

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by Upper Canada Transmission, Inc. under section 60 of the *Ontario Energy Board Act, 1998* for an electricity transmission licence.

**RESPONSE OF
UPPER CANADA TRANSMISSION, INC. (UCT)**

Nature of the Application

1. By application dated June 3, 2011 (Application), UCT applied to the Board for an electricity transmission licence. The Application was not made in reference to an immediate transmission project. Rather the Application indicates UCT's intention to participate in the Board's upcoming transmission development designation process for the East-West Tie Line.¹
2. UCT is a wholly indirectly owned subsidiary of NextEra Energy, Inc. (NextEra). NextEra is a leading North American clean-energy company with 2010 revenues of approximately US\$15 billion, approximately 44,000 megawatts of generating capacity in service, more than 100,000 kilometres of transmission and distribution lines in service or under construction, and more than 15,000 employees in 28 U.S. states and 4 Canadian provinces. NextEra is a Fortune 200 corporation trading on the New York Stock Exchange (trading symbol NEE).²
3. Three parties other than UCT participated in this process; Board Staff, Hydro One and Great Lakes Power. Each of these three parties asked interrogatories of UCT.

¹ Application section 4 at page 2, Application Transmittal Letter dated June 3, 2011, page 2.

² Application section 6 at page 3; Application Transmittal Letter dated June 3, 2011, pages 1 and 2.

4. UCT filed detailed responses to these interrogatories on August 26, 2011.
5. Submissions on the Application from interested parties were due by September 8, 2011.
6. Great Lakes Power did not file submissions.
7. Hydro One filed a letter with the Board which expresses appreciation for the full interrogatory responses provided by UCT and indicates that Hydro One has no submissions to make with respect to the Application. (Hydro One did note the parallel licence amendment application by TransCanada Power Transmission (TCPT) regarding the effective date for TCPT's transmission licence, and suggested that if TCPT's application is granted, the Board may wish to consider putting other new entrant transmitters "*on a similar footing*".)
8. Board Staff filed submissions dated September 8, 2011 in which Staff submitted that UCT "*meets the threshold requirements for a transmission licence*"³. Board Staff comments further only on UCT's narrowed request for a temporary exemption from section 2.1.2 of the Board's *Affiliate Relationships Code for Electricity Distributors and Transmitters (ARC)*.

Granting of a Transmission Licence

9. In all of its decisions on transmission licence applications by new entrants since issuance of its policy *Framework for Transmission Project Development Plans* (EB-2010-0059), the Board has found that obtaining a transmission licence is intended to be a threshold qualification step, and is not intended to be unduly onerous.⁴

³ Board Staff Submissions dated September 8, 2011, page 2, 2nd last paragraph.

⁴ AltaLink licence Decision (EB-2011-0126, August 31, 2011); Chatham-Kent Transmission licence Decision (EB-2010-0351, May 24, 2011); TransCanada Power Transmission licence Decision (EB-2010-0324, June 22, 2011); Icon Transmission licence Decision (EB-2010-0403, June 30, 2011).

10. The key areas reviewed by the Board in a transmission licence application are the financial viability, technical capability and conduct of the applicant.⁵
11. UCT's Application and interrogatory responses provide extensive information about UCT and about the financial viability, technical capability and conduct of its numerous affiliates engaged in the electricity sector in Ontario and throughout North America, including in respect of the planning, construction and operation of electricity transmission infrastructure.
12. Board Staff has submitted that UCT meets the threshold requirements for a transmission licence, and no other party has submitted otherwise.
13. UCT respectfully submits that it has demonstrated its qualification to receive an Ontario transmission licence, and requests that the Board issue a transmission licence to it.

ARC Exemption

14. UCT has requested exemption from section 2.1.2 of the ARC, which states:

A utility shall ensure that at least one-third of its Board of Directors is independent from any affiliate.
15. This request is narrowed from that originally contained in the Application. In the June 3, 2011 transmittal letter for the Application, UCT requested exemption from the ARC as a whole, and from the Board's *Electricity Reporting and Record Keeping Requirements (RRR)*, all until such time as UCT becomes designated by the Board as a transmission developer or owns and/or operates transmission facilities in Ontario.
16. As explained in response to Board Staff interrogatory 3, considering Board transmission licencing decisions issued subsequent to submission by UCT of its Application, and in particular considering the Board's responses to *ARC/RRR*

⁵ Ibid.

exemption requests by other new entrant transmitters, UCT has withdrawn its *RRR* exemption request, and has narrowed its *ARC* exemption request to only section 2.1.2 of the *ARC*.

17. For the assistance of the other parties participating in this Application, UCT provided its rationale for this narrowed *ARC* exemption request in its response to Board Staff interrogatory 3.
18. Essentially, UCT has interpreted the intent of the *ARC*'s requirement for independent utility directors as one of ensuring that utility governance strikes an appropriate balance between the interests of ratepayers (i.e. the "public interest"), and the interests of shareholders.
19. In the *Staff Research Paper: Affiliate Relationships Code for Electricity Distributors and Transmitters* (June 15, 2007), issued by the Board in EB-2007-0062, Board Staff stated its studied view of the rationale for a requirement for independent directors as follows⁶: *The primary purpose of the provision requiring a minimum number of independent directors for a utility is to ensure that utility-related decisions are taken independently of affiliate interests and in the interests of ratepayers.* The Staff Research Paper also acknowledged the costs associated with retaining independent directors.⁷ In its subsequent decisions on *ARC* amendment the Board determined⁸ to continue the then current provision of the *ARC* in what is now *ARC* section 2.1.2, presumably accepting the rationale for this provision expressed in the Board Staff Research Paper.
20. In response to Board Staff Interrogatory 3, UCT asserts that until it becomes a designated transmission developer and thus able to recover costs from Ontario ratepayers, UCT's only obligation will be to its shareholder. Prior to designation, and subject to adherence to the other conditions of its licence and to its general obligations as an applicant before the Board, UCT will not have a "public interest"

⁶ Page 28.

⁷ Page 29.

⁸ *Notice of Proposal to Amend a Code: Proposed Amendments to the Affiliate Relationships Code for Electricity Distributors and Transmitters* (RP-2007-0662), September 19, 2007, page 7.

obligation. The independent director requirement of section 2.1.2 of the *ARC* – intended to ensure utility governance in accord with the interests of ratepayers as well as shareholders - can thus provide no incremental public protection until such time. Conversely, adherence to such a requirement will present costs and administrative burden to UCT.

21. Only Board Staff has argued in opposition to UCT's narrowed *ARC* exemption request. Neither Hydro One nor Great Lakes Power have taken issue with this request. Board Staff has argued against this request on two bases:
 - a. First, that with one narrow exception, the *ARC* related exemptions sought by other new entrant transmission licence applicants have all been denied by the Board.
 - b. Second, that granting UCT's narrowed exemption request could unfairly disadvantage other transmitters licenced to participate in a Board transmission development designation process, contrary to the sentiments of the Board as expressed in the recent AltaLink transmission licence decision.
22. In respect of Board Staff's first argument - that exemptions sought by other new entrant transmitters have all been denied by the Board - none of these earlier requests were of the nature of UCT's request. With the exception of the Chatham-Kent Transmission *ARC* exemption request (which was granted), the other licence applicants requested much broader exemption than is being requested by UCT. Further, with the exception of AltaLink's recent exemption request (addressed below), those broader exemptions related to the *ARC* provisions designed to protect confidential customer information, and were denied on the basis of the Board's concerns regarding the protection of such information.
23. UCT's request for exemption from the requirement for independent directors, until such time as it has a public service obligation which is distinct from, and to be balanced against, the interests of its shareholder, has nothing to do with the previously expressed concerns of the Board regarding the maintenance in

confidence of customer information. UCT has indicated that it is prepared to adhere to all of the ARC provisions related to that protection.

24. UCT's request for exemption from ARC section 2.1.2 is of a kind not yet considered by the Board in respect of new entrant transmitters in Ontario, and previous Board decisions have not addressed the issue raised by the request.
25. In respect of Board Staff's second response to UCT's narrowed exemption request - that granting UCT's request could unfairly disadvantage other transmitters - Board Staff has not offered any description of what such disadvantage would be.
26. Reference to the Board's recent AltaLink licencing decision relied on by Board Staff does not provide any additional guidance on what manner of harm may be of concern to Board Staff. In the AltaLink decision⁹ the Board was concerned with a request by AltaLink for exemption from the ARC's affiliate transfer pricing provisions. AltaLink had argued that without such an exemption, AltaLink's costs of participating in a transmission development designation process would be higher than those of Hydro One or Great Lakes Power Transmission, both of which incumbent transmitters could, according to AltaLink, "*draw on existing ratepayer funded resources to participate in the designation process*". That is, AltaLink argued that without the requested exemption, it would be unfairly disadvantaged.
27. In response to AltaLink's concern, the Board's Delegated Decision Maker reiterated that the Board would not permit recovery by an unsuccessful designation applicant from ratepayers of the costs of preparing a transmission development plan, whether or not that unsuccessful applicant was an incumbent rate-regulated transmitter.¹⁰ The exemption requested by AltaLink on the basis that it was necessary to "level the playing field" was denied on the basis that no such "levelling" was required. (On the other hand, the Board found that failing to

⁹ AltaLink licence Decision, August 31, 2011, page 8.

¹⁰ AltaLink licence Decision, August 31, 2011, page 8, first full paragraph.

require AltaLink to adhere to the transfer pricing rules of the ARC in development of its transmission development designation application could prejudice ratepayers in the event that AltaLink was successful, obtained designation, and sought to recover its pre-designation costs from ratepayers. UCT's exemption request herein has nothing to do with adherence to affiliate transfer pricing rules, which rules UCT has agreed to adhere to.)

28. The statement in the AltaLink decision which Board Staff relies on in arguing against UCT's requested exemption, to the effect that no applicant for designation should have an unfair advantage over other applicants, was a statement made by the Delegated Decision Maker in agreement with AltaLink's assertion, not as a basis for denying the exemption requested by it.¹¹
29. If the Board accepts that requiring UCT to comply with section 2.1.2 of the ARC will present a burden to UCT with no concomitant public interest protection or benefit, then the fact that other new entrant transmission licence applicants have not to date sought such exemption is, it is respectfully submitted, insufficient basis to deny UCT's request. Other new licencees are free to do so if they deem it necessary based on their own particular circumstances.
30. While incumbent transmitters may not be able to seek such an exemption given their pre-existing public interest obligations and existing Board of Director independence, neither would they have to fund any new independent directors out of their shareholder's own pocket (as would UCT and other new entrant transmitters).
31. UCT reiterates its request for a temporary exemption from ARC section 2.1.2, on the basis that no public harm could result from such temporary exemption and an administrative and cost burden to UCT as a new entrant transmitter would be removed.

¹¹ Ibid, second full paragraph.

Effective Licence Date

32. TransCanada Power Transmission (TCPT) has filed an application for amendment of its recently granted transmission licence, seeking deferral of the effective date of that licence and thus of the effective date of the obligations flowing from that licence.¹²
33. On September 13, 2011 UCT filed brief submissions in TCPT's licence amendment application.
34. In this Application, Hydro One has submitted that the Board should consider putting other new entrant transmitters "*on a similar footing*" to TCPT should the Board grant TCPT a change to the effective date of its transmission licence.
35. UCT agrees with Hydro One. UCT submits that other new entrant transmitters would first require an opportunity to consider the implications of any such findings, and then should be able to request similar treatment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:


GOWLING LAFLEUR HENDERSON LLP, per:
Ian A. Mondrow
Counsel to Upper Canada Transmission, Inc.

September 22, 2011

TOR_LAW\ 7742363\1

¹² EB-2011-0260.