

July 21, 2010

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VIA E-MAIL

File 10606.00015

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto ON M4P 1E4

Dear Ms Walli:

**Re: Creation of the Conservation and Demand Management Code for Electricity
Distributors
Board File No. EB-2010-0215**

We are counsel to the Consumers Council of Canada (the "CCC").

In its *Notice of Proposal to Issue a New Code*, dated June 22, 2010, the Board invited interested parties to make written submissions on its proposed Conservation and Demand Management Code (the "CDM Code"). The CCC will, by separate letter, provide those comments.

In this letter, we address certain jurisdictional questions which, we submit, must be resolved before the CDM Code can be implemented.

It is our position that the Board does not have the jurisdiction, whether under the *Ontario Energy Board Act, 1998* (the "OEB Act") or pursuant to the Directive issued by the Minister of Energy and Infrastructure on March 31, 2010 (the "Directive"), to authorise the recovery of the costs associated with CDM Programs through the Global Adjustment Mechanism ("GAM"), and to do so without a hearing.

A. Background: the OEB Act, the Directive, and the proposed CDM Code

(i) The OEB Act

Section 27.1(1) of the OEB Act is as follows:

The Minister may issue, and the Board shall implement, directives that have been approved by the Lieutenant Governor in Council

that require the Board to take steps specified in the directives to promote energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources.

Section 27.2 of the OEB Act, in turn, provides in relevant part:

(1) The Minister may issue, and the Board shall implement, directives that have been approved by the Lieutenant Governor in Council that require the Board to take steps specified in the directive to establish conservation and demand management targets to be met by distributors and other licensees.

(2) To promote conservation and demand management, a directive may require the Board to specify, as a condition of a licence, the conservation targets associated with those specified in the directive, and the targets shall be apportioned by the Board between distributors and other licensees in accordance with the directive.

...

(7) A directive may specify whether the Board is to hold a hearing, the circumstances under which a hearing may or may not be held and, if a hearing is to be held, the type of hearing to be held.

(ii) The Directive

Among other things, the Directive requires the Board to amend each distributor's licence to add a condition requiring the distributor to achieve reductions in electricity consumption and reductions in peak provincial electricity demand through the delivery of CDM Programs by the amounts specified by the Board (the "CDM Targets"), over a four-year period beginning January 1, 2011. According to the Directive, the Board is to amend the licence conditions without a hearing.

The Directive goes on to require the Board to:

...issue a code that includes rules relating to the reporting requirements and performance incentives associated with CDM Programs and to the planning, design, approval, implementation and the evaluation, measurement and verification ("EM&V") of Board-Approved CDM Programs and to such other matters as the Board considers appropriate.

(iii) The proposed CDM Code

On June 22, 2010, the Board circulated a draft CDM Code for comment.

According to the CDM Code, each licensed electricity distributor ("LDC") must submit for Board approval a CDM Strategy by November 1, 2010. LDCs may apply for the Board approval of CDM Programs that (a) are designed to assist the distributor in meeting the CDM targets set out in its licence; and (b) are cost effective, as measured using the OPA's Cost Effectiveness Tests.

According to the CDM Code, LDCs are required to use a fully allocated costing methodology. All direct and indirect costs associated with CDM Programs, including staffing costs, are to be included in the program budget for recovery through the GAM, and not through a distributor's distribution rates.

Lastly, the CDM Code provides that any matter under the Code requiring an approval, consent, or determination (thus including the approval of CDM Programs and the recovery of costs through the GAM) may be determined by the Board without a hearing, at the Board's discretion.

B. The Board does not have the jurisdiction to allow the recovery of the costs of CDM Programs from the GAM without a hearing

Neither the OEB Act nor the Directive give the Board the jurisdiction to order or direct the recovery of costs of CDM Programs from the GAM, and to do so without a hearing.

The Directive requires the Board to amend each LDCs' license to reflect their allotted CDM targets, and to do so without a hearing. The Directive also requires the Board to have regard to the objective that lost revenues that result from CDM Programs should not act as a disincentive to a distributor.

The Directive does not, however, authorize or require the Board to approve the recovery of the costs of CDM Programs from the GAM, nor does it authorize or require the Board to do so without a hearing, as the Board proposes to do.

The costs recovery that is contemplated by the Board is not formulaic; it is not similar to the type of costs recovery mechanisms one would expect to encounter as part of an incentive regulation regime. Rather, the costs of CDM Programs are caused by the activities of individual utilities, and the Board must determine whether those costs are prudent.

The GAM encompasses a number of costs related to electricity *per se*, rather than to the distribution or transmission of electricity. The costs included in the GAM are derived by formula or by contract. The costs do not include those related to discretionary spending by LDCs. The costs of CDM activities, and the recovery of those costs, properly fall within the ambit of section 78 of the OEB Act.

Section 78 of the OEB Act provides that no transmitter or distributor of electricity shall charge for the transmission or distribution of electricity, except with an order of the Board. Subsection 21(2) of the OEB Act, in turn, provides that the Board shall not make an order until it has held a hearing.

It follows that, by proposing to approve CDM Programs, which includes the approval of the recovery of the costs of the CDM Programs from the GAM, and to do so without a hearing, the Board is acting without authority and in excess of its statutory jurisdiction.

As the Ontario Court of Appeal recently held, in *Great Lakes Power Ltd. v. Ontario (Energy Board)*, a public utility must undergo a prudency review before passing along its costs to its customers. The Board does not have the authority to waive that requirement. In addition, the Board has a duty to balance the rights and interests of utilities against those of ratepayers. In allowing for the recovery of costs of the CDM Programs from the GAM without a hearing, the Board is eschewing this duty.

Furthermore, by authorising the recovery of costs from the GAM without a hearing, the Board is disregarding its duties under section 1 of the OEB Act, which mandate it, among other things, to “protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service”.

C. In the alternative, the Directive constitutes an impermissible delegation of authority

In the alternative, if the Directive purports to provide the Board with the necessary authority to authorise the recovery of costs for CDM Programs from the GAM, and to do so without a hearing, it constitutes an impermissible delegation of authority.

Subsection 27.2(7) provides that "a directive may specify whether the Board is to hold a hearing, the circumstances under which a hearing may or may not be held and, if a hearing is to be held, the type of hearing to be held".

Effectively, subsection 27.2(7) amends subsection 21(2) of the OEB Act, which provides that the Board may not issue an order without a hearing. What is problematic is that it does so by circumventing the proper legislative process, by authorising a Minister, by way of directive, to amend the OEB Act. This amounts to an impermissible delegation of authority by the Legislature.

In the circumstances, the Board cannot rely on section 27.2(7) of the OEB Act, nor on the Directive, for the authority to approve the recovery of costs for CDM Programs from the GAM, without a hearing.

The Board, pursuant to section 19 of the OEB Act, is fully empowered to determine all questions of law and jurisdiction. This includes determining the legality of subsection 27.2(7) of the OEB Act and of the Directive.

In *R. v. Conway*, the Supreme Court of Canada stated that an administrative tribunal has the obligation – and duty – to consider and apply the Constitution when answering questions of law. While that case dealt with a constitutional issue, the broader principle it stands for is that an administrative tribunal must consider the legality of what it proposes to do before it does it. Therefore, before it takes steps to meet the requirements of the Directive, the Board must first determine whether it is legal and in fact provides it with the requisite jurisdiction.

D. Conclusion

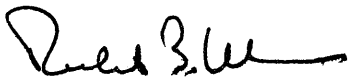
The CCC submits that neither the Board nor the Minister, through the Directive, can override the Board's rate-setting statutory obligations. The objectives and requirements of the Directive and sections 27.1 and 27.2 of the OEB Act must be implemented in a manner that is compatible with the Board's statutory rate-setting jurisdiction under section 78 of the OEB Act, the Board's statutory-mandated duties under section 1 of the OEB Act, and the Board's obligations and duties, as recognised by the courts.

In the circumstances, it is inappropriate for the Board to give effect to the Directive and to the CDM Code without first holding a hearing to determine the threshold issue of jurisdiction of the Board to allow for the recovery of costs related to the CDM Program from the GAM, and to do so without a hearing.

In addition, the Board may wish to receive submissions on how the Board can accomplish the policy goals of the Directive in a manner that is consistent with its rate-setting obligations, and in a manner that is consistent with the Board's statutory mandated objectives.

Yours truly,

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