DECISION

2020 NSUARB 56
M08888

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

- and -

IN THE MATTER OF an application by **EFFICIENCYONE** for approval for the use of measure-level Non-Energy Benefits within the context of Cost-Effectiveness testing associated with future Demand Side Management (DSM) planning regulatory processes

BEFORE: Peter W. Gurnham, Q.C., Chair
Roberta J. Clarke, Q.C., Member
Stephen T. McGrath, LL.B., Member

APPLICANT: **EFFICIENCYONE**
James Gogan, Counsel

INTERVENORS: **CONSUMER ADVOCATE**
William L. Mahody, Q.C.

SMALL BUSINESS ADVOCATE
E.A. Nelson Blackburn, Q.C.

AFFORDABLE ENERGY COALITION
Brian Gifford

ECOLOGY ACTION CENTRE
Emma Norton

INDUSTRIAL GROUP
Nancy Rubin, Q.C.

NOVA SCOTIA POWER INCORPORATED
Brian Curry, Counsel

BOARD COUNSEL: S. Bruce Outhouse, Q.C.

FINAL SUBMISSIONS:	March 23, 2020
DECISION DATE:	**April 15, 2020**
DECISION:	The Board does not have the jurisdiction to take into account non-energy impacts in cost-effectiveness testing.

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1.0 INTRODUCTION

[1] EfficiencyOne applied to the Nova Scotia Utility and Review Board on September 19, 2018, for approval to use measure-level non-energy benefits for cost-effectiveness testing associated with future DSM planning regulatory processes. The Board issued an Order dated October 1, 2018, establishing a timetable leading to a hearing commencing January 8, 2019; however, by letter dated November 22, 2018, EfficiencyOne requested that regulatory proceedings in this application be deferred in order to enable additional consultation with participants.

[2] On November 23, 2018, the Board raised the issue of jurisdictional authority in correspondence to EfficiencyOne granting the Order to defer the proceedings. The Board's letter stated:

> …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.

[3] EfficiencyOne, by letter dated February 5, 2020, requested the Board establish a timeline to consider whether the Board has jurisdiction to take into account non-energy impacts in the context of cost-effectiveness testing. With the agreement of NS Power, the Consumer Advocate, Small Business Advocate, Industrial Group and EfficiencyOne, the question put to the Board is:

> 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?

[4] For the reasons outlined in this Decision, the answer to the question is "no", the Board does not have the jurisdiction to take into account non-energy impacts in cost-effectiveness testing.

2.0 DECISION AND ANALYSIS

2.1 Non-Energy Benefits

[5] Information about non-energy benefits from the Vermont Energy Investment Corporation is contained in a report filed by EfficiencyOne with its original application. That report recommends the inclusion of a number of specified non-energy benefits in the Total Resource Cost Test to judge the cost-effectiveness of proposed EfficiencyOne measures. The Industrial Group, in its submission, outlined a summary of the cost-effectiveness measures contained in the Vermont Energy evidence.

> While the specifics of EfficiencyOne's proposed integration of [non-energy benefits] 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 [Non-Energy Benefit] Application.

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	

[Exhibit E-11, p. 2]

2.2 Legislation

[6] The Board is a statutory regulatory body created by the *Utility and Review Board Act*, S.N.S. 1992, c. 11. The Board's functions, powers, duties and jurisdiction are outlined 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; and

(b) the Governor in Council.

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.

[7] The Board's duties and the scope of its authority in regulating public utilities is set out generally in the *Public Utilities Act.* The regulation of EfficiencyOne specifically is outlined in the various components of Sections 79A to 79V of that *Act*. The following provisions are relevant to the question to be determined in this proceeding.

[8] Electricity efficiency and conservation activities is defined in Section 79A as follows:

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,

(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;

[9] The statutory regime requires NS Power to enter into an agreement with the franchise holder (currently EfficiencyOne) 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;

(c) describe the electricity efficiency and conservation activities that the franchise holder will provide to Nova Scotia Power Incorporated; and

(d) identify the amount that Nova Scotia Power Incorporated will pay to the franchise holder for the supply of electricity efficiency and conservation activities.

[10] The agreement must be approved by the Board. Sections 79L (8) and (9) set out the basis for the Board's evaluation of a proposed agreement between NS Power and a franchise holder.

Board's approval of agreements

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.

[11] Under Section 79H of the *Act*, the Board is required to determine the electricity efficiency and conservation activities to be undertaken.

Board determines required activities

79H The Board shall determine the cost-effective electricity efficiency and conservation activities that must be undertaken for the purpose of this Act.

2.3 Positions of the Parties

2.3.1 EfficiencyOne

[12] EfficiencyOne argued that the Board has jurisdiction to decide what is in the best interests of customers and the appropriate factors to consider in that assessment, including how cost-effectiveness is determined. EfficiencyOne noted that the *Public Utilities Act* provides the Board with broad discretion and jurisdiction to determine what factors are relevant in the assessment of customers' best interests. It submitted that a reasonable interpretation of best interests is not restricted to best interests strictly in the context of electricity savings.

[13] EfficiencyOne referenced the fact that cost-effective electricity efficiency is referenced in Sections 79H and 79L(1) of the *Public Utilities Act* and draws the conclusion that the Legislature intended cost-effectiveness of activities to fall squarely within the jurisdiction of the Board. It argued that, had the Legislature intended the best interests of customers to 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. EfficiencyOne also said, while the primary objective of the Province in establishing an independent demand-side management provider was to reduce electricity use, another objective was the protection of the environment at the lowest cost to Nova Scotians.

[14] In relation to Section 79H specifically, EfficiencyOne argued that inclusion of "cost-effective" in relation to electricity efficiency and conservation activities means the

Legislature intended the cost-effectiveness of such activities to fall squarely within the Board's jurisdiction.

[15] EfficiencyOne pointed to other jurisdictions, particularly the State of Maryland, as precedent for the broad inclusion of non-energy benefits. However, NS Power, in its submission, pointed out that certain non-energy benefits are explicitly provided for in the legislation governing DSM in Maryland.

2.3.2 Industrial Group

[16] The Industrial Group reviewed the provisions cited above concerning the Board's jurisdiction to regulate the activities of EfficiencyOne and said that nowhere can it be inferred that the Board is authorized to take into account incidental effects of these activities beyond their direct impact on electricity use. The Industrial Group noted that EfficiencyOne based its jurisdictional argument primarily on Section 79L(8), relying on the words "is in the best interests of Nova Scotia Power Incorporated's customers". The Industrial Group stated:

> 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."
>
> 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 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 <u>electricity-based</u> 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 [non-energy benefits] in cost effectiveness testing. 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. 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 [non-energy benefits] 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. [Emphasis added in original.]
>
> [Exhibit E-11, pp. 5-6]

2.3.3 NS Power

[17] NS Power took the position that the Board's discretion must be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, and that the ultimate goal is contained in Section 79L(9) of the *Public Utilities Act*. The Board must take into account affordability along with any other matters considered appropriate. It argued the Board is not a proxy for policy implementation. NS Power stated there is no express power in the Board to take non-energy benefits into account and it cannot be done by necessary implication.

[18] NS Power cited with approval the principles of statutory interpretation outlined by the Supreme Court of Canada in *Atco Gas Properties Limited v. EUB*, 2006 SCC 4:

> The interpretation of the relevant legislation must be done through the lens of the PUA. As the Supreme Court of Canada stated in *ATCO Gas and Pipelines Ltd. v. EUB (2006)*, 2006 SCC 4 (*ATCO Gas*) [Tab 1] at paragraph 50, a "Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation".
>
> The Court at paragraph 38 of *ATCO Gas*, stated that in addition to Driedger's Modern Principle, in the area of administrative law, the jurisdiction of tribunals and boards over

matters is obtained from two sources: express grants of jurisdiction under various statutes (explicit powers); and, the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers).

This is discussed further at paragraph 51 of *ATCO Gas*:

> …[t]his rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statue are construed to *include* not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.

Therefore, the jurisdiction required for the Board to take into account non-energy impacts in cost effectiveness testing when assessing electricity efficiency and conservation activities must be expressly granted in the language of the relevant legislation or, failing such, the jurisdiction to do so, and as follows the action, must be implied to be necessary for the fulfillment of the Board's intended mandate or objective under the PUA.

As stated by the Court in *ATCO Gas* at paragraph 7:

> …<u>The Board's seemingly broad power to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes</u> which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. <u>The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.</u> [emphasis added]

[Exhibit E-13, pp. 7-8]

[19] NS Power stated there is neither an explicit power in the *Public Utilities Act* nor an implicit power in the Board to take into account non-energy benefits. Again, relying on the *Atco Gas* decision, NS Power stated:

> On the basis of the foregoing, despite the broad powers granted in s. 116(2) of the PUA, the Board's discretion in exercising its authority is fettered in that the exercise of any authority must be grounded within its main function of ensuring that rates are just and reasonable and that safe and adequate service is maintained. The exercise of any such authority must then also be "necessary" for the Board to carry out its role as the regulator of public utilities under the PUA.
>
> Accounting for non-energy impacts in cost effectiveness testing is not necessary for or relevant to the Board's broad regulatory role or, more specifically, the objective set out in s. 79I(1) of reducing electricity rates for NS Power customers. Consequently, the Board does not have the jurisdiction to account for or consider them in cost effectiveness testing.

[Exhibit E-13, pp. 11-12]

[20] NS Power referenced a Federal Court of Appeal decision, *Reference Re National Energy Board Act*, (1986) 69 N.R. 174. At issue there was the jurisdiction of the National Energy Board to award costs. The *National Energy Board Act* was silent on costs. The Court, after an examination of the implicit and explicit jurisdiction of the National Energy Board to award costs, found no such jurisdiction existed:

> In *Re NEB*, Heald J. for the Court asserted the following in rejecting the explicit jurisdiction of the NEB to award costs at paragraph 9:
>
> > As was pointed out by some of the counsel opposing the Board's jurisdiction, the Board has effectively operated for many years without awarding costs. It can, therefore, hardly be said that such a power is "necessary" for the exercise of its jurisdiction. It might well be argued that the Board would operate more effectively with that power but such a circumstance does not make such a power necessary to its exercise of jurisdiction.
>
> [Exhibit E-13, pp. 12-13]

[21] Relying on this decision, NS Power argued there is no basis for implicitly granting the Board the jurisdiction to take into account non-energy benefits.

[22] EfficiencyOne, in its reply submission, attempted to isolate whether the Board has jurisdiction to approve non-energy benefits from the decision as to whether any non-energy benefits should be considered.

[23] EfficiencyOne attempted to distinguish the National Energy Board costs case on the basis that the argument in this proceeding is based on the express powers in Section 79L (8) and (9) of the *Public Utilities Act*.

2.3.4 Findings

[24] The starting point in this analysis is to clearly understand the Board's role in regulating EfficiencyOne and what electricity efficiency and conservation activities mean. Sections 79H and 79I(1) state as follows:

> **79H** The Board shall determine the cost-effective electricity efficiency and conservation activities that must be undertaken for the purpose of this Act.

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.

[25] Section 79A(b) states:

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,

(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;

[26] Sections 79L (8) and (9) guide the Board's assessment of these activities. The Board must be satisfied "the proposed electricity efficiency and conservation activities" that are the subject of the agreement are in the best interest of NS Power's customers and the Board must take into account "their affordability to Nova Scotia Power Incorporated's customers along with any other matter considered appropriate by the Board or as may be prescribed."

[27] Both EfficiencyOne and NS Power pointed to the broad powers granted to the Board pursuant to Section 116(1) of the *Public Utilities Act*:

Interpretation and construction of Act and powers of Board

116 (1) This Act shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Board by the provisions of this Act, the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this Act conferred on the Board.

[28] While it is true the Legislature has entrusted the Board with broad powers, it is incumbent upon the Board to exercise those powers prudently and carefully.

[29] The principles of statutory interpretation apply when interpreting the *Public Utilities Act*. In determining the intent of any particular statute, this Board is aware of *Verdun v. Toronto Dominion Bank,* [1996] 3 S.C.R. 550, and cases following it (see, for example, *Chartier v. Chartier,* [1998] S.C.J. No. 79; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27), which make it clear that the Supreme Court of Canada has adopted what it calls the "modern contextual approach" to legislative interpretation, supplanting earlier rules it has supported, such as the "equitable construction approach", the "plain meaning rule", and the "golden rule".

[30] In *Re Rizzo & Rizzo Shoes Ltd.*, Mr. Justice Iacobucci said:

> ...Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p.87, he states:
>
>> Today there is only one principle or approach, namely, 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.

[31] In a recent judgment, the Nova Scotia Court of Appeal reiterated the modern principle of statutory interpretation in *Sparks v. Holland*, 2019 NSCA 3. Farrar, J.A., stated:

> [27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he 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 (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21).
>
> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.
>
> [29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slauenwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:

1. What is the meaning of the legislative text?
2. What did the Legislature intend?
3. What are the consequences of adopting a proposed interpretation?

[32] The Board must also have regard to the *Interpretation Act*, R.S.N.S. 1989, c. 235, including ss. 9(1) and 9(5):

> **9(1)** The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> **9(5)** Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (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.

[33] The Board's principal responsibility in regulating utilities is to ensure:

a) safe and adequate service;

b) just and reasonable rates;

c) lowest long-term cost.

[34] The Board also has an over-arching public interest mandate in everything it does.

[35] With regard to EfficiencyOne specifically, the Legislature has given the Board further instruction with respect to affordability and the best interests of ratepayers. EfficiencyOne argued that "in the best interests of Nova Scotia Power Incorporated's customers", in the absence of any limiting language, allows "a cumulative consideration of the diverse interests of the customer" in a manner that accounts for the unrestrictive range of costs and benefits.

[36] EfficiencyOne also argued that a legislative intention for the Board to account for a broader environmental context when considering the best interests of customers under the *Public Utilities Act* was evidenced in comments made by the Minister of Energy in 2009, when the bill leading to the enactment of the *Efficiency Nova Scotia Corporation Act*, S.N.S. 2009, c. 3, was introduced in the House of Assembly. EfficiencyOne replaced the Efficiency Nova Scotia Corporation as the demand-side management provider in 2014.

[37] The Board agrees with the submissions of the Industrial Group that the open-ended interpretation urged by EfficiencyOne is not appropriate. The Board's jurisdiction, as noted by the Industrial Group, is to determine what is in the best interests of customers and must be necessarily limited by the statutory definition of "electricity efficiency and conservation activities" outlined in Section 79A(b).

[38] The Board interprets the comments of the Minister of Energy cited by EfficiencyOne in relation to the *Efficiency Nova Scotia Corporation Act* as simply acknowledging that there are also environmental benefits associated with using less electricity. Neither the purposes of that *Act* set out in s. 2 nor the objects of Efficiency Nova Scotia Corporation set out in s. 8 included a separate environmental mandate for the corporation. In any event, statutory amendments in 2014 all but eliminated that corporation when the *Electricity Efficiency and Conservation Restructuring (2014) Act*, S.N.S. 2014, c. 5, added Sections 79A to 79V to the *Public Utilities Act*. The new legislation requires NS Power to undertake cost-effective electricity efficiency and conservation activities that are reasonably available in an effort to reduce the costs for its customers by entering into an agreement with the holder of the electricity efficiency and

conservation franchise granted under s. 79C of the *Act*. The Board does not interpret anything in the amendments to the *Public Utilities Act* as establishing an environmental mandate or jurisdiction under the *Act.*

[39] The Board agrees with the Industrial Group that to interpret "broad discretion" as a license for the Board to exercise regulatory oversight functions in respect of matters beyond that which is clearly contemplated by Section 79A of the *Public Utilities Act* misinterprets the jurisdiction conferred by the *Public Utilities Act*.

[40] The Board cites with approval the passage noted above in *Atco*:

> …The Board's seemingly broad power to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system. [Emphasis added]
>
> [Exhibit E-13, p. 8]

[41] The Board agrees with the Industrial Group that, in the absence of any evidence to suggest that non-energy benefits directly contribute towards EfficiencyOne's mandate to address electricity use, the Board would be acting outside the scope of its statutory authority by considering such benefits.

[42] The Board refers back to certain of the non-energy benefits referenced in the Vermont Energy evidence, such as noise reduction, property value, reduction in labour costs, health benefits and an array of environmental benefits. Such a broad array of considerations cannot be squared with the definition of electricity efficiency and conservation activities in the *Public Utilities Act*.

[43] EfficiencyOne stated that the use of the term "cost-effective" in Sections 79H and 79I(1) of the *Public Utilities Act* means that the Legislature intended the cost-

effectiveness of such activities to be a matter falling within the Board's jurisdiction. The Board acknowledges that cost-effectiveness is an integral part of the administration of DSM activities and the Board currently uses the well-established Total Resource Cost Test. There are other measures such as the Program Administration Cost Test which the Board could also use if it chose to do so. The question here is not whether the Board can use cost-effectiveness in reviewing energy efficiency programs; the Board does. The question here is whether the Board can include non-energy benefits.

[44] As noted, EfficiencyOne in its Reply Submission, attempted to isolate whether the Board has jurisdiction to approve non-energy benefits from the decision as to whether any non-energy benefits should be considered. While that is a valid point, the Board has to examine what non-energy benefits are in order to consider the jurisdictional question. Non-energy benefits stray far away from the Board's core mandate.

[45] NS Power cited *Reference Re National Energy Board Act*, a decision of the Federal Court of Appeal which examined Section 10(3) of the *National Energy Board Act*, as it then was, and considered whether the words "and other matters necessary or proper for the due exercise of its jurisdiction" provided the National Energy Board with the authority to order costs where the *National Energy Board Act*, at that time, did not expressly do so. The Court found that the National Energy Board did not have that authority.

[46] The power to award costs, which was denied to the National Energy Board, seems more aligned to the core functions of the National Energy Board than non-energy benefits are to the core functions of the Utility and Review Board in overseeing the

electricity efficiency and conservation franchise holder as a public utility, yet the Federal Court of Appeal found that the National Energy Board did not have those powers.

[47] The Board finds that "cost-effective" means considering the "electricity efficiency and conservation activities" of EfficiencyOne, as defined in the *Public Utilities Act*, to determine whether they are "affordable" and result in the lowest long-term cost of electricity.

3.0 CONCLUSION

[48] The Board was asked the following question by the parties to this proceeding:

> 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?

[49] For the reasons outlined in this Decision, the answer to the question is "no", the Board does not have the jurisdiction to take into account non-energy impacts in cost-effectiveness testing.

[50] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 15th day of April, 2020.

Peter W. Gurnham

Roberta J. Clarke

Stephen T. McGrath