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December 30, 2009

BY COURIER

Ontario Energy Board
2300 Yonge Street
P.O. Box 2319
Suite 2700
Toronto ON M4P 1E4

Attention: Ms Kirsten Walli
Board Secretary

Dear Ms. Walli:

RE: Toronto Hydro-Electric System Limited ("THESL")
Board File: EB-2009-0308

Please find enclosed THESL's responses to Interrogatories.

Sincerely,



George Vegh
Counsel for THESL

c: Maureen Helt – Ontario Energy Board
Michael Millar – Ontario Energy Board
Dennis O'Leary – Aird & Berlis
Guru Kalyanraman – Electricity Distributors Association
Glen Zacher – Stikeman Elliott
Colin McLorg – Toronto Hydro Electric-System Limited
Lawrence Wilde – Toronto Hydro Electric System Limited
Pankaj Sardana – Toronto Hydro Electric System Limited
Chris Tyrrell – Toronto Hydro Electric System.

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Interrogatory 1: Suite Metering Policies for New Condominiums

Reference(s): Written Direct Evidence of Colin McLorg and Christopher Tyrrell, pp. 2 to 5

- 1) Why does THESL distinguish between new and existing condominiums for the purposes of its suite metering policies for condominium buildings? What is the rationale? Specifically:
 - a) Why does THESL offer bulk metering connections as an end-state configuration for existing condominiums, but not for new condominiums?

Answer:

The distinction between ‘new’ and ‘existing’ condominiums, as defined in THESL’s evidence at A. 3, reflects the effective date of revisions to THESL’s COS, i.e., February 29, 2008. The distinction does not rest on any other ground, including whether or not a condominium board has been formed for a particular project. However, given the stage in the planning and construction of a condominium at which THESL is contacted regarding a connection, it is typical for the building to be new in the conventional sense of that word.

As is the case for any similar change in rules (for example, in building codes) it is also typical that the rule change is effective only prospectively, not retrospectively. Furthermore, ‘existing’ condominiums are already connected. Consequently THESL did not take the position that buildings erected and occupied under the prior COS would be required after the fact to install suite metering.

- b) Explain why THESL’s concern about “contravention of law” by exempt distributors and/or sub-meter providers are [sic] not applicable in the case of existing condominiums or all the other opportunities for smart sub-metering that are described by THESL in A.6.

Answer:

Contrary to the premise of the question, THESL’s concerns about ‘contravention of law’ are applicable in many cases of ‘existing’ condominiums in which sub-meterers have bought the rights to sub-meter at unregulated rates under compulsory long-term contracts from condominium developers. However, in these cases the configuration is already completed and a connection is not required.

- 2) Why does THESL use the date of February 29, 2008 to distinguish between new and existing condominiums? In particular, was there a legislative or regulatory change or some other circumstance that caused THESL to change its policy and amend section 2.3.7.1.1 of its Conditions of Service as of that date?

Answer:

The date of February 29, 2008 was incidental to the internal process of revising the COS (at least) annually to reflect changing conditions, new requirements, etc. The date was not tied to any legislative or regulatory change. See response to question 1a.

- 3) Does THESL’s policy of not providing bulk-metered connections as an end-state configuration for new condominiums depend upon whether its communications and/or dealings are with a condominium

developer or a condominium board of directors? If THESL's communications or dealings for a new condominium were with a condominium board as opposed to a developer, would it maintain its policy of refusing to offer a bulk-metered connection as an end-state configuration? If so, explain why.

Answer:

As explained in response 1a above, the application of THESL's policy in this area turns on the inception date of the policy rather than the identity of the party which seeks connection. In practical terms a condominium which is being constructed and for which the developer seeks a connection will not have a condominium board at the time the connection arrangements must be made.

For clarity however, THESL emphasizes that in cases where the metering decision is in the hands of a condominium board (which could only occur in cases of 'existing' condominiums) THESL has and will accept direction from that board either to install a bulk interval meter (if not already in place) as required for sub-metering or to install suite meters.

- 4) Explain why, as referenced in A.5, THESL believes it has the right to require the installation of meters for individual units in a new condominium and not for the individual units in a campus style multi-facility development.

Answer:

Contrary to the premise of the question, THESL does not assert that it does not have the right to require the installation of individual meters in campus style multi-facility developments.

Interrogatory 2: Avonshire and Metrogate

Reference(s): Written Direct Evidence of Colin McLorg and Christopher Tyrrell, pp. 5 to 7

- 1) What was the date of Avonshire's request for a connection referenced at A.7? Please produce Avonshire's request for connection and all related documentation in THESL's possession, including the plans dated January 22, 2008.

Answer:

Connection requests do not take the form of discrete applications. Rather, potential customers, through their contractors, will contact THESL staff to discuss potential projects. The key dated document that has sufficient information to trigger an offer to connect, and on which the offer to connect is based, is the electrical plan provided by a potential customer. The plans filed by Metrogate and Avonshire are large and awkward documents. They are available for viewing during business hours. THESL notes that they are also available from the Compliance Team's witnesses.

- 2) What was the date of Metrogate's request for a connection referenced at A.7? Please produce Metrogate's request for connection and all related documentation in THESL's possession, including the plans dated April 1, 2008.

Answer: See Response to 1) above.

- 3) Why did THESL not offer Metrogate the same type of amended offer to connect that it offered to Avonshire on November 27, 2009 (referenced at A.9)? Specifically, if the purpose of the "self certification" conditions (as described by THESL at A.24) is "to foreclose the possibility of charging unlawful mark-ups", why would THESL not make the same offer to Metrogate (or other new condominiums)?

Answer:

The offer to Avonshire to provide an amended Offer to Connect (OTC) was an exceptional and transitional offer, predicated on the fact that the original OTC was based on plans dated earlier than February 29, 2008. It has been refused by Avonshire. The same circumstances do not apply in the case of Metrogate. Were similar circumstances to emerge with respect to another project THESL would be prepared to extend an amended OTC on the same terms offered to Avonshire, but THESL does not intend that the exception should become the rule or standard practice.

Furthermore, as stated in THESL's evidence, THESL's view is that self-certification is a second-best approach which is not superior to a uniform approach to all 'new' condominiums. It is not superior because among other things, including administrative burden, self-certification does not afford the scope to fulfill utility mandates under the Green Energy Act. Such mandates include the achievement of conservation targets which themselves will be conditions of licence for distributors.

Interrogatory 3: Marking-Up Distribution Services and

S. 3.1.1(a) of the Distribution System Code

Reference(s): Written Direct Evidence of Colin McLorg and Christopher Tyrrell, pp. 11 to 22

THESL states in its pre-filed evidence that:

- THESL is concerned that the practice of condominium developers in their commercial dealings with sub-meterers has resulted in condominium developers acting in a manner that does not qualify them as “exempted distributors”. Specifically, THESL’s information is that condominium developers have been offered payments by sub-meterers to allow them to provide sub-metering services and sub-meterers have been marking up distribution services”. (A.19)
- “... [THESL] will not provide a metering configuration that will facilitate unlicensed distributors to unlawfully profit from distribution activities. The most effective way to ensure this is through THESL’s provision of suite metering.” (A.23)
- “For a developer to prefer a licensed smart sub-meterer (which uses the same equipment as THESL), it is reasonable to infer that it is earning a profit; otherwise, there is no financial reason to choose that option.” (A.26)
- “Second, and more concretely, it is established business practice for sub-meterers to offer payments to condominium developers in the order of \$100 per unit or more in exchange for the right to install sub-meters in condominiums”. (A.26)
- “It also does not appear that sub-meterers are complying with the Board’s Requirement that exempted distributors may only use sub-meterers to allocate, rather than resell, the exempted distributors’ costs among sub-metered units.” (A.30)

1) With regards [sic] to the foregoing evidence:

Did THESL ever lodge a complaint or otherwise inform the Board (or any other authority) that it had concerns that condominium developers and/or sub-meterers were contravening the law in a manner set out in THESL’s pre-filed evidence? If it did, please provide the particulars and the relevant documents.

Answer:

Yes, it did. While THESL understood that these practices were of common knowledge, on May 26, 2009, THESL specifically flagged its concerns together with several other large distributors as follows in submissions in the Discretionary Metering proceeding, EB-2009-0111:

Exempt distribution is different in essence from unregulated distribution by an independent commercial company, that acquires the end-use customers, provides only distribution, metering and associated services, and charges unregulated rates that do not demonstrably satisfy the requirement that the “price [be] no greater than that required to

recover all reasonable costs”. In that case the distribution activity is the only, or principal, concern of the distributor and is not incidental to some other primary objective or activity; rather, it is undertaken primarily as a commercial enterprise with the purpose of making profits by providing an essential service to captive customers at unregulated rates. That situation is conducive to the achievement of excess profits because the customers are captive and the rates are unregulated. The provisions in the *Definitions and Exemptions* regulation do not, and should not be interpreted, to permit the establishment and exercise of unregulated monopoly power in the distribution of electricity, an essential service.

It follows therefore that sub-meterers should not be independently able to attach and have direct customer relationships with end-users, but rather should have as their direct and only customers the unifying agents, which themselves should be the only entities eligible for designation as ‘exempt distributors’. While it would be unreasonable to erect barriers to the contracting of sub-meterers by exempt distributors to conduct an activity that those distributors may have no expertise or capability in, it would be equally unreasonable to confer directly on sub-meterers the classification of exempt distributor, since in fact they would be nothing other than unregulated embedded distributors.

At page 2 of PO No. 1, the OEB also states:

“In many instances, the smart sub-metering systems have been installed, and are being used to bill consumers, by a licensed smart sub-metering provider on behalf of the Exempt Distributor.”

Nothing in the Definitions and Exemptions regulation or the Prescribed Activities regulation (O. Reg. 443/07) does or should be construed to permit sub-meterers to profit on the direct re-sale of bulk distribution services to individual end-users. However, in the current marketplace it appears possible that captive customers can be turned over to sub-meterers who then maintain independent, unregulated relationships with end-users instead of acting strictly as a sub-contractor to the exempt distributor. For the reasons set out above, the OEB should take steps to ensure that sub-meterers are indeed billing consumers only on behalf of exempt distributors, and not on their own behalf.

Although the Board largely adopted these recommendations, THESL is not aware that Compliance Staff has acted on these concerns.

- 2) Did THESL ever lodge a complaint or otherwise inform the Board (or any other authority) about any concerns it had with Avonshire or Metrogate (or SSM providers with whom Avonshire or Metrogate were dealing) acting in a way that contravened the law in a manner set out in THESL’s pre-filed evidence? If so, please provide the particulars and the relevant documents.

Answer:

No, it did not. Furthermore, contrary to the implication of the question, THESL has never alleged wrongdoing specifically on the part of Metrogate or Avonshire or on the part of their sub-meterer (and it

has no specific information in that regard). THESL's understanding is that these projects are still under construction and no consumers are currently using electricity or electricity distribution services. In any event, THESL's policy is preventative in nature; it is not aimed at remedying practices of specific developers or sub-meterers.

- 3) With regards [sic] to THESL's evidence that:

"... [THESL] will not provide a metering configuration that will facilitate unlicensed distributors to unlawfully profit from distribution activities. The most effective way to ensure this is through THESL's provision of suite metering." (A.23)

Did THESL ever inform the Board that its suite metering policy had been designed to prevent unlawful profiting by unlicensed distributors and/or did it seek Board authorization for this policy? If so, please provide the particulars and relevant documentation.

Answer:

No, it did not, nor did THESL seek Board authorization for THESL's condominium connection policy. As indicated in THESL's pre-filed evidence, its policy is authorized under all of the relevant enforceable provisions.

- 4) When did THESL first decide to base its condominium metering policy of refusing to provide bulk-metered connections as an end state configuration for new condominiums on the grounds that doing so would or could facilitate or cause a contravention of law as set out in THESL's pre-filed evidence? More specifically, was this concern for "contravention of law" a foundation or component of THESL's condominium metering policy prior to the Board's April 2008 investigation of THESL with regards [sic] to Avonshire and Metrogate? Please provide documentation evidencing when this became a component of THESL's condominium metering policy.

Answer:

While THESL personnel were generally aware of the practices of certain condominium developers and sub-meterers, there is no documentation to indicate when it first became 'a foundation or component of THESL's condominium metering policy'. As THESL has advised the Compliance Team on several occasions, preventing unauthorized mark-ups of distribution services is one motivating factor of its policy. Another motivating factor in developing its policy was facilitating the ability of condominium unit holders to participate in THESL's conservation programs.

- 5) THESL's April 22, 2009 letters to Avonshire and Metrogate refusing to provide bulk metering configurations do not reference THESL's concern for contravention of laws (as set out in THESL's evidence) as grounds for its refusal. When, if at all, did THESL first inform Avonshire and Metrogate that its refusal was, at least in part, based on these grounds

Answer:

Please also refer to response 2) above. THESL's position as expressed in those letters was in response to the assertion by Avonshire and Metrogate that they enjoyed rights under Section 53.17 of the *Electricity Act*, which assertion was disputed by THESL. There was no occasion to refer to other matters.

- 6) What information, if any, did THESL have on or about April 22, 2009 when it refused Avonshire's and Metrogate's requests for bulk metering configurations that Avonshire or Metrogate were acting in contravention of the law in the manner set out in THESL's prefiled evidence or in any other way?

Answer:

Please refer to response 2) above.

- 7) With regards [sic] to the statement that "[f]or a developer to prefer a licensed smart sub-meterer (which uses the same equipment as THESL), it is reasonable to infer that it is earning a profit; otherwise, there is no financial reason to choose that option", what evidence or other information does THESL have to support this inference? In particular, what information, if any, does THESL have about Metrogate or Avonshire, and their business practices and arrangements, to support this inference *vis-à-vis* Metrogate and Avonshire?

Answer:

Please refer to response 2) above. More generally, THESL's position on this point follows from generally recognized economic theory: freely acting economic agents generally seek the economically preferable outcome from their own perspective. Under regulated rates, THESL recovers the cost of meters through distribution rates over time, and does not charge the developer for those meters. Furthermore, THESL's COS expressly permit Alternative Bid arrangements to accommodate the preferences of developers and do not require that THESL provide and install the unit meters. Assuming no form difference in the meters themselves, or other pragmatic difference in installation timing etc, THESL asserts that it is reasonable to infer that some other economic advantage must accrue to developers for them to strongly prefer sub-metering to suite metering. Since developers have no ongoing interest in the building and since sub-metering compared to suite metering is unlikely to represent a key marketing difference to potential buyers, it is plausible to infer that the economic advantage to developers comes in the form of consideration from sub-meterers, in exchange for the ability to sub-meter customers.

In addition, please see Tab 23 of THESL's Pre-Filed evidence, which is the redacted version of a document in the possession of THESL. The document is an agreement between a sub-meterer and a condominium developer which provides for payments of \$100 per unit.

- 8) With regards [sic] to the statement that "[s]econd, and more concretely, it is established business practice for sub-meterers to offer payments to condominium developers in the order of \$100 per unit or more in exchange for the right to install sub-meters in condominiums", what evidence or other information does THESL have to support that this statement? In particular, what information, if any, does THESL have about Metrogate or Avonshire, and their business practices and arrangements, to support this assertion *vis-à-vis* Metrogate and Avonshire?

Answer:

Please refer to responses 2) and 7) above.

THESL has set out in its evidence the industry practices of which it is aware. It believes these practices are not restricted to the one sub-meterer referenced in the evidence, but that sub-meterer is the most transparent in its presentation of information. One more example of the practice of condominium developers to require unit holders to enter into long term contracts with sub-meterers (as discussed at Q&A 35 of the evidence), is found in the conditions of service of Provident Energy Management Inc. (copy attached).

- 9) The evidence states that while THESL does not have any more documented examples (i.e., of sub-meterers offering payments to condominium developers), “as an industry participant, [Mr. McLorg] can advise that this practice is a matter of common knowledge” (A.28). Identify what evidence Mr. McLorg has to support his assertion that it is “common knowledge”.

Answer:

In the course of his duties as Manager, Regulatory Policy and Relations, and particularly with respect to the issue of suite metering generally, Mr. McLorg has on numerous occasions spoken about the issue of royalty payments specifically with Metering staff at THESL who specialize in the metering of condominiums and other multi-residential buildings. In turn, in the course of their duties these Metering staff persons come to have knowledge through industry contacts, customers, consultants and lawyers of the practices of participants in the market place.

- 10) With regards [sic] to the statement that “[i]t also does not appear that sub-meterers are complying with the Board’s Requirement that exempted distributors may only use sub-meterers to allocate, rather than resell, the exempted distributors’ costs among sub-metered units”, what evidence or other information does THESL have about Metrogate or Avonshire, and their business practices and arrangements, to support this assertion *vis-à-vis* Metrogate and Avonshire?

Answer:

Contrary to the premise of the question, neither Avonshire nor Metrogate are licensed sub-meterers, and THESL makes no allegations specifically about either party’s preferred sub-meterer. Please refer to response 2) above.

- 11) Identify what evidence, if any, THESL has that Avonshire and/or Metrogate were to receive a per unit payment from a sub-metering provider, and file it with the Board if that evidence is not already contained in the evidence filed to date.

Answer:

THESL does not have information on sub-meterers that Avonshire and or Metrogate would have preferred to retain. THESL’s request for such information has consistently been refused by Compliance Staff who are in a better position to seek such information than THESL but have refused to do so.

- 12) Please confirm that the email and offer to sub-meter (referenced at A.26 and A.27) do not relate to either the Avonshire or Metrogate projects.

Answer:

Confirmed.

- 13) The evidence identifies one sub-meterer that has posted its billing determinants as an example (A.31). Please confirm that the evidence does not relate to either the Avonshire or Metrogate projects.

Answer:

THIESL is unable to confirm the subject statement for the same reasons cited in response 11) above.