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BY EMAIL and RESS

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Our File No. 20120100

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2012-0100/211 – Smart Metering Entity – Preliminary Issue

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #1, this letter constitutes SEC's submissions on the preliminary issue set out by the Board.

SEC is in general agreement with the analysis set out by Board Staff in their submissions, and the overall direction of their conclusions. However, we wish to propose a somewhat different way of reaching a similar result.

In principle, SEC believes that the best approach for the Board to take in considering the Agreement is to stop thinking about it as an agreement.

Although technically the Agreement, once signed by the SME and an LDC, will be a binding and enforceable contract, conceptually it is not an agreement as normally understood in law. An agreement is a *consensus ad idem* between two parties who each define their interests and ensure that the document expresses them the way they want. Agreements are, in general, binding precisely because they are entered into voluntarily. The law says that if you make a voluntary promise, and received consideration for doing so, you are then bound to keep that



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promise. In many circumstances, promises which are made for consideration, but are not considered voluntary, are not even enforced in law.

In this case, the Agreement comes within a legal category known as “*contracts of adhesion*”, which simply means agreements in which one party has no say in the contents. They have to sign, whether they actually agree with the terms or not.

The Agreement is one that must be signed by the distributors, and the SME is expressly authorized to require them to sign. Absent the requirement, in both DSC s. 5.4.1 and the SME licence at s. 3.2, that the Agreement must be approved by the Board, the distributor would have no ability to influence the terms of the Agreement. The SME could in theory establish any document they wished (within the statutory framework), and the distributor would be obligated to sign. This is a classic contract of adhesion.

To avoid this clearly unfair situation, both the DSC and the SME licence insert the Board into the process. The practical effect of this is that the Board decides the rules of the relationship between the distributor and the SME. While the overall relationship is of course mandated and circumscribed by legislation and regulation, the rules governing the relationship on a day to day basis must still be determined. The Agreement is the document in which those rules are defined and described. Since neither the SME nor the distributor are able, due to the non-voluntary nature of the relationship, to establish those rules, the Board has the responsibility to do so.

Thus, for all practical purposes the Agreement is not primarily a contract, in the normal sense, but is simply a convenient form in which to set out the rules governing the relationship. It could just as easily be a Code, or a Board direction in a decision, or any number of other binding documents.

Once this is clear, the Board's approval role is also clearer. The Board, in light of the legislation and regulations, is charged with the responsibility to set out the rules governing the relationship between the SME and each distributor. In our submission, each of those rules (and therefore each of the provisions of any agreement the Board approves) must meet three tests:

1. It must be consistent with, and promote the spirit and intent of, the legislation and the regulations.
2. It must be a right, obligation, liability or other requirement that the Board should properly impose on the parties whether or not they agree with it.
3. It must be fair to the parties, and by extension to the ratepayers who are in the end paying for it either way.

From a practical point of view, if the Board looks at this as a set of rules governing the relationship, it can then establish the set of rules that it determines the parties should be required to follow. At that point, it is merely incidental that the form in which those rules are expressed is an Agreement.



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The importance of this approach is that the Board should not consider any provision through the lens of contracting parties (i.e. "Is this a normal provision for a commercial contract?"), but should think of each of the provisions as akin to a rule in a Code (i.e. "Is this a rule that we should, in light of the statutory framework, good policy, and protection of the ratepayers, require the parties to follow?"). The last step, subsequently translating those rules into language suitable for an agreement, is largely a mechanical drafting exercise, and should not in any way change the nature of the rules themselves.

Thus, it is submitted that the scope of the Board's approval of the Agreement is to establish a set of rules governing the relationship between the distributor and the SME. Those rules should meet the tests set forth above, and should not be coloured by the immaterial fact that they will be expressed in an Agreement.

All of which is respectfully submitted.

Yours very truly,

JAY SHEPHERD P. C.

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cc: Wayne McNally, SEC (email)
Interested Parties