Summary of Comments Received
by 5:00 pm, February 15, 1999

Affiliate Relationships Code
for
Electricity Distributors and Transmitters

ONTARIO ENERGY BOARD
Staff Draft for Consultation Purposes

29 January 1999

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NOTE: Comments are included within the text of the draft Code as bold typeface. These will not be included in the final Code, but are for discussion purposes only.

GENERAL COMMENTS

Aird & Berlis notes that the Code appears overly restrictive and prescriptive, and may create unduly onerous and unfair obligations on municipal electric corporations. The standards also are difficult to understand. Depending on how the Code is interpreted, it may practically prevent the permitted activities of municipal electric corporations and their affiliates as set out in subsection 73(1) of the *Act*.

Aird & Berlis, Borden & Elliott on behalf of Oakville Hydro, the MEA and Port Hope Hydro suggest that there should be a differentiation between utilities by size as the requirements may be prohibitively onerous for small utilities and the consequences of non-conformance are minimal. In some cases, the imposition of some requirements and conditions on smaller utilities will result in additional administrative and regulatory burden, and will lead to inefficiencies and the impairment of the delivery of services and products. A more effective application of the Code may be to establish size or dollar threshold levels that would trigger their application with respect to particular utilities. For example, Port Hope Hydro suggests that there should be a general relaxation of the Code to those utilities who have an employee base (full-time, part-time, contract, etc.) of under 40 people in total. Utilities located in remote areas also should be given concessions in this regard. The MEA estimates that the physical and employee separation requirements should not apply to utilities other than the 30 largest. The proposed code likely will affect existing arrangements, especially shared plant and services between electrical and other public utilities. At the very least, current relationships should be recognized in the rules.

Alliance Gas believes that the purpose of the Code is not only to establish the framework under which electric utilities and their affiliates operate, but also the circumstances under which an affiliate is created. Alliance also contends that the Code is meaningless if it is not binding on the affiliate as well as the utility. The phrasing of the Code does not address the obligations of the affiliate, which could lead to problems in the enforcement or investigation of the Code. Alliance refers to section 70(2)(f) of the *Act* that requires maintaining separate business records for organizational units, and contends that this section should be interpreted to mean that the affiliate should be subject to the Code as well.

Belleville Utilities Commission, Borden & Elliott on behalf of Oakville Hydro, the Hydro-Electric Commission of the City of Nepean, the MEA, Ontario Hydro Generation (OPG), Ottawa Staff and Port Hope Hydro believe that there should be a transition period and/or some softening of the Code for a utility to set up a competitive utility. Perhaps an initial mode would be financial separation (as in a PUC environment for water and electricity)

with which existing municipal electric utilities have good experience. This transition period could implement the Code in timed stages, or with respect to class and type of utility. For example, there could be a transition period of at least two years after incorporation during which the wires businesses would be permitted to participate in some competitive businesses, possibly kept at a certain size. This would permit the Board of Directors to assess the value of the various businesses to shareholders and to deal with issues related to the Code in a consultative and educational process. OPG suggests a grace period, as opposed to grandfathering, to allow MEUs to come into compliance with the Affiliate Code. Nepean notes that the absence of such an approach will guarantee that few, if any MEUs, ever participate in offering competitive services.

Bennett Jones on behalf of Electrical Contractors Association of Ontario (ECAO) notes that, on the whole, the draft Code is reasonably effective, well-written and balanced. It demonstrates an appreciation of the overarching and sometimes conflicting interests of participants, consumers and ratepayers in the restructured electricity marketplace. With appropriate fine-tuning, the draft Code could be suitably improved and refined so as to benefit all Ontarians.

Borden & Elliot on behalf of Oakville Hydro, Clarington, Enron, Hydro Guelph, the Hydro-Electric Commission of the City of Nepean, the MEA, Oshawa PUC, Sault Ste. Marie PUC, Utilities Kingston and Woodstock PUC convey concerns regarding timing and process. There is insufficient time for a thorough examination, consideration and response to the Code. Given the profound importance of the issues involved, the MEA feels that a more formal proceeding or hearing on these issues may be necessary. The MEA requests that its members and other participants be afforded more time for input and that subsequent process and/or process options be clearly outlined by the Board.

Borden & Elliot on behalf of Oakville Hydro notes that Oakville Hydro provides a variety of services in the Halton region in addition to the distribution of electricity:

- **meter reading, billing, collection and call center services to the Region of Halton for its water and waste water services; and**
- **street lighting services to the Town of Oakville, which includes design, maintenance and call center service.**

The future of these mutually beneficial, cost-effective and efficient arrangements are called into question by this Code.

Bracebridge Hydro-Electric Commission notes that the Code, as it stands, would be detrimental to the cost effective and efficient approach Bracebridge uses for its generation operations, which provides approximately 20 percent of its electrical supply to customers. Bracebridge believes that all generation should be grandfathered for each utility due to the fact that each Council and Commission had the foresight and ingenuity to construct their

own generation. These decisions were made over 100 years ago, and now that benefit is in jeopardy because of the way competition is being set up.

Brantford Hydro notes that the inference of the Code is that the distributor is the lead agency and has its own staff, thus there would be a significant firewall to the retail affiliate. In Brantford, the City Council recently dissolved the elected Commission, appointed a new commission and took all hydro staff into the City as employees. The original Hydro, now City, employees are leased back to the Commission as staff.

Brockville PUC notes that the rights and responsibilities of a distributor to make a profit should not be unduly hampered by regulation. It is anticipated that a distributor will be able to continue to have a full business function to promote the use of electrical energy, to bill customers and retailers, to collect accounts, construct and maintain plant and respond to customer inquiries, while making a profit for the shareholder. As it is, the Code makes the possibility of a stand-alone retail affiliate unlikely for small and medium MEUs. Options for cooperative actions and partnerships may assist in the development of a retail company without cross-subsidization.

Enbridge Consumers Gas commends the Board for the level playing field that this Code will help to achieve between gas and electricity distribution utilities, as well as between marketers and retail affiliates of electricity distribution utilities. Enbridge feels that the Code is practical and workable, and strikes a balance that will promote a competitive market. Enbridge also notes that Cornwall Electric should be exempt by regulation from a number of sections of the *Act*. If exempted from section 80 of the Act, Cornwall Electric would continue to share services and employees with those involved in the operation of a small amount of generation.

Enbridge, Ontario Hydro Services Corporation (OHSC) and Scott & Aylen on behalf of Ottawa Hydro cautions the Board from making exemptions based on the size of a utility. This distinction will be arbitrary and most likely will dictate whether a distributor creates an affiliate at all. A level playing field should be created for all utilities and energy marketers and not be impacted due to size. Enbridge and Scott & Aylen note that the policy objective of the government is to rationalize the number of utilities and encourage amalgamations in order to achieve more efficient operation of distribution utilities. Therefore, spending time assessing and debating applicability of the Code based on a utility's size is not productive.

"G6" (Outerbridge Miller on behalf of Hydro Mississauga, London Hydro, Oshawa PUC, Sarnia Hydro, St. Catharines Hydro and Whitby Hydro) notes that a formal presentation by Board staff regarding how these codes would be implemented at an operational level would be very valuable.

G6 also notes that the Code in conjunction with the Standard Supply Service Code attempts to eliminate any perceived advantage associated with a retail company providing the standard supply service on behalf of a distribution company. Although laudable, these objectives are not practical and will result in increased costs, lost opportunities to achieve efficiencies, and diminished tax payer value in existing municipal electric utilities. In their opinion, the constraints which the draft Code seeks to place on retail companies are ineffective, are in contradiction to the principles of the *Electricity Act, 1998*, and fail to achieve the stated objectives at the operational level.

Gloucester Hydro voices general disappointment that this Code does not allow for any transition period for the distributors to get their affiliate energy company up and operating before they are completely separated. The Code will put the affiliate at a severe disadvantage in raising start-up capital from any source other than through municipal guarantees.

Granite Power notes that the timetable to achieve conformity with the Code may take several years, and compliance will be very difficult and costly. For distributors that already are corporations, there should be a different timeframe than for MEUs due to the complexity of the issues that must be resolved before compliance can be achieved.

The Hydro-Electric Commission of the City of Nepean (Nepean HEC) notes that it has some businesses, such as rental water heaters and streetlighting, that make up a very small part of the utilities' businesses and could not justify the setting up of separate corporations. The Code, as written, would force utilities out of all such activities. Furthermore, it is possible that no private enterprise will come forward to provide these services in some areas of the province.

The Nepean HEC notes that very few, if any, MEUs would be able to participate in any competitive businesses given the restrictions in the Code. An MEU could not set up a competitive affiliate without sharing, at least during a transition period, a common location and operating officers with the wires business. Nepean does not advocate cross-subsidization, only that it be allowed to allocate costs on a fair and appropriate basis for some interim period. Nepean hopes and trusts that it is not the intent of the Board to prevent MEUs from participating in some competitive markets as envisioned by Bill 35, but that would be the result of this Code.

The MEA notes that the Code is extremely rigorous in attempting to avoid any kind of utility affiliate relationship benefit. As a consequence, it can be questioned if this degree of rigor is necessary and if it is implemented, what effect will it have on the electricity market and what benefits will flow to consumers. For other than the largest MEUs, the degree of separation required for competitive electricity affiliates will virtually eliminate their ability

to staff and establish a fledgling business, resulting in fewer choices for consumers.

The MEA and Sault Ste. Marie PUC note that it is unclear how a water utility falls under this Code. The MEA submits that the degree of separation in the Code is not necessary for affiliates that provide services such as water system operation, utility line services, tree trimming, etc. as long as the financial rules are followed. Implementation of the Code as written likely will result in the loss of significant economies both for the utility and the recipient of the affiliate services.

John S. McGee on behalf of the Federation of Ontario Cottages Association, notes that the Code does not mention the role of a holding company, which is central to the whole issue of affiliate relations. A number of MEUs already operate other municipal services such as water, transit, parks, gas distribution, etc. Services have been shared for many years and it is not clear whether the Code is intended to apply to these relations. About 15 MEUs own generation facilities which will have to be moved to an unregulated affiliate. Some MEUs also have engaged in other competitive activities such as appliance sales and rental, district heating plants, fiber optic systems, cogeneration plants and electrical contracting services. Many recently have invested in an energy procurement company, EnerConnect, and in other cooperative ventures. It is evident that no incorporated MEU affiliates exist at the present time, so it is important to get the right rules established for their formation. The bottom line is that captive customers of regulated monopolies need firm protection from risky investments. Any competitive risky investments must be entered into by the competitive affiliate, not the utility. In that way, a competitive affiliate's owners take all the risks and rewards.

OPG notes the Board's desire for symmetry in the gas and electricity industries but notes one important difference: section 1.5 of the Code for gas affiliates provides that Undertakings between the LGIC and gas utilities or their affiliates prevail over the proposed Gas Affiliate Relationships Code. To the extent Undertakings are more permissive than the proposed Codes, then gas utilities and their affiliates could have a competitive advantage over market participants in the electricity industry. OPG recommends that the Board attempt to maintain a level playing field between the two industries by ensuring that any latitude accorded gas utilities is correspondingly reflected in the Affiliate Relationships Code for the electricity industry.

OHSC notes that the electricity industry is still in the early stages of restructuring. While there is a benefit in scoping out the rules, many initiatives required to have open access are inter-related and are all in their formative stages. While a Code can be developed now, given the limited understanding of market rules, settlement procedures, etc., changes may require substantial rewrites of the code in the future.

Orillia Water, Light & Power Commission note that it has embedded generation and recently installed state-of-the-art fibre optic based data communications system that not only meets its own needs, but also has allowed it to market excess capacity to local business users to foster local economic development. It is clear that generation and telecommunications will become non-regulated affiliates of the regulated Wires business and must adhere to the Code. However, the Code appears to have been written to address the concern of avoiding cross-subsidization between the distributor and the competitive retail affiliate, and to prevent preferential access by the competitive electricity affiliates to services of the distributor. For Orillia, significant additional costs and inefficiencies would be imposed if the existing relationship between distribution and generation, which has a single Control Centre, a single SCADA system and one employee who splits his time, are not allowed. Requirements relating to clause 2.2.1, customer information and transfer pricing should not be applied to this relationship. Furthermore, increased costs would be created due to employees who are members of the Generation Department and also work on substations of the distribution department. The relationship between generation and distribution is not the same "kettle of fish" as a relationship between a distributor and a retail affiliate. Other distributors with embedded generation share this concern. Shared personnel and services should be allowed under a Services Agreement to prevent any inappropriate financial cross-subsidization of the generation affiliate.

Ottawa Staff notes that at first reading, the Standards in the Code appear to be understandable. However, when they attempted to apply the standards to a reorganized Ottawa Hydro, it became obvious that there was not a common understanding amongst senior staff, indicating some ambiguity. While not a long document, the interaction between some of the sections can be complex. Perhaps much of this ambiguity could be removed by providing in a companion document an explanation of the intent of the clause together with some examples.

Ottawa Staff notes that as the market opens and all these Codes come into effect, there will be sufficient customer enquiries to overload most utility Call Centres. The possibility for negative impact from frustrated customers is significant.

Scott & Aylen on behalf of Ottawa Hydro believe that a number of provisions in the draft Code need to be tempered, having regard to the principal purpose and concerns which the Code attempts to address. The difficult question to answer is how far the Codes ought to go in constraining the activities in which the utility can engage. Scott & Aylen submit that as long as activities of a utility fall within the ambit of transmitting or distributing electricity, such activities should not be constrained by the Codes unless they are likely to impair competition or harm the utility. With respect to providing services to other utilities, the Code does not appear to prevent this so long as the regulated rates charged to Ottawa Hydro customers are derived on a basis which assigns the fully allocated costs of providing

such services to those utilities. Board staff should confirm that this interpretation is correct.

Pembroke Hydro notes that affiliate small generation and load management programs are an asset to the province of Ontario, yet the Code discourages efficiency and local employment.

Port Hope Hydro notes that aspects of the Code are very broad and non-definitive. Where certain performance or standards come into play, the Code should identify what these indicators are.

Port Hope Hydro suggests that existing relationships and arrangements between regulated distribution companies should be grandfathered as long as the practices are essentially a rationalization of services only and not a "money-making" enterprise.

Renfrew Hydro notes that municipal generation currently derives its revenue from the avoided cost of purchasing electricity from Ontario Hydro. This will change with the introduction of the new marketplace, and it is paramount that Renfrew's ability to adapt not be hindered. It asks that the Board not be blinded by the drive to achieve open competition for the big fellows while ignoring and destroying the flexibility and efficiencies that small utilities have achieved.

Peterborough PUC notes that Minister Jim Wilson said, last summer, that essentially employees would continue to work as they have in the past. There would be a requirement for accurate and honest accounting of costs for employees performing multiple duties, but there would not be a requirement for job separation. This does not seem to be the intent of the Code.

Terrace Bay Hydro Electric Commission understood the choices of legislation to be that a municipality could wholly own both the utility and affiliate, and that the source of standard supply could be either the utility, the affiliate or a third party. The Code makes it impossible to own a wholly owned affiliate and to achieve efficiencies in other areas such as joint billing, thereby making the company less efficient and increasing the price of power. It is their preference that a municipality could separately own and operate both the utility and an affiliate in order to serve its community.

TransCanada supports the principle of "solid" separation between the utility and its affiliates, and is pleased that the Board has proposed the strong separation measures contained in the Code. With some modifications for practical reasons, it believes that these codes will form the basis for a truly competitive marketplace at the retail level.

Utilities Kingston operates as fully integrated utilities, most of which comprises "monopoly" businesses, electric wires and gas, water and wastewater pipes. It also is engaged in gas appliance servicing and gas hot water tank rental programs. This Code seriously imperils its ability to manage these functions jointly in a cost effective manner.

Whitby Hydro is concerned that the effect of the Affiliate Relationships Code and the Standard Supply Service Code is that competition in local markets will be unduly restrained. The market will lose some of the considerable customer benefit that would derive from healthy and competitive municipal utility retail affiliates across Ontario. As thriving utility affiliates are in its opinion, an important part of a comprehensive response to the industry's financial situation, it urges the Board to rethink the code provisions concerned.

1. GENERAL AND ADMINISTRATIVE PROVISIONS

1.1 Purpose of this Code

The purpose of the Affiliate Relationships Code is to set out the standards and conditions for the interaction between electricity distributors or transmitters and their respective affiliated companies. The principal objectives of the Code are to enhance the development of a competitive market while saving ratepayers harmless from the actions of network service providers with respect to any dealings with their affiliates. The standards established in the Code are intended to:

OHSC and Toronto Hydro note that "network service providers" is not defined and suggest that the reference to "network service providers" should be replaced with "transmitters and distributors."

- minimize the potential for cross-subsidization of competitive or non-monopoly activities by distributors or transmitters; and

Brockville PUC notes that regulation of the affiliate seems to limit the power of a company based on the need to regulate to ensure that there is no cross-subsidies. Perhaps this should be reviewed further to determine if there is not a better way of achieving the objective without limiting the ability of the retail company to market.

Granite Power notes that the Board makes a very strong statement that cross-subsidization is very bad and it must be stopped. Granite Power notes that it has been very good for its customers, and that although it can be abused, that is not always the case.

The Public Interest Advocacy Centre (PIAC) / Ontario Coalition Against Poverty (OCAP) note that the term "minimize" presents to feeble a goal. While "eliminate" may be too optimistic, the use of the term "minimize" could lead to difficulties with respect to compliance. PIAC/OCAP suggests a phrase similar to "ensure there is no potential for . . ."

- ensure there is no preferential access to the regulated networks or customers of the distributors or transmitters.

The Upper Canada Energy Alliance suggests that there should be an additional intention:

> **c. ensure that there be no increase in costs to the distributor or transmitter because of the separation requirements.**

The Upper Canada Energy Alliance notes that consumers are not going to be concerned about preferential access for affiliates, nor about cross subsidization if it means that their bills are going to increase. The Board's real protection should be to prevent unnecessary added costs.

Utilities Kingston is supportive of the expressed principles to ensure no cross-subsidization or preferential access.

In establishing the standards and conditions of this Code, the Board has considered the objectives of the *Ontario Energy Board Act, 1998*.

Borden & Elliot on behalf of Oakville Hydro notes that the Code should reflect the spirit and intent of the market restructuring that now is underway in Ontario. This spirit includes an emphasis on creating efficiencies, promoting open access and transparency, and reducing regulatory burden. With these principles in mind Oakville Hydro would expect to be able to ensure that financial cross-subsidies would be precluded, without jeopardizing efficient and effective use of resources. If this Code is designed to preclude a challenge over cross-subsidization at a hearing, then it may have some merit. However, if the utility still could be exposed to the risks and challenges of a hearing, the Code has questionable value.

Brockville PUC notes that a number of principles should be followed in determining the details of the Code and the environment in which distributors will operate:

- **Saving distributor ratepayers harmless**
- **No cross-subsidization**
- **Ease of regulation**
- **Distributor neutrality when dealing with customers and the retail market**

Enershare Technology Corporation and Direct Energy Marketing Limited agree that the

draft Code in its present form accomplishes the goals "to enhance the development of the competitive market while keeping ratepayers unharmed from affiliate transactions."

John S. McGee notes that the purpose of this section is clear in protecting the captive customers of the monopoly utility from risky investments and ensuring a level playing field for other players in the unregulated competitive market. However, many other aspects of the Code are inconsistent with the purpose section.

OHSC submits that the following principles should be laid out in the Code:

- **The Code should encourage the development of the competitive retail market for electricity.**
- **The Code should not disadvantage consumers that remain with Standard Supply Service once open access is declared, in comparison to their existing service levels.**
- **The Code should protect against the use of competitive advantages by distributors and transmitters gained by virtue of their monopoly position. This does not mean that all competitive advantages should be prohibited, only those that arise by virtue of the monopoly position. For example, economies of scope and scale by being part of a larger company sharing administrative services over both energy and other services should be allowed.**
- **The Code should protect against improper relationships between regulated utilities and their unregulated affiliates.**

Whitby Hydro supports the purpose of the Code.

1.2 Definitions

Terrace Bay Hydro suggests that definitions be clearer and use examples so that the Code can stand on its own and not depend on references to legislation or other codes.

"Act" means the *Ontario Energy Board Act, 1998;*

"affiliate" with respect to a corporation, has the same meaning as in the *Business Corporation Act* (Ontario);

OHSC notes that the OBCA definition is a broad definition that includes the parent company, affiliate regulated utilities in Ontario, and regulated and unregulated affiliates outside the province of Ontario. Except for ensuring that no cross-subsidization is occurring, the Code should not apply to relationships between the utility and regulated affiliates and non-regulated affiliates operated outside of Ontario. Specifically, there should be no restrictions on shared directors where the affiliates are not operating in

Ontario. Additionally, the definition should exclude a parent holding company due to OHSC's special circumstances in which the transmitter and distributor must be affiliates. OHSC should not be disadvantaged vis-a-vis other utilities by including the holding company in the definition of affiliate.

"agent" -- OPG notes that the term "agent" is reference in clause 2.5.2 but has not been defined in this Code.

"Board" means the Ontario Energy Board;

"Code" means this Affiliate Relationships Code for Electricity Distributors and Transmitters;

"confidential information" -- Scott & Aylen on behalf of Ottawa Hydro suggest that "confidential information," referred to in clauses 2.2.7 and 2.6.2, be defined so that everyone will know the nature of the information which is not to be disclosed.

"cross-subsidization" -- Bennett Jones on behalf of Electrical Contractors Association of Ontario (ECAO) suggests introducing a definition of "cross-subsidization" of competitive business activities by participants in the monopoly and quasi-monopoly functions of the market. This definition should incorporate both its traditional meanings (e.g., joint finances and shared costs) and its new or effective meanings. In particular, such definition should include the direct or indirect influence of tangible or intangible assets, as well as market and customer information, and should take account of revenue which is forgone or diminished in situations which amount to cross-subsidization.

"Director" means the Director of Licensing appointed under section 5 of the *Act*;

"distribution system" means a system for distributing electricity at voltages of 50 kilovolts or less along with the related facilities and structures, including those facilities and or systems that operate at above 50 kilovolts that the Board has determined, pursuant to section 84 of the *Act*, are part of a distribution system;

Granite Power notes that this definition is very general. Does it include interconnection substations, metering or billing? Where does the system begin and end?

"distributor" means a person who owns or operates a distribution system;

"energy-related services" -- OPG and Utilities Kingston requests the Board to provide a definition of "energy or energy-related services" referenced in section 2.2.5.

"executive" -- The MEA suggests that this term as referred to in clause 2.2.4 be defined.

"fair market value" means the value that the market places on a product or service the margin is based on the demand and supply of the product or service;

OPG notes that this definition seems fairly academic. The Board should adopt difficult for utilities to apply.

Toronto Hydro requests clarification of the scope of the "market" in the concept of "fair market value." The Greater Toronto Area is a market that Toronto Hydro reasonably can access. However, a wider market area may have different prices. Toronto Hydro recommends that the definition of fair market value refer to the relevant market of competitive activity.

Whitby Hydro assumes that the definition of the cost at the margin is different from what is conventionally known as variable cost, in that marginal cost should include variable and fixed costs as well as cost of capital.

"fully distributed cost" means an accounting-based method for measuring costs, whereby costs are defined as the sum of direct costs and a share of common costs;

Borden & Elliot on behalf of Oakville Hydro, OPG and Ottawa Staff note that "fully distributed cost" is not used in the Code. To the extent it is used, there should be additional definitions for "direct costs" and "a share of common costs."

"fully distributed cost price" means a price applied to each product or service that would produce enough revenues to pay for the total costs plus a reasonable return on capital;

Borden & Elliot on behalf of Oakville Hydro, OPG and Ottawa Staff note that "fully distributed cost price" is not used in the Code. To the extent it is used, there should be additional definitions for "total costs" and "reasonable return on capital."

"information services" means computer systems, services, databases and personnel knowledgeable about the information technology systems;

"in writing" -- OPG notes that this provision in clause 2.6.3 appears to be inconsistent with the use of telemarketing or marketing via the Internet. The term "in writing" requires clarification.

"licence" shall mean a licence issued under Part V of the *Act*;

"licensee" shall mean a transmitter or distributor licensed under Part V of the *Act*;

"marketing*"* means to provide for a consumer's consideration an offer, and is characterized by door-to-door selling, telemarketing, direct mail selling activities, and any other means by which an energy marketer or a salesperson interacts directly with an energy consumer;

OPG notes that this does not cover advertising, providing product information, or brand awareness techniques that do not include an offer to customers. If this is not the Board's intentions, it should be clarified. Additionally, "energy consumer" should be simplified to "consumer."

"offer" means a proposal to enter into a contract, agency agreement, or any other agreement or combination thereof, made to an existing or prospective consumer for the sale of natural gas or electricity;

Whitby Hydro notes that it is unclear why "natural gas" appears in this paragraph, considering that the document refers to electricity distributors' affiliates. Would not the sale of natural gas be covered by the natural gas marketer's code?

"operational responsibilities" means the activities of an employee of the utility or affiliate where the employee is involved in the day to day operation of the network, customer relations, customer data, or the planning of construction or expansion of the network;

Ottawa Staff and Sault Ste. Marie PUC note that it is unclear who this leaves out, and hence, the application of sections 2.2.4, 2.2.5 and 2.2.6 is ambiguous. Ottawa Staff provides the example of a lines person or a substation electrician/mechanic who, under present practice, are deemed to have operational responsibilities. Are these people included? If so, it makes no sense as they provide network service by do not carry confidential customer information.

Scott & Aylen on behalf of Ottawa Hydro notes that this definition is far too broad and the scope ought to be confined to activities which have the potential of impeding the emergence of a competitive market or of harming the utility, notwithstanding that such activities may be shared in compliance with the transfer pricing rules. For example, the services of a utility lineman will not operate to cross-subsidize or prefer the affiliate or harm the utility. Yet, such a service falls within the definition of "operational responsibilities" reflected in the draft Code. Scott & Aylen submits that there is no need to prohibit sharing of services provided by employees engaged in the day-to-day operation of the network, or the planning of construction or expansion of the network unless the sharing of such services is likely to

either harm the utility or provide the affiliate with access to information not available to parties with whom the affiliate competes.

Upper Canada Energy Alliance suggests that this be limited to employees who are only involved in customer relations. Only those employees who come into contact with customers as a routine part of their job should be included in this definition.

"rate" means a rate, charge or other consideration, including a penalty for late payment, that has been established by the Board;

Borden & Elliot on behalf of Oakville Hydro notes that, if fully distributed cost price is to be included in this Code, a distinction needs to be clarified between that definition and the definition for "rate."

"Rate Order " means an order of the Board that is in force at the relevant time which, among other things, regulates distribution, transmission and connection rates to be charged by the licensee;

"retail" means:

(a) to sell or offer to sell electricity to a consumer; or

(b) to act as agent or broker for a retailer with respect to the sale or offering for sale of electricity; or

(c) to act or offer to act as an agent or broker for a consumer with respect to the sale or offering for sale of electricity;

"retailer" or "electricity retailer" means a person who retails electricity and is licensed as such under Part V of the *Act*;

"Service Agreement" means a contract or agreement that establishes for any service or resource to be shared by a utility and its affiliate the terms of the agreement, including the type, quality and pricing of the service or resource; the apportionment of any liability or risks; and any other terms and conditions related to the sharing of the service or resource;

"transaction" -- TransCanada suggests defining a transaction so that, for the purposes of clause 2.8.1, there is not a wide difference in how utilities maintain and update records on such "affiliate transactions."

"transmission system" means a system for transmitting electricity at voltages of 50 kV or greater, and includes any wires, structures, transformers, equipment or other things used for that purpose, including assets or systems that the Board has determined, pursuant to section 84 of the Act, are part of a transmission system;

"transmitter" means a person who owns or operates a transmission system;

"utility" means, for the purpose of this Code, a licensee;

OPG notes that this definition may be problematic since there are many types of licensees which would not be subject to this code. Language similar to that proposed in the Gas Affiliate Code should be adopted. OPG suggests:

"utility" means, for the purpose of this Code, a distributor or transmitter who is licensed under the *Act*.

"utility services" means the services provided by utilities for which a regulated rate, charge or range rate is approved by the Board under section 78 of the Act, and includes a distributor's obligation to sell electricity pursuant to section 29 of the *Electricity Act, 1998*.

"valid tendering process" -- Scott & Aylen on behalf of Ottawa Hydro suggest that "valid tendering process," referenced in subsection 2.3.2, be defined so that the phrase "reasonable proof" can be changed to read "proof" and that evidence of a valid tendering process will satisfy the Code provision.

1.3 Interpretations

Unless otherwise defined in this Code, words and phrases that have not been defined shall have the meaning ascribed to them in the licenses issued by the Board, the *Ontario Energy Board Act, 1998* or the *Electricity Act, 1998* as the case may be. Headings are for convenience only and shall not affect the interpretation of this Code. Words importing the singular include the plural and vice versa. A reference to a document or a provision of a document includes an amendment or supplement to, or a replacement of, that document or that provision of that document.

1.4 To Whom this Code Applies

This Code applies to all electricity distributors and transmitters licenced by the Ontario Energy Board under Part V of the *Ontario Energy Board Act, 1998*. Each of these

entities is obligated to comply with the Code as a condition of their licence.

NOTE: The intent of the Code is to obligate the regulated entities (wires businesses) and not their affiliates. However, certain provisions of the Code in fact place restrictions and limitations on the affiliates of the licence holder, such as provisions relating to the use of resources and the provision of information to the Board. With respect to protection of data and information, the Code establishes it as a breach of a licence condition for any licensed utility to provide or disclose customer information or utility data without proper authorization. A similar condition will be included in the licences for retailers, generators, wholesale suppliers and wholesale buyers issued by the Board.

Alliance Gas notes that, while pre-market contracting is restricted by competitive retailers, there has been no control over the spending by MEUs to build up their brand names or distribute literature that discourages competition. This spending has been with ratepayer dollars, and it is difficult to see where, in the myriad processes occurring, it will be addressed. The establishment of this Code seems to be the only opportunity to address it. Accordingly, Alliance recommends that the purpose section be extended to restrict expenditures prior to separation.

G6 notes that sections of this Code only apply to utilities after they have been separated into distinct distribution and retail companies. Section 142 of the *Electricity Act, 1998* provides a municipal corporation with two years to cause a corporation to be established to distribute or retail electricity. Moreover, sections 70(2)(f), 70(7) and 70(8) of the *OEB Act* permits the Board to impose conditions in a licence requiring the maintenance of specified records and separate accounts for separate businesses in order to prohibit subsidies between separate businesses. Sections 70(7) and (8) specifically contemplate the issuance of licences to public utility commissions or a municipal corporation and permit the licence so issued to contain provisions allowing the licence to be transferable by transfer-by-law to a corporation incorporated pursuant to section 142. In their opinion the legislature contemplated the approach currently being suggested by the G6 and made specific provisions for the Board to apply this approach. The sections of the Code that only apply after incorporation should be amended to reflect that this provision is subject to section 142 of the *Electricity Act, 1998* and does not prohibit the licensing of the MEU in the interim as either a distribution company or a retail company.

Granite Power notes that its impression is that physical separation between the wires and generation companies is not as critical as separation between wires and retail companies. However, there does not seem to be any differentiation in the Code.

The MEA notes that the necessity to establish an affiliate is not in the Code, therefore, it must be in the licence or another Code. The *Act* uses the term business activity in relation to limiting what a "wires" company can do. Many MEUs provide wires related services to

utilities and other entities. These include activities such as line maintenance for a neighboring utility, tree trimming for a customer, replacing a customer-owned pole, etc. These activities improve efficiencies to the benefit of both the user of the service and the utility. These activities should not require that an affiliate be established. If it does, then utilities may stop doing this type of work, resulting in lost economies for all.

OPG and Union Gas is concerned that the Code will not apply to the anti-competitive and inappropriate behaviors (and consequences) that it is trying to prevent during the pre-incorporation (*Ontario Business Corporations Act*) period. Specifically, the Code only applies to the relationship between a utility and its affiliates; yet, MEUs have until November 2000 to reorganize their monopolies and competitive business activities into "affiliated" companies. MEUs will have an ability to market and to provide information to customers in a manner which would promote the "yet to be incorporated" retail affiliates. This issue is not addressed in the interim distribution licences. Union Gas submits that during the pre-incorporation period, cross-subsidization and preferential direction should be prohibited. This will ensure that there is a level playing field both within and between the gas and electricity sectors while electricity restructuring proceeds. At a minimum, the Board needs to address the potential for MEUs to promote their retail activities to be carried on through affiliates prior to the actual establishment of those retail affiliates.

Scott & Aylen on behalf of Ottawa Hydro notes that the provisions of the Code will begin to apply on the date when restructuring has been completed and interim licences have been assigned to the corporations which are created as a result of the restructuring. It is not the act of incorporating the OBCA utility and affiliates, but the licensing of the OBCA utility and affiliates which engages the provisions of the proposed Code. This effective date ought to be clearly stated in the Code and section 1.4 should be revised accordingly.

1.5 Hierarchy of Codes

The Affiliate Relationships Code will be subject to any specific conditions of a distributor's licence and will prevail over any other code established by the Board where there is a conflict.

NOTE: This provision is included to ensure that a licensee considers the conflict of codes according to the same standard as the Board. It is envisioned that various provisions of this Code may overlap with the Distribution System Code.

OHSC submits that the Board should be aware of potential conflicts as the other codes and licences are being developed so that instances where utilities are required to resolve conflicts are minimized.

OPG notes that this also should include reference to transmitter's licences.

Toronto Hydro notes that there is significant interdependency among the codes, and may have further comment on the hierarchy of codes once the Retail Settlements and Metering Codes have been issued for consultation by the Board.

Whitby Hydro notes that the Affiliate Code is in the first position of hierarchy and suggests that the contents of all codes should truly reflect the Affiliate Code's purpose.

1.6 Amendments to this Code

This code may be amended only in accordance with the procedures set out in the licence issued to a transmitter or distributor.

NOTE: It is proposed that for purposes of providing certainty to licensed entities, the amendment of codes referred to in the licence shall be spelled out in the licence thereby tying the applicable amendment process to licenses. Exemptions or derogations for particular utilities will be dealt with in the licence, so that the Code applies generally except where there is a conflict with a licence.

Ottawa Staff notes that each licence could have a unique amending formula, ultimately leading to complete lack of uniform structure.

Utilities Kingston requests the Board to provide information on any latitude that may be available such that unique circumstances may be considered at the point of licensing.

2. STANDARDS OF BUSINESS PRACTICE AND CONDUCT

Toronto Hydro submits that under section 72 of the *Act* as a MEU, a distributor may keep financial records of the distributor associated with distributing electricity separate from its financial records associated with other activities. However, in its opinion the degree of separation specified in this Code goes beyond the provisions of legislation. This will create a costly barrier for existing MEUs to establish a future retail business. Toronto Hydro recommends that the Board adopt the provision that separation between the monopoly and competitive businesses can be realized through the use of technology to create "firewalls" in its database systems, billing systems and call centre operations. Further measures to prevent cross-subsidization between the monopoly and competitive businesses could be achieved through Service Agreements.

2.1 Organizational and Financial Separation

Bennett Jones on behalf of Electrical Contractors Association of Ontario (ECAO), on the whole, supports Code provisions which require clear public disclosure and differentiation between the regulated and unregulated entities.

John S. McGee notes that it is not the MEU but the holding company (Municipal Council) that establishes, finances and governs the affiliate and takes any responsibility for that business failure. Otherwise, the affiliate would be a dependent subsidiary (i.e., a daughter rather than a sister company).

Terrace Bay Hydro notes that this section seems to prevent the utility from having a wholly owned affiliate. While the objective of financial and corporate separation is understandable, some of the requirements such as limiting Board members is unclear.

2.1.1 A utility shall be physically and financially separated from its affiliates, subject to the conditions set out under subsections 2.2 and 2.3.

Aird & Berlis notes that this requirement will be very onerous and in its opinion it is contrary to the intent of subsection 73(1) of the *Act* that allows municipal electric corporations the authority to undertake certain activities through an affiliate. The legislation's intent seems to be to allow maximum flexibility to municipal electric corporations and not to restrict the shared provision of services currently being undertaken by many municipal utilities. This requirement should be rethought so as to prevent cross-subsidization while not requiring a more rigid and costly regime for the public relating to the provision of public utilities and related permitted activities.

Belleville Utilities Commission notes that physical separation is one of the most onerous requirements of the proposed Code.

Brantford Hydro-Electric Commission, Enershare Technology Corporation and Direct Energy Marketing Limited, the MEA, Ontario Hydro Services Company, Pembroke Hydro and PIAC/OCAP note that the term "physically" is unclear. Does it mean separate areas on the same floor? Different floors? Will affiliates be required to be in separate buildings as in the gas industry? Brantford suggests further examples could clarify the degree of separation required via firewalls and whitehands approach.

Borden & Elliot on behalf of Oakville Hydro, Scott & Aylen on behalf of Ottawa Hydro and TransCanada note that without clarification, this clause could prove to be impractical

and unworkable. The requirement to physically separate into separate buildings ought not to be operative where an affiliate business is not of a size to threaten the emergence of competitive markets in its licensed area. TransCanada notes that existing office space may be underutilized while new space costs are incurred. Scott & Aylen suggest that a threshold measure of size (e.g., the number of employees) ought to be adopted, below which physical separation provisions of the Code do not apply.

Borden & Elliott on behalf of Oakville Hydro, Campbellford/Seymour PUC and Upper Canada Energy Alliance note that physical separation is unreasonable and will greatly increase costs and result in inefficiencies.

G6 notes that this section only applies to utilities after they have been separated into distinct distribution and retail companies under section 142 of the *Electricity Act, 1998,* and should be amended to reflect that this provision is subject to section 142 of the *Electricity Act, 1998* and does not prohibit the licencing of the MEU in the interim as either a distribution company or a retail company. It is unrealistic to physically separate in time for the April 1, 1999 licensing period. The costs of immediate separation are too significant to bear in a short period of time.

Granite Power notes that physical separation will be difficult given its generation facilities and long- and short-term lenders.

The MEA notes that it is not clear why physical separation is required if all other sections in the Code are adhered to.

OPG and Toronto Hydro note that the terms physical separation and financial separation require clarification. Specifications as to what constitutes "physically and financially separate" is necessary to help utilities organize their affairs and reduce regulatory challenges in the future. OPG also notes that the Board needs to ensure that this provision is consistent with section 70(13) of the Act which provides that a licence shall not require a person to dispose of assets or to undertake a significant corporate reorganization.

OHSC notes that the definition of affiliate in the OBCA would require the parent company to be physically separate from the other affiliates. This would not be efficient or necessary. OHSC also assumes that since transmission and distribution can be held in one subsidiary, accounting separation and not physical separation is required. It also assumes that common directors are acceptable. OHSC submits that it should have access to that same flexibility if, for other reasons, it chooses to move transmission and distribution into separate subsidiaries in the future.

Ottawa Staff notes that physical separation is not reasonable. Furthermore, it is not

defined. Does it imply separate buildings or separate entrances, cafeterias, washroom facilities, and so forth? At Ottawa Hydro, separated work places with the only common area being halls, foyers and so forth could be achieved at minimum expense. But, separate washrooms, cafeterias, parking lots and all such facilities would come at great expense. A separate building raises serious questions.

Pickering Hydro and Toronto Hydro requests clarification on the note related to whether this Code requires the establishment of non-subsidiary affiliates. The term "non-subsidiary affiliate" referred to in the note should be defined.

Upper Canada Energy Alliance note that costs would be increased for an affiliate who wants to ensure the customers of their municipality receive a fixed price offering for electricity similar to what they currently receive. Retailers will not be offering services in every part of the province, and in some areas, affiliates will have to be established.

2.1.2 A utility shall maintain separate financial records and books of accounts from those of any affiliate. Such financial records shall be separately audited by the utility's external auditor on an annual basis and a notification of completion of the independent audit shall be provided to the Director.

Alliance Gas suggests that the word "maintain" be changed to "establish" in order to require an accounting of the affiliate creation expenses which otherwise would be charged to system customers.

Brockville PUC notes that PUCs have successfully maintained two or more set of books and apportioned costs and revenues associated with common facilities. The requirement for separate books should not present significant problems and can be verified by separate audit.

Granite Power notes that considerable time may be required before this requirement may be achieved due to the complexity of separating accounting, assets, etc.

Port Hope Hydro notes that it should be clarified whether independent audits need to be conducted according to some generally accepted measurement technique.

Upper Canada Energy Alliance notes that financial separation is appropriate and a fair Services Agreement will ensure proper allocation of expenses.

2.1.3 A utility shall not permit the members of its Board of Directors to comprise more than 30 percent of the members of an affiliate's Board of Directors.

Bennett Jones on behalf of several MEUs notes that this places unrealistic restrictions on members of utility Boards of Directors not comprising more than 30 percent of the members of an affiliate's Board of Directors. Particularly as this relates to smaller utilities, this is an impractical and unrealistic expectation.

Borden & Elliott on behalf of Oakville Hydro and John S. McGee note that in the case of a small three -person board, the 30 percent rule would prevent any cross membership on the board of a sister company. Mr. McGee suggests that this problem could be remedied by substituting the words "Holding Company" (Council) for the word "utility."

Borden & Elliott on behalf of Oakville Hydro, the MEA, Scott & Aylen on behalf of Ottawa Hydro and Ottawa Staff note that a 30 percent requirement may require a Board of Directors to be larger than desirable. Borden & Elliott and Ottawa suggests 1/3 to accommodate a three person Board. The MEA suggests 35 percent. Alternatively, the Code may impose an obligation on the utility not to permit the members of its Board of Directors to comprise a majority of the members of an affiliate's Board of Directors.

Brockville PUC notes that the requirement for different directors for the various affiliates makes good business sense. This allows for the Board to be composed of relevant expertise, stay focused on the goals of the company, ensure that contracts for services with affiliates are appropriate and ensure a reasonable return on for the shareholders.

Granite Power notes that this requirement is extremely onerous for a small, privately held utility.

OHSC notes that limitations on shared directors should only apply between a utility and its non-regulated affiliates operating in Ontario. There should be freedom for a utility to have common directors with regulated affiliates in Ontario and with both regulated affiliates and unregulated affiliates operating outside of Ontario. Furthermore, given an average Board of six members, the restriction should be set at 33.3% to allow two common directors between unregulated affiliates and regulated utilities.

Terrace Bay Hydro notes that limits on the number of utility Board members on an affiliate Board is not understandable and would limit the utility's ability to wholly own and operate an affiliate. There is no valid reason, in Terrace Bay's circumstance, to limit who sits on the Board.

Toronto Hydro recommends that there be no restriction on board membership, except as provided in the *Business Corporations Act (Ontario)*.

2.2 Provision of Services and Sharing of Resources

Aird & Berlis and Brockville note that prohibiting the sharing of personnel and information between a distributor and affiliate (who may be providing a public utility) does not allow the potential for savings through convergence of services or one-stop shopping to utility and energy consumers. For example, current practices of shared meter reading and billing may be compromised. This section will lead to ineffective use of resources, some of which are public, and perpetuate or amplify inefficiencies in the current system of utility provisions. Brockville suggests that the Code be modified to recognize the benefits of convergence and the related synergies which can occur and allow distributors the opportunity to converge services that are not energy retail operations.

Bennett Jones on behalf of Electrical Contractors Association of Ontario (ECAO) notes concern that the provision of joint services and the sharing of resources between utilities and affiliates may "open the door" to unnecessary opportunities for cross-subsidization of competitive businesses by utilities. If not properly managed, such an allowance could amount to increased regulation and supervision by the Board.

Brantford EC suggests that certain basic tenets in staffing could apply:

- **all day-to-day operational staff should be with the distributor;**
- **all sales staff, retailing, load controlling electricity, etc., should be with the energy service provider;**
- **senior staff, President & CEO, can be in charge of some or all of the utility or affiliates, provided that they do not do day-to-day operational duties;**
- **City services, legal, human resources, etc., can be provided in a contestable way on a cost-plus regulated market basis.**

Enbridge Consumers Gas notes that it intends to acquire additional electricity distributors, and trusts that nothing in the language or intent of the Codes would preclude the sharing of resources and services between two regulated companies. Synergies resulting from joint gas/electric utility operation will result in benefits to customers in terms of efficiency gains and improved services.

Granite Power notes that this section is unclear and poses potential difficulties. Currently, every employee has responsibilities in the wires business, and approximately one-third are involved in the retail business, billing or meter reading. In a small company, each employee may do many individual jobs and each of those jobs needs to have knowledgeable backup personnel. Acceptable contracts between various companies is not a problem, but this additional cost must be minimized. Independent reviews and audits cost money and their value should be questioned. Furthermore, customer information from a wires company has no value or meaning to a generation company selling into the spot market, so why should these be separated?

The MEA notes that this section is a significant obstacle to economies of scope and scale. Most clauses refer to all types of affiliates, not just those associated with electricity retailing. If sections 2.2.2, 2.2.3 and 2.2.4 were revised to limit their application to affiliates who provide energy or energy related services, much of the existing economies could be retained.

The MEA notes that if, as a result of a Board ruling, the SSS had to be provided by a third party, and the distributor had to establish an affiliate to do so, the utility should be allowed to share resources, staff, facilities, etc. Nothing would be achieved by separation.

John S. McGee notes that sharing of services is acceptable, provided they are properly priced.

Pickering Hydro notes that this section is critical to a utility's decision on whether to enter the electricity marketing business or simply retain the wires business. It is difficult to apply the meaning of this section to a utility. Perhaps further information or examples would provide some clarification.

Port Hope Hydro asks for clarification on reasonable and acceptable limits on personnel interaction, if any.

2.2.1 A utility shall share services with an affiliate in accordance with a Services Agreement, the terms of which may be reviewed by the Director or the Board to ensure compliance with this Code. The Services Agreement shall establish:

- the type and quality of service;
- pricing mechanisms;
- cost allocation mechanisms;
- confidentiality arrangements;
- the apportionment of risks (including risks related to under or over provision of service); and
- a dispute resolution process for any disagreement arising over the terms or implementation of the Services Agreement.

Belleville Utilities Commission notes that the level of detail required in a Services Agreement, and the apportionment of shared services in any other method than cost allocation could add a considerable additional administration load on the utility. For example, tendering for services between a utility and its affiliate could be very time consuming and expensive.

Borden & Elliott on behalf of Oakville Hydro notes that the requirement of a Services Agreement which captures all services which a utility shares with an affiliate is overly broad and onerous. This could result in an administrative burden that is impractical and

inefficient. A better approach may be to establish a dollar value threshold which would trigger the need for a Services Agreement. Another approach may be for the Affiliate Code to provide a precedent agreement which would outline the principles behind the sharing of services and specific services could be appended to this main agreement as required and with respect to particular circumstances.

Granite Power notes that the Board must show a great deal of flexibility and understanding because this section could escalate costs excessively, all in the name of preventing cross-subsidization.

OPG suggests adding to the list a catch-all phrase such as: "other appropriate provisions necessary to fulfill the purposes of the Code."

Toronto Hydro and PIAC/OCAP suggest that the Board consider issuing a model Service Agreement for use by utilities and their affiliates, including the inclusion of mandatory clauses.

Scott & Aylen on behalf of Ottawa Hydro notes that if clause 2.3.6 is unnecessary, as it argues, then a phrase ought to be added at the end of this clause to read, "provided that the methods used are consistent with the transfer pricing provisions of this Code." Furthermore, if the intent is that all Services Agreements and revisions thereto are to be provided to the Director, then this clause should be amended to say so.

2.2.2 A utility shall not share its information services with an affiliate, unless access to any customer or utility operational data is protected. Access to a utility's information services shall include appropriate computer data management and data access protocols as well as contractual provisions regarding the breach of any access protocols. Compliance with the protocols and the Services Agreement shall be carried out by independent audits and reviews under the Agreement. The results of all independent audits shall be made available to the Director or the Board upon request.

Brockville PUC suggests that the sharing of customer information systems with non-energy related affiliates should be allowed, thereby providing the distributor and associated affiliate with cost-effective information systems. It has been common in PUCs across the province to share information systems among public utility functions, thereby allowing effective and efficient systems to be developed.

OPG suggests dropping the requirement to notify the Director that the independent audit has been completed. This notification is unnecessary and will only result in additional filings from utilities which must be organized and tracked by the Board. This requirement

also appears to be contrary to the spirit of the Board's licensing regime which is designed to place responsibilities on regulated entities and minimize the burden of regulation on utilities and the Board.

Ottawa Staff notes that this seems to allow information systems to reside in the utility. It also would make sense to locate billing, collection and call centre in the utility as well. But could a utility staff person provide these services to the affiliate or other retailers on a cost recovery basis? An example or further explanation would be helpful. Furthermore, the frequency of independent audits should be specified and held to a minimum.

Pembroke Hydro notes that this only increases costs to the customer.

Port Hope Hydro notes that it is unclear whether information services only refers to data and database management or includes hardware/software support and customized programming. Furthermore, it is unclear what appropriate data management and data access protocols are and how they can be verified by independent audits. Clarification is required if independent audits need to be conducted according to some generally accepted measurement technique.

Toronto Hydro submits that under section 72 of the *Act*, a distributor may keep financial records of the distributor associated with distributing electricity separate from its financial records associated with other activities. However, in its opinion the degree of separation specified in this Code goes beyond the provisions of legislation. Toronto Hydro recommends that the Board define more narrowly the utility operational data to those that could give the affiliate an unfair advantage (e.g., customer specific information). Toronto Hydro also recommends that separation between the monopoly and competitive businesses can be realized through the use of technology to create "firewalls" in its database systems, billing systems and call centre operations. Further measures to prevent cross-subsidization between the monopoly and competitive businesses could be achieved through Service Agreements.

2.2.3 A utility shall not use the information services of an affiliate, except to the extent it purchases such services from the affiliate.

The MEA notes that this clause is clear, but seems to say that a utility must pay for what it gets. A more explicit description would be helpful.

OHSC states that it is not clear how 2.2.4 and 2.2.5 and 2.2.6 relate to 2.2.1, 2.2.2 and 2.2.3. OHSC presumes that the intent of the Board is for 2.2.4 to 2.2.6 to apply, notwithstanding 2.2.1 to 2.2.3. If so, this clause is unduly invasive and sterilizes management's ability to deploy resources in an economically efficient manner. The services agreements and

confidentiality requirements imposed by the rest of the Code should be sufficient to address this concern. Limitations on shared employees and executives should not apply between regulated affiliates in Ontario, between a regulated utility and a parent holding company.

PIAC/OCAP note that if such information services are purchased by a utility from its affiliate, such an agreement should contain firewall clauses similar to paragraph 2.2.2.

Toronto Hydro suggests modifying this clause to add ", or acquires on other cost recovery basis," after the phrase "except to the extent it purchases . . ."

TransCanada suggests that the words "at fair market value" be inserted after the work "purchases."

2.2.4 A utility shall not provide to an affiliate the services of its executives or the services of employees that carry out operational responsibilities related to the provision of utility services.

Borden & Elliott on behalf of Oakville Hydro suggest that it would be helpful if the Affiliate Code specifically identified the scope and character of "shared services" and "operational responsibilities." This may be done by attaching schedules or appendices to the Code to clarify these matters.

Enershare Technology Corporation and Direct Energy Marketing Limited are concerned that the question of salary or performance bonuses is not addressed. For separation and the avoidance of conflict of interest to be effective, there must be a provision that an employee or executive of the regulated utility or its competitive affiliate is not entitled to a bonus or any other remuneration based on the performance of the other. The companies recommend that the possibility of compensation that is somehow tied to the performance of both functions should be prohibited by amending this section accordingly.

The MEA suggests that there be a definition for "executive."

Pembroke Hydro asks why Ontario Hydro still has only one board. Does sharing of executives mean that they cannot talk to each other. There must be some practical approach to allow a manager to discuss business with any affiliate or retailer. Is supplying the best service at the lowest cost to a customer out the window?

Scott & Aylen on behalf of Ottawa Hydro suggest that the broad definition of "operational responsibilities" would prohibit the utility from providing a billing service or call centres to its unregulated affiliate or to other unregulated electricity retailers. Surely this is not intended since gas utilities currently provide a billing and collection service to unregulated

gas sellers on the basis of the fully distributed costs of providing that service, and electric utilities ought to be allowed to provide a similar service. Similarly, as long as call centres do not provide a marketing function for a retail affiliate, the sharing of call centre resources with an affiliate will not impede the emergence of competition or harm the utility.

Terrace Bay asks what this clause is expected to accomplish in the scenario of a remote northern community where it is highly unlikely that the competitive market will want to operate? Who is going to supply even the standard supply if there is no flexibility for the utility and setting up an affiliate will not provide an acceptable alternative. There is no valid reason, in Terrace Bay's circumstance, to limit who its officers or employees may be.

Toronto Hydro recommends that the Board add "except as provided in a Service Agreement" at the end of the sentence.

2.2.5 A utility shall not accept the services of an affiliate's executives or employees who carry out operational responsibilities for the affiliate related to the provision of energy or energy related services.

NOTE: This condition is intended to relate to the retaining of an affiliate employee by contract or other sharing arrangement, where the employee would remain an employee of the affiliate during the term of the sharing arrangement.

Belleville Utilities Commission notes that the inability to share executives and employees is one of the most onerous aspects of the Code. It currently has only three executives who carry out business strategy and planning. These would be needed to, at least, help get the other businesses going. Setting up the operation of an electricity retailer would require direction and assistance from the General Manager of the "parent" company who would use other staff as resources. Furthermore, Belleville currently has two "competitive" businesses which are integrated with its operations – rental water heaters and sentinel lights. No employees are 100 percent dedicated to these businesses, which require a smooth transition to ensure continued customer service. Inability to share staff during a transition may mean it has to sell or exit these businesses.

Bracebridge HEC is very concerned about the possibility of not being able to share staff between the distribution and generation activities. Currently, employees in generation are used to answer calls for consumer service after hours and monitor and control the distribution flow of electricity within Bracebridge's municipal limits; distribution staff are used for breaking and clearing ice to allow water flow to generate electricity and are used to stop logging to prevent flooding from the river shed.

Brockville PUC notes that the Code should allow for the utilization of officers if the affiliate

is not in a "competitive energy market." Affiliates may be in businesses that are not necessarily in energy competition (e.g., water). In these cases, the need for complete separation of operating officers does not appear to be appropriate. This section should be expanded to include the executives of the distributor and the provision of services to non-energy related affiliates.

G6 notes that clauses 2.2.4 and 2.2.5 only apply to utilities after they have been separated into distinct distribution and retail companies under section 142 of the *Electricity Act, 1998*, and should be amended to reflect that this provision is subject to section 142 of the *Electricity Act, 1998* and does not prohibit the licencing of the MEU in the interim as either a distribution company or a retail company. Cost implications of hiring duplicate executives and operational staff will be prohibitive, when combined with all of the other costs contemplated under the draft Standard Supply Service Code. These clauses should be deleted, or only come into effect after a reasonable period of operating time, such as four years after licensing, so as not to impose an immediate cost burden on customers.

Pembroke Hydro notes that this would prevent a distributor from asking its affiliate for assistance on load forecasting. There are efficiencies to be gained, and that have been gained by multiple use of employees that would be prohibited by the Code. For an example that exists today in the division of Ontario Hydro, a switch yard at a generating station is under the control of the Transmission System. An operator cannot go out into the yard and do repairs, but must wait for an operator to come one hundred miles to perform the task. Meanwhile, the city could be without power.

Peterborough PUC notes that, due to the fact that employees in multiple PUCs perform work for the water utility, the wires side and the energy side of the electric utility, clauses 2.2.4 and 2.2.5 will require a substantial increase in operating costs. Similar conflicts exist for staff in human resources, accounting, information systems, and vehicle maintenance. Restructuring will create a labour relations nightmare. In smaller utilities, there will be a need to add substantial numbers of new staff to ensure separation. Mr. Lake recommends that the Board require an accounting only separation of staff involved with multiple tasks, similar to what is required in the Norway/Sweden deregulated electricity market, Nordpool.

Renfrew Hydro notes concern that clauses 2.2.4 and 2.2.5 shows a complete lack of understanding of the flexibility that a small utility has developed in order to provide value to their customers. It notes specific examples of this flexibility and the willingness of employees to perform a variety of tasks, including the fact that the plant supervisor is a licensed electrician, an MEA meter technician and an MEA substation electrician. Their employees perform many tasks and cross the lines that are being set up in the name of competition. Renfrew Hydro argues that small municipal hydro generation should be exempt from clauses 2.2.4 and 2.2.5 because small water powered generation is accepted

environmentally and it should be encouraged in the new marketplace, not hindered.

Scott & Aylen on behalf of Ottawa Hydro suggest that clauses 2.2.4 and 2.2.5 ought to be revised so that they do not preclude a utility from contracting labour for day-to-day operation of the network, the planning of construction or expansion of the network from a non-retail affiliate incorporated for the specific purposes of offering such services to the utility, its affiliates or others seeking such services. Since the relationship will be governed by transfer pricing rules, there will be no cross-subsidization.

Upper Canada Energy Alliance and Waterloo North Hydro note that clauses 2.2.4 and 2.2.5 may prove to be very restrictive and costly to smaller utilities which may not be able to provide the expected separation of staff and services. There are instances where sharing between a smallish distributor and its affiliated generator or water department produce great cost savings for all activities. The Code should permit these types of activities that do not have a direct impact on preferential treatment to an affiliate.

2.2.6 A utility may share with an affiliate, employees or executives that do not carry out operational responsibilities related to utility services, subject to the conditions set out in subsection 2.3.

NOTE: Examples of acceptable types of shared services or activities would include: legal services, human resources (compensation and benefits administration, staffing), financial services and planning, treasury services, shareholder and investor relations, insurance and risk management, and audit functions.

Ottawa Staff notes that mutual assistance agreements exist between utilities to cover emergency situations (e.g., the Ice Storm of 1998). Exceptions should be provided where necessary to cover emergency situations. Also, would examples of shared services include purchasing, stores and materials support activities in general? These could be common services provided under a services agreement.

Toronto Hydro suggests a broader definition to acceptable types of shared services or activities to include: IT systems, vehicle maintenance, materials management, realty & facilities management. Licensees need as much certainty as possible concerning permitted activities, and the Board should attach schedules to the Code which specifically identify and include the scope of shared services and "operational responsibility activities."

Toronto Hydro notes that clauses 2.2.5 and 2.2.6 are much more stringent than normal business practice between subsidiaries. It recommends aligning the provisions with the *Business Corporations Act (Ontario)*.

TransCanada notes that this clause is missing some wording after the word "share." Presumably this refers either to information or services that may be shared.

2.2.7 If an employee of a utility transfers to an affiliate, the utility shall require that the employee undertake not to divulge, disclose or otherwise use the utility's customer data or other confidential information.

The MEA and the PIAC/OCAP ask for clarification on how the utility will be responsible for enforcing this promised confidentiality.

Granite Power notes that this should not be limited solely to an affiliate, but also to competitors and other companies.

Pembroke Hydro notes that employees are hired for their ability, knowledge, and expertise.

Pickering inquires whether this restriction is going to be applied to marketers who hire utility staff. If so, how will it be controlled? If not, there is no level playing field. Perhaps this clause is unworkable.

Scott & Aylen on behalf of Ottawa Hydro notes that the words "otherwise use" are unduly broad, particularly when taken in the context of "confidential information," which is not a defined term. Furthermore, a utility will not, in all circumstances, know whether an employee takes up employment with an affiliate. In that instance, the utility cannot require anything of the employee. Thus, clause 2.2.7 presumably refers only to "transfers" of which the utility is aware (i.e., that result from a reorganization).

Waterloo North Hydro notes that if an employee "transfers" to an affiliate, it may be difficult to restrict the use of the information and knowledge that the employee has.

2.3 Transfer Pricing

Aird & Berlis notes that this section will make it cumbersome for municipal electric corporations to function with their affiliates in providing service to other public utilities.

Whitby Hydro notes that the tendering processes as described in clauses 2.3.2 and 2.3.6 are not needed in a PBR environment. These clauses appear to be a hold-over from the pre-PBR era on the natural gas side of the business, which cannot be used as an exact analogy for the electricity industry in Ontario. These paragraphs represent an undue obstacle to the development of municipal utility affiliates, the success of which will aid in the development of a competitive market, which is the purpose of the Code. Therefore, these sections should be deleted.

2.3.1 For any provision of a service, resource or product to an affiliate, a utility shall ensure that the price of such arrangement is no less than the fair market value of the service, resource or product.

Granite Power asks for clarification on how a small utility in a small municipality determines "fair market value." Using a consulting fee schedule may unnecessarily raise costs.

2.3.2 In purchasing a service, resource or product from an affiliate, a utility shall pay a price no greater than the fair market value that the utility would have incurred if purchasing the service, resource or product from a non-affiliated party. Evidence of a valid tendering process shall be considered reasonable proof of the fair market value.

Aird & Berlis notes that a using a tendering process to ensure "fair market value" may be inappropriate and cumbersome.

Granite Power asks for clarification on how a small utility in a small municipality determine "fair market value" so that this determination is acceptable. Calling for tenders may seem on a superficial basis to be a reasonable solution, but there is a cost to the process which, if unsuccessful, increases rates or decreases services. Does the added cost benefit the ratepayer?

The MEA, OPG, OHSC and Toronto Hydro suggest rewording the last sentence to make it clear that use of a tendering process is not the only means available to utilities to demonstrate that purchases were done at "fair market value." Alternatively, separate out what constitutes reasonable proof into a separate paragraph so it applies to both purchases from and sales to affiliates by utilities. A tendering process should not be the only means of purchasing a service, resource or product from an affiliate. For example, a price list, arms-length transaction between non-affiliated companies or other evidence should be allowed. The requirement to tender as a means of verifying market price may lead the vendor community to being subject to "fishing expeditions" which may harm the relationship between utilities and vendors.

Scott & Aylen on behalf of Ottawa Hydro suggest that "valid tendering process" be defined so that the phrase "reasonable proof" can be changed to read "proof" and that evidence of a valid tendering process will satisfy the Code provision.

2.3.3 In the event that a fair market value is not available, a utility shall pay a price no greater than a cost-based price for the service, which may include a reasonable return component. The return component of the cost should be set at the lower

of a comparable market based return or the utility's approved rate of return.

Granite Power notes that the utility or affiliate may be forced to provide the service, but the rate of return component may not be sufficient for this service from the standpoint of the shareholder. This limitation must be removed, unless the Board has the obligation to regulate this service.

OPG notes that any assessment of the "cost-based price" would require the affiliate to reveal their cost information. This raises legitimate commercial confidentiality issues for the affiliate. What is the Board proposing to do with this information? Would this information be treated as confidential by the Board? Also, the utility's regulated return has no relationship to the profit margin that companies would incorporate into the pricing of their products and services. Overall, this provision creates significant disincentives for affiliates to consider transactions, even in circumstances where the transaction provides benefits to the regulated entity.

OHSC submits that prices provided by the competitive retail affiliate may not have the same risk profile as a utility service. Therefore the last sentence should read, "The return component of the cost should be set equal to a comparable market-based return or the utility's approved rate of return where a reasonable measure of a market-based return is not available."

Scott & Aylen on behalf of Ottawa Hydro notes that this needs to be revised to use the term "fully distributed cost price." The clause can be revised to state:

> **"In the event that a fair market value is not available, a utility shall pay a price no greater than the fully distributed cost price. The return component of the price should be based on the utilities approved rate of return."**

Toronto Hydro notes that under the "price cap" regulation regime being considered for Ontario, utilities may not have a fixed rate of return, and a comparable market based return is not easily determined.

2.3.4 A utility shall sell assets to an affiliate at a price no less than the net book value of the asset.

G6 submits that section 145 of the *Electricity Act, 1998* enables councils of municipalities to make by-laws which transfer employee assets, liabilities, rights and obligations of the municipal corporation or the commission to a new OBCA company for the purposes of distribution or retailing of electricity. These provisions of the legislation enable a municipality to make the initial discretionary decision regarding how assets shall be

transferred to an affiliate. Accordingly, clause 2.3.4. should be amended to reflect the provisions of section 145 and related sections of the *Electricity Act, 1998*.

Granite Power notes that if the market value of an asset is less than the net book value, then this asset cannot be sold, but must be kept and perhaps maintained until the market value is higher than net book value. This may indicate an inadequate rate of amortization for this asset and may be a bad business decision. Decisions regarding sale of assets must be left to the utility. On a related issue, how is the Board proposing to handle stranded assets due to changes in the industry?

2.3.5 Where a utility transfers an employee to an affiliate, the utility shall charge the affiliate a reasonable amount for the recruitment and training of a replacement, if necessary, as well as any additional or outstanding benefits and taxes.

Bennett Jones on behalf of several MEUs and the Upper Canada Energy Alliance note that this requirement is entirely unfair when other non-affiliated entities may attract the former utility employee to its business enterprise and the enterprise would pay nothing to the utility, unless there were enforceable employee contracts in place that would require pay-out clauses. MEU affiliates should not be treated any differently. Furthermore, when a utility employee transfers in the gas industry, the affiliate does not pay the utility for the employee's training and experience.

Borden & Elliott on behalf of Oakville Hydro inquires whether an employee transfer from an affiliate to a utility also triggers the transfer pricing provision.

G6 submits that this is overly bureaucratic and creates inequities for employees who will face unnecessary cost barriers in seeking new jobs or career advancement.

Granite Power notes that in order for no cross-subsidization to occur, the same must apply if an employee from an affiliate moves to the utility. However, this clause is unreasonable and unworkable. It reduces the market value of a utility or affiliate and particular assets that would be transferred with the employee. This clause changes the competitive market that exists for manpower. It would be better to say that transfers between affiliates and utilities need a valid reason – if there is a need to have this in the Code at all.

The MEA submits that this requirement should be removed. In a PBR environment, the regulated utility will have every incentive to avoid losing good employees. If they are no longer required due to restructuring of the utility, allowing them to transfer to an affiliate on acceptable terms without recruitment and training charges is beneficial to all.

OHSC submits that this clause is inconsistent with providing a level playing field as no

such clause applies to licensed retailers. Recruitment and training costs that result from employees leaving are part of the cost of doing business, whether regulated or not.

Toronto Hydro believes that there would be only a limited match of required skills between a distributor and retail affiliate. Thus, this clause is unnecessary and should be deleted.

2.3.6 A utility engaged in a shared services activity with an affiliate shall develop appropriate mechanisms for the sharing of costs and a tendering process for the purchase of services, resources or products.

Borden & Elliott on behalf of Oakville Hydro notes that a tendering process is too onerous, excessively costly, and creates an administrative burden. A transparent costing process for the purchase of services, resources or products in a shared services situation may be more manageable and meet the same objectives. If a tendering process is adopted, establishing a dollar value threshold for triggering the requirement of a tendering process may be more rational and effective.

G6 submits that this be amended such that the tendering process is only for large items or selected items in order to ensure that tendering for all matters, regardless of cost or significance, is not compelled.

OPG notes that the exact scope of this provision is not clear since it deals with two separate items: shared services and tendering processes. Is it the Board's intention that utilities must tender for all shared services, products and resources? If yes, this could result in time delays and a heavy administrative burden. With respect to pricing of shared services, OPG recommends that the Board require the utility to recover in its charges at least the fully-allocated costs of providing that service.

OHSC and Toronto Hydro believe that a valid tendering process should not be the only means of establishing fair market value, and that other mechanisms should be allowed to acquire services, resources or products.

Scott & Aylen on behalf of Ottawa Hydro note that this appears to dilute the transfer pricing rules contained in clauses 2.3.1 to 2.3.4 since it says that a utility and its affiliate are free to develop mechanisms for the sharing of costs and tendering processes. As Scott & Aylen understand it, the mechanisms to be established must comply with the pricing rules reflected in clauses 2.3.1 to 2.3.4 inclusive. If correct, then clause 2.3.6 is unnecessary, and a phrase ought to be added at the end of clause 2.2.1 to read, "provided that the methods used are consistent with the transfer pricing provisions of this Code."

2.4 Financial Transactions with Affiliates

Aird & Berlis notes that this is overly restrictive and unnecessary.

Bennett Jones on behalf of Electrical Contractors Association of Ontario (ECAO) notes concern that an affiliate may obtain credit under an arrangement that would permit a creditor, upon default, to have recourse to assets of the "wires" subsidiary. This should not be permitted in the final draft of the Code.

Granite Power has not looked into the financial implications of the restructuring and, as a result, does not know how debt holders will regard these sections. Granite Power's situation would be similar to any other vertically integrated utility, and this section may be unworkable.

John S. McGee notes that the idea of allowing loans or investments by the utility in its affiliate is completely contrary to the purpose section. A competitive affiliate must be completely financially separate. The holding company (Council) may decide to take Board regulated dividends from the utility and use them for tax mitigation, investment in affiliates or other ventures. In that way, it is accountable to ratepayers for business failures. The Board-regulated utility should be absolutely forbidden from risking its resources in speculative ventures.

2.4.1 A utility may provide loans, guarantee the indebtedness of, or invest in the securities of an affiliate, but shall not invest or provide guarantees or any other form of financial support if the amount of support or investment, on a aggregated basis over all transactions with all affiliates, would equal an amount greater than 25 percent of the utility's total equity.

NOTE: This restriction is intended to protect the utility from the impacts of investment in risky ventures, which risks may ultimately be borne by the utility and its ratepayers.

Aird & Berlis suggests that if there is a limit on loans or guarantees, there should be some way for the Board to increase the limit in the appropriate circumstances.

Pickering Hydro asks whether there are going to be any restrictions on what is included in a utility's total equity. On what basis is the use of 25 percent decided?

Toronto Hydro recommends that the decision on the percentage of investment by the utility in its affiliates be the fiduciary responsibility of the Board of Directors and shareholders.

Upper Canada Energy Alliance notes that Bill 35 in its opinion, limits equity in municipal-owned distributors to 20 percent without Board approval. Assuming there was a good rationale for this figure, it is applicable here as well.

2.4.2 A utility shall ensure that any loan, investment, or other financial support provided to an affiliate is provided on terms that the affiliate would be able to obtain on its own from the market, and shall provide evidence supporting the cost and charges.

NOTE: Similar to the transfer pricing rules, a utility should not be permitted to use its borrowing potential to support an affiliate, due to the risk that this may increase its borrowing costs or may reduce its access to the capital markets.

OHSC submits that joint financing is allowed for its transmission and distribution businesses since they are in the same affiliate, but that this clause would prohibit joint financing if they were in separate affiliates. It is not reasonable that what is permitted under the *Act* be prohibited under the Code if OHSC chooses to separate its transmission and distribution businesses into separate subsidiaries. This section should be restricted to financial support between regulated and non-regulated affiliates, but not between regulated affiliates.

2.5 Equal Access to Services

Aird & Berlis notes that this is overly restrictive and will serve to inhibit the effective publicizing of affiliate activities. This provision also may lead to litigation as various competitors challenge publicity or marketing companies. Similarly, the agglomeration of certain public utility and related functions like gas distribution presumably would be intended to allow one-stop shopping and customer service efficiencies, but this section would restrict those goals.

Bennett Jones on behalf of Electrical Contractors Association of Ontario (ECAO) suggests that a more concise "non-discrimination" policy should be stated as:

> **A utility may not discriminate between said utility, its subsidiaries or affiliates and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards or referral customers.**

Granite Power notes that if its existing Power Purchase Agreement is validated by the Court or by the Government, most of this section is not applicable to Granite's service area in the Town of Gananoque. However, this section unfairly can put an affiliate or distributor in an unfavourable, uncompetitive position. For example, if a competitor levels uncomplimentary comments at the distributor or affiliate, neither is in a position to defend themselves and slander or underhanded competition cannot be contradicted or explained.

Pickering Hydro notes that this section seems to be quite clear.

Toronto Hydro notes that not allowing an affiliate to use the brand name or be identified in any way as the utility customers have known contrasts sharply with the treatment of the natural gas utilities. It places an unreasonable financial burden on the utility to brand its retail affiliate, as a typical branding program would cost about $25 million over a three to five year period. These conditions erode the principle of a truly level playing field.

2.5.1 A utility shall not endorse or support marketing activities of an affiliate, except where such endorsement is part of a listing of alternative service providers and the affiliate's name is not in any way highlighted.

OHSC notes that this clause should be restricted to prohibiting endorsement or support of retail electricity affiliates. The utility should be free to endorse or engage in joint promotions with affiliate or non-affiliate companies engaged in businesses other than energy retailing (the market which this Code and the Acts seek to promote) as do all other companies including energy retailers.

2.5.2 A utility, including its employees and agents, shall not state or imply, either directly or indirectly, a preference for an affiliate to its customers.

OPG notes that the term "agent" has not been defined in this Code.

2.5.3 A utility shall take all reasonable steps to ensure that an affiliate does not imply favoured treatment or preferential access to the utility's system in its marketing material, and shall not permit tied selling by an affiliate. When a utility becomes aware of such activity by an affiliate, it shall:

OHSC notes that the prohibition on tied selling should restrict a utility or Standard Supply provider from tying utility services to a non-regulated affiliated service. Non-regulated affiliates should be free to secure utility services and bundle them with other non-utility services as any other competitive supplier would, provided the affiliate does not imply that any preference will be received by the consumer by choosing the utility's affiliate.

PIAC/OCAP and Scott & Aylen on behalf of Ottawa Hydro note that the reference to "tied selling" is ambiguous and adds nothing to the first part of the sentence. The PIAC/OCAP notes that the newly proclaimed section of the *Bank Act,* section 491, may be studied with a view to crafting such a definition that would ensure that consumers are protected from pressure to buy products and services that they would not normally choose to buy. Scott & Aylen suggest that the sentence should end after the word "material" and the phrase "and

shall not permit tied selling by an affiliate" ought to be deleted.

- immediately notify all affected customers of the violation;

OHSC suggests that the statement, "immediately notify all affected customers of the violation" should be replaced with "take all reasonable steps to promptly notify affected customers of the violation." Immediately notifying all customers could be onerous or might not be the most cost effective approach.

- take all necessary steps to ensure the affiliate is aware of the concern; and
- inform the Director of such activity and the remedial measures that were undertaken by the utility.

2.5.4 If a Rate Order or schedule to a Rate Order provides for discretion in the provision of utility services (e.g., a range rate), a utility shall not provide any preferential treatment to an affiliate and shall apply such rate schedule in a like manner to similarly situated parties.

2.5.5 A utility shall not provide any preferential service to an affiliate in regards to connection of the affiliate or an affiliate's customers. Requests by an affiliate or an affiliate's customers for access to a utility's network or for utility services shall be processed in the same manner and within the same time frame as for similarly situated customers and their representatives.

Enershare Technology Corporation and Direct Energy Marketing Limited believe that this section should be clarified so that offering an affiliate either utility services or access to its network (other than as specified by the Code) means offering those services to all competitors.

OHSC notes that it may not always be possible to respond to customers in the same time frame. When backlogs occur, they still must be cleared sequentially. To deal with these situations, the wording should refer to "with the same priority" instead of "in the same time frame."

2.5.6 A utility shall ensure that the use of the utility's name, logo and other distinguishing qualities by an affiliate is in accordance with this Code and shall not permit an affiliate to improperly characterize its relationship with the utility.

Bennett Jones on behalf of Electrical Contractors Association of Ontario (ECAO) submits that, although the law does not grant the Board the authority to limit the use of the utility

name, the Board should establish clear rules on the use of logos, trademarks, service markets, etc..

Borden & Elliot on behalf of Oakville Hydro notes that provisions related to "equal access to services" includes a prohibition on activities that improperly characterize the relationship between a utility and its affiliate. Clarification of what conduct may be improper would be of assistance in outlining for utilities the scope of their allowed activities with respect to branding and marketing.

Gloucester Hydro notes that this will add confusion for the consumer where the affiliated company chooses to use the existing MEU utility name and logo to gain a market position and the distributor chooses a new name and logo.

The MEA notes that it is not clear that a utility would have the authority to meet the requirements of this clause.

OHSC notes that this clause is too vague to apply in practice. Clauses 2.5.1 to 2.5.5 should be sufficient to deal with the Board's concern.

Pembroke Hydro notes that the companies are owned by the same shareholders, municipalities or customers. It is ridiculous to say that you cannot have a common symbol on their logo with the names spelt out.

PIAC/OCAP point out that there does not seem to be any guidance concerning the use of a utility's name, logo, and other distinguishing qualities in this Code.

Toronto Hydro notes that not allowing an affiliate to use the brand recognition that has been established over 100 years creates an unlevel playing field tilted against the retail affiliate.

2.6 Confidentiality of Consumer Information

Aird & Berlis notes that this section is overly restrictive and may prevent such basic current activities such as shared meter reading and billing by different public utilities serving the same municipality.

Granite Power considers all customer information confidential and does not give it to anyone without the customer's permission. The only exception would be to the customer's legal representative, or to give consumption details to a new owner or tenant of certain premises. Financial information is given only to a credit bureau if it is assisting with collections.

OPG notes that if a grace period or transition period is allowed, the customer information protections in this section should be effective as soon as possible, and not implemented during a transition period.

Pickering Hydro notes that this section seems to be quite clear.

2.6.1 A utility shall not, in the course of any transaction or dealings with an affiliate, disclose without prior authorization from a consumer or other market participant information obtained from the consumer or market participant. This standard applies to any information obtained by a utility in the course of carrying out or providing utility services.

OHSC notes that it is not clear why 2.6.1 is required if 2.6.2 is in place. This should be removed from the Code and 2.6.2 should have an additional sentence that expressly permits disclosure of information in numeric or aggregated form which is not confidential or proprietary in nature.

2.6.2 A utility shall not release to an affiliate confidential consumer, retailer, marketer or supplier information without the consent of that consumer, retailer, marketer or supplier.

OHSC submits that if 2.6.1 is removed, this clause should have an additional sentence that expressly permits disclosure of information in numeric or aggregated form which is not confidential or proprietary in nature.

PIAC/OCAP suggest that the consent should be "in writing" or by way of suitable electronic alternative.

Toronto Hydro notes that it is sufficient to say that information shall be provided to all retailers on the same basis. Information covered by this requirement should be clarified. For example, load information has been considered by the Privacy Commission to belong to a utility, not the customer.

2.6.3 A utility shall not transfer or assign to an affiliate a customer for whom the utility is providing utility services, unless the customer gives permission to such transfer or assignment in writing.

Enershare Technology Corporation and Direct Energy Marketing Limited believe that this section should be clarified so that the transfer or assignment of customers from a utility to an affiliate be undertaken "in a manner similar to customer requests for transfer or assignment to other retailers."

OPG notes that this provision appears to be inconsistent with the use of telemarketing or marketing via the Internet. Is this the Board's intention? If so, this restriction will delay the development of the competitive market.

Toronto Hydro notes that this issue deals with customer transfer and does not belong under confidentiality of information. Toronto Hydro also notes, in its opinion, that all of its customers must be transferred to an affiliate to comply with section 71 of the *Act*.

2.7 Compliance Measures

Aird & Berlis notes that the requirements in this section may be difficult to carry out practically given the restriction on appointments to the Board of Directors.

2.7.1 A utility shall be responsible for ensuring compliance with this Code and shall:

- perform periodic compliance reviews;
- use its best efforts to have the Code communicated to and understood by its employees;
- require and monitor compliance of this Code by its employees; and
- conduct annual compliance reviews, the results of which shall be filed in the format specified from time to time by the Board as part of this Code.

Granite Power notes that this sounds like a very costly, bureaucratic nightmare, particularly the last item. With a small company, this should be easy to monitor, but the "red tape" requirements are unnecessary. Only complaints to the Board should be handled in writing.

OPG notes that the first point is redundant given the fourth point. Also, it should not be necessary to file the results of the annual compliance reviews with the Board. This simply adds to the regulatory burden and the costs borne by the Board and utilities. Instead, utilities should be required to have the results available for Board review if requested.

Pickering Hydro asks who is going to pay the costs for this. It seems that distributors are getting hit with costs that they do not have now. Who pays for these costs is an important issue.

Port Hope Hydro asks for clarification on what the penalties are for non-compliance or breach.

2.7.2 The Audit Committee of the Board of Directors of a utility is responsible for ensuring the utility's adherence to this Code.

Granite Power notes that with a small Board of Directors for a small company, there may not be an Audit Committee.

OPG notes that, while ensuring compliance with the Code should be the responsibility of a utility and thus ultimately the utility's Board of Directors, it is not appropriate for the Board to propose specific roles for the Board of Directors' committees. Instead, a utility's Board should be left to organize their own internal responsibilities. Also, there may be difficulties with this provision in that there is no requirement that company Boards have audit committees unless they are offering corporations.

Port Hope Hydro asks for clarification on whether auditors are appointed by the Board of Directors.

Terrace Bay Hydro sees no reason to assign Code adherence responsibility to an "audit committee" of the Board of Directors. The entire Board of Directors and the officers should be responsible for this compliance. This clause also would impose a Board operating structure that may not be appropriate.

Toronto Hydro notes that under the OBCA, an Audit Committee does not have the authority to make independent decisions. The responsibility rests with the full Board of Directors. Also, many smaller distributors will not have an Audit Committee of the Board.

2.7.3 The external or independent auditor of a utility shall certify to the Audit Committee and to the Director that the utility's affiliate transactions comply with the conditions of this Code.

Granite Power notes that this clause increases the cost of the audit, and the auditor may not fully understand the Code.

OPG notes that the Board should not require this external certification to be filed with the Director unless requested.

OHSC notes that these are potentially onerous and costly to implement. The Code obligates utilities to comply. How they ensure compliance is an internal governance matter that should be left to the utilities instead of being prescribed by the Code. Each utility should be required to come forward with a compliance plan that is reasonable in their circumstances and clearly defines what constitutes compliance, for acceptance by the Director.

Port Hope Hydro notes that it should be clarified whether independent audits need to be conducted according to some generally accepted measurement technique.

2.8 Record Keeping and Reporting Requirements

Aird & Berlis notes that this section appears to be acceptable.

John S. McGee notes that some very clear rules and direction are going to have to be provided for external auditors to provide assurance to the Board and consumers that utility financial statements comply with both Generally Accepted Accounting Principles and the Board Affiliate Relationships Code.

Toronto Hydro is concerned that much of the information its retail affiliate would be asked to file to the Board could be used by its competitors to their advantage. Therefore, Toronto Hydro believes that it is necessary that the Board establish review processes that protect any confidential information from public disclosure. Furthermore, Toronto Hydro notes the cost of collecting and providing the required information and expects to be compensated for costs if the request is based on a third-party's intervention and is deemed to be unreasonable.

OPG suggests that the words "when requested by the Director" be added to the end of this provision to make it clear that evidence is not required to be filed with the Board unless specifically requested. Minimizing the number of routine filings will reduce the regulatory burden on the Board and on utilities.

2.8.1 A utility shall maintain updated records and provide the following information to the Director on an annual basis, or as otherwise required by the Director:

a. A list of all affiliates, including their business address, a list of the officers and directors, and a description of the business activity;

b. A corporate organization chart indicating relationships and ownership percentages;

Granite Power notes that this information seems excessive, and some of the requirements are confidential. A confidentiality agreement from the Board would be required.

Pickering Hydro asks whether marketers are going to be required to file the same type of information. If not, there is a potential that a marketer could be a third party SSS provider and still do retail and marketing in the distributor's licensed service territory.

c. A list of all affiliate transactions where the total cost of each transaction exceeds the lesser of $100,000 or 0.1 percent of a utility's approved

annual operating and maintenance expense, including:

Belleville Utilities Commission's electric utility is approximately 38th in size in the Province. Belleville notes that perhaps this clause shows the size of utility for which this Code has been designed. 0.1 percent of Belleville's expenses would be approximately $5,000, one twentieth of the stated $100,000. Belleville extrapolates to conclude that this Code could be readily applied to a utility twenty times its size.

Bennett Jones on behalf of Electrical Contractors Association of Ontario (ECAO) and Port Hope Hydro note concern that the use of financial thresholds for reporting affiliate transactions could be averted merely by "breaking up" transactions into their smaller, component parts. An appropriate mechanism should be introduced into these provisions which would forestall this possibility.

Borden & Elliott on behalf of Oakville Hydro notes that this threshold may be placing an undue administrative burden on smaller utilities. In most cases, the 0.1 percent threshold would capture many smaller transactions. A more reasonable percentage threshold may be 1.0 percent, or a sliding scale matched to classes of utilities ranked by size. The restructuring process and PBR would be well served by adopting a flexible approach that minimizes the regulatory and administrative burden while facilitating efficiency and competition.

Gloucester Hydro notes that this threshold puts smaller utilities under much more scrutiny than larger utilities.

Granite Power notes that the threshold of $100,000 would be acceptable, but may not be high enough for larger utilities.

OPG notes that the threshold of 0.1 percent seems too low, particularly for small utilities. OPG suggests an absolute minimum figure of $25,000. Below this figure, the costs of filing the requested information and the Board's review probably exceed any savings on transactions for ratepayers.

OHSC states that the $100,000 threshold is not appropriate because it represents 0.03 percent of distribution OM&A or 0.025 percent of transmission OM&A. The threshold should be 0.1 percent of approved OM&A in order to result in reporting of transactions that materially affect rates.

Pickering Hydro notes that the $100,000 threshold could be used at the start provided that it can be adjusted later.

Port Hope Hydro and TransCanada suggests defining a transaction so that there is not a wide difference in how utilities maintain and update records on such "affiliate transactions."

Scott & Aylen on behalf of Ottawa Hydro and Ottawa Staff notes that the threshold should be $100,000 or 0.5 percent to 2.5 percent, depending on utility size.

Toronto Hydro recommends that the list to the Director should include only transactions with costs that exceed 0.2 percent of the annual O&M expense.

Upper Canada Energy Alliance suggests that the dual trigger is low, and that percentage of O&M expense alone should be used. Given the diverse nature of distributors, the stated triggers could see many utilities reporting all affiliate transactions, which is arguably overly onerous. Given PBR and transfer pricing, affiliate preference will be obvious. A trigger that serves as a gross indicator of affiliate dealings above an expected norm to prompt a review should be 20 percent.

- the name of the affiliate;
- the product or service in question;
- the price or cost involved in both unit terms and aggregated;
- the form of price or cost determination; and
- the timing and duration of the transaction;

d. For each ongoing affiliate transaction, the start date for the transaction and the expected completion date;

Granite Power notes that under 2.8.1(c) and (d), the Board may receive a great deal of information. The cost of assembling this information and the cost of assessing it seems very high when measured against the benefits. This information is not needed and is irrelevant. If a wires company adheres to all other sections of this Code, then it is in compliance, and the requirements in this section is a costly form of redundancy.

e. A copy of any revisions to the approved costing and pricing guidelines, tendering process and Service Agreement.

OHSC notes that copies of Service Agreements filed should have commercially sensitive or customer information blacked out, unless the Board is able to hold such information confidential.

Scott & Aylen on behalf of Ottawa Hydro note that clause 2.2.1 which calls for the sharing of services in accordance with a Service Agreement does not require the Agreement to be

filed with the Director, but gives the Director discretion to review the Agreement. If the intent is that all Services Agreements and revisions thereto are to be provided to the Director, then clause 2.2.1 ought to be amended.