

THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

MOTION RECORD

Date: April 26, 2010

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TO: Ontario Energy Board
Attention: Kirsten Walli, Board Secretary
Suite 2701 - 2300 Yonge Street
Toronto ON M4P 1E4
Fax: 416-440-7656

AND TO: The Attorney General of Ontario
Constitutional Law Division
720 Bay Street, 4th Floor
Toronto, ON M5G 2K1
FAX: 416-326-4015

AND TO: The Attorney General of Canada
Department of Justice
130 King Street West - Suite 3400
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THE ONTARIO ENERGY BOARD

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MOTION RECORD

INDEX

<u>TAB</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
1	Notice of Motion dated April 26, 2010	1
2	Affidavit of Tiffany Tsun Sworn April 26, 2010	8
	A. Exhibit A – Ontario Energy Board Letter Dated April 9, 2010	13
	B. Exhibit B – Ontario Energy Board Letter Dated April 23, 2010	17
3	Notice of Constitutional Question	21
4	Appendix 1	25
	A. <i>Ontario Energy Board Act</i> , Sections 1, 19, 16.1, 16.2, 32 and 78	26
	B. Ontario Regulation 66/10	38
	C. Ontario Energy Board <i>Rules of Practice and Procedure</i> , Section 42	42

TAB 1

THE ONTARIO ENERGY BOARD

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AND IN THE MATTER OF Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

NOTICE OF MOTION

The Consumers Council of Canada ("CCC") will make a motion to the Ontario Energy Board ("the Board") at its offices at 2300 Yonge Street, Toronto, on a date and at a time to be fixed by the Board.

THE MOTION IS FOR:

1. An Order cancelling the Assessment issued by the Board under section 26.1 of the *Ontario Energy Board Act*, 1998 (the "OEB Act") for Ministry of Energy and Infrastructure Conservation and Renewable Energy Program Costs.
2. A determination of whether the Board has the jurisdiction to issue an Assessment to Licensed Electricity Distributors ("LDCs"), for payment to the Ministry of Finance, pursuant to unconstitutional legislation.
3. A determination of whether the Board has the jurisdiction to issue an Assessment prescribing the formula by which the amount of the Assessment may be recovered by LDCs from their consumers, pursuant to unconstitutional legislation.

4. An Order cancelling the authorization of Account 1521, Special Purpose Charge Assessment Variance Account (the "Variance Account"), which authorization was made pursuant to section 8 of Ontario Regulation 66/10.
5. A determination of whether the Board has the jurisdiction to authorize the creation of the Variance Account without an Order having been issued under section 78 of the OEB Act.
6. A determination of whether the Board has the jurisdiction to authorize the Variance Account pursuant to unconstitutional legislation.
7. In the alternative, an Order pursuant to section 32 of the OEB Act stating a case in writing for the opinion of the Divisional Court as to whether section 26.1 of the OEB Act is constitutionally valid.
8. Such further and other relief as the CCC may request and the Board may grant.

THE GROUNDS FOR THE MOTION ARE:

(a) Background

1. The Board is governed by the OEB Act.
2. Section 1 of the OEB Act sets out the Board's objectives with respect to electricity. The OEB Act provides that the Board shall be guided by these objectives in carrying out its responsibilities. According to section 1, the Board's first objective is: "to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service".
3. On April 9, 2010, the Board issued "Special Purpose Charge" Assessments (the "Assessment") under Section 26.1 of the OEB Act to LDCs.
4. Each Assessment was accompanied by, among other things, an invoice setting out the amount that each LDC was being assessed for the Special Purpose Charge. Payment of the Assessment is to be made to the Ministry of Finance by 30 July 2010.
5. Also included with the Assessment were instructions related to the recovery of the assessed amount from the LDCs' consumers.

6. On April 23, 2010, the Board wrote to the LDCs advising that it had authorized the Variance Account. The Board explained that Ontario Regulation 66/10 contemplates that each LDC will record in a variance account any differences between: (a) the amount remitted to the Minister of Finance for the LDCs' Assessment; and (b) the amounts recovered from consumers on account of the Assessment (the "Variance Amounts"). The Board also provided instructions for recording the Variance Amounts in the Variance Account.

7. In its letter of April 23, 2010, the Board advised the LDCs that in accordance with section 8 of Ontario Regulation 66/10, the LDCs were required to apply to the Board no later than April 15, 2012 for an order authorizing [the LDC] to clear any debit or credit balance in "Sub-account 2010 SPC Variance".

8. The Board further advised that it expected that requests for disposition of the balance in the Variance Account would be addressed as part of the proceedings to set rates for the 2012 rate year, except in cases where this approach would result in non-compliance with the timeline set out in section 8 of Ontario Regulation 66/10.

(b) Section 26.1 of the OEB Act is unconstitutional and the Assessment and the authorization of the Variance Account are invalid

9. The Assessment was authorized by Section 26.1(1) of the OEB Act and by Ontario Regulation 66/10, which is made pursuant to the OEB Act. The Variance Account was authorized by the Board pursuant to section 8 of Ontario Regulation 66/10.

10. Section 26.1(2) of the OEB Act authorizes the LDCs, in turn, to collect the amounts so assessed from the consumers to whom they distribute electricity.

11. Ontario Regulation 66/10 sets out the formula that is the basis for the recovery of the amounts assessed from the consumers to whom the LDCs distribute electricity.

12. Section 26.1(6) of the OEB Act provides that, if a person fails to pay an Assessment, the Board may, without a hearing, order the person to pay the Assessment.

13. Section 26.1 of the OEB Act establishes an unconstitutional indirect tax:

- (a) The Assessment is indirect in nature, because it effectively requires consumers to pay for the Special Purpose Charge by allowing LDCs to recover the costs of the Assessment from their consumers; and
- (b) The Assessment constitutes an indirect tax, as opposed to a regulatory charge, and therefore falls outside of the constitutional competence of the provincial Legislature, pursuant to Section 92(2) of the *Constitution Act, 1867*, which limits provincial legislatures to direct taxation.

14. Any step taken pursuant to Section 26.1 of the OEB Act is, therefore, invalid. That includes the issuance of the Assessment by the Board, and the authorization for the creation of the Variance Account.

15. In issuing the Assessment and authorizing the Variance Account pursuant to a section of the OEB Act that is not constitutionally valid, the Board failed to be guided by its first statutorily mandated objective, namely the protection of the interests of consumers.

(c) The Board authorized the creation of the Variance Account in breach of section 78 of the OEB Act

16. Section 78 of the OEB Act provides that "no transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract" (emphasis added).

17. The amount that may be collected by the LDCs from their consumers to recover the amount of the Assessment is a rate, despite the assertion to the contrary contained in the Board's letter of April 9, 2010.

18. Indeed, in its letter dated April 23, 2010, the Board advised the LDCs that the disposition of the Variance Amounts would be dealt with in the course of the rate proceedings for the 2012 rate year.

19. The Board authorized the Variance Account without an order having previously been made under section 78 of the OEB Act and, in doing so, exceeded its jurisdiction.

(d) Other grounds

20. Section 19 of the OEB Act grants the Board authority to hear and determine all questions of law and fact in all matters within its jurisdiction.

21. The Board also has the authority to review the issuance of the Assessment and to cancel it.

22. In the alternative, the Board has the authority, pursuant to Section 32 of the OEB Act, to state a case in writing for the opinion of the Divisional Court on any question that is a question of law within the jurisdiction of the Board. The constitutional validity of Section 26.1 of the OEB Act is a question of law within the jurisdiction of the Board.

23. Sections 19 and 32 of the OEB Act.

24. The Board's *Rules of Practice and Procedure*.

The following Documentary Evidence will be used at the hearing of the motion.

1. The Affidavit of Tiffany Tsun, sworn the 26th day of April, 2010.
2. Such further and other documents as counsel may advise and the Board may permit.

April 26, 2010

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 Consumers Council of Canada

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AND IN THE MATTER OF Rule 42 of the Rules of Practice and
Procedure of the Ontario Energy Board.

ONTARIO ENERGY BOARD

NOTICE OF MOTION

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Counsel to the Moving Party,
The Consumers Council of Canada

TAB 2

THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

AFFIDAVIT OF TIFFANY TSUN

I, **TIFFANY TSUN**, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am an articling student employed by WeirFoulds LLP, counsel to the Consumers Council of Canada ("CCC"), and as such have knowledge of the matters herein deposed.

The CCC

2. The CCC is a non-profit, public interest entity which represents the interests of residential consumers, in dealings with federal and provincial governments, and before federal and provincial boards and tribunals, in a number of economic sectors.

3. The CCC has, for many years, represented the interests of residential consumers with respect to energy matters in Ontario. Included in those activities are the following:

- (a) Appearing in numerous rate proceedings, before the Ontario Energy Board ("Board"), in applications by Licensed Electricity Distributors ("LDCs"), Hydro One Networks Inc., and Ontario Power Generation Inc., as well as in applications by the natural gas distribution companies;
- (b) Appearing in numerous policy-making proceedings before the Board, for both the electricity and natural gas sectors;

- (c) Making submissions to legislative committees on proposed changes to laws governing the energy sector;
- (d) Participating in advisory committees, dealing with consumer matters, of Hydro One Networks Inc., the Independent Electricity System Operator, the Ontario Power Authority, as well as the natural gas distribution companies.

Statutory Background

4. Section 26.1 of the *Ontario Energy Board Act, 1998* (the "OEB Act") requires the Board to assess LDCs with respect to "the expenses incurred and expenditures made by the Ministry of Energy and Infrastructure in respect of its energy conservation programs or renewable energy programs".

5. Section 26.1(2) of the OEB Act authorizes LDCs to collect amounts assessed under Section 26.1(1) from consumers or classes of consumers as prescribed by regulation and in the manner prescribed by regulation.

6. Section 26.1(6) of the OEB Act provides that, if a person fails to pay an Assessment, the Board may, without a hearing, order the person to pay the Assessment.

7. Section 26.2 of the OEB Act sets out the "special purposes" for which amounts collected under Section 26.1 relating to assessments are paid to Ontario. They are:

1. To fund conservation or renewable energy programs aimed at decreasing the consumption of two or more of the following fuels:
 - i. natural gas,
 - ii. electricity,
 - iii. propane,
 - iv. oil,
 - v. coal, and
 - vi. wood.
2. To fund conservation or renewable energy programs aimed at causing consumers of fuel to change from one or more of the fuels listed in paragraph 1 to any other fuel or fuels listed in that paragraph.

3. To fund conservation or renewable energy programs aimed at decreasing peak electricity demand, while increasing or decreasing the consumption of another type of fuel.
4. To fund research and development or other engineering or scientific activities aimed at furthering the conservation or the efficient use of fuels.
5. To fund conservation or renewable energy programs aimed at a specific geographical, social, income or other sector of Ontario.
6. To reimburse the Province for expenditures it incurs for any of the above purposes.

8. Section 7 of Ontario Regulation 66/10, passed pursuant to Section 26.1 of the OEB Act, sets out the formula for the determination of the amounts to be assessed from each LDC and the formula by which each LDC can recover the amounts assessed from the consumers from whom it distributes electricity.

9. Section 8 of Ontario Regulation 66/10, passed pursuant to Section 26.1 of the OEB Act, sets out the process by which LDCs shall apply to the Board for an order authorizing the LDC in question to clear the credit or debit balance in any variance account authorized by the Board to track the difference between the amounts remitted by the LDC pursuant to the Assessment and the amounts recovered by the LDC pursuant to section 7 of Ontario Regulation 66/10.

10. Section 78 of the OEB Act provides that "no transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract".

The Assessment

11. By letter dated April 9, 2010, the Board issued an assessment to LDCs, pursuant to Section 26.1 of the OEB Act (the "Assessment"). Attached to the Board's letter was an invoice setting out the amount the LDC receiving the letter was being assessed for the Special Purpose Charge ("SPC"). A copy of the Board's letter of April 9, 2010, is attached to this affidavit as **Exhibit "A"**.

12. In its letter, the Board explained that the Assessment was made pursuant to Sections 26.1 and 26.2 of the OEB Act, as well as Ontario Regulation 66/10. The Board also

went on to provide instructions relating to the recovery of the assessed amount from the LDCs' consumers, as reproduced below:

Recovery of your SPC Assessment

Section 26.1 of the Act and the SPC Regulation authorize each licensed electricity distributor to recover the amount of its SPC assessment from its customers, other than embedded licensed distributors, based on the volume of electricity distributed to the customer. Recovery is to be done using the formula set out in section 7 of the SPC Regulation. In accordance with section 9 of the SPC Regulation, recovery is to be spread over a one-year period, starting from the date on which you begin billing to recover your assessment. The amount that may be collected to recover the SPC assessment is not a rate, and it may be collected under the authority of the Act and the SPC Regulation. No rate order is required, and none will be issued.

The Variance Account

13. On April 23, 2010, the Board wrote to the LDCs advising that it had authorized Account 1521, Special Purpose Charge Assessment Variance Account (the "Variance Account"). A copy of the Board's letter of April 23, 2010, is attached to this affidavit as **Exhibit "B"**.

14. The Board explained that Ontario Regulation 66/10 contemplates that each LDC will record in a variance account any differences between: (a) the amount remitted to the Minister of Finance for the LDCs' Assessment; and (b) the amounts recovered from consumers on account of the Assessment (the "Variance Amounts"). The Board also provided instructions for recording the Variance Amounts in the Variance Account.

15. The Board advised the LDCs that in accordance with section 8 of Ontario Regulation 66/10, the LDCs were required to apply to the Board no later than April 15, 2012 for an order authorizing [the LDC] to clear any debit or credit balance in "Sub-account 2010 SPC Variance".

16. The Board further advised that it expected that requests for disposition of the balance in the Variance Account would be addressed as part of the proceedings to set rates for

the 2012 rate year, except in cases where this approach would result in non-compliance with the timeline set out in section 8 of Ontario Regulation 66/10.

17. I make this affidavit in support of a Motion by the Consumers Council of Canada.

SWORN before me at City of Toronto, in)
the Province of Ontario, this 26th day of)
April, 2010.)

Rev. B. Green

Commissioner For Taking Affidavits

ROBERT B. WARREN



TIFFANY TSUN

TAB 2A

This is Exhibit "A" referred to in the
affidavit of Tiffany Tsun
sworn before me this 26th
day of April, 2010

A handwritten signature in black ink, appearing to read "Rene B. [unclear]", is written over a horizontal line.

A Commissioner, etc.

**Ontario Energy
Board**
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VIA EMAIL AND WEB POSTING

April 9, 2010

TO: Licensed Electricity Distributors

RE: "Special Purpose Charge" Assessment under Section 26.1 of the *Ontario Energy Board Act, 1998* for Ministry of Energy and Infrastructure Conservation and Renewable Energy Program Costs

Sections 26.1 and 26.2 of the *Ontario Energy Board Act, 1998* (the "Act") make provision for a special purpose charge (the "SPC") to enable the recovery of the expenses incurred and the expenditures made by the Ministry of Energy and Infrastructure in respect of its energy conservation programs or renewable energy programs.

Sections 26.1 and 26.2 of the Act, added by the *Green Energy and Green Economy Act, 2009*, have now been proclaimed into force. Two regulations have also now been made under the Act in relation to the assessment, payment, recovery and billing of the SPC: (a) Ontario Regulation 66/10 (Assessments for Ministry of Energy and Infrastructure Conservation and Renewable Energy Program Costs) (the "SPC Regulation"); and (b) Ontario Regulation 67/10, which amends Ontario Regulation 275/04 (Information on Invoices to Low-Volume Consumers of Electricity) (the "Simplified Bill Regulation"). Copies of these two regulations are attached.

The invoice attached to this letter sets out the amount that you are being assessed for the SPC. Instructions relating to payment of the assessment to the Ministry of Finance and to recovery of the assessed amount from customers are set out below.

Amount and Payment of your SPC Assessment

The Board is responsible for apportioning the total amount of the SPC among licensed electricity distributors and the IESO in accordance with the rules set out in the SPC Regulation. For this purpose, the Board has calculated a quotient ("Q") using the formula set out in section 5 of the SPC Regulation. "Q" has been calculated as **\$0.0003725**. The Board has determined your assessment for the SPC using this value and volumetric information, as also required by the SPC Regulation. The amount of your assessment and payment instructions are shown on the attached invoice.

Recovery of your SPC Assessment

Section 26.1 of the Act and the SPC Regulation authorize each licensed electricity distributor to recover the amount of its SPC assessment from its customers, other than embedded licensed distributors, based on the volume of electricity distributed to the customer. Recovery is to be done using the formula set out in section 7 of the SPC Regulation. In accordance with section 9 of the SPC Regulation, recovery is to be spread over a one-year period, starting from the date on which you begin billing to recover your assessment. The amount that may be collected to recover the SPC assessment is not a rate, and it may be collected under the authority of the Act and the SPC Regulation. No rate order is required, and none will be issued.

Presentation on the Bill

Subsection 4(2) of the Simplified Bill Regulation referred to above has been amended to require that amounts being collected for the SPC be included as part of the "regulatory charges," and therefore included within the total amount shown on the "Regulatory Charges" line of the bill. Subsection 10(1) of the Simplified Bill Regulation has also been amended to revise the "Regulatory Charges" portion of the "Glossary of Terms" that is required to be included on or with the bill. The Simplified Bill Regulation applies only to bills issued to low-volume electricity consumers. For consistency, distributors should, but are not required, to do the same in respect of bills issued to other customers.

Variances

Section 8 of the SPC Regulation contemplates that each licensed electricity distributor will record in a variance account any differences between: (a) the amount remitted to the Minister of Finance for the distributor's SPC assessment; and (b) the amounts recovered from customers for that assessment. The Board will be creating an account for this purpose, and will provide further information in the near future.

Any questions regarding the attached invoice, other than in relation to payment, should be directed to the Market Operations Hotline at 416-440-7604 or by e-mail at market.operations@oeb.gov.on.ca. The Board's toll free number is 1-888-632-6273.

Any questions regarding payment should be directed to the Non-Tax Revenue Branch Contact Centre for the Ministry of Finance at 1-877-535-0554 or by fax at 416-326-5177.

Yours truly,


Original signed by

Kirsten Walli
Board Secretary

Attachments: Invoice - Assessment for Ministry of Energy and Infrastructure
Conservation and Renewable Energy Program Costs
Ontario Regulation 66/10 and 67/10

TAB 2B

This is Exhibit "B" referred to in the
affidavit of Tiffany Tsun
sworn before me this 26th
day of April, 2010

A handwritten signature in black ink, appearing to read "R. B. Lee", is written over a horizontal line.

A Commissioner, etc.

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Board**
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VIA EMAIL AND WEB POSTING

April 23, 2010

TO: Licensed Electricity Distributors

RE: Variance Account for "Special Purpose Charge" Assessment under Section 26.1 of the *Ontario Energy Board Act, 1998* for Ministry of Energy and Infrastructure Conservation and Renewable Energy Program Costs

Under cover of a letter dated April 9, 2010, the Board issued your invoice setting out the amount that you are being assessed on account of the special purpose charge (the "SPC") referred to in sections 26.1 and 26.2 of the *Ontario Energy Board Act, 1998* (the "Act").

As indicated in the Board's letter, section 8 of Ontario Regulation 66/10 (Assessments for Ministry of Energy and Infrastructure Conservation and Renewable Energy Program Costs) (the "SPC Regulation") contemplates that each licensed electricity distributor will record in a variance account any differences between: (a) the amount remitted to the Minister of Finance for the distributor's SPC assessment; and (b) the amounts recovered from customers on account of the assessment.

For that purpose, the Board has now authorized Account 1521, Special Purpose Charge Assessment Variance Account. Any difference between the amount remitted to the Minister of Finance for your SPC assessment and the amount that you recover from customers must be recorded in "Sub-account 2010 SPC Assessment Variance" of Account 1521. Account 5681, Special Purpose Charge Expense, should be used to record the amount of your SPC assessment, and Account 4324, Special Purpose Charge Recovery, should be used to record amounts collected from customers on account of that assessment.

Carrying charges shall apply to the monthly opening debit or credit balances in "Sub-account 2010 SPC Assessment Variance" and shall be recorded in "Sub-account 2010 SPC Assessment Carrying Charges" of Account 1521. Any carrying charges shall be calculated using simple interest, at the Board's prescribed interest rates.

The balance in Account 1521 should be reported quarterly, at the same time as filings are due in relation to the balances in other deferral and variance accounts under section 2.1.1 of the Board's Electricity Reporting and Record Keeping Requirements.

In accordance with section 8 of the SPC Regulation, you are required to apply to the Board no later than April 15, 2012 for an order authorizing you to clear any debit or credit balance in "Sub-account 2010 SPC Variance". The Board expects that requests for disposition of the balance in "Sub-account 2010 SPC Variance" and "Sub-account 2010 SPC Assessment Carrying Charges" will be addressed as part of the proceedings to set rates for the 2012 rate year, except in cases where this approach would result in non-compliance with the timeline set out in section 8 of the SPC Regulation.

In accordance with section 9 of the SPC Regulation, recovery of your SPC assessment is to be spread over a one-year period, starting from the date on which you begin billing to recover your assessment. The request for disposition of the balance in "Sub-account 2010 SPC Variance" and "Sub-account 2010 SPC Assessment Carrying Charges" should be made after that one-year period has come to an end, and all bills that include amounts on account of that assessment have come due for payment.

Any questions regarding the above should be directed to the Market Operations Hotline at 416-440-7604 or by e-mail at market.operations@oeb.gov.on.ca. The Board's toll free number is 1-888-632-6273.

Yours truly,

Original signed by

Kirsten Walli
Board Secretary

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AFFIDAVIT OF TIFFANY TSUN
SWORN April 26, 2010

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TAB 3

THE ONTARIO ENERGY BOARD

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AND IN THE MATTER OF Sssessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

NOTICE OF CONSTITUTIONAL QUESTION

TAKE NOTICE that the Consumers Council of Canada intends question the constitutional validity of section 26.1 of the *Ontario Energy Board Act*, 1998.

The question is to be argued on a date and at a time to be fixed by the Ontario Energy Board, at its chambers at 2300 Yonge Street, Toronto, Ontario.

The following are the material facts giving rise to the constitutional question.

1. On April 9, 2010, the Ontario Energy Board ("Board") issued, to Licensed Electricity Distributors ("LDCs"), a "Special Purpose Charge" assessment (the "Assessment") under section 26.1 of the *Ontario Energy Board Act*, 1998 (the "OEB Act").
2. The Assessment required each LDC to pay a specified amount to the Ministry of Finance, by July 30, 2010.
3. The amounts so collected are to be used for the special purposes set out in section 26.2 of the OEB Act.
4. The amounts so collected from LDCs are to be recovered from the consumers to whom the LDCs distribute electricity.
5. If the LDCs fail to pay the Assessment, the Board may by order require them to do so.

The following is the legal basis for the constitutional question.

1. Section 26.1 of the OEB Act requires the Board to assess, in respect of consumers in their service areas, gas distributors and licensed distributors with respect to the expenses incurred and expenditures made by the Ministry of Energy and Infrastructure in respect of its energy conservation programs or renewable energy programs.

2. Ontario Regulation 66/10, made pursuant to the OEB Act, sets out the formula by which the amount of the assessments to licensed distributors are to be calculated.
3. Section 26.1(2) of the OEB Act provides that LDCs may collect the amounts assessed from the consumers or classes of consumers prescribed by regulation and in the manner prescribed by regulation.
4. Ontario Regulation 66/10 sets out the formula by which a LDC may recover from persons to whom it distributes electricity in its service area the amounts it is required to pay pursuant to the Assessment.
5. Accordingly, the Assessment authorized by section 26.1 of the OEB Act is to be paid by someone other than the person to whom it is directed.
6. The purposes for which the Assessment are levied are set out in section 26.2 of the OEB Act. They are:
 1. To fund conservation or renewable energy programs aimed at decreasing the consumption of two or more of the following fuels:
 - i. natural gas,
 - ii. electricity,
 - iii. propane,
 - iv. oil,
 - v. coal, and
 - vi. wood.
 2. To fund conservation or renewable energy programs aimed at causing consumers of fuel to change from one or more of the fuels listed in paragraph 1 to any other fuel or fuels listed in that paragraph.
 3. To fund conservation or renewable energy programs aimed at decreasing peak electricity demand, while increasing or decreasing the consumption of another type of fuel.
 4. To fund research and development or other engineering or scientific activities aimed at furthering the conservation or the efficient use of fuels.
 5. To fund conservation or renewable energy programs aimed at a specific geographical, social, income or other sector of Ontario.
 6. To reimburse the Province for expenditures it incurs for any of the above purposes.
7. The purposes set out in 26.2 are broad and essentially comprise all of the energy-related objectives and activities of the Ministry of Energy and Infrastructure.

8. The Assessment is indirect in nature, because it effectively requires consumers to pay for the Special Purpose charge by allowing LDCs to recover the amount of the Assessment from those consumers.
9. If a LDC fails to pay the Assessment, the Board may, pursuant to section 26.1(6) of the OEB Act, order the LDC to do so.
10. The Assessment constitutes an indirect tax, as opposed to a regulatory charge, and is therefore fully outside of the constitutional competence of the provincial Legislature, pursuant to Section 92(2) of the *Constitution Act, 1867*, which limits provincial legislatures to direct taxation.
11. Section 26.1 of the OEB Act is constitutionally invalid as constituting an indirect tax.

April 26, 2010

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THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

ONTARIO ENERGY BOARD

NOTICE OF CONSTITUTIONAL QUESTION

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TAB 4

THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

APPENDIX 1

Tab 4 Appendix 1

- A. *Ontario Energy Board Act*, Sections 1, 19, 16.1, 16.2, 32 and 78
- B. Ontario Regulation 66/10
- C. Ontario Energy Board *Rules of Practice and Procedure*, Section 42

TAB 4 A

Ontario Energy Board Act, 1998**S.O. 1998, CHAPTER 15
SCHEDULE B**

Consolidation Period: From March 1, 2010 to the e-Laws currency date.

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. 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. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

Order

(2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).

Reference

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).

Additional powers and duties

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

Exception

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

Jurisdiction exclusive

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

Assessment

26. (1) Subject to the regulations, the Board's management committee may assess those persons or classes of persons prescribed by regulation with respect to all expenses incurred and expenditures made by the Board in the exercise of any powers or duties under this or any other Act. 1998, c. 15, Sched. B, s. 26 (1) ; 2003, c. 3, s. 24.

Obligation to pay assessment

(2) Every person assessed under subsection (1) shall pay the amount assessed. 1998, c. 15, Sched. B, s. 26 (2).

Order to pay assessment

(3) If a person fails to pay an assessment made under subsection (1), the Board may, without a hearing, order that person to pay the assessment. 1998, c. 15, Sched. B, s. 26 (3).

Failure to pay

(4) If a licensee fails to pay an assessment in accordance with the order, the Board, without a hearing, may suspend or cancel that person's licence. 1998, c. 15, Sched. B, s. 26 (4).

Payment of full amount

(5) The Board may reinstate the licence of a person whose licence was suspended or cancelled under subsection (4) if the person pays all amounts owing under this section. 1998, c. 15, Sched. B, s. 26 (5).

Regulations

(6) The Lieutenant Governor in Council may make regulations,

- (a) prescribing persons or classes of persons liable to pay an assessment under subsection (1);

- (b) prescribing the frequency of the assessments;
- (c) respecting the manner in which an assessment under this section is carried out;
- (d) prescribing the amount of the assessment or the method of calculating the amount;
- (e) prescribing the proportion of the assessment for which each person or class of persons is liable or a method of determining the proportion;
- (f) prescribing such other matters relating to the carrying out of an assessment as the Lieutenant Governor in Council considers appropriate. 1998, c. 15, Sched. B, s. 26 (6).

Scope

(7) A regulation under this section may be general or particular in its application. 1998, c. 15, Sched. B, s. 26 (7).

Assessment, Ministry conservation programs, etc.

26.1 (1) Subject to the regulations, the Board shall assess the following persons or classes of persons, as prescribed by regulation, with respect to the expenses incurred and expenditures made by the Ministry of Energy and Infrastructure in respect of its energy conservation programs or renewable energy programs provided under this Act, the *Green Energy Act, 2009*, the *Ministry of Energy and Infrastructure Act* or any other Act:

1. In respect of consumers in their service areas, gas distributors and licensed distributors.
2. The IESO.
3. Any other person prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessments, collection by gas distributors and licensed distributors

(2) Gas distributors and licensed distributors may collect the amounts assessed under subsection (1) from the consumers or classes of consumers as are prescribed by regulation and in the manner prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessments, IESO

(3) The IESO may collect the amounts assessed under subsection (1) from market participants or classes of market participants as are prescribed by regulation and in the manner prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessment, amount and timing

(4) For the purposes of subsection (1), the Board shall assess the amount prescribed by regulation within the time prescribed by regulation in accordance with the methods or rules prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessment, obligation to pay

(5) Every person assessed under subsection (1) shall pay the amount assessed in accordance with the Board's assessment by remitting the amount to the Minister of Finance. 2009, c. 12, Sched. D, s. 6.

Failure to pay

(6) If a person fails to pay an assessment made under subsection (1), the Board may, without a hearing, order the person to pay the assessment. 2009, c. 12, Sched. D, s. 6.

Reporting

(7) Persons referred to in subsection (1) shall report such information in such manner and at such times to the Board or to the Minister as is prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Regulations

- (8) The Lieutenant Governor in Council may make regulations,
- (a) governing assessments under this section, including,
 - (i) prescribing the amount to be assessed or the amounts to be assessed against each person, or class of person liable to pay an assessment or the method of calculating the amount or amounts, and
 - (ii) prescribing the time within which the assessments must occur;
 - (b) prescribing persons or classes of persons liable to pay an assessment under subsection (1);
 - (c) prescribing the frequency of the assessments;
 - (d) respecting the manner by which an assessment under this section is carried out;
 - (e) prescribing the proportion of the assessment for which each person or class of persons is liable or a method of determining the proportion;
 - (f) with respect to subsection (7), prescribing the time at which such reports must be made or submitted, the manner by which such reports must be made or submitted, and governing the information to be provided, including the manner in which such information is presented or provided;
 - (g) prescribing such other matters relating to the carrying out of an assessment as the Lieutenant Governor in Council considers appropriate. 2009, c. 12, Sched. D, s. 6.

Special purposes

26.2 (1) For the purpose of the *Financial Administration Act*, all amounts collected under section 26.1 relating to assessments paid shall be deemed to be money paid to Ontario for the special purposes set out in subsection (2). 2009, c. 12, Sched. D, s. 6.

Same

(2) The following are the special purposes for which amounts collected under section 26.1 relating to assessments are paid to Ontario:

1. To fund conservation or renewable energy programs aimed at decreasing the consumption of two or more of the following fuels:
 - i. natural gas,
 - ii. electricity,
 - iii. propane,
 - iv. oil,
 - v. coal, and
 - vi. wood.
2. To fund conservation or renewable energy programs aimed at causing consumers of fuel to change from one or more of the fuels listed in paragraph 1 to any other fuel or fuels listed in that paragraph.
3. To fund conservation or renewable energy programs aimed at decreasing peak electricity demand, while increasing or decreasing the consumption of another type of fuel.
4. To fund research and development or other engineering or scientific activities aimed at furthering the conservation or the efficient use of fuels.
5. To fund conservation or renewable energy programs aimed at a specific geographical, social, income or other sector of Ontario.
6. To reimburse the Province for expenditures it incurs for any of the above purposes. 2009, c. 12, Sched. D, s. 6.

Special Purpose Conservation and Renewable Energy Conservation Fund

(3) The Minister of Finance shall maintain in the Public Accounts an account to be known as the Ministry of Energy and Infrastructure Special Purpose Conservation and Renewable Energy Fund in which shall be recorded all receipts and disbursements of public money under this section. 2009, c. 12, Sched. D, s. 6.

Non-interest bearing account

(4) The balances from time to time in the account do not bear interest. 2009, c. 12, Sched. D, s. 6.

Interpretation

(5) For the purposes of this section, the terms used in it that are not defined in this Act but that are defined in section 1 of the *Financial Administration Act* have the meanings provided in that Act. 2009, c. 12, Sched. D, s. 6.

Stated case

32. (1) The Board may, at the request of the Lieutenant Governor in Council or of its own motion or upon the motion of any party to proceedings before the Board and upon

such security being given as it directs, state a case in writing for the opinion of the Divisional Court upon any question that is a question of law within the jurisdiction of the Board. 1998, c. 15, Sched. B, s. 32 (1); 2003, c. 3, s. 27.

Same

(2) The Divisional Court shall hear and determine the stated case and remit it to the Board with its opinion. 1998, c. 15, Sched. B, s. 32 (2).

Orders by Board, electricity rates

Order re: transmission of electricity

78. (1) No transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re: distribution of electricity

(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re the Smart Metering Entity

(2.1) The Smart Metering Entity shall not charge for meeting its obligations under Part IV.2 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2006, c. 3, Sched. C, s. 5 (1).

Rates

(3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity or such other activity as may be prescribed and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*. 2009, c. 12, Sched. D, s. 12 (1).

Rates

(3.0.1) The Board may make orders approving or fixing just and reasonable rates for the Smart Metering Entity in order for it to meet its obligations under this Act or under Part IV.2 of the *Electricity Act, 1998*. 2006, c. 3, Sched. C, s. 5 (1).

Orders re deferral or variance accounts

(3.0.2) The Board may make orders permitting the Smart Metering Entity or distributors to establish one or more deferral or variance accounts related to costs associated with the smart metering initiative, in the circumstances prescribed in the regulations. 2006, c. 3, Sched. C, s. 5 (1).

Orders re recovery of smart metering initiative costs

(3.0.3) The Board may make orders relating to the ability of the Smart Metering Entity, distributors, retailers and other persons to recover costs associated with the smart metering initiative, in the situations or circumstances prescribed by regulation and the

orders may require them to meet such conditions or requirements as may be prescribed, including providing for the time over which costs may be recovered. 2006, c. 3, Sched. C, s. 5 (1).

Orders re deferral or variance accounts, s. 27.2

(3.0.4) The Board may make orders permitting the OPA, distributors or other licensees to establish one or more deferral or variance accounts related to costs associated with complying with a directive issued under section 27.2. 2009, c. 12, Sched. D, s. 12 (2).

Methods re incentives or recovery of costs

(3.0.5) The Board may, in approving or fixing just and reasonable rates or in exercising the power set out in clause 70 (2) (e), adopt methods that provide,

- (a) incentives to a transmitter or a distributor in relation to the siting, design and construction of an expansion, reinforcement or other upgrade to the transmitter's transmission system or the distributor's distribution system; or
- (b) for the recovery of costs incurred or to be incurred by a transmitter or distributor in relation to the activities referred to in clause (a). 2009, c. 12, Sched. D, s. 12 (2).

Annual rate plan and separate rates for situations prescribed by regulation

(3.1) The Board shall, in accordance with rules prescribed by the regulations, approve or fix separate rates for the retailing of electricity,

- (a) to such different classes of consumers as may be prescribed by the regulations; and
- (b) for such different situations as may be prescribed by the regulations. 2004, c. 23, Sched. B, s. 14 (1).

Same

(3.2) The first rates approved or fixed by the Board under subsection (3.1) shall remain in effect for not less than 12 months and the Board shall approve or fix separate rates under subsection (3.1) after that time for periods of not more than 12 months each or for such shorter time periods as the Minister may direct. 2004, c. 23, Sched. B, s. 14 (1).

Rates to reflect cost of electricity

(3.3) In approving or fixing rates under subsection (3.1),

- (a) the Board shall forecast the cost of electricity to be consumed by the consumers to whom the rates apply, taking into consideration the adjustments required under section 25.33 of the *Electricity Act, 1998* and shall ensure that the rates reflect these costs; and
- (b) the Board shall take into account balances in the OPA's variance accounts established under section 25.33 of the *Electricity Act, 1998* and shall make

adjustments with a view to eliminating those balances within 12 months or such shorter time periods as the Minister may direct. 2004, c. 23, Sched. B, s. 14 (1).

Forecasting cost of electricity

(3.4) In forecasting the cost of electricity for the purposes of subsection (3.3), the Board shall have regard to such matters as may be prescribed by the regulations. 2004, c. 23, Sched. B, s. 14 (1).

Imposition of conditions on consumer who enters into retail contract

(3.5) A consumer who enters into or renews a retail contract for electricity after the day he or she becomes subject to a rate approved or fixed under subsection (3.1) is subject to such conditions as may be determined by the Board. 2004, c. 23, Sched. B, s. 14 (1).

Rates

(4) The Board may make an order under subsection (3) with respect to the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998* even if the distributor is meeting its obligations through an affiliate or through another person with whom the distributor or an affiliate of the distributor has a contract. 1998, c. 15, Sched. B, s. 78 (4).

(5) Repealed: 2004, c. 23, Sched. B, s. 14 (2).

Same, obligations under s. 29 of *Electricity Act, 1998*

(5.0.1) In approving or fixing just and reasonable rates for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*, the Board shall comply with the regulations made under clause 88 (1) (g.5). 2003, c. 8, s. 1.

Same, Hydro One Inc. and subsidiaries

(5.1) In approving or fixing just and reasonable rates for Hydro One Inc. or a subsidiary of Hydro One Inc., the Board shall apply a method or technique prescribed by regulation for the calculation and treatment of transfers made by Hydro One Inc. or its subsidiary, as the case may be, that are authorized by section 50.1 of the *Electricity Act, 1998*. 2002, c. 1, Sched. B, s. 8; 2003, c. 3, s. 52 (2).

Same, statutory right to use corridor land

(5.2) In approving or fixing just and reasonable rates for a transmitter who has a statutory right to use corridor land (as defined in section 114.1 of the *Electricity Act, 1998*), the Board shall apply a method or technique prescribed by regulation for the treatment of the statutory right. 2002, c. 1, Sched. B, s. 8; 2003, c. 3, s. 52 (3).

Conditions, etc.

(6) An order under this section may include conditions, classifications or practices, including rules respecting the calculation of rates, applicable,

(a) to the Smart Metering Entity in respect of meeting its obligations;

- (b) to an activity prescribed for the purposes of subsection (3); and
- (c) to the transmission, distribution or retailing of electricity. 2009, c. 12, Sched. D, s. 12 (3).

Deferral or variance accounts

(6.1) If a distributor has a deferral or variance account that relates to the commodity of electricity, the Board shall, at least once every three months, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2003, c. 3, s. 52 (4).

Same

(6.2) If a distributor has a deferral or variance account that does not relate to the commodity of electricity, the Board shall, at least once every 12 months, or such shorter period as is prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2003, c. 3, s. 52 (4).

Same

(6.3) An order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates shall be made in accordance with the regulations. 2003, c. 3, s. 52 (4).

Same

(6.4) If an order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates is made after the time required by subsection (6.1) or (6.2) and the delay is due in whole or in part to the conduct of a distributor, the Board may reduce the amount that is reflected in rates. 2003, c. 3, s. 52 (4).

Same

(6.5) If an amount recorded in a deferral or variance account of a distributor is reflected in rates, the Board shall consider the appropriate number of billing periods over which the amount shall be divided in order to mitigate the impact on consumers. 2003, c. 3, s. 52 (4).

Same

(6.6) Subsections (6.1), (6.2) and (6.4) do not apply unless section 79.6 has been repealed under section 79.11. 2003, c. 3, s. 52 (4).

Fixing other rates

(7) Upon an application for an order approving or fixing rates, the Board may, if it is not satisfied that the rates applied for are just and reasonable, fix such other rates as it finds to be just and reasonable. 1998, c. 15, Sched. B, s. 78 (7).

Burden of proof

(8) Subject to subsection (9), in an application made under this section, the burden of proof is on the applicant. 1998, c. 15, Sched. B, s. 78 (8).

Order

(9) If the Board of its own motion, or upon the request of the Minister, commences a proceeding to determine whether any of the rates that the Board may approve or fix under this section are just and reasonable, the Board shall make an order under subsection (3) and the burden of establishing that the rates are just and reasonable is on the transmitter or distributor, as the case may be. 1998, c. 15, Sched. B, s. 78 (9).

Payments to prescribed generator

78.1 (1) The IESO shall make payments to a generator prescribed by the regulations, or to the OPA on behalf of a generator prescribed by the regulations, with respect to output that is generated by a unit at a generation facility prescribed by the regulations. 2004, c. 23, Sched. B, s. 15.

Payment amount

- (2) Each payment referred to in subsection (1) shall be the amount determined,
- (a) in accordance with the regulations to the extent the payment relates to a period that is on or after the day this section comes into force and before the later of,
 - (i) the day prescribed for the purposes of this subsection, and
 - (ii) the effective date of the Board's first order in respect of the generator; and
 - (b) in accordance with the order of the Board then in effect to the extent the payment relates to a period that is on or after the later of,
 - (i) the day prescribed for the purposes of this subsection, and
 - (ii) the effective date of the Board's first order under this section in respect of the generator. 2004, c. 23, Sched. B, s. 15.

OPA may act as settlement agent

(3) The OPA may act as a settlement agent to settle amounts payable to a generator under this section. 2004, c. 23, Sched. B, s. 15.

Board orders

(4) The Board shall make an order under this section in accordance with the rules prescribed by the regulations and may include in the order conditions, classifications or practices, including rules respecting the calculation of the amount of the payment. 2004, c. 23, Sched. B, s. 15.

Fixing other prices

- (5) The Board may fix such other payment amounts as it finds to be just and reasonable,
- (a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; or
 - (b) at any other time, if the Board is not satisfied that the current payment amount is just and reasonable. 2004, c. 23, Sched. B, s. 15.

Burden of proof

(6) Subject to subsection (7), the burden of proof is on the applicant in an application made under this section. 2004, c. 23, Sched. B, s. 15.

Order

(7) If the Board on its own motion or at the request of the Minister commences a proceeding to determine whether an amount that the Board may approve or fix under this section is just and reasonable,

- (a) the burden of establishing that the amount is just and reasonable is on the generator; and
- (b) the Board shall make an order approving or fixing an amount that is just and reasonable. 2004, c. 23, Sched. B, s. 15.

Application

(8) Subsections (4), (5) and (7) apply only on and after the day prescribed by the regulations for the purposes of subsection (2). 2004, c. 23, Sched. B, s. 15.

Payments to the Financial Corporation

78.2 (1) The IESO shall make payments to the Financial Corporation with respect to the Financial Corporation's contracts with generators relating to output generated at generation facilities prescribed by the regulations and the provision of ancillary services at those generation facilities. 2004, c. 23, Sched. B, s. 16.

Payment amounts

(2) The payments to the Financial Corporation in respect of a contract referred to in subsection (1) shall equal the amounts required to reimburse the Financial Corporation for its indirect costs, as determined under the regulations, and its direct costs under the contract. 2004, c. 23, Sched. B, s. 16.

OPA may act as settlement agent

(3) The OPA may act as a settlement agent to settle amounts payable to the Financial Corporation under this section. 2004, c. 23, Sched. B, s. 16.

Payments to the OPA for output under procurement contracts

78.3 (1) The IESO shall make payments to the OPA with respect to output generated by units at generation facilities and ancillary services in respect of which the OPA has entered into procurement contracts under Part II.2 of the *Electricity Act, 1998* that are prescribed by the regulations or that satisfy the rules prescribed by the regulations. 2004, c. 23, Sched. B, s. 17.

Payment amounts

(2) The payments under subsection (1) to the OPA shall equal the amounts payable by the OPA under the procurement contracts referred to in that subsection. 2004, c. 23, Sched. B, s. 17.

Payment to the OPA under procurement contracts

78.4 (1) The IESO shall make payments to the OPA with respect to amounts paid or payable by the OPA to an entity with whom the OPA has entered into a procurement contract under Part II.2 of the *Electricity Act, 1998* that is prescribed by the regulations or that satisfies the rules prescribed by the regulations. 2004, c. 23, Sched. B, s. 18.

Payment amounts

(2) The payments under subsection (1) to the OPA shall be the amounts payable by the OPA under the procurement contracts referred to in that subsection. 2004, c. 23, Sched. B, s. 18.

Payments to distributors or the OPA under conservation and demand management programs

78.5 (1) The IESO shall make payments to a distributor or to the OPA on behalf of other persons prescribed by the regulations with respect to amounts approved by the Board for conservation and demand management programs approved by the Board pursuant to a directive issued under section 27.2. 2009, c. 12, Sched. D, s. 13.

Amount and timing of payment

(2) The amount and timing of each payment referred to in subsection (1) shall be determined by the Board in accordance with such rules, methods and criteria as may be prescribed by the regulations or mandated by a code issued by the Board or an order of the Board. 2009, c. 12, Sched. D, s. 13.

Regulations review

(3) A regulation made under subsection (2) may require the Board to undertake its review of the amounts referred to in this section at the time or times prescribed by the regulation. 2009, c. 12, Sched. D, s. 13.

OPA may act as settlement agent

(4) The OPA may act as a settlement agent to settle amounts payable to a distributor under this section. 2009, c. 12, Sched. D, s. 13.

Conflict with market rules

78.6 In the event of a conflict, sections 78.1 to 78.5 prevail over the market rules to the extent of the conflict. 2009, c. 12, Sched. D, s. 13.

TAB 4 B

ONTARIO REGULATION 66/10

made under the

ONTARIO ENERGY BOARD ACT, 1998

Made: February 24, 2010

Filed: March 12, 2010

Published on e-Laws: March 15, 2010

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**ASSESSMENTS FOR MINISTRY OF ENERGY AND INFRASTRUCTURE
CONSERVATION AND RENEWABLE ENERGY PROGRAM COSTS****Definitions**

1. (1) In this Regulation,

“IESO-controlled grid” means the IESO-controlled grid as defined in the *Electricity Act, 1998*;

“market participant” has the same meaning as in section 56 of the Act;

“Ministry” means the Ministry of Energy and Infrastructure;

“net distributor volume” means the sum of the amount of electricity withdrawn from the IESO-controlled grid by a distributor licensed under Part V of the Act, the amount of electricity purchased from any host distributor and the amount of electricity supplied by qualified embedded generators, less the amount of electricity supplied to qualified embedded distributors;

“qualified embedded distributor” means a distributor that is licensed under Part V of the Act that is provided electricity by another licensed distributor;

“qualified embedded generator” means a generator who is connected to a distributor’s distribution system;

“qualified host distributor” means a distributor licensed under Part V of the Act that distributes electricity to another distributor;

“Retail Settlement Code” has the same meaning as in section 56 of the Act.

(2) In this Regulation, a reference to a volume of electricity distributed by or to a licensed distributor includes the volume for total losses, as defined in the Retail Settlement Code.

Board assessments re energy conservation or renewable energy programs

2. The Board shall, with respect to the expenses incurred and expenditures made by the Ministry in respect of its energy conservation programs or renewable energy programs,

- (a) assess the persons and members of classes of persons referred to in section 3 for the amounts set out in section 4;
- (b) apportion the amount in accordance with section 5; and
- (c) issue the assessment on or before April 15, 2010.

Persons and classes of persons to be assessed

3. The following are the persons and classes of persons to be assessed for the purposes of subsection 26.1 (1) of the Act:

- 1. Distributors licensed under Part V of the Act.
- 2. The IESO.

Assessed amount

4. For the purposes of section 2, the total amount to be assessed by the Board in respect of persons and classes of persons referred to in paragraphs 1 and 2 of section 3 is \$53,695,310.

Rules re apportioning assessments

5. (1) For the purposes of this Regulation, the Board shall calculate a quotient based on the following formula:

$$A \div (C + D)$$

where,

“A” is the amount prescribed under section 4,

“C” is the total amount of electricity withdrawn from the IESO-controlled grid by all persons referred to in subsection 7 (3), as determined in accordance with the market rules, for use in Ontario for the most recent 12-month period for which the information is available for the person, and

“D” is the sum of the net distributor volumes of all distributors licensed under Part V of the Act for the 12-month period ending December 31, 2008 or for the most recent 12-month period ending before December 31, 2008 for which the information is available for each distributor.

(2) The Board shall publish the quotient referred to in subsection (1) on its website as soon as is practical after the Board calculates it.

(3) For the purposes of section 2, the Board shall calculate the amount of the assessment for each distributor licensed under Part V of the Act according to the following formula:

$$Q \times B$$

where,

“Q” is the quotient calculated under subsection (1), and

“B” is the net distributor volume for each distributor licensed under Part V of the Act for the 12-month period ending December 31, 2008 or for the most recent 12-month period ending before December 31, 2008 for which the information is available for the distributor as used in the calculation of “D” in subsection (1).

(4) For the purposes of section 2, the Board shall calculate the amount of the assessment of the IESO according to the following formula:

$$Q \times C$$

where,

“Q” is the quotient calculated under subsection (1), and

“C” has the same meaning as in subsection (1).

Payment of assessment

6. On or before July 30, 2010, each person or member of a class of persons assessed under section 2 shall remit the assessed amount, together with such identifying information as may be specified by the Board, to the Minister of Finance in accordance with the instructions issued by the Board.

Recovery of funds

7. (1) A distributor licensed under Part V of the Act may recover from persons to whom it distributes electricity in its service area, other than persons who are distributors licensed under Part V of the Act, amounts calculated using the following formula:

$$Q \times E$$

where,

“Q” is the quotient published by the Board and referred to in subsection 5 (2), and

“E” is the volume of electricity distributed to the person during the current billing period in each bill referred to in section 9.

(2) The IESO may recover from the persons who are market participants and are referred to in subsection (3) the amount calculated under subsection 5 (4) using the following formula:

$$H \times (I \div J)$$

where,

“H” is the amount assessed under subsection 5 (4),

“I” is the volume of electricity withdrawn by the market participant from the IESO-controlled grid, as determined in accordance with the market rules, for use in Ontario over the most recent 12-month period for which information is available for the market participant, and

“J” is the sum of all volumes of electricity withdrawn from the IESO-controlled grid, as determined in accordance with the market rules, for use in Ontario by market participants from which the IESO may recover in accordance with subsection (3), over the most recent 12-month period for which information is available for the market participant.

- (3) The IESO may recover the amount assessed under subsection 5 (4) from persons,
- (a) who are market participants as of the date when the IESO calculates the amounts to recover under subsection (2) and who are not distributors licensed under Part V of the Act; and
 - (b) who are not licensed under Part V of the Act as a generator, unless their primary business activity is not the generation of electricity.

Variance accounts

8. (1) Every distributor licensed under Part V of the Act shall apply to the Board by no later than April 15, 2012 for an order authorizing it to clear any debit or credit balance in any variance account established by the distributor and authorized by the Board to track the difference between the amounts remitted by the distributor pursuant to the assessment under subsection 5 (3) and the amounts recovered by the distributor under subsection 7 (1).

(2) The IESO shall add any variance between the assessment referred to in subsection 5 (4) of this Regulation and the recovery referred to in subsection 7 (2) of this Regulation to the amount it may recover with respect to any future assessment under section 26.1 (1) of the Act.

Customer billing, distributors

9. A distributor licensed under Part V of the Act shall bill the persons referred to in subsection 7 (1) of this Regulation the amounts calculated in that subsection in each bill issued during the one-year period starting on the date the distributor begins the billing.

Information

10. (1) Every person assessed under section 2 shall provide the Board with the information, in the manner and at the times set out by the Board, that the Board requires to implement and administer the assessments.

(2) The Ministry and the Board may share any invoicing and payment information that each may require from the other.

Commencement

11. **This Regulation comes into force on the later of the day section 6 of Schedule D to the *Green Energy and Green Economy Act, 2009* comes into force and the day this Regulation is filed.**

TAB 4 C

ONTARIO ENERGY BOARD
Rules of Practice and Procedure

42. Request

42.01 Subject to **Rule 42.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

42.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 42.01**.

42.03 The notice of motion for a motion under **Rule 42.01** shall include the information required under **Rule 44**, and shall be filed and served within 20 calendar days of the date of the order or decision.

42.04 Subject to **Rule 42.05**, a motion brought under **Rule 42.01** may also include a request to stay the order or decision pending the determination of the motion.

42.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

42.06 In respect of a request to stay made in accordance with **Rule 42.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

ONTARIO ENERGY BOARD

MOTION RECORD

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