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VIA COURIER AND EMAIL

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

Dear Ms. Walli:

**Re: Horizon Utilities – Service Area Amendment
Letter of Comment
Board Proceeding No.: EB-2012-0047**

We are counsel to Brant County Power Inc., EnWin Utilities Ltd. and Essex Powerlines Corporation (the “**Distributors**”).

The Distributors would like to make comments regarding the Motions being held in the Board’s office on November 30th, 2012. Each of the Distributors’ licensed distribution service area is adjacent to Hydro One Networks Inc. (“**Hydro One**”) and each has been involved or will be involved in service area amendments in the not too distant future. Therefore, the Distributors have valuable insight into the process which we submit would be of interest to the Board. The Distributors do not intend to appear at such Motion. For clarity, the Distributors are not at this time taking a position on the merits of the Horizon Application or the motion regarding the sufficiency/quality of the evidence.

In short, the Distributors are very concerned about the motion to dismiss Horizon Utilities Corporation’s application that has been brought by Hydro One and would submit to the Board that the motion to dismiss should not be granted for the reasons outlined herein. Further, assuming the Board does not dismiss the Horizon Application, the Distributors believe the underlying issues raised by this Service Area Amendment Application and other recent proceedings would benefit from the participation of other stakeholders.

Our comments have been organized into two sections: the test for granting a motion to dismiss; and (ii) the basis for the motion.

Motion to Dismiss

The Distributors understand that Hydro One has requested the Board dispose of this matter prior to considering all of the relevant evidence. Horizon has filed an application pursuant to section 74 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 Sched. B (the “**OEB Act**”).

The Board’s Rules of Practice and Procedure (the “**Rules**”), Rule 18.01, provides the basis upon which the Board may dispose of a proceeding without a hearing. Specifically, Rule 18 provides:

18.01 The Board may propose to dismiss a proceeding without a hearing on the grounds that:

- (a) the proceeding is frivolous, vexatious or is commenced in bad faith;
- (b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or
- (c) some aspect of the statutory requirements for bringing the proceedings has not been met.

From a review of the materials the Distributors are not aware of any allegation or evidence that would satisfy paragraph (a). Further, the matter is squarely within the Board’s mandate, paragraph (b); and the Application has been properly brought forward by Horizon (paragraph (c)). As such, the pre-conditions for dismissal do not exist and the Board should proceed to consider the other motions and the proceeding based upon the relevant and necessary evidence.

Further, the Distributors would suggest the Board’s Rules for dismissing a proceeding should be interpreted in a manner that is consistent with the court’s approach in a summary judgment motion under Rule 20 of the Rules of Civil Procedure.

The Ontario Court of Appeal has recently clarified the test for summary judgment under the new Rule 20 established on January 1, 2010. The underlying question for a motion judge now is whether or not a trial is required in the “interest of justice” – a question that must be answered in light of whether the “full appreciation” of the evidence and issues that is required to make dispositive findings can be achieved by way of summary judgment, or whether this full appreciation can be achieved only at trial.¹

Using the court’s approach, the Distributors submit the Board should only dispose of a proceeding without a hearing where one of the pre-conditions exists and it determines the

¹ *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 at para. 50

matter does not warrant consideration of the “full appreciation” of the evidence or order to fulfill the public interest. For the reasons outlined below, the Distributors submit the Board should proceed to consider the evidence.

Basis for the Motion to Dismiss

It appears from the materials filed to date that the basis for Hydro One’s motion is premised solely on the fact that the “customer” has not requested service from Horizon. We understand that there may be some disagreement between the Parties about the underlying facts but that is not necessary for our purpose of commenting upon the analytical process and considerations of the Board in such proceedings.

In RP-2003-0044, the Board combined several service area proceedings and made comments regarding the various objectives provided in the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 Sched. B (the “OEB Act”) and considerations of the Board in meeting those statutory objectives. The OEB Act, section 1, reproduced below, provides objectives for guiding the Board in carrying out its responsibilities under the Act.

1.(1)The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer’s economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

The Application has been brought by Horizon pursuant to section 74 of the OEB and therefore the Board is obligated to be guided by these objectives. Many of these objectives have not changed since the Board issued the Decision with Reasons in RP-2003-0044 and

so the Distributors are of the view that the Board's findings and statements in RP-2003-0044 regarding customer choice and economic efficiency are still valid.

(a) *Public Interest v. Customer Choice*

In RP-2003-044, the Board considered, what is now objective 1 (then objective 3), and made the following findings and statements regarding customer choice in a service area amendment application:

It was argued by some that the third objective reinforces the importance of customer preference in service area amendments. However, in the Board's view, the protection of consumer interests encompasses broader considerations than the immediate and narrow interest of a given consumer at a given point in time. In our view the term requires the Board to consider the protection of the interests of other consumers in the proposed amendment area, the remaining customers of each utility, and the interests of electricity consumers throughout the province, over a time period that includes more than the short-term implications of any given action. Individual customer preference must be balanced with the interests of all consumers with respect to prices and the reliability and quality of electricity service. The preference of a particular customer or group of customers cannot be relied upon to yield results that are necessarily in the overall public interest.

The Board finds that the protection of the interests of the larger group of consumers affected by any service area amendment application must take precedence over the preference of any individual consumer. The more general interest of consumers will be protected through the rational optimization of existing distribution systems.²

As such, customer choice is but one factor and the Board specifically noted that the needs of the broader public come ahead of the wishes of a single customers. The Board is the regulator for the electricity and natural gas industry in the province of Ontario and has long considered its role to further the broader public interest. Service area amendments form the geographic basis for the utilities to serve customers and develop their infrastructure and the evolution of the electrical infrastructure should further such broader interest.

The notion of balancing the individual interest versus the broader public interest is not new to the Board and the courts have accepted the position that the broader public interest must trump the individual interest of a single customer.³ Therefore, the mere fact that the customer has signed an agreement with Hydro One should not be dispositive of the matter.

² RP-2003-0044, Ontario Energy Board, Decision with Reasons, paras. 63 and 64.

³ *Union Gas Ltd. v. Dawn (Township)*, (1977) 2M.P.L.R. 23, 15 O.R. (2d) 722, 76 D.L.R.(3d) 613 (Ont. Div. Ct.).

(b) *Economic Interest.*

The Distributors would also note that not only was customer choice not dispositive of the matter but the Board in RP-2003-0044 stated that economic efficiency was the foremost consideration. Specifically, the Board made the following findings and statements:

The promotion of economic efficiency in the distribution sector is one of the Board's guiding objectives in the regulation of the electricity sector. The Board is persuaded that economic efficiency should be a primary principle in assessing the merits of a service area amendment application. Economic efficiency would include ensuring the maintenance or enhancement of economies of contiguity, density and scale in the distribution network; the development of smooth, contiguous, well-defined boundaries between distributors; the lowest incremental cost connection of a specific customer or group of customers; optimization of use of the existing system configuration; and ensuring that the amendment does not result in any unnecessary duplication or investment in distribution lines and other distribution assets and facilities. The Board recognizes that there may be applications where all these components of economic efficiency do not apply.⁴

In its consideration of the economic efficiency of any given amendment proposal, an important factor will be the extent to which a proposal builds upon existing, well-developed electricity distribution assets from high or medium density systems. In many instances this will favour proposals that represent the extension of an existing local distribution system into a contiguous area. Proposals that are attempts to stretch distribution assets to create outposts of service will not be favoured.⁵

Economic efficiency would therefore appear to be the primary concern of the Board and the only way in which the economic efficiency of the Horizon Application can reviewed is through the full consideration of the evidence in the matter. The dismissal of the Horizon Application at this stage would preclude the Board's consideration of the very issue that the Board has stated is the core consideration in a service area amendment application. As such, the fulfillment of the Board's mandate necessitates a full hearing.

Economic efficiency has been a fundamental consideration of the Board for many years and carrying out its mandate. The Provincial Government recently constituted the Ontario Distribution Sector Panel, to consider ways in which the distribution sector may realize short and long-term operational efficiencies. Therefore, the Distributors are of the view that the current policy of the Provincial Government would suggest that economic efficiency has been further entrenched as the pre-eminent consideration in such applications.

⁴ RP-2003-0044, Ontario Energy Board, Decision with Reasons, para. 84.

⁵ RP-2003-0044, Ontario Energy Board, Decision with Reasons, para. 87.

Concluding Thoughts

The Distributors are not suggesting the Board is restricted to these only considerations but submits the Board's statements indicate that there is an issue to be considered on the basis of the evidence. Therefore, the Board should not dismiss the Horizon Application but rather should conduct a full review of the relevant evidence prior to rendering a decision.

If the Horizon Application was dismissed at this early stage on the basis that no customer request had been made, it would undermine the Board's earlier decisions in such proceedings and render the current service areas permanent. As a side note, such a position would likely render distributors helpless to deal with the long-term load transfers which the Board has been trying to eliminate.

As such, the Distributors submit the motion to dismiss should not be granted and the Board should consider the Horizon Application on the merits. Further, the Distributors feel the proceeding would benefit from a broader consideration of the process and considerations in service area amendment applications and the Board should provide the opportunity for other stakeholders to participate in the proceeding.

If the Board determines that it will grant the Distributors the opportunity to intervene and participate in the proceeding, the Distributors will take the record as it stands and will adhere to schedules set forth by the Board so that the parties not delayed or prejudiced.

Thank you for considering these comments.

Yours Respectfully,

**BRANT COUNTY POWER INC., ENWIN UTILITIES LTD.
AND ESSEX POWERLINES CORPORATION**

By Counsel


Scott Stoll
SAS

cc: EB-2012-0047, All Participants

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