R.S. Engle
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November 13, 2017

Mr. Joshua A. Krane
Blake, Cassels & Graydon LLP
Barristers & Solicitors
199 Bay Street
Suite 4000
Toronto, ON
M5L 1A9

Re: Ontario Ministry of Energy's *Fair Hydro Plan*

Dear Mr. Krane,

When Ad Standards receives advertising-related complaints from consumers, such as the consumer complaints about recent advertising by the Ontario Ministry of Energy (MOE) concerning the Ontario government's *Fair Hydro Plan*, Ad Standards tests the advertising by asking the following questions before sending the complaints to Council for its adjudication,:

1. Is this an "advertisement" as defined in the *Canadian Code of Advertising Standards (Code)*?

2. If "yes", is this particular advertising exempted from review under any provision of the *Code*?

3. If "no", does Ad Standards believe a *prima facie* case has been made concerning this complaint and advertising such that a Council of Ad Standards could reasonably conclude the advertising in question contravenes one or more provisions of the *Code*?

Preliminary Matter:
After applying this multi-step test to the complaints from consumers about Ontario's *Fair Hydro Plan* advertising, this is where Ad Standards nets out on the advertising in question, and the submissions to Ad Standards made in your October 31, 2017 brief made on behalf of the MOE.

i. The material and claims under review qualifies, in the opinion of Ad Standards, as "advertising" as defined in the *Code*. (See the Definitions Section of the *Code.*)

ii. Ad Standards is also of the opinion that this advertising qualifies as "Government advertising" and, as such, is reviewable under the *Code*. (See "Application" Section of the *Code*.)

iii. Furthermore, Ad Standards is of the opinion that the advertising about which the complaints were made to Ad Standards has not "been specifically approved by an agency (or some other comparable entity) of the Canadian government."

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iv. In other words, Ad Standards disagrees with your written submission of October 31st in which you argued that the making of the contested advertising (viewed as a whole as distinct from several statements made within the advertising) has "been specifically authorized" under the Ontario Fair Hydro Plan Act, 2017 (the "Act"). On that basis, Ad Standards does not agree that it is or should be required to cease its review.

Ad Standards understands that under Ontario Regulation 196/17, invoices to hydro consumers must include certain prescribed statements; and that, with regulated frequency, these invoices must include inserts on which prescribed statements must be prominently made about certain benefits the government claims the *Fair Hydro Plan* delivers*.*

Ad Standards would never, and does not now, contest the government's right or authority to legislate exact language that must be used in communicating with the public. Nor would Ad Standards ever, and does not now, propose that its *Code* takes primacy over the exact language the government might legislate be used in its communications through advertising or otherwise.

However, without altering the exact language the government has said <u>must</u> be included in hydro invoices to its customers, and in other hydro-related *communiqués* to the public, the issue in this case is whether the 'advertising' (which is the limit of Ad Standards' purview) when viewed as a whole may communicate impressions that a Standards Council, acting not unreasonably, believes contravenes the *Code.*

The function of Council is to adjudicate complaints by consumers. The responsibility of Ad Standards in issues related to consumer complaints is to determine if the complaints raise a *prima facie* case of *Code* contravention based strictly on the *Code* and its provisions.

Council would not be entitled or authorized to conclude that the language prescribed by legislation needs to be changed. Council is perfectly competent to conclude, however, that the general impression likely to be conveyed by advertising is misleading or otherwise in contravention of the *Code*; and, without proposing changes to the prescribed language, that the advertisement(s) need to correct that impression. Unless, of course, the Ministry responsible for the advertising decides to amend the mandated language.

These are legitimate issues and questions for Council to work on and deliberate over, the outcome of which Ad Standards has, and exercises, no authority to predetermine.

It needs repeating that, in matters involving questions of "accuracy and clarity" in advertising, the primary concern in the *Code* is not with the intent of the sender (of the advertising claim, representation or message). Nor is it with the precise legality of the presentation. Rather the focus is on the message, claim or representation as received or perceived, i.e. on the general impression conveyed by the advertisement.

As you know, Ad Standards has applied this fundamental principle to advertising about which a Ministry of the Ontario government has imposed a requirement to disclose a set of prescribed facts that, when disclosed, are lengthy and complicated to understand. We refer to price advertising of motor vehicles in Ontario, regardless of the advertising medium that is used. This legislation has not prevented a Council from reviewing the complained-of advertising under the *Code* when, allegedly, the television advertising was unreadable (the font used in the disclaimer was too small and on-screen too briefly); and the details could not be understood by readers or viewers of the advertising, contrary to the *Code.*

Issue One: The "25% Reduction" Claim

Ad Standards does not, at this time, take issue with the "25% reduction" claim made in the advertising which, Ad Standards understands, is this: 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.

On that basis, Ad Standards would not ask Council to adjudicate on the merits of the complaints about "issue one".

Please confirm that Ad Standards' understanding correctly states the facts represented in issue one.

Issue Two: The "Affordability" Claim

Ad Standards does not subscribe to the analogy you made in your submission between the Ministry's obligation to make fair and reasonable disclosures in its advertising, and the obligation of what you termed "other advertiser(s)" who "advertise new, lower prices on a product or service".

The strongest distinguishing feature between these two categories of advertisers is this: conventional advertisers only receive revenue sourced from consumers when they purchase the advertised product and services. Conventional advertisers cannot tax their customers, indirectly or directly, as governments can, for additional revenue to make up any shortfall in the actual cost of what's being sold by the advertiser and purchased by the consumer.

While the Ministry's advertising in this case may be literally true, it falls short of informing its customers, who are also citizens and taxpayers, that the consequence of the short term (four year) gain from reduced hydro bills by all odds will result in longer term financial pain, as has been argued by critics of the program.

We make no suggestion in this memo as to how this part of the Ministry's message may be acceptably balanced. However, before deciding to ask Council to consider this issue, we would be pleased to discuss the options with you.

In your submission you wrote that the Government is free to choose whether to subsidize the lower prices from current or future revenues and is under no obligation to disclose this to the public. It is our view that a better analogy would have been to say, for example, that Loblaw or Metro does not have to advertise that it will make up for its loss-leader price advertising after the loss-leader program expires by charging an amount per product or service that is equal to the losses experienced during the price reduction program. In the conventional commercial scenario, the customer is free to decide whether it wants to continue buying from Loblaw or Metro at the higher price (assuming Loblaw or Metro does not have a monopoly). But in the case of hydro, consumers do not have the luxury of a competitive market. Consumers cannot find a different supplier of hydro. Consumers cannot withdraw or decline from paying the higher taxes and rates that inevitably will follow in four or more years after the *Ontario Fair Hydro Plan* expires.

Issue Three: The "Reliability" Claim

You acknowledged in your written submission that the reliability claim and language was not subject to the *Ontario Fair Hydro Act* or Regulations made thereunder.

Both a casual as well as more careful reading of the arguments you made in support of the reliability claim seem, to Ad Standards, to boil down to the statement that the Ministry has competent and reliable evidence that the claim is true. You referenced the significant investment that has been made since 2003 in "clean generation" (which is not a reliability issue); in "conservation" (which is not necessarily a reliability issue); and in "improving Ontario's transmission and distribution" (which may or may not be a reliability issue).

But where is the <u>evidence</u> that the system is more reliable now and everywhere: in Ontario's rural and northern communities as well as to conventional, residential consumers?

The language of issue three in the now-suspended advertising is categorical and unconditional: "Upgrades to our electrical system…<u>have</u> made it more reliable (impliedly more reliable than "ever before")…for all Ontarians." To complainants who personally have experienced outages, this reliability claim may not ring true, as evidenced by a complainant in this case.

Ad Standards invites the Ministry to consider and discuss with us how the Ministry may be able to advertise "reliability" without provoking the negative response from disbelievers based on their actual, personal experiences.

On a final note, it needs repeating that if Council were eventually asked to adjudicate any one or more of the three issues, and if as a result one or more complaints were upheld by Council, the *Code* provides that, in cases where the advertising and/or claims in question were withdrawn prior to Council's adjudication and not reinstated as such, Ad Standards will take care that the advertiser is not identified or identifiable in the report on Council's decisions that are periodically published on Ad Standards' website.

Yours sincerely,

Ad Standards
Per:

R.S. Engle
Legal Counsel to Ad Standards
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Copy by email to: Janet Feasby
Vice President, Standards
Ad Standards