

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.

SUBMISSIONS OF THE SMART SUB-METERING WORKING GROUP ON REMEDIES

1. On January 27, 2010, the Ontario Energy Board (the “OEB”, or the “Board”) issued a Decision and Order (the “Decision”) in this matter, concluding that Toronto Hydro-Electric System Limited (“Toronto Hydro”) has breached four enforceable provisions of the *Electricity Act, 1998* (“Electricity Act”) and Distribution System Code (“DSC”). The Board’s Decision provided that it will hear oral submissions on the appropriate remedy relating to the breaches of the enforceable provisions specified in the Decision, and also invited parties to file written submissions outlining their position.
2. The members of the Smart Sub-metering Working Group (the “SSMWG”) are pleased to provide their position on the remedies that are appropriate against Toronto Hydro. The remedies proposed by the SSMWG are designed to remedy the effects of Toronto Hydro’s past improper and anticompetitive actions, and to ensure that, on a go-forward basis, smart sub-metering (“SSM”) providers can more fairly compete with Toronto Hydro in suite metering activities.
3. As set out in more detail herein, the remedies that the SSMWG asserts are appropriate are the following:
 - (a) Toronto Hydro should be compelled to immediately offer Metrogate Inc. (“Metrogate”) and the Residences of Avonshire Inc. (“Avonshire”) unconditional connection agreements that allow the projects to be smart sub-metered.
 - (b) Toronto Hydro should be required to immediately amend its Conditions of Service to make it clear that developers have the choice of whether to have new projects smart sub-metered or suite metered by Toronto Hydro. Consistent with

this, Toronto Hydro should be ordered to immediately discontinue its policy that refuses connections to new condominium developments that will be smart sub-metered.

- (c) Toronto Hydro should be compelled to write letters to every building owner, condominium developer and condominium corporation that has requested a connection subsequent to February 29, 2008 (the date that Toronto Hydro instituted its policy that refused connections where SSM configurations were requested). The letter should include the Decision and notify the recipient that Toronto Hydro is not, and never has been, entitled to insist that new condominiums be suite metered only by Toronto Hydro. The letter should further note that condominium developers and condominium corporations may choose to engage a licensed SSM provider and that Toronto Hydro is prepared to revise existing signed connection agreements to allow a building to be smart sub-metered with a Toronto Hydro bulk meter.
- (d) The Order should contain a Board determination that renders “void” any connection agreement which contemplates Toronto Hydro suite metering a building contrary to the wishes of the developer or building owner.
- (e) The Board’s decision about remedies should contain an explicit statement that it is not Toronto Hydro’s proper role to be the regulator of whether development projects should be connected, because of alleged concerns about the conduct of the SSM provider. It should be clear that if Toronto Hydro has concerns about the practices or conduct of a SSM provider, then this should be addressed by way of complaint or application to the OEB, and the connection should not be refused or delayed unless or until the OEB makes a determination in that regard.
- (f) Toronto Hydro should be required to confirm that it has provided to all relevant staff and contractors a copy of the Decision and instructions about future conduct which compels staff to operate in compliance with the Decision. Toronto Hydro should be ordered to institute a self audit compliance review in several months to ensure that its staff and contractors are abiding by the Board’s Decision and changes to Toronto Hydro’s Conditions of Service.

4. These remedies, if ordered, provide for a measured approach to address the effects of Toronto Hydro's non-compliance on condominium developers (including Metrogate and Avonshire) and SSM providers, and to ensure that Toronto Hydro's future conduct is consistent with its legal and regulatory obligations.

BACKGROUND

5. In its Notice of Intention to Make an Order for Compliance against Toronto Hydro (the "Notice"), the Board set out the allegations at issue, and made clear its intention to:
 - (a) "take such action as the Board may specify to remedy the contravention that has occurred, or prevent a contravention or further contravention of the enforceable provisions." (page 1)
 - (b) "make an Order requiring THESL to take such action as the Board may specify including but not limited to an Order to THESL to amend its Conditions of Service, to remedy the contravention that has occurred or prevent a contravention or further contravention of any of the enforceable provisions" (page 2)
 - (c) In the event that a hearing is requested, then "upon finding a contravention(s) of the enforceable provision(s), to make an order it deems appropriate under Sections 112.3, 112.4 or 112.5 of the Act." (page 3)
6. Under section 112.3 of the *Ontario Energy Board Act, 1998* ("OEB Act"), the Board has very broad powers to make an order requiring Toronto Hydro to comply with an enforceable provision and to take such action as the Board may specify to remedy a contravention that has occurred and/or prevent any further contravention. (Section 112.4 allows the Board to suspend Toronto Hydro's licence; section 112.5 deals with administrative penalties).
7. On September 18, 2009, the Board convened a "Standing Hearing" in this matter to hear submissions about the intervention requests of the SSMWG and the Electricity Distributors Association (EDA).
8. In its Decision, issued that day, the Board summarized what this proceeding is about:

At issue in this proceeding is Toronto Hydro's alleged practice, of refusing to connect new condominium projects within its service area unless all units in the condominium are individually smart metered by Toronto.

It is alleged in the Notice that this practice effectively precludes condominium corporations or the developers of those condominiums from seeking the services of alternative sub-metering providers.¹

9. The Board's Standing Hearing Decision then described how this case would proceed, stating that:

This proceeding - (and there is largely agreement on this) - can be described as having two phases. In phase 1, there are two aspects: First, the interpretation of the enforceable provisions and the defences having regard to the Board's statutory objectives and other criteria. That I would call the legal issue. The second aspect which I would call the factual issue is, given the legal interpretation, whether there has been compliance or non-compliance.

The second phase is: Having found non-compliance, if non-compliance is found, what order or remedy should the Board formulate and issue?²

10. On January 5 and 7, 2010, the first phase of the proceeding was held and the Board heard evidence and argument from Compliance Counsel and Toronto Hydro.
11. On January 27, 2010, the Board issued its Decision in respect of phase 1. The Decision sets out clear findings of non-compliance by Toronto Hydro with enforceable provisions of the Electricity Act and the DSC. Among the key findings are the following:
- (a) "Toronto Hydro admits that its new connection policy limits the activities of smart sub-meterers. That policy, as set out in section 2.3.7.1 of the company's Conditions of Service, and clarified in the evidence in this proceeding, states that no bulk meter will be offered and each individual unit holder must be a customer of Toronto Hydro. Those conditions mean simply that no one other than Toronto Hydro can charge for electricity. That eliminates the possibility of an exempt distributor using the services of a smart sub-meterer to purchase electricity at the bulk level at a bulk meter and re-invoicing the individual owner" (p. 13)
 - (b) "[i]t is clear that Toronto Hydro is refusing to provide certain types of connections. In this Board's view, that refusal is not justified by the statute or any associated codes or regulation. In fact, in our view the statute prohibits it." (p. 17)
 - (c) "What happened here is Toronto Hydro unilaterally decided in February 2008 to take action which has the effect of removing the competitors completely from one aspect of the smart metering business." (pp. 19-20)

¹ Transcript of Standing Hearing, September 18, 2009, at p. 37. This description of the proceeding was repeated on the first day of the phase 1 hearing (1 Tr. 1) and in the phase 1 Decision, at page 4.

² *Ibid*, pp. 37-38. The SSMWG and the EDA were granted standing to participate in phase 2 : p. 40.

- (d) “An existing condominium wishing to be smart metered or a developer of a new condominium building has the choice of choosing suite metering .. or submetering with another company, such as one of the SSMWG member companies”. (p. 16, quoting from the 2009 PowerStream rate proceeding decision – EB-2008-0244, dated July 27, 2009)
 - (e) “[smart sub-metering] 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...”. (pp. 16-17, quoting from PowerStream decision)
 - (f) Toronto Hydro has breached the following enforceable provisions:
 - (a) section 28 of the Electricity Act by refusing to connect the Metrogate and Avonshire properties. (p. 22)
 - (b) section 2.4.6 of the DSC because its Conditions of Service for connection of new condominiums do not comply with section 28 of the Electricity Act or section 70 of the OEB Act. (p. 23)
 - (c) section 3.1.1 of the DSC because its connection policy is not compliant with section 28 of the Electricity Act. (p. 23)
 - (d) section 5.1.9 of the DSC because it has sought to require condominium developers to use Toronto Hydro smart meters, where that should be the developers’ choice.
12. Given these findings of non-compliance, the Board determined that phase 2 should be convened to address the issue of remedies.
13. Following the issuance of the Board’s Decision, counsel to Metrogate and Avonshire wrote to Toronto Hydro (on January 29, 2010), again requesting that offers to connect be provided for those projects to allow for a smart sub-metering configuration. A copy of that letter is attached as Appendix “A”. Notwithstanding the unequivocal language in the Decision stating that Metrogate and Avonshire are entitled to that connection, Toronto Hydro has thus far failed to provide any response to this letter. That is particularly concerning in light of the evidence provided by Metrogate and Avonshire at the phase 1

hearing that the revised connection agreements are required by mid-February and early March, respectively.³

NEED FOR A REMEDIAL ORDER

14. As the Board stated in its Notice, it has broad jurisdiction to make any order that is appropriate under Sections 112.3, 112.4 or 112.5 of the OEB Act.
15. While it may not be necessary or appropriate at this juncture (on an initial finding of non-compliance) to suspend/revoke Toronto Hydro's licence (section 112.4) or impose an administrative penalty (section 112.5), there are a range of remedies that are appropriate under section 112.3 to remedy contraventions that have occurred and prevent further contraventions.
16. The SSMWG submits that the Order issued in this proceeding should be consistent with the broad findings and conclusions in the Decision.
17. First, the Order should address the following specific and current findings of non-compliance. For example:
 - (a) Toronto Hydro should be compelled to immediately offer Metrogate and Avonshire unconditional connection agreements that allow the projects to be smart sub-metered.
 - (b) The Board should direct Toronto Hydro to amend its Conditions of Service to make it clear that it will respond to a request that contemplates an SSM configuration. That is consistent with the Board's recent PowerSteam decision, which resulted in a change to that LDC's Conditions of Service. Section 2.3.7.1.1 of Toronto Hydro's Conditions of Service should be changed, to contain a provision identical or similar to the foregoing:

"Under Ontario Regulation 442/07, all new multiunit condominium buildings must be either individually metered by the licensed distributor or smart sub-metered by an alternative licensed service provider. For existing condominiums the installation of individual

³ 1 Tr. 22 and 28.

smart meters or smart sub-meters is at the discretion of the condominium's board of directors."⁴

- (c) Consistent with this, the Board should order Toronto Hydro to discontinue its policy that refuses connections to new condominium developments that will be smart sub-metered. As part of this change, Toronto Hydro should be ordered to amend all suite metering advertising materials to reflect the discontinuance of the policy.
18. The above remedies on their own, however, are not sufficient to remedy Toronto Hydro's contraventions of enforceable provisions that have occurred and prevent future contraventions.
19. It is clear that Toronto Hydro has set upon a deliberate course of action to exclude SSM providers from the new condominium market.⁵ The evidence and submissions made during phase 1 make clear that Toronto Hydro's policy is a "preventative policy"⁶, not based on any individual evidence of alleged illegal conduct⁷, but instead directed at protecting what Toronto Hydro sees as its natural and rightful monopoly⁸. As Vice-Chair Kaiser remarked on a couple of occasions, the intent and effect of Toronto Hydro's policy was to foreclose this market to competition from SSM providers, and Toronto Hydro had a commercial basis for doing so.⁹
20. Toronto Hydro's blanket policy over the past two years of refusing connections to any developers who wish to contract with a SSM provider has impacted on many developers, condominium corporations and SSM providers. As is the case with Metrogate and Avonshire, many of these parties would not have contracted with Toronto Hydro but for its illegal policy.

⁴ PowerStream 2009 rates application, EB-2008-0244: Majority Decision dated July 27, 2009, at p. 8, and Rate Order, dated August 13, 2009 (at Appendix B).

⁵ As the Board stated in the Decision, Toronto Hydro effectively removed competitors from one aspect of the suite metering business (pp. 19-20).

⁶ 1 Tr. 58 and 60-61; and 2 Tr. 63-64.

⁷ See, for example, 1 Tr. 164, 2 Tr. 63-64 and 2 Tr. 74.

⁸ See, for example, 2 Tr. 22-24, 29

⁹ 2 Tr. 120-123.

21. The SSMWG therefore submits that the Order should require Toronto Hydro to notify all potentially impacted persons and allow them the opportunity to re-contract with an SSM provider. That will help to remedy Toronto Hydro's past contraventions, which resulted from the application of its improper policy, and will assist in supporting the growth of competitive SSM industry, which the Board has recognized is in the public interest.
22. In particular, the Board should require Toronto Hydro to write to every building owner, condominium developer and condominium corporation that has requested a connection subsequent to February 29, 2008 (the date that Toronto Hydro changed its policy). In situations where Toronto Hydro has dealt with the owner or developer's representative (such as an electricity subcontractor), then the letter should be addressed to that representative. The letter should also be sent to industry representatives such as BILD (Building Industry and Land Development Association). The letter should be sent to all appropriate recipients within 30 days of the Board's Order.
23. The letter should include:
 - (a) a copy of the Board's Compliance Decision;
 - (b) confirmation that previous advice/communications from Toronto Hydro may have been inconsistent with the Board's Decision;
 - (c) a statement highlighting Toronto Hydro's revised policy (to reflect the Board's Decision) which confirms that condominium developers/condominium corporations may choose to engage a licensed SSM provider and that Toronto Hydro, under such circumstances, is required to install a master bulk meter;
 - (d) a statement that Toronto Hydro is obligated, upon request, to provide an Offer to Connect consistent with this configuration; and
 - (e) a statement offering to revise signed connection agreements to allow a building to be smart sub-metered with a Toronto Hydro bulk meter.

24. Attached to these submissions as Appendix “B” is a form of letter that could be used by Toronto Hydro and appended to the Board’s Order.
25. It is appropriate that Toronto Hydro send this letter (rather than simply assuming that industry participants will become self-educated) because most stakeholders do not follow OEB decisions and it cannot be presumed that they will become aware of the Board’s ruling on Toronto Hydro’s non-compliance. It is appropriate that the letter come from Toronto Hydro, not its SSM competitors, because only Toronto Hydro knows what parties have requested connections and because Toronto Hydro should be required to acknowledge its non-compliance, as well as possible remedies, to those who may have been affected as a result.
26. The SSMWG notes that the requirement to have Toronto Hydro itself provide notification is consistent with the Board’s Procedural Order in the “Discretionary Metering” proceeding (EB-2009-0111), where licensed SSM providers were required (within one business day) to provide a copy of the Board’s Notice of Written Hearing to each exempt distributor with whom they had contracted, and to let each such party know that they were required to post the Board’s Notice in a prominent place in their building within two business days.¹⁰ As was the case in the Board’s Notice in EB-2009-0111, it is also appropriate for Toronto Hydro to file with the Board a list of the developers, building owners and condominium corporations (or their representatives) who have requested connections since February 2008, along with confirmation that the required letter has been provided to each such person.
27. As noted above, Toronto Hydro’s communications to developers should include an option allowing developers to be released from their connection agreements with Toronto Hydro if the developers prefer to have a revised connection agreement to allow their building to be smart sub-metered, with a Toronto Hydro bulk meter. The SSMWG submits that the Board’s Order ought to expressly allow this right for developers who make such a request. That is consistent with the Board’s previous statement in the

¹⁰ EB-2009-0111, Notice of Written Hearing and Procedural Order No. 1, issued May 5, 2009. (attached as Exhibit “C”).

PowerStream case that it has jurisdiction to amend existing contracts between a licensed utility and customer under appropriate circumstances.¹¹

28. Toronto Hydro's conduct to date demonstrates its intent to use its monopoly position to entrench itself in the suite metering market, to the detriment of SSM providers. The SSMWG has reasonable and real concerns that this behaviour may continue, perhaps in a slightly different form. The SSMWG is concerned that, even following the Decision in phase 1, Toronto Hydro may rely on its illegality allegation in respect of the amounts charged by SSM providers and exempt distributors to justify future refusals to connect.
29. The only Board finding in this case related to Toronto Hydro's illegal conduct allegation is that there is no evidence to support that allegation in respect of Metrogate and Avonshire.¹² Toronto Hydro has confirmed that it has never made any complaint to OEB Compliance Staff about its illegal conduct concerns.¹³ There has never been any OEB finding in any other proceeding to support Toronto Hydro's allegation of illegal conduct. The members of the SSMWG certainly dispute that there is any illegal conduct. Accordingly, there is no basis for any determination by Toronto Hydro that any of the billing activities of SSM providers or exempt distributors are illegal. Similarly, there is no basis for Toronto Hydro to require some sort of self-certification from developers (as was demanded of Avonshire) to confirm that the developer is acting in accordance with Toronto Hydro's interpretation of the rules related to exempt distributors.¹⁴
30. Toronto Hydro has confirmed in this proceeding that it continues to have confidence in the Board's ability to monitor, address and remedy any abuses by SSM companies.¹⁵ Toronto Hydro has further confirmed that "we certainly do not see ourselves as the

¹¹ PowerStream 2009 rates application, EB-2008-0244: Minority Decision dated July 27, 2009, at pp. 16-17.

¹² Decision, at p. 19.

¹³ 2 Tr. 79-81.

¹⁴ That is consistent with the finding, at page 19 of the Decision, that "The Board does not accept the concept of reverse onus or that certification is necessary in the form set out by Toronto Hydro."

¹⁵ 2 Tr. 65-66.

metering cop on the beat in any sense, and we have no wish at all to improperly intrude on [the Board's] jurisdiction or exceed our proper scope of activities".¹⁶

31. The SSMWG therefore submits that if Toronto Hydro intends to rely on allegations of illegal conduct to justify a refusal to connect, then Toronto Hydro should be required to first make its case to the OEB. Otherwise, Toronto Hydro is again positioning itself as the regulator of an industry in which it is a competitor. That is not appropriate. To that end, the SSMWG submits that the Board should expressly limit Toronto Hydro's ability to unilaterally determine which projects may be smart sub-metered.
32. In particular, the SSMWG submits that the Board's decision in phase 2 should include a reminder that it is not Toronto Hydro's proper role to be the regulator of which development projects should be connected, because of alleged concerns about the conduct of the SSM provider. The Order should make clear that if Toronto Hydro has concerns about the practices or conduct of a SSM provider, then this should be addressed by way of complaint or application to the OEB, and no connection should be refused or delayed unless or until the OEB makes a determination that such an approach is appropriate.
33. Finally, members of the SSMWG are concerned that the substance of the Board's Decision may not be comprehensively communicated to those Toronto Hydro staff and representatives who are involved with the utility's suite metering program. To ensure that happens, the SSMWG suggests that the Board require Toronto Hydro to provide to all relevant staff and contractors a copy of the Decision and instructions about future conduct which compels staff to operate in compliance with the Decision. To provide further assurances to the Board and the public in this regard, Toronto Hydro should be ordered to institute a self audit compliance review in several months to ensure that its staff and contractors are abiding by the Board's Decision and changes to Toronto Hydro's Conditions of Service. The results of this self audit should be filed with the Board for review in a timely manner.

¹⁶ 2 Tr. 34.

34. Toronto Hydro should also be required to confirm the Compliance Order with a quarterly compliance certificate, for the next two years, signed by the Ethics and Compliance Officer, General Counsel and President & CEO certifying that:
- (a) Toronto Hydro has not taken any action to circumvent the Order, evade the intent of the Order or act in any way to obstruct competition;
 - (b) All relevant employees are aware of the decision and its implications; and
 - (c) There have been no alleged breaches of Toronto Hydro's revised suite metering policy, except as disclosed to the OEB.
35. Given the fact that these submissions are being filed at the same time as those of other parties, the SSMWG is not aware of the positions that will be taken by Compliance Counsel, Toronto Hydro and the EDA in respect of remedies. The SSMWG will provide its response to those submissions at the phase 2 hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

A handwritten signature in black ink, appearing to read 'David Stevens', followed by a period.

David Stevens
Counsel to SSMWG

APPENDIX “A”



DELZOTTO, ZORZI LLP

BARRISTERS & SOLICITORS

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January 29, 2010

Colin McLorg, Manager
Regulatory Policy & Relations
Toronto Hydro
14 Carlton Street
Toronto, Ontario
M5B 1K5

Dear Mr. McLorg:

Re: Compliance Proceeding against Toronto Hydro

Following the issuance of the decision recently rendered by the Ontario Energy Board ("OEB") in the compliance proceeding initiated against Toronto Hydro (EB-2009-0308) (hereinafter referred to as the "**Compliance Decision**"), the writer is corresponding to you in my capacity as legal counsel in connection with each of the Avonshire and Metrogate condominium development projects that are currently under construction, and which require permanent connection to the Toronto Hydro electricity distribution system.

As you know, our clients the Residences of Avonshire Inc. ("**Avonshire**") and Metrogate Inc. ("**Metrogate**") earlier requested an offer to connect from Toronto Hydro which contemplated the installation of a smart sub-metering system by a licensed smart sub-metering provider. Toronto Hydro refused these requests, and these refusals were the subject of the aforementioned compliance proceeding.

The Compliance Decision confirms that Toronto Hydro's refusals were unlawful, and that each of Avonshire and Metrogate are entitled to a connection to or at a bulk meter, and are free to thereafter use the services of a licensed smart sub-metering provider downstream of the bulk meter.

The Compliance Decision is effective immediately. Accordingly, the writer sees no reason why Avonshire and Metrogate need to wait for phase 2 of the compliance proceeding. As you may no doubt be aware, the need for permanent power by Avonshire and Metrogate is immediate, and we are therefore requesting that Toronto Hydro prepare an offer to connect for each of Avonshire and Metrogate which contemplates the installation of a bulk meter, and the use of a licensed smart sub-metering provider downstream of the Toronto Hydro bulk meter.

It is also the writer's understanding that your letter dated November 27, 2009 addressed to Giuseppe Bello, Project Manager for the Avonshire project, confirmed that a revised offer to connect may result in a change in the capital contribution requirement from that set out in the earlier offer to connect. In the event that each of the revised offers to connect hereby requested ultimately reflect or include a capital contribution that is greater than the figure that was included in the earlier offer to connect, then the writer requests that you also provide a detailed breakdown of costs that would assist in explaining how the increased figure was arrived at, including the methodology and all assumptions used for the purposes of calculating the capital contribution.

Given the known urgency of the Avonshire and Metrogate projects receiving a permanent connection, and in light of the clarity of the OEB's Compliance Decision, the writer trusts that the foregoing request will be met with a prompt response.

Yours very truly,

DELZOTTO, ZORZI LLP

Per:


HARRY HERSKOWITZ

HH/jd

c.c. George Vegh (McCarthy's)
Glenn Zacher (Stikeman)

APPENDIX “B”

[TORONTO HYDRO-ELECTRIC SYSTEM LIMITED LETTERHEAD]

[Name of Developer]
[Address of Developer]

Dear _____.

Condominium developer's right of choice of suite metering providers

The Ontario Energy Board (the "Board") released its Decision on January 27, 2010 in a Regulatory Enforcement proceeding it initiated against Toronto Hydro (a copy is attached). The Board's findings are clear. The Board determined that Toronto Hydro's policy against allowing the smart sub-metering of new condominiums was not only unlawful, but was in fact statutorily prohibited. Developers and building owners have the right to require Toronto Hydro to install a bulk meter and to use a licensed smart sub-metering provider (which is not associated with Toronto Hydro) to install suite meters downstream of the bulk meter. Toronto Hydro has no monopoly or exclusive right to insist that only it can meter units in any building.

Effective immediately, Toronto Hydro has rescinded its previous policy of refusing to connect new condominiums that were to be smart sub-metered (where electricity submeters were to be installed and operated by a party other than Toronto Hydro). As required by the Board, Toronto Hydro will respond to an Offer to Connect, when so requested by a developer or building owner, that contemplates the installation of a bulk meter and the use of a licensed smart sub-metering company.

If you have signed a connection agreement with Toronto Hydro in the two years since February 2008 that contemplates that Toronto Hydro will install smart meters in each unit, then you may be entitled to receive a replacement connection agreement. If Toronto Hydro has not yet installed its smart meters for each unit, then you have the right to receive a revised connection agreement from Toronto Hydro that contemplates the installation of a bulk meter and the use of a licensed smart sub-metering company to install and operate suite smart sub-meters. If you wish to proceed in that manner, please let us know as soon as possible and we will provide you with a revised connection agreement.

Yours truly,

Toronto Hydro-Electric System Limited

APPENDIX “C”



EB-2009-0111

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

AND IN THE MATTER OF an order or orders authorizing
certain distributors to conduct specific discretionary metering
activities under section 53.18 of the *Electricity Act, 1998*,
S.O. 1998, c. 15, Schedule A.

NOTICE OF WRITTEN HEARING AND PROCEDURAL ORDER NO. 1

The Ontario Energy Board (the "Board") has commenced a proceeding to determine whether, and if so under what conditions, certain distributors that have not otherwise been authorized to conduct discretionary metering activities in accordance with section 53.18 of the *Electricity Act, 1998* (the "Electricity Act") should be authorized to do so by an order or orders of the Board. The file number assigned to this proceeding is EB-2009-0111.

Section 53.18 of the *Electricity Act* states that:

- (1) On and after November 3, 2005, no distributor shall conduct discretionary metering activities unless the distributor is authorized to conduct the activity by this Act, a regulation, an order of the Board or a code issued by the Board or it is required to do so under the *Electricity and Gas Inspection Act* (Canada).
- (2) For the purpose of this section,
"discretionary metering activity" means the installation, removal, replacement or repair of meters, metering equipment, systems and technology and any associated equipment, systems and technologies which is not mandated by the *Electricity and Gas Inspection Act*

(Canada), by regulation, by an order of the Board or by a code issued by the Board or authorized by a regulation made under this Act.

The distributors that may be authorized to conduct certain discretionary metering activities in this proceeding are distributors that are exempt from licensing and other requirements under sections 4.0.1(1)(a)(2) and (3) of Ontario Regulation 161/99—*Definitions and Exemptions* (made under the *Ontario Energy Board Act, 1998*). In order to fall within these exemptions, the distributor must:

- (a) distribute electricity for a price no greater than that required to recover all reasonable costs; and
- (b) distribute the electricity through a distribution system that is owned or operated by the distributor that is entirely located on land on which one or more of the following types of building or facilities is also located:
 - (i) a residential complex as defined in the *Residential Tenancies Act, 2006*; and
 - (ii) an industrial, commercial, or office building.

For the purposes of this proceeding, these distributors will be referred to as the "Exempt Distributors". Distributors, including the Exempt Distributors, are prohibited from conducting discretionary metering activities unless they have been authorized to do so through one of the means set out in section 53.18 of the Electricity Act.

The Compliance Office was made aware of consumer concerns regarding the installation and use of smart sub-metering systems by Exempt Distributors. In many instances, the smart sub-metering systems have been installed, and are being used to bill consumers, by a licensed smart sub-metering provider on behalf of the Exempt Distributor. On March 24, 2009, the Board's Chief Compliance Officer issued Compliance Bulletin 200901, which stated that the installation of smart sub-metering systems in residential complexes (as defined in the *Residential Tenancies Act, 2006*) by distributors that have not been authorized is a discretionary metering activity that is prohibited by section 53.18 of the Electricity Act. Since that time, the Board has been informed of situations where the smart sub-metering systems are providing benefits to the Exempt Distributors and the consumers and the parties want those benefits to continue.

The Board has commenced this proceeding to determine whether the Exempt Distributors that have previously engaged in, or intend in the future to engage in, discretionary metering activities should be authorized to conduct those activities. In particular, the discretionary metering activity that may be authorized by the Board in this proceeding is the installation of smart sub-metering systems in the Exempt Distributor's buildings or facilities ("buildings"). If the Board does authorize Exempt Distributors to conduct these activities, the Board also needs to determine what conditions, if any, should apply to that authorization.

Issues the Board may consider in this proceeding include the following:

- whether the discretionary metering activities should be allowed in all buildings (including buildings under development) or whether it should be limited to buildings where the smart sub-metering systems are already in place;
- whether the smart sub-metering system, once installed, should only be used to bill the tenant/consumer if there is tenant/consumer consent;
- whether the smart sub-metering system should be allowed to be used for billing purposes for existing tenants/consumers, new tenants/consumers, or both;
- whether a licensed smart sub-metering provider must be retained to provide and install the smart sub-metering system in the buildings; and
- whether a licensed smart sub-metering provider must be retained to provide services associated with the smart sub-metering system, including billing.

The Board's determination in this proceeding may have an effect on:

- Exempt Distributors;
- consumers who receive electricity distribution services from an Exempt Distributor or its agent; and
- licensed smart sub-metering providers who have contracted with an Exempt Distributor for the commercial provision of smart sub-metering systems and associated services.

At this time, the Board intends to proceed in this matter by way of a written hearing unless a party satisfies the Board that there is good reason for not holding a written hearing.

The Board will provide funding to groups representing the interests of tenant/consumers that may be affected by this proceeding. The funding will be limited to a maximum of 10 hours per group for legal counsel in order to prepare the submissions for the group.

The rates for the legal counsel's hourly fees will be determined in accordance with the Tariff in the Board's Practice Direction on Cost Awards. Groups requesting the funding shall make that request in writing at the same time their written submissions in this proceeding are due. The request for funding should include an explanation of who the group is, what interest they represent, why they require financial assistance (including an explanation of any other sources of funding the group has access to), a copy of the legal counsel's dockets for this proceeding, and the year of call for the legal counsel. Please note that a request for funding does not guarantee that the request will be granted nor does it guarantee that the maximum amount will be awarded if the request for funding is granted.

The Board considers it necessary to make provision for the following procedural matters. The Board may issue further procedural orders from time to time.

THE BOARD THEREFORE ORDERS THAT:

1. Licensed smart sub-metering providers shall provide, within one business day, a copy of this Notice of Written Hearing and Procedural Order No. 1 to each Exempt Distributor with whom it has entered into a contract for the commercial provision of smart sub-metering systems and/or associated services. Furthermore, the licensed smart sub-metering provider shall inform the Exempt Distributor that the Exempt Distributor must, within 2 business days of receiving the Notice from the smart sub-metering provider: (i) post a copy of this Notice of Written Hearing and Procedural Order No. 1 in a prominent location in each building in which a smart sub-metering system has been installed; and (ii) provide a copy of this Notice of Written Hearing and Procedural Order No. 1 to the tenants/consumers in their buildings in which a smart sub-metering system has been installed.
2. Licensed smart sub-metering providers shall file with the Board a list of the Exempt Distributors identified in paragraph 1 and confirmation that it has provided a copy of the Notice of Written Hearing and Procedural Order No. 1 (and the instructions in paragraph 1) to each of those Exempt Distributors.

3. Any objection to a written hearing, along with the written reasons for why an oral hearing is necessary, must be filed with the Board on or before May 12, 2009.
4. Board staff shall file a written submission in this proceeding with the Board on or before May 12, 2009.
5. Any other person may file a written submission in this proceeding with the Board on or before May 26, 2009.

All submissions will be posted on the Board's website.

All filings to the Board must quote file number EB-2009-0111, and consist of two (2) paper copies and one (1) electronic copy in searchable / unrestricted PDF format filed through the Board's web portal at www.err.oeb.gov.on.ca. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may e-mail your document to the address below. Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file seven (7) paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date. Parties must also include the Case Manager, Barbara Robertson (barbara.robertson@oeb.gov.on.ca), on all electronic correspondence related to this proceeding.

Address of the Board

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Attention: Board Secretary

Tel: 1-877-632-2727 (toll free)
Fax: 416-440-7656
E-mail: Boardsec@oeb.gov.on.ca

Important

If you do not file an objection to a written hearing or if you do not participate in the written hearing in accordance with this Notice, the Board may proceed without your participation and you will not be entitled to further notice in this proceeding.

ISSUED at Toronto, May 5, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary