FW: ASC - Privileged and Confidential

From: "McKenzie, Ashley (MAG)" <ashley.mckenzie2@ontario.ca>
To: "Bromm, William (CAB)" <william.bromm2@ontario.ca>
Date: Mon, 18 Dec 2017 09:33:33 -0500

Hi William,

This is FYI only and further to our emails on the ASC's settlement offer. Blakes has produced a legal opinion for ENE on the settlement offer. It is below.

I understand that ENE is briefing its MO this morning.

Ashley McKenzie
Counsel to the Deputy Attorney General
Tel.: 416-326-2055

From: KRANE, JOSHUA <JOSHUA.KRANE@blakes.com>
Date: Saturday, Dec 16, 2017, 3:09 PM
To: Murray, Maud (ENERGY/MEDG/MRIS/MOI) <Maud.Murray3@ontario.ca>, Thouin, Alena (ENERGY) <Alena.Thouin@ontario.ca>
Subject: RE: ASC - Privileged and Confidential

Privileged and Confidential

Dear Maud and Alena,

You asked for an assessment of three issues in contemplation of a proposed resolution with the ASC. Set out below is (A) a brief summary of the context, (B) the ASC's proposal and (C) responses to your questions.

A. Context

- On May 4, 2017, the MOE received a letter from the ASC enclosing a copy of a consumer complaint regarding a 30-second radio commercial for the Ontario Fair Hydro Plan ("**OFHP**").

- On May 18, 2017, the MOE provided a response to the ASC in respect of that commercial. MOE indicated in that letter that the radio commercials were no longer in market.

- On July 5, 2017, the second phase of the OFHP advertising campaign commenced.

- On August 14, 2017, MOE received a second letter from the ASC enclosing three new complaints regarding the (new) 30-second commercials. ASC requested a response from the MOE by September 19, 2017. Following discussions with the ASC, the ASC extended the deadline to October 6, 2017.

- Further to an October 3, 2017 call with the ASC, the ASC agreed to an extension for a response until October 31 on condition that 1) no new ads are run and 2) minor adjustments are made to the MOE OFHP webpage.

- On October 31, 2017, MOE submitted a response to the ASC.

- On November 13, 2017, ASC provided feedback on the MOE response. ASC determined that the 25% reduction claim does not contravene the *Canadian Code of Advertising Standards* subject to the MOE confirming that “electricity bills to hydro’s customers will be lowered, on average, by 25% effective now; and, for the next four years, any increases to these reduced rates will not exceed the annual rate of inflation”. ASC did not agree with the MOE’s submissions regarding the other claims but invited a reply from the MOE.

- ASC has pressed for a reply from the MOE. On December 1, 2017, ASC was advised that the reply would be submitted on December 15, 2017. On December 13, 2017, MOE asked the ASC for an extension on the reply deadline.

- On December 15, 2017, ASC provided the proposed resolution.

B. Proposed Resolution

- In consideration for closing its file, ASC requires that MOE agree to the following statement by no later than Monday, December 18, 2017 at 5 pm.

  “ Since the advertising in question is not now being circulated or distributed anywhere to the public, and has not over the past several months, the advertiser has decided not to revive the same advertising now, or in the future.”

- ASC has also advised that if and when the MOE develops new OFHP advertising, it would be “***well advised to consult with [the ASC] for its advice on whether, in the [ASC’s] opinion, the new advertising may raise issues under the Code***.” This statement is not expected to form part of the response to the ASC.

C. Questions for Consideration

1. Does the language in the statement from ASC bind future governments?

- No . The ASC is not a court and does not have any power to compel action. Its authority derives from its ability to use suasion to cause an advertiser to withdraw its advertising or alter it to conform to the Code.

- The ASC has invited the MOE to consult on any future advertising around the OFHP in advance of running that advertising. The ASC still has concerns about the potential false/misleading nature of certain claims, particularly the claims that “recent changes have made electricity bills more affordable” (“**affordability claim**”) and “upgrades to our electricity system have made it more reliable for all Ontarians” (“**reliability claim**”).

- MOE is not under any obligation to consult with the ASC; however, if the MOE or the government elects to run new OFHP advertising without reaching out to the ASC in advance, the ASC is highly unlikely to afford the MOE the same courtesy of delaying a decision to refer the advertising to a Standards Council as it did in this case.

- A Standards Council is comprised of ad executives and lawyers who can issue a public decision regarding whether advertising contravenes the Code. Failure to comply with a decision of the Standards Council can result in the ASC filing a complaint with the Competition Bureau and asking broadcasting media to discontinue the advertising.

2. Does the language in the statement from ASC only covers TV/Radio ads?

- We can reasonably infer this from the ASC’s proposed statement from the words “circulated” and “revive”.

- The genesis of the complaint in this matter was the 30-second radio commercials.

- The ASC did not take issue with the MOE website other than a couple of minor sentences, which the MOE amended on October 5, 2017.

3. What is meant by 25% won’t be included? Is this because the ASC already ruled on the issue?

- The ASC has strongly suggested that the MOE consult with the ASC prior to running any new OFHP advertising, including advertising that makes a 25% reduction claim.

- However, the ASC's November 13, 2017 memo is clear that the 25% claim does not raise issues under the Code on the understanding that " electricity bills to hydro's customers will be lowered, on average, by 25% effective now; and, for the next four years, any increases to these reduced rates will not exceed the annual rate of inflation".

- Accordingly, if the MOE were to run new advertising limited only to the 25% claim (i.e., the advertising does not make an affordability or reliability claim), and consumers filed new complaints with the ASC, the MOE should reasonably be able to avoid a referral of the advertising to the Standards Council for a hearing.

- If the ASC were to raise a concern with new advertising, we would refer them to the November 13, 2017 memorandum. Note, however, that the MOE did **not** confirm the accuracy's of the ASC's understanding as requested in the memorandum, meaning that the ASC may require a formal response from the MOE before administratively resolving a new complaint.

4. Other considerations

- This resolution effectively terminates the matter without any public record.

- The only requested concession is for the MOE to consult with the ASC in advance of running new commercials.

- As noted above, this is not a binding requirement, but is advisable in the circumstances to maintain goodwill with the ASC and potentially mitigate a referral of any new OFHP advertising to a Standards Council.

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Please let me know if you have any further questions or wish to discuss on Monday by phone.

Regards,

Josh

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From: Thouin, Alena (ENERGY) [mailto:Alena.Thouin@ontario.ca]
Sent: Saturday, December 16, 2017 11:04 AM
To: KRANE, JOSHUA
Cc: Murray, Maud (ENERGY/MEDG/MRIS/MOI)
Subject: ASC

Hi Josh
Given things are moving quickly and we have allot to consider, we were hoping you can provide us an email opinion on the following issues to assist with the decision making:

1. Risk elements of agreeing to accept or reject the offer from ASC (assuming as you indicated this is a non-negotiable language)?
    a. In this considerations our stakeholders had the following inquiries which should be addressed:
        i. Does the language in the statement from ASC binds future governments?
        ii. Does the language in the statement from ASC only covers TV/Radio ads?
        iii. What is meant by 25% won't be included? Is this because the ASC already ruled on the issue?
2. Any additional considerations we should be aware of in helping our clients come to a decision.

Having all of these in one email would help everyone to understand and address any risks/ambiguities before making a decision. It would help to have by Monday am so we can hit the ground running.

Many thanks and feel free to reach out if you have any questions 416-873-0271.

Regards,
Alena