



STAFF REPORT INFORMATION ONLY

Ontario Energy Board Decision on Installation of Smart Sub-Metering Systems in Rental Residential Buildings

Date:	September 29, 2009
To:	City Council
From:	General Manager, Shelter, Support and Housing Administration
Wards:	All
Reference Number:	

SUMMARY

This report responds to the request by Community Development and Recreation Committee at its meeting of September 22, 2009, for the General Manager, Shelter, Support and Housing Administration, to report directly to Council on the recent decision by the Ontario Energy Board (OEB) respecting sub-metering of electricity in rental residential properties. The report provides information on strategies available to landlords and to tenants who currently have had their units sub-metered and, as a result of the OEB decision, are no longer obliged to pay energy costs directly. In addition, this report provides comments on measures which will increase fairness of sub-metering in residential rental properties.

FINANCIAL IMPACT

None.

DECISION HISTORY

At its January 27 and 28, 2009 meeting, Council approved a report titled "Installation of Sub-Meters in Residential Rental Units and Its Impact on Tenant Affordability". The report was not about energy efficiency or actions that may reduce the environmental impacts of private rental housing. It was not a report about whether sub-metering of rental residential properties is an effective means for energy conservation. Rather, the report was concerned with the issue of a fair transfer of responsibility for payment of utility costs from the landlord to the tenant. Among other things, Council recommended that the appropriate provincial ministries:

- move quickly to enact legislation to ensure comprehensive energy efficiency measures are in place prior to electricity being removed from tenant rents, and that rent reductions be calculated in a fair and transparent manner;
- in the interim, take immediate steps to improve protection for tenants, including information for tenants, ensuring fair practices in the transfer of electricity costs from landlords to tenants, and ensuring fair and transparent determinations of rent reductions; and
- review the provincial regulatory and incentive environment for sub-metering in residential rental properties, and move quickly to put in place measures to ensure fair practices and protect tenants, including licensing of sub-meter providers operating in residential rental buildings.

In addition, Council approved up to \$25,000 to support tenant dispute applications, in partnership with Toronto community legal clinic(s), on issues related to sub-metering of residential rental properties.

The recommendations, as approved by Council, are listed in Appendix A
<http://www.toronto.ca/legdocs/mmis/2009/cd/reports/2009-01-12-cd21-cr.pdf>

On March 25, 2009, the Tenant Defence Sub-committee requested that staff provide a briefing to councillors on the sub-metering issue, including information about a recent decision of the Landlord and Tenant Board (LTB) with respect to sub-metering of residential rental properties.

<http://www.toronto.ca/legdocs/2009/agendas/committees/td/td090325/tddd.pdf>

On September 22, 2009, the Community Development and Recreation Committee requested the General Manager, Shelter, Support and Housing Administration report to City Council on September 30, 2009 on: (1) the OEB Order and its impact on tenants; (2) strategies available to tenants who currently have had their units sub-metered and, as a result of the OEB Order, are no longer obliged to pay energy costs directly; and (3) what measures would increase fairness.

<http://www.toronto.ca/legdocs/mmis/2009/cd/decisions/2009-09-22-cd26-dd.htm>.

This report responds to both the request from Tenant Defence Sub-committee and the Community Development and Recreation Committee.

BACKGROUND

Most tenants in Toronto pay rent which includes the provision of electricity service. Some landlords have been “sub-metering” rental units to remove electricity as a service included in the rent, and to have the tenants pay separately for electricity.

The OEB recently issued a Decision and Order (the “Order”) finding that all existing sub-metering arrangements are unenforceable and must be unwound. The OEB Order permits

sub-metering in rental residential buildings provided that certain terms and conditions are met. Existing agreements must be renegotiated under the newly established terms.

The Federation of Rental Housing Providers of Ontario (FRPO) has made a motion to the OEB requesting that it review its decision. As of the date this report was prepared, the OEB has not yet determined whether or not to review its decision.

Tenants may apply to the Landlord and Tenant Board (LTB) under the Residential Tenancies Act where they believe that the rent charged is unfair as a result of sub-metering, and for other concerns. A recent decision by the LTB provides insights into how the LTB may address applications from other tenants, and is consistent with the OEB Order in terms of the need for informed tenant consent and a fair and transparent rent reduction. Information about the decision is contained in this report.

Both landlords and tenants may be confused about the implications of the Order, particularly in light of a pending request for review, and how to work within LTB operations to support implementation of the “unwinding” of agreements ordered by the OEB. This report provides information that may assist landlords and tenants in understanding the decision, and to decide what action they may take. Additional information may be accessed from the Shelter, Support and Housing Administration Division website at <http://www.toronto.ca/housing/about-tenant-landlord.htm>.

ISSUE

Ontario Energy Board Bulletin and Order

The OEB regulates the energy and gas sectors in Toronto. On March 24, 2009, the OEB issued Compliance Bulletin 200901 stating that landlords of residential rental properties are not allowed to install sub-meters (available at: http://www.oeb.gov.on.ca/OEB/Documents/Compliance/Compliance_Bulletin_200901.pdf).

On May 5, the OEB began a review to determine whether to permit sub-metering in residential rental properties. The Council report approved on January 27 and 28, 2009 was submitted to the OEB as the City’s submission to the review.

On August 13, 2009, the OEB issued its Order. The Order is intended to provide interim “regulatory guidance” with terms and conditions to provide reasonable protection for the interests of all affected persons, until such time as the provincial government is able to put in place a comprehensive legislative package. The Order noted that the Minister of Energy and Infrastructure intends to enact regulations to authorize discretionary metering activity by landlords, and that there are provisions respecting smart metering in the *Residential Tenancies Act* which have yet to be implemented.

Key Elements of the OEB Order

1. Current sub-metering arrangements are no longer valid

The OEB found that any smart sub-metering installation in bulk metered rental residential buildings from November 3, 2005 onwards is unauthorized, and any resulting changes to financial arrangements respecting the payment of electricity charges by tenants are unenforceable. Any consent given before the OEB Decision of August 13, 2009 is “ineffective and cannot be relied upon.”

The OEB does not provide details of how existing agreements should be unwound, other than to say that it should be undertaken “within the context of the specific leasehold or rental arrangement existing between the tenant and his or her landlord.” This suggests that tenants and landlords should work together to undo any current arrangements where tenants are paying separately for sub-metered electricity, and that electricity should resume as a service included in the rent.

It is not clear what total rent amount the tenant should now be paying to their landlord (with electricity again included in the rent) and how rebates of past payments to the sub-metering company should be determined. Tenants and landlords who are not able to determine what new financial arrangements should govern the tenancy may wish to apply to the LTB to determine: (a) the rental amounts with electricity included; and (b) what rebate, if any, the landlord owes the tenant for amounts charged by the sub-meter company.

The Order does not apply to tenants who pay directly for their electricity (i.e. have their own account with Toronto Hydro). Tenants renting in condominium buildings where sub-metering is lawful should determine whether the Order applies, as licensing of sub-metering in condominiums was approved previously by the OEB.

2. Sub-metering may be introduced or re-introduced

A landlord wishing to use sub-metering to remove electricity as a service included in the rent must obtain new informed, voluntary and written consents from current tenants (and any prospective tenants). To ensure that it is an informed consent, the landlord must:

- Obtain an energy audit of the property conducted by an independent third party to evaluate the energy efficiency of the building envelope and individual units, as well as to identify which in-suite appliances are certified to meet Energy Star or other standards. They must provide a copy of the complete audit to the tenant, along with information about the energy efficiency of the building and appliances.
- Provide information on the methodology to be used to establish the rent reduction. This includes an explicit description of all elements used in the methodology such as how electricity charges for common areas and non-participating tenants would be accounted for, administration charges, and the individual tenant’s proportional

share of the landlord's overall bulk electricity bill (which must be no greater than what is required by the landlord to recover all reasonable costs).

In addition, the landlord must retain all contractual documents relating to the installation of the smart sub-meters and provide these to the tenants or the OEB upon request (i.e. installation costs, capital costs, and administrative fees for the sub-metering provider).

3. Sub-metering providers have responsibilities

Where the tenant has given informed, voluntary and written consent as per the requirements of the Order, the tenant will then pay separately for electricity. The sub-metering provider is required to comply with the OEB's Smart Sub-Metering Code:

http://www.oeb.gov.on.ca/OEB/Documents/EB-2007-0772/smart_sub_metering_code.pdf.

Key elements of the smart sub-metering code include:

- standards for quality control of data used for billing purposes
- responsibility to respond to consumer metering disputes, and requirements for complaints management
- requirement to document and make public its conditions of service
- standards for security deposits

4. Copies of the OEB Order must be provided to tenants

Smart sub-meter providers must provide any landlord with which they have a sub-metering agreement with a copy of the Order (which includes the Decision and the Order), and the landlord must promptly post copies in a prominent location in each building in which a smart sub-metering system has been installed.

Review of Order

On September 1, 2009, the Fair Rental Policy Organization (FRPO), which represents 800 persons and entities that own, manage, build and finance residential rental properties, submitted a request for a review and stay of the Order. The OEB file number for this review is EB-2009-0329. FRPO's submission was received on September 18, 2009 and is available on the OEB's website:

http://www.rds.oeb.gov.on.ca/webdrawer/webdrawer.dll/webdrawer/search/rec&sm_udf10=eb-2009-0329&sortd1=rs_dateregistered&rows=200

The OEB will first decide whether there are grounds for a review in relation to FRPO's request. If a review is held, all the parties involved in the written hearing would be notified and would have an opportunity to submit comments. The OEB does not have a deadline by which it must decide whether a review will be granted. Community Development and Recreation Committee, at its meeting of September 22, 2009, recommended that staff be authorized to participate in any activities related to a review of

the OEB Order, should a review proceed, to oppose any loss of protection for tenants granted by the Order.

LANDLORD AND TENANT BOARD DECISION ON SUB-METERING

Several tenant applications related to sub-metering are before the LTB. The first LTB decision regarding sub-metering was made on July 2, 2009 respecting a rental property at 10 Walmer Road. While LTB decisions do not set precedent in the same way as court decisions, they do provide insight into how the LTB might address future applications with similar circumstances, and this information may be helpful for landlords and tenants in determining what actions to take with respect to sub-metering of their units/buildings.

In the 10 Walmer Road case, electricity was included in the tenants' rent, however, the landlord installed sub-meters and began to require tenants to pay separately for the electricity service. The landlord had included a clause in some leases suggesting that the terms of the lease may change in the future, and argued that this wording demonstrated that the tenants who had those clauses in their leases had agreed to the removal of electricity service from the rent.

The LTB found that the landlord had substantially interfered with the reasonable enjoyment of the rental units by transferring the electricity payment obligation to the tenants without consent. The LTB further found that the clause in some leases allowing the landlord to transfer responsibility for payment for electricity service to the tenant did not create a binding agreement by the tenants to pay directly for electricity service.

Since issuance of the LTB decision, the landlord has now filed an appeal to Divisional Court. Council has approved up to \$25,000 in funding from the Tenant Defence Fund to support tenant dispute applications, in partnership with community legal clinic(s), which may include assisting Downtown Legal Services with the appeal. Staff will continue to monitor this matter.

STRATEGIES AVAILABLE TO LANDLORDS AND TENANTS

Despite the uncertainty as to how the OEB may proceed and the LTB may rule on any future case, the following information will be helpful to both landlords and tenants:

1. If a rental unit has been sub-metered (also referred to as "smart metered") and the tenant has been paying for electricity, the agreement is now void. This does not apply to sub-metering before November 3, 2005, condominium buildings, or situations where the tenant pays Toronto Hydro directly for electricity.
2. As all existing sub-metering agreements are now void, the agreements must be unwound. Tenants and landlords may negotiate the rental amount that the tenant should pay as a result of the electricity being included in the rent. If the parties can not agree on the rent or terms of the unwinding (including potential rent rebates), either may contact the LTB for information on resolving the dispute.

This may involve making an application to the LTB as was done in the 10 Walmer Road situation.

3. Tenants may wish to view materials posted by the Advocacy Centre for Tenants Ontario on the Cleo Net website, and contact the Landlord and Tenant Board for legal information regarding their rights and obligations in light of the OEB's decision (Cleonet: <http://www.cleonet.ca/resources/1856>; LTB: 416-645-8080, <http://www.ltb.gov.on.ca>). Tenants may also wish to call the City funded Tenant Hotline for information about options (416-921-9494).

The Cleo Net site provides helpful information for tenants on how to work with their landlords on unwinding the sub-metering arrangements for their units, including sample letters. Tenants are encouraged to pay careful attention to how they recover funds so as to avoid potential applications against them for non-payment of rent, and landlords are encouraged to be proactive in calculating and repaying rents that may be owing to tenants as a result of the unwinding.

4. If the tenant's electricity is disconnected or threatened to be disconnected because the tenant stops paying electricity bills from a third party smart sub-metering company, the tenant may want to contact the Ministry of Municipal Affairs and Housing's Investigation and Enforcement Unit (416-585-7214) to file a complaint under the *Residential Tenancies Act* and may also want to contact the OEB to file a complaint.
5. Landlords and tenants may sign new consents to continue or start a sub-metering arrangement. Such consents must comply with the requirements set out in the Order, including providing the tenant with a copy of the energy audit and details about electricity costs and the need for the tenant to give a voluntary, informed consent. Tenants may wish to seek legal assistance and/or wait until more information is available from the province about their plans to address sub-metering of residential rental buildings, to help them make their decision before signing any consent.
6. If the tenant is concerned about sub-metering activities or if the landlord needs guidance about compliance with the *Electricity Act*, contact the OEB's Customer Relations Centre (416-314-2455) or use the on-line submission form at its website (<http://www.oeb.gov.on.ca>).

MEASURES TO INCREASE FAIRNESS

Fairness issues were discussed by many in the consultations undertaken by staff at the request of Council. The results of these consultations are described in the report approved by Council at its January 27 and 28, 2009 meeting, and were reflected in the recommendations approved by Council outlined in Appendix A.

In that report, Council requested the Minister of Municipal Affairs and Housing to quickly enact sections 137 and 138 of the Residential Tenancies Act, which address removal of electricity from the rent, and develop regulations which will ensure that comprehensive and effective energy efficiency measures are in place prior to hydro being removed from the rent. The report also recommends that where sub-metering is permitted by the province, fair and transparent rules should be established and enforced to ensure tenants can make a voluntary and informed decision about the removal of electricity from the rent, including the potential for future increases in electricity and related administration costs. The rent reduction amount must be fairly determined, with straight forward options available to both the landlord and tenant to determine the appropriate reduction when there is a dispute.

Incentive programs are important for residential rental properties because they can reduce rent increases that might otherwise be charged to tenants for capital improvements related to energy efficiency and conservation. Sub-metering companies operating in rental buildings at the request of the landlord should also be regulated by the Province to ensure fair practices and protect tenants. Therefore, Council also requested that the Minister of Energy and Infrastructure review the provincial regulatory and incentive environment as it applies to sub-metering in multi-residential rental properties, and to move quickly to put in place measures to ensure tenants are protected, including licensing of sub-meter providers operating in rental residential buildings.

The report previously approved by Council also recommended that the province should add new programs and enhance existing programs aimed at addressing energy poverty to ensure that low income tenants have help when needed to pay for electricity.

CONTACT

Katherine Chislett, Director, Housing & Homelessness Supports & Initiatives
Shelter, Support and Housing Administration Division
Phone: 416-397-0260 ; Fax: 416-338-1144 ; E-mail: kchisle@toronto.ca

Alexandra Flynn, Policy Development Officer
Shelter, Support and Housing Administration Division
Phone: 416-392-0643 ; Fax: 416-338-1144 ; E-mail: aflynn@toronto.ca

SIGNATURE

Phil Brown
General Manager
Shelter, Support and Housing Administration Division

ATTACHMENT

Appendix A: Installation of Sub-meters in Residential Rental Units and Its Impact on Tenant Affordability

APPENDIX A

Installation of Sub-meters in Residential Rental Units and Its Impact on Tenant Affordability

City Council Decision

City Council on January 27 and 28, 2009, adopted the following:

1. City Council request the Minister of Municipal Affairs and Housing to move quickly to enact sections 137 and 138 of the Residential Tenancies Act, and develop regulations which will ensure that comprehensive and effective energy efficiency measures are in place prior to hydro being removed from the rent, and the rent reductions be calculated in a fair and transparent manner.
2. Until such time as sections 137 and 138 are enacted, City Council request the Minister of Municipal Affairs and Housing to immediately take steps to improve protection for tenants from negative impacts of sub-metering, including:
 - a. implementing interim information and communication programming to support tenants in understanding and enforcing their rights under section 125 of the Residential Tenancies Act;
 - b. legislative interim information and communication programming to support tenants in understanding and enforcing their rights under section 125 of the Residential Tenancies Act;
 - c. regulatory amendments to section 125 to ensure a fair and transparent determination of rent calculations.
3. City Council request the Minister of Energy and Infrastructure to review the provincial regulatory and incentive environment as it applies to sub-metering in multi-residential rental properties, and to move quickly to put in place measures to ensure fair practices and protect tenants, including licensing of sub-meter providers operating in rental residential buildings.
4. City Council request the Chair of the Cabinet Committee on Poverty Reduction to support enhanced funding to programs that help low-income tenants to pay hydro costs when they cannot afford the cost of this vital service, and to take other actions towards reducing energy poverty.
5. City Council delegate authority to the General Manager, Shelter, Support and Housing Administration, to allocate up to \$25,000 from the Tenant Defence Grant Fund to support tenant dispute applications, in partnership with one or more Toronto community legal clinics, on issues related to the removal of hydro as a

service included in the rent, and to report to the Tenant Defence Sub-committee on the results of any cases funded under this recommendation.

6. City Council send a copy of this report to the Ontario Energy Board, the Ontario Power Authority, Ontario's Chief Energy Conservation Officer, the Ministry of Energy and Infrastructure, the Ministry of Municipal Affairs and Housing, the Landlord Tenant Board, and Toronto Hydro to advise of council's concerns about tenant protection and fair rent reductions where hydro is removed as a service included in the rent.
7. City Council request the Province of Ontario to put a hold on the installation of "smart meters" in residential units until such time as the appropriate legislative amendments and/or regulations have been brought into force.
8. City Council forward these recommendations to all municipalities in Ontario with a population of over \$30,000.