March 10, 2008

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

Subject: Notice of Revised Proposal to Amend the Affiliate Relationships Code
File No.: EB-2007-0662

In response to the Ontario Energy Board's ("the Board") Notice of February 11, 2008, regarding the revised proposed amendments to the Ontario Affiliate Relationships Code for Electricity Distributors and Transmitters (the "Electricity ARC"), the Coalition of Large Distributors ("CLD") consisting of Enersource Hydro Mississauga, Horizon Utilities, Hydro Ottawa, PowerStream, Toronto Hydro-Electric System and Veridian Connections, wishes to offer the following comments.

In responding, the CLD members have primarily focused on those amendments that were revised in response to the written consultation of October 26, 2007. Comments have also been provided with respect to the operational impacts of certain code amendments, relative to the ARC objectives. Further comments have not been offered on decisions that have already been made by the Board and the CLD has not reiterated previous arguments; however, this should not be interpreted to mean agreement with all proposed amendments. The CLD has also reviewed the submission put forth by the Electricity Distributors Association ("EDA") and concurs with the EDA's comments.

The CLD notes that on page 5 of the Notice, the Board makes reference to an application for exemption, relating to the provisions on the sharing of employees that have access to confidential information (2.2), as follows:

> "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."

Given the variety of corporate structures and functional differences among the many Ontario LDCs there may be numerous circumstances that comply with the "spirit" set out in the

proposed objectives of the ARC but involve departures from the “letter” of the ARC. A utility may be able to demonstrate that their particular circumstances result in no harm to ratepayers, no customer confusion and no cross subsidization of the affiliate. In these cases, the Board should grant exemptions. To do otherwise might result in a utility having to undertake complex and costly corporate restructuring with no resulting benefit to customers or the company. The CLD considers it to be very important for the Board to develop a transparent, efficient process for processing exemption applications that it may receive from utilities. There should be an expedited process to approve applications dealing with departures from the "letter" of the code when the "spirit" of the code is met, possibly under a delegated authority. It would also be helpful for utilities to be able to "state a case" to the Board's Chief Compliance Officer requesting his interpretation of the compliance of a utility's circumstances, upon request by a utility. Notwithstanding that, the CLD would prefer that the ARC itself be as clear and focused as possible in order to minimize the need for exemption applications.

DEFINITIONS (1.2)

New Definitions

The Board has proposed the inclusion of a definition for “smart sub-metering provider”. The ARC is the prevailing code therefore definitions for consumer, retailer, generator and wholesaler should also be included for consistency. In particular, this should clarify that the terms retailer and generator mean those parties licensed by the Board as such.

Confidential Information

The revised definition for “confidential information” is appropriate in light of recent industry developments. However, the CLD notes that reference is made in the Notice to include ‘wholesalers’ within this definition; however, the proposed changes to the code do not reflect this. Similarly, the second reference to ‘wholesaler’ is missing from section 2.6.1 and the reference to ‘consumer retailer’ should be differentiated by a comma, in section 2.6.2.

System Planning Information

The CLD remains concerned about the restrictive provisions on system planning information being proposed by the Board that do not exist in the Gas ARC. The Board has not provided a transparent rationale as to why it believes that system planning information is an issue in the electricity industry but not the gas industry. The replacement of “strategic business information” with “system planning information” does provide some clarity as to what type of information is protected; however, the CLD questions the inclusion of “work management” and “customer service” systems as part of the definition. The CLD does not share the Board’s view that an unfair business advantage could be provided to an energy service provider affiliate with respect to “customer service” systems and, moreover, submits that these concerns are already addressed through other sections of the code. For instance, if the system plans involve outsourcing, section 2.3.3.2 ensures that if a market exists there will be a fair and open competitive bidding process.

If this section is to remain, the definition of "system planning information" and the associated plans, services and systems referred to needs to be clarified. As written, these references are open-ended and could lead to a variety of interpretations and inconsistencies among distributors. As noted earlier, corresponding provisions do not exist within the Gas ARC and the CLD still does not understand why the Board feels that these restrictive protections are required in the electricity industry.

Energy Service Provider

The CLD has had extensive discussions on this issue because of differing interpretations of what it means to share an employee. The Board has expressed its view, on page 6 of the Notice, that an employee is shared for the purpose of section 2.2.3 of the ARC: "if the employee performs work for both the utility and the affiliate, regardless of which entity is legally the employer of the employee". The CLD concluded that it was the Board's intent that employees of an affiliate are not considered "shared" if they are only providing services to the utility, even if that affiliate provides other unregulated services elsewhere in the company.

However, through discussions of different scenarios, it has become clear that what constitutes "sharing" is still an open question and the Board should provide greater clarity in this area.

The CLD is very concerned about the inclusion of "billing for utility or natural gas services" in the definition of an "energy service provider", particularly when examined in conjunction with the prohibition on sharing employees from section 2.2.3. This inclusion was not considered in the previous draft code or by Board staff in their discussion paper and therefore the CLD has yet to comment on the implications of this restriction. Clearly, the Board contemplated and endorsed that affiliates may do billing and settlements for a utility through the inclusion of the proposed section 2.6.2 that sets out the conditions under which confidential information can be shared with an affiliate, which includes:

> "(a) for billing, settlement or market operation purposes;"

However, practically, the Board is proposing to set rules that are so limiting that the possibly of gaining any economies of scale in doing billing through an affiliate have been eliminated. For instance, an affiliate that rents water heaters and provides billing services to a utility would normally want to provide only one bill to a customer for both services. This is preferred by customers. With the current proposed ARC, the affiliate would have to have two separate groups of employees doing the billing for a particular customer because employees, who by the nature of the work have access to confidential information, would be deemed to be "shared". Another affiliate may try to gain economies of scale by providing billing services to other utilities. It is not clear if the Board considers employees billing for both an affiliated utility and a non-affiliated utility to be "shared" and therefore prohibited, even though this circumstance would still meet the proposed objectives of the ARC. It is inappropriate to set rules that would restrict an affiliate from gaining economies of scale, provided that the objectives of the ARC are met.

The CLD does not share the Board's view that billing for utility services is related to the supply of electricity as stated on page 11 of the Notice. Unlike other activities listed for an "energy service provider", billing for utility services has always been considered by the Board to be an allowable distribution activity. The CLD recommends that all of these issues be addressed by removing "billing for utility or natural gas services" from the definition of an "energy service provider".

If the Board's concern is the protection of information when an affiliate is both billing for utility services and retailing electricity, this would be no different from a utility outsourcing to a third party who was both billing and retailing electricity, and there is no prohibition on this. In the case of the third party, consumer information is protected through confidentiality agreements and there is no reason to think that this would not also work for an affiliate.

PROVIDING OR RECEIVING SERVICES, RESOURCES, PRODUCTS OR USE OF ASSET (2.2)

Section 2.2.3

Section 2.3.5.1 recognizes that efficiencies can be gained to the benefit of both the company and consumers when corporate services can be shared. The Board has noted that the proposed definition of shared corporate services is intended to be an exhaustive list. In the provision of these corporate services, as defined by the Board, an employee may from time to time have access to confidential information. For instance, in providing "public affairs" services, an employee may need access to a customer's information in order to assist in addressing a complaint from that customer. For "audit services", the internal auditor may undertake an audit of the company's customer information system (CIS) and therefore indirectly have access to consumer information. Numerous other examples could be provided, but the common element is that the access to the confidential information is ancillary to the employee's role and the access is always consistent with the purposes for which the information was gathered. For these reasons, the CLD seeks a condition under section 2.2.3 that allows sharing of employees who perform shared corporate services. Given the limited definition of shared corporate services, this exclusion would not result in any unacceptable risk. The CLD proposes the following revised wording:

> *2.2.3 A utility shall not share with an affiliate that is an energy service provider employees that are directly involved in collecting, or have access to, confidential information, except where those employees are providing only shared corporate services.*

The CLD similarly seeks a further condition under section 2.6.2 that allows for access to confidential information in the provision of shared corporate services. The CLD proposes that Section 2.6.2. be amended to add:

> *(e) for the purposes of providing shared corporate services.*

TRANSFER PRICING (2.3)

Section 2.3.2.2

With reference to section 2.3.2.2(e), it is not obvious why a business case to outsource should require an estimate of any expected benefits to ratepayers. The underlying objective of the ARC is to prevent harm to the Ontario ratepayers rather than to demonstrate benefits. Outsourcing to an affiliate, or otherwise, should be completely acceptable even in the absence of benefits to consumers provided that the fundamental "no harm" principle is met.

The CLD would therefore propose that section 2.3.2.2(e) be replaced with the following wording:

> *(e) demonstration that the outsourcing poses no harm to the utility's Ontario ratepayers*

Section 2.3.3.6

Similarly, referring to section 2.3.3.6, the CLD does not agree with the proposed amendment since it goes further than is required by the new ARC objectives. Where a reasonable market exists, it is appropriate that a utility should charge no less than the market price. This is consistent with Section 2.3.9 of the Gas ARC. To further require that a utility charge a fully allocated cost if this exceeds the market price could result in an affiliate seeking those services from the marketplace instead of from the utility. The net result of this would be a loss of other revenue to the utility and therefore an increase in distribution rates.

The CLD understands the concern that there be no cross-subsidization between the utility and its affiliates. Where a market exists, this concern can be addressed by requiring that the amount charged by the utility exceed the utility's direct costs. Any additional revenues received by the utility for providing affiliate services that exceed its direct costs are beneficial to consumers through lower distribution rates since the indirect costs will be incurred regardless. By recovering all associated direct costs, the distributor has followed the "no harm" principle established by the Board. The proposed pricing rules in section 2.3.3.6 could preclude such service opportunities from being pursued, even though there is no risk of financial harm to the utility's customers and, possibly, a benefit in additional revenue earnings. The CLD submits that price comparisons be based on the distributor's direct costs, rather than fully allocated costs, in order to facilitate continued revenue generation from services provided to affiliates that result in lower distribution rates.

The CLD therefore recommends that section 2.3.3.6 read as follows:

> *2.3.3.6 Where a reasonably competitive market exists for a service, product, resource or use of asset, a utility shall charge no less than the market price when selling that service, product, resource or use of asset to an affiliate, provided that the market price exceeds the utility's direct costs of providing that service, product, resource or use of asset.*

CONFIDENTIALITY OF CONFIDENTIAL INFORMATION AND RESTRICTION ON PROVISION OF SYSTEM PLANNING INFORMATION (2.6)

Section 2.6.5

The operational implications of section 2.6.5 could be significant and create other impacts that were not contemplated in the code amendments. In order to ensure the objectives of this provision can be achieved, more clarity on the intent of this section is requested. As written, the requirements are quite complex and broad. The types of planning information that apply, the utility's obligation to update previous requests and ongoing obligations to respond to requests, once the tendering process has concluded, are just some questions that arise.

With reference to section 2.6.5(a) and (b), CLD members have routinely provided system planning information to both affiliates and non-affiliated third parties on a consistent and equitable basis, upon request. However, these requests can be made at different times, for different purposes and relate to different geographic parts of the service area. System planning information is not static. It evolves over time and as circumstances change. Any requirements in the code need to reflect that the system planning information provided to a third party in the past may not be exactly the same information provided to an affiliate in the future depending on the nature of the request and the circumstances at the time. The important concept is that all requests for this information be treated in a like manner, whether from an affiliate or non-affiliated third-party.

The CLD therefore proposes that 2.6.5 (a) be amended to read as follows:

> *(a) if the system planning information is made available to non-affiliated third parties at the same time, or this type of information has previously been made available to non-affiliated third parties, on a non-confidential basis in substantially the same form and on the same terms and conditions as it is made available to the affiliate;*

Given the above concerns, the CLD submits that it would be helpful for the Board to hold a technical conference, with respect to sections 2.6.4 and 2.6.5 of the code, so that utilities can better understand what concerns the Board is trying to address with this new requirement and the Board can better understand the associated impacts on distributor operations so that a balanced solution can be developed. The outcome of the technical conference would assist the Board in

setting a definition for system planning information that appropriately balances its concerns in meeting the objectives of the ARC with the impact on utilities.

SUMMARY

The CLD recognizes that the Board has listened to many stakeholder concerns and has made revisions to the proposed code amendments, accordingly. Through this latest consultation process, the CLD members have focused their comments in a constructive effort to ensure the underlying objectives of the ARC continue to be achieved. The CLD is mindful that further discussion on the proposed ARC changes through the proposed technical conference could extend implementation; however, given the significant influence of the ARC on distributor operations and the prevailing status of the ARC over other codes, it is essential that the Board have a full and complete understanding of the implications of the amendments and consider whether the proposed objectives of the ARC can be achieved through alternate provisions.

Thank you for the opportunity to comment. Three (3) paper copies, along with electronic Adobe Acrobat (PDF) and Word files accompany this submission.

Yours truly,

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(On behalf of the Coalition of Large Distributors)