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Richard P. Stephenson
T 416.646.4325 Asst 416.646.7417
F 416.646.4335
E richard.stephenson@paliareroland.com
www.paliareroland.com

File 15912

VIA COURIER 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: Great Lakes Power Limited – Applications to Transfer
Board File No. EB-2007-0647, 0649, 0650, 0651 and 0652**

As you are aware, we are counsel to the Power Workers' Union ("PWU"), an intervenor in this proceeding.

Pursuant to the Board's Procedural Order No. 3, enclosed please find 7 copies of the Submissions of Power Workers' Union in these proceedings. An electronic copy and searchable word document has been forwarded via email to the Board, and to all parties to the proceedings.

We trust this is satisfactory.

Yours very truly,

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP



Richard P. Stephenson

RPS:jr

cc: All Participants (via email)

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HONORARY COUNSEL

Ian G. Scott, Q.C., O.C.
(1934 - 2006)

Judi Roszell

Distribution List Name: EB-2007-0647/0649/0650/0651/0652 GLPL

Members:

Carl Burrell (IESO)	carl.burrell@ieso.ca
Charles Keizer (Ogilvy Renault)	ckeizer@ogilvyrenault.com
J. Paul Cassan (Wishart Law Firm)	pcassan@wishartlaw.com
Jennifer Tuer (Ogilvy Renault)	jtuer@ogilvyrenault.com
John Rattray (IESO)	john.rattray@ieso.ca
John Sprackett (PWU)	sprackett@pwu.ca
Judy Kwik (Elenchus Research)	jkwik@era-inc.ca
Michael Buonaguro (PIAC)	mbuonaguro@piac.ca
Michael Janigan (PIAC)	mjanigan@piac.ca
OEB Secretary	Boardsec@oeb.gov.on.ca
Richard Stephenson (Paliare Roland)	richard.stephenson@paliareroland.com
Tim Lavoie (GLPL)	tlavoie@glp.ca
Victoria Chiapeppetta (Algoma Steel Inc.)	vchiappe@algoma.com
William Harper (Econalysis Consulting Services)	bharper@econalysis.ca

EB-2007-0647
EB-2007-0649
EB-2007-0650
EB-2007-0651
EB-2007-0652

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 Great
Lakes Power Limited under section 86 of the *Ontario
Energy Board Act*, 1998 seeking leave to transfer its
transmission system to Great Lakes Power
Transmission LP;

AND IN THE MATTER OF an application by Great
Lakes Power Limited under section 60 of the *Ontario
Energy Board Act*, 1998 for an electricity transmission
licence;

AND IN THE MATTER OF an application by Great
Lakes Power Limited under section 18 of the *Ontario
Energy Board Act*, 1998 seeking leave to transfer its
transmission rate order to Great Lakes Power
Transmission LP;

AND IN THE MATTER OF an application by Great
Lakes Power Limited under section 74 of the *Ontario
Energy Board Act*, 1998 for a licence amendment;

AND IN THE MATTER OF an application by Great
Lakes Power Limited under section 18 of the *Ontario
Energy Board Act*, 1998 seeking leave to transfer its
leave to construct order to Great Lakes Power
Transmission LP;

SUBMISSIONS OF POWER WORKERS' UNION

INTRODUCTION

1. The PWU's submissions in this proceeding are limited to the issue of whether the proposed transaction is consistent with the provisions of s. 71

of the *Ontario Energy Board Act, 1998* (the "*Act*"). The PWU submits that, in the event the Board concludes that the proposed transaction would result in a corporate structure which is not consistent with s. 71 of the *Act*, the Board should not approve the applications.

PART I: THE FACTS

2. Presently Great Lakes Power Limited ("GLPL") carries on business as a vertically integrated utility. It owns and operates generation, distribution and transmission facilities. It has separate licenses from the Board to carry out each of these functions.
3. If these applications are approved, GLPL will transfer ownership of its transmission assets to a newly created entity, GLPTLP ("GLPTLP"). All of the personnel who are presently engaged in the operation of the transmission facilities to be transferred will remain at GLPL. GLPTLP will contract with GLPL to have GLPL provide all of the services and personnel required to continue the operation of the transmission facilities, on essentially the same basis as today.¹
4. The applications propose that the Board licence GLPTLP as a transmitter because it will be the owner of the transmission assets. In addition, GLPL will continue to be a licensed transmitter, as the operator of those transmission assets.
5. The effect of the proposed transaction, if approved, is that GLPL would be acting as a contractor, providing transmission services to a third party.²
6. GLPL gives two justifications for the proposed transaction:
 - a. The proposed structure will put GLPL's transmission business into compliance with s. 71 of the *Act*; and

¹ Exhibit A.1.3 pp. 12-15

² The third party being GLPTLP, which itself would be a licensed transmitter.

- b. The proposed structure will permit more efficient access to the capital markets for financing.³
7. GLPL acknowledges that this transaction alone will not be sufficient to put the whole of GLPL's operations into compliance with s. 71 of the *Act*. That is because even after the proposed transaction is complete, GLPL will continue to conduct both distribution and generation operations within the same corporate entity. However, GLPL contemplates further future corporate restructuring in order to separate the generation and distribution functions. This separation must be achieved no later than December 31, 2008, when GLPL's exemption from s. 71 expires.⁴

PART II: SUBMISSIONS

8. The PWU is concerned that a recent ruling of the Board⁵ (made after these applications were filed) creates substantial doubt as to whether the proposed transaction will achieve the Applicant's stated objective of putting its transmission operations into compliance with s. 71 of the *Act*.
9. It is the position of the PWU that the Board's decision in EB-2006-0189 and EB-2006-0200 (the "Connection Procedures Decision") was incorrectly decided insofar as it purports to interpret the scope of "transmission" for the purposes of s. 71 of the *Act*.
10. The Connection Procedures Decision is presently the subject of a Motion to Review (Board File No. EB-2007-0797). The PWU is an intervenor in that proceeding, supporting the applicant's position that the Board's decision with respect to the interpretation of s. 71 was wrongly decided.
11. The PWU recognizes the possibility that the Board may determine that it will not grant the motion to review the Connection Procedures Decision

³ Exhibit A.1.3 pp. 5-6

⁴ Exhibit A.1.3 p. 5; O.Reg 161/99

⁵ EB-2006-0189 and EB-2006-0200 Decision and Order dated September 6, 2007

potentially for reasons that are unrelated to the correctness (or lack of correctness) of the underlying decision.

12. Certainly, the PWU recognizes that, unless and until the Board rules otherwise, the Board's interpretation of s. 71 as set out in the Connection Procedures Decision stands as persuasive, if not binding, authority with respect to the limits of permitted activity for transmitters pursuant to s. 71 of the *Act*.
13. The PWU submits that it is necessary and appropriate for the Board to revisit the interpretation of s. 71 in this case.
14. The PWU recognizes that GLPL is exempted by regulation from compliance with s. 71 of the *Act* until December 31, 2008. However, the PWU submits that the Board should not approve the proposed transaction if it is satisfied that, even after the transaction is complete, GLPL's transmission operations will not be compliant with s. 71 of the *Act*. In that circumstance, GLPL would require a further restructuring transaction for its transmissions business to achieve compliance with the *Act*. This will require a further application to the Board to approve the further transaction, all of this being completed prior to December 31, 2008.
15. In those circumstances, it is submitted that the Board should not approve the applications because:
 - a. It would not achieve GLPL's first stated objective of putting its transmission operations into compliance with s. 71; and
 - b. The Board should not sanction an application which creates a multiplicity of proceedings with the associated waste of ratepayer, regulatory and stakeholder resources.

The Connection Procedures Decision

16. In the Connection Procedures Decision the Board considered connection procedures proposals filed by Hydro One Networks Inc. and GLPL. The proposals were made by the transmitters in accordance with the provisions of the Transmission System Code ("TSC").

17. In reviewing Hydro One's proposal the Board noted that parts of the proposal appeared to deal with:

situations that could include system components or elements being constructed, installed or put together by Hydro One in circumstances where the components or elements will be owned by the customer. This appears to contemplate that Hydro One may be acting as a contractor on behalf of the customer in relation to customer-owned facilities.⁶

18. The Board proceeded to consider whether these proposals were consistent with the provisions of s. 71 of the *Act*, which prohibits transmitters or distributors from carrying out any business activity other than transmitting or distributing electricity, except through an affiliate.

19. Since Hydro One was proposing to undertake the work in question directly, and not through an affiliate, the Board determined that it was necessary for it to decide whether the proposed work was, or was not, "transmission" work for the purposes of s. 71 of the *Act*.

20. First, the Board acknowledged that the construction of transmitter-owned connection facilities "is an integral component of the transmission of electricity". As a result, the Board agreed that this work was not subject to the prohibition contained in s. 71 of the *Act*.⁷

21. The Board then proceeded to consider the case of the construction of transmission connection facilities that are not owned by the transmitter,

⁶ Connection Procedures Decision, p. 10

⁷ *supra*, p. 11

but rather are owned by the customer.⁸ In that regard the Board noted as follows:

The situation is different, however, when the facilities to be constructed are not owned by the transmitter, but are rather part of the plant owned, operated and controlled by a transmission customer. By definition, such facilities are not part of the transmitter's system and their construction cannot be seen as integral to the transmitter's design and operation of that system. It follows that their construction cannot be seen in the same light as construction of transmission assets to be owned and operated by the transmitter. The construction of such projects should be seen as independent undertakings by customers, the design and placement of which may be informed by the transmitter, but which are fundamentally private in nature. As such, they are really no different than other kinds of construction projects, such as office or warehousing facilities, which clearly could not be undertaken by the transmitter given the wording of section 71.

The difference in ownership is a critical distinction. Where the transmitter constructs and owns the assets, it is meeting its licence obligation, and the net capital investment is rolled into its rate base, and in turn is reflected in its revenue requirement. The effect of the transmitter competing in the marketplace for the construction of customer-owned connection facilities is to raise the spectre of potential cross-subsidization of these unregulated activities by the regulated transmission revenue requirement. Such projects fall outside the transmitter's scope, and are therefore subject to the prohibition contained in section 71. (emphasis added)

22. The effect of the Connection Procedures Decision is to create a "bright line" distinction between what is and is not "transmission" work for the purposes of s. 71 based upon the ownership of the transmission assets upon which the work is done. While the decision clearly arose in the case of transmission assets owned by a transmission customer of the transmitter, it is clear that particular circumstance was not relevant to the distinction drawn by the Board. To contrary, none of the rationale relied upon by the Board in drawing the ownership distinction are dependant upon the *identity* of the owner. Rather, ownership by anyone, *other than the transmitter*, triggers the prohibition is s. 71 of the *Act*.

⁸ Note that there was no dispute that these would be precisely the same type of facilities, performing precisely the same function as in the case of transmitter owned connection facilities. The only distinction is the ownership of the facilities.

Application of the Connection Procedures Decision to this Case

23. It is necessary for the Board to consider the Connection Procedures Decision in deciding the present case because, under the corporate structure proposed by the applications GLPL which is a licence transmitter would be providing transmission services as a contractor to a third party (GLPTLP). These services will be provided by GLPL directly, and not through an affiliate. As a result, this case falls on the wrong side of the “bright line” established by the Connection Procedures Decision.

The Connection Procedures Decision was Wrongly Decided

24. The PWU submits that the Connection Procedures Decision was wrongly decided, and this panel of the Board should refuse to apply it here on that basis. In fact, the PWU submits that the present case provides a compelling illustrative example of how the Connection Procedures Decision, when applied in the real world, generates absurd results. The PWU submits that, other than the application of the Connection Procedures Decision, there is no material reason why the applications should not be approved. In other words, the Connection Procedures Decision has created a roadblock to an otherwise meritorious application.
25. As noted above, 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*.
26. 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 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; or
 - ii. The customer can have the facilities constructed for it by a third party contractor and transfer the facilities to the transmitter.
27. 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.
28. 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.
29. 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.
30. 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. In fact, the evidence earned by transmitters from this activity is used by them to reduce their revenue requirement, thereby lowering rates to customers. 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.⁹

31. It is also important to recall that there is no suggestion that transmitters have a monopoly on providing transmission services to third parties. The choice of whether to contract with 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 in the Connection Procedures Decision 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.

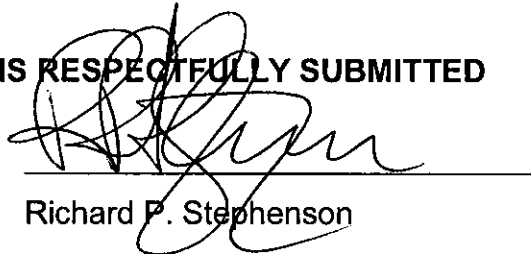
⁹ Connection Procedures Decision, p. 11

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

CONCLUSION

33. In conclusion, the PWU submits that:
- a. The Board should consider the Connection Procedures Decision with respect to the issue of the interpretation of s. 71 of the *Act*, and conclude that decision was wrongly decided and refuse to apply it here, or, in the alternative;
 - b. If it concludes that the Connection Procedures Decision was correctly decided, deny these applications.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Richard P. Stephenson

Paliare Roland Rosenberg Rothstein LLP

250 University Av. Ste. 501

Toronto, ON, M5H 3E5

Counsel for the Intervenor Power Workers'
Union