

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 being commenced on the Ontario Energy Board's own motion, pursuant to section 19 of the *Ontario Energy Board Act, 1998*.

**SUBMISSIONS OF THE SMART METERING ENTITY ON THE
PRELIMINARY ISSUE**

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1. These are the submissions of the Independent Electricity System Operator ("IESO") in its capacity as the Smart Metering Entity ("SME") on the preliminary issue identified by the Board in Procedural Order No. 1:

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?

2. The SME has reviewed the submissions of Board Staff and those of the intervenors. For the reasons set out below, the SME does not support the three "cascading considerations" proposed by Board Staff and submits that when undertaking its review, the Board should:

- (a) review the reasonableness of the SME/LDC Agreement negotiated by the SME with distributor representatives and the Electricity Distributors Association ("EDA") in its entirety and provide direction on the three specific issues identified in paragraph 8 of the Application;
- (b) maintain the SME/LDC Agreement as a single agreement rather than dividing it into approved and unapproved sections;
- (c) maintain the Terms of Service as a subordinate document from the SME/LDC Agreement; and

- (d) consider all of the Board's relevant statutory objectives as well as the regulatory and contractual constraints under which the SME and distributors operate when conducting its review.

The Board should review the reasonableness of the SME/LDC Agreement in its entirety

3. The Board derives its approval authority over the SME/LDC Agreement from section 5.4.1 of the Distribution System Code ("DSC") and section 3.2 of the SME licence, which have been excerpted below for ease of reference:

Distribution System Code, 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.

Smart Metering Entity Licence, ES-2007-0750, 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.

4. Board Staff have likened these provisions to other sections of the DSC and other codes that mandate the use of Board-approved agreements. The intervenors have generally agreed that the Board has broad authority to modify the SME/LDC Agreement by deleting, amending or adding provisions. While the SME does not dispute that the Board has authority over the SME/LDC Agreement, there are important differences between these provisions and the other Code provisions referenced by Board Staff that should shape the scope of the Board's review.

5. By way of comparison, sections 6.2.7 and 6.2.22 of the DSC require a distributor to enter into a connection agreement when connecting a new generation customer and state that the agreement "shall be in the form set out in Appendix E". Similarly, section 4.1.1 of the Transmission System Code ("TSC") requires a transmitter to enter a connection agreement that "shall be in the form set out in the applicable version of the connection agreement set out in Appendix 1." The drafting of the standard form connection agreements in those cases was done through a public stakeholdering process led by the Board.

6. Section 5.4.1 of the DSC and section 3.2 of the SME licence differ from these other provisions because they do not require the SME to use a standard-form agreement drafted by the Board. Instead, these provisions grant the SME and distributors primary responsibility for negotiating and drafting the

agreement with the Board having an oversight role. This interpretation is consistent with the rationale for section 5.4.1 of the DSC identified in the Board's Notice of Amendment to a Code (EB-2007-0032) dated June 27, 2007:

The Board remains of the view that it is appropriate for licensed distributors and the SME (or in the interim period the IESO) to enter into an agreement regarding metering in order that there be greater clarity as to the parties' respective roles and responsibilities. The Board also remains of the view that it should have oversight of the terms and conditions of that agreement.

7. As detailed in the Pre-Filed Evidence, the SME consulted extensively with distributor representatives and the EDA when developing the SME/LDC Agreement. In the SME's view, it is neither accurate nor useful to approach the SME/LDC Agreement as akin to a rule in a Code or as a "contract of adhesion" as argued by the School Energy Coalition ("SEC"). The SME/LDC Agreement was negotiated at arm's-length between sophisticated entities (each of whom is regulated by the Board). The legislative and regulatory provisions relating to the smart metering initiative set out the respective roles and responsibilities of the SME and distributors at a high level and it is the parties themselves that are best positioned to negotiate the detailed allocation of roles and responsibilities within those parameters.

8. The proposed version of the SME/LDC Agreement included in the Pre-Filed Evidence at Exhibit D-2 represents a comprehensive agreement that was

agreed upon through the usual give and take of contractual negotiations. The modification of individual provisions by the Board in this proceeding could fundamentally alter the deal negotiated between the parties and have unintended consequences that may not be immediately apparent. In light of the substantial work that has been done to negotiate the proposed agreement, the SME does not believe it would be a productive exercise for the Board to now engage in a clause-by-clause redrafting of the agreement through this proceeding. In this regard, the SME agrees with the submission of the Association of Major Power Consumers of Ontario ("AMPCO") that the SME/LDC Agreement "must ultimately pass the Board's litmus test; but, the Board, as regulator, should not also draft provisions of that agreement."

9. Accordingly, the SME submits that the Board should review the reasonableness of the proposed SME/LDC Agreement in its entirety and be cautious about modifying or removing provisions that have been negotiated between the SME and the distributors. In addition, a fundamental component of EDA support for the SME/LDC is Board adjudication of the three conditions for support identified in paragraph 8 of the Application, which request that the Board:

- (a) endorse the proposed approach to liability management contained in Article 7 of the SME/LDC Agreement and providing distributors

with a regulatory mechanism to promptly recover through rates prudent costs incurred by a distributor in the event of a failure of the Meter Data Management and Repository (the "MDM/R") failure that disrupts the distributor's operations;

- (b) endorse the SME's proposal that a distributor could seek review of an amendment to the MDM/R Terms of Service by bringing an application to amend the SME/LDC Agreement; and
- (c) agree that the Board will determine any disputes between distributors and the SME related to the SME/LDC Agreement that cannot be resolved through good faith negotiation as provided for in section 8.1 of the SME/LDC Agreement.

10. In the event that the Board is unable to endorse these proposals, or questions the reasonableness of any of other provisions of the SME/LDC Agreement, the SME requests that the Board articulate its concerns and refer the agreement back to the SME and the EDA for renegotiation before making a final order.

The SME/LDC Agreement should be maintained as a single agreement

11. Board Staff have raised the possibility of dividing the SME/LDC Agreement into an "approved" segment (containing provisions related to roles and responsibilities of the SME and the distributor) and an "unapproved"

segment (consisting of the remaining provisions). This approach was specifically endorsed by the Canadian Manufacturers & Exporters ("CME") in its submission.

12. The SME does not support the division of the SME/LDC Agreement into separate approved and unapproved segments. The term "roles and responsibilities" in section 5.4.1 of the DSC should be interpreted broadly to include the full range of ancillary matters that must be dealt with for the agreement to operate effectively. To give an example, allocating a particular responsibility to a party will be ineffective if the SME/LDC Agreement does not address how the potential liability associated with not performing that responsibility is to be handled or how a dispute related to that responsibility is to be resolved. In the absence of a clear boundary to "roles and responsibilities", the SME submits that attempting to divide the SME/LDC Agreement into approved and unapproved segments will ultimately prove to be an arbitrary distinction.

13. The SME also questions the practical utility of dividing the agreement into separate approved and unapproved segments and fears that the result will be, as AMPCO stated in its submission, "unnecessary and cumbersome." One possibility is that the SME will have the legal authority to compel a distributor to execute the approved segment of the agreement, but will face the prospect of

negotiating individual agreements on the unapproved sections with each of the distributors receiving service from the MDM/R. The uncertainty created by such an outcome would not be desirable for the SME, distributors or other stakeholders.

14. Moreover, as set out above, the SME/LDC Agreement was negotiated as a comprehensive agreement between sophisticated parties dealing at arm's-length. The parties have specifically turned their minds to the matters they determined should be addressed in a Board-approved agreement for the proper functioning of the relationship between the SME and a distributor. When negotiating the SME/LDC Agreement, the parties did not contemplate a two-tiered contract with approved and unapproved provisions. The SME believes it would be inappropriate for the Board to impose such a structure at this stage.

The Terms of Service should not be incorporated into the SME/LDC Agreement

15. Board Staff note that certain provisions of the Terms of Service appear to relate to the respective roles and responsibilities of the parties and suggest the Board could incorporate such provisions into the approved SME/LDC Agreement.

16. The SME does not dispute that the Terms of Service contain provisions that relate to the roles and responsibilities of the parties; the very purpose of the Terms of Service (and the numerous manuals that underlie the Terms of Service)

is to define the roles and responsibilities of the parties in precise detail. As detailed in paragraph 95(b) of Exhibit D-1 of the Pre-Filed Evidence, the structure of the SME documentation was based on the model of the IESO Market Rules so that the parties would not be required to return to the Board to modify the terms of the SME/LDC Agreement to deal with a myriad of operational matters. Preserving flexibility is particularly important in this initial transitional stage of the operation of the MDM/R.

17. The decision on what matters to delegate to the Terms of Service was made in consultation with distributor representatives and the EDA. The SME included a copy of the Terms of Service as Exhibit D-3 in the Pre-Filed Evidence for information purposes, but is not requesting Board approval of the Terms of Service. The SME submits that the Board should maintain the provisions of the Terms of Service separate from the SME/LDC Agreement so as to preserve flexibility over those matters during this transitional stage.

18. The SME also notes that if an issue with the Terms of Service arises that a distributor believes requires Board review, it will be able to get Board adjudication on that issue under the approach proposed in paragraph 8(b) of the Application. This will provide distributors with a mechanism to appeal provisions of the Terms of Service to an independent decision-maker.

The Board should consider the entire regulatory regime

19. Board Staff and the intervenors argue that the Board's review of the SME/LDC Agreement should focus on whether the agreement is consistent with the protection of "the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service."

20. This is a core statutory objective of the OEB and the SME does not disagree that it is an important consideration in the Board's review. However, this is not a scenario where the Board is examining a contract between a regulated and unregulated entity where there is the potential for inappropriate subsidization by ratepayers. Both the SME and the distributors are subject to rate regulation by the Board. The SME's costs will be paid by distributors and passed onto the distributors' ratepayers. For this reason, the Board's review of the agreement should be thorough but seek to avoid unnecessary duplication of cost review that would otherwise be covered in the Smart Metering Charge application or a distributor's rate application.

21. In addition to the impact on consumers, the Board must also have regard for its other statutory objectives when reviewing the SME/LDC Agreement, which include to "promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario" and to

“facilitate the implementation of a smart grid in Ontario.” A proper review must consider the regulatory scheme and all of the relevant objectives equally.

22. Finally, the Board should be cognizant of the contractual and regulatory constraints under which the parties operate. These constraints were articulated at paragraph 94(c) of Exhibit D-1 of the Pre-Filed Evidence):

The SME/LDC relationship is not a standard commercial relationship – The relationship between the SME and the LDCs is a unique one that is subject to a number of constraints not present in standard commercial relationships. Notably, as the counterparty to IBM Canada in the MDM/R Agreement (and any future operational service provider (“OSP”)), the SME effectively acts as a contract manager on behalf of all LDCs, but is also constrained by the provisions of the MDM/R Agreement. Further, the activities of both the SME and the LDCs are ultimately subject to oversight and regulation by this Board and the parties are required to enter into an agreement by the Distribution System Code.

23. As noted, the SME is subject to contractual constraints under the MDM/R Agreement with IBM (which was negotiated on a commercial basis after selecting IBM through a competitive procurement process). There is a risk that if the Board were to modify the SME/LDC Agreement in a manner inconsistent with the provisions of the MDM/R Agreement, it could place the SME in a position of being unable to satisfy one set of its contractual obligations. If the Board has concerns with particular provisions of the proposed SME/LDC

Agreement, it should provide the parties with an opportunity to renegotiate the SME/LDC Agreement before issuing a final order.

Conclusion

24. For the foregoing reasons, the SME does not believe the three “cascading considerations” advocated by Board Staff at page 13 of its submission provide an appropriate framework for reviewing the SME/LDC Agreement.

25. The SME is concerned that the proposed considerations fail to recognize that the SME and distributors are primarily responsible for negotiating the agreement; are premised on a narrow interpretation of the parties’ roles and responsibilities; will result in an unnecessary division of the SME/LDC Agreement and Terms of Service into approved and unapproved segments; and do not consider the complete regulatory regime and all of the relevant Board objectives.

26. The SME submits the Board’s review of the SME/LDC Agreement should be premised on the following issue:

Is there a need for the Board to change, revise and add to the negotiated SME/LDC Agreement in light of the regulatory regime for the smart metering initiative, the Board’s statutory objectives, and the contractual and regulatory constraints under which the parties operate?

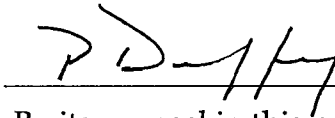
27. In addition, the Board should consider the three specific issues identified in paragraph 8 of the Application, which have been recast below:

- (a) Does the Board endorse the proposed approach to liability management contained in Article 7 of the SME/LDC Agreement and will it provide distributors with a regulatory mechanism to promptly recover through rates prudent costs incurred by a distributor in the event of an MDM/R failure that disrupts the distributor's operations?
- (b) Does the Board endorse the SME's proposal that a distributor could seek review of an amendment to the MDM/R Terms of Service by bringing an application to amend the SME/LDC Agreement?
- (c) Will the Board determine any disputes between distributors and the SME related to the SME/LDC Agreement that cannot be resolved through good faith negotiation as provided for in section 8.1 of the SME/LDC Agreement?

28. If the Board is unable to endorse these three conditions or approve the SME/LDC Agreement as drafted, the SME requests that the agreement be referred back to the SME and the EDA for renegotiation in accordance with the Board's directions before a final order is issued.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

**INDEPENDENT ELECTRICITY SYSTEM
OPERATOR**

A handwritten signature in black ink, appearing to read "P. Duffy", is written over a horizontal line.

By its counsel in this proceeding

Patrick G. Duffy