

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 an Order by the Ontario Energy Board dated March 19, 2008 which approved rates and other charges to be charged by Oshawa PUC Networks Inc. for electricity distribution (Board File No. EB-2007-0710);

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's Rules of Practice and Procedure.

SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA

I INTRODUCTION AND OVERVIEW

1. These are the submissions of the Consumers Council of Canada ("CCC") in the Motion filed by the Association of Major Power Consumers of Ontario ("AMPCO"). These submissions are filed pursuant to Decision and Procedural Order No. 1, dated May 2, 2008.

2. The CCC was not a party to the application of Oshawa PUC Networks Inc. ("OPUCN") for approval of its rates. However, because of the potential significance for the residential consumers of electricity, which the CCC represents, of the granting of the relief sought in the AMPCO Motion, the CCC asked for and was granted status as an intervenor in the OPUCN Application, for the purpose of responding to the AMPCO Motion.

3. OPUCN applied for approval of distribution rates to be effective from May 1, 2008, to April 30, 2009. In support of that application, OPUCN provided evidence on, among other things, its proposed cost allocation. **(EB-2007-0710, Ex.8/T1/S1)**

4. OPUCN's proposed cost allocation was based on a cost allocation model issued by the Ontario Energy Board ("Board") in November of 2006. OPUCN recognized that, at the time its prefiled evidence was prepared, the Board was engaged in a review of its policies with respect to cost allocation matters for electricity distributors. OPUCN's position, however, was that "it would be prudent to maintain its existing Revenues to Cost Ratios until the Board completes its Cost Allocation Review and provides direction to the industry, rather than speculating as to the outcome of the Board's review at this time. OPUCN will implement any cost allocation adjustment required by the Board that comes out of its review". **(EB-2007-0710, Ex.8/T1/S1, p. 3)**

5. The only evidence on revenue-to-cost ratios was that filed by OPUCN, supplemented by its response to Interrogatory #62 filed by Board Staff. In that response, OPUCN provided tables which, among other things, reflected changes to customer category ratios to reflect the ceiling and floor levels identified by the Board in its Cost Allocation Report. **(EB-2007-0710, OPUCN Response to Board Staff Interrogatory #62)**

6. On November 28, 2007, the Board issued its Report, entitled "Application of Cost Allocation For Electricity Distributors" (the "Cost Allocation Report"). In that Report, the Board set out its policies in relation to specific cost allocation matters for electricity distributors. In that Report, the Board stated that "a range approach is preferable to implementation of a specific revenue-to-cost ratio". The Board further stated that it was adopting a proposal to create "bands or ranges of tolerance around revenue-to-cost ratios of 1". **(“Application of Cost Allocation For Electricity Distributors”, Report of the Board, EB-2007-0667, November 28, 2007).**

7. The Decision of the Board, in OPUCN application, is dated March 19, 2008. **(“OPUCN Decision”)**. In the OPUCN Decision, the Board acknowledged that, since the application had been filed, the Board had issued guidance on cost allocation matters. In addressing OPUCN's proposed cost allocation, the Board did three things, as follows:

1. It ruled that the rates for two classes were to be set so that a move of 50% to the top of the Board's target ranges would be achieved for 2008;
2. It directed OPUCN to achieve the remaining 50% by equal increments in the years 2009 and 2010, when OPUCN makes applications for rate adjustments;
3. Where the revenue-to-cost ratios are below the Board's ranges, it directed that the rates for 2008 were to be set so that the ratios for these classes shall move by 50% towards the bottom of the Board's target ranges, with the expectation that OPUCN was to achieve the remaining 50% by equal increments in the years 2009 and 2010. **(OPUCN Decision, EB-2007-0710, p. 13)**

8. The effect of the Board's OPUCN Decision, accordingly, was to adopt the guidelines set out in the Cost Allocation Report, but to direct OPUCN to do so over a period of three years. In doing so, the Board acknowledged that, as a result of these findings, there will be a higher net revenue requirement that needs to be recovered from the other classes, stating that...“the Board finds that the higher net revenue requirement shall be recovered from the Residential Rate Class so that the under-contribution will be reduced.” **(OPUCN Decision, EB-2007-0710, p. 14)**

9. AMPCO, in its Motion, has asked the Board to set aside the OPUCN Decision, and to replace it with an Order that requires OPUCN's revenue-to-cost ratio, used for setting rates for 2008, be brought to unity, unless OPUCN can demonstrate that it is not practically possible to do that, based on the absence of information. AMPCO further states that, if the Board determines that a revenue-to-cost ratio of unity would result in “rate shock”, then OPUCN can phase in any rate adjustments, provided, however, that any under-recovery from a customer class is ultimately collected from that customer class over time, and not from other classes of customers. **(AMPCO Submission, pp. 44)**

II Issues

(a) Issues Raised by AMPCO

10. AMPCO argues, first, that the OPUCN Decision approves rates which “unduly discriminate against large volume customers by requiring them to subsidize other customers”. (AMPCO Submission, pp. 2)

11. It is unclear whether AMPCO’s argument is that the rates unduly discriminate because of the amount or percentage of the cross-subsidy, or simply the fact that there is a cross-subsidy. The distinction is an important one. If it is the former, then AMPCO’s argument relates only to the OPUCN Decision. If it is the latter, then the argument is about a principle of rate-making, which applies to all utility rate applications. If it is the latter, then the argument has, in other words, implications well beyond the confines of the OPUCN case.

12. The CCC submits that AMPCO should have made it clear whether it believes that any cross-subsidy amounts to undue discrimination. However, regardless of AMPCO’s position on this point, CCC submits that AMPCO’s argument is wrong, because the Board has a broad discretion to approve rates which it believes are just and reasonable, even if in so doing, one class of ratepayers is required to cross-subsidize another.

13. AMPCO’s second argument is that all rates must be based on considerations of cost causality. AMPCO’s argument on this point is, again, unclear, because AMPCO conflates cost causality with one measure of cost causality, namely a revenue-to-cost ratio of one. In support of its argument, AMPCO cites a number of OEB decisions, and the submissions of the OEB to the Divisional Court in the LIEN appeal. None of the cases cited by AMPCO support the proposition that cost causality, and a revenue-to-cost ratio of one, are the only considerations, or indeed the dominant considerations, which the Board must use in approving utility rates. As set out below, the Board has been given, and indeed must have in order to carry out its legislative mandate, a broad discretion to approve rates based on a number of considerations, including cost causality.

14. The CCC further submits that AMPCO’s use of the Board’s arguments in the LIEN appeal is misleading, because AMPCO does not put those arguments in the context of the

relief sought by LIEN, and the issues to which that relief gave rise. This point is discussed in greater detail, below.

15. AMPCO's third argument is that the OPUCN Decision misapplies the Board's Cost Allocation Report.

16. CCC submits that AMPCO's argument on this point should have been predicated on an analysis of whether, or to what extent, that Cost Allocation Report is binding on the Board. For the reasons discussed below, the CCC submits that it is not.

17. Whether, and how, the Board applies the Cost Application Report is a something which, as a matter of law, must be left to the Board panel considering individual applications. As discussed in greater detail below, the OPUCN Decision does apply the Cost Allocation Report. AMPCO disagrees with the way the OPUCN Decision applies the Cost Allocation Report. That disagreement does not constitute sufficient grounds for overturning the OPUCN Decision.

18. In addition, the CCC submits that AMPCO gives an inaccurate account of the nuances in the Board's Cost Allocation Report, in two critical respects, as follows:

1. The Board emphasizes the importance of having accounting and load data available "at the appropriate level of detail to address the need for and use of estimated or default allocations and to ensure the reasonableness of the cost allocation results". The Board goes on to state that it "anticipates that the installation of smart meters, with their more exact load data, will provide opportunities for better analysis in the future and, as a result, will provide better cost allocators for the cost allocation model";
("Application of Cost Allocation For Electricity Distributors", Report of the Board, EB-2007-0667, November 28, 2007, p. 5)

AMPCO's analysis of the Board's Cost Allocation Report suggests that, unless a utility can point to specific frailties in its data, it must be assumed that revenue-to-cost ratios can be set at one. That argument is contrary to the

Board's recognition, in its Cost Allocation Report, that better and more accurate cost allocation data will be available in the future.

2. The Board recognizes that "cost allocation is, by its very nature, a matter that calls for the exercise of some judgment, both in terms of the cost allocation methodology itself and in terms of how and where cost allocation principles fit within the broader spectrum of rate setting principles that apply to – and the objectives sought to be achieved in – the setting of utility rates.

(Emphasis added) (**"Application of Cost Allocation For Electricity Distributors", Report of the Board, EB-2007-0667, November 28, 2007, p. 2)**

AMPCO's insistence that the default position, for rate setting purposes, is always a revenue-to-cost ratio of one, runs contrary to the Board's acknowledgement, in the Cost Allocation Report, that cost allocation principles are simply one principle, among many, to be used in setting utility rates.

19. One flaw, which underlies all of AMPCO's arguments, is the assumption that cost allocation is an exact science. It is not, as the Board's Cost Allocation Report recognizes. All cost allocation reflects, to greater or lesser degree, subjective judgment. In addition, since rates are based on forecasts of costs, cost allocation, however precise it might be to begin with, becomes less precise over time. The cost to serve any individual customer is never the same as the cost to serve another individual customer. Even within what appears to be a homogenous rate class, the cost to serve the members of that class will never be the same.

20. AMPCO's fourth argument is that the OPUCN Decision somehow grants OPUCN the right to "determine who should be paying how much based, not on cost causality, or even the "exceptional circumstances" identified by the Board in the "Rate Affordability Program Decision", but on an explicit or implicit set of non-economic preferences held by the utility".

21. The CCC submits that argument is wrong. As discussed in greater detail below, the OPUCN Decision directs OPUCN how it is to bring its rates into conformity with the

guidelines in the Cost Allocation Report, and the timeframe within which it is to do it. Any discretion which is left to OPUCN is entirely consistent with appropriate rate-making.

22. AMPCO'S final argument is that, if there is to be a transition period, in order to avoid rate shock, then "the customers who benefit from the transition should bear the cost of the transition". The CCC submits that how the Board effects a transition period is a matter that lies properly within the discretion of the Board. The CCC submits that the Board did not err in structuring the transition arrangement in the way that it did in the OPUCN Decision.

(b) Issues Raised by CCC

23. The CCC submits that the AMPCO Motion gives rise to the following issues:

1. What is the scope of the Board's discretion, under s. 78 of the *Ontario Energy Board Act* (the "Act"), in deciding whether proposed rates are just and reasonable? In particular, is the Board required to approve only those rates which reflect a revenue-to-cost ratio of one?
2. Whether, or to what extent, is the Board's rate-setting discretion limited by the policies in relation to cost allocation matters set out in the Cost Allocation Report?
3. Did the Board err in the OPUCN Decision?
4. What are the implications of granting the relief sought in the AMPCO Motion?

1. What is the scope of the Board's discretion, under s. 78 of the Ontario Energy Board Act (the "Act") in deciding whether proposed rates are just and reasonable? In particular, is the Board required to approve only those rates which reflect a revenue-to-cost ratio of 1?

24. The courts have long recognized that the Board has a broad discretion in exercising its rate-making powers. The Divisional Court, in the case of *Union Gas Ltd. v. Ontario Energy Board*, made the following observation:

Put another way, it is the function of the Board to balance the interest of the appellant earning the highest possible return on the

operation of its enterprise (a monopoly) with the conflicting interest of its customers to be served as cheaply as possible.

Then in balancing these conflicting interests in determining rates that are just and reasonable, the Board has a wide discretion, is not an issue, or in doubt.

(Union Gas Ltd. v. Ontario (Energy Board) (1983), 1 D.L.R. (4th) 698 at 710)

25. To like effect is the observation of the Ontario Court of Appeal in the case of *Natural Resource Gas Ltd. v. Ontario (Energy Board)* 2006, as follows:

It is clear that the Act constitutes the Board as a specialized expert tribunal with broad authority to regulate the energy sector in Ontario. In carrying out its mandate, the Board is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially-viable gas industry.

(Natural Resource Gas Ltd. v. Ontario (Energy Board) 2006 214 O.A.C. 236, at pp. 17-18)

26. The courts have recognized that, in approving just and reasonable rates, the Board has regard to the cost of providing a service. For example, the Supreme Court of Canada, in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, observed that “Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources.” In so saying, however, the Supreme Court of Canada did not mean that the cost of service was the only criteria to be used in determining whether to approve rates. That observation of the Supreme Court of Canada was made in the context of deciding that, when paying for the cost of service, ratepayers did not purchase the assets of the utility’s investors. ***(ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) 2006 1 S.C.R. 140 at 177)***

27. Subsection 1(1) of the Act, provides as follows:

The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

28. Neither of the objectives in subsection 1(1) refers to the cost of providing a service. In addition, these objectives may be in conflict, and require the Board to balance competing considerations. That the legislature requires the Board to consider what may be competing objectives confirms the grant of a broad discretion on the Board. The breadth of that discretion is also reflected in the list of objectives, set out in section 2 of the Act, that are to guide the Board in carrying out its responsibilities in relation to gas.

29. The Council submits that there is no rule which requires the Board to base rates exclusively on the cost of providing a service. Were the Board to adopt a rule, requiring that all rates reflect a revenue-to-cost ratio of one, it would be fettering its discretion, which it cannot do. In addition, if rates were to be based exclusively on the cost to provide a service, and on a revenue-to-cost ratio of one, then the Board's function would be reduced to a purely administrative one, at least with respect to the rate-design component of rate-making. To reduce the Board to a purely administrative function would be contrary to the clear legislative intent, long recognized by the Courts, that the Board have a broad discretion in approving utility rates.

30. The scope of the Board's rate-setting jurisdiction was the subject of consideration in the LIEN proceeding, both before the Board and the Divisional Court. As noted above, AMPCO places heavy, and repeated, reliance on the position which the Board took, with respect to its own jurisdiction, before the Divisional Court, in support of its position in this motion.

31. Also as noted above, AMPCO, in discussing the Board's position in the LIEN appeal, fails to describe the unique nature of the relief which LIEN sought. It was LIEN's argument that the Board's jurisdiction is sufficiently broad to develop and implement a specific rate program, based on income determinants, for low income consumers. LIEN's proposal put in issue the question of whether the Act gave the Board the jurisdiction to pursue objectives related to social welfare.

32. The Board argued that it did not have that jurisdiction, an argument which was supported by the CCC and by Enbridge Gas Distribution Inc.

33. In its argument before the Divisional Court, the Board acknowledged that cost causality is a driver, indeed arguably a principal driver, in setting rates. But it did not posit cost causality as an absolute rule or the sole determinant of rates, nor did it argue that rates must always reflect a revenue-to-cost ratio of one. It is, we submit, simply wrong to characterize the Board's argument, in the LIEN proceeding, in that way.

34. The CCC submits, therefore, that the Board's discretion in approving just and reasonable rates, is broad, and is not limited to considerations of cost causality. In particular, the CCC submits that the Board is not limited to approving rates based on a revenue-to-cost ratio of one.

2. Whether, or to what extent, is the Board's rate-setting discretion limited by the policies in relation to cost allocation matters set out in the Cost Allocation Report?

35. That the Board, like any regulator, can issue policy guidelines, without specific statutory authority to do so, has been recognized by the Courts. For example, the Ontario Court of Appeal, in the *Ainsley* case, made the following statement:

The authority of a regulator, like the Commission to issue non-binding statements or guidelines intended to inform and guide those subject to regulation is well established in Canada. The jurisprudence clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments. (Emphasis added)

(*Ainsley Financial Corp. v. Ontario (Securities Commission)*, 21 O.R. (3d) 104 at 108)

36. However, it is also recognized by the Courts that such policy statements or guidelines cannot bind the regulator that issues them. That limitation was also expressly stated in the *Ainsley* case, in the passage cited in the preceding paragraph.

37. Accordingly, while the policies on cost allocation matters, as set out in the Cost Allocation Report, may be used to guide the cost allocation methods employed by electricity

LDCs, and while those policies may inform the Board's decisions, each application must be considered on its own merits, and on the basis of the evidence filed in that application.

3. Did the Board err in the OPUCN Decision?

38. The CCC submits that the Board did not err in the OPUCN Decision.

39. It is clear, from the OPUCN decision, that the Board put its mind to the application of the policies in the Cost Allocation Report to the cost allocation proposal made by OPUCN. It directed OPUCN to adjust its cost allocation proposal to conform to the policy guidelines, but to do so over a period of time. The CCC submits that that is an entirely proper exercise of the Board's discretion.

40. Contrary to AMPCO's repeated assertion, the OPUCN Decision did not leave the discretion on cost allocation to OPUCN. On the contrary, the OPUCN Decision required OPUCN to change its cost allocation, for 2008, in a particular way. It also directed OPUCN, for the periods 2009 and 2010, to bring its cost allocation into line with the policies in the Cost Allocation Report. When OPUCN applies for approval of rates, for the years 2009 and 2010, a panel of the Board can, based on the evidence before it, decide what cost allocation it should approve. At no point will OPUCN be free to set its cost allocation without the specific approval of the Board.

41. The CCC also submits that the OPUCN Decision is a reasonable one based on the limited evidence in the case on cost allocation.

4. What are the implications of granting the relief sought in the AMPCO Motion?

42. AMPCO, directly, and by necessary implication, invites the Board to find that there is a rule which requires that rates be set on a revenue-to-cost ratio of one. AMPCO argues that any deviations from that rule must be justified.

43. If the Board were to adopt that rule, it would be required to review every electricity LDC rate decision made, to this point, to see if that rule had been followed. It would also preclude the Board from allowing electricity LDCs to set rates under incentive regulation ("IR") regimes.

44. The CCC also submits that the Board would be required to reconsider its recent approval of the IR regimes for Union Gas Limited and Enbridge Gas Distribution Inc. The theory of an IR regime is, in part, that the link between rates and costs is severed. An IR regime allows utilities to reduce their costs, through efficiencies, and to keep some portion of the reductions so achieved. As a result, the rates charged may well not reflect the cost of providing the service. However, if the rule were that all rates had to be based on a revenue-to-cost ratio of one, then the utilities could not keep any cost reductions and could only charge ratepayers the cost of providing the service.

45. The CCC submits that the Board should not make a decision, with such Draconian implications, based on AMPCO's dissatisfaction with the results of one case.

III Relief Requested

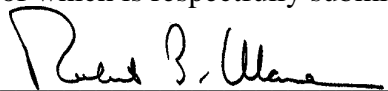
46. CCC submits that the AMPCO Motion should be dismissed.

47. CCC submits that there is no rule that requires that rates be set on the basis of a revenue-to-cost ratio of one. The CCC submits that the revenue-to-cost ratios are one tool which the Board applies in determining whether any particular set of rates are just and reasonable.

48. The CCC submits that AMPCO has not met the onus on it of demonstrating that the OPUCN decision is wrong. CCC submits that the OPUCN decision reflects an appropriate exercise of the Board's discretion to balance a number of considerations, including the application of the cost allocation policy set out in the Cost Allocation Report, in deciding on the appropriate rates based on the evidence before it.

49. CCC asks that it be awarded 100% of its reasonably-incurred costs in the AMPCO Motion. CCC submits that it has behaved responsibly.

All of which is respectfully submitted.



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May 15, 2008

SCHEDULE "A"

1. Application of Cost Allocation For Electricity Distributors”, *Report of the Board*, EB-2007-0667, November 28, 2007
2. Ontario Energy Board, *Decision With Reasons*, EB-2007-0710
3. *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 1 D.L.R. (4th) 698
4. *Natural Resource Gas Ltd. v. Ontario (Energy Board)* 2006 214 O.A.C. 236
5. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)* [2006] 1 S.C.R. 140
6. *Ainsley Financial Corp. v. Ontario (Securities Commission)*, 21 O.R. (3d) 104

SCHEDULE "B"

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15 SCHEDULE B

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry. 2004, c. 23, Sched. B, s. 1.

Facilitation of integrated power system plans

(2) In exercising its powers and performing its duties under this or any other Act in relation to electricity, the Board shall facilitate the implementation of all integrated power system plans approved under the *Electricity Act, 1998*. 2004, c. 23, Sched. B, s. 1.

Board objectives, gas

2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.
2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
3. To facilitate rational expansion of transmission and distribution systems.
4. To facilitate rational development and safe operation of gas storage.
5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.
- 5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
6. To promote communication within the gas industry and the education of consumers. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2