



EB-2012-0100
EB-2012-0211

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*.

DECISION ON THE PRELIMINARY ISSUE
AND
PROCEDURAL ORDER NO. 3

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, 1998*. 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.

The IESO, in its capacity as the SME, has applied to the Ontario Energy Board (the "Board") for approval of a Smart Meter Charge ("SMC") of \$0.806 per Residential and General Service <50kW customer per month which the IESO proposes to collect from all licensed electricity distributors ("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 assigned File No. EB-2012-0100 to this application.

Pursuant to section 19 of the Act, the Board 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 assigned File No. EB-2012-0211 to this proceeding.

Pursuant to its powers under section 21(5) of the Act, 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 (the "Combined Proceeding").

The Board issued a Notice of Application May 18, 2012 with respect to this Combined Proceeding.

By way of letter issued on May 31, 2012 the Board deemed the Electricity Distributors Association ("EDA") and distributors to be intervenors in the Combined Proceeding.

On June 22, 2012, the Board issued its Decision on intervenor requests and cost eligibility as well as Procedural Order No. 1.

In Procedural Order No. 1, the Board 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 ES-2007-0750, what is the scope of the Board’s approval of an agreement between the SME and Distributors?

On July 6, 2012, the Board issued Procedural Order No. 2 granting the EDA’s request to file submissions on the Preliminary Issue at the same time as the SME.

Summary of Comments on the Preliminary Issue

Submissions on the Preliminary Issue were received from Board staff, Hydro One Networks Inc. (“Hydro One”), the Association of Major Power Consumers in Ontario (“AMPCO”), the Canadian Manufacturers and Exporters (“CME”), the Consumers Council of Canada (“CCC”), the Vulnerable Energy Consumers Coalition (“VECC”), Energy Probe, the School Energy Coalition (“SEC”) and Just Energy and by the SME and the EDA in reply.

Board staff submitted that as per the DSC and SME Licence, the licensed electricity Distributors are required to enter in an agreement and the agreement must be approved by the Board. Board staff also submitted that the scope of the Board’s approval in respect of the form of the agreement is restricted to those parts of any agreement that are related to the consideration of the roles and responsibilities of the parties involved and must be in relation to either metering or the exchange of information to allow for the conduct of the respective roles and responsibilities.

Board staff referred to the *Electricity Act, 1998* and Ontario Regulation 393/07 which describe the roles and responsibilities of the SME and Distributors in relation to the MDM/R.

Board staff also argued that the Board should be guided by the nature of the relationship between the SME and the Distributors and in particular by the fact that it is not a standard commercial relationship. The relationship between the parties is legislated. Distributors are required to enter an agreement with the SME in a form

approved by the Board. Board staff submitted that the Board acts as a proxy for commercial reasonableness between the parties due to the regulated nature of the transaction. Board staff also highlighted the fact that consumers are likely to be paying the costs associated with the fulfillment of the obligations of the parties and that the Board's review must consider the protection of 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 also submitted that the Board determines the form of the agreement and is not restricted by the type of document provided in evidence. New provisions may be added and revisions made to the extent that they are related to the roles and responsibilities.

VECC indicated that it had reviewed the submissions by Board Staff and generally supported the positions.

CME agreed with the submissions of Board Staff and VECC that, when determining the appropriateness of provisions of a proposed agreement related to "roles and responsibilities" and "information exchange", the Board should be mindful of its role in assuring that the costs to be recovered from ratepayers are reasonable.

CME submitted further that the Board's prior approval mandate extends to all provisions in the proposed Agreement that can reasonably be regarded as related to "roles and responsibilities" of each of the parties and the "exchange of information" needed to accommodate the performance by the parties of their respective roles and responsibilities.

AMPCO submitted that the role of the Board as regulator, in this situation is particularly important because, as Board Staff suggests, "consumers are likely to be paying the costs associated with the fulfillment of the obligations of the parties outlined in the form of agreement." AMPCO did not, however, agree with Board staff's position that the Board could revise the terms of the Agreement, indicating that the elements of the Agreement should be left to the parties to develop.

The CCC submitted that the Board 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.

SEC generally agreed with the analysis set out by Board Staff, and the overall direction of staff's conclusions. However, SEC proposed an alternative way of reaching a similar result, indicating that the best approach for the Board to take in considering the Agreement is not to view it as an agreement. SEC argued that the Agreement is a contract of adhesion in that one party, the Distributors, has no say in the contents and is required to sign the contract. The Agreement must be signed by the Distributors, and the SME is expressly authorized to require them to sign. In SEC's submission, absent the requirement, in both s. 5.4.1 of the DSC and s. 3.2 of the SME Licence that the Agreement must be approved by the Board, the Distributor would have no ability to influence the terms of the Agreement. In SEC's submission, the SME could in theory establish any document they wished (within the statutory framework), and each distributor would be obliged to sign.

SEC submitted that to avoid this "clearly unfair situation", both the DSC and the SME Licence insert the Board into the process. The practical effect of this, in SEC's submission, is that the Board decides the rules of the relationship between the Distributors and the SME. While the overall relationship is mandated and circumscribed by legislation and regulation, the rules governing the relationship on a day to day basis must still be determined. SEC's submission is that the Board is charged with the responsibility to set out the rules governing the relationship between the SME and each distributor.

SEC's submission is that the Agreement could just as easily be a Code, or a Board direction in a decision, or any number of other binding documents. SEC argued that the scope of the Board's approval of the Agreement is to establish a set of rules governing the relationship between each distributor and the SME. SEC argued that the rules "must be:

1. consistent with, and promote the spirit and intent of, the legislation and the regulations.
2. a right, obligation, liability or other requirement that the Board should properly impose on the parties whether or not they agree with it.

3. fair to the parties, and by extension to the ratepayers who are in the end paying for it either way.”

Energy Probe indicated that it was in substantial agreement with Board staff’s submissions and adopted the submissions of SEC, in general and the last paragraph in particular:

“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.”

Hydro One submitted that it is of the view that the provisions set out in section 3.2 of the SME Licence and in section 5.4.1 of the DSC provide the Board with full authority to establish the standard terms of all agreements to be entered into between Distributors and the SME or the IESO relating to metering.

Just Energy submitted that the scope of the Board’s approval of an agreement between the SME and Distributors should specifically include the format in which information will be exchanged in order for these two entities to conduct their roles and responsibilities under the Agreement. The Board’s consideration of the format of this information should include a consideration of responsibilities of the above noted parties that are not addressed within the Smart Metering Agreement itself.

In order to discuss and make determinations regarding the information required to be exchanged between the SME and Distributors under the Agreement, Just Energy submitted that the Board must consider all uses for which that information has already been mandated. Just Energy submitted further that electricity retailers should be permitted to participate in any consultations or proceedings which aim to determine the nature, format, communication or other characteristics of the information to be exchanged as a result of the Agreement.

The EDA submitted that Board must approve an agreement which contains roles and responsibilities and information to be exchanged, but the Agreement should not be limited to these provisions and the Board is not required to accept the Agreement on a

“take it or leave it” basis, but should allow parties to negotiate a contract that satisfies both sides.

The EDA also submitted that the Agreement is the result of extensive good faith negotiations and party concessions and provisions such as governance structure, audit requirements, liability and indemnification are essential components. The EDA is of the view that the structure of the Agreement and the terms of service respects Board oversight but does not burden the Board with frequent applications on operational and technical matters.

The SME submitted that the Agreement was negotiated at arm’s length by sophisticated entities, that it does not support the “cascading considerations” of Board staff and expressed that the Agreement must be reviewed for reasonableness in its entirety.

The SME submitted that modification of individual provisions could fundamentally alter the negotiated deal, that the Agreement should be maintained as a single agreement and that it does not support segmenting the agreement into approved and unapproved sections as suggested by Board staff.

The SME indicated that a fundamental component of EDA support of the Agreement is adjudication of the 3 specific issues outlined in the pre filed evidence regarding liability management; provision for review of amendments to the Agreement; and dispute determination. The SME submitted that if the Board is unable to endorse the 3 provisions, it should refer the Agreement back to the SME and EDA for further negotiations before making a final order.

The SME also submitted that the Board’s review should be premised on the following question:

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?

Decision on the Preliminary Issue

The Board accepts the views of Board staff and SEC regarding the scope of the Board's approval of the Agreement between the SME and Distributors. The Board's scope of approval includes the approval of a set of rules that governs the relationship between the SME and Distributors in the public interest – but only those rules that are required to operationalize the relationship between the SME and Distributors. The Board is of the view that the SME exists as a matter of government policy and the Board is required to oversee the relationship between the SME and Distributors vis-à-vis the MDM/R in the public interest.

It is clear in the Board's view that the relationship between the SME and the Distributors is not a standard commercial relationship. Neither party can go elsewhere, nor do they set the price. Neither party owns the information and/or data that are contained in the MDM/R and neither party pays for the creation, storage or management of that information.

The nature of the relationship between the SME and Distributors necessitates that the Board discharge its approval mandate in the public interest.

The Board is therefore charged with approving or if required, setting, the rules by which the parties must abide.

More particularly, the Board will approve terms that are restricted to defining the roles and responsibilities of the SME and each individual distributor provided that:

- (a) those roles and responsibilities relate to metering or the exchange of information to allow for the conduct of the respective roles and responsibilities; and
- (b) those roles and responsibilities reflect ratepayer considerations, and, are in the public interest.

The Board is mindful of the efforts that the SME, the EDA and Distributors have put into developing the Agreement and related Terms of Service filed in evidence and will use those documents as a basis for its review. The Board notes, however, that it is not wed to these documents in discharging its approval mandate. The Board will determine the

extent to which it may not be appropriate in the circumstances of codifying the rules by which regulated parties must abide, for the Board to use commercial terms to define and regulate the relationship between them.

Having determined the scope of its approval, the Board will make provision for oral submissions on the appropriate application of its mandate to the Agreement and Terms of Service filed in evidence. Specifically, the Board seeks submissions:

- first as to whether and why each existing clause (either as drafted or with proposed amendments) is (a) necessary for purposes of defining 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; and (b) in the public interest;
- second, whether any additional clauses are required; and
- third, what, if any clauses are out of the scope of the Board's approval in their entirety.

The SME, the EDA and any Distributors that wish to make submissions independently of the EDA will make submissions in chief, followed by responding submissions from Board staff and intervenors, followed by reply from the SME, the EDA and any Distributors that made submissions in chief.

The Board considers it necessary to make provision for the following procedural matters. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. An oral hearing will be held at the Board's offices at 2300 Yonge Street on the 25th floor **on September 20 and 21, 2012** for submissions on the application of the Board's scope of approval. The oral hearing will commence at 9:30 a.m. in the Board's North Hearing Room.

All filings to the Board must quote the file number, EB-2012-0100/EB-2012-0211, be made through the Board's web portal at <https://www.errr.ontarioenergyboard.ca>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document

Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to boardsec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Michael Bell at michael.bell@ontarioenergyboard.ca.

Issued at Toronto, August 2, 2012.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary