

Our File: 186095

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March 31, 2008

Kirsten Walli, Board Secretary  
**ONTARIO ENERGY BOARD**  
2300 Yonge Street  
Suite 2700  
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: EB-2007-0662: Revised Proposed Amendments to the Affiliate Relationships Code for Electricity Distributors and Transmitters - Comments by ECAO.**

We are regulatory counsel to the Electrical Contractors Association of Ontario (ECAO). On behalf of our client, we are submitting this letter of comment in respect of the above, and we respectfully request that, although filed late, the Board accept these comments.

**Request for late acceptance.**

The Board's Notice of Revised Proposal to Amend a Code (the Revised Notice) was issued on February 11, 2008. The due date for comments on the proposed amendments was March 10, 2008. As a result of internal changes at our firm, including the departure in mid-January of the senior associate that previously managed this matter, the Revised Notice came to my attention only recently. On behalf of ECAO, we are therefore requesting that, while late, the Board accept these brief comments.

ECAO has been engaged in the matter of review by the Board of the Affiliate Relationships Code for Electricity Distributors and Transmitters (the ARC) since the inception of that review in mid-2007. ECAO filed comprehensive comments dated July 2007 on Board Staff's research paper dated June 15, 2007. ECAO also filed comprehensive submissions with respect to the ARC amendments proposed by way of the Board's notice dated September 19, 2007. Particularly in light of this history of active and responsible participation on this matter, ECAO requests the Board's indulgence in accepting this late submission.

In the circumstances of this late submission, and conscious of the Board's own schedule and workload, ECAO has limited itself to brief comments on areas of proposed amendment of particular concern. The submissions provided are consistent with ECAO's earlier submissions.

### **Comments.**

ECAO wishes to provide brief comments in respect of the Revised Notice in three areas:

1. Indicating support for determinations articulated by the Board in the Revised Notice.
2. Addressing replacement of the proposed concept of "strategic business information" with that of "system planning information".
3. Addressing the proposed exclusion [of a municipal corporation] from the definition of "energy service provider".

### **Determinations articulated by the Board in the Revised Notice.**

ECAO wishes to indicate its support for the following determinations articulated by the Board in the Revised Notice:

1. That the addition to ARC section 1.1 of the concept of "unfair business practice" is both appropriate and sufficiently clear as a statement of general principle.
2. That the Board's determination not to expressly include efficiency as an ARC objective remains appropriate.
3. That the (new) proposed revisions to ARC paragraph 1.1(c), which are intended to clarify that the harm guarded against is cross-subsidization of an affiliate, are appropriate.
4. That the initial proposal for ARC section 2.2.3 to remain focused on sharing employees (with access to confidential information) rather than on the use of information remains appropriate.
5. That it would not be appropriate to narrow the ARC definition of "confidential information" by excluding information that is publicly available.
6. That it is appropriate for the Board to revise the definition of "energy service provider" to specifically include, as further examples, street lighting services, sentinel lighting service, and the other proposed additions to the definition.

### **Replacement of the proposed concept of "strategic business information" with that of "system planning information".**

While stating that it remains appropriate to include in the ARC restrictions on the disclosure of certain, non-customer specific information that a utility has as a result of its privileged position as a monopoly service provider, the Board is proposing to replace the concept of "strategic

business advantage" to define such information with the narrower concept of "system planning information".

ECAO's particular concern in this area is in respect of information pertaining to competitive system connection work. ECAO has considered the replacement concept of "system planning information" in this context. ECAO notes that the previous proposed concept of "strategic business advantage" included express reference to inclusion of information that a utility has "obtained or developed in the course of providing.....current or prospective utility service" [emphasis added]. ECAO further notes that the definition of "confidential information", which information the utility is generally precluded from sharing with an energy services affiliate, includes information relating to a specific consumer "obtained" by the utility, but does not include information relating to a specific consumer developed by the utility. In the result, ECAO is concerned that in replacing the concept of "strategic business information" with the narrower concept of "system planning information", without amending the definition of "confidential information", information developed by the utility in respect of, *inter alia*, specific customer connections, would not be subject to prohibition on sharing with an energy services affiliate.

***ECAO therefore submits that if the Board proceeds with the narrower concept of "system planning information" in place of the previously proposed "strategic business advantage", then the definition of "confidential information" should be amended to add information "developed" by the utility in respect of the categories of individuals enumerated in the definition.*** From ECAO's perspective, this would capture, and preclude from sharing with an energy services affiliate, information developed by the utility that might provide a competitive advantage to an energy services affiliate that competes with ECAO's members.

In respect of the new concept of "system planning information", the Board is also proposing to exclude from the prohibition on sharing information that *"is, at the relevant time, already publicly available in substantially the same form as it is being made available to the affiliate"*. This exception does not consider the cost (in dollars, effort and/or time) to a non-affiliated energy service provider of obtaining the information that could be provided by the utility to the affiliate. ECAO submits that if such information is indeed otherwise publicly available in substantially the same form, then the energy services affiliate should obtain that information from such public source, as would any other competitive energy service provider to whom such information is relevant. This is particularly so given that the information in question is, as recognized by the Board in its own explanation (at the top of page 13 of Revised Notice) *"information that a utility has as a result of its privileged position as a monopoly service provider"* [emphasis added]. ECAO also notes the Board's determination reflected at page 10, second full paragraph of the Revised Notice, that in respect of the definition of "confidential information", exception for information available to the public is not warranted. Accordingly, ***ECAO submits that proposed ARC paragraph 2.6.5(b) should not be incorporated into the final ARC.***

**Proposed exclusion of a municipal corporation from the definition of "energy service provider".**

It is ECAO's understanding from the Revised Notice that the Board's proposal to exclude a "municipal corporation" from the definition of "energy service provider" is intended to address concerns raised by other stakeholders that corporate governance requirements might otherwise be compromised. ECAO notes that no definition of "municipal corporation" is proposed.

ECAO recognizes that there are circumstances in which it may be desirable to allow utilities to share information with their municipality owners. ECAO is concerned, however, that without defining the term "municipal corporation", utilities might take the position that municipally owned competitive affiliates are excluded from the definition as well. ***ECAO therefore submits that the Board should consider clarifying the proposed exclusion of "municipal corporation" from the definition of "energy services affiliate" to make it clear that it is the owner municipality that is excluded from the definition and not other municipally owned corporations.***

ECAO also notes, with support, the Board comments at the second full paragraph of page 14 of Revised Notice to the effect that the Board expects the utility to take reasonable steps to ensure that "system planning information" disclosed to affiliates who are not "energy service providers" not end up being disclosed by those other affiliates to energy service provider affiliates (i.e. that the subject information not get to the energy service affiliate indirectly when it cannot be disclosed directly). ***ECAO respectfully suggests that if this is the Board's expectation, it should be codified.***

**Conclusion.**

ECAO appreciates the opportunity to provide these comments, and hopes that they are of assistance to the Board in its deliberations.

Yours truly,

**MACLEOD DIXON LLP**



Robert Frank

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