

**Comments of Ontario Energy Savings L.P. on Staff Research Paper:  
Affiliate Relationship Code for Electricity and Transmitters  
EB-2007-0062**

**July 20, 2007**

Ontario Energy Savings L.P. ("OESLP") is a large retailer of natural gas with affiliates that operate in numerous jurisdictions throughout Canada and the United States. In Ontario, OESLP provides more than 500,000 customers with energy services. As such, OESLP has a direct interest in the Affiliate Relationship Code for Electricity Distributors and Transmitters ("ARC") and believes it to be an important mechanism for preventing cross-subsidization of affiliates, protecting and regulating the sharing of customers' confidential information and preventing affiliates from gaining improper advantages in their competitive markets through affiliation with the regulated entity.

OESLP provides its comments below on the 11 issues identified in Section 1.1 of the Staff Research Paper in addition to comments on further changes which it believes must be made to the ARC to ensure a truly "level playing field" exists for distribution affiliates wishing to enter the market as a retail competitive energy service provider.

OESLP provides its comments in the order that the comments are presented in the Staff Research Paper.

**1. Does Utility efficiency belong in the ARC as a code objective?**

OESLP does not believe it is necessary to amend the ARC to include efficiency as a code objective as economic efficiency is already an objective in the *Ontario Energy Board Act, 1998*. OESLP is concerned that adding a reference to efficiency in the ARC could lead parties to viewing it as the core objective of the code.

**2. Does competition belong in the ARC as a code objective?**

Competition clearly belongs in the ARC as a code objective. The current ARC provisions provide that the standards established are intended to minimize cross-subsidizes and to ensure that there is no preferential access to regulated utility services. A competitive market place cannot develop if anti-competitive behaviours are allowed by the utility or its affiliate. OESLP submits that it is the role of the Board to enhance the competitive energy service market by ensuring that the utility does not use its dominant position in the storage, transmission, and distribution of gas to thwart the development of a competitive market

### **3. Should the current ARC definition of energy service provider be narrowed or eliminated entirely?**

OESLP contends that the current definition of energy service provider should be retained and, in fact, broadened to spell out all energy service activities as identified in Compliance Bulletin 200604. Some of the clarified scope of activities include generation, street and sentinel lighting, sales, metering wholesale settlement, billing and water heater rentals.

The Board notes in its Staff Research Paper that the early expectations that distribution affiliates would enter the competitive electricity retail sector have not materialized. OESLP contends that, although the early expectations that distribution affiliates would enter the competitive electricity retail sector have not materialized, the potential still exists for such entry once the Regulated Price Plan (“RPP”) concludes and a true open and competitive market place develops.

OESLP strongly contends that further tightening of the rules that providers of energy service face are required. The current ARC rules that apply to all affiliates, as referenced in the Board Staff Paper page 14 are;

- transfer pricing, confidentiality of information, equal access to services, and the rules related to the marketing material and the use of names .

Affiliates that are energy service providers face the following additional rules:

- physical separation requirement (section 2.1.2)
- prohibition against sharing employees who carry out day-to-day operation of utility business (section 2.2.4)
- prohibition on utility support for the marketing activities of an energy service provider (section 2.5.1)
- requirements that the utility shall not state a preference for an affiliate that is an energy service provider (section 2.5.2)

The specific areas of the Electricity ARC that require a more thorough addressing in order to ensure fairness to all retail energy service providers follow:

Section 2.1.2 currently states “A utility shall be physically separated from any affiliate who is an energy service provider.” OESLP suggests that the word “shall” be replaced by the word “must.”

#### **Section 2,2 Sharing of Services and Resources**

Section 2.2.1. – This section states that “where a utility shares services or resources with an affiliate it shall do so in accordance with a Service Agreement, the terms of which may be reviewed by the Board to ensure compliance with the Code. “ OESLP submits that a utility should not be able to share services or resources with an affiliate under any circumstance. Sharing of services or resources especially in the competitive retail energy supply business can amount

to an unfair advantage to the affiliate. An independent retailer must cover the entire cost of resources and services, whereas, an affiliate if allowed to share services and resources can simply allocate a portion of the cost incurred by a competitive retail energy supplier. For this reason, OESLP recommends that this section of the ARC be changed to indicate that a utility can not share service or resources with an affiliate.

Section 2.2.2. – “Where a utility shares information services with an affiliate, all confidential information must be protected from access by the affiliate.” OESLP strongly submits that an affiliate of a local distribution company which competes directly against other retail energy service providers must not be given any type of advantage over others in the market. These advantages could include preferential or shared access to any of the following: i) general consumer information; ii) proprietary information; iii) confidential data or databases, iv) call center data; or v) billing information. OESLP submits that this section of the ARC should be amended to reflect that a utility should not be authorized to share information service with an affiliate owing to the potential advantage it can provide.

Section 2.2.4 – “A utility shall not share with an affiliate that is an energy service provider employees that carry out the day-to-day operations of the utility’s transmission or distribution network” OESLP contends that sharing of employees should be strictly prohibited with an affiliate that is an energy service provider. As utility worker are privy to information that energy service providers may not have access to these employees should not be shared regardless if they are day-to-day operation or “non-operating” employees.

Section 2.5.1. - “A utility shall take all reasonable steps to ensure that an affiliate does not use the utility’s name, logo or other distinguishing characteristics in a manner which would mislead consumers as to the distinction between the utility and the affiliate.” OESLP strongly argues that this section of the ARC must be strengthened to ensure that utility affiliates cannot share any type of branding and/or logos with the distribution company nor have any similarities in its name, additionally, the companies must not share billing, websites, telephone or fax numbers. Utilities’ affiliates wishing to use the same brand, logo or any type of name similarity would enjoy a significant advantage over retailers as they would enjoy major brand recognition and the benefit of the distribution relationship with the existing customer base. OESLP proposes the following rewording for this section:

Section 2.5.1. - A utility shall ensure that an affiliate does not use the utility’s name, logo or other distinguishing characteristics, including name similarities, in a manner which would mislead consumers as to the distinction between the utility and the affiliate.

**4. Should the current ARC treatment of confidential information be narrowed or otherwise changed?**

The current ARC definition of confidential information is appropriate and does not require any change.

**5. Should the ARC Rules on sharing of employees between utilities and their affiliates be made more flexible?**

The ARC rules on sharing of employees should not be made more flexible. OESLP is of the view as expressed above that no sharing of employees should be allowed.

**6. Do provisions regarding the percentage of Independent utility directors remain appropriate?**

OESLP believes that the number of independent directors should be increased to at least 50%, as the current limited requirement for directors may introduce conflicts of interest when agreements between the distributor and the affiliate are being negotiated.

**7. Should the current Electricity ARC rules for market or cost-based pricing of goods and services be changed?**

As the Staff Research Paper states:

The major objective of the transfer pricing rules for products and services is to protect ratepayers by ensuring a utility does not pay an unreasonably high amount to an affiliate for a service or product, or provide a service or product to an affiliate for an unreasonably low amount. Although the primary objective is to protect utility ratepayers against cross subsidization, a by-product of such rules is to protect third-party service providers against anti-competitive pricing behaviour resulting from ratepayer subsidy of competitive operations. The issues for analysis are whether the current Electricity ARC rules for market or cost-based pricing of goods and services should remain as is, be amended to adapt the Gas ARC transfer pricing rules or be modified to reflect the directions provided in Compliance Bulletin 200604.

The ARC should ensure that transfer-pricing policies are transparent and fair. As there have been issues around the transfer-pricing rules which have required the Chief Compliance Officer's ("CCO") guidance OESLP believes that the ARC should be amended to more closely reflect the views of the CCO Compliance Bulletin 200604 and the Gas ARC's transfer pricing rules for products and services. Further, OESLP believes that extending the Gas ARC rules to the electricity sector would expand ratepayer protection.

**8. Should the Gas ARC outsourcing provisions be included in the Electricity ARC?**

OESLP submits that the ARC be amended to require a business case analysis whenever any outsourcing is contemplated, including the benefits that will ensue to ratepayers by outsourcing. The business case must provide proof that all options have been thoroughly evaluated, that the outsourcing decision is prudent and that no harm will be done to ratepayers.

**9. Should the cost-based pricing rules for shared corporate services used in the Gas ARC be extended to the Electricity ARC?**

OESLP believes that the cost-based transfer pricing rules for shared corporate services should be extended to the ARC.

**10. Should the asset transfer-pricing provisions of the Electricity ARC mirror the requirements of the Gas ARC rules?**

The asset transfer-pricing provisions of the Gas ARC should be extended to the ARC in order to bring consistency to the different utility sectors.

**11. Should the Electricity ARC rules or exemption process treat small distributors differently?**

OESLP submits that a distributor's size should not be the basis for its regulatory treatment. Customers no matter the size of their utility should be afforded the basic protections afforded to any ratepayer, therefore, provisions that exempt small distributors should not be incorporated into the ARC.