

September 27, 2018

Ontario Energy Board
Attn: Board Secretary
2300 Yonge St., 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: **EB-2014-0255**

On behalf of the Electricity Distributors Association (EDA), I would like to thank you for convening a meeting of sector representatives on September 13 to review the Ontario Energy Board's (OEB) proposed guidance on corporate governance, and for your willingness to consider additional input from stakeholders. This letter provides our follow comments on certain issues raised at the meeting.

Utility governance vs. Holdco governance

The EDA encourages the OEB to revise its guidance on the size of the Board of Directors to permit LDCs to continue with the current size of its board.

We understand that the OEB has concerns with the size of the utility's board vs. the Holdco's board, and that the OEB'S best practice guidance would increase the size of the utility board. Our concern is that increasing the size of the utility board would add costs to each utility, which may not be cost effective, nor in the best interest of the customer. Moreover, the significant majority of utilities are structured with a Holdco board and a smaller LDC board regardless of the size of the utility, and we do not observe any systemic issue of governance practices within the sector with this governance structure.

Therefore, we believe that increasing the size of the utility board will likely have no impact on performance but only add costs to the system.

Until there is evidence that utility performance is weak stemming from this governance structure, we encourage the OEB to permit the current size of utility boards within its corporate governance framework.

Expectation of director independence

The EDA encourages the OEB to revise its guidance to permit the current composition of LDC boards, in particular their composition of independent vs. non-independent directors.

Independence is more accurately a factual assessment than a status informed by consideration of one's affinity/association with a shareholder.

The OEB has expressed concerns for whether current governance structures and practices are resulting in the best interest of the utility and its customers. While we understand the OEB's concerns, we wish to point out that every director has a fiduciary duty to the corporation it serves. That fiduciary duty, as confirmed by the Supreme Court of Canada in its decision in the Peoples Department Stores Inc. v. Wise in 2004, is clear that the fiduciary duty is to the corporation, and not to any other stakeholder, i.e. not to the shareholder(s), nor to the customer. Any suggestion or requirement to shift or recharacterize that duty to any other stakeholder would then breach that director's fiduciary duty.

As well, the shareholder should have the right to determine its governance structure as long as the directors uphold their fiduciary duty to the corporation.

Shareholder agreements

LDCs are empowered to enter into shareholder agreements as they are companies under the *Ontario Business Corporations Act*. Consistent with that enabling legislation, shareholder agreements will remain in place without limitation.

Mandatory Reporting

LDCs are concerned that the OEB may administer its guidance on governance as an obligation. As you mentioned at the meeting, the OEB's governance guidance is best practice guidance only, and only the reporting on it is mandatory. We trust that this will be the OEB's ongoing position, and specifically, that the OEB will not engage in further action if an LDC appears not to be adhering to OEB guidance.

Your suggestion that reporting would be annual with updates only as boards change was encouraging.

Thank you once again for giving us the opportunity to follow up with additional comments. If you have any follow up questions, please feel free to contact Kathi Farmer, the EDA's Senior Regulatory Affairs Advisor, at kfarmer@eda-on.ca, or 905-265-5333.

Sincerely,



Teresa Sarkesian
President and Chief Executive Officer

c.c. Mr. C. Bishop, Director, Strategic Policy