

April 1, 2010

VIA COURIER AND RESS FILING

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 Regarding
Alternative Bid Option Provisions (EB-2010-0038)**

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 regarding Alternative Bid Option Provisions (EB-2010-0038).

We hope you will find the PWU's comments useful.

Yours very truly,
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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
Erie Thames Services and Powerlines
ES Fox
Grimsby Power Incorporated
Halton Hills Hydro Inc.
Hydro One Inc.
Independent Electricity System Operator
Inergi LP
Infrastructure Health and Safety Association
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 Generation Partnership O.H.S.C.
Vertex Customer Management (Canada) Limited
Whitby Hydro Energy Services Corporation

**NOTICE OF PROPOSAL TO AMEND A CODE
PROPOSED AMENDMENTS TO THE DISTRIBUTION SYSTEM CODE
EB-2010-0038**

Comments of the Power Workers' Union ("PWU")

I. INTRODUCTION

1. On March 10, 2010, the Ontario Energy Board ("OEB" or the "Board") issued a Notice of Proposal to Amend the Distribution System Code ("DSC" or "Code") regarding alternative bid option provisions of the Code. The Board indicated that it decided to initiate this consultation for several reasons, including providing greater clarity regarding the application of the alternative bid provisions.

II. BACKGROUND AND PURPOSE OF THE PROPOSED AMENDMENTS

A. Amendments made to the Code in October, 2009 (EB-2009-0077)

2. Section 3 of the Code provides connecting customers with an alternative bid option under which the customer is entitled to use the services of a qualified contractor to perform certain work related to the connection of a customer's facilities for which the customer is required to pay a capital contribution.

3. In October, 2009 amendments to the Code ("October 2009 Amendments") were made under EB-2009-0077 that revised the Board's approach to assigning cost responsibility as between a distributor and a generator in relation to the connection of renewable generation facilities to distribution systems in a manner that would facilitate implementation of the Government's policy objectives related to the Green Energy and Green Economy Act, 2009.

4. As a result of the October 2009 Amendments (EB-2009-0077), there are now two instances in which a capital contribution may be required (and the alternative bid option therefore applies):

- i. any “expansion” made to connect a customer that is a load or a nonrenewable generation facility; and
- ii. in certain cases¹, an “expansion” made to connect a renewable energy generation facility.

5. According to the October 2009 Amendments, a distributor bears all of the costs associated with making a “renewable enabling improvement” and, as such, “no capital contribution can be required and the alternative bid option would not apply”.

B. Provisions that require greater clarity

6. The Board is proposing amendments to the Code that will provide greater clarity regarding the application of the alternative bid provisions. The amendments include:

- a. Elimination of the terms “contestable” and “uncontestable” from the Code.
- b. Obligation to Transfer Work Done under Alternative Bid Option.
- c. Scope of Alternative Bid Option.

III. PWU COMMENTS ON THE PROPOSED AMENDMENTS TO THE DSC

A. Nomenclature: “contestable” and “uncontestable”

7. The current DSC refers to work that is eligible for the alternative bid option as “contestable”, and work that is ineligible for the alternative bid option as “uncontestable”.

¹ A capital contribution cannot be required if the cost of the expansion is at or below the generator’s renewable energy expansion cost cap or if the expansion is in a Board-approved distribution system plan or is otherwise approved or mandated by the Board.

8. In its March 10, 2010 Notice of Proposed Amendments, the Board notes that the terms “contestable” and “uncontestable” in the Code have a different meaning than the terms “contestability” and “contestable markets” that have particular meaning in economic theory. While noting that this distinction has not given rise to any misinterpretation of the Code, the Board is taking this opportunity to provide greater clarity by proposing to eliminate the terms “contestable” and “uncontestable” from the Code and instead use the phrase “subject to alternative bid” or language of similar effect as the context may require.

9. The PWU, while recognizing that the intended clarity can also be achieved by including clear definitions of the terms in the DSC, sees no harm in the Board’s proposal to substitute the terms. However, the PWU is concerned about the potential contextual as well as legal interpretations of the Board’s recommended substitute phraseology: “subject to alternative bid”. The concern is the use of the term “subject to” and how it relates to the customer’s (e.g. generator) right to choose whether to pursue an alternative bid or not.

10. The customer’s right to choose, for example, can be seen under ‘a’ and ‘b’ of section 3.2.10 of the DSC wherein the language used is “if the customer has not chosen to pursue an alternative bid...” or “if the customer has chosen to pursue the alternative bid option,...” Given these provisions, the PWU’s understanding of the Board’s intent in the proposed language of “subject to alternative bid” is for the distributor to give the customer the option of pursuing an alternative bid as provided for under section 3.2.14 of the DSC which states: “where the distributor requires a capital contribution from the customer, the distributor shall allow the customer to obtain and use alternative bids for the contestable work.²” Therefore, the customer may choose not to use the alternative bid and have the distributor carry out the work for whatever reason.

² Ontario Energy Board, Distribution System Code, 3.2.14, page 31

In the PWU's view, while the term "subject to" can imply conditionality around the alternative bid, more importantly, can imply that the alternative bid is mandatory.

11. The PWU, therefore, submits that "open to alternative bid" or "available to alternative bid" are preferable to "subject to alternative bid" because they clearly articulate the provision of the Code that provides the customer the option of pursuing an alternative bid.

B. Obligation to Transfer Work Done under Alternative Bid Option

12. The Board is proposing to include in the Code the requirement that the alternative bid option applies only where the expansion facilities will be transferred to the distributor when completed.

13. The relevant section in the Code that the Board proposes to amend is section 3.2.14, which states the following:

Where the distributor requires a capital contribution from the customer, the distributor shall allow the customer to obtain and use alternative bids for the contestable work. The distributor shall require the customer to use a qualified contractor for the contestable work.

The Board's proposed amendment would amend the above as follows:

Where the distributor requires a capital contribution from the customer, the distributor shall allow the customer to obtain and use alternative bids for the work that is subject to alternative bid provided that the customer agrees to transfer the expansion facilities that are constructed under the alternative bid option to the distributor upon completion. The distributor shall require the customer to use a qualified contractor for the work that is subject to alternative bid.

14. The PWU supports the proposed amendment. The expansion facilities are distribution assets that form part of the licenced distributor's distribution system and therefore should be owned and operated by the distributor. In turn the distributor takes responsibility for maintaining the expanded distribution system's integrity and operational efficiency, and service quality and reliability regardless of whether the expansion work was carried out by the distributor or by a third party through alternative bid.

C. Scope of Alternative Bid Option

15. The Board states that there have been differences of opinion between distributors and their customers regarding the scope of work that is subject to alternative bid, and in particular in relation to the work that is identified as “uncontestable” under section 3.2.15 of the Code. The Board is therefore proposing amendments to the Code that will provide greater clarity regarding the application of the alternative bid provisions.

16. Section 3.2.15 of the Code currently states that the following work is uncontestable:

(a) the preliminary planning, design and engineering specifications of the work required for distribution system expansion and connection (specifications shall be made in accordance with the distributor’s design and technical standards and specifications); and

(b) work involving existing distributor assets.

17. The Board states that experience has demonstrated that the term “preliminary” and the phrase “involving existing distributor assets” are not sufficiently precise so as to avoid disagreements between distributors and their customers as to the scope of the alternative bid option.

(a) Design and Engineering Planning and Specifications

18. The Board is proposing to introduce two amendments relating to the ‘design and engineering planning and specification’ aspect of the scope of uncontestable work.

19. The first amendment replaces Section 3.2.15 (a) with:

Planning and the development of specifications for the design, engineering and layout of an expansion are not subject to alternative bid.

20. The second amendment revises Section 3.2.16 by adding a provision that work done under the alternative bid option must conform to the distributor’s design and engineering plans and specifications and requires that the plans for

such work be subject to review and approval by the distributor to ensure such conformance, at the customer's cost.

21. As the PWU understands the proposed amendments, the effect of the amendment in s. 3.2.15(a) is to clarify that three categories of work are not subject to alternative bid under this section, namely:

- a. Development of specifications for design work;
- b. Engineering work; and
- c. Layout work.

22. Based on the PWU's understanding of the effect of the proposed amendments, the PWU supports both amendments on the ground that they will ensure ongoing reliability and quality of service. The PWU agrees with the Board's view that distributors are accountable to their customers and to the Board for providing reliable service and for the efficient and rational planning of their distribution systems. Also, given that the Board is proposing that facilities constructed under the alternative bid option be transferred to the distributor, it is necessary that planning and the development of specifications for the design as well as the engineering and layout of expansions are the responsibility of the distributor and that the customer's work under alternative bid conform with the distributor's planning, design and engineering specifications. In addition the PWU submits that in the absence of distributor specifications on how work is to be approached, inefficiencies can result when work under alternative bid is involved. Therefore distributors also need to be responsible for the logistics of projects that involve work under alternative bid.

23. However, the PWU notes that the proposed revised sections 3.2.15 and 3.2.16 as crafted lack specificity on the relevant work related to the proposed provisions. The PWU submits that the Board should use this consultation as an opportunity to understand and identify the work that needs to be articulated under these provisions.

(b) Physical Contact with Existing System and De-energization

24. Noting that the DSC currently considers “work involving existing distribution assets” as uncontestable work, the Board is proposing to amend the Code by adding a new section 3.2.15A. The Board’s intent appears to be to clarify that the proposed rule applies only to work that actually requires physical contact with the distribution system in the sense that the specific piece of work cannot be done without that contact³. The Board also states that the proposed rule does not preclude the alternative bid option for other associated work that can be done without the need for such contact. Similarly, work that has the potential for incidental physical contact with the existing distribution system is eligible for the alternative bid option.⁴

25. In this regard, the Board proposes that section 3.2.15 (A) read as follows:

Work that requires physical contact with the distributor’s existing distribution system is not subject to alternative bid unless the distributor decides in any given case to allow such work to be subject to alternative bid.

26. The PWU opposes the proposed amendment. In the view of the PWU, if the intended purpose of the proposed amendment is to eliminate uncertainty and confusion between distributors and customers in identifying that work which is subject to alternative bid and that which is not, the proposed amendment will not achieve this result. Rather, its effect will simply be to eliminate one form of confusion and uncertainty and replace it with another.

27. For example, it is entirely unclear what the proposed “physical contact” standard will require. Clearly, any part of work that requires actual physical contact with the distributor’s assets will not be subject to alternative bid and will remain within the exclusive domain of the distributor. However, that begs the question as to how to define the scope of such “work”. If a project of work inevitably requires physical contact with the distributor’s assets does that mean

³ Ontario Energy Board, EB- EB-2010-0038, Proposal to amend the DSC, Page 3-4

⁴ Ibid

that the entire project is not subject to alternative bid? In the alternative, is the proposal that all parts of such a project would be subject to alternative bid *except* the discrete aspects of the project which require direct physical contact?

28. If it is the latter concept that is intended, it would give rise to a variety of perverse and highly inefficient outcomes. It is possible to imagine projects which would involve frequent but intermittent physical contacts with distributor assets, while at the same time having significant elements of the work that do not require physical contact. Surely it is in no one's interest to have two separate teams of workers, working side by side, each standing down while the other performs its discrete tasks, on a single project.

29. Consider the situation where the expansion project in question involves the stringing of new, additional conductor (in order to facilitate a new load or connection customer) on existing poles which are part of the distributor's distribution system. Although the vast majority of the length of the new conductor would span between the distributor's poles (and not be in direct physical contact with them), the entire project is entirely dependent upon the physical connection of the conductor to the poles. How would responsibility of this project be allocated between the distributor and a potential alternative bidder? There is no obvious answer, and the proposed new language of the Code is entirely unhelpful in resolving the issue.

30. The PWU suggests that an entirely different approach to the issue is required. The proper starting point of the analysis is to look at the purpose of having certain categories of work that are not subject to alternative bid. The purpose is obvious: the distributor owns and operates distribution assets as a part of an integrated distribution system. It is responsible for the safe and reliable operation of the system and uninterrupted delivery of electricity to customers. The purpose of excluding categories of work from alternative bid is to

ensure that distributors maintain sufficient control over their assets and systems in order that they can fulfill these obligations.

31. The PWU submits that with this purpose in mind, a different approach to the rules concerning alternative bids is warranted.

32. There are two basic categories of expansion projects. Each gives rise to different issues relating to maintaining the integrity of the distributors' ongoing system integrity and operations. These differences warrant different treatment for the purposes of alternative bids.

33. The first category of expansions is the so called "greenfield" expansions. These projects involve the construction of distribution facilities into areas which were previously unserved by the distributor, and terminating with a connection to the distributor's existing system. Up to the point of connection, such greenfield projects are essentially discrete and separate systems which in no way affect the distributor's current system.

34. For this category of projects, so long as the project is constructed in accordance with the appropriate planning and development of specifications for the design as well as the engineering and layout of expansions, concerns with respect to the maintenance of the integrity of the distributor's existing system do not arise. As a result, such projects should be subject to alternative bid (with the exception of the work pertaining to the final connection of the new assets to the distributor's existing system).

35. The second category of expansions relate to the modification and/or replacement of parts of the distributor's existing system. An example of this type of expansion project is the replacement of an existing series of distribution poles with taller poles that are able to accommodate additional conductor circuits

needed to accommodate the new load or generation customer (together with the distributor's existing customers).

36. This type of project is entirely different from the greenfield expansion in the sense that both the work involved in the construction of the project and the final outcome of the project are inextricably interrelated to the distributor's existing distribution system and assets. Such projects are, for all intents and purposes, modifications of the distributor's existing system.⁵

37. For this category of projects, distributors have a real, legitimate and substantial interest in ensuring that the work is performed in such a manner that there is no interference with the ongoing operation of their existing systems, and that the completed project is in every way consistent with the assets that existed prior to the modification or replacement.

38. As a result, consistent with the objective of protecting the distributors' legitimate interest in ensuring the integrity of their existing distribution systems, it is submitted that expansion projects in the category of modification or replacement of the distributor's exiting assets should not be subject to competitive bid.

39. The PWU recognizes that in some circumstances it is possible that an expansion project may have a discrete aspect that is properly characterized as "greenfield" and another discrete aspect that is properly characterized as a "modification" of the existing system. In such circumstances, if the "greenfield" work is truly a discrete and severable part of the project, then it would be appropriate for that work of the project to be eligible for alternative bid. However, in cases where the "greenfield" work is not truly discrete or is merely ancillary to

⁵ Moreover, it is important to recall that, upon the completion of the project, ownership of the new constructed assets, together with responsibility for their ongoing operation, will be transferred permanently to the distributor.

a modification then none of the work would be subject to alternative bid. The converse would also be true.

40. The PWU submits this proposed distinction is significantly preferable to the “physical contact” distinction contained in the proposed amendment for two important reasons:

- a. It provides a workable distinction which will achieve the intended purpose of providing clear guidance to distributors and other industry participants with respect to the scope of their respective roles; and
- b. It is consistent with and assists in the achievement of the underlying purposes of excluding categories of work from alternative bid, namely, protecting the distributors’ legitimate interest in ensuring the integrity of their existing distribution systems.

41. As a result, the PWU proposes that section 3.2.15 (A) have two parts which specify expansion work that will not be subject to alternative bid unless the distributor decides in any given case to allow such work to be subject to alternative bid:

(i) Expansion projects, or discrete and severable aspects thereof, which constitute a modification and/or replacement of part of the distributor’s existing distribution system.

(ii) The final connection to the distribution system of a new expansion, that was undertaken by a customer or third party under the alternative bid option,

42. Finally, the Board proposes to add a new section 3.2.15B which deals with de-energization of part of the distribution system in order to allow work on the distribution system. The amendment provides that decisions related to the temporary de-energization of any portion of the distributor’s existing distribution system are the sole responsibility of the distributor. Moreover, where the temporary de-energization is required in relation to work that is being done under alternative bid, the distributor shall apply the same protocols and procedures to

the de-energization as it would if the customer had not selected the alternative bid option. The PWU supports this Board proposed amendment.

All of which is respectfully submitted

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