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VIA COURIER AND RESS FILING

Richard P. Stephenson

T 416.646.4325 Asst 416.646.7417

F 416.646.4335

E richard.stephenson@paliareroland.com

www.paliareroland.com

File 10329

Chris G. Paliare
Ian J. Roland
Ken Rosenberg
Linda R. Rothstein
Richard P. Stephenson
Nick Coleman
Margaret L. Waddell
Donald K. Eady
Gordon D. Capern
Lily I. Harmer
Andrew Lokan
John Monger
Odette Soriano
Andrew C. Lewis
Megan E. Shortreed
Massimo Starnino
Karen Jones
Robert A. Centa
Nini Jones
Jeffrey Larry
Emily Lawrence
Denise Sayer
Danny Kastner
Tina H. Lie
Jean-Claude Killey
Jodi Martin
Michael Fenrick

HONORARY COUNSEL

Ian G. Scott, Q.C., O.C.
(1934 - 2006)

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Walli

Re: Proposed Amendments to the Distribution System Code and the Affiliate Relationships Code for Electricity Distributors and Transmitters (EB-2009-0411)

The Power Workers' Union ("PWU") represents a large portion of the employees working in Ontario's electricity industry. Attached please find a list of PWU employers.

The PWU is committed to participating in regulatory consultations and proceedings to contribute to the development of regulatory direction and policy that ensures ongoing service quality, reliability and safety at a reasonable price for Ontario customers. To this end, please find the PWU's comments on the *Proposed Amendments to the Distribution System Code and the Affiliate Relationships Code for Electricity Distributors and Transmitters (EB-2009-0411)*. We hope you will find the PWU's comments useful.

Yours very truly,

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Original signed by

Richard P. Stephenson
RPS:jr
encl.
cc: John Sprackett
Judy Kwik

Doc 746164v1

List of PWU Employers

Algoma Power
AMEC Nuclear Safety Solutions
Atomic Energy of Canada Limited (Chalk River Laboratories)
BPC District Energy Investments Limited Partnership
Brant County Power Incorporated
Brighton Beach Power Limited
Brookfield Power – Lake Superior Power
Brookfield Power – Mississagi Power Trust
Bruce Power Inc.
Capital Power Corporation Calstock Power Plant
Capital Power Corporation Kapuskasing Power Plant
Capital Power Corporation Nipigon Power Plant
Capital Power Corporation Tunis Power Plant
Coor Nuclear Services
Corporation of the City of Dryden – Dryden Municipal Telephone
Corporation of the County of Brant, The
Coulter Water Meter Service Inc.
CRU Solutions Inc.
Ecaliber (Canada)
Electrical Safety Authority
Electrical and Utilities Safety Association
Erie Thames Services and Powerlines
ES Fox
Grimsby Power Incorporated
Halton Hills Hydro Inc.
Hydro One Inc.
Independent Electricity System Operator
Inergi LP
Innisfil Hydro Distribution Systems Limited
Kenora Hydro Electric Corporation Ltd.
Kincardine Cable TV Ltd.
Kinectrics Inc.
Kitchener-Wilmot Hydro Inc.
London Hydro Corporation
Middlesex Power Distribution Corporation
Milton Hydro Distribution Inc.
New Horizon System Solutions
Newmarket Hydro Ltd.
Norfolk Power Distribution Inc.
Nuclear Waste Management Organization
Ontario Power Generation Inc.
Orangeville Hydro Limited
Portlands Energy Centre
PowerStream
PUC Services
Sioux Lookout Hydro Inc.
Sodexo Canada Ltd.
TransAlta Energy Corporation - O.H.S.C. Ottawa
Vertex Customer Management (Canada) Limited
Whitby Hydro Energy Services Corporation

**Proposed Amendments to the
Distribution System Code and the Affiliate Relationships Code for
Electricity Distributors and Transmitters**

Power Workers' Union's Comments

1 BACKGROUND

The Ontario Energy Board's ("OEB" or "Board") December 10th, 2009 Notice ("Notice") of proposed amendments to the Distribution System Code ("DSC") and the Affiliate Relationships Code ("ARC") for electricity distributors and transmitters relate to amendments to the *Ontario Energy Board Act, 1998* ("Act") made by the *Green Energy and Green Economy Act, 2009*. Under these amendments electricity distributors are now permitted to own and operate certain renewable and other generation facilities ("qualifying generation facilities") as well as energy storage facilities (collectively, "qualifying facilities"). The proposed amendments are also intended to support the Board's new objective of promoting the use and generation of electricity from renewable energy sources.

The enabling legislation for distribution ownership of qualifying facilities is subsection 71(3) of the Act, which states:

Despite subsection (1), a distributor may own and operate,

(a) a renewable energy generation facility that does not exceed 10 megawatts or such other capacity as may be prescribed by regulation and meets the criteria prescribed by regulation;

(b) a generation facility that uses technology that produces power and thermal energy from a single source that meets the criteria prescribed by regulation; or

(c) an energy storage facility that meets the criteria prescribed by regulation

The Notice states that as a result of the amendments, the following three scenarios, which are not mutually exclusive, may arise:

- **a distributor may own a new qualifying facility;**
- **an affiliate of a distributor may continue to own an existing and may own a new qualifying facility; or**
- **an affiliate of a distributor may transfer an existing qualifying facility to the distributor.**

The Notice goes on to state that the above scenarios raise issues on how generation activities might interact with the operation of a distributor and on the continued applicability or adequacy of regulatory requirements contained in the DSC and ARC.

The PWU appreciates the opportunity for comment on the proposed amendments to the DSC and ARC. The PWU's input stems from its energy policy statement:

Reliable, secure, safe, environmentally sustainable and reasonably priced electricity supply and service, supported by a financially viable energy industry and skilled labour force is essential for the continued prosperity and social welfare of the people of Ontario. In minimizing environmental impacts, due consideration must be given to economic impacts and the efficiency and sustainability of all energy sources and existing assets. A stable business environment and predictable and fair regulatory framework will promote investment in technical innovation that results in efficiency gains.

2 PROPOSED AMENDMENTS TO THE ARC

The purpose of the ARC set out in section 1.1 of the ARC is as follows:

1.1 Purpose of this Code

This Code sets out rules that govern the conduct of utilities as that conduct relates to their respective affiliates, with the objective of:

- a) protecting ratepayers from harm that may arise as a result of dealings between a utility and its affiliate;**
- b) preventing a utility from cross-subsidizing affiliate activities;**
- c) protecting the confidentiality of information collected by a utility in the course of provision of utility services;**
- d) ensuring there is no preferential access to utility services;**
- e) preventing a utility from acting in a manner that provides an unfair business advantage to an affiliate that is an energy service provider; and,**

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- f) preventing customer confusion that may arise from the relationship between a utility and its affiliate.

The ARC defines energy service provider as follows:

“energy service provider” means a person other than a utility or a shareholder of a utility that is a municipal corporation or the provincial government, involved in the supply of electricity or gas or related activities, including; retailing of electricity; marketing of natural gas; generation of electricity; energy management services: conservation or demand management programs; street lighting services; sentinel lighting services; metering (including smart sub-metering that is the subject of the Smart Sub-Metering Code and wholesale metering); billing other than solely for the delivery and supply of electricity or natural gas or for sewer or water services; an appliance (including water heater) sales, service and rentals;

The proposed ARC amendments are intended to result in certain provisions related to qualifying facilities no longer applying to dealings between a distributor and an energy service provider given subsection 71(3) of the Act.

2.1 EMPLOYEE SHARING (NEW SECTIONS 2.2.3A AND 2.2.3B)

2.2.3A Despite section 2.2.3, a utility that is a distributor may share employees that are directly involved in collecting, or have access to, confidential information with an affiliate that is an energy service provider whose sole activity at the relevant time is the ownership and operation of one or more qualifying facilities.

2.2.3B Despite section 2.2.3, a utility that is a distributor may share employees that are directly involved in collecting, or have access to, confidential information with an affiliate that is an energy service provider and whose activities at the relevant time include but are not limited to the ownership and operation of one or more qualifying facilities, provided that:

- (a) the employees to be shared are limited to employees whose sole or principal function is to operate, maintain or repair the distributor’s distribution system; and**
- (b) the employees may only be shared in relations to activities associated with the ownership and operation of one or more qualifying facilities.**

The PWU agrees with and supports the proposed s. 2.2.3A. However, with regard to s. 2.2.3B, the PWU is of the view that, in the circumstances where a distributor’s affiliate that is an energy service provider whose activities are not limited to ownership and operation of qualifying facilities, the sharing of employees ought not be limited to

employees whose sole or principle function is to operate, maintain or repair the distributor's distribution system. Such sharing should not be limited to activities associated with the ownership and operation of the qualifying facilities. The PWU has argued the limitation contained in section 2.2.3 of the ARC is too restrictive in earlier consultations on the ARC. Section 2.2.3 of the ARC states:

2.2.3 A utility shall not share with an affiliate that is an energy service provider employees that are directly involved in collecting, or have access to, confidential information.

The PWU repeats its March 4, 2008 comment on employee sharing as submitted in EB-2007-0662 for the Board's consideration in this consultation:

The PWU submits that the OEB should adopt a pragmatic approach which focuses specifically on avoiding the particular mischief the ARC is intended to guard against. In particular, the underlying purpose of the ARC is to prevent the misuse of confidential LDC information. As a practical matter, information can be misused in one of two ways:

- a. Information can be misused by employees who have the ability, by virtue of their scope of duties and responsibilities of their positions within an LDC or affiliate, to use the confidential information to affect the conduct of the affiliate, to the detriment of LDC customers or third party competitors. It is submitted that the group of employees that would fit into this category is very small, essentially restricted to senior management; and**
- b. For other employees, the risk of misuse of confidential information is limited to the ability of those employees to disclose the confidential information to others who have the power to misuse it, or to violate privacy interests by disclosing the information generally.**

What is clear, however, is that in the latter case, the risk of mischief is limited to the risk of disclosure of the confidential information. As a result, it is submitted that the purposes of the ARC with respect to these employees can be fulfilled if sufficient guarantees of non-disclosure of confidential information are obtained.

In these circumstances, the PWU submits that, for all employees other than senior management employees, there should be no restriction on sharing such employees on the condition that the employees execute written undertakings prohibiting them from disclosing confidential LDC information other than to persons within the LDC authorized to receive it. It is submitted that such undertakings, combined with the effect of Federal and Provincial privacy laws, provide strong assurances against improper disclosure of confidential information, and are sufficient to fulfill the objectives of the ARC.

The PWU noted in that submission Board staff's perspective articulated in the Research Paper that by virtue of the OEB's statutory objects it is required to promote the economic efficiency of LDCs generally, and in the ARC in particular. The PWU's March 4, 2008 proposal above enhances economic efficiency for the LDC's, which is a merit of

increasing value today as costs and rate impacts related to the *Green Energy and Green Economy Act, 2009* accumulate. As a matter of fact the PWU's proposal is in line with the following statement in the Notice:

The Board anticipates that the proposed amendments to the ARC will provide opportunities for distributors to save costs, including costs associated with ARC compliance.

Therefore, the PWU recommends that Section 2.2.3 should be revised to delete any restriction on sharing of employees between LDCs and affiliates other than senior management employees so long as shared employees execute an undertaking (in a form acceptable to the Board) to maintain the confidentiality of confidential LDC information. Doing so will provide ongoing protection of the LDC's customers information while providing the LDC with flexibility to pursue economic efficiency that will mitigate upward pressure on rates.

2.2 AFFILIATE CONTRACTS (NEW SECTION 2.3.1.2)

2.3.1.2 Despite section 2.3.1.1, where an Affiliate Contract between a utility that is a distributor and an affiliate is for the provision of services related to a qualifying facility, in term of the Affiliate Contract may extend to a maximum of 20 years.

The PWU agrees that the five-year limitation on the term of Affiliate Contracts set out in section 2.3.1.1 of the ARC may cause uncertainty in relation to the stability of the affiliate relationship arrangements over the life of a 20-year Feed-in Tariff ("FIT") contract and that a maximum term of 20 years is more appropriate. In addition, given that the lifespan of generation assets is generally greater than 20 years, there ought to be a provision for the extension of the Affiliate Contract related to a qualifying facility.

2.3 BUSINESS CASE (NEW SECTION 2.3.2.3)

2.3.2.3 Despite section 2.3.2.1, a utility that is a distributor shall not be required to undertake a business case analysis prior to entering into an Affiliate Contract for the receipt of a service, product, resource or use of asset that it currently provides to itself and that pertains exclusively to the ownership and operation of one or more qualifying facilities.

The Notice notes that currently there is no regulatory requirement for a distributor to do a business case analysis as a condition of engaging in qualifying facility activities itself. In addition, Accounting Guidelines expect, and proposed ARC provisions on transfer pricing require, a distributor to apply a fully-allocated costing methodology in respect to activities associated with its qualifying facilities. With these provisions in place, the PWU would agree that a distributor should not be required to undertake a business case analysis prior to entering into an Affiliate Contract.

2.4 TRANSFER PRICING (NEW SECTION 2.3.4A)

2.3.4A.1 For a service, product, resource or use of asset that pertains exclusively to the ownership and operation of one or more qualifying facilities, fully-allocated cost-based pricing (as calculated in accordance with sections 2.3.4.1 and 2.3.4.2) may be applied between a utility that is a distributor and an affiliate in lieu of applying the transfer pricing provisions of section 2.3.3.1 or section 2.3.3.6, provided that the distributor complies with section 2.3.4.3.

The PWU agrees with the elimination of the requirement for market-based pricing between a distributor and an affiliate for activities related to qualifying facilities.

As a matter of fact, the PWU opposes market-based pricing and supports cost-based pricing of a distributor's services, products, resource and use of assets for affiliates even where a reasonable market exists. The PWU advocated this position in EB- 2007-0662 as follows:

The PWU submits that from the perspective of the LDC, and more importantly, the LDC's customers, the market price is an irrelevant consideration for the purposes of sales of products and services to third parties, including affiliates. In cases where the market price of the product or service is higher the LDC's cost, it is not clear why the LDC is prohibited from selling to its affiliate at below the market price, so long as the LDC at least recovers its costs. If an LDC has natural cost advantages over market competitors, there is no reason it should not be able to exploit those cost advantages. Any such sales (i.e. sales at greater than the LDC's costs, even if lower than the market price) will benefit LDC ratepayers by contributing incremental revenues and make more efficient use of the LDC's embedded costs.

The only apparent justification from prohibiting sales by an LDC to an affiliate at prices above cost but below the market price is that potential competitors of the LDC may be shut out of such sales, presumably retarding the development of a the competitive market for such goods and services. The PWU submits this justification is simply not valid. To prohibit an LDC from selling at a price which is above its cost is a *de facto* subsidy to the LDC's market competitors. It is in no one's interest to undertake an

economic development program whose existence is premised on a direct subsidy program.

Moreover, to the extent the development of a competitive market for services is the justification for the restrictions on LDC pricing, then presumably the same justification would be equally applicable for similar sales by LDC's to non-affiliates. No such restrictions exist.

It is therefore submitted that in the case of sales by an LDC to an affiliate the market price standard is an inappropriate basis for costing. For all such sales, the appropriate standard is that the sales should be permitted so long as the price is no less than the LDC's costs, regardless of whether the price is higher or lower than the market price. As a result, the PWU submits that paragraph 2.3.3.6 of the proposed revisions should be further revised to read as follows:

2.3.3.6 Where a reasonably competitive market exists for a service, product, resource or use of asset, a utility shall charge no less than the utility's fully-allocated cost to provide the service, product, resource or use of asset, when selling that service, product, resource or use of asset to an affiliate.

The PWU is of the view that the Board's current consideration of the continued applicability of existing regulatory requirements contained in the ARC is an opportune time for reconsideration of the applicability of section 2.3.3 of the ARC ("Where a Market Exists"). Release from the requirements of 2.3.3 will enhance the distributors' financial well being and alleviate at least to some extent the cost/rate pressure related to the *Green Energy and Green Economy Act, 2009*.

2.5 FINANCIAL TRANSACTIONS WITH AFFILIATES (NEW SECTIONS 2.4.1A, 2.4.1B AND 2.4.3)

- 2.4.1A** Despite section 2.4.1, a utility that is a distributor and that has an affiliate that owns one or more qualifying facilities may invest or provide guarantees or any other form of financial support to its affiliates in an amount that, on an aggregated basis over all transactions with all affiliates, would equal an amount up to but not exceeding 35% of the distributor's total equity.
- 2.4.1B** Despite sections 2.4.1 and 2.4.1A, a utility that is a distributor may invest or provide guarantees or any other form of financial support to an affiliate whose sole activity is the ownership and operation of one or more qualifying facilities in any amount, subject only to the limitation that in no event may the distributor's investments or financial support be in an amount that, on an aggregated basis over all transactions with all affiliates, would equal an amount that exceeds 100% of the distributor's total equity.

2.4.3 Despite section 2.4.2, in the case of a utility that is a distributor any loan investment or other financial support provided to an affiliate may be provided on terms no more favourable than what the distributor could obtain directly for itself in the capital market if the loan, investment or other financial support is for the purpose of financing the ownership of one or more qualifying facilities.

The PWU understands the need to limit a utility's investment and financial support of its affiliates to protect its continued stability and the interests of its ratepayers while promoting renewable generation. The proposed amendments appear to address these objectives with: section 2.4.1A increasing a distributor's support or investment from 25% to 35% of a distributor's total equity where the affiliate conducts other business in addition to a qualifying facility; section 2.4.1B providing for an increase in support of affiliates whose sole-purpose is a qualified facility as long as the support of all affiliates in aggregate does not exceed 100% of the distributor's total equity; and section 2.4.3 providing for financial terms for qualifying facilities to be no more favourable than the distributor could obtain for itself.

2.6 EQUAL ACCESS TO SERVICES (NEW SECTIONS 2.5.2A)

2.5.2A Sections 2.5.1 and 2.5.2 do not apply in respect of the activities of an affiliate that is an energy service provider that are related to the ownership and operation of qualifying facilities.

The PWU agrees that the removal of restrictions on supporting or promoting the activities of an affiliate that relate to the ownership and operation of qualifying facilities will support the Board's new objective of promoting renewable generation without material adverse impact on opportunities for the development of generation projects by third parties.

3 PROPOSED AMENDMENTS TO THE DSC

The Notice notes that some of the provisions of the DSC may not be readily or easily applicable in the context of a qualifying generation facility that is owned and operated by a distributor and that the proposed amendments to the DSC are intended to provide additional clarity and certainty in this regard.

3.1 GENERAL OBLIGATION OF EQUAL TREATMENT (NEW SECTION 2.1)

2.1 Distributor-owned Generation Facilities

A distributor shall not, in respect of any matter addressed in or under this Code, provide favoured treatment or preferential access to the distributor's distribution system or the distributor's services for any generation facilities that are owned by the distributor.

The PWU agrees that distributors should be required to treat their own generation facilities in the same manner as they would treat generation facilities owned by third parties, consistent with the requirement to provide non-discriminatory access.

3.2 THE CONNECTION PROCESS (NEW SECTION 6.2A)

The proposed new section 6.2A clarifies which provisions of 6.2 apply to the connection of distributor-owned qualifying facilities and which do not, and in the cases where requirements should apply but its terms cannot be satisfied in its current form the proposed section 6.2A includes requirements of equivalent effect of intent. The PWU believes that this is a reasonable and pragmatic approach to ensuring an effective and fair connection process.

All of which is respectfully submitted.