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.

REPLY OF COMPLIANCE COUNSEL ON THE ISSUE OF MOOTNESS

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1. This is the written reply of Compliance Counsel on the issue of mootness which Toronto Hydro-Electric System Limited ("THESL") raised in its written submissions.

2. It is the position of Compliance Counsel that Bill 235, which is currently in second reading before the Provincial Parliament, will not render this proceeding moot and that the panel should therefore not reserve its decision until the outcome of the legislative process is known.

3. Contrary to the submissions of THESL, there remains a "live controversy" in this proceeding. Specifically:

(a) Bill 235, if passed, will maintain the availability of choice between smart metering and smart sub-metering.

(b) Further, the Board's determination will have a direct impact on Avonshire and Metrogate (and possibly other condominium developers awaiting offers to connect that contemplate a smart sub-metering configuration from THESL).

(c) Finally, Bill 235 does not purport to be retroactive and, if passed, will have no bearing on whether THESL did or did not contravene the law in April 2009.

A. The Test for Mootness

4. In *Borowski v. Canada (Attorney General)*, the Supreme Court of Canada established a two-stage analysis to be considered by a court or tribunal in deciding whether to decline to render a decision because of mootness:

(a) In the first stage, it must be determined whether the "required tangible and concrete dispute has disappeared and the issues have become academic". A "live controversy" is present if the decision will affect or may affect the rights of the parties. It is only when a

decision will have no effect on the rights of the parties that a matter is said to be moot.

(b) The second stage in the analysis requires that a court or tribunal consider whether it should exercise its discretion to decide the merits of the case, despite the absence of a live controversy. As noted by the Court, "[i]n order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly."

Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342 at paras. 15, 16, 26 and 36.

B. Bill 235 does not render this proceeding moot

(a) Bill 235 will maintain choice between smart metering and smart sub-metering

5. If passed in its current form, Bill 235 will create a new *Energy Consumer Protection Act* ("ECPA") and amend other legislation including the *Electricity Act* and the *Ontario Energy Board Act*. Contrary to the submissions of THESL, Bill 235 maintains smart sub-metering as a legitimate option available to consumers (both for installation of equipment and the provision of billing services). In particular, the proposed ECPA continues to provide for a choice between smart metering by a distributor and smart sub-metering by a licensed smart sub-metering provider.

Bill 235, *An Act to enact the Energy Consumer Protection Act, 2009 and to amend other Acts*, 1st Sess., 39th Parl., 2009, ss. 30 to 33

6. Notably, Bill 235 will not repeal or amend section 28 of the *Electricity Act* or introduce any "right" for THESL (or other distributors) to make unit owners direct customers of the distributor. The determination of this matter will therefore remain a "live controversy", as defined in *Borowski*, even if Bill 235 is passed.

7. Section 53.17 of the *Electricity Act* will be repealed (in form) if Bill 235 passes, but it will continue in substance through sections 31(1) and 32(1) of the new ECPA. Therefore an order requiring compliance with section 53.17 or its successors remains important:

> "suite meter provider" means a unit smart meter provider or unit sub-meter provider;
>
> "unit sub-meter provider" means a person, including a distributor, licensed by the Board to engage in unit sub-metering, or such other persons or classes of persons as may be prescribed.
>
> "unit smart meter provider" means a distributor licensed by the Board to engage in unit smart metering;
>
> [...]
>
> Suite meter specifications
>
> 31. (1) When a suite meter provider installs a suite meter or replaces an existing meter or suite meter, the suite meter provider shall use a suite meter that meets the suite meter specifications.
>
> [...]
>
> Installation of suite meters permitted
>
> 32. (1) A suite meter provider may, in such circumstances as may be prescribed and subject to such conditions as may be prescribed, install a suite meter in such properties or classes of properties as may be prescribed and for such consumers or classes of consumers as maybe prescribed.
>
> Bill 235, *An Act to enact the Energy Consumer Protection Act, 2009 and to amend other Acts*, 1st Sess., 39th Parl., 2009, cl. 31 and 32.

8. Although much of the detail remains to be resolved, it is clear from the provisions of Bill 235 that distributors would continue to be under an obligation to provide offers to connect that contemplate smart sub-metering if the legislation passes. Consequently, a compliance order requiring THESL to amend its Conditions of Service and issue offers to connect that allow for smart sub-metering will continue to be operative even if Bill 235 is passed.

9. The circumstances of this case are distinguishable from the authorities on mootness cited by THESL. In *Borowski,* the appellant was attacking the constitutionality of legislation that had been previously struck down by the courts, thus leaving the court with an abstract question of law. In *Payne v. Ontario (Minister of Energy, Science & Technology),* the Court of Appeal dismissed the appeal as moot where legislation that directly "overruled" the lower court decision under appeal was passed after the appeal was heard but before a decision was issued. In *Halifax (Regional Municipality) v. Nova Scotia Human Rights,* the Nova Scotia Human Rights Commission was found to have erred when it commenced an inquiry the day ***after*** a bill received Royal Assent that retroactively made legislative changes to remedy the precise issue of the complaint.

> *Borowski, supra.*
>
> *Halifax Regional Municipality v. Nova Scotia Human Rights Commission,* 2009 NSSC 12 at para. 17 [*Halifax*].
>
> *Payne v. Ontario (Minister of Energy, Science & Technology)* [2002] O.J. No. 2566 at paras. 6-8 and 17 [*Payne*].

10. By contrast, Bill 235 is currently in second reading and it is uncertain if or when Bill 235 will be passed. The final contents of the Bill also remain unknown and are subject to the making of regulations. Moreover, unlike *Halifax* and *Payne,* Bill 235 does not render the precise issue of this proceeding moot; to the contrary, Bill 235 reinforces the availability of choice between smart metering and smart sub-metering. A tribunal should only refrain from rendering a decision where there is proposed legislation in an advanced stage that will render the matters in issue moot. That is not the case here.

(b) The outcome of this proceeding will have a direct impact on Avonshire and Metrogate

11. Unlike the abstract question at issue in *Borowski,* the Board's determination in this proceeding will have a direct impact on whether Avonshire

and Metrogate are entitled to connections based on a smart sub-metering configuration. As the witnesses from Avonshire and Metrogate stated in their evidence, they have construction deadlines and require a determination on this issue by the end of March and mid-February 2010 respectively if they are to pursue the option of smart sub-metering. If a determination is not made by then, they may have to accede to the metering configuration imposed on them by THESL's offers to connect.

> Examination-in-Chief of Giuseppe Bello and Lou Tersigni dated January 5, 2010 at p. 22, lines 11 to 22 and p. 28, lines 11 to 17.

12. There may also be other condominium developers within THESL's service area that are awaiting a decision in this proceeding to determine whether they can proceed with a smart sub-metering configuration.

13. This proceeding is therefore not moot insofar as Avonshire and Metrogate (and other similarly situated condominium developers) are concerned. In the circumstances, it would not be appropriate to decline to decide (or to reserve). Regardless of how the law may evolve, Avonshire and Metrogate (and other condominium developers) should be entitled to the legal choices and protections the law affords them at the time they make their requests for connection.

(c) Bill 235 is not retroactive

14. In its present form, the provisions of Bill 235 are ***not retroactive*** and will not impact whether THESL's refusal to connect to Avonshire and Metrogate on April 22, 2009 breached the enforceable provisions (as they read at that time). In this respect, the present case is distinguishable from the circumstances of the *Halifax* case, where the complaint was held to be moot because the legislation in question retroactively dealt with the precise issue of the complaint.

> *Halifax, supra* at paras. 77 to 83 [*Halifax*].

15. Consequently, Bill 235 is not relevant to the central issue of whether THESL breached the enforceable provisions by refusing to make revised offers to

connect to Avonshire and Metrogate. Irrespective of what changes there may be to the law, this issue is not academic. It is important that companies comply with their legal and regulatory requirements and be held to account when they fail to do so.

16. For the foregoing reasons, Compliance Counsel respectfully submits that the Panel should not decline to decide this matter or reserve its decision on account of Bill 235.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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