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File 15162

VIA FAX AND EMAIL

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

Dear Ms. Walli:

Re: Hydro One Connection Procedures Decision
Board File No. EB-2007-0797

Please accept the following as the Power Workers' Union's (the "PWU's") summary of submissions in respect of the above referenced matter, filed in accordance with Procedural Order #1, dated October 26, 2007.

The PWU supports Hydro One's Motion to Review the OEB's Decision and Order in this matter dated September 6, 2007 (the "Motion"). Moreover, the PWU supports the summary of submissions filed by Hydro One in this matter, filed pursuant to Procedural Order #1. The PWU's additional submissions on the Motion are limited to the need to review section 3.3 of the Board's decision (the "Contestability" issue).

In support of its position that a review of the Board's decision with respect to the Contestability issue is appropriate, the PWU will make the following submissions:

1. The Board failed to give adequate notice that the interpretation of s. 71 of the *OEB Act, 1998* was to be an issue in the proceeding;

2. There is good reason to believe that the Board's decision with respect to the interpretation of s. 71 is incorrect, as a matter of law, mixed fact and law, or both; and

3. The Board's error with respect to the interpretation of s. 71 was material to the outcome of its decision with respect to the Contestability issue, and if the error is corrected, the reviewing panel would conclude that this aspect of the Connection Procedures decision should be varied.

1. Failure to Give Adequate Notice

As noted by the Board in its May 22, 2007 Decision with Reasons on the NGEIR Motions (proceeding EB-2006-0322/EB-2006-0338/EB-2006-0340), the Board is governed by the provisions of the *Statutory Powers Procedure Act* ("*SPPA*"), including s. 6 thereof which requires:

> **Notice of hearing**
>
> **6.(1) The parties to a proceeding shall be given reasonable notice of the hearing by the tribunal. R.S.O. 1990, c. S.22, s. 6 (1).**
>
> .....
>
> **Written hearing**
>
> **(4) A notice of a written hearing shall include,**
>
> **(a) a statement of the date and purpose of the hearing, and details about the manner in which the hearing will be held;**
>
> **(b) a statement that the hearing shall not be held as a written hearing if the party satisfies the tribunal that there is good reason for not holding a written hearing (in which case the tribunal is required to hold it as an electronic or oral hearing) and an indication of the procedure to be followed for that purpose;**
>
> **(c) a statement that if the party notified neither acts under clause (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13); 1997, c. 23, s. 13 (13); 1999, c. 12, Sched. B, s. 16 (5).**

The PWU submits that the Board's statutory and common law obligation to provide adequate notice includes, at a minimum, sufficient information to permit potentially affected parties to understand whether and how their rights or interests might be affected. Only by providing such information is a potentially affected party provided the opportunity to determine whether and to what extent they should seek to become involved in the proceeding, and just as important, the nature of the information and submissions to bring to the attention of the decision maker.

The PWU was an intervenor in the proceeding. However, the fact that the PWU received sufficient information to permit it to decide that it should intervene in the proceeding did not exhaust the Board's obligation to provide adequate notice. The Board must also provide reasonable notice of the full scope of the issues which are to be determined in the proceeding. In other words, providing adequate notice that issues A, B and C may be determined does not give the Board the authority to determine issue D, without giving new or further notice of that fact.

The PWU submits that is what occurred in this case. In particular, the PWU relies on the following:

a. The Notice of Hearing made no reference whatever to s. 71 of the *OEB Act, 1998*, or that the statutory limits on the activities of transmitters was to be the subject of review in the proceeding;

b. At no time did the Board promulgate an issues list of any kind, and in particular, no issues list identifying the s. 71 issues as an issue for decision in the proceeding;

c. The Board acknowledged in its Decision and Order dated September 6, 2007 that the s. 71 issue was not raised by the Notice of Hearing or any issues list. To the contrary, the Board notes that the issue was "initially raised in this proceeding through interrogatories filed by ECAO and Board Staff".[1]

d. Neither the fact that a party chooses to ask a question about a particular subject matter, nor the fact that a proponent chooses to answer that question can determine or alter the scope of a proceeding. Only the Board can determine the scope of a proceeding. It is not incumbent upon interested intervenors to sift through interrogatories filed by other parties to attempt to discern why a particular party asks a particular question, and to anticipate what positions, if any, parties might ultimately seek to advance in their submissions.

e. Parties in the proceeding filed their submissions, in writing, pursuant to Procedural Order #2. Pursuant to that Procedural Order, all intervenors and Board Staff filed their submissions simultaneously, with no right of reply to one another. As a result, the first time the PWU saw the submissions filed by ECAO and Board Staff on the s. 71 issue was *after* the PWU had filed its submissions in the proceeding.

Obviously, the consequences of the Board's failure to give adequate notice at the outset of the proceeding were even more profound for persons and entities that reviewed the initial notice and, seeing nothing that affected their interests, chose not to intervene in the proceeding.

The inadequacy of the notice given in this case is further demonstrated when compared to the Board's statutory notice obligations in relation to the creation or amendment of a Code pursuant to the provisions of s. 70.2 of the *OEB Act, 1998*.

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[1] Decision and Order EB-2006-0189/EB-2006-0200, p. 10

If the Board intended to make even minor amendments to the contestability provisions of the Transmission System Code, it would be obliged to provide detailed notice of the proposed amendment, including the publication of the text of the proposed amendments. The effect of the Board's decision with respect to the interpretation of s. 71 is to create a major alteration to transmission contestability, without any meaningful notice being provided.

The law is clear that where there has been a failure of natural justice, such as the failure to give adequate notice, there must be a new hearing. No party will be permitted to suggest that the outcome of the proceeding would have been the same if the proper procedure had been followed. The PWU and other parties were denied the opportunity to fully participate in the s. 71 issue. The appropriate remedy for the Board is to set aside the decision to the extent that it was affected by the inadequate notice, and to permit interested parties the right to exercise their participatory rights in respect of that issue.

2. Good Reason to Believe that the Board's Interpretation of s. 71 is Incorrect

The Board's decision is dependant entirely upon ownership of the transmission assets. Neither the nature of the work, nor the nature of the assets, nor the function performed by them is relevant to the analysis. The PWU submits that the ownership "bright line" is both arbitrary and irrelevant to whether the work is "transmission" work for the purposes of s. 71 of the *OEB Act, 1998*.

The case of the construction of new transmission connection facilities provides an illustrative example of the arbitrary quality of the distinction drawn by the Board. The Transmission System Code ("TSC") contemplates at least three scenarios for the construction of such facilities:

a. Facilities owned by transmitter: There is no dispute that the construction of such facilities is "transmission" work of the purposes of s. 71;

b. Facilities not owned by transmitter: There is no dispute that the customer has two options:

   i. The customer can have the facilities constructed for it by a third party contractor and retain ownership[2]; or

[2] The customer only has the option of retaining ownership if the facility is a "dedicated connection facility". A customer who builds its own "non-dedicated connection facility" is obliged to transfer that facility to the transmitter – see TSC s. 6.6.2 (e).

ii. The customer can have the facilities constructed for it by a third party contractor and transfer the facilities to the transmitter.

In both cases under scenario (b) the TSC expressly contemplates that, rather having the facility built for it by a third party contractor, the customer can, at is option, "require" the transmitter to build the facilities in question (see sections 6.6.2 (c) and (e)). If the Board's interpretation of s. 71 stands, these provisions of the TSC would be unlawful.

What is critical, however, is that under each of the three scenarios, there is no distinction whatsoever between the nature of the assets, the function they perform, or the role they play within the integrated transmission system.

The PWU submits that the distinction required by s.71 between what is, or is not transmission work must be one of substance (i.e. the nature and function of the assets in question) and not form (i.e. ownership). Simply put, if the assets in question are "transmission" assets, then their construction and maintenance is a "transmission" function.

The Board's decision places reliance upon the potential for cross-subsidization (i.e. that ratepayers would be called upon to financially support unregulated activity). No evidence that this phenomenon has actually occurred is referred to. The evidence from Hydro One is precisely to the contrary. Ratepayers financially benefit from this activity. In any event, the potential need for rules to regulate the behaviour of transmitters undertaking the activity does not change the true nature of the activity itself.

It is also important to remember that there is no suggestion that transmitters would have a monopoly on providing transmission services to third parties. The choice of whether to retain a transmitter or another contractor to do the work in question would always remain with the customer. Presumably, sometimes the transmitter will provide the more attractive bid, and sometimes it will not. Interpreting the Act so as to prohibit transmitters from providing these services simply deprives customers from having the alternative of contracting with a transmitter to provide these services *in cases where the customer considers it to be in its interests to do so.* As a result, it is submitted that the Board's interpretation is inconsistent with both of its statutory objectives in relation to electricity, namely:

> **Board objectives, electricity**
>
> **1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:**
>
> > **1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.**

> **2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry. 2004, c. 23, Sched. B, s. 1.**

In particular, the Board's interpretation will result in increased costs to consumers, and decreased economic efficiency and cost effectiveness.

3. Materiality of Error to Outcome of Case

The materiality of the impact of the Board's error with respect to its interpretation of s. 71 is apparent from the face of the Board's Decision and Order. In particular, at p. 11 of the Decision and Order after reaching its conclusion with respect to the interpretation of s. 71 the Board states the consequences as:

> **Therefore all sections of Hydro One's CCP that deal with this aspect need to be amended, including Section 2.6, pages 39, 40 and 43, and "Option 3", as should the CCRA, page 7 (on "Ownership", bolded text in brackets) and page 8 (Work chargeable to customers)."**

It is apparent that if the review of the Board's decision with respect to the interpretation of s. 71 is successful, it will result in a direct and material change to this aspect of the Board's Decision and Order.

Conclusion

For these reasons, it is submitted that Hydro One's motion for review should succeed, and the Board should order a new hearing to determine those aspects of the Connection Procedures Decision as set out in the Notice of Motion.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Richard P. Stephenson

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Judi Roszell

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