

April 17, 2009

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Kirsten Walli
Board Secretary
Ontario Energy Board
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2300 Yonge Street
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File 10606

Dear Ms Walli:

**Re: Cost of Capital in Current Economic and Financial Market Conditions/
Board File No. EB-2009-0084**

In its letter of March 16, 2009, the Board invited comments on certain issues related to the question of whether the Board should make changes in the parameter values in its cost of capital calculation. These are the comments of the Consumers Council of Canada in response to that invitation.

Before addressing the issues identified in the Board's March 16, 2009, letter, we believe it necessary to make submissions on the Board's jurisdiction to make changes in the parameter values.

I Jurisdiction

In its Report on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors, dated December 20, 2006, the Board adopted a formulaic approach to the setting of ROE for Electricity LDCs. That Report set out how the parameter values within the formula were to be determined. The Report stated that it would be the policy of the Board to use this formula in setting rates for electricity LDCs. The Board stated that "the cost of capital policy will remain in effect until it is reviewed and changed by the Board"¹ (emphasis added).

The Council submits that the key point is that this is a policy. As such it cannot be binding on the Board. It is open to any LDC, the Board, or another party to argue, in a given case, that either the policy should not be followed, or the parameter values should be changed. In either

¹ Ontario Energy Board – *Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors*, December 20, 2006, p. 49

case, the Board must hold a hearing which, in turn, requires that parties seeking a change in the parameters lead evidence, and so forth.

In its letter of March 16, 2009, the Board states that it is considering whether certain circumstances warrant the Board "exercising its discretion to adjust any or all of the values produced by the application of its established formulaic methodology". The Board further states that the written comments of the stakeholders are intended to "help the Board determine if, when and how to make any appropriate adjustments to any of the values". Finally, the Board states that it "notes that this determination may impact the rates the 23 distributors that had their rates rebased this year".

The Council submits that the Board cannot change the decisions already made with respect to the 23 distributors without first holding a hearing. Aside from the policy considerations of whether the Board should, by making changes in those decisions, engage in retroactive ratemaking, subsection 21(2) of the *Ontario Energy Board Act*, requires a hearing.

An additional consideration is that some of the decisions in the cases of the 23 distributors were based, in whole or in part, on compromises reached as a part of an ADR process. Those negotiations may have had a different result if parties had known that the Board might undertake a different approach in adjusting any or all of the values produced by the application of its established formulaic methodology. Even for those cases where a settlement process was not part of the proceeding the positions advanced by intervenors in argument, and/or the final decision of the Board may have been impacted. It would be unfair to now change the ROE without reopening the entire application. This is an issue of fundamental fairness, bearing on the integrity of the Board's processes,. It is another reason why the 23 decisions cannot be changed without a hearing.

The Council acknowledges that the Board does have the discretion to change its policy with respect to the formulaic calculation of ROE by, for example, changing the parameter values, without holding a hearing. Whether it should do so, is another matter, considered below. However, for that changed policy to have any effect in the rates to be charged by an LDC, it would have to be considered as part of a rate application, at a hearing. As noted above, that would, in turn, engage the full panoply of procedural requirements associated with the holding of a hearing.

Accordingly, the Council submits that the Board does not have the jurisdiction to change the parameter values in the formula, in a way which would affect the 23 decisions already made, without holding a hearing.

One of the reasons that the policy for a formulaic approach to the setting of ROE was adopted, in the first instance, was to save the time and expense associated with re-calculating the ROE, for each LDC, annually. The Council supported that rationale for the use of that policy, when it was first adopted, and continues to do so. However, if any aspect of the formula is to be changed, including the parameter values, the Board should hold a hearing at which it hears evidence with respect to whether the parameter values should be changed and, if so, in what ways. On the basis of that evidence, the Board can then make a decision as to whether its policy should change regarding the derivation of the values.

III The Issues Raised By The Board

- 1. How do the current economic and financial conditions affect the variables (i.e., Government of Canada and Corporate bond yields, bankers' acceptance rate, etc.) used by the Board's Cost of Capital methodology?**
- 2. In the context of the current economic and financial conditions, are the values produced by the Board's Cost of Capital methodology and the relationships between them reasonable? Why, or why not?**
 - 2.1. If the values are not reasonable, what are the implications, if any, to a distributor?**

Various stakeholders will provide information, in response to these two questions, which may or may not suggest that the values are reasonable. This information is not evidence, upon which the Board can act, because it has not been examined in a hearing.

The Council, along with a number of other stakeholders, had the benefit of information provided by Dr. Laurence Booth, a recognized expert on establishing the ROE for utilities. The information provided by Dr. Booth is summarized in Mr. Thompson's letter, on behalf of the Canadian Manufacturers and Exporters, dated April 16, 2009. We will not repeat Mr. Thompson's summary herein. In our view, Dr. Booth provides credible information which suggests, among other things, that the values produced by the Board's cost of capital methodology are reasonable, and do not need to be changed. We acknowledge, however, that other stakeholders may disagree with the information provided by Dr. Booth and may themselves provide information suggesting that the values are not reasonable and should be changed. The important point is that, if the Board proposes to act on this information, it should receive it in a hearing, and allow those with differing views to examine it.

3. What adjustments, if any, should be made to the Cost of Capital parameter values to compensate or correct for the current economic and financial conditions?

Based on the information that the Council has, we submit that no adjustments are either necessary or appropriate. However, before the Board considers making any adjustments, it should hold a hearing at which relevant evidence is considered.

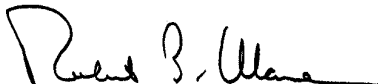
4. Going forward, should the Board change the timing of its Cost of Capital determination, for instance, by advancing that determination to November?

5. Are there other key issues that should be considered if the Board were to adjust any or all of the Cost of Capital parameter values produced by the application of its established formulaic methodology?

These questions cannot be answered on the basis of the information before the Board. Attempting to answer them, at this point, would be premature.

Yours very truly,

WeirFoulds LLP


Robert B. Warren

cc: Julie Girvan
cc: Joan Huzar
cc: All parties
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