



**SOCIETY of  
UNITED PROFESSIONALS**  
IFPTE 160

11<sup>th</sup> February, 2021

Chris Graham  
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Toronto, ON M4S 2B5

**VIA Email and RSS Filing**

Ms. Christine E. Long  
Registrar  
Ontario Energy Board  
P.O. Box 2319  
2300 Yonge St.  
Toronto, ON  
M4P 1E4

**Re: Consultation on the Deferral Account –  
Impacts Arising from the COVID-19 Emergency (EB-2020-0133)  
Supplementary Submissions of the Society of United Professionals**

Dear Ms. Long,

Please find attached the Society of United Professionals' (SUP) Supplementary Submissions in the Consultation on the Deferral Account – Impacts Arising from the COVID-19 Emergency (EB-2020-0133).

Consistent with OEB direction, no hard copies of this submission are being sent to your attention.

Sincerely,

*[Original signed by]*

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Copy by email: interested parties



**SOCIETY *of***  
**UNITED PROFESSIONALS**  
IFPTE 160

**Society of United Professionals'  
SUPPLEMENTARY SUBMISSIONS**

**Consultation on the Deferral Account -  
Impacts Arising from the COVID-19 Emergency (EB-2020-0133)**

**11<sup>th</sup> February, 2021**

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## **EB-2021-0133 - Society of United Professionals' Supplementary Submissions**

### **Introduction**

These are the supplementary submissions of the Society of United Professionals (“the Society” or “SUP”) in the Consultation on the Deferral Account – Impacts Arising from the COVID-19 Emergency (EB-2020-0133). These submissions are in response to the OEB’s December 16, 2020 letter to participants inviting them to submit brief reply comments to other participants’ initial submissions, which were to be filed with the Board on January 25, 2021. In its letter, the OEB asked that reply comments not exceed 5 pages.

### **Next Steps – Draft Guidance Review?**

In addition to SUP, eighteen participants filed submissions on January 25. Some of these submissions were complex and lengthy in nature and SUP is of the view that OEB Staff have a great deal of useful input on which to base next steps. In its December 16 letter, the OEB implied that there might not be an opportunity for participants to review its COVID-19 guidance in draft before it is issued. “The OEB anticipates finalizing any guidance in Spring 2021. While the OEB has not ruled out any opportunities for stakeholders to comment on a draft of the eventual guidance that will be issued, stakeholders’ comprehensive comments on the Staff Proposal will maximize the prospects for a timely conclusion to this consultation.”

SUP strongly believes that issuing guidance without further stakeholder review would be a significant mistake. There are vast differences in stakeholder viewpoints which have been communicated throughout the consultation process to date. In addition, the January 25 submissions included material, new information, detailed alternative recommendations, and concerns that the mechanisms communicated in the current Staff Proposal had not been clearly set out. To have all of this disappear into a “black box” for resolution, with no further opportunity to comment, would be extremely shortsighted.

SUP agrees that the consultation needs to be completed on a timely basis given that it began almost nine months ago, on May 14, 2020. However, the pandemic is still ongoing and if the choice is completion in Spring 2021 or concluding with an appropriate guidance document grounded in appropriate regulatory principles, SUP believes the latter is more important.

### **Positions of the Participants**

It won’t take long for readers of the January 25 submissions to detect a clear and potentially troubling pattern. Most, if not all, of the responding intervenors have enthusiastically applauded the general concept used in Staff’s Proposal, specifically the introduction of the new necessity “principle.” However, most intervenors have then proceeded to claim that Staff’s proposed application is not radical enough. Most

have put forward a view that cost recovery should be limited to only those qualifying costs that are necessary to avoid a utility's loss of financial viability, however that may be defined. Financial viability is determinable or definable in many ways and most intervenors do not accept the thresholds used as part of Staff's proposed means test as an appropriate measure of viability. SUP interprets intervenors' collective view of loss of financial viability as meaning a loss of "going concern" status or a utility's financial ability to provide mandatory service to customers at a minimum acceptable level of reliability.

In addition, intervenors generally take the approach of jettisoning traditional regulatory frameworks, precedents and regulatory principles in an effort to ban recovery of almost all net costs and losses that would traditionally qualify as legitimate regulatory charges. At the same time, several intervenor stakeholders complain that Staff has omitted net gains from consideration.

Intervenors have generally opposed Staff's proposed means test and 50% cost sharing ideas, instead arguing for a yet to be determined, after the fact test of financial viability based on some mix of financial ratio outputs. SUP is concerned with the theoretical underpinnings for such an approach but is also concerned that such an approach would result in unpredictability of outcome, delays in application until audited information was available, regulatory inconsistency, and additional regulatory complexity.

In addition, several intervenors have suggested specific pre-recovery customer communication and consultation requirements be introduced. SUP considers these proposals to be clearly designed to embarrass utilities and the regulator by focusing customer ire on the likely immaterial incremental recovery of pandemic-related costs. Several intervenors also argue that no dividends or employee bonuses should be permitted to be paid while cost recovery is occurring, even though such payments may be legally or contractually required.

Utilities are in general more concerned about how OEB staff have apparently introduced a new regulatory "principle" that is obscuring the regulatory principles that have historically been the basis of Ontario and North American ratemaking. Note that SUP is using quotation marks when referring to the necessity "principle" throughout this submission. This is because SUP does not accept that the necessity "principle" that Staff has introduced in its Proposal is either generally accepted or appropriate.

### **Necessity "Principle"**

In its January 25 submission, SUP said: "SUP is also concerned that the principles and treatments determined to be appropriate under this process are well considered and appropriate given they have the potential to impact future regulatory decision-making after the pandemic has subsided and a new normal comes into being. SUP is concerned that OEB decisions taken in reaction to this

specific emergency do not inadvertently lead to the adoption of regulatory principles, treatments and precedents that inappropriately work their way into generally accepted regulatory practice.”

SUP’s concern has increased after reading intervenors’ submissions. Intervenor proposals elevate the necessity “principle” to a kind of super principle that is more important than any other. Intervenor have used Staff’s suggestion of adopting necessity as a principle as a basis for regulation that appears to be based on utility survival. While SUP and the utilities do not discount the seriousness of the pandemic emergency, it would be naïve to conclude that intervenors’ desire to apply this regulatory approach would be limited to these specific costs and circumstances if the OEB accepted it as appropriate in this specific case.

SUP notes that the appropriateness of using the new necessity “principle” is not just concerning to the utility participants. While VECC generally aligns with the other intervenors in stating that Staff’s proposal does not go far enough, they do note: “we disagree with Staff that a new and rather ill-defined principle, of “necessity” need (sic) to be invented on the fly. Rather the Board should, in our view, focus on how the principles and tools it already has at its disposal can be modified to address the current circumstances. (VECC January 25 Submission p. 5)”

In its submission, AMPCO/IGUA recognizes that the introduction of the necessary “principle” is “an appropriate conceptual approach for evaluating the imperative to depart from the pre-established regulatory framework in order to address the circumstances of the COVID-19 pandemic. (AMPCO/GUA January 25 Submission page 4)” While SUP does not agree with this intervenor’s overall proposals, it does agree that Staff have effectively cast away the existing regulatory framework in a misplaced desire to appropriately address intervenors’ concerns over allowing recovery of pandemic-related costs.

It appears to SUP that the concept of using necessity as a new regulatory principle is firmly anchored in the work done for the OEB by LEI. In its January 25 submission, SUP noted that only a small percentage of COVID-related regulatory findings or decisions identified by LEI referred to necessity in some way.

SUP considers that the lengthy submission by OEA/CLD+ has provided important new information that needs to be taken into account and evaluated by the OEB and other participants. Specifically, the Aird and Berlis LLP Report on Legal and Regulatory Principles provides a convincing argument for using a consistent regulatory framework. (OEA/CLD+ January 25 Submission Appendix A) The same submission’s Appendix B provided a new consulting report by ScottMadden Inc., entitled “Regulatory Treatment of COVID-19 Related Costs: Research of U.S. and Canadian Regulatory Jurisdictions.” SUP’s view is that this report provides a serious challenge to the conclusions reached by LEI in its work and by extension to the conclusions that OEB Staff has drawn from that work.

Specifically; “In the 23 jurisdictions that have authorized the deferral of COVID-related costs in generic proceedings for all utilities, ScottMadden Inc. found no instances where “necessary” for recovery is applied in the context of maintaining a utility’s financial viability. For those jurisdictions with “reasonable and necessary” standards referenced in COVID-related orders/legislation, the context instead is similar to the context in which it is applied in that jurisdiction regarding the allowable costs to provide service to customers.” (ScottMadden Inc. Report p. 10)

## **Conclusion**

Given that Staff’s proposal is heavily predicated on LEI’s work, SUP believes that the findings of these two OEA/CLD+ reports make an important contribution to the consultation that needs to be fully taken into account, preferably before further specific guidance is based on questionable principles.

The Staff Proposal and intervenors’ comments in aggregate start from a view that necessity is the sole principle that should be used in determining the appropriate final guidance. SUP does not agree. SUP considers that the difference in views evidenced in utility and intervenor submissions shows the importance of determining the appropriate regulatory principles to be applied before specific regulatory guidance is crafted, approved and communicated.

To withstand challenge and to be appropriate over time, any new accounting or regulatory problem should be solved using an established framework and an application of generally accepted underlying principles as well as sound judgment. New regulatory principles should no more be adopted without extensive justification and rationale than should new accounting or legal principles. SUP does not consider that the necessity “principle” has been subjected to these tests sufficiently to be adopted as the foundational principle for the OEB’s COVID-19 guidance.

SUP looks forward to future opportunities to review the OEB’s draft guidance or to discuss appropriate regulatory principles.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS  
11th DAY OF FEBRUARY, 2021**