

ONTARIO ENERGY BOARD

Proposed Revisions to the OEB Cost Assessment Model to reflect the Proposed Amendment to Ontario Regulation 16/08

Comments of Just Energy

Introduction and Summary of Position

1. Section 26 of *Ontario Energy Board Act, 1998 (OEB Act)* empowers the Ontario Energy Board to levy assessments to recover its operating costs, and requires payment of such assessments by those who are assessed. Ontario Regulation 16/08 prescribes the persons or classes of persons who may be assessed. Ontario Regulation 16/08 was amended effective January 1, 2011 to add natural gas marketers and low volume customer electricity retailers (collectively referred to below as “energy retailers”) to the list of classes of persons who may be assessed.
2. The Board’s Cost Assessment Model is the methodology the Board uses to apportion its costs to the persons or classes of persons that are required to pay costs assessed to them under section 26.1. In response to the amendment to Regulation 16/08 the Board has issued for comment a draft revision to its Cost Assessment Model.
3. In the draft revision to the Board’s Cost Assessment Model the Board proposes to commence, beginning with assessment invoices issued in April, 2011, to allocate significant (up to \$4.5 million for the first year) costs to energy retailers. These are costs that have been previously allocated to rate regulated market

¹ Draft Cost Assessment Model issue for comment December 14, 2010.

participants, and recovered primarily through regulated transmission and distribution charges paid by energy consumers.

4. it is Just Energy's position that:

- a. ***Regulation 16/08 provides the Board with a discretion to determine whether to extend its operating cost recovery to energy retailers. Prior to extending its operating cost recovery to energy retailers, the Board has a positive legal duty to exercise its discretion and consider whether such extension would be appropriate, at this time.***
- b. ***There is no indication from the Board that the advisability and propriety of including competitive energy market participants in its Cost Assessment Model has changed since development of that model in 2004/2005 and review of its model in 2006. There is no apparent basis established upon which the Board could exercise its discretion to extend its Cost Assessment Model to energy retailers, at this time.***
- c. ***There is no publicly available document, description or information addressing or explaining the manner in which the Board proposes to identify, allocate and assesses its operating costs for recovery under section 26, other than the Draft Ontario Energy Board Cost Assessment Model (January 2011) that the Board has issued for comment, and the December 14, 2010 Notice under which that document was issued. These documents contain insufficient information to allow affected energy retailers to review and understand the basis upon which they are to be assessed up to \$4.5 million. In light of the Board's own adopted cost assessment principles of "stability", "predictability", "transparency" and "fairness", the Board should refrain from extending its Cost Assessment Model to energy retailers until details of its proposed allocation methodology, judgements and results are made public and can be reviewed, understood and properly commented on by the energy retailers affected.***
- d. ***Following the establishment of a methodology that is, in fact, transparent (through the public accessibility urged above), and should the Board proceed to reverse its expressly articulated pre-existing policy and extend its Cost Assessment Model to energy retailers, the Board should then provide for a transition period during which any assessments determined for energy retailers be phased in. By phasing in any such assessments at 20% a year over 5 years, energy retailers will be afforded the same opportunity as other assessed payors to pass through these costs to energy consumers.***

To do otherwise would result in inequity and anti-competitiveness as between rate regulated and competitive retailer energy providers.

- e. ***Subject to an opportunity to examine and understand the manner in which the Board's costs are tracked and allocated, and the results of such tracking and allocation, it is Just Energy's view that should the Board proceed to extend its Cost Assessment Model to energy retailers, indirect allocations to energy retailers should be on an incremental basis. To do otherwise would result in an undue cross-subsidy between energy retailer customers and energy consumers choosing rated regulated supply options.***
- f. ***The Board's proposal for intra-class allocation of 50% of the energy retailer class costs among energy retailers on the basis of average number of complaints should be replaced by an allocator on the basis of the average per capita customer complaint ratio. This allocator would provide a sharper incentive for retailers to reduce their complaint experience and thereby reduce the Board's operating costs.***

Legislative Framework

- 5. Section 26 of the OEB Act provides that, subject to the regulations, the OEB "may" assess prescribed classes of payors for recovery of its operating costs. Unlike many recent amendments to the Board's governing legislation, this provision grants to the Board a discretionary rather than a mandatory authority.
- 6. For the Board to continue to operate under its self-funding corporate structure it must (rather than may) assess and recover its operating costs. However, it does not have to (though it may) spread its assessed costs among all prescribed classes of payors.
- 7. Regulation 16/08 makes payment by the prescribed classes of payors (which as of January 1, 2011 include energy retailers) mandatory, when assessments are issued to them. The regulation says;

“The following persons or classes of persons are liable for the purpose of subsection 26(1) of the Act to pay an assessment with respect to expenses incurred and expenditures made by the Board:”

8. Read in conjunction with the legislative provision which authorizes it, this provision of Regulation 16/08 should be interpreted as directing that persons whom the Board determines should be assessed must pay assessments received. It should not be read as making the discretionary legislative authority provided to the Board to determine whom it should assess mandatory.²
9. In the result, while persons receiving assessments from the Board are required to pay them, the Board has a discretion to determine which of the prescribed classes of persons it should assess on account of any particular, or any, operating costs.
10. Further, the Board must exercise that discretion, and make an independent determination as to which classes of persons it should assess pursuant to section 26 for recovery of the Board’s operating costs. A failure to independently consider and determine this question would be an abdication by the Board of its jurisdiction.³
11. The Board also has a legal duty to provide reasons for its decisions.⁴ This legal duty is particularly evident given that the Board’s draft Cost Assessment Model proposes to reverse its reasoned and articulated policy to date that it would be inappropriate to include energy retailers in its Cost Assessment Model, and to proceed to levy millions of dollars for payment by energy retailers. Just Energy itself would be liable for millions of dollars in annual assessments.

² *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, page 43.

Current Cost Assessment Policy

12. The Board developed its current cost assessment model in 2004/2005, in response to changes to the *OEB Act* which reconstituted the Board as a self-funding non-share corporation.
13. In developing the model by which the Board would henceforth be funded, it obtained advice from Navigant Consulting Group, which prepared a comprehensive report⁵. The Navigant report included discussion of the principles applicable to assessment by a regulatory agency of its operating costs, as well as a comprehensive scan of how jurisdictions worldwide approach such assessment.
14. Navigant's 68 page report was issued for public comment. The Board received 16 written responses.
15. Following consideration of Navigant's report and the written responses received, the Board issued its report in the matter on March 14, 2005. The Board's report reflected, inter alia, the conclusion that:

*"...inclusion of gas marketers and electricity retailers in general cost assessment would lead to inequity in costs ultimately borne by customers who are served by default supply (whether gas or electricity) on the one hand, compared to customers who are served by competitive supply on the other."*⁶

16. In its March 14, 2005 report, the Board further stated as follows:

"... it is the view of the Board that it is inappropriate for customers of retailers/marketers to pay these costs and in addition pay regulatory costs related to competitive supply. The Board believes that the recovery of

³ *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)*, [1998] F.C.J. No. 141, paragraph 9, on appeal from [1996] F.C.J. No. 1390, see paragraph 26.

⁴ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, paragraphs 42 and 43.

⁵ *Ontario Energy Board Cost Assessment Model*, October 28, 2004, Navigant Consulting Ltd.

⁶ *Report on the OEB Cost Assessment Model Development and Consultation Process*, March 14, 2005, page 6, paragraph 1.

costs through approved rates will more accurately apportion ratepayer costs.⁷

....

Much of the OEB cost uniquely associated with retailers/marketers relates to compliance and enforcement. While the OEB views compliance as an important and proactive function of the Board, it is a relatively small portion of the annual budget. The added complexity and administrative cost of introducing a separate Class [sic] for retailers/marketers to which only compliance and enforcement costs would be apportioned, was not considered to be warranted.⁸

17. The Board next considered its Cost Assessment Model in the first half of 2006. In reviewing its model, the Board commissioned a report by EES Consulting to survey regulatory bodies in other jurisdictions to determine the assessment methodology used by each.⁹
18. Again the Board published the report and solicited comments.
19. After considering the EES Consulting report and the submissions received, the Board issued a letter dated March 27, 2006 in which the Board concluded (as did the report) that its then current cost assessment model aligned with best practices in other jurisdictions, and no change was warranted.
20. The instant process is the first public consideration of the Board's Cost Assessment Model since the March 27, 2006 communication from the Board, which validated the conclusions of the Board's March 14, 2005 report.
21. The Board has, to date, consistently and expressly determined and communicated that it would be inappropriate to extend its Cost Assessment Model to energy retailers.

⁷ *Report on the OEB Cost Assessment Model Development and Consultation Process*, March 14, 2005, page 6, paragraph 2.

⁸ *Report on the OEB Cost Assessment Model Development and Consultation Process*, March 14, 2005, page 6, bottom to page 7, top.

⁹ *Regulatory Cost Allocation Survey and Recommendations*, January 2006.

22. Neither the draft Cost Assessment Model, nor the December 14, 2010 Notice to Interested Parties under which it was issued by the Board for comment, provides any reasoning at all regarding considerations based on which the Board has concluded that reversal of earlier expressly articulated policy is warranted. As outlined above a decision by the Board about whether to extend its Cost Assessment Model to cover energy retailers is a discretionary one. The Board has provided no indication of the what has changed since it created and then reviewed its Cost Assessment Model that would merit a policy reversal in this area.

Legal Position

23. As noted above, the Board's determination of which classes of persons it should assess for recovery of its operating costs is a discretionary one. Yet the Board seems to have taken the amendment to Regulation 16/08 as requiring it, rather than authorizing it, to extend its Cost Assessment Model to cover energy retailers. It is not apparent that the Board has in fact exercised any independent discretion in determining whether to reverse its previously articulated and reasoned policy of not assessing energy retailers. Certainly no reasoning has been provided by the Board.
24. Just Energy respectfully submits that for the Board to proceed to extend its Cost Assessment Model to cover energy retailers without independent consideration of whether it is appropriate to do so would be an abdication of the Board's jurisdiction.¹⁰
25. Just Energy further respectfully submits that, as a party against whom such an assessment would result in a material legal obligation, it has a legal right to understand the basis upon which the Board has concluded that it should reverse

¹⁰ Supra, note 3.

its previously articulated policy and extend its Cost Assessment Model to cover energy retailers and their customers.¹¹

26. As a party against whom such an assessment would result in a material financial obligation, Just Energy submits that it has a further legal right to understand the detailed methodology with which the Board proposes to assess energy retailers. The very general description of such methodology provided in the Board's Draft Cost Assessment Model and associated Notice is insufficient to allow Just Energy to understand, validate and identify any reasonable concerns regarding the proposed assessment of it and other energy retailers. Essentially, Just Energy would get a bill for some millions of dollars, and be required to pay it annually, without any further basis upon which to understand its derivation or verify its validity.
27. By way of example, Just Energy would need to understand how call centre activity is allocated as between energy retailer driven activity, and general market information inquiries. The latter is the Board's function, the costs of which should be shared across all customer classes and not allocated specifically to the retailer customer class. Further, if call centre attendants are directing first time callers to their energy retailers for initial discussion of concerns and complaints, these calls should be relatively short, as compared to calls on which attendants are spending time recording concerns for further Board action and discussing next steps with callers. The base for determination and allocation of the costs of such activities (are the costs allocated by number of calls or by time spent, and under what rules for categorizing and recording them), and of the protocols for the activities underlying those costs (are first time callers directed to contact their retailer first) need to be considered.
28. Just Energy thus submits that the Board should not, and legally cannot, proceed to extend its Cost Assessment Model to cover energy retailers without some further action.

¹¹ Supra, note 4.

29. At a minimum, the Board must provide:
- a. Some transparent reasoning in support of such determination. As this is a discretionary authority, reasoning to support the exercise of the Board's discretion in the manner proposed is required.
 - b. Disclosure of the detailed basis for the proposed allocations, to allow those affected to understand, validate, and identify any reasonable concerns regarding the proposed assessment which they would be obligated to pay, and thus respond with properly informed comment.

Transition

30. Following the proper exercise by the Board of its discretionary authority, as outlined above, should the Board proceed to extend its Cost Assessment Model to cover energy retailers, then principles of fundamental justice, and the Board's own principles of "transparency", "fairness", "stability" and "predictability" (see "*Guiding Principles*" 1, 5 and 6 of the Board's draft Cost Assessment Model), dictate that energy retailers be provided with some period of notice and an appropriate transition mechanism. This is particularly so as the Board would be reversing its current expressly articulated policy of no liability by energy retailers for these costs to a policy which would fix energy retailers with a very material liability.
31. The Board's current Cost Assessment Model results in assessed costs being passed through by payors in regulated rates. In contrast, and as noted in the Board's March 14, 2005 report on development of its Cost Assessment Model;

...retailers and marketers offer consumer long-term, fixed-price contracts. In most cases, these participants are not able to recover newly imposed costs from existing customers and therefore either new customers or shareholders, or both, would have to bear these costs.¹²

¹² Report on the OEB Cost Assessment Model Development and Consultation Process, March 14, 2005, page 6, paragraph 3.

This was one of the reasons that the Board, when it developed its Cost Assessment Model, determined that it would be inappropriate, inequitable, and anti-competitive to include energy retailers in its model.

32. If and when the Board does proceed to extend its Cost Assessment Model to energy retailers, in order to mitigate the inequitable result which the Board was concerned with in the past, a transition period is warranted.
33. The majority of energy retailer supply contracts with low-volume consumers are 5 year contracts. Thus, on average, it can be assumed that roughly (though only very roughly, as there are still distinct contract expiry cycles, particularly in respect of electricity supply contracts) 20% of an energy retailer's low-volume supply contracts come up for renewal each year. If the OEB does determine to extend its Cost Assessment Model to cover energy retailers, then phasing that extension in over 5 years, at an incremental 20% of the costs that they would otherwise be allocated in each year, would at least allow energy retailers to pass such costs through to its new customers, and thus preclude some inequity between competitive and regulated energy suppliers.

Inter-class Allocation

34. The Board's current Cost Assessment Model provides that where possible the Board's operating costs are allocated directly to those classes of payors which directly drive the costs incurred. The balance of the Board's operating costs are considered "indirect" in this context, and are allocated in proportion to the direct allocation of costs. Thus the costs assessed to any particular payor are determined on the basis of the Board's tracking of, and judgements regarding, the direct allocations.
35. The draft Cost Assessment Model provides no detail regarding how the Board's operating costs are grouped, and the basis upon which each such grouping is attributed to one or more of the payor classes. The brief description provided at

page 9 of the draft Cost Assessment Model issued by the Board for comment is of little assistance in assessing the reasonableness of the Board's proposed approach and of its application to the costs incurred. The level of disclosure provided by the Board in its publicized documents stands in stark contrast to the level of disclosure that the Board habitually requires of those which it regulates.

36. In the result, Just Energy can offer no comment on the veracity and appropriateness of the direct allocations that would result under the draft Cost Assessment Model. This circumstance flies in the face of the Board's stated principles of "transparency", "stability" and "predictability".¹³
37. In the result, despite the Board's invitation to comment, Just Energy has no real opportunity to comment on the proposed direct allocations pursuant to which it is to be fixed with millions of dollars of cost liability annually. As argued above, this is a breach of Just Energy's, and other energy retailers', legal entitlements as subjects of the Board's regulation.
38. Subject to an opportunity to examine and understand the manner in which the Board's costs are to be tracked and allocated to it, it is Just Energy's view that should the Board proceed to extend its operating cost recovery to energy retailers, indirect allocations to energy retailers should be on an incremental basis.
39. It was a concern of the Board, as noted in its 2004/2005 report on development of its Cost Allocation Model¹⁴, that to the extent that energy retailers pass OEB assessed costs through to their customers, energy retailer customers could pay OEB assessed costs twice; once through their delivery rates and a second time through their competitive energy supply price.
40. Unless the costs allocated for recovery from energy retailer customers, on both a direct and indirect basis, are truly incremental (that is, incurred by the Board only

¹³ Draft Cost Assessment Model issue for comment December 14, 2010, page 5, principles 1 and 5.

¹⁴ *Report on the OEB Cost Assessment Model Development and Consultation Process*, March 14, 2005, page 6, paragraphs 1 and 2.

in relation to regulation of energy retailers), customers of energy retailers who would pay both distribution utility assessments and energy retailer assessments, would end up inappropriately subsidizing regulated supply customers. Such a cross-subsidy would be both anti-competitive and unfair to energy retailer customers (in violation of the Board's "guiding principle" 2 for its draft Cost Allocation Model).

Intra-class Allocation

41. In respect of the proposed allocation of costs within payor classes, the Board's draft Cost Assessment Model proposes to allocate costs within the energy retailer classes on the following basis:¹⁵
 - a. 50% of the costs would be allocated on the basis of the average total number of customers of the retailer taken from the three most recent annual Report and Record Keeping Requirements statistics.
 - b. 50% of the costs would be allocated on the basis of the average number of complaints received by the Board's Consumer Relations Centre in the three most recent years.
42. Just Energy submits that the second of these allocation factors – average number of complaints received – should be replaced by an average of the per customer number of complaints received by a particular payor.
43. The first of the Board's proposed allocators within the energy retailer class already directs 50% of identified costs according to size of the customer base of the retailer.
44. Applying the average of the per customer number of complaints, rather than the total number of complaints, for the second intra-class allocator for energy retailers would enhance the incentive for energy retailers to improve their complaint experience. Energy Retailers who experienced lower normalized (for

¹⁵ Draft Cost Assessment Model issue for comment December 14, 2010, page 10.

customer number) complaints would pay less, ultimately resulting in greater decreases in required regulatory services, and associated regulatory costs. This result would be in keeping with the incentive component of "guiding principle" 1 of the Board's draft Cost Allocation Model.

45. Without particulars of how the Board's operating costs are grouped for application of its Cost Assessment Model, and the basis upon which each such grouping is attributed to one or more of the payor classes, Just Energy cannot numerically assess the results of the proposed alternative approach to the second intra-class allocation factor. Should the alternative proposed result in overburdening of smaller energy retailers, then the Board could consider adding the proposed alternative approach as a third allocator, or adjusting the percentage of costs to which each allocator would be applied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:



GOWLING LAFLEUR HENDERSON LLP, per:
Ian A. Mondrow
Counsel for Just Energy

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