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January 13, 2010

BY COURIER

Ontario Energy Board
2300 Yonge Street
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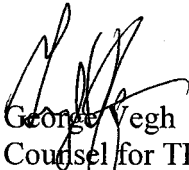
Attention: Ms Kirsten Walli
Board Secretary

Dear Ms. Walli:

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

Please find enclosed two copies of THESL's response on the mootness issue.

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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EB-2009-0308

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

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

**TORONTO HYDRO-ELECTRIC SYSTEM LIMITED RESPONSE ON MOOTNESS
ISSUE**

George Vegh

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Counsel for Toronto Hydro Electric System Limited

1. In its final written submissions, Toronto Hydro Electric-System LTD. ("THESL") submitted that, by tabling Bill 235 the legislature and the government have engaged a debate about the future regulation of smart metering and sub-metering. The OEB's role in that regulation will be a subject of that debate. In light of that, although THESL does want this matter to be resolved, there may also be prudence in the Board avoiding the appearance of participating in that debate by reserving its decision until the future legislative landscape is made clearer. Thus, if Bill 235 passes, then the decision will be moot and there will be no reason to produce it. If Bill 235 does not pass, then the decision will not be moot and it can be released at that time.
2. Compliance Counsel's responded to this point on January 11 by stating that, if passed, Bill 235 will not render these proceedings moot. The argument seems to be that, the obligations that Bill 235 imposes on distributors are the same as those imposed under the provisions that Bill 235 will repeal, specifically s. 53.17 of the Electricity Act.¹
3. In THESL's submission, this position is incorrect as a matter of law, and short sighted as a matter of policy. Before turning to these points, THESL does acknowledge the legitimate concern of Avonshire and Metrogate to have some practical certainty as to their metering configurations pending any stay of the Board's decision and is prepared to address terms that would avoid prejudice to them. In this regard, THESL believes that, if the Board wanted to consider such terms, it would be beneficial to appoint a facilitator to assist THESL and Compliance Counsel in discussing those terms and perhaps even jointly presenting them to the panel. THESL would be prepared to enter into such discussions on a good faith basis and would hope that Compliance Counsel is also prepared to do so.
4. With respect to Compliance Counsel's substantive submissions, THESL submits that they are legally incorrect because they require the Board to speculate on the contents of

¹ Compliance Counsel correctly points out that s. 28 of the Electricity Act remains unaffected by Bill 235. Section 28 contains a general right to connect. That right is, of course, expressed in very general terms and subject to hundreds of pages of conditions as set out in various codes, legislation and conditions of service. In other words,

the regulatory regime the province may put in place to implement Bill 235. Specifically, under Bill 235, the regulatory regime for metering in condominiums will be repealed and replaced. Compliance Counsel's position is that the relevant provisions of Bill 235 (ss. 31 and 32) will result in a regime that is the same as the one it repealed. However, a brief look at the text of these provisions demonstrates that they are quite different. The text of current s. 53.17 and proposed ss. 31 and 32 are set out at Appendix A.

5. As appears from Appendix A, for example, s. 53.17 puts an obligation on distributors and other licenced persons (by providing that they "shall" install meters under certain circumstances) while s. 32 of Bill 235 creates an entitlement on distributors and other licenced persons (by providing that they "may" install meters under certain circumstances). These approaches are fundamentally different.
6. Further, Bill 235 is largely enabling legislation. As a result, the substance of the regime will be addressed in regulations, which, of course, have not yet been proposed.
7. To follow Compliance Counsel's approach, the Board would not only have to provide a legal interpretation of Bill 235 before it is passed (which is precisely what the mootness doctrine says should not be done), the Board would also have to find that, for all material purposes, the issues in this proceeding, will be regulated in the same manner under Bill 235 as they are under the current regime.
8. A finding that Bill 235 does not change the regulatory structure of metering in condominiums is counter intuitive. Further, one of the issues in these proceedings addresses the reasonableness of THESL's response to the issue of sub-meterers charging unregulated distribution rates. This issue is explicitly addressed as one of the purposes of Bill 235 in materials released by the Minister of Energy and Infrastructure. These materials identified the "problems" and the "solutions" that Bill 235 are meant to address. The relevant materials read as follows:

"The proposed Energy Consumer Protection Act, 2009, would ensure Ontarians have the information they need about electricity contracts and bills, as well as the

section 28 is an empty vessel. The substantive rights that it grants are all found in implementing regulatory provisions.

comfort of knowing they can rely on fair business practices. If passed, the proposed legislation would help families make wise and informed energy choices. Many of the provisions resulting from the proposed legislation, should it pass, would involve consultation and be set at a later date by regulation...”

Suite Metering		
Problem		Proposed Solution
No framework to install suite metering in rental apartment buildings	→	Enable mandatory installation in new residential buildings Voluntary installation in existing buildings
No rules for individual billing in rental apartment buildings	→	Consent required from sitting tenants Establish a framework for rent reduction if a tenant agrees to suite metering Prospective new tenants given prescribed information on suite energy use
<i>Suite-metering companies not subject to the same rules as local distribution companies (LDCs)</i>	→	<i>Suite-metering providers subject to rules paralleling LDCs concerning fee regulation, licensing, security deposits and disconnections</i>
Tenants can't control major energy efficiency factors in their suites, things like windows or appliances	→	Landlords required to meet certain energy efficiency standards for appliances and suites

(emphasis added). Source: <http://www.mei.gov.on.ca/en/energy/ecpa/>

9. It is therefore legally incorrect for the Board to find that, if enacted, Bill 235 will exactly replicate the smart metering regime that it repeals.

10. Compliance Counsel's approach is also short sighted as a matter of policy. The issue on mootness goes to whether it is in the public interest for the Board to be commenting on the regulatory regime of smart metering at a time when the future of that regime, including the role of the Board, is under discussion by the legislature. It goes beyond Compliance Counsel's more parochial interest in doing whatever it can to seek a conviction against THESL.
11. THESL appreciates that staying these proceedings at this time could have an impact on the reasonable desire of Avonshire and Metrogate to have some certainty on the metering configurations for their facilities. THESL is prepared to address the terms of a stay that would avoid prejudice to Avonshire and Metrogate. In this regard, THESL believes that, if the Board wanted to consider such terms, it would be beneficial to appoint a facilitator to assist THESL and Compliance Counsel in discussing those terms and perhaps even jointly presenting them to the panel. THESL would be prepared to enter into such discussions on a good faith basis and would hope that Compliance Counsel is also prepared to do so.

All of Which is Respectfully Submitted

Date: January 13, 2010

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Counsel for Toronto Hydro-Electric System Limited

Appendix A

Electricity Act, s. 53.17 and Regulation 442/07

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.

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*. 2006, c. 3, Sched. B, s. 2.

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. 2006, c. 3, Sched. B, s. 2.

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. 2006, c. 3, Sched. B, s. 2.

ONTARIO REGULATION 442/07

Definitions

1. In this Regulation,

“board of directors” means the board of directors of a condominium corporation;

“condominium corporation” means a corporation created or continued under the *Condominium Act, 1998*;

“smart meters” includes smart meters, metering equipment, systems and technology and associated equipment, systems and technologies;

“smart sub-metering systems” includes smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies. O. Reg. 442/07, s. 1.

Prescribed class of property

2. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed classes of property:

1. A building on land for which a declaration and description have been registered pursuant to section 2 of the *Condominium Act, 1998*.
2. A building on land for which a declaration and description have been registered creating a condominium corporation that was continued pursuant to section 178 of the *Condominium Act, 1998*.
3. 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*. O. Reg. 442/07, s. 2.

Prescribed circumstances

3. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed circumstances:

1. The approval by the board of directors to install smart meters or smart sub-metering systems, in the case of a building that falls into a prescribed class of property described in paragraph 1 or 2 of section 2.
2. The installation of smart meters or smart sub-metering systems, in the case of a building that falls into a prescribed class of property described in paragraph 3 of section 2. O. Reg. 442/07, s. 3.

Installation of authorized metering technology

4. (1) For a class of property prescribed under section 2 and in the circumstances prescribed under section 3, a licensed distributor, or any other person licensed by the Board to do so, shall install smart meters or smart sub-metering systems of a type, class or kind,

- (a) that are authorized by an order of the Board or by a code issued by the Board; or
- (b) that meet any criteria or requirements that may be set by an order of the Board or by a code issued by the Board. O. Reg. 442/07, s. 4 (1).

(2) For licensed distributors installing smart meters in a class of property prescribed under section 2,

- (a) unless otherwise required by the Board, the distributor is not required to comply with the requirements set out in Ontario Regulation 425/06 (Criteria and Requirements for Meters and Metering Equipment, Systems and Technology) made under the Act; and
- (b) the distributor shall comply with the procurement requirements set out section 2 of Ontario Regulation 427/06 (Smart Meters: Discretionary Metering Activity and Procurement Principles) made under the Act. O. Reg. 442/07, s. 4 (2).

(3) For a person, other than a licensed distributor, who is licensed by the Board to engage in the activity prescribed by subsection 1 (2) of Ontario Regulation 443/07 (Licensing Sub-Metering Activities), made under the *Ontario Energy Board Act, 1998*, unless otherwise required by the Board, the person is not required to comply with the requirements set out in Ontario Regulation 425/06 made under the Act. O. Reg. 442/07, s. 4 (3).

(4) In this section,

“licensed distributor” means a distributor licensed by the Board under clause 57 (a) of the *Ontario Energy Board Act, 1998*. O. Reg. 442/07, s. 4 (4).

Exclusive authority of the Board

5. (1) Pursuant to subsection 53.17 (4) of the Act, the Board has the exclusive authority, on and after August 1, 2007, to approve or authorize the type, class or kind or to approve or authorize the criteria or requirements applicable to smart meters and smart sub-metering systems when installed in a class of property prescribed under section 2. O. Reg. 442/07, s. 5 (1).

(2) In carrying out its functions under subsection (1), the Board shall ensure that smart meters and smart sub-metering systems are capable of measuring electricity consumption or use in accordance with electricity rates that are based on the time of day when electricity is consumed or used and, at a minimum, are capable of measuring electricity consumption or use in hourly intervals. O. Reg. 442/07, s. 5 (2).

6. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 442/07, s. 6.

Bill 235

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.

Definition, specifications

(2) In this section,

“suite meter specifications” means the specifications that are prescribed by regulation or mandated by a code issued by the Board or by an order of the Board, or meet the criteria or requirements prescribed by regulation or mandated by a code issued by the Board or by an order of the Board, under the circumstances prescribed by regulation or mandated by a code issued by the Board or by an order of the Board in respect of,

- (a) types, classes or kinds of suite meters,
- (b) properties or classes of properties, and
- (c) consumers or classes of consumers.

Requirements to take certain actions

(3) A regulation, code or order referred to in the definition of “suite meter specifications” in subsection (2) may require that a suite meter provider take certain actions and may require that the actions be taken within a specified time.

Exclusive authority of Board

(4) A regulation referred to in the definition of “suite meter specifications” in subsection (2) may provide the Board with exclusive authority to approve or authorize the suite meters after a prescribed date.

Obligations of distributors, etc., re procurement, contracts or arrangements

(5) When a suite meter provider enters into a procurement process, contract or arrangement in relation to suite metering, the procurement process, contract or arrangement shall meet any criteria or requirements that may be prescribed by regulation or mandated by a code issued by the Board or by an order of the Board.

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 may be prescribed.

Installation of suite meters required

(2) A suite meter provider shall, 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 may be prescribed.

Same, condominiums

(3) The provisions of subsections (1) and (2) apply despite a registered declaration made in accordance with the *Condominium Act, 1998*, if a suite meter is installed in accordance with this section in respect of a unit of a condominium.