

**Submissions of Board Staff on
Hydro One Networks Inc. Motion to Review the Board's Decision and Order
in the
Combined Proceeding on Connection Procedures under the Transmission
System Code (Proceeding EB-2006-0189/EB-2006-0200)**

Board File No.: EB-2007-0797

1. Introduction

The following are the submissions of Board staff made in response to the issues raised in the Board's October 26, 2007 Notice of Hearing and Procedural Order No. 1 in relation to the Motion by Hydro One Networks Inc. ("Hydro One") to review sections 3.3 and 3.5 of the Board's September 6, 2007 Decision and Order (the "Motion to Review") in the combined proceeding relating to the customer connection procedures filed with the Board by Hydro One and Great Lakes Power Limited ("Great Lakes") under section 6.1.5 of the Transmission System Code (the "Code") (the "Connection Procedures Decision").

The Notice of Hearing and Procedural Order No.1 raised four preliminary issues.

Board staff takes no position on the preliminary issue of the delay in filing of Hydro One's Notice of Motion.

Board staff does not oppose Hydro One's request for an order extending the deadline by which it must file new connection procedures concerning matters affected by sections 3.3 and 3.5 of the Connection Procedures Decision.

However, for the reasons set out below in relation to the issue of Hydro One's request for a stay of sections 3.3 and 3.5 of the Connection Procedures Decision, Board staff submits that Hydro One should not act on the basis of the connection procedures as currently drafted.

The remainder of these submissions address the preliminary issues of the threshold for review and Hydro One's request for a stay.

2. The Threshold Issue

a. Introduction

The Motion to Review relates to two sections of the Connection Procedures Decision. The first, section 3.3, deals with the issue of contestability and more specifically with the issue of whether a transmitter is prohibited by section 71 of the *Ontario Energy Board Act, 1998* (the “Act”) from acting as a contractor in relation to customer-owned facilities (the “Section 71 Issue”). The second, section 3.5, deals with provisions of the Code that address transmission plans and cost responsibility for connection facilities (the “Code Issue”).

Board staff submits that, for the reasons set out below, the threshold for review has not been met on either the Section 71 Issue or the Code Issue. Hydro One has not demonstrated that:

- the Connection Procedures Decision is incorrect;
- an identifiable, material or relevant error was made, or that the findings of the Board were contrary to the evidence that was before it, the Board failed to address a material issue, the Board made inconsistent findings, or another error of a similar nature was made by the Board; or
- there are facts that could not have been discovered by reasonable diligence at the time.

b. The Section 71 Issue

Board staff’s understanding of the scope of the Connection Procedures Decision in relation to the Section 71 Issue differs from that of Hydro One.

Hydro One's Notice of Motion and its November 1, 2007 written submissions refer to a variety of services related to customer-owned facilities (such as metering, maintenance and repair and protection and control). Board staff submits, however, that section 3.3 of the Connection Procedures Decision stands only for the proposition that section 71 of the Act prohibits a transmitter from constructing, or acting as contractor in relation to the construction of, customer-owned connection facilities in circumstances where the customer has elected not to require the transmitter to construct and own the connection facilities. In other words, once a customer has decided to treat the connection construction as contestable work, the transmitter cannot thereafter participate in the bidding process for that work except through an affiliate.

On this specific question of whether section 71 of the Act prohibits a transmitter from constructing, or acting as contractor in relation to the construction of, customer-owned connection facilities, Hydro One had ample and fair opportunity to make its case during the combined proceeding. This issue was the subject of interrogatories, of submissions and of reply by Hydro One. Hydro One did not, at the time, assert that it was unable to make its case.

Were the Board to accept Hydro One's assertion that there are facts that could not have been discovered by reasonable diligence at the time, Board staff submits that the facts now sought to be brought forward by Hydro One are not material or relevant to the outcome of Connection Procedures Decision on the issue of the implications of section 71 of the Act in relation to the construction of customer-owned facilities. The additional facts identified in the Notice of Motion and in Hydro One's written submissions are not such as could result in the Board deciding that a transmitter is not prohibited by section 71 of the Act from constructing, or acting as a contractor in relation to the construction of, customer-owned connection facilities.

As noted earlier, Hydro One's Notice of Motion and its written submissions refer to a variety of services related to customer-owned facilities (such as metering, maintenance and repair and protection and control).

Board staff understands that the issue of the scope and implications of section 71 of the Act in relation to those other services is an important one for Hydro One and some of its customers. Board staff also understands that concerns have been expressed with respect to, among other things, the safe operation of nuclear facilities. Board staff is not dismissive of those concerns. These other services were not, however, in Board staff's view at issue in the combined proceeding nor are they the subject of the Connection Procedures Decision. Board staff therefore submits that this review proceeding should not become a forum in which to determine the status of those services for the first time and essentially from the ground up. That, in Board staff's submission, would not be in the nature of a review, but rather in the nature of a new proceeding on fresh issues.

To the extent that there is uncertainty regarding the scope of the Connection Procedures Decision in relation to section 71 of the Act, Board staff would be supportive of the Board using this proceeding as an opportunity to provide additional clarity.

c. The Code Issue

The Code Issue relates to the interpretation of the Code, and more specifically to section 6.3.6 of the Code, to the nature of the transmission plans referred to in that section, and to the implications for cost responsibility.

Hydro One's interpretation is that a capital contribution is not required for the construction or reinforcement of connection facilities which Hydro One characterizes as being for "Local Area Supply" or "LAS", except for advancement

costs. An LAS connection facility is defined by Hydro One as a radial line (or line connection facility) that serves more than a single customer. Board staff understands this to include a transmission facility that is radially connected (such as a 230kV:115kV autotransformer). It follows that any plan regarding a connection facility that is required to meet the needs of more than one customer would, under Hydro One's approach, be a transmission plan within the meaning of section 6.3.6 of the Code, and a capital contribution would therefore not be required.

The Code as currently drafted was the result of significant consultations, and the issue of cost responsibility was one that was the subject of considerable attention throughout. The Board decided as a matter of policy that cost responsibility for customer-driven connection facilities should rest with the customer, and that this should also be the case where the facilities are triggered by the needs of more than one customer. That policy was then embodied in the Code in a direct and express manner.

Section 6.3.6 of the Code provides an exception to the general rule that cost responsibility for customer-driven connection facilities rests with the customer(s) in question. The exception arises when a connection facility was otherwise planned by a transmitter.

Board staff submits that there is no error in the Board's findings. Parties were invited by the Board's June 7, 2007 Procedural Order No. 3 to make submissions on the Code Issue, and a number did so. Many supported Hydro One's approach, others expressed a different view. These were all considered by the Board in making the Connection Procedures Decision. In Board staff's view, the Board did not err in concluding that cost responsibility does not shift simply because more than one customer triggers the need for a new or modified connection facility. That conclusion is entirely consistent with the Code.

Section 6.3.6 of the Code does not expressly identify what might constitute a “plan” for purposes of that section. The Connection Procedures Decision sets out some parameters in that regard. Board staff does not agree with Hydro One that those parameters have no basis in the Code. The parameters elaborate on, and give meaning to, the reference to plans “to meet load growth and maintain the reliability and integrity of” a transmission system that is set out in section 6.3.6 of the Code. They do so in a manner that allows section 6.3.6 to have meaning while remaining entirely consistent with the cost responsibility principles underlying and embodied in the Code.

Hydro One’s Notice of Motion raises, as a ground for review in relation to the Code Issue, that the Connection Procedures Decision is “contrary to regulatory principles”. Board staff is aware that the grounds set out in Rule 44.01 of the *Rules of Practice and Procedure* may not be exhaustive of the grounds for review. However, Board staff submits that the Board should not recognize the concept of “contrary to regulatory principles” as a ground for review, at least without additional information as to what that ground might mean.

Board staff acknowledges the concerns expressed by a number of parties during the combined proceeding regarding the implications of not accepting Hydro One’s LAS approach to cost responsibility. These concerns raise fundamental issues of policy regarding cost responsibility for connection facilities. The Board may well determine that its policy approach to cost responsibility merits a fresh look. Board staff submits that it is not within the ability of the Board, in a review proceeding, to amend the Code. This review proceeding is therefore not, in Board staff’s view, the appropriate forum in which to debate and determine those policy issues.

3. The Request for a Stay

In the event that the Board were to conclude that a review is warranted in relation to either or both the Section 71 Issue or the Code Issue, Board staff offers the following submissions on Hydro One's request that the Board stay the operation of sections 3.3 and 3.5 of the Connection Procedures Decision.

Both of the sections of the Connection Procedures Decision at issue deal fundamentally with questions of interpretation; one in relation to the Act and the other in relation to the Code. Board staff submits that it is unclear what the practical consequence or effect of a stay would be in the circumstances, absent an understanding of the status quo that the stay is intended to preserve.

With respect to the Section 71 Issue, the Connection Procedures Decision is neither the first nor the only source of the meaning to be given to section 71 of the Act in relation to the construction of customer-owned connection facilities. Compliance Bulletin 200605 issued on July 10, 2006 identifies a number of activities that are not permitted to be undertaken by a distributor under section 71 of the Act, including "the provision of engineering and construction services, where such services are provided outside the scope of a distributor's obligations (for example, in relation to privately-owned electrical infrastructure)". To Board staff's knowledge, transmitters and distributors have generally been conducting themselves in accordance with that portion of the Compliance Bulletin. Great Lakes did not take issue with the approach in the combined proceeding. Board staff therefore submits that the status quo in relation to the impact of section 71 of the Act on the construction of customer-owned facilities is as set out in section 3.3 of the Connection Procedures Decision. Board staff believes that maintaining this status quo pending determination of Hydro One's Motion to Review is the appropriate outcome.

Similarly, in the case of the Code Issue, the principles associated with cost responsibility that underlie and are expressly embodied in the Code have been well documented for some time. In Board staff's view, cost responsibility as expressed in the Connection Procedures Decision represents the status quo based on the Code. Board staff also believes that maintaining this status quo pending determination of Hydro One's Motion to Review is the appropriate outcome.

In terms of the criteria for a stay, Board staff submits that Hydro One has not met that portion of the test that relates to the merits of the Motion to Review. This follows from Board staff's submission that the Motion to Review does not meet the threshold for review.

Board staff also submits that Hydro One has not met those portions of the test relating to irreparable harm or to the balance of convenience.

Hydro One has not provided specific information on the irreparable harm that would be suffered if Hydro One is not permitted to construct customer-owned connection facilities pending determination of its Motion to Review. As noted above, the record of the combined proceeding reveals that there are third parties that are capable of performing such construction work. In Board staff's view, any argument for irreparable harm could weigh equally in favour of those third parties. Moreover, customers would not appear to be at a loss in terms of parties available to construct their connection facilities should that need arise pending determination of the Motion to Review.

On balance, Board staff does not believe that it would be in the public interest for Hydro One to cease any construction work that it has already commenced. However, even then the issue is better addressed as a matter of discretion in relation to compliance than it is by means of a stay. However, Board staff does not believe that the balance of convenience or the public interest favours Hydro

One being permitted to embark upon new customer-owned connection facility construction projects pending the determination of its Motion to Review.

With respect to the Code Issue, Hydro One has provided, as an attachment to its written submissions, a list of projects that will be the subject of applications under section 92 of the Act. Hydro One has not identified how many of these projects would be affected by section 3.5 of the Connection Procedures Decision, in the sense that a capital contribution would be required based on that Decision whereas it would not based on Hydro One's "Local Area Supply" interpretation of the Code. Hydro One has also not identified the status of such projects in terms of advancement, nor for how many the capital contribution question is imminently pending and urgent. In the absence of such information, Board staff submits that the Board does not have a basis on which to conclude that any person will suffer irreparable harm pending the determination of Hydro One's Motion to Review.

Board staff believes that, on the Code Issue, the balance of convenience and the public interest also weigh against the granting of a stay. Hydro One should perform an economic evaluation and, where applicable, calculate and collect a capital contribution from customers where that would be required based on the Connection Procedures Decision. Were the Board to decide to review the Connection Procedures Decision and determine that another interpretation of the Code should prevail that would affect the outcome, the capital contribution could be refunded to the customer, with interest.

All of which is respectfully submitted this 7th day of November, 2007.