



ONTARIO ENERGY BOARD STAFF ISSUE COMPLIANCE BULLETIN ON RENEWABLE ELECTRICITY GENERATION BY ELECTRICITY DISTRIBUTORS

By James C. Sidlofsky

Introduction:

Section 71 of the *Ontario Energy Board Act, 1998* (the "OEB Act"), sets out various permitted activities for Ontario's licensed electricity transmitters and distributors. With certain limited exceptions, transmitters and distributors are prohibited from carrying on any business activities other than electricity transmission and distribution except through an affiliate. The prohibition had included electricity generation.

Section 71 of the OEB Act was recently amended by the *Green Energy and Green Economy Act, 2009* (the "GEGEA"). The GEGEA added a new subsection 71(3), which permits distributors to own and operate certain renewable generation projects. Subsection 71(3) provides:

Exception

- (3) 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.

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Board Staff Compliance Bulletin on Distributor-Owned Generation: Application of Section 71(3) of the *Ontario Energy Board Act, 1998*

On July 7, 2010, Ontario Energy Board (the “Board”) staff issued a Compliance Bulletin in which they provide guidance in relation to certain issues associated with the application of subsection 71(3) “regarding the ownership and operation of generation and energy storage facilities by electricity distributors.”

The Bulletin reflects Board staff views on various questions that have arisen in respect of subsection 71(3) of the OEB Act. As is typical of Compliance Bulletins, staff confirmed that the Bulletin reflects the views of Board staff and is not binding on the Board. Key elements of the Bulletin are as follows:

- Staff are not limiting their concept of ownership of generation or other facilities addressed in the subsection to 100% ownership by the distributor – staff believe that a controlling interest in a corporation (where the distributor holds voting shares carrying more than 50% of the votes for the election of directors; and where those votes are sufficient to elect a majority of the board of directors, consistent with the concept of control in the *Ontario Business Corporations Act*, referred to here as the “OBCA”) is sufficient to constitute ownership, as is the control of management and key decision-making in a partnership;
- Staff do not believe that distributors should be able to act simply as operators of generation for third parties. A distributor may contract out operations of its facilities to third parties provided that the distributor ultimately remains responsible and accountable to the Board for all applicable legal and regulatory requirements relating to the operation of the facility. However, the distributor cannot simply act as a service provider – staff feel that this would be inconsistent with the “own AND operate” wording of subsection 71(3), and that had the legislature’s intention been that distributors could act as service providers, the wording would have been “own OR operate”;
- Staff do not have a concern with distributors owning multiple facilities – this approach is consistent with the government’s policy of promoting the use and generation of electricity from renewable energy sources;
- Facilities outside a licensed distributor’s service area are acceptable, subject to any applicable generator licensing requirements; and
- Notwithstanding the addition of renewable generation (within the limits set out in the subsection) to the activities that may be carried on by an electricity distributor, Section 80 of the OEB Act continues to apply.

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OEB Act Section 80 Requirements:

Section 80 of the OEB Act provides that no transmitter or distributor or affiliate of a transmitter or distributor shall acquire an interest in a generation facility in Ontario, construct a generation facility in Ontario or purchase shares of a corporation that owns a generation facility in Ontario unless it has first given notice of its proposal to do so to the Board and the Board (a) has not issued a notice of review of the proposal within 60 days of the filing of the notice; or (b) has approved the proposal following a review. If the Board determines that a review is necessary, the OEB Act requires it to approve a proposal described in section 80 if it determines that (a) the impact of the proposal would not adversely affect the development and maintenance of a competitive market; or (b) the proposal is required to maintain the reliability of the transmission or distribution system of the relevant transmitter or distributor.

As noted above, this notice requirement applies not only to distributors themselves, but also to their affiliates (as that term is defined in the OBCA). In the context of a local electricity distribution company, affiliates will typically include (among others) the parent holding company; the municipality that in turn owns the shares of the holding company; and other competitive (generation and/or other services) companies controlled by the holding company and/or municipal shareholder.

The "Preliminary Filing Requirements" for Section 80 and 81 proceedings (Section 81 relates to situations in which generators intend to construct or acquire distribution and/or transmission systems) are available on the Board's web site. The form requires the proponent(s) to identify itself (themselves), other corporate family members, and the nature of the project that is the subject of the notice. Proponents must provide information about the anticipated capacity of the generation project(s) and how that capacity compares to Ontario's overall generation capacity (this relates to the concern for the maintenance of a competitive market). While not in the form at this time, distributors and their affiliates considering development of renewable generation should be prepared to provide information on whether capacity also exists on the distribution system to accommodate other parties' anticipated renewable generation projects. This is again related to concerns about the maintenance of a competitive market. Board Staff indicate in the Compliance Bulletin that revisions to the Section 80/81 Preliminary Filing Requirements are being developed and will be issued in the near future.

For further information please contact **James Sidlofsky** at 416 367-6277 or jsidlofsky@blgcanada.com.

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Group Contacts - Toronto Office

Linda L. Bertoldi

Tel: 416 367-6647

Email: lbertoldi@blgcanada.com

Co-Chair, Energy Markets Law Group

Shane Freitag

Tel: 416 367-6137

Email: sfreitag@blgcanada.com

Adam Chamberlain

Tel: 416 367-6172

Email: achamberlain@blgcanada.com

Stephen J. Fyfe

Tel: 416 367-6650

Email: sfyfe@blgcanada.com

Rick F. Coburn

Tel: 416 367-6038

Email: rcoburn@blgcanada.com

William R. McLean

Tel: 416 367-6021

Email: wmclean@blgcanada.com

Anna Naud

Tel: 416 367-6260

Email: anaud@blgcanada.com

Andrew Smith

Tel: 416 367-6734

Email: ansmith@blgcanada.com

Government Relations Advisor

Stephen Andrews, Ph.D

Tel: 416 367-6219

Email: sandrews@blgcanada.com

J. Mark Rodger

Tel: 416 367-6190

Email: mrodger@blgcanada.com

Co-Chair, Energy Markets Law Group

James C. Sidlofsky

Tel: 416 367-6277

Email: jsidlofsky@blgcanada.com

Bruce Fowler

Tel: 416 367-6194

Email: bfowler@blgcanada.com

W. Paul McCarten

Tel: 416 367-6230

Email: pmccarten@blgcanada.com

Christine E. Long

Tel: 416 367-6683

Email: clong@blgcanada.com

Domenic Damiani

Tel: 416 367-6030

Email: ddamiani@blgcanada.com

Tracy D. Robillard

Tel: 416 367-6041

Email: trobillard@blgcanada.com

John Vellone

Tel: 416 367-6730

Email: jvellone@blgcanada.com

Senior Utility Rate Consultant

Bruce Bacon

Tel: 416 367-6087

Email: bbacon@blgcanada.com

National Leader	Linda L. Bertoldi	lbertoldi@blgcanada.com	416 367-6647
Calgary Leader	Kent D. Howie	khowie@blgcanada.com	403 232-9535
Montreal Leader	Sylvie Bouvette	sbouvette@blgcanada.com	514 954-2507
Ottawa Leader	Vincent DeRose	vderose@blgcanada.com	613 787-3589
Toronto Leader	J. Mark Rodger	mrodger@blgcanada.com	416 367-6190
Vancouver Leader	Sean Muggah	smuggah@blgcanada.com	604 640-4020

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Calgary

1000 Canterra Tower
400 Third Avenue S.W.
Calgary, Alberta, Canada
T2P 4H2
tel: 403 232-9500
fax: 403 266-1395

Montréal

1000 de La Gauchetière
Street West
Suite 900, Montréal,
Québec, Canada H3B 5H4
tel: 514 879-1212
fax: 514 954-1905

Ottawa

World Exchange Plaza
100 Queen St., Suite 1100
Ottawa, Ontario, Canada
K1P 1J9
tel: 613 237-5160
1-800-661-4237
legal fax: 613 230-8842
IP fax: 613 787-3558

Toronto

Scotia Plaza,
40 King Street West
Toronto, Ontario, Canada
M5H 3Y4
tel: 416 367-6000
fax: 416 367-6749

Vancouver

1200 Waterfront Centre
200 Burrard Street,
P.O. Box 48600
Vancouver, British Columbia,
Canada V7X 1T2
tel: 604 687-5744
fax: 604 687-1415

Waterloo Region

Waterloo City Centre
100 Regina Street South,
Suite 220
Waterloo, Ontario,
Canada N2J 4P9
tel: 519 579-5600
fax: 519 579-2725
IP fax: 519 741-9149

www.blgcanada.com