

Introduction

On December 4, 2018, the Independent Electricity Operator (“IESO”), in its capacity as the Smart Meter Entity (“SME”), filed an application with the Ontario Energy Board (“OEB”) under subsections 74, 78(2.1), (3.0.1) and (3.0.3) of the Ontario Energy Board Act, 1998 (“Act”), and Ontario Regulation 453/06 made under the Act, and subsection 53.8(8) of the Electricity Act, 1998 for an Order approving fees for access to data by third parties. The requested orders are set out in paragraph 6 of the legal application and are reproduced in full below:

The SME hereby applies to the OEB for an order under subsections 74, 78 (2.1), (3.0.1), (3.0.2) and (3.0.3) of the Ontario Energy Board Act, 1998 (“OEB Act”):

- a) Authorizing the SME to charge market price for third party access (‘TPA’) to the data;
- b) Any reference to ‘market price’ in this application means the service provided by the SME through a competitive market-based model where prices will be set based on what the market is prepared to pay;
- c) Approving the establishment of a new sub-account, the Benefits Account under the Balance Variance Account (‘BVA’) to track the net revenue generated from TPA; and
- d) Amending the SME’s licence to allow the SME to:
 - i) Provide access to the data to any person who meets the terms of access established by the SME and enters into a Data Use Agreement (‘DUA’) with the SME; and
 - ii) Annually report the net revenue generated by TPA accumulated in the Benefits Account, sub-account of the BVA.

(EB-2018-0316, Exhibit A, Tab 1, Schedule 1, Page 2 and 3)

These are the submissions of the EDA. As is set out in greater detail below, it is the EDA’s submission that the Ontario Energy Board (OEB) cannot issue the orders requested as the SME’s application is not in the public interest and the SME has not met the burden of proof. The EDA’s objective is to ensure customer data is appropriately protected and privacy respected in all instances by all parties whether they have custody, title or any other form of access to customer data.

The EDA’s submission that follows is organized according to the OEB approved Issues List. However, the EDA’s has prioritized the issues it deems as most relevant; issues 3, 1, 10 and 11 as they are policy issues that the Board ought to engage in before it can address the issues of implementation and administration, being issues 2 and 4-9.

Submission on Policy Issues

Issue 3: Is the SME’s licence amendment proposal appropriate?

The EDA submits that the OEB cannot authorize the licence amendments as proposed. Should the OEB find it appropriate to approve the application, it is the EDA's submission that revisions and amendments need to be introduced, concerning for example the appropriate level and form of data protection so that current standards are preserved if not enhanced. It is the submission of the EDA that the Board lacks the appropriate evidentiary base to adjudicate the SME's market-based pricing proposal.

The IESO has neither demonstrated that it has clear title to low volume consumer smart meter data or that it has the consent of the parties it pertains to release the data. Furthermore, the IESO has not demonstrated that the parties that the data pertains to are aware that the SME intends to transact that data on a for-profit basis (Exhibit I, Tab 8.0, Schedule 5.12, VECC 12, page 1 of 1, Line 13). The SME must be able to demonstrate that it can satisfy all these issues for the OEB to be able to grant the proposed licence amendment as being in the public interest.

Provincial government policy required that low volume customers be smart metered by their local distribution company (LDC) and that the LDC transfer that data to the SME. Customers were not given a choice whether to be smart metered and if their data was to be transferred to the SME. Because each smart meter is deployed at a specific premise, it records the consumption, by time period, of the occupants of those premises who operate the fixtures, devices and appliances situated at their premises. The EDA submits that the SME's proposed distinction between the consumer and the premises blurs the issue of data disclosure rather than clarifying it.

The EDA submits that LDCs treat the metered consumption as the information of the occupant, and therefore, appropriately protect it. Pursuant to each LDC's OEB issued distribution licence, smart metered data information is to be appropriately protected. LDCs are able to disclose it upon the explicit direction of the customer or if permitted under section 15 of the licence. LDCs acknowledge that the exemptions permitted under section 15 do not relieve the recipient of the information of the duty to protect the information. LDCs respect the consumer expectations that any party with whom the LDC shares their information, whether at the consumers request or under the exemptions permitted in section 15, is similarly bound to protect the information.

The SME's definition of, "de-identified information" explicitly states "...information cannot reasonably be identified" (Exhibit I, Tab 3.0, Schedule 1.05, OEB Staff 5, page 1, line 27 to page 2, line 2). The SME's evidence is clear: the risk of re-identification is not zero (Exhibit B, Tab 1, Schedule 1, page 4) (Exhibit I, Tab 0, Schedule 2.15, BOMA 15, Attachment 1). The EDA submits that the Board should require the SME to address the available techniques that would either eliminate or reduce this risk and that without such evidence, the OEB cannot find the SME's proposed licence amendment appropriate.

The EDA submits that the SME has not demonstrated either that it has clear title to the data (Exhibit I, Tab 1.0, Schedule 4.04, EDA 4, page 1 of 1) or that low volume smart meter customers are not opposed to the SME transacting in their data. Just as there is no evidence on the record of this proceeding as to the SME's title to the data, there is no evidence as to transfer title either explicitly or through an implied power of a regulatory instrument (Exhibit 1, Tab 1.0, Schedule 4.04, EDA 4). As the evidence demonstrates, the SME has not consulted with low volume consumers to inform them that their data may be a subject of a transaction (Exhibit I, Tab 8.0, Schedule 5.12, VECC 12) (Exhibit I, Tab 8.0, Schedule 5.13, VECC 13, page 1 of 1). The LDC owns and operates the smart meter that transfers, records and gathers the data to the SME and takes receipt of it from the SME so that it can correctly use the smart metering data for billing purposes. It is the EDA submission that for the same reason that the SME does not have title to the low volume consumers' smart meter data, neither does the LDC: it has custody.

Clearly only the consumer, being the occupant of the premises, can authorize the release of its information to another party. The customer's privacy and data protection rights persist independent of whether its information is held by the LDC or the SME or any other entity who may receive it through the exemptions permitted under section 15 of an LDC's distribution licence. The EDA submits that unless the SME can demonstrate that the customers' information will not unreasonably be able to be re-identified, the OEB should not grant the request order that would amend the SME's licence as proposed.

Issue 1: Is the SMEs proposal that access should be provided at market prices appropriate?

The SME's written pre-filed evidence of December 4th, 2018 is silent on the state of competition, and participation of alternative data providers or competitors in the market for smart meter data. It is important to recognize that the first reference on the record in this proceeding to the issue of competition is in the SME's responses to interrogatories, specifically BOMA 15, OEB Staff 2, EDA 5, VECC 9, BOMA 7.

The EDA submits that the SME's application for approval to charge market-based prices should not be granted as the SME has not satisfied the burden of proof as to the state of competition (Exhibit 1, Tab 0, Schedule 2.07, Page 2 of 2, Line 2). The EDA points to the SME response to VECC interrogatory 9 that makes hypothetical reference to LDCs "presumably" being capable of providing smart meter data (Exhibit I, Tab 3.0, Schedule 5.09, VECC 9, page 1 of 1). Sections 29 and 78 of the OEB Act deal with pricing. These sections are mutually exclusive. Section 29 provides that where competition exists, the OEB can refrain from regulating. Section 78 empowers the OEB to authorize just and reasonable rates. The SME submitted neither written pre-filed evidence on the state of competition in the market for smart meter data nor generally on the market for smart meter data.

EDA interrogatory 6 explicitly requested evidence on the state of competition; the EDA submits that the SME's response to that interrogatory is unresponsive. It is the EDA's submission that the OEB cannot authorize the requested licence amendment related to charging market-based prices if the evidence is incapable of supporting a similar finding pursuant to section 29 of the Act.

The EDA reviewed the written pre-filed evidence for information on the origins of the request to charge market-based prices. While there are several references to TPA, there are none dealing with the SME's proposal to charge market-based prices. The EDA notes that the SME's licence amendment proceeding (EB-2018-0316) referenced TPA and was silent on the approach to pricing. The EDA submits that the SME's response to EDA interrogatory 6 (Exhibit I, Tab 1.0, Schedule 4.06, EDA 6, page 1 of 2), is unhelpful.

Without clear, compelling uncontroverted evidence of appropriate competition, the EDA submits that the OEB's powers are to find that competition is sufficient to permit market-based prices and that where competition is not sufficient, the OEB is to authorize just and reasonable rates. Just and reasonable rates recover the costs incurred and provide an opportunity to earn the allowed rate of return and, among other things, are free of undue cross subsidization. The SME is a not-for-profit entity without shareholder capital; accordingly, just and reasonable rates would be set to recover the reasonably incurred costs only as there is no invested capital eligible to earn the allowed rate of return. Since the SME recognizes that market prices may recover amounts that exceed incurred costs, this implies that market prices are not capable of being found to be just and reasonable. The SME cannot have it both ways.

For these reasons, the EDA submits that the OEB should not authorize the SME to charge market-based prices.

Issue 10: What steps has the IESO/SME taken to ensure that the data is sufficiently protected and to prevent its re-identification. Are those steps sufficient? What conditions, if any, should be included in the SME's licence to ensure privacy protection in respect of the data?

As already discussed, the EDA submits that the SME has not taken adequate steps to appropriately protect consumers' information and that based on the evidence filed in this proceeding, it is not possible for the Board to identify the conditions to include in the SME's licence to ensure that privacy is protected. The EDA submits that the OEB cannot make a favourable finding on this issue.

The OEB is obliged to consider the SME's evidence on the potential for re-identification and cannot overlook this outcome either as an isolated or low risk matter. All OEB issued licences address the protection of data and the protection of privacy. These licences are consistent with and reinforce related legislation. The EDA submits that without appropriate evidence on the

reasonability of the risk of re-identification, the OEB cannot make a favourable finding on this issue.

Issue 11: What are the overall objectives of the IESO/SME regarding its proposals to provide data to third parties at market prices? How will the OEB determine whether these objectives have been met?

The EDA submits that the SME's written pre-filed evidence is silent on its objectives. The EDA references the SME's response to CCC interrogatory 14 as providing the clearest representation of the SME's objectives:

"The objectives of the TPA, over and above generating additional revenue for ratepayers, are to provide third parties with non-discriminatory access to electricity consumption data and to achieve the value inherent in a single provincial repository of electricity consumption data from over 5 million smart meters."

The EDA submits that it is essential that as a public agency, the IESO (SME's parent) act in the public interest. It is the EDA's submission that the SME has not demonstrated that this application is in the public interest such that the OEB can authorize the SME to generate additional revenue by providing third parties with access to smart meter data. It is premature for the OEB to engage in Issue 11 until such time that the SME demonstrates that third party access is in the public interest.

Submission on Administrative and Implementation Issues

The EDA submits that it is premature for the OEB to consider issues 2,4-9 as the SME's written pre-filed evidence is silent on corporate governance, supervision, risks and management. The EDA notes that the SME responded to over two dozen interrogatories requesting finance and costs data (EDA 5, 7, 10, 11, 13, 14, 16, 17, BOMA 1, 6, 14,18, CCC,3, 6,8,9,12,15,VECC 1.1, 9.1, 9.2, OEB staff 2,6,7,8,10,11). The EDA submits that the SME's evidence does not demonstrate:

- an appropriate governance model
- an acceptably complete business plan or business case (Exhibit I, Tab 1.0, Schedule 4.05, EDA 5)
- an appropriate level of risk identification, analysis or mitigation

and therefore, the Board should not decide on any administration or implementation issues raised by this application.

Conclusion

The EDA submits that based on the evidence filed to date in this proceeding the OEB's only alternatives are to either deny the application outright or adjourn the application to permit the SME an opportunity to file further evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED