

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 a Notice of Intention to Make an
Order for Compliance against Toronto Hydro-Electric System
Limited.

**WRITTEN SUBMISSIONS OF COMPLIANCE COUNSEL
ON INTERVENTION REQUESTS OF EDA AND SSMWG**

September 16, 2009

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PART I - OVERVIEW

1. These submissions address requests to intervene from the Electricity Distributors Association ("EDA") and the Smart Sub-Metering Working Group ("SSMWG").
2. The intervention requests must be placed in proper context. This proceeding is not a rate proceeding or policy review where the rights or interests of various stakeholders stand to be affected. It is a compliance proceeding in which the Board is seeking an order under s. 112.3 of the *Ontario Energy Board Act, 1998* ("OEB Act") requiring a single distributor, Toronto Hydro Electric System Limited ("THESL"), to comply with certain "enforceable provisions", as defined in the OEB Act, and to remedy contraventions that have occurred and/or prevent further contraventions.
3. Compliance Counsel respectfully submits that EDA and SSMWG should not be granted full intervention status on the following grounds:
 - (a) The intervention of non-parties is generally not appropriate in compliance or enforcement proceedings which are adjudicative in nature and brought in the public interest.
 - (b) EDA and SSMWG members do not have direct or substantial interests in the outcome of this proceeding necessary to establish grounds for intervention. The matter to be decided in this proceeding is whether THESL contravened an enforceable provision and the only party that will be directly and substantially affected by a finding on that matter is THESL.
 - (c) EDA's position that policy issues concerning the smart metering of new condominiums may need to be addressed misconstrues the nature and scope of this proceeding. As noted, this is an adjudicative proceeding in which the Panel will have to make

findings of fact as to whether THESL contravened and/or will contravene the law. Matters of policy are not properly the subject of this type of proceeding; there are other appropriate forums for such policy debates.

4. In some cases, intervenor status has been granted in compliance or enforcement proceedings on a limited basis. In the present circumstances, it may be appropriate to grant limited intervention status — i.e. *amicus curiae* standing — to allow intervenors to address the issue of remedy only. This is discussed in more detail below.

5. Lastly, neither the EDA nor SSMWG should be eligible for a costs award in this proceeding.

PART II - THE FACTS

A. Background

6. This is a compliance proceeding in which Compliance Counsel is seeking an Order under section 112.3 of the OEB Act, which states:

112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

(a) remedy a contravention that has occurred; or

(b) prevent a contravention or further contravention of the enforceable provision.

Ontario Energy Board Act, 1998, c. 15, Sched. B, s. 112.3 (the "OEB Act").

7. In its Notice of Intention to Make an Order for Compliance dated August 4, 2009, the Board identified the enforceable provisions that had been contravened as: section 28 of the *Electricity Act, 1998* (the "*Electricity Act*");

section 53.17 of the Electricity Act; section 2.4.6 of the Distribution System Code (the "DSC"); section 3.1.1 of the DSC; and section 5.1.9 of the DSC.

Notice of Intention to Make an Order For Compliance under
Section 112.3 of the *Ontario Energy Board Act, 1998*, dated August
4, 2009 ("Compliance Notice").

8. The foregoing provisions create a scheme under which a condominium developer or a condominium corporation may opt to: (i) have a distributor smart-meter individual condominium units, in which case each unit owner becomes a customer of the distributor; or (ii) have a Board-licensed provider smart sub-meter individual units, in which case the condominium corporation (through a bulk meter) continues to be the customer of the distributor and the smart sub-metering provider allocates the bulk bill to the individual unit owners.

9. At issue in this proceeding is THESL's practice of refusing to connect new condominium projects within its service area unless all units in the condominium are individually smart-metered by THESL. It is alleged that this practice effectively precludes condominium corporations or developers from the option of using the services of licensed smart sub-metering providers. This allegation is set out in the Compliance Notice issued to THESL:

1. THESL's Conditions of Service, specifically section 2.3.7.1.1, states that THESL "will provide electronic or conventional smart suite metering for each unit of a new Multi-unit site, or a condominium." By way of letters dated April 22, 2009, THESL informed Metrogate Inc. ("Metrogate") and Avonshire Inc. ("Avonshire") that despite Metrogate and Avonshire's request that THESL prepare a revised Offer to Connect for condominiums based on a bulk meter / sub-metering configuration, THESL would not offer that connection for new condominiums and would not prepare a revised Offer to Connect on that basis.

2. THESL's refusal to connect on that basis is contrary to the requirement of a distributor to connect a building to its distribution system as per section 28 of the Electricity Act and is contrary to section 3.1.1 of the DSC. The Board is also satisfied that THESL is likely to contravene section 28 of the Electricity Act and section 3.1.1 of the DSC in the future by continuing to refuse to connect buildings with a smart sub-metering system to its distribution system.

3. THESL's practice is also contrary to section 5.1.9 of the DSC which states that distributors must install smart meters *when requested to do so* by the board of directors of a condominium corporation or by 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*. [emphasis added]

4. THESL's practice is also contrary to section 53.17 of the Electricity Act (and Ontario Regulation 442/07—*Installation of Smart Meters and Smart Sub-Metering Systems in Condominiums* (made under the Electricity Act)) which contemplates a choice between smart metering and smart sub-metering.

5. THESL's Conditions of Service are therefore contrary to section 2.4.6 of the DSC which states that Conditions of Service must be consistent with the provisions of the DSC and all other applicable codes and legislation.

Compliance Notice at pp. 1-2.

B. Intervention Requests

10. On August 26, 2009 the Board received an intervention request from the EDA. In its request, the EDA stated that its participation was warranted because the oral hearing may involve "policy issues":

The EDA supports policies that retain the ability of distributors to include in their conditions of service, provisions to require individual suite smart metering in new condominiums. The EDA believes the issues addressed in the oral hearing may move beyond the interpretation of existing provisions and may involve policy issues, such as whether distributors should continue to have the ability to mandate smart meters in new condominiums.

Letter to the Board from Guru Kalyanraman, Electricity Distributors Association, dated August 26, 2009 ("EDA Intervention Letter").

11. On August 28, 2009, the Board received a second request to intervene from counsel for the SSMWG, in which counsel identified the SSMWG's interest in the proceeding as follows:

Members of the SSMWG have been directly impacted by the conduct of THESL that is at issue in this proceeding. As SSM Providers contract with condominium developers and condominium boards in the City of

Toronto, members of the SSMWG have encountered the same types of practices and behaviour by THESL as detailed in the Notice. It follows that the members of the SSMWG will likely be directly affected by any Board Order (or lack thereof) arising from this proceeding which could include an order(s) directing THESL to amend its Conditions of Service, remedy contraventions of "enforceable provisions" that have occurred and/or prevent any future contraventions of "enforceable provisions".

Letter to the Board from Dennis M. O'Leary, Counsel for the SSMWG, dated August 28, 2009 ("SSMWG Intervention Letter").

12. SSMWG's request to intervene was expressly limited to providing submissions on the appropriate outcomes and remedies:

The SSMWG does not intend for its participation to complicate or add time to the proceeding. To that end, the SSMWG does not intend to lead evidence or participate in the cross-examination of witnesses. The SSMWG simply seeks an opportunity to provide its perspective about what outcomes and remedies are appropriate under the circumstances. This is consistent with the Board's Notice, which indicates that the OEB may issue an Order that will aim to remedy THESL's past contraventions and prevent future contraventions.

SSMWG Intervention Letter, p. 2.

PART III - ISSUES

13. The issues to be determined are:
- (a) Should EDA and SSMWG be granted full standing to participate in this proceeding?
 - (b) If EDA and/or SSMWG are granted standing to participate, what participation rights should they be granted?
 - (c) Are EDA and SSMWG eligible to have the costs of their intervention in this proceeding covered?

PART IV - LAW AND ANALYSIS

A. EDA and SSMWG Should Not be Granted Full Standing to Intervene

(a) The General Test for Intervention

14. In *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*, the Ontario Court of Appeal identified four factors that a tribunal should generally consider when evaluating a request for intervenor status:

- (a) the nature of the proceeding;
- (b) whether the proposed intervenor will make a useful contribution;
- (c) whether the intervention would unfairly prejudice the other parties; and
- (d) whether the proposed intervenor has a direct interest in the outcome of the proceeding.

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd., 74 O.R. (2d) 164, [1990] O.J. No. 1378 at para. 10 [*Peel*].

Re Hollinger, 2005 LNONOSC 858 at para. 45 [*Hollinger*].

15. Ontario courts have consistently followed *Peel*; some administrative tribunals have also supplemented the *Peel* test with other considerations including the "subject-matter of the decision-making power, the nature of the issue to be decided at the hearing and the object of the governing legislation."

McFadyen v. Ontario (Mining Lands Commissioner), [2007] O.J. No. 4875 at para. 35.

(b) The nature of the proceeding – interventions are generally not appropriate in compliance proceedings

16. Standing to intervene in an adjudicative administrative proceeding (such as enforcement, compliance or enforcement hearings) is more restricted than in

other proceedings. As noted by the Ontario Securities Commission's ("OSC") in *Re Albino*:

[T]he position in Ontario would appear to be that where a hearing is purely or largely disciplinary in its nature, interventions will not be allowed. Adversarial proceedings brought in the public interest are to be prosecuted by counsel for the Commission, and the intervention of other parties is not warranted.

Re Albino, 1991 LNONOSC 27, citing *Re James F. Matheson*, May 9, 1990, Alberta Securities Commission Summary for June 1, 1990.

17. The OSC affirmed this principle in its more recent *Re Hollinger* decision:

[I]ssues of standing should be viewed differently in hearings involving contested take-over bids, for example, versus disciplinary proceedings. The Commission has granted broader intervention rights in bid-related and similar types of proceedings than in disciplinary hearings.

Hollinger at para. 47.

(c) *Intervenors must make a useful contribution to the proceeding*

18. A proposed intervenor should demonstrate that "it will advance arguments or evidence that would not otherwise be presented" or that it will "bring a different perspective to the issue before the Court".

Hollinger at para. 48.

(d) *Intervenors must not prejudice the interests of the parties*

19. The tribunal must also consider whether intervenors' participation will unfairly prejudice the existing parties and process. This requirement will not be met where allowing interventions will unduly prolong or protract the proceeding.

Hollinger at para. 49.

(e) *Intervenors must have a direct interest in the outcome of the proceeding*

20. Lastly, the party seeking intervenor status must establish that it has a clear and direct interest in the outcome of the proceedings. To meet this test, a would-be intervenor must have a direct interest, whereby it stands to benefit or incur a loss as an immediate result of the decision. An interest which is merely political, which is anticipatory or speculative, or which is concerned with an indirect economic or commercial effect, is not sufficient to entitle a party to intervene in a proceeding.

Manitoulin and District Assn. for Community Living, [2000] OLRD No. 2023.

Greenberg Stores Ltd., [1997] O.J. No. 725.

21. The common law requirement to have a direct interest in the outcome of the proceeding is reflected in Rule 23 of the *Ontario Energy Board Rules of Practice and Procedure*:

23.02 The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross-examining a witness. [Emphasis added.]

Ontario Energy Board Rules of Practice and Procedure, r. 23.02.

(f) *EDA and SSMWG should not be granted full standing to intervene*

22. It is respectfully submitted that EDA's and SSMWG's requests to intervene do not meet the requisite test and should be denied.

23. This proceeding concerns a compliance issue that the Board is statutorily mandated to decide: Specifically, the Panel must decide whether THESL contravened or is likely to contravene an enforceable provision and should THESL be ordered to comply and remedy any contraventions.

24. This matter must be adjudicated by the Panel based on the allegations and evidence put forward by Board staff and the responding evidence adduced by THESL. It is not necessary nor appropriate for outside parties to participate, either to assist Compliance Counsel in proving the allegations or to assist THESL in defending them.

25. EDA and SSMWG do not have direct or substantial interests in the outcome of this proceeding that would warrant their participation. The only party that stands to be directly or substantially affected by an order of the Board is THESL.

26. EDA and SSMWG also do not offer a "useful contribution" in the sense that they "will advance arguments or evidence that would not otherwise be presented" or that they will "bring a different perspective to *the issue before the Court*". The "issue before the [Panel]" is whether THESL contravened or is likely to contravene an enforceable provision. That is a determination that lies within the exclusive mandate of the Board under section 112.3 of the OEB Act and it is not necessary or appropriate for outside parties to weigh in on this determination.

27. The EDA's position that it ought to be entitled to intervene because "the issues addressed in the oral hearing may move beyond the interpretation of existing provisions and may involve policy issues, such as *whether distributors should continue to have the ability to mandate smart meters in new condominiums*", misconstrues the nature of the proceeding. Policy issues concerning what distributors *should* or *should not* be permitted to do — and whether legislation, regulations, codes, etc. should be amended — is well outside the scope of this proceeding.

28. Lastly, allowing the proposed interventions will unfairly prolong and protract the proceeding by enlarging the nature and scope of the proceeding beyond the narrow issue of compliance which is its focus.

B. Alternatively, EDA and SSMWG Should Have Limited Participation Rights

29. As an alternative to full participation, an administrative tribunal can provide a party with amicus curiae or 'friend of the court' standing (often referred to as "Torstar" standing in the administrative context). Torstar standing provides an intervenor with limited rights to make submissions before the decision-maker without the ability to introduce any new evidence.

Re Torstar, 8 OSCB 5068, 1985 at para. 28.

30. The Board's *Rules of Practice and Procedure* expressly confer authority to limit the participation rights of intervenors. Rule 23.09 provides that the Board may grant intervenor status "on conditions it considers appropriate." Rules 24 and 25 of the *Rules of Practice and Procedure* also contemplate participation in a proceeding that does not involve full participation rights.

Ontario Energy Board Rules of Practice and Procedure, r. 23.09, 24 and 25.

31. In this case, SSMWG states that its members are those who have been or stand to be adversely affected by THESL's conduct and that it would therefore like "an opportunity to provide its perspective about what outcomes or remedies are appropriate under the circumstances".

32. This sort of limited participation may be appropriate. If SSMWG's members are persons whose rights and interests are being impacted, they may be well positioned to offer assistance to the Panel in fashioning appropriate remedies for addressing existing contraventions and preventing future ones.

C. EDA and SSMWG are not Eligible for a Cost Award

33. In the event the Board allows EDA and/or SSMWG to participate in this proceeding, neither intervenor should be eligible for a cost award. The Ontario Energy Board's *Practice Direction On Cost Awards* provides that the burden of establishing eligibility for a cost award is on the party applying for a cost award.

Ontario Energy Board Practice Direction On Cost Awards, dated June 9, 2009, s. 3.02 (the "*Practice Direction*").

34. Granting intervenors eligibility for a cost award is not just or appropriate in an adjudicative proceeding of this nature. Unlike a standard rate or fee case, this proceeding was not brought by a commercial applicant that has the ability to recover any cost award from its ratepayers. Rather, the Board, as *de facto* applicant in this proceeding, is itself acting on behalf of the public interest and it would be contrary to the interests of justice (and a potential deterrent for future compliance proceedings) if the Board were required to bear the costs of the intervenors in this proceeding.

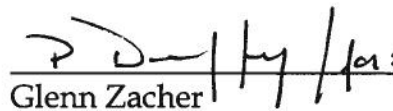
35. In addition, EDA and SSMWG represent commercial interests that do not fall within the boundaries of the eligible parties identified in section 3.03 of the *Practice Direction*. Allowing EDA to be eligible for a cost award would also run contrary to section 3.05(b) of the *Practice Direction*, which provides that electricity distributors, either individually or in a group, are generally not eligible for a cost award. Nothing in the circumstances of this proceeding justify varying the application of sections 3.03 or 3.05(b).

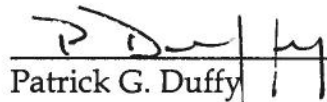
Ontario Energy Board Practice Direction On Cost Awards, dated June 9, 2009, ss. 3.03 and 3.05(b).

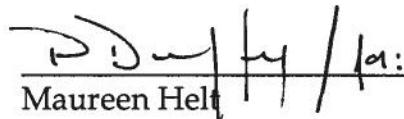
PART V - ORDER REQUESTED

36. Compliance Counsel respectfully request that the Board:
- (a) deny EDA and SSMWG's requests for intervenor standing;
 - (b) if it grants EDA and/or SSMWG intervenor status, limit the participation rights of the intervenors to making submissions on appropriate sanctions; and
 - (c) order that neither EDA nor SSMWG is eligible for a costs award.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


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Patrick G. Duffy


Maureen Helt

**SCHEDULE “A”
STATUTORY AND REGULATORY PROVISIONS**

1. *Ontario Energy Board Act, 1998, c. 15, Sched. B., s. 112.3*

Action required to comply, etc.

112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

- (a) remedy a contravention that has occurred; or
- (b) prevent a contravention or further contravention of the enforceable provision.

Application

(2) This section applies to contraventions that occur before or after this section comes into force.

2. *Electricity Act, 1998, c. 15, Sched. A, ss. 28 and 53.17*

Distributor’s obligation to connect

28. A distributor shall connect a building to its distribution system if,

- (a) the building lies along any of the lines of the distributor’s distribution system; and
- (b) the owner, occupant or other person in charge of the building requests the connection in writing.

Sub-metering: condominiums

53.17 (1) Despite the Condominium Act, 1998 and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation, in a property or class of properties prescribed by regulation at a location prescribed by regulation and for consumers or classes of consumers prescribed by regulation at or within the time prescribed by regulation. 2006, c. 3, Sched. B, s. 2.

3. Notice of Proposal to Amend a Code and Notice of Proposal to Issue a New Code, EB-2007-0772 dated January 8, 2008

"Smart metering" [is used] to describe the situation in which a licensed distributor individually meters every condominium unit (and the condominium's common areas) with a smart meter. In this scenario, each unit will become a residential customer of the licensed distributor and each unit and the common areas must have a separate account with the licensed distributor.

"Smart sub-metering" [is used] to describe the situation in which a licensed distributor provides service to the condominium's bulk (master) meter and then a separate person (the smart sub-meter provider on behalf of the condominium corporation) allocates that bill to individual units and the common areas through the smart sub-metering system. In this scenario, the condominium continues to be the customer of the licensed distributor and will receive a single bill based on the measurement of the bulk (master) meter.

4. *Distribution System Code*

2.4.6 A distributor's Conditions of Service shall include, at a minimum, a description of the following:

- The types of connection service performed by the distributor for each customer class, and the conditions under which these connections will be performed (connection policy).
- The distributor's basic connection service that is recovered through its revenue requirements and does not require a variable connection charge.
- The distributor's capital contribution policy by customer class for an offer to connect, including procedures for collection of capital contributions.
- The demarcation point at which the distributor's operational responsibilities for distribution equipment end at the customer.
- The demarcation point at which the distributor's ownership of distribution equipment ends at the customer.
- The billing cycle period and payment requirements by customer class.
- Design requirements for connection to the distribution system.

- Voltages at which the distributor provides electricity and corresponding load thresholds.
- Type of meters provided by the distributor.
- Meters required by customer class.
- Quality of Service standards to which the distribution system is designed and operated.
- Conditions under which supply may be unreliable or intermittent.
- Conditions under which service may be interrupted.
- Conditions under which the distributor may disconnect a consumer.
- Policies for planned interruptions.
- The business process the distributor uses to disconnect and reconnect consumers, including means of notification and timing.
- The distributor's rights and obligations with respect to a customer.
- Rights and obligations a consumer or embedded generator has with respect to the distributor.
- The distributor's liability limitations in accordance with this Code.

3.1 Connections

3.1.1 In establishing its connection policy as specified in its Conditions of Service, and determining how to comply with its obligations under section 28 of the *Electricity Act*, a distributor may consider the following reasons to refuse to connect, or continue to connect, a customer:

- (a) contravention of the laws of Canada or the Province of Ontario including the Ontario Electrical Safety Code;
- (b) violation of conditions in a distributor's licence;
- (c) materially adverse effect on the reliability or safety of the distribution system;
- (d) imposition of an unsafe worker situation beyond normal risks inherent in the operation of the distribution system;
- (e) a material decrease in the efficiency of the distributor's distribution system;
- (f) a materially adverse effect on the quality of distribution services received by an existing connection; and
- (g) if the person requesting the connection owes the distributor money for distribution services, or for non-payment of a security deposit. The distributor

shall give the person a reasonable opportunity to provide the security deposit consistent with section 2.4.20.

5.1.9 When requested by either: (a) the board of directors of a condominium corporation; or
(b) 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 smart 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).

5. *Ontario Energy Board Rules of Practice and Procedure.*

23. Intervenor Status

23.01 Subject to **Rule 23.05** and except as otherwise provided in a notice or procedural order issued by the Board, a person who wishes to actively participate in the proceeding shall apply for intervenor status by filing and serving a letter of intervention by the date provided in the notice of the proceeding.

23.02 The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross-examining a witness.

23.03 Every letter of intervention shall contain the following information:

- (a) a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention;
- (b) subject to **Rule 23.04**, a concise statement of the nature and scope of the intervenor's intended participation;
- (c) a request for the written evidence, if it is desired;
- (d) an indication as to whether the intervenor intends to seek an award of costs;
- (e) if applicable, the intervenor's intention to participate in the hearing using the French language; and
- (f) the full name, address, telephone number, and fax number, if any, of no more than two representatives of the intervenor, including counsel, for the purposes of service and delivery of documents in the proceeding.

23.04 Where, by reason of an inability or insufficient time to study the document initiating the proceeding, a person is unable to include any of the information required in the letter of intervention under **Rule 23.03(b)**, the person shall:

(a) state this fact in the letter of intervention initially filed; and

(b) refile and serve the letter of intervention with the information required under **Rule 23.03(b)** within 15 calendar days of receipt of a copy of any written evidence, or within 15 calendar days of the filing of the letter of intervention, or within 3 calendar days after a proposed issues list has been filed under **Rule 30**, whichever is later.

23.05 A person may apply for intervenor status after the time limit directed by the Board by filing and serving a notice of motion and a letter of intervention that, in addition to the information required under **Rule 23.03**, shall include reasons for the late application.

23.06 The Board may dispose of a motion under **Rule 23.05** with or without a hearing.

23.07 A party may object to a person applying for intervenor status by filing and serving written submissions within 10 calendar days of being served with a letter of intervention.

23.08 The person applying for intervenor status may make written submissions in response to any submissions filed under **Rule 23.07**.

23.09 The Board may grant intervenor status on conditions it considers appropriate.

24. Public Comment

24.01 Except as otherwise provided in a notice or procedural order issued by the Board, a person who does not wish to be a party in a proceeding, but who wishes to communicate views to the Board, shall file a letter of comment.

24.02 The letter of comment shall include the nature of the person's interest, the person's full name, address and telephone number, as well as any request to make an oral presentation to the Board in respect of the proceeding.

24.03 The Board shall serve a letter of comment filed under **Rule 24.01** on the party who commenced the proceeding and on any other party who requests a copy.

24.04 Any party may file a reply to the letter of comment, and shall serve it on the person who filed the letter and such other persons as directed by the Board.

24.05 Where the Board has permitted a person to make an oral presentation, that person shall contact the Board Secretary to arrange a time to be heard by the Board.

24.06 A person who makes an oral presentation shall not do so under oath or affirmation and shall not be subject to cross-examination, unless the Board directs otherwise.

25. Observer Status

25.01 Except as otherwise provided in a notice or procedural order issued by the Board, a person who is interested in being served with documents issued by the Board in a proceeding shall file a request for the documents desired.

25.02 A person who is interested in being served with documents filed by a party in respect of a proceeding shall file and serve a request for documents on that party.

25.03 A party who has been served with a request under **Rule 25.02** is entitled to be reimbursed by the observer for expenses actually incurred in serving the documents on the observer, unless the Board directs otherwise.

25.04 Upon being reimbursed, if applicable, under **Rule 25.03**, the party shall serve the requested documents on the observer.

25.05 All documents filed in a proceeding may be examined free of charge at the Board's offices.

6. *Ontario Energy Board Practice Direction On Cost Awards*

3. COST ELIGIBILITY

3.01 The Board may determine whether a party is eligible or ineligible for a cost award.

3.02 The burden of establishing eligibility for a cost award is on the party applying for a cost award.

3.03 A party in a Board process is eligible to apply for a cost award where the party:

(a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to regulated services;

(b) primarily represents a public interest relevant to the Board's mandate; or

(c) is a person with an interest in land that is affected by the process.

3.04 In making a determination whether a party is eligible or ineligible, the Board may also consider any other factor the Board considers to be relevant to the public interest.

3.05 Parties not eligible for a cost award include:

(a) applicants before the Board;

(b) transmitters, wholesalers, generators, distributors, and retailers of electricity, either individually or in a group;

(c) transmitters, distributors, and marketers of natural gas, and gas storage companies, either individually or in a group;

(d) the IESO; and

(e) the Ontario Power Authority.

3.06 Notwithstanding section 3.05, the Board may, in special circumstances, find that a party which falls into one of the categories listed in section 3.05 is eligible for a cost award in a particular process.

3.07 The Board may, in appropriate circumstances, award an honorarium recognizing individual efforts in preparing and presenting an intervention or submission. The amount of the honorarium will be specified by the Board panel presiding.

**SCHEDULE “B”
DOCUMENTS AND AUTHORITIES**

TAB	
1.	Notice of Intention to Make an Order For Compliance under Section 112.3 of the <i>Ontario Energy Board Act, 1998</i> , dated August 4, 2009.
2.	Letter to the Board from Guru Kalyanraman, Electricity Distributors Association, dated August 26, 2009.
3.	Letter to the Board from Dennis M. O’Leary, Counsel for the SSMWG, dated August 28, 2009.
4.	<i>Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.</i> , 74 O.R. (2d) 164, [1990] O.J. No. 1378.
5.	<i>Re Hollinger</i> , 2005 LNONOSC 858.
6.	<i>McFadyen v. Ontario (Mining Lands Commissioner)</i> , [2007] O.J. No. 4875.
7.	<i>Re Albino</i> , 1991 LNONOSC 27.
8.	<i>Manitoulin and District Assn. for Community Living</i> , [2000] OLRD No. 2023.
9.	<i>Greenberg Stores Ltd.</i> , [1997] O.J. No. 725.
10.	<i>Re Torstar</i> (1985), 8 OSCB 5068.



EB-2009-0308

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

AND IN THE MATTER OF a Notice of Intention to Make an
Order for Compliance against Toronto Hydro-Electric System
Limited.

**NOTICE OF INTENTION TO MAKE AN ORDER FOR
COMPLIANCE UNDER SECTION 112.3 OF THE *ONTARIO
ENERGY BOARD ACT, 1998***

The Ontario Energy Board (the "Board"), on its own motion under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act"), intends to make an Order under section 112.3 of the Act requiring Toronto Hydro-Electric System Limited ("THESL") to comply with a number of enforceable provisions as defined in section 112.1 of the Act. The Board also intends to make an Order under section 112.3 of the Act requiring THESL to take such action as the Board may specify to remedy the contravention that has occurred or prevent a contravention or further contravention of the enforceable provisions. This Notice and Order concerns THESL's conduct relating to smart metering and smart sub-metering in new condominiums. For the purposes of the Order, the enforceable provisions are: section 28 of the *Electricity Act, 1998* (the "Electricity Act"); section 53.17 of the Electricity Act; section 2.4.6 of the Distribution System Code (the "DSC"); section 3.1.1 of the DSC; and section 5.1.9 of the DSC.

The particulars of non-compliance are set out below.

1. THESL's Conditions of Service, specifically section 2.3.7.1.1, states that THESL "will provide electronic or conventional smart suite metering for each unit of a new Multi-unit site, or a condominium." By way of letters dated April 22, 2009, THESL informed Metrogate Inc. ("Metrogate") and Avonshire Inc. ("Avonshire")

that despite Metrogate and Avonshire's request that THESL prepare a revised Offer to Connect for condominiums based on a bulk meter / sub-metering configuration, THESL would not offer that connection for new condominiums and would not prepare a revised Offer to Connect on that basis.

2. THESL's refusal to connect on that basis is contrary to the requirement of a distributor to connect a building to its distribution system as per section 28 of the Electricity Act and is contrary to section 3.1.1 of the DSC. The Board is also satisfied that THESL is likely to contravene section 28 of the Electricity Act and section 3.1.1 of the DSC in the future by continuing to refuse to connect buildings with a smart sub-metering system to its distribution system.
3. THESL's practice is also contrary to section 5.1.9 of the DSC which states that distributors must install smart meters *when requested to do so* by the board of directors of a condominium corporation or by 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*. [emphasis added]
4. THESL's practice is also contrary to section 53.17 of the Electricity Act (and Ontario Regulation 442/07—*Installation of Smart Meters and Smart Sub-Metering Systems in Condominiums* (made under the Electricity Act)) which contemplates a choice between smart metering and smart sub-metering.
5. THESL's Conditions of Service are therefore contrary to section 2.4.6 of the DSC which states that Conditions of Service must be consistent with the provisions of the DSC and all other applicable codes and legislation.

THEREFORE TAKE NOTICE that THESL may request, within fifteen days after receiving this Notice, that the Board hold a hearing on these matters. If no request for a hearing is made within this time period, the Board may proceed to make an Order that THESL comply with any of the enforceable provisions listed in this Notice. The Board may also make an Order requiring THESL to take such action as the Board may specify, including but not limited to an Order to THESL to amend its Conditions of Service, to remedy the contravention that has occurred or prevent a contravention or further contravention of any of the enforceable provisions.