

**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.

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**CLOSING ARGUMENT OF COMPLIANCE COUNSEL**

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January 7, 2010

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## PART I - OVERVIEW

1. This is a compliance proceeding in which the Board (acting through its Compliance Staff and Compliance Counsel) is seeking an Order under section 112.3 of the *Ontario Energy Act, 1998* (the "OEB Act"):

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").  
Tab 1 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

2. In this proceeding, it is alleged that THESL's conduct relating to smart metering and smart sub-metering in new condominiums violates enforceable provisions of the *Electricity Act, 1998* ("Electricity Act") and the Distribution System Code ("DSC"). The particulars of non-compliance are set out in the Notice of Intention to Make an Order for Compliance issued by the Board on August 4, 2009. Specifically, it is alleged that THESL's Conditions of Services contravene the Electricity Act and the DSC and that THESL wrongfully refused to offer to connect two new condominium projects, Avonshire and Metrogate, that requested a connection based on a smart sub-metering configuration.

Notice of Intention to Make an Order For Compliance under  
Section 112.3 of the Ontario Energy Board Act, 1998, dated  
August 4, 2009 ("Notice of Compliance"). Exhibit A-1 of  
Compliance Counsel Pre-Filed Evidence (Ex. K.1.1).

3. THESL's refusal contravenes a distributor's fundamental obligation to connect a building to its distribution system upon request and frustrates the current legislative/regulatory scheme under which the developer of a condominium or a condominium corporation may opt to:

- (a) have a distributor smart meter individual condominium units (referred to as "smart metering" or "suite metering"), in which case each unit owner becomes a customer of the distributor; or
  - (b) have a Board-licensed smart sub-meter provider 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 (referred to as "smart sub-metering").
4. THESL's practice effectively eliminates condominium developers' option of using the services of licensed smart sub-metering providers.
5. There is clear and convincing evidence in this proceeding to demonstrate that THESL has contravened the enforceable provisions identified in the Notice of Compliance and is likely to continue to contravene these provisions unless the Board orders an appropriate remedy. THESL does not deny the facts that underlie this proceeding and has attempted to distract attention from the issue of its contraventions by making speculative allegations about the practices of smart sub-metering providers. THESL has also made unsubstantiated and baseless allegations of bias and partisanship against Board Compliance staff.

## **PART II - FACTS**

### **A. Section 2.3.7.1.1 of THESL's Conditions of Service**

6. At the core of this proceeding is THESL's policy of refusing to provide permanent connections to new condominiums in the City of Toronto unless the condominium owners agree to contract THESL to connect and individually suite-meter all individual condominium units so that each unit/customer is billed as an individual customer of THESL. This policy is set out in section 2.3.7.1.1 of THESL's Conditions of Service, the relevant portion of which reads as follows:

### **2.3.7.1.1 Metering Requirements for Multi-Unit Sites and Condominium Corporations**

In an effort to promote conservation, Toronto Hydro will provide electronic or conventional smart suite metering for each unit of a new Multi-unit site, or a condominium at no direct charge to the Customer. [...]

THESL Conditions of Service, section 2.3.7.1.1. Exhibit F-2 of Compliance Counsel Pre-Filed Evidence.

7. Section 2.3.7.1.1 was revised by THESL as part of an internal review to eliminate sub-metering for new condominiums effective February 29, 2008. This amendment "was not tied to any legislative or regulatory change" and THESL did not inform the Board of its change in policy.

THESL's Responses to Compliance Counsel Interrogatories, Interrogatory Responses of Compliance Counsel and THESL (Ex. K1.7), Tab 2 IRs 1(1a), 1(2) and 3(3).

8. The requirement in section 2.3.7.1.1 that new condominium buildings to be "suite metered" by THESL came to the attention of OEB compliance staff in or about July 2008. Paul Gasparatto, Project Advisor, Regulatory Policy and Compliance thereafter wrote to Colin McLorg of THESL on July 24, 2008 and posed a number of questions about THESL's condominium metering policy to THESL. In his response dated July 29, 2008, Mr. McLorg confirmed that THESL does not provide for smart sub-metering:

1. QUESTION: Please confirm whether section 2.3.7.1.1 [of THESL's Conditions of Service] refers to the provision of smart sub metering by THESL, or refers to installing distribution metering so that the resident of each unit becomes a distribution customer of THESL.

ANSWER: For clarity please note that 'sub-metering' refers to the practice of subdividing a master or bulk meter bill based on meter readings from individual units, which may or may not be suites, existing behind the bulk meter. This is distinct from suite metering, which refers to the practice of establishing each suite in a condominium (as well as separate common area consumption) as a separately metered and billed customer of the distribution utility. In the latter case no bulk meter is involved except in the circumstances of a retrofit where it may be required to determine common area consumption as a residual amount.

The cited section refers to suite metering. THESL does not provide sub-metering.

[Emphasis added.]

Letter from Paul Gasparatto, Ontario Energy Board, to Colin McLorg, THESL, dated July 24, 2008. Exhibit C-2 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

Letter from Colin McLorg, THESL, to Paul Gasparatto, Ontario Energy Board, dated July 29, 2008. Exhibit C-6 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

9. In a subsequent email exchange between Mr. Gasparatto and Mr. McLorg in which Mr. Gasparatto posed further questions, Mr. McLorg confirmed that there is no scope for sub-metering under section 2.3.7.1.1 since all customers including the common facilities are required to be directly metered individual customers of THESL:

#### QUESTION

1) Did you mean that THESL requires all new facilities to install meters so that each unit/customer is billed as a customer of the distributor? In other words, new facilities may not install sub-metering behind a bulk meter?

#### ANSWER

To the first part of this question, yes. THESL takes the position that unit holders (residential or commercial, as the case may be) as well as the common facilities in new condominiums are individual residential or general service customers of THESL. THESL provides the meters, so the 'facilities' do not have to. THESL routinely installs bulk meters at the time of construction to establish metering for the period prior to the assumption of the building by the condominium, so in most cases a bulk meter would exist, but this is not the impediment to sub-metering in new facilities. Rather, it is that there is no scope for sub-metering since all the customers including the common facilities are directly metered individual customers.

#### QUESTION

2) If the answer to question 1 is yes, can you please point out the section in your COS that says that all new units have to be Suite Metered. (I read section 2.3.7.1 to say that THESL will provide Suite Metering, but I don't see where it says the customer must install Suite Metering.)

ANSWER

If the Conditions of Service are unclear, THESL is quite prepared to revise and clarify them. In this case, Section 2.3.7.1.1 states "...Toronto Hydro will provide electronic or conventional smart suite metering for each unit of a new Multi-unit site, or a condominium at no direct charge to the Customer". Taken as a whole, Section 2.3.7.1.1 clearly distinguishes between new and existing buildings, and makes provision for sub-metering only in the context of an existing building. Generally, if an option exists, it is mentioned: in the case of new buildings, THESL feels that the absence of mention of a sub-metering option is clear in itself.

QUESTION

3) If the answer to question 1 is yes, please provide the regulatory authority THESL is relying on to impose this requirement.

ANSWER

THESL takes the view that providing individual suite smart metering to new condominium customers is no different in any relevant respect than providing the same service to new customers in single detached homes. As such, THESL requires no special "regulatory authority" that it "is relying on to impose this requirement", beyond the authorities presently conferred to it by way of its rate orders and distribution license.

[Emphasis added.]

Email from Paul Gasparatto, Ontario Energy Board to Colin McLorg, THESL, dated July 30, 2008. Exhibit C-8 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

Email from Colin McLorg, THESL, to Paul Gasparatto, Ontario Energy Board, dated August 5, 2008. Exhibit C-9 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

10. On October 22, 2008, the Board's Chief Compliance Officer Brian Hewson wrote to Mr. McLorg to advise that, in his view, THESL was applying inappropriate policies in regards to the installation of smart metering and smart sub-metering systems in new condominiums and other multi-unit sites. Mr. McLorg responded by letter dated November 12, 2008 and advised that THESL did not accept Mr. Hewson's view and was not prepared to alter its policy on this basis. Mr. McLorg again confirmed there was no scope for the provision of



smart sub-metering services in new condominiums under section 2.3.7.1.1 of THESL's Conditions of Service as the unit would remain a direct customer of THESL:

THESL's COS state that THESL will provide, at no cost to the developer, smart metering for each distinct unit of the condominium, either directly or under an alternative bid framework. It is incorrect to conclude that the COS preclude the installation of a sub-metering system; should the developer or subsequently the condominium board of directors wish to install an additional sub-metering system for any reason, they are at liberty to do so provided there is no interference with THESL's smart metering system. In any case, each distinct residential or commercial unit (including common areas) would remain as a direct customer of THESL.

[Emphasis added.]

Letter from Brian Hewson, Ontario Energy Board to Colin McLorg, THESL, dated October 22, 2008. Exhibit C-10 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

Letter from Colin McLorg, THESL, to Brian Hewson, Ontario Energy Board, dated November 12, 2008. Exhibit C-11 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

11. Mr. Hewson responded in a letter to Mr. McLorg dated January 29, 2009 in which he advised that THESL's Conditions of Service were inconsistent with the DSC and that if THESL refused to connect a customer because of the customer's decision to install smart sub-metering, THESL would be acting contrary to section 28 of the Electricity Act and its licence. In a responding letter dated February 9, 2009, Mr. McLorg advised that THESL's position had not changed since its letter of November 12, 2008.

Letter from Brian Hewson, Ontario Energy Board to Colin McLorg, THESL, dated January 29, 2009. Exhibit C-12 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

Letter from Colin McLorg, THESL, to Brian Hewson, Ontario Energy Board, dated February 9, 2009. Exhibit C-13 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

12. In its Pre-Filed evidence in this proceeding, THESL has set out its interpretation and application of section 2.3.7.1.1 with respect to new condominium projects:

With respect to new condominiums, THESL's policy is to connect each unit (including residential, commercial, and common area units) as an individual direct customer of THESL by installing suite meters. Because at this stage of development new condominiums do not yet have boards of directors, all communications are with condominium developers.

THESL provides two options to condominium developers with respect to the connection of new condominiums: (i) THESL will provide smart metering for each unit at no charge to the developer; or; (ii) the developer may choose to pursue an alternative bid for the provision and installation of the smart meters. In the latter case, the developer gets a credit for the costs of installation by a third party. These options are set out in THESL's Conditions of Service ("CoS").

In either case, and apart from the provision and installation of the metering, each individual unit becomes a direct customer of THESL.

[...]

For new condominiums, it is THESL's policy not to provide bulk-metered connections as an end-state configuration to condominium developers. New condominiums must have individual suite metering, whether provided by THESL or by way of alternative bid arrangements.

Written Direct Evidence of Colin J. McLorg and Christopher Tyrrell, Tab A of Pre-Filed Evidence of THESL (Ex. K1.2), paras. A.3 and A.5.

**B. THESL's refusal to connect Avonshire and Metrogate**

**(a) *THESL's refusal to provide a permanent connection to Avonshire***

13. Residences of Avonshire Inc. ("Avonshire") is owner/developer of condominium project on Yonge Street between 401 and Sheppard Avenue that includes two 21-storey towers consisting of approximately 456 units. Demolition began in February 2009 and construction started in September 2009. The anticipated occupancy date is December 2010.

Examination-in-Chief of Giuseppe Bello and Lou Tersigni dated  
January 5, 2010 at p. 23, lines 3 to 8.

14. The Avonshire project lies within THESL's distribution service area and Avonshire received a temporary connection from THESL for construction. Because the temporary connection will not support the substantial power requirements for the completed condominium, Avonshire (through its electrical consultant) requested a permanent connection from THESL.

Examination-in-Chief of Giuseppe Bello and Lou Tersigni dated  
January 5, 2010 at p. 18, line 19 to p. 19, line 7 and p. 23, lines 9 to 21.

15. THESL made an offer to connect dated January 29, 2009 to Avonshire. The offer to connect was premised on THESL's Conditions of Service and contemplated the installation of 792 smart meters by THESL (which would include a smart meter for each condominium unit).

THESL Offer to Connect dated January 29, 2009. Exhibit D-1 of  
Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

16. The offer was unacceptable to Avonshire and in a letter dated March 6, 2009, Avonshire requested that THESL provide a revised offer to connect that contemplated the installation of a bulk meter by THESL and the project "being smart sub-metered by a licensed sub-metering company."

Letter from Giuseppe Bello, Avonshire Inc., to THESL dated  
March 6, 2009. Exhibit D-2 of Compliance Counsel Pre-Filed  
Evidence (Ex. K1.1).

Examination-in-Chief of Giuseppe Bello and Lou Tersigni dated  
January 5, 2010 at p. 23, line 25 to p. 24, line 10.

17. In a letter to Avonshire dated April 22, 2009, THESL refused Avonshire's request for a revised offer to connect and stated that:

Your letter goes on to request that Toronto Hydro prepare a revised Offer to Connect for those condominiums based on a bulk meter/sub-metering configuration. As explained below, Toronto Hydro does not offer that connection configuration for new condominiums and therefore will not prepare you a revised Offer to Connect on that basis.

...

As set out in Toronto Hydro's Conditions of Service, for condominium projects commenced with Toronto Hydro on and after February 28, 2008 ("New Condominiums"), Toronto Hydro will provide smart metering as defined by the OEB (i.e., individual unit or suite metering compliant with smart metering regulations) for all separate units and for common areas ("individually metered units") at no charge to the developer. Upon registration and creation of the condominium corporation, the holders of the individually metered units become the direct customers of Toronto Hydro.

...

Toronto Hydro therefore asserts that it is authorized to connect new condominiums in the manner prescribed in its Conditions of Service and that it has no obligation to do otherwise. [Emphasis added]

Letter from Colin McLorg, THESL, to Giuseppe Bello, Avonshire Inc. dated April 22, 2009. Exhibit D-3 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

*(b) THESL's refusal to provide a permanent connection to Metrogate*

18. Metrogate Inc. ("Metrogate") is the owner/developer of condominium project "Solaris at Metrogate" project in Scarborough that will consist of approximately 2100 units when completed. Demolition began in January 2007 and construction started in November 2008. The anticipated occupancy date is December 2010.

Examination-in-Chief of Giuseppe Bello and Lou Tersigni dated January 5, 2010 at p. 16, line 23 to p. 17, line 14.

19. The Metrogate project lies within THESL's distribution service area and Metrogate received a temporary connection from THESL for construction. Because the temporary connection will not support the substantial power requirements for the approximately 2100 residential units, Avonshire (through its electrical consultant) requested a permanent connection from THESL.

Examination-in-Chief of Giuseppe Bello and Lou Tersigni dated January 5, 2010 at p. 17, line 15 to 18, and p. 18, line 19 to p. 19, line 7.

20. THESL made an offer to connect dated February 2, 2009 to Metrogate. The offer to connect was premised on THESL's Conditions of Service and contemplated the installation of 1597 smart meters by THESL (which would include a smart meter for each condominium unit).

THESL Offer to Connect dated February 2, 2009. Exhibit E-1 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

21. The offer was unacceptable to Metrogate and in a letter dated March 10, 2009, Metrogate requested that THESL provide a revised offer to connect for its project that contemplated the installation of a bulk meter by THESL and the project "being smart sub-metered by a licensed sub-metering company."

Letter from Lou Tersigni, Metrogate Inc., to THESL dated March 10, 2009. Exhibit E-2 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

Examination-in-Chief of Giuseppe Bello and Lou Tersigni dated January 5, 2010 at p. 19, line 8 to 26.

22. In a letter to Metrogate dated April 22, 2009 (which is nearly identical to the letter to Avonshire of the same date), THESL refused Metrogate's request for a revised offer to connect.

Letter from Colin McLorg, THESL, to Lou Tersigni, Metrogate Inc. dated April 22, 2009. Exhibit E-3 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

*(c) Re-issued Offers to Connect*

23. Avonshire and Metrogate require permanent power connections to proceed with construction on a timely basis. Consequently, both Avonshire and Metrogate have executed Re-issued Offers to Connect with THESL accepting THESL's requirement that the individual units be suite metered by THESL, subject to new Schedule "G" reserving Avonshire/Metrogate's right to pursue any legal or regulatory remedies before the Courts or the Board to permit it to engage a licensed smart sub-metering provider.

Examination-in-Chief of Giuseppe Bello and Lou Tersigni dated January 5, 2010 at p. 21, line 4 to p. 22, line 10, and p. 26, line 6 to p. 27, line 4.

Schedule "G" to Re-issued Offers to Connect. Tab B-7 of Pre-Filed Evidence of THESL (Ex. K1.2), p. 115 and 129.

24. On November 27, 2009, THESL delivered a letter to Avonshire (the "November 27 Offer") stating that because Avonshire had delivered its request to connect before THESL's change in policy on February 29, 2008, THESL would deliver a revised offer to connect reflecting a smart sub-metering configuration if Avonshire agreed to provide written confirmation of the following conditions:

1. Avonshire will ensure that all suites, commercial units, and common areas are individually metered by a licensed sub-meterer;
2. Avonshire has not received and will not receive any royalty or other type of payment, including payment in kind, from a smart sub-meterer in exchange for Avonshire's consent for the sub-meterer to provide smart sub-metering services;
3. The price charged for electricity by Avonshire or its sub-meterer to all sub-metered accounts will be no greater than that required to:
  - a. Exactly recover the costs charged to Avonshire by THESL through the bulk meter in proportion to each metered unit's consumption; and
  - b. Recover the reasonable costs required for the installation, administration, and maintenance of the sub-metering system.
4. Neither Avonshire nor its licensed sub-meterer will resell or charge any mark-up or profit on delivery services provided to Avonshire by THESL, and will only allocate those costs charged to Avonshire by THESL in proportion to each account's consumption.

Letter from Colin McLorg, THESL, to Giuseppe Bello dated November 27, 2009. Tab B-8 of Pre-Filed Evidence of THESL (Ex. K1.2).

25. Avonshire's solicitor advised THESL in a responding letter dated December 9, 2009 that Avonshire would not accept the conditions set out in the November 27 Offer. Specifically, Avonshire's solicitor stated that:

2. There is not now, nor has there ever been, any basis to believe or imply that Avonshire will fail to meet any applicable legal or regulatory requirement. THESL has at no prior time expressed such concern to Avonshire and we note that your letter does not indicate that THESL has any evidence or belief that Avonshire is at risk of contravening any applicable law. To be clear, your November 27 letter is THESL's first request for confirmation of compliance.

3. We are concerned by your request for copies of "all documentary smart sub-meterers". We are unaware of any legal or regulatory requirement which makes the production of such materials a pre-requisite to obtaining an OTC in connection with a building being smart sub-metered.

4. We are particularly concerned by the role which THESL appears to want to take as the entity that will make determinations, apparently unilaterally, about whether developers, condominium corporations and/or licensed smart sub-metering providers are in compliance with certain regulatory requirements. Aside from the fact that THESL would in effect be supplanting the true regulator, namely, the Ontario Energy Board, there is the further troubling fact that THESL would be in a clear conflict of interest, acting as Judge and potential direct beneficiary of its decision. This cannot be right.

Letter from Harry Herskowitz, Del Zotto, Zorzi LLP to Colin McLorg, THESL dated December 9, 2009. Tab B-9 of Pre-Filed Evidence of THESL (Ex. K1.2).

### **PART III - ISSUES**

26. The issues to be determined in this proceeding are the following:

- (a) What is the applicable burden of proof in a compliance proceeding before the Board under section 112.3(1) of the OEB Act?
- (b) Has THESL contravened or is it likely to contravene section 28 of the Electricity Act and section 3.1.1 of the DSC?
- (c) Has THESL contravened or is it likely to contravene section 5.1.9 of the DSC?

- (d) Has THESL contravened or is it likely to contravene section 53.17 of the Electricity Act and Ontario Regulation 442/07?
- (e) Has THESL contravened or is it likely to contravene section 2.4.6 of the DSC?
- (f) Has THESL established its asserted defences to any of the alleged contraventions or likely contraventions?

#### **PART IV - LAW AND ARGUMENT**

##### **A. The applicable burden of proof is a balance of probabilities**

27. In administrative matters, absent an express statutory provision to the contrary, the standard of proof is “a balance of probabilities”. Under the balance of probabilities standard, a decision-maker must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

Robert Macaulay & James Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 2004) at 17-8. Tab 1 of Compliance Counsel Authorities.

*F.H. v. McDougall*, [2008] S.C.J. No. 54 at para. 40 (S.C.C.). Tab 2 of Compliance Counsel Authorities.

*Stetler v. Agriculture, Food, Rural Affairs Appeal Tribunal*, [2005] O.J. No. 2817 at paras. 79 to 81 (C.A.). Tab 3 of Compliance Counsel Authorities.

##### **B. THESL has contravened and is likely to contravene section 28 of the Electricity Act and section 3.1.1 of the DSC**

###### **(a) *THESL has an obligation to connect***

28. As a licensed electricity distributor, THESL has a statutory obligation to connect customers provided that the following two conditions are met:

- (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.

*Electricity Act, 1998, c. 15, Sched. A, s. 28. Tab 2 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).*

29. The obligation to connect is fundamental to the operation of public utilities and has deep historical roots in Canada and other common law jurisdictions. The obligation of a public utility was described by the British Columbia Supreme Court in *Chastain v. British Columbia Hydro and Power Authority*:

The obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public has long been clear. It is to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers. The great utility systems supplying power, telephone and transportation services now so familiar may be of relatively recent origin, but special obligations to supply service have been imposed from the very earliest days of the common law upon bodies in like case, such as carriers, innkeepers, wharfingers and ferry operators.

*Chastain v. British Columbia Hydro and Power Authority* (1973), 32 D.L.R. (3d) 443 at 454. Tab 4 of Compliance Counsel Authorities.

30. Exceptions to the obligation to connect are limited and a utility will be in violation of its obligation to connect if it imposes unauthorized conditions on customers as a precondition for obtaining service. As the Alberta court noted in *Red Deer (Municipality) v. Western General Electric Co.*:

[T]he franchise holder may lay down reasonable conditions or regulations relating to performance of the obligation. That is no doubt so, but, only, in my opinion, in the sense in which I have expressed it, namely, that the customer is to accord all reasonable facilities to admit of the convenient performance of the obligation — the obligation of the consumer is not to be tested by the conditions or regulations of the franchise holder, but by the reasonableness of his requirements to enable him to fulfil his obligation conveniently.

[Emphasis added.]

*Red Deer (Municipality) v. Western General Electric Co.*, 1910 CarswellAlta 28. Tab 5 of Compliance Counsel Authorities.

See also: *St. Lawrence Rendering Co. Ltd. v. City of Cornwall*, [1951] 4 D.L.R. 790. Tab 6 of Compliance Counsel Authorities.

31. The obligation to connect is incorporated in THESL's Electricity Distribution License which, consistent with the jurisprudence, provides that the terms of an offer to connect "shall be fair and reasonable and made in accordance with the Distribution System Code" and that THESL "shall not refuse to connect or refuse to make an offer to connect unless it is permitted to do so by the Act or a regulation or any Codes":

7 Obligation to Connect

7.1 The Licensee 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.

7.2 The Licensee shall make an offer to connect a building to its distribution system if:

- a) the building is within the Licensee's service area as described in Schedule 1 [The City of Toronto as of January 1, 1998]; and
- b) the owner, occupant or other person in charge of the building requests the connection in writing.

7.3 The terms of such connection or offer to connect shall be fair and reasonable and made in accordance with the Distribution System Code, and the Licensee's Rate Order as approved by the Board.

7.4 The Licensee shall not refuse to connect or refuse to make an offer to connect unless it is permitted to do so by the Act or a regulation or any Codes to which the Licensee is obligated to comply with as a condition of this Licence.

32. In the case of electricity distributors in Ontario, the circumstances under which a distributor may consider refusing connection, or continuing connection, to a customer are limited to those listed in section 3.1.1 of the DSC:

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.

Distribution System Code, s. 3.1.1. Tab 10 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

33. If a distributor refuses to connect or continue to connect a customer, section 3.1.3 of the DSC requires the distributor to inform the customer of the reason for not connecting.

Distribution System Code, s. 3.1.3. Tab 10 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

(b) *THESL does not have a "right" to smart meter individual condominium units*

34. Under section 28 and 3.1.1 of the DSC, a distributor has an obligation to connect a new condominium project with a smart sub-metering configuration when requested by the developer. Contrary to the assertions made by THESL, a distributor does not have a right under any applicable legislation or code to demand that the developer have the project smart metered by the developer. As such, demanding that the developer smart meter a project using the equipment and services of a distributor is not a reasonable condition to place an offer to connect.

35. Further, such a demand is unreasonable because it frustrates the current regulatory regime under which the developer of a condominium may opt to have a distributor smart meter individual condominium units or smart sub-meter individual units using the services of a Board-licensed smart sub-metering provider. A developer's right to choose one of these options has been recognized by this Board in its recent decision concerning discretionary metering activities:

The government also explicitly authorized the installation of smart meters or smart sub-metering systems in condominium settings through the adoption of Ontario Regulation 442/07 made under the Electricity Act. The regulatory regime established by the government to achieve this purpose involved empowering the condominium corporation or the developer to enter into smart metering or smart sub-metering implementation arrangements.

Decision and Order dated August 13, 2009, EB-2009-0111 at p. 8.  
Tab 7 of Compliance Counsel Authorities.

Decision and Order dated October 6, 2009, EB-2009-0329. Tab 8  
of Compliance Counsel Authorities.

36. The right of a developer to choose to smart sub-meter a new condominium building was also addressed in a recent decision involving PowerStream in which the Board ordered PowerStream to amend its Conditions of Service to make that choice clear to its customers. Both the majority and the

minority decisions in that case recognized the importance of the developer's choice:

An existing condominium wishing to be smart metered or a developer of a new condominium building has the choice of choosing suite metering with PowerStream or sub-metering with another company, such as one of the SSMWG member companies. So, the metering market is contestable. The fact that PowerStream is allowed to carry [on] this activity as part of its distribution business does not take away from the fact that the metering of condominium units is a contestable market.

[Emphasis added.]

Majority Decision dated July 27, 2009, EB-2008-0244 at p.5. Tab 9 of Compliance Counsel Authorities.

While the Legislation states that utilities can carry out these activities through the regulated entity, there is no indication that the Legislature intended to promote or condone anti-competitive conduct. I believe that the intent of the legislation was to promote competitive markets with a large number of suppliers in order to best promote the rapid introduction of this technology. Put differently, utilities were allowed to enter the market directly to promote competition, not lessen it.

[...]

This is an important service. Installation of smart meters in individual condominium units offers significant gains in energy conservation. The Legislature has signalled the advantage of competing suppliers and specifically allowed regulated utilities to engage in the service directly. Implicit in this direction is a belief that competing suppliers will promote price competition and improve service quality.

It is also significant that this is a new market with new competitors. It would be unfortunate (and contrary to the public interest) if competitors were disadvantaged or even eliminated in the early days of this market ...

[Emphasis added.]

Minority Decision dated July 27, 2009, EB-2008-0244 at pp. 12 to 14. Tab 9 of Compliance Counsel Authorities.

37. Further, this panel in its earlier ruling on production and disclosure stated that:

[3] In the 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.

[4] 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.

[Emphasis added.]

Ontario Energy Board, Decision and Order dated October 14, 2009, as amended on October 23, 2009, EB-2009-0308 at paras. 3 and 4.

38. The availability of this choice is reflected in the Board's licensing of smart sub-metering providers and the Smart Sub-Metering Code ("SSM Code"). The SSM Code establishes the minimum conditions and standards that a licensed smart sub-metering provider must meet when providing smart sub-metering services. The provisions of the SSM Code recognize that developers can contract with a smart sub-metering provider to have a new condominium project smart sub-metered:

"condominium corporation or developer" means the person authorized to contract for smart sub-metering services on behalf of a prescribed location;

[...]

#### 1.7 Contract with a Prescribed Location

1.7.1 A smart sub-metering provider shall not undertake any prescribed activity in a prescribed location unless the smart sub-metering provider has a contract with the condominium corporation or developer to do so.

[...]

#### 2.2 Technical Requirements for the Master Meter

2.2.1 A smart sub-metering provider shall ensure that 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*,

has requested, and a distributor has installed, a master meter that is an interval meter before beginning to provide smart sub-metering services.

[...]

### 3.1 Disclosure of Agreements and Disclosure in Agreements

3.1.1 Upon creation of a condominium corporation for a prescribed location, the smart sub-metering provider shall disclose to the condominium corporation all agreements between itself or its affiliate and the developer of the condominium or an affiliate of the developer.

Smart Sub-Metering Code dated July 24, 2008. Tab 11 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

39. The Coalition of Large Distributors, in a letter to the Board dated January 7, 2008 to which Mr. McLorg is a signatory, acknowledged the ability of developers to choose between these two options:

While we understand the Ministry's concern that converting existing bulk metered condominiums to individual suite metering may not be cost effective in some areas, we were disappointed to see that the Ontario Regulation 442/07 did not call for mandatory individual suite metering in new condominiums. Of greater concern to us was the Ministry's reluctance to accept that individual suite metering in condominiums is a natural monopoly service. However, we do think that the Board has been given sufficient tools and jurisdiction to ensure that customers are protected from potential abuses of monopoly power and regulate sub-metering companies in condominiums in effectively the same manner the Board regulates all distribution companies in Ontario.

[...]

The selection of the metering company is made by the developer of a new condominium not by the subsequent home owner ...

[Emphasis added.]

Letter from the Coalition of Large Distributors in Smart Sub-Metering Licence Applications in EB-2007- 0922/- 0924/- 0925/- 0926/- 0940/- 0942/- 0943. Exhibit in Cross-Examination of Colin McLorg.

(c) *THESL's contravention of s. 28 of the Electricity Act and s. 3.1.1 of the DSC*

40. In the present case, there is undisputed evidence that THESL refused in its letters of April 22, 2009 to make an offer to connect Avonshire and Metrogate that contemplated a smart sub-metering configuration. That evidence is set out above in paragraphs 13 to 22.

Letter from Colin McLorg, THESL, to Giuseppe Bello, Avonshire Inc. dated April 22, 2009. Exhibit D-3 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

Letter from Colin McLorg, THESL, to Lou Tersigni, Metrogate Inc. dated April 22, 2009. Exhibit E-3 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

41. As Avonshire and Metrogate lie within THESL's distribution service area and requested a connection in writing, the refusal is a clear contravention of THESL's obligation to connect under section 28 of the Electricity Act and section 3.1.1 of the DSC. THESL was obligated to connect the Avonshire and Metrogate buildings and THESL had no right to make its offers to connect conditional on allowing THESL to connect and individually smart meter the condominium units. THESL's refusal to provide an offer that contemplated a smart sub-metering configuration is not a reasonable condition for refusing an offer to connect.

42. There is also strong evidence to support the conclusion that THESL will further contravene these provisions unless ordered to comply by the Board. As detailed above at paragraphs 6 to 12, THESL has repeatedly confirmed that it interprets and applies section 2.3.7.1.1 of its Conditions of Service in a manner that does not permit the connection of new condominium projects with smart



sub-metering configurations. The intent to continue contravening section 28 and section 3.1.1 could not be clearer.

**C. THESL has contravened and is likely to contravene section 5.1.9 of the DSC**

43. THESL's policy and practice of only connecting new condominium projects in the City of Toronto under a smart metering configuration is contrary to section 5.1.9 of the DSC:

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).

[Emphasis added.]

Distribution System Code, s. 5.1.9. Tab 10 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

44. Under section 5.1.9 of the DSC, a distributor's obligation to install smart metering in a new condominium project only arises upon the *request* of the developer for such a configuration. The provision clearly signals that a distributor such as THESL does not have a right to *impose* a smart metering configuration upon the developers of new condominiums; rather, section 5.1.9 reinforces the right of developers to choose between smart metering and smart sub-metering configurations for their projects. To the extent that the practices and policies of a distributor eliminate that choice, they are in contravention of section 5.1.9.

45. Section 2.3.7.1.1 of THESL's Conditions of Service states that THESL "will provide" smart metering for all new condominium projects even where the

developer has *not requested* that configuration. This practice is illustrated by THESL's Offers to Connect to Avonshire and Metrogate in which THESL imposed a smart metering configuration on the developers despite the developers' request for a connection that contemplated a bulk meter/smart sub-metering configuration. It is evident that THESL has contravened and is likely to further contravene section 5.1.9 of the DSC.

THESL Conditions of Service, section 2.3.7.1.1. Exhibit F-2 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

Letter from Colin McLorg, THESL, to Giuseppe Bello, Avonshire Inc. dated April 22, 2009. Exhibit D-3 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

Letter from Colin McLorg, THESL, to Lou Tersigni, Metrogate Inc. dated April 22, 2009. Exhibit E-3 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

**D. THESL has contravened and is likely to contravene section 53.17 of the Electricity Act and Ontario Regulation 442/07**

46. By refusing to connect new condominium projects that seek a connection premised on a smart sub-metering configuration, THESL is acting contrary to section 53.17 of the Electricity Act:

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.

[Emphasis added.]

*Electricity Act, 1998*, s. 53.17. Tab 2 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

47. The circumstances and classes of properties referred to in section 53.17 are prescribed in sections 2 and 3 of Ontario Regulation 442/07 and it includes new condominium projects that are under construction:

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

[...]

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*.

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

[...]

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.

*Installation of Smart Meters and Smart Sub-Metering Systems in Condominiums*, O. Reg. 442/07. Tab 6 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

48. The other persons licensed to install smart sub-metering equipment referred to in section 53.17 are prescribed in Ontario Regulation 443/07:

1. (1) In relation to the classes of property prescribed by section 2 of Ontario Regulation 442/07 (*Installation of Smart Meters and Smart Sub-Metering Systems in Condominiums*) made under the *Electricity Act, 1998*, no person shall engage in an activity that is a prescribed activity under subsection (2) unless the person is licensed to do so under section 57 of the Act.

(2) For the purposes of clause 57 (i) of the Act, the commercial offering or the commercial provision of smart meters, 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 and any associated services is a prescribed activity.

*Licensing Sub-Metering Activities*, O. Reg. 443/07. Tab 7 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

49. When read in conjunction with Ontario Regulations 442/07 and 443/07, section 53.17 imposes an obligation on distributors and licensed smart sub-metering providers to install either smart meters or smart sub-metering systems in new condominium projects that comply with the prescribed technical requirements. Section 53.17 does not create a right for a distributor to require that a customer smart meter a building – the choice of smart metering by the distributor or smart sub-metering by a license smart sub-metering provider is left to the customer.

50. THESL's policy and practices interfere with the ability of the customer (in this case Avonshire and Metrogate) to choose to sub-meter its building under section 53.17 and as such, constitute a contravention of that section. THESL's Conditions of Service and the position it has taken in correspondence and in this proceeding demonstrates that further contravention of section 53.17 is likely.

**E. THESL has contravened and is likely to contravene section 2.4.6 of the DSC**

51. Under section 2.4.1 of the DSC, a distributor is required to document its operating practices and connection policies in its Conditions of Service. Section 2.4.6 of the DSC identifies the matters that must be included in a distributor's Conditions of Service at a minimum and states:

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

Distribution System Code, s. 2.4.6. Tab 10 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

52. As detailed above, the requirement in section 2.3.7.1.1 of THESL's Conditions of Service that all new condominium projects be suite metered by THESL is inconsistent with sections 28 and 53.17 of the Electricity Act, Ontario Regulation 442/07, and sections 3.1.1 and 5.1.9 of the DSC.

53. Consequently, THESL has contravened section 2.4.6 of the DSC and will continue to contravene section 2.4.6 until its Conditions of Service are brought into compliance with the applicable provisions of the Electricity Act and the DSC.

**F. THESL has not established any defences to alleged contraventions and likely contraventions**

**(a) *THESL has not established a defence under s. 3.1.1(a) of the DSC***

54. THESL has not established a defence under section 3.1.1(a) of the DSC that justifies its policy of refusing to offer connects to condominium projects that contemplate a smart sub-metering configuration.

55. Under its defence, THESL asserts that it has a right to apply a policy of refusing connections based on a presumption of unlawful conduct by customers without affording THESL's customers review by an impartial authority or any procedural protections. Such a presumption is not fair and reasonable to customers. If THESL suspects that a customer is using its electrical connection in contravention of the law, then THESL can report that conduct to the responsible regulatory authority so that authority can undertake a proper investigation that respects the due process rights of the customer. Notably, THESL's concern about unlawful conduct was not raised in THESL's correspondence with the Board's Compliance Team between October 2008 and February 2009 and THESL has not filed a complaint in respect of these allegations.

THESL's Answers to Compliance Counsel Interrogatories,  
Interrogatory Responses of Compliance Counsel and THESL (Ex.  
K1.7), Tab 2, IRs 3(1), 3(2) and 3(3).

56. In addition, THESL's defence should be rejected because THESL's presumption of unlawful conducted by its customers is based entirely on uncorroborated speculation and inference. Further, in this case, THESL admits

that it never had (and does not have) any evidence of wrongdoing (or intended wrongdoing) by Avonshire and Metrogate. THESL's concern about unlawful conduct was not referred to as a reason to justify the refusal to connect Avonshire and Metrogate in THESL's respective letters to those companies dated April 22, 2009 as required by section 3.1.3 of the DSC.

THESL's Answers to Compliance Counsel Interrogatories,  
Interrogatory Responses of Compliance Counsel and THESL (Ex.  
K1.7), Tab 2, IRs 3(2), 3(5), 3(7), 3(8), 3(10), 3(11), 3(12) and 3(13).

57. The foundation of THESL's defence rests on an allegation of illegal "markups" by exempt distributors even though there has been no determination by the Board as to what constitutes "all reasonable costs" under section 4.0.1 of Ontario Regulation 161/99 and no proceeding in which the Board found that licensed smart sub-metering providers are acting illegally. As noted by Brian Hewson, the Board's Senior Manager, Networks & Smart Grid, and former Chief Compliance Officer, reasonable costs could include a reasonable administrative charge (as noted by the Board in its discretionary metering activities decision) and the cost of capital:

MR. KAISER: Mr. Hewson, in that case, can they charge the cost of capital on the wires?

MR. HEWSON: I think what the Board has said in the discretionary metering, going back to the services related to putting in the meters and providing the services that there can be a reasonable administrative charge. I don't think the Board has ever opined on whether that includes the cost of capital. In my own view, it would be appropriate to include the cost of capital because that is part of the cost of acquiring the assets and installing the assets is the cost of borrowing money, ensuring that you can fund the installation.

*Definitions and Exemptions*, O. Reg. 161/99, s. 4.0.1. Tab 4 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

Cross-Examination of Brian Hewson dated January 5, 2010, p. 139, line 25 to p. 140, line 8.

Decision and Order dated August 13, 2009, EB-2009-0111 at p. 12. Tab 7 of Compliance Counsel Authorities.

58. In support of its defence, THESL also relies upon this Board's decision in the discretionary metering activities proceeding; however, this decision dealt with sub-metering in the context of landlord/tenant relationships and expressly noted the differences between the two settings:

In the condominium setting, the condominium corporation has a fiduciary duty to the unit holders and is unequivocally accountable to the occupants of the respective buildings. There is no parallel to the condominium corporation in the residential complex setting. Each tenant in a residential complex has a separate and distinct contractual relationship with the landlord, and there is no corporate entity that has the legal obligation to represent the interests of the respective apartment unit tenants.

Implementation of smart sub-metering in the residential tenancy environment is a very different exercise than in the condominium context ...

Decision and Order dated August 13, 2009, EB-2009-0111 at p. 8.  
Tab 7 of Compliance Counsel Authorities.

59. It should be noted that in dismissing a request to review its discretionary metering decision, the Board stated that there was not necessarily an agency relationship between a landlord and a smart sub-metering provider and interpreting the decision in that way (as THESL appears to do) is "a fundamental misunderstanding of the Decision."

Decision and Order dated October 6, 2009, EB-2009-0329 at p. 2.  
Tab 8 of Compliance Counsel Authorities.

60. Finally, THESL ignores the existing protections for customers contained in the Board's SSM Code and section 112 of the *Condominium Act, 1998*, which permits condominium corporations, within 12 months of the election of a new condominium board, to terminate contracts entered into with the corporation prior to election of the board.

*Condominium Act, 1998*, S.O. 1998, c. 19, s. 112. Tab 3 of Brief of  
Statutory and Regulatory Provisions (Ex. K1.6).

*(b) The November 27 Offer does not negate THESL's contraventions*

61. The November 27 Offer issued by THESL to Avonshire does not negate THESL's contraventions or the need for a remedial order from the Board.

62. The issue in this proceeding is whether THESL improperly refused to make an offer to connect to Avonshire and Metrogate in its respective letters of April 22, 2009. The subsequent November 27 Offer does not affect this determination.

63. The terms of the November 27 Offer only apply to Avonshire and other projects that submitted requests to connect prior to THESL's amendment of section 2.3.7.1.1 on February 29, 2008. As such, the November 27 Offer cannot possibly remedy THESL's contravention in respect of Metrogate nor would it require THESL to amend its Conditions of Service in respect of requests to connect received by THESL after February 29, 2008; as such, THESL is still likely to contravene the enforceable provisions in the future.

Letter from Colin McLorg, THESL, to Giuseppe Bello dated November 27, 2009. Pre-Filed Evidence of THESL (Ex. K1.2), Tab 8.

64. The terms of the November 27 Offer are also inappropriate as it continues to place THESL in the role of regulator of the relationship between THESL's customers and smart sub-metering providers. This approach is not fair or reasonable to the customer as it does not afford the customer any protections and procedural rights that govern the conduct of a regulator.

*(c) Green Energy Act and other policy arguments are not relevant*

65. THESL's asserted defences related to the *Green Energy Act* and other policy arguments have no bearing on the determination to be made in this proceeding. This proceeding is about compliance with the existing regulatory structure; it is not a policy debate about the merits of that structure.



## PART V - ORDER REQUESTED

66. Sections 28 and 53.17 of the Electricity Act are listed as enforceable provisions in subsection 112.1(b) of the OEB Act. Compliance with sections 2.4.6, 3.1.1 and 5.1.9 of the DSC is required under section 70.1 of the OEB Act as a condition of THESL's electricity distribution licence and is therefore are enforceable provisions under subsection 112.1(c) of the OEB Act.

OEB Act, ss. 70.1 and 112.1. Tab 1 of Brief of Statutory and Regulatory Provisions (Ex. K1.6).

Electricity Distribution License, ED-2002-0497 at s. 5.1. Exhibit F-1 of Compliance Counsel Pre-Filed Evidence (Ex. K1.1).

67. Compliance Counsel requests that this Board make a finding under section 112.3(1) of the OEB Act that THESL has contravened and is likely to contravene the enforceable provisions listed in the Notice of Compliance; in particular:

- (a) That THESL's refusal to connect Avonshire and Metrogate on the basis of section 2.3.7.1.1 of THESL's Conditions of Service 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, and 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.
- (b) That 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*.

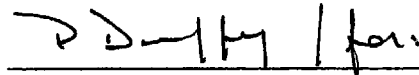
- (c) That THESL's practice is also contrary to section 53.17 of the Electricity Act (and Ontario Regulation 442/07—Installation of Smart Meters and Smart Sub- Metering Systems in Condominiums (made under the Electricity Act)) which contemplates a choice between smart metering and smart sub-metering.
- (d) That 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.

68. In the event the Panel finds THESL to be in contravention of all or some of the enforceable provisions, an order should be made:


- (a) remedying past contraventions (specifically, in respect of Avonshire and Metrogate); and
- (b) preventing further contraventions by, among other things, amending its Conditions of Service to provide for the right of any board of directors of a condominium corporation or the developer of a condominium to request and be connected to THESL's distribution system based on either a smart metering configuration or a bulk metered connection as an end-state configuration (the latter which would thereby allow the board of directors or the developer to choose to have the individual condominium units smart sub-metered by a licensed smart sub-meter provider).

69. In accordance with the Panel's direction, Compliance Counsel will, if necessary, make submissions on the specifics of the remedy requested at a future date.

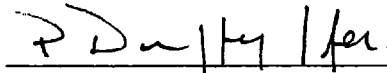
ALL OF WHICH IS RESPECTFULLY SUBMITTED



Glenn Zacher



Patrick G. Duffy



Maureen Helt

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

**EB-2009-0308**

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

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**CLOSING ARGUMENT OF COMPLIANCE  
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