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Your reference
EB-2012-0100 /
EB-2012-0211

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Dear Ms. Walli:

Approval of the SME/LDC Agreement EB-2012-0100/EB-2012-0211

The purpose of this letter is to address two minor matters that arose during the Board's hearing on the approval of the SME/LDC Agreement on September 20, 2012, and is further to the letter to you from Mr. Duffy (counsel to the SME) of October 2, 2012.

Assignment (Article 10)

With respect to the assignment provision, the Board Panel inquired about the importance of the final sentence of section 10.4 given that the Distribution System Code (DSC) requires LDCs to sign the SME Agreement when requested to do so by the SME. The relevant excerpts are set out below:

SME Agreement, Section 10.4: Except as provided for in section 11.2, neither Party may assign its rights and obligations under or transfer any of its interest in this Agreement without the prior consent of the other Party, which consent shall not be unreasonably withheld. *An assignment under this section does not require the approval of the OEB.* (emphasis added)

DSC, 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.* (emphasis added)

Section 10.4 of the DSC is legally binding on an LDC by virtue of the LDC's distribution licence. The specific obligation on an LDC is to comply with a request from the SME to sign an SME Agreement that has been approved by the Board. It is, in other words, an obligation owed to the SME or IESO (both of which are regulated by the Board), and section 10.4 of the SME Agreement provides the SME the opportunity to withhold its consent to any assignment that it considers unreasonable. In that context, there would seem to be no need for a further formal approval requirement by the Board. Practically speaking, an assignment of an SME Agreement will only arise in the event of a consolidation transaction (i.e., a merger or asset acquisition), which would require leave of the Board under section 86 of the *Ontario Energy Board Act, 1998* and a consequential licence amendment. As noted at the hearing, a consolidation transaction would require the assignment of a large number of material contracts that are integral to the LDC's operations, but do not require Board approval. For these reasons and in

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the EDA's view, there is no compelling reason to single out this particular contract as requiring Board approval for assignment.

Allocation of Service Credits (Article 7)

As noted in Mr. Duffy's letter of October 2, 2012, the EDA and SME have been working on a mutually agreeable mechanism for returning service level credits to the LDCs. The EDA and the SME have agreed in principle on a mechanism which the SME will explain in a letter to the Board very shortly.

At the time the SME Agreement was negotiated, the LDC representatives did not contemplate that the disbursement of the service level credit funds (as allocated by the SME Steering Committee) would require Board approval. From the LDC's perspective, the intent of section 7.6 of the SME Agreement was to allow for LDCs to receive some compensation for incremental costs incurred as a result of service level shortfalls of IBM in a relatively simple, quick manner. The rationale for designating the SME Steering Committee as the entity allocating such funds was simply that the members of the SME Steering Committee would be in the best position to determine whether certain LDCs suffered greater harm than others as a result of a service level shortfall. The SME Steering Committee, in that case, would have some discretion to allocate any service credits in accordance with any such determination. This flexibility and simplicity to distribute funds in an efficient manner was considered by the LDCs to be important given the restricted liability provisions.

The EDA acknowledges that a significant amount of time has now passed since both the negotiation of the SME Agreement and the operational commencement of the MDM/R, and the \$1.07 million in service credits accumulated to date have been incorporated into the Smart Metering Charge being proposed by the SME. Going forward, our understanding from the SME is that any future service level credits would be sent to the SME Steering Committee for consideration and proposed allocation, and that ultimately the service level credit funds would be returned by way of a credit to an LDC on the LDC's invoice from the IESO. In other words, the service level credit funds would be flowed to LDCs as a rebate. The question for the Board to determine is whether the IESO returning these funds to LDCs as a rebate falls within the Board's rate-making jurisdiction, or whether the return of such funds (for essentially contractual service level shortfalls) lies beyond the jurisdiction of the Board. To date, the amount of the service credits has been immaterial (i.e., \$1.07 million spread across 75 LDCs). Should the Board find that the return of these funds does fall within the Board's rate setting jurisdiction, then the EDA would request that the Board approve the mechanism to return these service level credits developed by the EDA and the SME.

Please contact me if further clarification is required.

Yours very truly,



Richard King

RK/mnm

Cop(y/ies) to: T. Sarkesian, EDA
J. Rangooni, EDA
All Parties to EB-2012/0100/EB-2012-0211