Ontario Energy Board

Commission de l'Energie de l'Ontario

RP-2004-0166

PROPOSED CHANGES TO

THE JUNE 2, 2004 PROPOSED AMENDMENTS TO THE DISTRIBUTION SYSTEM CODE

Regarding Unpaid Electricity Charges

SUMMARY REPORT

2004 December 21

RP-2004-0166

IN THE MATTER OF ss. 70.2 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, (Sched. B);

AND IN THE MATTER OF THE Proposal To Amend The Distribution System Code, dated June 2, 2004.

BEFORE: Paul B. Sommerville
Presiding Member

Cynthia Chaplin
Board Member

Pamela Nowina
Board Member

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INTRODUCTION

The Distribution System Code (the "Code") is a regulatory instrument that defines the rights and obligations of distributors in their relationship with their customers. Early in 2004, it became clear that several aspects of the relationship between distributors and some of their customers and other interested parties required refinement through amendments to the Code.

The Ontario Energy Board (the "Board") had received significant correspondence and complaint respecting the following issues:

- Can a distributor insist upon a guarantee from a property owner/manager respecting the electricity charges incurred by a tenant, when only the tenant has contracted for distribution services?

- Can distributors refuse to reconnect premises until account arrears have been paid where the defaulting customer is a tenant and not the property owner/manager?

- What recourse does a distributor have in circumstances where it has properly required payment of a security deposit from a consumer, and the security deposit has not been paid, either in whole, or in part?

- What is the appropriate regulatory response to the theft of electricity, often associated with the phenomenon of marihuana grow houses?

The Board proposed to amend the Code to address the issues that had been brought to its attention. Section 70.2 of the *Ontario Energy Board Act, S.O. 1998, Chapter 15, Schedule B (*the *"Act")* prescribes the procedure for amendment of codes developed by the Board. In accordance with this section,

the Board caused Notice of its proposed amendments to be placed on its website on June 2, 2004 and published on June 8, 2004. Specific notice was extended to the licensed distributors, organizations representing tenants, property owners/managers and organizations or persons advocating for low-income customers. A copy of the June 2, 2004 proposed amendments to the Code are attached to this Report in Appendix B.

The Board received numerous responses to its Notice, which are posted on the Board's website.

The Board decided to provide persons who had filed written materials with an opportunity to make an oral presentation to the Board. Notice of this opportunity was circulated on June 8, 2004. On Tuesday, August 24, 2004 the Board convened to hear those oral submissions. A transcript of this oral proceeding is available on the Board's website. A list of those written submissions and oral presentations is provided in Appendix A. In making its proposals for amendment of the Code, the Board recognized that there was a need for change and clarification. The proposals represented the Board's unilateral attempt to find the most appropriate regulatory approach to the issues identified. This consultation has been very helpful in assisting the Board in determining whether the course the Board proposed at the outset was the most fitting regulatory response.

With several minor revisions and two material exceptions, the Board, having considered all of the written and oral submissions placed before it, confirms the Code amendments published on June 8, 2004. The material exceptions concern the proposed revision of section 4.2.5 through the creation of a new section 4.2.5.3, which would have authorized a distributor to recover, from a property owner, reasonable costs associated with reconnection. The Board will not implement this proposed change for reasons expressed later within this Report. The other change concerns the refund of security deposits. A proposed amendment has been drafted to require that security deposits, when refunded, be returned to the party that provided the security deposit, whether or not that

party is the contracting customer. The reasons for this proposed amendment are also provided later in this Report. The modified proposed amendments to the Code are attached to this Report as Appendix C. The Board is providing Notice with respect to these amended proposed amendments simultaneously with the release of this Report.

As the Board assessed these issues, two other elements emerged.

The first of these involved the apparent absence of a consistent approach among distributors with respect to the management of accounts and security deposits for low-income customers who are clients of social agencies. This issue is of interest to the Board and is addressed separately in the final section of this Report.

The second emergent issue involved an assessment of the mechanisms available to distributors for recovery of unpaid accounts through rates. This issue arises both through simple failure to pay by customers, and as part of theft of power scenarios. Resolution of this issue is beyond the Board's current jurisdiction. Any change to rates is dependent on the Minister's consent and his referral of individual applications of distributors to the Board, pursuant to section 79.6 of the *Act*. Notwithstanding that the Board cannot implement any changes in this area without the Minister's consent, the Board felt it appropriate to provide its observations on the submissions that touch on the various proposed recovery mechanisms for unpaid accounts.

As the Board considered the various submissions placed before it and the oral presentations, it became clear that the issues fell into four distinct areas:

- Arrears;
- Security deposits;
- Reconnection charges; and
- Theft of power.

Accordingly, the Board's consideration of the issues has been organized to consider each area separately. As mentioned above, the issues related specifically to low-income customers are addressed separately at the end of this Report.

ISSUES RAISED BY THE PARTIES AND PROPOSED CHANGES TO THE CODES

1.1 Arrears

Arrears - Submissions of Parties

A number of distributors want to require that a property owner or property manager ("property owner/manager") guarantee payment of the electricity charges incurred by tenants. Some distributors have approached landlords with a view to requiring such guarantees as a condition of connection. Such guarantees would transfer risk of loss with respect to electricity charges from distributors to property owners/managers. The proposed Code amendments have as their objective the prevention of these practices. The amended provisions restrict the distributor's ability to collect unpaid charges from anyone other than the customer.

Some distributors noted that it is not their policy to attempt to collect residential arrears from property owners, and that therefore the amendments would not affect their current practice in this area. Distributors also generally acknowledged that security deposits are the appropriate means by which to manage the risk of residential consumer arrears. Mr. Collie, representing the Electricity Distributors Association ("EDA"), explained that the risk of residential non-payment beyond a year is small, manageable and predictable, and he also noted that it is a risk that is incorporated into the distributors' regulated rate of return.

The distributors' concern regarding unpaid electricity accounts is exacerbated in circumstances where there has been a significant theft of electricity by criminal tenants, often engaged in illicit drug manufacturing or cultivation activities. In such circumstances, distributors find themselves responsible for significant losses. The distributor's obligation to pay other market participants is absolute.

It is in these situations particularly that distributors have sought to transfer the liability to the property owner/manager.

The Building Owners and Managers Association ("BOMA") and the Federation of Rental-housing Providers of Ontario ("FRPO") presented the position of property owners/managers regarding unpaid electricity charges. Mr. Struthers, representing BOMA, stated that the issue of unpaid electricity bills or charges has been redirected from a discussion of distributors' conditions of service to a focus on grow houses and the associated theft of power. While sharing other parties' concern for the cost and societal dangers of grow houses, Mr. Struthers felt that the use of the distributors' conditions of service to address these problems was inappropriate and punitive to all legitimate tenants and property owners/managers, particularly since conditions of service are filed with, but not approved by the Board.

Given the above, Mr. Struthers stated that assigning liability for unpaid electricity charges to a third party such as a property owner/manager is inappropriate. Accordingly, BOMA strongly supported the changes that clarify that it is only the customer of the distributor (i.e., the person who contracts for service) who should be liable for payment of charges.

FRPO in its written submission made several arguments regarding assigning the liability for unpaid charges and illegal activities to property owners/managers. FRPO believes that the persons who have contractual relationships with the distributor should bear the complete cost of their actions, which includes energy, service disconnection and any additional reconnection charges beyond standard reconnection charges. FRPO stated that it is "completely unacceptable, unfair and illegal to expect the owner of the property, who is non-privileged to the account, and third party to the transaction, to pay for the tenants' hydro".

The Halton Community Housing Corporation, a not-for-profit housing provider, strongly opposed any effort by distributors to require the property owner/manager

to guarantee payment of unpaid electricity charges incurred by tenants. Mr. Blake reported that their distributor had approached them early in 2004 seeking such guarantees.

The Advocacy Centre for Tenants Ontario ("ACTO"), representing low-income customers, also supported the amendment to clarify that the customer is liable for unpaid electricity charges. This includes situations where the customer is a tenant, provided the tenant has contracted with the distributor.

Arrears - Conclusions

The Board confirms its view, expressed in the proposed amendments to the Code, that it is the contracted customer of the distributor that has exclusive responsibility for unpaid electricity charges. The Board notes that this view is consistent with the line of reasoning expressed by Mr. Justice Gordon in the Ontario Superior Court of Justice in the recent unreported case *Duong v. Waterloo North Hydro Inc.,* dated August 5, 2004, Superior Court of Justice. In this decision, Mr. Justice Gordon states that the *Electricity Act, S.O. 1998, Chapter 15, Schedule A* (the "*Electricity Act*") does not authorize the distributor to demand or collect charges or to withhold service from a property owner/manager because of previous tenant's theft of electricity. Justice Gordon went on to find that the *Electricity Act* establishes that the distribution and sale of electricity is a matter of contract and that the common law doctrine of privity of contract prohibits the distributor from seeking recovery from any person other than the contracting entity. The Board is of the opinion that this finding applies to payment arrears in general and not just when illegal use is involved.

It is a natural extension of the same line of reasoning that the distributor may not require guarantees for tenants' liabilities from the property owners/managers, as a condition of connection, or at any other point in the tenant's term. The Board regards the obligation to connect a customer, which is found in section 28 of the *Electricity Act*, to be one of the most important obligations of the distributor, one

that cannot be encumbered without the clearest statutory authority or regulatory rationale. Mr. Justice Gordon made a similar finding. The *Electricity Act* does not place conditions around the section 28 obligation, other than the requirements contained in that section. The Code, in section 3.1.1 provides direction as to how to comply with the section 28 obligation. Generally, the circumstances justifying a refusal to reconnect relate to safety and efficiency of the distribution system, and the situation where the person requesting reconnection owes money to the distributor. Distributors should not adopt practices which have the effect of placing other preconditions around this obligation. The Board believes that the distributor's appropriate non-payment risk mitigation tool is a customer security deposit, consistent with the Code.

The Board agrees with the position of the EDA that the risk to a distributor associated with residential arrears is small, predictable and manageable, and that the proposed amendments, in concert with the security deposit provisions, will provide an appropriate measure of security for distributors in these circumstances.

The Board acknowledges that the difficulty faced by the distributor is its current inability to reflect extraordinary losses due to customer defaults or thefts of electricity in its rates. For a number of years, the price that distributors charge their low volume customers has been determined by legislation. Their ability to address increased exposure to unpaid accounts, however arising, has been virtually non-existent since the electricity market was first restructured. Their liability to their suppliers, transmitter and generators, has not been mitigated.

Their effort to transfer such exposure to property owners/managers is understandable, but cannot prevail. The distributor's obligation to connect, codified in section 28 of the *Electricity Act* is a key element of electricity supply policy in the Province. The distributor is not entitled to clog that duty to connect by imposing conditions on parties who are not its customers. The customer of the distributor is the party who contracts for distribution services. This

relationship is subject to the provisions of the Code, and the protection of the distributor from unpaid charges is addressed in the Code's security deposit provisions. In some instances, the customer may be the property owner/manager; in many others it will be a tenant. In each case, the distributor is limited to the remedies available to it under statute and the Code. This issue is addressed further in the Theft of Electricity section below.

1.2 Consumer Security Deposits

Consumer Security Deposits – Submissions of Parties

The Board completed a significant revision to the consumer security deposit aspects of the Code earlier this year. One of those changes involved a provision for a staged payment of a permitted security deposit. Some distributors were concerned that there were no provisions in the revised Code for the enforcement of a customer's obligation to pay the installments when each was due. They feared that the Code, as presently drafted, denied them the opportunity to disconnect or refuse to connect a customer where that customer had made some security deposit installment payments but had failed to make others when due. Proposed amendments to sections 3.1.1 and 4.2.6 are directed to this issue and provide distributors with the authority to disconnect or refuse to connect customers on the basis of unpaid security deposits, in whole or in part. The distributors generally support these revisions.

ACTO and other representatives of low-income customers proposed that distributors should not be able to disconnect, or refuse to connect, low-income customers and customers leaving an abusive relationship because of non-payment of a security deposit. ACTO clarified that disconnection of low-income consumers should not be permitted when the consumer has paid all of the electricity related charges on the bill (i.e, is not in arrears) and only the security deposit is outstanding.

Mr. Struthers, representing BOMA, expressed concern regarding the proposed changes to the Code which confirm that distributors can use non-payment of security deposits as grounds for disconnection. While clarifications regarding security deposits have been made in the Code, BOMA is concerned that ambiguities remain. Mr. Struthers was concerned that, for commercial buildings, distributors may consider the titleholder of the property, as opposed to the beneficial owner, (for example, a pension fund, real estate trust or commercial bank) in establishing payment history or satisfactory credit. With respect to the amount of the deposit, BOMA would like some consideration of the size and the risk level of the corporation owning the building — not just the one specific building. BOMA suggested that the amount of the required deposit should reflect the risk that the distributor might incur, not, for example, simply a calculation of the number of units multiplied by a set amount.

Mr. Struthers also stated that, in the view of his organization, the criteria for a satisfactory credit check may still be open to considerable discussion and may result in inconsistent security deposit policies. He pointed out that the practical application of the new security deposit policy is yet to be fully understood. The Code amendments relating to security deposits (RP-2002-0146), issued in February, 2004, did not go into effect until August, 2004.

In its written submission, FRPO raised similar concerns, stating that security deposits should be based on the good account history of the corporation (for all owned properties) and the account history of any parent company at a provincial level. FRPO also stated in its written submission that “a consistent application by distributors of a risk assessment mechanism to determine the correct level of credit/security deposits must be instituted”. FRPO went on to comment that such a mechanism must be reasonable, understandable and transparent to all consumers.

BOMA advised that, until the industry has more experience in the application of the security deposit policies, safeguards are required against arbitrary

application, to prevent disconnection of customers who are not in arrears but who have legitimate concerns regarding application of new security deposit policies. Mr. Struthers pointed out that disconnection could have “disastrous” results for some tenants due to the disruption to their critical operations. He stated that an arbitration process should be required before a distributor could disconnect a customer for non-payment of a security deposit. BOMA’s written submission suggests that this should be a hearing before the Board.

A number of the distributors raised concerns regarding the risks associated with larger commercial and industrial customer arrears. One aspect of their concern involves the fact that, while the distribution component is a small portion (15-20%) of the total customer bill, the distributor is liable to upstream market participants (generators and transmitters), through the IMO, for the full amount of the account. In their view, this is a misallocation of risk. According to the distributors, the difficulty arises in part from their inability to impose a security deposit if there is a good payment history, even if there are substantial, publicly known concerns about the continuing creditworthiness of the customer.

Some distributors identified increased payment frequency as one means of risk mitigation in these situations. However, recognition and use of this option appeared varied among the distributors. Veridian raised the concern that the proposed amendment to delete the first part of section 2.4.6.2 would remove the ability to bill more frequently. On the other hand, Mr. Collie, representing the EDA, explained that while increased payment frequency might help, the risk would already have been incurred if the change were made after the company has filed for bankruptcy protection. While Mr. Collie agreed that more frequent billing in advance of bankruptcy protection would be of assistance, he noted that it would be difficult to assess the requirement for more frequent payment if the

customer's payment history is good. The Coalition1 also agreed that more frequent payment would be of assistance.

Security Deposits - Conclusions

The Board appreciates the serious consequences that disconnection may have to property owner/managers and their tenants. The Board believes that it is in the best interest of the distributor to avoid the unnecessary disconnection of any customer, regardless of its size. However, the Board confirms its view that the financial risk to the distributor requires that the distributor be permitted to use the instrument of disconnection for non-payment of security deposits as a measure to mitigate that risk. It is important to note that the maintenance of a viable and efficient distribution system benefits all customers and the Province as a whole.

While the Board encourages distributors to work with customers to understand levels of credit risk and appropriate security deposits, the Board emphasizes that it is the risk of the contracting party, not a parent company or shareholder, that must be assessed. To require distributors to accept the payment history of a non-contracting party on behalf of the contracting party would run counter to the principle underpinning the amendments, namely that the relevant relationship is that between the distributor and the contracting customer. In the case where the contracting party has a credit history regarding other properties in Ontario, it is prudent for the distributor to take this information into account, recognizing that the potential business arrangements can be quite complex.

The Board finds that it would not be practical to institute an arbitration and/or hearing process in each instance of potential disconnection for non-payment of security deposits. We expect distributors to work with customers to take every

1 The "Coalition" is comprised of AMALCO (now PowerStream.), Enersource Hydro Mississauga, Hamilton Hydro Inc., London Hydro Inc., and Toronto Hydro-Electric System Ltd.

reasonable measure to avoid disconnection. We also encourage distributors to work together to institute common policies and practices regarding security deposits, for matters that go beyond the Code requirements, and to make this information available to the public. Customers may bring disputes concerning security deposits that cannot be resolved with the distributor to the Board.

The Board notes that, unlike residential arrears, commercial/industrial arrears are less frequent, but potentially large. The Board agrees that distributors should have appropriate tools to mitigate this risk. Increasing billing frequency is an option that the distributors support. Contrary to Veridian's interpretation, the Board does not consider that removing the first part of section 2.4.6.2 will remove a distributor's ability to bill a customer more frequently. The Board points, for example, to section 2.4.15. This section identifies the potential use of interim payments in the context of reducing security deposit requirements.

The Board is sensitive to the concern that there be an appropriate mechanism to assess the reasonableness of requiring more frequent billing, and cautions that the distributor must apply consistent criteria in a responsible and non-discriminatory manner. In the event that a distributor becomes concerned regarding the ongoing creditworthiness of a customer, which nevertheless maintains a good payment record, and wishes to institute more frequent billing, the distributor is entitled to bring the matter to the Board if it is not able to reach agreement with the customer. The Board does not believe it is necessary at this time to propose Code amendments to address this issue specifically.

The Board re-examined the proposed deletion of section 2.4.6.2 and concluded that it is the first sentence of the section , " …., a distributor may use any mitigation options available under the law to manage customer non-payment risk.", that has been the focus of all the concerns expressed by participants in this process. The Board is of the view that maintaining the second sentence of the section, "A distributor may not discriminate among customers with similar risk profiles or risk related factors except where expressly permitted under this

code.", is important to ensure that distributors do not discriminate among customers with similar risk profiles when it comes to matters such as security deposits or disconnection. Accordingly, this section will be amended through the deletion of the first sentence. The second sentence of section 2.4.6.2 will be retained.

Finally, the Board notes the concerns of the low-income customer representatives with respect to the proposed revisions of the security deposit provisions and their proposal that security deposits not be applied to low-income customers. These issues are addressed in the final section of this Report.

1.3 Reconnection Charges

Reconnection Charges – Submissions of Parties

Under the proposed amendments to the Code, section 4.2.5.3 states, "a distributor may recover from a property owner reasonable costs associated with reconnection."

Mr. Bressia, representing FRPO, asked that the Board clearly outline what is to be included in reconnection costs. Mr. Bressia stated that this is necessary to ensure that no additional costs were included within reconnection that were or ought to be liabilities of another party. Mr. Bressia also noted that, in the case of unauthorized energy use, the property owner/manager is left with costs to repair damage to his or her property with recourse to the courts to seek compensation from persons responsible for the damage. He said that the same recourse should apply to distributors. He also observed that if this issue arose with a supplier who had competitors, rather than a monopoly provider, the property owner/manager would have the option of changing suppliers. Mr. Bressia concluded, "We [property owners/managers] have our defined responsibility on the housing provision; they [distributors] have their defined responsibility on the infrastructure related to providing their particular service. So their infrastructure

costs are related to the provision of their service, and those aren't our infrastructure costs."

Mr. Struthers, representing BOMA, stated that appropriate charges for reconnection to be incurred by the property owner should not include any penalty costs, but rather the direct and administrative costs for reconnection. He pointed out that this comment referred not only to grow house situations but also to "an ownership change, or whatever, of the property".

Distributor representatives identified a number of cost areas related to reconnection, including labour, and the repair of distributor property. In normal reconnections, these costs are nominal and fairly standard. In cases where tampering or theft of power has taken place, these costs are often quite substantial and are not necessarily set at any standard level.

Reconnection Charges - Conclusions

The Board agrees that reconnection at the request of the property owner/manager should not be dependant on the property owner paying charges or penalties that are properly assigned to the delinquent customer. The distributor is required to comply with a request from a landowner or occupant to provide electrical service notwithstanding the theft of electricity by a prior occupant. In the Board's view this finding is consistent with the statutory requirements and the Code. It is also consistent with the finding and line of reasoning expressed by Mr. Justice Gordon in the case referred to above. It is the Board's view that this approach is appropriate without regard to the manner in which the unpaid charges were generated.

The Board concludes that the requesting party, be it a new tenant or the property owner/manager, may be charged only the standard Board-approved reconnection charge. Any additional costs related to repair of the distributor's

assets during reconnection are payable by the customer responsible for the disconnection.

As the parties observed, the proposed amendment to the Code does not provide sufficient clarity on this issue. A revised version of the Code amendments (appended to this document) reflects this in a revision to section 4.2.5.3.

1.4 Theft of Electricity

Theft of Electricity – Submissions of Parties

The primary focus for most of the distributor submissions was theft of electricity, which focused almost exclusively on marihuana grow houses. Some concern was expressed related to residential customers stealing electricity in small quantities or re-connecting on an unauthorized basis after being disconnected for arrears. However, there were no distributor submissions that the proposed amendments would adversely affect their current means of dealing with these issues. The Board is content that small volume theft of electricity by residential customers can be addressed in the same way as arrears, which are discussed above.

The Board received several submissions from police agencies evidencing the growing concern they have with respect to this criminal behaviour. These submissions highlighted the extent of the problem, which appears to have grown very substantially in recent years, and the difficulties faced by policing agencies in detecting these operations.

A number of the distributor submissions included information and estimates of the rising number of grow houses being discovered, the significant safety risks, and the substantial costs of stolen electricity and damage to distributor equipment. In the case of theft of electricity for grow house operations, as with commercial/industrial arrears, the distributors are concerned that 100% of the

risk is borne by them, although distribution services account for only 15%-20% of the bill.

In general, the distributors did not support the proposed amendments, which are intended to ensure that financial liability for theft of electricity remains with the contracting customer and cannot be unilaterally assigned or transferred to the property owner/manager by the distributor. Distributors take the position that the amendments reduce their ability to mitigate the revenue loss associated with unauthorized energy use. Some distributors suggested that the amendments actually provide an incentive to unauthorized energy use. The Coalition took this position in stating that limiting the distributors' ability to hold property owners/managers accountable for such losses would reduce the operating costs for grow houses and encourage grow house activity.

Some distributors took the position that property owners should bear the financial liability for theft of electricity situations. For example, the EDA took this position on the basis that the property owner/manager selects the tenant and has therefore assessed the risks associated with the tenant. Oakville Hydro held the view that the property owner/manager should conduct regular inspections and suggested that the rules should protect a property owner/manager who reports a grow house, which is discovered as a result of such inspections.

Property Owner/Manager representatives took a very different view. FRPO explained to the Board the highly regulated nature of residential property owner/manager/tenant relations, including a statutory prohibition on utility security deposits and limitations on landlord access to tenant utility accounts. FRPO believed that holding property owners/managers accountable for tenants' arrears would not reduce illegal operation in rental properties. FRPO explained that property owners/managers are already highly motivated to ensure that they have qualified tenants who will care for their properties. For example, illegal grow house operations result in fire hazards, increased insurance costs, the costly removal of mold and thousands of dollars in general repair to a property.

According to FRPO, property owners/managers have no authority or methods to police such crimes.

There was a strong implication in many of the distributor submissions, in particular those of the Coalition, that some property owners/managers themselves were connected or complicitous in the unauthorized energy use through the assignment of fictitious tenants. The Coalition went so far as to suggest that the proposed amendment would create an incentive for property owners/managers to create fictitious tenancies. In the Coalition's view, property owners/managers should bear the responsibility if they knew or "ought to have known" about the unauthorized use and, if a property owner/manager believes that they should not be held responsible, they should have some form of recourse to the courts or the Board. In other words, property owners/managers would be presumed to be in some manner complicitous in the unauthorized use of electricity, and would be held accountable for it unless they could convince some adjudicative body that they were not.

There were a variety of submissions regarding the financial implications of theft of electricity and the associated proposed amendments. Mr. Collie explained that, historically, losses and bad debt were reasonably predictable, relatively low and included in the original revenue requirement calculation used to establish rates in 2001. In contrast, amounts related to grow house losses are much larger and therefore cannot be considered to be accounted for through the current provisions.

Some distributors suggested that there is a financial disincentive to the detection of theft of electricity as undetected theft results in a pass-through to ratepayers through the distributor's power variance accounts. However, Veridian explained that if a theft of power situation is discovered, retroactive bills are issued, and the amount goes to bad debt expense and penalizes shareholders. The Coalition echoed this view, stating that the detection and disconnection of grow house operations will ultimately result in lower distributor incomes. In addition, while

distributors are required to monitor and react to line losses and unauthorized energy use, the costs of theft of power prevention and detection programs are not included in distributors' current rates because the issue of theft of power associated with the phenomenon of grow houses was not identified when rates were last set. In their view, preventing distributors from holding property owner/managers liable for the theft of electricity, as proposed in the Code amendments, potentially reduces the incentive to detect theft even further.

There was recognition that positive incentives could play a role in addressing the grow house issue. In its submission, Veridian proposed that a fixed loss factor would create an incentive to reduce losses and invest in a range of loss management initiatives including theft prevention. The Coalition also expressed support for incentives for distributors to detect and prevent theft of power.

Various distributors put forward a number of alternatives, including:

- Making or deeming the property owner/manager to be the customer of the distributor;
- Reinstituting the former statutory lien on the property;
- Collecting from the property owner/manager where there has been theft of electricity;
- Creating a default pool by which to share the losses amongst all wholesale market participants; and
- Using a "Z-factor", that is an extraordinary event adjustment, or variance accounts to capture losses related to stolen power.

Theft of *Electricity* - Conclusions

The Board recognizes that the theft of power, a phenomenon that has become more prevalent since the revenue requirements governing distributors rates were last set, has financial and system integrity implications. The Board also recognizes that distributors are affected to different degrees by this phenomenon. For example, Hydro One's submission made it clear that urban distributors (i.e.,

in the GTA) are affected by unauthorized energy use to a much greater degree than rural distributors.

The Board agrees that property owner/managers bear a significant risk associated with grow houses. Innocent property owners/managers are directly and adversely affected by such drug operations. Therefore, they have a great incentive to detect, prevent and report such activities. However, the property owner/manager is not necessarily in a position to have special knowledge of the activities being conducted at its premises. Law and contract may limit the property owner/manager's access to the property.

The Board rejects the suggestion by the Coalition that a property owner/manager's willingness to pay the distributor for stolen electricity, in order to have his premises reconnected, indicates any complicity in the illegal activity. The Board further rejects the Coalition's proposal that the onus should be on the property owner/manager to prove they are "innocent" through the courts or the Board. In the Board's view, this approach is unacceptable, particularly since distributors have been shifting this requirement to pay through their Conditions of Service document, which does not require Board approval. It is the Board's view that property owner/managers should only be responsible for any charges relating to the theft of electricity at the premises in those circumstances wherein the collusion or complicity of the property owner/manager in the criminal enterprise had been proven and found by a court of competent jurisdiction. In such cases, the collection of unpaid charges could proceed through the normal legal process. To impose such an obligation through the Code, when there has been no such proof, would be a very significant and inappropriate departure from legal and regulatory norms.

The Board concludes that the amendments which clarify that unpaid electricity charges are the exclusive responsibility of the customer contracting with the

distributor are appropriate. This conclusion is consistent with *Duong v. Waterloo North Hydro Inc.*, *supra*.

In coming to this conclusion, the Board accepts that the amendments will reduce the distributor's ability to mitigate its risk of lost revenues and that the level of a residential security deposit does not provide adequate protection in the extraordinary circumstances created by a grow house operation. Theft in a grow house situation may result in unpaid bills in the tens of thousands of dollars and, once a grow house is identified and shut down, there is a very low probability that the distributor will collect the amounts owing from the customer.

In the Board's view, the appropriate focus should be on detecting and preventing theft of electricity (from all causes) and not mitigating revenue loss, after the fact, by seeking to transfer the liability to another – non-contracting – party. The Board is particularly concerned with the distributor position that the amendments will create a disincentive to pursue theft of power detection and prevention programs. Beyond the direct financial impact, this position ignores distributors' obligations regarding the safety and system integrity concerns that the distributors have themselves described.

With respect to the alternatives proposed, the Board does not support the re-legislation of the lien as it departs from the principle that liability remains with the customer and should not be transferred to the property owner/manager. For the same reason, the Board rejects the option of placing the liability on property owners/managers in cases of illegal activities. Given the statutory limitations on property owners/managers respecting the collection of utility security deposits and the monitoring of tenant utility accounts, the Board also concludes that it would be inappropriate to deem the property owner/manager to be the customer of the distributor.

The Board notes that the Government of Ontario has expressed great interest in the subject matter of grow house operations and is studying various approaches to deal with this issue.

With respect to the proposal for establishing a default pool for unauthorized energy use and large customer defaults, the Board finds that this proposal goes beyond the scope of this process. It is also premature in light of the proposed changes to the overall electricity market structure under Bill 100 and associated regulations.

The Board notes that the use of a variance account or the Z-factor would shift the loss to a separate account once it is detected. Shifting the costs to a variance account or Z-factor may remove the disincentive to detecting theft, but would not create a positive incentive to minimize theft through early detection. Also, variance accounts and Z-factors are most appropriately used for items that are beyond the control of the distributor. There is scope for the distributor to control theft to some extent, as indicated during the Coalition's oral presentation. The Board would like to encourage innovation in this area, subject to the limitations imposed through the Code.

The Board recognizes the difficult issues involved in terms of the accounting treatment and the potential disincentive to detect theft situations. The Board observes that the understanding of the accounting treatment of these losses, both detected and undetected, appears to vary amongst distributors. In the Board's view, distributors should have a fair opportunity to account for and receive some protection from these losses. The Board further believes that there should be an incentive to detect unauthorized use of electricity, so as to limit and prevent it. The combination of an extraordinary loss provision and a cap on that provision, similar to that proposed by Veridian, may provide the appropriate balance between financial protection and a financial incentive to minimize these losses. The Board believes that the 2006 Electricity Distribution Rate process is

the appropriate forum in which to develop a fair and uniform methodology for assessing these losses and to establish an effective incentive for distributors to minimize these losses cost-effectively.

1.5 Low-Income Customers

The proposed amendment to section 4.2.6 would entitle a distributor to disconnect a customer if that customer had failed to provide a security deposit or an installment thereof, when the request for a security deposit was in conformity with the Code. The proposed section 3.1.1, at its second bullet point, would entitle a distributor to refuse to connect or to continue to connect a customer for non-payment of a security deposit.

This proposal elicited considerable input from organizations advocating for low-income customers.

The Advocacy Centre for Tenants Ontario ("ACTO") urged the Board to mandate an explicit, system-wide exemption for all qualifying low-income residential customers from the requirement to provide the distributor with a security deposit.

In its submission, the Sudbury delegation emphasized the often confused and dysfunctional interaction between social agencies, such as the Social Planning Council, and distributors. Their commentary was not inherently a criticism of distributors or their empathy for low-income customers. Rather, it was an observation that there was no consistent and predictable protocol to deal with low-income customers, the arrears they may incur, the incidence and timing of pending disconnection, or security deposit management. One key observation provided by the Sudbury delegation, and one which was echoed by other participants was to the effect that, if appropriate protocols and procedures were developed and followed, the management of arrears and security deposit issues would improve greatly, and the vast majority of disconnections would be avoided.

This outcome, were it to be achieved, would benefit all parties and the system as a whole.

The Halton Community Housing Corporation suggested that it was important for it to develop predictability and consistency in the interaction between itself and the distributor. One important subset of low-income customers requiring capable and predictable outcomes is comprised of individuals and families leaving abusive relationships. These emergency situations have a number of elements which require special care and flexibility. Often, time and resources are limited, good payment history is unprovable, and the safety of those involved requires special consideration.

The Ontario Non-Profit Housing Association ("ONPHA"), in its very able presentation, voiced similar concerns. This group represents over 150,000 units housing more than 350,000 hard to house clients. Among its members are a range of institutional public housing providers operating under the direct auspices of the Provincial and Federal Governments. While acknowledging that it had not itself developed a specific and definitive proposal for the Board's consideration in this proceeding, the ONPHA regarded the creation of a predictable and consistent process for use by distributors in their interaction with social agencies and non-profit social housing providers to be a highly desirable and useful outcome.

The Board agrees.

Mr. Collie, representing the EDA, agreed that distributors would be willing to work with social agencies to develop a best practice for the industry to address these issues.

This approach would be useful, as the submissions indicate that there is a wide range of practice throughout Ontario where it concerns the distributors' approach to low-income consumers. In some cases, distributors do not require customers

who are clients of social agencies to pay security deposits. In other cases, such customers are afforded extended periods to enable them to pay security deposits. In still other instances, low-income customers are not provided with any particular, or predictable latitude or forbearance.

In some instances, it appears that distributors may not have a predictable or reliable communication channel to deal with the special issues raised by low-income customers.

In some cases security deposits are supplied directly by social agencies to distributors to enable social agency clients to become connected or to avoid disconnection. When these security deposits are refunded after an appropriate period of good payment history, the deposit is refunded to the client, and not to the party that actually paid the deposit. The Board finds that the security deposit should appropriately be returned to the party that paid the deposit. This will permit such social agencies to assist other low-income customers in need. The Board believes this situation is properly addressed through a further amendment to the Code, and a new provision to this effect is included in the Amended Proposed Amendments in Appendix C as section 2.4.28.

In other instances, the social agency became aware of the threat of disconnection too close to the date set for disconnection. This typically arises because the client of the social agency does not pass this information along to the agency in a timely manner. As a result the agency may be unable to organize its response to the notice in time to avoid the disconnection. The Board heard submissions to the effect that if the agency were to receive such notices in a timely manner, many disconnections could be avoided altogether.

The Board also heard submissions respecting the difficulties encountered by individuals and families leaving dangerous or abusive relationships. In such cases, it is often impossible for such persons to demonstrate good payment

history, without revealing personal information, which may place the individual and family members in peril.

The Board wants to emphasize that the representatives for tenants and low-income customers generally found that the distributors were well motivated in their actions respecting the clients of social agencies, and sought to deal respectfully and effectively with the relevant agencies. The problems seem to arise as the result of a lack of clear, consistent and predictable procedures governing the interface between distributors and low-income customers and the agencies that serve them.

One of the key difficulties in this area concerns the extent to which distributors can or should be required to identify an existing or potential customer as a low-income customer or otherwise as a person requiring some measure of special management. It is the Board's view that distributors ought to have no such definitional role. The identification of a customer as a low-income customer should rest with the responsible social agencies.

The proposed amendments assume the applicability of the security deposit regime outlined in the Code to all customers, without regard to their status as clients of social agencies. The security deposit provisions are designed to strike an appropriate balance between the responsibility of an individual for his or her own electricity charges and the extent to which system users, as a collective, ought to backstop the distributor for unpaid bills. This is necessary so that system integrity and viability can be maintained. The collective responsibility can be invoked only after the security deposit governing a given defaulting account has been applied to the arrears, and any additional outstanding amounts are reasonably considered to be uncollectible.

Security deposits play an important role in the financial underpinning of public utilities, such as the distributors. This is especially important during a period when the ability of distributors to account properly for unpaid accounts is

somewhat unnaturally limited because of the effect of legislation on rates applications.

The Board recently placed important new restrictions on the distributors' ability to hold and calculate security deposits. For the first time, distributors are now obliged to return security deposits after the customer demonstrates an appropriate period of good payment. Where a security deposit is appropriate, the amount of the deposit that the distributor can require is also now capped. In addition, a provision was added that requires distributors to permit at least four instalments, a measure which was included to benefit low-income consumers.

Given the importance of security deposits to distributors, and their role in underpinning the financial structure of the distribution system as a whole, the Board does not consider that it has been presented with justification to conclude that security deposits ought not to be applicable to clients of social agencies or low-income consumers in general. What we have heard is that there are serious difficulties and dysfunctions in the management of the relationship between clients of social agencies who are customers or potential customers, the social agencies themselves, and the distributors, due in large part to a lack of consistency and predictability in practices. These difficulties concern areas such as disconnection and security deposit policies.

To address this circumstance, the Board will facilitate a dialogue between the distributors and appropriate representation of social agencies with a view to the development of a set of common practices across the Province. The Board's role will be one of facilitation only. The Board anticipates that the distributors and social agencies will take leadership in developing, implementing, and maintaining the practices. These practices could address issues such as security deposit policies and disconnection practices. It is not intended that the practices that emerge from this dialogue would become part of the Code. Rather the set of practices should become a living document developed by and used by

distributors and social agencies to provide an appropriate level of consistency and predictability to their interactions.

The Board wants to commend the representatives of the social agencies who prepared cogent and effective submissions on the issues facing them in their representation of their clients. From the very practical and grass-roots perspective provided by the Sudbury delegation, to the higher level overview presented by the housing providers, and the ACTO delegation, the Board has been greatly assisted in its deliberations. It is hoped that the organizations who participated in this proceeding, and who have developed a measure of expertise in this subject matter, will be able to participate in the meetings. It is further hoped that a variety of social agencies and the government itself may be able to assist these participants in continuing this work to an appropriate and needed conclusion.

The Board also wishes to commend the EDA for its thoughtful and accommodating approach to this subject matter. Its positive and constructive representation in this matter has given the Board confidence that the dialogue will have a positive outcome.

The Board will issue a letter respecting the dialogue in due course.

APPENDICES

Appendix A – List of Participants

Written submissions were received from:

- Advocacy Centre for Tenants Ontario - ACTO
- Building Owners and Managers Association - BOMA
- Coalition of LDCs (AMALCO, Enersource, Hamilton Hydro, London Hydro, Toronto Hydro)
- Electricity Distributors Association - EDA
- EnWin Powerlines
- Haldimand County Hydro
- Halton Community Housing Corporation
- Hydro One Brampton
- Hydro One Networks Inc
- Hydro Ottawa
- London Property Management Association
- Oakville Hydro
- Ontario Association of Chiefs of Police
- Ontario Non-Profit Housing Association - ONPHA
- Community Partners of Sudbury
- Veridian Connections
- York Regional Police

Oral presentations were heard from:

- Dave Collie, Electricity Distributors Association – EDA
- Dale Struthers, Building Owners and Managers Association – BOMA
- Vince Brescia, Federation of Rental Housing Providers Ontario
- Joan White, Ontario Non-Profit Housing Association - ONPHA
- Rod Blake, Halton Community Housing
- Andrew Evangelista and Doug Morrison, Coalition of LDCs (AMALCO, Enersource, Hamilton Hydro, London Hydro, Toronto Hydro)
- Amanda Chodura and Christine Mick, Community Partners of Sudbury
- Mary Todorow, Teresa McClenaghan and Judy Simon, Advocacy Centre for Tenants of Ontario - ACTO

Appendix B - June 2, 2004 Proposed Amendments

Code Section	Proposed Amendment
1.7	Amended as follows: "The amendments to this Code made by the Board on (insert date when made by Board) come into effect 30 days after this date. [Note: Sections 2.4.6.2, 3.1.1, 4.2.5, 4.2.5.2, 4.2.5.3, 4.2.6 and 4.3.3]"
2.4.6.2	Revoked.
3.1.1	Second last bullet point is amended to include: "...or for non-payment of a security deposit. The distributor shall give the person a reasonable opportunity to provide the security deposit consistent with section 2.4.20"
3.1.1	Last bullet point is revoked.
4.2.5	Renamed 4.2.5.1.
4.2.5	Amended by two new sections: Section 4.2.5.2 – "A distributor may recover from the customer responsible for the disconnection reasonable costs associated with disconnection." Section 4.2.5.3 – "A distributor may recover from a property owner reasonable costs associated with reconnection."
4.2.6	Added as the second-last bullet point: "If the person owes the distributor money for distribution services, or for a security deposit. The distributor shall give the person a reasonable opportunity to provide the security deposit consistent with section 2.4.20."
4.2.6	Last bullet point revoked.
4.3.3	Amended to read: "A distributor may recover from the customer responsible for the unauthorized energy use all reasonable costs incurred by the distributor arising from unauthorized energy use."

Appendix C - Revised Proposed Amendments

Code Section	Proposed Amendment
1.7	Section 1.7 amended by adding the following: "The amendments to this Code made by the Board on (insert date when made by Board) come into effect 90 days after this date."
2.4.6.2	Section 2.4.6.2 is revoked and replaced by the following: "In managing customer non-payment risk, a distributor shall not discriminate among customers with similar risk profiles or risk related factors except where expressly permitted under this Code."
2.4.28	Renumbered 2.4.29
	New section 2.4.28 is added as follows: "Despite sections 2.4.22, 2.4.23, 2.4.25, 2.4.26 and 2.4.27, where a deposit has been paid by a third party on behalf of a customer, the distributor shall return the full amount of the security deposit, including interest, where applicable, to the third party that provided the security deposit."
3.1.1	Amended by adding the following to the second last bullet point: "...or for non-payment of a security deposit. The distributor shall give the person a reasonable opportunity to provide the security deposit consistent with section 2.4.20"
3.1.1	Amended by revoking the last bullet point.
4.2.5	Renumbered 4.2.5.1.
	Two new sections added: Section 4.2.5.2 - "A distributor may recover from the customer responsible for the disconnection reasonable costs associated with disconnection, including overdue amounts payable by the customer. A distributor may recover from the customer responsible for the disconnection reasonable costs for repairs of the distributor's physical assets attached to the property in reconnecting the property." Section 4.2.5.3 - "A distributor may recover from the person requesting the reconnection any Board approved reconnection charges."
4.2.6	Amended by revoking the last bullet point.
4.2.6	Amended by inserting the following as the last bullet point: "The customer owes the distributor money for distribution services, or for a security deposit. The distributor shall give the customer a reasonable opportunity to provide the security deposit consistent with section 2.4.20."

Code Section	Proposed Amendment
4.3.3	Revoked and replaced with the following: “A distributor may recover from the customer responsible for the unauthorized energy use all reasonable costs incurred by the distributor arising from unauthorized energy use.”