

Moving FORWARD

With individual suite meters

By Scott Stoll and Andrew Webster

The reasons for a condominium corporation to install individual suite metering using smart meter technology are compelling – overall reduction of electricity costs for the condominium, reduced common expenses, ability to monitor and modify electricity consumption habits and the fact that installation of smart meters will soon be mandatory. In fact, section 53.17 of the Electricity Act, 1998 (S.O. 1998, c.15, Sched. A, the “Electricity Act”) requires condominiums, in the circumstances prescribed by regulation, to install smart meters for individual suites. Draft regulations published for comment requires that individual meters be installed by the end of 2010 but these regulations have not yet been enacted.

The absence of such regulations need not deter or delay a condominium board from pursuing the installation of individual suite meters. In the absence of the regulations, condominium boards

who want to realize the advantages of smart meters sooner rather than later are able to use a combination of section 97 of the Condominium Act, 1998 (S.O. 1998, s. 19, the “Condominium Act”) and an agreement with a meter service provider to move forward now.

SECTION 97 OF THE CONDOMINIUM ACT

Section 97 of the Condominium Act governs changes to the common elements and changes in the services that a condominium corporation provides to its owners. A change from bulk metering to individual suite metering may be considered a change in a service that the condominium corporation provides to its owners. Section 97 provides that a condominium corporation shall not make a change in service without following one of three different procedures. The required procedure depends on the cost to the condominium corporation of the

change in service and/or whether the board elects to treat the change as a "substantial change."

Firstly, pursuant to section 97(2) of the Condominium Act, the condominium board (by resolution and without notice to the owners) may decide to proceed with a change in service if:

- (a) it is necessary to make the change in order to comply with a shared facilities agreement or in order to comply with any existing or new legislative requirements;
- (b) the change is necessary for safety reasons or to prevent damage to the property; or
- (c) the estimated cost of the change is less than \$1,000 or 1 per cent of the corporation's current operating budget (whichever is the greater).

Secondly, pursuant to section 97(3) of the Condominium Act, the corporation may make a change in a service provided:

- (a) the corporation has sent notice to the owners that describes the proposed change, contains a statement of the estimated cost of the change, indicates how the corporation proposes to pay for the change, specifies that the owners have the right to requisition a meeting to discuss and vote on the change and contains a copy of section 46 of the Condominium Act for their reference; and
- (b) the change will be effective if the owners do not requisition a meeting within 30 days after receiving the notice or, if a meeting is requisitioned, the change will be effective provided that a majority of the unit owners (present in person or by proxy at the meeting) vote in favour of the proposed change in service.

Thirdly, pursuant to section 97(4) of the Condominium Act, the corporation may make a "substantial change" in a service which the condominium provides to its owners if the owners of at least 66 2/3 per cent of the dwelling units vote in favour of the change. Section 97(6) defines a "substantial change" as a change that will cost an amount equivalent to greater than 10 per cent of the corporation's current

operating budget or a change that the board elects to treat as "substantial."

Given the logistics of converting to individual suite meters and the need to inform unit owners of new billing procedures and other details, it is reasonable for the board of directors to follow the unit owner approval procedure set out in section 97(3) of the Condominium Act (notice, right to requisition a meeting and majority vote) rather than the board proceeding

unilaterally pursuant to section 97(2). This assumes that the change in service is not considered to be a "substantial change." The problem with the approval procedure set out in section 97(4) of the Condominium Act is that the 66 2/3 per cent affirmative vote of all unit owners prescribed by section 97(4) is a substantially higher threshold than a majority vote of the unit owners attending a meeting called for this purpose (either in person or by proxy) as prescribed by

section 97(3) and may result in the board's good intentions being thwarted by lack of participation by the unit owners in the vote. It is important to note that most metering companies will not charge the condominium corporation for the capital cost of installing meter technology. Consequently, in most cases, the financial threshold prescribed by section 97(6) in the definition of "substantial change" should not be a consideration for the board of directors in determining whether

they should proceed pursuant to section 97(3) or 97(4) of the Condominium Act for unit owner approval.

Clearly, section 97 of the Condominium Act provides the condominium corporation with several procedural options for approving conversion to individual suite metering (assuming that such conversion does not conflict with the condominium's declaration, which subject is discussed below).

CONFLICT WITH THE DECLARATION OF A CONDOMINIUM CORPORATION

Any condominium corporation contemplating a conversion from bulk metering to individual suite metering must also consider whether such change in service will conflict with any provisions of its registered declaration. If the declaration specifies that electricity shall be bulk metered and/or billed as common expenses, then the condominium board must consider either:

- (a) amending the declaration; or
- (b) ignoring this provision of the declaration.

In view of the 80 per cent approval vote required by section 107(2)(e) of the Condominium Act, amending the declaration is not practical. As an alternative, it may be argued that section 53.17(2) and (3) of the Electricity Act obviates the need to amend the declaration. As mentioned above, section 53.17 of the Electricity Act mandates the installation of individual suite metering using smart meter technology and the draft regulations prescribe a conversion deadline of Dec. 31, 2010. If a condominium corporation decides to convert to individual suite metering prior to the date required by legislation and the unit owners of such condominium corporation have voted in favour of converting to individual suite meters, then section 53.17 of the Electricity Act provides clear legislative authority for the condominium corporation to ignore any provision in its declaration that may be inconsistent with this initiative mandated by unit owners.

CONTRACTING WITH A METER SERVICE PROVIDER

Once a board has decided to proceed with suite metering, it is imperative that a proper contract is put in place between the condominium and the meter service provider. The meter service provider may be either the local distribution company or a sub-metering company. Both entities should have a form of agreement as a starting point for negotiations. The contract offerings from local distribution companies and sub-metering companies vary considerably. Some of the more important provi-



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sions which should be considered are discussed below.

OWNERSHIP AND SERVICE OBLIGATIONS

The contract should clearly delineate which party owns the meters because ownership will determine legal responsibilities, rights and obligations. In addition, the contract should provide for the specific maintenance and service levels that must be maintained throughout the life of the contract. It is important to understand the work involved in providing the service (trouble call response, recertification, links to billing, regulatory documentation involved in owning, operating and maintaining meters) and which party is responsible for these matters. The contract should clearly state the service provider's obligations so that the condominium board understands its responsibilities and has proper expectations.

COSTS, PRICING AND RISK OF NON-PAYMENT

Understanding the costs and treatment of accounts has a direct impact on every unit owner as well as the condominium corporation and can vary extensively from company to company. Clarity on such topics as security deposits required from the condominium corporation and/or unit owners, set-up fees and other service charges ensures that the true cost of the service and actual service level is known. The legal obligation for bulk meter payments to the local distribution company, the responsibility for collecting receivables and the risk of delinquent accounts should not be overlooked.

BILLING

Boards should ensure that the contract specifies what information will be included in the bills and how such information will be presented. At a minimum, commodity, distribution costs and service charges should be separated. The contract should also deal with whether each customer is directly billed or whether there is an allocation. Clarity will allow customers to confirm that charges comply with posted rates

and reduce future problems for the condominium board.

COMPLIANCE

Compliance with current and future regulatory requirements is a must. Contractually mandating that the service provider meets all current and future requirements of the Ontario Energy Board, Measurement Canada and all other applicable regulatory requirements will provide the board and

unit owners with the greatest level of protection. It is expected that sub-metering companies will be licensed in the future by the Ontario Energy Board and that compliance with all relevant consumer safeguards will be mandated.

TERMINATION

The contract should clearly specify the duration of the contract and the basis upon which the contract may be terminated by either side, and the ramifications of such a termination. The contract should clearly state what happens to equipment, customer accounts, receivables, removal costs and any other potential charges.

MOVING FORWARD

Individual suite meters ensure that each unit owner/occupant is only responsible to pay for the electricity consumed by his/her unit (plus an allocation of the common area) and, therefore, the days of responsible owner/occupants subsidizing irresponsible energy consumption will be gone forever. Individual meters will permit customers to take advantage of "time of use pricing" which will be implemented in the future. Each customer will be able to decide how and when they consume electricity and how to maximize their opportunities to save money. Boards that are prepared to seize the advantages of smart metering individual units are moving forward now. Proceeding with this change in service is permitted under the Condominium Act and boards do not need to wait for future regulations. By following section 97 of the Condominium Act and negotiating a comprehensive contract with the meter service provider, boards will have complied with their statutory duties and they will have helped to facilitate the implementation of our government's policy of creating a culture of energy conservation in Ontario. **CB**

The authors, Scott Stoll and Andrew Webster, are with the law firm Aird & Berlis. The foregoing is not intended to be, nor should it be construed as legal advice. Proper advice should be sought.