



**EB-2009-0308**

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

**AND IN THE MATTER OF** a Notice of Intention to Make an  
Order for Compliance against Toronto Hydro-Electric System  
Limited.

**BEFORE:** Gordon Kaiser  
Vice-Chair and Presiding Member

Cynthia Chaplin  
Member

## **DECISION AND ORDER**

### **Background**

[1] The Ontario Energy Board issued a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited (“Toronto Hydro” or “THESL”) under section 112.3 of the *Ontario Energy Board Act, 1998* (the “*OEB Act*”) on August 4, 2009. On August 17, 2009, Toronto Hydro gave notice requiring the Board to hold a hearing on this matter indicating that it intended to be present at the hearing, adduce evidence and make submissions to defend against the allegations.

[2] The Electricity Distributors Association (“EDA”) and the Smart Sub-Metering Working Group (the “Working Group”)<sup>1</sup> applied for and received permission to

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<sup>1</sup> The Smart Sub-Metering Working Group is made up of the following members:

Carma Industries Inc.  
Enbridge Electric Connections Inc.  
Hydro Connection Inc.  
Intellimeter Canada Inc.  
Provident Energy Management Inc.  
Stratacon Inc.  
Wyse Meter Solutions

participate in the proceeding, but that participation has been limited to Phase 2, which will address the appropriate remedy, if the Board determines that a remedy is necessary.

### **Production of Documents**

[3] Prior to hearing this matter, Toronto Hydro brought three motions for the production of documents. The first motion, filed September 4, 2009, sought orders requiring Compliance Counsel (i.e. counsel retained by Board staff to conduct the enforcement proceeding) to produce all information that relates to suite metering or smart metering practices of Toronto Hydro or third parties received or reviewed or exchanged with any employee of the Board involved in this investigation. The motion also sought all communications between four named parties (Metrogate Inc., Avonshire Inc., Deltera Inc., and Enbridge Electric Connections Inc.), and sub-meterers or condominium developers addressing the terms on which sub-meterers offer to provide sub-metering to condominium developers in the City of Toronto. Finally, the motion sought materials from members of the Working Group, including all proposals made and all contracts with, all condominium developers with respect to the installation of sub-meters for condominiums in the City of Toronto.

[4] In its written Amended Decision and Order dated October 23, 2009 (the “disclosure decision”), the Board refused to grant the broad based disclosure sought by Toronto Hydro on the basis of the *Stinchcombe* case.<sup>2</sup> Instead, the Board ordered Compliance Counsel to produce certain documents in its possession relating to the dealings with Metrogate and Avonshire but declined to require third parties, such as the Working Group members, to produce documents.<sup>3</sup>

[5] The motion of September 4 also sought an order from the Board establishing certain rules segregating Compliance Counsel and the staff supporting Compliance Counsel from other staff members of the Board supporting the panel. Toronto Hydro further requested that both the Compliance “team” and the Board staff “team” be segregated from all other staff at the Board. The parties reached an agreement on an appropriate procedural protocol, which was addressed in the disclosure decision and is reproduced here as Appendix A.

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<sup>2</sup> *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

<sup>3</sup> Decision dated October 23, 2009, EB-2009-0308 at p.11.

[6] On November 5, 2009, Toronto Hydro filed a further motion with the Board seeking an order that Compliance Counsel produce additional materials that, in Toronto Hydro's view, should have been produced previously in accordance with the disclosure decision. Toronto Hydro also asked the Board panel to review documents for which Compliance Counsel had claimed privilege. On November 12, 2009, Toronto Hydro withdrew this motion.

[7] The final motion brought by Toronto Hydro on December 8, 2009, sought an order requiring Compliance Counsel to respond to certain interrogatories, and if granted, an order granting Toronto Hydro leave to file supplementary evidence. In an oral decision, dated December 21, 2009, the Board found that the burden of proof for requesting documents from third parties was not met by Toronto Hydro and the motion was denied.<sup>4</sup>

### **The Enforcement Proceeding**

[8] In this proceeding Compliance Counsel seeks an Order under section 112.3 of the *OEB Act*. That section states:

112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

- (a) remedy a contravention that has occurred; or
- (b) prevent a contravention or further contravention of the enforceable provision.

[9] In the Notice of Intention to Make an Order For Compliance dated August 4, 2009, the Board identified the relevant enforceable provisions as:

- section 28 of the *Electricity Act, 1998* (the "*Electricity Act*");
- section 53.17 of the *Electricity Act*;
- section 2.4.6 of the Distribution System Code (the "DSC");
- section 3.1.1 of the DSC; and
- section 5.1.9 of the DSC.

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<sup>4</sup> Motion Hearing EB-2009-0308, Transcript, December 21, 2009, p.99.

[10] Compliance Counsel argues that the foregoing provisions create a scheme under which condominium developers or corporations may opt to: (i) have a distributor smart-meter individual condominium units, in which case each unit owner becomes a customer of the distributor; or (ii) have a Board-licensed smart sub-meter provider smart sub-meter individual units, in which case the condominium corporation (through a bulk meter) is the customer of the distributor and the smart sub-meter provider (on behalf of the condominium corporation) allocates the bulk bill to the individual unit owners.

[11] At issue in this proceeding is Toronto Hydro's practice of refusing to connect new condominium projects within its service area, unless all units in the condominium are individually smart-metered by Toronto Hydro. This practice, it is alleged, effectively precludes condominium corporations or developers from the option of using services of licensed smart sub-meter providers and therefore is in violation of various enforceable provisions.

[12] Compliance Counsel alleges that Toronto Hydro's practice violates the above-noted provisions of the *Electricity Act* and the DSC. The particulars of non-compliance as set out in the Compliance Notice relate to two condominiums under construction:

- (a) THESL's Conditions of Service, specifically section 2.3.7.1.1, states that THESL "will provide electronic or conventional smart suite metering for each unit of a new Multi-unit site, or a condominium." By way of letters dated April 22, 2009, THESL informed Metrogate Inc. ("Metrogate") and Avonshire Inc. ("Avonshire") that despite Metrogate and Avonshire's request that THESL prepare a revised Offer to Connect for condominiums based on a bulk meter / sub-metering configuration, THESL would not offer that connection for new condominiums and would not prepare a revised Offer to Connect on that basis.
- (b) THESL's refusal to connect on that basis is contrary to the requirement of a distributor to connect to a building, to its distribution system as per section 28 of the *Electricity Act* and is contrary to section 3.1.1 of the DSC...
- (c) THESL's practice is also contrary to section 5.1.9 of the DSC which states that distributors must install smart meters *when requested to do so* by the board of directors of a condominium corporation or by 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*.

- (d) THESL's practice is also contrary to section 53.17 of the Electricity Act (and Ontario Regulation 442/07 – *Installation of Smart Meters and Smart Sub-Metering Systems in Condominiums* (made under the Electricity Act)) which contemplates a choice between smart metering and smart sub-metering.
- (e) THESL's Conditions of Service are therefore contrary to section 2.4.6 of the DSC which states that Conditions of Service must be consistent with the provisions of the DSC and all other applicable codes and legislation.<sup>5</sup>

[13] For ease of reference the specific wording for the statutes, codes and regulations relevant to this proceeding are set out at Appendix B.

### **The Refusal to Connect Policy**

[14] At the end of the day there is little dispute on the facts. Toronto Hydro is not refusing to connect the two buildings, Avonshire and Metrogate, on any terms; it is refusing to connect at a bulk meter. Compliance Counsel argues that the refusal to connect at the bulk meter frustrates the legislative and regulatory scheme under which the developer of a condominium or a condominium corporation may opt to use a licensed smart sub-meter provider.

[15] As the proceeding developed, it became clear that as of February 29, 2008, Toronto Hydro had changed its policy with respect to connecting or providing electricity to condominiums. The new policy, with respect to new condominiums, is that Toronto Hydro will not provide a bulk meter, and will not connect unless the condominium corporation or the developer agrees that each unit holder or suite residence will become a direct customer of Toronto Hydro.

[16] The Toronto Hydro connection policy with respect to existing buildings is different. (Toronto Hydro classifies as “existing” any building for which a request to connect was made before February 29, 2008.) Here, connection will be allowed provided the developer or condominium corporation provides a warranty or assurance

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<sup>5</sup> Notice of Intention to make an Order for Compliance under section 112.3 of the *OEB Act, 1998*, August 4, 2009 (EB-2009-0308).

that the condominium developer or corporation, and the company engaging in the sub-metering, are doing so in a way which is consistent with all applicable regulatory requirements. The requested form of warranty is set out in Appendix C of this Decision and represents Toronto Hydro's view of appropriate terms on which an exempt distributor, and its smart sub-meter provider, may provide service. As it turns out, Avonshire is deemed to be an existing building, subject to the more permissive approach, because the original offer to connect was made before February 29, 2008. Metrogate, on the other hand, is subject to the complete prohibition because it is deemed to be a new building.

[17] The members of the Working Group view themselves as competitors with Toronto Hydro in the metering business. They not only provide the hardware, but they provide distribution services behind the bulk meter on behalf of the condominium corporation, which is an exempt distributor. On February 29, 2008, Toronto Hydro took deliberate steps to remove this option.

[18] Mr. McLorg, one of Toronto Hydro's witnesses, testified that there are essentially two elements to the metering business. There is the hardware side, which he says is contestable, and the service side, which he says is not contestable. That is to say, the service side is a monopoly service that can only be provided by Toronto Hydro. By service he means distribution service or the resale of electricity.

[19] It is for that reason that Toronto Hydro refuses to provide a bulk meter and insists, as a condition of connection, that each unit holder or condominium owner become a direct customer of Toronto Hydro. These specific words do not appear in the Conditions of Service, but clearly are conditions based upon the testimony in this proceeding. It is Toronto Hydro's declaration that this aspect of smart-metering serves as a monopoly, which is a central issue in this proceeding.

[20] Today, Toronto Hydro will not connect to a new building unless the condominium corporation, or the developer, agrees that each individual unit holder in the building will become a customer of Toronto Hydro. That means a licensed sub-meter provider cannot install smart sub-meters and bill the individual unit holder on behalf of the condominium corporation. Moreover, Toronto Hydro refuses to provide a bulk meter to the building, which in technical terms eliminates the smart sub-meter provider's ability to provide service. Compliance Counsel argues that this limits competition in an important

aspect of the smart metering business that Toronto Hydro has declared unilaterally to be a non-contestable business or a natural monopoly.

[21] Compliance Counsel argues that this claim of an exclusive right by Toronto Hydro is not supported by the statutes, codes and regulations governing the conduct of Toronto Hydro. Toronto Hydro acknowledges that they do not have an exclusive franchise. In fact, as pointed out by Compliance Counsel, section 70 (6) of the *Electricity Act* specifically states as follows:

Unless it provides otherwise, a licence under this part should not hinder or restrict the grant to licence to another person within the same area and the licensee should not claim any right of exclusivity.

Toronto Hydro's licence is filed in this proceeding, and provides for no grant of exclusivity. In addition, the legislation recognizes unlicensed distributors and these currently exist in Toronto Hydro's service territory.

[22] In this section of the Decision we have reviewed the general policy of Toronto Hydro regarding its connections to condominiums, following the reformulation of its policy on February 29, 2008. However, this compliance proceeding is based on the alleged refusal to connect two condominiums, Avonshire and Metrogate. Accordingly, it is important to outline the particular facts with respect to those two buildings.

### **The Refusal to Connect to Avonshire**

[23] Residences of Avonshire is the owner/developer of a condominium project on Yonge Street between Highway 401 and Sheppard Avenue that includes two 21-storey towers consisting of 456 units. Construction started in September 2009 with occupancy planned for December 2010.

[24] The Avonshire project lies within Toronto Hydro's distribution service area and Avonshire received a temporary connection for construction from Toronto Hydro. Because the temporary connection will not support the substantial power requirements for the completed condominium, Avonshire (through its electrical consultant) requested a permanent connection from Toronto Hydro.

[25] Toronto Hydro made an offer to connect on January 29, 2009 to Avonshire. The offer to connect was premised on Toronto Hydro's Conditions of Service and contemplated the installation of 792 smart meters by Toronto Hydro (which would include a smart meter for each condominium unit).<sup>6</sup>

[26] The offer was unacceptable to Avonshire and in a letter dated March 6, 2009, Avonshire requested that Toronto Hydro provide a revised offer to connect that contemplated the installation of a bulk meter by Toronto Hydro and the project "being smart sub-metered by a licensed sub-metering company".<sup>7</sup>

[27] In a letter to Avonshire dated April 22, 2009, Toronto Hydro refused Avonshire's request for a revised offer to connect and stated:

Your letter goes on to request that Toronto Hydro prepare a revised Offer to Connect for those condominiums based on a bulk meter/sub-metering configuration. As explained below, Toronto Hydro does not offer that connection configuration for new condominiums and therefore will not prepare you a revised Offer to Connect on that basis.<sup>8</sup>

### **The Refusal to Connect to Metrogate**

[28] Metrogate is the owner/developer of a condominium project in Scarborough, consisting of 2100 units in total. Construction started in November 2008 with an anticipated occupancy for a portion of the project for December 2010.

[29] The Metrogate project lies within Toronto Hydro's distribution service area and Metrogate received a temporary connection from Toronto Hydro for construction. Because the temporary connection will not support the substantial power requirements for the approximately 2100 residential units, Avonshire (through its electrical consultant) requested a permanent connection from Toronto Hydro.

[30] Toronto Hydro made an offer to connect dated February 2, 2009 to Metrogate for a portion of the total project. The offer to connect was premised on Toronto Hydro's

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<sup>6</sup> Toronto Hydro Offer to Connect dated January 29, 2009. Exhibit D-1 of Compliance Counsel Pre-Filed Evidence (Exhibit K1.1).

<sup>7</sup> Letter from Giuseppe Bello, Avonshire Inc., to Toronto Hydro dated March 6, 2009. Exhibit D-2 of Compliance Counsel Pre-Filed Evidence (Exhibit K1.1).

<sup>8</sup> Letter from Colin McLorg, Toronto Hydro, to Giuseppe Bello, Avonshire Inc. dated April 22, 2009. Exhibit D-3 of Compliance Counsel Pre-Filed Evidence (Exhibit K1.1).

Conditions of Service and contemplated the installation of smart meters by Toronto Hydro (which would include a smart meter for each condominium unit).<sup>9</sup>

[31] The offer was unacceptable to Metrogate and in a letter dated March 10, 2009, Metrogate requested that Toronto Hydro provide a revised offer to connect for its project that contemplated the installation of a bulk meter by Toronto Hydro and the project “being smart sub-metered by a licensed sub-metering company.”<sup>10</sup>

[32] In a letter to Metrogate dated April 22, 2009, Toronto Hydro refused Metrogate’s request for a revised offer to connect.<sup>11</sup>

### **The Revised Offers to Connect**

[33] Both the Avonshire and Metrogate projects are nearing completion and the developers require power to the individual units in order to complete the units. In the circumstances, Toronto Hydro agreed to revise its offer, and both Avonshire and Metrogate executed those revised offers by adding a new schedule “G”, that reserves the rights of both Avonshire and Metrogate to pursue legal regulatory remedies before the courts or the Board, which would permit them to engage the services of a licensed sub-meter provider.

[34] On November 27, 2009, Toronto Hydro delivered a letter to Avonshire stating that because Avonshire had delivered its request to connect before Toronto Hydro’s change in policy on February 29, 2008, Toronto Hydro would deliver a revised offer to connect reflecting a smart sub-metering configuration if Avonshire agreed to provide written confirmation of the following conditions:

1. Avonshire will ensure that all suites, commercial units, and common areas are individually metered by a licensed sub-meterer;
2. Avonshire has not received and will not receive any royalty or other type of payment, including payment in kind, from a smart sub-meterer

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<sup>9</sup> Toronto Hydro Offer to Connect dated February 2, 2009. Exhibit E-1 of Compliance Counsel Pre-Filed Evidence (Exhibit K1.1).

<sup>10</sup> Letter from Lou Tersigni, Metrogate Inc., to Toronto Hydro dated March 10, 2009. Exhibit E-2 of Compliance Counsel Pre-Filed Evidence (Exhibit K1.1).

<sup>11</sup> Letter from Colin McLorg, Toronto Hydro, to Lou Tersigni, Metrogate Inc. dated April 22, 2009. Exhibit E-3 of Compliance Counsel Pre-Filed Evidence (Exhibit K1.1).

in exchange for Avonshire's consent for the sub-meterer to provide smart sub-metering services;

3. The price charged for electricity by Avonshire or its sub-meterer to all sub-metered accounts will be no greater than that required to:
  - (a) Exactly recover the costs charged to Avonshire by THESL through the bulk meter in proportion to each metered unit's consumption; and
  - (b) Recover the reasonable costs required for the installation, administration, and maintenance of the sub-metering system.
  
4. Neither Avonshire nor its licensed sub-meterer will resell or charge any mark-up or profit on delivery services provided to Avonshire by THESL, and will only allocate those costs charged to Avonshire by THESL in proportion to each account's consumption.<sup>12</sup>

[35] Avonshire's solicitor advised Toronto Hydro in a responding letter dated December 9, 2009, that Avonshire would not accept the conditions set out in the November 27 Offer. Specifically, Avonshire's solicitor stated:

1. There is not now, nor has there ever been, any basis to believe or imply that Avonshire will fail to meet any applicable legal or regulatory requirement. THESL has at no prior time expressed such concern to Avonshire and we note that your letter does not indicate that THESL has any evidence or belief that Avonshire is at risk of contravening any applicable law. To be clear, your November 27 letter is THESL's first request for confirmation of compliance.
  
2. We are concerned by your request for copies of "all documentation with smart sub-meterers". We are unaware of any legal or regulatory requirement which makes the production of such materials a pre-requisite to obtaining an OTC in connection with a building being smart sub-metered.

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<sup>12</sup> Letter from Colin McLorg, Toronto Hydro, to Giuseppe Bello dated November 27, 2009. Tab B-8 of Pre-Filed Evidence of Toronto Hydro (Exhibit K1.2).

3. We are particularly concerned by the role which THESL appears to want to take as the entity that will make determinations, apparently unilaterally, about whether developers, condominium corporations and/or licensed smart sub-metering providers are in compliance with certain regulatory requirements. Aside from the fact that THESL would in effect be supplanting the true regulator, namely, the Ontario Energy Board, there is the further troubling fact that THESL would be in a clear conflict of interest, acting as Judge and potential direct beneficiary of its decision. This cannot be right.<sup>13</sup>

### **The Obligation to Connect**

[35] A refusal to connect by a public utility on fair and reasonable grounds violates one of the most basic principles of public utility law. This principle underlies all public utility law in North America and dates from early railroad regulation.<sup>14</sup> This principle is contained in section 28 of the *Electricity Act*, and further enumerated in the DSC and licences that apply to the electric utilities this Board regulates.

[36] Section 28 of the *Electricity Act* states that a licensed electricity distributor, such as Toronto Hydro, has an obligation to connect customers where two conditions are met:

- (a) the building lies along any of the lines of the distributor's distribution system; and
- (b) the owner, occupant or other person in charge of the building requests the connection in writing.

[37] The prohibition against refusals to connect was set out by the British Columbia Supreme Court in *Chastain v. British Columbia Hydro and Power Authority* as follows:

The obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public has long been clear. It is to supply its product to

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<sup>13</sup> Letter from Harry Herskowitz, Del Zotto, Zorzi LLP to Colin McLorg, Toronto Hydro, dated December 9, 2009. Tab B-9 of Pre-Filed Evidence of Toronto Hydro (Exhibit K1.2).

<sup>14</sup> Section 321 *Railway Act* R.S.C. 1970 c.35, Section 27(2) *Telecommunications Act* SC 1993 c.38, *Bell Canada v. Challenge Communication Limited* [1979] 1 F.C. 857 (CA) Leave to Appeal Refused [1978] 2 S.C.R. v.

all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers. The great utility systems supplying power, telephone and transportation services now so familiar may be of relatively recent origin, but special obligations to supply service have been imposed from the very earliest days of the common law upon bodies in like case, such as carriers, innkeepers, wharfingers and ferry operators.<sup>15</sup>

[38] Where a railroad or telephone company refuses to connect, it has an onus to establish that there are reasonable grounds for the refusal.<sup>16</sup> That is because the utility has a monopoly. While Toronto Hydro does not have an exclusive franchise, it does by its own admission have a de facto monopoly on certain portions of the system, including provision of distribution services up to the bulk meter. When a company is a sole supplier of an essential product, such as electricity, it faces special responsibility in terms of supplying customers. This is one of the most fundamental principles and obligations that face a public utility in this country.

[39] While there is no reverse onus in the *Electricity Act*, the circumstances under which a distributor may refuse connection are limited to those listed in section 3.1.1 of the DSC:

3.1.1 In establishing its connection policy as specified in its Conditions of Service, and determining how to comply with its obligations under section 28 of the *Electricity Act*, a distributor may consider the following reasons to refuse to connect, or continue to connect, a customer:

- (a) contravention of laws of Canada or the Province of Ontario including the Ontario Electricity Safety Code;
- (b) violation of conditions in a distributor's licence;
- (c) materially adverse effect on the reliability or safety of the distribution system;
- (d) imposition of an unsafe worker situation beyond the normal risks inherent in the operation of the distribution system;

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<sup>15</sup> *Chastain v. British Columbia Hydro and Power Authority* (1973), 32 D.L.R. (3d) 443 at 454.

<sup>16</sup> Section 321 *Railway Act* R.S.C. 1970 c.35, Section 27(2) *Telecommunications Act* S.C. 1993 c.38, *Bell Canada v. Challenge Communication Limited* [1979] 1 F.C. 857 (CA) Leave to Appeal Refused [1978] 2 S.C.R. v.

- (e) a material decrease in the efficiency of the distributor's distribution system;
- (f) a materially adverse effect on the quality of distribution services received by an existing connection; and
- (g) If the person requesting the connection owes the distributor money for distribution services, 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. [emphasis added]

[40] It is significant that section 28 of the *Electricity Act* does not provide any justifications for the refusal to connect. It merely states two conditions, both of which are met by both the developments in this proceeding. There are justifications for refusal to connect set out in the DSC. The Board believes those should be narrowly interpreted. A utility refusing connection on the basis of the Code must clearly satisfy the Board that those conditions exist. This responsibility is also reflected in Toronto Hydro's distribution licence, which provides that an offer to connect shall be fair and reasonable and the utility should not refuse to connect unless it is permitted to do so by the *OEB Act*, or a regulation or any codes.<sup>17</sup>

[41] The parties made reference to the Board's recent *PowerStream* decision.<sup>18</sup> The Board in *PowerStream* made no distinction in the hardware and service markets, an issue that has arisen in this case. The Board clearly stated that the entire sub-metering market, including distribution of electricity on behalf of an exempt distributor behind the bulk meter, was contestable.

[42] Toronto Hydro admits that its new connection policy limits the activities of smart sub-meterers. That policy, as set out in section 2.3.7.1 of the company's Conditions of Service, and clarified in the evidence in this proceeding, states that no bulk meter will be offered and each individual unit holder must be a customer of Toronto Hydro. Those conditions mean simply that no one other than Toronto Hydro can charge for electricity. That eliminates the possibility of an exempt distributor using the services of a smart sub-meterer to purchase electricity at the bulk level at a bulk meter and re-invoicing the individual owners.

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<sup>17</sup> Electricity Distribution Licence, ED-2002-0497 at s. 7. See Appendix A.

<sup>18</sup> Decision with Reasons, EB-2008-0244, July 27, 2009.

[43] Section 2.4.6 of the DSC requires that a distributor's Conditions of Service be consistent with the provisions of the Code, all other applicable codes and legislation. Compliance Counsel says Toronto Hydro's Conditions of Service are not compliant with the Code and are inconsistent with sections 28 and 53.17 of the *Electricity Act*, Ontario Regulation 442/07 and sections 3.1.1 and 5.1.9 of the DSC. Section 53.17 of the *Electricity Act* reads as follows:

Sub-metering: condominiums

53.17 (1) Despite the *Condominium Act, 1998* and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation, in a property or class of properties prescribed by regulation at a location prescribed by regulation and for consumers or classes of consumers prescribed by regulation at or within the time prescribed by regulation. [emphasis added]

[44] Licensed smart sub-meter providers, including members of the Working Group, fall within the meaning of "any other person licensed by the Board to do so."

[45] The circumstances and classes of properties referred to in section 53.17 are prescribed in sections 2 and 3 of Ontario Regulation 442/07. It includes new condominium projects that are under construction:

2. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed classes of property:

[...]

3. 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*.

3. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed circumstances:

[...]

2. The installation of smart meters or smart sub-metering systems, in the case of a building that falls into a prescribed class of property described in paragraph 3 of section 2.

[46] The other persons licensed to install smart sub-metering equipment referred to in section 53.17 are prescribed in Ontario Regulation 443/07:

1. (1) In relation to the classes of property prescribed by section 2 of Ontario Regulation 442/07 (Installation of Smart Meters and Smart Sub-Metering Systems in Condominiums) made under the Electricity Act, 1998, no person shall engage in an activity that is a prescribed activity under subsection (2) unless the person is licensed to do so under section 57 of the Act.

(2) For the purposes of clause 57 (i) of the Act, the commercial offering or the commercial provision of smart meters, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies and any associated services is a prescribed activity. [emphasis added]

[47] Toronto Hydro takes the view that supply of hardware in a smart metering system is contestable or competitive, but the supply of distribution service, that is the recharging for the electricity purchased at the bulk meter, is not contestable, but is a natural monopoly belonging to Toronto Hydro. Compliance Counsel disputes this claim and says the term “any associated services” covers the resale of electricity behind the bulk meter.

[48] It is clear that section 28 of the *Electricity Act* and section 3.1.1 of the DSC create an obligation for Toronto Hydro to connect or provide electricity to both new and existing condominiums. The Board does not accept the arguments that the provision of distribution of electricity behind the bulk meter is a natural monopoly. Smart sub-meter

providers can obtain a licence to provide smart sub-metering services to the exempt distributor and those services may include the resale of electricity on behalf of the condominium corporation. That is clear from the reading of section 53.17 of the *Electricity Act* and Ontario Regulation 442/07 and 443/07. The Toronto Hydro “carve out” is an “associated service”, as described in Ontario Regulation 443/07, a service that can be provided by persons licensed under section 57 of the *Electricity Act* on behalf of exempt distributors.

[49] In the *PowerStream* decision, this Board specifically addressed the question of whether the sub-metering market was contestable. The Board concluded that the scheme of the legislation leaves no doubt:

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 [on] 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.<sup>19</sup>

The minority decision in that case went on to state:

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 markets with a large number of supplies 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.

[...]

This is an important service. Installation of smart meters in individual condominium units offers significant gains in energy conservation. The Legislature has signalled the advantage of competing suppliers and specifically allowed regulated utilities to engage in the service directly.

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<sup>19</sup> Majority Decision dated July 27, 2009, EB-2008-0244 at p.5.

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...<sup>20</sup>

[50] In summary, it is clear that Toronto Hydro is refusing to provide certain types of connections. In this Board's view, that refusal is not justified by the statute or any associated codes or regulations. In fact, in our view the statute prohibits it.

[51] Toronto Hydro next relies on a number of defences or justifications. These might be referred to as the Unlawful Activity Defence, the Green Energy Defence and the Minimal Impact Defence. Each will be considered in turn.

### **The Unlawful Activity Defence**

[52] Toronto Hydro argues that, even if it is wrong in its position that it has the sole legal right to distribute electricity behind the bulk meter, it can refuse connections if the exempt distributor is behaving unlawfully. In this, Toronto Hydro relies on Ontario Regulation 161/99, which states that clause 57 and sections 71, 72, 78, 80 and 86 of the Act do not apply to a distributor who distributes electricity for a price no greater than the price required to cover all reasonable costs. Condominium corporations fall within this meaning of an "exempt distributor" in this Regulation.

[53] Section 4.0.1 (1) of Ontario Regulation 161/99 states:

Clause 57 (a) and sections 71, 72, 78, 80 and 86 of the Act do not apply to a distributor who distributes electricity for a price no greater than that required to recover all reasonable costs,

- (a) With respect to a distribution system owned or operated by the distributor that is entirely located on land on which one or more of the following types of building or facilities is also located:

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<sup>20</sup> Minority Decision dated July 27, 2009, EB-2008-0244 at pp. 12 to 14.

1. A building that forms part of a property as defined in the *Condominium Act, 1998*.
2. A residential complex as defined in the *Tenant Protection Act, 1997*.
3. An industrial, commercial or office building.
4. A university, a college of applied arts and technology established under the *Ministry of Training, Colleges and Universities Act* or another post-secondary institution.
5. A school or private school as defined in the *Education Act*.
6. A hospital as defined in the *Public Hospitals Act*, a private hospital as defined in the *Private Hospitals Act* or an institution as defined in the *Mental Hospitals Act*.
7. A shopping mall.
8. An airport.
9. A marina.
10. A mine as defined in the *Mining Act*.

[54] The interesting point about this regulation is that it clearly contemplates that an exempt distributor can distribute electricity for a price, provided that the price is no greater than required to cover all reasonable costs. In other words, this Regulation indicates that there is no prohibition on exempt distributors from reselling electricity. There is only a prohibition on reselling electricity and associated distribution services at a price greater than reasonable cost.

[55] Toronto Hydro's claim that exempt distributors, through their smart sub-meterers, are distributing electricity at a price greater than required to cover all reasonable costs, was subject to considerable testimony from Toronto Hydro witnesses, relying on various third party evidence. The basis for these claims is set out at paragraph 56 of Toronto Hydro's argument<sup>21</sup>, as follows:

In particular Toronto Hydro relies on written documentation that sub-meter providers have:

- paid royalties to condominium developers in exchange for the ability to provide sub-metering services; (Exhibit K.1.2, Tab A 24)
- explicitly represented to consumers that they "make a return on the cost of delivering your electricity"; (Exhibit K.1.2, Tab A 25)

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<sup>21</sup> Oral Hearing, Transcript Day 2, January 7, 2010, EB-2009-0308, at p.p. 159 - 168 and Exhibit No. K2.5: Toronto Hydro's Final Argument and Authorities, p 17.

- used billing determinants for individual unit holders that effectively mark up the bulk distribution bill by close to 40%; and (Exhibit 1.2, Q&A 30-34, Tab A 26)
- imposed contractual terms that commit customers to purchasing services from them, including distribution services simply upon the customer receiving electricity. (Exhibit K.1.2, Q&A 30-34, Tab A 27)

[56] There are a number of reasons why this defence fails. First, there must be clear evidence of illegal activity by the smart sub-meter entities providing service to the two buildings we are dealing with, Avonshire and Metrogate. We now know that the proposed service provider is Provident Energy Management Inc. (“Provident”), a related company. Mr. Vegh conceded in his argument that the factual circumstances relied upon in paragraph 56 of his argument, and reproduced above, are not based on Provident’s practices. There is in fact, little or no evidence of whether Provident was behaving illegally.

[57] To establish a refusal to connect on the basis of illegality requires more than an allegation of general industry practice, which can best be described as speculative. That surely cannot be basis for an illegality defence.

[58] There is a suggestion by Toronto Hydro that there is a reverse onus and that the exempt distributor, in order to justify his exemption, must provide clear evidence that it is complying with Ontario Regulation 161/99. In fact, Toronto Hydro takes the position that the connection to Avonshire, when the request to connect was made prior to the new policy of February 29, 2008, would be acceptable provided there was a warranty that the regulation was being complied with, or a certification by the Chief Compliance Officer of the Board. The Board does not accept the concept of reverse onus or that certification is necessary in the form set out by Toronto Hydro. In order to be successful in its defence, Toronto Hydro must prove that it has reason to believe that the practices of Provident were or were about to breach the requirements of the regulation. The evidence in this proceeding does not meet that test.

[59] Moreover, even if such a defence could be demonstrated on the facts, it would not justify an industry-wide policy relating to all future buildings in the City of Toronto. It requires at best, a case by case determination. That is clearly the intent of the statutory scheme. What happened here is Toronto Hydro unilaterally decided in February 2008, to take action which has the effect of removing the competitors completely from one

aspect of the smart metering business. There would be no connection unless each individual unit holder became a direct customer of Toronto Hydro. That prevented the distribution of electricity by an exempt distributor, even if it was at a price no greater than a price required to recover all reasonable costs, a practice clearly contemplated by the regulation. Nor is it evident that the facts relating to illegal conduct were even examined or considered at the time the new policy was implemented.

### **The Green Energy Defence**

[60] Toronto Hydro offers a number of additional defences or justifications for its exclusionary conduct. The first is that its connection policy will promote conservation generally and the objectives of the recently enacted *Green Energy and Green Economy Act, 2009* (the “*Green Energy Act*”) in particular by ensuring there is a direct relationship between it and the end use consumer. Toronto Hydro argues that it has a particular obligation in achieving certain of the objectives of the *Green Energy Act* and that it is best placed to deliver conservation and other programs to consumers and that it can only do so if it has a direct relationship with the end use consumer.

[61] There are a number of reasons why this justification fails. First, the *Green Energy Act* had not been enacted when Toronto Hydro in February 2008, arrived at its new policy position that prohibited connection at bulk meters and required, as a condition of connection, that all suite residents be direct customers of Toronto Hydro. Moreover, the Board does not believe it is appropriate for Toronto Hydro to second guess the government in its decisions with respect to this legislation. There is no doubt that the legislative scheme considered in this Decision was intended to promote conservation. But it is equally clear that the government’s view is that to achieve this goal, there should be competition in the market; the scheme allows for smart sub-metering, and did not provide for an exclusive right for the LDC.

### **The Minimal Impact Defence**

[62] The next justification offered by Toronto Hydro is its exclusionary policy with respect to new condominiums will have a minimal impact. This is based on the assurance that the bulk of condominiums in Toronto are in existing buildings and the new buildings, to which the new policy is directed, represent a small fraction of the installed base and will for some time. Toronto Hydro argues that existing condominiums and apartment buildings currently make up approximately ninety-seven percent of

residential sub-metering opportunities. These, they note, are not affected by the exclusionary policy Toronto Hydro has with respect to new buildings. Nor are retail malls, office towers, industrial parks and the like. There is no expert evidence on this point, although a large amount of statistical information was provided.

[63] The problem with this defence or justification, as pointed out by Compliance Counsel, is that the real market for smart sub-metering is likely to be new buildings. It stands to reason that the cost of retrofitting old, existing buildings will likely be much higher. Accordingly, by declaring a monopoly with respect to new buildings, Toronto Hydro arguably has foreclosed virtually all of the relevant market.

[64] Essentially, Toronto Hydro is arguing that the Board, in looking at the reasons for non-connection, should apply a public interest test. Accordingly, the minimal impact of the exclusionary policy is relevant. In fact, Toronto Hydro would argue that the difference in policies between new and existing buildings leaves the Board and the public with the best of both worlds. All units in new buildings will be smart metered directly by Toronto Hydro; the policies with respect to existing buildings will protect consumers from unauthorized and unregulated distribution rates; and, finally, the ability in existing buildings for the smart sub-meterers to use bulk meters and re-bill electricity, still leaves a substantial market open to the competitors. The Board is not convinced that this trade-off works towards the public interest. We remain convinced that the policies will effectively limit competition, and that we do not believe is in the public interest or in keeping with the statutory and regulatory requirements.

### **Has Compliance Counsel Proved Its Case?**

[65] In any enforcement proceeding, the respondent is entitled to know exactly which provision of the statutes, regulations or codes it is accused of breaching. In order to make an order requiring a person to comply with an enforceable provision, under section 112.3 of the *OEB Act*, the Board must be satisfied that the person has contravened or is likely to contravene an enforceable provision.

[66] The particulars of non compliance are set out in the Notice of Intention to Make an Order for Compliant issued by the Board on August 4, 2009. Five enforceable provisions are identified:

- Section 28 of the *Electricity Act*,

- Section 53.17 of the *Electricity Act*,
- Section 2.4.6 of the DSC,
- Section 3.1.1 of the DSC, and
- Section 5.1.9 of the DSC.

Each will be considered in turn.

[67] Section 28 of the *Electricity Act* provides that a distributor shall connect the building to its distribution system, if:

- (a) the building lies along any of the lines of the distributor's distribution system; and
- (b) the owner, occupant or other person in charge of the building requests the connection in writing.

Both the Metrogate and Avonshire properties meet these conditions. Toronto Hydro has by its own admission denied connection at the bulk meter. The Board finds no justification for this denial. Accordingly, the Board finds this enforceable provision has been breached by Toronto Hydro.

[68] Section 53.17 of the *Electricity Act* provides that a distributor shall, under circumstances prescribed by regulation, install smart meters and metering equipment, systems and technology and associated equipment, systems and technology, the type prescribed by regulation, and property and class of properties described by regulation at a location prescribed by regulation for consumers or classes of consumers prescribed by regulation. Toronto Hydro is prepared to provide smart metering systems that meet the requirements of this section and the regulations to the consumers and class of properties at locations described by regulation. There is no apparent breach of this enforceable provision by Toronto Hydro.

[69] Section 2.4.6 of the DSC sets out minimum conditions that must be described in the distributor's Conditions of Service. These include the types of connection service performed by the distributor for each customer class and the conditions under which these connections will be formed (connection policy). The Toronto Hydro Conditions of Service meet this requirement. However, section 2.4.6 also provides that the Conditions of Service must be consistent with the provisions of the Code or other applicable regulations and legislation, including the Rate Handbook. The Conditions of

Service with respect to connection in the Toronto Hydro Conditions of Service do not meet this requirement in that they do not comply with the applicable legislation. In particular, it does not comply with section 28 of the *Electricity Act* and section 70 of the *OEB Act*.

[70] Section 3.1.1 of the DSC provides, in establishing its connection policy in its Conditions of Service to comply with its obligations under section 28 of the *Electricity Act*, a distributor may consider a number of reasons for refusing to connect. One of those reasons is a contravention of the laws of the Province of Ontario, including the Ontario Electrical Safety Code. This section of the Code is relied upon by Toronto Hydro to defend its exclusionary conduct. As indicated earlier in this Decision, the Board sees no evidence of a contravention of the laws in Ontario as argued by Toronto Hydro, in particular with regard to Metrogate and Avonshire. Toronto Hydro has not acted in accordance with this provision because its reasons for denying a connection do not meet any of the stipulated reasons.

[71] Section 5.1.9 of the DSC provides that a distributor shall, where requested by the board of directors of a condominium corporation or the developer of the building which is intended to be registered as a condominium, provide smart metering that meets the functional requirements of Ontario Regulation 425/06. The Board finds that Toronto Hydro has failed to comply with this enforceable provision because it has not been requested by the condominium corporation or developer to do so, but rather has sought to impose this requirement on the condominium corporation or developer.

[72] In conclusion, the Board finds that Toronto Hydro has breached the following enforceable provisions:

- Section 28 of the *Electricity Act*,
- Section 2.4.6 of the DSC,
- Section 3.1.1 of the DSC, and
- Section 5.1.9 of the DSC.

[73] The Board would add that section 70(6) of the *OEB Act* states that unless a licence provides otherwise, a licence should not hinder or restrict the grant of a licence to another person within the same area and the licensee should not claim any right of exclusivity. Toronto Hydro is claiming a right of exclusivity and has precluded sub-meters from conducting business they are licensed to conduct. Toronto Hydro's

Conditions of Service (Ex. K2.3) section 2.3.7.1.1 (metering requirements for multi-unit sites and condominium corporations) does not accurately state Toronto Hydro's Conditions of Service, as described in this proceeding. It does say that Toronto Hydro will provide electronic or conventional smart metering for each unit of new multi-unit site or condominium at no direct charge to the customer. It does not say that Toronto Hydro will refuse to provide a bulk meter after February 29, 2008. Nor does it say that as a condition of connection each unit holder must become a direct customer of Toronto Hydro. That however, clearly is Toronto Hydro's new policy. It is that policy that underlies this enforcement proceeding.

### **Is This Proceeding Moot?**

[74] Late in this proceeding, Counsel for Toronto Hydro raised the question whether Bill 235, which if enacted will create a new *Energy Consumer Protection Act* ("ECPA")<sup>22</sup>, will cause this proceeding, and the Board decision relating to it, to become moot. He suggested that the Board stay the proceeding or reserve our decision until it is determined whether the Bill becomes law, and if so, in what form. The Bill is currently in second reading.

[75] Toronto Hydro relies principally on the Supreme Court of Canada's decision in *Borowski*.<sup>23</sup> There, the appellant had attacked certain sections of the Criminal Code relating to abortion as contravening the Canadian Charter of Rights and Freedom. Both the Trial court and the Court of Appeal found that the Charter did not apply, and the appellant appealed to the Supreme Court of Canada. Before the Supreme Court of Canada could rule on the case, a decision of another court in *R. v. Morgentaler* struck down section 251 of the Criminal Code which was the issue in this case. As a result, the Court ruled that the appeal was moot and chose not to exercise its discretion to hear it.

[76] The Supreme Court in *Borowski* also ruled that the appellant no longer had any standing to pursue the appeal. Mr. Justice Sopinka noted that there was no longer a live issue or concrete dispute as the substratum of Mr. Borowski's appeal had disappeared. The Court concluded that none of the relief claimed in the statement of claims was relevant because five of the Constitutional questions at issue, were no

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<sup>22</sup> Bill 235, *An Act to enact the Energy Consumer Protection Act, 2009 and to amend other Acts*, 1st Sess., 39th Parl., 2009, ss.30 to 33.

<sup>23</sup> *Borowski v. Canada (Attorney General)*, [1989] 1S.C.S. 342 at paras. 15, 16, 26 and 36.

longer applicable, having been struck down in a different proceeding. That is not the situation here. In the current case we have only a Bill. There is no certainty regarding when, or even if, the Bill will be proclaimed into law, nor what any associated regulations might provide. This is still a live controversy and a concrete dispute before us based on statutory and regulatory instruments that are still current.

[77] Moreover, it is not clear that even if this proposed legislation passes as currently drafted the issues surrounding Toronto Hydro's connection policies, which are at issue in this proceeding, would be rendered moot. For example, section 28 of the *Electricity Act* remains unaffected by Bill 235. Furthermore, it appears that under the Bill both condominium corporations and condominium developers will have the same rights, that is a choice between using the smart metering services of Toronto Hydro and the smart sub-metering services of licensed smart sub-meterers, such as members of the Working Group. And it appears in the proposed legislation the competitors will have the right, as they do now, to provide both the hardware and the services.

[78] We must also recognize that this is an enforcement proceeding. The allegations relate to past conduct. Regardless of what the law may be in the future, the question of whether the past conduct was contrary to the law and related regulatory instruments remains. The Board would note that while section 53.17 of the *Electricity Act* would be repealed if Bill 235 passes, it will continue in substance through sections 311 and 321 of the new ECPA.

[79] We would also distinguish this case from *Payne v. Ontario*<sup>24</sup> where the Court of Appeal dismissed the appeal as moot where the legislation that directly overruled a lower court decision under appeal, was passed after the appeal was heard, but before the judgment was issued.

[80] We were also referred to *Halifax (Regional Municipality) v. Nova Scotia Human Rights* where the Nova Scotia Human Rights Commission was found to have erred when it commenced an inquiry the day after a bill received Royal Assent that retroactively made legislative changes to remedy the precise issue of the complainant.<sup>25</sup>

[81] Unlike the *Halifax* case, Bill 235 has not received Royal Assent and it is currently in second reading. It is uncertain whether this legislation will be passed, or what

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<sup>24</sup> *Payne v. Ontario (Minister of Energy, Science & Technology)* [2002] O.J. No.2566 at paras. 6-8 and 17 [*Payne*].

<sup>25</sup> *Halifax Regional Municipality v. Nova Scotia Human Rights Commission*, 2009 NSSC 12 at para. 17 [*Halifax*].

amendments might be made. Because much of the substance of the proposed legislation will be set by regulations, the regulatory scheme may not be known for some time. In short, Bill 235 does not render the precise issue of this proceeding moot. It appears to us that the controversy, which is the extent of utility's monopoly in smart metering, and conversely, the permissible range of the competitor's service offerings will remain a live issue.

[82] We would add that there are private interests at issue here. Certain complainants have sought relief. They have buildings under construction and those will be completed shortly. Without a timely ruling, they will be forced to accept the solution being mandated by Toronto Hydro and the opportunity to install smart sub-metering provided by alternative suppliers will have passed. In the circumstances, the Board finds that this issue is not moot and will not stay these proceedings or reserve on the decision.

### **Remedies**

[83] As provided for in the decision of September 18, 2009<sup>26</sup>, the Board will hear oral submissions on the appropriate remedy relating to the breaches of the enforceable provisions specified in this Decision, namely section 28 of the *Electricity Act* and sections 2.4.6, 3.1.1 and 5.1.9 of the DSC. The Board will hear those submissions on February 22, 2010.

[84] Parties wishing to make submissions will file a factum outlining their position prior to the oral hearing.

### **IT IS THEREFORE ORDERED THAT:**

1. The hearing of submissions on the remedy will be held at 2300 Yonge Street, 25<sup>th</sup> Floor, Toronto, Ontario in the Board's North Hearing Room on February 22, 2010. The hearing will commence at 9:30am.
2. Parties wishing to make submissions will file a factum with the Board no later than February 16, 2010, and shall copy the other parties to the proceeding.

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<sup>26</sup> Standing Hearing, September 18, 2009, EB-2009-0308 at p. 40.

**DATED** at Toronto, January 27, 2010.

ONTARIO ENERGY BOARD

*Original signed by*

Kirsten Walli  
Board Secretary

## **Appendix A**

### **Procedural Protocol**

By Notice of Motion dated September 4, 2009, the Defendant Toronto Hydro Electric System Limited (“THESL”) requested an order from the Board establishing a process for this proceeding, and in particular, governing how the Board will ensure that the Board Staff Team (consisting of individuals listed below) and the Panel hearing this proceeding (the “Panel”) will govern their interactions with the Compliance Team (consisting of individuals listed below).

The Board Staff Team consists of persons who are assisting the Panel in this matter, specifically Michael Millar, Lenore Dougan and Adrian Pye.

The Compliance Team consists of persons who have been engaged in the investigation, compliance or prosecution of this application, specifically: Maureen Helt, MaryAnne Aldred, Joanna Rosset, Martine Band, Mark Garner, Brian Hewson, Jill Bada, (no longer an employee of the OEB) Fiona O’Connell, Lee Harmer, and Paul Gasparatto.

The Board Staff Team agrees to support the following protocol for the Panel’s endorsement:

1. Members from each Team will have no contact with each other about matters relevant to this proceeding, except through the public hearing process or through correspondence copied to all other parties. Members of the Compliance team will have no contact with Board members on matters relevant to this proceeding, except through the public hearing process.
2. No member of either Team will place any files relevant to this proceeding that are not on the public record (computer or otherwise) in a place that can be accessed by the other team or anyone not on their Team.
3. The Team lists will be circulated to everyone at the Board, with instructions that no person at the Board that is not on one of the Teams may communicate with any member of either Team about this case except as specifically authorized in writing from the Board. If it is discovered that a person at the Board has either assisted the panel in this matter or engaged in the investigation and prosecution

of this matter throughout the course of this proceeding, or if, during the course of this proceeding, any additional persons either assist the panel in this matter or engage in the investigation and prosecution of this matter, then the Board Staff Team will immediately inform THESL and such person will be added to the appropriate list of persons.

4. The Board Staff Team will only provide advice to the Panel on questions of facts, law, policy or some combination thereof on the public record so that all other parties can respond. This restriction applies to substantive procedural matters. However, it does not apply to administrative procedural issues, such as advice on where items are addressed in the Board's Rules of Practice and Procedure or other matters that are similarly not contestable.
5. Point 4 (above) applies to advice on questions of facts, law policy or some combination thereof in communications between the Board Staff Team and the Panel after the hearing has concluded (including in discussing or reviewing a draft decision) so that the Board Staff Team will not provide any such advice unless the hearing is re-opened and all parties have an opportunity to hear staff's submissions and make their own submissions.

I undertake to abide by the protocol described above, to the extent that it applies:

Original signed by

Michael Millar

Original signed by

Maureen Helt

Original signed by

Glenn Zacher

Original signed by

Patrick Duffy

## Appendix B

### Relevant Statutes, Codes & Regulations

#### A. *Electricity Act, 1998*

Section 28: Distributor's obligation to connect

A distributor shall connect a building to its distribution systems if,

(a) the building lies along any of the lines of the distributor's distribution system; and

(b) the owner, occupant or other person in charge of the building requests the connection in writing. 1998, c.15, Sched. A, s.28.

Section 53.17: Sub-metering: condominiums

(1) Despite the Condominium Act, 1998 and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation, in a property or class of properties prescribed by regulation at a location prescribed by regulation and for consumers or classes of consumers prescribed by regulation at or within the time prescribed by regulation. 2006, c. 3, Sched. B, s. 2.

#### **Non-application of registered declaration**

(2) If a smart meter or smart sub-metering system is installed in accordance with subsection (1) in respect of a unit of a condominium, the distributor, retailer or any other person licensed to conduct activities referred to in subsection (1) shall bill the consumer based on the consumption or use of electricity by the consumer in respect of the unit despite a registered declaration made in accordance with the Condominium Act, 1998. 2006, c. 3, Sched. B, s. 2.

#### **Priority over registered declaration**

(3) Subsection (2) applies in priority to any registered declaration made in accordance with the *Condominium Act, 1998* or any by-law made by a condominium

corporation registered in accordance with that Act and shall take priority to the declaration or by-law to the extent of any conflict or inconsistency. 2006, c. 3, Sched. B, s. 2.

### **Exclusive authority of Board**

(4) A regulation referred to in subsection (1) may provide the Board with exclusive authority to approve or authorize, after a prescribed date,

(a) the smart meter, metering equipment, systems and technology and any associated equipment, systems and technologies; and

(b) the smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies. 2006, c. 3, Sched. B, s. 2.

### ***B. Ontario Energy Board Act, 1998***

Section 70: Licence Conditions

#### **Non-exclusive**

(6) Unless it provides otherwise, a licence under this Part shall not hinder or restrict the grant of a licence to another person within the same area and the licensee shall not claim any right of exclusivity. 1998, c. 15, Sched. B, s. 70 (6).

### **C. Distribution System Code**

Section 2.4.6

A distributor's Conditions of Service shall include, at a minimum, a description of the following:

- The types of connection service performed by the distributor for each customer class, and the conditions under which these connections will be performed (connection policy).
- The distributor's basic connection service that is recovered through its revenue requirements and does not require a variable connection charge.
- The distributor's capital contribution policy by customer class for an offer to connect, including procedures for collection of capital contributions.
- The demarcation point at which the distributor's operational responsibilities for distribution equipment end at the customer.

- The demarcation point at which the distributor's ownership of distribution equipment ends at the customer.
- The billing cycle period and payment requirements by customer class.
- Design requirements for connection to the distribution system.
- Voltages at which the distributor provides electricity and corresponding load thresholds.
- Type of meters provided by the distributor.
- Meters required by customer class.
- Quality of Service standards to which the distribution system is designed and operated.
- Conditions under which supply may be unreliable or intermittent.
- Conditions under which service may be interrupted.
- Conditions under which the distributor may disconnect a consumer.
- Policies for planned interruptions.
- The business process the distributor uses to disconnect and reconnect consumers, including means of notification and timing.
- The distributor's rights and obligations with respect to a customer.
- Rights and obligations a consumer or embedded generator has with respect to the distributor.
- The distributor's liability limitations in accordance with this Code.
- The distributor's dispute resolution procedure.
- Terms and conditions under which the distributor provides other services in its capacity as a distributor.

The conditions of service must be consistent with the provisions of this Code and all other applicable codes and legislation including the Rate Handbook.

#### Section 3.1.1

In establishing its connection policy as specified in its Conditions of Service, and determining how to comply with its obligations under section 28 of the *Electricity Act*, a distributor may consider the

following reasons to refuse to connect, or continue to connect, a customer:

- (a) contravention of the laws of Canada or the Province of Ontario including the Ontario Electrical Safety Code;
- (b) violation of conditions in a distributor's licence;
- (c) materially adverse effect on the reliability or safety of the distribution system;
- (d) imposition of an unsafe worker situation beyond normal risks inherent in the operation of the distribution system;
- (e) a material decrease in the efficiency of the distributor's distribution system;
- (f) a materially adverse effect on the quality of distribution services received by an existing connection; and
- (g) if the person requesting the connection owes the distributor money for distribution services, 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.

Section 5.1.9 When requested by either:

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

a distributor shall insert 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).

## **D. Toronto Hydro Distribution Licence**

Section 7: Obligation to Connect

7.1 The Licensee shall connect a building to its distribution system if:

- (a) the building lies along any of the lines of the distributor's distributions system; and
- (b) the owner, occupant or other person in charge of the building request the connection in writing.

7.2 The Licensee shall make an offer to connect a building to its distribution system if:

- (a) the building is within the Licensee's service area as described in Schedule 1 [The City of Toronto as January 1, 1998]; and
- (b) the owner, occupant or other person in charge of the building request the connection in writing.

7.3 The terms of such connection or offer to connect shall be fair and reasonable and made in accordance with the Distribution System Code, and the Licensee's Rate Order as approved by the Board.

7.4 The Licensee shall not refuse to connect or refuse to make an offer to connect unless it is permitted to do so by the Act or a regulation or any Codes to which the Licensee is obligated to comply with as a condition of this Licence.

## **E. Ontario Regulation 425/06: Criteria and Requirements for Meters and Metering Equipment, Systems and Technology**

### **Adoption of criteria and requirements**

1. For residential and small general service consumers, the prescribed criteria and requirements for meters, metering equipment, systems and technology and any associated equipment, systems and technologies are the criteria and requirements specified in the document entitled "Functional Specification for Advanced Metering Infrastructure" dated July 14, 2006 and available at the Ministry of Energy, 4th Floor, Hearst Block, 900 Bay Street, Toronto, Ontario or at

[http://www.energy.gov.on.ca/english/pdf/electricity/smartmeters/Functional\\_Specification\\_for\\_Advanced\\_Metering\\_Infrastructure.pdf](http://www.energy.gov.on.ca/english/pdf/electricity/smartmeters/Functional_Specification_for_Advanced_Metering_Infrastructure.pdf).

## **F. Ontario Regulation 442/07: Installations of Smart Meters and Smart Sub-Metering Systems in Condominiums**

### **Definitions**

1. In this Regulation,

“board of directors” means the board of directors of a condominium corporation;

“condominium corporation” means a corporation created or continued under the *Condominium Act, 1998*;

“smart meters” includes smart meters, metering equipment, systems and technology and associated equipment, systems and technologies;

“smart sub-metering systems” includes smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies.

### **Prescribed class of property**

2. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed classes of property:

1. A building on land for which a declaration and description have been registered pursuant to section 2 of the *Condominium Act, 1998*.
2. A building on land for which a declaration and description have been registered creating a condominium corporation that was continued pursuant to section 178 of the *Condominium Act, 1998*.
3. 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*.

### **Prescribed circumstances**

3. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed circumstances:

1. The approval by the board of directors to install smart meters or smart sub-metering systems, in the case of a building that falls into a prescribed class of property described in paragraph 1 or 2 of section 2.
2. The installation of smart meters or smart sub-metering systems, in the case of a building that falls into a prescribed class of property described in paragraph 3 of section 2.

### **Installation of authorized metering technology**

4. (1) For a class of property prescribed under section 2 and in the circumstances prescribed under section 3, a licensed distributor, or any other person licensed by the Board to do so, shall install smart meters or smart sub-metering systems of a type, class or kind,

- (a) that are authorized by an order of the Board or by a code issued by the Board; or
- (b) that meet any criteria or requirements that may be set by an order of the Board or by a code issued by the Board.

(2) For licensed distributors installing smart meters in a class of property prescribed under section 2,

- (a) unless otherwise required by the Board, the distributor is not required to comply with the requirements set out in Ontario Regulation 425/06 (Criteria and Requirements for Meters and Metering Equipment, Systems and Technology) made under the Act; and
- (b) the distributor shall comply with the procurement requirements set out section 2 of Ontario Regulation 427/06 (Smart Meters: Discretionary Metering Activity and Procurement Principles) made under the Act.

(3) For a person, other than a licensed distributor, who is licensed by the Board to engage in the activity prescribed by subsection 1 (2) of Ontario Regulation 443/07 (Licensing Sub-Metering Activities), made under the *Ontario Energy Board Act, 1998*, unless otherwise required by the Board, the person is not required to comply with the requirements set out in Ontario Regulation 425/06 made under the Act.

(4) In this section, “licensed distributor” means a distributor licensed by the Board under clause 57 (a) of the *Ontario Energy Board Act, 1998*.

**Exclusive authority of the Board**

5. (1) Pursuant to subsection 53.17 (4) of the Act, the Board has the exclusive authority, on and after August 1, 2007, to approve or authorize the type, class or kind or to approve or authorize the criteria or requirements applicable to smart meters and smart sub-metering systems when installed in a class of property prescribed under section 2.

(2) In carrying out its functions under subsection (1), the Board shall ensure that smart meters and smart sub-metering systems are capable of measuring electricity consumption or use in accordance with electricity rates that are based on the time of day when electricity is consumed or used and, at a minimum, are capable of measuring electricity consumption or use in hourly intervals.

**G. Ontario Regulation 443/07: Licensing Sub-Metering Activities****Prescribed activities**

1. (1) In relation to the classes of property prescribed by section 2 of Ontario Regulation 442/07 (Installation of Smart Meters and Smart Sub-Metering Systems in Condominiums) made under the *Electricity Act, 1998*, no person shall engage in an activity that is a prescribed activity under subsection (2) unless the person is licensed to do so under section 57 of the Act.

(2) For the purposes of clause 57 (i) of the Act, the commercial offering or the commercial provision of smart meters, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies and any associated services is a prescribed activity.

**H. Ontario Regulation 161/99**

## Definitions and Exemptions

**4.0.1** (1) Clause 57 (a) and sections 71, 72, 78, 80 and 86 of the Act do not apply to a distributor who distributes electricity for a price no greater than that required to recover all reasonable costs,

- (b) With respect to a distribution system owned or operated by the distributor that is entirely located on land on which one or more of the following types of building or facilities is also located:
11. A building that forms part of a property as defined in the *Condominium Act, 1998*.
  12. A residential complex as defined in the *Tenant Protection Act, 1997*.
  13. An industrial, commercial or office building.
  14. A university, a college of applied arts and technology established under the *Ministry of Training, Colleges and Universities Act* or another post-secondary institution.
  15. A school or private school as defined in the *Education Act*.
  16. A hospital as defined in the *Public Hospitals Act*, a private hospital as defined in the *Private Hospitals Act* or an institution as defined in the *Mental Hospitals Act*.
  17. A shopping mall.
  18. An airport.
  19. A marina.
  20. A mine as defined in the *Mining Act*.

## **I. Toronto Hydro's Conditions of Service<sup>27</sup>**

### **Section 2.3.7.1.1 Metering Requirements for Multi-Unit Sites and Condominium Corporations**

In an effort to promote conservation Toronto Hydro will provide electronic or conventional smart suite metering for each unit of a new Multi-unit site, or a condominium at no direct charge to the

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<sup>27</sup> Exhibit K2.3: Toronto Hydro's Current Conditions of Service effective February 27, 2009 at pp. 47-48.

Customer. If the Customer chooses to pursue an Alternative Bid for the installation of suite metering and uses services of a qualified contractor, the Customer is required to:

- (i) select and hire a qualified contractor;
- (ii) ensure all contestable work is done in accordance with Toronto Hydro's technical standards and specifications; and
- (iii) assume full responsibility for the installation and warranty all aspects for a period of 2 years from date of commissioning.

Where the Customer transfers the metering facilities installed under the alternative bid option to Toronto Hydro and provided Toronto Hydro has inspected and approved the facilities installed, Toronto Hydro shall pay the Customer a transfer price. The transfer price shall be the lower of the cost to the Customer to install the metering facilities or Toronto Hydro's burden cost to install the metering facilities.

For existing condominium corporations that fall under the Condominium Act, 1998, and Ontario Regulation 442/07, the Condominium Corporation wishing to install smart suite metering systems, shall make arrangements with Toronto Hydro. In each case, the Customer will comply with the detailed technical requirements set forth at:

[http://www.torontohydro.com/electricsystem/business/suite\\_meters.html](http://www.torontohydro.com/electricsystem/business/suite_meters.html)

Installation and operation of a smart sub-metering system will require a licence from the Ontario Energy Board.

a) Individual Metering and House Metering Requirements for Multi-Unit Sites

Where individual units in a multi-unit site, or condominium, are to be metered individually, the building owner (or operator, or property manager, or condominium corporation) shall enter into a contract with Toronto Hydro for the supply of electrical energy for all common or shared services. Common or shared services

typically include lighting of all common areas shared by the tenants, or units owners, or which supply common services such as heating, air conditioning, hot water heating, elevators, and common laundry facilities. In such cases, in addition to the individual meter for each unit, a separate house meter (or halls meter) will be required to measure the energy used for all common or shared services.

b) Requirements for Existing Multi-Unit Sites with no House Meter

Where units in an existing multi-unit site, or condominium, are metered individually and shared services are supplied through one or more unit meters (i.e. the existing multi-unit site is not equipped with a house meter or halls meter), the building owner shall enter into a contract with Toronto Hydro for the supply of electricity to such unit(s).

For better clarity, the house meter account(s) shall be in the multi-unit site, or condominium, owner's name, who shall also be responsible for the payment for all energy supplied through such meter(s).

## Appendix C

### Toronto Hydro's Requested Warranty<sup>28</sup>

"To ensure compliant with law, THESL will provide to Avonshire, if requested, an amended OTC, conditional upon written confirmation by Avonshire that:

1. Avonshire will ensure that all suites, commercial units, and common areas are individually metered by a licensed sub-meterer;
2. Avonshire has not received and will not received any royalty or other type of payment, including payment in kind, from a smart sub-meterer in exchange for Avonshire's consent for the sub-meterer to provide smart sub-metering services;
3. The price charged for electricity by Avonshire or its sub-meterer to all sub-metered accounts will be no greater than that required to:
  - a. Exactly recover the costs charged to Avonshire by THESL through the bulk meter in proportion to each metered unit's consumption; and
  - b. Recover the reasonable costs required for the installation, administration, and maintenance of the sub-metering system.
4. Neither Avonshire nor its licensed sub-meterer will resell or charge any mark-up or profit on delivery services provided to Avonshire by THESL, and will only allocate those costs charged to Avonshire by THESL in proportion to each account's consumption."

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<sup>28</sup> Letter from Toronto Hydro to Avonshire, November 27, 2009: Pre-filed Evidence of Toronto Hydro, Book 1, December 14, 2009, Tab A 8.