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**LAW**

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October 15, 2012

BY COURIER AND RESS

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

Dear Ms Walli:

**Re: EB-2012-0047: Horizon Utilities Service Area Amendment Application--  
Response of Hydro One Networks Inc. to Horizon Utilities Corporation's Notice of  
Motion dated October 10, 2012**

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This letter is the response of Hydro One Networks Inc. ("HONI") to the Notice of Motion filed by Horizon Utilities Corporation ("HUC") with the Ontario Energy Board ("the Board") on October 10, 2012.

Yours very truly,

ORIGINAL SIGNED BY MICHAEL ENGELBERG

Michael Engelberg

**HYDRO ONE NETWORKS INC.  
SUBMISSION**

**ISSUE #1 SHOULD THE BOARD BEGIN DEALING WITH HUC'S SERVICE AREA AMENDMENT APPLICATION?**

HONI submits that HUC's Service Area Amendment ("SAA") Application, which is at the stage where no procedural order has been issued by the Board, should not be considered by the Board because there is no customer within HONI's service territory who is requesting a connection to HUC. On September 11, 2012, the developer [Multi-Area Developments Inc. ("Multi-Area")] faxed a letter to the Board dated September 10, 2012, informing the Board that Multi-Area had accepted an Offer to Connect ("OTC") from HONI, the incumbent distributor. HUC and HONI were copied on that letter, and HUC acknowledges that letter in paragraph #5 of its Notice of Motion.

In the Board's Filing Requirements for Service Area Amendment Applications, the introduction states, in part, "For the purposes of these filing requirements, it is assumed that the applicant is a distributor who requires a service area amendment to its licence." HONI states that it is obvious that HUC does not require an SAA to its licence.

Additionally, presumably as a result of the developer's having accepted HONI's OTC, HONI received a phone call from Board Staff on September 21, indicating that Horizon had notified the Board the previous week that HUC would be submitting a letter withdrawing the SAA.

HONI therefore submits that the Board should not now begin dealing with HUC's SAA Application and that the Board should find that the Application should not proceed at all, including, but not limited to, the Notice of Motion now being brought by HUC within the context of its now-groundless SAA Application.

**ISSUE #2 SHOULD ONGOING WORK BEING PERFORMED BY HONI BE STOPPED BY THE BOARD?**

Part of HUC's Notice of Motion states:

*"It has just come to Horizon Utilities' attention that HONI is undertaking work intended solely to serve the Project. HONI has been upgrading poles and insulators and is preparing to make an interconnection to the Nebo M3 or M4 express feeders located within Horizon Utilities' service area and which currently exclusively serve Horizon Utilities."*

Another part of the Notice of Motion states:

*"It is apparent to Horizon Utilities that this recent work undertaken by HONI is taking place, to a large extent, in Horizon Utilities' service area. Indeed, HONI has requested that Horizon Utilities interrupt service to several of its customers on Tuesday, October 16, 2012, to facilitate HONI's work. This work appears to be contrary to Clause 6.3.4 of the Distribution System Code which prohibits a distributor from building any part of its distribution system in another distributor's licensed service area unless three preconditions are met. Horizon Utilities submits that these preconditions do not exist and that the prohibitions of Clause 6.3.4 apply. Horizon Utilities therefore requests that the Ontario Energy Board direct HONI to discontinue the work until a determination is ultimately made by the Board in respect of the within Application."*

Contrary to HUC's allegation that the work "has just come to Horizon Utilities' attention," the fact is that for several months, HUC has not only been aware of HONI's work but has cooperated with HONI and has facilitated the work, which shows HUC's

implicit approval of the work. Events have been as shown in the following timeline chart:

### **Timeline Chart**

- August 1: Bell requests HUC to review the design for the pole line on Rymal Road. (The pole line will be owned by Bell and will be used by Bell, HUC and HONI.)
- August 9: HONI confirms with HUC that the M3 will be used to service Summit Park Phase 7, the development that is the subject matter of HUC's SAA Application.
- August 17: HUC responds by stating they are looking at the design of the Rymal Road pole line.
- August 22: HUC requests HONI's plans for the pole line so that HUC can assess the pole heights to ensure that the poles can accommodate HUC's lines (in addition to Bell's and HONI's).
- August 23-30: HUC and HONI communicate back and forth by e-mail to work out the details of the pole design, after which time HUC agrees with the design to move forward with circuits on the Bell-owned poles for both HUC and HONI.
- September 6: HUC and HONI meet at the worksite and agree that any billing for extra framing will go from HONI to HUC.
- September 7-11: HUC and HONI confirm design with Bell.
- October 1, 2 and 11: As contemplated by all three parties who will share the poles, HONI completes the installation of the taller poles provided by Bell, so that the poles can accommodate the lines of all three parties.
- October 10: HUC requests up-to-date construction drawings for their records so they can update GIS.

HONI therefore states that the timeline above makes it clear that for at least the past two and one-half months, HUC has been actively communicating with, and cooperating with, Bell and HONI on the replacement of poles and transfer of circuits that HUC has alleged (in its Notice of Motion) on October 10, 2012, for the first time, is contrary to s. 6.3.4 of

the Distribution System Code. In fact, the Bell-owned tall poles, which are the height requested by HUC so that they would accommodate the lines of Bell, HUC and HONI, have already been installed by HONI next to the old, shorter poles, as implicitly agreed to by all three parties. Only nine new poles have been installed in HUC's service territory, out of a total of 43 poles required for the project. Installation of the nine poles is complete. The photograph below shows the situation as it already existed before HUC filed its Notice of Motion. Both sets of poles (the old shorter poles with street light attachments still on them and the new taller replacement poles) can be seen in the photograph.

**Figure 1**



HONI therefore states that it is clear that it has not breached any of the three preconditions in s. 6.3.4 of the Distribution System Code. Those preconditions are as follows:

- The part of the distribution system that is to be located inside another licensed service area is dedicated to the delivery of electricity to the distributor who owns the distribution facilities; and
- There is no apparent opportunity for both distributors to share the distribution facilities; and
- The distributor in whose service area the distribution facilities are to be located determines that the presence of the distribution facilities in that location does not impinge on its distribution operations.

The first precondition has not and will not be breached because the lines to be installed by HONI will be used to serve only HONI customers; the second precondition has not and will not be breached because the two distributors will be sharing the Bell-owned poles, as the two distributors and Bell planned to do all along; and the third precondition has not and will not be breached because HUC has shown for months, by its above-referenced conduct and cooperation, that the HONI lines do not impinge on HUC's distribution operations. More will be said below, in the Background section, regarding this "impinging on distribution operations" item.

In addition, with reference to the above timeline chart showing activities going back to the beginning of August and proceeding throughout August, September and October to date, HONI submits that HUC should not, at this late date, be granted injunctive relief to stop the work. It is a well-known principle in the law of injunctions that a party who acquiesces in activity may be defeated in an application to enforce that right by

injunction. Furthermore, delay in seeking an injunction, coupled with an alteration of the condition of other parties (e.g. expenditure of monies by Bell and/or HONI on poles, digging of holes, and installation of poles), may render it unconscionable to grant an injunction or at least raise an inference that the applicant will not suffer irreparable harm if an injunction is not granted.

→ The *Canadian Encyclopedic Digest (Ontario)*, Third Edition, “Injunctions,” paragraphs 33 and 34

Furthermore, the work now being performed by HONI is required to supply a loop feed to existing HONI customers and should not be stopped as a result of HUC’s SAA application. It is therefore logical, and in the ordinary course of events, for the work to be continue and completed as quickly as possible.

HONI therefore requests that:

- i. the Board dismiss HUC’s request for a stop-work order; and
- ii. the Board order HUC to cooperate with HONI, as HUC has in the past, by providing the necessary supporting guarantee so that an outage can occur within the next 14 days, thereby enabling the almost-completed work to be completed and so that there is mitigation of the disruption already experienced by the customers who rearranged their own schedules to accommodate the planned outage necessary to complete the work on the pole line.



**Additional Background on Issue #2 to Address Additional Allegations by HUC in its Notice of Motion**

- a) HUC's statement that the work is solely to service the Project is incorrect. As HUC has been informed by HONI on several occasions, the work is part of a previously-planned larger sustainment project to bring a loop feed to serve HONI customers in Binbrook and the Alfreda Industrial Park, which is east of Summit Park on Rymal Road. All of those customers are inside HONI's service territory.
  
- b) The timeline chart appearing above in this submission, as well as HUC's actions and acquiescence since early August, provide clear evidence that HUC did not determine that the distribution facilities in that location impinge on HUC's distribution operations, nor is there any evidence to support the Notice of Motion's allegation of impinging. The facts on the ground are that the M3 and M4 feeders are not at full capacity, and the connection to the M3 for Summit Park Phase 7 is planned to be temporary while HONI builds 2 new feeders by spring 2013. Because the winter months are low peak in the absence of air conditioning loading, there is ample capacity available on the feeders to service both HUC and Summit Park Phase 7. [HUC's allegation of "impinging" is also referred to in g) below.]
  
- c) HONI rejects HUC's repeated references to previous SAA applications by HUC for prior phases of Summit Park as justification for an assumption by HUC that future phases of Summit Park would also be handed to HUC. Previous SAA applications for Phases 1-6 of Summit Park are not relevant to the present phase. HONI now has a 27.6kV circuit running past the new phase which can be utilized to service the development, thus following best practices of economic efficiency for the distribution system. As well, because of HONI's plan to bring a loop feed to existing customers in Binbrook and the Alfreda Industrial Park (previously mentioned in this submission), HONI is in a position to service Phase 7 and utilize assets, thus

maximizing its return on investment for these assets. This fact provides yet another reason for HONI to retain Phase 7.

d) In its Notice of Motion, HUC alleges:

*”..... given the time that it ultimately took HONI to respond to the Developer’s request for an OTC which could be used for comparison purposes, it is our understanding that the Developer became concerned about the adjudication process, believing that the unexpected opposition to the SAA would lengthen the process and cause the Project to be delayed.”*

The fact is that there were no delays on HONI’s part.

Delay did result because HUC, which was working with the developer as early as February 2012, did not fulfill its obligation of informing the developer of the requirement to contact the incumbent distributor for an OTC.

After HONI reminded HUC and the developer numerous times that an application to connect needed to be submitted to the incumbent LDC, along with information from the developer to enable HONI to prepare an Offer to Connect, that package was received on June 7. HONI worked closely with Multi-Area to prepare the OTC as quickly as possible and presented the completed OTC to the developer on July 25. The developer requested changes to the design at that time, which resulted in a revised OTC presented to the developer on July 27. The developer and its consultant next issued a tender to price the contestable and civil costs based on each LDC’s design. The developer and its consultant then did a comparison of the two OTCs and concluded that the costs to connect to HONI were lower than the costs to connect to HUC. The developer therefore accepted and signed HONI’s OTC on September 7.

- e) HUC's Notice of Motion makes a bald allegation that HONI's OTC accepted by the developer did not fully account for the costs of the work, and HUC is now asking the Board for an order requiring HONI to provide a detailed breakdown and description of the costs and revenues used by HONI for the purposes of its OTC. HONI complied with the Distribution System Code and with all HONI policies when HONI presented the developer with an OTC months ago. Furthermore, as Multi-Area and HUC have informed the Board, and as HONI has acknowledged to the Board, Multi-Area has accepted HONI's OTC. HONI therefore submits that not only does the customer already have a full understanding of the costs it has agreed to pay, but also that the topic of costs and revenues is no longer a topic to be dealt with.
  
- f) Contrary to HUC's allegation in item #12 in the Notice of Motion, which allegation is to the effect that HUC's service territory encircles Summit Park Phase 7, the fact is that Phase 7 is not only entirely within HONI's service territory but also has HONI service territory on its western boundary, its eastern boundary, and its southern boundary. Therefore, HONI's service territory is on three sides of Summit Park Phase 7.
  
- g) To HUC's knowledge and approval, HONI had planned to perform work tomorrow (Tuesday, October 16, 2012). On October 4, 2012, HONI requested that HUC provide work protection by opening a switch which would result in a four-hour service interruption to six of its customers to facilitate this work; and HUC issued a permit to HONI therefore on October 5, 2012 (Job No. 25705). The work to be done tomorrow was to string new 556 MCM conductor near HUC's 13 kV 3541X circuit. HONI's request involved work by HONI on the approximately 2-km 27.6 kV circuit which is needed to serve the Project. HUC is now stating that this preplanned work should not proceed, and it is HONI's understanding that HUC is proceeding to rescind the work permit and to notify HONI that its planned work may not proceed.

While HONI has no choice but to abide by HUC's cancellation of the supporting guarantee and outage required tomorrow to transfer circuits to the new joint use (Bell, HUC and HONI) poles referred to throughout this submission, HONI does not accept HUC's decision. Not only did HONI negotiate the outage time with the six affected customers and with both LDCs' control rooms, but also HUC and HONI were prepared to execute the necessary work to complete the job that is now left incomplete with two pole lines side-by-side, as shown by the above photograph. The fact that as recently as October 5, HUC issued the permit to move forward with the work, once again illustrates HUC's knowledge and acceptance of the work and HUC's own assessment that the work would not impinge on its distribution system.

## **CONCLUSION**

HONI therefore submits that there is no basis in fact or in law for HUC's Notice of Motion. Since September 10, 2012, there has not existed a customer who is requesting a connection to a non-incumbent LDC, the very basis of the SAA Application filed by HUC. Furthermore, regarding HUC's request for a stop-work order in the nature of an injunction, not only has there been no breach of s. 6.3.4 of the Distribution System Code, but also HUC has delayed its complaint and allowed work to be done and monies to be expended by both Bell and HONI. HONI therefore submits that it would not be appropriate for the Board to issue a stop-work order. HONI therefore requests that:

- i. the Board dismiss HUC's request for a stop-work order;
- ii. the Board order HUC to cooperate with HONI, as HUC has in the past, by providing the necessary supporting guarantee so that an outage can occur within the next 14 days, thereby enabling the almost-completed work to be completed and so that there is mitigation of the disruption already experienced by the customers who rearranged their own schedules to accommodate the planned outage necessary to complete the work on the pole line; and

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iii. the Board order that the SAA Application proceed no further.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

ORIGINAL SIGNED BY MICHAEL ENGELBERG

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Michael Engelberg, counsel for Hydro One Networks Inc.