



January 7, 2008

BY EMAIL AND FACSIMILE

Ms Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
26th Floor, Box 2319
Toronto, ON M4P 1E4

Dear Ms Walli

RE: Smart Sub-Metering Licence Applications EB-2007- 0922/- 0924/- 0925/- 0926/- 0940/- 0942/- 0943

This submission is filed on behalf of the Coalition of Large Distributors (CLD) in response to the Ontario Energy Board's recent "Notice of Application and Notice of Written Hearing Electricity Generation and Smart Sub-Metering". The CLD has significant concerns regarding the regulation and monitoring of 3rd party sub-metering companies owning or operating distribution systems in condominiums (hereafter referred to as sub-metering companies).

The CLD notes that there does not appear to be a draft licence or code available governing the regulatory framework for Smart Sub-Metering and as such the comments contained in this submission are based on our concerns over the regulation and monitoring of 3rd party sub-metering in general. We trust that any draft licence or code will be posted for comment when they are available. However, we hope that the comments provided here will be helpful in providing input to such draft material.

The CLD is generally supportive of individual suite metering in condominiums. Individual suite metering offers the potential for significant conservation and demand management savings to accrue to consumers with the installation of individual unit metering. U.S. studies have demonstrated a potential for significant load reduction. CDM programs targeted at these units have the potential to offer significant demand and cost savings and contribute to the achievement of Government conservation objectives.

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 CLD believes that a home owner in Ontario should have the benefit of the same regulatory oversight whether she/he lives in a condominium unit or a detached home.

The Board must be confident that the consumers who reside in condominiums have been afforded an appropriate level of consumer protection that is reconcilable with the protections provided to similarly situated consumers. Consumers residing in condominiums will look forward to enjoying the protection available through legislation and the accompanying regulatory instruments that will support the Board's ability to confirm:

- competitive benefits, such as choice of supplier;
- just and reasonable pricing;
- orderly exit options for consumers wishing to change providers;
- acceptable levels of reliability and quality of service; and
- access to other services, such as conservation demand management and retail supply.

Potential for competitive benefits from the regulations is very limited

The selection of the metering company is made by the developer of a new condominium not by the subsequent home owner. The subsequent home owner is then obligated to sign an agreement with the sub-metering company as a condition of purchasing the unit. To the extent that the interest of the developers and homeowners do not coincide, the ultimately affected party having long term interest in the property (the condominium unit owner) will not even benefit from the opportunity to make the initial choice. We submit that the potential for competitive benefits from the regulations is very limited, principally because once connected, customers will not be contestable; that is, customers will not be able to switch electricity distributors in the way that they can switch cellular telephone carriers. Because new sub-metering entities would have monopoly power, they would need to be regulated by the Board. We suggest that this extend to rate regulation but understand that this is not what the Ministry has envisioned.

Determining a price to recover reasonable costs

However Ontario Regulation 161/99 states that a distributor in a condominium "who distributes electricity for a price no greater than that required to recover all reasonable costs". In its decision RP-2003-0044 the Board subsequently determined that distributors must not impose upon consumers a price which includes a profit. We submit that this regulation provides the Board with the jurisdiction to review sub-metering companies' costs to ensure that the price charged is no greater than costs. Such a review should be conducted on a regular basis as it is with all distributors. This regulatory process will protect the interest of customers and will provide stakeholders with price transparency and an ability to compare bills against other service providers.

Simply using the current residential rate as a benchmark therefore would not provide a measure of reasonable cost for the sub-metering company.

We submit that the Board needs to ensure that any incentive payments made to the developer by sub-metering companies are not subsequently recovered from the captive end-use customer.

Agreement between a sub-metering company and a condominium unit owner cannot be terminated by Section 112 of the Act.

Section 112 of the Condominium Act 1998 provides that the condominium corporation, through its board of directors, elected after the turnover of the condominium corporation by the developer to the owners, can rescind agreements to which the condominium corporation is party. Based upon the form of the agreement that is typically used by sub-metering companies it indicates that the individual unit owners will be the contracting party with the supplier. In this instance the condominium corporation does **not** have the ability to terminate the agreement. If the condominium corporation entered into the agreement for the common elements portion of the building then the board of directors could rescind that Agreement pursuant to Section 112 of the Condominium Act.

The Condominium Act does not preclude a corporation or supplier from charging a termination fee for an agreement terminated under Section 112 of the Condominium Act. The Condominium Act is silent as to this matter and therefore the general laws of contract would apply. As such, the agreement could include a termination fee for early termination, and it would be enforceable at the discretion of the courts.

We have confirmed this interpretation with legal counsel and respectfully suggest that the Board secure legal advice on the degree to which the Condominium Act provides flexibility to a condominium corporation.

The regulatory framework for Smart Sub-Metering activities should provide a level playing field with LDCs

The CLD suggests that the Board ensure it establishes a licensing and code regime for sub-metering companies that be able it to meet its objectives under the Act to protect the interests of consumers with respect to price and the adequacy, reliability and quality of electricity service – regardless of where consumers decide to live.

Much of the CLD's concern and focus in the current proceeding will be to ensure that the regulatory regime adopted for sub-metering activities does not inadvertently create a two-tier system of regulation depending on where a customer lives. Such a regime should promote optimal use of distribution resources, and overall economic efficiency as well as being in the public interest.

Specific questions that the CLD has in this proceeding include:

- In absence of natural contestability will the licence or code protect customers by specifying contract provisions such as conditions of termination and the term of contracts?
- Since condominium unit purchasers are under considerable time pressure to sign contracts at the time of closing, will the licence or code provide protections similar to those provided for Retail Electricity Contracts: re-affirmation of the contract by the service provider and a cooling-off period whereby the unit holder may opt out of a service contract, where the contract is with a party other than the condominium corporation?
- Would a licensed sub-meterer/contractor also be a retailer – a person who sells electricity to a consumer – and if so, when must it be licensed as such?

- Would a licensed sub-meterer/contractor effectively operate the in-building distribution system and, if so, is it an embedded distributor for the purposes of the Distribution System Code, Retail Settlement Code and the Standard Supply Service Code?
- What charge(s) can the licensed sub-meterer/contractor, include in its bill to an individual unit owner that are incremental to the LDC's charges to it?

We look forward to receiving for comment the draft licence and code that is proposed to govern the regulatory framework of sub-metering in Ontario. The CLD notes that the Board intends to decide the subject licence applications through its delegated authority powers, as is its practice for all other licence applications. Previously, the Board consulted on the form of the licence prior to deciding applications under the delegated authority. Assuming there are no contentious provisions in the licence applied for the Board's normal practice should be reliable. The CLD looks forward to reviewing the draft licence and any accompanying regulatory instrument(s) and participating in the Board's processes that will culminate in their approval.

If you have any questions or concerns, please do not hesitate to contact any of the undersigned.

Yours truly,

(Original signed by)

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Cc: Applicants to the Proceeding