

RE: ASC Response to FHP advertising | next steps

From: "MacKenzie, Rebecca (OPO)" <"/o=govon/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=mackenzie, rebecca (opo)7a8">
To: "Berry, James (ENERGY)" <james.berry5@ontario.ca>
Cc: "Archer, Amy (MAG)" <amy.archer@ontario.ca>, "McPhail, Blane (OPO)" <blane.mcphail@ontario.ca>, "Bossin, Bryan (OPO)" <bryan.bossin@ontario.ca>
Date: Mon, 18 Dec 2017 16:45:36 -0500

Thx James. I've given the green light to CO as well

Sent with BlackBerry Work (www.blackberry.com)

From: "Berry, James (ENERGY)" <James.Berry5@ontario.ca>
Sent: Dec 18, 2017 4:31 PM
To: "MacKenzie, Rebecca (OPO)" <Rebecca.MacKenzie@ontario.ca>
Cc: "Archer, Amy (MAG)" <Amy.Archer@ontario.ca>; "McPhail, Blane (OPO)" <Blane.McPhail@ontario.ca>; "Bossin, Bryan (OPO)" <Bryan.Bossin@ontario.ca>
Subject: RE: ASC Response to FHP advertising | next steps

Understand from Atel that we're good to settle on this as a result of a conversation he had with you. But I wanted to close the loop that we're not able to have the "since" removed from the settlement language. We just received word from Blakes.

From: MacKenzie, Rebecca (OPO)
Sent: December-18-17 2:52 PM
To: Berry, James (ENERGY)
Cc: Archer, Amy (MAG); McPhail, Blane (OPO); Bossin, Bryan (OPO)
Subject: RE: ASC Response to FHP advertising | next steps

I'll be back to you by 3:30!

From: Berry, James (ENERGY)
Sent: December-18-17 2:43 PM
To: MacKenzie, Rebecca (OPO)
Cc: Archer, Amy (MAG); McPhail, Blane (OPO); Bossin, Bryan (OPO)
Subject: RE: ASC Response to FHP advertising | next steps

ASAP this afternoon. Mind you, in a briefing we had earlier this afternoon on our options, energy legal branch didn't seem too confident that the ASC would move away from the language in the statement.

We feel it makes sense to seek settlement regardless, but yeah, removal of the word since would make it an even more attractive option. What are thoughts on your side?

From: MacKenzie, Rebecca (OPO)
Sent: December-18-17 2:38 PM
To: Berry, James (ENERGY)
Cc: Archer, Amy (MAG); McPhail, Blane (OPO); Bossin, Bryan (OPO)
Subject: RE: ASC Response to FHP advertising | next steps

Thanks James, Co had given me a heads up too. When will we know about the "since"?

From: Berry, James (ENERGY)
Sent: December-18-17 1:59 PM
To: MacKenzie, Rebecca (OPO)
Cc: Archer, Amy (MAG); McPhail, Blane (OPO); Bossin, Bryan (OPO)
Subject: RE: ASC Response to FHP advertising | next steps

Important to note that I failed to mention in my previous email, the ASC is looking for a response from the Province by 5 p.m. today on whether or not we agree to the terms of the settlement.

From: Berry, James (ENERGY)
Sent: December-18-17 1:55 PM
To: MacKenzie, Rebecca (OPO)
Cc: Archer, Amy (MAG); McPhail, Blane (OPO); Bossin, Bryan (OPO)
Subject: FW: ASC Response to FHP advertising | next steps

Hi Rebecca,

Just wanted to provide you with an update. From our end, we feel the settlement path is the right approach here (context, background in the chain below). Blakes is going to engage with ASC's legal rep with respect to the language in the settlement statement in quotations below. The firm will see if the language can be modified, potentially removing the word "since".

"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."

For your reference, this language would be sent to the complainants (it's our understanding there were three total) along with a preface that the case has been closed as a result of the explanation in the statement. We feel this is the better approach, rather than sending another piece of correspondence to the ASC (defending the two outstanding claims of affordability and reliability) and risk the Council adjudicating the complaint(s). When a decision is made for the ASC to formally adjudicate, the government being a party would be made public.

I understand these options are now with CO for feedback, including William Bromm.

Let me know if you have any thoughts/concerns.

James

From: Chatterjee, Jeet (ENERGY)
Sent: December-17-17 6:17 PM
To: Berry, James (ENERGY); Whittington, Matt (ENERGY)
Cc: Schlaepfer, Martin (ENERGY); Berg, Denna (ENERGY); Armstrong, Hillary (ENERGY)
Subject: Re: ASC Response

Matt/James,

Please see further clarification from Blakes on the ASC issue. As requested by Andrew, We are setting up a briefing tomorrow.

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.

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Chatterjee, Jeet (ENERGY)
Sent: Friday, December 15, 2017 6:20 PM
To: Berry, James (ENERGY); Whittington, Matt (ENERGY)
Cc: Schlaepfer, Martin (ENERGY); Berg, Denna (ENERGY); Teliszewsky, Andrew (ENERGY)
Subject: Re: ASC Response

Since the ASC has given us till 5pm on Monday, they will likely be looking for a response by then (either accepting or rejecting the offer). We could ask for an extension to further consider their 'settlement', given that they sent it to us at 5pm today.

And yes, the alternative staff response will likely refer to both.

Jeet

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Berry, James (ENERGY)
Sent: Friday, December 15, 2017 6:11 PM
To: Chatterjee, Jeet (ENERGY); Whittington, Matt (ENERGY)
Cc: Schlaepfer, Martin (ENERGY); Berg, Denna (ENERGY); Teliszewsky, Andrew (ENERGY)
Subject: RE: ASC Response

Thanks for the update Jeet. Hypothetically typing, if the decision is made to reject the settlement offer, when does the earlier attached Blakes' correspondence need to be approved and sent to the ASC by? Just curious about that timeline.

Look forward to seeing the proposed alternative response from staff re: the settlement. And for clarity, the Blakes' response speaks to only radio ads, not TV ads. Imagine staff response to ASC will include both TV *and* radio ads as the lone examples of the advertising in question, not FHP website, earned social media, etc.?

From: Chatterjee, Jeet (ENERGY)
Sent: December-15-17 6:01 PM
To: Berry, James (ENERGY); Whittington, Matt (ENERGY)
Cc: Schlaepfer, Martin (ENERGY); Berg, Denna (ENERGY)
Subject: RE: ASC Response

Hi,

In initial conversations Blake's had with the ASC on this, it is Blake's understanding that this only refers to the paid TV ads, not the website etc.

Staff will provide an alternative response to the one shared earlier accepting this settlement while outlining our understanding of the 'settlement'.

Please let me know how MO would like to proceed by Monday – since we'd need to respond to the ASC by EOD.

Thanks,

Jeet

Jeet Chatterjee
Senior Policy Advisor, Deputy Minister's Office
Ontario Ministry of Energy
P: 416-327-7025

From: Chatterjee, Jeet (ENERGY)
Sent: December-15-17 5:30 PM
To: Berry, James (ENERGY); Whittington, Matt (ENERGY)
Cc: Schlaepfer, Martin (ENERGY); Berg, Denna (ENERGY)
Subject: RE: ASC Response

Hi,

Attached is an email from our LSB which outlines the ASC's settlement offer. Basically the settlement involves the government confirming to ASC *"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."*

Staff are reviewing this – and are open to the possibility of accepting this settlement IF the advertising only refers to paid advertisements on TV etc. and does not refer to the websites, bill inserts etc. In addition, LSB are reviewing the implication of the "and in the future" part of the phrase since this may be seen to constitute binding future governments.

We will provide you with more information as we get it.

Unfortunately, the ASC is asking for a response by 5pm on Monday.

Jeet

Jeet Chatterjee
Senior Policy Advisor, Deputy Minister's Office
Ontario Ministry of Energy
P: 416-327-7025

From: Chatterjee, Jeet (ENERGY)
Sent: December-15-17 4:56 PM
To: Berry, James (ENERGY); Whittington, Matt (ENERGY)
Cc: Schlaepfer, Martin (ENERGY); Berg, Denna (ENERGY)
Subject: RE: ASC Response

Hi,

Attached is our draft response. LSB have informed us that apparently the ASC may be reaching out through Blake's to offer some sort of "settlement offer". We have not yet received this offer and this draft response does not reflect any potential offer.

Given the potential for such a 'settlement', the Ministry recommends that we do not send this letter out till we get more information (but we wanted to move the response through approvals, in case no offer materializes).

Thanks,

Jeet

Jeet Chatterjee
Senior Policy Advisor, Deputy Minister's Office
Ontario Ministry of Energy
P: 416-327-7025

From: Berry, James (ENERGY)
Sent: December-14-17 11:20 AM
To: Chatterjee, Jeet (ENERGY); Whittington, Matt (ENERGY)
Cc: Schlaepfer, Martin (ENERGY); Berg, Denna (ENERGY)
Subject: RE: ASC Response

Thanks Jeet.

From: Chatterjee, Jeet (ENERGY)
Sent: December-13-17 5:38 PM
To: Berry, James (ENERGY); Whittington, Matt (ENERGY)
Cc: Schlaepfer, Martin (ENERGY); Berg, Denna (ENERGY)
Subject: RE: ASC Response

James,

The response will be addressing the affordability claim as well.

Staff are working to have a revised response for MO approvals this week so we hope to have the necessary approvals to not request a second extension (LSB has confirmed that Blake's can turn around our final version pretty quickly).

I can check in with staff regarding what happens if the extension is not granted – though this seems to be an unlikely scenario.

Jeet

Jeet Chatterjee
Senior Policy Advisor, Deputy Minister's Office
Ontario Ministry of Energy
P: 416-327-7025

From: Berry, James (ENERGY)
Sent: December-13-17 3:29 PM
To: Chatterjee, Jeet (ENERGY); Whittington, Matt (ENERGY)
Cc: Schlaepfer, Martin (ENERGY); Berg, Denna (ENERGY)

Subject: RE: ASC Response

Thanks Jeet.

Correct me if I'm wrong, but the response is supposed to be addressing the affordability claim as well, right – that the ads didn't present what will happen to electricity bills post the four year inflationary cap?

Also, ministry has had the ASC's incoming for about month. Are we confident that all necessary approvals will be secured by end of next week, including PO/CO and MAG, if an extension is granted? Not sure we want to be going back for another extension...

And my last question: Is there a plan in place if the extension is not granted?

From: Chatterjee, Jeet (ENERGY)
Sent: December-13-17 3:01 PM
To: Berry, James (ENERGY); Whittington, Matt (ENERGY)
Cc: Schlaepfer, Martin (ENERGY); Berg, Denna (ENERGY)
Subject: ASC Response

Hi James/Matt,

Staff are continuing to work on a response to the ASC concern with the messaging regarding reliability. In order to get a comprehensive answer, we're requesting an extension of the Dec 15th deadline to the Week of the 18th. Staff should have something for folks to review by end of this week.

Thanks,

Jeet

Jeet Chatterjee
Senior Policy Advisor, Deputy Minister's Office
Ontario Ministry of Energy
P: 416-327-7025