

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.

I **CHRISTOPHER BITONTI** 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, lawyers for the Consumers Council of Canada and Aubrey LeBlanc in this matter, and as such have knowledge of the matters herein deposed.

2. The cross-examination of the affidavit of Barry Beale, sworn the 5th day of November, 2010, took place on November 16, 2010. During the course of the cross-examination of Mr. Beale, he was asked certain questions, in response to which his counsel took under advisement whether she would provide responses thereto. Responses to the questions taken under advisement were delivered in three tranches, the first dated November 26, 2010, the second dated December 20, 2010, and the third dated December 23, 2010. Only the responses delivered on December 20, 2010, and December 23, 2010, are relevant to the motion herein.

3. During the course of his cross-examination, Mr. Beale was asked to provide copies of any studies or analyses of the cost recovery implications of sections 26.1 and 26.2 of the *Ontario Energy Board Act*. Counsel for the Attorney General took under advisement whether she would produce the requested materials. That was given undertaking number JT 1.5.

4. By letter dated December 20, 2010, counsel for the Attorney General provided a response, together with attached documents, to undertaking JT 1.5. The response was as follows:

Relevant analysis/advice enclosed. See Exhibits 1, 2, and 3 attached.

Relevant material includes documents pertaining to the ultimate decision taken by Government which is the subject of the constitutional challenge. Policy options, including the option of recovering costs against natural gas utilities/ratepayers and recovering costs for programs other than HESP or OSTHI, considered but never implemented by the Government, are not relevant.

Policy options are only germane to a s. 1 analysis when a constitutional challenge is initiated under the *Charter*, as opposed to the instant challenge brought under the division of powers. When determining whether a levy constitutes a regulatory charge *intra vires* the province, or an unconstitutional indirect tax, the legal inquiry is framed by the jurisprudential test set out by the Supreme Court in *Westbank* [1999] 2 S.C.R. 134 and refined in *620 Connaught* [2008] 1 S.C.R. 131. The criteria in the legal test are measured against the levy entrenched in the legislative scheme itself-an examination of the policy options considered but never implemented in the legislation is neither relevant nor appropriate to the reviewing court's analysis: *Confederation des syndicats nationaux* [2008] 3 S.C.R. 511.

The enclosed documents have been redacted to exclude: material irrelevant to the constitutional challenge to s.26.1 and 26.2 of the OEBA, and O. Reg. 66/10 thereto; material irrelevant to the jurisprudential test relating to whether a levy constitutes an *intra vires* regulatory charge, and; material covered under solicitor-client privilege.

Exhibit 1 (Note)

Rationale for the Reallocation of MEI Multi-Fuel conservation program costs to Electricity Ratepayers

Exhibit 2 (Note)

Program Cost Recovery Outline

Exhibit 3 (Slide Deck)

Program Cost Recovery 2009-04-27 + PK's comments.

Attached as Exhibit A is a copy of the documents that were attached to undertaking response JT 1.5.

5. During the course of his cross-examination, Mr. Beale was asked to provide any reports or analyses that underlay the creation and implementation of Ontario Regulation 66/10. Counsel for the Attorney General took under advisement whether she would produce the requested materials. That was given undertaking number JT 1.5b

6. By letter dated December 20, 2010, counsel for the Attorney General provided a response, together with attached documents, to undertaking JT 1.5b. The response was as follows:

Relevant document enclosed. See Exhibit 1 (Slide Deck) attached.
(For an explanation of relevance, and the basis for redactions made, please see the Response to Under Advisement JT 1.5, above.)

The enclosed document has been redacted to exclude: material irrelevant to the constitutional challenge to s.26.1 and 26.2 of the OEBA, and O. Reg. 66/10 thereto, and; material irrelevant to the jurisprudential test relating to whether a levy constitutes an *intra vires* regulatory charge.

Attached as Exhibit B is a copy of the documents that were attached to undertaking response JT 1.5b.

7. During the course of his cross-examination, Mr. Beale was asked to provide any written proxy for a business case underlying Ontario Regulation 66/10. Counsel for the Attorney General took under advisement whether she would produce the requested materials. That was given undertaking number JT 1.6.

8. During the course of his cross-examination, Mr. Beale was asked to provide a regulatory impact assessment or proxy prepared in connection with Ontario Regulation 66/10. Counsel for the Attorney General took under advisement whether she would produce the requested materials. That was given undertaking number JT 1.7.

9. By letter dated December 23, 2010, counsel for the Attorney General provided a response, together with attached documents, to undertaking JT 1.6 and JT 1.7. The response was as follows:

Relevant material enclosed. See Exhibits 1, 2 and 3.

Relevant material includes documents pertaining to the ultimate decision taken by Government which is the subject of the constitutional challenge. Policy options, including the option of recovering costs against natural gas utilities/ratepayers and recovering costs for programs other than HESP or OSTHI, considered but never implemented by the Government, are not relevant.

Policy options are only germane to a s. 1 analysis when a constitutional challenge is initiated under the *Charter*, as opposed to the instant challenge brought under the division of powers. When determining whether a levy constitutes a regulatory charge *intra vires* the province, or an unconstitutional indirect tax, the legal inquiry is framed by the jurisprudential test set out by the Supreme Court in *Westbank* [1999] 2 S.C.R. 134 and refined in *620 Connaught* [2008] 1 S.C.R. 131. The criteria in the legal test are measured against the levy entrenched in the legislative scheme itself—an examination of the policy options considered but never implemented in the legislation is neither relevant nor appropriate to the reviewing court's analysis: *Confederation des syndicats nationaux* [2008] 3 S.C.R. 511.

The enclosed documents have been redacted to exclude: material irrelevant to the constitutional challenge to s.26.1 and 26.2 of the OEBA, and O. Reg. 66/10 thereto; material irrelevant to the jurisprudential test relating to whether a levy constitutes an *intra vires* regulatory charge, and; material covered under solicitor-client privilege.

Exhibit 1 (Form)

Application and Report to Treasury Board/Management Board of Cabinet

Exhibit 2 (Note)

Ministry of Energy and Infrastructure: MB 20 for MEI's Conservation Cost Recovery from Electricity Utilities and the IESO.

Exhibit 3 (Form)

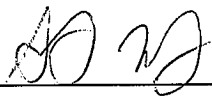
Legislation and Regulations Committee: Ministry Approval Form.

Attached as Exhibit C is a copy of the documents that were attached to the responses to undertakings JT 1.6 and JT 1.7.

10. Attached as Exhibit D are copies of the responses of counsel for the Attorney General to the requests taken under advisement.

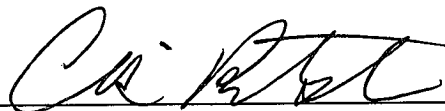
11. I make this affidavit in relation to an application for an order requiring the provision of complete and unredacted copies of the documents provided in response to the questions taken under advisement during the cross-examination of Mr. Beale, together with related relief, and for no improper purpose.

SWORN before me at City of Toronto, in
the Province of Ontario, this 31st day of
January, 2011.



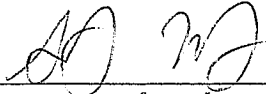
Commissioner For Taking Affidavits

Scott McLaughlin



Christopher Bitonti

This is Exhibit "A" referred to in the Affidavit of Christopher Bitonti sworn before me this 31st day of January, 2011.

A handwritten signature in cursive script, appearing to read "AM", is positioned above a horizontal line.

A Commissioner for taking Affidavits, etc.

Scott McGrath

UNDER ADVISEMENT NO. JT 1.5

EXHIBIT 1: COPY OF GEA_RATIONAL FOR REALLOCATION OF MEI PROGRAM COSTS TO RATEPAYERS

RATIONALE FOR THE REALLOCATION OF MEI MULTI-FUEL CONSERVATION PROGRAM COSTS TO ELECTRICITY [REDACTED] RATEPAYERS

ISSUE

Ongoing costs relating to MEI multi-fuel conservation programs are more appropriately borne by [REDACTED] electricity ratepayers given that the predominant beneficiaries for these programs are [REDACTED] electricity ratepayers.

BACKGROUND

Context

Energy conservation programs are generally administered by energy agencies and utilities such as the Ontario Power Authority, the natural gas utilities, and the local distribution companies (LDCs)¹.

The costs of those programs are recovered from energy users (ratepayers) through various mechanisms that result in charges being added to energy bills and remitted to the organization administering the program on a cost-recovery basis. The benefits of those programs are calculated on the basis of deferred investments in the energy system (e.g. generation or distribution infrastructure) and are established via a variety of cost-benefit tests.

MEI's involvement in program delivery has been justified on the basis of a structural gap in the energy sector which prevents any of the existing agencies and market participants from delivering multi-fuel conservation programs (e.g. a program that saves both natural gas and electricity)². The benefit to the energy users from such a multi-fuel program is derived from not only the strengths of an integrated conservation offering (given that most energy users are, in fact, multi-fuel users) but also from the efficiencies in being able to deliver a multi-fuel program through one service provider (i.e. MEI), rather than multiple parties.

Rationale

MEI's multi-fuel conservation programs have been more successful than anticipated, in terms of levels of participation, and are placing increasing pressures on the Treasury. Given that the primary rationale and beneficiary of these programs is the energy user, MEI is proposing to recover the appropriate portion of its multi-fuel program costs from the ratepayers.

¹ electric utilities

² Regulatory structure of the industry prevents, in large part, an electricity utility from recovering costs for anything but conservation of electricity, and so on.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Design of Proposed Solution

[REDACTED] MEI needs to establish a cost-recovery mechanism with sufficient flexibility to accommodate future policy and energy sector developments. In order to establish the appropriate rigour, transparency, and justification for imposing MEI program costs on the ratepayers, the following process would be established and described through regulation [REDACTED]

1. Definition of MEI program costs included and excluded from cost-recovery process

MEI would continue to fund activity for propane and oil conservation, where there is no pre-existing mechanism for allocating costs directly to these energy users. Further, MEI would continue to fund all program administration costs (staff, IT resources, etc) for its multi-fuel programs.

Specifically, MEI would seek cost recovery of the non-administrative costs directly related to [REDACTED] electricity conservation efforts.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Design of Proposed Solution

[REDACTED] MEI needs to establish a cost-recovery mechanism with sufficient flexibility to accommodate future policy and energy sector developments. In order to establish the appropriate rigour, transparency, and justification for imposing MEI program costs on the ratepayers, the following process would be established and described through regulation [REDACTED]

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Specifically, MEI would seek cost recovery of the non-administrative costs directly related to [REDACTED] electricity conservation efforts.

³ Sample data chart attached at end of document

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Implementation

[REDACTED]

[REDACTED]

UNDER ADVISEMENT JT 1.5

EXHIBIT 2: COPY PROGRAM COST RECOVERY OUTLINE- ORIGINAL

rogram Cost Recovery

Policy Intent: Energy Efficiency program costs, regardless of who delivers, should have appropriate costs allocated to the electricity [REDACTED] rate base [REDACTED]

This is the case for CDM projects delivered by OPA and LDCs as well as DSM by Union Gas and Enbridge. Savings from government initiated programs have no such mechanism.

Benefits: a measure of acceptable rate impact which may include consideration of provincial policy objectives related to GHG emission reduction or other factors (e.g. social equity, R&D). Test such as TRC, RIM, participant tests will need to be reviewed and modified as required. Tests would be used as a matter of program discipline, not for debate before a regulator.

Appropriate Costs: up to the benefit calculated above. Direct program costs would be allocated by electricity and natural gas savings achieved, by rate category as required. Costs related to staffing and administration would remain with the MEI and not charged back.

Suitable accountability framework: may vary by option depending on depth of reporting requirements but features public reporting not subject to comment by the regulator.

Options:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

For each:

Further elaborate on description, mechanics of implementation

Pros/Cons

Considerations

Anticipated Stakeholder reaction

UNDER ADVISEMENT JT 1.5

**EXHIBIT 3: PROGRAM COST RECOVERY 2009-04-27+PK's
COMMENTS**

[SEE ATTACHED PDF DOCUMENT]

JT 1.5 Exhibit 3

**EXHIBIT : PROGRAM COST RECOVERY 2009-04-27+PK's
COMMENTS**

Energy and Infrastructure

MEI Program Cost Recovery

Date Prepared: April 20, 2009



Renewables and Energy Efficiency Division

1

MEI programs

- At this time, funds collected via the proposed MEI Cost Recovery are intended to be used to support the delivery of multi-fuel energy conservation programs and renewable energy development. [REDACTED] programs will be included for FY 2009/2010 at an estimated total cost of approximately \$150 million.
- The programs are: [REDACTED], Home Energy Savings Program, and the Ontario Solar Thermal Heating Incentive Program. All these programs affect both electricity and natural gas users, as well as users of other fuels.

- [REDACTED]
- The Home Energy Savings Program (HESP) provides incentives to residential homeowners to carry out conservation measures at home. The program subsidizes a home energy audit for 50% of the cost of the audit, up to \$150. The program then pays retrofit grant to homeowners who completes energy retrofits recommended through the audit. The retrofit grant is matched by the federal government's eco-energy program; thus, every federal dollar in benefits to the participant is matched by the province with another dollar of benefit to the participant.
- The Ontario Solar Thermal Heating Initiative (OSTHI) program similarly subsidizes the installation of large (commercial) solar air and solar water roofs. The first are generally used to substitute natural gas heating in warehouses, barns, etc; while the solar water is used to pre-heat water.

Timeline



Cost Recovery: Principles and Rules

- ♦ Principles and Rules created based on what data is available to be used
- ♦ When the energy retrofit measure reduces the consumption of only one fuel:
 - allocate the full cost to that fuel. For example:
 - If energy retrofit measures displace/reduce electricity consumption only
 - 100% cost assigned to Electricity
 - If energy retrofit measures displace/reduce natural gas consumption only
 - 100% cost assigned to Natural Gas
 - If energy retrofit measures displace/reduce the consumption of other fuels only
 - 100% cost assigned to Other
- ♦ When the energy retrofit measure reduces the consumption of several fuels or reduces the consumption of some fuels and increases the consumption of other fuels:
 - If the measure affects the building envelope (insulation, doors, windows, etc): allocate 90%/10% cost to fuel displaced-electricity
 - If the measure does not affect the building envelope (ground source heat pump): allocate the cost to the displaced fuel
 - Always allocate the furnace DC motor cost to Electricity

Cost Recovery – Estimated Breakdown by Program

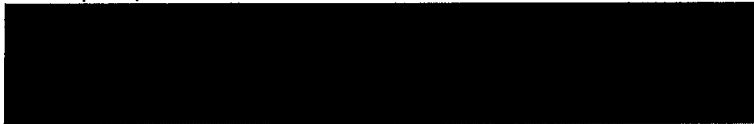
Program	[REDACTED]		Electricity		Other		Total
OSTHI (Ontario Solar-Thermal Heating Incentive)							
[REDACTED]							
OHESP (Ontario Home Energy Savings Program)	[REDACTED]		\$29M	20%	\$13M	8%	\$146M
Total							

Cost Recovery Example: Ontario Solar Thermal Heating Incentive

♦ **Sample Project 1:**

- ↳ Solar Water Installation on Apartment Building
- ↳ Total System Cost: \$7,495.00; Ontario Contribution: \$1,873.50
- ↳ Displaced Energy: Electricity
 - Invoice split for NG – 0%; Invoice split for Electricity – 100%; Invoice Split for Taxes – 0%

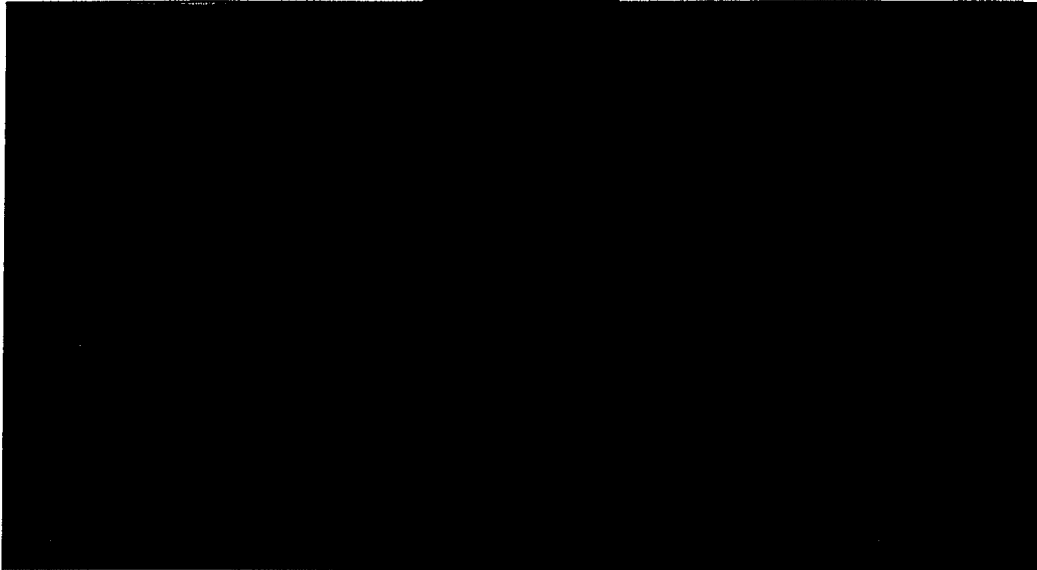
♦ **Sample Project 2:**



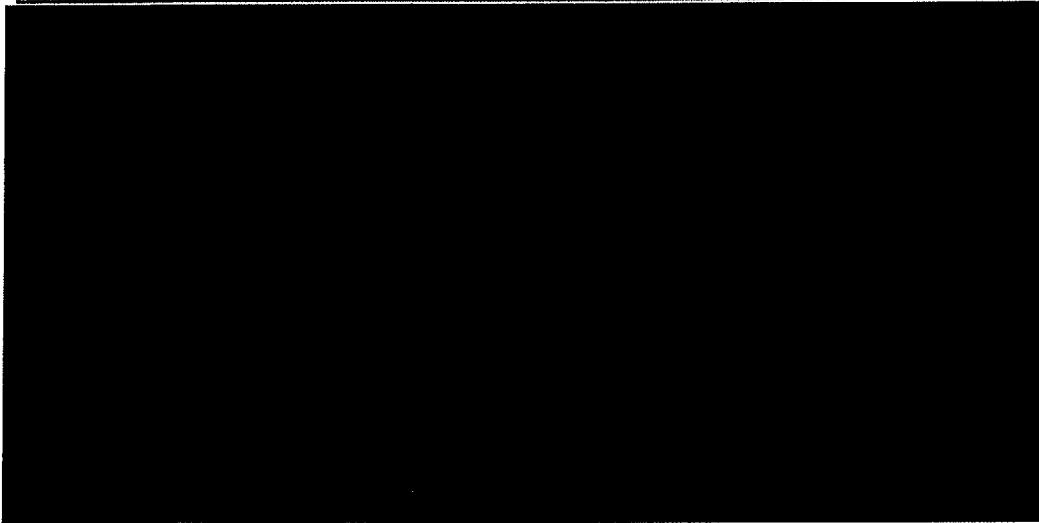
♦ **Sample Project 3:**



Cost Recovery Example:



Cost Recovery Example: [REDACTED] (contd.)



Cost Recovery Example: OHESP

Sample Project 1

Displaced Energy: Natural Gas (heating); Electricity (cooling)

Retrofit	Air Sealing	Central AC	ESTAR Doors
Ont. Contribution	\$150.00	\$200.00	\$90.00
Split (%)	NG - 90; Elec - 10	Elec - 100	NG - 90; Elec - 10
Split (\$)	NG - \$135; Elec - \$15	Elec - \$200	NG - \$81; Elec - \$9

Total: Ontario Contribution: \$440; SBC: Natural Gas: \$216; Electricity: \$224

Sample Project 2

Displaced Energy: Oil (heating); Electricity (cooling)

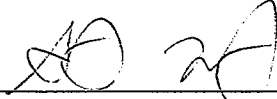
Retrofit	Air Sealing	Central AC	ESTAR Doors	Attic Insulation
Ont. Contribution	\$150.00	\$200.00	\$90.00	\$300.00
Split (%)	Taxes - 90; Elec - 10	Elec - 100	Taxes - 90; Elec - 10	Taxes - 90; Elec - 10
Split (\$)	Taxes - \$135; Elec - \$15	Elec - \$200	Taxes - \$81; Elec - \$9	Taxes - \$270; Elec - \$30

Total: Ontario Contribution: \$740; SBC: Taxes: \$486; Electricity: \$254



Renewables and Energy Efficiency Division

This is Exhibit "B" referred to in the Affidavit of Christopher Bitonti sworn before me this 31st day of January, 2011.

A handwritten signature in dark ink, appearing to read "Scott McGrath", written over a horizontal line.

A Commissioner for taking Affidavits, etc.

Scott McGrath

UNDER ADVISEMENT JT 1.5B

EXHIBIT 1

SLIDE DECK TO UPDATE MINISTER

[SEE ATTACHED PDF DOCUMENT]



MINISTRY OF ENERGY AND INFRASTRUCTURE

PURPOSE OF BRIEFING

- To update the Minister on the status of a regulation under the GEA to recover the cost of MEI's conservation programs from [REDACTED] electricity ratepayers.
 - Why
 - How much
 - Who Pays – Apportioning the costs amongst Residential, Commercial, Industrial users [REDACTED]
 - Timing considerations

2



MINISTRY OF ENERGY AND INFRASTRUCTURE

Background

- The Green Energy Act includes provisions allowing recovery of funds for MEI multi-fuel conservation programs from ratepayers (consistent with ratepayers currently funding all other conservation programs).
- Two MEI programs are in market: the Ontario Solar Thermal Heating Initiative (OSTHI) program and the Home Energy Savings Program (HESP).
 - Both of these programs are scheduled to run until March 2011 [REDACTED]
- The expense associated with current MEI programs for FY 09/10 is estimated at \$185 million. \$140 million would be funded from [REDACTED] electricity ratepayers while the rest (admin, oil/propane related incentives) would be paid by existing MEI allocations.
- The \$140 million that needs to be recovered is next apportioned to [REDACTED] electric ratepayers by determining the costs associated with [REDACTED] electricity savings that HESP and OSTHI would yield. MEI estimates the division to be: \$40 million (electricity) [REDACTED]

		Electricity (\$million)
HESP	[REDACTED]	39
OSTHI	[REDACTED]	1
Total	[REDACTED]	40

3

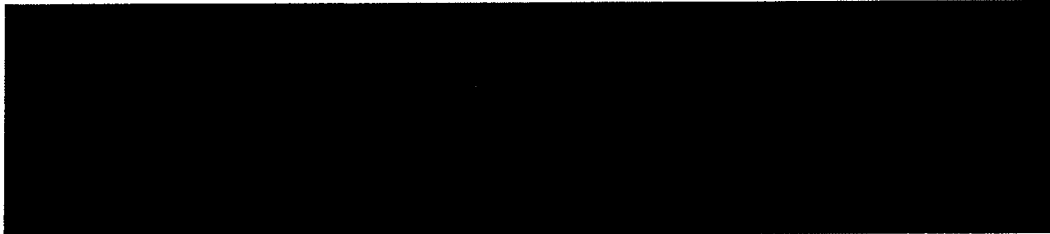


Ontario

MINISTRY OF ENERGY AND INFRASTRUCTURE

Current Status

- MEI staff have worked extensively with internal and external stakeholders to develop a process for cost recovery. It would require the OEB to assess [REDACTED] electric utilities for amounts as identified in a regulation, to be filed annually on the basis of Treasury Board approved figures.
- Direction is required in three key areas in order to complete the drafting of the regulation:





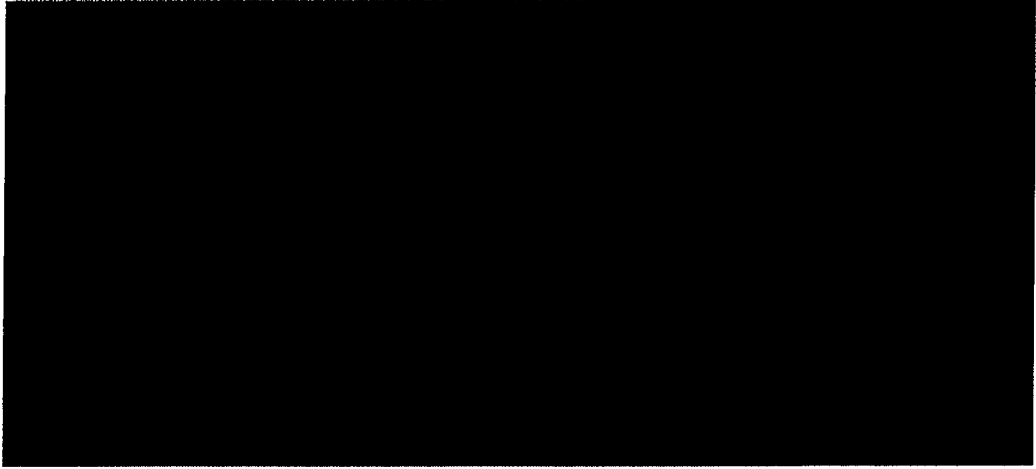
MINISTRY OF ENERGY AND INFRASTRUCTURE

Issue 1: Apportioning the Charges

- Considerations on which customer class is charged and for how much:
 - Who benefits directly from the programs (e.g. residential)?
 - Who benefits indirectly from reducing demands on the energy infrastructure for expansion of storage (gas), distribution (both electricity and gas), and generation (electricity) capacity?
 - What are the rate impacts?
 - What is the constitutional law assessment of whether the recovery may be viewed as a regulatory charge or a tax?



Apportioning the Charges:

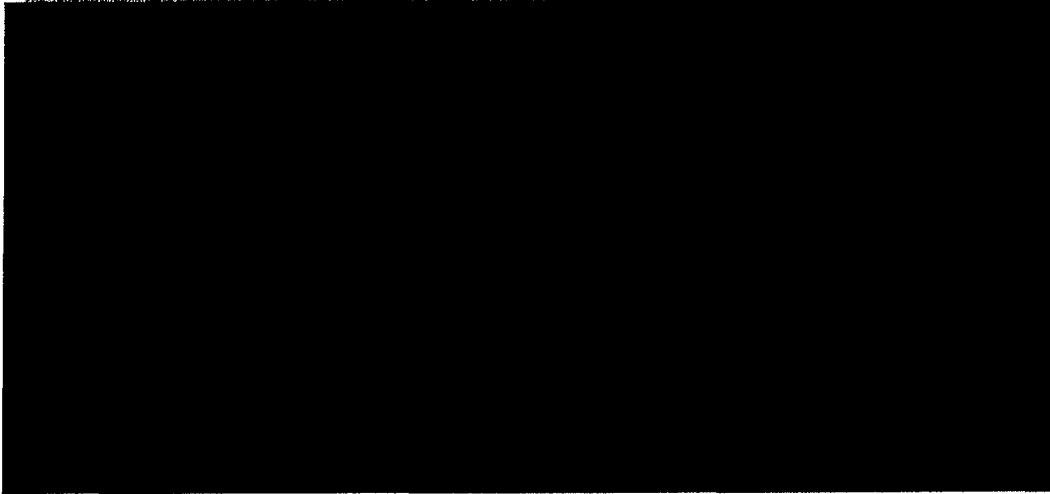


[Redacted line of text]



MINISTRY OF ENERGY AND INFRASTRUCTURE

Apportioning the Charges: [REDACTED]



[REDACTED]

7

Apportioning the Charges: Electricity Options

Recovery from
electricity users:
(all amounts annual)

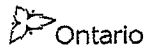
\$0 ————— \$20M ————— \$40M

Pay based on
volume of electricity
consumed
Rate: \$/Kwh 0.00028

Residential	Commercial	Industrial
\$3 (avg)	\$300 (avg)	\$100 (avg)

The volumetric approach is preferred in the electricity sector as consistent with the system benefits for which all other electricity conservation is paid for by users.

Rate impacts are modest, representing about a 0.3% increase in all sectors

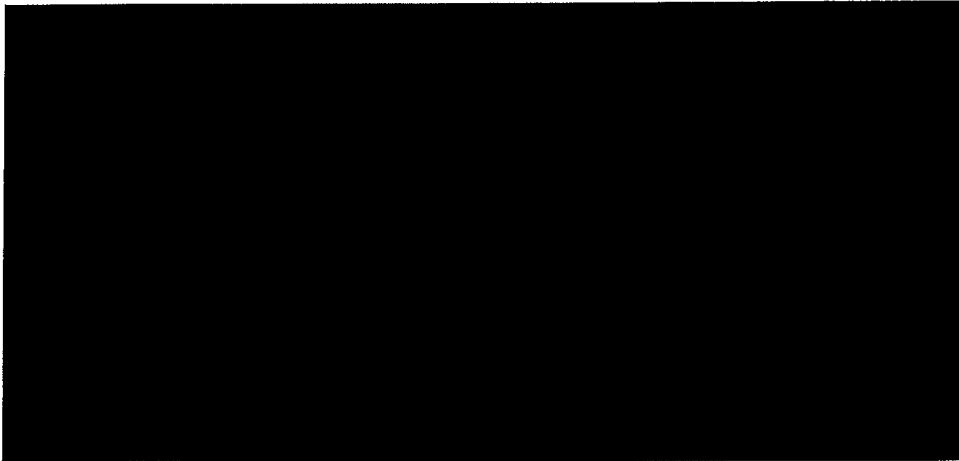


Ontario

MINISTRY OF ENERGY AND INFRASTRUCTURE

Issue 2: Cash flow

- Provincial accounting rules require the full amount of charges for FY09/10 to be remitted no later than July 31, 2010.





Ontario

MINISTRY OF ENERGY AND INFRASTRUCTURE

Cash flow options





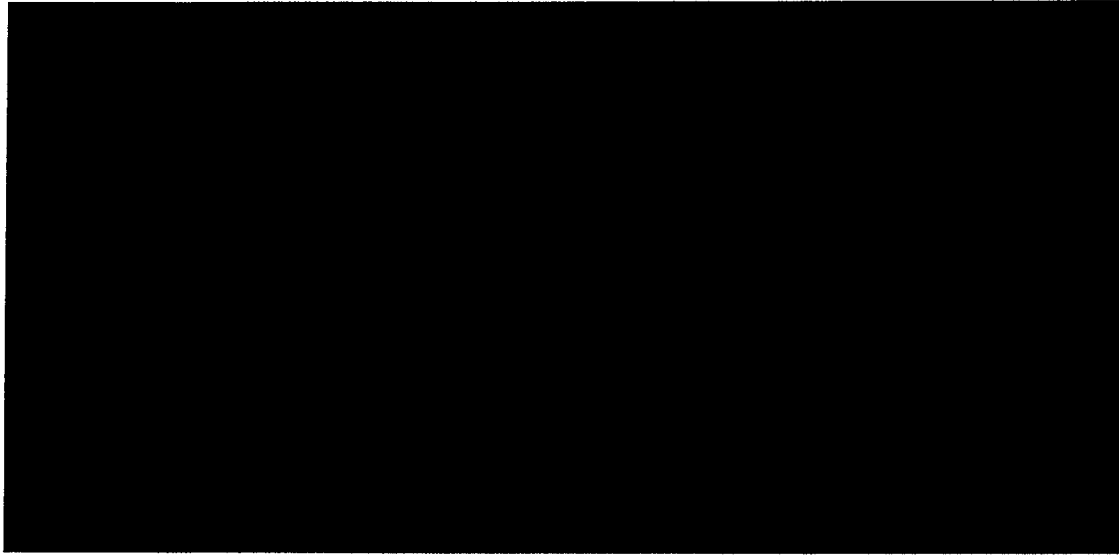
Ontario

MINISTRY OF ENERGY AND INFRASTRUCTURE

Issue 3: Bill presentment



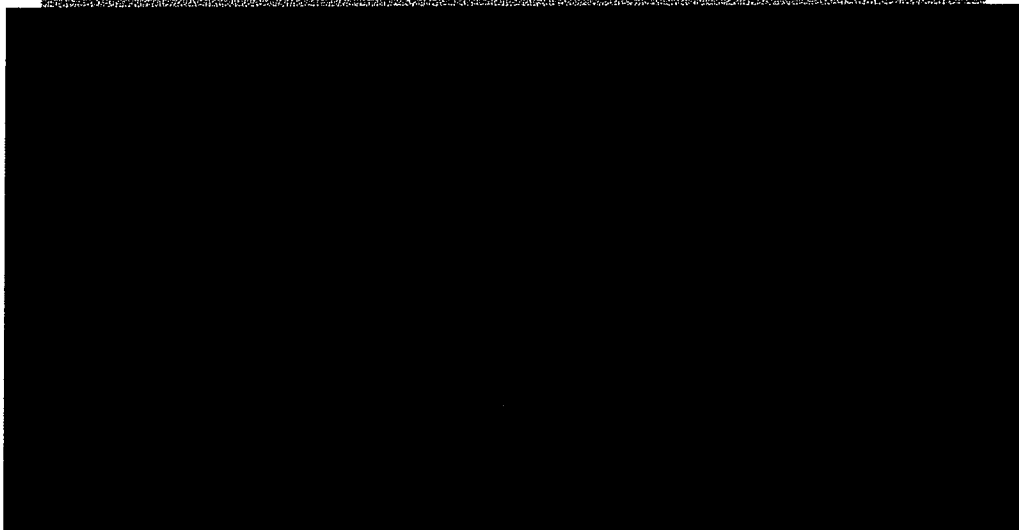
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MINISTRY OF ENERGY AND INFRASTRUCTURE

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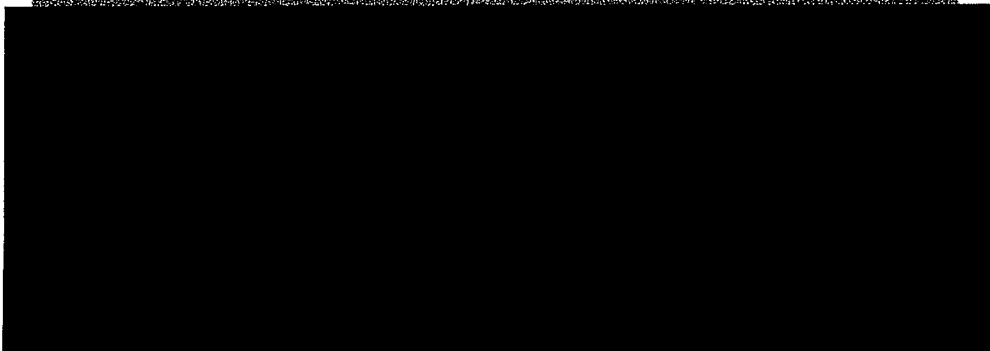


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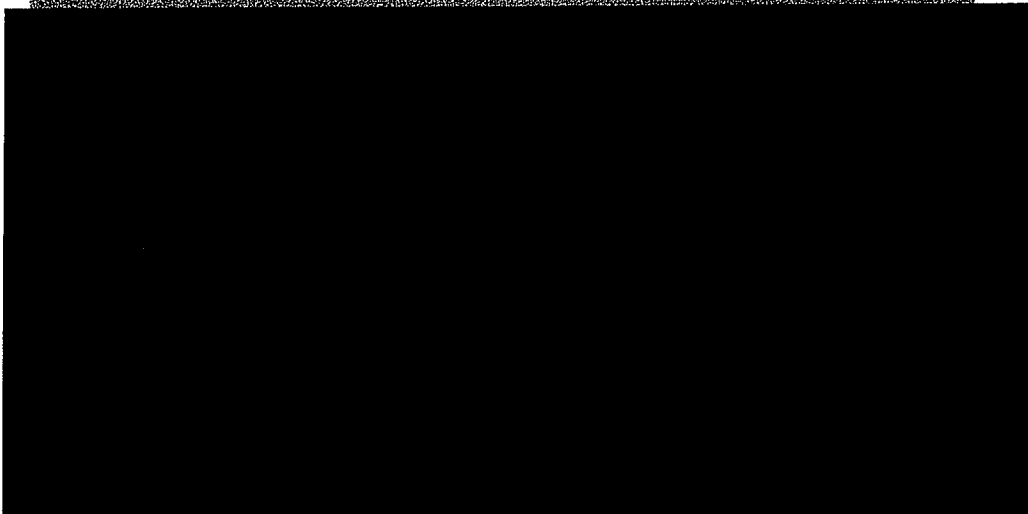


MINISTRY OF ENERGY AND INFRASTRUCTURE

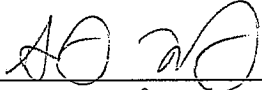
Decisions and Next steps



Timeline



This is Exhibit "C" referred to in the Affidavit of Christopher Bitonti sworn before me this 31st day of January, 2011.



A Commissioner for taking Affidavits, etc.

Scott M. Brink



Application and Report to Treasury Board/Management Board of Cabinet
(Refer to instructions on next page)

1. MINISTRY OF ENERGY AND INFRASTRUCTURE			2. MINISTRY LOG # 2009-10 -02		3. TB/MBC LOG #			
4. TYPE OF REQUEST: Revenue								
5. PURPOSE OF REQUEST: The Ministry of Energy and Infrastructure is requesting approval from TB/MBC to: 1) proceed to LRC with a regulation on February 22nd that will enable the cost recovery of MEI's conservation programs from electricity rate payers; 2) the change in cost recovery mechanism and a revised revenue target in the amount of \$53.695M in 2009-10; 3) Note that MEI will fully offset the remaining revenue shortfall in 2009-10 through savings identified in the third quarter report;								
6. FINANCIAL DETAILS			(\$ Millions)					
			Current Year		Year 1		Year 2	
			2009-10		2010-11		2011-12	
			Operating	Capital	Operating	Capital	Operating	Capital
A. Program Current Base		Expense						
		Asset						
B. Program Request (change from existing base)		Expense						
		Asset						
C. Available for Offset		Expense						
		Asset						
D. Net Impact On Program Allocation (B-C)		Expense						
		Asset						
E. Revenue Implications			53.6950					
			Current Year	Year 1		Year 2		
			2009-10		2010-11		2011-12	
7. IMPACT ON FTE LIMIT			2009-10		2010-11		2011-12	
A. Program Current Base FTE Limit								
B. Program FTEs Request								
C. Available FTE Offset								
D. Net Impact on FTE Limit (B-C)								
E. Change to Ministry Salaries & Wages Allocation (Included in the Program Request (\$ Millions))								
8. OTHER DECISION FACTORS			Y/N	EXPLANATION				
A. Consistent with Government Priorities and Results (If Yes identify key Result(s) - Include details in submission)			Y	Better Health, Jobs and Prosperity				
B. Policy approval (If yes identify policy committee and date approved)			Y	The Ministry is seeking LRC approval on February 22, 2010				
C. Key Performance Risks (If yes provide details in submission)			N					
D. Impact on other Ministries (if yes - include sign-off date. Include resources impact in submission)			N	Ministries:				
E. Impact on the Fiscal Plan (if yes provide details in submission)			N					
9. AUTHORIZATION /DATE								
 Signature of Minister			Day/Month/Year		 Signature of Deputy Minister			
Day/Month/Year			Day/Month/Year		Day/Month/Year			

Application and Report to Treasury Board/Management Board of Cabinet

Administrative Data for Current year (relates to 6C and 6D from page.1).

Vote & Item	Standard Account	Ministry Request (\$ Millions)				
		Holbrooks Release (A)	Treasury Board Order (B)	Increase (C)	Decrease (D)	Total (E) (A+B)
2902/01	Salaries & Wages					
	Employee Benefits					
	Transportation & Communications					
	Services					
	Supplies and Equipment					
	Transfer Payments					
	Other Transactions					
	Recoveries					
	Other (Specify)					
	ITEM TOTAL					
	Salaries & Wages					
	Employee Benefits					
	Transportation & Communications					
	Services					
	Supplies and Equipment					
	Transfer Payments					
	Other Transactions					
	Recoveries					
	Other (Specify)					
MINISTRY SUMMARY	Salaries & Wages					
	Employee Benefits					
	Transportation & Communications					
	Services					
	Supplies and Equipment					
	Transfer Payments					
	Other Transactions					
	Recoveries					
	Other (Specify)					
	MINISTRY TOTAL					

**MINISTRY OF ENERGY AND INFRASTRUCTURE
MB 20 FOR MEI'S CONSERVATION COST RECOVERY FROM
ELECTRICITY UTILITIES AND THE IESO**

1.0 MINISTRY REQUEST

The Ministry of Energy and Infrastructure (MEI) is requesting Treasury Board/Management of Cabinet (TB/MBC) approval to proceed to Legislation and Regulation Committee on February 22, 2010 with a regulation to allow the partial cost recovery of MEI's conservation programs from the electricity utilities; there would be no cost recovery from gas utilities.

MEI also seeking TB/MBC approval for a reduction in the amount of revenue collected in 2009-10. MEI is proposing to change its cost recovery mechanism to collect \$53.695M from electricity utilities only. This would result in a decrease of revenue from the \$142.8M minuted in the 2009-10 RbP. The ministry is noting however that the revenue shortfall in 2009-10 would be fully offset from within MEI's savings identified through the third quarter report.



2.0 BACKGROUND

On May 14, 2009 the *Green Energy and Green Economy Act* (GEA), received Royal Assent.

The GEA has the following key elements:

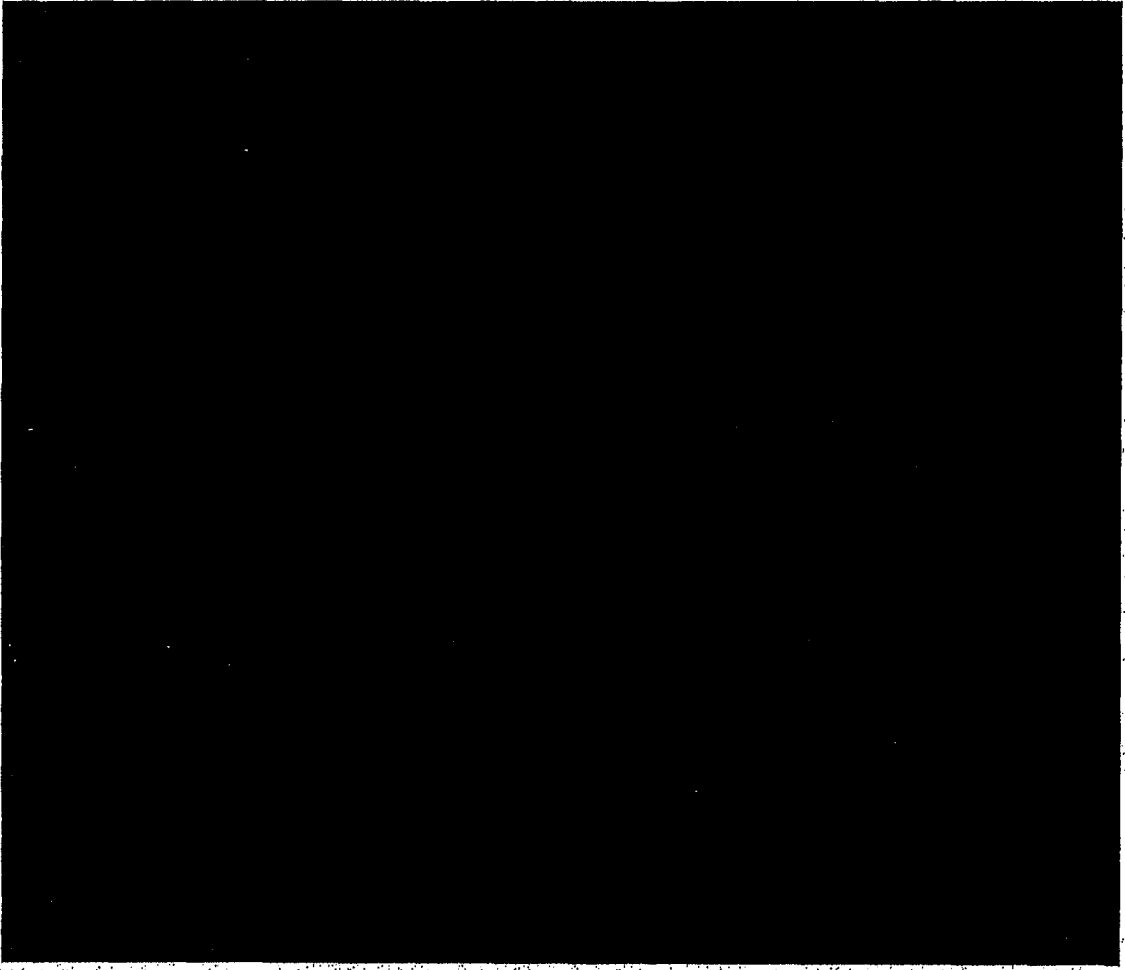
- Establishing Ontario as a leading jurisdiction for renewable energy
- Creating a conservation culture within government and broader society
- Expanding and supporting economic investment in a "green economy"

The goals of the GEA are to accelerate the development and delivery of renewable energy and conservation, stimulate investment and innovation, and support the creation of new, green jobs.

Schedule D, Section 6 of the Act amends the *Ontario Energy Board Act 1998*, allowing the Board to assess prescribed persons or classes of persons for expenses incurred and expenditures made by the Ministry of Energy and Infrastructure in respect of conservation programs or renewable energy programs provided (section 26.1). For the February 2010

purpose of the Financial Administration Act, Board assessments under section 26.1 are deemed to be money paid to Ontario for special purposes (section 26.2), and will be placed into a special purpose account.

Through the 2009-10 and 2010-11 RbP process, and the quarterly reports, the ministry has noted its intention to recover a significant portion of the cost of conservation programs it delivers from electricity [REDACTED] utilities. Electricity [REDACTED] utilities are expected to further recover these amounts from their ratepayers through a rate increase expected to be approved by the Ontario Energy Board.



It should be noted that the original recovery of \$148M in the 2009-10 RbP was derived from a volumetric based approach of MEI's conservation programs for electricity and gas utilities.

3.0 PROPOSED COURSE OF ACTION

OPTION 1: Recovery from Electricity Utilities and the IESO Only- RECOMMENDED-

For fiscal 2009-10 the ministry could regulate the collection of a total amount of \$53.695M from electricity utilities and the IESO and not proceed with collection from the gas. The revenue shortfall expected from exclusion of the gas sector could be fully offset from MEI savings that were identified through the Ministry's third quarter report, and will have no fiscal impact.

OPTION 2:

OPTION 3:

[REDACTED]

The ministry is recommending to proceed with Option 1, recovery of \$53.695M in 2009-10 from electricity utilities. This would require the ministry to proceed to LRC with a draft regulation on February 22nd. [REDACTED]

4.0 PERFORMANCE MEASURES

MEI's conservation programs will contribute to achieving two existing performance measures for MEI:

- Reducing peak electricity demand by 2025 by 6300 MW, through energy conservation.
- Increasing energy saved by consumers through increased use of energy efficient products, 22.6 petajoules by 2012-13.

5.0 FINANCIAL IMPLICATIONS

Government Fiscal Impact:

[REDACTED] MEI's preferred option and recommendation, has a no fiscal impact [REDACTED]

(\$ Millions)	Minuted Recovery 2009-10 RbP	Proposed Recovery from Rate Base	Savings Identified in Q3	Estimated Impact (Variance from Original Revenue Forecast)
Option 1: Recovery from the Electricity Utilities and IESO	142.8	53.7	104.0	(7.5)

Consumer Impact:

For a typical residential customer, Option 1 is estimated to add about \$3/year (about 0.3% bill increase) while a typical commercial customer would see an additional charge of about \$300/year (both spread among the number of billing periods). A typical industrial consumer would pay closer to \$14,000/year (a typical large industrial consumer would pay closer to \$70,000/year).

6.0 RECOMMENDATION

The ministry is requesting that Treasury Board/Management Board of Cabinet:

RECOMMEND for Cabinet approval the Ontario Energy Board regulation to allow collection of cost recovery from electricity utilities for fiscal 2009-10.

APPROVE the change in cost recovery mechanism and a revised revenue target of \$53.695M in 2009-10.

NOTE that MEI will fully offset the remaining recovery in 2009-10 from within, using savings that were identified through the ministry's third quarter report.

JT 1.6 + 1.7, Exhibit (3)



LEGISLATION AND REGULATIONS COMMITTEE:
MINISTRY APPROVAL FORM

LRC Tracking #: REG-8834
EVista Tracking #: SUB-REG-2009-09146

MINISTRY OF ENERGY AND INFRASTRUCTURE

**Assessments for Ministry of Energy and Infrastructure
conservation and renewable energy program costs**

Regulation; [REDACTED]

Profile at a Glance



New Costs/Burdens: Yes for Stakeholders/ No for Government



Proposed Items for Review

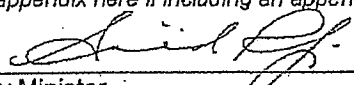
1. New regulation under the *Ontario Energy Board Act, 1998*, titled "Assessments for Ministry of Energy and Infrastructure conservation and renewable energy program costs".



Approvals required prior to LRC

	Committee and date	Cabinet Date	No approval needed
Policy	CCOEF, Dec. 17, 2008	Cabinet, Dec. 17, 2008	
TB/ MBC	(Get info from Corp-RbP approval)		*

*Note appendix here if including an appendix that addresses costs, or if a Budget commitment.


Deputy Minister

Date


Minister

Date

s. 1

Proposal and Context

- The Ministry of Energy and Infrastructure ("MEI") has proposed to recover certain costs of delivering certain MEI energy conservation and renewables programs ("programs") from electricity ratepayers.
- The same programs were funded up to Fiscal Year 2009/2010 using MEI's budgetary appropriations.

s. 2

Approach and Intended Outcomes

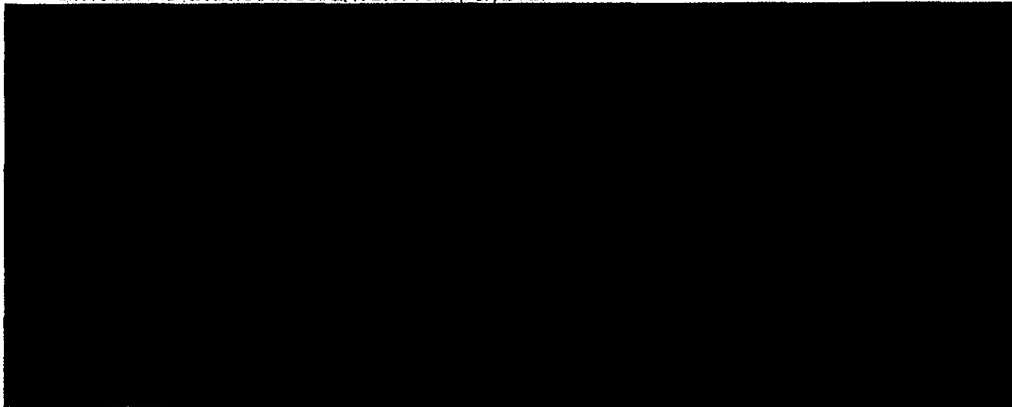
- MEI is proposing a regulation under the *Ontario Energy Board Act* which sets the amounts to be collected, as well as the timing, collection method, and recovery method for the funds.
- Costs would be recovered for the following MEI programs for FY 2009/2010.
 - Home Energy Savings Program (HESP): Provides incentives for energy audits and for installation of energy conservation measures to improve residential home energy efficiency.
 - Ontario Solar Thermal Heating Initiative (OSTHI): Subsidizes the installation of large (commercial) solar air and solar water roofs. The first are generally used to substitute for natural gas heating in warehouses, barns, etc; while the solar water is used to pre-heat water.
- Program administration costs (staffing, overheads and marketing) and costs associated with displacing heating oil and propane are not included as recoverable costs
- The amounts to be recovered from electricity ratepayers for each of the programs with respect to program expenses in FY 09/10 is show below:

PROGRAM	Recoverable Amount- Electricity
HESP	\$53,266,344
OSTHI	\$428,965
Total	\$53,695,310

- These programs affect both electricity and natural gas users, as well as users of other fuels. However, for the current fiscal year, only the electricity portion of the funding will be recovered.



- Program costs will be recovered from electricity ratepayers in proportion to the benefits that the programs deliver to the electricity ratepayers.
- The funding needed from MEI's appropriations will be reduced by a similar amount to that collected from ratepayers.



s. 3 Direction and Urgency

- Cabinet policy minute of December 17, 2008 included specific direction to "align program funding so MEI can recover appropriate costs for conservation program delivery from the rate base in proportion to electricity and natural gas savings". Enabling authority was subsequently included in the *Green Energy and Green Economy Act, 2009*, which received Royal Assent on May 14, 2009.
- The proposed regulation affects ministry appropriations for the current FY closing March 31, 2010. The Ministry's 2009/10 RbP assumed that cost recovery of MEI conservation programs from ratepayers would be in place for the current FY. The amounts stated in the proposed regulation must be recovered in the near term in order to comply with ministry obligations to Treasury Board whereby these amounts would be recovered in FY 09/10.

**s. 4 Impact Assessment and
Costs**

- The proposed regulation establishes an additional obligation on electricity ratepayers in Ontario, apportioned among residential, commercial and industrial ratepayers. For the current fiscal year, this obligation is estimated at \$53,695,310
- Conservation Programs which reduce the overall load and throughput in the system benefit ratepayers since they increase reliability, decrease



maintenance costs, and decrease commodity costs, as well as avoiding capital expenses to build new plant.

- The benefit accruing to electricity ratepayers was estimated based on how much of each fuel was displaced by the conservation measures undertaken. In principle, a conservation measure which reduces or displaces electricity consumption benefits the electricity system and ratepayers. Thus, the apportionment of the charge to electricity [REDACTED] ratepayers was estimated based on analysis of how much electricity [REDACTED] are displaced.
- Average charges to ratepayers for the current fiscal year are estimated as follows:
 - For residential electricity ratepayers about \$3/year.
 - For commercial ratepayers about \$300/year electricity.
 - For typical industrial ratepayers about \$14,000/year (a typical large industrial would be closer to \$70,000).

- [REDACTED]
- A decision not to proceed with this regulation will require that the foregone revenues be offset from elsewhere within government.
 - The funds will continue to be used to deliver MEI energy conservation and renewable programs, making it possible for Ontarians to conserve energy while reducing energy costs and greenhouse gas emissions.

s. 5 Implementation

- By approving the proposed regulation, the collection process would be implemented. MEI, the Ontario Energy Board, and electricity distributors would be expected to participate in the implementation.
- This process is explained in the regulation. It consists of several steps, starting with MEI requiring the Ontario Energy Board to establish an assessment from electricity utilities. Utilities are then regulated to remit the amounts in the assessment to the government's Consolidated Revenue Fund under a Special Purpose Account. Utilities are permitted to recover the remitted amounts from their ratepayers.
- Expenses related to the conservation and renewables programs being funded started April 1, 2009. Full collection of the amounts from electricity is required by July 30, 2010 to meet government accounting rules related to the administration of the Special Purpose Account.
- The order-in council provides for the relevant amendments to the *Ontario Energy Board Act* to come into force on March 1, 2010. It is expected that the regulation will be filed shortly after this, and come into force immediately upon filing.

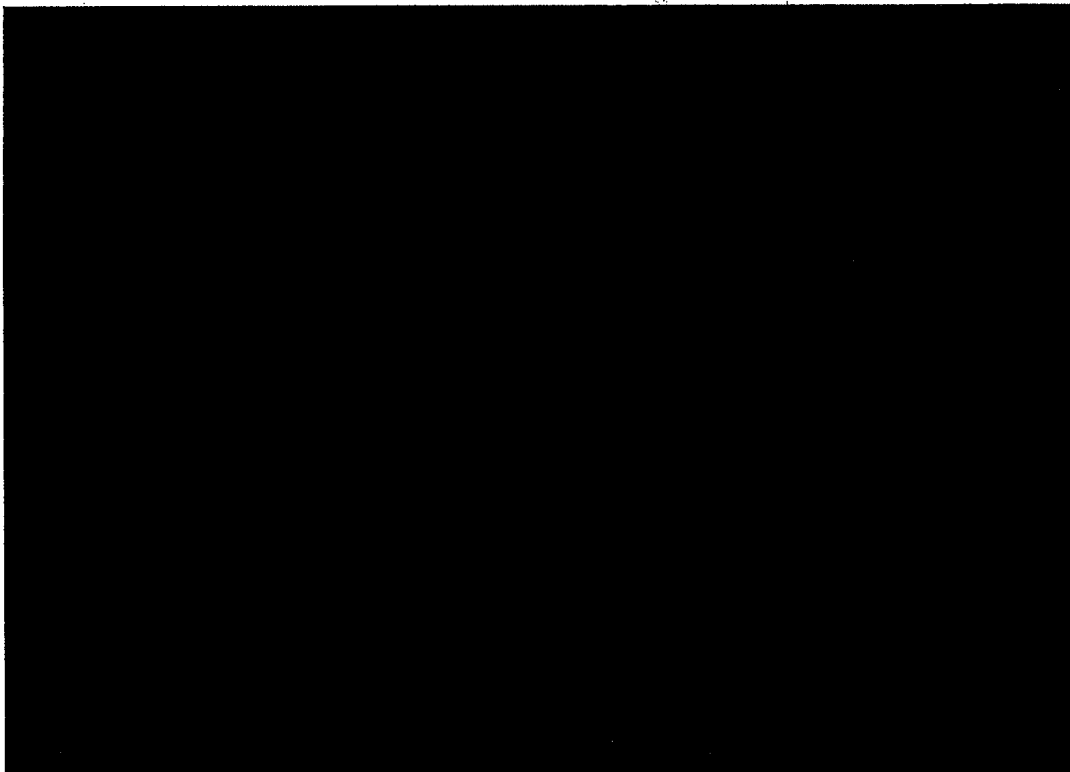
CONFIDENTIAL CABINET DOCUMENT



s. 6 **Delivery and Results
Tracking**

- The success of this proposal will be measured by achieving the collection of the funds. The ministry must have approval and registration of the regulation before the end of the fiscal year to be able to collect the funds.

s. 7 **Stakeholder
Consultations**



s. 8 **Other Jurisdictions and
Harmonization**



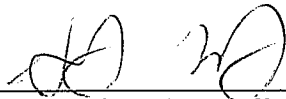
s. 9 Communications



**s. 10 Contacts and
Appendices**

Contacts		
	Name	Phone Number
Ministry Policy/Program	Barry Beale	416-326-4551
Ministry Legal	James Rehob	416-325-6676
Ministry Communications	Eric Pelletier	416-325-1810
Assistant or Deputy Minister's Office	Sue Lo	416-327-8552
Cabinet Office Policy	Melissa Faber	416-325-9140

This is Exhibit "D" referred to in the Affidavit of Christopher Bitonti sworn before me this 31st day of January, 2011.

A handwritten signature in dark ink, appearing to read 'Scott McGrath', written above a horizontal line.

A Commissioner for taking Affidavits, etc.

Scott McGrath

Ministry of the
Attorney General
Constitutional Law Branch

720 Bay Street, 4th Floor
Toronto ON M7A 2S9

Tel: (416) 326-0131
Fax: (416) 326-4015
arif.virani@ontario.ca

Ministère du
Procureur général
Direction du droit constitutionnel

4^e étage, 720 rue Bay
Toronto ON M7A 2S9

Tél.: (416) 326-0131
Télé.: (416) 326-4015
arif.virani@ontario.ca



Via e-mail

December 20, 2010

Mr. Robert Warren
Weir Foulds
Suite 1600, P. O. Box 480
130 King St. W.
Toronto, ON
M5X 1J5

Dear Mr. Warren:

RE: Motion by the Consumer's Council of Canada ("CCC") and Aubrey LeBlanc in relation to s. 26.1 of the *Ontario Energy Board Act, 1998* (the "Act") and Ontario Regulation 66/10

Board File No.: EB-2010-0184

Attorney General of Ontario, Response to matters taken Under Advisement from the Cross-Examination of the Government's Witness

Please find enclosed the Attorney General of Ontario's Response to questions JT 1.4, 1.5 and 1.5 B, taken under advisement from the cross-examination of the Government's witness, which took place on November 16, 2010. Responses to questions JT 1.6 and 1.7, also taken under advisement, remain outstanding.

Yours very truly,

Arif Virani
Counsel

cc: Remaining Intervenors (by e-mail)

**RESPONSE TO MATTERS TAKEN UNDER ADVISEMENT, FROM THE CROSS-
EXAMINATION OF THE GOVERNMENT'S WITNESS, NOV. 16, 2010**

Number	
JT 1.4	<p>Under AdviseMENT:</p> <p>To take under adviseMENT whether to produce any written recommendations or analysis provided to the Minister for the increase in OSTHI funding levels.</p> <p>Transcript p. 67, lines 18-28, p.68, lines 1-3</p> <p>Response:</p> <p>Ministry staff did not provide direct recommendations to the Minister on this matter.</p> <p>The attached three notes (Exhibits 1, 2, 3) were provided only to the Minister's staff.</p> <p>Portions of Exhibits 2 and 3 have been redacted to protect the privacy interests of institutions involved in accessing rebates under the OSTHI program.</p>
JT 1.5	<p>Under AdviseMENT:</p> <p>To take under adviseMENT whether to produce any analysis/advice to given to the Minister respecting the content of ss.26.1 and 26.2 of the OEBA, at the time of the development of the Green Energy and Green Economy Act</p> <p>Transcript p.70, lines 7-13</p> <p>Response:</p> <p>Relevant analysis/advice enclosed. See Exhibits 1, 2, and 3 attached.</p> <p>Relevant material includes documents pertaining to the ultimate decision taken by Government which is the subject of the constitutional challenge. Policy options, including the option of recovering costs against natural gas utilities/ratepayers and recovering costs for programs other than HESP or OSTHI, considered but never implemented by the Government, are not relevant.</p>

	<p>Policy options are only germane to a s.1 analysis when a constitutional challenge is initiated under the <i>Charter</i>, as opposed to the instant challenge brought under the division of powers. When determining whether a levy constitutes a regulatory charge <i>intra vires</i> the province, or an unconstitutional indirect tax, the legal inquiry is framed by the jurisprudential test set out by the Supreme Court in <i>Westbank</i> [1999] 2 S.C.R. 134 and refined in <i>620 Connaught</i> [2008] 1 S.C.R. 131. The criteria in the legal test are measured against the levy entrenched in the legislative scheme itself—an examination of the policy options considered but never implemented in the legislation is neither relevant nor appropriate to the reviewing court’s analysis: <i>Confederation des syndicats nationaux</i> [2008] 3 S.C.R. 511.</p> <p>The enclosed documents have been redacted to exclude: material irrelevant to the constitutional challenge to s.26.1 and 26.2 of the OEBA, and O. Reg. 66/10 thereto; material irrelevant to the jurisprudential test relating to whether a levy constitutes an <i>intra vires</i> regulatory charge, and; material covered under solicitor-client privilege.</p> <p>Exhibit 1 (Note)</p> <p>Rationale for the Reallocation of MEI Multi-Fuel conservation program costs to Electricity Ratepayers</p> <p>Exhibit 2 (Note)</p> <p>Program Cost Recovery Outline</p> <p>Exhibit 3 (Slide Deck)</p> <p>Program Cost Recovery 2009-04-27 + PK’s comments</p>
JT 1.5b	<p>Under Advisement:</p> <p>To take under advisement whether to provide any Ministry reports or analyses that support the creation and implementation of O.Reg. 66/10</p> <p>Transcript, p.78, lines 11-18</p> <p>Response:</p>

Relevant document enclosed. See Exhibit 1 (Slide Deck) attached.

(For an explanation of relevance, and the basis for redactions made, please see the Response to Under Advisement JT 1.5, above.)

The enclosed document has been redacted to exclude: material irrelevant to the constitutional challenge to s.26.1 and 26.2 of the OEBA, and O. Reg. 66/10 thereto, and; material irrelevant to the jurisprudential test relating to whether a levy constitutes an *intra vires* regulatory charge.

Ministry of the
Attorney General
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720 Bay Street, 4th Floor
Toronto ON M7A 2S9

Tel: (416) 326-0131
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arif.virani@ontario.ca

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Toronto ON M7A 2S9

Tél.: (416) 326-0131
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Via e-mail

December 23, 2010

Mr. Robert Warren
Weir Foulds
Suite 1600, P. O. Box 480
130 King St. W.
Toronto, ON
M5X 1J5

Dear Mr. Warren:

RE: Motion by the Consumer's Council of Canada ("CCC") and Aubrey LeBlanc in relation to s. 26.1 of the *Ontario Energy Board Act, 1998* (the "Act") and Ontario Regulation 66/10

Board File No.: EB-2010-0184

Attorney General of Ontario, Response to matters taken Under Advisement from the Cross-Examination of the Government's Witness

Please find enclosed the Attorney General of Ontario's Response to questions JT 1.6 and 1.7 taken under advisement from the cross-examination of the Government's witness, which took place on November 16, 2010. This letter concludes the Attorney General's full response to all matters undertaken/taken under advisement from the cross-examination.

Yours truly,

A handwritten signature in black ink, appearing to read "Arif Virani".

Arif Virani
Counsel

cc: Remaining Intervenors (by e-mail)

**RESPONSE TO MATTERS TAKEN UNDER ADVISEMENT, FROM THE CROSS-
EXAMINATION OF THE GOVERNMENT'S WITNESS, NOV. 16, 2010**

Number	
JT 1.6 and	Under Adviseмент: 1.6 To take under adviseмент whether to provide any written proxy for a business case underlying O. Reg. 66/10. Transcript p. 82, line 28, p.83, lines 1-13
JT 1.7	1.7 To take under adviseмент whether to provide a regulatory impact assessment or proxy prepared in connection with the O. Reg. 66/10. Transcript, p.83, lines 27-28, p.84, lines 1-9 Response: Relevant material enclosed. See Exhibits 1, 2 and 3. Relevant material includes documents pertaining to the ultimate decision taken by Government which is the subject of the constitutional challenge. Policy options, including the option of recovering costs against natural gas utilities/ratepayers and recovering costs for programs other than HESP or OSTHI, considered but never implemented by the Government, are not relevant. Policy options are only germane to a s.1 analysis when a constitutional challenge is initiated under the <i>Charter</i> , as opposed to the instant challenge brought under the division of powers. When determining whether a levy constitutes a regulatory charge <i>intra vires</i> the province, or an unconstitutional indirect tax, the legal inquiry is framed by the jurisprudential test set out by the Supreme Court in <i>Westbank</i> [1999] 2 S.C.R. 134 and refined in <i>620 Connaught</i> [2008] 1 S.C.R. 131. The criteria in the legal test are measured against the levy entrenched in the legislative scheme itself—an examination of the policy options considered but never implemented in the legislation is neither relevant nor appropriate to the reviewing court's analysis: <i>Confederation des syndicats nationaux</i> [2008] 3 S.C.R. 511.

The enclosed documents have been redacted to exclude: material irrelevant to the constitutional challenge to s.26.1 and 26.2 of the OEBA, and O. Reg. 66/10 thereto; material irrelevant to the jurisprudential test relating to whether a levy constitutes an *intra vires* regulatory charge, and; material covered under solicitor-client privilege.

Exhibit 1 (Form)

Application and Report to Treasury Board/Management Board of Cabinet

Exhibit 2 (Note)

Ministry of Energy and Infrastructure: MB 20 for MEI's Conservation Cost Recovery from Electricity Utilities and the IESO

Exhibit 3 (Form)

Legislation and Regulations Committee: Ministry Approval Form

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.

EB-2010-0184

ONTARIO ENERGY BOARD

AFFIDAVIT OF CHRISTOPHER BITONTI

Sworn January 31, 2011

WeirFoulds LLP

Barristers & Solicitors

The Exchange Tower, Suite 1600, P.O. Box 480
130 King Street West

Toronto, Ontario M5X 1J5

Robert B. Warren

(LSUC # 17210M)

Tel: 416-365-1110

Fax: 416-365-1876

Lawyers for the Moving Parties,
The Consumers Council of Canada and Aubrey LeBlanc