January 15, 2016

via RESS and email

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

Dear Ms. Walli:

Re: Notice of Proposal to Amend Various OEB Regulatory Instruments with respect to Specifying a Mandatory Record Retention Period for Regulated Entities (EB-2015-0247)

On November 11, 2015 the Ontario Energy Board ("OEB" or "Board") released a Notice of Proposal to Amend Various OEB Regulatory Instruments with respect to Specifying a Mandatory Record Retention Period for Regulated Entities ("Notice"). This Notice was subsequently revised on December 10, 2015. The purpose of the proposed amendments is to formalize a requirement for a retention period covering nine years plus current year applicable to all records specifically mandated by the instruments in question, along with others that the OEB expects the utilities to retain by way of "reasonable inference".[1]

This is the submission of the Coalition of Large Distributors ("CLD")[2] regarding the Notice. The submission has been filed via the Board's web portal and two (2) requisite paper copies have been couriered to the Board.

The CLD welcomes and appreciates the opportunity to provide its views on the Notice. Collectively, the member utilities service nearly 2.0 million Ontario ratepayers and distribute 45% of all electricity consumed in the Province.

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[1] Ontario Energy Board, November 11, 2015, Notice of Proposal.
[2] The CLD consists of Enersource Hydro Mississauga Inc., Horizon Utilities Corporation, Hydro Ottawa Limited, PowerStream Inc., Toronto Hydro-Electric System Limited, and Veridian Connections Inc.

GENERAL COMMENTS

It is the position of each member of the CLD that the proposed record retention framework could require sweeping and financially material changes to LDC policies, practices and systems. If not constructed and implemented properly, the CLD respectfully submits that the value this initiative ultimately delivers to customers could be significantly reduced if not eliminated entirely. The CLD respectfully recommends that the OEB take every opportunity to consult with affected parties if it intends to develop nuanced record retention periods at this time and as the framework evolves, and to work with LDCs over time to emphasize flexible approaches, knowledge sharing and continuous improvement. The CLD would welcome the establishment of a forum, such as a working group, to address specific proposals or issues prior to the issuance of any specific guidance from the OEB.

Notwithstanding the above comment, the CLD submits that the OEB consider a record retention framework ("Framework") that provides for multiple retention periods depending on the particular record type. The CLD submits that the appropriate retention period for records of a particular type should be established with regard to the role and value of those records to reporting and record-keeping objectives and the incremental cost of retaining those records. As currently proposed, the Framework contemplates a single retention period standard for records of all types, including those that previously had a considerably shorter two-year timeframe prescribed by the relevant regulatory instruments.

A customized approach is consistent with records and information best practices.[3] Different records provide different insights to the OEB and its staff in terms of the frequency with which they are relied upon and the type of information they contain. Further, there are administrative costs of organizing and storing more records for longer periods of time, opportunity costs of regulated entities' staff time dedicated to record retention or retrieval, and the compliance and reputational costs associated with the risk the utilities may assume in determining which records are worth retaining and which are not (where this is not explicitly prescribed).

The CLD also submits that a Framework which provides for multiple retention periods is consistent with the principles of the Renewed Regulated Framework for Electricity, in which the OEB determined that distributors that demonstrate sound regulatory performance require less stringent regulatory oversight. CLD members, and particularly those that are reporting issuers subject to regulation by the Ontario

[3] Office of the Privacy Commissioner of Canada, Personal Information Retention and Disposal, Principles and Best Practices, page 2.

Securities Commission, already follow stringent policies and processes associated with record retention and destruction, in addition to achieving their regulatory obligations to the OEB.

Finally, the CLD urges the Board to consider that record retention requirements could extend obligations to third-party service providers and other regulated entities that maintain source data and records in support of the reported data, such as the MDM/R. Appropriate coordination with these entities would be necessary to ensure retention requirements are consistent, aligned and non-duplicative. A failure to do so could drive significant incremental pressure on costs and other resources.

RESPONSES TO SPECIFIC QUESTIONS

Format of Retained Records

The CLD respectfully submits that the format of retained records, whether electronic or paper, should be at the discretion of individual utilities. This choice may vary between different utilities and depend largely on the operating characteristics of each utility (e.g., existing systems and controls) and the type of records involved. It is equally likely that a regulated entity may find a particular combination of paper and electronic records to be advantageous from an efficiency perspective. To maximize administrative efficiency, and avoid the need for various entities to revise their record retention practices or upgrade the associated systems that are otherwise operating effectively (and experience the corresponding costs of doing so), the CLD submits that a specific record format should not be prescribed.

Regulated utilities have benefited from guidance from the OEB through Guidelines that set out non-exhaustive lists of examples of compliant means of achieving the regulatory end. Such a guideline, either enhancing or supplementing the current RRR filing guideline, would improve regulatory consistency while preserving regulatory flexibility. Consideration should be given to whether the record is housed by the LDC or by a third party, such as at the MDM/R.

Types of Records to Which Retention Requirements Apply

In describing the proposed amendments, the OEB notes that it expects itself to "not [be] concerned with any records that are not required for regulatory purposes, e.g., records that a Regulated Entity retains solely for corporate operational purposes, but which are not required for regulatory purposes".[4] The CLD agrees with this approach, and believes that any extension of record retention policies to corporate records is not necessary to meet the substance of the OEB's mandate and the ensuing policies.

[4] Ontario Energy Board, November 11, 2015 Notice of Proposal, page 5.

The CLD's preliminary assessment is that even with this carve-out, an innumerable amount of incremental records could be encompassed by the proposed amendments, including those that are maintained by third parties, such as the MDM/R. Compounded over a ten-year retention period, it is possible that these amendments could give rise to one of the largest single increases in OEB requirements in recent years, second only to the Distribution System Plans. Based on the streamlined process to bring about these amendments, it is not clear to the CLD that the OEB intended or is aware of this possible outcome.

Records Demonstrating Compliance with Regulatory Instruments

While the CLD supports taking reasonable steps to ensure records are maintained to validate compliance with regulatory instruments, it submits that the OEB adopt a framework that encourages continuous improvement. It is crucial that LDCs are afforded sufficient flexibility at the outset of this framework, provided that a "good faith" effort is made to achieve compliance, in order to ensure an efficient and cost-effective implementation occurs to achieve a positive outcome that is in the public interest.

Prospective vs. Retrospective Application

The CLD respectfully submits that new standards should only apply prospectively and that the retrospective application of new legal standards is at odds with the fundamental tenets of administrative law. Moreover, retrospective application is suboptimal for practical reasons: the administrative burden and costs related to investigating existing records and applying new retention requirements is considerable, as are the practical limitations of systems and processes that would need to apply new standards to old materials.

A prospective application would allow utilities to apply the new requirements to its operations in a uniform manner and not have to make expensive and time consuming changes to systems and policies as they apply to existing records.

Exceptions and Other Statutory Requirements

Where there are other legislative requirements that apply to the retention of documents, the CLD submits that the legislation of closest relationship to the type of record should apply. For example, there may be jurisdictional conflicts where federal legislation would have priority over provincial legislation and regulation, especially where the substance of a matter is under the purview of the federal legislation. In these cases, the natural priority of regulatory obligations should prevail. Additionally, there are legal implications and risks associated with retaining some records; therefore, retention periods need to weigh such risks against the intended benefits.

In conjunction with records retention, there is also value in adopting record destruction practices, which the CLD submits is best left to individual LDCs on the basis that not all LDCs are subject to the same set of obligations from other authorities (e.g., Ontario Securities Commission). It is a well-accepted principle in record retention policies and practices that rules be established not only for retention but also destruction. In that way, consideration is given to the temporal nature of information. Over time, the subjects about which records pertain to change as do the record gathering techniques. As a result, the value of certain types of historic information diminishes as it becomes less comparable. Moreover, data storage systems have limitations and the cost of housing even electronic records increases over time.

Implementation Date and Transition Period Duration

In order to effectively implement the proposed records retention program, the implementation date must consider the potentially different state of existing records and information management practices currently in place among LDCs. For example, existing retention schedules may need to be revised and/or expanded to align with the specific record retention requirements proposed, and computer programming, technology and process changes may also be required. As recommended above, the CLD submits that further consultation and collaboration is also necessary.

For these reasons, the CLD respectfully requests that the effective implementation date of this requirement be, at a minimum, 18 months following the Board's decision in this matter.

The CLD appreciates the opportunity to provide its comments on this matter. Please do not hesitate to contact me should you have any questions.

Sincerely,

[original signed by Kaleb Ruch for]

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