



EB-2010-0245

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O, 1998, c. 15, Schedule B;

AND IN THE MATTER OF cost award eligibility for interested parties in the consultation process regarding the implementation of consumer protection (retailer/marketer) provisions of the *Energy Consumer Protection Act, 2010*.

BEFORE: Cynthia Chaplin
Vice Chair

DECISION ON COST ELIGIBILITY

On August 4, 2010, the Ontario Energy Board (the “Board”) issued a letter to interested parties that set out an overview of the consultation process that the Board intends to follow to implement the consumer protection provisions of the *Energy Consumer Protection Act, 2010* (the “ECPA”) that relate to the activities of electricity retailers and gas marketers (“suppliers”). In that letter, the Board indicated that cost awards will be available to eligible persons under section 30 of the *Ontario Energy Board Act, 1998* (the “OEB Act”) in relation to the consultation. The Board also indicated that costs awarded will be recovered from licensed electricity retailers (50%) and licensed gas marketers (50%), and apportioned amongst them in the manner to be determined by the Board at the relevant time.

On August 12, 2010, the Board issued a Notice of Proposal (the “Notice”) inviting comment on a proposed restated Electricity Retailer Code of Conduct, a proposed restated Code of Conduct for Gas Marketers, and a proposed amendment to the Gas Distribution Access Rule. In the Notice, the Board also indicated that it was allowing an additional opportunity for the filing of cost award eligibility requests, and established 40 hours as the maximum cost award that will be available for each eligible participant in relation to the provision of written comments on the Board’s proposals as set out in the Notice.

The Board received requests for cost award eligibility from the following participants within the deadline set out in the Board's August 4, 2010 letter:

- Building Owners and Managers Association of the Greater Toronto Area ("BOMA");
- Canadian Manufacturers & Exporters ("CME");
- Consumers Council of Canada ("CCC");
- Energy Probe Research Foundation ("Energy Probe");
- Housing Help Association of Ontario ("HHAO");
- London Property Management Association ("LPMA");
- Mr. Bruce Sharp; and
- Vulnerable Energy Consumers Coalition ("VECC").

No further requests for cost eligibility were received in response to the Notice.

Suppliers were given an opportunity to file any objections they might have in relation to the eligibility of the above-noted participants for an award of costs. On August 18, 2010, Direct Energy and Just Energy filed a joint letter in which they objected to certain of the requests for cost eligibility. On the same date, these suppliers also filed another joint letter asking the Board to reconsider its approach to the recovery of cost awards in this consultation. On August 18, 2010, Superior Energy Management ("SEM") filed a letter in which it similarly objected to certain of the requests for cost eligibility and addressed the issue of cost award recovery.

Cost Award Recovery

As noted above, the Board indicated in both its August 4, 2010 letter and the Notice that costs awarded in this consultation will be recovered from licensed suppliers.

In their joint letter on cost award recovery, Direct Energy and Just Energy submitted that the costs incurred in this consultation are "more appropriately recovered under the Board's Cost Assessment Model similarly as all other costs relating to market rules and code implementations have been in the past". These suppliers submitted that, although section 30 of the Act allows the Board to order any person to pay costs, it would in their view be inequitable to recover costs in this consultation from suppliers. Among other things, these suppliers noted that the issues in this consultation and any ensuing new

regulatory requirements relate and apply to all consumers, whereas only a subset of that consumer base (customers of suppliers) would bear the costs associated with this consultation under the Board's approach. These suppliers also noted that, unlike distributors, they and other suppliers are unable to recover regulatory costs from customers at Board-approved rates, and that the Board's approach would place a punitive financial burden on suppliers and certain consumers.

In its letter, SEM similarly submitted that the "recovery of costs associated with this consultation should be determined based on the Board's Cost Assessment Model as it applies to market rules", and that suppliers should have an opportunity to respond in advance of a decision that would depart from this model. SEM also submitted that, should the Board proceed with the recovery of costs from suppliers, the Board should apportion the costs based on each supplier's proportionate share of the market. Based on the Board's past practice, it is not unusual for cost awards to be recovered from the regulated sector of the industry that is most directly affected by the subject-matter of a given consultation process. Like the ECPA, the subject-matter of this consultation is specific requirements regarding the conduct and activities of suppliers. The Board remains of the view that suppliers should bear some portion of the costs involved in developing those requirements. However, the Board acknowledges the comments made in the supplier filings to the effect that both the ECPA and the Board's work that devolves from it will result in the implementation of rules that will avail to the benefit of all consumers. As such, the Board is persuaded that some portion of the costs involved in this consultation should also be borne by electricity and gas distributors.

The Board has therefore determined that cost awards in this consultation will be recovered from licensed electricity retailers (25%), licensed gas marketers (25%), rate-regulated licensed electricity distributors (25%) and rate-regulated gas distributors (25%), and will be apportioned amongst them as follows:

1. for each of the electricity distributor and gas distributor groups, based on their respective distribution revenues; and
2. for each of the electricity retailer and gas marketer groups, based on their respective share of the low-volume consumer market. The Board will, in due course, direct licensed retailers and marketers to provide updated low-volume customer figures for this purpose. If retailers and marketers have concerns regarding the confidentiality of relative market share information,

the Board may act as a clearinghouse for the purposes of the payment of cost awards to eligible participants.

Cost Award Eligibility

In their joint letter on cost award eligibility, Direct Energy and Just Energy objected to the granting of cost awards for a number of participants as follows:

- i. CME, BOMA and LPMA, as participants representing a commercial interest, should not be eligible. In addition, these participants do not represent low-volume consumers generally nor can they provide material information or expertise beyond that which can be provided by other participants.
- ii. Energy Probe should not be eligible as its expertise and focus is not directed at the subject matter of this consultation, nor does Energy Probe purport in its request for cost eligibility to have this expertise or any relevant significant experience dealing with consumers in this regard.
- iii. Mr. Sharp should not be eligible as he does not possess the experience and broad representation of consumers as do other participants, and it would be inefficient to pay costs for a single participant in this consultation. In addition, granting cost awards to Mr. Sharp would set a precedent that all consumers generally should be individually compensated for participating in a Board consultation, even where they provide no subject matter expertise beyond what already exists.

With respect to CCC, HHAO and VECC, Direct Energy and Just Energy acknowledged that this consultation will be enriched by their experience in dealing with residential and low-volume consumer interactions as it pertains to energy supply. However, these suppliers noted that there is overlap across the three participants, and suggested that the Board choose the two most experienced organizations as eligible for an award of costs.

In its letter, SEM requested that the Board limit cost award eligibility to CCC, HHAO and VECC, to the extent that the Board determines that the scope of their representation does not overlap.

Based on the criteria set out in section 3 of the Board's *Practice Direction on Cost Awards* (the "Practice Direction"), the Board finds that CCC, Energy Probe, HHAO, LPMA and VECC are eligible for an award of costs in this consultation process. The Board notes that each of these, including LPMA, represents the interests of low volume consumers. The Board does not consider it appropriate in this case to limit the eligibility of organizations representing the interests of low-volume consumers to a sub-set of the requesting participants. However, the Board reminds these participants that it expects them to make every effort to communicate and co-ordinate their participation in this process to the extent that they represent the same interests or class of person. Failure to do so will be considered by the Board in determining the amount of costs awarded to the relevant participants. The Board also reminds eligible participants that they should ensure that they have the ability to process any cheques that may be issued to them for any award of costs approved by the Board.

Based on the criteria set out in section 3 of the Practice Direction, the Board also finds that BOMA and CME are eligible for an award of costs in this consultation process. These participants primarily represent higher volume consumers. While many of the issues being addressed in this consultation pertain exclusively to low-volume consumers, the Board notes that some of the issues are also relevant to higher volume electricity consumers. The Board expects these participants to limit their participation in this consultation to issues directly affecting their respective higher volume consumer constituencies, and does not anticipate that these participants will require the full allotment of 40 hours in order to participate effectively. The Board also reminds these participants of the Board's expectation regarding coordination as set out above.

In his request for cost eligibility, Mr. Sharp noted that he would participate in this consultation in his capacity as a private citizen rather than in his capacity as part of an energy consultancy. Mr. Sharp indicated that, while he does not directly represent any consumers, he would "represent the interests of all Ontario residential energy consumers, i.e. the public interest". Based on Mr. Sharp's request, his participation in this consultation does not appear to be at the instance of any particular identified group of consumers. It also appears to the Board that, to the extent that Mr. Sharp's interests as a low-volume consumer are affected by this consultation, they would be affected in the same way as the interests of any other low-volume consumer in the Province. That common interest is already represented in this consultation by the eligible participants identified above. Nonetheless, given the particular nature of this consultation, the Board finds that Mr. Sharp is eligible for an award of costs, but only to the extent of any

reasonable disbursements that he may incur to participate in this consultation. In keeping with section 3.08 of the Practice Direction, the Board may consider awarding Mr. Sharp an honorarium if appropriate based on his participation.

The Board also takes this opportunity to remind interested parties that they are welcome to participate in this consultation irrespective of their status in terms of eligibility for an award of costs.

As noted above, the Board has determined that the recovery of cost awards in this consultation should be allocated on a basis that differs from what the Board specified in its letter of August 4, 2010 and in the Notice. In particular, in accordance with this Decision cost awards will be recovered from two new classes of payors (electricity distributors and gas distributors), neither of which has had an opportunity to object to any of the requests for cost eligibility. The Board's determination on the cost eligibility of the participants as set out above is therefore subject to any objections that rate-regulated licensed electricity distributors and rate-regulated natural gas distributors might make. Any such objections must be filed with the Board by **September 14, 2010**, and will be posted on the Board's website.

In their joint letter on cost award eligibility, Direct Energy and Just Energy requested clarification regarding the statement in the Notice to the effect that cost awards will be available to a maximum of 40 hours "per eligible participant". The Board confirms that "per eligible participant" refers to the eligible organization itself, and that 40 hours is the maximum for each such organization regardless of the number of individual persons that might be representing or advising the organization in this consultation.

DATED at Toronto, September 8, 2010

ONTARIO ENERGY BOARD

Original signed by

Cynthia Chaplin
Vice Chair