

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^è étage, 720 rue Bay
Toronto ON M7A 2S9

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



April 18, 2011

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

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 and Undertakings from the Cross-Examination of the Government's Witness

Please find enclosed the Attorney General of Ontario's Response to matters taken under advisement from the cross-examination of the Government's witness, which took place on November 16, 2010. Enclosed are responses to questions JT 1.6 and 1.7.

Please also note that this material was provided to counsel on December 23, 2010. It was inadvertently not uploaded onto the Board's web portal at that time.

Yours truly,

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

Arif Virani
Counsel

Cc All parties, by email (cover letter only)

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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,

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



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 2		Year 3		Matures In	
		2009-10		2010-11		2011-12			
		Operating	Capital	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 2		Year 3		Matures In		
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			

Application and Report to Treasury Board/Management Board of Cabinet

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

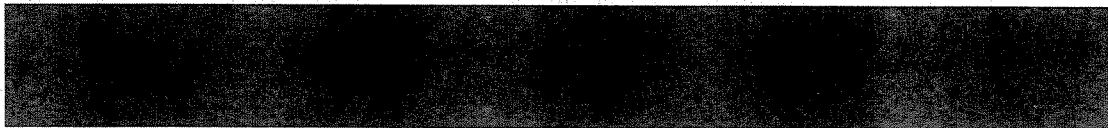
Vote & Item	Standard Account	Ministry Request (\$ Millions)				
		Holdback/ Release (A)	Treasury Board Order (B)	Increase (C)	(Decrease) (D)	Total (E=B+C+D)
2902/01	Salaries & Wages					
	Employee Benefits					
	Transportation & Communications					
	Services					
	Supplies and Equipment					
	Transfer 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:

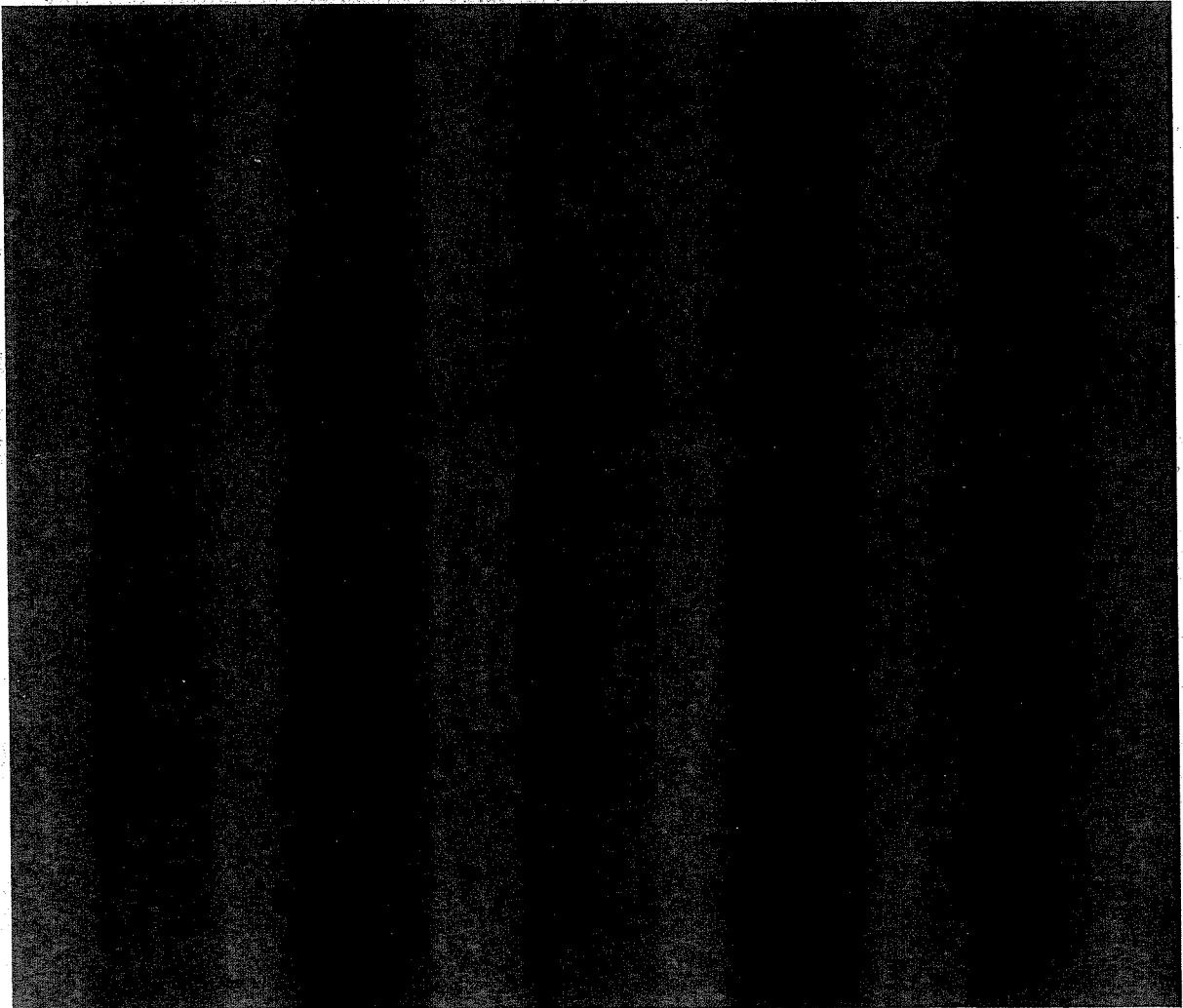
- Establishing Ontario as a leading jurisdiction for renewable energy
- Creating a conservation culture within government and broader society
- Expanding and supporting economic investment in a "green economy"

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

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.

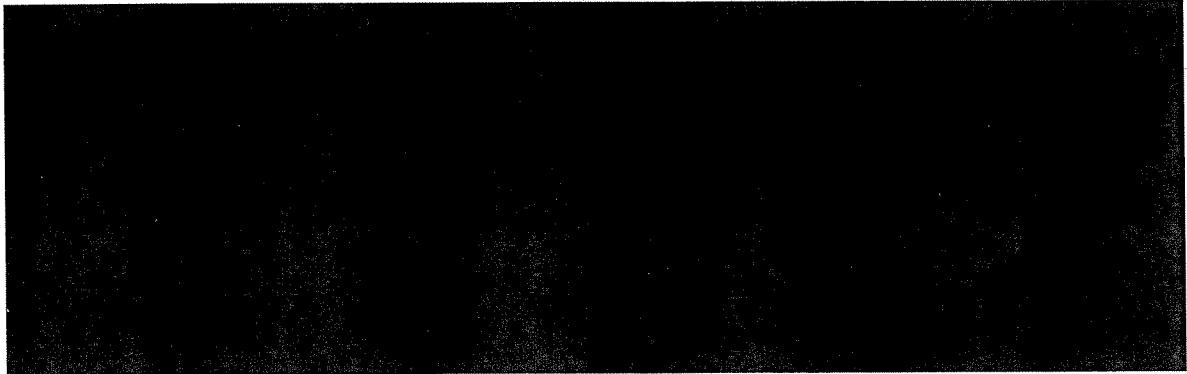
3.0 PROPOSED COURSE OF ACTION

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:



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.

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

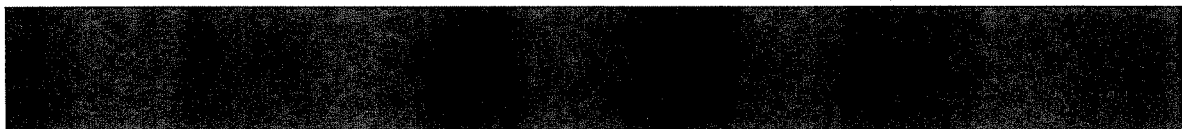
Government Fiscal Impact:

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

(\$ Millions)	Minuted Recovery 2009-10 RbP	Proposed Recovery from Rate Base	Savings Identified in Q3	Fiscal Impact (Variance from Original Revenue Forecast)
Option 1: Recovery from the Electricity Utilities and IESO	142.8	53.7	104.0	(14.9)

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).



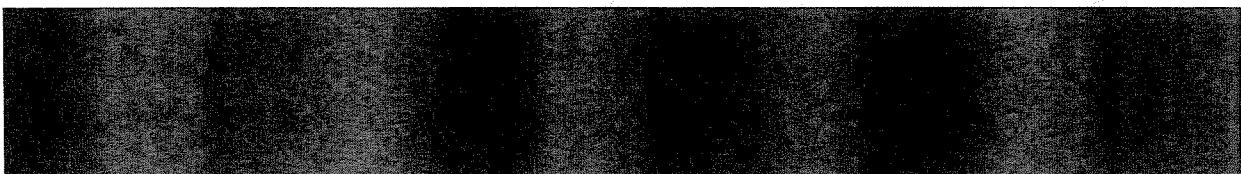
6.0 RECOMMENDATION

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.





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

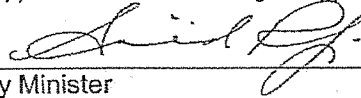
1. New regulation under the *Ontario Energy Board Act, 1998*, titled "Assessments for Ministry of Energy and Infrastructure conservation and renewable energy program costs".



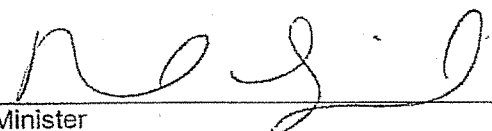
Approvals required prior to LRC

	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

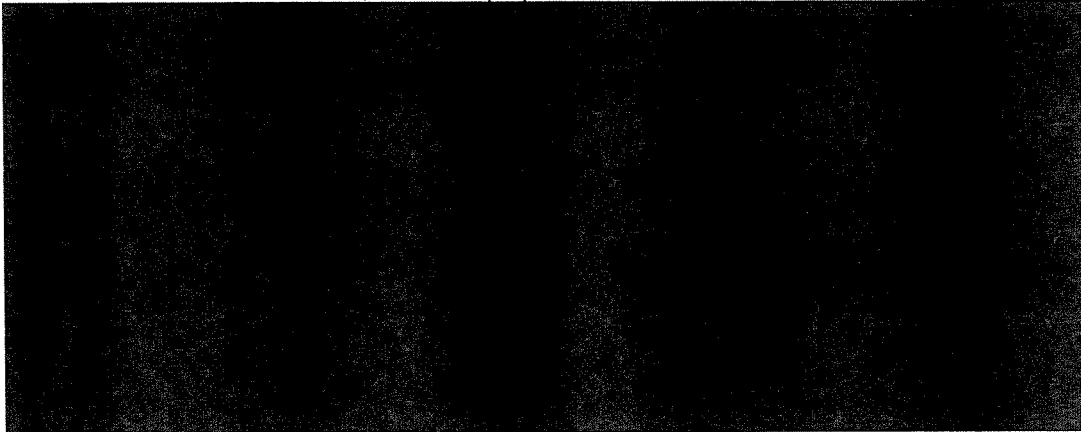
- MEI is proposing a regulation under the *Ontario Energy Board Act* which sets the amounts to be collected, as well as the timing, collection method, and recovery method for the funds.
- Costs would be recovered for the following MEI programs for FY 2009/2010.
 - Home Energy Savings Program (HESP): 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 [REDACTED]



- 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

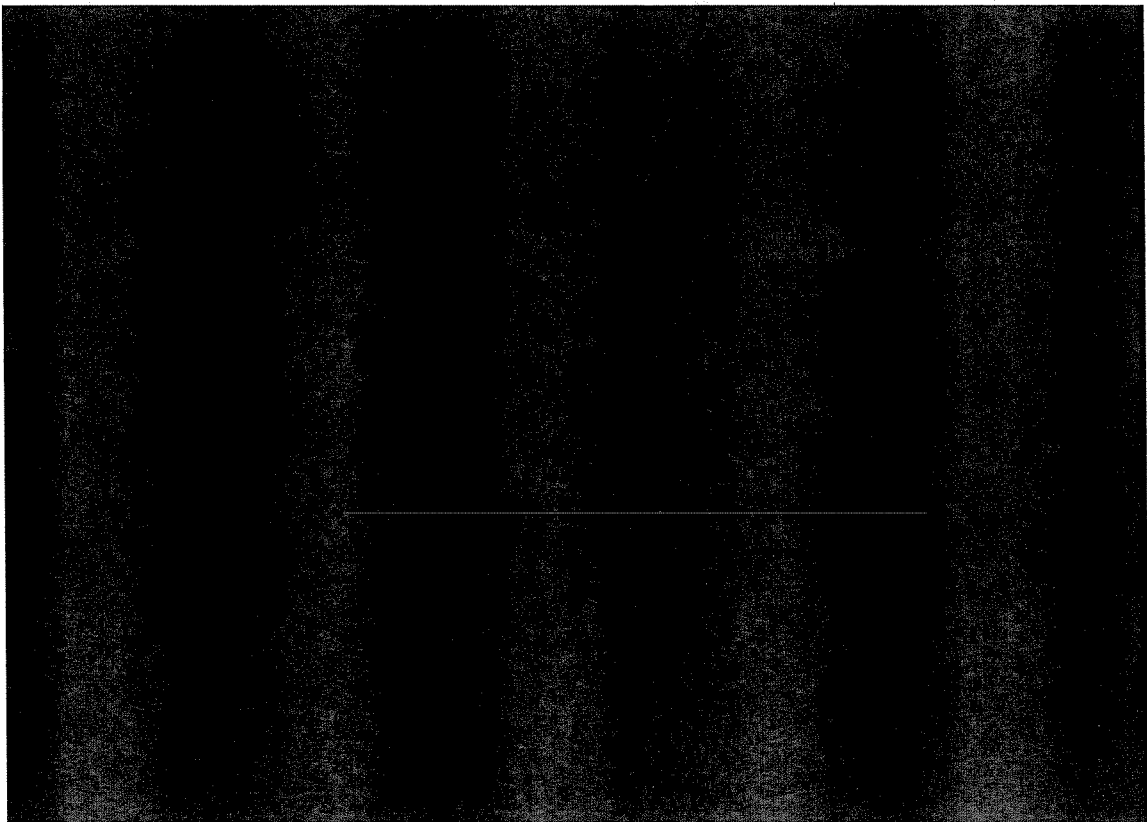
- By approving the proposed regulation, the collection process would be implemented. MEI, the Ontario Energy Board, and electricity distributors would be expected to participate in the implementation.
- This process is explained in the regulation. It consists of several steps, starting with MEI requiring 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.



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