EB-2009-0180
EB-2009-0181
EB-2009-0182
EB-2009-0183

FINAL ARGUMENT OF

THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO (ECAO)
and
THE GREATER TORONTO ELECTRICAL CONTRACTORS ASSOCIATION (GTECA)

Introduction

1. In these applications, the Toronto Hydro group of companies is seeking to transfer the street light system serving the City of Toronto from the unregulated affiliate which currently owns and operates that system (THESI), into the regulated utility which owns and operates the regulated distribution system serving the City of Toronto (THESL).

2. The applicants urge a historical perspective. The street light system, they emphasize, was designed, built and operated within the regulated utility for decades before it was separated in the mid-1990s, at the direction of Ontario Hydro. The importance of this historical context, the applicants say, is the fact that the street light system has been engaged to serve non-street light unmetered loads (USL loads), and thus function as a "secondary" distribution system, in circumstances where this was more economic than expanding the primary distribution system to serve such USL loads.

3. ECAO/GTECA accept that the street light system was initially built within the distribution utility, and in some instances functions as a secondary distribution system for a relatively small number of USL loads.

4. However, the street light system was built for a specific purpose; to provide lighting services to the City of Toronto. The use of the street light system in some instances to

provide secondary distribution services is ancillary to its primary function of providing lighting services to the city.

5. Despite the historical context urged, the distinction between the street light system and the primary distribution system - between provision of lighting services and provision of electrical distribution services - was sufficiently clear for Ontario Hydro to direct that street light systems be separated from primary distribution systems.

6. The distinction was also sufficiently clear to be maintained, both as a matter of fact and as a matter of law, when the electricity sector was restructured and the "pure distribution utility" model was enshrined through section 71 of the *Ontario Energy Board Act, 1998* (*OEB Act*).

7. Nothing has changed in the interim. The street light system has been, and remains, distinct from the primary distribution system, and is in fact separately owned and operated.

8. Arguments about the efficiency of inclusion of non-distribution assets within the regulated utility company, whether embedded in regulation or accounted for separately as suggested by Board Staff, are irrelevant. The legislature has made a decision about how to address arguments that marrying non-distribution businesses with distribution business can lead to efficiencies. Section 73 of the *OEB Act* provides that to the extent such efficiencies exist, the non-distribution business can be run through an affiliate, with the attendant ratepayer and competitive protections afforded by this structure and augmented by the Board's affiliate relationships code.

9. The legislative and regulatory policy in this respect is clear, and from the perspectives of ECAO and GTECA, whose members compete for the provision of street lighting services, is a sound basis for proper economic regulation.

Position of ECAO/GTECA.

10. ECAO/GTECA submit that the Board must examine the components of the street light system and consider which of these components are properly characterized as distribution assets and thus required to be owned and operated by a licenced distributor (i.e. THESL). For this purpose, the components of the street light system can be identified as; i) the electrical conductors (the wires) conveying electricity to the street lights and, in some instances, other loads; ii) the poles supporting the street lights; iii) the brackets holding the street lights to the poles; and iv) the street light fixtures themselves (which properly include the bulbs and the wires that connect the street light to the appropriate point of demarcation with the distribution system).

11. ECAO/GTECA submit that

(a) The conductors conveying electricity to the street lights and one or more other loads are properly characterized as distribution assets, and must be transferred by THESI to a licenced distributor.

(b) The street lights themselves - the light fixtures (or luminaires) and the brackets that attach them to the poles which support them - are loads. They are not in any sense distribution assets and cannot be owned and operated by the licenced distributor.

The load assets include the conductor that connects the luminaire to the distribution conductor. ECAO/GTECA submit that the proper point of demarcation between the distribution conductor and the conductor that is part of the streetlight fixture is the point at which the conductor coming out of the street light fixture joins a conductor that services that street light and a separate, additional load. (ECAO/GTECA understand that this demarcation point will generally be at either a hand well or, sometimes, the hand hole in the street light pole itself).

(c) The poles (or standards) that support the street light fixture are not distribution assets, and cannot be owned and operated by the licenced distributor.

Legislative Framework

12. Section 71 of the *OEB Act* dictates that a licenced electricity distributor cannot carry on any business activity other than the distribution of electricity. To the extent that construction, ownership, and operation of the street light system owned by THESI is not electricity distribution, section 71 prohibits the acquisition of that system to THESL.

13. Conversely, section 57 of the *OEB Act* requires any owner or operator of electricity distribution to hold a licence from the Board. To the extent that construction, ownership and operation of the street light system owned by THESI is electricity distribution, then THESI cannot continue to own or operate that system as is. Either THESI requires a licence, or the system must be transferred to a licenced distributor (such as THESL).

14. Determination of which portion or portions of the street light system are distribution assets is key to determination of these applications.[1]

15. "Distribute", with respect to electricity, means to convey electricity at voltages of 50 kilovolts or less.[2] A "distribution system" includes any structure, equipment or other things used to distribute electricity.[3]

16. ECAO/GTECA submit that "distribute" for the purposes of this inquiry is properly read as relating to conveyance of electricity to a consumer, or a user, of the electricity conveyed, other than the entity conveying the electricity. Since electricity is fed to any electricity consuming appliance by a wire, the critical issue is where the appropriate demarcation point is that separates the distribution system from the load in question.

17. For metered load, the demarcation point is easily identifiable as the meter. From the utility's perspective, each load has its own meter, its own demarcation point.

[1] Transcript Volume 1, page 99 line 21 through page 100, line 8.
[2] OEB Act section 56.
[3] OEB Act section 56.

18. Neither streetlights nor the other USL loads in issue in this inquiry are metered. Another appropriate demarcation point separating each such load from the distribution system must be identified.

19. ECAO/GTECA submit that the appropriate demarcation point between the street light load and the distribution system is the point at which the conductor serving the street light serves only the street light. This should generally be at a connection point in the hand well from which the street light is fed, though it might also be at a connection point in the hand hole on the pole supporting the street light fixture.

20. There are other regulatory facts that assist with the determinations required in these applications regarding what portion or portions of the street light system are distribution assets.

21. Ontario Regulation 161/99 provides for definitions and exemptions related to the *OEB Act*. The regulation provides, in part, as follows (emphasis added):[4]

> *5(6) Section 71 of the Act does not apply to a subsidiary of the Services Corporation, that owns or operates a distribution system in Ontario, with respect to the provision of sentinel light services including the maintenance of sentinel lights, for the persons who, on the day this subsection came into force, were customers of a sentinel light program.*
>
> *5(7) Section 71 of the Act does not apply to a subsidiary of the Services Corporation, that owns or operates a distribution system in Ontario, with respect to the provision of municipal street lights services.*
>
> *5(8) Subsection 7 does not apply after September 30, 2002.*

The term "Services Corporation" is defined through section 2(6) of the *Electricity Act, 1998* as Hydro One Inc. Hydro One Networks Inc. is Hydro One Inc.'s subsidiary and the province's largest electricity distributor, and is thus governed by the foregoing provisions of regulation 161/99.

[4] Ontario Regulation 161/99, subsections 5(6), 5(7) and 5(8).

22. These provisions in regulation 161/99 are, on their face, transitional in nature. Hydro One Networks Inc. is entitled to continue to provide sentinel lighting for legacy sentinel lighting customers, and was specifically permitted to provide street lighting services up until June 30, 2002.

23. These provisions indicate the legislative intent behind section 71 of the *OEB Act* that, generally, regulated electricity distributors are prohibited from offering street lighting or sentinel lighting services. If that were not the case, then the specific exemption would not be required.

24. The Board's (then) Chief Compliance Officer (CCO) also considered street lighting not to be a distribution activity, and so indicated in Compliance Bulletin 2006-05 issued in July, 2006.

25. This legislative intent of section 71 was also apparently assumed by the Electricity Distributors Association (EDA). Following the issuance of Compliance Bulletin 2006-05, the EDA lobbied the Ministry of Energy for a regulatory exemption to allow electricity distributors to provide street lighting services.[5] No such exemption was provided.

26. Neither the CCO's Compliance Bulletin nor the failure of the EDA to obtain a regulatory clarification permitting regulated electricity distributors to offer street lighting services is wholly determinative of the proper legal characterization of THESI's the street light system. These facts do, however, reflect the thinking of the Board to date on the issue, that of the EDA, and arguably that of the Ministry of Energy.

27. ECAO/GTECA further submit that, under any interpretation of the scope of "structures or equipment" used for the purpose of distributing electricity, the legally authorized activities of THESL to distribute electricity cannot reasonably be interpreted to include

[5] Transcript Volume 1, page 101 line 25 through page 102 line 9.

the provision of light. Yet this is precisely what THESL intends should these applications be approved.[6]

28. Apart from the obvious conclusion that providing light is not the same thing as conveying electricity, and the obvious conclusion that there is no "natural" or efficient monopoly associated with the provision of light (as opposed to the distribution of electricity), THESL justifies this surprising proposal to offer, on a rate regulated basis, light, with reference to other "services" that THESL provides in addition to simply selling electricity. In response to a question from the Hearing Panel Chair, Mr. Couillard cited two other such "services".

29. The first service that Mr. Couillard cited is the provision of protective coverings for distribution conductors around construction sites. Insulating distribution conductors with protective coverings around construction sites is simply protecting distribution assets, and the public, from harm. The fact that THESL charges those requiring such protection in order to recover the costs for its provision does not render this, in any sense, a service separate and apart from electricity distribution.

30. The second "service" that Mr. Couillard cited in response to the Panel Chair's question is the selling of the distributor's scrap metal. This is not even a service.

31. Other than conservation and demand management services (which are expressly permitted to a distributor under subsection 71(2) of the *OEB Act*) and pole rental services (which have been permitted by the Board, at a Board regulated rate, for some time), there are no services other than the distribution of electricity that THESL provides. That is as it should be, as is legally required by *OEB Act* section 71.

32. THESL, as a licenced electricity distributor, is not legally entitled to be in the business of offering light, and, with respect, this Board has no jurisdiction to set rates for such a service.

[6] Transcript Volume 1, page 123 line 12 through line 16.

33. The City of Toronto, in its final submissions in this matter[7], has indicated the City's view that it, and not THESL, is statutorily responsible for lighting Toronto's streets.

The Assets in Issue

34. Diagrams provided by the applicants as part of Exhibit K1.2 illustrate the configuration of the street light system, and the USL loads that are attached to the primary distribution system through the street light system. Review of these diagrams, and consideration of the testimony provided by the applicants' witnesses in respect of these diagrams, has been helpful in considering which parts of the street light system thereby illustrated are properly characterized as distribution assets.

Electrical conductor.

35. The electrical conductor that connects street lights and other unmetered scattered loads convey electricity to consumers. In testimony the applicants' witnesses indicated that while diagrammed in this instance as being underground, these circuits might be overhead as well. These conductors are properly characterized as distribution assets.

Luminaires (including bulbs and brackets).

36. In no circumstances are the luminaires (including the street light bulbs) involved in the distribution of electricity. These components of the street light system are not structures or equipment used in the distribution of electricity. Electricity distributors cannot be engaged in the business of owning and operating street lighting fixtures.

37. In respect of the bracket that holds the luminaire, there is only one circumstance posited by the applicants' witnesses in which the bracket is potentially involved in the distribution of electricity.

[7] November 27th Letter from Ian Blue as Counsel to City of Toronto.

38. Diagram 6 of Ex. K1.2 illustrates an underground electrical circuit break and the necessity of temporary installation of a distribution line strung across a series of street light poles to reach and distribute electricity to an unmetered load (in the case of this diagram a traffic signal). The diagram schematically indicates that the temporary distribution line is connected to the first in the line of street light poles at the point where the bracket meets the pole. This would exclude the bracket from any possible engagement in the distribution of electricity to the traffic signal.

39. However, Mr. Cook testified[8] that such connections, when required, are often made at the point where the bracket connects to the luminaire. In respect of this scenario, ECAO/GTECA submit that:

(a) It would only be in a situation where there are no proximal distribution assets and an USL load is located at the end of a line of street lights that such a scenario would even arise[9], which itself should be rare.[10]

(b) Mr. Cook also testified that such connections can be made at the hand hole in the pole or the heel plate where the bracket joins the pole.[11] Walking or driving around Toronto one can readily observe street light poles with conductors; i) emanating from the ground or from a hand hole on the pole and running up the side (generally enclosed in a plastic raceway, presumably for safety and protection of the conductor and/or connectors from the elements); or (ii) emanating from the top of the pole near where the bracket supporting the street light bolts on to the pole. It appears from the evidence that it would be a rare occasion when there would be no cost effective way to provide temporary distribution services other than through connection of the temporary distribution conductor at the light fixture end of the bracket.

(c) In emergency circumstances a joint use agreement is effectively in place between THESL and THESI to allow for temporary distribution service.[12] Such eventualities are also expressly provided for in Toronto Hydro's *Conditions of Service*, which provide that Toronto Hydro has the right to have supply facilities on private property to maintain the reliability, integrity and efficiency of the distribution system.[13]

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[8] Transcript Volume 1, page 122, lines 5 through 17.
[9] Transcript Volume 1, page 46, lines 1 to 3.
[10] Transcript Volume 1, page 49 line 15 through page 50 line 14.
[11] Transcript Volume 1, page 46 lines 22 through 25 and page 47 lines 19 to 22.
[12] Transcript Volume 1, page 133 line 6 through page 134 line 10.
[13] Toronto Hydro Electric System *Conditions of Service, Revision #8,* section 2.1.6 at page 30 first paragraph.

(d) Going forward, the ability to connect temporary service at the pole, rather than at the luminaire, can be planned for.[14]

40. ECAO/GTECA submit that there is insufficient evidence for the Board to conclude that the brackets that hold the luminaires are, "in pith and substance", structures used in the conveyance of electricity to load. This is so even if the conductor running inside the bracket to the luminaire could, on a temporary basis, be engaged to function as a distribution conduit in an emergency situation.

41. An entire system of non-distribution assets should not be (improperly) recharacterized based on what is likely to be a rare scenario. Rather, ECAO/GTECA submit, the brackets are properly characterized as part and parcel of the street light fixture, which is not a distribution asset.

Poles.

42. Poles that support only a street light fixture, are in no way connected with other electricity loads, and house only a conductor that feeds only the street light at the top of the pole, are not distribution assets. THESL is not legislatively authorized to own these structures.

43. The testimony of the applicants' witnesses indicates that there are instances when wires that run through street lighting poles connect both the street light fixture supported by that pole and other loads physically proximal to (and in some instances physically connected to) that pole. Where a conductor serves more than one load, it is properly characterized as a distribution asset.

44. USL loads should generally be connectable at LDC chambers or hand wells.[15] To the extent that, on a legacy basis, USL load can only be connected at a hand hole in a pole, then it would be appropriate to characterize the conductor running from the hand well to the hand hole as a distribution asset as well. This functional characterization should not,

[14] Transcript Volume 1, page 129 lines 6 through 8.
[15] Transcript Volume 1, page 13, lines 26 and 27 and page 15, lines 7 and 8.

however, change the characterization of the pole itself, which may be used as required by THESL (and at lower cost) under an appropriate joint use agreement with the owner of the pole (THESI). The applicants' witnesses confirmed that there are many joint use instances now where the distributor uses poles belonging to other entities.[16]

45. Support of a distribution conductor in or on a street light pole does not *per se* render the pole a distribution asset, any more than attaching distribution equipment to a house or a pole owned by a third party (a cable or phone company) renders the house or third party pole a distribution asset.

Other Arguments Made by the Applicants.

Efficiencies.

46. ECAO/GTECA submit that the *OEB Act* legally determines what constitutes distribution assets. Assertions regarding potential efficiencies from distributor ownership of more assets than are properly characterized as distribution assets are, with respect, irrelevant to the Board's determinations on this application.

47. The legislature has determined how such efficiency assertions are properly addressed. *OEB Act* section 73 permits affiliates of municipally owned distribution companies to engage in business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor. There is evidence of service agreement managed efficiencies that THESL and THESI are already engaged in, and could readily expand.[17]

[16] Transcript Volume 1, page 58 line 27 to page 59, line 17.
[17] Transcript Volume 1, page 81 line 15 through page 82, line 11 and page 88 line 6 through line 25 and page 96 line 4 through page 98 line 6; Section F/T21/S7 and Transcript Volume 1 page 115 line 26 through page 116 line 7; Transcript Volume 2, page 3 line 18 through page 4 line 15.

48. In any event, the evidence reveals that for all of the efficiency justifications cited by the applicants there would be no financial benefit to THESL ratepayers from the proposed transactions.[18]

Safety.

49. The testimony of the applicants' witnesses confirms that the real safety issue presented by the City of Toronto's electrical infrastructure is the lack of physical or record keeping clarity regarding which wires run where. This situation requires rectification regardless of who owns the street light system, and is being pursued independently of these applications.[19]

50. There was much discussion during the oral portion of this proceeding regarding uncertainty of Electrical Safety Authority (ESA) inspectors as to where the distribution system ends and where the street light system begins. The practical consequence of such determination is that the electrical safety of the distribution system is self-governed by the regulated distributor under *Electrical Safety Act* regulation 22/04, whereas non-distributor owned electrical infrastructure is governed by the *Electrical Safety Code* enforced by ESA inspectors.[20]

51. The evidence on this point reveals that:

(a) This is a regulatory demarcation issue, and not a safety issue.[21]

(b) In the end, THESL personnel address these issues with ESA inspectors as they arise in the field.[22]

(c) To the extent that utility safety standards differ in some detail from code safety standards (which has become an issue as a result of the contact voltage matter), THESL personnel are engaged with ESA officials to harmonize standards.[23]

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[18] Transcript Volume 1, page 105 line 15 through page 109 line 25.
[19] Transcript Volume 1, page 74 line 18 through page 75, line 14.
[20] Transcript page 41, line 7 through page 42 line 9.
[21] Transcript Volume 1, page 21, lines 20 through page 22, line 6. [Cf. Transcript Volume 1, page 23 line 27 through page 24 line 8, though it is submitted that this evidence is inconclusive and contradicts the evidence of those witnesses more directly knowledgeable about the issue.]
[22] Transcript Volume 1, page 21, lines 24 through 28.

(d) The initiative to clean-up THESL records, which is proceeding independent of, and regardless of, the outcome of these applications, will ultimately resolve any remaining issues of this sort. [24]

52. It is submitted that the basic issue regarding ESA jurisdiction is the need for proper definition and identification of the demarcation point between the distribution system and the street light system.[25] While folding the entire street light system into the distribution system would solve this issue, that is not legislatively permitted (and in any event would be a "solution" wholly disproportionate to the concern). The Board can best assist in resolution of the ESA jurisdictional matter by determining in this proceeding a clear set of principles for demarcation of the distribution system from the street light system.

Legislative exceptions to section 71 - "green energy".

53. There are limited legislative exceptions to the rule that electricity distributors are restricted to the business of conveying electricity at voltages of 50 kilovolts or less to consumers. These exceptions are[26]:

(a) The promotion of electricity conservation and the efficient use of electricity.

(b) Electricity load management.

(c) The promotion of cleaner energy sources, including alternative energy sources and renewable energy sources.

54. In argument counsel for the Applicants seems to suggest that street lighting may be subject to future efficiencies, including through "smart grid" type technology (which the Board is mandated to facilitate the implementation of pursuant to a new objective found in subsection 1(4) of the *OEB Act*). As a result, it is asserted, ownership and operation of the street light system should be considered as falling within the exceptions to the restrictions on business activities that electricity distributors may engage in.

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[23] Transcript Volume 1, page 18, lines 8 through 14 and page 44, lines 9 through 11.
[24] Transcript Volume 1, page 74 line 18 through page 75, line 14.
[25] Transcript Volume 1, page 11, lines 8 through 10.
[26] *OEB Act* section 71(2).

55. Pursuing this reasoning to its logical conclusion, THESL would be entitled to seek to own any electrical device capable of more efficient operation. Dining room chandeliers would become part of the Ontario distribution system.

56. Obviously this result would be absurd. Simply because a fixture or appliance can be operated more efficiently, does not mean that ownership and operation of such appliance is a proper or permitted business activity for Ontario's electricity distributors.

57. Ontario's electricity consumers, not Ontario's electricity distributors, own Ontario's electricity powered appliances. This is as true for street lights as for dining room chandeliers.

58. Instructively, the evidence on this point is that THESI, the unregulated affiliate, is the entity engaging in pilot programs regarding efficient, "smart" street lighting. Leaving aside the issue of whether smart street lights are necessarily part of a "smart grid" as the latter term is used in the *OEB Act*, the record is clear that street lighting need not be moved into the regulated distributor in order to promote energy efficiency in the street light system.[27]

59. ECAO/GTECA also note section 72 of the *OEB Act*, which requires that to the extent a distributor does engage in activities falling within the legislative exceptions to the general restriction of a distributor to distribution activities, separate books and records for non-distribution activities must be retained. This provision indicates the legislative intent that such non-distribution activities not be folded into distribution cost of service as the applicants have proposed for the street light system. This model has recently been endorsed by the Board through its G-2009-0300 *Guidelines: Regulatory and Accounting Treatments for Distributor-Owned Generation Facilities.*

[27] See generally Transcript Volume 2, pages 96 through 101.

Uniqueness of the Toronto street light system.

60. Despite bald assertions in the prefiled evidence[28] and an interrogatory response to Board Staff[29] that the instant applications have no bearing on other regions of the province, the determination of this application could well have broad repercussions. If the Board determines that the THESI owned street light system functions as a distribution system, then wherever USL load is connected through what are currently considered street light conductors the current owners of the street light system will legally have to respond by selling at least parts of their street light systems to regulated distributors, or themselves applying to become licenced distributors.

61. The evidence posits the uniqueness of the City of Toronto street light system as a result of the fact that the system is owned and operated by a corporate affiliate of the regulated distributor, as opposed to a municipality. Such distinction makes no difference to the legislative requirement that distribution assets must be owned and operated by licenced distributors.

62. The high probability that the Board's determination in this proceeding will effect other street lighting arrangements in the province commends careful consideration and articulation of the principles under which the Board ultimately determines how this application is properly disposed of.

Proper disposition.

63. ECAO/GTECA respectfully submit that the Board:

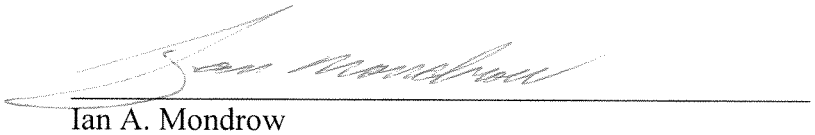
(a) Should find that certain of the conductors currently owned and operated by THESI, which serve the street lights and one or more other, independently owned loads are distribution assets and should be transferred to THESL.

(b) Must find that the luminaires (including bulbs and brackets) are loads, rather than *"structures, equipment or other things used to convey electricity"*, and cannot be owned or operated by THESL.

[28] Applications Tab 1, Cover Letter, Page 2.
[29] Section F/T18/S0.

(c) Should find that the street lighting poles owned by THESI are not properly characterized as structures used to convey electricity and should not be owned or operated by THESL.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:
Macleod Dixon LLP, per:



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November 30, 2009.

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