

THE ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act,
1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by
PowerStream Inc. for an order approving just and
reasonable rates and other charges for electricity
distribution to be effective May 1, 2009.

**Written Argument Of
The Consumers Council of Canada**

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WRITTEN ARGUMENT OF THE CONSUMERS COUNCIL OF CANADA

I Introduction

1. This is the Written Argument of the Consumers Council of Canada ("CCC") on the one unsettled issue in the application of PowerStream Inc. ("PS") for approval of its distribution rates for 2009.

2. The unsettled issue is described on page 8 of 32 of the Settlement Proposal, which is Schedule A to Procedural Order No. 5, dated June 3, 2009. The Settlement Proposal states that the Smart Sub Metering Working Group ("SSMWG") takes the position that the revenue requirements of PS's individual suite metering activities should not be included in rates. The cost of those activities are included in rate base, and OM&A, and form part of the overall revenue requirement. Although PS has estimated what those amounts are, PS's estimate is, by its own admission, imprecise, in the absence of a full cost allocation study (Tr., pp. 70,72 and 74).

3. Underlying the SSMWG's position that the revenue requirement of PS's individual suite metering activities not be included in rates are the propositions that PS has been improperly cross-subsidizing its individual suite metering activities, that PS's suite metering activities are anti-competitive, and that they are having an adverse impact on the development of a smart sub-metering competitive market (Ex. K1.7, Tab 22, pp. 3-4).

4. Consideration of this unsettled issue is affected, if not governed, by the relevant regulatory framework. It is also affected by the Ontario Energy Board's ("Board") long-standing practice with respect to cost allocation. Specifically, the Board has historically treated residential consumers as one class, albeit a class in which residential consumers have different characteristics. As a result of that long-standing practice, the Board has not required LDCs to perform cost allocation studies within the residential rate class. The result is that there is a limited factual basis upon which the Board can draw any conclusions about, among other things, whether there is a cross-subsidy of PS's individual suite metering activities by other residential ratepayers and how much, if any, of the costs of those activities should be eliminated from the revenue requirement.

5. For the reasons set out below, the CCC does not believe that the relief which the SSMWG seeks can or should be granted. The CCC submits that PS should be allowed to recover in rates the costs of its individual suite metering activities.

6. The CCC will begin its argument with a consideration of the regulatory framework. It will then consider evidence before the Board on the unsettled issue. Finally, it will address the relief which the SSMWG seeks.

II The Regulatory Framework

7. There are four components to the regulatory framework. One is the decision of the Board, in EB-2007-0680, in the matter of an application by Toronto Hydro-Electric System Limited ("THESL") for approval of its distribution rates for the years 2008, 2009 and 2010. We will refer hereinafter to that decision as the "THESL Decision". The second is the provision in the Distribution System Code ("DSC") dealing with the provision of smart meters to condominiums. The third is the requirement, in Ontario Regulation 422/07 ("OR 442/07"), that a licenced distributor install smart meters or smart sub-metering systems when asked to do so. The fourth is the requirement, imposed by section 28 of the *Electricity Act* ("EA"), that a distributor connect a building to its distribution system when asked to do so.

8. The change in the DSC was first proposed by the Board in a notice of January of 2008. The proposal was to amend the DSC by adding a new section 5.1.9 in the following terms:

5.1.9 Smart Meters in Condominiums

When requested by the board of directors of a condominium corporation or the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the *Condominium Act, 1998*, a distributor **shall install** metering that meets the functional specification of *Ontario Regulation 425/06—Criteria and Requirements for Meters and Metering Equipment, Systems and Technology* (made under the *Electricity Act*). (Emphasis added.)

9. The policy behind the proposed addition of section 5.1.9 was to encourage conservation measures in condominium buildings. To accomplish that goal, the decision was to allow LDCs to participate in the competitive suite metering market.

10. Section 5.1.9 does not contain any limits on the way LDCs may participate in the metering market. For example, section 5.1.9 does not, directly, or by necessary implication, contain any requirement that the metering activities of the LDCs be done on a fully-allocated cost basis.

11. The THESL Decision was issued on May 15, 2008. It was issued before section 5.1.9 of the DSC was formally adopted by the Board. However, the hearing panel was aware of the proposal to amend the DSC, as reflected in the following passage, in the Decision:

On January 8, 2008, the Board issued a Notice of Proposal to amend the Distribution System Code and to issue a Smart Sub-Metering Code. While the Board has not yet formally adopted the change to the DSC and the new code, the Company's proposed involvement in this conversion initiative is consistent with the proposed section 5.1.9 of the DSC. (*Decision of the Board dated May 15, 2008, EB-2007-0680, p. 20*)

12. The Board, in the THESL Decision, approved THESL's expenditure forecasts for its smart meter conversions in condominiums. It did so without reservations. It did so without imposing any limitations on the way THESL could engage in that activity. The hearing panel did note that an issue with respect to cost allocation had been raised in the hearing, but reached the following conclusion:

At this time, for the purposes of this Decision, the Board will not consider differentiation in metering costs to be a pivotal consideration in entertaining the separation of the existing residential class or to direct the institution of contributions, capital or otherwise. (*Decision of the Board dated May 15, 2008, EB-2007-0680, p. 20*)

13. On the issue of cost allocation, the Board limited itself to the observation that:

This is an issue that requires consideration in a more generic proceeding, with appropriate notice to effected parties, directed towards rate design, and cost allocation. (*Decision of the Board dated May 15, 2008, EB-2007-0680, p. 20*)

14. The CCC submits that what PS has been doing, in its suite metering activities, is consistent with its obligations under section 28 of the EA, its obligations under OR 442/07, with the DSC, and with the THESL Decision. Given that, the CCC submits that it would be unfair to PS to grant the relief which the SSMWG now seeks.

15. The CCC submits that granting the relief that the SSMWG seeks would be to effectively modify the DSC and reverse a portion of the THESL Decision. It would also, by implication, modify OR 422/07 and, perhaps, section 28 of the EA. The CCC submits that the Board can do none of those things in this proceeding. The Board should not modify the DSC or the THESL Decision without giving notice to all those, including THESL, who might be affected by its doing so.

16. The CCC notes that the SSMWG, when it made submissions to the Board on the proposed amendment to the DSC, did not propose any limitations on the ability of LDCs to participate in the metering market. This point is particularly significant in light of the testimony given by the SSMWG's witness in this case. His testimony was that the SSMWG was "caught" by the THESL Decision (Tr., p. 189). That is a surprising statement, in that the SSMWG was aware of the proposed amendment to the DSC, and had made comments on it to the Board before the THESL Decision. The THESL Decision followed the logic, indeed the direction, of the DSC. In addition, when the SSMWG made a further submission to the Board on the proposed changes to the DSC, within about a month of the THESL Decision, it made no mention of that Decision or of its implications for its members (U51.3). Although, according to its witness, the SSMWG was aware of the THESL Decision at the time it made its further submission to the

Board on the proposed amendment to the DSC, it still did not object to LDC participation in the metering market. The SSMWG did not seek to overturn that portion of the THESL Decision dealing with metering activities, nor did it seek to have the DSC changed (Tr., pp 202-203). Instead, the SSMWG waited some nine months to intervene in the PS case with a view to, as the SSMWG's witness stated in this case, reversing the effect of the THESL Decision (Tr., p. 201).

17. That the position which the SSMWG takes in this application differs markedly from the position which the SSMWG took in commenting on the proposed amendments to the DSC, undermines the credibility of the SSMWG's position in this application. More importantly, however, it points to the unfairness to PS of granting the relief that the SSMWG now seeks. Based on the SSMWG's silence on the THESL Decision, and its apparent acceptance of the principle of unfettered LDC participation in the metering market, PS would have had no notice that the SSMWG, or anyone else for that matter, would *ex post facto* object to PS's participation in that market.

18. The CCC submits that granting the relief the SSMWG seeks would be contrary to public policy. It would run contrary to the government's direction that LDCs participate in that market in order to promote energy conservation. It would also send contradictory signals to the market. LDCs have, presumably, governed their activities on the basis of the DSC and the THESL Decision. To grant the relief the SSMWG seeks would signal that the LDCs were wrong to do so.

III The Evidence

19. As noted above, PS has never been required to do a cost allocation study to determine the costs of the suite metering program, or the costs of servicing any other sub-component of the residential rate class. The result is that there is no credible evidence presented in this case which demonstrates that the suite metering activities are being subsidized, or that these activities subsidize any other sub-component of the residential rate class.

20. The SSMWG's argument about cross-subsidy is based entirely on the cost of the meters themselves. The cost of the meters is only one component of the overall cost of serving residential consumers. As the witness for PS conceded, the cost to serve different categories of

residential consumers differs, with a result that one group of residential consumers may be subsidizing another (Tr., p. 179).

21. In support of its argument about cross-subsidy, the SSMWG filed exhibit J1.6. On the basis of the analysis in that exhibit, the SSMWG alleged that PS was cross-subsidizing its metering activities in the amount of approximately \$118,000.00. However, when confronted with a change in the underlying cost assumption, that deficiency of \$118,000.00 became a sufficiency of \$220,000.00 (Tr., pp 206-208 and p. 227). The witness for the SSMWG tried to explain that change by saying that none of the numbers were reliable (Tr., p. 219). That argument underscores the point that, absent a cost allocation study, there is no basis upon which the Board can conclude with the required degree of certainty whether there exists a cross-subsidy or whether some or all of the costs of the metering activity should be removed from PS's revenue requirement. Indeed, the witness for the SSMWG conceded that the Board does not have enough information to reduce the revenue requirement by any amount (Tr., p. 220).

22. The CCC submits that the evidence in this case does not suggest the need for a fundamental reconsideration of how rates are set. Class rate-making has been the accepted standard in Ontario. Although the costs to serve each residential consumer, or each sub-component of the residential rate class, differ, rates are based on the average cost. To create a new rate class for condominium customers would require a consideration of the costs to serve all of the various sub-classes within the existing rate classes. The Board has an ongoing process to consider rate design changes, and it would be inappropriate to examine the issue of a separate design for suite metering outside that process.

23. However, the CCC is concerned that the issues raised by the SSMWG will continue to arise in individual rate applications. If the Board is persuaded that the rules governing the participation of the LDCs in the suite metering business need to be clarified, in order to preserve a truly competitive market, the CCC submits that the Board should convene a generic process in which all stakeholders, including the provincial government, can make their positions known.

IV Relief Requested

24. The relief which the SSMWG seeks in this case is unclear. In paragraph 16 of its Witness Statement, the SSMWG asks that PS be required to carry on its individual suite metering business either in an affiliate or as a non-utility activity. The CCC submits that there is no evidence that that is required. In addition, the CCC believes that imposing that requirement on PS would be tantamount to amending OR 442/07 and section 5.1.9 of the DSC. CCC submits that the Board cannot do the former at all and cannot do the latter in this proceeding.

25. The SSMWG also asks that PS's costs of its suite metering activities be removed from the revenue requirement so that they are not recovered in rates. However, section 5.1.9 of the DSC, by necessary implication, allows those costs to be recovered. In addition, in the absence of a cost allocation study, there is no basis upon which the Board can, with the degree of precision that fairness requires, determine what amount should be removed from the revenue requirement, even if the Board were inclined to do so.

26. The CCC submits that the relief which the SSMWG seeks should be denied.

27. The CCC submits that PS should be allowed to recover, in rates, the cost of its individual suite metering activities.

V COSTS

28. The CCC asks that it be awarded 100% of its reasonably-incurred costs for its participation in this matter.

29. The CCC submits that the SSMWG's case was a weak one from the outset. The CCC submits that the question of whether, given the regulatory constraints reviewed above, the Board could grant the relief it sought was one the SSMWG should have addressed before it intervened. The CCC further submits that the relief which the SSMWG seeks could and should have been pursued in another forum, either by way of an application to amend the DSC, or an application to review the THESL Decision. The CCC submits that the SSMWG should have been aware that, even if it were inclined to do so, the Board would almost certainly not grant the relief it sought in this proceeding without notice to other affected stakeholders. Finally, the CCC submits that the SSMWG should have been aware that, in the absence of a cost allocation study,

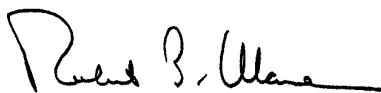
there was no reasonable evidentiary basis upon which the Board could grant the relief it sought. The evidence which the SSMWG proffered was of limited value, as the SSMWG's own witness ultimately conceded.

30. This is not a circumstance where intervening in the PS application was the first opportunity the SSMWG had to advance its position. It could have challenged the proposed amendment to the DSC, and in so doing, proposed conditions that would circumscribe the ability of LDCs to participate in the metering market. It could have sought to reverse the THESL Decision on this issue. It could have sought to have the DSC modified. It chose to do none of those things, and instead did nothing until after PS had already spent money in this market and planned to spend more.

31. The CCC acknowledges that stakeholders should not be punished, in the form of a cost award, for unsuccessfully raising an important issue. However, ratepayers should not be burdened with the costs of an intervention that should never have been brought.

32. The CCC submits that PS's ratepayers should not be required to pay the costs of the hearing on this unsettled issue. The CCC submits that the Board should consider whether some or all of the costs of the unsettled issue should be awarded against the SSMWG.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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