

**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 ELECTRICITY DISTRIBUTORS ASSOCIATION (“EDA”)  
REGARDING REMEDY**

**Overview**

1. On August 4, 2009, the Ontario Energy Board (the “Board”) issued a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited (“THESL”) under section 112.3 of the *Ontario Energy Board Act, 1998*<sup>1</sup> (the “OEB Act”). The Board reserved its right to make an order under sections 112.3, 112.4 or 112.5 of the OEB Act should it find a contravention by THESL.
2. In a letter dated August 26, 2009, the EDA requested standing to participate in the present proceeding. An oral hearing was held on September 18, 2009 to determine the matter. The Board granted the EDA standing only to comment on the proposed remedy for any non-compliance by THESL, should same be found.
3. On January 27, 2010, the Board issued its Decision and Order (“Decision”) regarding the allegations against THESL. The Board found that THESL had breached section 28 of the *Electricity Act*, and sections 2.4.6, 3.1.1 and 5.1.9 of the Distribution System Code (“DSC”).
4. The EDA submits that these circumstances do not warrant a penalty over and above what is contemplated by section 112.3 of the OEB Act. As stated by the Board, “this

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<sup>1</sup> S.O. 1998, Chapter 15, Schedule B [the “OEB Act”].

compliance proceeding is based on the alleged refusal to connect two condominiums”.<sup>2</sup> Therefore, the only remedy the Board ought to require is for THESL to connect the subject condominiums at the bulk meter.

5. The factors required for the imposition of an administrative penalty against THESL do not exist in this case. There was no intention to contravene the *Electricity Act* or the DSC. THESL is committed to the obligation to connect under section 28 of the *Electricity Act*. Notwithstanding the Board’s findings, THESL reasonably interpreted its obligations in respect of sub-metering condominiums. The Board has interpreted THESL’s interpretation as incorrect. Nonetheless, absent bad faith, prejudice to consumers or specific harm flowing from THESL’s interpretation, the EDA submits that it would be inappropriate to impose an administrative penalty in these circumstances.

#### **Facts**

6. The Board found that there were breaches of enforceable regulatory provisions, namely section 28 of the *Electricity Act* and sections 2.4.6, 3.1.1 and 5.1.9 of the DSC. These findings were made in the context of particular circumstances relating to THESL’s refusal to connect Avonshire Inc. (“Avonshire”) and Metrogate Inc. (“Metrogate”) at the bulk meter unless all units in their under-construction condominiums were to be individually smart-metered by THESL.<sup>3</sup>
7. THESL’s refusal was not arbitrary or unreasonable. THESL’s central concern was the protection of its customers from unreasonable rates or provision of services below regulatory standards.<sup>4</sup> Nonetheless, the Board found that THESL’s refusal to provide certain kinds of connections was not justified by statute, code, or regulation. In the Board’s view, the statute prohibited THESL’s conduct.<sup>5</sup>

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<sup>2</sup> Decision at para. 22.

<sup>3</sup> Decision at paras. 11, 14.

<sup>4</sup> Decision at para. 34.

<sup>5</sup> Decision at para. 50.

8. The Board also held that THESL's actions had the "effect of removing the competitors completely from one aspect of the smart metering business."<sup>6</sup> It is clear, however, that THESL had no intention of reducing competition in a contestable realm. Its reasonably held view was that re-charging for electricity purchased at the bulk meter is not contestable, but a natural monopoly.<sup>7</sup> Furthermore, the proposed sub-metering service provider in this case was not found through a competitive process or by consumer choice<sup>8</sup> – it is an entity related to the condominium developer.<sup>9</sup> Accordingly, THESL's interpretation of its obligations, though deemed by the Board to be incorrect, was an interpretation which favoured consumer choice, in that the end-use consumer would be able to elect to remain with THESL or purchase electricity from a licensed retailer.

### **Law and Argument**

9. Section 112.3 of the OEB Act provides:

Action required to comply, etc.

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.

10. In this case, the Board disagreed with THESL's interpretation of the relevant statutory and regulatory provisions. Nevertheless, THESL did not act unreasonably in its interpretation of the relevant provisions or of the defences available to it in this proceeding.

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<sup>6</sup> Decision at para. 59.

<sup>7</sup> Decision at para. 47.

<sup>8</sup> The condominiums at issue were still under construction. There were, therefore, no condominium boards or consumer groups to whom service proposals could be made. Rather, customers' options were being decided for them by the developers Avonshire and Metrogate.

<sup>9</sup> Decision at para. 56.

11. In particular, the EDA submits that it was not clear that, to form the foundation of the “unlawful activity defence”, specific and clear evidence of wrongdoing in the particular circumstances was necessary, especially where the service provider being placed in the stead of THESL is a related company to the condominium developer. In the face of that fact and third party evidence of disturbing practices by sub-metering service providers, it was not unreasonable for THESL to have feared wrongdoing and taken steps to protect consumers.
12. Although the Board has reserved to itself the power to revoke THESL’s licence under section 112.4 or impose an administrative penalty under section 112.5 of the OEB Act, the EDA submits that neither of these penalties is warranted in these circumstances. The relevant sections provide, in part:

Suspension or revocation of licences

112.4 (1) If the Board is satisfied that a person who holds a licence under Part IV or V has contravened an enforceable provision, the Board may make an order suspending or revoking the licence.

...

Administrative penalties

112.5 (1) If the Board is satisfied that a person has contravened an enforceable provision, the Board may, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order for each day or part of a day on which the contravention occurred or continues. ...

13. A regulation has been passed under section 112.5 of the OEB Act setting out the considerations to factor into a decision to award an administrative penalty.<sup>10</sup> When determining the amount of such a penalty, the Board must consider:
  - (a) Whether the contravention was a major, moderate, or minor deviation from the requirements of the enforceable provision;
  - (b) Whether the contravention had a major, moderate or minor potential to adversely affect consumers, persons licensed under the Act or other persons;

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<sup>10</sup> Ontario Regulation 331/03.

- (c) The extent to which the adverse effects of the contravention have been mitigated by person who committed the contravention;
  - (d) Whether the person who committed the contravention has previously contravened any enforceable provision; and
  - (e) Whether the person who committed the contravention derived any economic benefit from the contravention.<sup>11</sup>
14. These factors echo many of the factors cited by the courts in relation to administrative penalties.<sup>12</sup> Additional factors such as the deliberateness of the offence have been considered in other contexts where the matter concerns sentencing in a quasi-criminal regime.<sup>13</sup>
15. In light of the factors set out above and the circumstances of this case, the EDA submits that there is no basis upon which to make an order under sections 112.4 or 112.5 of the OEB Act:
- (a) THESL sought to protect consumers in the condominium developments at issue by providing them with smart metering service at rates that would be subject to regulation by the Board, under circumstances which reasonably signalled to THESL that consumer prices might be inflated by sub-metering service providers.
  - (b) THESL did not inappropriately exercise a monopoly to the detriment of consumers.
  - (c) THESL acted in good faith at all times.
  - (d) THESL did not profit from the contraventions found.
16. The EDA urges upon the Board the principle enunciated by the Ontario Court of Appeal in *Stetler*, that “there must be some degree of proportionality between the wrongdoing and the penalty imposed.”<sup>14</sup> THESL’s wrongdoing was minor, had a minimal impact on

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<sup>11</sup> *Ibid*, s. 1.

<sup>12</sup> See, e.g. *Stetler v. Ontario Flue-Cured Tobacco Growers’ Marketing Board*, [2009] O.J. No. 1050 (C.A.) (QL) [“*Stetler*”]; *Ontario (Ministry of Labour) v. Ontario Food Terminal Board (No.2)*, [2006] O.J. No. 4548 (Ct. Jus.) (QL) [“*Food Terminal Board*”].

<sup>13</sup> See para. 12 of *R. v. Fraser Inc.*, [1993] N.B.J. No. 641 (Prov. Ct.) (QL) [“*Fraser*”].

<sup>14</sup> *Stetler* at para. 37.

the parties sought to be protected, and resulted from good faith interpretation of the relevant provisions. Therefore, no penalty should be ordered against THESL in this proceeding beyond what is required to comply with section 112.3 of the OEB Act.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of February, 2010.**

**OGILVY RENAULT LLP**

Kelly Friedman  
Christine Kilby

Counsel for the Electricity Distributors Association