

RE-WIRED:

How the Green Energy Act has changed



If there even ever was a "business-as-usual" scenario for an LDC in the last decade, the Green Energy Act has permanently altered that reality.

Electricity distributors have been faced with a number of challenges during the past decade. The *Green Energy Act* (GEA) provides for several new challenges with the expansion of the distributors' responsibilities to encompass renewable generation, mandatory conservation and demand management (CDM) targets, regional planning and the smart grid. For lawyers advising distributors, GEA has created a number of issues such as:

- Should the distributor own renewable generation assets?
- Can you explain the change of control provisions of the Feed-In Tariff (FIT) contract?
- How does my rate application change?
- There are several generators in my service territory, what are my obligations regarding connection and what agreements need to be drafted and negotiated?
- What are consequences if the CDM target is missed?

Each of these issues can have a different answer depending upon the circumstances. Also, a non-legal issue, but an issue the lawyer must consider, is the changing business environment and stress that such a change can place on the personnel of the distributor.

Distributor as generator/developer

When GEA was first enacted, distributors wanted to determine whether generation should be undertaken within the utility or an affiliate, if at all.

The Ontario Energy Board (OEB) issued guidance to the industry where generation is to be located within the utility. Having determined that the distributor should have an ownership interest in generating assets, it is the acquisition of that interest and the progression to commercial operation that is the current focus of the industry.

Renewable generation is almost exclusively being developed pursuant to the Ontario Power Authority's (OPA) FIT program. Aird & Berlis LLP (A&B) is working with several distributors to help evaluate investment opportunities and to navigate through the FIT contract requirements. Distributors are viewed as a financially stable entity with knowledge of the electricity industry and are therefore desired buyers of renewable generating projects. A&B often helps distributors perform due diligence on targets and to develop an acquisition strategy on generating projects.

In particular, the assignment and change of control provisions have garnered a significant amount of attention as parties work to ensure compliance with the FIT contract while achieving the desired commercial result. Often we are required to stage transactions in phases to comply with the contractual requirements and avoid seeking consent from the OPA. In other instances, we have to develop a structure for transactions to qualify for the Aboriginal or Community Price Adder while recognizing the often limited investment resources of such groups.

In other cases, the distributor is not purchasing the project but is acting

the electricity distribution business



as the developer evaluating opportunities and competing for resources such as real estate or waterpower site release. A&B will help secure the resource through option agreements and then assist with the permitting and contractual arrangements to bring the project to fruition. Often, distributors rely upon lawyers to assist with permitting these projects. Legal advice can be of particular assistance in dealing with obligations created by legislation which the distributor may not be familiar with such as the *Endangered Species Act*.

As the business activities expand to own generating assets the number and complexity of issues that a distributor must consider expands. Lawyers help guide the distributor through the strategic, commercial and regulatory considerations of becoming a generator.

Conservation and demand management

GEA amended the OEB Act, to provide the Minister with the power to issue mandatory CDM targets as a condition in the distribution license. On March 31, 2010 the Minister issued the directive to the Board to, without a hearing, ensure the province's distributors reduce peak demand by 1,330MWs and 6,000 GWhs of consumption over a four-year period commencing January 1, 2011. As such, each and every distributor had its license amended to incorporate a specific CDM target.

Distributors have to determine the CDM programs they will participate in and how they will deliver such programs. Some utilities have opted to

have a third party deliver some or all of the CDM programs.

In these situations the distributor needs to ensure the service provider is capable of delivering the CDM program and, second, that the agreement provides adequate protection for the distributor should the third party be unable to meet the contractual commitments.

We are often called upon to help distributors develop evidence for rate applications including portraying the CDM program in its best light. In such proceedings, load forecasting was historically a contentious issue for distributors and intervenors. The inclusion of mandatory CDM targets only adds to the potential for controversy.

Further, in the background utilities want to ensure that all mandatory targets are met in order to comply with their licenses. No utility wants to be out of compliance with a condition of its license.

Integration and co-ordination

Another issue facing distributors is how to deal with renewable generators when the distribution system is impacted, yet there is no physical connection by the generator to the distribution system. This issue has been of note where wind generators have determined that the municipal road allowance, in which the existing distribution system is currently located, is the optimal location for the proposed gathering system and the transmission line to connect to the high voltage transmission grid.

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These scenarios give rise to a number of issues including: joint use pole agreements, the potential to re-locate infrastructure and stranded assets, arrangements for emergency response, co-ordination of infrastructure, maintenance and allocation of resources. Further, the Distribution System Code and the FIT contract often impose strict timelines where failure to comply can have disastrous consequences such as losing the allocated capacity. Ensuring the agreements properly reflect the obligations of distributors while allowing the generator to comply with its obligations under the FIT Contract requires an understanding of both regimes – and sometimes a little creativity.

These are just a few examples of the issues distributors are facing each day. A decade ago the electricity market opened and distributors were envisioned as wires-only companies. Now, GEA has created the opportunity for small scale vertically integrated utilities where the distributor becomes a generator, transmitter and energy service provider. There are a myriad of opportunities for distributors and our legal advice is intended to provide practical goal-oriented solutions for distributors to achieve their objectives.

Scott Stoll is a partner at Aird & Berlis LLP practising in the areas of energy and environmental law. This article is not intended nor should it be construed as legal advice. ■

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