



**EB-2009-0111**

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

**AND IN THE MATTER OF** an order or orders authorizing  
certain distributors to conduct specific discretionary metering  
activities under section 53.18 of the *Electricity Act, 1998*,  
S.O. 1998, c. 15, Schedule A.

**BEFORE:** Paul Sommerville  
Presiding Member

## **DECISION AND ORDER**

**August 13, 2009**

## Introduction

The Ontario Energy Board (the “Board”) has initiated this proceeding respecting discretionary metering activities on its own motion. Discretionary metering activity includes the installation of smart sub-meters.

This case has documented that considerable unauthorized discretionary metering activity has been undertaken by landlords or those working on their behalf.

Technically, landlords are “Exempt Distributors”. This status has important implications for the manner in which smart sub-metering may be implemented in rental apartments and industrial, commercial, or office building settings. These implications will be dealt with later in this Decision and Order.

Prior to the creation of this proceeding the Board received many complaints from tenants with respect to the implementation of smart sub-metering in their apartment buildings.

In addition, in the course of this proceeding, the Board received over 250 submissions from affected parties, an overwhelming number of which came from bitterly unhappy tenants and tenant organizations. Tenants have indicated that smart sub-meters have been installed in their buildings and their units under a variety of terms and conditions, not all of which have been clear. Submissions made by smart sub-metering companies have confirmed that a considerable number of rental premises have in fact been smart sub-metered over the last couple of years.

As noted above, the volume of complaints, their nature, and the scope of the smart sub-metering activity being undertaken in the province led the Board’s Chief Compliance Officer to issue a Compliance Bulletin which unequivocally characterized the discretionary metering activity being undertaken as unauthorized, and inconsistent with the requirements of the *Electricity Act, 1998* (the “Electricity Act”).

It is not intended that this proceeding make any findings with respect to compliance with the Electricity Act, the *Ontario Energy Board Act, 1998* (the “Act”), any regulations made pursuant to either of those statutes, or Board codes.

For the purposes of this proceeding it is sufficient to say that there exists no regulation in force today that has the effect of authorizing discretionary metering activities by

landlords in rental apartment buildings, also referred to as “residential complexes”<sup>1</sup>, or industrial, commercial or office building settings. Nor is there any Board order or any Board code which has the effect of authorizing such activities in those settings. The Board will address the effect of these unauthorized arrangements later in this Decision.

The issue facing the Board in this case is whether to make such an order in light of the considerable activity being undertaken by landlords.

In making this determination, the Board has considered the statements made by the Minister of Energy and Infrastructure respecting his intention to enact regulations authorizing discretionary metering activity by landlords on appropriate terms and conditions. In his public pronouncements<sup>2</sup> and in the Provincial Legislature<sup>3</sup> the Minister has indicated that it is his intention to introduce legislation and develop regulations for this purpose later this year. The Minister also recognized in the course of his comments that the development of these legislative tools would require consultation involving a variety of interests and opinion.

The development of a Board code directed to the subject, which could also serve as authorization pursuant to the Electricity Act, would take a considerable period of time, time during which there may be serious prejudice to legitimate interests.

In the Board's view, the best mechanism for the authorization of discretionary metering activity is in fact legislation specifically developed by and enacted by the government to address the issues after an appropriate period of consultation. It appears, however, that that process may take a considerable period of time. In this interval the aggressive pursuit of smart sub-metering by landlords in residential complexes may continue. In the past, the absence of authorization does not appear to have curbed the enthusiasm of landlords and smart sub-metering agents or contractors working on their behalf in this process. They have a legitimate interest in providing smart sub-metering systems, provided it can be done pursuant to an authorization consistent with the requirements of section 53.18 of the Electricity Act.

The consequences of the continued implementation of smart sub-metering without the benefit of authorization are serious. As indicated above, many tenants have

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<sup>1</sup> *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, s. 2(1) [hereinafter referred to as the RTA].

<sup>2</sup> T. Hamilton, “Rogue energy sellers face fall clampdown” *The Toronto Star* (21 May 2009).

<sup>3</sup> Ontario, Legislative Assembly, *Debates* (2 June 2009) at 7144 and Ontario, Legislative Assembly, Standing Committee on Estimates, *Debates* (2 June 2009) at E-714.

complained about the process and outcomes associated with the rollout of smart sub-metering in apartments. In some instances, this process has led to very important financial consequences for tenants, and uncertain mechanisms for the consideration and resolution of their concerns. Tenants have been, and apparently are being, asked to consent to smart sub-metering under circumstances that do not meet the statutory requirements, or even reasonable practice. The submissions received from all sides of the issue suggest that there is an air of urgency respecting this subject.

It is the Board's view that, during the period between now and the time the government is able to put in place its comprehensive legislative package, the public interest requires that some measure of regulatory guidance is given. Accordingly, the Board has determined that it is appropriate for it to make an order arising from this proceeding which will authorize discretionary metering activities by landlords, and those operating on their behalf, on certain terms and conditions.

The terms and conditions are largely directed to consumer protection measures designed to ensure that tenants, in consenting to their participation in the smart sub-metering program that has been made available within their respective buildings, are appropriately informed about the financial, energy efficiency and environmental implications associated with it.

The Board is also mindful of the importance that the smart sub-metering program plays in the government's overall energy strategy. As things stand now, no discretionary metering activity by landlords in residential complexes or industrial, commercial, or office building settings is authorized. The Board considers it to be in the public interest to remove such barriers as it reasonably can to the orderly and lawful implementation of this important government policy.

Accordingly, the Board has decided to issue an order which will permit these discretionary metering activities, according to a set of terms and conditions which are thought to provide reasonable protection for the legitimate interests of all affected persons, until such time as the anticipated legislative package is in place. In the Board's view, reasonable protection will be achieved through written consent, which is both informed and voluntary, by tenant consumers.

While the Board is issuing this Decision and Order to address the current situation, the Board cautions landlords and their smart sub-metering agents or sub-contactors that

this Order is intended to be transitional and interim in nature. Legislative action by the government in this area may have important consequences for any installations undertaken in this interim period.

### **The Submissions**

The parties were sharply divided on which course the Board should take. Tenants and organizations representing tenants strongly urged the Board to not issue an order authorizing discretionary metering activity. Smart sub-metering companies, on the other hand, sought to have these activities authorized by the Board by way of order.

A common feature among those tenants and tenant organizations most vehemently opposed to the rollout of smart sub-metering was strong support for the government's overall electricity strategy of conservation and energy efficiency, and the general objectives associated with smart sub-metering and smart metering. Their concerns centered on several key questions.

First, they had little confidence in the methodologies employed by landlords to establish rent reductions associated with individual metering. A very high percentage of the submissions received reported that the rent reductions offered by landlords were far smaller than the new electricity bill they were being asked to pay. In many instances, there does not appear to have been a particularly programmatic exposition by the landlord as to how the rent reduction was arrived at, nor what would be the basis for the new electricity charges to be paid by the individual tenant. Tenants complained about being surprised at both the level of the new electricity bill and some of its constituent elements. These elements included installation charges and administration fees associated with the operation of the smart sub-meters.

Another area of concern for tenants really goes to the heart of the program itself. Tenants expressed the view that they had little ability to control or manage the costs associated with their electricity use. They complained that the landlord has exclusive authority to select and install all of the important electricity dependent appliances. In many cases they indicated that the appliances in use in their particular apartments were old, inefficient, and sometimes poorly maintained. Similar concerns were raised with respect to the insulation value of their respective apartments. Tenants have typically no authority, and little ability, to improve leaking windows and doors or poorly insulated walls. This lack of control of key elements of conservation potential is particularly

concerning. If tenants have no genuine ability to improve the energy efficiency of their units, how meaningful can individual billing be?

Many tenants complained that the proposal for smart sub-metering was presented substantially as a requirement and not as a matter requiring their consent. Many tenants also expressed concern about the unauthorized nature of the smart sub-metering activity in their buildings, and wondered how and where their remedies might lie.

The organizations representing residential tenants generally took the view that they would rather have any authorization of smart sub-metering activity be subject to the legislative process to be undertaken by the government later this year. In their view, that process offered their constituency its best opportunity to have its interests reflected.

For their part, organizations representing residential property owners and the smart sub-metering companies urged the Board to issue an order which would permit them to get on with the implementation of the government's program. They pointed to the general public interest in ensuring that conservation measures are implemented as soon and as effectively as possible. They submitted that consumer protection could be achieved through use of an approved voluntary code.

The smart sub-metering companies also noted the effect that the decision may have on employment levels within their industry and their legitimate interests in meeting their business objectives.

The companies also pointed to specific endorsements made by political officials as indicators of both the legality and desirability of the rollout of smart sub-meters in apartment building settings.

Representatives acting on behalf of owners of commercial buildings submitted that consumer protection should be available to residential tenant consumers but that smart sub-metering in commercial buildings occurs as an accepted normal business practice requiring no further tenant protections.

### **What Is Discretionary Metering Activity?**

Discretionary metering activity is a defined term arising from the Electricity Act. The term was defined in amendments to the Electricity Act which were enacted to support

the government's smart metering initiative (the "SMI"). The SMI was defined in those amendments as the government's policy to ensure electricity consumers are provided, over time, with smart meters. The prohibition of discretionary metering activity ensured that the SMI is, in fact, phased in over time as distributors are authorized to conduct these activities.

Section 53.18 of the Electricity Act states:

- (1) On and after November 3, 2005, no distributor shall conduct discretionary metering activities unless the distributor is authorized to conduct the activity by this Act, a regulation, an order of the Board or a code issued by the Board or it is required to do so under the *Electricity and Gas Inspection Act (Canada)*.
- (2) For the purpose of this section,  
"discretionary metering activity" means the installation, removal, replacement or repair of meters, metering equipment, systems and technology and any associated equipment, systems and technologies which is not mandated by the *Electricity and Gas Inspection Act (Canada)*, by regulation, by an order of the Board or by a code issued by the Board or authorized by a regulation made under this Act.

Residential complexes and industrial, commercial or office building settings are typically supplied with electricity by licensed distributors through a bulk meter. This meter records all of the electricity flowing into the building without any differentiation between users.

Smart sub-metering systems are designed to enable the allocation of electricity usage by individual tenants on an apartment-by-apartment basis. Each tenant consumer will be assessed according to his or her actual usage as recorded by their individual smart sub-meters. Ultimately it is intended that the smart sub-meters will operate so as to be capable of charging for the actual electricity consumption by the tenant according to the time of usage. Smart sub-meters are intended to enable consumers to time their use of electricity so as to avoid high-priced peak period usage. Smart sub-meters will operate in conjunction with time-of-use rate structures that will reward off-peak usage with lower per unit rates.

In the residential complex setting the implementation of smart sub-meters is intended to at once make tenants directly responsible for their actual usage, while enabling them to control and constrain their usage to control their costs. This element of direct control

and attendant responsibility for electricity usage is key to the government's smart metering strategy. It is the government's stated intention to drive overall conservation and energy efficiency through individual responsibility incented by pricing structures. It is for this reason that the government announced that smart meters will be installed in every home in the province by the end of 2010. The government explicitly authorized licensed distributors to install smart meters through Ontario Regulation 427/06 made under the Electricity Act. That process for single-family residential dwellings is well underway, and in some communities in Ontario has been completed. It is expected that the government's goal of province wide installation of smart meters will be achieved soon, and that time-of-use rates, necessary to exploit the full value of smart meters and smart sub-meters, will be in place in the near term. The Board has noted the government's announcement on May 14, 2009 which stated that an estimated 3.6 million customers will be on time-of-use rates by June 2011.<sup>4</sup>

The government also explicitly authorized the installation of smart meters or smart sub-metering systems in condominium settings through the adoption of Ontario Regulation 442/07 made under the Electricity Act. The regulatory regime established by the government to achieve this purpose involved empowering the condominium corporation or the developer to enter into smart metering or smart sub-metering implementation arrangements.

In the condominium setting, the condominium corporation has a fiduciary duty to the unit holders and is unequivocally accountable to the occupants of the respective buildings. There is no parallel to the condominium corporation in the residential complex setting. Each tenant in a residential complex has a separate and distinct contractual relationship with the landlord, and there is no corporate entity that has the legal obligation to represent the interests of the respective apartment unit tenants.

Implementation of smart sub-metering in the residential tenancy environment is a very different exercise than in the condominium context. That may explain why the government has not yet put in place parallel legislative instruments to authorize the program for residential complexes.

First, in an important sense, the roll-out of smart sub-meters in residential complexes is inconsistent with a key principle of the overall conservation energy strategy, which is that with control over energy usage comes cost responsibility.

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<sup>4</sup> [http://www.mei.gov.on.ca/english/news/?page=news-releases&body=yes&news\\_id=36](http://www.mei.gov.on.ca/english/news/?page=news-releases&body=yes&news_id=36)



As was pointed out by many tenants in their submissions, a very substantial element of conservation and energy efficiency activity lies exclusively within the power and purview of the landlord. The landlord selects, maintains and installs the appliances used in the units, and is solely responsible for the maintenance of the buildings, including installation of windows, doors and insulation. Typically, the tenant has no control over these key elements, yet the installation of smart sub-meters has the effect of transferring responsibility for electricity charges for the apartment unit from the landlord to the tenant. This is a disconnect between control and cost responsibility.

In the Board's view, this set of circumstances requires that the implementation of smart sub-metering in residential complexes is accompanied by a set of terms and conditions that provides the tenant with sufficient information respecting the condition of the appliances and the integrity of the building's apartments to make his or her consent an informed consent. The Order accompanying this Decision will contain a provision requiring that the landlord conduct an energy audit of the premises, and make that audit available to the tenant at the time his or her consent is sought. A tenant should not be asked to agree to participate in the smart sub-metering program without having a good appreciation of the extent to which the building and the appliances in use meet the government's objectives with respect to conservation and energy efficiency.

There is a considerable variety of arrangements between landlords and tenants. The informed consent structure reflected in the Order enables tenants to take into account their specific circumstances in deciding whether to participate in a smart sub-metering program in their building.

The Board finds that any smart sub-metering installation in bulk metered residential complexes and industrial, commercial, or office building settings on or after November 3, 2005 is unauthorized, and any resulting changes to financial arrangements respecting the payment of electricity charges by tenants to be unenforceable. This conclusion flows directly from the clear wording of section 53.18(1) of the Electricity Act.

It is important to note again that this proceeding is not a compliance proceeding nor is it intended to impose any form of penalty, restitution order, or other disciplinary action against any Exempt Distributor that has engaged in unauthorized discretionary metering activity. However, having engaged in unauthorized metering activity, in contradiction to the terms of the Electricity Act, the Board finds that the landlord cannot now insist on performance of the changes to lease agreements. Whatever unwinding of changed

financial arrangements may be necessary should be undertaken within the context of the specific leasehold or rental arrangement existing between the tenant and his or her landlord.

### **The Architecture of Exempt Distribution**

In order to put the rest of this Decision in its proper context, it is necessary to describe the manner in which landlords, who are Exempt Distributors, are entitled to engage in discretionary smart sub-metering activities.

The concept of an exempt distributor is set out in section 4.0.1 of Ontario Regulation 161/99 – *Definitions and Exemptions* made under the Act. In that regulation several categories of persons are exempted from the usual requirements of electricity distribution, such as licensing and rate regulation. For the purposes of this proceeding, the Board refers to the “Exempt Distributors” as those that are exempt under section 4.0.1(1)(a)(2) and (3); that is, those that distribute electricity entirely on land on which the following types of buildings are located: (i) a residential complex as defined in the RTA; and (ii) an industrial, commercial or office building. A key qualification for Exempt Distributors is that they must distribute electricity for a price no greater than that required to recover all reasonable costs. This means that the distribution of electricity cannot be undertaken by an Exempt Distributor for profit.

Exempt Distributors who are engaged in this case have entered into contractual arrangements with smart sub-metering providers whose business involves the installation and administration of the smart sub-meters. In conducting this activity, the smart sub-metering providers are in reality the agents or sub-contractors of the Exempt Distributor (e.g., the landlord). It is axiomatic that neither agents nor sub-contractors, sometimes referred to as smart sub-metering providers, acquire any novel or additional rights or status *viz-a-vis* third parties, in this case tenants, by reason of their agency or contractual relationship with the landlord.

Accordingly, the smart sub-metering provider does not have a stand-alone contractual relationship with the tenants in buildings that have been rewired, in the case of existing buildings, or configured for smart sub-meters during the construction phase, in the case of new buildings. The relationship is always a relationship rooted in the relationship between the landlord, who qualifies as the Exempt Distributor, and the tenant. The smart sub-metering provider, as agent or sub-contractor of the landlord, has no, and legally can have no, genuinely independent relationship with the tenant with respect to

the distribution of electricity within the building, whether related to smart sub-meters or otherwise.

It is worth noting that electricity charges are comprised of two basic components: a charge intended to recover distribution delivery costs on the one hand, and a charge intended to recover the costs of the electricity commodity on the other. The Exempt Distributor, that is the landlord, must pass each of these components through to the consumer, that is the tenant, at a rate that is no greater than the reasonable costs charged to the Exempt Distributor by the licensed distributor through the bulk meter.

The Board has no authority to regulate the rates of smart sub-metering companies. The Board also has no authority to regulate the rates of the Exempt Distributors so long as the distributor meets the exemption requirements. However, the status of Exempt Distributors is based upon the wording of the exemption regulation and is dependent on the Exempt Distributor distributing electricity for a price that is no greater than that required to recover all reasonable costs.

It follows that in installing and administering smart sub-meters, the fundamental rule governing the activity for the landlord is that the landlord may not impose any costs associated with the smart sub-metering activity that violates the primary rule governing his status, which is that the price charged for the distribution of electricity can be no greater than that required to recover all reasonable costs associated with the distribution of electricity to the building, as recorded by the bulk meter. There is no room in this equation for royalties payable to the landlord or for any other charge beyond a demonstrably reasonable set of costs associated with the smart sub-metering activity. The landlord, in passing these costs through to the participating tenants, must ensure that the full range of costs, including but not limited to the costs making up the administration charge, is justifiable and reasonable.

In establishing the rules governing discretionary metering activities, the transparency of this cost issue is key. A consenting tenant must be in a position to have confidence that the smart sub-metering activity does not impose an unreasonable cost burden associated with the distribution of electricity. This means that the arrangements between the landlord and the smart sub-metering provider must be disclosed to tenants and regulatory authorities requesting the same. Accordingly, the Order accompanying this Decision will contain a provision requiring that the landlord retain, for examination

upon request, all of the contractual documents related to any smart sub-metering activity at his or her place of business.

Administration charges imposed by smart sub-metering agents or sub-contractors are charges to the landlord, not to individual tenants; however, to the extent that these costs are reasonable, they can then be passed through to the tenant. Again, the smart sub-metering provider, as agent or sub-contractor for the Exempt Distributor, has no independent relationship with the tenant.

The methodology used to arrive at the rent reduction proposal shall contain a detailed and comprehensive depiction of any administration charges sought to be passed through to the tenant arising from the Exempt Distributor's relationship with the smart sub-metering agent or sub contractor.

There may be additional complexity relating to distribution delivery charges.

Landlords are charged by licensed distributors according to the amount of electricity entering the premises as measured by a bulk meter. The billing determinant used to create the bill for the landlord, who is typically a general service customer, is based on a non-coincident demand measured in kW or kVA at the meter. In order to qualify as an Exempt Distributor, it is the cost generated by this methodology that may be passed through to the individual tenants. To the extent that the smart sub-metering equipment uses a different billing determinant, the sum of individual tenants' burden will not accord with the bulk meter billing determinant methodology. The result of this mismatch is a potential for excess revenues, which would take the arrangement out of the Exempt Distributor qualification.

In order to avoid this outcome, which would violate the pass-through requirement, in these circumstances the landlord's allocation of the distribution cost to individual tenants must be based on their proportional share of the overall bulk meter burden. That is to say that the quantum of the monthly bill derived from the bulk meter and payable by the landlord must be distributed to individual tenants according to their proportional share.

Billing predicated on individual non-coincident peak demands, for example, is not apparently compatible with the requirements of the Exempt Distributor's pass through obligation.

In soliciting tenants for participation in the smart sub-metering program in individual buildings, Exempt Distributors must take care to ensure that this potential outcome is addressed, and that the underlying calculations demonstrating pass through of both delivery charges and commodity charges are available to tenants as part of the informed consent needed to support enrollment.

### **The Significance of Section 137 of the RTA**

Section 137 of the RTA formed part of a reform package in 2006. It has not been proclaimed to be in force. The proclamation of the section, together with the development and adoption of necessary regulations, is intended to form part of the government's legislative approach to the implementation of smart metering in apartment buildings.

Organizations representing tenants, who generally opposed the issuance of an order by the Board authorizing smart sub-metering activities, looked to the existence of section 137 of the RTA as a definite short-cut to the implementation of the government's legislative package. And so it may be. But the Board urges caution in this approach.

There is an anomaly that lies at the core of section 137 of the RTA and its presumed relevance to smart sub-metering situations. In fact, the Electricity Act and regulations made under that Act make it clear that there is intended to be a distinction between "smart meters" as that term is used in the various legislative instruments, and "smart sub-metering systems" as that term is used in the same instruments.

Put simply, "smart meters" is a term that is used to describe exclusively the smart metering activities of licensed distributors. It does not appear to refer to smart sub-metering activities undertaken by Exempt Distributors.

The Board dealt with this distinction in the process leading to the development of the Smart Sub-Metering Code, proceeding EB-2007-0772. Interested persons are urged to read the Board's treatment of this issue in that proceeding, but the important distinction between smart metering on the one hand, and smart sub-metering on the other hand, flows directly from the use of those terms in the statute and the regulations adopted by the Lieutenant Governor in Council.

Section 137 of the RTA references only "smart metering". Even when proclaimed into force, it appears that section 137 of the RTA will only apply to the scenario where a

licensed distributor smart meters the individual units in the residential complex. Section 137 of the RTA does not appear to apply to the smart sub-metering situation where an Exempt Distributor, or its agent or sub-contractor, individually smart sub-meters the units in the residential complex.

Further support for the view that the terms are not intended to be used interchangeably can be found in the other provisions contained in section 137. Section 137 of the RTA appears to be geared towards the situation in which the Exempt Distributor is no longer the distributor of electricity, which is what occurs in the smart metering situation when the licensed distributor takes over the individual tenants as new, independent customers. This is not true in the smart sub-metering scenario.

In the smart sub-metering scenario, the smart sub-metering provider acts as an agent or sub-contractor for the Exempt Distributor under the terms of a contract. The smart sub-metering providers have no status to become distributors of electricity to tenants. That status is always reserved for the Exempt Distributor. The Exempt Distributor never terminates the obligation to provide electricity in the smart sub-metering situation even though there may be a change in the methodology used to account for and bill electricity.

The smart sub-metering agent or sub-contractor cannot assume the role of distributor, exempt or otherwise, independently. If the landlord chooses to abandon his role as distributor, he may only do so in favour of a licensed distributor.

It can be seen that section 137 of the RTA can operate only if the units of residential complexes are smart metered, not smart sub-metered. As stated above, the Board has previously determined that smart metering can only be undertaken by licensed distributors. Further, at the current time, almost all licensed distributors have been authorized to conduct smart metering activities by Ontario Regulation 427/06 made under the Electricity Act. This means that licensed distributors are currently authorized to install and implement smart meters in residential complexes.

For all of these reasons, the Board does not believe that the proclamation of section 137 of the RTA is relevant to this proceeding as it appears that section 137, once proclaimed, will not apply to smart sub-metering.

## **The Order**

### **Should Exempt Distributors be authorized to install smart sub-metering systems?**

The Board has concluded that it is appropriate at this time to make an order which authorizes Exempt Distributors to conduct discretionary metering activities in relation to smart sub-metering systems in residential complexes; however, as part of the authorization allowing the installation, the Board is requiring the Exempt Distributors to meet certain conditions before they can use the smart sub-metering systems for the purposes of billing tenant consumers. The Order establishes the elements necessary to establish informed consent and a genuine acceptance of the terms and conditions associated with the transition to smart sub-metering for billing purposes within an apartment building. It is the Board's view that any existing purported consents in the residential tenant setting are ineffective, and must be renovated in a manner consistent with this Order.

With respect to the industrial, commercial or office building settings, the Board considers that industrial and commercial entities have access to, and are presumed to avail themselves of, appropriate legal and other advice so as to protect their interests in relation to landlords seeking to smart sub-meter their leased premises. The Board notes that no concerns were submitted from consumers in this category. Further, representatives of consumers in this category supported the existing arrangements. Accordingly, while the Board will require a much more demanding set of conditions for residential tenants, implementation of smart sub-metering for commercial tenants will not be subject to these protections. The only requirements attaching to industrial, commercial or office building settings are that the consent of the commercial tenant must be evidenced in writing and a licensed smart sub-metering provider must be used. Where landlords have implemented smart sub-metering with their industrial or commercial tenants, and the consent of the industrial or commercial tenant is evidenced in writing, there is no requirement that the landlord re-visit that consent. If the consent of the industrial or commercial tenant is not in writing, the landlord must procure it in that form.

### **Scope of discretionary metering activities and associated services.**

The Board considers that, provided the preconditions and conditions established within this Order are met, Exempt Distributors for residential complexes and industrial,

commercial or office buildings may conduct discretionary metering activities in relation to smart sub-metering systems.

The smart sub-metering companies argued for, and in some instances have apparently implemented, arrangements that would change the terms and conditions associated with consent to the implementation of smart sub-metering according to whether the residential tenant was an existing tenant or a new tenant entering the premises. The Board has found that all of the sub-metering activity in apartment settings following November 3, 2005 has been unauthorized, and arrangements predicated on the unauthorized activities are unenforceable. It makes no difference that those arrangements may have been made with a tenant who is newly entering the premises as opposed to a tenant who is already resident in the residential complex undergoing the transition to smart sub-metering. The same is true going forward. Prospective tenants are entitled to the same protections as those afforded existing tenants, and the same preconditions and conditions associated with informed consent will apply to both categories.

**Must a licensed smart sub-metering provider be retained to provide and install smart sub-metering systems and/or to provide associated services?**

Yes. Licensed smart sub-metering providers are obliged to conduct their activities in a manner consistent with the Board's Smart Sub-Metering Code. This Code ensures that appropriate metering equipment is installed and that protections are in place for consumers in relation to metering services and business practices and conduct. Failure to conform to the Code can result in a number of sanctions, including licence suspension. The Order will require licensed smart sub-metering providers to comply with the Code when providing smart sub-metering services on behalf of Exempt Distributors.

**Tenant/Consumer consent.**

The Board recognizes that the government's future program may not require the consent of individual tenants. It is the Board's view that for the purposes of this Order, which is intended to fill the gap pending the development and implementation of the government's legislative package, a regime requiring the written consent of individual tenants is most appropriate. To date, this environment has been characterized by a high degree of confusion and complaint, and imposing mandatory enrollment by residential tenants in smart sub-metering would seem to be premature. It is better in the



Board's view for all affected parties to gain a better working knowledge of how smart sub-metering can operate in residential complexes. There is also an unfortunate legacy of unauthorized activities, the effect of which should be purged to allow a more thoughtful and orderly roll-out of smart sub-metering programs.

The Board considers that an informed written consent by the tenant consumer is a precondition to any transition to smart sub-metering. This means that the conditions outlined in this Order must be satisfied before any consent executed by a tenant can be of effect.

As noted above, smart sub-metering may only be undertaken pursuant to a Board order or legislation enacted by the government. It follows that to be authorized any smart sub-metering activity must be consistent with the enabling order. In this case, the Board Order requires conformity with a set of conditions associated with the consent of a tenant for the implementation of smart sub-metering in his or her apartment.

Neither the landlord nor its agent or sub-contractor smart sub-meterer has the authority to assume any form of consent that is not explicitly consistent with the terms of this Order. The Board notes that a contrary position was advanced by at least one of the smart sub-metering companies who suggested that, where the landlord had reserved the right to change the contractual terms of the lease agreement, that no specific consent was required. The Board rejects this point of view on the basis of the clear words of the statute and the requirement that discretionary metering activities be conducted pursuant to, *inter alia*, an order of the Board. The landlord has no unilateral authority to assume consent or to act on a consent that is not consistent with this Order.

It is appropriate to remind landlords that the structure created by the legislation and regulations for the implementation of smart sub-metering places the landlord squarely at the centre of the process. Conformity with the Board Order is the responsibility of the landlord. This does not involve, and cannot involve, the termination of its obligation to provide electricity to its tenants. The Exempt Distributor, that is typically the landlord, is always the provider of electricity to the tenants within the building.

The smart sub-metering agent or sub-contractor is not a distributor of electricity and cannot be a licensed distributor of electricity unless duly authorized by the Ontario Energy Board. That engagement would involve the full range of regulatory measures,

including rate regulation and conformity to all of the Board's codes governing the actions, responsibilities and obligations of licensed distributors in Ontario.

The smart sub-meterer has no stand-alone billing relationship with the tenant and, to the extent that the smart sub-metering equipment records usage on a different billing determinant than that used to establish the landlord's obligation to the licensed distributor, the amount of the bill charged to the individual tenant must be predicated on the tenant's proportional share of the landlord's bulk meter electricity bill. Any other arrangement may take the situation out of the Exempt Distributor context and may place the landlord in the role of a conventional electricity distributor, requiring licensing and rate regulation.

The Board appreciates that this approach may create a need for adjustments to be made to the arrangements made to date by landlords and smart sub-metering companies in relation to tenants. Whatever unwinding of these arrangements may be necessary needs to be undertaken pursuant to structures and processes in place to resolve and adjudicate such matters. Landlords and smart sub-metering companies accepted a risk by embarking on discretionary metering activities without the benefit of any authorization pursuant to section 53.18 of the Electricity Act. Their approach has resulted in considerable confusion and disaffection among tenants. The rather awkward state that now exists must be regularized in a responsible fashion if the government's conservation program is to have any credibility among this segment of consumers. The Board's Order is intended to do that.

The constituents of informed consent for smart sub-metering in residential apartment buildings are set out below.

The landlord is required to conduct and share the results of an energy audit of the premises with the tenant. The audit must be conducted by an independent third party, and must disclose what proportion of the landlord-supplied appliances within the apartment units are certified to be Energy Star or otherwise certified to be energy-efficient appliances. The audit must also assess the overall energy efficiency of the building envelope and identify deficiencies that can be remedied through weatherization techniques. This includes an assessment of the integrity of in-suite outside doors and windows in the units. This audit report must be provided to the tenant unexpurgated.

The landlord is required to disclose to the tenant the methodology to be used to establish the rent reduction associated with that specific tenant's rent obligation. This will include an explicit description of all of the constituent elements brought to bear in establishing the proposed electricity-related reduction in the rent charge. The Board will not prescribe the precise methodology to be used, but it must include the method adopted to account for electricity usage associated with common areas, any assumptions that are made must be explicitly stated, and the landlord must detail how electricity charges associated with non-participating tenants will be used in the calculation for an individual tenant's rent reduction. The methodology must also disclose as a separate line item any administration charges the landlord seeks to recover from the tenant. The methodology must also disclose the methodology to be used to apportion an individual tenant's proportional share of the landlord's overall distribution delivery charge as established by the bulk meter.

The consent must be in writing, and attached to the document at the time of execution of the consent will be the energy audit and methodology disclosure referenced above. The landlord shall retain this record in a manner consistent with all other documents associated with the tenancy.

### **Confidentiality**

In the Notice of Hearing and Procedural Order No. 1 (the "Notice"), the Board required each licensed smart sub-metering provider to file with the Board a list of the Exempt Distributors with whom it had entered into a contract for the commercial provision of smart sub-metering systems and/or associated services (the "List").

Stratacon Inc. ("Stratacon"), a smart sub-metering provider, filed the required information together with a request that the List be held in confidence by the Board. The filing was made in accordance with the Board's *Rules of Practice and Procedure* pursuant to section 10.01. In accordance with the Board's Practice Direction on Confidential Filings, Stratacon filed a non-confidential version of the document in which it redacted the List and instead disclosed the number of identified Exempt Distributors.

In its covering letter, Stratacon asserted that disclosure of the List would prejudice its competitive position and would not be required under either the *Freedom of Information and Protection of Privacy Act* or the *Statutory Powers Procedure Act*. Stratacon also stated that most of its contracts obligate it not to disclose the information.

As a rule, the Board is reluctant to receive information on a confidential basis, and is unsympathetic to contractual terms that purport to limit disclosure of arrangements made with regulated entities where those arrangements may be relevant from a regulatory point of view.

As is clear from the Decision and Order, the commercial environment surrounding the installation and operation of smart sub-metering systems is at an early and crucial stage. A key objective of this proceeding is to attempt to provide some regulatory guidance to smart sub-metering providers as they pursue their business goals. In the Board's view, in this light, Stratacon's request is not objectionable, and will be granted.

It is to be noted that the Board offers no opinion on whether the confidentiality claim made by Stratacon would survive a request made pursuant to the *Freedom of Information and Protection of Privacy Act*. In this Decision the Board merely finds that it will not, on its own motion, place the affected material on the public record. This approach should be seen to be very case specific, and without any broad or precedential application to other circumstances.

### **Funding**

The Notice stated that the Board will provide funding.

Requests for funding were submitted by the following parties (altogether, the "requesting parties"):

- Advocacy Centre for Tenants Ontario ("ACTO");
- Building Owners and Managers Association of the Greater Toronto Area ("BOMA");
- Federation of Rental-housing Providers of Ontario ("FRPO");
- Green Light on a Better Environment ("GLOBE");
- Low-Income Energy Network ("LIEN"); and
- Vulnerable Energy Consumers Coalition.

The Board has reviewed the funding requests submitted by the requesting parties and has determined that 100% of the funds submitted by the requesting parties will be paid to each individual party.

**THE BOARD THEREFORE ORDERS THAT:**

1. Distributors that meet the requirements of section 4.0.1(1)(a)(2) of Ontario Regulation 161/99—*Definitions and Exemptions* (made under the *Ontario Energy Board Act, 1998*), namely distributors that:
  - (a) distribute electricity for a price no greater than that required to recover all reasonable costs; and
  - (b) distribute the electricity through a distribution system that is owned or operated by the distributor that is entirely located on land on which a residential complex as defined in the *Residential Tenancies Act, 2006* is located,

are authorized, under section 53.18 of the *Electricity Act, 1998*, to conduct discretionary metering activities in relation to smart sub-metering systems in their properties; however, the distributors must comply with the conditions in sections 2 to 6 below in order to use the smart sub-metering system for the purposes of billing their customers.
2. Distributors included in section 1 of this Order must obtain an energy audit of the property where the smart sub-metering system is installed. The energy audit must be conducted by an independent third party. The report from the energy audit must, in addition to any other energy efficiency evaluation:
  - (a) disclose the proportion of the landlord-supplied appliances within the individual units of the residential complex that are certified to be Energy Star or certified to be energy-efficient appliances; and
  - (b) assess the energy loss through the building envelope, and identify deficiencies that can be remedied through weatherization techniques for the building and the individual units.
3. Distributors included in section 1 of this Order must retain all contractual documents relating to the installation of the smart sub-metering system in the property including, but not limited to, documents regarding the costs of installation, the costs of the capital assets, and the administrative fees for the smart sub-metering provider. This information must be provided to any customer of the distributor, or the Board, upon request.

4. Distributors included in section 1 of this Order may only use the smart sub-metering system for their customers that consent in writing to the use of the smart sub-metering system. The customer's written consent must be voluntary and informed. Therefore, distributors included in section 1 of this Order must provide their customers with the following information at the time they request their customer's consent to use the smart sub-metering system:
- (a) the results of the energy audit required by section 2 of this Order must be provided in their entirety;
  - (b) the amount of any administrative charge that will be included on the electricity bills;
  - (c) a detailed description of the methodology used to arrive at the rent reduction (including information relating to how the electricity used by the common areas will be accounted for, how the electricity charges for non smart sub-metered customers will be used in the rent reduction methodology, and any other numbers or assumptions used in the methodology);
  - (d) the specific amount of the rent reduction being offered to the customer; and
  - (e) the methodology used to apportion the delivery charges amongst the customers.

The customer's written consent must be attached to the documents referred to above and the customer must initial all of the documents to show that they were provided to them. Distributors included in section 1 of this Order shall provide their customers with a copy of the executed documents and shall retain the customer's written consent and the initialed documents in a manner consistent with all other documents associated with the tenancy.

5. Any consent obtained by a distributor included in section 1 of this Order prior to this Decision and Order is ineffective and cannot be relied upon. Distributors included in section 1 of this Order will need to obtain new consents from their customers in accordance with the terms and conditions in this Order. The terms and conditions contained in this Order apply to existing customers as well as prospective customers.

6. Distributors included in section 1 of this Order must use a licensed smart sub-metering provider if the distributor is going to conduct discretionary metering activities in relation to a smart sub-metering system. Smart sub-metering providers must comply with the Board's Smart Sub-Metering Code, as applicable, when conducting these activities on behalf of the distributors included in section 1 of this Order. For the purpose of following the Smart Sub-Metering Code in relation to smart sub-metering in residential complexes as defined in the *Residential Tenancies Act, 2006*, smart sub-metering providers shall:
- (a) consider "prescribed activity" to mean the installation and use of smart sub-metering systems;
  - (b) consider "prescribed location" to mean a residential complex as defined in the *Residential Tenancies Act, 2006*;
  - (c) consider the "condominium corporation or developer" to mean a distributor included in section 1 of the Board's Order in Proceeding EB-2009-0111; and
  - (d) for the purposes of section 4.1.3 of the Smart Sub-Metering Code, and in addition to sections 4.1.4 and 4.1.5 of the Code, deem a consumer to have a good payment history if the consumer provides a letter from its landlord or a service delivery provider (i.e., a telecommunications or cable provider) confirming a good payment history with the landlord or service delivery provider for the most recent relevant time period set out in section 4.1.3 of the Code where some of the time period which makes up the good payment history has occurred in the previous 24 months.
7. Distributors that meet the requirements of section 4.0.1(1)(a)(3) of Ontario Regulation 161/99—*Definitions and Exemptions* (made under the *Ontario Energy Board Act, 1998*), namely distributors that:
- (a) distribute electricity for a price no greater than that required to recover all reasonable costs; and
  - (b) distribute the electricity through a distribution system that is owned or operated by the distributor that is entirely located on land on which an industrial, commercial, or office building is located,

are authorized, under section 53.18 of the *Electricity Act, 1998*, to conduct discretionary metering activities in relation to smart sub-metering systems in their

properties provided that the conditions listed in sections 8 and 9 of this Order are met.

8. Distributors included in section 7 of this Order may only use the smart sub-metering system for their customers that consent in writing to the use of the smart sub-metering system.
9. Distributors included in section 7 of this Order must use a licensed smart sub-metering provider if the distributor is going to conduct discretionary metering activities in relation to a smart sub-metering system. Smart sub-metering providers must comply with the Board's Smart Sub-Metering Code, as applicable, when conducting these activities on behalf of the distributors included in section 7 of this Order. For the purpose of following the Smart Sub-Metering Code in relation to smart sub-metering in an industrial, commercial, or office building, smart sub-metering providers shall:
  - (a) consider "prescribed activity" to mean the installation and use of smart sub-metering systems;
  - (b) consider "prescribed location" to mean a commercial, industrial, or office building;
  - (c) consider the "condominium corporation or developer" to mean a distributor included in section 7 of the Board's Order in Proceeding EB-2009-0111; and
  - (d) for the purposes of section 4.1.3 of the Smart Sub-Metering Code, and in addition to sections 4.1.4 and 4.1.5 of the Code, deem a consumer to have a good payment history if the consumer provides a letter from its landlord or a service delivery provider (i.e., a telecommunications or cable provider) confirming a good payment history with the landlord or service delivery provider for the most recent relevant time period set out in section 4.1.3 of the Code where some of the time period which makes up the good payment history has occurred in the previous 24 months.
10. Licensed smart sub-metering providers shall promptly provide a copy of this Decision and Order to each Exempt Distributor with whom it has entered into a contract for the commercial provision of smart sub-metering systems and/or associated services. Furthermore, the licensed smart sub-metering provider shall inform the Exempt Distributor that the Exempt Distributor must promptly



post a copy of this Decision and Order in a prominent location in each building in which a smart sub-metering system has been installed.

ISSUED at Toronto, August 13, 2009.

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary