



By electronic filing and by e-mail

January 15, 2010

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
27<sup>th</sup> floor  
Toronto, ON M4P 1E4

Dear Ms Walli,

**Rate Protection and the Determination of Direct Benefits  
under Ontario Regulation 330/09 ("O.Reg. 330/09")**

**Board File No.: EB-2009-0349**

**Our File No.: 339583-000056**

**A. Introduction**

The following comments are provided on behalf of Canadian Manufacturers & Exporters ("CME"). They pertain to Board Staff's December 14, 2009 Discussion Paper entitled "Proposed Framework for Determining the Direct Benefits Accruing to Customers of a Distributor under Ontario Regulation 330/09." ("O.Reg. 330/09"). Throughout this letter, we refer to this document as the "Discussion Paper".

**B. Context for CME's Responses to Discussion Paper Questions**

1. Board's Statutory Objectives

The opening paragraph of the Discussion Paper quotes the new objective that the *Green Energy and Green Economy Act 2009* (the "GEA" or the "Green Energy Act") added by way of amendment to section 1 of the *Ontario Energy Board Act, 1998* (the "OEB Act"). The new objective, that is to guide the Board in carrying out its responsibilities under the *OEB Act* and any other *Act* in relation to electricity is "to promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities."

At the outset, we wish to emphasize that this new objective does not take priority over the other mandatory objectives that are to guide the Board's conduct as the economic regulator of monopoly electricity utilities, including, in particular, its obligation "to

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protect the interests of consumers with respect to prices and the reliability and quality of electricity service." (emphasis added)

2. The Scope of the Consultative is Narrow but its Implications are Broad

The specific questions upon which Board Staff invites comments in this consultative pertain to a determination of the "direct benefits" to the customers of a particular distribution utility of its spending on *GEA* initiatives that qualify as "eligible investments" under section 79.1 of the *OEB Act* and O.Reg. 330/09 issued thereunder. While the narrow focus of this consultative is the manner in which these "direct benefits" should be identified and quantified, the implications of the exercise are broad. The Discussion Paper recognizes that, in combination with an application of certain provisions of the Distribution System Code ("DSC"), the outcome of this consultative eventually leads to Board determined amounts for the electricity distributors it regulates that will be recovered, province-wide, from all electricity consumers.<sup>1</sup>

3. The Phrase "Rate Protection" Misdescribes the Province-wide Recovery Amount and is Misleading

Section 79.1(1) of the *OEB Act* and portions of the O.Reg. 330/09 use the phrase "rate protection" to describe the amount of the rate increase pertaining to eligible investments by distributors that will be recovered province-wide from all electricity consumers. The Discussion Paper notes that the language of section 79.1 closely resembles the provision in section 79 of the *OEB Act* for Rural and Remote Rate Protection ("RRRP").<sup>2</sup> We nevertheless suggest that, in the context of the Board's statutory objective requiring it to protect the interests of consumers with respect to the prices of electricity service, it is misleading for the Board to characterize its determination of the amount that will be recovered province-wide from all electricity consumers for *GEA* eligible investments by distributors as a "rate protection" measure. We make this suggestion for the reasons set out below.

The use of the word "protect" in the Board's statutory objectives implies that the Board is obliged to act to prevent consumers from being subjected to price increases and that, when price protection is warranted, there will be a reduction from the charges that would otherwise prevail. However, the amount for province-wide allocation that the Board determines is not going to appear as a deduction on any bills all distribution utilities render to their customers. On the contrary, what will appear on these bills is an incremental charge pertaining to the province-wide rate recovery amount.

The Board's determination of the province-wide cost responsibility amounts for the distribution utilities it regulates will not protect electricity consumers from price increases. Rather, the determination of these amounts will result in the significant price increase for all electricity consumers. In the context of its statutory obligation to protect the interests of consumers with respect to prices and regardless of the presence of the

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<sup>1</sup> See Discussion Paper, page 2.

<sup>2</sup> See Discussion Paper, page 1.

phrase "rate protection" in the *OEB Act* and O.Reg. 330/09, we suggest that the Board's use of the phrase to describe the rate increase that will be recovered province-wide from all electricity consumers is misleading. We respectfully urge the Board to refrain from using the phrase in its public communications to describe an amount that will appear as an incremental charge on all electricity distributor bills to consumers. We urge the Board to adopt a phrase that accurately describes the amount as an item of incremental province-wide rate responsibility. A phrase something like "GEA province-wide rate responsibility amount" transmits to electricity consumers the true nature of this item.<sup>3</sup>

#### 4. Economic Feasibility and Board Approval of Utility Specific *GEA* Spending Levels

The "direct benefits" determination that is the focus of this consultative and the consequential determination of the province-wide rate responsibility amount are secondary steps in an exercise that begins with the Board's consideration, in utility-specific rate cases, of the *GEA* spending plans of the electricity utilities it regulates.

The Board has yet to establish the guiding principles and criteria that it will apply to determine the extent to which the test period and longer term *GEA* spending plans of the distribution and transmission utilities it regulates are to be approved. Matters pertaining to these guidelines and criteria are currently under consideration in applications for the approval of distribution rates for 2010 and 2011 by Hydro One Networks Inc. ("Hydro One") and some other distribution utilities.

The Discussion Paper refers to the *GEA* eligible investment spending plans submitted by Hydro One and two of the other distributors it regulates. In the Discussion Paper, the magnitude of these costs of about \$1.315B over the next 5 years is considered by Board Staff to inform them of the potential "direct benefits" flowing to distributors making the investments and to provide insight as to whether a single method for determining direct benefits is appropriate for all distributors.<sup>4</sup>

In CME's view, the test period and longer term total *GEA* related spending by all of the electricity transmitters and distributors the Board regulates is a matter of vital significance in the priority exercise to be performed by the Board of determining the level of *GEA* spending that is going to be approved. For CME, a determination of the guiding principles and criteria to be applied to quantify the "direct benefits" of such spending for a particular distributor's customers is not the priority issue. The principles and criteria that the Board plans to apply when considering the extent to which it approves the *GEA* spending plans of a particular distribution or transmission utility it regulates are the priority concern for CME.

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<sup>3</sup> In its January 14, 2010 Oral Decision on a Motion brought by Consumers Council of Canada ("CCC") in the EB-2009-0096 proceeding pertaining to an Application by Hydro One, the Board recognized, at Transcript Volume 11, page 11, the importance of clear and transparent communications to electricity consumers. We rely on this concept in making these suggestions about the misleading nature of the phrase "rate protection" in relation to the province-wide rate recovery amount that the Board will be determining.

<sup>4</sup> See Discussion Paper, page 3.

It is the economic feasibility of total *GEA* spending by the transmission and distribution utilities it regulates that the Board must assess and control before moving on to considering the extent to which *GEA* spending on eligible investments by a particular distributor can be accommodated and the subsequent question of the extent to which customers of the particular distributor benefit from the eligible investments made by that utility. All electricity consumers expect and are relying upon the Board to constrain the *GEA* spending plans by the utilities it regulates within the bounds of reasonableness.

In this context, *GEA* transmission spending plans of Hydro One over the next few years totalling \$2.3B<sup>5</sup> need to be considered along with the \$1.315B of *GEA* spending by three (3) of the distributors the Board regulates to which the Discussion Paper refers. All transmitter and distributor *GEA* spending needs to be considered when evaluating the economic feasibility of a particular distributor's Green Energy Plan. The implications of these infrastructure additions on the total cost of electricity commodity should also be recognized. The economic feasibility of parts of the whole cannot be assessed without first considering the economic feasibility of the whole.

It is this aspect of matters raised in the Discussion Paper that is the priority concern of CME.<sup>6</sup> In this letter, we express CME's priority concerns with the overall economic feasibility issue because they provide the context for and inform the brief responses that CME provides to the specific questions posed in the Discussion Paper.

The criteria that should be applied to determine the reasonableness of such spending plans include all matters pertaining to economic feasibility. One important aspect pertaining to economic feasibility is cost benefit analysis. Another is affordability. These criteria and others pertaining to economic feasibility should be applied when the Board considers the reasonableness of the total, as well as the utility specific *GEA* spending plans of the utilities it regulates.

##### 5. Total Bill Impact Analysis and Affordability

As already noted, an important aspect of economic feasibility is affordability. We submit that the Board cannot monitor and evaluate the reasonableness of *GEA* spending without considering total spending and the impact of total spending on the total bills electricity consumers receive.

The Board needs to determine and consumers need to know the impact on their current total electricity bill of all of the cost consequences of all of the spending described in or triggered by the utility spending plans before the Board for consideration.

The total bill impacts that utilities currently present are of little assistance to the Board in measuring affordability because they represent changes to only part of the total bill measured against amounts that do not reflect all of the components of the total bill that

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<sup>5</sup> This figure is contained in materials Hydro One presented to its Transmission Stakeholders at a meeting held in Toronto on November 16, 2009.

<sup>6</sup> See Board letter of December 14, 2009, in these proceedings at page 2 stating that "Participants should, however, feel free to comment on any aspect of the Discussion Paper."

electricity consumers receive.<sup>7</sup> We suggest that, by definition, the total bill impact analysis should be based on all of the charges in the bills that consumers receive. We understand the components of the total bill to include the following:

- (i) Regulated transmission charges;
- (ii) Regulated distribution charges;
- (iii) Energy charge;
- (iv) A Global Adjustment/Provincial Benefit amount consisting of three (3) items:
  - (a) Ontario Power Authority costs,
  - (b) Ontario Financial Services Corporation ("OFSC") charges, and
  - (c) Market price/regulated energy price variance charge;
- (v) Regulated province-wide recovery charge; and
- (vi) Pending but not yet authorized for inclusion in the total bill is another "special charge" that will flow monies to the Ministry of Energy to fund its conservation programs.

We submit that the reasonableness of planned utility spending, including *GEA* spending, cannot be monitored without a bill impact analysis that realistically evaluates all of the impacts of the spending plans proposed by the utilities the Board regulates on all components of the total bill.<sup>8</sup>

Moreover, with the addition to the bills of all electricity consumers of a province-wide recovery charge, a total bill impact analysis needs to consider not only the *GEA* spending plans of a particular utility, but also the *GEA* spending plans of all utilities. This is because a portion of the *GEA* spending plans by transmitters will be collected to all electricity consumers in the province, along with the portion of the *GEA* spending plans of all utilities that the Board determines is to be collected in the province-wide charge applicable to all consumers.

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<sup>7</sup> The amendments to section 26.1 of the *OEB Act* authorize this special charge, subject to yet to be issued regulations. The validity of this statutory provision in any regulations passed thereunder are likely to be questioned by some parties on grounds that they arguably comprise constitutionally invalid taxation.

<sup>8</sup> We appreciate that the Board does not have control over all items that appear on the bill. That said, the total bill impact electricity consumers consider is the impact of changes on the total of all elements in the bills they receive. Since the Board adopts a total bill impact concept in its Mitigation Guidelines, a realistic means of measuring total bill impacts should be adopted in order to enhance clarity and transparency for consumers and regardless of the fact that the Board lacks control over all elements of an electricity consumer's bill.

## 6. Comments and Submissions by Other Ratepayer Representatives

In the course of preparing this letter, we have considered drafts of the comments and submissions that the Vulnerable Energy Consumers Coalition ("VECC") and Association of Major Power Consumers of Ontario ("AMPCO") will be providing. We support the detailed section by section analysis of the Discussion Paper contained in their comments. We also generally support the suggestions that we understand VECC and AMPCO will be making in response to the specific questions Board Staff has posed. In providing our responses to these questions, we attempt to refrain from repeating points VECC and AMPCO will be making and, to the extent possible, attempt to avoid duplication by confining our comments to points that are not covered in their submissions.

We have also considered the submissions provided on January 11, 2010, by counsel for the Schools Energy Coalition ("SEC"). His suggestions for identifying and quantifying the benefits that form the subject matter of this consultative merit consideration. However, we wish to emphasize that we strongly disagree with the conceptual premise contained in paragraph 5 of the submissions of SEC that:

"It is arguable that the costs associated with implementation of GEGEA, on all levels, are at their essence costs associated with the energy commodity, ..."

The subject matter of the *GEA* plans submitted by the electricity transmitters and distributors the Board regulates is transmission and distribution utility infrastructure. Costs related thereto are not energy commodity costs. They are costs being planned by transmission and distribution utilities to provide regulated transmission and distribution services.

At a conceptual level, we submit that when the Board determines the amount of regulated distribution utility costs that will be recoverable, province-wide, from all electricity consumers, it will be exercising its statutory mandate under the *OEB Act* to set just and reasonable rates for the transmission and distribution of electricity. The *OEB Act* specifically authorizes the Board to fix and approve these regulated rates.

The conclusion that the Board is exercising its rate-setting power when it determines the amounts to be recovered, province-wide, from all electricity consumers is reinforced by the language of section 79.1(1) of the *OEB Act*. The section, in part, states as follows:

"The Board, in approving just and reasonable rates for a distributor that incurs costs to make an eligible investment for the purpose of connecting or enabling the connection of a qualifying generation facility to its distribution system, shall provide rate protection ..." (emphasis added)

7. Board's Jurisdiction over the Method of Recovery of Regulated Utility Costs cannot be fettered by Government Regulation

The Board's statutory mandate is to fix and approve just and reasonable rates that enable the utilities it regulates to recover the costs that they incur to provide regulated services. The Board's power to determine the manner in which these costs are recovered in rates cannot be fettered in any way by a government regulation. This point is of relevance to those parts of the Discussion Paper in which Board Staff appears to accept that the Board determined amounts to be collected from all Ontario electricity consumers can be mandated by O.Reg. 330/09.<sup>9</sup> It is also of relevance to SEC's suggestion that costs associated with the implementation of *GEA*, on all levels, are energy commodity costs.<sup>10</sup>

We submit that the Government cannot, by Regulation, alter the Board's statutory jurisdiction to fix and approve just and reasonable rates, which is an adjudicative exercise that encompasses a determination of the manner in which utility costs should be recovered from ratepayers. In its recent EB-2009-0172 Decision on a Preliminary Motion in the 2010 Rate Application of Enbridge Gas Distribution Inc. ("EGD"), the Board referred to the principle that its statutory mandate to set just and reasonable rates cannot be fettered by a government regulation.<sup>11</sup> We rely on this principle to question the constitutional validity of the provisions of O.Reg. 330/09 that suggests that the province-wide recovery amounts determined by the Board must be recovered from all Ontario ratepayers on a commodity basis.

We recognize that this issue cannot be determined in this consultative and that an adjudicative process needs to be established to enable matters pertaining to the constitutional validity of O.Reg. 330/09 to be determined at a hearing.

At such a hearing, our submission will be that the Board's statutory authority empowering it to fix and approve just and reasonable rates requires that it determine, in an adjudicative process, how the province-wide amounts should be recovered. All cost recovery options with respect to the Board determined province-wide amounts for recovery from all electricity consumers will be open for consideration in this adjudicative process. These options include the recovery of these amounts by applying the same cost allocation factors that will apply to the *GEA* eligible investment spending that directly benefits the customers of the utility making the expenditure.

A failure to allocate infrastructure costs in a manner that ascribes appropriate weight to rate class differentials in peak period usage is counter-productive and economically inefficient. Conversely, allocating more and more infrastructure costs on a commodity basis could irreparably damage Ontario's economy by making it an island of high cost electricity within North American and world markets. As the economic regulator of Ontario's electricity utilities, the Board should not turn a blind eye to these realities.

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<sup>9</sup> See Discussion Paper, page 2.

<sup>10</sup> See SEC's Submission, paragraph 5.

<sup>11</sup> See EB-2009-0172 Decision on a Preliminary Motion at pages 4 and 5.

Differentials in the costs to serve various rate classes, and all relevant rate design factors, should be considered before the Board exercises the power the Legislature conferred on it to set just and reasonable rates for the transmission and distribution of electricity.

**C. CME's Response to Board Staff Questions**

Having regard to the foregoing, CME's response to the specific questions the Board poses is set out below.

<b>1)</b>	<b>In addition to the two types of direct benefits identified above (i.e., reduced transmission and WMSC charges, improved capability of the distribution system), should the Board take into account any other direct benefits that accrue to customers of the distributor making the investment?</b>
<p>We cannot point to any other direct benefits that should be considered. As noted, our priority concern is that Board only approve a level of <i>GEA</i> eligible investment spending by a particular utility that satisfies an economic feasibility test that includes a consideration of the impact of total <i>GEA</i> spending by all of the transmission and distribution utilities the Board regulates on all of the elements of the bill of the particular utility being considered. An integrated approach to the implications of total <i>GEA</i> spending on each of the distribution utilities the Board regulates is vital.</p>	
<b>2)</b>	<b>Are there any circumstances under which a distributor should be permitted to deviate from the proposed <i>ex-post</i> approach and use an <i>ex-ante</i> (i.e., forwarding looking forecast) approach?</b>
<p>For the reasons described by SEC in its submission and for the reasons that we understand will be articulated by VECC and AMPCO in their submissions, we support the <i>ex-post</i> approach, being one based on actual facts.</p>	
<b>3)</b>	<b>Are there any potential refinements to the proposed Guiding Principles discussed above?</b>
<b>4)</b>	<b>Should any additional Guiding Principles be considered by the Board?</b>
<p>These questions pertain to the Guiding Principles Board Staff has identified for estimating the direct benefits for customers of the particular distribution utility making an eligible investment related to the category of benefits entitled "Improved Capability of Distribution System for Load Customers". We endorse the "keep it simple" principle expressed in the Discussion Paper. SEC makes a number of specific submissions with respect to Board Staff's proposed Guidelines. We understand that VECC and AMPCO will also be making some observations in response to these questions. We have nothing further to add. to those comments.</p> <p>We reiterate that our priority concern is that the reasonableness of <i>GEA</i> eligible investment costs proposed by a particular distributor be evaluated by applying economic feasibility, consumer impact and affordability criteria to the total <i>GEA</i> spending being planned by all of the transmission and distribution utilities the Board regulates and by considering the total impact of such total spending on all elements of the bills of the particular distributor.</p>	



5)	Are there any potential refinements to the proposed criteria discussed above for the purpose of estimating the direct benefits?
6)	Are there any other criteria that the Board should potentially take into consideration or should certain criterion listed above not be taken into account? In proposing the addition and/or elimination of certain criteria, a solid business case should be made for the Board to consider the merits.
7)	Is a ranking or weighting of the criteria above necessary? If so, please propose an appropriate ranking or weighting, from most to least applicable, and provide a supporting justification.
8)	Are there any information limitations that may prevent certain distributors from providing an assessment of any criteria above?
9)	In the absence of having the best available information possible (e.g., recently completed study), are there any factors above for which a distributor would not be able to provide a reasonable estimate?
10)	What information should all distributors already have on hand (e.g., for distribution planning) that would allow for a reasonable estimate that is specific to certain areas of a distributor's territory of: (1) load growth; and (2) customer density?
11)	Where provincial ratepayers have provided rate protection and the asset is not ultimately used by the distributor as an eligible investment, Board staff proposed that the amount of rate protection should be reduced accordingly going forward to reflect the use of the investment for other purposes. In such cases, are there any circumstances under which the amount of rate protection provided by provincial ratepayers should not be reduced? If so, please explain.
<p>Questions 5 to 11 posed in the Discussion Paper relate to the list of criteria that could be considered for measuring the category of direct benefits described as "Improved Capability of Distribution System for Load Customers on a Utility Specific Basis".</p> <p>As long as the criteria are being applied to a level of distribution utility-specific <i>GEA</i> spending that reflects a consideration of economic feasibility, including affordability, in the context of all planned <i>GEA</i> spending by all utilities the Board regulates, and its impacts on all elements of the bills of the particular utility being considered, we have nothing specific to add to the points that we understand VECC and AMPCO will be making with respect to these questions.</p>	
12)	Should the Board consider a certain standardized approach? If so, how should the approach be standardized?
13)	Would a certain percentage of expansion investments and a certain percentage of REI investments (using a historical "baseline" specific to each distributor) provide a reasonable estimate on a go forward basis?
14)	<p>If the Board decided a standardized approach would be appropriate for certain distributors:</p> <ul style="list-style-type: none"> <li>(i) What <i>timeframe</i> would be suitable for implementation?</li> <li>(ii) What would an appropriate <i>threshold</i> be to determine which distributors could proceed under a standardized approach and which distributors should be required to continue under the more rigorous assessment discussed in section 3.3.2.1?</li> </ul>

Questions 12 to 14 pertain to the option of transitioning, in the future, towards a standardized approach for determining "direct benefits" for some distributors. We agree that it makes sense to simplify the process, if possible. Subject to that, we have nothing to add to what we understand VECC and AMPCO will be suggesting with respect to these particular points.

**D. Conclusion & Costs**

We appreciate being afforded the opportunity to participate in this consultation and hope that these submissions will help the Board understand CME's concerns.

We request that CME be awarded 100% of its reasonably incurred costs of participating in this matter.

Yours very truly,



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