NORTON ROSE

Barristers & Solicitors / Patent & Trade-mark Agents

Norton Rose Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 CANADA

F: +1 416.216.3930
nortonrose.com

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Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
Suite 2700
2300 Yong Street
Toronto ON M4P 1E4

Your reference EB-2012-0100	Direct line +1 (416) 216-1927
Our reference 01009188-0044	Email john.beauchamp@nortonrose.com

Dear Ms. Walli:

Independent Electricity System Operator ("IESO"), in its capacity as Smart Metering Entity ("SME")
Determination of Smart Metering Charge ("SMC") – EB-2012-0100
Determination of Appropriate Allocation and Recovery of SMC – EB-2012-0211

We are counsel to the Electricity Distributors Association ("EDA") and write this letter on their behalf. The EDA represents the interests of 75 publicly and privately owned local distribution companies ("LDCs") in Ontario, and provides members with advocacy and representation in the legislative and regulatory environment and the electricity market in Ontario.

By way of Procedural Order No. 1 (dated June 22, 2012), the Board requested submissions on the following issue (the "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 EDA's members will be a party to the agreement between the SME and distributors (the "SME/LDC Agreement"). As per Procedural Order No. 2 issued by the Board on July 6th, 2012, the EDA offers the following submissions on the Preliminary Issue.

<u>Submissions on Preliminary Issue</u>

Section 5.4.1 of the Distribution System Code ("DSM") reads as follows:

> 5.4 Agreement with SME or IESO Relating to Metering
>
> 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

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> the IESO in relation to metering and the information required to be exchanged to allow for the conduct of these respective roles and responsibilities.

Section 3.2 of ES-2007-0750 (the “SME License”) 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.

Based on the wording of these provisions, the EDA agrees that the Board must approve the form of the SME/LDC Agreement, which will set out the following: 1) the respective roles and responsibilities of the distributor and the SME in relation to metering; and 2) the information required to be exchanged to allow for the conduct of those respective roles and responsibilities. The SME/LDC Agreement filed by the IESO speaks to both of these issues.

We would argue, however, that nowhere in the DSC or SME License is it mandated that the contract only encompass these topics. Indeed, for any SME/LDC Agreement to be viable, it must address the commercial realities of the relationship. The proposed SME/LDC Agreement is operational in nature and must be flexible enough to support a MDM/R system that will develop over time. The implementation of the MDM/R will not only require a great deal of cooperation on the part of each party, but will also involve the sharing of sensitive data. Consequently, any agreement must address, among other things: how either party might put forward an amendment (to the SME/LDC Agreement or Terms of Service); how MDM/R Manuals and Procedures (“MDM/R Manuals”) might be incorporated; rules regarding access to and disclosure of MDM/R Data; intellectual property matters; liability and indemnification; dispute resolution; and any opportunities for assignment. As explained below, the parties went to great lengths to ensure that these issues are covered off in the current version.

In its submission on the Preliminary Issue, Board Staff contends that “the Board is not required to take the form of agreement presented by the SME as a ‘take it or leave it’ proposition. While we agree that it is not necessarly mandated that the Board accept the agreement on a “take it or leave it” basis, we do believe the Board should allow the SME and LDCs to negotiate a contract that satisfies the requirements of the DSC and SME licence and recognizes the commercial necessities of the relationship. Indeed, the EDA supports AMPCO’s submissions on this issue – while the Board must ultimately approve the elements of the SME/LDC Agreement pertaining to “roles and responsibilities” and “information exchange”, it should not begin revising, excising or imposing provisions of the agreement (which are invariably inter-related). Rather, it should allow the parties to develop a package agreement that suits the needs of the situation.

For the reasons set out below, the EDA requests that the Board not unilaterally impose any revisions to the proposed agreement and either (a) accept the proposed SME/LDC Agreement on an “as is” basis, or (b) send it back to the parties with directions and allow them the opportunity to renegotiate a new version for Board approval.

When reviewing the SME/LDC Agreement, the Board must be cognisant of the following issues:

The Expertise of the IESO and EDA Members: *Ontario Regulation 452/06 – Additional Objects of the IESO* establishes the following as objects of the IESO: 1) to plan, manage and implement the smart metering initiative or any aspect of the initiative; and 2) to oversee, administer and deliver the smart metering initiative or any aspect of the initiative. LDCs, on the other hand, will be charged with performing various obligations under the agreement, including the transmission of smart metering data and ensuring the smart meters and accompanying equipment satisfy the necessary functional and technical specifications. The Board should view the SME/LDC Agreement and its development in this context. The proposed contract is the product of extensive negotiations between the SME charged with administering the initiative and those entities who manage the advanced metering infrastructure that forms the backbone of the system. The expertise that these parties brought to the table and extensive efforts they put forward in preparing the agreement (additional details are provided below) should be recognized by the Board when reviewing the agreement.

The IESO's Role is Transitional: As discussed in the IESO's application, because the MDM/R is integrated into an LDC's "meter-to-bill" process, the IESO believes it is appropriate to transition the SME role from the IESO to the control of the LDCs. The SME/LDC Agreement was developed in a manner that acknowledges this setup. The IESO was mindful of the fact that LDCs must be fully engaged in the implementation of the Smart Metering System Implementation Program and the parties worked on a flexible document that would allow for a smooth transfer. The agreement in its current form is forward-looking, and the Board should not impose any revisions that could hinder the anticipated transition.

Ratepayer Interests: Board Staff, Consumer Council of Canada and the Vulnerable Energy Consumers Coalition all contend that the Board's scope of approval in respect of the SME/LDC Agreement must consider the interests of ratepayers. The EDA submits that the negotiated agreement was developed by the SME and distributors with the interests of ratepayers in mind. Regardless, parties should bear in mind that the Board and all interested participants will be given the opportunity to fully assess the reasonableness of the proposed smart metering charge and rate structure during the course of this proceeding. To that end, the EDA does not believe the Board must engage in a full analysis of cost implications and the effect on ratepayers at this time.

The SME/LDC Relationship is Not a Standard Commercial Relationship: As discussed in the IESO's application, the relationship between these entities is unique in that it is subject to various restrictions not found in other standard commercial relationships.

On one hand, as the counterparty to the operational service provider in the MDM/R Agreement, the IESO is constrained by its agreement with IBM Canada. The SME/LDC Agreement was negotiated with the MDM/R Agreement in mind and, should the Board decide to revise terms in the SME/LDC Agreement, it must be mindful of how any changes might affect the SME's contractual relationship with IBM.

On the other side, the SME/LDC Agreement will be used by 75 separate LDCs and must be flexible enough to address each organization's individual circumstances. The SME and LDC members worked hard to ensure that the proposed agreement was flexible enough to respond to the ongoing development of the MDM/R system (without requiring constant applications to the Board). The Board should thus be wary of inserting any revisions which may offset this flexibility.

Extensive Good Faith Negotiations and Party Concessions: The EDA has consulted with individuals who were involved in the negotiations between the SME and LDC representatives in developing this agreement. As stated in the SME's application (see Exhibit D, Tab 1, Page 1, Para 92), LDC representatives and the SME began consulting on the proposed agreement in 2007. The negotiations were conducted in good faith and lasted for months on end, with both parties offering numerous concessions in order to reach a consensus.

Certain provisions were the subject of extensive negotiation. Discussions relating to the governance structure of the steering committee, audit requirements and liability and indemnification were very time-consuming, and required a great deal of give-and-take from both sides of the table. The settled-upon liability and indemnification provisions are particularly important to the EDA, as they provide a regulatory mechanism to promptly recover any costs incurred by an LDC in the event of an MDM/R failure that disrupts operations. As discussed in the IESO's application, this mechanism is imperative to the financial viability of the system – it will provide potential lenders with the assurance they need in order to grant LDCs access to financial and other resources required to respond to failures. From the EDA's perspective, these provisions are an essential component of the SME/LDC Agreement and their importance cannot be overstated.

Other topics requiring extensive discussion included the delegation of roles and responsibilities (as between the SME/LDC Agreement and the Terms of Service) and the processes under which these instruments can be amended. As discussed in the IESO's application, the Terms of Service are subordinate to the SME/LDC

Agreement and outline the operational details of the MDM/R (e.g. technical interface design, invoicing procedures, etc.) With this in mind, the SME and LDCs sought an arrangement which (a) respects the need for Board oversight, and (b) does not encumber the Board with frequent applications on operational or technical matters. Thus, while the proposed agreement requires Board approval for any amendment to the SME/LDC Agreement (article 10.1), it does not require Board approval for amendments to the Terms of Services (article 3.4). While LDCs can always seek review of an amendment to the Terms of Service as a last resort (see Exhibit D, Tab 1, Page 8, Para 106 of the IESO application), this ensures that the Board is not burdened with hearing an application every time operational matters in the Terms of Service require modification.

Finally, Board Staff submits that the wording of the DSC and the fact that it requires a distributor to enter into the agreement in a form approved by the Board creates the potential for an "imbalance of power". The School Energy Coalition ("SEC") goes further in its submission, describing the proposed agreement as a "contract of adhesion" (wherein distributors have no ability to influence the terms of the Agreement), resulting in a "clearly unfair situation". The SEC also contends that the SME and LDCs are incapable of establishing rules for the relationship due to its non-voluntary nature. With respect, the EDA believes that any supposed power imbalance has been negated through the years of good faith negotiations that went into developing the SME/LDC Agreement. LDCs were engaged every step of the way, and both sides offered considerable concessions in reaching a solution. Indeed, the EDA and its members would not be supporting the SME/LDC Agreement if they were not satisfied with the balance of the results.

Conclusion:

For the reasons mentioned above, the EDA formally requests the Board approve the form of the SME/LDC Agreement filed by the IESO in its entirety. Should the Board disagree or take issue with any aspect of the SME/LDC Agreement, we would request that it send the SME/LDC Agreement back to the parties with directions and allow them the opportunity to renegotiate a new version for Board approval.

All of which is respectfully submitted.

Regards,

Original signed by

John Beauchamp

JB/mnm

Cop(y/ies) to: All interested parties