EB-2009-0308

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 THE MOTION OF TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

September 22, 2009

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PART I - OVERVIEW

1. These submissions address the motion brought by Toronto Hydro Electric System Limited ("THESL") for the production and disclosure of certain documents from: (i) the Board; (ii) the "Complainants" as defined by THESL (Metrogate Inc. ("Metrogate"), Residences of Avonshire Inc. ("Avonshire"), Deltera Inc. ("Deltera") and Enbridge Electric Connections Inc. ("Enbridge")); and (iii) members of the Smart Sub-Metering Working Group ("SSMWG").

2. The *Stinchcombe* level of disclosure sought by THESL does not apply in this case. The Board is primarily an economic regulator and THESL faces economic consequences, not criminal sanction or a restriction on individual rights. In the circumstances, THESL is entitled to be fully informed of the case against it and to be provided with all documents that Compliance Counsel intends to rely upon, but it is not entitled to every document in the Board's possession – e.g., internal Board staff notes, emails, etc.

3. The documents sought by THESL which the Board obtained from Complainants or that relate to Complainant interviews (if any such documents exist) are also protected by "public interest privilege".

4. Subject to any procedural order or direction from the Panel, Compliance Counsel agrees to provide THESL with copies of all documents to be relied upon and (if the hearing will entail *vive voce* evidence) summaries of all witness testimony. That is sufficient for THESL to know and defend the case against it and to meet the Board's obligation to ensure procedural fairness.

5. Compliance Counsel also opposes THESL's request for disclosure of documents from third parties. The Complainant Information and SSMWG Materials (defined *infra*) have not been shared with Board compliance staff, will

not be relied upon by Compliance Counsel and are not relevant to the matters that are within the scope of this proceeding.

6. Subject to the Panel's direction, Compliance Counsel will be prepared to address the maters raised in THESL's motion regarding the appropriate procedure and schedule for this proceeding at the hearing of this motion on September 25, 2009.

PART II - THE FACTS

A. Background

7. This is a compliance proceeding in which Compliance 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 Act, 1998*, c. 15, Sched. B, s. 112.3 (the "*OEB Act*").

8. In its Notice of Intention to Make an Order For Compliance dated August 4, 2009, the Board identified the enforceable provisions 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").

9. The foregoing provisions create a scheme under which condominium developers or corporations 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 smart sub-meter 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.

10. 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. This practice effectively precludes condominium corporations or developers from the option of using the services of licensed smart sub-metering providers.

11. In a letter dated May 9, 2009, the Board informed THESL that it had received specific allegations of incidents where THESL had "informed developers that individual units in new condominiums must be metered by THESL." The letter detailed four examples, including the refusal to provide revised offers to connect to Metrogate, Avonshire, Deltera and Enbridge.

> Letter from Paul Gasparatto, OEB to Colin McLorg, THESL dated May 9, 2009.

B. The Compliance Notice

12. In this proceeding, the Board alleges that THESL's practice violates the above-noted provisions of the *Electricity Act* and the DSC. The particulars of non-compliance are set out in the Compliance Notice:

> 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.

THESL Conditions of Service, s. 2.3.7.1.1.

Letter from Colin McLorg, THESL, to Lou Tersigni, Metrogate Inc. dated April 22, 2009.

C. THESL's Requests for Disclosure

13. On August 21, 2009 THESL wrote to Compliance Counsel and requested "disclosure and production of all information that may relate to suite metering or smart metering practices of THESL or third parties". THESL sent a follow-up request on August 28, 2009.

Letter from George Vegh, counsel for THESL, to Maureen Helt, Compliance Counsel, dated August 21, 2009.

> Letter from George Vegh, counsel for THESL, to Maureen Helt, Compliance Counsel, dated August 28, 2009.

14. On September 1, 2009 Compliance Counsel couriered to counsel for THESL a package of documents that contained documents related to:

(a) Stakeholder complaints made to the Board;

(b) Compliance office communications with THESL; and

(c) Extracts from THESL's Conditions of Service, the Distribution System Code, and the Smart Sub-Metering Code.

> Affidavit of Patrick G. Duffy sworn September 22, 2009.

15. On August 28, 2009 THESL wrote to SSMWG and requested disclosure of "all contracts made with, condominium developers with respect to the installation and operation of sub-meters for condominiums in the City of Toronto" from each member of SSMWG member:

> In the meantime, in order to clarify the impact of any outcome of this proceeding on your clients, and in order for THESL to defend itself in these proceedings, THESL requires the production of materials from the members of the SSMWG. Specifically, by this letter, THESL is requesting that each member of the SSMWG provide THESL with copies of all proposals made to, and all contracts made with, condominium developers with respect to the installation and operation of sub-meters for condominiums in the City of Toronto.

> Letter from George Vegh, counsel for THESL, to Dennis O'Leary, counsel for SSMWG, dated August 28, 2009.

16. On August 31, 2009, SSMWG informed THESL by letter that it would not be providing the materials requested.

> Letter from Dennis O'Leary, counsel for SSMWG, to George Vegh, counsel for THESL, dated August 31, 2009.

17. In its motion, THESL is seeking the production of the following:

(a) all information that may relate to suite metering or smart metering practices of THESL or third parties, prepared, sent, received, or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of THESL in relation to THESL's smart-metering of condominium units (referred to by THESL as "Compliance Information");

(b) all communications among the "Complainants" (Metrogate, Avonshire, Deltera, and Enbridge) and sub-meterers or condominium developers addressing the terms on which sub-meterers offer to provide sub-metering to condominium developers in the City of Toronto (referred to by THESL as "Complainant Information"); and

(c) materials from the members of SSMWG, specifically all proposals made to, and all contracts made with, condominium developers with respect to the installation and operation of sub-meters for condominiums in the City of Toronto ("SSMWG Materials").

PART III - ISSUES

18. The issues to be determined are:

(a) Should the Board require production and disclosure of all Compliance Information?

(b) Should the Board require production and disclosure of all Complainant Information and SSMWG Materials from third parties?

PART IV - LAW AND ANALYSIS

A. The Board should deny THESL's Request for Disclosure of all Compliance Information

(a) Stinchcombe level of disclosure not required

19. The *Stinchcombe* level of disclosure applies to criminal proceedings and some disciplinary proceedings where the accused faces severe sanction. Contrary to THESL's position, the *Stinchcombe* standard does not apply in this case. As the Supreme Court of Canada recently stated:

> It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context. [Emphasis added.]
>
> *May v. Ferndale Institution,* [2005] 3 S.C.R. 809,2005 SCC 82 at paras. 91 and 92.

20. In the administrative context, the duty of procedural fairness requires only that a person (i) be fully informed of the case against him or her, and (ii) be provided with all of the documents upon which the administrative agency intends to rely.

> *Litchfield v. College of Physicians and Surgeons of Alberta,* [2005] A.J. No. 1771 at paras. 69 and 70.
>
> *C.E.P., Local 707 v. Salvation Army Community Service Centre Fort McMurray Corps.* (1998), 46 C.L.R.B.R. (2d) 114 at para. 36.

21. The leading case of *Re CIBA-Geigy Canada Ltd.* articulates the applicable principles when dealing with an economic regulator such as the Board. *Re CIBA-Geigy Canada Ltd.* concerned the disclosure standard for the federal Patented Medicine Prices Review Board ("PMPRB") in a proceeding to determine if a drug was being sold at an excessive price. The disclosure requested by the target of

the proceeding, Ciba-Geigy, closely mirrored what is being requested by THESL in this case:

> At the pre-hearing conference held on January 18, 1994, CIBA requested that the board issue an order requiring both the board and board staff to produce copies of all documents relating to any matter at issue in the proceedings that were or had been in the power, possession, or control of the board or board staff. This request was for all relevant documents, whether favourable or prejudicial to CIBA's position and whether or not board staff planned to rely on the relevant document as part of its case.
>
> ...
>
> CIBA sought, in particular, to have the board's report disclosed. This report was prepared for the chairperson and was only used to decide if a notice of hearing should issue. [Emphasis added.]
>
> *Re CIBA-Geigy Canada Ltd.* (1994), 83 F.T.R. 2 at paras. 15 and 38 [*CIBA-Geigy*].
>
> Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 2008) at §9:7300.
>
> See also: *Re Mills*, [1999] I.D.A.C.D. No. 41.

22. The PMPRB refused CIBA-Geigy's request and this determination was upheld on an application for judicial review to the Federal Court. In upholding the PMPRB's decision, the Court observed that the Board was primarily an economic regulator, as opposed to a criminal court, and that its work would be unduly impeded if it was required "to disclose all possibly relevant information gathered while fulfilling its regulatory mandate". The Court accordingly found that the requisites of procedural fairness would be met "if the subject of the inquiry is advised of the case it has to meet and is provided with all the documents that will be relied on":

> Certainly, the subject of an excess price hearing is entitled to know the case against it, but it should not be permitted to obtain all the evidence which has come into the possession of the board in carrying out its regulatory functions in the public interest on the sole ground that it may be relevant to the matter at hand. The board's function is not to obtain

> information solely for investigative purposes; its primary role is to monitor prices.
>
> [...]
>
> [W]hen the statutory scheme of this board is looked at, the board is a regulatory board or tribunal. There is no point in the legislature creating a regulatory tribunal if the tribunal is treated as a criminal court. The obligations concerning disclosure imposed by the doctrine of fairness and natural justice are met if the subject of the inquiry is advised of the case it has to meet and is provided with all the documents that will be relied on ... It is not intended that proceedings before these tribunals be as adversarial as proceedings before a court. To require the board to disclose all possibly relevant information gathered while fulfilling its regulatory obligations would unduly impede its work from an administrative viewpoint. Fairness is always a matter of balancing diverse interests. I find that fairness does not require the disclosure of the fruits of the investigation in this matter.
>
> *CIBA-Geigy, supra* at paras. 30 and 32.

23. The Federal Court's decision was affirmed on appeal wherein it was noted that administrative proceedings are not analogous to criminal prosecutions even where the subject of the proceeding may face "extremely serious economic consequences":

> There are admittedly extremely serious economic consequences for an unsuccessful patentee at a s. 83 hearing, and a possible effect on a corporation's reputation in the market place. But as McKeown J. found, the administrative tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings.
>
> *Re CIBA-Geigy Canada Ltd.*, [1994] 3 F.C. 425 at para. 8 (C.A.).

24. THESL's request for disclosure is akin to that made in *Ciba-Geigy* and should be refused for the same reasons. The Board, like the federal PMPRB, is primarily an economic regulator and THESL, like Ciba-Geigy, faces economic consequences, not criminal sanction or a restriction on individual rights.

25. In the circumstances, THESL is entitled to be fully informed of the case against it and to be provided with all documents that Compliance Counsel

intends to rely upon. Subject to any procedural order or direction from the Panel, Compliance Counsel agree to provide THESL with copies of all documents to be relied upon and (if the hearing will entail *vive voce* evidence) to provide THESL with summaries of all witness testimony.

26. The proposed approach is consistent with Rule 14 of the Board's *Rules of Practice and Procedure* concerning disclosure:

> 14. Disclosure
>
> 14.01 A party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document in accordance with the Board's directions.
>
> 14.02 Any party who fails to comply with Rule 14.01 shall not put the document in evidence or use it in the cross-examination of a witness, unless the Board otherwise directs.
>
> 14.03 Where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished with reasonable information of any allegations at least 15 calendar days prior to the hearing.
>
> *Ontario Energy Board Rules of Practice and Procedure,* R. 14.

(b) Information and documents obtained from the Complainants are subject to public interest privilege

27. The documents sought by THESL which the Board obtained from Complainants or that relate to Complainant interviews (if any such documents exist) are also protected by "public interest privilege". The purpose of public interest privilege is to allow complainants to come forward to regulatory bodies in an uninhibited fashion without fear of reprisal.

28. Public interest privilege was recognized in *Canada (Director of Investigation & Research) v. Southam Inc.* where the Director of Competition's refusal to provide notes of interviews with complainants was upheld:

> In the competition law area, at least in merger and abuse of dominant position cases, the individuals who are interviewed may be potential or actual customers of the respondents, they may be potential or actual employees. They may fear reprisals if they provide the Director with information which is unfavourable to the respondents. Many of them are likely to be in a vulnerable position vis-à-vis the respondents. It is in the public interest, then, to allow the Director to keep their identities confidential, to keep the details of the interviews confidential, to protect the effectiveness of his investigations. It is in the public interest to keep the interview notes confidential except when the interviewees are called as witnesses in a case or otherwise identified by the party claiming privilege. In addition, the Director is not required to prepare the respondents' case by identifying potential witnesses for them. [Emphasis added.]
>
> *Canada (Director of Investigation & Research) v. Southam Inc.*,1991 CarswellNat 1583 at para. 26 (Comp. Tribunal) [*Southam*].

29. The Federal Court of Appeal affirmed the availability of public interest privilege in *D & B Co. of Canada Ltd. v. Canada (Director of Investigation & Research)*. In that case, Justice Strayer considered the Competition Tribunal's refusal to produce all correspondence, memoranda or submissions from a complainant and all notes, materials and statements obtained or prepared by the Director from meetings and discussions with the complainant. His Honour concluded that these documents were covered by public interest privilege:

> To gain the cooperation of people in the industry [the Director] must be able to gather information in confidence, his informants not being identified unless of course they are called as witnesses in a proceeding before the Tribunal.
>
> *D & B Co. of Canada Ltd. v. Canada (Director of Investigation & Research)*, 1994 CarswellNat 1849 at para. 2 (Fed. C.A.) [*D & B*].

30. Justice Strayer went on to state that public interest privilege continues to be recognized in light of *Stinchcombe* and is analogous to the various forms of privilege recognized in civil cases:

> *Stinchcombe* does require very broad disclosure by the Crown in indictable offenses. But it does not purport to lay down identical requirements for civil cases or even for summary conviction offences. Nor does it require that privileged information be disclosed. Indeed, the

> main thrust of *Stinchcombe* is to require that the Crown in prosecution of indictable offences make disclosure similar to that available in civil cases. But civil cases have always recognized various forms of privilege. *Stinchcombe* has not been widely applied in civil cases: I need go no farther than the decision in this Court in *Ciba-Geigy Canada Ltd. v. Patented Medicine Prices Review Board* which held that *Stinchcombe* does not apply to proceedings before that Board. The essential distinction was that a proceeding before such a tribunal does not have the dire consequences for a party as does a prosecution for an indictable offence. The same can be said of a proceeding such as the present one before the Competition Tribunal. The learned presiding judge in my view correctly declined to apply *Stinchcombe* in this case.
>
> *D & B, supra* at para. 6.

31. Like the Director of Competition, Board compliance staff must have the ability to protect communications with complainants by way of public interest privilege. The concerns identified in *Southam* and *D & B* regarding the disclosure of complainant information apply to the Board.

32. Moreover, the need for public interest privilege far outweighs any impact on THESL's ability to respond to the allegations in this proceeding. Compliance Counsel will provide all documents that it intends to rely upon and will, should *vive voce* evidence be required, provide summaries of all witness testimony. These measures will ensure that the requirements of procedural fairness are met and will also protect the confidentiality of the complainants.

(c) Information and documents related to Deltera and Enbridge are outside the scope of this proceeding

33. THESL has requested documents from Deltera and Enbridge because these entities are referred to in the May 9, 2009 letter from Paul Gasparatto of the Board.

34. However, the Compliance Notice (which sets the scope of this proceeding) only advances allegations of non-compliance with respect to THESL's dealings with Metrogate and Avonshire. Deltera and Enbridge are not mentioned in the

Compliance Notice. As such, THESL's request that Compliance Staff disclose correspondence with these entities is clearly outside the scope of this proceeding.

B. The Board should deny THESL's Request for Disclosure of all Complainant Information and SSMWG Materials

35. In order to grant disclosure of documents from third parties, the Board must be satisfied that the information requested is relevant to a material issue and it would be unfair for the respondent to proceed to the hearing without disclosure of the information.

36. Such orders against third parties should be exercised with restraint. As the Ontario Municipal Board cautioned in *Hammerson Canada Inc. v. Guelph (City)*:

> The Board is mindful of the possible abuse of the discovery process. We are vigilant against any attempt to transform the right to discover into a licence to procure information from the world at large. We are also keenly concerned that the process should not become a Prometheus Unbound, with little concern to the inconvenience and disruption of others.
>
> *Hammerson Canada Inc. v. Guelph (City)*, [1999] O.M.B.D. No. 1174 at para. 7 [*Hammerson*].

37. The caution in *Hammerson* is apt in this case. The Complainant Information and SSMWG Materials have not been shared with Board compliance staff and will not be relied upon by Compliance Counsel in this proceeding. Nor does THESL require disclosure of this information to know the case against it.

38. The Complainant Information and SSMWG Materials are, it is respectfully submitted, well beyond the scope of this proceeding.

PART V - PROCEDURAL MATTERS

39. Compliance Counsel is prepared to address the balance of THESL's motion (requesting the implementation of certain procedures and the setting of

schedule for this proceeding) during the hearing of this motion on September 25, 2009.

PART VI - ORDER REQUESTED

40. For the foregoing reasons, Compliance Counsel respectfully requests that the Board dismiss THESL's motion for the production of Compliance Information, Complainant Information and the SSMWG Materials.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Glenn Zacher

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.

Non-application of registered declaration

(2) If a smart meter or smart sub-metering system is installed in accordance with subsection (1) in respect of a unit of a condominium, the distributor, retailer or any other person licensed to conduct activities referred to in subsection (1) shall bill the consumer based on the consumption or use of electricity by the consumer in respect of the unit despite a registered declaration made in accordance with the *Condominium Act, 1998.*

Priority over registered declaration

(3) Subsection (2) applies in priority to any registered declaration made in accordance with the *Condominium Act, 1998* or any by-law made by a condominium corporation registered in accordance with that Act and shall take priority to the declaration or by-law to the extent of any conflict or inconsistency.

Exclusive authority of Board

(4) A regulation referred to in subsection (1) may provide the Board with exclusive authority to approve or authorize, after a prescribed date,

(a) the smart meter, metering equipment, systems and technology and any associated equipment, systems and technologies; and

(b) the smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies.

3. *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.

• The distributor's dispute resolution procedure.

• Terms and conditions under which the distributor provides other services in its capacity as a distributor.

The conditions of service must be consistent with the provisions of this Code and all other applicable codes and legislation including the Rate Handbook.

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).

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

14. Disclosure

14.01 A party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document in accordance with the Board's directions.

14.02 Any party who fails to comply with **Rule 14.01** shall not put the document in evidence or use it in the cross-examination of a witness, unless the Board otherwise directs.

14.03 Where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished with reasonable information of any allegations at least 15 calendar days prior to the hearing.

SCHEDULE "B"
COMPENDIUM OF DOCUMENTS

TAB	DOCUMENT
1.	Notice of Intention to Make an Order For Compliance under Section 112.3 of the *Ontario Energy Board Act, 1998,* dated August 4, 2009.
2.	Letter from Paul Gasparatto, Project Advisor, Regulatory Policy and Compliance to Colin McLorg, THESL dated July, 24, 2008.
3.	THESL Conditions of Service, s. 2.3.7.1.1.
4.	Letter from Colin McLorg, THESL, to Lou Tersigni, Metrogate Inc. dated April 22, 2009.
5.	Letter from Colin McLorg, THESL, to Giuseppi Bello, Residences of Avonshire Inc. dated April 22, 2009.
6.	Letter from George Vegh, counsel for THESL, to Maureen Helt, Compliance Counsel, dated August 21, 2009.
7.	Letter from George Vegh, counsel for THESL, to Maureen Helt, Compliance Counsel, dated August 28, 2009.
8.	Letter from George Vegh, counsel for THESL, to Dennis O'Leary, counsel for SSMWG, dated August 28, 2009.
9.	Letter from Dennis O'Leary, counsel for SSMWG, to George Vegh, counsel for THESL, dated August 31, 2009.

SCHEDULE "C"
AUTHORITIES

TAB	AUTHORITIES
1.	*May v. Ferndale Institution,* [2005] 3 S.C.R. 809,2005 SCC 82.
2.	*Litchfield v. College of Physicians and Surgeons of Alberta,* [2005] A.J. No. 1771.
3.	*C.E.P., Local 707 v. Salvation Army Community Service Centre Fort McMurray Corps.* (1998), 46 C.L.R.B.R. (2d) 114.
4.	*CIBA-Geigy Canada Ltd.* (1994), 83 F.T.R. 2.
5.	Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 2008) at §9:7300.
6.	*Re Mills,* [1999] I.D.A.C.D. No. 41.
7.	*CIBA-Geigy Canada Ltd.,* [1994] 3 F.C. 425 (C.A.).
8.	*Canada (Director of Investigation & Research) v. Southam Inc.,*1991 CarswellNat 1583 (Comp. Tribunal).
9.	*D & B Co. of Canada Ltd. v. Canada (Director of Investigation & Research),* 1994 CarswellNat 1849 (Fed. C.A.).
10.	*Hammerson Canada Inc. v. Guelph (City),* [1999] O.M.B.D. No. 1174.