

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*,  
S.O. 1998, c.15, Schedule B;

**AND IN THE MATTER OF** an application by Port Colborne  
Hydro Inc. under section 86 of the *Ontario Energy Board Act,  
1998* (the "Act") seeking an order for leave to sell its distribution  
system as an entirety to Canadian Niagara Power Inc. (the  
"Application");

**REPLY SUBMISSION OF PORT COLBORNE HYDRO INC.**

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## A. BACKGROUND

1. Effective April 15, 2001, Canadian Niagara Power Inc. (“CNPI”) and Port Colborne Hydro Inc. (“PCH”) entered into an arrangement whereby CNPI would lease and operate the distribution system of PCH for a period of ten (10) years. Upon expiry of the lease in April of 2012, CNPI has the option to purchase the distribution assets subject to the lease and assume ownership and operation of the existing distribution system in Port Colborne. Both PCH and CNPI continued to be licensed electricity distributors in the city of Port Colborne.
2. PCH filed an application with the Ontario Energy Board (the “Board”) on October 19, 2011, under section 86(1)(a) of the Act, seeking leave to sell its distribution system in its entirety (the “Application”) to CNPI (the “Proposed Transaction”).
3. PCH also indicated as part of its Application that, in the event leave is granted by the Board, PCH would seek the Board’s approval to maintain its electricity distribution licence upon completing the Proposed Transaction.
4. Board staff was the only party to file submissions on the Application (dated February 10, 2012), wherein they stated:

*“Board staff has no issues with the Proposed Transaction, but is concerned with Port Colborne’s secondary request to maintain its licence should the Board grant leave to proceed with the Proposed Transaction.”*

## B. PROPOSED TRANSACTION

5. PCH demonstrated in its Application that the Proposed Transaction satisfies the Board’s “no harm” test for the following reasons:
  - (a) the transfer of the distribution assets will have no adverse operation impacts; and
  - (b) the transfer of the distribution assets will be rate neutral.
6. As stated in their submissions, Board staff has no concerns with PCH’s request for approval of the Proposed Transaction

## C. PCH REQUEST TO MAINTAIN ELECTRICITY DISTRIBUTION LICENCE

7. In respect to Board staff concerns restated in paragraph 4 above, PCH respectfully submits that PCH should be entitled to maintain its distribution licence upon completion of the Proposed Transaction based on the following:
  - (a) As the Ontario electricity regulatory framework continues to evolve, licensed participants, such as distributors, are authorized to engage in a broader range of activities than originally contemplated when the Energy Competition Act was first enacted in 1998. In order to accommodate and facilitate flexibility and to avoid

- the imposition of unnecessary or duplicative regulatory costs and processes, the Board should not impose barriers where there is no evidence of prejudice of any kind to any stakeholder or to the public interest generally;
- (b) In PCH's circumstances there is no legislative prohibition against PCH maintaining its distribution licence; and
  - (c) By maintaining its distribution license, PCH is avoiding the need for duplicative regulatory applications resulting from PCH pursuing future distribution related opportunities. Since PCH already has had a distribution licence for many years it would be needless to require them to make another licence application in the future. Any subsequent transaction, such as transferring street lighting infrastructure into the LDC, may be the subject of a Board application under other OEB requirements (such as MAADs) therefore nothing will be taken away from any subsequent application by the fact that PCH's distribution licence is allowed to continue.

#### **D. CHANGING REGULATORY FRAMEWORK**

8. As stated in PCH's response to the interrogatories of Board staff, filed on January 30, 2012, the group of activities in which licensed electricity distributors may participate has grown to include, in addition to electricity distribution, provision of services that would assist the Government of Ontario in achieving its goals in electricity conservation, services related to the promotion of electricity conservation and the efficient use of electricity; electricity load management; or the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources. Distributors may also now carry on certain generation activities pursuant to subsection 71(3) of the OEB Act. In addition to these legislative changes, the Board has in its decisions determined that certain assets (not traditionally classified as part of the distribution system) may properly be considered to be distribution assets. Based on this expanded scope of distribution activities, PCH will be pursuing new distribution-related opportunities in the future for the benefit of the City of Port Colborne, its taxpayers and ratepayers. PCH seeks to maintain its distribution licence in order to preserve these future opportunities in a manner which avoids duplicative regulatory costs such as applying for a new distribution licence. It is not at all clear to PCH why it would be required to reapply for a licence given its existing licence has been in place now for over a decade.
9. In its submissions, Board staff state that under section 57 of the Act, a licence is required for any person that owns or operates a distribution system. Section 3 of the Act defines a distributor as "*a person who owns or operates a distribution system*", and a distribution system as "*a system for distributing electricity, and includes any structures, equipment or other things used for that purpose*". Board staff go on to state that, if granted leave to proceed with the Proposed Transaction, PCH will no longer be a distributor as defined under the Act and will no longer require a licence from the Board, "*as it would be neither necessary nor appropriate for it to continue to be regulated by the Board.*"

10. PCH respectfully submits that the Board should not apply such a rigid and narrow interpretation to the provisions of the Act as suggested by Board staff given the obvious changes that have occurred within the Ontario distribution sector. Firstly, post-transaction, PCH will continue to exist as a valid Ontario *Business Corporations Act* company. Secondly, the Board has on other occasions granted licences to other entities without requiring that those entities own assets related to the licence – an intention to own and/or operate has been sufficient. Similar to the requirement described in paragraph 9 above in relation to distributors, section 57 also requires any person that owns or operates a transmission system, a *transmitter*, to hold a licence. Section 3 of the Act similarly defines a transmission system as “*a system for transmitting electricity, and includes any structures, equipment or other things used for that purpose*”. As a result, a direct parallel can be drawn to entities seeking transmission licences without owning or operating the transmission assets relating to the licence - an example of which is application for a licence in order to participation in the Board’s designation process for new transmission investment in Ontario under the Board’s policy framework for transmission project development plans (EB-2010-0059) (the “Framework”).
11. In their submissions, Board staff suggest that the Board’s decision to grant transmission licences to entities without requiring them to own and/or operate the assets related to the licence presupposes the applicant being a new entrant under the Framework:  
  
*“The Board’s policy that underlies the designation process (Framework for New Transmission Project Development Plans: EB-2010-0059), requires each new entrant transmitter to obtain a transmission licence from the Board prior to participating in the designation process. For the purposes of the designation process, the licence requirement (entailing a review of the applicant’s past conduct, technical capability, and financial viability) primarily serves as a pre-qualification step.”* [emphasis added]
12. PCH disagrees with Board staff’s presupposition – the designation process is one example of the Board granting a licence to entities not owning the assets relating to the licence. PCH refers the Board to its decision on an application by Lexi Transmission Corporation (“Lexi”) for an electricity transmission licence (EB-2009-0164) (“Lexi Decision”) – a decision which predates the Board’s designation process. At the time of its application, Lexi did not have an “*active transmission business in Ontario*” and its transmission facilities were “*to be determined.*” In its decision, the Board set forth a two prong threshold test for an application of this nature, as follows:
  - (i) whether there is a specific project which underpins the application; or
  - (ii) in the absence of a specific transmission project, whether the applicant is engaged in transmission activity elsewhere and whether it has the necessary technical and financial expertise to undertake transmission activity in Ontario.

Applying this test to PCH’s, although PCH will not immediately have a specific distribution project upon completion of the Proposed Transaction, PCH will be able to

satisfy the second prong of the threshold test. PCH has over ninety years of experience in the distribution business through its predecessor, Port Colborne Hydro-Electric Commission, and since the transfer of the distribution business from the commission to PCH in 2000. Therefore, PCH has in the past, and will continue to demonstrate to the Board that it possesses the technical expertise and financial viability to undertake distribution activity in Ontario.

13. The second prong of the Lexi Decision threshold test, namely, whether an entity was financial viable and technical capable of participating in transmission activities, was in fact applied in the Board's decisions for transmission licences relating to applicants wishing to participate in the Board's designation process. In the context of these decisions, it is the intention of applicants under the Framework to develop, construct, own and operate transmission assets in the province, that is relevant – despite not currently owning any transmission assets in Ontario. Similar to the transmission entrants under the Framework, PCH wishes to maintain its distribution licence, without immediately owning any distribution assets, in order to participate in future distribution activities.
14. Furthermore, PCH would ask that the Board confirm that during the interim period, until PCH engages in these distribution activities, compliance with those sections of the Board's regulatory instruments (such as the Board's Codes, Rules and Guidelines and the Board's Reporting and Record Keeping Requirements) that cannot be complied with by a distribution licence holder without assets in the service area would be inapplicable to PCH. As part of their transmission licence applications under the Framework, applicants have requested that the Board exempt them from certain obligations under the Board's Codes, Rules and Guidelines. These transmission licence applicants were not able to comply with the subject provisions because they do not yet own or operate transmission assets in Ontario. The Board recognized that these entities would not be able to comply with the subject provisions by stating in its Framework that:

*“[t]he Board notes that some of the requirements in the transmission licence may not apply unless a transmitter has assets in Ontario. If a new entrant transmitter feels that there are particular requirements that should not apply to them, it may raise those issues as part of its application process.”*

This approach has been accepted by the Board in its decision on the application for a transmission licence by AltaLink Ontario L.P. (EB-2011-0126), where the Board stated that:

*“As I interpret the quote from the Board policy document and the findings in these decisions, those sections of the Board's regulatory instruments that cannot be complied with by a transmission licence holder without assets in the province are simply inapplicable, and no specific exemption is necessary. If, in addition, a transmission licence applicant seeks to avoid compliance with provisions that are applicable to a transmission licence holder without assets, an exemption request is necessary as part of the licence application.”*

The Board also accepted this approach in its decision on an application by Icon Transmission Inc. for a transmission licence (EB-2010-0403), where the Board recognized that not all obligations under its Codes, Rules and Guidelines are applicable without the applicant owning or operating transmission assets in Ontario.

**E. NO PREJUDICE SHOWN OR EVEN ANTICIPATED**

15. PCH submits no prejudice will result from the Board permitting PCH to maintain its electricity distribution licence upon completing the Proposed Transaction and Board staff have provided no compelling reasons that any prejudice or other harm will result. CNPI is the only other licenced distributor in the PCH service area. CNPI and PCH have maintained an excellent working relationship throughout the period of the lease and the parties fully expect this cooperation to continue into the future. Furthermore, CNPI has expressed no objection or other concern if PCH maintains its distribution licence upon completion of the Proposed Transaction. In this application no public interest groups or other intervenors have intervened to express concern. PCH submits that since neither the general public nor the host distributor take any issue with PCH's proposal, it is unclear why Board staff would be the only participant to "express concerns" with the relief sought.
16. PCH also notes that there is no legislative prohibition against PCH maintaining its license. Pursuant to subsection 70(6) of the Act,

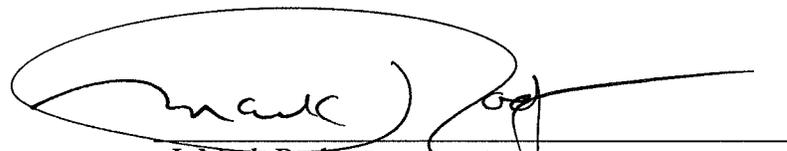
*"Unless it provides otherwise, a licence under this Part shall not hinder or restrict the grant of a licence to another person within the same area and the licensee shall not claim any right of exclusivity."*

This express recognition of non-exclusivity supports PCH's approach to maintaining its distribution licence which Board staff has chose to ignore in its submissions.

**F. CONCLUSIONS**

17. For the reasons cited above and the complete absence of any indication of prejudice or harm to any party, PCH believes that it should be granted leave to proceed with the Proposed Transaction, and should be permitted to maintain its existing distribution licence.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2012.**

  
J. Mark Rodger  
Counsel to Port Colborne Hydro Inc.