

August 18, 2010

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto, Ontario M4P 1E4

Dear Ms. Walli,

Re: EB-2010-0245- Request for Reconsideration of Cost Recovery

1 *As requested by the Board in its August 4th Notice to this consultation¹, Just Energy Ontario L.P.*
2 *and Direct Energy (collectively the “Suppliers”) share similar views as presented in this*
3 *submission and therefore have filed this position jointly. Both parties reserve their right to*
4 *participate independently throughout the consultation.*

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6 On August 4th, 2010, the Ontario Energy Board (“OEB”, the “Board”) issued a notice under Board
7 File Number EB-2010-0245 stating its intention to conduct a consultation in regards to the
8 Implementation of Consumer Protection Provisions of the *Energy Consumer Protection Act, 2010*
9 (“ECPA”). In that Notice, under the section titled “Cost Awards”, the Notice states:

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11 *“Cost awards will be available under section 30 of the OEB Act to eligible*
12 *participants for their participation in this consultation. Costs awarded will be*
13 ***recovered from licensed electricity retailers (50%) and licensed gas marketers***
14 ***(50%), and apportioned amongst them in the manner to be determined by the***
15 ***Board at the relevant time.” [Emphasis added]***

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17 On August 12, 2010, the OEB issued its second Notice in this consultation, restating the same
18 determination² and further provides that the Board will determine eligibility for costs in
19 accordance with its *Practice Direction on Cost Awards*³.

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21 The Suppliers respectfully submit that the costs incurred in this consultation are more
22 appropriately recovered under the Board’s *Cost Assessment Model* similarly as all other costs

¹ OEB Notice Dated August 4, 2010; Appendix A

² Section F- Cost Awards

³ OEB Notice Dated August 12, 2010; Attachment G

23 relating to market rules and code implementations have been in the past. Further the Suppliers
24 find no reason why this consultation differs from past consultations and undertakings of the
25 Board in regards to the continuing market regulatory changes of the energy markets.

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27 **Considerations**

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29 The *Ontario Energy Board Act* (the “Act”) provides the Board with authority to order a person to
30 pay all or part of another person’s costs⁴; however the Suppliers submit the following
31 comments for the Board’s consideration.

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33 Section 26 (1) of the *Ontario Energy Board Act* (the “Act”) provides that

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

40
41 Further, OReg 16/08 sets out the persons or classes of persons liable for assessments for the
42 purpose of Section 26(1) of the *Act*. Retailers of electricity and marketers of natural gas are not
43 classes which can be made liable for such assessments.

44
45 In 2004, the Board undertook a consultation to review and establish a Cost Assessment Model
46 for the energy industry. That Model was finalized and issued in March of 2005. A further review
47 of the Model was conducted in 2006 and the Board determined that no change was required to
48 the Model.

49
50 The Board determined, in its Report on The OEB Cost Assessment Model⁵;

51
52 *“Competitive Market Participants*
53 *The OEB was convinced that inclusion of gas marketers and electricity retailers in*
54 *general cost assessment would lead to inequity in costs ultimately borne by*
55 *customers who are served by default supply (whether gas or electricity) on the*
56 *one hand, compared to customers who are served by competitive supply on the*
57 *other. This is because distributors will pass through their assessment costs to all*
58 *distribution customers regardless of whether these customers’ commodity is*
59 *supplied by the distributor or a retailer/marketer.*

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61 *In other words, distributor assessments do not unbundle regulatory costs*
62 *relating to distribution from regulatory costs relating to commodity. Thus all*
63 *distribution customers pay for both. In light of this, it is the view of the Board*
64 *that it is inappropriate for customers of retailers/marketers to pay these costs*
65 *and in addition pay regulatory costs related to competitive supply. The Board*

⁴ Section 30 of the *Act*

⁵ Report on The OEB Cost Assessment Model Development and Consultation
Process – Issued March 14, 2005 – Page 6

66 *believes that the recovery of costs through approved rates will more accurately*
67 *apportion ratepayer costs.*

68
69 *Also, retailers and marketers offer consumers long-term, fixed-price contracts. In*
70 *most cases, these participants are not able to recover newly imposed costs from*
71 *existing customers and therefore **either new customers or shareholders, or***
72 ***both, would have to bear these costs.** [Emphasis added]*

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74 The Suppliers submit that these same principles and findings hold true and that, consistent with
75 the Board's principles for Cost Assessments, it would be inequitable to recover costs in this
76 consultation from the suppliers. Suppliers pay annual licensing fees in accordance with the
77 Board's determination. Further, although the market rules are established for all consumers, the
78 costs would therefore be borne only by a subset of the consumer base.

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80 Further, as the energy market matures in natural course, we will continue to undergo legislative
81 and regulatory changes and these costs should continue, as they have in the past, to be
82 recovered under the general assessment model.

83
84 In the Board's Cost Assessment Model, it states⁶:

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86 *"Much of the OEB's cost that is uniquely associated with retailers/marketers*
87 *relates to compliance and enforcement. The OEB can and will collect the costs of*
88 *proceedings (i.e., outside of the general cost assessment process) that directly*
89 *relate to marketers/retailers."*

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91 The Suppliers share the view that this consultation is not a compliance or enforcement
92 undertaking- it is a consultation to implement changes to the energy industry rules and
93 regulations, not different than the numerous proceedings and consultations undertaken in
94 previous years since the markets deregulated and as such, cost recovery should be determined
95 similarly.

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97 The Board, on its own motions, has implemented a number of proceedings and consultations
98 with respect to the establishment or amendment of market rules such as the Retail Settlement
99 Code and underlying EBT Standards, the amendment to the gas industry rules resulting in GDAR
100 and its technical implementations, previous revisions to the Codes of Conduct for both
101 electricity retailers and gas marketers, both on its own motion and again previously in response
102 to the legislative introduction of Bill 58.

103
104 There are numerous other proceedings and consultations on record similar to this instant
105 consultation which have been conducted to amend or implement new rules and regulations in
106 which the Board has determined cost recovery in accordance with the Assessment Model.

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108 The Suppliers find no basis for a different approach for cost recovery as noticed by the Board.
109 The examples outlined in the preceding paragraph were consultations which considered similar
110 changes, including consumer protections, as does this consultation.

⁶ Ontario Energy Board Cost Assessment Model – dated March 14, 2005 (ref: Part II, A2,c))

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Further, the Suppliers recognize that Section 30 of the Act allows the Board to direct cost payments by one party to another, and that the Board has the ability to require the payment of cost awards by Suppliers in this proceeding. Much like Applications wherein distributors, for example, are required to participate and recover the prudently incurred costs of their own, and others' participation, this proceeding is an initiative that requires Suppliers to be active participants. However, unlike distributors, Suppliers are unable to recover regulatory costs from customers at Board approved rates. Consequently, the Board's proposal for cost awards in this proceeding will place a punitive financial burden on those Suppliers and certain consumers.

Summary

The Suppliers believe that the proposal for cost awards in this consultation imposes material impacts to retailers of electricity and marketers of natural gas and may set a precedent for future matters before the Board.

All distribution customers may avail themselves of choice in supply, and this consultation provides amendments to the business rules and regulations governing the consumer's choice, and the underlying industry rules regarding it, no different than the numerous undertakings preceding it.

As retail choice is an option for all consumers, regardless of whether or not they avail themselves of that option, the Suppliers are of the view that a more appropriate methodology would be to recover the costs of the consultation consistently in the same manner as cost recovery and assessment has been employed for previous industry consultations, as noted herein.

The Suppliers respectfully request that the Board consider this submission before determining a Final Order in regards to the parties to be liable for cost recovery.

All of which is respectfully submitted.



Gord Potter
Executive Vice President
Just Energy

Original signed by
Gary Newcombe
Vice President
Direct Energy