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
REPLY SUBMISSIONS ON THE PRELIMINARY ISSUE OF JURISDICTION

FILED

March 23, 2020

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INTRODUCTION

EfficiencyOne is providing these reply submissions in accordance with the procedural process established by the Nova Scotia Utility and Review Board ("NSUARB") in correspondence dated February 10, 2020. Interested parties have set out their positions on this issue in comments provided to the NSUARB, two of which align with the position of EfficiencyOne on this discreet issue of jurisdiction, and two of which do not.

REPLY TO NS POWER SUBMISSIONS

Mandate of the NSUARB Under The Public Utilities Act

NS Power argues that the NSUARB's mandate under the Public Utilities Act is the dual role of ensuring that rates are just and reasonable and that safe and adequate service is maintained. NS Power refers to the NSUARB's decision in 2006 NSUARB 85 wherein the NSUARB referenced the comments of Chief Justice MacKeigan (as he then was) in *Nova Scotia (Public Utilities NSUARB) v. Nova Scotia Power Corp. (1976), 18 N.S.R. (2d) 692* that that scheme of regulation compels control by the NSUARB of all aspects of a utility's operation and that "[t]wo great objects are enshrined – that all rates charged must be just, reasonable and …. service must be adequately, efficiently and reasonably supplied". [1]

It is in the context of this position that NS Power proceeds to present its argument regarding the explicit and implicit powers of the NSUARB, which will be addressed further below.

The foundation upon which NS Power builds its argument is flawed and fails to consider the role of the NSUARB in regulating the evolving energy efficiency industry. The above statement of the Court of Appeal regarding the duties of the NSUARB was cited approvingly by the NSUARB prior to the relevant amendments to the *PUA* and do not reflect the role of the NSUARB respecting DSM regulation.

[1] NS Power Submissions, filed March 9, 2020, p. 8-9

The mandate of the NSUARB in relation to EfficiencyOne is to assess, and approve or reject, proposed energy efficiency and conservation activities on the basis of whether the proposed activities are in the best interests of customers, with regard to affordability and any other matters the NSUARB may consider appropriate to take into account[2].

NS Power refers to the decision of the NSUARB for the 2016-2018 DSM Plan at *2015 NSUARB 204*, where the NSUARB cited counsel for the Industrial Group in support of a limited role of the NSUARB, who stated "it is not the role of the NSUARB to prop up or sustain an industry… Job creation is a policy matter for the Province, not the NSUARB under the *Public Utilities Act*". [3]

Counsel for the Industrial Group's statement cited in the NSUARB's 2015 decision is not relevant to the jurisdictional issue in question. EfficiencyOne is not requesting that the NSUARB approve DSM plans in consideration of matters of public policy including job creation or maintenance of such. The NEB Application is not seeking authorization for the NSUARB to approve proposed DSM plans on the basis of NEBs, but rather that NEBs can be one of multiple factors considered in the cost-effectiveness testing employed by EfficiencyOne and relied on by the NSUARB. The NSUARB can permit the cost-effectiveness testing tool to include any number of considerations, as discussed below, and this does not, in any way, bind the NSUARB to an ultimate determination that any proposed activity is in the best interest of customers.

The NEB Application is seeking approval of a modification of the cost-effectiveness testing employed by EfficiencyOne and relied on by the NSUARB in assessing proposed DSM activities in order to better reflect the actual costs and benefits experienced by customers through various measures and programs. This aligns directly with the explicit statutory mandate of the NSUARB to assess proposed DSM activities on the basis of whether the proposed activities are in the best interests of customers, with regard to affordability and **<u>any other matters</u>** the NSUARB may consider appropriate to take into account.

[2]Public Utilities Act, R.S.N.S. 1989, c. 380, s. 79(L)(9)
[3] NS Power Submissions, filed March 9, 2020, p. 10

Explicit and Implicit Powers of the NSUARB

NS Power relies on *ATCO Gas and Pipelines Ltd. V. EUB (2006), 2006 SCC 4* to argue that the NSUARB's right to consider NEBs must be expressly granted or must be implied to be necessary for the fulfillment of the NSUARB's intended mandate or objective under the PUA.[4]

NS Power argues that the PUA does not explicitly authorize the consideration of NEBs in cost-effectiveness testing. No factors to be considered in cost-effectiveness testing are explicitly referenced in the *PUA*. Notwithstanding this absence of express requirements, the NSUARB has in its previous decision[5] exercised its discretion in previously approving and amending the formula used for CE testing.

NS Power's analysis fails to reference the NSUARB's explicit authority to determine what matters are appropriate to consider in the assessment of whether proposed electricity efficiency and conservation activities are in the best interests of customers under section 79L(9) of the *PUA.* This was the focus of EfficiencyOne's initial submissions on this question and the basis for the NSUARB's jurisdiction.

The issue before the NSUARB is whether it has the jurisdiction to account for NEBs in cost-effectiveness testing, which is a central method employed in assessing proposed electricity efficiency and conservation activities. Although the NSUARB does not have an explicit power to account for NEBs, as stated by NS Power, it does have the explicit power to take into account affordability "along with any other matters considered appropriate by the NSUARB" in assessing whether DSM activities are in the best interests of customers.

NS Power attempts to rely on a statement from *ATCO Gas* regarding broad statutory powers of an administrative tribunal to require by Order, any person or local authority to do any act, matter or thing in any manner[6]. The Court rightfully found it would be absurd to allow the board in question an unfettered discretion to attach any condition it wishes to an order it makes. However, this is not relevant to the question before the NSUARB, which is not attempting to assert the NSUARB's jurisdiction to attach any condition it wishes to an order it makes. Rather, the question before the NSUARB is its jurisdiction to authorize the consideration of a factor in the CE testing used by EfficiencyOne and relied on by the NSUARB on the basis of a narrower statutory power under the *PUA*.

[4] NS Power Submissions, filed March 9, 2020, p. 8, lines 9-13
[5] Efficiency Nova Scotia Corporation (Re), 2011 NSUARB 99
[6] NS Power Submissions, filed March 9, 2020, p. 11, lines 11-31

These statutory powers are inherently different, one addressing the power to impose any condition seen fit, and the other the power to take into consideration an additional factor as part of an overall review and approval of a full DSM Plan. The treatment of the proposed statutory authority in *ATCO Gas* is not relevant to the authority of the NSUARB to take into account any matters it "considers appropriate" in assessing proposed DSM activities – the later broad authority being specifically permitted by the legislation

NS Power asserts that "The exercise of any such authority must also be "necessary" for the NSUARB to carry out its role as the regulator of public utilities under the *PUA*". The statutory power dealt with by the Court in *ATCO Gas* is clearly distinguishable from the authority in question. NS Power attempts to assert a conclusion regarding the exercise of a discretionary power that is inherently different than that which is at issue before the NSUARB. Conclusions should not be drawn on the basis of a statutory power irrelevant to the source of the jurisdiction of the NSUARB to take into account any matter it considers relevant. There is nothing in NS Power's analysis, the *PUA* or the overarching context of the Board's role to suggest that an exercise of discretion may only be that which is "necessary" for the NSUARB to carry out its role as regulator.

NS Power also relies on the Federal Court of Appeal Case in *Reference Re National Energy Board Act, 69 N.R. 174,* where the issue was the jurisdiction of the National Energy Board to award costs. NS Power argues the "necessary and proper" qualifier in *Re NEB* is similar to the "proper and necessary" language in s. 116(2) of the *PUA*, and undertakes an analysis of the broad powers of the NSUARB under s. 116(2). However, that section is not relied on in support of the position of EfficiencyOne that the NSUARB has the jurisdiction to take into account any matter it considers appropriate in assessing proposed DSM activities. NS Power's analysis surrounding what is "necessary" in the context of explicit powers is not relevant to the position taken by EfficiencyOne, as it is framed in the context of a provision that has not been relied on by EfficiencyOne as the authority for the jurisdiction in question. The provisions in question are the express powers under s. 79L(8) and (9), rather than the broad power under s. 116(2) that is not relied on in support of EfficiencyOne's position on the jurisdiction of the NSUARB.

NS Power characterizes the issue before the NSUARB as depending upon an implicit power of the NSUARB grounded in the doctrine of jurisdiction by necessary implication despite the existence of the explicit power of the NSUARB to determine what is appropriate to take into account in assessing proposed DSM activities[7]. The intention of the legislature in granting the NSUARB the broad and explicit authority to determine what is appropriate to consider in assessing DSM activities should not be ignored.

Standard of Review

In response to NS Power's argument regarding standard of review, EfficiencyOne submits that the suggested interpretation is not only reasonable, but is the only possible correct interpretation of the NSUARB's powers under sections 79L(8) and (9). The PUA clearly establishes an explicit power of the NSUARB to take into account any matters considered appropriate in its assessment of proposed electricity efficiency and conservation activities. The undeniable intention of this section of the legislation is to authorize the NSUARB to exercise a broad discretion in determining appropriate consideration in the approval of proposed DSM activities. While the NSUARB must, under the legislation, consider affordability in approval of DSM Plans submitted for approval by the DSM utility, it is in no way limited with regard to other factors that it may wish to take into consideration in this context. The weight and degree to which the NSUARB factors in consideration of NEBs is not relevant in this preliminary matter – merely whether the legislation allows for the possibility that this factor being given any degree of consideration whatsoever.

Hansard

EfficiencyOne respectfully suggests that NS Power is incorrect to suggest the reference to the Hansard in EfficiencyOne's submissions is an attempt to extend the powers of the NSUARB to spheres not granted by the legislature. The jurisdiction-conferring provisions in question provide the NSUARB with the broad discretion to determine what is appropriate in considering whether proposed DSM activities are in the best interests of customers. The reference to the Hansard in EfficiencyOne's submissions is intended to highlight the fact that EfficiencyOne, as the DSM provider created by legislation, is not simply intended to reduce electricity consumption, but also to further the protection of our environment.

[7] PUA, supra, s. 79(L)(9)

Although this appears to address the merits of inclusion of NEBs in CE testing rather than the jurisdiction of the NSUARB to approve such inclusion, it indicates that what the NSUARB may consider appropriate to take account of in assessing proposed DSM activities is not limited to matters that relate directly to the reduction of energy consumption, as the function of EfficiencyOne as regulated DSM provider extends beyond that goal, and also incorporates matters such as environmental protection. This position is bolstered by the NSUARB Order of July 23, 2018 requiring the incorporation of avoided C02 emissions in cost-effectiveness analysis. However, this is largely an issue better left for the NEB application itself, as it does not impact the jurisdiction of the NSUARB to determine what is appropriate to take into account in assessing proposed DSM activities.

Other Jurisdictions

EfficiencyOne agrees with NS Power that there are important differences between the enabling legislation of Maryland and Nova Scotia. The provision cited by NS Power, §7-211(i)(1), requires that the Commission, in assessing proposed DSM activities, consider:

(i) the impact on jobs;

(ii) the impact on the environment;

(iii) the impact on rates; and

(iv) the cost-effectiveness.

NS Power argues that the Maryland Commission is explicitly authorized and required to account for NEBs in assessing DSM activities by inclusion of impacts on jobs and the environment. However, NEBs accounted for in Maryland, similarly to those proposed to be accounted for in Nova Scotia, extend far beyond the narrow spheres of impacts on jobs and the environment. They relate to a diverse range of non-energy related benefits experienced by customers, and by and large, do not include benefits related to impacts on jobs or the environment at all.

NS Power's submission fails to note that §7-211(i)(1) of the legislation requires that the Maryland Commission consider these four explicit categories, "**among other factors**". The Maryland legislation does not include the same explicit language of the the PUA which empowers the NSUARB to take into account any “other matters considered appropriate by the Board” in assessing DSM activities[8].

Nonetheless, this provision was considered to be sufficient to enable the Maryland Commission to account for NEBs unrelated to jobs or the environment in cost-effectiveness testing relied on in assessing proposed DSM activities.

REPLY TO INDUSTRIAL GROUP SUBMISSIONS

The Industrial Group submitted that the NSUARB does not have jurisdiction to take into account non-energy benefits because (1) NEBs do not bear any relevance to EfficiencyOne’s statutory mandate to undertake electricity efficiency and conservation activities, and (2) the discretionary power of the NSUARB must be exercised within the boundaries of its defined jurisdiction.

Relevance of NEBs to EfficiencyOne’s Statutory Mandate

The Industrial Group submissions rely on a narrow characterization of the potential impact of including NEBs in cost-effectiveness testing, which is not supported by the materials provided in the course of the NEB application itself. A central feature of both parties’ positions posits that because the inclusion of NEBs in cost-effectiveness testing does not have the potential to address electricity use it would not be an appropriate factor for the NSUARB to include in cost-effectiveness testing. This is not only an argument on the merit of the NEB application itself, but it also misrepresents the potential impacts from the proposed inclusion of NEBs on electricity use and savings.

Inclusion of NEBs in CE testing has the potential to reduce consumption, increase conservation and ultimately result in electricity related savings to customers. In part, this is due to the potential to increase the number of measures that satisfy the CE testing and can be implemented by EfficiencyOne as part of its DSM activities. Although this is an argument on the merits of the NEB Application, the repeated mischaracterization of the relation between the inclusion of NEBs in CE testing and the impact on electricity usage and savings warrants clarification. It is respectfully submitted that whether or not a

[8] Ibid.

non-energy benefit has a direct impact on the furtherance of EfficiencyOne's mandate has not yet been determined and it cannot be said that NEBs do not directly impact or further EfficiencyOne's mandate. This is a question to be determined as part of the NEB Application itself.

C02 Emissions

The Industrial Group states "the benefit derived from the avoidance of CO2 emissions directly corresponds to energy reduction and cost effective delivery of electricity" and that "the same cannot be said for the presently proposed NEBs". EfficiencyOne submits this also goes to the merits of the NEB Application. The Industrial Group's statement is not supported by the submissions and IR responses filed by EfficiencyOne on the NEB Application itself. The inclusion of NEBs in CE testing has the potential to directly impact energy consumption, and whether or not it does so is a question to be determined in the NEB Application, as discussed above

Gas Distribution Act and Regulations

The Industrial Group further refers to the NSUARB's explicit mandate to account for non-gas benefits when considering an application for a gas distribution franchise. The purpose of the Gas Distribution Act was to provide a framework for the orderly development and operation of a gas delivery system in Nova Scotia, and to allow for fair competition in the sale and consumption of natural gas in the Province.

CONCLUSION

Respectfully, the submissions provided by those interested parties in opposition to the position taken by EfficiencyOne attempt to conflate the jurisdictional question presently before the NSUARB with the ultimate question of the merit of the overarching NEB application. These submissions wrongly suggest that the approval of the NEB application would lead to the NSUARB approving DSM plans on the basis of policy matters. The degree to which, if at all, the NSUARB considers NEB's in any subsequent review of a DSM plan, is not relevant to the narrower question of whether consideration of these factors is even permitted by the legislation.

This argument should not distract from the issue currently under consideration by the NSUARB, which is whether it has the authority to consider NEBs in cost-effectiveness testing used to assess proposed DSM activities. Whether it is, in fact, appropriate to account for NEBs is the issue to be determined in the NEB Application itself, and consideration must be paid to the subtle distinction between these two questions. Finally, the inclusion of NEBs in cost-effectiveness testing would not lead to the NSUARB approving DSM plans on the basis of policy matters, as the cost-effectiveness testing is one factor used in assessing proposed activities, and does not dictate whether the NSUARB will approve a proposed DSM Plan.

EfficiencyOne submits that the PUA clearly confers broad discretion on the NSUARB to take into consideration "other matters it considers appropriate" in assessing DSM plans. The degree to which the NSUARB may do so, in the future proceedings, will likely be the subject of vigorous debate. However, EfficiencyOne should not be denied an opportunity to make this argument on the merits - on the basis that mere consideration is beyond the scope of the legislation and the authority of the NSUARB.

All of which is respectfully submitted.