



NOTICE OF AMENDMENT TO A CODE

AMENDMENTS TO THE AFFILIATE RELATIONSHIPS CODE FOR ELECTRICITY DISTRIBUTORS AND TRANSMITTERS

BOARD FILE NO: EB-2007-0662

BY E-MAIL AND WEB POSTING

**To: All Licensed Electricity Distributors
All Licensed Electricity Transmitters
All Participants in Consultation Process EB-2007-0662
All Other Interested Parties**

The Ontario Energy Board (the "Board") has today issued amendments to the Affiliate Relationships Code for Electricity Distributors and Transmitters (the "Electricity ARC" or the "Code") under sections 70.1 and 70.2 of the Ontario Energy Board Act, 1998 (the "Act").

I. Background

On September 19, 2007, the Board issued a Notice of Proposal (the "September Notice") in which it proposed a number of amendments to the Electricity ARC (the "September Proposed Amendments"). The September Notice set out background information relating to affiliate relationships of distributors and transmitters ("utilities") in the electricity sector, and described in detail the rationale for the September Proposed Amendments.

The Board received 16 sets of written comments on the September Proposed Amendments from a variety of stakeholders, including distributors, an electricity retailer, ratepayer groups and business groups whose members compete with some distributor affiliates. These are available for viewing on the Board's website at www.oeb.gov.on.ca

on the “Affiliate Relationships Code for Electricity Distributors and Transmitters” webpage on the “OEB Key Initiatives” portion of the “Industry Relations” section of the website.

After consideration of the comments received on the September Proposed Amendments, the Board issued a Notice of Revised Proposal on February 11, 2008 (the “February Notice”) in which the Board proposed further amendments to the Electricity ARC (the “February Proposed Amendments”). The February Proposed Amendments comprised: (a) minor clarifying changes to some of the September Proposed Amendments; (b) more substantive changes to other of the September Proposed Amendments; and (c) proposed amendments in relation to a small number of sections of the Electricity ARC that were not the subject of the September Proposed Amendments. The February Notice also identified those of the September Proposed Amendments in relation to which no further revisions were proposed.

The Board received written comments on the February Proposed Amendments from nine stakeholders, including distributors and a business group whose members compete with some distributor affiliates. These are also available for viewing on the Board’s website at www.oeb.gov.on.ca on the “Affiliate Relationships Code for Electricity Distributors and Transmitters” webpage on the “OEB Key Initiatives” portion of the “Industry Relations” section of the website.

The Board has considered the comments received and has determined that no material changes need to be made to either the February Proposed Amendments or to those of the September Proposed Amendments that were not further amended by the February Proposed Amendments. However, in light of the comments received, the Board has made minor revisions to the February Proposed Amendments as described in section II below.

The text of the amendments to the Electricity ARC as adopted by the Board is set out in Attachment A. For convenience, Attachment B contains a comparison version of the amendments which shows all of the final revisions relative to the proposed amendments that were issued with the February Notice. Also for convenience, Attachment C contains a clean version of the Electricity ARC that integrates all of the amendments adopted by the Board.

The Board takes this opportunity to thank stakeholders for the thoughtful comments that they have provided throughout this notice and comment process, which have been of great assistance to the Board in arriving at a revised Electricity ARC that the Board believes strikes an appropriate balance among the various interests concerned.

The Board will address cost awards for this consultation in accordance with the Notice of Hearing being issued today for that purpose.

II. Summary of Stakeholder Comments and Revisions to the February Proposed Amendments

In the February Notice, the Board requested that stakeholders confine their comments to the February Proposed Amendments, and the comments received were generally in keeping with that request. Some interested parties did reiterate or expand on their concerns in relation to some of the September Proposed Amendments that were not the subject of material revision in the February Proposed Amendments. This was the case, for example, in relation to the requirement for an independent evaluator in relation to competitive bidding processes (section 2.3.3.4); to the date of coming into force of the proposed amendments to the ARC that have been the subject of this notice and comment process (section 1.6); and to the definition of “shared corporate services” (section 1.2). The Board has further considered those comments, but remains satisfied that its approach to these matters as set out in the September Notice or the February Notice, as the case may be, is appropriate. By way of exception, the Board has made one minor change to section 1.6.2 regarding the coming into force of provisions relating to transfer pricing, as discussed in section IV below.

With respect to the February Proposed Amendments, the comments of stakeholders generally focused on one or more of the following: (i) the definition of, and the prohibition on the disclosure of, “confidential information”; (ii) the definition of “energy service provider” and the associated prohibition on the sharing of employees with energy service provider affiliates; (iii) transfer pricing for certain affiliate transactions; and (iv) the definition of, and the prohibition on the sharing of, “system planning information”.

i. Confidential Information (sections 1.2 and 2.6.1)

The February Proposed Amendments included revisions to the provisions of the Electricity ARC relating to “confidential information” with a view to, among other things, more closely aligning those provisions with the comparable section of utility licences. A number of stakeholders noted that the revisions included the addition of a reference to wholesalers in some places but not in others. The Board has now also included a reference to wholesalers in the definition of “confidential information” in section 1.2, as well as in section 2.6.1.

ii. Energy Service Provider (sections 1.2 and 2.2.3)

Section 2.2.3 of the Electricity ARC, as proposed to be amended as part of the September Proposed Amendments, would prohibit a utility from sharing with an affiliate that is an energy service provider any employees that are involved in collecting, or have access to, confidential information. The Board remains of the view that this prohibition is an important element of the Electricity ARC for the reasons set out in each of the September Notice and the February Notice, and does not propose to eliminate or modify it at this time.

The February Proposed Amendments included revisions to the definition of the term “energy service provider” to specifically include further examples of energy service provider activities. In their comments, representatives of distributors expressed concern about the inclusion of “billing for electricity or natural gas services” as an energy service provider activity, noting the potential adverse effect on achieving economies in the provision of billing services. The Board has concluded that the sharing of employees with an affiliate whose only energy service provider activity is billing for utility services (electricity or natural gas supply) or utility-like services (sewer or water services) is unlikely to result in any of the harms that the Electricity ARC is intended to protect against. The Board has therefore now revised the definition of “energy service provider” to clarify that only billing for non-utility services is captured by the definition.

In response to other comments received, the Board has also made the following additional revisions to the definition of “energy service provider”: (i) clarifying that the exclusion of municipal corporations from the definition is limited to municipal shareholders of utilities; (ii) extending the benefit of the exclusion to also cover the provincial government in its capacity as a utility shareholder; (iii) replacing the reference to “demand-side management” with a reference to “conservation and demand

management”, in keeping with the nomenclature that is more commonly used in the electricity sector; and (iv) clarifying that the reference to water heater sales, service and rentals is an example of the broader reference to appliance sales, service and rentals.

iii. Transfer Pricing (section 2.3.3.6)

The February Proposed Amendments included revised rules for the pricing of transactions where a utility provides a service, product, resource or use of asset to an affiliate. Specifically, the February Proposed Amendments contemplated that these transactions would be priced at no less than the greater of the market price and the utility’s fully-allocated cost of providing the service, product, resource or use of asset.

Some representatives of distributors commented that these transactions should be priced at no less than the greater of the market price and the utility’s direct costs. Otherwise, there could be a loss of opportunity to engage in the transaction and obtain additional net revenues for the benefit of ratepayers. By contrast, another stakeholder commented that these transactions should be priced at no less than the utility’s fully-allocated costs, regardless of the market price.

The Board remains of the view that, where a reasonably competitive market exists, a transfer price that is no less than the greater of the market price or the utility’s fully-allocated cost better ensures that there is no cross-subsidization. The Board has therefore retained section 2.3.3.6 of the Electricity ARC as proposed in the February Proposed Amendments.

iv. System Planning Information (sections 1.2, 2.6.4 and 2.6.5)

The September Proposed Amendments included a new provision that would have precluded a utility from disclosing “strategic business information” to an affiliate that is an energy service provider, together with a supporting definition of the term “strategic business information”.

In light of comments received, the Board proposed a modified approach in the February Proposed Amendments. Specifically, the Board proposed to replace the concept of “strategic business information” with the more clearly defined concept of “system planning information”. The Board also proposed to add provisions to clarify that the prohibition on the disclosure of “system planning information” would not apply in

circumstances where the information in question is already available to third parties or where disclosure is required by a legal or regulatory requirement.

Representatives of distributors voiced concerns regarding the Board's modified approach, including in relation to the scope of the definition of "system planning information" and to the likelihood of practical implementation issues arising in substantial numbers. These stakeholders suggested that the Board should convene a technical conference to allow for further consultation in relation to the "system planning information" provisions. Another distributor noted that the concept of "system planning information" has a historical and specific meaning within the electricity industry and is relatively free of ambiguity, but suggested that the inclusion of computer systems may cause confusion and possibly be unnecessary.

A representative of business groups whose members compete with some distributor affiliates was generally supportive of the modified approach, although requested that further revisions be made to ensure that information regarding competitive connection work is clearly covered. This stakeholder also objected to the exception in section 2.6.5(b) that would allow "system planning information" to be disclosed where the information is publicly available, given that there may well be costs (in dollars, effort and/or time) to an entity in obtaining the information that was given to the utility's affiliate.

The Board continues to believe that the "system planning information" provisions as set out in the February Proposed Amendments strike an appropriate balance and need not be revised at this time. The Board notes that "system planning information" expressly includes information pertaining to distribution system development or reinforcement plans, and therefore in most cases covers information pertaining to competitive connection work. Where this might not be the case, such as where a customer elects to use the alternative bid process, the non-disclosure of that information to affiliates is covered by the Electricity ARC provisions regarding confidential information.

The Board does not believe that it is desirable to further delay implementation of the Electricity ARC amendments for the purposes of additional consultation on the "system planning information" provisions. As with any new regulatory requirement, implementation issues may arise. The Board is satisfied that it has processes in place that can be used to address such implementation issue in an expeditious manner as and when they arise. If greater experience with these provisions should reveal that

there are implementation issues that cannot be overcome, the Board may revisit the matter at that time.

v. Other

In addition to the revisions noted above, the Board has also made minor corrections to sections 2.3.3.6, 2.3.6.1, 2.3.7.1 and 2.6.2(d).

Some representatives of distributors commented on the issue of exemptions from the Electricity ARC provisions. One requested that the criteria for exemptions be included in the Electricity ARC to provide clarity. Another suggested that the Board needs to develop a transparent and efficient exemption process, and that utilities should be able to “state a case” to the Board’s Chief Compliance Officer in relation to interpretation issues.

The Board does not believe that it is desirable at this time to attempt to codify the criteria for exemptions, and considers that exemptions are best left to be determined by the Board on a case-by-case basis having regard to the circumstances of any application that may be before it. As and when the Board develops a body of jurisprudence in relation to exemptions from the amended Electricity ARC, it may be opportune for the Board to reconsider codification of exemption criteria. The Board understands and has noted the concerns expressed regarding the need for an efficient exemption process. The Board also confirms its expectation that issues of interpretation and implementation will continue to be resolved through the issues management process administered by the Board’s Compliance Office.

Some distributors suggested replacing the proviso in item (e) of section 2.3.2.2, that requires that an estimate of any benefits to a utility’s ratepayers from outsourcing be included in the business case, with a proviso that calls for consideration of harm to utility ratepayers. The Board notes that this section of the Electricity ARC mirrors that in the Affiliate Relationships Code for Gas Utilities, which is the source of many of the amendments to the transfer pricing provisions of the Electricity ARC, and does not believe that this is an area where electricity and gas utilities need to be treated differently.

One distributor suggested that clarification is required in relation to the application of the business case requirement (section 2.3.2.2) to contracts with automatic renewal periods. As indicated in the September Notice, the Board would consider the renewal of a contract, even if automatic, to be a new contract for the purpose of the application of this and other relevant provisions of the Electricity ARC.

III. Anticipated Costs and Benefits

The anticipated costs and benefits of the amendments to the Electricity ARC, other than the revisions noted in section II above, were addressed in the September Notice or the February Notice, as applicable, and interested parties should refer to those Notices for further information in that regard.

The Board believes that that the further revisions noted in section II above will provide enhanced clarity regarding the nature and scope of the provisions of the Electricity ARC. The Board does not anticipate that those revisions will require utilities to incur material incremental costs relative to implementation of the amendments as originally proposed through the September Notice or the February Notice, as applicable.

IV. Coming into Force of Amendments

As was proposed in the September Notice and reflected in section 1.6.1 of the amended Electricity ARC, most of the amendments to the Electricity ARC as set out in Attachment A will come into force on today's date, being the date on which they are published on the Board's website after having been made by the Board.

In the September Notice, the Board also proposed that the coming into force of the following amendments would be deferred for a period of three months: (a) the amendment that deletes the definition of "fair market value"; and (b) the amendments to section 2.3, other than the amendment that adds sections 2.3.4.1 and 2.3.4.2. The Board has concluded that, for simplicity and to avoid potential confusion, the coming into force of all of the amendments to section 2.3 should be deferred. Accordingly, as reflected in section 1.6.2 of the amended Electricity ARC, the amendment that deletes the definition of "fair market value" and all of the amendments to section 2.3 will come into force on the date that is three months from today's date.

As discussed in the February Notice and reflected in section 1.6.3 of the amended Electricity ARC, the amendments to the Electricity ARC that have now been adopted by the Board do not apply to an Affiliate Contract that was in effect on September 19, 2007 until such time as the initial term of such Affiliate Contract expires.

This Notice, including the attached amendments to the Electricity ARC, will be available for public viewing on the Board's website at www.oeb.gov.on.ca and at the office of the Board during normal business hours.

If you have any questions regarding the amendments to the Electricity ARC described in this Notice, please contact the Market Operations Hotline at 416-440-7604 or by email at market.operations@oeb.gov.on.ca

DATED at Toronto, May 16, 2008

ONTARIO ENERGY BOARD

Original Signed By

John Pickernell
Assistant Board Secretary

Attachments:

Attachment A: Amendments to the Affiliate Relationships Code for Electricity Distributors and Transmitters

Attachment B: Comparison Version of Amendments to the Affiliate Relationships Code for Electricity Distributors and Transmitters relative to the Proposed Amendments as proposed on February 11, 2008 (for information purposes only)

Attachment C: Amended Affiliate Relationships Code for Electricity Distributors and Transmitters (for information purposes only)