EfficiencyOne

M08888

IN THE MATTER OF *The Public Utilities Act*, R.S.N.S. 1989,

c. 380, as amended.

\- and -

IN THE MATTER OF an Application by EfficiencyOne for Approval of the Use of Measure Level Non-Energy Benefits Within Cost Effectiveness Testing

EFFICIENCYONE

SUBMISSIONS ON THE PRELIMINARY ISSUE OF JURISDICTION

FILED

February 24, 2020

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BACKGROUND

On September 19, 2018, EfficiencyOne filed an Application for Approval for Use of Measure Level Non-Energy Benefits within Cost-Effectiveness ("CE") Testing for future Demand Side Management ("DSM") plans with the Nova Scotia Utility and Review Board (the "NEB Application").

In the NEB Application, EfficiencyOne sought the following specific approvals from the Nova Scotia Utility and Review Board ("NSUARB" or the "Board") as set out at pages 13 and 14 of the NEB Application:

1. that the per measure values in Table 10 of Attachment 4 (VEIC Report) be approved for use in future CE testing;
2. to implement Annual NEB values on a per-first-year kWh basis for the BNI sector, recognizing the increased variability of energy savings if differing measure applications. Without this accommodation, NEBs may be over-valued in low-savings applications, and under-valued in high-savings applications. The per-first-year kWh values would be derived by dividing Table 10 results by the first-year-energy savings modelled as part of the 2016-2018 DSM Resource Plan. This reflects the format of native data adapted from Massachusetts (i.e. Massachusetts values for BNI measures are described on a per-first year kWh basis).;
3. approval of the Ongoing Management and Update strategy described in Section 3.2 of the NEB Application; and
4. approval to base future estimates of Low-Income NEBs on the 2016 Three study performed in Massachusetts, subject to discussion on implementation at the DSMAG.

On October 1, 2018, the NSUARB issued a Hearing Order setting out the timetable for the NEB Application proceeding. Information Requests (IRs) to EfficiencyOne were filed by Intervenors on October 24, 2018. EfficiencyOne responded to these IRs on November 14, 2018 (with a correction to Multeese IRs filed November 15, 2018).

On November 22, 2018, after responding to the Information Requests of the Intervenors, and having regard to the upcoming regulatory proceedings in 2019 with respect to the 2020-22 DSM Plan Application, EfficiencyOne requested the NEB Application be deferred.

On November 23, 2018, the NSUARB issued an Order adjourning the regulatory proceedings without day, requiring EfficiencyOne to file updates and request resumption of the NEB Application proceeding before December 31, 2019.

In its November 23, 2018 correspondence to EfficiencyOne, granting the Order to defer the proceedings, the NSUARB also raised the issue of jurisdictional authority, stating:

> …While the Board generally encourages settlement discussions on all or a portion of the issues in a proceeding, the Board will need to be satisfied in this proceeding that it has the jurisdiction, under the Public Utilities Act, to take into account Non-Energy Benefits and the appropriateness of doing so in the interest of NS Power's ratepayers.

Responding to the direction of the NSUARB in its November 23, 2018 Order, EfficiencyOne engaged various Stakeholders throughout October 2019 and November 2019, including the Consumer Advocate, the Small Business Advocate, Nova Scotia Power Inc. and the Industrial Group.

The issue of the NSUARB's jurisdictional authority to grant the approval sought by EfficiencyOne was also raised in various IRs filed by Intervenors. In particular, such concerns were expressly noted by the NSUARB's consultant Synapse, the Small Business Advocate and Nova Scotia Power Incorporated ("NSPI"). These concerns were raised again through the subsequent discussions with key Stakeholders in October and November 2019.

In order to address these concerns, EfficiencyOne wrote to the NSUARB by letter dated November 28, 2019. In that letter, EfficiencyOne sought, as a preliminary matter, the opportunity to seek a determination of the NSUARB's jurisdiction to order the approvals sought by EfficiencyOne in the NEB Application. The NSUARB responded by letter dated November 29, 2019, allowing EfficiencyOne to proceed with framing the jurisdictional question for determination through consultation with key Stakeholders. By letter dated February 5, 2020, EfficiencyOne wrote to the NSUARB seeking approval of the framing of the jurisdictional question. The NSUARB responded by letter dated February 10, 2020 accepting the framing of the question and establishing timelines for submissions on this preliminary matter by EfficiencyOne and interested parties.

ISSUE

With the concurrence of NSPI, the Consumer Advocate, the Small Business Advocate, and the Industrial Group representative, the following is the preliminary legal question to be determined by the NSUARB:

> **In assessing proposed electricity efficiency and conservation activities, does the NSUARB have the jurisdiction to take into account non-energy impacts in cost effectiveness testing?**

EFFICIENCYONE'S POSITION

EfficiencyOne respectfully submits that the NSUARB has full jurisdiction to take into account non-energy impacts in cost effectiveness testing. In particular, the *Utility and Review Board Act S.N.S. 1992, c. 11* and the *Public Utilities Act*, RSNS 1989, c 380 empower the NSUARB to determine the following:

1. the best interests of the customer in assessing and approving cost-effective energy efficiency and conservation activities, including the determination of factors relevant to such an assessment;
2. any matters the NSUARB considers appropriate in assessing proposed electricity and conservation activities;
3. any performance requirements for the franchise holder that the NSUARB considers appropriate in approving a Demand Side Management plan; and
4. such terms and conditions that the NSUARB considers appropriate in approving a DSM plan.

EfficiencyOne respectfully submits that the above-noted statutory authorization provides the NSUARB with the jurisdiction to consider non-energy impacts in cost effectiveness testing. The particulars of this legislative jurisdiction are detailed further in these submissions.

LEGISLATION

The Nova Scotia Utility and Review Board is a statutory regulatory body created by the *Utility and Review Board Act S.N.S. 1992, c. 11* (the "*UARB Act*"). As such, the jurisdiction and authority of the Board is derived from legislation. The assignment of the Board's authority and jurisdiction is found in various statutes, as identified in the *UARB Act*, which specifically includes the *Public Utilities Act*:

> 4 (1) The Board has those functions, powers and duties that are, from time to time, conferred or imposed on it by
>
> (a) this Act, the Assessment Act, the Expropriation Act, the Gasoline and Diesel Oil Tax Act, the Health Services Tax Act, the Heritage Property Act, the Insurance Act, the Motor Carrier Act, the Municipal Government Act, the Public Utilities Act, the Education Act, the Shopping Centre Development Act, the Tobacco Tax Act or any enactment; and
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> (b) the Governor in Council.[1]

And further:

> Jurisdiction
>
> 22 (1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.
>
> (2) The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and of fact. [2]

Pursuant to the *Public Utilities Act*, (the "*PUA*"), the Minister of Energy and Mines may grant a franchise for the delivery of "electricity efficiency and conservation activities" in the Province[3].

"Electricity and conservation activities" is defined in section 79A of the *PUA* as follows:

> 79A …

[1] Utility and Review Board Act, SNS 1992, c. 11, s.4.
[2]Utility and Review Board Act, SNS 1992, c. 11, s. 22
[3] Public Utilities Act, RSNS 1989, c. 380, s 79C.

> (b) "electricity efficiency and conservation activities" means activities, programs or plans relating to
>
> (i) the efficient use of electricity,
> (ii) the conservation of electricity,
> (iii) the alteration of the consumption pattern of an end-user of electricity that has the effect of reducing demand during Nova Scotia Power Incorporated's periods of highest demand,
> (iv) the utilization or management by Nova Scotia Power Incorporated of its electrical system in a more cost-effective manner,
> (v) the delivery of a reduction in the amount of electrical energy or capacity that Nova Scotia Power Incorporated would otherwise be required to supply to its customers, or
> (vi) any other prescribed activities, plans or programs;

The NSUARB, under section 79G of the *PUA*, has the general supervision of a franchise holder in relation to the franchise holder's franchise activities:

> Board supervision
>
> 79G (1) The Board has the general supervision of a franchise holder in relation to the franchise holder's franchise activities, and may make all necessary examinations and inquiries, keep itself informed as to the compliance by the franchise holder with the law and obtain from the franchise holder all information necessary to enable the Board to fulfil its duties.
>
> (2) For the purpose of Sections 15 to 19, 21, 22, 25, 27 to 29, 34, 46, 47, 49 to 51, 63, 76, 79, 80, 83 to 85, 88 to 106 and 111 to 118, a franchise holder is deemed to be a public utility in relation to its franchise activities and those Sections apply mutatis mutandis to the franchise holder with respect to those activities.

EfficiencyOne is the franchise holder pursuant to section 79C of the *PUA,* under which it is the exclusive provider of reasonably available, cost-effective electricity efficiency and conservation activities to NSPI.

Section 18 of the *PUA* authorizes the Board to make all necessary examinations and inquiries with respect to EfficiencyOne's franchise activities and to obtain from any public utility all information necessary for the Board to fulfill its duties:

> 18 The Board shall have the general supervision of all public utilities, and may make all necessary examinations and inquiries and keep itself informed as to the compliance by the said public utilities with the provisions of law and shall have the right to obtain from any public utility all information necessary to enable the Board to fulfil its duties

Pursuant to section 79H of the *PUA*, the Board is required to determine the electricity efficiency and conservation activities to be undertaken:

> 79H The Board shall determine the cost-effective electricity efficiency and conservation activities that must be undertaken for the purpose of this Act. 2014, c. 5, s. 15.

Under section 79I of the *PUA*, NSPI shall undertake cost-effective electricity efficiency and conservation activities that are reasonably available in an effort to reduce costs for its customers. As EfficiencyOne is the exclusive provider of energy efficiency and conservation activities, NSPI is required to enter into an agreement with EfficiencyOne for the supply of these activities. These agreements take the form of a Supply Agreement, which includes a Board-approved DSM plan. Pursuant to the *PUA*, each such agreement must be for a term of three years, must describe the electricity efficiency and conservation activities that EfficiencyOne will provide to NSPI, and must be approved by the NSUARB.

Where NSPI and EfficiencyOne are unable to finalize the required agreement, either or both may apply to the Board pursuant to section 79J(3) of the *PUA* for a decision with respect to a proposed agreement and, upon considering the application, the Board shall establish a final agreement between the parties "on such reasonable terms as the Board considers appropriate". Despite no agreement being reached, an application pursuant to section 79J(3) of the *PUA* is deemed to be an application for the approval of an agreement subject to section 79L[4] of the *PUA*.

Section 79L of the *PUA* establishes the central considerations of the NSUARB in approving such an agreement between EfficiencyOne and NSPI:

[4] Public Utilities Act, RSNS 1989, c. 380, s 79J(4).

> 79L(8) The Board shall approve an agreement pursuant to this Section if, in addition to any other matters considered appropriate by the Board, it is satisfied that the agreement, including the proposed electricity efficiency and conservation activities that are the subject of the agreement, is in the best interests of Nova Scotia Power Incorporated's customers and satisfies the requirements of Section 79J.
>
> (9) The Board's assessment of the proposed electricity efficiency and conservation activities for the purpose of the approval must take into account their affordability to Nova Scotia Power Incorporated's customers, along with any other matters considered appropriate by the Board or as may be prescribed.

The Board is required to approve an agreement if it is satisfied that the agreement, including all activities set out in the agreement, is in the best interests of NSPI's customers. In order to satisfy this statutory obligation, the Board is required to assess whether the agreement is in the best interests of customers.

In addition, sections 79M(1) and (4) of the *PUA* authorize the NSUARB to attach any terms or conditions it considers appropriate in approving such an agreement:

> 79M (1) In making an order approving an agreement pursuant to Section 79L, the Board shall establish such performance requirements for the franchise holder as the Board considers appropriate.
>
> …
>
> (4) In making an order approving an agreement pursuant to Section 79L, the Board may attach such modifications to the agreement or such terms or conditions as the Board considers appropriate, and the agreement is subject to any modifications, terms or conditions that the Board attaches to its approval.

Further, when there is a disagreement between EfficiencyOne and NSPI with respect to such an agreement, the Act authorizes the NSUARB to provide direction to the parties "based on its assessment of the matter and its determination of what is in the best interests of NSPI's customers".[5]

[5] Public Utilities Act, RSNS 1989, c. 380, s 79P(4).

EfficiencyOne respectfully submits that the Act provides the NSUARB with the jurisdiction to make its own determination of what is in the best interests of customers and to determine what factors are appropriate to consider as part of the assessment of whether a proposed DSM plan is in the best interests of customers. EfficiencyOne further submits that this jurisdiction necessarily extends to the consideration of cost-effectiveness testing and its requisite elements.

ANALYSIS

Best Interests of Customers

The overarching consideration of the Board in assessing and approving cost-effective energy efficiency and conservation activities is the “best interests of NSPI customers”. The term “best interests” is not defined under the *PUA*, and what may, should and must be considered in such an assessment depends on an exercise of statutory interpretation.

The interpretation of this central consideration of the best interests of customers must be guided by *Driedger’s Modern Principle*, as adopted by the Supreme Court of Canada, which states that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”[6]

Statutory interpretation is also guided by a consideration of section 9(5) of the *Interpretation Act*, RSNS 1989, c. 235, as amended:

> 9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
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> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
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> (c) the mischief to be remedied;
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> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[6] Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 SCR 27

It is also important to note that exercises of statutory interpretation undertaken by the Board of its home or related statutes have overwhelmingly been reviewed by the Nova Scotia Court of Appeal under the more relaxed standard of reasonableness, rather than correctness.[7] The Court of Appeal often defers to the Board as the most suitable body to interpret its home and related statutes. The Board typically need not be correct in its interpretation of a related statute, but its interpretation must be reasonable. Although a determination of the applicable standard of review is outside the scope of this Application, the standard generally applied in the review of the Board's interpretation of the *PUA* and other related legislation should be considered relevant.

The "best interests" of a customer, in its ordinary sense, without further limitation, does not indicate that the best interests are to be assessed through a sole category or metric. Rather, it indicates a cumulative consideration of the diverse interests of the customer, and whether the particular issue in question satisfies the customer's interests in the best way, accounting for an unrestricted range of costs and benefits.

The sole factor specifically named in the *PUA* that the Board must account for in determining whether a proposed DSM plan is in the best interests of customers is the affordability of the proposed plan to the customers[8]. In addition to the plan's affordability, the Board must account for, "… **any other matters considered appropriate by the Board** or as may be prescribed."[9] There is no enumerated list of criteria that the Board may, or must, consider in determining whether a DSM plan is in the best interests of customers and no regulations prescribing same.

In its ordinary sense, the phrase "any other matters" means *any* matters. The phrase "any other matters considered appropriate by the Board", when read in its entire context along with the scheme and object of the *PUA* as well as the intention of the Legislature, clearly provides the Board with a broad discretion to determine what matters, aside from affordability, are appropriate to consider. In other words, in the event the Board determines a particular factor is appropriate to assessing whether a DSM plan is in the best interests of customers, then the Board must account for it. Therefore, the Board has an implicit

[7] Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited, 2019 NSCA 22
[8] Public Utilities Act, RSNS 1989, c. 380, s 79L(9).
[9] *Supra*

duty to determine what is appropriate for consideration in the assessment of a DSM plan. The *PUA* provides no explicit direction to the Board in determining the best interests of customers. The *PUA* does not restrict the types of matters that the Board may consider, aside from the requirement that such matters are "appropriate". Importantly, it is entirely within the Board's discretion to determine whether any particular matter is appropriate.

Had the Legislature intended that the best interests of the customer be assessed solely on the basis of affordability and benefits in terms of energy savings, without accounting for non-energy or societal benefits, then the Legislature would have used more restrictive language. Instead, the *PUA* provides the Board with the authority and duty to determine what is appropriate to consider without any explicit restrictions or limitations. Accordingly, the *PUA* provides the Board with broad discretion and jurisdiction to determine what factors are relevant to an assessment of the customers' best interests.

The *PUA* empowers the Board to exercise general supervision over all electric utilities operating as public utilities within the Province. This jurisdiction includes a broad range of matters, such as the approval of rates and charges, the approval of certain capital expenditures, the approval of DSM plans, and any other matter the Board feels is necessary to properly exercise its mandate regarding electricity regulation. The purpose of sections 79A – 79V has been stated to be "to create a comprehensive DSM service delivery model, which is cost-effective, with performance standards, subject to the Board's regulatory oversight".[10] It is evident that the legislature intended the Board to exercise extensive oversight of the DSM activities undertaken by EfficiencyOne, including the approval of proposed activities, and the language used in the *PUA* to define the extent of and considerations relevant to the Board's oversight indicates that the Board has a broad authority to determine what is or is not appropriate to consider in assessing such DSM activities.

The intention of the legislature is also reflected in the history of related legislation. EfficiencyOne replaced the Efficiency Nova Scotia Corporation ("ENSC") as DSM provider in 2014, and the *PUA* was amended at that time to include Sections 79A to 79V. The *Efficiency Nova Scotia Corporation Act*, (the

[10] Efficiencyone (Re), 2017 NSUARB 174 para 66.

"ENSCA"), established ENSC as the DSM provider in 2010. In introducing Bill 49, which became the ENSCA, the Energy Minister at the time stated:

> […] This legislation creates a new independent body to manage electricity and efficiency programs in our province. Its main focus will be to help Nova Scotians use less electricity. I repeat, the main focus will be to help Nova Scotians use less electricity. […] It's also the lowest-cost option to protect our environment and our environment, of course, remains a concern for us of all ages, I want to assure you. Nova Scotians want a clearer and greener province, and energy efficiency and conservation will help us achieve this goal.[11]

It is evident from this statement that although the primary objective of establishing an independent DSM provider was to reduce electricity use, it was not the sole purpose. In establishing this independent body, another objective was evidently the protection of the environment at the lowest cost to Nova Scotians.

Considering the importance of environmental protection in establishing an independent DSM provider, an assessment of whether a DSM plan is in the best interests of the customers could reasonably account for the environmental impacts of the plan. Accordingly, a reasonable interpretation of the "best interests" of customers under the *PUA* is not limited to the direct energy savings experienced as a result of measures or programs. The Board's consideration of best interests of the customers extends to environmental protections. In particular, the Board already exercised this jurisdiction when it ordered EfficiencyOne to begin incorporating the value of avoided CO2 emissions in its cost effectiveness analysis and improve the accuracy of the avoided Green House Gas (GHG) estimates through improved accounting for the timing of DSM savings.[12].

Considering the broad language in Sections 79L(8) and (9) of the *PUA*, the lack of any contrary direction from the Board or from the Court of Appeal, and the purpose and history of the *PUA* and the *ENSCA*, EfficiencyOne submits that a reasonable interpretation of "best interests" is not restricted to a consideration of the customers' best interests strictly in the context of electricity savings. The Board may take into account *any other* matters it considers appropriate. Accordingly, a reasonable interpretation of the best interests of customers could also include an accounting of non-energy

[11] Hansard, Sixty First General Assembly, First Session: October 27, 2009, pp. 1807-1808
[12] M08604, Order of the NSUARB dated July 23, 2018.

benefits, as proposed. In making this determination, the Board may consider impacts experienced by the customers as a result of the DSM plan including non-energy benefits, as long as the Board considers it appropriate to do so. It is clear that the Board has the broad discretion and thus the jurisdiction to determine what is appropriate to consider in assessing a DSM plan. The intention of the Legislature clearly shows that sections 79A to 79V of the *PUA* are intended to reduce electricity use in Nova Scotia and protect the environment at a low cost to Nova Scotians. Reading the relevant provisions in this context certainly provides the Board with the jurisdiction to consider including non-energy benefits in CE testing. Once this preliminary matter has been decided, the actual determination as to whether such benefits should be included in CE testing is to be determined separately in the NEB Application itself.

Cost-Effectiveness Testing

As mentioned above, the Board has the ultimate authority under the *PUA* to approve DSM plans and the energy efficiency and conservation activities set out therein. One of the primary means employed by EfficiencyOne in developing DSM plans is cost-effectiveness testing. The results of the CE testing have been considered by the Board in determining whether to approve all DSM plans previously submitted by EfficiencyOne. The CE testing is a primary means of assessing the affordability of energy efficiency and conservation activities, and more broadly, whether they are in the best interests of NSPI customers, as required under the *PUA*.

In particular, at sections 79H and 79I, the *PUA* specifically requires that the electricity efficiency and conservation activities be cost-effective:

> 79H The Board shall determine the cost-effective electricity efficiency and conservation activities that must be undertaken for the purpose of this Act. 2014, c. 5, s. 15.

> 79I (1) On and after the Implementation Date, Nova Scotia Power Incorporated shall undertake cost-effective electricity efficiency and conservation activities that are reasonably available in an effort to reduce costs for its customers.

By specifically including the term “cost-effective” in relation to the electricity and conservation activities to be performed pursuant to the *PUA*, EfficiencyOne respectfully submits that the Legislature intended the cost-effectiveness of such activities to be a matter falling squarely within the Board’s jurisdiction. The cost-effectiveness is relied on to determine whether the proposed DSM plan is in the best interests of customers.

It necessarily follows that factors considered in CE testing also fall squarely within the Board’s jurisdiction pursuant to the *PUA.* The primary CE testing used in assessing DSM plans is the Total Resource Cost (“TRC”) Test. The TRC test has been the primary cost-effectiveness test for DSM in Nova Scotia since the commencement of DSM related activities in the province.

In 2011, the previous DSM provider, ENSC, applied to the Board for approval of a DSM plan, which included a request to change the application of the TRC test from the measure level to the program level. The objective of this request was to enable more measures to be implemented by ENSC, so as to provide for greater benefits to NSPI customers. The Board approved this request, on the basis of “the benefits and flexibility which will be provided to ENSC with this change.” The Board cites the reasoning of ENSC that:

> In some cases, a measure that fails the TRC test may provide strategic or long-term benefits, such as stimulating demand for newer technologies to achieve economies of scale.[13]

Although occurring prior to the relevant amendments to the *PUA*, it is evident from the Board’s discussion in the above-noted decision that the Board had the authority to modify the CE test relied on by the DSM provider in developing a DSM plan. Further, the specific mention by the Board of “strategic or long-term benefits” further supports the view that the Board has the jurisdiction to consider other benefits in cost-effectiveness testing. EfficiencyOne respectfully submits that, despite the changes in the legislative scheme, this statement is illustrative of the factors that may be considered by the Board in assessing DSM plans. This authorization has not been changed by the subsequent amendments to the

[13] Efficiency Nova Scotia Corporation (Re), 2011 NSUARB 99

PUA, as such amendments do not restrict what may be considered in assessing the best interests of customers, as discussed above.

In the 2015 application for approval of the DSM plan for 2016-2018, EfficiencyOne sought the approval of the Board to change the primary CE test from the TRC to the Program Administrator Cost ("PAC") method.[14] The reason for this proposed change was that the TRC test has been noted on multiple occasions to contain inaccuracies[15], primarily through failing to account for non-energy benefits to participants. This shortcoming of the TRC test was also noted in the 2011 NSUARB decision discussed above. The objective of this change was to more accurately account for DSM costs and benefits, to have a better balanced CE test. The primary CE test directly informs DSM planning and decision-making and it is essential to ensure it is accurate. Although the requested change from the TRC to the PAC test was couched in the 2015 application process, there were no issues raised regarding the jurisdiction of the Board to make such a change. Clearly, the goal of having a "better balanced CE test" and therefore more accurate and complete cost effectiveness screening, is in the best interest of NS Power ratepayers – and on that basis falls within the legal authority of the Board to at least consider such amendments - noting however, that a final determination of whether or not to actually permit inclusion is beyond the scope of this Application. As additional support for this broader interpretation – EfficiencyOne points to the Board's own decision in respect to EfficiencyOne's request to NS Power for enhanced supply of NS Power customer data . The Board, in granting the EfficiencyOne request noted with regard to "best interests of NS Power customers" and the supply of DSM:

[14] EfficiencyOne (Re), 2015 NSUARB 204 (CanLII)

[15] M08888, Exhibit E-1, Attachment 4, Page 9 of 54::

Currently, in the screening methodology for Nova Scotia's portfolio, all of the costs of the program are included in the ratio, but some of the benefits, namely benefits to participants beyond direct energy savings are not included in the equation. This is a critical omission. As a result, the existing screening practice of Nova Scotia's programs is out of compliance with the symmetry principle of the National Standard Practice Manual…which reads "For each type of impact included in a cost-effectiveness test, it is important that both the costs and benefits be included in a symmetrical way. Otherwise the test may be skewed and provide misleading results. More accurately, capturing benefits of programs will lead to more accurate reporting of the value of efficiency, which will provide better information to policy-makers and ratepayers. [footnotes omitted]

> **The best interests of NSPI customers are also an overarching concern of the DSM provisions of the** PUA**. It is in the best interest of ratepayers that best practices, which seek to obtain the best results in the most cost-effective manner, are utilized by E1.**

Further, EfficiencyOne respectfully submits that the Board has an implicit duty to ensure that the CE test applied by EfficiencyOne is accurately formulated in order to appropriately determine whether a DSM plan and the included programs are cost-effective and in the best interests of the customers. If the CE test does not accurately reflect the benefits experienced by customers through proposed measures and programs, then the Board is unable to satisfy its duty to determine whether a DSM plan is in the best interests of the customers.

There are no explicit limits as to what may be considered by the Board as part of the CE test either under the relevant legislation or regulations, or through past decisions of the Board or the Court of Appeal that have dealt with the formulation of the CE test. EfficiencyOne respectfully submits the Board's authority to approve and modify the CE test is derived from the Board's general statutory authority and oversight in relation to the assessment of DSM plans, and is not explicitly defined in the *PUA*. Accordingly, the jurisdiction of the Board to approve the inclusion of non-energy impacts in the CE test is grounded in a reasonable interpretation of the relevant statutory powers and obligations, as set out above.

Other Jurisdictions

As the implementation and operation of energy efficiency programs continue to develop and grow throughout North America, it is often helpful to look at the practice and experience of other jurisdictions, not only within Canada, but also in the United States, where some energy efficiency markets are more mature.

In the NEB Application, EfficiencyOne referred to three particular jurisdictions which include non-energy benefits in their cost-effectiveness test: Maryland, Rhode Island and Massachusetts.

The Maryland *Public Utilities Code §7-211 – Energy Efficiency Programs* requires gas and electric companies to develop and implement programs and services to encourage and promote the efficiency use and conservation of energy by consumers. The Code states:

(f) The Commission shall:

(1) require each gas company and electric company to establish any program or service that the Commission **deems appropriate and cost effective** to encourage and promote the efficient use and conservation of energy:

Maryland is similar to Nova Scotia in that the Commission must consider whether or not an energy program is "cost-effective". In 2015, the Public Service Commission of Maryland had occasion to consider its cost-effectiveness screening. In its Order No. 87082, the Commission stated:

We have a statutory duty to require each gas and electric company to establish any program or service that the Commission deems appropriate and cost effective to encourage and promote the efficient use and conservation of energy. We maintain an active role throughout program implementation, as the Commission is charged with monitoring and analyzing program impacts and outcomes using four statutory factors, including whether the program is cost effective…

To date, our cost-effectiveness standard has focused on ensuring a real return on the ratepayers' investment. Based on evaluation, measurement, and verification … best practices, in 2009 we adopted an independent, third-party evaluator model to review the EmPOWER Maryland portfolio results. Among other things, this process evaluates free-ridership, deemed savings calculations, spillover, cost-effectiveness, and other factors pertinent to a thorough and ongoing review of viable and cost-effective energy efficiency and demand response programs.

While the results of this thorough EM&V analysis frequently result in recommendations for future programmatic modifications, it is by definition a retrospective evaluations. Today we provide direction regarding the scope and balancing of factors for purposes of prospective cost-effectiveness screening in order to provide transparency and foster innovation in the growing energy efficiency industry of Maryland. [footnotes omitted][16]

The Commission noted that the primary focus had been the Total Resource Cost test, although a range of tests were utilized in varying degrees to screen energy efficiency programs. Utilities and stakeholders advocated for a range of cost-effectiveness tests and combinations. The Commission noted that the "recommended choice of test ultimately depended on the Commission's decision regarding whether to account for non-energy benefits"[17].

[16] Public Service Commission of Maryland, Order No. 87082, pp 3-4
[17] Ibid, p. 5

The Commission stated:

> "…A failure on our part to consider broader societal impact stemming from the implementation of energy efficiency programs would ignore the codified intent of the General Assembly "to provide affordable, reliable, and clean energy for consumers of Maryland."…
>
> "…We are cognizant of the concern raised by at least one utility that reliance on a societal viewpoint will expand the definition of cost effectiveness in a way that will greatly impact customer rates; however, we strongly disagree. By definition, a cost-effective program must yield benefits in excess of its costs. Moreover, we are not bound to approve *any* cost-effective program or service that is proposed to us; rather, the authorizing statute grants the Commission discretion in determining what we consider to be "appropriate" in light of certain statutory factors. *In addition* to considering whether the program is cost effective, we must also consider the program's impact on rates of each ratepayer class, its impact on jobs, and its impact on the environment. If we find a program to be appropriate after fully considering these four factors, only then will we authorize its implementation. Therefore, we find the conflating a program's impact on customer rates with whether the program is cost effective is unwarranted given the statutory discretion afforded to the Commission through the inclusion of the "appropriate" screen. For the circumstances in which a cost-effective program is projected to yield inappropriate impacts on consumer rates, the Commission retains its discretion to deny the implementation request irrespective of the cost-effectiveness screening results.

The excerpts from the Order of the Public Service Commission of Maryland are not referenced for the purpose of advocating support of any particular cost-effectiveness test or the inclusion of any specific category of non-energy benefits, rather they are intended to demonstrate the experience of a jurisdiction where the statutory considerations in energy efficiency programming are similar to those in Nova Scotia. It is significant that both jurisdictions are mandated to ensure that energy efficiency programs are cost-effective and affordable. The Commission relied on its mandate to provide "affordable" energy to its constituents to hold that a *failure* to include societal (non-energy) benefits would ignore this intent.

Section 79L of the *PUA* deserves repeating in the context of this discussion:

> (9) The Board's assessment of the proposed electricity efficiency and conservation activities for the purpose of the approval **must take into account their affordability**

> to Nova Scotia Power Incorporated's customers, **along with any other matters considered appropriate by the Board or as may be prescribed**.

Maryland's approach lends support to EfficiencyOne's position that the *Public Utilities Act* authorizes and empowers the Board to permit the inclusion of non-energy impacts in cost-effectiveness testing.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing, EfficiencyOne respectfully submits that the Board's broad jurisdiction to determine what matters are appropriate to consider in the assessment of DSM plans includes the authority to make a determination that it is appropriate to account for non-energy impacts in cost-effectiveness testing. Accordingly, EfficiencyOne respectfully requests the Board determine, as a preliminary matter, that it has the jurisdiction to order the approvals sought in the NEB Application, or some variation thereof.

All of which is respectfully submitted.