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BY EMAIL and RESS

July 27, 2012

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2012-0031 – Hydro One Networks Inc. Transmission – Issues List Reply

We are counsel to the School Energy Coalition ("SEC"). SEC has reviewed the submissions of all parties on the Draft Issues List. This letter constitutes our reply submission to the proposed addition submitted by Goldcorp.

SEC has always taken the view that the issues list should be interpreted broadly. While parties may disagree on the merits of a proposed issue, unless it is outside the scope of the proceeding it should be included in the Final Issues List. In that regard, SEC accepts the issue as stated by Goldcorp, but provides the following comments on its appropriate scope.

Overview

On its face, the issue seeks to change the *method* by which Hydro One Networks Inc. ("HONI") collects bypass compensation owed to it by Goldcorp, from that of a lump-sum (or other private agreement between parties) to recovery through transmission rates over the life of the Red Lake Transmission Station. SEC submits that the issue which seeks such a result is in scope in this proceeding.

The problem is that, on a further review of Goldcorp's supporting justification for inclusion of the issue, it appears that at best the method of recovery is a tangential concern. Goldcorp cites several reasons for the inclusion of this issue; SEC submits all are out of scope of this

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proceeding and none of them address the *method* of HONI's recovery of any bypass compensation owed to it by Goldcorp.

History of the Dispute

On April 25th 2011, Goldcorp submitted an application under s. 92 of the *Ontario Energy Board Act, 1998* (*"OEB Act*") for a Board order granting it leave to construct certain transmission assets near its Red Lake mining facilities, thus bypassing existing transmission assets of HONI. In fulfilling its statutory mandate, the Board held a hearing to consider if the application was in the public interest as defined by s. 96(2).

During that hearing, Goldcorp made assurances that it would hold ratepayers harmless by entering into a CCRA with HONI.[1] The Board expressly relied on Goldcorp's assurances when it issued its decision on June 20th 2011 granting Goldcorp leave to construct (EB-2011-0106).[2]

Even before the application for leave to construct was filed, Goldcorp had discussions with HONI in which it was informed that it would be required to pay bypass compensation in an amount between $8 and $11 million.[3]

Unsatisfied with quantum of bypass compensation it was required to pay, Goldcorp brought an application under s.19 of the *OEB Act* for a determination that the relevant sections of the Transmission System Code ("*TSC*") be declared *ultra vires* (EB-2011-0361). The Board held a hearing on a preliminary question regarding the ability of the Board to hear an application under s.19. In its Decision, the Board determined that Goldcorp's application was not a standalone application, in that it related directly to another Board proceeding. The Board stated:[4]

> In the case of Goldcorp, the application it has brought to have the Board declare sections of the Transmission System Code *ultra vires* is directly linked to its recent leave to construct application respecting the Red Lake mines (EB-2011-0106). It is clear to the Board that the reason for Goldcorp's current application is its dissatisfaction with the process leading to the creation of and performance of a CCRA. Specifically the company is dissatisfied with the requirement to pay a bypass compensation levy to Hydro One. During the oral argument, counsel for Goldcorp acknowledged that it was dissatisfied with the amount it would have to pay to Hydro One.
>
> ....
>
> In the Board's view, Goldcorp's application is not "freestanding", but rather is an attempt to reopen the leave to construct proceeding respecting the Red Lake mines.

The Board decided that it would still provide guidance to Goldcorp on how to proceed, if at all, with the substance of Goldcorp's application. It laid out three potential options through which

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[1] Ontario Energy Board EB-2011-0106, *Decision and Order*, dated June 20, 2011. ("*EB-2011-0106 Decision*") at p. 11. see Appendix A

[2] *EB-2011-0106 Decision* at p. 12

[3] *Affidavit of Curtis C. Pedwell* sworn October 5th, 2011, filed as Ex.A/2/4 in Goldcorp's EB-2011-0361 application ("*Pedwell Affdavit"*) at para 10. see Appendix B (excerpt)

[4] Ontario Energy Board (EB-2011-0361/0376) *Decision with Reasons and* Order, dated January 23, 2012 ("*EB-2011-0361 Decision*"), at p.7. see Appendix C

the merits of the application could be determined in conformity with the *OEB Act*, but went on to state that Goldcorp must determine what form of application it wanted to pursue." Each of those potential options has specific procedural and substantive requirements that would have to be satisfied by the applicant. None of those options presented to Goldcorp involved determining the issue during a s. 78 rate proceeding.

Goldcorp appealed the decision to the Divisional Court. In its Endorsement dated May 24, 2012, the Divisional Court upheld the Board's decision.[5]

SEC was an intervenor before the Board in the EB-2011-0361 proceeding and before the Divisional Court in the subsequent appeal.

Transmission System Code and Bypass Compensation

The *TSC* is a binding instrument made pursuant to s. 70.1-70.3 of the *OEB Act*. It sets out the major obligations of transmitters, as well as the technical and operational rules for the transmission system. Compliance with the *TSC* is a condition of the licences of each of Ontario's licensed transmitters, including HONI.

Bypass compensation is an integral component of the Board's regulatory regime regarding electricity transmission. It was incorporated into the *TSC* by amendment in 2005. Pursuant to the *TSC*, when a customer (e.g. Goldcorp) seeks to construct its own transmission facility to serve any new or existing electricity load, thus "bypassing" the incumbent transmitter serving that area, it must compensate the incumbent transmitter for the lost load on its system.[6] The *TSC* sets out the methodology for calculating this bypass compensation. It is determined by calculating the net book value of the stranded asset(s) plus reasonable salvage and removal costs.[7] Bypass compensation is paid by the bypassing customer to the incumbent transmitter, in the case HONI pursuant to a Connection and Cost Recovery Agreement ("CCRA"), the terms of which are governed by the *TSC*.[8]

The only way that Goldcorp may exempt itself from, the requirement to pay, and/or the specific quantum of bypass compensation, is through an amendment to the *TSC* (made pursuant to the procedures set out in s. 70.1-70.3 of the *OEB Act*), or an application to amend HONI's transmission license to exempt itself from the relevant sections pursuant to s. 74. It cannot do so by way of a s. 78 rate proceeding.

The *TSC* does contain dispute resolution provisions. They require that a transmitter establish a dispute resolution procedure in its connection procedures that covers "a dispute with a customer regarding the transmitter's obligations under the Act, the Electricity Act, its license, this Code or

[5] *Goldcorp Canada Ltd. v. Ontario Energy Board*, 2012 ONSC 371. see Appendix D
[6] *TSC,* ss. 6.7.2, 6.7.5, 6.76, 6.7.7, 6.7.8, 11.2, 11.2.1, 11.2.2, 11.2.3. see Appendix E (excerpts)
[7] *TSC*, ss. 6.7.6, 6.7.7
[8] *EB-2011-0106 Decision* at p. 7

any of the transmitter's connection procedures."[9] This would include the bypass compensation provisions of the *TSC*, including the quantum owed.

Goldcorp's Reasons Are Outside the Scope of the Proceeding

2. *Goldcorp submits that customers are entitled to transparency, basic supporting evidence, and a fair opportunity to challenge assumptions when a transmitter seeks compensation under section 6.7 of the Transmission System Code.*

SEC submits that any issue that pursues this objective is outside the scope of this proceeding. The *TSC* is a binding instrument, and that includes the dispute resolution mechanism that flows from it set out in section 17 of Appendix 1: Version A – Form of Connection Agreement for Load Customers (the "Version A Connection Agreement").[10]

As a consequence of Goldcorp being a connected customer before the *TSC* revision date and never having signed a connection agreement with HONI, it is bound by the terms of the Version A Connection Agreement.[11] That agreement contains a comprehensive dispute resolution mechanism which provides for arbitration to resolves any dispute between the transmitters (i.e. HONI) and the customer (i.e. Goldcorp) regarding the application of the *TSC*, including the bypass compensation provisions.[12] It does not provide an avenue for the dispute to be brought before the Board.

3. *Goldcorp wishes to adduce additional evidence to demonstrate that GL-1 will result in positive benefits to Hydro One's customers and the Ontario Electricity System which the Board should consider in determining the costs to be recovered in the requested rates.*

Goldcorp's position that the Board should consider other factors as a way to determine "whether Hydro One's demand for bypass compensation is reasonable"[13], is wholly incompatible with the *TSC*. The *TSC* is a binding instrument and sets out under what circumstances bypass compensation is required to be paid and how it is to be determined. Even if Goldcorp's claims about the positive benefits are correct, HONI and the Board are bound by the terms of the *TSC*. Without an application for an exemption from HONI's transmission license, the *TSC* governs.

For many of the same reasons set out in the Board's decision with respect to Goldcorp's EB-2011-0361 application, SEC submits that this is another collateral attempt to unseat the EB-2011-0106 decision. Once again, Goldcorp is seeking to have its bypass compensation obligations under the *TSC* altered after the Board relied on the assurances of Goldcorp that it would enter into a CCRA, which will hold ratepayers harmless.[14] Further, most distressing is

[9] *TSC* ss.12.1
[10] *TSC, Appendix 1: Version A – Form of Connection Agreement for Load Customers,* s. 17. see Appendix F (excerpts)
[11] *TSC* ss. 4.1.3, *Pedwell Affidavit* at para. 18
[12] *TSC, Appendix 1: Version A – Form of Connection Agreement for Load Customers,* s. 17.5
[13] Goldcorp's Submission on the Issues List at p. 3
[14] *EB-2011-0106 Decision* at p. 8

that in the EB-2011-0361 decision, the Board provided three different ways that it could proceed, yet Goldcorp has decided not to avail itself to any of them.[15] Goldcorp itself has recognizes this and states in its Submission on the Draft Issues List:[16]

> One of the options given to Goldcorp in the January 23 Decision in EB-2011-0361 was to bring an application to amend Hydro One's Electricity Transmission Licence to exempt Hydro One from having to comply with the requirements of the bypass compensation provisions of the *TSC*. Adding the Interim Rate Issue to the Draft Issues List in this proceeding would effectively be bringing that application, but without the need to deploy the additional resources required for a new and separate proceeding.

In addition to the binding nature of the *TSC*, SEC submits that Goldcorp's proposed approach is inappropriate. The statutory test for amending a transmission license is different than setting rates. The Board made similar comments in its EB-2011-0361 decision, i.e. "each of the applications which could give rise either to a reconsideration of the leave to construct decision, or for the amendment of Hydro One's license, or the Transmission System Code itself have specific procedural and substantive components."[17]

1. *Goldcorp submits that the Board will be able to provide a final order that would satisfy the terms of Goldcorp's CCRA with Hydro One.*

Goldcorp and HONI included in their CCRA a term that provided that, [t]he Customer shall pay bypass compensation in accordance with the methodology set out in Section 6.7 of the Transmission System Code unless a final order of the OEB or a court of competent jurisdiction states that the Customer shall not be required to pay the said bypass compensation". Goldcorp position is that this would "satisfy" such a term.

SEC submits that the CCRA sets out no requirement for the Board to provide "a final order", nor would such a term be appropriate. The term is quite clear. Goldcorp is required to pay bypass compensation *unless* the Board or a Court states otherwise. It provides no requirement on either body to even address the issue.

Counsel to Goldcorp, during the hearing before the Divisional Court, alluded to some agreement with HONI that it would not seek the payment of the amount until there is a "final order". If such an agreement does exist between those parties, SEC submits that raises issues about HONI's compliance with the *TSC*. Regardless, SEC submits it is not relevant to Goldcorp's wish to use a rate proceeding as a venue to resolve its continuing dispute about its obligation to pay bypass compensation.

What is in Scope

SEC submits that it is in scope in this proceeding for Goldcorp to raise the issue of the *method* of recovery of the bypass compensation it owes pursuant to the *TSC*. Instead of paying that amount directly to HONI, it would be in scope for Goldcorp to seek an order from the Board to

[15] *EB-2011-0361 Decision* at p.10-12
[16] Goldcorp's Submission on the Draft Issues List, dated July 23, 2012 at p. 5
[17] *EB-2011-0361 Decision* at p. 11

pay that amount through rates “over the remaining life of the Red Lake Transformer Station”. While taking no position on the merits of such a proposal, SEC submits that it would be appropriate for it to be included on the issues list.

Summary

SEC submits that the Board should include the issue as proposed by Goldcorp on the Final Issues List, but that the scope be limited to the *method* of recovery of any bypass compensation owed.

Yours very truly,
Jay Shepherd P.C.

Signed by

Mark Rubenstein

cc: Applicant and Intervenors (by email)

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Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0106

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 Goldcorp Canada Ltd. and Goldcorp Inc. for leave to construct new 115kV transmission facilities in the Municipality of Red Lake, and other orders.

BEFORE: Ken Quesnelle
Presiding Member

Cynthia Chaplin
Member and Vice-Chair

Marika Hare
Member

DECISION AND ORDER

The Proceeding

Goldcorp Canada Ltd. and Goldcorp Inc. acting jointly as Goldcorp ("Goldcorp" or the "Company") filed an application, dated April 25, 2011, with the Ontario Energy Board (the "Board") under section 92 of the *Ontario Energy Board Act, S.O. 1998*, c.15, Schedule B (the *"Act*"). Goldcorp sought an order of the Board granting leave to construct the following transmission facilities in the Municipality of Red Lake:

- a new switchyard connecting Hydro One Networks Inc's ("Hydro One's") tap on its E2R 115 kV transmission line approximately 2 km southwest of Harry's Corner with the proposed 115 kV transmission line;
- a new 10.7 km 115 kV single circuit transmission line running from the switchyard to the to-be-constructed Balmer Complex Transformer Station; and
- a 115 kV/44 kV Transformer Station at Goldcorp's Balmer Complex.

The Board issued a Notice of Application and Hearing ("Notice") on April 29, 2011. The Notice was served on potentially affected and interested parties and was published in the Northern Sun News and the Wawatay News.

Following the publication of the Board's Notice, the Independent Electricity System Operator ("IESO"), Lac Seul First Nation ("LSFN") and Hydro One requested intervenor status and were granted such status. The Board also determined that LSFN is eligible to apply for an award of costs under the Board's *Practice Direction on Cost Awards*. The IESO and Hydro One indicated that they did not intend to seek an award of costs.

On May 26, 2011, the Board issued Procedural Order No. 1, which amongst other things, set out the list of approved intervenors and the schedule for interrogatories and submissions.

Pursuant to Procedural Order No 1, Board staff and LSFN filed each of their interrogatories on Goldcorp's evidence on June 9, 2011. Goldcorp filed its responses to all interrogatories on June 17, 2011.

The Board received the final submissions from LSFN and Board staff on June 28, 2011 and a final reply argument from Goldcorp on July 8, 2011.

Motions

Goldcorp Motions

Goldcorp filed two separate Notices of Motion. In the first motion, which was filed on the same date as the application, Goldcorp sought an *ex parte*, interim and interlocutory order under section 19 of the Act, granting leave to carry out civil engineering work at the Balmer Complex Transformer Station site and to clear and grub the right-of-way prior to the Board rendering its decision on the leave to construct application.

In a Decision and Order dated April 29, 2011, the Board dismissed the motion. In making its determination the Board considered the requirements of section 21(4)(b) of the Act and found as follows:

> The Board cannot determine whether and to what extent any person, other than the applicant in this case, will be adversely affected by the outcome of this proceeding, without having provided notice in the Board's standard form of Notice and communicated in the Board's required methods. Therefore, the Board cannot at this time grant relief of the type sought by the Applicant.

The Board noted that it was issuing the Notice of Application and Letter of Direction in the main leave to construct application simultaneously with its Decision and Order on the Motion.

On May 3, 2011, the Board received a second Notice of Motion. In this second motion, Goldcorp sought an order to carry out the work contemplated in the original motion, however, the second motion was filed following the publication of the Board's Notice in the main leave to construct application. Goldcorp requested that the motion be heard orally and some ten days after the publication and service of the Board's Notice.

The Board convened an oral hearing on June 7, 2011 to hear the second motion. Goldcorp, LSFN and Board staff attended the oral hearing.

The Board issued its decision dismissing the motion on June 20, 2011. Copies of both decisions are attached as Appendix B and Appendix C to this order.

LSFN Motion

On June 27, 2011 LSFN filed a letter with the Board requesting access to Goldcorp's Mine Development Plan (the "Plan") which LSFN had asked for in interrogatory 16(A)(c). Goldcorp had refused to provide the Plan claiming that the Plan was subject to confidential communication privilege. LSFN took the position that Goldcorp had not requested confidentiality with respect to the Plan and further that LSFN had not had the opportunity to object to any such requests for confidentiality. LSFN requested a revision to Procedural Order No. 1 with respect to filing deadlines for submissions while the issue of confidentiality remained outstanding.

As noted above and in adherence to Procedural Order No.1 LSFN filed its final submissions on June 28, 2011.

On June 28, 2011 Goldcorp filed a letter objecting to LSFN's June 27, 2011 request. LSFN filed a further response dated July 4, 2011 and re-asserted the need to file the Plan.

In a letter dated July 5, 2011 the Board provided its response stating that it would not compel Goldcorp to file the Plan. The Board further stated:

> The Board notes that LSFN has filed its submissions in which it argues that need has not been established and that it is necessary to examine the Plan as part of the determination of need. Goldcorp could have chosen to file the Plan and sought confidential treatment. Instead it has indicated that it will not file the Plan voluntarily, even on a confidential basis. The Board will not compel Goldcorp to file the Plan and will address in its decision the issue of the sufficiency of the evidence in support of the application.

On July 8, 2011 the Board received a Notice of Motion from LSFN in relation to the same matter it had raised in its letter of June 27, 2011. In the Notice of Motion, LSFN stated that it had not had an opportunity to formally address the matter and to make complete submissions before the Board rendered its decision not to compel disclosure of the Plan. The motion was for:

- An order directing Goldcorp to provide full and adequate response to interrogatory 16(A)(c) and to file the Plan;
- Alternately, an order that Goldcorp file portions of the Plan that are not considered confidential;
- And, that the Board order Goldcorp to file the Plan on a confidential basis, and that the Plan be provided to parties that have executed the Board's Confidentiality Declaration and Undertaking pending the resolution of this matter.

The Board has addressed the motion under the Project Need section of this Decision and Order.

Decision of the Board

For the reasons that follow the Board grants Goldcorp leave to construct the facilities applied for in its application, subject to conditions.

Positions of Parties and Board Findings

Section 96(2) of the Act provides that for an application under section 92 of the Act, when determining if a proposed work is in the public interest, the Board shall only consider the interests of consumers with respect to prices and reliability and quality of electricity service, and where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. In the context of this application, the Board has considered the following categories of evidence in relation to its mandate under section 96(2):

- Project Need
- System Impact Assessment and Customer Impact Assessment
- Environmental Assessment, Land Matters and Permits
- Project Costs and Impact on Ratepayers

Project Need

Goldcorp submitted that the proposed transmission facilities are needed to meet its increasing electricity demand related to mining activities in the Red Lake area. Goldcorp's evidence is that the current peak demand for all of its complexes in Red Lake is 39.7 MVA and is forecast to increase to 50 MVA by 2015. Goldcorp's evidence further indicates that due to rising demand from other customers in the area and capacity limitations on the E2R line, Hydro One had imposed a limit of 41.7 MVA on Goldcorp's demand. Goldcorp submitted that it expected to exceed the imposed limit by 2012.

Goldcorp's evidence indicates that it had considered a number of alternatives to the proposed facilities, such as, obtaining additional supply from Hydro One, temporary use of diesel generation, on-site Natural Gas fired generators, wind and solar projects and conservation and demand management options. For each of the alternatives considered, Goldcorp explained why the alternatives were not appropriate and indicated that the building of the proposed transmission facilities was the most suitable alternative as it was technically feasible, made use of Goldcorp patented lands and available Crown lands and was supported by other users in the Red Lake area.

Goldcorp stated that the proposed facilities will also benefit other electricity customers in the area by improving the quality of electricity service and by freeing-up capacity at the Red Lake Transformer Station, which could be used to serve new customers. Goldcorp

also noted that the proposed facilities will allow it to avoid adverse operational and environmental effects of diesel generation and to meet the requirements of its Mine Development Plan, thereby creating employment opportunities in the Red Lake area.

LSFN submitted that the Board should not grant the relief sought by Goldcorp at this time.

LSFN argued that Goldcorp had not adequately demonstrated need for the proposed facilities and that Goldcorp's assertions regarding the benefits of the project, should be adopted with caution as they promote Goldcorp's self interest and not the broader public interest. With respect to the alternatives considered, LSFN submitted that Goldcorp's evidence lacked details and that Goldcorp had not fully considered all available conservation and demand management options, including lowering production. LSFN also submitted that the proposed facilities will likely not negate the need for diesel generation, noting that the System Impact Assessment Report had indicated that due to existing grid limitations, Goldcorp may have to arrange for additional supply "through other means, including from generators, not connected to the IESO-controlled grid".[1]

LSFN further submitted that the Board was being asked to approve a project that it knew little about. LSFN noted Goldcorp's refusal to provide the Mine Development Plan and argued that without the Plan, it was not possible to determine need or to test Goldcorp's load forecast.

Board staff submitted that Goldcorp had established need for the project and that the proposed facilities represented the best of the alternatives examined.

Goldcorp submitted that the Board should not accept LSFN's arguments. Goldcorp submitted that the question of need was not a determinative issue because under subsection 96(2) of the Act, the Board may only consider the interest of consumers with respect to prices and the reliability and quality of service. Goldcorp further submitted that there was no reason why Goldcorp, as a public-for-profit company, would invest millions in a project, if the project was not needed. Goldcorp also noted that LSFN had adduced no contrary evidence on the question of need and did not raise the matter at the oral hearing.

[1] Draft System Impact Assessment, p.i.

Goldcorp further submitted that LSFN's submissions did not directly address the question of need and are more emotive than material. In regards to the filing of the Plan, Goldcorp submitted that the Board had already ruled that it will not compel Goldcorp to file the Plan.

In the Board's view, the need for a project is a matter to be determined in the context of the Board's review of the interests of consumers with respect to "price". That is, if there is going to be any impact on "price" (i.e., impact on transmission rates), the Board will review the evidence of the applicant with respect to the costs for the project and any rate impacts against the evidence advanced by the applicant with respect to the need for the project. If the evidence demonstrates that the project is needed, then the Board must determine whether the price and, therefore, the rate impacts, if any, are commensurate with need. In section 92 applications, where the proponent is paying for a facility, the issue of impacts on ratepayers with regard to price does not surface.

However, where a proponent builds and then transfers a facility to a licensed transmitter (as is the case here), the rate impacts are addressed in the context of the Connection and Cost Recovery Agreement ("CCRA"). The Board notes that Goldcorp has provided assurances that the intent is for the CCRA, which will ultimately be entered into by Goldcorp and Hydro One, to hold provincial ratepayers harmless. The Board also notes that the terms of the CCRA are governed by the Transmission System Code and are a condition of Hydro One's licence. Further, parties will have an opportunity to examine the transfer of assets and the associated cost recovery in a future Hydro One rate application.

The issue of "price", (i.e. impacts on ratepayers) therefore does not arise in this case, and as a result the Board need not examine the issue of need in detail because it is not determinative. Certainly, even in the instance where there is no adverse impact on ratepayers, the Board would be unlikely to approve a project for which there was no demonstrable need. That is not the situation here. Goldcorp has provided evidence regarding its energy requirements. The Board finds that the evidence is sufficient.

LSFN's July 7th Motion for an Order compelling Goldcorp to provide the Plan either on a confidential or non-confidential basis is grounded on its assertion that "need' is a determinative factor in this application. The Board has determined that "need" is not a determinative factor in this application and therefore the Motion is hereby dismissed without a hearing.

System Impact Assessment (SIA) and Customer Impact Assessment (CIA)
The Board's filing requirements for leave to construct applications, specify that an applicant is required to file a SIA performed by the IESO and a CIA performed by the relevant licensed transmitter.

Goldcorp filed a draft SIA report and a draft CIA report. The SIA was performed by the IESO and the CIA was carried out by Hydro One. In response to a staff interrogatory, Goldcorp filed the final CIA.

Goldcorp submitted that the SIA confirms the need for the project and that the proposed facilities are adequate and will not adversely affect the IESO controlled grid, provided the conditions imposed by the IESO are met. Goldcorp submitted that the CIA confirms that the proposed transmission line will have a minimal impact on local supply facilities and on the reliability of service.

LSFN argued that the proposed facilities do not meet Goldcorp's long-term electricity requirements and that further upgrades would be needed to achieve the intended purpose. LSFN also submitted that it was unclear as to who would pay for these future upgrades. LSFN further submitted that there was no evidence on the impact on reliability and quality of service and that it was notable that Goldcorp had only received conditional approval in the SIA.

Goldcorp submitted that the proposed facilities are required to relieve the existing bottleneck at the Red Lake Transformer Station and if approved, would meet that intended purpose. With respect to LSFN's concerns regarding future upgrades, Goldcorp submitted that these would be resolved through discussions with Hydro One and others and would be the subject of future applications.

The purpose of the SIA was to study how the supply capability of the circuit E2R can be expanded beyond the existing 57 MVA threshold.[2] In that regard, the SIA concludes that the proposed facilities will not result in "any significant adverse impacts to the IESO controlled grid, provided that the requirements listed in this report are met". Similarly, the CIA concludes that the proposed transmission line will have a minimal impact on local supply facilities, no adverse affect on short circuits and will not materially affect the reliability of Hydro One's E2R line.[3]

[2] Draft System Impact Report, Ex B/T6/S3, p. i
[3] Final Customer Impact Assessment Report, dated June 10, 2011

The SIA and the CIA demonstrate that the project will have no adverse impact on the reliability and quality of electricity supply as long as Goldcorp fulfills the requirements included in each report. The Board's order will be conditioned accordingly to ensure theses requirements are fulfilled and the final SIA is filed.

LFSN raises concerns about potential future projects. The Board finds that future projects are beyond the scope of this proceeding. In any event, any concerns regarding future projects can be addressed at the appropriate time.

Environmental Assessment ("EA"), Land Matters and Permits

Goldcorp's evidence indicates that it was required to seek project approval under two Class EAs - *Class EA for Minor Transmission Facilities* and *Class EA for Resource Stewardship and Facility Development*. The pre-filed evidence notes that the project received approval from the Ministry of the Environment under the *Class EA for Minor Transmission Facilities* and that approval from the Ministry of Natural Resources (MNR) for the *Class EA for Resource Stewardship and Facility Development* was still pending. In its pre-filed evidence, Goldcorp indicated that approval from the MNR was expected by April 26, 2011. At the hearing of the motion, Goldcorp informed the Board that the MNR's approval and the issuance of permits was delayed until the MNR was satisfied that appropriate consultation with the affected First Nations had occurred.

With respect to land matters, Goldcorp's evidence is that the proposed facilities are to be constructed on land owned either by the province (Crown land held by the Ministry of Natural Resources) or by Goldcorp. Goldcorp stated that the necessary land rights required are confined to easements it expects to receive from the MNR over Crown lands and temporary access rights.

With respect to permits, in undertaking JM1.1, provided at the motion hearing, Goldcorp supplied a list of permits that it requires and the timelines for acquiring these permits. Goldcorp indicated that it would secure the necessary work permits from the MNR over Crown lands.

Board staff submitted that the Board's approval should be conditional on the completion of both Class EAs and on Goldcorp obtaining all necessary approvals.

LSFN submitted that granting leave to construct was premature and potentially adverse to the public interest. LSFN noted the Board should refrain from making a decision on

the application until the MNR had confirmed that duty to consult had been fully discharged. LSFN submitted that granting leave to construct prior to the conclusion of the consultation effectively narrows the range of possibility for adequate accommodation and presents a risk that the project may be cancelled due to lack of appropriate consultation, after it has been approved by the Board. LSFN also noted that Goldcorp had not yet acquired many of the permits that were required to begin construction.

Goldcorp submitted that not having the necessary permits is not a valid reason to deny the application. Goldcorp noted that it was usual Board practice to grant orders that were conditional on the issuance of the relevant permits. Goldcorp also referred to the Board's Decision in Yellow Falls[4] where the Board provided reasons in support of such an approach.

With respect to the duty to consult, Goldcorp again referred to the Yellow Falls Decision, in which the Board made a decision on a question of law, namely that in electricity leave to construct applications, the Board does not have the power to consider whether the degree of consultation with First Nations in relation to the EA process (which is conducted separately) has been adequate. Goldcorp further submitted that the Board's approach has been supported by the decision of the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Counsel.*[5]

The Board does not believe it is necessary to refrain from making a decision in this application because of ongoing consultations being undertaken as part of the EA process. In the Board's view, to the extent there are any concerns with respect to the completion of the EA process or the acquisition of permits, these are appropriately dealt with by making the Board's approval conditional on the successful completion of both Class EA's and on Goldcorp obtaining all necessary permits. This has been the Board's practice in leave to construct applications for some time. Further, in its preliminary Decision in the Yellow Falls case the Board stated:

> Board approvals of leave to construct applications invariably include conditions which require the proponent to procure all of the necessary permits and approvals associated with the project. This means that the Board's approval is strictly conditional on the successful completion of the various permitting and assessment processes. Under this architecture there is no danger that the project will somehow begin without all of the necessary

[4] EB-2009-0120, Decision and Procedural Order No. 4 dated November 18, 2009.
[5] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Counsel, [2010] 2 S.C.R.650.

> regulatory steps mandated by various agencies of government being completed. This is as true of the Ministry of Natural Resources permits, as it is of the environmental assessment process itself. [Emphasis Added]

Therefore, the Board's order granting leave to construct is conditional on Goldcorp obtaining all necessary Class EA approvals and all other necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the proposed facilities.

Project Cost and Impact on Ratepayers

Goldcorp's evidence is that the total cost of the proposed transmission facilities is approximately $15 million. Based on the breakdown provided, the cost of the transmission line is $2.6 million, the cost of the work on the switchyard is $0.5 million and the cost of the Balmer Complex Transformer Station is approximately $10 million.

The proposed facilities will be owned and constructed by Goldcorp until commissioned, following which, the switchyard and 115 kV transmission line, but not the Balmer Complex Transformer Station, will be transferred to and operated by Hydro One. The planned in-service date is December 2011.

In Board staff interrogatory no. 2, Goldcorp stated that the CCRA, under which the assets are to be transferred to Hydro One, had not been completed. In LSFN interrogatory no. 13, Goldcorp acknowledged that it had been informed by Hydro One that the terms of the asset transfer must not result in any negative impacts on electricity rates.

LSFN submitted that no evidence was provided with respect to the current project or with respect to possible future upgrades and their impact on electricity rates. As indicated above, the potential impact of other future projects is beyond the scope of this proceeding.

Goldcorp confirmed that it intended to transfer the facilities to Hydro One at no net cost to Hydro One and therefore the transfer will not adversely affect electricity rates. Goldcorp further submitted that it will follow the Transmission System Code Economic Evaluation and the CCRA to achieve the stated objective.

With respect to the matter of impact on ratepayers, as noted earlier in this Decision and Order, due to the fact that the proponent is paying for the facility, there is no ratepayer impact to be assessed. With regard to the intended future transfer of the assets, Hydro One, as a condition of its licence, is required to comply with the terms of the Transmission System Code Economic Evaluation when entering into the CCRA with Goldcorp thereby holding ratepayers harmless. Hydro One has an ongoing requirement to comply with the Transmission System Code and adherence to the Economic Evaluation provisions is a matter to be examined when Hydro One applies to have assets added to its rate base in a cost of service application.

Conclusion

Having considered all of the evidence related to the application, the Board finds the proposed project to be in the public interest in accordance with the criteria established in section 96(2) of the Act.

THE BOARD ORDERS THAT:

1. Pursuant to section 92 of the Act, Goldcorp is granted leave to construct the proposed transmission facilities, all in the Municipality of Red Lake, subject to the Conditions of Approval attached as Appendix A to this Order.

2. The Board had previously determined that LSFN was eligible to apply for an award of costs. Claims in this regard should conform with the Board's Practice Direction on Cost Awards, and shall be filed with the Board and one copy served on Goldcorp by **August 3, 2011**. Goldcorp should review the cost claims and any objections must be filed with the Board and one copy must be served on the claimant by **August 10, 2011**. LSFN will have until **August 17, 2011** to respond to any objections. All submissions must be filed with the Board and one copy is to be served on Goldcorp. Goldcorp shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

ISSUED at Toronto, July 20, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

TO DECISION AND ORDER

CONDITIONS OF APPROVAL

EB-2011-0106

DATED: JULY 20, 2011

Conditions of Approval for the
Goldcorp Transmission Line and Associated Facilities (the "Project")
EB-2011-0106

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1 General Requirements

1.1 Goldcorp shall construct the Project and restore the Project land in accordance with its Leave to Construct application, evidence and undertakings, except as modified by this Order and these Conditions of Approval.

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate July 31, 2012, unless construction of the Project has commenced prior to that date.

1.3 Goldcorp shall obtain all necessary Class Environmental Assessment approvals and all other necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the proposed facilities, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

1.4 Goldcorp shall satisfy the Independent Electricity System Operator ("IESO") requirements and recommendations as reflected in the Final System Impact Assessment Report, and such further and other conditions which may be imposed by the IESO. Goldcorp shall file the final System Impact Assessment Report with the Board, immediately upon its receipt and prior to the facilities being commissioned.

1.5 Goldcorp shall satisfy the Hydro One Networks Inc. requirements as reflected in the Final Customer Impact Assessment document dated June 10, 2011, and such further and other conditions which may be found to be necessary.

1.6 Goldcorp shall advise the Board's designated representative of any proposed material change in the Project, including but not limited to material changes in the proposed route, construction techniques, construction schedule, restoration procedures, or any other material impacts of construction. Goldcorp shall not make a material change without prior approval of the Board or its designated representative. In the event of an emergency the Board shall be informed immediately after the fact.

2 Project and Communications Requirements

2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Electricity Facilities and Infrastructure Applications.

2.2 Goldcorp shall designate a person as Project engineer and shall provide the name of the individual to the Board's designated representative. The Project engineer will be responsible for the fulfillment of the Conditions of Approval on the

construction site. Goldcorp shall provide a copy of the Order and Conditions of Approval to the Project engineer, within ten (10) days of the Board's Order being issued.

2.3 Goldcorp shall develop, as soon as possible and prior to the start of construction, a detailed construction plan. The detailed construction plan shall cover all material construction activities. Goldcorp shall submit two (2) copies of the construction plan to the Board's designated representative at least ten (10) days prior to the commencement of construction. Goldcorp shall give the Board's designated representative ten (10) days written notice in advance of the commencement of construction.

2.4 Goldcorp shall furnish the Board's designated representative with all reasonable assistance needed to ascertain whether the work is being or has been performed in accordance with the Board's Order.

2.5 Goldcorp shall, in conjunction with Hydro One Networks Inc., Ontario Power Generation and the IESO, develop an outage plan which shall detail how proposed outages will be managed. Goldcorp shall provide two (2) copies of the outage plan to the Board's designated representative at least ten (10) days prior to the first outage. Goldcorp shall give the Board's designated representative ten (10) days written notice in advance of the commencement of outages.

2.6 Goldcorp shall furnish the Board's designated representative with two (2) copies of written confirmation of the completion of Project construction. This written confirmation shall be provided within one month of the completion of construction.

3 Monitoring and Reporting Requirements

3.1 Both during and for a period of twelve (12) months after the completion of construction of the Project, Goldcorp shall monitor the impacts of construction, and shall file two (2) copies of a monitoring report with the Board within fifteen (15) months of the completion of construction of the Project. Goldcorp shall attach to the monitoring report a log of all comments and complaints related to construction of the Project that have been received. The log shall record the person making the comment or complaint, the time the comment or complaint was received, the substance of each comment or complaint, the actions taken in response to each if any, and the reasons underlying such actions.

3.2 The monitoring report shall confirm Goldcorp's adherence to Condition 1.1 and shall include a description of the impacts noted during construction of the Project and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction of the Project. This report shall describe any outstanding concerns identified during construction of the Project and the condition of the rehabilitated Project land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included

and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

-- End of document --

B

ONTARIO ENERGY BOARD

In the matter of the *Ontario Energy Board Act, 1998,* as amended (the Act); the *Ontario Energy Board Transmission Code of June 10, 2010* (**TSC**); Hydro One Networks Inc. (**HONI**); and the obligation of Goldcorp Canada Ltd. and Goldcorp Inc. to pay bypass compensation to HONI under the TSC.

AFFIDAVIT OF CURTIS C. PEDWELL

I, Curtis Pedwell, of the Municipality of Red Lake, am the Maintenance Manager at Goldcorp Red Lake Gold Mines. I make oath and say as follows:

1. I hold the qualification of Interprovincial Millwright. I have been employed in the mining industry since 1981. I have been employed in mine management since 1996. I was appointed Manager Maintenance – Red Lake Gold Mines in 2008. As such, I have knowledge of all the matters sworn to in this affidavit except where stated to be on information and belief.

2. As Maintenance Manager at Goldcorp Real Lake Gold Mines, my responsibilities include ensuring that the electricity system and facilities serving Red Lake Gold Mines are capable of satisfying forecast peak electricity demand with high quality electricity service

3. Goldcorp has never entered into any written agreement with HONI with respect to HONI's provision of electricity supply and related services to Goldcorp's Red Lake Gold Mines. Instead, the process followed by HONI each year has been to inform Goldcorp in writing about the capacity allotment it is prepared to provide. Goldcorp then pays for the electricity delivered.

4. On July 20, 2011, the Board approved the construction of GL-1. Now shown to me and marked as (**Ex. A**) to my affidavit is a true copy of the Board's Decision in File No. EB-2011-0106.

5. As stated in the Application, Goldcorp and HONI are currently negotiating a Connection and Cost Recovery Agreement (**CCRA**) respecting GL-1. HONI has been practically non responsive to Goldcorp's requests to complete the CCRA expeditiously even though the required in service date for GL-1 is Q1 2012. In addition, HONI has demanded funding of $25,000 for a review of SNC- Lavalin's engineering of GL-I, $15,000 for a review of SNC-Lavelin's Environmental Study Report which the Minister of the Environmental approved, and has indicated that there may be additional funding demands. What is more, Goldcorp and HONI still have to negotiate cost sharing of the additional reactive compensation facilities at HONI's Ear Falls TS as required by the IESO's System Impact Assessment Report (CAA ID 2010-407) filed in EB-2011-0106. Goldcorp cannot tolerate further delay by HONI now on the grounds that Goldcorp has brought this Application before the Board to declare the bypass compensation provisions of the TSC as ultra vires the Act.

6. Once GL-I is entered into service, Goldcorp plans to transfer its Red Lake, Campbell and Balmer complexes' loads, currently served through the Red Lake Transformer Station (**RLTS**), to GL-1. Goldcorp's Cochenour Complex will continue to be supplied through the RLTS at distribution voltages. Now shown to me and marked as (**Ex. B**) to my affidavit is a true copy of the e-mail from Ian Blue to Raj Ghai dated July 26, 2011, setting out this information.

7. Goldcorp's loading of GL-1 will result in some capacity at the RLTS being underutilized for an uncertain period. Now shown to me and marked as (**Ex. C**) to my affidavit is a true copy of an e-mail from Curtis Pedwell to Luc Major dated April 16, 2010, 7:31 a.m. and chain reporting this information reporting this information.

8. Goldcorp and HONI have been negotiating the placing of GL-1 into service since April 10, 2010. At that time, HONI informed Goldcorp that it would have to pay bypass compensation for the underutilized capacity at the RLTS. On April 15th, 2010, HONI estimated bypass compensation at $8 million. Now shown to me and marked as (**Ex. C**) to my affidavit is a true copy of an e-mail from Curtis Pedwell to Luc Major dated April 16, 2010, 7:31 a.m. and chain reporting this information.

9. On April 29, 2010 HONI re-estimated by pass compensation as between $8 and $11 million. Now shown to me and marked as (**Ex. D**) to my affidavit is a true copy of an e-

mail from Pappur Shankar of SNC- Lavalin to Luc Major, Robert Bustraen, Hadi Banakar dated April 30, 2010 at 3:06 p.m. and chain, reporting this information.

10. On November 4, 2010, Goldcorp met with HONI again. Goldcorp tabled an information request seeking information about the determinants of HONI's $8 to $11 million estimate, saying it would formally submit it again at another time. Goldcorp's position was that it was inappropriate for HONI to charge it bypass compensation because Goldcorp is an important economic engine in the Red Lake area, HONI's idle capacity will probably be reutilized in the near future by economic growth caused by Goldcorp and other local area consumers, and because Goldcorp's plans to transfer GL-1and its system benefits to HONI at no net cost which it considers is sufficient bypass compensation. HONI and Goldcorp disagreed on whether Goldcorp should have to pay bypass compensation. Now shown to me and marked as (**Ex. E**) to my affidavit is a true copy of Minutes – Goldcorp Red Lake Gold Mines, Meeting November 4th, 2010, prepared by HONI.

11. On December 17th, 2010 Goldcorp and HONI, joined by Rubicon Minerals Corporation, (**Rubicon**) met for a third time. Goldcorp and Rubicon informed HONI that they were negotiating an agreement under which Rubicon would utilize some, but not all, of the idle capacity at the RLTS that Goldcorp's proposed loading of GL-1 would create. It was then agreed that Goldcorp and Rubicon would provide up-to-date load forecasts to HONI and that HONI would then provide a new estimate of Goldcorp's required bypass compensation. . Now shown to me and marked as (**Ex. F**) to my affidavit is a true copy of Minutes – Goldcorp Red Lake Gold Mines, Meeting December 17th, 2010, prepared by HONI.

12. Goldcorp and Rubicon provided their load forecasts on January 10, 2011 On January 21, 2011 HONI requested a clarification from Goldcorp about certain scenarios in Goldcorp's load forecast .Now shown to me and marked as (**Ex. G**) to my affidavit is a true copy of an e-mail from Raj Ghai to Ian Blue dated January 21, 2011, 4:16 p.m. and chain, containing this information.

13. Goldcorp reserved its response until it had received a favourable decision about GL-1 from the Board.

14. On April 1, 2011 Goldcorp, Rubicon and HONI met for a fourth time concerning Goldcorp's plans for entering GL-1 into service. At this meeting, using the terminology of *stranded asset charge* the topic of bypass compensation was discussed again, without resolution. The discussion was as follows:

> The discussion of stranded assets reflected the parties long standing differences. Ian Blue stated that the electricity supply issues in the Red Lake area differ from those that the TSC contemplated. Naomi Martin confirmed that Stranded Asset charges require a trigger and depend on timing which Raj Ghai sought to clarify. Curtis Pedwell described that Goldcorp's proposed Balmer TS would be loaded incrementally as RLTS was offloaded in response to Ibrahim el-Nahas' inquiry of how its capacity would be utilized. Raj Ghai indicated that the 'lumpiness' of loads to be transferred could be examined. Ian Blue also pointed out that Goldcorp's proposed 115 kV line would facilitate connecting renewable generation in the Red Lake area. HONI acknowledged that such opportunities exist and that, to their knowledge, none are under development. HONI staff acknowledged that an OEB exemption from the TSC may clarify or resolve the stranded asset issue. The OEB Codes were acknowledged to have force of law. All recognized that the OEB has power either to amend its Codes

The meeting notes show no inclination on the part of HONI to exempt Goldcorp from paying bypass compensation. Now shown to me and marked as (**Ex. H**) to my affidavit is a true copy of Meeting Notes, April 1, 2011 prepared by Goldcorp.

15. On July 26th, 2011, counsel for Goldcorp provided HONI with new load forecast matrices using Goldcorp's most recent load data which assumed, again, that all electricity except the Cochenour complex's requirements would be transferred from the RLTS to GL-1. Counsel also formally requested responses to a fresh information request. Now shown to me and marked as (**Ex. B**) to my affidavit are true copies of the e-mail from Ian Blue to Raj Ghai dated July 26, 2011, setting out this information and Goldcorp's Information Request to Hydro One Networks Inc. dated July 26, 2011 setting out this information.

16. As a condition of licence, HONI is bound by the TSC. Now shown to me and marked as (**Ex. I**, to my affidavit is a true copy of Electricity Transmission Licence, ET-2003-0035, Hydro One Networks Inc. valid until December 2, 2023. Condition 5 of that licence imposes this condition.

17. Appendix A to the TSC provides a *pro forma* Form of Connection Agreement for Load Customers (CALC). This CALC, ninety-two pages long, contains among other provisions paragraph 3 which states:

> 3. INCORPORATION OF TRANSMISSION SYSTEM CODE
>
> 3.1 The Code is hereby incorporated in its entirety by reference into, and form an integral part of, this Agreement. Unless the context otherwise requires, all references in this Agreement to this Agreement shall be deemed to include a reference to the Code.
>
> 3.2 Without limiting the generality of s. 3.1:
>
> (a) the Transmitter hereby agrees to be bound by, and at all times to comply with, the Code; and
>
> (b) the Customer acknowledges and agrees that the Transmitter is bound at all times to comply with the Code in addition to complying with the provisions of this Agreement .

Now shown to me and marked as (**Ex. J**, to my affidavit is a true copy of paragraph 3 of Appendix A to the TSC from which the above quote was drawn.

18. Even though Goldcorp has never signed any agreement with HONI, the TSC purports to answer that problem in s. 4.1.3, which states:

> 4.1.3. Where a transmitter does not have a connection agreement with a customer whose facilities were connected to the transmitter's transmission system prior to the Code revision date, the transmitter shall be bound by the applicable version of the connection agreement set out in Appendix 1 in relation to that customer and shall be permitted to consider that customer's continued acceptance of transmission service as acceptance by that customer of all of the terms and conditions of the connection agreement in the form set out in the applicable version of the connection agreement set out in Appendix 1.

The TSC deals with bypass compensation in S. 6.7.6, 6.7.7 and 11.2.1 which state:

> 6.7.6 . . . for all or a portion of existing load a load customer may bypass a transmitter-owned connection facility with its own connection facility or the connection facility of another person, provided that the load customer compensates the transmitter.
>
> 6.7.7 . . . the transmitter shall calculate bypass compensation by first multiplying the net book value of the bypassed connection facility, including a salvage credit and reasonable removal and environmental facility. The transmitter shall then divide the resulting figure by the total normal supply capacity of the bypassed connection facility. For purposes of this calculation:
>
> (a) the bypassed capacity on the relevant connection facility shall be equal to the difference between the customer's existing load on that connection

facility at the time of bypass and the customer's average monthly peak load in the three-month period following the date on which bypass occurred; and

(b) the normal supply capacity of the bypassed connection facility shall be determined by the transmitter in accordance with the Board-approved procedure referred to in s. 6.2.7.

11.2.1 A transmitter shall require bypass compensation from a customer if:

(a) the customer disconnects its facility from the transmitter's connection facilities and subsequently connects that facility to a generation facility or to the facilities of any person such that both the load facility and a generation facility are connected to the transmitter's transmission facilities on that person's side of the connection point; and

(b) the transmitter will no longer receive line connection or

The transmitter shall calculate bypass compensation using the methodology set out in s. 6.7.7.

Now shown to me and marked as (**Ex. K**) to my affidavit is a true copy of Sections 4.1.3, 6.7.6, 6.7.7 and 11.2 of the TSC.

19. The above TSC provisions were added in 2005, with the following explanation:

Why was the Code Revised?

Numerous expressions of concern were received from stakeholders regarding the application and interpretation of the Code. This included applications for changes to the Code. The Board decided that the Code, in its previous form, was not sustainable and a broad review was needed. A primary objective was to refine the Code to enhance the level of regulatory certainty for participants in the Ontario electricity market.

. . .

Major Policy Issues

1. Available Capacity & Bypass

. . . .

A transmitter will not have an automatic right to require customers to use the transmitter's available capacity to service *new* customer load. Accordingly, a customer opting to build its own facilities to met new load will not be considered to have bypassed the transmitter's facilities. This approach allows for greater competition, which should increase economic efficiency on the part of the transmitter, without resulting in any uncompensated stranding of assets. It also enhances customer choice. However, this will only apply where the load is new –

in other words, where the load has not been part of a customer's contractual forecast of its needs. In such cases, the customer will be held accountable for its forecast (i.e., by way of true up payments), throughout the economic evaluation period. Transmitters invest in the connection assets based on the customer(s) contractual forecast and customers must be held accountable for the costs of facilities built to meet it. It would be inappropriate to burden all the rest of the transmitter's customers with such costs.

If a customer chooses to build its own new connection facilities, those new facilities may be used to supply the customer's *existing* load, provided the customer adequately compensates the transmitter for the loss of that customer's existing load.

20. Now shown to me and marked as (**Ex. L and M**, to my affidavit are true copies of OEB File No.RP-2002-0120, Phase 1 Policy Decision with Reasons, Chapter 52 and Synopsis of Changes to the Transmission System Code, July 25, 2005, respectively from which the information I quote was drawn.

21. I make this affidavit in support of the Orders sought by Goldcorp and not for any other reason.

SWORN before me at the City of Toronto, in the Province of Ontario, this 5th day of October, 2011.

A Commissioner for taking affidavits.

Curtis C. Pedwell

TORONTO-#268494-v1-Affidavit_of_Curtis_Pedwell

Linda Dianne Robinson, a Commissioner, etc.,
Province of Ontario, for
Gardiner Roberts LLP, Lawyers.
Expires July 9, 2012.

C

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0361
EB-2011-0376

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 Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the *Transmission System Code* are *ultra vires* the Ontario Energy Board's powers to enact under the *Ontario Energy Board Act, 1988* and certain other orders;

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally-owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998*.

BEFORE: Paul Sommerville
Presiding Member

Cathy Spoel
Member

Ken Quesnelle
Member

DECISION WITH REASONS AND ORDER

BACKGROUND

The Goldcorp Application

On November 4, 2011, Goldcorp Canada Ltd. and Goldcorp Inc. ("Goldcorp") filed an application (the "Goldcorp Application") with the Ontario Energy Board (the "Board") seeking the following:

1. An order under section 19 of the *Ontario Energy Board Act, 1998* (the "Act") declaring that sections 4.1.3, 6.7.6, 6.7.7 and 11.2 of the *Transmission System Code* are *ultra vires* the Board's powers to enact under the Act;

2. An order under section 19 of the Act declaring that Goldcorp is not under any legal obligation to pay bypass compensation to Hydro One Networks Inc. ("Hydro One") and that Hydro One may not demand such compensation from Goldcorp;

3. An interim order, under paragraph 7.1 of Hydro One's electricity transmission licence and under its implied obligation not to enforce any requirement contrary to the Act, that pending final determination of the Goldcorp Application Hydro One shall work cooperatively with Goldcorp in good faith and with all dispatch to complete all analyses and negotiations and to execute all required agreements, contracts or other instruments required in order to connect and energize Goldcorp's transmission line in the first quarter of 2012;

4. An order under section 3.06 of the Board's *Practice Direction on Cost Awards* and subsection 30(2) of the Act granting Goldcorp all of its costs of the Goldcorp Application; and

5. Such further and other orders as may be required.

Included in the Goldcorp Application was a Notice of Motion in support of the request for interim relief set out in paragraph 3 above.

On November 23, 2011, Goldcorp filed with the Board a letter setting out submissions respecting: The issue and legal test in its Application, notice, intervenors and costs.

The Board assigned file number EB-2011-0361 to the Goldcorp Application.

The Langley Utilities Application

On August 2, 2011, Langley Utilities Contracting Ltd. ("Langley Utilities") filed an application (the "Langley Utilities Application") with the Board under Rule 34 of the Board's *Rules of Practice and Procedure* (the "Rules of Practice") seeking a hearing before the Board to determine whether the services contemplated under City of Brampton contract No. 2008-079 (the "Brampton Contract") are permitted business activities for an affiliate of a municipally-owned electricity distributor under section 73 of the Act. The services at issue under the Brampton Contract are the performance of routine and emergency maintenance for street lighting and related devices.

The affiliate at issue in relation to the Brampton Contract is Enersource Hydro Mississauga Services Inc. ("EHMSI"), an affiliate of Enersource Hydro Mississauga Inc., an electricity distributor licensed by the Board. The Brampton Contract is also the subject of a civil proceeding in the Superior Court of Justice at Brampton (Court file number CV-10-3476-00), which has been stayed by agreement between the parties pending a decision by the Board in the Langley Utilities Application.

The Board assigned file number EB-2011-0376 to the Langley Utilities Application.

The Combined Hearing

The Board convened a combined hearing and determined that before deciding whether or not to hear the matters raised by the two Applications on their merits, it would hear argument on certain threshold questions. Accordingly, on November 25, 2011 the Board issued a Notice of Applications, Notice of Combined Hearing and Procedural Order No. 1 ("Notice and Procedural Order No.1"). The Notice and Procedural Order No. 1 set out the threshold questions pertaining to the two applications and the schedule for filing of applicant and intervenor submissions on the threshold questions. The Notice and Procedural Order No. 1 also set out the intervenors in the combined hearing and scheduled an oral hearing on December 19, 2011.

With respect to Goldcorp's Motion for interim relief, the Board determined that it would hear the Motion immediately following the hearing on the threshold questions. Pursuant

to the Notice and Procedural Order No. 1, Hydro One filed its evidence in relation to the Motion on December 5, 2011.

By letter dated December 14, 2011, Goldcorp notified the Board that it had received the draft Connection Cost Recovery Agreement ("CCRA") from Hydro One and as such did not intend to proceed with its Motion for interim relief or for Orders 2(c) and 2(e) of its Application, as elaborated in pages 16 to 23 of its written submissions, so these matters were not considered by the Board.

In addition to submissions on the threshold questions, the Board also sought submissions from parties in regards to Goldcorp's request that it be granted its costs in relation to its Application, as well as on the question of the person(s) from whom cost awards should be recovered, in the event the Board were to award costs to Goldcorp. The Board also sought submissions from Langley Utilities and the intervenors in the Langley Utilities Application on the issue of cost awards in relation to their participation in the combined hearing.

Intervenors

Hydro One, School Energy Coalition ("SEC") and the Consumers Council of Canada ("CCC") requested and were granted intervenor status in respect of the Goldcorp Application. The Board also granted intervenor status to Lac Seul First Nation ("LSFN") as an intervenor in respect of the Goldcorp Application. LSFN was an intervenor in the leave to construct proceeding (EB-2011-0106). SEC and CCC also sought eligibility to apply for an award of costs. SEC, CCC, and LFSN were granted eligibility to apply for cost awards.

Powerline Plus Ltd. ("Powerline") requested and was granted intervenor status in relation to the Langley Utilities Application. The Board also granted intervenor status to Enersource Hydro Mississauga Services Inc. ("EHMSI") and the City of Brampton in respect of the Langley Utilities Application.

Following the issuance of the Notice and Procedural Order No.1, the Board received requests for intervention from the Electricity Distributors Association ("EDA") in respect of the Langley Utilities Application and from the Association of Major Power Consumers in Ontario ("AMPCO") in respect of the Goldcorp Application. AMPCO also sought

eligibility to apply for an award of costs. Both parties were granted intervenor status and AMPCO was granted eligibility to apply for cost awards.

Common Threshold Questions

As noted earlier in this Decision, the Board determined that it would proceed to hear argument on the following threshold questions pertaining to the Goldcorp Application:

A1 Does section 19 of the Act, in and of itself, provide a statutory basis for Goldcorp's Application?

A2 If section 19 of the Act does not provide a statutory basis on which Goldcorp may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matters raised by the Goldcorp Application under section 19(4) of the Act?

The Langley Utilities Application was made pursuant to Rule 34 ("Format of Hearings and Notice") of the Rules of Practice. No provision of the Act was cited as the statutory basis for the Langley Utilities Application. The Board determined that, before deciding whether or not to hear the matters raised by the Langley Utilities Application, it would proceed to hear argument on the following threshold questions:

B1 Is there a statutory basis for the Langley Utilities Application under the Act?

B2 If the Act does not provide a statutory basis on which Langley may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matter raised by the Langley Utilities Application under section 19(4) of the Act?

Pursuant to the Notice and Procedural Order No. 1, the Board received submissions from Goldcorp and Langley Utilities in relation to threshold questions and costs awards issues on December 5, 2011. The Board received written submissions from SEC, CCC, AMPCO and Board staff in respect of the Goldcorp Application. The Board received submissions from Powerline, EHMSI, EDA and Board staff in respect of the issues pertaining to the Langley Utilities Application.

The Threshold Questions

Scope of Section 19

As neither the Goldcorp nor the Langley Utilities applications were explicitly rooted in other sections of the Act, the issue before the Board was whether section 19 allows freestanding or standalone cases to be brought before the Board. "Freestanding" or "standalone" cases refer to applications that do not have an explicit origin in a section of the Act (or any other act which confers jurisdiction on the Board) which gives rise to specific forms of relief. For example, section 78 provides for the establishment of just and reasonable rates, section 92 provides for leave to construct facilities and so on.

Section 19 does not provide for any particular type of application, nor does it provide any specific relief or outcome:

> **Board's powers, general**
> **Power to determine law and fact**
> 19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).
>
> **Order**
> (2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).
>
> **Reference**
> (3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).
>
> **Additional powers and duties**
> (4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).
>
> **Exception**
> (5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the Electricity Act, 1998 or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

> **Jurisdiction exclusive**
> (6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

However, in the Board's view, neither of these applications is genuinely freestanding or standalone. Both are directly related to other conventional Board proceedings. In effect, the Board considers these cases to be adjuncts to or supplementary to other proceedings or actions which are based on conventional applications or Board processes.

In the case of Goldcorp, the application it has brought to have the Board declare sections of the Transmission System Code *ultra vires* is directly linked to its recent leave to construct application respecting the Red Lake mines (EB-2011-0106). It is clear to the Board that the reason for Goldcorp's current application is its dissatisfaction with the process leading to the creation of and performance of a CCRA. Specifically the company is dissatisfied with the requirement to pay a bypass compensation levy to Hydro One. During the oral argument, counsel for Goldcorp acknowledged that it was dissatisfied with the amount it would have to pay to Hydro One. Mr. Blue candidly acknowledged this in response to a question from the Board Panel:

> MR. SOMMERVILLE: And it's not -- it wasn't -- that wasn't an abstract idea. That was a very specific series of comments by the Board with respect to dealing with the price issue and holding ratepayers harmless. What did you think they were talking about?
>
> MR. BLUE: The fact that we were giving the line to Hydro One at no cost, and that $11 million compared to HONI's revenue requirement would be equivalent to taking a pail of water out of the dock at the foot of York Street and asking what the effect on the level was at Thunder Bay. But $11 million for Goldcorp is a lot of money.[1]

In the Board's view, Goldcorp's application is not "freestanding", but rather is an attempt to reopen the leave to construct proceeding respecting the Red Lake mines.

With respect to Langley Utilities, it is clear to the Board that its application is directly and inextricably linked to the interpretative bulletin issued by Board staff relating to section 73 of the Act. It is not an isolated, unconnected plea for a declaration, but rather a

[1] Oral Hearing Transcript Vol. 1, p. 20

request for clarification, from the Board itself, of the scope of the activities delineated in section 73. The Board will address this more explicitly later in this Decision.

Accordingly, proceeding with these cases is not dependent on a finding that the Board can accept and act upon applications that are rooted in nothing more than section 19.

Were it obligated to make such a finding, the Board would conclude that section 19 does not bestow any independent or freestanding jurisdiction upon the Board. In order to invoke the Board's jurisdiction parties must base their applications on specific sections of the Act, or other legislation, which address specific subject matters. The effect of section 19 is to endow the Board with the necessary authority to deal definitively with all of the reasonably associated aspects of applications before it, applications that are brought under the authority of specific sections of the Act, or other legislation, dealing with specific subject matters.

Given our finding on the threshold question that these cases are not genuinely "freestanding" it is unnecessary to consider questions A2 and B2. However it still remains to consider how the Board will proceed with these cases.

Goldcorp Decision

Goldcorp seeks to have the Board declare specific sections of the Transmission System Code *ultra vires*. These specific sections deal with the compensation required from load customers when they bypass system assets that have been put in place to service their requirements.

Goldcorp's position is that had the legislature intended to bestow upon the Board the authority to impose "burdensome" financial obligations through its codes it would have provided for that much more explicitly than it has done.

As noted above, Goldcorp's application arises directly from its very recent leave to construct application respecting its Red Lake mining property. That leave to construct application, which was required by section 92 of the Act, authorized Goldcorp to construct facilities related to the power requirements of the mines. That authorization followed a hearing and carried with it a series of conditions. It is these transmission

facilities associated with the Red Lake mines that give rise to the demand for bypass compensation from Hydro One to Goldcorp.

In the leave to construct decision the Board made several relevant findings respecting the respective obligations of Goldcorp and Hydro One to give effect to the bypass compensation provisions of the Transmission System Code.

Specifically the Board made the following statements:

> However, where a proponent builds and then transfers a facility to a licensed transmitter (as is the case here), the rate impacts are addressed in the context of the Connection and Cost Recovery Agreement ("CCRA"). The Board notes that Goldcorp has provided assurances that the intent is for the CCRA, which will ultimately be entered into by Goldcorp and Hydro One, to hold provincial ratepayers harmless. The Board also notes that the terms of the CCRA are governed by the Transmission System Code and are a condition of Hydro One's licence. Further, parties will have an opportunity to examine the transfer of assets and the associated cost recovery in a future Hydro One rate application.[2]

The Board further stated:

> With respect to the matter of impact on ratepayers, as noted earlier in this Decision and Order, due to the fact that the proponent is paying for the facility, there is no ratepayer impact to be assessed. With regard to the intended future transfer of the assets, Hydro One, as a condition of its licence, is required to comply with the terms of the Transmission System Code Economic Evaluation when entering into the CCRA with Goldcorp thereby holding ratepayers harmless. Hydro One has an ongoing requirement to comply with the Transmission System Code and adherence to the Economic Evaluation provisions is a matter to be examined when Hydro One applies to have assets added to its rate base in a cost of service application.[3]

It is very clear from the record that it was only once the amount of the bypass compensation requirement was known that Goldcorp sought relief through this current application:

> MR. BLUE: …. Mr. Warren referred to the leave-to-construct decision at the highlighted portions. My submission there is everything in those statements is true, and that was the evidence of Goldcorp and there is nothing inconsistent in

[2] Decision and Order, EB-2011-0106, p.7
[3] *Ibid*., p.12

> those statements between what was said there and what Goldcorp is suggesting here.
>
> Clearly we will comply with the transmission code, all of the provisions of it that are legal.
>
> MR. SOMMERVILLE: Did you make that qualification at the time, Mr. Blue?
>
> MR. BLUE: No, because, as I said, Mr. Sommerville, at the time, we thought we were dealing with reasonable people at Hydro One, and I thought we could negotiate a trade-off between the system benefits that Goldcorp was making and the degree of bypass compensation.
>
> And we are still of that view today. We are still prepared to do that, but Hydro One was not prepared to discuss that issue. But at the time that we were before the Board, we did not have an *ultra-vires* argument in mind.[4]

In fact, it appeared that Goldcorp was perfectly content to conform to the requirements of the Transmission System Code, and the conditions imposed by the Board until its negotiations with Hydro One became difficult.

In the Board's view this background is very important in determining whether it should exercise its discretion to hear this matter on its own motion.

In the Board's view this application can be viewed in three ways:

First, it is really in the nature of an application for review of the leave to construct decision. The various undertakings made by Goldcorp in that case and the Board's findings are really the cause of Goldcorp's problem. This application appears to be nothing more than a collateral attempt to unseat that decision and the obligations to conform to the Transmission System Code that attend it.

The Board has very specific procedures in its Rules of Practice to deal with reviews of its decisions. Sections 42 through 45 of the Board's Rules of Practice provide a comprehensive template for motions to review, including guidance with respect to the grounds necessary to sustain such an application.

Goldcorp's current application does not conform with those provisions of the Rules of Practice.

[4] Oral Hearing Transcript, p. 107-108

Alternatively, this application can be seen as an application to amend the Hydro One license to exempt Hydro One from requiring conformity with the requirements of the bypass compensation sections of the Transmission System Code. This approach was taken recently in the case of a number of hydro generation projects on Crown lands. (see EB-2011-0067 Ontario Waterpower Association, May 5, 2011) In those instances, Hydro One was exempted from imposing the sections of the Distribution System Code respecting payment of funds to Hydro One in aid of construction. This approach would have the effect of eliminating the operation of the sections which Goldcorp now finds unpalatable. However, Goldcorp has explicitly turned away from this approach in its current application.

Finally, also alternatively, the application can be seen as an application to amend the Transmission System Code by deleting the bypass compensation sections.

Sections 70.1 through 70.3 of the Act provide a very specific procedure for the amendment of any of the Board codes. The process for amending the codes, including the Transmission System Code, is intended to be highly transparent, formal and consultative. An excerpt from the Act containing the relevant sections is attached as Appendix “A” to this Decision for ease of reference.

In the Board's view Goldcorp’s current application can safely be characterized as in substance an application to amend the Transmission System Code, by deleting the sections respecting bypass compensation. As such, it is subject to all of the procedural requirements codified in sections 70.1, 70.2 and 70.3.

Accordingly, in the Board’s view, it would certainly be acting outside of its jurisdiction were it to entertain such an application for amendment to the Transmission System Code in any manner that did not conform to all of the requirements of those sections of the Act.

It is the Board’s view that before it can proceed to address Goldcorp’s concerns Goldcorp must determine what form of application it wants to pursue.

To the extent that Goldcorp seeks to amend or vary the decision of the Board in the leave to construct case, such relief can only be obtained after due consideration of a

properly constituted motion for review. The Board's requirements for motions to review are stipulated in sections 42 through 45 of its Rules of Practice.

To the extent that Goldcorp seeks to amend the license of Hydro One to exempt it from the application of the impugned sections of the Transmission System Code, the Board has entertained cases of this nature, and would deal with a properly constituted application to do the same here.

In its submissions Goldcorp suggested that even if the Board rejected its application for a declaration that the sections of the Transmission System Code were *ultra vires*, the Board should resolve the outstanding issues within the context of this current application. The Board disagrees. As has been noted above, each of the applications which could give rise either to a reconsideration of the leave to construct decision, or for the amendment of Hydro One's license, or the Transmission System Code itself have specific procedural and substantive components. The choice of which method Goldcorp chooses to adopt is up to Goldcorp, and the Board will not advise it in any direction. It is also to be noted that each of the approaches open to Goldcorp carry different exposure to cost responsibility. For this reason alone it is important that Goldcorp determine for itself which course it chooses to follow, if any.

Langley Utilities Decision

Where Goldcorp has many options to consider in its objective to avoid the consequences of the Transmission System Code, Langley Utilities has none to pursue its objective of having the Board itself provide an interpretation of section 73 of the Act.

As noted above section 73 provides what purports to be an exhaustive inventory of activities permitted to the affiliates of licensed distributors.

Board staff had prepared two interpretive bulletins which suggest that streetlighting services should be considered to be included in those activities, even though they are not explicitly referenced. It is clear that parties have acted upon Board staff's interpretive bulletin, and it is also clear that there is disagreement about its correctness.

Considerable effort was made to characterize the Langley Utilities application as a veiled compliance matter, and therefore subject to the procedures encoded in sections

112 through 120 of the Act. This suggestion is that the Langley Utilities Application is a collateral and inappropriate effort to circumvent the compliance mechanism in the Act. The Board does not consider it to be that at all.

Langley Utilities and the intervenor Powerline find themselves in a position where a nonbinding interpretative opinion by Board staff appears to be governing the situation. Even though Board staff's bulletins are expressly not binding upon the Board, they do and they are expected to assist regulated and non-regulated parties in ordering their business relationships. This is a particularly useful measure when all of the parties interested generally can agree or accept the guidance provided in the bulletins.

But where there is fundamental dispute, and the issue is one that can have extremely important implications for some commercial interests, both regulated and unregulated, it is incumbent upon the Board itself to provide clarity and direction.

The record discloses that Langley Utilities, and Powerline have diligently attempted to achieve this outcome. They have asked for Board guidance on the subject, they have waited, and they have now taken this step to seek the Board's assistance in understanding the scope of section 73.

Accordingly the Board, on its own motion, will consider Langley's request to the extent that it seeks the Board's view with respect to the scope of section 73 activities. It is the Board's opinion that because of the very particular circumstances of this case it should provide further guidance. Those special circumstances include the potential commercial significance of the issue, the fact that requests for reconsideration of the issue have been made serially over a number of years, by a number of parties without success, and the fact that section 73 is not explicit on the subject.

The Board wishes to make it as clear as possible that it does not regard anyone to be in violation of section 73, or subject to compliance action from the Board at this time. Any enforcement or compliance activities which may arise would in these circumstances be prospective in nature, and would take into account the reasonable actions and expectations of parties who have ordered their business associations and activities in a reasonable manner and in light of Board staff's interpretive bulletin, whatever the outcome of the Board's consideration of this section may be.

The Board would welcome any suggestions respecting notice to interested persons respecting the determination of the issue.

Cost Awards

Goldcorp seeks its costs. The Board disagrees. As has been acknowledged by counsel for Goldcorp, and as outlined elsewhere in this Decision, this applicant had a number of avenues available to it. In choosing to characterize this application the way that it did, as striking out as *ultra vires* the bypass provisions of the Transmission System Code, the applicant engaged the participation of many of the parties who would have no interest whatsoever had the applicant chosen some of the other courses open to it. They very likely would not have appeared in the case and accordingly would not have incurred any costs associated with this case.

Further, the Board views this application to be a collateral attack on the leave to construct decision, and Goldcorp's pursuit of its desired relief through such a broad legal challenge is opportunistic. The Board finds that Goldcorp has put the intervenors and other parties to considerable effort and will award costs to those parties found eligible, to be paid by Goldcorp.

No party asked for costs of the motion in the Langley matter and none will be awarded.

With respect to the Board's costs in relation to the combined hearing, the Board has decided that it will apportion these costs equally between Goldcorp and the Langley Utilities application. Goldcorp shall pay its share of the Board's costs immediately upon receipt of the Board's invoice. With respect to the portion of the Board costs related to the Langley Utilities application, the recovery of these costs shall be determined as part of the hearing of the Langley Utilities Application.

The Board Orders that:

1. Intervenors eligible for costs in respect of the Goldcorp Application shall file with the Board and forward to Goldcorp their respective cost claims within **14 days** from the date of this Decision. The cost claims must conform to the Board's *Practice Direction on Cost Awards*.

2. Goldcorp shall file with the Board and forward to intervenors any objections to the claimed costs within **21 days** from the date of this Decision.

3. Intervenors shall file with the Board and forward to Goldcorp any responses to any objections for cost claims within **28 days** of the date of this Decision.

4. Goldcorp shall pay its share of the Board's costs and incidental to, this proceeding upon receipt of the Board's invoice.

DATED at Toronto, January 23, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

TO DECISION WITH REASONS AND ORDER

SECTIONS 70.1, 70.2 & 70.3 OF THE
ONTARIO ENERGY BOARD ACT, 1988

BOARD FILE NO: EB-2011-0361 & EB-2011-0376

DATED JANUARY 23 2012

Codes that may be incorporated as licence conditions

70.1 (1) The Board may issue codes that, with such modifications or exemptions as may be specified by the Board under section 70, may be incorporated by reference as conditions of a licence under that section. 2003, c. 3, s. 48.

Quorum

(2) For the purposes of this section and section 70.2, two members of the Board constitute a quorum. 2003, c. 3, s. 48.

Approval, etc., of Board

(3) A code issued under this section may provide that an approval, consent or determination of the Board is required, with or without a hearing, for any of the matters provided for in the code. 2003, c. 3, s. 48.

Incorporation of standards, etc.

(4) A code issued under this section may incorporate by reference, in whole or in part, any standard, procedure or guideline. 2003, c. 3, s. 48.

Scope

(5) A code may be general or particular in its application and may be limited as to time or place or both. 2003, c. 3, s. 48.

Legislation Act, 2006, Part III

(6) Part III (Regulations) of the Legislation Act, 2006 does not apply to a code issued under this section. 2003, c. 3, s. 48; 2006, c. 21, Sched. F, s. 136 (1).

Transition

(7) The following documents issued by the Board, as they read immediately before this section came into force, shall be deemed to be codes issued under this section and the Board may change or amend the codes in accordance with this section and sections 70.2 and 70.3:

1. The Affiliate Relationships Code for Electricity Transmitters and Distributors.

2. The Distribution System Code.

3. The Electricity Retailer Code of Conduct.
4. The Retail Settlement Code.

5. The Transmission System Code.

6. Such other documents as are prescribed by the regulations. 2003, c. 3, s. 48.

Proposed codes, notice and comment

70.2 (1) The Board shall ensure that notice of every code that it proposes to issue under section 70.1 is given in such manner and to such persons as the Board may determine. 2003, c. 3, s. 48.

Content of notice

(2) The notice must include,

(a) the proposed code or a summary of the proposed code;

(b) a concise statement of the purpose of the proposed code;

(c) an invitation to make written representations with respect to the proposed code;

(d) the time limit for making written representations;

(e) if a summary is provided, information about how the entire text of the proposed code may be obtained; and

(f) a description of the anticipated costs and benefits of the proposed code. 2003, c. 3, s. 48.

Opportunity for comment

(3) On giving notice under subsection (1), the Board shall give a reasonable opportunity to interested persons to make written representations with respect to the proposed code within such reasonable period as the Board considers appropriate. 2003, c. 3, s. 48.

Exceptions to notice requirement

(4) Notice under subsection (1) is not required if what is proposed is an amendment that does not materially change an existing code. 2003, c. 3, s. 48.

Notice of changes

(5) If, after considering the submissions, the Board proposes material changes to the proposed code, the Board shall ensure notice of the proposed changes is given in such manner and to such persons as the Board may determine. 2003, c. 3, s. 48.

Content of notice

(6) The notice must include,

(a) the proposed code with the changes incorporated or a summary of the proposed changes;

(b) a concise statement of the purpose of the changes;

(c) an invitation to make written representations with respect to the proposed code;

(d) the time limit for making written representations;

(e) if a summary is provided, information about how the entire text of the proposed code may be obtained; and

(f) a description of the anticipated costs and benefits of the proposed code. 2003, c. 3, s. 48.

Representations re: changes

(7) On giving notice of changes, the Board shall give a reasonable opportunity to interested persons to make written representations with respect to the changes within such reasonable period as the Board considers appropriate. 2003, c. 3, s. 48.

Issuing the code

(8) If notice under this section is required, the Board may issue the code only at the end of this process and after considering all representations made as a result of that process. 2003, c. 3, s. 48.

Public inspection

(9) The Board must make the proposed code and the written representations made under this section available for public inspection during normal business hours at the offices of the Board. 2003, c. 3, s. 48.

Amendment of code

(10) In this section, a code includes an amendment to a code and a revocation of a code. 2003, c. 3, s. 48.

Effective date and gazette publication

70.3 (1) A code issued under section 70.1 comes into force on the day specified in the code. 2003, c. 3, s. 48.

Publication

(2) The Board shall publish every code that comes into force in The Ontario Gazette as soon after the code is issued as practicable. 2003, c. 3, s. 48.

Effect of non-publication

(3) A code that is not published is not effective against a person who has not had actual notice of it. 2003, c. 3, s. 48.

Effect of publication

(4) Publication of a code in The Ontario Gazette,

(a) is, in the absence of evidence to the contrary, proof of its text and of its issuance; and

(b) shall be deemed to be notice of its contents to every person subject to it or affected by it. 2003, c. 3, s. 48.

Judicial notice

(5) If a code is published in The Ontario Gazette, judicial notice shall be taken of it, of its content and of its publication. 2003, c. 3, s. 48.

D

CITATION: Goldcorp Canada Ltd. v. Ontario Energy Board, 2012 ONSC 3097
DIVISIONAL COURT FILE NO.: 69/12
DATE: 20120605

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Goldcorp Canada Ltd. and Goldcorp Inc. (Goldcorp), Appellant

- AND -

Ontario Energy Board, Respondent

BEFORE: Swinton, Sachs and Wilton-Siegel JJ.

COUNSEL: *Ian Blue, Q.C. and Colin Pendrith*, for the Appellant

M. Philip Tunley and Justin Safayeni, for the Respondent

Robert Warren and Catherine Powell, for the Intervenor Consumers Council of Canada

Mark Rubenstein, for the Intervenor Ontario Education Services Corporation

HEARD at Toronto: May 24, 2012

ENDORSEMENT

The Court:

Overview

[1] This is an appeal by Goldcorp Canada Inc. and Goldcorp Inc. (collectively, "Goldcorp") from the decision with reasons and order dated January 23, 2012 (the "Decision") of the Ontario Energy Board (the "Board") in respect of its application filed November 4, 2011 seeking, among other things, a determination under s. 19 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B (the "Act") that certain provisions of the *Ontario Energy Board Transmission System Code* (the "Code") dealing with "bypass compensation" are *ultra vires* the Act.

Factual Background

[2] Goldcorp mines gold in the municipality of Red Lake, where it operates three mining facilities. The main source of energy for those facilities is electricity that it has been receiving from Hydro One Networks Inc. ("Hydro One").

[3] In 2010, Goldcorp decided that its mining facilities would be better served by a new transmission line and related facilities. Under the Code, Goldcorp was eligible to construct the new transmission line itself. Goldcorp proposed to build the new transmission line and transfer it to Hydro One at no cost. In respect of this proposed arrangement, Goldcorp and Hydro One were required to negotiate a "Connection and Cost Recovery Agreement" ("CCRA") between them dealing with a number of matters relating to the construction of the new line and its connection to the Hydro One facilities, including the capital cost of the facilities.

[4] In these circumstances, s. 11.2 of the Code also requires a transmitter to obtain "bypass compensation" from Goldcorp on the basis that the existing transmission line of Hydro One is stranded, i.e., Hydro One will no longer receive revenue from the existing transmission line. Section 6.7.7 of the Code sets out how Hydro One is to calculate the bypass compensation. The purpose of the bypass compensation is to compensate Hydro One's customers for the investment they have effectively made in the stranded transmission line, which will no longer be generating revenue. The payment of bypass compensation was also understood to be addressed in the CCRA to be negotiated.

[5] Goldcorp and Hydro One began negotiating the arrangements pertaining to the new transmission line in April 2010. At the commencement of these negotiations, Hydro One advised Goldcorp of its position that Goldcorp would have to pay bypass compensation. Hydro One estimated this amount to be between $8 and $11 million.

[6] Goldcorp decided to suspend negotiations with Hydro One pending a favourable decision from the Board on its Leave to Construct Application, which was required pursuant to s. 92 of the Act. The Leave to Construct Application was filed with the Board on April 25, 2011. In the course of the proceeding before the Board, Goldcorp provided assurances to the Board that the project was fully compliant with all relevant codes, rules and licences, which includes the Code, and that there would be no financial implications or risks to electricity ratepayers.

[7] A favourable decision was issued by the Board on July 20, 2011. In its reasons, the Board stated (EB-2011-0106 at p. 12),

> With respect to the matter of impact on ratepayers, as noted earlier in this Decision and Order, due to the fact that the proponent is paying for the facility, there is no ratepayer impact to be assessed. With regard to the intended future transfer of the assets, Hydro One, as a condition of its licence, is required to comply with the terms of the Transmission System Code Economic Evaluation when entering into the CCRA with Goldcorp thereby holding ratepayers harmless. Hydro One has an ongoing requirement to comply with the Transmission System Code and adherence to the Economic Evaluation provisions is a matter to be examined when Hydro One applies to have assets added to its rate base in a cost of service application.

[8] After the Leave to Construct was granted, Goldcorp and Hydro One were unable to successfully conclude negotiations on a number of matters to be addressed in the CCRA

including, in particular, the amount of bypass compensation to be paid by Goldcorp to Hydro One. In response to Hydro One's continuing demand for bypass compensation in the amount of $8 - $11 million, Goldcorp brought a new application before the Board seeking to have the Board declare the bypass compensation provisions of the Code *ultra vires* the Act.

[9] It is understood that the new transmission line is substantially complete. At the hearing of this appeal, Goldcorp provided the Court with a copy of the CCRA that it has entered with Hydro One. With respect to bypass compensation, the agreement provides that Goldcorp shall pay bypass compensation in accordance with the methodology set out in s. 6.7.7 of the Code unless a final order of the Board or a court of competent jurisdiction states that it is not required to do so.

The New Goldcorp Application

[10] As mentioned, in its new application, filed on November 4, 2011, Goldcorp sought, among other things, an order of the Board under s. 19 of the Act that ss. 4.1.3, 6.7.6, 6.7.7 and 11.2 of the Code are *ultra vires* the Board's powers under the Act, and an order under s. 19 of the Act declaring that Goldcorp is not under any legal obligation to pay bypass compensation to Hydro One and that Hydro One may not demand such compensation from Goldcorp.

[11] Following receipt of the Goldcorp application, the Board determined that before addressing the merits of the issues raised, it would hear argument from Goldcorp and intervenors on the following "threshold" procedural questions:

> A1 Does section 19 of the Act, in and of itself, provide a statutory basis for Goldcorp's Application?
>
> A2 If section 19 of the Act does not provide a statutory basis on which Goldcorp may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matters raised by the Goldcorp Application under s. 19(4) of the Act?

[12] The relevant parts of s. 19 of the Act state:

> 19(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.
>
> …..
>
> (4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application.

[13] The Board issued its decision on January 23, 2010. This is the decision under appeal.

[14] The threshold issue before the Board was whether s. 19(1) of the Act allowed freestanding or standalone cases to be brought before the Board, i.e., applications that do not have an explicit origin in a section of the Act (or any other act which confers jurisdiction on the Board) that gives rise to specific forms of relief. However, in its decision, the Board determined that Goldcorp's application was not a standalone application, in that it related directly to another Board proceeding.

[15] In reaching this conclusion, the Board stated (at p. 7):

> In the case of Goldcorp, the application it has brought to have the Board declare sections of the Transmission System Code *ultra vires* is directly linked to its recent leave to construct application respecting the Red Lake mines (EB-2011-0106). It is clear to the Board that the reason for Goldcorp's current application is its dissatisfaction with the process leading to the creation of and performance of a CCRA. Specifically the company is dissatisfied with the requirement to pay a bypass compensation levy to Hydro One. During the oral argument, counsel for Goldcorp acknowledged that it was dissatisfied with the amount it would have to pay to Hydro One.
>
> …..
>
> In the Board's view, Goldcorp's application is not "freestanding", but rather is an attempt to reopen the leave to construct proceeding respecting the Red Lake mines.

[16] The Board also referred to the findings made in the Leave to Construct decision concerning the respective obligations of Goldcorp and Hydro One to give effect to the bypass compensation provisions of the Code. In this regard the Board's decision in the Leave to Construct proceeding specifically noted (at p. 7),

> However, where a proponent builds and then transfers a facility to a licensed transmitter (as is the case here), the rate impacts are addressed in the context of the Connection and Cost Recovery Agreement ("CCRA"). The Board notes that Goldcorp has provided assurances that the intent is for the CCRA, which will ultimately be entered into by Goldcorp and Hydro One, to hold provincial ratepayers harmless. The Board also notes that the terms of the CCRA are governed by the Transmission System Code and are a condition of Hydro One's licence. Further, parties will have an opportunity to examine the transfer of assets and the associated cost recovery in a future Hydro One rate application.

[17] From these references, it is clear that the Board understood that the earlier Leave to Construct decision proceeded on the basis that Goldcorp acknowledged, and would be complying with, the bypass compensation provisions of the Code. Accordingly, the Board considered that Goldcorp's decision to challenge its obligations to comply with these provisions of the Code amounted to a change in a fundamental condition upon which the Leave to Construct decision was granted, i.e., the absence of any ratepayer impact.

[18] The Board laid out three potential options by which Goldcorp could seek a determination of the merits of its application that did not involve proceeding under s. 19(1):

> 1. A review of Goldcorp's Leave to Construct Decision pursuant to ss. 42-45 of the Board's *Rules of Practice and Procedure*;
>
> 2. An application to amend Hydro One's licence to exempt it from the requirement that it must collect bypass compensation pursuant to s. 74 of the Act; or
>
> 3. An application to amend the Code by removing the sections related to bypass compensation pursuant to the Board's code-making authority under ss. 70.1 to 70.3 of the Act.

[19] The Board was of the view that, before it could address Goldcorp's concerns, Goldcorp had to first determine what form of application it wanted to pursue. Each of the potential options has specific procedural and substantive requirements that would have to be satisfied by the applicant, as well as different potential cost consequences. The Board did not indicate a view regarding which course of action Goldcorp should pursue, nor did it issue any further order, other than regarding costs.

[20] The Board also declined to exercise its jurisdiction to hear this matter on its own motion under s. 19(4). The Board expressed the view that a very important consideration in reaching this decision was the fact that Goldcorp "was perfectly content to conform to the requirements of the [Code], and the conditions imposed by the Board until its negotiations with Hydro One became difficult."

[21] Further, the Board stated that "[w]ere it obliged to make such a finding, the Board would conclude" that s. 19(1), under which Goldcorp purported to bring its *ultra vires* challenge, does not confer an independent or freestanding jurisdiction on the Board under which a party may bring an application. Parties must base their application on a specific section of the Act or other legislation within the Board's jurisdiction that addresses a specific subject matter.

[22] The Board awarded costs against Goldcorp in favour of the eligible intervenors. In doing so, the Board reiterated a comment made earlier that it viewed the application as a collateral attack on the Leave to Construct decision and added that it considered Goldcorp's pursuit of its desired relief through a broad legal challenge of the Code provisions to be opportunistic. The Board found that, in choosing this legal avenue, Goldcorp engaged the participation of many parties who would have had no interest if another course of action had been selected.

The Issues on this Appeal

[23] Goldcorp raised the following arguments:

> 1. The Board erred in law in finding that Goldcorp's application was a collateral attack on the Leave to Construct decision.

2. The Board committed a jurisdictional error by declining to hear the application under s. 19(1) of the Act.

3. The Board erred in awarding costs to the intervenors.

The Standard of Review

[24] An appeal lies to this Court only on a question of law or jurisdiction (s. 33(2) of the Act).

[25] We disagree with Goldcorp's argument that the standard of review is correctness. The Board is a highly specialized tribunal. When it is interpreting the provisions of the Act, its home statute, its decisions are deserving of deference and are reviewable on a standard of reasonableness (*Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284 at paras. 39-40; *Great Lakes Power Limited v. Ontario Energy Board*, 2010 ONCA 399 at para. 11; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39). We are satisfied that the appeal raises no true question of jurisdiction.

Analysis

[26] The Board did not decline to hear the issue raised on Goldcorp's application, as Goldcorp alleges. All that the Board has determined is that there are three possible applications that Goldcorp can employ to challenge the Code provisions, and the Board has left it to Goldcorp to choose one of these procedural options. The Board also exercised its discretion pursuant to s. 19(4) of the Act not to hear the challenge on its own motion.

[27] The Board reasonably concluded that the proposed challenge was not "genuinely freestanding or standalone", and that it was "directly related to other conventional Board proceedings". In particular, it is clear that the new application was linked to the Board's earlier Leave to Construct decision approving the construction of the transmission line.

[28] In the Leave to Construct proceeding, the Board was required to consider whether the construction of the transmission facilities was in the public interest (Act, s. 96(1). In making that determination, the Board was obligated to consider the interests of consumers with respect to prices and the reliability and quality of electricity service (Act, s. 96(2)). As mentioned earlier, Goldcorp had given assurances to the Board that the construction project was fully compliant with all relevant codes, rules and licences, which includes the Code, and that there would be no financial implications or risks to electricity ratepayers.

[29] We agree with the submission of the Board and the intervenors that the central matters raised in this appeal are not questions of law *per se*, but rather an attempt to overturn an interlocutory and discretionary procedural decision by the Board as to how the challenge to the *vires* of certain provisions of the Code should proceed, given the determination that Goldcorp's application was not a standalone application. Goldcorp has not identified any error of law or

true jurisdictional error that can sustain an appeal under s. 33 of the Act in respect of this decision.

[30] Further, the Board's decision not to proceed with the application under s. 19(4) of the Act was a reasonable one, given what occurred in the Leave to Construct proceedings.

[31] Lastly, as Goldcorp has acknowledged in oral argument, the Board had the discretion to award costs to the intervenors. The Board gave persuasive reasons for doing so. Goldcorp has not identified any error of law by the Board in making such an award.

Conclusion

[32] For these reasons, the appeal is dismissed. Neither the parties nor the intervenors seek costs of the appeal, and none are awarded.

_____
Swinton J.

_____
Sachs J.

_____
Wilton-Siegel J.

Date: June 5, 2012

CITATION: Goldcorp Canada Ltd. v. Ontario Energy Board, 2012 ONSC 3717
DIVISIONAL COURT FILE NO.: 69/12
DATE: 20120629

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Goldcorp Canada Ltd. and Goldcorp Inc. (Goldcorp), Appellant

- AND -

Ontario Energy Board, Respondent

BEFORE: Swinton, Sachs and Wilton-Siegel JJ. **COUNSEL:** *Ian Blue, Q.C. and Colin Pendrith*, for the Appellant

M. Philip Tunley and Justin Safayeni, for the Respondent

Robert Warren and Catherine Powell, for the Intervenor Consumers Council of Canada

Mark Rubenstein, for the Intervenor Ontario Education Services Corporation

HEARD at Toronto: May 24, 2012

ADDENDUM TO ENDORSEMENT AFTER RELEASE

The Court:

[1] Subsequent to the release of the Court's initial Endorsement (Citation 2012 ONSC 3097 dated June 5, 2012), counsel pointed out factual errors in paragraph 4 of the Endorsement. Therefore, paragraph 4 is replaced in order to correct these factual errors. The underlining indicates changes.

[4] In these circumstances, s.6.7.6 of the Code also requires a transmitter to obtain "bypass compensation" from Goldcorp on the basis that a portion of the exiting transmission connection facilities of Hydro One are stranded, ie., Hydro One will no longer receive the expected revenue in respect of these existing facilities. Section 6.7.7 of the Code sets out how Hydro One is to calculate the bypass compensation. The purpose of the bypass compensation is to compensate Hydro One's customers for the investment they have effectively made in the stranded facilities, which will no longer be generating the expected revenue. The payment of bypass compensation was also understood to be addressed in the CCRA to be negotiated.

Swinton J.

Sachs J.

Wilton-Siegel J.

Date: June 29, 2012

E

Ontario Energy Board **Commission de l'Énergie de l'Ontario**

ONTARIO ENERGY BOARD

Transmission System Code

June 10, 2010

1. PURPOSE

1.0.1 The purpose of this Transmission System Code (the "Code") is to set out:

(a) the minimum conditions that a transmitter shall meet in designing, constructing, managing, maintaining and operating its transmission system;

(b) the rules governing a transmitter's obligation to connect customers to its transmission system, and to provide transmission service to its customers;

(c) the obligations between a transmitter and its customers and between a transmitter and its neighbouring Ontario transmitters;

(d) the rules governing the economic evaluation of transmission system connections and expansions;

(e) the minimum standards for facilities connected to a transmission system; and

(f) through the connection agreement set out in Appendix 1, the obligations of a customer to the transmitter to whose transmission system the customer's facilities are connected.

4. STANDARDS OF BUSINESS PRACTICE AND CONDUCT

4.1 GENERAL REQUIREMENTS

4.1.1 Subject to section 4.1.2, a transmitter shall connect a customer's facilities and shall offer and provide transmission services to a customer subject to that customer entering into or having a connection agreement with the transmitter. Such connection agreement shall be in the form set out in the applicable version of the connection agreement set out in Appendix 1. Where the customer is an unlicensed transmitter, the version of the connection agreement set out in Appendix 1 to be used shall be determined based on the nature of the facility that is connected to the unlicensed transmitter's transmission system. Where both a generation facility and a load facility are connected to the unlicensed transmitter's transmission system, this may require two connection agreements.

4.1.2 A transmitter may not enter into a connection agreement on terms and conditions other than those set forth in the applicable version of the connection agreement set out in Appendix 1 or amend the terms and conditions of a connection agreement relative to the terms and conditions set forth in the applicable version of the connection agreement set out in Appendix 1 except as expressly contemplated in the applicable version of the connection agreement set out in Appendix 1 or with the prior approval of the Board.

4.1.3 Where a transmitter does not have a connection agreement with a customer whose facilities were connected to the transmitter's transmission system prior to the Code revision date, the transmitter shall be bound by the applicable version of the connection agreement set out in Appendix 1 in relation to that customer and shall be permitted to consider that customer's continued acceptance of transmission service as acceptance by that customer of all of the terms and conditions of the connection agreement in the form set out in the applicable version of the connection agreement set out in Appendix 1.

4.1.4 A transmitter shall ensure that all connections to its transmission system are made by it with due regard for the safety of the transmitter's employees and the public.

4.1.5 A transmitter shall provide customers and any neighbouring Ontario transmitter with all necessary information that is in the possession of or reasonably available to the transmitter to enable the transmitter to comply with its obligations under this Code, including the information specified in Appendix 3.

4.1.6 Except as may be required by section 4.1.1 in relation to a customer that is an unlicensed transmitter, a transmitter may not require more than one connection agreement from a customer whose facilities will be or are connected either at a single site or at multiple sites or service territories that are geographically contiguous. A transmitter shall require a separate connection agreement for each facility that a customer may have at geographically noncontiguous sites or service territories.

4.2 TRANSMISSION SERVICE CHARGES

4.2.1 A transmitter shall maintain and make available to all customers a list of its transmission services and the rates or charges approved by the Board for those transmission services.

4.2.2 No transmitter shall charge a customer for any transmission service unless the charge has been approved by the Board.

4.2.3 A transmitter shall not charge a customer for any transmission services in relation to any reduction in that customer's load that the customer has demonstrated to the reasonable satisfaction of the transmitter (such as by means of an energy study or audit) has resulted from embedded renewable generation (determined in accordance with section 11.1), energy conservation, energy efficiency or load management activities, except in accordance with the transmitter's Rate Order.

4.2.4 A transmitter shall not impose or enforce a minimum payment obligation on any customer, except in accordance with this Code or a Rate Order.

4.3 FACILITIES STANDARDS

4.3.1 A transmitter shall ensure that its transmission facilities:

(a) meet all applicable requirements of the Ontario Electrical Safety Authority;

(b) conform to applicable industry standards, including those of the Canadian Standards Association, the Institute of Electrical and Electronic Engineers,

(g) the obligation of the transmitter to pay a transfer price that is the lower of the cost to the load customer or the transmitter's reasonable cost to do the same work, for any connection facility a load customer constructs and opts or is required to transfer to the transmitter; and

(h) where the transmitter pays a transfer price for a connection facility constructed by a load customer, the obligation of the transmitter to make any adjustment required to reflect that transfer price in any capital contribution that is to be paid by the load customer.

The transmitter shall prepare all estimates required by this section 6.6.2 in accordance with good utility practice and industry standards.

6.6.3 A transmitter shall provide a copy of its contestability procedure to any load customer requiring new connection facilities.

6.7 REPLACEMENT, RELOCATION AND BYPASS OF EXISTING FACILITIES

6.7.1 A transmitter shall notify each customer that will be affected by the transmitter's plans to retire a connection facility, at least five years in advance of the effective date of the retirement. The transmitter shall give each affected customer the option of:

(a) providing its own replacement connection facility;

(b) connecting its facilities to the connection facility of another person; or

(c) requiring the transmitter to provide a replacement connection facility.

6.7.2 Where a transmitter's connection facility is retired, the transmitter shall not recover a capital contribution from a customer to replace that connection facility.

6.7.3 Where a customer requests the relocation of a transmitter's connection or network facility, the transmitter shall recover from that customer the cost of relocating that connection or network facility.

6.7.4 Where a transmitter's connection or network facility is relocated in the absence of a customer request, the transmitter shall bear the cost of relocating that connection or

network facility.

6.7.5 When a load customer provides its own connection facility to serve new load or transfers new load to the connection facility of another person, the transmitter shall not require bypass compensation from that customer.

6.7.6 Subject to sections 6.7.2, 6.7.7 and 6.7.8, for all or a portion of existing load a load customer may bypass a transmitter-owned connection facility with its own connection facility or the connection facility of another person, provided that the load customer compensates the transmitter.

6.7.7 For the purposes of sections 6.7.6 and 11.2.1, but subject to section 6.7.8, the transmitter shall calculate bypass compensation by first multiplying the net book value of the bypassed connection facility, including a salvage credit and reasonable removal and environmental remediation costs, if applicable, by the bypassed capacity on the relevant connection facility. The transmitter shall then divide the resulting figure by the total normal supply capacity of the bypassed connection facility. For purposes of this calculation:

(a) the bypassed capacity on the relevant connection facility shall be equal to the difference between the customer's existing load on that connection facility at the time of bypass and the customer's average monthly peak load in the three-month period following the date on which bypass occurred; and

(b) the normal supply capacity of the bypassed connection facility shall be determined by the transmitter in accordance with the Board-approved procedure referred to in section 6.2.7.

6.7.8 Where an economic evaluation, including an economic evaluation referred to in section 6.2.24, 6.3.9 or 6.3.17, was conducted by a transmitter for a load customer in relation to a connection facility on the basis of a load forecast, a transmitter shall not, during the economic evaluation period to which the economic evaluation relates, require bypass compensation from a customer under section 6.7.6 in relation to any load that represents that customer's contracted capacity.

6.7.9 A transmitter should avoid overloading a connection facility above its total normal supply capacity. Where a connection facility has been overloaded, and a customer transfers the overload to its own connection facility or to the connection facility of another person, the transmitter shall not require bypass compensation from that customer.

6.7.10 A transmitter shall promptly notify the Board upon becoming aware that a load customer that is a distributor intends to bypass a transmitter-owned connection facility with its own connection facility or the connection facility of another person.

6.7.11 Where a transmitter becomes aware that a load customer intends to bypass a transmitter-owned connection facility with its own connection facility or the connection facility of another person, the transmitter shall promptly notify all other load customers served by the connection facility that is intended to be bypassed.

6.8 OBLIGATIONS BETWEEN NEIGHBOURING ONTARIO TRANSMITTERS

6.8.1 A transmitter shall enter into an agreement with each neighbouring Ontario transmitter. The agreement shall describe the facilities connecting the two transmission systems and shall set out the respective obligations of the parties in relation to:

(a) transmission system expansion and associated cost responsibilities;

(b) operational requirements and authorities;

(c) protections;

(d) emergency preparedness and emergency operations;

(e) outage co-ordination;

(f) forced outages;

(g) new or modified transmission facilities;

(h) the information to be exchanged between the parties;

(i) the protection of confidential information; and

(j) a dispute resolution process that provides for the fair, timely and effective resolution of disputes and that sets out specific timelines for completion of the dispute resolution process.

6.8.2 An agreement referred to in section 6.8.1 shall contain such other provisions as may be required to enable a transmitter to comply with its obligations under this Code relative to

the transmitter shall not for any purpose treat that generation facility as embedded generation in relation to that load facility.

11.1.5 The reference to "for all purposes" and "for any purpose" in sections 11.1.1 to 11.1.4 includes the purpose of determining whether bypass compensation is required to be paid by the load customer and the purpose of determining the manner in which network charges will be applied.

11.2 BYPASS COMPENSATION

11.2.1 A transmitter shall require bypass compensation from a customer if:

(a) the customer disconnects its facility from the transmitter's connection facilities and subsequently connects that facility to a generation facility or to the facilities of any person such that both the load facility and a generation facility are connected to the transmitter's transmission facilities on that person's side of the connection point; and

(b) the transmitter will no longer receive line connection or transformation connection rate revenues in relation to that facility.

The transmitter shall calculate bypass compensation using the methodology set out in section 6.7.7.

11.2.2 Where a transmitter becomes aware that a customer intends to bypass a transmitter-owned connection facility in the manner described in section 11.2.1, the transmitter shall promptly notify all other load customers served by the connection facility that is intended to be bypassed.

11.2.3 A transmitter shall not require bypass compensation from a customer for any reduction in a customer's load served by the transmitter's connection facilities that the customer has demonstrated to the reasonable satisfaction of the transmitter (such as by means of an energy study or audit) has resulted from embedded renewable generation (determined in accordance with section 11.1), energy conservation, energy efficiency or load management activities, except in accordance with the transmitter's Rate Order.

12. DISPUTE RESOLUTION

12.1 OBLIGATION TO INCLUDE IN PROCEDURES

12.1.1 Subject to section 12.1.4, a transmitter shall establish a dispute resolution procedure in its connection procedures referred to in section 6.1.4 and shall implement it in the event of a dispute with a customer regarding the transmitter's obligations under the Act, the Electricity Act, its license, this Code or any of the transmitter's connection procedures.

12.1.2 The dispute resolution procedure referred to in section 12.1.1 shall include provisions that:

(a) provide for the fair, timely and effective resolution of disputes;

(b) set out specific timelines for completion of the dispute resolution process; and

(c) establish the right of the transmitter or the customer to bring a dispute to the Board for resolution, if it has not been resolved by the parties within 30 days.

12.1.3 If a dispute arises while a transmitter is constructing new or modified connection facilities for a customer, the transmitter shall not cease work or slow the pace of work without leave of the Board.

12.1.4 The dispute resolution procedure referred to in section 12.1.1 shall not apply to disputes that arise between a transmitter and a customer:

(a) that are governed by the dispute resolution process contained in their connection agreement; or

(b) that relate to the terms and conditions of a contractual arrangement that is under negotiation between the transmitter and the customer, except where one party alleges that the other party is:

i. seeking to impose a term or condition that is inconsistent with or contrary to the Act, the Electricity Act, a party's licence, this Code or any of the transmitter's connection procedures; or

ii. refusing to include a term or condition that is required to give effect to this Code or any of the transmitter's connection procedures.

F

APPENDIX 1

VERSION A - FORM OF CONNECTION AGREEMENT FOR LOAD CUSTOMERS

TABLE OF CONTENTS

2.4. Except when an emergency is anticipated or is occurring, if the time for doing any act or omitting to do any act under this Agreement expires on a day that is not a business day, the act may be done or may be omitted to be done on the next day that is a business day.

3. INCORPORATION OF TRANSMISSION SYSTEM CODE

3.1 The Code is hereby incorporated in its entirety by reference into, and forms an integral part of, this Agreement. Unless the context otherwise requires, all references in this Agreement to Athis Agreement@ shall be deemed to include a reference to the Code.

3.2. Without limiting the generality of section 3.1:

(a) the Transmitter hereby agrees to be bound by, and at all times to comply with, the Code; and

(b) the Customer acknowledges and agrees that the Transmitter is bound at all times to comply with the Code in addition to complying with the provisions of this Agreement.

4. SCHEDULES

4.1. Incorporation of Schedules

4.1.1. The Schedules form a part of, and are hereby incorporated by reference into, this Agreement.

4.2. Schedules

4.2.1 The following are the Schedules to this Agreement:

Schedule A	-	Single Line Diagram, Description of the Customer=s Connection Point(s) and Details of Specific Operations
Schedule B	-	Transmission Services and Associated Charges
	-	Attachment B1
Schedule C	-	Cure Periods for Defaults
Schedule D	-	Fault Levels and Modifications Requiring Transmitter Approval
	-	Attachment D1
Schedule E	-	General Technical Requirements
Schedule F	-	Additional Technical Requirements for Tapped Transformer Stations Supplying Load
Schedule G	-	Protection System Requirements
Schedule H	-	Facilities Deemed Compliant and Obligation to Comply
Schedule I	-	Exchange of Information
Schedule J	-	Embedded Generation, Bypass, Assigned Capacity and True-Ups
	-	Attachment J1
	-	Attachment J2
Schedule K	-	Contacts for Purposes of Notice

PART FOUR
DISPUTE RESOLUTION

17. DISPUTE RESOLUTION

17.1. Exclusivity

17.1.1. Subject to sections 17.1.2 and 17.1.3:

(a) the dispute resolution procedure set forth in this section 17 shall apply to all disputes between the Customer and the Transmitter arising under or in relation to this Agreement; and

(b) the Parties shall comply with the procedure set out in this section 17 before taking any other civil or other proceeding in relation to the dispute.

17.1.2. Nothing in section 17.1.1 shall prevent a Party from seeking urgent or interlocutory relief from a court of competent jurisdiction in the Province of Ontario in relation to any dispute between them arising under or in relation to this Agreement.

17.1.3. The dispute resolution procedure set forth in this section 17 shall not apply:

(a) in relation to any matter that must or may be submitted to the Board for resolution under section 4.7.1, 6.1.8, 6.2.2, 6.2.20, 6.2.27, 6.3.5, 6.3.11(c) or Appendix 4 of the Code or section J.4.6 of Schedule J; or

(b) in relation to any dispute to be resolved under the Market Rules as described in section B.7 of Schedule B.

17.2. Duty to Negotiate

17.2.1. Any dispute between the Customer and the Transmitter referred to in section 17.1.1 shall be referred to a designated senior representative of each of the Parties for resolution on an informal basis as quickly as possible.

17.2.2. The designated senior representatives of the Parties shall attempt in good faith to resolve the dispute within thirty days of the date on which the dispute was referred to them. The Parties may by mutual agreement extend such period.

17.2.3. If a dispute is settled by the designated senior representatives of the Parties, the Parties shall prepare and execute minutes setting forth the terms of the settlement. Such terms shall bind the Parties. The subject-matter of the dispute shall not thereafter be the subject of any civil or other proceeding, other than in relation to the enforcement of the terms of the settlement.

17.2.4. If a Party fails to comply with the terms of settlement referred to in section 17.2.3, the other Party may submit the matter to arbitration under section 17.3.1.

17.2.5. A copy of the minutes referred to in section 17.2.3 from which all Confidential Information has been expunged shall be made available to the public by the Transmitter.

17.2.6. The Parties may not, by means of the settlement of a dispute under section 17.2.3 or section 17.5.10, agree to terms or conditions that would, if they had been the subject of an amendment to this Agreement, violate section 9.1.

17.3. Submission of Unresolved Disputes to Arbitration

17.3.1. If the designated senior representatives of the Parties cannot resolve the dispute within the time period set out in section 17.2.2 or where section 17.2.4 or 17.5.11 applies, either Party may submit the dispute to binding arbitration under sections 17.4 and 17.5 by notice to the other Party.

17.4. Selection of Arbitrator(s)

17.4.1. The Parties shall use good faith efforts to appoint a single arbitrator for purposes of the arbitration of the dispute. If the Parties fail to agree upon a single arbitrator within ten business days of the date of the notice referred to in section 17.3.1, each Party shall within five business days thereafter choose one arbitrator. The two arbitrators so chosen shall within twenty days select a third arbitrator.

17.4.2. Where a Party has failed to choose an arbitrator under section 17.4.1 within the time allowed, the other Party may apply to a court to appoint a single arbitrator to resolve the dispute.

17.4.3. No person shall be appointed as an arbitrator unless that person:

(a) is independent of the Parties;

(b) has no current or past substantial business or financial relationship with either Party, except for prior arbitration; and

(c) is qualified by education or experience to resolve the dispute.

17.5. Arbitration Procedure

17.5.1 The arbitrator(s) shall provide each of the Parties with an opportunity to be heard orally and/or in writing, as may be appropriate to the nature of the dispute.

17.5.2. The *Arbitration Act, 1991* (Ontario) shall apply to an arbitration conducted under this section 17.

17.5.3. The arbitrator(s) shall make due provision for the adequate protection of Confidential Information that may be disclosed or may be required to be produced during the course of an arbitration in a manner consistent with the confidentiality obligations of section 21.

17.5.4. All proceedings relating to the arbitration of a dispute shall be conducted in private unless the Parties agree otherwise.

17.5.5. Unless the Parties otherwise agree, the arbitrator(s) shall render a decision within ninety days of the date of appointment of the last to be appointed arbitrator, and shall notify the Parties of the decision and of the reasons therefore.

17.5.6. The decision of the arbitrator(s) shall be final and binding on the Parties and may be enforced in accordance with the provisions of the *Arbitration Act, 1991* (Ontario). The Party against which the decision is enforced shall bear all costs and expenses reasonably incurred by the other Party in enforcing the decision.

17.5.7. A copy of the decision of the arbitrator(s) from which all Confidential Information has been expunged shall be made available to the public by the Transmitter.

17.5.8. Subject to section 17.5.9, each Party shall be responsible for its own costs and expenses incurred in the arbitration of a dispute and for the costs and expenses of the arbitrator(s) if appointed to resolve the dispute.

17.5.9. The arbitrator(s) may, if the arbitrator(s) consider it just and reasonable to do so, make an award of costs against or in favour of a Party to the dispute. Such an award of costs may relate to either or both the costs and expenses of the arbitrator(s) and the costs and expenses of the Parties to the dispute.

17.5.10 If a dispute is settled by the Parties during the course of an arbitration, the Parties shall prepare and execute minutes setting forth the terms of the settlement. Such terms shall bind the Parties, and either Party may request that the arbitrator(s) record the settlement in the form of an award under section 36 of the *Arbitration Act, 1991* (Ontario). The subject-matter of the dispute shall not thereafter be the subject of any civil or other proceeding, other than in relation to the enforcement of the terms of the settlement.

17.5.11 If a Party fails to comply with the terms of settlement referred to in section 17.5.10, the other Party may submit the matter to arbitration under section 17.3.1 if the settlement has not been recorded in the form of an award under section 36 of the *Arbitration Act, 1991*

(Ontario).

17.5.12 A copy of the minutes referred to in section 17.5.10 from which all Confidential Information has been expunged shall be made available to the public by the Transmitter.