



ONTARIO ENERGY BOARD

BOARD STAFF SUBMISSION ON PRELIMINARY ISSUE

**Application by the Smart Metering Entity for Approval of a Smart
Metering Charge and Proceeding to Determine the Appropriate
Recovery and Allocation of the Smart Metering Charge**

Board File Nos. EB-2012-0100/EB-2012-0211

June 29, 2012

I. BACKGROUND

On March 28, 2007, the Independent Electricity System Operator (“IESO”) was designated as the Smart Metering Entity (the “SME”) by Ontario Regulation 393/07 made under the *Electricity Act*. In its role as the SME, the IESO is managing the development of the meter data management/repository (“MDM/R”) to collect, manage, store and retrieve information related to the metering of customers’ use of electricity in Ontario. By way of legislative requirement, the SME is the exclusive provider of billing and data services to all licensed electricity Distributors (“Distributors”).

On March 23, 2012 the IESO, in its capacity as the SME, applied to the Ontario Energy Board (the “Board”) for approval of a SMC of \$0.806 per Residential and General Service <50kW Customer per month which the IESO proposes to collect from Distributors for the period July 1, 2012 to December 31, 2017.

The SME has also asked for an annual automatic adjustment mechanism to update the billing determinant with the annual changes in the number of Residential and General Service <50kW Customers listed in the OEB Electricity Distributor Handbook; a variance account to deal with changes in the SME costs, or any revenue surplus; and approval of the Smart Metering Agreement for Distributors for use by the SME and Distributors.

The Board also commenced a proceeding on its own motion to review the options for, and ultimately determine, the appropriate allocation and recovery of the SMC.

The Board combined the hearing of the SME application for the SMC with the Board’s proceeding on its own motion to determine the appropriate allocation and recovery of the SMC.

II. PRELIMINARY ISSUE

In Procedural Order No. 1 issued on June 22, 2012, the Board noted that the SME had applied for the approval, under section 5.4.1 of the Distribution System Code (“DSC”), of the Smart Metering Agreement for Distributors (the “SME/LDC Agreement”) for use by the SME and Distributors. The Board asked for submissions on the following preliminary issue:

Given section 5.4.1 of the DSC and section 3.2 of ES-2007-0750, what is the scope of the Board's approval of an agreement between the SME and Distributors?

The relevant sections of the DSC and the SME Licence are set out below.

DSC – section 5.4.1

A distributor shall, upon being requested to do so, enter into an agreement with the Smart Metering Entity or the IESO, in a form approved by the Board, which sets out the respective roles and responsibilities of the distributor and the Smart Metering Entity or the IESO in relation to metering and the information required to be exchanged to allow for the conduct of these respective roles and responsibilities.

SME Licence – section 3.2

The Licensee is authorized to require licensed Distributors to enter into an agreement with the Licensee. The agreement shall set out the respective roles and responsibilities of the distributor and the Licensee in relation to metering and the information required to be exchanged to allow for the conduct of these respective roles and responsibilities. The agreement must be approved by the Board before the Licensee can require licensed Distributors to sign the agreement.

III. LEGISLATIVE FRAMEWORK

The following provisions relate largely to the SME and outline its legislative/regulatory existence. Some of the provisions also relate to Distributors in the context of their relationship with and obligations to the SME. Board staff is of the view that these legislative provisions describe, at the highest level, the relationship between the SME and Distributors and in many respects, the roles and responsibilities thereof. While these provisions are not, in Board staff's view, exhaustive in terms of enumerating the roles and responsibilities of the parties, for purposes of identifying the Board's scope of approval of the form of agreement between the parties, they are crucial to the analysis and must, in Board's staff view, be considered by the Board in approving the form of agreement.

(a) Ontario Energy Board Act, 1998

3. In this Act,

“Smart Metering Entity” means the corporation incorporated, the limited partnership or the partnership formed or the entity designated pursuant to section 53.7 of the *Electricity Act, 1998*.

78. (2.1) The Smart Metering Entity shall not charge for meeting its obligations under Part IV.2 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract.

(b) Electricity Act, 1998

53.8 The objects of the Smart Metering Entity, if it is a corporation, or the nature of its business activities, if the Smart Metering Entity is a limited partnership or a partnership, include, in addition to any other objects or business activities, the following:

1. To plan and implement and, on an ongoing basis, oversee, administer and deliver any part of the smart metering initiative as required by regulation under this or any Act or directive made pursuant to sections 28.3 or 28.4 of the *Ontario Energy Board Act, 1998*, and, if so authorized, to have the exclusive authority to conduct these activities.
2. To collect and manage and to facilitate the collection and management of information and data and to store the information and data related to the metering of consumers' consumption or use of electricity in Ontario, including data collected from Distributors and, if so authorized, to have the exclusive authority to collect, manage and store the data.
3. To establish, to own or lease and to operate one or more databases to facilitate collecting, managing, storing and retrieving smart metering data.
4. To provide and promote non-discriminatory access, on appropriate terms and subject to any conditions in its licence relating to the protection of privacy, by Distributors, retailers, the OPA and other persons,
 - i. to the information and data referred to in paragraph 2, and

- ii. to the telecommunication system that permits the Smart Metering Entity to transfer data about the consumption or use of electricity to and from its databases, including access to its telecommunication equipment, systems and technology and associated equipment, systems and technologies.
- 5. To own or to lease and to operate equipment, systems and technology, including telecommunication equipment, systems and technology that permit the Smart Metering Entity to transfer data about the consumption or use of electricity to and from its databases, including owning, leasing or operating such equipment, systems and technology and associated equipment, systems and technologies, directly or indirectly, including through one or more subsidiaries, if the Smart Metering Entity is a corporation.
 - 6. To engage in such competitive procurement activities as are necessary to fulfil its objects or business activities.
 - 7. To procure, as and when necessary, meters, metering equipment, systems and technology and any associated equipment, systems and technologies on behalf of Distributors, as an agent or otherwise, directly or indirectly, including through one or more subsidiaries, if the Smart Metering Entity is a corporation.
 - 8. To recover, through just and reasonable rates, the costs and an appropriate return approved by the Board associated with the conduct of its activities.
 - 9. To undertake any other objects that are prescribed by regulation.

53.14 In carrying out its objects or business activities, the Smart Metering Entity,

- (a) may directly or indirectly collect information and data relating to the consumption or use of electricity from consumers, Distributors or any other person; and
- (b) may manage and aggregate the data related to consumers' electricity consumption or use.

53.15 (1) Distributors, retailers and other persons shall provide the Smart Metering Entity with such information as it requires to fulfil its objects or conduct its business activities.

(2) If the Smart Metering Entity has provided access to a Distributor, retailer or another person to information under this Part, it shall not engage in a business activity prescribed by regulation if,

- (a) the person to whom access has been provided is also engaged in the business activity; and
- (b) the access was granted for the purpose of the person engaging in the business activity.

(c) O. Reg. 393/07 – Smart Metering Entity

1. The IESO is designated as the Smart Metering Entity.
4. The Smart Metering Entity shall specify what services constitute validation, estimating and editing services and any other services required to produce billing quantity data.
5. (1) The Smart Metering Entity has the exclusive authority to carry out the following functions:
 1. Specifying its database and system interface requirements and information and data transfer requirements.
 2. Receiving smart metering data for the purpose of carrying out the functions in paragraphs 3, 4 and 5, including receiving other information necessary for those functions.
 3. Providing all services, as specified by the Smart Metering Entity, performed on smart metering data to produce billing quantity data, including validation, estimating and editing services.
 4. Managing access rights to smart metering data and data derived from smart metering data in a manner consistent with the objects of the Smart Metering Entity set out in paragraph 4 of section 53.8 of the Act.
 5. Subject to subsection (2), maintaining and operating a database of,
 - i. smart metering data and other data that is necessary for the Smart Metering Entity to perform the exclusive functions referred to in paragraph 3, and
 - ii. data that is derived through the exclusive functions referred to in paragraph 3.

(2) Paragraph 5 of subsection (1) does not apply in respect of a class of data that would otherwise fall within paragraph 5 where an order of the Board or a code issued by the Board specifically authorizes non-exclusivity of part of the function referenced in paragraph 5 for certain classes of data.

IV. BOARD STAFF SUBMISSION

(a) Clause-by-Clause Analysis Not Required

As a starting point, Board staff wishes to clarify that it is of the view that the nature of the Preliminary Issue as articulated by the Board in Procedural Order No. 1 does not and should not, at this stage of the analysis, require a clause-by-clause review of the form of agreement or of the Terms of Service provided by the SME at Ex. D, Tabs 2 and 3, respectively, of the pre-filed evidence. If the Board were to require such an analysis at this stage of the proceeding, this would operate as an assumption that the untested evidence currently filed on the subject of the form of agreement is the only available evidence on which to base the analysis. This would necessarily preclude the introduction of additional provisions or language which could lead to a sub-optimal form of agreement.

Board staff's interpretation of the intention of the Preliminary Issue is that, at this stage, the Board is looking to define its scope of approval, which once determined, will be followed by a comprehensive review and examination of the specific provisions of the form of agreement, Terms of Service and any other relevant evidence as part of the hearing on this matter.

As such, it is not Board staff's intention to conduct a clause-by-clause review of the evidence provided in this respect at this time, but to make general submissions with respect to the scope of the Board's approval or more specifically, the Board's interpretation of the Board's mandate and the lens(es) or filter(s) the Board should use in reviewing whether or to what extent any suggested provision should or should not be included or added to the form of agreement between the SME and Distributors.

(b) Section 5.4.1 of the DSC and Section 3.2 of the SME Licence

It is Board's staff's view that the analysis of the scope of the Board's approval must necessarily begin with a review of section 5.4.1 of the DSC and section 3.2 of the SME licence.

Board staff submits that two fundamental premises fall out from the requirement in section 5.4.1 of the DSC and 3.2 of the licence, for a Distributor to enter into an agreement with the SME in a form approved by the Board.

The first is that the agreement must be approved by the Board. The second is that such approval must be obtained before the SME can require the Distributor to enter into the agreement. In Board's staff's view, each of these premises is clear from the wording in section 5.4.1 of the DSC, and perhaps even more obviously so, from the language in section 3.2 of the SME's licence. In particular, the last sentence of section 3.2 of the licence reads: "The agreement must be approved by the Board before the Licensee can require licensed Distributors to sign the agreement."

As such, Board staff will take these premises as non-contentious and as the basis upon which the Board's Preliminary Issue is framed.

The question that then arises, however, is what exactly is the nature and scope of the form of agreement to which the Board's approval mandate applies? Or, as the Board has framed the Preliminary Issue, "What is the scope of the Board's approval of an agreement between the SME and Distributors?"

In Board staff's view, the starting point for this discussion is found in section 5.4.1 of the DSC which contains explicit qualifying language around the form of agreement to which the Board's approval mandate applies.

In particular, if one removes the references to the requirement to enter into an agreement and the requirement for the Board to approve such agreement which, as stated, are taken as non-contentious, the remaining parts of the section qualify the nature of the agreement in question.

“...an agreement...which sets out the respective roles and responsibilities of the Distributor and the Smart Metering Entity...in relation to metering and the information required to be exchanged to allow for the conduct of these respective roles and responsibilities.”

Importantly, the form of agreement which is required to be approved by the Board and subsequently entered into by the Distributor is restricted to setting out the roles and responsibilities of the Distributor and the SME. It does not, therefore, define, describe or otherwise involve the roles and responsibilities of other (third) parties or of the SME or the Distributor vis-à-vis such third parties.

The primary qualifier which is “roles and responsibilities” is then further qualified. In particular, the “roles and responsibilities” that are the subject of the form of agreement must be in relation to:

- (a) metering; and
- (b) the information required to be exchanged to allow for the conduct of the respective roles and responsibilities (of the SME and the Distributor).

On a detailed but potentially important point of interpretation, Board staff takes the “and” between “metering” and “the information required to be exchanged...” to mean that the roles and responsibilities may be in relation to either metering or in relation to the information required to be exchanged, not that each role and each responsibility must be in relation to both metering and the information required to be exchanged. In other words, the roles and responsibilities must be in relation to one of metering or the information required to be exchanged.

At its most basic then, it is Board staff’s view that the scope of the Board’s approval in respect of the form of agreement to be entered into by the SME and the Distributor is restricted to those parts of any agreement that are related to the consideration of the roles and responsibilities of each of the signatories and only in relation to metering and the information required to be exchanged to allow for the conduct of the respective roles and responsibilities.

Any provisions that do not fit within these parameters are arguably outside of the Board’s scope of approval of the form of agreement. While the parties (i.e., the SME

and the Distributor) may choose to enter into a further (supplementary) agreement with provisions related to matters outside of this restricted scope, in Board staff's view the Board need not approve such supplementary agreement. It follows that a Distributor would not be required to enter into such an agreement in accordance with section 5.4.1 of the DSC and further that the SME would not be in breach of section 3.2 of its licence in not requiring Distributors to enter into such supplementary agreement.

(c) Roles, Responsibilities, Metering and Information Exchange

The logical question that then flows from this basic analysis of section 5.4.1 is what in general terms should be included within the definition of each of roles and responsibilities, metering and the information required to be exchanged to allow for the conduct of the respective roles and responsibilities.

In Board staff's view, the best and necessarily most important guidance for the Board is set out in legislation (*Electricity Act, 1998*) and regulation (Ontario Regulation 393/07). Through these instruments the SME's roles and responsibilities are described at the highest level. In particular the SME is responsible for managing the development of the MDM/R to collect, manage, store and retrieve information related to the metering of customers' use of electricity in Ontario to support Time-of-Use ("TOU") rate implementation. The MDM/R provides Distributors with billing data. The metering data provided by the MDM/R originates from the smart meters of distribution customers. In order for the MDM/R to process smart meter data so that a Distributor can bill its customers on a TOU basis, Distributors are required to enroll their smart meters with the MDM/R via a number of integration activities and processes that enable data exchange between the two parties.

In terms of providing guidance as to what does not fall into the category of roles and responsibilities of the parties, Board staff is of the view that this is a difficult thing to characterize in the abstract. As an example, however, Board staff submits that the fact that the IESO's role is transitional (Ex. D, Tab 1, par. 94(b)) is not relevant to the form of agreement and is not therefore within the Board's scope of approval of the form of agreement. The fact that there may be plans to, at some point in the future, transfer the operations of the SME to another entity or group of entities, while informative, is neither legislated, nor part of what is currently before this Board for consideration. While the SME has indicated that the Board must view the provisions of the SME/LDC

Agreement in this context, Board staff views this as outside of the scope of considering the roles and responsibilities of each of the signatories in relation to metering and the information required to be exchanged to allow for the conduct of the respective roles and responsibilities.

(d) Additional Considerations for the Board's Scope of Approval

The remaining question then, is whether and to what extent the Board should apply either an overarching lens or filter or a subset of considerations in defining whether something is, or is not, related to the roles and responsibilities of the SME and Distributors in relation to metering and the information required to be exchanged to allow for the conduct of the respective roles and responsibilities.

In Board staff's view, in addition to being guided by the relevant statutory provisions and using the actual words provided by section 5.4.1 of the DSC and section 3.2 of the SME licence, which are arguably the best and most relevant guidance the Board has with respect to its mandate, the Board must be guided by the nature of the relationship between the contracting parties and by the Board's statutory objectives.

On the first point, Board staff finds the principles provided by the SME at Ex. D, Tab 1, par. 94(a) and (c) to be useful in appropriately contextualizing the relationship between the contracting parties. Perhaps most critical is that the SME/Distributor relationship is not a standard commercial relationship (Ex. D, Tab 1, par. 94(c)). While the points made in the evidence under this heading are valid, Board staff starts from the more fundamental premise that the relationship between the parties is legislated. In fact, the existence of a smart metering entity, the designation of the IESO as the SME as well as the objects, authority and requirements of the SME are statutory. Many of the roles and responsibilities of the SME and of Distributors vis-à-vis each other are also dictated by statute or regulation (see for example, *Electricity Act, 1998* section 53.8(2) and (4), 53.14(a), 53.15, Ontario Regulation 393/07 sections 4 and 5).

The relationship between the SME and Distributors is therefore, unique and constrained in many respects by the SME's legislative existence and by the statutory requirements in respect of its relationship with Distributors. The Distributors are also largely creatures of legislation and regulation, and have been mandated (except in a few instances) to use the MDMR services. Thus, whether the DSC and the SME's licence mandate an agreement between the SME and Distributors or not, a

relationship is required to exist. This is not unlike other relationships that are regulated and overseen or mandated by the Board such as the relationship between retailers and Distributors which involve a Board mandated form of agreement, the licensing power to mandate Transmitters and the IESO to have agreements, and the various forms of agreement in the DSC and the Transmission System Code, which exist, in part, because a power imbalance is likely to exist between the parties. In Board staff's view, the Board should be mindful of the fact that in this case, the parties to the agreement are largely creatures of statute, that the relationship between them is legislated and that their transactional relationship is, at least at its core, mandated by the Board. The Board should also be guided by the legislative provisions outlining roles and responsibilities and treat these as paramount in approving any form of agreement as between the parties.

As mentioned in par. 94(c) of Ex. D, Tab 1, the DSC requires a Distributor to enter an agreement in a form approved by the Board. This, in Board staff's submission, has the potential to create an imbalance of power as between the parties to the agreement. Board staff is of the view that any such imbalance is eliminated by the need to have the form of agreement approved by the Board. Such review is being conducted in a regulatory process involving both parties and as such, is both fair and transparent.

Board staff submits that the regulated nature of the relationship between the parties needs to be borne in mind by the Board, however, to ensure that the terms of the agreement are not only within the scope articulated in (b) above, but that they are reasonable. In essence, in Board staff's submission, the Board acts as a proxy for commercial reasonableness as between the parties as a result of the regulated nature of the "transaction". Board staff submits that the Board has a role in ensuring that the relationship between the SME and the Distributors is reasonable because ultimately, as the SME's application for an SMC makes clear, consumers are likely to be paying the costs associated with the fulfillment of the obligations of the parties outlined in the form of agreement.

In so doing, the Board must also consider the first principle articulated by the SME (Ex. D, Tab 1, par. 94(a)), which is that the MDM/R provides a valuable service to customers across Ontario. In Board staff's submission, the Board's "proxy" role should incorporate the need to be aware of the value ascribed to the legislative existence and operation of the MDM/R (and by extension the SME) to Distributors and ultimately to their customers – consumers of electricity in Ontario. The Board has already

recognized that there will be cost considerations associated with the SME/LDC Agreement and the connection of those considerations to the SME's application by commencing a proceeding on its own motion to review the options for and ultimately determine the appropriate allocation and recovery of the SMC. Board staff suggests that these considerations should also be part of the lens through which the Board provides its approval of the SME/LDC Agreement itself.

The concern for the electricity consumer as a user of the MDM/R infrastructure and the services related thereto and as a ratepayer is brought into scope not only as an extension of the relationship between the SME and the Distributor, but also more generally and perhaps more fundamentally as part of the Board's objective to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.¹ In Board staff's view, a subset of the consideration of the Board's scope of approval in respect of the form of agreement between the SME and the Distributor must necessarily entail a consideration of protecting the consumer as both an end-user of the infrastructure and services of the MDM/R and as a ratepayer in respect of such infrastructure and services.

Board staff therefore submits that while the scope of the Board's approval of the form of agreement is restricted to those parts of any agreement that are related to the consideration of the roles and responsibilities of the SME and the Distributor in relation to metering and the information required to be exchanged to allow for the conduct of the respective roles and responsibilities, there are two additional filters through which the Board should view the form of agreement:

- (a) acting as a proxy for commercial reasonableness as between the parties as a result of the regulated nature of the transaction/business; and
- (b) protecting consumers as both end-users and ratepayers in relation to the infrastructure and service provided by the MDM/R.

¹ Other Board objectives in relation to electricity are relevant to the consideration of the MDM/R, the SME and the relationships with Distributors, (e.g. OEB Act, section 1(1)(2) To promote economic efficiency and cost effectiveness in the...distribution, sale and demand management of electricity... and 1(1)(3) To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.), however, Board staff is of the view that these are incorporated into the consideration of the SME's costs and of the agreement between the SME and Distributors generally and, therefore, need not be explicitly highlighted for purposes of the Board's approval of the form of agreement.

In Board staff's submission, this translates into the following cascading considerations when the Board is reviewing the evidence before it² with respect to the form of agreement between the SME and Distributors:

1. Does the provision in question relate to the consideration of a role and/or responsibility of the SME or the Distributor (or both)?
2. If so, is the provision related to metering and the information required to be exchanged to allow of the conduct of the role and/or responsibility from #1?
3. Is there a need for the Board to change, revise and add to the provision in question or to add a new provision (provided that it is restricted to the scope in #1 and #2) in light of:
 - a. the regulated relationship between the parties?
 - b. the objective to protect consumers with respect to prices and the adequacy, reliability and quality of electricity service?

(e) Board Determines the "Form of Agreement"

Board staff submits that the scope of the Board approval of the form of agreement should not in any way be dictated or restricted by the type of document provided in the evidence. In other words, the mere fact that certain provisions that describe the respective roles and responsibilities of the SME and the Distributor in relation to metering and the information required to be exchanged to allow for the conduct of the respective roles and responsibilities are filed in evidence as a form of agreement or terms of service or in any other format, should have no bearing on the Board's approval mandate.

If, for instance, there are provisions in the Terms of Service, filed at Ex. D, Tab 3 of the pre-filed evidence, which, on an objective review, are clearly related to the consideration of the roles and responsibilities of the SME and Distributors in relation to metering and the information required to be exchanged to allow for the conduct of the respective roles and responsibilities, then the Board should not be dissuaded from incorporating those provisions into the form of agreement that is the subject of its approval. Without having had the benefit of any form of discovery or examination of

² In Board staff's submission, the evidence before the Board could consist of the pre-filed evidence (the form of agreement filed at Ex. D, Tab 2, the Terms of Service filed at Ex. D, Tab 3 or any other aspect of the pre-filed evidence) or any written or oral evidence introduced by any party that the Board determines should be considered as part of its determination. Please see part (e) of the submission for more detail.

the evidence in this regard, Board staff is unwilling to draw definitive conclusions from the evidence filed by the SME, but at a high level, it appears to Board staff that there are provisions in the Terms of Service that do relate to the roles and responsibilities of the SME and Distributors which are properly within the scope of the Board's approval of the form of agreement.

It may be that after a more comprehensive review of the evidence, the Board determines that certain parts of the evidence which the SME has not characterized as the "form of agreement" are, in the Board's determination, within its scope of approval of the form of agreement. In such case, it is Board staff's submission that the Board can and should incorporate those provisions either into a new form of agreement as defined by the Board or by reference. In other words, in Board staff's view, the Board is not confined to looking only at the evidence that the SME has advanced as the form of agreement in determining what the Board, in the final analysis and determination, has decided is indeed the appropriate form of agreement.

It may also be that new evidence is presented or concerns are raised, either by Distributors or by other parties, that the Board determines should be addressed and that can properly be addressed by defining new roles and responsibilities of the SME and Distributors in relation to metering and the information required to be exchanged to allow for the conduct of the respective roles and responsibilities. In such case, Board staff submits that the Board can and should incorporate new provisions into the form of agreement.

Finally, Board staff is of the view that the Board's scope of approval includes the ability to revise the terms in the form of agreement, provided again that such terms are related to the roles and responsibilities of the SME and Distributors in relation to metering and the information required to be exchanged to allow for the conduct of the respective roles and responsibilities. In the same vein, Board staff is of the view that the Board should include provisions which clearly outline procedures to be followed for any future amendments of the form of agreement. In particular the Board must determine whether and to what extent any such amendments – depending on the purpose of the amendment, the provision being amended or the level of detail involved – will be required to be put before the Board for subsequent approval.

In summary, Board staff submits that the Board can in essence create a form of agreement based on whatever it deems to be necessary to adequately and

appropriately define the roles and responsibilities of the SME and Distributors in relation to metering and the information required to be exchanged to allow for the conduct of these respective roles and responsibilities. The Board is not required to take the form of agreement presented by the SME as a “take it or leave it” proposition. Given the need of the Board to act as a proxy for commercial reasonableness and to protect consumers, in Board staff’s view, the form of agreement ultimately approved by the Board may be made up of provisions from the written or oral evidence provided in the hearing or from the Board as a means of addressing concerns raised by parties, provided that any such provisions fall with the scope of the Board’s approval mandate as articulated herein.

All of which is respectfully submitted.