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Ontario Energy Board
27th Floor
2300 Yonge Street
Toronto, Ontario
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ATT: Kirsten Walli, Secretary

October 25, 2007.

Dear Ms. Walli,

NOTICE OF PROPOSAL TO AMEND A CODE
PROPOSED AMENDMENTS TO AFFILIATE RELATIONSHIPS CODE FOR ELECTRICITY DISTRIBUTORS AND TRANSMITTERS
BOARD FILE NO: RP-2007-0662

In accordance with the OEB's e-mail and web posting of September 19, 2007 ECMI submits its comments on the above noted matter.

Three paper copies are enclosed. Electronic copies in both Adobe Acrobat and Word have been submitted by email to boardsec@oeb.gov.on.ca.

Requested contact details are as follows:-
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Respectfully submitted for the Board's consideration,

Original signed by R. White

Roger White
President

ECMI Comments On Proposed Amendments To Affiliate Relationships Code For Electricity Distributors And Transmitters
BOARD FILE NO: RP-2007-0662

The proposed amendments to the Affiliate Relationships Code (ARC) include amendments to Section 1.1 Purpose of this Code;

> Pre-amendment wording of 1.1(a)
>
> "(a) minimize the potential for a utility to cross-subsidize competitive or non-monopoly activities;"
>
> *Reference Pre Amendment Affiliate Relationships Code, revised November 24, 2003*
> *1. GENERAL AND ADMINISTRATIVE PROVISIONS, Section 1.1 Purpose of the Code*

> Proposed wording of 1.1 (b) replacing existing 1.1(a)
>
> "b) preventing a utility from cross-subsidizing competitive or non-monopoly activities;"
>
> *Reference Proposed Amended Affiliate Relationships Code,*
> *1. GENERAL AND ADMINISTRATIVE PROVISIONS, Section 1.1 Purpose of the Code*

It is not apparent that the new 1.1(b) applies only to transactions within the utility (LDC). If it is proposed to apply this to contracts with affiliates, we would suggest that it may be beyond the scope of the Ontario Energy Board Act as affiliates may be involved in non-monopolistic activities which are beyond the reach of the Board save and except the extent that such a relationship may adversely affect the customers of the utility (LDC). If the intent of 1.1(b) is within the utility, the following comments apply.

To prevent means to preclude. The only way to comply with this proposed "guarantee" requirement of "preventing a utility from cross-subsidizing competitive or non-monopoly activities" requires a precise and indisputable definition for the exact cost of any financial arrangement. As the exact cost (not the contract cost) is always subject to the definition of cost the only way to preclude a bi-directional cross subsidy is to preclude any financial relationship at all or in fact any non-monopolistic activities within the utility (LDC). The bi-directional relationship imposed by the proposed wording requiring that no cross subsidy exists either to the competitive or non-monopoly activities relies on this perfect definition of cost.

The existing wording requiring that any cross subsidy be minimized recognizes that there is always the potential for cross subsidy and does not impose an absolute or unachievable standard.

The existing test appears to imply a reasonableness requirement to minimize the potential for cross subsidy. Again, the only way to achieve a guarantee for no cross subsidy within the utility (LDC) is to have no competitive activities within the utility (LDC).

If the scope of 1.1(b) is intended to include preventing cross subsidies between a utility and its affiliate then the comments under proposed 1.1(e) apply to 1.1(b) as well.

Also in Section 1.1 there is a proposed amendment under 1.1(e);

> e) preventing a utility from acting in a manner that provides an unfair business advantage to an affiliate that is an energy service provider*;* and
>
> *Reference Proposed Amended Affiliate Relationships Code,*
>
> *1. GENERAL AND ADMINISTRATIVE PROVISIONS, Section 1.1 Purpose of the Code*

If an affiliate has any revenue or revenue stream from the utility, to the extent that a non-affiliate does not have the same revenue then that revenue provides a business advantage to the affiliate. Whether the revenue provides an unfair advantage or the tests that might be applied by the Board is unstated. It is unclear how this apparent enhancement of the powers of the Board will benefit customers and in the extreme this enhanced latitude could eliminate the opportunity for any commercial relationship between a utility and its affiliate.

As the ownership and control of a company is itself a financial relationship, it follows that the proposed amendments preclude an affiliate relationship. By taking away the reasonableness test, the proposed amendments preclude any relationship with an affiliate.

Apparently, there is no way to establish a relationship acceptable to the proposed code. If that were within the intent of the statute then the statute would have specifically precluded it. The very fact that Bill 35 (Energy Competition Act, 1998) required municipalities to establish affiliates seems to indicate that the current thrust is in direct conflict with the statute.

This wording would also preclude the financial interest identified in Section 2.4.1 of the existing and proposed ARC.

The wording in Section 2.4 of the proposed ARC is either in conflict with the requirements of the revised Section 1.1 Purpose of this Code (e) or it is redundant.

> 2.4 Financial Transactions with Affiliates
>
> 2.4.1 A utility may provide loans, guarantee the indebtedness of, or invest in the securities of an affiliate, but shall not invest or provide guarantees or any other form of financial support if the amount of support or investment, on an aggregated basis over all transactions with all affiliates, would equal an amount greater than 25 percent of the utility's total equity.
>
> *Reference Section 2.4 Financial Transactions with Affiliates*

This proposed wording presumes that the exact cost of the utility's financial transactions with an affiliate can be calculated. For the reasons already stated, such as requirement imposes an absolute or unachievable standard in conflict with the requirements of Section 1.1 Purpose of this Code (e).

It appears that the proposed ARC precludes the establishment of OBCA companies as contemplated by the statute.

The original ARC recognised the right of the municipal corporation acting under Section 146 (a) of the Electricity Act to assign employees or obligations to be transferred. Those

rights or obligations can be assigned to individual employees or groups of employees as stipulated in Section 146(c) of the Act. This section does not preclude the assignment of the obligations of an employee to just one corporation. As such, the statue contemplates the sharing of employees between municipally owned OBCA companies.

The proposed ARC amendments appear to be in conflict with the statute with respect to the right of the municipal corporation acting under Section 146 (a) of the Electricity Act to assign employees or obligations to be transferred. Those rights or obligations can be assigned to individual employees or groups of employees as stipulated in Section 146(c) of the Act.

> **Electricity Act, 1998**
> **Description of things transferred**
>
> **146.** A transfer by-law may describe employees, assets, liabilities, rights or obligations to be transferred,
>
> (a)by reference to specific employees, assets, liabilities, rights or obligations;
>
> (b)by reference to any class of employees, assets, liabilities, rights or obligations; or
>
> (c)partly in accordance with clause (a) and partly in accordance with clause (b). 1998, c. 15, Sched. A, s. 146.

Further, Section 147(4) (b) specifies that “any term or condition of employment can lawfully be changed after the transfer” but no statutory obligation is created to require such a change.

> **Employees**
>
> **147.** (1) The employment of an employee who is transferred by or pursuant to a transfer by-law is not terminated by the transfer and shall be deemed to have been transferred to the transferee without interruption in service. 1998, c. 15, Sched. A, s. 147 (1).
>
> **Service**
>
> (2) Service with the transferor of an employee who is transferred by or pursuant to a transfer by-law shall be deemed to be service with the transferee for the purpose of determining probationary periods, benefits or any other employment-related entitlements under the *Employment Standards Act* or any other Act or under any employment contract or collective agreement. 1998, c. 15, Sched. A, s. 147 (2).
>
> **No constructive dismissal**
>
> (3) An employee who is transferred by or pursuant to a transfer by-law shall be deemed not to have been constructively dismissed. 1998, c. 15, Sched. A, s. 147 (3).
>
> **Future changes**
>
> (4) If an employee is transferred by or pursuant to a transfer by-law, nothing in this Act,
>
> (a)prevents the employment from being lawfully terminated after the transfer; or
>
> (b)prevents any term or condition of the employment from being lawfully changed after the transfer. 1998, c. 15, Sched. A, s. 147 (4).

Further, under Section145 (4) of the Electricity Act, the transfer by law appears to supersede general or special legislation or rule of law

Transfer by-laws

145. (1) The council of a municipality may make by-laws transferring employees, assets, liabilities, rights and obligations of the municipal corporation, or of a commission or other body through which the municipal corporation generates, transmits, distributes or retails electricity, to a corporation incorporated under the *Business Corporations Act* pursuant to section 142 for a purpose associated with the generation, transmission, distribution or retailing of electricity by the corporation incorporated pursuant to section 142. 1998, c. 15, Sched. A, s. 145 (1).

Debentures

(2) Despite subsection (1), a transfer by-law may not transfer any liabilities, rights or obligations arising under a debenture issued or authorized to be issued by a municipal corporation. 1998, c. 15, Sched. A, s. 145 (2).

Binding on all persons

(3) A transfer by-law is binding on the transferee, the transferor and all other persons. 1998, c. 15, Sched. A, s. 145 (3).

Same

(4) Subsection (3) applies despite any general or special Act or any rule of law, including an Act or rule of law that requires notice or registration of transfers. 1998, c. 15, Sched. A, s. 145 (4).

Section 73(1) 5 of the Ontario Energy Board Act clearly specifies that a distributor's affiliate may be involved in "Business activities that develop or enhance the ability of the distributor or any of its affiliates to carry on any of the activities described in paragraph 1, 3 or 4."

These include distribution activities (4) and do not limit the extent to which such development or enhancement shall occur.

Municipally-owned distributors

73. (1) If one or more municipal corporations own, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of a corporation that is a distributor, the distributor's affiliates shall not carry on any business activity other than the following:

1. Transmitting or distributing electricity.

2. Owning or operating a generation facility that was transferred to the distributor pursuant to Part XI of the *Electricity Act, 1998* or for which the approval of the Board was obtained under section 82 or for which the Board did not issue a notice of review in accordance with section 80.

3. Retailing electricity.

4. Distributing or retailing gas or any other energy product which is carried through pipes or wires to the user.

5. Business activities that develop or enhance the ability of the distributor or any of its affiliates to carry on any of the activities described in paragraph 1, 3 or 4.

Section 73(1) 6 of the Ontario Energy Board Act specifically identifies "Business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor, including providing meter installation and

reading services, providing billing services and carrying on activities authorized under section 42 of the *Electricity Act, 1998*."

ECMI would suggest that it is not by accident that Section 73(1) 6 specifies "including" when identifying the more efficient use of assets of the distributor or affiliate which should be pursued to include (implies including but not limited to) "providing meter installation and reading services, providing billing services and carrying on activities authorized under section 42 of the *Electricity Act, 1998"*. This inclusion statement clearly encourages municipalities to pursue activities which more effectively utilise the assets of the distributor. ECMI would suggest that the Board should be cautious in precluding or inhibiting this more effective use of assets which in the broadest sense of "including" can clearly include employees.

Section 73(1) 7,8 and 9 other specific activities which could be pursued by affiliates.

Also in Section 1.1 there is a proposed amendment under 1.1(f);

> f) preventing customer confusion that may arise from the relationship between a utility and its affiliate.

As previously noted, to prevent means to preclude and imposes an absolute or unachievable standard.

With respect to Section 2.2.2 the proposed wording, like the predecessor wording, is dependent on the interpretation that sharing confidential information "with an affiliate" or "access by the affiliate" to shared confidential information is limited to precluding situations where the affiliate might use such information in competitive activities. Where access is provided to the affiliate with the permission of the customer any such access should not be constrained.

ECMI agrees it is appropriate to strike Section 2.2.4 of the existing ARC for the reasons identified above with respect to the proposed Section 2.2.3.