 2003 Proposed Codes outlined retailer and gas marketer obligations regarding company contact information, and the collection and retention of certain information in carrying out its business.

Stakeholders' Comments

Coral commented that the requirement for a retailer to have a toll-free number for the general public creates unnecessary burden on retailers serving large customers, when previously this requirement only fell on retailer service to small consumers.

OESC submitted that section 4.2 of the October 8, 2003 Proposed Codes, which set out requirements on information to be maintained on file and provided to the Board upon request, need to be redrafted to reflect the provisions of PIPEDA so there is no conflict between the codes and the federal legislation.

EPCOR noted that the requirements to maintain a list of its retail customers and the evidence of each customer's permission for EPCOR to request a distributor to change supply for that customer beyond the life of a contract, including renewals, as provided for in subsections 4.2(b) and 4.2(c), are too burdensome. EPCOR suggested that these provisions be qualified with the phrase "for as long as the contract or any renewal [of it] is in effect".

Direct Energy commented that subsections 4.2(e) and 4.2(f) are inconsistent with the legislative amendment which provides for exceptions from the requirement for reaffirmation. In addition, Coral noted that these provisions should only apply to small consumers.

OPG submitted that subsection 4.2(g) should read: "such other information in the retailer's possession as the Board may reasonably require" to make the request less open-ended.

Direct Energy submitted that retailers and gas marketers should not be required to keep copies of paper contracts, as is currently required in section 4.4 of the October 8, 2003 Proposed Codes, when the ability to produce and keep an electronic copy will better balance consumer protection and efficiency objectives. Direct Energy commented that electronic storage facilitates data security, ease and speed of data retrieval, reduced storage and retrieval costs and reduced customer care costs (call centre staff can retrieve a contract while on an initial phone call with a customer). Further, Direct Energy submitted that *The*

Electronic Commerce Act allows for retention in electronic form of a written document if the electronic form "accurately represents the information contained in the written document". Direct Energy also observed that the argument that an electronic copy of a document that contains handwriting cannot meet this requirement would exclude large numbers of documents from electronic storage, and it appears that the statute did not intend this result. It is also questionable, Direct Energy noted, whether the information lost through conversion to an electronic form (i.e., pressure indentations) is truly necessary to confirm the authenticity of a document. Direct Energy concluded that the utility of the additional verification provided by pressure indentation must be balanced against the incremental cost and decrease in efficient customer service that will result from the requirement to retain a paper copy. EPCOR also submitted that retailers and gas marketers should be able to keep scanned and electronically stored contracts as paper retention is expensive and space consuming.

Board Comments and Proposed Changes

The Board agrees with the stakeholder comment that provision of a toll-free telephone number only should only apply to retailer service to low-volume consumers, and that section 4.1 of the Retailer Code should be changed.

The Board notes that the requirements outlined in section 4.2 of the Retailer Code are also provided for in the Electricity Reporting and Record Keeping Requirements (RP-2002-0140) issued by the Board on October 23, 2002. Therefore, the section should be deleted from the Retailer Code to eliminate the duplication. However, the section should remain in the Gas Marketer Code. Natural Gas Reporting & Record Keeping Requirements have been proposed and are currently under public consultation. Once those requirements are issued, the Board will remove section 4.2 from the Gas Marketer Code. In the meantime section 4.2 of the Gas Marketer Code should be changed as outlined below, and communicated to Board staff involved in the Natural Gas Reporting & Record Keeping Requirements consultation process.

The Board is of the view that there is no conflict between section 4.2 of the Codes and the federal legislation. The Board notes; however, that subsection 4.2(g) which provides for the Board's ability to require information beyond that

which is laid out in section 4.2 duplicates provisions in the Retailer and Gas Marketer Licences (sections 8 and 7, respectively). Therefore, subsection 4.2(g) should be deleted from the Codes to eliminate duplication.

The Board is of the view that the retention period for the customer list and the customer authorization may be changed to apply for only as long as the contract or renewal is in effect to avoid information management burden on retailers and gas marketers. Subsections 4.2(b) and 4.2(c) should be changed to reflect this.

The Board accepts stakeholder comment that subsections 4.2(e) and 4.2(f) should be consistent with legislation and is of the view that these provisions should apply only where reaffirmation and renewal acceptance is required to be obtained. The Board notes that by doing so, the provisions would only apply to low volume consumers.

While no party commented on section 4.3 of the October 8, 2003 Proposed Codes, which requires that a retailer or gas marketer retain a copy of a contract entered into in an electronic format, the Board notes that this requirement is stated in regulation (section 4(3) of Ontario Regulation 200/02). Therefore, section 4.3 should be deleted from the Codes to further reduce duplication with legislation and regulation.

Stakeholders make a convincing argument against the requirements set out in section 4.4 of the Codes. While pressure indentation may be lost when a document is reduced to an electronic copy, Board staff have advised the Board that in its past investigations of contracts that were alleged to be forgeries, it was still possible to determine the validity of a signature in the electronic copy of a contract. Further, the Board notes that the legislated reaffirmation requirements provide additional consumer protection. Therefore, section 4.4 should be removed from the Codes.

5 Confidentiality of Consumer Information

Chapter 5 of the October 8, 2003 Proposed Codes outlined retailer and gas marketer obligations regarding the collection, retention, use, and release of consumer information.

Stakeholders' Comments

OESC submitted that chapter 5 of the October 8, 2003 Proposed Codes should be deleted because it duplicates PIPEDA and is therefore unnecessary.

Direct Energy submitted that section 5.3 of the October 8, 2003 Proposed Codes, which restricts the use of consumer information without that consumer's consent in writing, should be deleted and stated that the federal privacy legislation, PIPEDA, will provide appropriate consumer information protection. The provisions in the October 8, 2003 Proposed Codes go beyond those found in PIPEDA, which require the holder of the information to give the consumer an opportunity to request that his information not be used for additional purposes. Further, the requirements in the October 8, 2003 Proposed Codes do not relate to the integrity of the energy product sale. Direct submitted that a more restrictive provision than PIPEDA is neither needed nor justified.

Board Comments and Proposed Changes

The Board is not convinced that chapter 5 of the Codes should be deleted. While in general, chapter 5 of the Codes is consistent with PIPEDA, it is important that the Board retain an ability to set rules regarding consumer information in the energy markets it regulates. In this case, keeping confidentiality provisions in the Codes enables the Board to better monitor and enforce the protection needed for gas and electricity consumer information.

Section 5.3 of the Codes does allow a retailer or gas marketer to use consumer information for purposes other than that which it was collected for if the consent of the consumer is obtained. The Board reminds retailers and gas marketers that consumer consent can be obtained when the information is collected.

6 Transfer and Assignment of Contracts

Chapter 6 of the October 8, 2003 Proposed Codes set out limitations on, and reporting requirements related to the sale, transfer, or assignment of customer contracts.

Stakeholders' Comments

Direct Energy submitted that chapter 6 of the October 8, 2003 Proposed Codes should be modified to exclude non-arm's length sales transfers or assignments that do not result in changes to the marketer's name, address or phone number. Direct Energy commented that these transactions do not affect customers.

Coral expressed concern that section 6.2 of the October 8, 2003 Proposed Retailer Code does not respect commercial process and confidentiality. Coral commented that the requirement for notice should not apply to "proposed" transactions, and that notice should not take place before the transaction closes. Coral suggested that notice could be required after a transaction is completed.

Board Comments and Proposed Changes

The Board is not convinced that "internal" sales, transfers or assignments should have blanket exemption from the requirements set out in chapter 6 of the Codes. Customer confusion is caused whenever a transfer of customers is made and there is a change of name of the marketer, whether the transfer is internal to a group of companies or not. The Board reminds retailers and gas marketers that in situations where an "internal" sale, transfer or assignment is not anticipated to be clearly apparent to the affected consumers, the retailer or gas marketer may apply to the Board for an exemption from this requirement for that transaction.

The Board appreciates stakeholder comment on section 6.2 of the Retailer Code and notes that the section was not intended to create blocks or cause premature disclosure of transactions. Therefore, the Board is of the view that the provision should be changed to require notice within 10 days of the sale, transfer or assignment, and notes that this change should be also made to the Gas Marketer Code.

7 Breach of the Code

Chapter 7 of the October 8, 2003 Proposed Codes addressed the potential consequences if a retailer or gas marketer is found in violation of the Code.

Stakeholders' Comments

There were no comments made by stakeholders on this chapter.

SUMMARY

The Board is changing the October 8, 2003 Proposed Codes as described in this report. The revised codes proposed by the Board are attached as Appendix B.

APPENDICES

Appendix A - October 8, 2003 Proposed Codes

Copy of the October 23, 2003 Notice of Proposal to Issue a Code and the Proposed Electricity Retailer Code of Conduct, dated October 8, 2003; and

copy of the October 23, 2003 Notice of Proposal to Issue a Rule and the Proposed Code of Conduct for Gas Marketers, dated October 8, 2003.

Appendix B - Board Proposed Codes

Copy of the Proposed Electricity Retailer Code of Conduct; and
copy of the Proposed Code of Conduct for Gas Marketers.