

November 7, 2007

**BY E-MAIL AND COURIER**

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, 27th Floor  
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

**Re: Submissions with respect to preliminary matters regarding Hydro One Network Inc.'s motion to review  
Board file no. EB-2007-0797**

We are counsel to the Electrical Contractors Association of Ontario ("ECAO") in respect of the above matter. Please find enclosed a copy of the summary of submissions with respect to preliminary matters regarding Hydro One Network Inc.'s motion to review.

An electronic copy has been sent via e-filing.

Yours truly,

**MACLEOD DIXON LLP**



Robert Frank

RIF/bk  
Encl.

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

**AND IN THE MATTER OF** the Application of Hydro One Networks Inc. for the review and approval of connection procedures;

**AND IN THE MATTER OF** the Application of Great Lakes Power Limited for the review and approval of connection procedures;

**AND IN THE MATTER OF** Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

## **ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO ("ECAO")**

### **SUMMARY OF SUBMISSIONS WITH RESPECT TO PRELIMINARY MATTERS REGARDING HYDRO ONE NETWORKS INC.'S MOTION TO REVIEW**

November 7, 2007

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## **Background to the ECAO**

1. The Electrical Contractors Association of Ontario (“**ECAO**”) is a not-for-profit corporation established to represent electrical contractors across Ontario.
2. ECAO is committed to addressing the needs of the industry by providing a variety of services directly to the membership, and by making representations on behalf of the industry to government and regulatory bodies.
3. ECAO’s eight hundred and fifty (850) member contractors provide services in the institutional, commercial, industrial, residential and electrical utility construction and maintenance marketplace. ECAO’s members are active in efficiently and effectively providing a broad range of electrical services including: the planning, siting, construction and maintenance of power lines, poles and transformers; the construction and maintenance of substations; the construction and maintenance of power generation equipment and facilities (powerhouses and all related inside and interconnection wiring); and the construction and maintenance of interconnection facilities.
4. As such, ECAO members have a direct and significant interest in the electrical construction and maintenance businesses housed within, or affiliated with, regulated electrical transmission and distribution utilities, and the appropriate regulation of such utilities vis-à-vis such competitive businesses. ECAO members also have a direct interest in the regulation of standards in respect of electrical transmission, distribution and related interconnection facilities.
5. ECAO is generally concerned with ensuring that the Ontario Government’s commitment to an efficient hybrid electricity market is upheld and implemented. Specifically, ECAO is concerned with the negative impact on the electricity marketplace resulting from utility/utility affiliate corporate expenditures and revenues associated with contestable business operations and related grid connection issues.

## **I. Deadline for Filing Notice of Motion Should Not be Waived**

6. While section 7.01 of the Rules of Practice and Procedure of the Ontario Energy Board (the “**Board**”) provides that the Board may extend a time limit on such conditions as the Board considers appropriate, Section 7.03 of the Board’s Rules of Practice and Procedure provide that “where a party cannot meet a time limit directed by the Rules, Practice Directions or the Board, the party shall notify the Board Secretary as soon as possible before the time limit has expired.”
7. ECAO submits that Hydro One Networks Inc. (“**Hydro One**”) could and should have notified the Board Secretary of its inability to meet the time limit for filing its notice of motion for a review of section 3.3 of the Board’s September 6, 2007 decision and order with respect to Hydro One’s connection procedures (the “**Connection Procedures Decision**”). Hydro One’s failure to have done so weighs against granting an extension of time.
8. Therefore, ECAO submits that the Board should not extend the time limit for filing a request for a motion to review in this instance, and the Board should deny the Hydro One request for the Board to waive the deadline.

## **II. The Threshold Question of Whether Section 3.3 of the Connection Procedures Decision Should be Reviewed**

### *Overview*

9. The foundation for much of Hydro One’s submissions on the threshold question of whether section 3.3 of the Connection Procedures Decision should be reviewed is the argument that:
  - (a) Hydro One’s role as a contractor was not properly identified as an issue in the EB-2006-0189 proceeding; and

- (b) as a result, the evidence before the Board was not complete and could not reasonably have been discovered at the time of the EB-2006-0189 proceeding.
10. Hydro One's summary of submissions and its notice of motion rely heavily on sub-paragraph 44.01(a)(iv) of the Board's Rules of Practice and Procedure which provides that the grounds for a motion to review may include "facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time".
11. ECAO submits that Hydro One's argument is ill-founded and that the Board should not order a review of section 3.3 of the Connection Procedures Decision. As outlined below, ECAO submits that:
- (a) Hydro One's role as a contractor was clearly in issue in the EB-2006-0189 proceeding;
  - (b) there are no relevant facts which Hydro One could put forward that could not have been discovered at the time by reasonable diligence; and
  - (c) even if the additional facts which Hydro One now seeks to put forward were before the Board, it would not change the outcome of the Connection Procedures Decision.

***Hydro One's role as contractor was clearly in issue***

12. Hydro One's role as a contractor with respect to customer-owned facilities was placed directly in issue by its inclusion in Hydro One's proposed connection procedures. It was clear that the scope of submissions would relate to and be defined by the content of Hydro One's connection procedures proposal, which included the issue of Hydro One's entitlement to act as a contractor with respect to customer-owned facilities. This is consistent with Procedural Order No. 1 dated October 18, 2006 in the EB-2006-0189

proceeding, which provided that “Board Staff and intervenors... [could] make written submissions in regard to the connection procedures of Hydro One Networks Inc.”

13. As noted by the Board in the Connection Procedures Decision:

“It is implicit in Hydro One’s connection procedures proposal...that Hydro One considers that it is entitled to bid along with other contractors to design and construct connection facilities for customers who intend to retain ownership of them.”

14. Simply put, there was no surprise here. The issue of Hydro One’s entitlement to act as a contractor with respect to customer-owned facilities arose as a result of the specific content of Hydro One’s proposed connection procedures. Therefore, ECAO submits that Hydro One is incorrect when it asserts that the interrogatories have somehow enlarged the scope of the proceeding. ECAO also submits that Hydro One is incorrect in its assertion that Hydro One’s role as a contractor for the construction of customer-owned connection assets is somehow tangential to the proceeding. On the contrary, that very role was part of the explicit content of Hydro One’s proposed connection procedures.
15. ECAO also notes that, early in the EB-2006-0189 proceeding, interrogatories from Board Staff and ECAO highlighted that there was an issue with respect to Hydro One’s ability to act as a contractor in connection with customer-owned facilities, and explicitly raised the issue of the scope of section 71 of the *Ontario Energy Board Act, 1998*.
16. If Hydro One’s argument is accepted, it would essentially require the Board to identify each of the specific issues to be decided upon as part of the review of proposed connection procedures. The Board’s ability to determine the process for review of connection procedures would be unduly restricted if it was required to create an issues list for all proceedings of this type, and such an approach would unduly constrain the Board’s decision-making powers and render meaningless section 30 of the Board’s Rules of

Practice and Procedure which provides that the Board with discretion as to the manner in which issues are identified.

17. Further, ECAO submits that where part of a connection procedure fails to comply with existing legislation, the Board cannot be constrained from rejecting it simply because it was not identified as a separate issue to be reviewed by the Board.

***Facts were reasonably discoverable***

18. ECAO submits that the facts referred to in Hydro One's submissions were reasonably discoverable at the time of the EB-2006-0189 proceeding and that Hydro One had the opportunity to bring forward such facts at the time.
19. With respect to the Hydro One submissions regarding the examples of facts that "were not discovered", it is ECAO's submission that such evidence is not new. Rather, had Hydro One acted with reasonable diligence, it could have put forward the evidence that it now seeks to have added to the record.
20. The matters that Hydro One submits are "material and relevant, and merit a fuller discovery" are also facts that were at all times known or could have been known with reasonable diligence.
21. With regard to the issue of the alleged harm to third parties and to the market place, once again, Hydro One had every opportunity to make submissions on these issues and chose not to do so in its submissions and reply submissions in the EB-2006-0189 proceeding.
22. With reasonable diligence, Hydro One could have made inquiries of its customers at the time of the EB-2006-0189 proceeding, and determined if there was any evidence that needed to be brought forward about them or from them.

23. In particular, ECAO submits that the Board should not accept Hydro One's argument that it did not realize that there would be a need for the type of evidence it now seeks to add to the record. For example, Hydro One now argues for the need to bring evidence which asserts that work on customer-owned connection facilities can only be performed by Hydro One employees because of the "critical nature of the protection and control work" and the "lack of alternative, qualified service providers". Hydro One's assertion that the need to bring this evidence could not have been reasonably contemplated at the time of the EB-2006-0189 proceeding is defeated by the following:
- (a) in ECAO's submissions dated January 26, 2007, ECAO specifically stated that "[t]here are no remaining practical considerations which justify the continued performance of connection work directly by the transmitter."<sup>1</sup> Hydro One chose not to respond to this aspect of ECAO's submissions;
  - (b) ECAO submitted evidence in the EB-2006-0189 proceeding outlining the ability of independent electrical contractors to perform work to the same standard as that of Hydro One employees; and
  - (c) ECAO also submitted affidavit evidence to support the following points:<sup>2</sup>
    - (i) Independent electrical contractors are fully qualified, and their personnel are as equally well-trained trained as Hydro One employees;
    - (ii) there are no standards or operating procedures that are particular to Hydro One and which would prevent independent electrical contractors from performing work on existing station sites and right-of-ways; and
    - (iii) there is no basis to support the contention that the performance of connection work by independent contractors would impact upon the need for a delineation of assets in order to purportedly maintain and operate Hydro One's system or the integrity of Hydro One's operating systems.

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<sup>1</sup> Submissions of ECAO dated January 26, 2007 at 5.

<sup>2</sup> This evidence was submitted in connection with the issue of the ability of independent contractors to perform work on an existing station site or an existing right-of-way over which Hydro One had ownership, easement or other land rights.



24. It is noteworthy that at no time after receiving the interrogatories or at any other time during the EB-2006-0189 proceeding did Hydro One take the position that additional evidence was required or that the Board should make any procedural orders regarding evidence, or that there was any reason why Hydro One could not respond in a satisfactory manner to the issue of its ability to act as a contractor in connection with customer-owned facilities. Instead, Hydro One received the interrogatories from Board Staff and ECAO, responded to them, received evidence from ECAO and submissions from Board staff and ECAO, and made reply submissions in respect of the issue of whether Hydro One had the authority to act as a contractor in connection with customer-owned facilities, including explicit submissions which argued that in so doing Hydro One would not be acting contrary to section 71 of the *Ontario Energy Board Act, 1998*.
25. It was only after the issue was argued and the Board determined that Hydro One is precluded from acting as a contractor in connection with customer-owned facilities that Hydro One complained about the Board having decided the issue without sufficient evidence before it.

***Additional facts would not change the outcome***

26. Even assuming that the facts which Hydro One now seeks to introduce could not reasonably have been known (which is disputed, as outlined above), ECAO submits that such facts would have no impact upon the decision of the reviewing panel.
27. The wording of section 71 of the *Ontario Energy Board Act, 1998* precludes Hydro One from acting as a contractor on behalf of a customer in relation to customer-owned facilities except through an affiliate. This is consistent with the interpretation given to section 71 in Compliance Bulletin No. 200605 which was adopted by the Board in the Connection Procedures Decision with the necessary modification that Hydro One is a transmitter rather than a distributor.

28. Section 71 of the *Ontario Energy Board Act, 1998* is in place in order to limit the potential for abuse of a distributor or transmitter's monopoly position with respect to competitive business activities. Like distributors, Hydro One should only be permitted to undertake competitive work through an affiliate, and the Connection Procedures Decision correctly prohibits Hydro One from acting as a contractor on behalf of a customer in relation to customer-owned facilities,<sup>3</sup> without prohibiting a Hydro One affiliate from doing so.
29. ECAO submits that the facts which Hydro One now seeks to introduce into the record would not impact on the ability of an affiliate to perform the work.<sup>4</sup> Therefore, ECAO submits that the facts which Hydro One now seeks to introduce would not have an impact on the decision of the reviewing panel.
30. Finally, Hydro One's submission also asserts that the Board erred in the Connection Procedures Decision because it failed to consider the benefit of providing choice in the market place that would result from allowing Hydro One to act as a contractor on behalf of a customer in relation to customer-owned facilities. However, contrary to this submission, the Board explicitly considered the issue of choice at page 10 of the Connection Procedures Decision.

### **III. Hydro One's Request for an Order Staying the Implementation and Effects of Section 3.3 of the Connection Procedures Decision Should not be Granted**

31. ECAO submits that Hydro One's request for an order staying the implementation and effects of section 3.3 of the Connection Procedures Decision should be denied.

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<sup>3</sup> The same is true with respect to the services that Hydro One refers as "ancillary to, or related to, transmission and distribution, and therefore not prohibited".

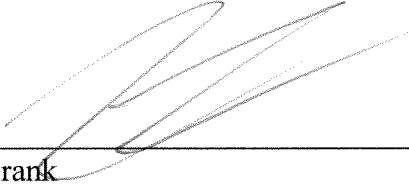
<sup>4</sup> Assuming that such facts are correct, which ECAO denies.

32. Hydro One has not met the criteria applied in *R.J.R. MacDonald Inc. v. Canada (Attorney General)*<sup>5</sup> and the Board's additional consideration of the impact on consumers.
33. As outlined above, the motion to review is not likely to change the outcome.
34. As well, there will be no irreparable harm. Hydro One is not precluded from undertaking such work through an affiliate, and independent contractors are capable of performing such work, both of which mitigate against any potential impact on customers.
35. In light of the above, it is submitted that the balance of convenience favours the denial of Hydro One's request for an order staying the implementation and effects of section 3.3 of the Connection Procedures Decision.

#### **IV. Hydro One's Request for an Order Extending the Deadline by Which it Must File New Connection Procedures Should not be Granted**

36. ECAO submits that the Board should dismiss Hydro One's request for a review of the Connection Procedures Decision, and that Hydro One should be required to file its new Connection Procedures promptly, and that a date for so doing should be fixed by the Board as part of its decision on these preliminary matters.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS  
7<sup>th</sup> DAY OF NOVEMBER, 2007.**



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Robert Frank  
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Counsel for ECAO

<sup>5</sup> [1994] 1 S.C.R. 311 (S.C.C.).