Aiken & Associates
578 McNaughton Ave. West
Chatham, Ontario, N7L 4J6

Phone: (519) 351-8624
Fax: (519) 351-4331
E-mail: raiken@xcelco.on.ca

January 19, 2010

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto, Ontario, M4P 1E4

Dear Ms. Walli:

Re: EB-2009-0411 – Notice of Proposal to Amend Codes – Proposed Amendments to the Distribution System Code and the Affiliate Relationships Code for Electricity Distributors and Transmitters – Comments of London Property Management Association

By way of a letter to interested parties dated December 10, 2009, the Ontario Energy Board ("Board") gave notice under Section 70.2 of the *Ontario Energy Board Act, 1998* ("Act") of proposed amendments to the Distribution System Code ("DSC") and the Affiliate Relationships Code for Electricity Distributors and Transmitters ("ARC").

These are the comments of the London Property Management Association ("LPMA") provided in response to the proposed amendments included in the Board letter. LPMA generally agrees with the proposals as outlined in the Notice of Proposal to Amend Codes.

1. Background

Electricity distributors are now permitted to own and operate certain renewable and other generation facilities ("qualifying generation facilities") and energy storage facilities (collectively, the "qualifying facilities") as a result of amendments to the Act made the *Green Energy and Green Economy Act, 2009.*

The Board describes three scenarios that may arise as a result of this amendment. These scenarios include:

- a distributor may own a new qualifying facility;
- an affiliate of a distributor may continue to own an existing and may own a new qualifying facility; or
- an affiliate of a distributor may transfer an existing qualifying facility to the distributor.

Subsection 71(3), which has been added to the Act, states in part that "a distributor may own and operate" qualifying facilities. It is not clear whether or not this prohibits a distributor from owning but not operating a qualifying facility. Neither is it clear whether a distributor could operate, but not own a qualifying facility. LPMA assumes that the subsection effectively means that a distributor may own *and/or* operate a qualifying facility.

LPMA submits that there may be other business arrangements in addition to those listed by the Board that may arise. These business arrangements could include, but are not limited, to the following:

- a distributor may be a part owner of a qualifying facility along with an affiliate(s);
- a distributor may be a part owner of a qualifying facility along with a third party;
- a distributor may be the owner of a qualifying facility, but it may be operated by an affiliate and/or a third party;
- a distributor may be the operator of a qualifying facility, but it may be owned by an affiliate and/or a third party; and
- a number of distributors could jointly own and/or operate a qualifying facility with or without the participation of affiliates of some or all of the distributors involved and/or third parties.

These scenarios, or others that may evolve, could raise additional issues about how unregulated generation activities interact with regulated distribution activities.

LPMA notes that the Board has already addressed accounting issues associated with the ownership and operation of qualifying facilities by distributors. Specifically, the Board issued its "Guidelines for Regulatory and Accounting Treatments for Distributor-owned Generation Facilities" (G-2009-0300) on September 15, 2009. LPMA submits that the Board should continue to monitor the need for further clarification of accounting issues in relation to the separation of the regulated and unregulated businesses of a distributor as the industry evolves.

LPMA also notes that the Board has indicated that it will also consider in the near term whether any changes to the Affiliate Relationships Code for Gas Utilities are needed, similar to those proposed by the Board for the electricity distributors. LPMA submits that the Board should also deal with accounting issues for the gas utilities to ensure separation of costs and assets for the regulated and unregulated portions of the gas utilities.

2. Proposed Amendments to the ARC

LPMA agrees with the Board that the ARC should not drive business decisions that would create incentives that favour one ownership structure over another.

a) Employee Sharing

LPMA submits that the additions of Sections 2.2.3A and 2.2.3B are appropriate. However, further clarification should be provided as to the meaning of "at the relevant time". It is not clear to LPMA what the relevant time is. It may mean, for example, that an affiliate could have access to confidential information from the distributor while it is an energy service provider whose sole activity is the ownership and operation of one or more qualifying facilities. Having obtained this information, the affiliate could then become involved in additional activities and cease having access to the confidential information from the distributor. However, the affiliate would effectively have bypassed the ARC requirements, potential giving it an unfair advantage over other third party competitors. LPMA submits that the Board should review its ability to promote the use and generation of electricity from renewable energy sources is not hindered or compromised by this possibility.

b) Affiliate Contracts

LPMA does not see the need to extend the allowable term for an affiliate contract that relates to a qualifying facility to 20 years. This may be harmful to the industry that the Board is now required to promote. Twenty year operating contracts between distributors and their affiliates could effectively stunt any growth in the competitive market for third party services that could be provided to the generation of electricity from renewable energy sources. This would be counter to the Board's objective to promote the use and generation of electricity from renewable energy sources. The Board should be encouraging the development of a competitive marketplace for these services, not placing barriers to entry.

c) Business Case

As long as there are no cost impacts on the regulated distributor, LPMA submits that elimination of the need for a business case in relation to the outsourcing of activities that relate to qualifying facilities is appropriate.

However, it should be made clear that any outsourcing of additional activities that are not related to qualifying facilities should not be tied in any manner to the outsourcing of activities that do relate to qualifying facilities. It should also be made clear that if any outsourcing to an affiliate related to qualifying facilities results in a decline of the financial well being of the distributor that causes, for example, third party lenders to seek higher debt rates than for a pure regulated distributor, then those excess debt related costs are for the account of the unregulated portion of the distributor and are not recoverable from ratepayers. LPMA provides further comments on this below in part (e).

d) Transfer Pricing

LPMA accepts the Board's proposal with respect to transfer pricing as being appropriate.

e) Financial Transactions with Affiliates

LPMA is concerned with the proposed changes in the limitations on utility investments in affiliates. These limitations have been imposed by the Board and other regulators to

provide financial stability for the operations of the regulated distributor and to protect the interests of ratepayers that receive the regulated services.

LPMA suggests that the increase in the ceiling from 25% to 35% of the distributor's total equity is appropriate. However, LPMA urges the Board to use caution in allowing a distributor to exceed the ceiling for the purposes of investing in or providing financial support to an affiliate whose sole business activity is the ownership and operation of a qualifying facility. The ceiling of 100% of the distributor's equity is, in the view of LPMA, significantly too high. LPMA suggests the ceiling should be reduced to 50% of the distributor's equity.

LPMA is concerned that any adverse operating conditions associated with the qualifying facilities over the next 20 years could have significant financial impacts on the regulated distributor. It may be difficult if not impossible to separate out the cost of new debt, for example, for the regulated distributor from that for the affiliate. This would be made even more difficult to monitor and assess given that many distributors only borrow from their parent company. Lenders may perceive generation as riskier than distribution and demand a higher rate of interest when they lend to the parent company. This additional cost could then be passed on through the regulated distributor to its ratepayers. Ring-fencing is ineffective when someone leaves the gate wide open.

If the Board believes that the 100% of equity ceiling is required to support the Board's new objective of promoting renewable generation, then LPMA submits that a time limit at this level should also be put in place so that the ceiling gradually declines over time. LPMA would suggest that the ceiling be reduced by 5% percentage points per year over the first 10 years, down to a ceiling of 50% of the distributor's equity. This would allow the distributor to provide significant financial support during the early years for the qualifying facility when third party financing may be the most difficult to obtain. At the same time, the gradual reduction in support would provide a more adequate degree of protection to ratepayers in the longer term.

f) Equal Access to Services

LPMA is concerned with the Board's proposal to eliminate the restrictions on supporting or promoting the activities of an affiliate as set out in sections 2.5.1 and 2.5.2 of the ARC in relation to the ownership and operation of qualifying facilities.

This proposal may add confusion for customers. It may also allow distributors to effectively bypass sections 2.5.1 and 2.5.2 of the ARC for affiliates that are not energy service providers in relation to activities associated with qualifying facilities. The names associated with the distributor and their affiliates are often very similar. ACME Distribution could promote the activities of ACME Generation. However it could be restricted from promoting the activities carried out by ACME Energy as ACME Energy is not involved with any qualifying facilities. The problem is that all three affiliates are likely to be known as ACME by the general public. The promotion of one spills over as promotion of the other. Even the use of a disqualifier to highlight the difference between ACME Generation and ACME Energy provides promotional value to ACME Energy.

LPMA submits that the distributor should not be supporting or promoting the activities of an affiliate including when that affiliate relates to the ownership and operation of qualifying facilities. Any such perceived favouritism could have unforeseen consequences on other potential renewable energy competitors. LPMA submits that the distributor should be, and should be seen as being, impartial when dealing with an affiliate as compared to a third party generator. As the Board has noted, it now has an objective to promote the use and generation of electricity from renewable energy sources. LPMA submits that the Board will fail in this objective if third party generators believe that some generators are preferred over others. This will likely be a problem where municipalities may favour their own generator over that of a third party. Allowing the municipally owned distributor to do the same thing may well impede the generation of electricity from renewable energy sources.

3. Proposed Amendments to the DSC

LPMA believes it is important that distributors treat their own qualifying generation facilities on an equal footing with those of third parties. The Board's objective of promoting the generation of electricity from renewable sources can only be met if there is a strong industry that includes third party generators. These third party generators may opt to not participate in the Ontario marketplace if there is a perceived advantage to generators that are owned by the regulated distributors.

a) General Obligation of Equal Treatment

LPMA agrees with the thrust of the new Section 2.1. The Board must ensure that a level playing field is maintained for all generators.

The proposed Section 2.1 clearly states that a distributor cannot provide favoured treatment or preferential access to the distribution system or to their services for any generation facilities that are owned by the distributor. LPMA supports the intent of the new Section, but submits that it is not broad enough.

Section 2.1 is limited to distributor-owned generation facilities. LPMA submits that Section 2.1 should be broader in scope and should apply not only to distributor-owned generation facilities, but also those of affiliates and third parties. In other words, a distributor should not be allowed to provide favoured treatment or preferential access to its distribution system or to its services for any generator, regardless of ownership. This is the only way that a level playing field can be established and maintained.

Clearly, a distributor should not be permitted to provide an advantage to it own generator. The proposed amendments to Section 2.1 cover this. However, a distributor should also not be permitted to provide an advantage to it a generator owned by an affiliate. Nor should a distributor be permitted to provide an advantage to a third party generator. This latter situation could arise if a distributor provided favoured treatment or preferential access to a generator owned by another distributor or an affiliate of another distributor in return for similar treatment of its generation facility, or that of an affiliate, on the other distributor's system.

LPMA submits that Section 2.1 should be changed as follows:

"A distributor shall not, in respect of any matter addressed in or under this Code, provide favoured treatment or preferential access to the distributor's distribution system of the distributor's services for any generation facilities, regardless of ownership."

The title of Section 2.1 should also be changed to reflect its applicability to all such generation facilities, regardless of ownership to simply *"2.1 Generation Facilities"*.

b) The Connection Process

The proposed Section 6.2A.2 appears to have an error in the list of sections provided that do not apply in respect of the connection of a generation facility that will be owned by the distributor to whose distribution system the facility is being connected. The first section listed is "6.2.". LPMA believes that this should probably be "6.2.2" since the distributor cannot enter into a Connection Agreement with itself.

Other than the issue noted above, LPMA believes that the new proposed Section 6.2A adequately and effectively covers the situations that will occur with distributor owned generation facilities to ensure equality in treatment with affiliate and/or third party generators. The intent of the existing Section 6.2 appears to be maintained for distributor owned generation facilities through the new Section 6.2A.

4. Anticipated Costs and Benefits

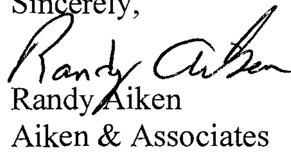
LPMA submits that the proposed amendments to the DSC may result in some immaterial increase in administration costs as they will be required to document a number of matters and events as described in the proposed amendments. Offsetting these incremental costs, the proposed amendments to the ARC should provide distributors with an opportunity to reduce costs associated with ARC compliance. Overall, LPMA agrees with the Board that any net additional costs are not like to be material.

5. Coming into Force

The Board has proposed that the proposed amendments to the ARC and the DSC as set out in the appendices to the December 10, 2009 letter come into force on the date that the proposed amendments are published on the Board's website after having been made by the Board.

LPMA agrees and submits that the proposed amendments should come into force as soon as possible.

Sincerely,



Randy Aiken
Aiken & Associates