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March 9, 2020

Doreen Friis
Regulatory Affairs Officer/Clerk
Nova Scotia Utility and Review Board
3rd Floor 1601 Lower Water Street
PO Box 1692 Unit "M"
Halifax NS B3J 3S3

Dear Ms. Friis:

Re: M08888 – Application by EfficiencyOne for Approval of the Use of Measure Level Non-Energy Benefits Within Cost Effectiveness Testing – Preliminary Issue of Jurisdiction

These submissions are filed on behalf of the Industrial Group.

On September 19, 2018, EfficiencyOne filed an Application for Approval for Use of Measure Level Non-Energy Benefits within Cost-Effectiveness Testing for future Demand Side Management plans (the "NEB Application"). This application was subsequently deferred by EfficiencyOne, and in the course of discussions regarding the NEB Application, numerous stakeholders raised the question as to the Board's jurisdiction under the *Public Utilities Act* to take into account non-energy benefits as requested by EfficiencyOne.

These submissions will address the preliminary jurisdictional issue now before the Board, framed as follows with the Board's approval: **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?**

The Industrial Group submits that the Board does not have jurisdiction to take into account non-energy benefits ("NEBs") in assessing the cost effectiveness of EfficiencyOne's electricity efficiency and conservation activities. It is the Industrial Group's position that:

- NEBs do not bear any relevance to EfficiencyOne's statutory mandate to undertake electricity efficiency and conservation activities, and accordingly cannot constitute criteria by which the Board may evaluate the cost effectiveness of these activities.

- To the extent that the *Public Utilities Act* grants discretionary powers to the Board, these powers must nonetheless be exercised within the boundaries of its defined jurisdiction, which specifically provides for oversight of electricity-related efficiency and conservation activities.

The NEB Application

The NEB Application relies on a report prepared by the Vermont Energy Investment Corporation that recommends the inclusion of a number of specified NEBs within the Total Resource Cost ("TRC") test by which the cost effectiveness of EfficiencyOne's measures is determined.

While the specifics of EfficiencyOne's proposed integration of NEBs into its cost effectiveness testing is beyond the scope of the narrow jurisdictional issue addressed in these submissions, it is relevant at the outset of this discussion to make note of the categories of benefits recommended for adoption in the NEB Application[1]:

Residential	Business, Non-Profit, and Institutional
Thermal comfort	Reduced Operations and Maintenance
Noise Reduction	Reduction in Other Labour Costs
Property Value	Increased Rent Revenue
Equipment Maintenance	Increased Sales Revenue
Lighting Quality	Reduction in Waste Disposal
Home Durability	

As these submissions will illustrate, assessing EfficiencyOne's cost effectiveness on a basis that relies on any of the above benefits is not properly within the Board's jurisdiction to approve and oversee electricity efficiency and conservation activities.

UARB Jurisdiction

The NSUARB is a statutory regulatory body created by the *Utility and Review Board Act* S.N.S. 1992, c. 11 (the "**UARB Act**"). The Board's functions, powers and duties and jurisdiction are defined in the *UARB Act* as follows:

> ***Functions, powers and duties***
>
> *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; […]*

[1] NEB Application, page 9; and see E1 (Multeese) IR-16, "In light of recent developments in Massachusetts, VEIC recommends that EfficiencyOne withdraw its property value related NEBs from this application."

> *[…]*
>
> ***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. 1992, c. 11, s. 22.*

In accordance with section 4(1) of the *UARB Act*, the *Public Utilities Act*, S.N.S. 1989, c. 380 (the "**PUA**") details the Board's mandate and scope of authority in regulating public utilities.

Pursuant to the *Electricity Efficiency and Conservation Restructuring (2014) Act*[2] the *PUA* was amended in 2014 to incorporate a statutory regime governing NSPI's mandatory purchase of cost-effective electricity efficiency and conservation activities. These amendments empowered the Minister of Energy and Mines to "grant an electricity efficiency and conservation franchise" to hold "the exclusive right to supply Nova Scotia Power Incorporated with reasonably available, cost effective electricity efficiency and conservation activities."[3]

The Board is tasked with regulatory oversight of the franchise's mandated activities. Under section 79H of the *PUA*, the Board has the authority to "determine the cost-effective electricity efficiency and conservation activities that must be undertaken for the purpose of this Act."

The *PUA* is explicit in defining the scope of what constitutes electricity efficiency and conservation activities:

> ***Interpretation***
>
> *79A In this Section and Sections 79B to 79V,*
>
> *[…]*
>
> *(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,*

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[2] 2014, c.5, s. 15.

[3] *PUA*, s. 79C.

(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 statutory scheme requires NSPI to enter into an agreement with the franchise holder for the supply of electricity efficiency and conservation activities:

Agreements with franchise holder required

79J (1) In order to purchase electricity efficiency and conservation activities from a franchise holder to meet its obligation pursuant to clause 79I(2)(a), Nova Scotia Power Incorporated shall enter into agreements with a franchise holder that meet the requirements of this Section.

(2) Each agreement must (a) be for a term of three years, ending on December 31st of the third year of the agreement; (b) not be terminable or terminated unless the franchise holder's franchise is terminated or the termination is approved by the Board pursuant to Section 79N;

Such agreements must obtain Board approval. Sections 79L(8) and (9) of the *PUA* set out the basis on which the Board is to evaluate a proposed agreement between NSPI and a franchise holder:

Board's approval of agreements

79L (1) No agreement between Nova Scotia Power Incorporated and a franchise holder, including an agreement amending such an agreement, is valid until it has been approved by the Board pursuant to this Section.

[…]

(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 Industrial Group submits that nowhere in the above-cited provisions delineating the Board's jurisdiction to regulate the activities of a franchise can it be inferred that it is authorized to take into account the incidental effects of these activities beyond their direct impact on electricity use. The Industrial Group accordingly disagrees with EfficiencyOne's interpretation of the *PUA* as conferring jurisdiction to the Board to approve the inclusion of NEBs in cost effectiveness testing.

The Board's characterization of EfficiencyOne's dual status as a regulated/non-regulated entity is important to keep in mind when considering the nature of the oversight it must exercise in relation to the entity's activities as a franchise holder.

> *[2] Currently EfficiencyOne carries on two lines of business. Its principal business is as franchise holder of the Efficiency Nova Scotia franchise and it provides Demand Side Management (DSM) services to Nova Scotia Power Inc. Under the Public Utilities Act, EfficiencyOne is a utility in relation to DSM activities and is regulated by the Nova Scotia Utility and Review Board (Board).*
>
> *[3] Its second line of business is providing separate efficiency and conservation activities to the Province of Nova Scotia. These are not regulated activities.*[4]

Where EfficiencyOne's non-regulated efficiency and conservation activities are concerned, it is entitled to undertake such programs and to measure cost effectiveness as it deems appropriate, including with reference to individual and societal NEBs associated with its activities. However, the legislation clearly intends for EfficiencyOne's provision of DSM programming as a franchise holder to be regulated as a public utility and therefore subject to the jurisdictional constraints inherent in such oversight.

EfficiencyOne bases its jurisdictional argument primarily in the requirement in Section 79L(8) that the Board consider whether a franchise-NSPI agreement, including its proposed electricity efficiency and conservation activities, "<u>is in the best interests of Nova Scotia Power Incorporated's customers</u>." Relying on the principle of statutory interpretation whereby legislative language is to be read in its "ordinary sense", EfficiencyOne submits that in the absence of any limiting qualifier on the term "best interests", this provision allows for "a cumulative consideration of the diverse interests of the customer" in a manner that "[accounts] for an unrestricted range of costs and benefits."[5]

The Industrial Group submits that this open-ended interpretation is fundamentally at odds with the necessarily limited and properly defined jurisdiction of a statutory regulatory body. Rather, the Board's jurisdiction insofar as it must determine what is in the best interests of NSPI customers

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[4] 2017 NSUARB 142

[5] EfficiencyOne Submissions, February 24, 2020, at page 12.

is not "unrestricted", but is clearly and necessarily limited by the statutory definition of a franchise's mandated activities in Section 79A(b)(i)-(vi).

On a plain reading of the enumerated objectives in that section, it is clear that for the purposes of acting as a franchise under the *PUA*, EfficiencyOne's sole mandate relates to achieving electricity-based efficiency and conservation. It is submitted that it would therefore be outside of the Board's jurisdiction to evaluate the cost effectiveness of a franchise's activities on the basis of purported benefits that have no direct impact on the furtherance of its statutory mandate.

The same can be said with respect to EfficiencyOne's submission that the Board's ability to assess proposed electricity efficiency and conservation activities taking into account "any other matters considered appropriate by the Board" pursuant to Section 79L(9) confers sufficiently broad discretion so as to permit the inclusion of NEBs in cost effectiveness testing.[6] Again, the Board's powers as found in Section 79L(9) must be read in light of the broader statutory context which clearly articulates that a franchise's activities are to provide energy-related benefits and savings.

Ultimately, EfficiencyOne may be correct in characterizing Section 79L(8) and (9) as affording the Board a "broad discretion" with respect to what it will consider in assessing a DSM plan.[7] However, the Industrial Group submits that to equate this discretion with a license for the Board to exercise its oversight functions in respect of subject matter beyond that which is clearly contemplated in Section 79A(b)(i)-(vi) misinterprets the jurisdiction conferred upon the Board in the *PUA*. In the absence of any evidence that the proposed NEBs directly contribute towards EfficiencyOne's mandate to address electricity use, the Board would be acting outside of its statutory authority in relying on data of that nature to determine whether EfficiencyOne's activities are cost effective.

Further, the Industrial Group respectfully disagrees with EfficiencyOne's submission that the Board's 2018 Order approving the incorporation of avoided CO2 emissions into cost effectiveness testing represents a prior exercise of jurisdiction with respect to environmental protection measures unrelated to direct energy savings. The recommendation to account for the value of CO2 emissions in DSM cost effectiveness analysis was made by Synapse Energy Economics, a consultant engaged by Board counsel, on the basis that reduced load would reduce compliance costs with respect to the emissions target regulations governing Nova Scotia's power plants. Synapse further relied upon a study demonstrating that an increased level of energy efficiency programs would save CO2 emissions from the system while reducing the system wide cost for consumers.[8]

EfficiencyOne's own submissions adopting this recommendation clearly articulate the rationale for including this data in cost effectiveness testing as being on the basis that reduced CO2 emissions ultimately provided cost savings to rate payers:

> *Under a cap and trade system, NS Power will receive a compliance benefit for investing in DSM, which may take the form of either "avoided costs" (if NS Power would otherwise exceed its cap) or*

[6] EfficiencyOne Submissions, February 24, 2020, at pages 12-13.

[7] EfficiencyOne Submissions, February 24, 2020, at page 13.

[8] M08604, Evidence of Alice Napoleon, June 13, 2018 at page 21.

> *"additional revenue" (if NS Power is under its cap and can sell credits). Under either scenario, DSM would be providing an additional cost savings to ratepayers, and such savings should be included in future cost effectiveness testing.*[9]

In the context of the applicable environmental regulations, avoided CO2 emissions directly correspond to one the franchise's mandated objectives to deliver activities, programs or plans relating to "the utilization or management by Nova Scotia Power Incorporated of its electrical system in a more cost-effective manner."[10]

The Industrial Group therefore submits that the Board's Order in that matter does not support an exercise of jurisdiction as it relates to the approval of the above-cited NEBs as argued by EfficiencyOne here. Instead, the benefit derived from the avoidance of CO2 emissions directly corresponds to energy reduction and cost effective delivery of electricity; the same cannot be said for the presently proposed NEBs..

By way of further contrast, the Industrial Group points to the Board's explicit mandate to account for non-gas benefits when it is required to consider applications for a gas distribution franchise under the authority of the *Gas Distribution Act*, SNS 1997, C.4 and *Gas Distribution Regulations* ("GIC Regulations"). As part of the gas franchise evaluation, an applicant is required to submit a Socio-Economic Impact Statement that includes a "benefits plan"[11].

The nature of the impacts and benefits which may form the subject of such a plan extend far beyond those directly associated with the use of gas and its cost. Some of these were described by Gardner Pinfold in the 2003 franchise application which extended the franchise of Heritage Gas to the Counties of Cumberland, Colchester, Pictou and Halifax, the Municipality of the District of East Hants and the Goldboro area of Guysborough County[12]. As planned, the proposal would have a positive impact during development through the supply of goods and services by NS companies and individuals, increase the provincial GDP, increase employment, and increase tax revenues. On an ongoing basis, benefits contemplated included savings from lower energy spending by customers, greater inter-fuel competition, environmental benefits from reduced SO_2, CO_2 and NOx emissions and reduced risk of oil spills as gas market share increases. The study also discussed constraints on land use and nuisance.

While the NEBs proposed for cost-effectiveness testing are not on all fours with what's considered in a benefits plan which forms part of a Socio-Economic Impact Statement for a gas franchise, they're the tip of the proverbial iceberg. The critical difference, of course, is that the Board is legislatively mandated to consider this type of expanded benefits in approving a gas franchise; not so with the efficiency franchise.

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[9] M08604, EfficiencyOne Reply Submissions, June 20, 2018 at page 5.

[10] *PUA*, s. 79A(b)(iv).

[11] GIC Regulations s. 5(c).

[12] 2003 NSUARB 8 at para. 86.

Moreover, given that the *Gas Distribution Act and Regulations* were in place long before the *Electricity Efficiency and Conservation Restructuring (2014) Act*, it can be presumed that the omission of explicit direction to the Board to consider NEBs was deliberate.

CONCLUSION

The Industrial Group respectfully submits that the *Public Utilities Act* does not provide the Board with the jurisdiction to take into account non-energy impacts in cost effectiveness testing in its assessment of proposed electricity efficiency and conservation activities.

Respectfully,

Nancy G. Rubin, Q.C.

NGR/SKJ

cc. Participants in M08888