



EB-2008-0244

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

AND IN THE MATTER OF an application by
PowerStream Inc. for an order approving just and
reasonable rates and other charges for electricity
distribution to be effective May 1, 2009.

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Paul Vlahos
Member

Cathy Spoel
Member

MAJORITY DECISION

July 27, 2009

This is a Majority Decision by Members Paul Vlahos and Cathy Spoel. The Minority Decision by Vice Chair Gordon Kaiser follows the Majority Decision.

Background

On June 03, 2009, the Ontario Energy Board approved the terms and conditions of the Settlement Proposal dated May 19, 2009 in connection with PowerStream's application to approve just and reasonable rates for electricity distribution effective May 1, 2009. PowerStream and the intervenors settled all issues with the exception of one.

The one outstanding issue, raised by the Smart Sub-Metering Working Group, a group of seven Board-licensed companies offering smart sub-metering services to condominiums (the "SSMWG"), is whether and to what extent PowerStream should be permitted to include in distribution rates the costs and revenues associated with its condominium suite metering activities.

A one-day oral hearing was held on June 15, 2009 and written arguments were submitted by parties.

For the reasons set out below the Board approves the forecast revenues and costs of the condominium suite metering activities reflected in the 2009 revenue requirement that results from the settlement agreement.

The Issue and Relief Sought

Historically, condominium buildings have typically been treated as commercial customers with a bulk meter. The units are not individually metered and the utility has one customer, the condominium corporation.

Condominium suite metering, as offered by PowerStream, involves installing a separate meter for each condominium unit, and billing each unit owner as a residential customer; the condominium corporation is billed for the common areas. There is no bulk master meter required and there is no sub-metering taking place. The rates are regulated. As is common for residential customers, PowerStream does not charge for the cost of the meters; these are included in the costs allocated to the residential class as a whole. The cost of the condominium meter (Quadlogic) is considerably more expensive (about \$680) than the standard meter for an individual single home (about \$250). On the revenue side, PowerStream replaces one commercial customer with a larger number of residential customers, generating higher revenue because of the rate classification under which it bills for the same load previously billed for the bulk meter.

Smart sub-metering, as offered by members of the SSMWG, happens “behind” the bulk meter. Members of the SSMWG install the smart meters for the condominium units. The condominium corporation continues to be a commercial customer of PowerStream. Smart sub-metering allows for the allocation of the condominium corporation’s bill among the various unit owners, presumably in relation to their consumption of electricity. The rates are not regulated.

Because no contribution is required by PowerStream for the higher cost of the meter for condominium customers, the SSMWG alleges that there is a cost subsidy for these customers by the rest of PowerStream’s ratepayers and that this harms the competitive market and harms the SSMWG members.

The relief sought by the SSMWG is that the condominium activity should be performed by an affiliate of PowerStream. In the alternative, if in the utility, the condominium activity should be treated as a stand-alone program, on a fully-costed basis. Under the stand-alone categorization, revenues and costs of the condominium suite program would be segregated from the rest of the distribution business. In the event the program is less profitable than the distribution business on a fully-costed basis, revenue would be imputed thereby reducing the revenue requirement and rates for the rest of the ratepayers.

Should the Program be offered through an Affiliate?

The SSMWG accepted that under the existing legislative and regulatory framework, utilities are required, when asked, to install smart meters in condominiums but argued that it is open to the Board to require that the condominium activity should be undertaken through an affiliate.

PowerStream, Board staff and the intervenors argued that the legislative and regulatory framework clearly suggest that a utility such as PowerStream not only has the ability to carry out these activities directly through the utility as opposed to a separate subsidiary, but in fact it is required to do so. PowerStream argued that if the activity was carried out through a separate subsidiary, which is not by definition a distributor, a utility would not be meeting its requirements under the *Electricity Act*, the Regulations and the Distribution System Code.

Section 71 (1) of the *Ontario Energy Board Act, 1998* (the “Act”) states that distributors cannot carry on any business activity other than the distributing of electricity, except through an affiliate. However, section 71 (2) of the Act provides an exception to the general rule. Section 71 (2) states that a distributor may provide services in accordance with section 29.1 of the *Electricity Act, 1998* that would assist the government of Ontario in meeting its objectives in relation to electricity conservation.

Ontario Regulation 442/07, promulgated on August 1, 2007, allows licensed distributors to install smart meters in existing condominiums when the board of directors of the condominium corporation approves the installation of smart meters.

The Board’s Distribution System Code was recently amended by adding section 5.1.9 which reads as follows:

When requested by either:

- (a) the board of directors of a condominium corporation; or
- (b) the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the Condominium Act, 1998,

a distributor **shall install** smart metering that meets the functional specification of Ontario Regulation 425/06 – *Criteria and Requirements for Meters and Metering Equipment, Systems and Technology* (made under the Electricity Act).(Emphasis added).

On the basis of the existing legislative and regulatory framework, the Board accepts that it is appropriate for PowerStream to continue to carry out its condominium activities as it has and proposes to continue.

Should the Program be Stand-Alone?

The alternative relief sought by SSMWG is for the Board to treat PowerStream’s condominium suite activity as a stand-alone program, with the ratemaking framework as described above.

The legislative framework does not specify the ratemaking treatment of the condominium suite metering activity by distributors. The Board accepts that there may be a legitimate concern by the SSMWG if PowerStream and the SSMWG companies

competed in the same market and if there is an undue cost subsidy of PowerStream's condominium suite metering activities. The Board deals with these two matters below.

Before doing so, the Board points out that treating an activity on stand-alone basis is not necessarily a remedy to allegations of anti-competitive behaviour and predatory pricing, the matters of concern for the SSMWG. Under the stand-alone ratemaking model, the Board's role is limited to imputing revenue, when warranted, to ensure that there is no cost subsidy for the suite metering business by the rest of the ratepayers. The Board would not regulate the pricing and offerings of the program. These would be at the discretion of the utility.

Do PowerStream and the SSMWG companies compete in the same market?

As noted above, suite metering, as offered by PowerStream, involves installing a separate meter for each condominium unit, and billing each unit owner as a residential customer; the condominium corporation is billed for the common areas. There is no bulk meter.

Also as noted above, sub-metering, as offered by members of the SSMWG, happens "behind" the distributor's bulk meter.

An existing condominium wishing to be smart metered or a developer of a new condominium building has the choice of choosing suite metering with PowerStream or sub-metering with another company, such as one of the SSMWG member companies. So, the metering market is contestable. The fact that PowerStream is allowed to carry this activity as part of its distribution business does not take away from the fact that the metering of condominium units is a contestable market. To the extent that there is a cost subsidy as the SSMWG alleges, and if material, the SSMWG may be legitimately concerned.

Is There a Cost Subsidy?

The SSMWG argued that, as PowerStream used a more expensive Quadlogic meter rather than the standard smart meters used for single unit residential customers, there is a cost subsidy or there is likely a cost subsidy since there is no customer contribution for the higher cost of the Quadlogic meter.

PowerStream on the other hand argued that the utility has an obligation to provide service that meets the applicable standards and the standard smart meter for technical reasons could only be used in about 5% of the units. Moreover, all market participants use the same Quadlogic meter for the same reasons - it is the most effective equipment to meet the requirements of condominium units. The Board accepts PowerStream's rationale for using the higher cost Quadlogic meter. The Board notes that members of the SSMWG use the same meter for its technical and other advantages in the condominium sub-metering market.

As a number of interveners note, metering costs (a capital cost) may be higher but operating costs are likely lower. PowerStream was unable to provide precise operating costs as it was not previously required to segregate costs for the condominium activity in any fashion. On the basis of the information produced, most parties argued that there is no cost subsidy but other parties conceded that there may be a cost subsidy. There was however general agreement that the information adduced was not sufficient to conclude confidently that there is a subsidy, and in which direction.

The Board agrees with that assessment. The SSMWG has not, in this case, convinced the Board that there is a cost subsidy to condominium unit customers by the other residential ratepayers and, if there is, that it is material.

On the findings and reasons above, the Majority Panel is not prepared to grant the relief requested by the SSMWG.

Which Way Forward?

The metering capital cost differentiation issue for condominium customers was first raised by Board staff in the Toronto Hydro proceeding (EB 2007-0680). (The SSMWG was not a participant in the Toronto Hydro proceeding). In that proceeding, that Board Panel stated as follows:

At this time, for the purposes of this Decision, the Board will not consider differentiation in metering costs to be a pivotal consideration in entertaining the separation of the existing residential class or to direct the institution of contributions, capital or otherwise.

This is an issue that requires consideration in a more generic proceeding with appropriate notice to effected parties, directed towards rate design and cost allocation. (Decision of the Board dated May 15, 2008, EB 2007-0680 – page 20)

The SSMWG intends to raise its issue in other rates proceedings. The Board's view is that consideration of the issue on a utility-specific basis going forward is not the best approach for two reasons. First, there are substantial differences in the rates and operating costs from one utility to the next. The conclusions drawn in one case will be of little if any value in the resolution of this matter. Second, this is clearly a matter of Board policy. The shaping of Board policy will of course need to consider this issue in the context of a number of other policy issues before the Board. In that regard, the Board will now have two decisions from rate proceedings as it considers this matter. In the Majority Panel's view, it would be advisable for the Board to take a generic approach in addressing this matter.

PowerStream's Conditions of Service and Contracts

The SSMWG argued that PowerStream's Conditions of Service and contracts (filed in the form of a Terms of Reference Letter in SSMWG Schedule 3-1) , are unclear and misleading and do not indicate that a multi-unit building has the option of bulk metering. On cross-examination the witness for PowerStream denied this was the meaning or intent of the Conditions of Service and offered to amend the Conditions of Service to clarify the wording. (TR pg 165).

On the issue of contract exclusivity, there were also some questions raised as to the clarity of provisions in the PowerStream contracts regarding the freedom of the condominium corporation to exit a contract for another service provider. Again the PowerStream witnesses indicated that the condominium corporation could choose another service provider and that there are no barriers to exit. (TR pg 77)

The Board directs that PowerStream amend its Conditions of Service and related contracts going forward in a manner that clearly reflects the intent described by the PowerStream witnesses in this hearing. PowerStream shall file, for convenience, the amended sections of the Conditions of Service and related Terms of Reference Letters or other contracts as part of its draft rate order.

Rate Base

In accepting the revenue requirement reflected in the Settlement Proposal earlier in this decision, the Board considered the argument advanced by SEC that non-revenue producing condominium suite meters should not be forming part of rate base. The Board does not accept that revenue-generation is the test for including an asset in rate base. The test is used or useful. SEC's suggestion is not consistent with the long-standing regulatory practices in this regard. Notably, as article 410 of the Board's Accounting Procedures Handbook points out, assets will be included in rate base if they have the "capacity" to contribute to future cash flows and earn income. PowerStream's asset recognition approach to condominiums is the same as that for conventional subdivisions where installations can pre-date connection and revenue producing by a considerable time period. There is no supportable basis to treat the condominium suite metering assets distinctly.

Implementation of Rates

Pursuant to the Settlement Proposal that was approved by the Board the new rates are to be effective May 1, 2009 and implemented August 1, 2009.

Given the date of this Decision, an August 1, 2009 implementation date is no longer possible. The Board authorizes PowerStream to implement the new rates September 1, 2009.

The results of the Settlement Proposal together with the Board's findings outlined in this Decision are to be reflected in a Draft Rate Order. The Board expects PowerStream to file detailed supporting material, including all relevant calculations showing the impact of the implementation of the Settlement Proposal and this Decision on its proposed revenue requirement, the allocation of the approved revenue requirement to the classes and the determination of the final rates, including bill impacts. Supporting

documentation shall include, but not be limited to, filing a completed version of the Revenue Requirement Work Form excel spreadsheet, which can be found on the Board's website. PowerStream should also show detailed calculations of any revisions to its low voltage rate adders, retail transmission service rates and variance account rate riders reflecting the Settlement Proposal and this Decision.

A final Rate Order will be issued after the following steps have been completed.

1. PowerStream shall file with the Board, and shall also forward to the intervenors, a Draft Rate Order attaching a proposed Tariff of Rates and Charges and other filings reflecting the Board's findings in this Decision, within 14 days of the date of this Decision.
2. Intervenors shall file any comments on the Draft Rate Order with the Board and forward to PowerStream within 7 days of the date of filing of the Draft Rate Order.
3. PowerStream shall file with the Board and forward to intervenors responses to any comments on its Draft Rate Order within 7 days of the date of receipt of intervenor submissions.

Costs Awards

The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. The Board will determine eligibility for costs in accordance with its Practice Direction on Cost Awards. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's Practice Direction on Cost Awards. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

PowerStream and CCC requested that costs of this proceeding should be assessed against the SSMWG on the basis that this was not the appropriate forum to raise that issue. Having accepted the SSMWG's issue for consideration in this proceeding, the Board does not find it appropriate to assess costs against the SSMWG.

A cost awards decision will be issued after the following steps have been completed.

1. Intervenor found eligible for cost awards shall file with the Board, and forward to PowerStream, their respective cost claims within 30 days from the date of this Decision.
2. PowerStream shall file with the Board and forward to intervenors any objections to the claimed costs within 44 days from the date of this Decision.
3. Intervenor shall file with the Board and forward to PowerStream any responses to any objections for cost claims within 51 days of the date of this Decision.

PowerStream shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, July 27, 2009

ONTARIO ENERGY BOARD

Original Signed By

Paul Vlahos
Member

Original Signed By

Cathy Spoel
Member

MINORITY DECISION

I have had the benefit of reading the reasons of the majority. I agree that PowerStream should be granted the rate relief requested but would add two conditions. The first is that PowerStream file a study that identifies the costs and revenues of its condominium smart meter service. The second is that the contracts between PowerStream and the condominium corporation relating to this service be amended to indicate that the contracts can be terminated on 90 days notice without penalty.

Background

On June 3, 2009, the Ontario Energy Board approved the terms and conditions of the Settlement Proposal filed by PowerStream Inc. in connection with PowerStream's application to approve just and reasonable rates for electricity distribution effective May 1, 2009.

The Applicant and the intervenors settled all issues with the exception of one. The one outstanding issue is whether and to what extent PowerStream should be permitted to recover in rates the operating and capital costs of its smart metering activities in condominiums. That issue is the subject of this decision.

PowerStream's request is supported by Board staff and all intervenors with one exception. The opposing intervenor is the Smart Sub-Metering Working Group (the "Working Group"). The Working Group consists of eight licensed smart submetering companies that compete with PowerStream in providing Smart Meters to condominium residents.

It is accepted that the market for this service is competitive. All nine companies appear to supply essentially the same service using similar, if not identical equipment.

The Working Group argues that the costs PowerStream is seeking to recover should not be recovered in rates. Instead, they argue that PowerStream should deliver these services through a separate subsidiary or alternatively through the utility but by using a non utility account which means that expenses are not recovered in rates.

The Regulatory Framework

As a general rule, the Board requires utilities to carry out competitive activities through a separate subsidiary. There are two reasons for this approach. First, there is a concern that the utility will subsidize the competitive activities from revenues received from monopoly services. This works to the disadvantage of ratepayers of monopoly services. Second, it may provide a utility with an unfair competitive advantage in the marketplace if monopoly revenues are used to subsidize the competitive services.

In the case of conservation activities such as smart metering, however special provisions apply. The relevant exemption is set out in section 71 (2) of the *Ontario Energy Board Act, 1998*.

Restriction on business activity

71. (1) Subject to subsection 70 (9) and subsection (2) of this section, a transmitter or distributor shall not, except through one or more affiliates, carry on any business activity other than transmitting or distributing electricity. 2004, c. 23, Sched. B, s. 12.

Exception

(2) Subject to section 80 and such rules as may be prescribed by the regulations, a transmitter or distributor may provide services in accordance with section 29.1 of the *Electricity Act, 1998* that would assist the Government of Ontario in achieving its goals in electricity conservation, including services related to,

- (a) the promotion of electricity conservation and the efficient use of electricity;
- (b) electricity load management; or
- (c) the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources. 2004, c. 23, Sched. B, s. 12

PowerStream and most intervenors argued that these sections clearly indicate that a utility such as PowerStream has the ability to carry out these activities directly through the utility as opposed to a separate subsidiary. I accept this interpretation.

This leaves open the alternative relief sought by the Working Group which is that the activities could be carried out through the utility but through a non-utility account which means that the expenses cannot be recovered in rates.

Anti Competitive Conduct

The Working Group is concerned that if utilities are allowed to carry out these activities through the regulated entity they will be able to subsidize competitive services by monopoly revenues and eliminate competitors.

While the Legislation states that utilities can carry out these activities through the regulated entity, there is no indication that the Legislature intended to promote or condone anti-competitive conduct. I believe that the intent of the legislation was to

promote competitive markets with a large number of suppliers in order to best promote the rapid introduction of this technology. Put differently, utilities were allowed to enter the market directly to promote competition, not lessen it.

The concern of the Working Group is understandable, but is there any evidence of anti-competitive conduct in this case?

The evidence is inconclusive. On the one hand, the Working Group relies upon the differences in capital cost. They argue for example that the cost of the Quadlogic meter used by PowerStream is significantly more expensive than the meter used for most residential customers. That may be, but as PowerStream argues the utility has an obligation to provide service that meets the applicable standards and the standard meter for technical reasons could only be used in about 5% of the units. Moreover, the competitors all use the same meter for the same reasons - it is the most effective equipment to meet the requirements of condominium units.

In addition, as a number of intervenors note, capital costs are just part of the equation. In the case of operating costs, PowerStream is unable to provide a precise allocation. The utility is not able to differentiate the operating costs applicable to condominium units as opposed to other residential units. As a result, the Board is unable to determine whether there has been cross subsidization or any anti-competitive impact.

To be clear, PowerStream is not being accused of predatory pricing. This is not a situation where PowerStream is designing a special rate with a view to eliminating competition. PowerStream is simply applying the existing approved residential rate of \$13.23 per month to the residents of the condominium units. This is the rate monopoly customers with smart meters currently pay.

PowerStream and many of the intervenors argue that the residential class is a broad class and there are invariably subsidies flowing between various members of that class. In other words, the Board usually ignores subsidies between members of such a broad rate class. But that principle, with respect, applies to monopoly services.

This is a competitive service and the usual protection for competitors (that utilities provide competitive services through a separate affiliate) is not available given the specific statutory exemption. In the circumstances, it is important that the Board be able to determine if revenues are covering costs.

One solution is to require the utility to segregate the costs and revenues of this particular service. With the proper cost allocation, the Board and the parties will be able to determine if revenues are covering costs. Or put differently, are competitive services being subsidized by monopoly revenues?

Some intervenors argue that if the Board wishes to adopt this approach it should be done in a generic proceeding sometime in the future. The intervenors point to the recent Toronto Hydro decision where the Board adopted that approach in this exact situation. There, the Board stated at page 20:

At this time, for the purposes of this Decision, the Board will not consider differentiation in metering costs to be a pivotal consideration in entertaining the separation of the existing residential class or to direct the institution of contributions, capital or otherwise

This is an issue that requires consideration in a more generic proceeding with appropriate notice to effected parties, directed towards rate design and cost allocation. (Decision of the Board dated May 15, 2008, EB-2007-0680)

A generic decision is often the preferred solution but it cannot be an excuse for delay. This is the second time the Board has faced this issue. Moreover, it is not clear that this is necessarily a generic issue. All Ontario utilities will not be providing this service. And, we have heard that other utilities intend to carry out this activity through a separate subsidiary.

This is an important service. Installation of smart meters in individual condominium units offers significant gains in energy conservation. The Legislature has signaled the advantage of competing suppliers and specifically allowed regulated utilities to engage in the service directly. Implicit in this direction is a belief that competing suppliers will promote price competition and improve service quality.

It is also significant that this is a new market with new competitors. It would be unfortunate (and contrary to the public interest) if competitors were disadvantaged or even eliminated in the early days of this market. Repeating what the Board stated in Toronto Hydro is not, in my view, a satisfactory approach.

I accept that utilities such as PowerStream should be entitled to recover the cost of this competitive service in rates and should not be required to conduct the business through a separate subsidiary.

However, as a condition of granting this relief to PowerStream, I would require PowerStream to file within four months, a cost allocation methodology for this new service with estimates of the costs and revenues incurred to date in a manner that will allow the Board and the parties to determine whether revenues are covering costs. The Working Group will then be able to deal with this matter in PowerStream's rate application next year or through a motion for alternative relief in the event the facts warrant further action.

This process will not affect the rate recovery ordered by this decision. The Board has found that PowerStream may recover all of the costs of its condominium smart meters. Those rates are effective May 1, 2009 and run to May 1, 2010.

It may be that revenues are covering costs and there is no basis for any further action let alone a generic proceeding. It's likely that the costs and revenues of this service are similar for all utilities. All utilities have similar residential rates and the cost of installing smart meters in condominiums is not likely to differ from utility to utility in a material fashion. The evidence in this proceeding that both the utility and competitors use virtually identical equipment.

I do not believe that the condition I would attach to the rate order in any way compromises a generic initiative in the event the Board decides to pursue it. In a generic proceeding this information will be required in any event. If the Board elects not to implement a generic proceeding, the competitors will at least have the information necessary to argue the issue in a meaningful fashion.

In my view the competitors are entitled to have their argument heard. It cannot be heard in any meaningful fashion without an accurate accounting of costs and revenues relating to this service. This information is within the complete control of the utility and to date the utility has elected not to provide it.

This is not simply a question of fairness to private interests. There is also an important public interest aspect. The goal here is to encourage conservation. The seven competitors include one of the Province's largest gas distribution utilities, a useful addition to the conservation initiative in electricity markets. There can be little doubt that the entire legislative scheme with respect to this issue is designed to promote increased investment in this activity. I doubt that any of these companies, much less the gas distributors, will make a long-term commitment to this market unless they are confident there will be a level playing field.

The conservation agenda is important to the Board and the Government. Confusion and delay regarding regulatory rules is not helpful. The required cost allocation will ensure that the necessary fact-finding aspect of this issue moves forward on a timely basis.

Contract Exclusivity

The contracts used by PowerStream were placed before the Board. The Working Group argued that on their face the contracts grant PowerStream exclusivity. In other words, once the condominium had entered into a PowerStream agreement they are not free to shift to a competing vendor and the utility has locked up the market.

While the contracts are less than clear on their face, the testimony of the PowerStream witnesses clearly indicates the condominium corporation can choose to exit the contract at any time for another service provider. There are no exit fees and PowerStream, in the event the condominium chooses to terminate the contract, would simply remove the individual sub-metering equipment and deploy it elsewhere. The Board believes however that PowerStream should clarify its contract to clearly indicate the basis on which a condominium corporation can terminate service.

A monopoly utility has inherent advantages in a competitive market such as this. The PowerStream brand itself is a powerful advantage. These are long-term contracts in a newly emerging market. It is not in the public interest to allow a dominant supplier to

lock up the market with long-term exclusive agreements. The PowerStream contract should be amended to clearly state that customers can terminate the contract on 90 days notice without penalty.

The utility agrees that this is the intent of the existing agreement. It is important that customers clearly understand the contract terms. They should not be required to read transcripts or regulations. There is no question that the Board has authority to require amendments to contract terms where those contracts are integral to rate regulated services¹.

DATED at Toronto, July 27, 2009

ONTARIO ENERGY BOARD

Original Signed By

Gordon Kaiser
Presiding Member and Vice-Chair

¹ Re The Interim Contract Carriage Arrangements of Consumers Gas Company Ltd., Northern and Central Gas Corporation, and Union Gas Limited, E.B.R.O. 410, 411, 412, (April 4, 1986) at page 182.