



**NOTICE OF REVISED PROPOSAL TO AMEND A CODE**

**REVISED PROPOSED AMENDMENTS TO THE AFFILIATE RELATIONSHIPS CODE**  
**FOR**  
**ELECTRICITY DISTRIBUTORS AND TRANSMITTERS**

**BOARD FILE NO: EB-2007-0662**

**BY E-MAIL AND WEB POSTING**

**To: All Licensed Electricity Distributors**  
**All Licensed Electricity Transmitters**  
**All Participants in Consultation Process EB-2007-0662**

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The Ontario Energy Board (the "Board") is giving notice under section 70.2 of the *Ontario Energy Board Act, 1998* (the "Act") of revised proposed amendments to the Affiliate Relationships Code for Electricity Distributors and Transmitters (the "Electricity ARC").

**I. Background**

On September 19, 2007, the Board issued a Notice of Proposal (the "September Notice") in which it proposed a number of amendments to the Electricity ARC (the "Proposed Amendments"). The September Notice set out background information relating to affiliate relationships of distributors and transmitters ("utilities") in the electricity sector, and described in detail the rationale for the Proposed Amendments.

The Board received 16 sets of written comments on the Proposed Amendments from a variety of stakeholders, including distributors, an electricity retailer, ratepayer groups and business groups whose members compete with some distributor affiliates. These are available for viewing on the Board's website at [www.oeb.gov.on.ca](http://www.oeb.gov.on.ca) on the "Affiliate Relationships Code for Electricity Distributors and Transmitters" webpage on the "Key Initiatives & Consultations" portion of the "Industry Relations" section of the website.

The Board has considered the comments received and has determined that minor clarifying changes should be proposed in relation to some of the Proposed Amendments (the “Category 1 Revisions”). The Board has also determined that revisions of a more substantive nature should be proposed in relation to other of the Proposed Amendments, and that revisions should also be proposed in relation to a small number of sections of the Electricity ARC that were not the subject of the Proposed Amendments (the “Category 2 Revisions”).

The Category 1 Revisions are described in section III below, and the Category 2 Revisions are described in section IV. The text of the Proposed Amendments embodying both the Category 1 Revisions and the Category 2 Revisions is set out in Attachment A to this Notice. For convenience, Attachment B contains a comparison version of the Proposed Amendments which shows all of the Category 1 Revisions and all of the Category 2 Revisions. Also for convenience, Attachment C contains a comparison version of the Electricity ARC that integrates all of the Proposed Amendments and shows all of the Category 1 Revisions and the Category 2 Revisions, and Attachment D contains a clean version of the Electricity ARC that integrates all of the Proposed Amendments including the Category 1 Revisions and the Category 2 Revisions.

## **II. Overview of Comments Received**

The comments received from ratepayer groups and business groups whose members compete with some distributor affiliates were generally supportive of the Proposed Amendments. Some of these stakeholders expressed the view that the Proposed Amendments reflect a fair and balanced approach, although some also indicated concern about the risks associated with what they understand to be a relaxation of certain rules. Some of these stakeholders, as well as the electricity retailer that commented on the Proposed Amendments, also expressed continued concern regarding “co-branding” and the use of utility logos by affiliates.

Distributors were supportive of some of the Proposed Amendments, but took issue with a number of others. Distributors, as well as the gas distributor that commented on the Proposed Amendments, took particular issue with the proposed introduction of rules associated with the disclosure of “strategic business information”. A number of distributors also raised concerns about the Proposed Amendments relating to the “Purpose” section of the Electricity ARC (section 1.1); the provisions of the Electricity ARC relating to confidential information (section 1.2 (the definition of “confidential information”), section 2.2.3 (sharing of employees with access to confidential information) and sections 2.6.1 and 2.6.2 (non-disclosure of confidential information)); and certain elements of the Proposed Amendments relating to transfer pricing (section 2.3).

Further detail regarding the comments received, and the extent to and manner in which they have been addressed by the Board, is set out in sections III and IV below.

### **III. Category 1 Revisions and Proposed Amendments not Proposed to be Revised**

#### **A. Category 1 Revisions to Proposed Amendments to Section 1.1 – Purpose of the Code**

The Proposed Amendments included revisions to section 1.1 of the Electricity ARC to delete the objective relating to enhancing the development of a competitive market, to add an objective relating to preventing a utility from providing an unfair business advantage to an energy service provider affiliate (section 1.1(e)) and an objective relating to preventing customer confusion (section 1.1(f)), and to modify other objectives for greater clarity.

Comments received on these Proposed Amendments tended to be focused on the unfair business advantage objective and on the fact that the Board did not propose to include a further objective pertaining to utility efficiency or cost effectiveness. With respect to the former, certain distributors reiterated their views as to the scope of the Board's authority in relation to markets other than the electricity and natural gas markets. Some also expressed concern over the lack of definition surrounding the concept of "unfair business advantage". Other stakeholders were supportive of the objective relating to unfair business advantage as proposed. The Board remains of the view that this objective is within the scope of its mandate, as explained in the September Notice. The Board also believes that the concept of "unfair business advantage" is sufficiently clear as a statement of the general principle.

With respect to the issue of adding an efficiency objective, the Board's rationale for not including a reference to utility efficiency or cost effectiveness as an objective of the Electricity ARC was explained in the September Notice. The Board is not persuaded that any change to its approach is warranted, and notes that while some distributors argued in favour of the inclusion of such an objective, some other stakeholders were supportive of the Board's approach.

In response to comments received, the Board is proposing revisions to the objective relating to cross-subsidization (section 1.1(b)) to provide greater clarity as to the nature of the harm that the objective is intended to guard against.

#### **B. No Category 1 Proposed Revisions to Proposed Amendments to Section 1.2 – Definitions**

The Proposed Amendments included the introduction of new definitions to support the new transfer pricing provisions and the new provision relating to the non-disclosure of strategic business information, as well as a number of amendments of a "housekeeping" nature. Other than in relation to the definition of "strategic business information", few comments were received on these Proposed Amendments, although a number of comments were received on definitions that the Board did not initially propose to amend.

The Board is proposing revisions to the definition of "shared corporate services", as described in section IV.A below, but is not otherwise proposing to revise any of the

Proposed Amendments to section 1.2.

As described in sections IV.A and IV.D below, the Board is also proposing a number of Category 2 Revisions to section 1.2.

**C. Category 1 Revisions to Proposed Amendments to Section 1.6 – Amendments to the Code and Determinations by the Board**

The Proposed Amendments introduced new sections regarding the coming into force of amendments to the Electricity ARC (sections 1.6.1 and 1.6.2), the grandfathering of existing Affiliate Contracts (section 1.6.3) and the manner in which determinations under the Electricity ARC may be made by the Board (section 1.6.4). Few comments were received on most of these Proposed Amendments.

A number of distributors argued that the effective date of existing Affiliate Contracts to be grandfathered should be no earlier than September 19, 2007, the date of the September Notice. One stakeholder suggested that an Affiliate Contract be grandfathered only until the utility's next cost of service rate proceeding. The Board is proposing to revise section 1.6.3 such that it refers to Affiliate Contracts that were effective on September 19, 2007 rather than to those that were in place on June 15, 2007. The Board does not believe it is necessary or appropriate in the circumstances to grandfather existing contracts for only a limited period of time. The Board notes that "grandfathering" in the context of section 1.6.3 of the Electricity ARC refers to consistency with the Proposed Amendments (as they may be revised and adopted), and does not provide any immunity in relation to non-compliance with other provisions of the Electricity ARC that existed prior to the adoption and coming into force of the Proposed Amendments.

Certain distributors also argued that the Proposed Amendments relating to transfer pricing should not come into force for a period of one year, rather than the three-month deferral contemplated in the Proposed Amendments (section 1.6.2). The Board does not believe that more than three months is necessary for most, if not all, utilities to make such arrangements as may be necessary to enable them to comply with the new transfer pricing provisions.

The Board is proposing revisions to section 1.6.1 such that it would provide a rule of general application that can apply to all future amendments to the Electricity ARC rather than being limited to the amendments currently under consideration. This is consistent with the manner in which the coming into force of amendments are dealt with in other codes, such as the Distribution System Code and the Retail Settlement Code.

**D. No Proposed Revisions to Proposed Amendments to Section 2.1 – Degree of Separation**

The Proposed Amendments included the elimination of the requirement (formerly in section 2.1.2) that a utility be physically separated from any affiliate that is an energy service provider. Distributors that commented on the elimination of this requirement were supportive of it. One stakeholder expressed concern regarding the potential customer confusion risks associated with the elimination of this requirement, and

another argued that it should be re-introduced. The Board remains of the view that elimination of this requirement will provide additional flexibility to utilities without creating the potential for material incremental harm.

#### **E. Category 1 Revisions to Proposed Amendments to Section 2.2 – Sharing of Services and Resources**

The Proposed Amendments included the elimination of the prohibition on the sharing of employees involved in the day-to-day operation of the network (formerly section 2.2.4); the narrowing of the prohibition on the sharing of employees with access to confidential information such that it would apply only in relation to an affiliate that is an energy service provider (section 2.2.3); and the addition of a new provision regarding transfer pricing for services and resources that are shared in emergency situations (section 2.2.5).

Comments on these Proposed Amendments focused primarily on the elimination of the prohibition on the sharing of operational employees and on the remaining prohibition on the sharing of employees with access to confidential information. With respect to the former, distributors that commented on the elimination of the prohibition were supportive of it. One stakeholder expressed concern regarding the potential customer confusion risks associated with the elimination of the prohibition and another suggested that this matter be revisited in the future if the market changes. The Board does not believe that strong arguments have been raised that would prompt the Board to change its approach in relation to its proposal to eliminate this prohibition.

With respect to the prohibition on the sharing of employees that have access to confidential information, distributor comments included proposals that section 2.2.3 be revised such that: (i) it prohibits the use of confidential information rather than the sharing of employees that have access to it; (ii) it allows the sharing of employees for billing and customer service purposes; or (iii) the reference to access is deleted. Other stakeholders suggested that section 2.2.3 be amended to: (i) capture direct or indirect access to confidential information; (ii) capture employees that analyze confidential information; or (iii) specifically identify the type of employee that might be caught by the prohibition.

The Board does not believe that any change is required to section 2.2.3 of the Electricity ARC as it was proposed in the Proposed Amendments, and remains of the view that this provision as drafted is important to the objectives of preventing cross-subsidization and customer confusion. The Board is not persuaded that a general policy shift to a focus on the use of information is appropriate at this time. The Board reiterates that if a utility can demonstrate that use of confidentiality agreements in particular circumstances will result in no harm to ratepayers, no customer confusion and no cross-subsidization of the affiliate, then those specific circumstances could be assessed through an application for an exemption from section 2.2.3.

The Board also does not believe that section 2.2.3 needs to be modified to accommodate distributor-consolidated billing. Distributor-consolidated billing is a regulated distribution service that distributors are required to provide under the Board's Retail Settlement Code to any retailer that requests that service, including a retailer that

is affiliated with the utility. The Board does not consider that utility employees involved in the provision of a regulated distribution service to an affiliated retailer are “shared” with an affiliated retailer for the purposes of section 2.2.3 of the Electricity ARC.

The Board also takes this opportunity to clarify that an employee is “shared” for the purposes of section 2.2.3 of the Electricity ARC if the employee performs work for both the utility and the affiliate, regardless of which entity is legally the employer of the employee. Thus, as was expressed in Compliance Bulletin 200604 issued on July 10, 2006, section 2.2.3 is not limited in its application to persons that are employed by the utility.

Two stakeholders suggested that the term “emergency” be defined for purposes of sections 2.2.4 and 2.2.5. The Board believes that a certain degree of flexibility is desirable to enable utilities to identify and respond appropriately to emergency situations, which could range from situations affecting the reliability or integrity of a distribution system to situations involving public health or safety. The Board may revisit this issue if it appears that utilities are using this section as a means of avoiding the otherwise applicable provisions of the Electricity ARC regarding transfer pricing or the need for Services Agreements.

In response to other comments received, the Board is proposing a number of revisions to section 2.2, including the heading, to ensure consistency in wording as between this section and section 2.3. The Board is also proposing to revise section 2.2.2 to provide greater clarity as to when a review under section 5970 of the CICA Handbook may be required and to better reflect the tenor of that section of the CICA Handbook.

#### **F. Category 1 Revisions to Proposed Amendments to Section 2.3 – Transfer Pricing**

The Proposed Amendments regarding transfer pricing incorporated into the Electricity ARC, with some modifications, the parallel provisions in the Affiliate Relationships Code for Gas Utilities (“Gas ARC”). With few exceptions, distributors did not generally oppose these provisions, and they were generally supported by other stakeholders that commented on section 2.3.

Some distributors did object to the requirement in section 2.3.3.4 that an independent evaluation be conducted for certain contracts before they are awarded to an affiliate, on the grounds that this requirement imposes a significant burden, carries little apparent benefit and is redundant or superfluous when considered in light of existing utility bid selection criteria or other internal controls. Section 2.3.3.4 calls for an assessment as to whether a competitive tender complies with a utility’s competitive bidding criteria, and the Board does not believe that the underlying purpose is adequately served solely by the fact that such bid selection criteria are in place. The Board also cannot confirm at this time that all utilities have internal controls in place that would adequately ensure that competitive tenders are properly evaluated against bid criteria. While the Board acknowledges that compliance with the independent evaluation requirement will entail some costs for distributors, the Board remains of the view that the benefits of the requirement outweigh the costs. This is particularly so when considered in light of the fact that the requirement applies only to contracts that exceed the materiality thresholds,

which the Board has set at a higher level than those that currently apply under the Gas ARC. Retention of the independent evaluation requirement is consistent with the approach currently used in the Gas ARC, and the Board does not believe that there is any compelling reason to treat electricity utilities differently in that regard.

The Board also received a small number of comments on the materiality thresholds contained in section 2.3. One stakeholder suggested that the materiality thresholds should be expressed solely as a percentage of utility revenue; another suggested that the materiality thresholds appeared to be relatively low for larger utilities; and another suggested that it may be more appropriate for the materiality threshold applicable to the requirement for an independent assessment of the price of an asset to be expressed as the greater of a percentage of utility revenue or a fixed amount, rather than being expressed solely as a fixed amount. Most stakeholders did not object to the materiality thresholds, and the Board does not believe that a sufficient case has been made to the effect that they need to be revised at this time.

One stakeholder proposed that the Board include a requirement that outsourcing decisions be subject to a business case every five years, as is currently the case in the Gas ARC. The Board remains of the view that the interests of ratepayers are adequately protected by the five-year limit on the term of Affiliate Contracts, which ensures that any transfer price is reflective of more current business conditions. The economic merits of a decision to continue outsourcing, and an analysis of the alternatives, are better addressed in the context of a utility's rate case.

Two stakeholders commented that the transfer pricing provisions applicable to the sale or transfer of assets (section 2.3.6) raise the question of the disposition of the proceeds or gain associated with such sale or transfer. This issue is not addressed in the Electricity ARC, and is in the Board's view also properly left to be addressed in the context of a utility's rate case.

One distributor expressed concern that guidance provided in Compliance Bulletin 200604 regarding the conduct of a market review, and in particular the statements regarding the bundling of services, could effectively limit a distributor's ability to outsource operations, maintenance and administration to one affiliated supplier. The Board notes that the references to bundling in Compliance Bulletin 200604 were made in the context of determining the transfer price for goods or services, and not in the context of determining from whom goods or services may be obtained. While the transfer pricing provisions of the Electricity ARC include safeguards to ensure that affiliate transactions are priced on an appropriate basis, they do not prohibit the selection of an affiliate as the provider of goods or services. Again, issues relating to the merits of outsourcing to an affiliate may be reviewed in the context of a utility's rates case.

One stakeholder proposed that the transfer pricing provisions regarding shared corporate services be augmented by a requirement that a reasonable cost allocation be applied to all shared corporate services and that such cost allocation be documented in the Services Agreement. A provision to that effect currently exists in the Gas ARC. The Electricity ARC does require that cost allocation be addressed in Services Agreements (section 2.2.1(c)). The Board believes that a separate requirement that cost allocation

be reasonable is superfluous in light of the reference to the transfer price for shared corporate services being determined on the basis of fully-allocated costs.

Another stakeholder suggested that sections 2.3.3.5 and 2.3.6.5 (the anti-avoidance provisions) should be revised to clarify that the sections apply regardless of when the Affiliate Contracts in question were entered into. The Board believes that this is already implicit in these sections.

In response to other comments received, the Board is proposing the following revisions to section 2.3: (i) a small number of revisions throughout section 2.3 to ensure consistency in wording; (ii) revisions to section 2.3.3.2 to clarify that the competitive tendering requirement applies to the utility and not to an affiliate; (iii) revisions to section 2.3.5.1 to clarify that fully allocated cost-based pricing is the sole alternative to market pricing for shared corporate services; and (iv) the addition of a new section 2.3.7 to clarify that where a transfer price is set by law or in another code established by the Board, that transfer price governs over the transfer pricing provisions of the Electricity ARC to the extent of any inconsistency.

The Board is also proposing a Category 2 Revision to section 2.3.3.6, as described in section IV.B below.

#### **G. No Proposed Revisions to Proposed Amendments to Section 2.5 – Equal Access**

The Proposed Amendments included a small number of amendments to section 2.5, all of a “housekeeping” nature. No comments were received on these Proposed Amendments.

However, certain stakeholders did reiterate their views that the equal access provisions of the Electricity ARC do not provide adequate protection. These stakeholders proposed that the Electricity ARC should be strengthened by: (i) prohibiting “co-branding”; (ii) prohibiting the sharing of websites, call centres and phone systems; or (iii) prohibiting use of a utility website to sell goods or services offered by an affiliate. The Board understands the concerns expressed by these stakeholders with respect to “co-branding”. However, the Board considers that the existing provisions of the Electricity ARC are sufficient to address issues of customer confusion as to the distinction between a utility and an affiliate. The Board also believes that any prohibition on the use by an affiliate of a utility’s name, logo or other distinguishing characteristic would be of limited practical value unless accompanied by a prohibition against an affiliate ever referring to its corporate affiliation with a utility. The Board notes, in this regard, that Ontario Regulation 200/02 - *Consumer Protection* made under the Act does not prohibit the making of statements regarding affiliation by electricity retailers or gas marketers (who could be utility affiliates), although action may be taken if these statements are false, misleading or deceptive. The Board is satisfied that the equal access provisions of section 2.5 of the Electricity ARC in their current form strike an appropriate balance, and does not intend to revise them at this time. The Board may revisit this issue if market conditions change.

With respect to the issue of use of website, the Board notes that Compliance Bulletin



200604 sets out expectations regarding distributor websites in the context of the restrictions set out in section 2.5 of the Electricity ARC. The Board does not believe that it is necessary to codify those or any additional restrictions at this time.

#### **H. No Proposed Revisions to Proposed Amendments to Section 2.8 – Record Keeping and Reporting Requirements**

The Proposed Amendments included the deletion of section 2.8, as the record-keeping and reporting requirements set out in that section are now also set out in the Board's "Electricity Reporting and Record Keeping Requirements". Those stakeholders that commented on this Proposed Amendment were supportive of it. The Board takes this opportunity to remind utilities that this Proposed Amendment does not eliminate affiliate-related record-keeping and reporting, but simply recognizes that these obligations are now addressed elsewhere.

One stakeholder proposed that the Board's "Electricity Reporting and Record Keeping Requirements" be revised to include further provisions regarding affiliate-related activities and that utilities be required to make annual public filings regarding those activities. The Board's Regulatory Audit group is currently conducting a review of the "Electricity Reporting and Record Keeping Requirements", and those proposals will be brought to the attention of that group and further considered in the context of that project.

#### **IV. Category 2 Revisions**

##### **A. Category 2 Revisions to Proposed Amendments to Section 1.2 – Definitions**

In response to comments received, the Board is now proposing revisions to the definition of "shared corporate services", the definition of "confidential information" and the definition of "energy service provider". The Board is also proposing revisions to the definition of "strategic business information", as described in section IV.D below.

###### *"Shared corporate services"*

The Board is proposing to revise the definition of "shared corporate services" to include other examples of common services identified by various distributors. The Board remains of the view that an exhaustive definition of "shared corporate services" is appropriate, and has not revised the definition to make it more open-ended. Use of an exhaustive definition is also consistent with the manner in which this same issue is dealt with in the Gas ARC.

###### *"Confidential information"*

The Proposed Amendments did not include any revisions to the definition of "confidential information". The Board is now proposing to revise the definition of "confidential information" to include a reference to smart sub-metering providers, whose information should in the Board's view be protected in like manner to information pertaining to a consumer, generator or retailer. A new definition of "smart sub-metering provider" has also been proposed to support this revision to the definition of

“confidential information”. In addition, the Board is proposing to further revise the definition of “confidential information” to include a reference to wholesalers, for consistency with the provisions of the licences issued to utilities.

Certain distributors reiterated the view that “confidential information” should be defined to exclude information that is publicly available. The term “confidential information” is relevant to five sections of the Electricity ARC: section 2.2.2 (protection of confidential information when information services are shared); section 2.2.3 (the prohibition on sharing of employees that collect or have access to confidential information); and sections 2.6.1, 2.6.2 and 2.6.3 (non-disclosure of confidential information). In the September Notice, the Board expressed its belief that information about customers gathered in the process of providing current or prospective utility service should not be shared with affiliates. The Board is not persuaded by the comments received that there is a compelling reason or need to revise its approach at this time, and also notes that this approach is consistent with the manner in which this same issue is dealt with in the Gas ARC.

The Board also notes that the licences issued to all distributors and transmitters contain a provision that prohibits the utility from disclosing to any party information about a consumer, retailer, generator or wholesaler without consent, except for certain specified purposes or on an aggregated basis. The licences do not create an exception that allows information about such persons to be disclosed on the basis that the information is available to the public. The Electricity ARC is therefore consistent with the licences in that regard.

#### *“Energy service provider”*

The Proposed Amendments did not include any revisions to the definition of “energy service provider”. Some stakeholders did, however, make comments on that definition.

One stakeholder proposed that the definition be amended to include a reference to smart metering. The Board notes that metering is already referred to in the existing definition of “energy service provider” and believes that a reference to smart metering is not required. However, for greater clarity the Board is proposing to identify in the definition that metering includes smart sub-metering and wholesale metering.

Another stakeholder proposed that the definition be amended to exclude references to demand-side management programs and energy management services, on the grounds that the rules relating to transfer pricing and cross-subsidization are adequate to protect the interests of ratepayers. This stakeholder also suggested that there is a real risk that the Electricity ARC restrictions will produce negative unintended consequences for conservation and demand management (“CDM”) programs administered by the Ontario Power Authority. Demand-side management and energy management have been included in the definition of “energy service provider” since the inception of the Electricity ARC. While distributors in particular have suggested that the restrictions in the Electricity ARC may have adverse implications for achievement of the government’s goals in relation to CDM, the Board does not find those arguments to be sufficiently well supported so as to cause the Board to consider that a change to the Electricity ARC is required. The Board notes that while utilities are authorized to engage in CDM

activities, those activities are for the most part not in the nature of monopoly activities. In that context, it is particularly important that the scope for competition in CDM not be undermined by the conduct of utilities relative to their energy service provider affiliates.

The Board is, however, now proposing to revise the definition of “energy service provider” to specifically include, as further examples, the following: street lighting services, sentinel lighting services, billing for electricity or natural gas services and water heater sales, service and rentals. These are, in the Board’s view, activities related to the supply of electricity or gas. The Board is also proposing to revise the definition of “energy service provider” by excluding from the definition affiliates that are municipal corporations.

The Board believes that continued flexibility is desirable in relation to the definition of “energy service provider”, and is therefore not proposing to revise the definition in a manner that would make it exhaustive as suggested by one stakeholder.

## **B. Category 2 Revisions to Proposed Amendments to Section 2.3 – Transfer Pricing**

As noted in section III.F above, the Board is proposing to revise section 2.3.3.2 to clarify that the competitive tendering requirement applies only where a utility is acquiring a service, resource, product or use of asset from an affiliate. This then raises the question of how the market price is to be established when a utility sells a service, product, resource or use of asset to an affiliate and, as noted in a stakeholder comment received on that point, also raises the more fundamental question of the appropriate transfer price for such transactions.

Upon further consideration, the Board believes that, where a reasonably competitive market exists, the transfer price for such transactions should be no less than the greater of the market price or the utility’s fully-allocated costs. In the Board’s view, this better ensures that there is no cross-subsidization. Accordingly, the Board is now proposing to embody that transfer pricing requirement in section 2.3.3.6. As indicated in the September Notice, a utility must of necessity conduct a market review to determine whether a reasonably competitive market exists, as described in Compliance Bulletin 200604. That market review can provide a basis on which to determine the market price of the service, product, resource or use of asset for purposes of section 2.3.3.6, as may satisfactory benchmarking or suitable evidence. Utilities are reminded that they must be able to demonstrate the basis for the determination of the market price if requested to do so.

The Board expects that transactions involving the sale by a utility of a service, resource, product or use of asset to which section 2.3.3.6 or section 2.3.4.2 would apply will be limited in number. This is due to the restrictions set out in section 71 of the Act and to the fact that the transfer pricing rules applicable to shared corporate services are addressed separately (in section 2.3.5.1).

## **C. Category 2 Revisions to Section 2.6 Regarding Confidential Information**

Sections 2.6.1 to 2.6.3 of the Electricity ARC deal with the protection of confidential

information. The Proposed Amendments did not include revisions to those sections.

The Board is now proposing to revise sections 2.6.1 to 2.6.3 as follows.

- Revisions are proposed to be made to include references to smart sub-metering providers and wholesalers in sections 2.6.1 to 2.6.3. These revisions are consequential on the revisions proposed to be made to the definition of “confidential information” as described in section IV.A above.
- Revisions are proposed to be made to section 2.6.2 to bring the text of that section into line with the text that is currently found in the comparable provision of utility licences.
- To accommodate the possibility that utility licences may, at some time in the future, be amended to allow the disclosure of confidential information without consent for additional purposes, revisions are also proposed to be made to section 2.6.2 to include a reference to disclosure as permitted by a utility's licence. This will avoid the need to amend the Electricity ARC to keep pace with revisions that may be made to the comparable provisions of utility licences in the future.

**D. Category 2 Revisions to Sections 1.2 and 2.6 Relating to “Strategic Business Information”**

The Proposed Amendments included a new provision that precludes a utility from disclosing “strategic business information” to an affiliate that is an energy service provider (section 2.6.4), together with a supporting definition of the term “strategic business information”.

These Proposed Amendments were the subject of comment by most stakeholders. Distributor comments were uniformly against adoption of these Proposed Amendments, and generally focused on one or more of three objections. First, in their view, the definition of “strategic business information” is not workable as it is overly broad, ambiguous and not able to be practically implemented. As a result, distributors would not be in a position to know what they can and cannot do without offending the restrictions on disclosure set out in section 2.6.4. Second, they suggested that the restrictions on the disclosure of strategic business information are: (i) incompatible with good corporate governance practices; (ii) incompatible with the fact that distributors and their affiliates are permitted to have common directors and often have common officers; and (iii) incompatible with the fact that distributors and their affiliates are permitted to have shared corporate services for the purpose of providing strategic management and policy support. Third, they expressed concern that the provisions regarding strategic business information would preclude a utility from disclosing to an affiliate information that is either publicly available or that is provided to non-affiliated parties.

The comments of non-distributor stakeholders on the strategic business information provisions were uniformly supportive.

For the reasons set out in the September Notice, the Board remains of the view that it is

appropriate to include in the Electricity ARC restrictions on the disclosure of certain information that a utility has as a result of its privileged position as a monopoly service provider. The Board also remains of the view that the existing restrictions on the disclosure of confidential information are not in and of themselves sufficient to address all of the harms identified in the September Notice, since those restrictions broadly speaking relate only to customer information.

However, in light of the comments received and after further consideration, the Board has concluded that a modified approach that more clearly defines the nature of the information to which the restriction on disclosure would apply is appropriate. The Board is therefore proposing the following revisions.

- The term “strategic business information” is proposed to be replaced by the new term “system planning information”. “System planning information” is proposed to be defined as information pertaining to (i) distribution system planning and (ii) planning of systems involved in the provision of customer service.
- A new section 2.6.5 is proposed to be added to clarify that the prohibition on the disclosure of system planning information to an energy service provider affiliate does not apply where the information: (i) is or has been made available to non-affiliated parties at the same time, in substantially the same form and on the same terms and conditions as it is being made available to the affiliate; (ii) is, at the relevant time, already publicly available in substantially the same form as it is being made available to the affiliate; or (iii) is disclosed for the purposes of complying with a legal or regulatory requirement.

The Board sees merit in more specifically defining the information that cannot be shared with an energy service provider affiliate, which not only provides for a suitable level of regulatory certainty but also ensures that compliance with the Board’s rules can be more readily monitored and enforced, where required.

The proposed revisions described above focus specifically on the harm associated with an energy service provider having an advantage over third parties in relation to the provision of services to its affiliated utility. The Board acknowledges that some stakeholders are desirous of limiting the opportunity for such an advantage in relation to services that an energy service provider may be providing to others in competition with third party service providers. However, the Board is of the view that the provisions of the Electricity ARC relating to confidential information are the primary means by which to provide that protection. If the Board is presented with compelling information and arguments regarding specific types of information (other than confidential information) that, if disclosed to an energy service provider affiliate, would give rise to harm in relation to the provision of services by that affiliate to third parties, the Board may revisit this issue.

The Board believes that concerns, if any, regarding the implications of the system planning information provisions on corporate governance would be adequately addressed by the proposal to allow disclosure of system planning information where necessary to comply with a legal or regulatory requirement, and by the proposal to exclude municipal corporations from the definition of “energy service provider” (see

section IV.A above). This latter proposal would remove a potential barrier to system planning information being disclosed up the corporate chain. It is not clear to the Board why affiliates that are energy service providers would in any event require system planning information as a matter of good corporate governance.

The Board also does not believe that there are significant issues regarding the implications of the system planning information provisions for a utility that shares directors or officers with an energy service provider affiliate. The Board notes, in this regard, that although the Electricity ARC contemplates that utilities and affiliates may have common directors, it does restrict the sharing of officers if these are employees and they are involved in the collection of, or have access to, confidential information.

The Board also takes this opportunity to remind utilities that the purpose of section 2.6.4 is that an energy service provider affiliate not have access to system planning information. Where a utility discloses system planning information to other affiliates, the Board expects the utility to take reasonable steps to ensure that those affiliates do not then disclose the information to any energy service provider affiliates. If it appears to the Board that indirect disclosure to energy service affiliates is becoming an issue, the Board may consider the need for further measures to address the matter.

## **V. Anticipated Costs and Benefits of Revisions to the Proposed Amendments**

The anticipated costs and benefits of the Proposed Amendments as originally proposed were addressed in the September Notice, and interested parties should refer to the September Notice for further information in that regard.

The Category 1 Revisions to the Proposed Amendments provide greater consistency and enhanced clarity regarding the nature and scope of the provisions of the Electricity ARC, and will assist in ensuring a better understanding of those provisions by all interested parties and in more effective implementation by utilities. As stated in the September Notice, greater clarity provides greater regulatory certainty to utilities and other stakeholders in relation to the rules governing affiliate relations, and may over time decrease compliance costs. The Board does not anticipate that the Category 1 Revisions to the Proposed Amendments will require utilities to incur material incremental costs relative to implementation of the Proposed Amendments as originally proposed through the September Notice.

The Category 2 Revisions to the definition of “shared corporate services” ensure that the definition better reflects the services that are commonly shared between utilities and affiliates, and allow additional operational flexibility for utilities. The services proposed to be added to the definition are of a similar nature to those that were included in the definition as originally proposed, and the Board does not believe that the addition of those services is such as to give rise to concerns of material incremental harm to ratepayers.

The Category 2 Revisions to the definition of “confidential information” and to sections 2.6.1 to 2.6.3 regarding confidential information will ensure that information pertaining to new entrants to the electricity marketplace (smart sub-metering providers) is afforded the same protection as information pertaining to customers of a utility. These Category

2 Revisions also ensure greater consistency with parallel provisions that are contained in the licences issued by the Board to utilities.

The Category 2 Revisions to the definition of “energy service provider” will provide utilities and other interested parties with greater clarity regarding the scope of that definition. They mirror the views expressed in Compliance Bulletin 200604. The proposed exclusion of municipal corporations from the ambit of the definition will ensure that utility relationships with their municipal affiliates are not unduly restricted without creating the potential for material incremental harm.

The Board does not expect that implementation of the above Category 2 Revisions will require utilities to incur material costs.

The Category 2 Revisions to section 2.3.3.6 with respect to the transfer price for transactions involving the sale of a service, resource, product or use of asset by a utility to an affiliate will better support the objective of ensuring that utilities do not cross-subsidize affiliate activities, and therefore will better protect the interests of ratepayers.

The Board believes that the proposal to replace the definition of “strategic business information” with a clearer definition of “system planning information” and the addition of proposed new section 2.6.5 will provide greater clarity for utilities and ensure that utilities are not precluded by the Electricity ARC from complying with governance and other requirements imposed by law or regulation. In addition, by limiting the scope of the restriction to information that is not otherwise available to non-affiliated parties, the proposed new section 2.6.5 more clearly targets the harm that is intended to be addressed. The revised proposal will continue to contribute to the achievement of a number of the objectives of the Electricity ARC, and will benefit ratepayers and consumers without imposing material costs on utilities.

## **VI. Coming into Force of Revised Proposed Amendments**

As was proposed in the September Notice, the Board is proposing that most of the Proposed Amendments, revised as described above and as set out in Attachment A, come into force on the date on which they are published on the Board’s website after having been made by the Board. As also proposed in the September Notice and discussed above, the Board is proposing that the following Proposed Amendments, revised as described above and as set out in Attachment A, come into force on the date that is three months from the date on which they are published on the Board’s website after having been made by the Board: (a) the Proposed Amendment that deletes the definition of “fair market value”; and (b) the Proposed Amendments to section 2.3, other than the Proposed Amendment that adds sections 2.3.4.1 and 2.3.4.2. As discussed in section III.C above, the Proposed Amendments would not apply to an Affiliate Contract that was in effect on September 19, 2007 until such time as the initial term of such Affiliate Contract expires.

## VII. Cost Awards

Cost awards will be available under section 30 of the Act to eligible persons in relation to the provision of comments on the revisions to the Proposed Amendments, **to a maximum of 20 hours**.

## VIII. Invitation to Comment on Revisions to Proposed Amendments

All interested parties are invited to submit written comments on the Board's revised Proposed Amendments to the Electricity ARC by **March 10, 2008**. The Board asks that interested parties confine their comments to the revisions to the Proposed Amendments as shown in the comparison version of the Proposed Amendments set out in Attachment B.

Three (3) paper copies of each filing must be provided, and should be sent to:

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street  
Suite 2700  
Toronto, Ontario  
M4P 1E4

The Board requests that interested parties make every effort to provide electronic copies of their filings in searchable/unrestricted Adobe Acrobat (PDF) format, and to submit their filings through the Board's web portal at [www.errr.oeb.gov.on.ca](http://www.errr.oeb.gov.on.ca). A user ID is required to submit documents through the Board's web portal. If you do not have a user ID, please visit the "e-filings services" webpage on the Board's website at [www.oeb.gov.on.ca](http://www.oeb.gov.on.ca), and fill out a user ID password request. Additionally, interested parties are requested to follow the document naming conventions and document submission standards outlined in the document entitled "RESS Document Preparation – A Quick Guide" also found on the e-filing services webpage. If the Board's web portal is not available, electronic copies of filings may be filed by e-mail at [boardsec@oeb.gov.on.ca](mailto:boardsec@oeb.gov.on.ca).

Those that do not have internet access should provide a CD or diskette containing their filing in PDF format.

Filings to the Board must be received by the Board Secretary by **4:45 p.m.** on the required date. They must quote file number **EB-2007-0662** and include your name, address, telephone number and, where available, your e-mail address and fax number.

This Notice, including the attached revised Proposed Amendments to the Electricity ARC and all written comments received by the Board in response to this Notice, will be available for public viewing on the Board's website at [www.oeb.gov.on.ca](http://www.oeb.gov.on.ca) and at the office of the Board during normal business hours.



If you have any questions regarding the revised Proposed Amendments described in this Notice, please contact John Vrantzidis at 416-440-8122. The Board's toll free number is 1-888-632-6273.

**DATED** at Toronto, February 11, 2008.

ONTARIO ENERGY BOARD

*Original Signed By*

John Pickernell  
Assistant Board Secretary

Attachments:

- |                      |                                                                                                                                                                                                                                                                 |
|----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <u>Attachment A:</u> | Revised Proposed Amendments to the Affiliate Relationships Code for Electricity Distributors and Transmitters                                                                                                                                                   |
| <u>Attachment B:</u> | Comparison Version of revised Proposed Amendments to the Affiliate Relationships Code for Electricity Distributors and Transmitters relative to Proposed Amendments as proposed on September 19, 2007 (for information purposes only)                           |
| <u>Attachment C:</u> | Comparison Version of Affiliate Relationships Code for Electricity Distributors and Transmitters containing revised Proposed Amendments and showing revisions relative to Proposed Amendments as proposed on September 19, 2007 (for information purposes only) |
| <u>Attachment D:</u> | Affiliate Relationships Code for Electricity Distributors and Transmitters containing revised Proposed Amendments: Clean Version (for information purposes only)                                                                                                |

**Attachment A**

**Revised Proposed Amendments to the Affiliate Relationships Code for Electricity  
Distributors and Transmitters**

(see attached document)

**Attachment B**

**Comparison Version of revised Proposed Amendments to the Affiliate Relationships Code for Electricity Distributors and Transmitters relative to Proposed Amendments as proposed on September 19, 2007  
(for information purposes only)**

(see attached document)

**Attachment C**

**Comparison Version of Affiliate Relationships Code for Electricity Distributors  
and Transmitters containing revised Proposed Amendments and showing  
revisions relative to Proposed Amendments as proposed on September 19, 2007  
(for information purposes only)**

(see attached document)

**Attachment D**

**Affiliate Relationships Code for Electricity Distributors and Transmitters  
containing revised Proposed Amendments: Clean Version  
(for information purposes only)**

(see attached document)