

ONTARIO ENERGY BOARD

IN THE MATTER OF subsections 78(2.1), (3.0.1), (3.0.2) and (3.0.3) of the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF subsection 53.8(8) of the Electricity Act, 1998;

AND IN THE MATTER OF Ontario Regulation 453/06 made under the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF an Application by the Independent Electricity System Operator as Smart Metering Entity for an Order fixing a Smart Metering Charge for July 1, 2012 to December 31, 2017;

AND IN THE MATTER OF a proceeding on the Ontario Energy Board's own motion to review the options for and ultimately determine the appropriate allocation and recovery of the Smart Metering charge pursuant to section 19 of the Ontario Energy Board Act, 1998.

**CONSUMERS COUNCIL OF CANADA SUBMISSION
ON THE PRELIMINARY ISSUE**

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PART 1 -INTRODUCTION AND OVERVIEW

1. The Independent Electricity System Operator, in its capacity as the Smart Metering Entity ("SME"), has applied for approval of a monthly Smart Metering Charge ("SMC") to be charged to all licenced electricity distributors ("LDCs") for the period of July 1, 2012, to December 31, 2017, as well as certain incidental relief. The SMC will, once approved, be recovered by LDCs from their ratepayers.
2. The Ontario Energy Board ("OEB") has, pursuant to section 19 of the *Ontario Energy Board Act* (the "*OEB Act*"), commenced a proceeding to review the options for and ultimately determine the appropriate allocation and recovery of the SMC.
3. Pursuant to subsection 21(5) of the *OEB Act*, the OEB has combined the SME application and its own proceeding.

4. In Procedural Order No. 1, the OEB has determined that it will consider the scope of its approval of the proposed agreement between the SME and the LDCs, and has asked for submissions on the following preliminary issue (“Preliminary Issue”):

Given section 5.4.1 of the Distribution System Code (“DSC”) and section 3.2 of the SME Licence (ES-2007-0750), what is the scope of the OEB’s approval of an agreement between the SME and Distributors?

5. These are the Submissions of the Consumers Council of Canada (“Council”) on the Preliminary Issue.

6. For the reasons set out below, the Council submits that the OEB may examine all aspects of the Agreement, including the MDM/R Terms of Service, to determine whether they are prudent, and to determine whether they appropriately protect the interests of ratepayers. The Council submits that the OEB is not restricted to considering merely the form of the Agreement, and whether the Agreement accurately allocates responsibilities between the SME and the LDCs in accordance with regulatory provisions.

7. The Council submits that the overarching obligation of the OEB in considering whether to approve the agreement is to protect the interests of ratepayers, those who are ultimately responsible for the payment of the SME’s costs.

PART 2 -THE REGULATORY FRAMEWORK

8. The functions of the SME, and the respective functions of the SME and the LDCs with respect to smart meters, are prescribed by provisions of the *Electricity Act*, O.R. 393/07 under the *Electricity Act*, the DSC, and the SME Licence. We will not herein set out all of those provisions, as they appear in full in OEB Staff Submission on Preliminary Issue.

9. For purposes of determining the scope of the OEB’s approval of an agreement between the SME and LDCs, the Council submits that the following are the relevant regulatory provisions:

- (i) Section 53.8 of the *Electricity Act* requires that the objects of the SME include a requirement that the recovery of its costs, through just and reasonable rates, be approved by the OEB;
- (ii) Section 78(3.0.1) of the *OEB Act* provides that the OEB may make orders approving or fixing just and reasonable rates for the SME in order for it to meet its obligations under the *OEB Act* or the *Electricity Act*;
- (iii) Section 5.4.1 of the DSC provides as follows:

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 OEB, 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;

- (iv) Section 3.2 of the SME Licence provides as follows:

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 OEB before the Licensee can require licensed distributors to sign the agreement.

PART 3 -ANALYSIS

(A) Section 5.4.1 of the DSC must be read in conjunction with other regulatory provisions to determine the scope of the OEB's authority

10. On its face, section 5.4.1. of the DSC appears to limit the scope of the OEB's approval to that of the form of the agreement and, in particular, whether the form appropriately sets out the respective roles of the SME and the LDCs.

11. Such a restrictive reading of the scope of the OEB's authority would, among other things, have the anomalous result of requiring the OEB to approve provisions that might, for example, give rise to unjust and unreasonable rates or might be contrary to the public interest.

12. The Council submits that a restrictive reading of section 5.4.1 of the DSC is inconsistent with other elements of the regulatory framework. It is inconsistent with the SME Licence, which requires the OEB to approve the agreement and not just its form. It is also inconsistent with the discretion which the *OEB Act* grants to the OEB to approve recovery of the costs of the SME. Since the agreement between the SME and the LDCs will have cost consequences, the OEB must have the discretion to approve the agreement and not merely its form.

13. Section 5.4.1 of the DSC must be read in a way which is consistent with all of the elements of the regulatory framework governing the relationship between the SME and the LDCs.

14. In addition, and as described in greater detail below, such a restrictive reading of the OEB's powers is inconsistent with the terms of the draft agreement and with the SME's own interpretation of the OEB's role.

(B) Section 3.2 of the SME Licence and the OEB's discretion to approve the SME's costs give the OEB a broad scope in approving the agreement

15. Section 3.2 of the SME Licence requires that an agreement between the LDCs and the SME be approved by the OEB. Section 3.2 does not limit the OEB to approving the form of the agreement or to a mere determination that the allocation of responsibilities between the SME and the LDCs is consistent with the relevant regulatory provisions.

16. While section 3.2 does require the agreement to set out the respective roles of the SME and the LDCs, it does not limit the OEB's approval to that component of the agreement. On the wording of section 3.2, the OEB's authority to approve the agreement is separate from the setting out of the respective roles of the SME and the LDCs.

17. In addition, the requirements that the costs of the SME be approved, for recovery in rates, combined with the OEB's discretion in approving those costs, requires that the OEB

have the scope to review all of the provisions of the agreement. Were it otherwise, the OEB's authority to approve costs would be improperly constrained.

(C) The provisions of the draft agreement require that the OEB have a broad scope of approval

18. The provisions of the draft agreement (Exhibit D, Tab 2) require that the OEB's scope of approval be broad. The following provisions of the draft agreement demonstrate that point:

- (i) Article 2 describes the respective roles and responsibilities of the SME and an LDC. The SME asserts, in Exhibit D, Tab 1, page 6, that "the language strikes an appropriate balance that ensures a successful operation of the MDM/R while protecting the interests of both the SME and the LDCs". The OEB must determine whether the interests of the LDCs, and of their ratepayers, are adequately protected;
- (ii) Section 3.2 of the agreement establishes a SME Steering Committee "as a forum to represent stakeholders". The OEB must determine whether the interests of all stakeholders are adequately represented in that forum;
- (iii) The OEB must determine whether the MDM/R Terms of Service form part of the agreement and, if so, whether the Terms of Service are appropriate;
- (iv) Article 7 of the draft agreement limits the exposure of SMEs and LDCs to damages. The OEB must determine whether those limitations are appropriate;
- (v) The OEB must determine whether the provisions of the agreement, dealing with the allocation of service credits in the event of a failure by IBM Canada, or any other OSP, are appropriate;
- (vi) The OEB must determine whether the dispute resolution mechanisms, set out in Article 8 of the Agreement, are appropriate, and, in particular, whether the OEB has the jurisdiction to determine disputes between the SME and an LDC.

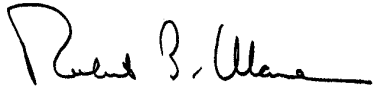
19. It would appear that the SME itself acknowledges, implicitly or otherwise, that the OEB has a broad scope for approval of the agreement. For example, in Exhibit D, Tab 1,

Page 11, the SME effectively asks the OEB to “explicitly endorse the proposed approach to liability” set out in the agreement.

(D) The limits on the scope of the OEB’s authority

20. The Council acknowledges that there are some limits on the scope of the OEB’s authority to approve the agreement. The OEB cannot alter the allocation of responsibilities, as between the SME and the LDCs, as those are prescribed in the relevant regulatory provisions. What the OEB can do, however, is determine whether the agreement appropriately reflects those allocations of responsibility.

All of which is respectfully submitted.



Robert B. Warren
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