

**BOARD STAFF SUBMISSION**

**Application for Amendment to Gas Marketer and  
Electricity Retailer Licences**

**Just Energy Ontario L.P.**

**EB-2012-0435**

May 14, 2013

## INTRODUCTION

Just Energy Ontario L.P. (“Just Energy”) filed an application dated December 18, 2012 with the Ontario Energy Board (the “Board”) pursuant to sections 52 and 74 of the *Ontario Energy Board Act, 1998* to amend its gas marketer licence GM-2010-0152 and electricity retailer licence ER-2010-0153. The amendments relate to a request for exemption from section 5.1 of Just Energy’s gas marketer licence and section 5.1(a) of its electricity retailer licence as these sections relate to compliance with sections 4.11(b), 4.14(a) and 4.14(b) of the Code of Conduct for Gas Marketers and the Electricity Retailer Code of Conduct (collectively, the “Codes”). The Board assigned file number EB-2012-0435 to the application.

## THE APPLICATION

In its application Just Energy has applied for the following relief:

- An exemption from Section 5.1 of its Gas Marketer Licence, which states that:

*“The Licensee shall at all times comply with all applicable provisions of the Code of Conduct for Gas Marketers...”*

- An exemption from Section 5.1(a) of its Electricity Retailer Licence, which states that:

*“The Licensee shall at all times comply with the following Codes...except where the Licensee has been specifically exempted from such compliance by the Board:*

*a) The Electricity Retailer Code of Conduct...”*

The *Energy Consumer Protection Act, 2010* (the “ECPA”), which came into force on January 1, 2011, established a new framework for the regulation of the activities of licensed electricity retailers and gas marketers. As part of its work in implementing the ECPA, the Board updated the Codes, which also came into effect on January 1, 2011 and include new rules related to, among other things, the Board-approved scripts to be used to verify or renew contracts.

Just Energy seeks to deviate from the Board-approved script and requests an

amendment to its licences such that it will not have to comply with sections 4.11(b), 4.14(a) and 4.14(b) of the Codes, which state:

“...the verification representative shall not deviate from the applicable Board-approved script except to comply with paragraph (e), to provide a factual answer to a question from the consumer or to provide a factual clarification...” (Section 4.11(b))

“...the salesperson shall ensure that the [renewal] call includes all of the statements and questions set out in the applicable script approved for that purpose by the Board...” (Section 4.14(a))

“...the salesperson shall not make any representation that is inconsistent with or contrary to any of the statements or questions set out in the applicable Board-approved script...” (Section 4.14(b))

These sections of the Codes require that Just Energy’s verification representative, while completing the telephone verifications with customers who either sign or renew their contracts, does not deviate from the applicable Board-approved scripts. The scripts that Just Energy wants to deviate from read, in part, as follows: *“You should be aware that energy savings under the contract are not guaranteed.”*

Just Energy states that it has recently developed a product that does guarantee consumers cost savings when compared to utility supply under the condition that the consumer remain on the contract for its entire 5 year term. Accordingly, Just Energy requests either the addition of a subsection to section 5.1 of its gas marketer and electricity retailer licences or the creation of an additional schedule to these licences, which in both cases will state that:

*“The Licensee shall be exempt from Sections 4.11(b), 4.14(a) and 4.14(b) of the Code of Conduct for [Gas Marketer/Electricity Retailer] in the following circumstances:*

- a) The Licensee is directed by the Board-approved script to inform a consumer that energy cost savings under a [natural gas/electricity] contract are not guaranteed, when in fact energy savings are guaranteed, provided that the Licensee’s claim of guaranteed savings is substantiated.”*

The Board issued a Notice of Application and Hearing on March 13, 2013. The Board received a request for intervention from Union Gas Limited ("Union") and Direct Energy Marketing Limited ("DEML"). The Board granted Union and DEML intervenor status in this proceeding. Summitt Energy L.P., Access Gas Services Inc., Sunwave Gas and Power Inc. and Planet Energy Corp. filed observer requests. The City of Kitchener and Ag Energy Co-operative Ltd. filed their respective comments on Just Energy's exemption request.

Board staff filed interrogatories on April 16, 2013. Just Energy filed responses to Board staff interrogatories on April 30, 2013.

This submission is being provided by Board staff following a review of the application and evidence filed in this proceeding.

## **STAFF SUBMISSION**

### **Just Energy's Request for an Exemption to its Electricity Retailer Licence ER-2010-0153:**

In Board staff interrogatory 2(a) Just Energy was asked to specify for which commodity (natural gas and/or electricity) the Agreement which guarantees consumer cost savings under certain conditions has been developed. Just Energy stated that the Agreement which guarantees cost savings has been developed only for natural gas.

As Just Energy has not developed a product which can guarantee savings for electricity contracts at this time, nor has it provided any information regarding how it intends to guarantee savings for electricity contracts in the future, Board staff submits that Just Energy's request for an exemption to its electricity retailer licence at this time is premature and should be denied.

**Just Energy's Request for an Exemption to its Gas Marketer Licence GM-2010-0152:**

In its application, Just Energy stated that it has an offer that “does in fact guarantee consumers’ energy cost savings under certain conditions”<sup>1</sup>. Through the interrogatories, Board staff sought to understand how these savings will be realized and whether the conditions to guarantee savings are reasonable. In addition, Board staff sought to understand Just Energy’s pricing model and what prices are being compared to recognize cost savings, for example, utility total bill vs. Just Energy’s total bill or utility supply cost vs. Just Energy’s supply cost. It is Board staff’s view that the average consumer would consider he/she had achieved a cost saving only if the total Just Energy bill was lower than what the consumer would have paid to the utility had the consumer not switched to competitive supply.

Below, Board staff has structured its submission to deal with various aspects of Just Energy’s application for an exemption to its gas marketer licence which are of concern to Board staff.

***Pricing***

Through interrogatory No 2, Board staff sought to understand how the price would be determined and presented to the consumer, what baseline price would be used to determine cost savings and whether the price would be adjusted as market prices change.

In response to Board staff interrogatory No 2(b), Just Energy stated that it currently has developed two products for natural gas which guarantee savings. Board staff submits that the limited evidence put forward by Just Energy, specifically the limited detail about the terms of the proposed contract and the method of calculating any cost savings, gives rise to Board’s staff’s position that there is insufficient evidence on which to grant the exemption. Although the price comparison, a sample of which was submitted with Just Energy’s response to interrogatory 2 (b) provides some information to the consumer setting out the details for the first six months of the contract, it is not clear to Board staff how the price will be adjusted following that

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<sup>1</sup> Page 2 of Application dated December 18, 2012

initial six month period and as such it is not possible for Board staff to determine if there will be any cost savings.

In its interrogatory No 2 (c), Board staff asked whether Just Energy would change the price to reflect the current market prices as those prices increase or decrease. Just Energy in its reply stated that an adjustment would be made quarterly, however, it did not explain whether market prices would influence the adjustments.

### ***Factors for Price Comparison***

In its interrogatory 2(h), Board staff asked how Just Energy would calculate what the consumer would have paid if he or she remained with the utility to ensure the consumer receives savings while on the contract. Just Energy's response stated: *"The comparison will be done by reviewing the actual consumer bill using the consumer's terms and conditions, and the amount the consumer would have paid with the Utility using the consumption, transportation and supply inputs from the Utility".<sup>2</sup>*

Based on the evidence filed by Just Energy, it is Board staff's understanding that Just Energy will only consider three factors in making cost comparisons: consumption, transportation and supply inputs. This leads Board staff to conclude that Just Energy does not guarantee savings on the consumer's total natural gas bill, but guarantees savings only in relation to the commodity charge and transportation. Board staff submits that there are more costs, as described below, in addition to commodity charge and transportation costs that the consumer would have to pay. Board staff is concerned that these additional costs, if not factored into the formula used by Just Energy for comparing prices, could actually make the consumer's bill higher than if they had remained with the utility. It follows, therefore, that the statement that savings are guaranteed may not be true.

#### **A. Storage charge**

Some Just Energy consumers who are located within Union Gas' franchise area have to pay an additional storage charge. This storage charge may be the same as the utility cost or Just Energy may impose its own cost. Since this has not been identified as a factor for the purpose of the price comparison, Board staff is not clear

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<sup>2</sup> Page 4 of the Just Energy's Response, April 30, 2013

how Just Energy will apply this cost. Although Just Energy provided two price comparison samples, neither was for consumers located in the Union Gas' franchise area where the storage cost should be a separate line item on the price comparison. If this cost is not factored into the price in a Just Energy contract it may make the statement that there will be guaranteed cost savings untrue.

#### **B. Regulatory charge**

The regulatory charge is only applicable to a consumer who is enrolled in a Just Energy contract and does not apply to a consumer who is billed by the utility. The price comparison refers to the Regulatory Charge as "*Regulatory Charge is a variable monthly charge passed through to you in order to cover costs incurred under the Ontario Energy Board's Cost Assessment Model.*"<sup>3</sup>

In Board staff's view the regulatory charge is a variable cost and may be increased or decreased over the term of the contract. If this cost is not factored into the consumer's price under Just Energy's contract, Board staff submits that it can potentially increase the overall price for consumers and make the statement of guaranteed savings untrue.

#### **Conditions for Cost Savings**

In its application Just Energy stated that the contract conditions and limitations are well documented and disclosed for the consumer's protection. In response to Board staff interrogatory No 2(e), Just Energy stated: "The guaranteed cost savings apply under the condition that the consumer remains in the Agreement for the full term. These conditions and limitations are disclosed in the terms and conditions of the Agreement."<sup>4</sup>

It appears that consumers who are not able to stay on the contract for the full term may not receive any cost savings. Board staff notes that since it is not clear how Just Energy will calculate the price for consumers throughout the term of the contract, there is a potential risk that consumers would pay significantly more for natural gas supply if they have to leave the contract prematurely.

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<sup>3</sup> Price Comparisons provided in Just Energy's Response to Interrogatories.

<sup>4</sup> Page 3 of Just Energy's responses, dated April 30, 2013

Board staff further submits that Just Energy has failed to provide any persuasive evidence to ensure that each consumer will receive cost savings as a result of the contract offering. Further, as any savings will not be realized until after the term of the contract expires, which can be up to five years, there is a potential risk to consumers to pay a higher price over the term of the contract.

### ***Communication to Consumers***

In its interrogatory No 2(j), Board staff asked whether the savings will be demonstrated to consumers throughout the term of the contract by some form of communication. Just Energy responded that it will only communicate the savings to a consumer at the end of the term. Board staff is concerned that due to a variable price model, consumers will not see the savings from bill to bill until the end of the contract and in the interim, Just Energy may charge the consumer an amount that may be significantly higher than the consumer would have otherwise paid to the utility.

### ***Blanket Exemption***

In response to Board staff interrogatory No 3, when asked if the requested exemption would only apply to the current Agreement, Just Energy responded that, if approved, Just Energy will apply the exemption to all products that offer a guarantee of savings. It is Just Energy's intent to apply this exemption to all future products as well without the intervention of Board staff.

Board staff submits that providing a blanket exemption for all contract offerings is not in the best interest of consumers. If the Board approves the requested exemptions, Board staff submits that the exemption should only apply for the product offering described in this application and Just Energy should be required to substantiate the guarantee of cost savings being offered in any contract being offered to consumers.

## **CONCLUSION**

Just Energy has requested an exemption from the Codes, in particular, as it relates to the statement of guaranteed savings, so that the verification and renewal scripts



can be modified to either implicitly or explicitly state that there is a guarantee of savings.

Board staff notes that it is not in principle opposed to a contract which offers a cost savings to consumers however, in this case Board staff submits that Just Energy has failed to establish, through the introduction of clear and convincing evidence that savings will be in fact guaranteed. Board staff submits that it is not in the best interests of consumers to allow for this type of exemption when the evidence fails to support the claim of guaranteed savings and further may result in consumers being confused or misled about the terms of the contract. Board staff submits that if the Board were to allow this sort of exemption it would undermine the regulatory processes put in place under the ECPA to protect the public. It is clear that Ontario Regulation 389/10 is intended to offer protection to the public from situations where a consumer may be misled. The regulation specifically provides, in section 5 which defines unfair practices as follows:

1. Knowingly making a false or misleading statement to the consumer, either directly or by way of an advertisement or other publicly released statement, including, but not limited to, a false or misleading statement relating to one or more of the following:
  - i. The provisions of a contract.
  - viii. A price or financial advantage from entering into a contract with the supplier or a cost saving or the amount of a cost saving if the consumer purchases electricity or gas from the supplier instead of another supplier or an energy distributor.
11. Structuring the contract price or the billing or payment arrangements for a contract in such a manner that a reasonable person could be misled with respect to,
  - i. the cost of the contract, or
  - ii. the cost of the contract over any period during the term of the contract or, if the contract is renewed or extended, during any period in the term of the renewed or extended contract.

Board staff is not alleging that Just Energy is engaging in an unfair practice but rather, there is insufficient information in the application to support Just Energy's claim that there will be guaranteed cost savings. It is Board staff's submission that a claim of "guaranteed savings" is a financial incentive being offered to consumers and Board staff submits that this in itself creates a potential for consumers to be misled unless there is clear evidence presented to the consumer about the offering.

Board staff submits that Just Energy has failed to provide the evidence necessary to support its claim of guaranteed savings and therefore opposes Just Energy's request to amend its gas marketer licence GM-2010-0152.

All of which is respectfully submitted.