Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

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.*

BEFORE: Ken Quesnelle
Presiding Member

Cathy Spoel
Member

Paula Conboy
Member

DECISION ON AGREEMENT AND TERMS OF SERVICE, DECISION ON CONFIDENTIALITY AND PROCEDURAL ORDER NO. 7

January 17, 2013

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 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 SME 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 "Agreement"). 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 to 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").

This decision deals with the Agreement and Terms of Service, confidentiality and procedural matters going forward. A record of all procedural matters that have been dealt with up to this point in this proceeding is available on the Board's web site.

Submissions on Agreement and Terms of Service

The Board held an oral hearing on September 20, 2012 to hear submissions on three issues. The first was whether and why each clause of the proposed Agreement, either as drafted or with proposed amendments, is

A. necessary for the 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 their respective roles and responsibilities; and
B. in the public interest.

The second issue was whether any additional clauses are required. The third issue was what, if any, clauses are out of scope of the Board's approval.

The Board heard oral submissions from the SME, EDA, Board staff, the School Energy Coalition ("SEC") and the Association of Major Power Consumers in Ontario ("AMPCO") on September 20, 2012. The Board received written submissions from the SME on October 2 and 24, 2012 and from the EDA on Oct 24, 2012, in response to questions posed by the Board at the oral hearing.

The SME noted that the draft Agreement was negotiated between the SME and various distributor representatives, including the EDA. The view of the SME is that the Agreement should be read broadly by the Board and should be read in a sense that allows for a workable outcome to its provisions.

The SME submitted that the public interest is broader than simply ratepayer impact; it also includes some of the other statutory objectives of the Board that need to be considered, namely references to and promotion of demand management of electricity, the policies of the government of Ontario as well as facilitating the implementation of a smart grid in Ontario. The SME reminded the Board that the MDM/R plays a key role in the use of smart meters and in the eventual implementation of a smart grid in the province. The SME stated that it does not see any significant ratepayer impact in terms of costs that flows from the revisions to the Agreement. The SME noted that any resulting costs are reviewable by the Board or in a distributor's rate case.

The SME submitted that having worked on the Agreement for a number of years with the distributors, it does not think there are additional clauses that are required and argued that it is important to maintain a separation between the Agreement and the Terms of Service, to ensure that there is a regulatory mechanism that allows for oversight and protection but that is also flexible enough to allow the parties to deal with day-to-day issues without having to come back to the Board for approval when amendments are required.

The SME submitted that the Board should take a holistic view of the Agreement and be cautious about ruling individual matters out of scope. The SME's concern is that if the agreement is divided into parts that are approved by the Board and parts that are not, the SME will find itself in a situation where it will be able to compel distributors to sign some portions of the Agreement but not others, and then find itself in negotiations with individual distributors. In addition to these general comments, the SME provided submissions on certain provisions regarding the Agreement and Terms of Service which are described under the various headings below.

The EDA supported the SME's submissions.

Board staff argued that the Board should ensure that it reviews the Agreement and the Terms of Service with the public interest in mind and emphasized that ratepayers, who are not parties to the Agreement, may be affected by its terms. Specifically, Board staff submitted that the risk being allocated by the parties to the Agreement is not actually being allocated between those parties, but rather, between the SME and the ratepayers.

SEC submitted that it agrees with the SME and the EDA that the Board should interpret the scope of the agreement broadly, and that it must include not only the responsibilities for carrying out the functions, but also terms that properly operationalize and set out the risk allocation of those functions.

AMPCO indicated that its position is very similar to that of SEC.

Decision on the Agreement

The Board has reviewed and considered all submissions on the Agreement and Terms of Service.
The Board has organized its findings into the following 8 areas:

1. Boilerplate Agreement Provisions

Board staff argued that part G of the recitals, the consideration provision, and other similar boilerplate provisions of the Agreement were not relevant to the relationship between the SME and the distributors given the Board's decision on the preliminary issue that this is not a commercial arrangement. Board staff indicated that if the Board is embarking upon an exercise of codifying the relationship between the SME and the distributors, a relationship that is neither commercial, nor contractual, these provisions are unnecessary.

AMPCO argued that there is value in the relationship between the SME and the distributor being enshrined in a contract and that although the contract need not reflect a commercial relationship, there is value in setting out the parties' positions in the event of a dispute. AMPCO concluded therefore that these provisions should not be removed from the Agreement.

The SME responded that while the relationship is not a standard commercial one between two for-profit private companies, it is still fundamentally a commercial contract, required by the DSC, and that certain boilerplate provisions are required in order for the contract to be functional. The SME asked that the provisions remain in the Agreement unless they were clearly not in the public interest. No party had made any submissions that this was the case.

The EDA supported the SME's submissions on this point.

The Board finds that there is no compelling reason to remove or amend any of the recitals, the preamble, or boilerplate provisions from the Agreement. The Board is of the view that the provisions are not detrimental to the public interest and that they do not detract from the overall Agreement and in fact in many cases are likely to add clarity to the relationship between the parties or provide context to the Agreement.

2. Terms of Service

Board staff argued that under Section 1.1.1 the Terms of Service are given contractual force and effect between the SME and the distributors by virtue of the execution of the Agreement. Board staff suggested that this was inconsistent with section 12.7 of the Agreement which indicates that in the event of a conflict or inconsistency between the Agreement and the provisions of the Terms of Service, the Agreement prevails. Board staff expressed a concern that if the Board approves the structure that is currently in place, it is implicitly approving the Terms of Service.

The SME and the EDA submitted that the Terms of Service were developed to be a subordinate document to the Agreement that would provide more detailed and technical provisions to ensure the MDM/R works properly. Any amendments to the Terms of Service would be reviewed and approved by the Steering Committee (essentially providing a stakeholder process) but that distributors would also have the ability to come to the Board in the event they felt any proposed amendments might hinder their ability to operate.

On this point, the SME explicitly asked in its application that the Board not approve the Terms of Service as that would mean any amendments, no matter how minor, would also require Board approval.

More generally, Board staff argued that while there are provisions in the Terms of Service, which are, strictly speaking, related to the roles and responsibilities with respect to metering and the exchange of information to allow for the conduct of these roles and responsibilities, it is not practical for the Board to exercise oversight at the level of granularity provided for in the Terms of Service.

SEC agreed with Board Staff that as drafted much of the Terms of Service set out the roles and responsibilities between the distributor and the SME and indicated that it understood that the parties do not want to come before the Board every time there is a small change to the Terms of Service. SEC pointed out however, that the DSC requires the Board to approve the roles and responsibilities with respect to metering and information exchange related thereto. SEC submitted that the provisions of the Terms of Service need to be incorporated into the Agreement. Alternatively, SEC argued that section 3.1 of the Agreement, which sets the authority to create the Terms of Service,

should be amended to clarify that the Board must approve any changes to those sections of the Terms of Service that set out the roles and responsibilities of the distributor and the SME as required by section 5.4.1 of the DSC.

AMPCO submitted that it would be more valuable if the provisions of the Terms of Service were made part of the Agreement and were therefore subject to Board approval.

The Board has determined that other than the specific exclusions provided for in this Decision, the Terms of Service shall remain a separate and subordinate document to the Agreement. The Board accepts the arguments put forward by the SME and the EDA with respect to the desirability of having an efficient manner in which to address the inevitable evolution of the working relationship and the concomitant revisions to the Terms of Service.

The provisions in the Terms of Service, with the exceptions noted in this decision, will not be subject to Board oversight, and amendments to those provisions do not need to be reviewed or approved by this Board. In the event of a dispute over an amendment to the Term of Service, however, parties are able to come to the Board for resolution.

3. Governance

Board staff highlighted section 3.2 of the Agreement which describes the SME Steering Committee. In this context, Board staff referenced Exhibit B-2 of the SME's application which indicates that the IESO believes that it is appropriate to transition the SME role from the IESO to the control of the province's distributors, and that in that case, the Steering Committee, which includes distributors, could be used as a tool for this governance change. Staff argued that the Board should not be endorsing, either directly or indirectly, the concept of enshrining distributor control of the SME since it is not a formal request before the Board. Board staff argued that this is an issue that would require additional evidence and may in fact not be within the Board's jurisdiction to decide.

The SME, supported by the EDA, responded that the Board of the SME and not the Steering Committee is responsible for the transition of the governance of the MDM/R. The SME argued that any fundamental transition to distributor control will likely require

government approval in the form of a regulation. The SME advised the Board that the information on transition in the application was provided for context only and not for Board approval.

The Board expects that any future proposal to transfer the role of the SME from the IESO to some other entity will require some form of government approval, and will require a Board licence. This will involve a full review, including the consideration of any new requirements to ensure the integrity of the SME, based on the proposal and the evidence provided at the time. The Board makes no findings at this time with respect to the proposal put forward by the SME in its application with respect to future transition.

Staff also took issue with the fact that while the constitution of the Steering Committee is provided for in Section 3.2 of the Agreement, the mandate of the Committee is contained in the Terms of Service. Staff argued that the mandate of the Steering Committee is something that is part of the roles and responsibilities between the SME and the distributors and should therefore be subject to Board approval.

The SME indicated that the composition of the Steering Committee was contained in the Agreement in order to provide distributors with the assurance that it couldn't be changed without Board approval. The mandate of the Steering Committee however was placed in the Terms of Service in order to maintain flexibility as to how it might develop over time.

The Board finds that the public interest requires that both the composition and the mandate of the Steering Committee be subject to the oversight of the Board. In particular, the Board finds that the Steering Committee's mandate forms part of the definition of the roles and responsibilities of the distributors in relation to metering and the information required to be exchanged to allow for the conduct of these roles and responsibilities.

SEC and AMPCO both argued that the composition of the Steering Committee should include consumer and ratepayer representatives. SEC submitted that there would be decisions made at the Steering Committee that would have cost implications which could in turn affect ratepayers. SEC also argued that since the data being managed is

private consumer data that may ultimately be accessed by third parties, ratepayer interests should be represented on the Steering Committee.

SEC also argued that the method for selecting members at large of the Steering Committee should be clarified in the Agreement.

On this point, the SME emphasized that the Steering Committee fulfills a technical role and function which is to make business decisions and govern the MDMR, which is essentially an information technology project. The SME argued that while not precluded, the MDMR is not the kind of project that requires ratepayer representatives. The SME pointed to section 1.2.5 of the Terms of Service which indicates that expertise in MDM/R, Advanced Metering Infrastructure and Customer Information System technologies and associated business processes will be a factor in making appointments to the Steering Committee.

The SME acknowledged the concerns expressed by SEC regarding the privacy of the data being housed in the MDM/R and advised the Board of the SME's plans to work with the Privacy Commissioner to develop protocols for any third party access to the MDM/R. The SME indicated that the appropriate forum to address privacy concerns is the process with the Privacy Commissioner and that the SME would not object to including ratepayer representatives in that process.

The EDA advised the Board that the initial goal of the distributors is distributor majority governance of the Steering Committee given that the data is generated by distributor customers and that it relates to the handling and usage of that customer information before it is sent back to the distributor. The EDA argued that the management of customer data is something that distributors have done for years without any sort of ratepayer involvement or input.

The Board agrees that the role of the Steering Committee is largely a technical one that requires members to be familiar with technology; including distributors' advanced metering infrastructure and billing systems. The Board finds there are adequate ratepayer safeguards in place given that cost implications will ultimately have to be approved in distributors' and SME applications. In addition, privacy concerns will be considered in the context of the process with the Privacy Commissioner. The Board will not require ratepayer representation on the Steering Committee.

4. Liability

Board staff expressed two main concerns. The first related to section 7.1 and in particular the fact that the distributor has no recourse against the SME in respect of any breach of the Agreement or any loss or damage to the distributor which is attributable to an act or omission of any operational service provider. Staff argued that ultimately the MDM/R is a large information technology project and that IBM Canada, the current Operational Service Provider (as that term is defined in the Agreement) is the one that is delivering the service. Staff acknowledged that section 7.6 of the Agreement allows for a reduction of the smart metering charge if IBM Canada fails to meet the service levels required under its agreement, but was still of the view that the omission from the limitation of liability clause of exceptions for acts of wilful misconduct or negligence coupled with the limitation of the cumulative liability of the SME to all MDM/R recipients of $1,000 in the aggregate was not in the public interest and in particular, the interest of ratepayers.

Board staff's second area of concern is described below.

SEC argued that the terms of the agreement with respect to liability and $1,000 caps on damages for acts and omissions are not in the public interest. SEC submitted that each party should be responsible for the damages that flow from its acts and omissions and that negligence should also be provided for in the liability section.
SEC submitted that the Board must determine the prudent rate impact of costs of damages for acts and omissions. These costs should not necessarily flow to ratepayers but might be borne by an distributor's shareholders
SEC indicated that if it became clear to the SME that it might be exposed to some potential loss, it might be incented to have insurance to deal with these sorts of potential liability issues.

SEC enumerated a number of potential scenarios in which significant damages could result from one of the parties' acts or omissions. This could include the inadvertent uploading of a virus by a distributor into the MDM/R system that causes substantial damage to the system and results in some legal liability; or damage resulting to the distributor's system as a result of the acts or omissions of the SME that could expose the distributor, its consumers or third parties to liabilities. SEC argued that in neither case would it be in the public interest for the liability of the SME and/or the distributor to

be limited and for all the losses to be visited upon the ratepayers or upon all distributors (as opposed to resting solely on the distributor that caused the damage).

Finally, SEC argued that with the advent of the smart grid, which potentially involves increased access of third parties to consumer data, the increased financial liabilities being recognized by the courts for invasion of privacy and the proliferation of class actions only increase the risk of potentially significant financial losses being incurred as a result of the kind of data management and sharing contemplated by the use of the MDM/R and the relationship of the SME and the distributor with respect to that mandate.

SEC submitted that, given the potentially large losses that could be incurred, the Board should ensure that the liability provisions of the Agreement make clear that liability flows from the act(s) or omission(s) that caused the losses.

The SME argued that scenarios of substantial failure of the MDM/R system resulting in significant losses are not realistic. The SME argued that the largest risk it identified was an interruption in the MDM/R service, which could delay the ability of a distributor to bill its customers, or which might require a manual work-around and estimated bills.

More generally, the SME argued that the agreement allocates responsibilities between the SME and the distributor, and that if these are changed by the Board the resulting costs will ultimately come before the Board as collection is sought from ratepayers and the Board will have a chance to review the request at that time. The SME emphasized that any changes the Board makes that might allocate greater liability to the SME cannot be passed on to its service provider, IBM, given the limitations of liability in its existing contract with IBM.

The SME argued that as it is a not-for-profit entity, it should not have any liability and that as a result, any costs assigned to the SME will ultimately have to be recovered from ratepayers.

The SME advised the Board that if IBM fails to meet its obligations, it pays back service credits to the SME which are largely in the form of reductions to the fees payable by the SME. The SME argued that ratepayers would get the benefit of any credits that the SME collects from IBM.

The Board inquired whether the concept of insuring against catastrophic events that might arise in the operation of the MDM/R had been considered in the negotiation of the agreement.

The SME responded to the Board's inquiry in its letter of October 2, 2012. The SME submitted that it had examined the possibility of acquiring insurance to cover a catastrophic MDM/R failure and that the following obstacles to obtaining such coverage were identified:

1. As detailed in the Application and Pre-filed Evidence, the MDM/R's function as an integral part of the "meter to bill" process for all of the province's distributors is unique and does not exist in other jurisdictions. As a result, the risk of a catastrophic MDM/R failure cannot be effectively pooled with other similar risks. The SME is not aware of any existing insurance product that would cover this risk.

2. The SME considered the possibility of obtaining a specialty insurance product that pools risk amongst the province's distributors, but determined that the benefits of such a policy were outweighed by the costs. While the likelihood of a catastrophic MDM/R failure is very low, if such a failure were to occur it would likely impact all or a substantial number of the province's distributors. In these circumstances, a policy that pools risk solely amongst the province's distributors does not offer any significant benefit over a regime of self-insurance.

3. The potential liability associated with a catastrophic MDM/R failure that could affect all of the province's 73 participating distributors is impossible to quantify, while recovery from IBM Canada (the Operational Service Provider) is subject to strict contractual limitations of liability. An insurer is unlikely to expose itself to this risk without strict limitations on its own liability.

In consideration of the submissions of the SME and the EDA the Board finds the liability and indemnification terms of the Agreement to be acceptable. The Board accepts that the nature of the MDM/R activities, with its multi-entity operation and multi-entity handling of data in a new environment is both unique and evolving. The Board accepts that the identification of potential risks of system failure as well as the predetermination

of the ownership of the liability and costs associated with those risks is therefore not possible in any meaningful way at this time. The Board considers that the SME and distributors have adequately substantiated their decision to rule out the use of third party insurance to mitigate unintended costs associated with catastrophic system failure.

The Board has dealt with the issue of service credits intended to offset service costs when service is not provided later in this decision. The liability issues discussed here are separate from those that would be dealt with in that process.

SEC and Board staff have argued that those liabilities should be identified and steps taken to protect ratepayers from possibly having to incur any costs that arise due to improper operation of the system. The Board finds that there is no need to amend the liability and indemnification clauses of the proposed agreement to provide the ratepayer protection sought by Board Staff and SEC. The Board's existing processes for establishing both the rates charged by the SME and the rates charged by distributors are well suited to examine any unforeseen costs that may arise and to facilitate the Board's determinations regarding who should bear those costs.

As all distributors are required to participate regardless of size or financial capacity, and the SME is a non-profit entity, it seems reasonable to limit the liabilities in the way it has been done in the proposed agreement. The Board will review and determine the appropriate ratepayer impact of costs of damages for acts and omissions.

The second concern of Board staff in relation to the liability provisions related to section 7.5 of the Agreement, which requires the SME to cooperate in assisting distributors to come forward and ask for rate recovery from the Board when their losses or incremental costs as a result of any act or omission of the SME, the Operational Service Provider or a service provider of the SME. Staff argued that this clause is inherently problematic because the two parties are asking the Board to approve a scheme whereby they come to the Board to ask for ratepayer dollars to cover monies that cannot otherwise be recovered through the Agreement because of limitation of liability clauses.

SEC agreed with Board staff on this point and submitted that the question is what exactly is meant by "cooperate" in section 7.5. SEC argued that if cooperating is

providing relevant information to the Board and to distributors because the SME holds this information, then this is understandable but that if cooperation means that the SME will withhold information that might go against the distributor's claim or otherwise support the distributor's claim when the evidence indicates otherwise, that this would not be in the interest of ratepayers or in the broader public interest.

The SME clarified that the cooperation was intended to mean that the SME would cooperate in providing distributors with evidence and support through the regulatory process and in doing so avoid the distributors having to seek orders of the Board compelling the production of documents and witnesses that in the SME's view would likely be requested in any event.

The Board accepts the SME's explanation of what the term "cooperation" is intended to convey and in this context does not consider its inclusion in the agreement to be detrimental to the public interest.

5. Assignment

Board staff took issue with section 10.4 of the Agreement which indicates that neither party is permitted to assign its rights and obligations under the Agreement without the prior consent of the other party, but that the assignment does not require the approval of the Board. Staff noted section 18 of the *Act* indicates that a licence issued under the Act is not transferable or assignable without leave of the Board and argued that the carve-out with respect to Board approval was therefore inappropriate and impractical.

SEC argued that it was in the broader public interest generally that any assignment from the terms of this sort of agreement should have to be approved by the Board, particularly since it might be the case that a distributor or the SME assigns any sort of rights or obligations or any term of or liability that comes under the Agreement to a non-regulated entity. SEC argued that the last caveat in section 10.4 should be deleted.

The SME argued that it did not think it was useful or necessary that the Board impose an obligation that every time a distributor comes forward to the Board to have its licence amended for such matters as a merger or purchase that it would also have to get the Agreement approved for assignment as well. The SME also pointed out that any new SME would be created by regulation and that assignment of the agreements it had

entered into would likely be dealt with as part of the regulatory structure permitting the new SME.

In its letter to the Board dated Oct. 24, 2012 the EDA submitted that Section 10.4 of the Agreement provides the SME the opportunity to withhold its consent to any assignment that it considers unreasonable. It submitted that in that context there would seem to be no need for a further formal approval requirement by the Board.

The Board finds that because a distributor would only be in a position to assign the Agreement as a result of having either merged with, acquired, amalgamated with another distributor or having divested itself of all or part of its own assets or shares, which require approval of this Board in accordance with the *Ontario Energy Board Act, 1998*, that the issue of the treatment of the Agreement can be addressed as part of that review process, if necessary. As a result, the Board will not require any change to section 10.4 of the Agreement.

6. Miscellaneous Items

(a) Access to MDM/R Data

SEC argued that currently the only restriction on the disclosure of MDM/R data is that it shall be presented in a manner that prevents specific data of an individual customer of the distributor from being identified with a customer or premises. SEC indicated that the SME may sell, provide or otherwise give access to the MDM/R data and that in fact, the SME licence requires the SME not just to provide, but to promote, non-discriminatory access and this raises two public interest questions. First, SEC raised the question of the scope of what is permitted by section 53.8 of the *Electricity Act, 1998* in respect of the provision of access to information and data. Second, SEC raised the question of the approval of the setting, collection and distribution of fees for this information. SEC requested the Board to address these issues either in the context of approving the Agreement or in this proceeding more generally.

The SME responded that the system capability to provide access to third parties does not yet exist and that its view is that any charges for access to MDM/R data would have to be approved by the Board. It suggested that those types of charges could be proposed in a future rate case.

The Board is satisfied that it need not deal with the scope of what is permitted by section 53.8 of the Electricity Act at this time. The Board agrees with the SME's views on the need to have and access charges approved by the Board and any scope issues that arise will be more appropriately dealt with at that time.

(b) Force Majeure

Board staff argued that the force majeure provision should be more reflective of the more extensive provisions found in the agreements attached to the Transmission System Code. In particular, staff suggested that these provisions contain more detail with respect to the notice, duration and mitigation of a force majeure. Staff provided an excerpt of the provision as Exhibit K1.1.

No other submissions on force majeure were presented.

The Board finds that the force majeure provision in the Agreement is sufficient and that no amendments to the provision are required.

(c) Term

Board staff pointed out that section 11.1 of the Agreement indicates that the Agreement terminates March 31, 2012, while the application refers to January 26, 2016. Staff asked for clarification with respect to the termination date.

The SME described the history related to the inclusion of the March 31, 2012 date and indicated that it had unilaterally indicated that it would like the term of the Agreement to be consistent with the term of the SME licence (January 2016), but that it did not have time to consult with the EDA on this point and have the draft Agreement amended to reflect the change.

In its Oct. 2, 2012 letter the SME informed the Board that it had consulted with the EDA and confirmed that the January 2016 termination date was acceptable.

The Board will require the Agreement be amended to reflect a termination date of January 26, 2016.

7. Service Credits

SEC objected to section 7.6 of the Agreement which provides that if the Operational Service Provider does not meet certain service levels under the MDM/R Agreement or otherwise breaches the Agreement and the breach results in a reduction of the fees payable by the SME, then the amount will be set aside for MDM/R recipients, including the distributors, to be allocated by the SME Steering Committee.

SEC argued that the allocation of any amount that may have the effect of reducing the smart metering charge is a rate-setting issue, which is for the Board to determine.

SEC submitted that the section should be deleted in its entirely, and that as part of its broader mandate with respect to the smart metering charge, the Board should set up a deferral account that would record any sort of credits or amounts to be paid from the Operational Service Provider, or reduction in fees owed to the distributor. The SME could then come to the Board for clearance of that account and then make a determination on how to disburse any amounts in the account.

In its October 2, 2012 letter to the Board the SME acknowledged that the Board has the authority to approve any disbursement to distributors of service credits received from the Operational Service Provider. The SME also indicated that it was working with the EDA on a mutually agreeable mechanism to allocate any service level credits received amongst distributors.

The SME and the EDA filed letters addressing this issue on October 24, 2012.

The SME letter reiterated its acknowledgement of the Board's authority to approve any disbursement to distributors of the service credits. The letter also contained the following process for that disbursement.

1. Any service level credits received from the Operational Service Provider will be accumulated by the SME in a separate variance account.

2. The amounts of any service letter credits received would be reported to the SME Steering Committee, which would allocate credits amongst the Province's distributors as contemplated by section 7.6 of the Agreement.

3. The SME will apply to the Board to clear the variance account on the earlier of (i) the date on which the balance in the variance account meets or exceeds $2 million, or (ii) the date on which the SME licence expires (January 26, 2016). As part of its application, the SME will ask the Board to approve the allocation of service level credits amongst distributors as determined by the SME Steering Committee.

4. Once the allocation has been approved by the Board, the service level credits will be paid to distributors as a rebate to the SMC.

If the Board approves this mechanism, the SME proposed that it be implemented through amendments to section 7.6 of the Agreement presented to the Board for approval.

The EDA letter contained a submission that the Board must determine "whether the IESO returning these funds to the distributors as a rebate falls within the Board's ratemaking jurisdiction, or whether the return of such funds (for essentially contractual service level shortfalls) lies beyond the jurisdiction of the Board."

The EDA letter also raised the issue of the $1.7 million in service credits that has already been incorporated into the proposed SMC. The EDA requested that if the Board finds that the return of these funds does fall within the Board's rate setting jurisdiction that the Board approve the mechanism to return these service level credits developed by the EDA and the SME.

The Board finds that it has the authority to approve the disbursements of credits to distributors. The Board does not accept the EDA's characterization of the credits as a rebate for contractual shortfalls as being fully descriptive of what was contained in the original application. A refund for contractual shortfalls in and of itself would not necessarily constitute rate setting. It is the function that the SME steering committee was originally intended to perform in determining the allocation and the distribution of the service credits that gave rise to the concern regarding the SME's authority to do so.

The Board notes that there has been no opportunity for parties to comment on the SME and EDA proposal for the disbursements of service credits. However, the Board is satisfied that the proposal addresses the issue raised by SEC regarding the SME's lack

of authority to set rates. The Board will not provide its findings at this time on the acceptability of the disbursement proposal. The Board has provided for a settlement conference in the Order which forms part of this Decision and Order. The Board expects the parties to include the proposed disbursement process as well as the appropriate treatment of the $1.7 million in service credits to date incorporated in the proposed SMC in the settlement deliberations. The Board will establish a process to deal with any unsettled issues as needed.

8. Deviations from Board-Approved Agreement

A question arose at the oral hearing with respect to whether, once the Board approves the Agreement or some form thereof, two parties could mutually agree to deviate from it without Board approval or oversight.

The SME argued in reply that it should be permissible for the SME and one or more distributors to decide to deviate from the Agreement approved by the Board. The rationale for this position was that section 5.4.1 of the DSC requires a distributor to enter into an agreement when the SME requests it to do so, but it is only obligated to enter into the agreement if it is in the form approved by the Board. The SME submitted that this code provision does not restrict the parties from forming their own agreement and that it does not restrict the parties from departing from the Board-approved form if they wish to. Board approval is necessary, the SME says, only where the SME needs to compel a distributor to sign the agreement. The SME indicated that as a practical matter, it does not wish to be in a situation where it is negotiating and departing from the approved agreement with individual distributors, indicating that this would be “troublesome”, but that it could. The SME differentiated the construct in the DSC related to the Board’s approval of the Agreement from, for instance, the codified requirement for a distributor to use the form of connection agreement attached to the DSC.

The Board views its approval under section 5.4.1 of the DSC broadly as being for the purpose of protecting the public interest and particularly the ratepayers that derive the benefit of, but also pay the costs associated with, the proper functioning of the MDM/R. The Board notes that the Agreement does not therefore affect only the parties to it, but clearly impacts the consumers whose information and data is being sent to the MDM/R and back to the distributor for billing purposes. The findings in this Decision reflect a thorough review by the Board of the Agreement with a view not only to ensuring that the

roles and responsibilities of the SME and the distributor are clear, but also that the interests of the public generally and the ratepayers specifically are contemplated, understood and protected. The Board sees its mandate under section 5.4.1 of the DSC as a continual approval mandate that is not limited only to the scenario where a distributor is unwilling to enter into the Agreement with the SME voluntarily. The Board will therefore require that any proposed changes to the Agreement going forward be the subject of a review and approval of this Board. The Board does not consider an agreement that departs from what has been approved by the Board to be acceptable in terms of compliance with section 5.4.1 of the DSC.

Decision on Confidentiality

On November 29, 2012, the SME filed the following material with the Board pursuant to the Board's *Practice Direction on Confidential Filings* (the "Practice Direction"):

- Meter Data Management and Repository, Hosting and Support Agreement between the SME and IBM Canada Limited dated December 5 (JTC 1.6);
- Memorandum of Understanding between the IESO and the Ministry of Energy relating to the program to implement Ontario's Smart Metering Initiative, dated June 9, 2006 (JTC 1.8); and
- Meter Data Management and Repository Operational Service Provider Request for Proposal released July 30, 2012 (JTC 1.9).

In Procedural Order No. 6 the Board provided for submissions from parties and a response from the SME with respect to the SME's claim for confidential treatment. There were no submissions received.

The Board has reviewed the undertakings for which SME has claimed confidentiality and approves the confidential status of these documents. Any counsel or consultant for an intervenor who wishes to receive a copy of the confidential documents may do so after signing a copy of the Board's Declaration and Undertaking with respect to confidential documents, and filing it with the Board and serving it on the SME.

SME Application for SMC and SMC Cost Allocation and Recovery

The Board has made provision for an Issues List and a Technical Conference with respect to the SME's application for smart metering costs (EB-2012-0100). With respect to the Smart Metering Charge cost allocation and recovery part of the proceeding (EB-2012-0211), the EDA has filed evidence and the Board has provided for interrogatories and responses on that evidence. The Board also invited any other party to file evidence with respect to cost allocation and recovery, but none was filed.

The Board will now provide for a settlement conference in respect of the SME's application for the SMC, the issues for which are provided in the Board approved Issues List, as well as for the Board's proceeding to determine the appropriate allocation and recovery of the SMC.

The Board finds that a second round of interrogatories is not required. However, if parties require further discovery with respect to the evidence filed in respect of either the SME application for the SMC or for the cost allocation and recovery thereof, the Board encourages parties to ensure that all outstanding requests for information have been addressed at the outset of the settlement conference.

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. The SME and the EDA shall provide to the Board and copy all parties with a new proposed Agreement that incorporates the findings of the Board in this Decision, no later than **January 31, 2013**.

2. Board staff and parties shall, no later than **February 7, 2013,** file with the Board and copy all other parties any comments with respect to whether the new proposed Agreement accurately reflects the Board's findings.

3. A Settlement Conference will be convened at 9:30 a.m. on **February 19, 2013** with the objective of reaching a settlement among the parties on the Smart Metering Charge and the allocation and recovery of the Smart Metering Charge. The Settlement Conference will be held in the Board's West hearing room at 2300 Yonge Street, 25th Floor, Toronto, and may continue on **February 20, 2013**, if needed.

4. Any Settlement Proposal arising from the Settlement Conference shall be filed with the Board on or before **March 5, 2013**.

5. An oral hearing will be held at the Board's offices at 2300 Yonge Street on the 25th floor **on March 22, 2013** for the presentation of any Settlement Proposal filed with the Board. 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.pes.ontarioenergyboard.ca/eservice/, 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, January 17, 2013.

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary