



ONTARIO ENERGY BOARD

FILE NO.: EB-2012-0047

VOLUME: Motion Hearing

DATE: November 30, 2012

BEFORE: Paula Conboy Presiding Member
Cathy Spoel Member
Emad Elsayed Member

THE ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act
1998, S.O. 1998, c.15, (Schedule B);

AND IN THE MATTER OF an application under
section 74 of the Act by Horizon Utilities
Corporation for a licence amendment.

AND IN THE MATTER OF a motion by Horizon
Utilities Corporation.

AND IN THE MATTER OF a motion by Hydro One
Networks Inc.

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Friday, November 30th, 2012,
commencing at 9:38 a.m.

MOTION HEARING

BEFORE:

PAULA CONBOY	Presiding Member
CATHY SPOEL	Member
EMAD ELSAYED	Member

A P P E A R A N C E S

RICHARD LANNI MAUREEN HELT	Board Counsel
JUDITH FERNANDES	Board Staff
DENNIS M. O'LEARY AJEET GROVER	Horizon Utilities Corp.
MICHAEL ENGELBERG	Hydro One Networks Inc. (HONI)
ROBERT MALCOLMSON	Multi-Area Development Inc.
JAY SHEPHERD	School Energy Coalition (SEC)
ALSO PRESENT:	
INDY BUTANY-DeSOUZA KATHY LARETTE NEIL FREEMAN BART BURMAN JIM PATTERSON DANIEL ROBERGE BRIAN LENNIE	Horizon Utilities Corp.
TAMMY O'SULLIVAN RICK PUTMAN	Hydro One Networks Inc.
DAVE MORRISSEY	Hamilton-Wentworth Catholic District School Board
STEVE SPICER	Multi-Area Development Inc.

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U N D E R T A K I N G S

Description

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NO UNDERTAKINGS WERE GIVEN IN THIS PROCEEDING.

1 Friday, November 30, 2012

2 --- On commencing at 9:38 a.m.

3 MS. CONBOY: Good morning, everyone. The Board is
4 sitting today to hear two motions filed in relation to an
5 application filed and subsequently amended by Horizon
6 Utilities Corporation for an order of the Board to amend
7 Horizon's licensed service area.

8 The Board has assigned EB No. 2012-0047 to this
9 proceeding. Horizon seeks to expand its distribution
10 service area to include specific lands currently located in
11 Hydro One network's licensed service area, the specific
12 areas of land are described in Horizon's application and
13 subsequent amendments.

14 On October 10th Horizon filed a notice of motion in
15 this proceeding seeking four heads of relief. These are
16 identified in the Horizon motion and in the Board's notice
17 of application and notice of motions and Procedural order
18 No. 1, which I will refer to as PO No. 1 for brevity.

19 On October 30th, Hydro One filed a motion seeking five
20 heads of relief. These are identified in Hydro One's
21 motion and also in the Board's PO No. 1.

22 There have been numerous letters filed with the Board,
23 and these have all been placed on the public record. As
24 set out in PO 1, the Board has referred certain matters
25 identified in the two motions to its compliance office.
26 These matters are currently being considered separately
27 from this proceeding by the Board's compliance and consumer
28 protection group.

1 The Board indicated that it would convene today to
2 hear arguments on the remaining matters in the two motions.
3 We will also invite any party directly affected by the
4 application to make submissions on the motions.

5 We have School Energy Coalition and Multi-Area
6 Developments Inc. on the public record at this point, but
7 we will identify any other party when I get to appearances.

8 The Board will hear parts (a) to (d) of the Hydro One
9 motion first, given that they deal with striking,
10 dismissing or staying parts of the Horizon application.

11 The Board will then hear parts (c) and (d) of the
12 Horizon motion, which deal primarily with requiring Hydro
13 One to provide certain additional information about its
14 offer to connect made to Multi-Area Developments.

15 My name is Paula Conboy, and I will be presiding over
16 today's proceedings. With me are Board members Kathy Spoel
17 and Board member Dr. Emad Elsayed.

18 May I have appearance, please?

19 **APPEARANCES:**

20 MR. LANNI: Richard Lanni, counsel with the Board, and
21 with me I have Judith Fernandes and Maureen Helt.

22 MR. O'LEARY: Good morning, Madam Chair. Dennis
23 O'Leary for Horizon Utilities, and I am joined by a number
24 of people. To my right is Ms. Indy Butany-DeSouza, who is
25 vice president regulatory affairs. To her right is Kathy
26 Larette, vice president utility operations. To my left is
27 Neil Freeman, vice president business development and
28 corporate.

1 Behind me is Mr. Neil Burman, who is the author of the
2 report that you may hear a bit about today. He is also
3 joined by Jim Patterson and Daniel Roberge. Mr. Roberge is
4 here. Oh, Him is not in the room, sorry.

5 And it's Neil -- sorry, Bart Burman, my apologies, and
6 Ajeet Grover is an associate from our firm.

7 MS. CONBOY: Good morning, Mr. O'Leary and team.

8 MR. ENGELBERG: Good morning, Madam Chair and members
9 of the Panel. I am Michael Engelberg, and I appear for the
10 intervenor Hydro One Networks Inc., the incumbent service
11 territory provider. I have with me to my left Tammy
12 O'Sullivan, manager of program integration, and Rick
13 Putman, superintendent for Hydro One zone 2.

14 MS. CONBOY: Good morning, Mr. Engelberg.

15 MR. SHEPHERD: Good morning, Madam Chair. Jay
16 Shepherd for the School Energy Coalition. I would like to
17 introduce to the board Dave Morrissey in the back corner,
18 who represents the Hamilton-Wentworth Catholic District
19 School Board, one of our member boards.

20 MS. CONBOY: Good morning, Mr. Shepherd. Welcome, Mr.
21 Morrissey.

22 MR. MALCOLMSON: Robert Malcolmson, representing
23 Multi-Area Developments. I am here with Mr. Steve Spicer
24 from Multi-Area, an intervenor.

25 MS. CONBOY: Good morning. Before we get started, do
26 we have any preliminary matters?

27 **PRELIMINARY MATTERS:**

28 MR. O'LEARY: There are several, Madam Chair. First

1 is there are some additional filings which should be, I
2 think, identified on the record, and they consist of --
3 initially there are -- there is one replacement map. This
4 is -- I have shared it with my friends in the room here,
5 but it is one of the maps that are included in the October
6 24th update by Horizon.

7 It is the systems map. There has just been a slight
8 correction in the depiction of part of the system on there,
9 so we wanted to refile that.

10 It is being sent around as we speak, but I have
11 brought three copies that I am going to share with you.

12 We also have a number of other maps that we are going
13 to use for the purposes of our submissions today, and
14 ultimately it may be appropriate to give those maps an
15 exhibit number.

16 We have also brought with us several briefs. One is
17 the Horizon Utilities brief of law and authorities, which I
18 will be using for our submissions today, and the second is
19 a document brief, which includes documents that have all --
20 with the two exceptions, have all been filed in this
21 proceeding in some form or another.

22 We understand that Mr. Burman's report is the subject
23 of some question, which I understand will be a preliminary
24 matter my friend is going to raise. But these include a
25 copy of the recent letter from the School Board, which Mr.
26 Shepherd will likely speak to. There is a letter from
27 counsel for several of the LDCs in the province that have
28 made submissions in respect to the motion today.

1 There is an affidavit from Eileen Campbell, who is in
2 charge of customer service at Horizon, and that affidavit
3 swears to the fact that one of the homeowners which are
4 affected by this application have indicated support for the
5 application.

6 And I thought at some point, when appropriate, we
7 would mark those documents as exhibits.

8 MS. CONBOY: Okay. Well, why don't we get that done
9 with now. Have you got any objection Mr. Engelberg, of
10 entering these into the record?

11 MR. ENGELBERG: I have no objection, Madam Chair.

12 MS. CONBOY: Thank you. So I am assuming we can count
13 all of the maps, including the replacement maps, as one
14 exhibit number, or do you want to have the replacement maps
15 done separately?

16 MR. O'LEARY: The replacement maps I brought and a
17 separate Google map that we are going to provide to you,
18 which you can actually spread out, because it's still going
19 to be difficult I think to follow the submissions, but we
20 do have four large copies. Two of the maps are in the form
21 that I am going to be able to provide a copy to you at the
22 dais. Two are not. It might be appropriate to mark them
23 individually just so we know what we are talking about on
24 the record.

25 If I could describe them, would that help?

26 MS. CONBOY: Sure.

27 MR. O'LEARY: The order that we're proposing to
28 proceed, the first is a Google satellite map with a couple

1 notations that we have tried to identify salient features
2 on.

3 MR. LANNI: Exhibit KM1 will be Horizon systems map,
4 Google satellite map.

5 MS. CONBOY: Sorry, KM1?

6 MR. LANNI: Yes.

7 **EXHIBIT NO. KM1: HORIZON SYSTEMS MAP, GOOGLE**
8 **SATELLITE MAP.**

9 MS. CONBOY: Thank you.

10 MR. O'LEARY: The second is a map which depicts all
11 the earlier phases of the Summit Park Development. There
12 have been eight of them, and if we could have number for
13 that, Mr. Lanni?

14 MR. LANNI: Exhibit KM2, Horizon map, Summit phases 1
15 through 7.

16 **EXHIBIT NO. KM2: HORIZON MAP, SUMMIT PHASES 1**
17 **THROUGH 7.**

18 MS. CONBOY: Sorry, 1 through 7 or 1 through 6?

19 MR. O'LEARY: There are actually six earlier approved
20 phases. The seventh is one of the subjects of this
21 proceeding, and there are two other commercial applications
22 which are also depicted on that map, as well.

23 MS. CONBOY: So they are all there?

24 MR. O'LEARY: They are all there, and we will walk you
25 through them.

26 The next is what I have described as a systems map
27 which depicts the various systems that are in existence
28 today and what Hydro One is proposing, and this is the map

1 that was replaced and I have additional copies.

2 It was initially filed with, as I said, the October
3 24th filing, and this will be Exhibit KM3.

4 MR. LANNI: KM3, yes, Horizon system map replacing the
5 October 24th map.

6 **EXHIBIT NO. KM3: HORIZON SYSTEM MAP REPLACING THE**
7 **OCTOBER 24TH MAP**

8 MR. O'LEARY: And the fourth is a map which depicts
9 specifically all of the lands that are the subject of this
10 application individually so that we can make it clear to
11 you exactly the relief that's being sought by Horizon.

12 MS. CONBOY: Thank you.

13 MR. LANNI: And that would be Exhibit KM4, Horizon
14 general overview map.

15 Could we also mark Horizon's compendiums? Exhibit KM5
16 will be Horizon Utilities brief of law and authorities, and
17 Exhibit KM6 will be Horizon Utilities document brief.

18 **EXHIBIT NO. KM4: HORIZON GENERAL OVERVIEW MAP**

19 **EXHIBIT NO. KM5: HORIZON UTILITIES BRIEF OF LAW AND**
20 **AUTHORITIES**

21 **EXHIBIT NO. KM6: HORIZON UTILITIES DOCUMENT BRIEF**

22 MS. CONBOY: Thank you.

23 And perhaps when we get to a break, if we could take a
24 minute to give the Panel a list, so that we are not
25 flipping pages back and forth trying to refer to them.

26 MR. LANNI: It might be a good idea to have the other
27 parties introduce any exhibits at this time.

28 MR. O'LEARY: Those are our preliminary matters.

1 MS. CONBOY: Thank you.

2 MR. ENGELBERG: Madam Chair, I have provided to Ms.
3 Helt of Board Staff a two-page document, the first page of
4 which is a section from the Ontario Energy Board Act; the
5 second page is an excerpt from the rules of Civil Procedure
6 of Ontario, although it does not state that at the top.
7 And I will be referring to those two sections.

8 MS. CONBOY: Thank you, Mr. Engelberg.

9 MR. LANNI: We will mark that as Exhibit KM7, Hydro
10 One Networks compendium.

11 **EXHIBIT NO. KM7: HYDRO ONE NETWORKS COMPENDIUM.**

12 MS. CONBOY: And Mr. Shepherd, I think I see you with
13 a map, as well?

14 MR. SHEPHERD: No, it's one of Horizon's maps. We
15 don't have any documents, but we do have a preliminary
16 matter.

17 MS. CONBOY: Thank you.

18 Mr. Engelberg, have you got any other preliminary
19 matters?

20 MR. ENGELBERG: No, I do not, Madam Chair.

21 MR. SHEPHERD: Madam Chair, the Board will have
22 received a letter yesterday from Hamilton-Wentworth
23 Catholic District School Board, one of our member boards,
24 asking for observer status.

25 MS. CONBOY: We did.

26 MR. SHEPHERD: And I wonder if the Board is in a
27 position to deal with that request for observer status.

28 MS. CONBOY: Certainly, we are happy -- we do have the

1 letter. It has been put on the public record, so we have
2 received it. Are you asking me to enter it explicitly
3 today, or...

4 MR. SHEPHERD: No. We are asking for the Board to
5 make a determination of whether they can have observer
6 status.

7 MS. CONBOY: Yes.

8 MR. SHEPHERD: Thank you.

9 MS. CONBOY: Consider yourself having observer status.
10 Thank you.

11 MR. SHEPHERD: Thank you.

12 MS. CONBOY: Multi-Area, have you got any preliminary
13 matters?

14 MR. MALCOLMSON: You will be happy to hear we have no
15 preliminary matters and no exhibits.

16 MS. CONBOY: Wonderful. Thank you.

17 No, I'm wondering at some point -- do we want to deal
18 with the Burman report? There was some question from Hydro
19 One after Horizon had filed the report as to whether it was
20 going to be referred to today -- I notice that it is in the
21 document brief -- or whether it was to be placed as part of
22 the application and dealt with if and when we get to
23 actually hearing the application.

24 Can we deal with that first? Mr. O'Leary, would you
25 like to go first, please?

26 MR. O'LEARY: It's somewhat unusual that I should have
27 to start and defend a piece of evidence that has been
28 filed. I would like to hear my friend's submissions as to

1 why it should not be entertained, but the bottom line is
2 that the motion cannot proceed on a procedurally fair basis
3 without reference to the Burman report. And I will go into
4 more specific details, but if my friend is objecting to it,
5 perhaps it would be appropriate to first hear his
6 submissions.

7 MS. CONBOY: Thank you. I just wanted some clarity
8 from you, because I knew there was some question about
9 clarity of the purpose of it.

10 Mr. Engelberg, please?

11 MR. ENGELBERG: Madam Chair, for purposed of the
12 motions being heard today, Hydro One's submission is that
13 the Burman report and the maps, I would both put into the
14 same category. They are not relevant to the motion today,
15 which is to -- to either motion today, which are on legal
16 matters, not on factual matters.

17 Hydro One submitted a letter after the Burman report
18 was filed, when Hydro One was not even certain whether the
19 Burman report was intended to be referred to on the motions
20 today, but Hydro One's submission in that letter -- which I
21 would repeat for both the maps and the letters -- is that
22 the issues to be dealt with today are legal issues set out
23 in the notice of motion; they are not arguments concerning
24 which LDC is cheaper or more reliable, or where the lands
25 are, or whether it is Hydro One's service territory that
26 surrounds Horizon or Horizon's territory that surrounds
27 Hydro One.

28 And Hydro One's respectful submission is that if the

1 Board determines as a result of its decision today that
2 this amended application is to go to a full hearing, the
3 Board may well want to consider where the parties'
4 competing facilities are located and who would be more
5 appropriate to serve the existing customers and the
6 intended customers.

7 But the way the motions today are constructed, Hydro
8 One's submission is that the maps are not helpful and the
9 Burman report is not helpful.

10 MS. CONBOY: The fact that there is a Burman report
11 and the maps is not helpful? We understand that these maps
12 and the report have not gone through a discovery process in
13 terms of asking interrogatories on it or making
14 submissions. Is there a difference between Horizon saying
15 that they do have this as part of their application, and if
16 and when the Board decides to hear the application, it can
17 go through the interrogatory phase on the maps and the
18 Burman report?

19 MR. ENGELBERG: Well, what I was saying was that if
20 the matter proceeds to a hearing level and Hydro One's
21 motion is denied, the Board may well want to look at these,
22 and then Hydro One will have submissions to make, certainly
23 on the unhelpfulness of the Burman report.

24 Hydro One will have no objection at that point to the
25 Board's consideration of maps. Maps as to location of
26 assets and whose facilities are where will be very helpful
27 to the Board at that time.

28 My submission that I was making is that for purposes

1 of the motion today, that the Board should not be referring
2 to the maps or to the Burman report.

3 MS. CONBOY: Thank you.

4 Mr. O'Leary?

5 MR. O'LEARY: Thank you, Madam Chair. Our response
6 is, in one word, extraordinary.

7 The motion that my friend has brought is a motion for
8 summary dismissal. He is saying that the entirety of
9 Horizon's application, perhaps now with the exception of
10 the school board, part 4, should be dismissed without you
11 considering any of the evidence.

12 Our position -- and I won't go into it in great detail
13 in terms of the law -- is that the Ontario Energy Board Act
14 in itself obligates you to proceed with a hearing. Today
15 is not a hearing. It is oral, yes, but it is a
16 consideration of two motions, Hydro One's motion to dismiss
17 and our motion for certain procedural relief. You are not
18 here to make a decision about the correctness of the
19 evidence that's been filed. You are not going to, at the
20 end of the day, accept certain facts that may be referred
21 to. That's something that will be saved for a date in the
22 future -- as you quite correctly noted, Madam Chair --
23 after there has been some discovery process that has taken
24 place in the proceeding.

25 What my friend is asking you to do is to basically
26 cover your eyes and listen to their submissions, don't pay
27 any attention to the record which has been filed, and in
28 short, that is completely contrary to any notion of

1 procedural fairness which I have ever understood to exist
2 and would be completely prejudicial to the position that
3 Horizon is taking and its right to have an appropriate
4 hearing.

5 Again, I don't want to belabour the legal submissions
6 I am going to make later, but our submission, first of all,
7 is that under your rules, there is a specific rule which
8 allows the Board to deal with a matter without a hearing.
9 None of the provisions of that rule apply here. This is
10 not a frivolous or vexatious matter, obviously by the
11 people in attendance here. The other aspects of the rule
12 are not met, as well.

13 Our position is, Madam Chair, respectfully, you could
14 end the matter right there and say that this Board does not
15 have the jurisdiction to entertain the motion, because it
16 is obligated by the Act and the nature of this application.
17 This is an application under section 74, section 74 of the
18 act, and perhaps I could take you there, just --

19 MS. CONBOY: I don't want to get into your whole
20 argument, Mr. O'Leary. So I realize it's --

21 MR. O'LEARY: It's unfortunate, because it almost
22 compels me to get into it for the purposes of the
23 preliminary matter, but I do have to take you, then, to one
24 point.

25 Assuming that you conclude that -- and this is an
26 alternative argument -- you conclude that the Board does
27 have the flexibility to actually entertain this motion, my
28 friend is undoubtedly going to refer you to Rule 20 of the

1 Rules of Civil Procedure, and presumably that's the
2 compendium that he has provided. And, Mr. Engelberg, when
3 you have a chance, I would appreciate a copy of it.

4 But if I could take you to our brief of authorities,
5 tab 4, this is a copy, and presumably it's in Mr.
6 Engelberg's materials, as well. Obviously the Rules of
7 Civil Procedure apply to cases before the courts in
8 Ontario.

9 And if I could ask you to turn to tab 4?

10 MS. CONBOY: Just to be clear, I just want to make
11 sure that we are talking about actually the existence of
12 the reports and the map are relevant in the -- to move
13 forward with this motion.

14 MR. O'LEARY: That's exactly.

15 MS. CONBOY: We are not talking about the actual
16 content of the report and of the maps, which I think
17 everybody would agree has to go through an appropriate
18 discovery period.

19 MR. O'LEARY: Certainly. What our submissions today
20 will include will be references to the maps. I can't
21 imagine that someone is going to object to us pointing out
22 where physical assets exist, but, again, you are not here
23 to make a determination that our submissions are right or
24 wrong in that regard. But for the purposes of attempting
25 to demonstrate the reason why this application must go
26 forward, we have to try and show you geographically and
27 physically the nature of the assets, where the properties
28 are located, the boundaries of the two utilities and a

1 number of other factors, and I will take you through those
2 documents.

3 So I am actually even further surprised that my friend
4 is objecting to the use of the maps, which he acknowledges
5 are relevant. But in terms of Mr. Burman's report, and
6 this is why the rules are important, it's not the specifics
7 that I am going to take you to today that I am asking you
8 to rule on. It's for you to understand that what we have
9 done is complied with the rule and provided the evidence
10 which warrants this matter going through to an application.

11 So if you look at Rule 20, this is a motion by, in
12 effect, the defendant or respondent, but it indicates at
13 Rule 20.01(3) that a defendant may, after delivering a
14 statement of defence, move with supporting affidavit
15 material or other evidence for summary judgment dismissing
16 all or part of the claim.

17 So that's what, in effect, Hydro One is doing. Now,
18 they have not moved with any evidence. There is absolutely
19 none. But then there is an obligation on the parties in
20 the next sub-rule, and it's important that you understand
21 this obligation, in (2), 20.02(2):

22 "In response to affidavit material or other
23 evidence supporting a motion for summary
24 judgment, a responding party..."

25 So we are the responding party, Horizon:

26 "...may not rest solely on the allegations or
27 denials in the party's pleadings, but must set
28 out, in affidavit material or other evidence,

1 specific facts showing there is a genuine issue
2 requiring a trial."

3 I will go into more of this later in the Court of
4 Appeal decision which interprets this new rule, but if we
5 were here today and we didn't have Mr. Burman's report, you
6 can be certain my friend would be arguing we haven't
7 complied with the rule and the matter should be dismissed.

8 So if your ruling is that the Burman report cannot be
9 referred to -- and I only intend to take you to it to show
10 you the various areas and factors they considered, all of
11 which are factor which is the Board has indicated in an
12 earlier proceeding, which Ms. Spoel was involved with,
13 which we all affectionately call the combined proceeding.

14 I don't intend to walk you through the report to
15 detail all of the things that Mr. Burman believes are in
16 favour of the Horizon report, but only to indicate that we
17 have considered those and there is now evidence before this
18 Panel which would warrant, we submit, that a finding is --
19 that the public interest test has been met and the section
20 74 application should proceed.

21 We are not asking for the decision finding that today,
22 but if we had not produced the Burman report, we might be
23 alleged to be deficient in terms of our obligation to
24 comply with that rule.

25 So if we are unable to do that, we are in a
26 significant prejudicial position, and it's our respectful
27 submission that there is absolutely no procedural or legal
28 precedent which would support such a finding. In fact,

1 it's completely contrary to the rule.

2 MS. CONBOY: Thank you, Mr. O'Leary. Mr. Engelberg?

3 MR. ENGELBERG: Madam Chair, I think perhaps I am in a
4 better position to state what Hydro One's position would be
5 than my friend is. I can tell the Panel that if my friend
6 had not appeared today with a Burman report or with maps,
7 Hydro One would have been very satisfied.

8 Hydro One's position remains that on a motion which is
9 on a point of law, it is focussed. It is to determine
10 whether a matter is to go ahead or not, that the facts on
11 the ground of which party's assets are where as shown by
12 the maps. The fact that someone has provided an opinion
13 that Horizon's assets are in a better position to serve the
14 territory than the incumbent provider are matters to be
15 dealt with at a full hearing, as you have pointed out,
16 Madam Chair, with interrogatories and so forth.

17 The whole purpose of a motion, motions in law at
18 tribunals and courts, is to focus a hearing to achieve an
19 expeditious result, to determine if there are any matters
20 that can be determined at that time without a full hearing,
21 and Hydro One submits that its maps, which would show where
22 its assets are, are not relevant to this motion. And if
23 Hydro One were in possession of a report today that said
24 that Hydro One is better positioned to serve the territory
25 than Horizon, Hydro One would not be filing such a report
26 today.

27 That's what a full hearing is for, if in fact the
28 Board determines that there is to be a full hearing.

1 MS. CONBOY: Thank you. Mr. Shepherd, I am looking at
2 your body language saying that you would like to say
3 something on the matter.

4 MR. SHEPHERD: Yes. We are concerned, because the
5 essence of Hydro One's motion in this proceeding is that
6 the developer's decision with respect to who serves the
7 area is conclusive, and it effectively ousts the Board's
8 jurisdiction to make that determination.

9 The only evidence that is relevant is who the
10 developer chooses. So this preliminary matter is
11 attempting to sort of jump the gun on that and say, Board,
12 please exclude all other evidence, all other discussion,
13 except what the developer has decided, and we are concerned
14 about that because it's jumping the gun.

15 MS. CONBOY: Thank you. If you will give us a minute,
16 please?

17 Thank you very much. We have decided that we will
18 allow the maps to be entered in today. So the fact that
19 there exists this report and there exists the maps as part
20 of your evidence, we will accept that.

21 We will remind Horizon, however, that we are just
22 dealing with today's motion -- the two motions before us
23 today. We understand it's a little bit tricky to argue the
24 motion without getting into aspects of the application, but
25 we do remind you that neither the maps -- whether there is
26 dispute over them or not, the maps or the report have not
27 gone through the appropriate discovery period, and we will
28 take that into consideration when we are rendering our

1 decision. Thank you.

2 So are there any other preliminary matters. We had
3 mentioned that despite the fact that the Horizon motion was
4 filed first, it was more appropriate to proceed with the
5 Hydro One motion first today.

6 So, Mr. Engelberg, I will hand it over to you, please.

7 **SUBMISSIONS BY MR. ENGELBERG:**

8 MR. ENGELBERG: Thank you, Madam Chair.

9 I am going to try to save a little bit of time by
10 dealing with the two matters raised by the Horizon motion
11 as I give my submissions on Hydro One's motion, and perhaps
12 that will be more expeditious.

13 I would like to go through a little bit of the history
14 first.

15 The Board's Procedural order No. 1 informed us that
16 the matters that would be dealt with today are items (a),
17 (b), (c) and (d) of Hydro One's motion, and items (c) and
18 (d) of Horizon's motion. So as I said, I want to go
19 through some of the background to be able to deal with both
20 of them.

21 Horizon's application, which was filed incomplete, was
22 filed on June 18th, for the purpose of expanding Horizon's
23 service territory to enable Horizon to serve a new
24 residential development called Summit Park Phase 7, which
25 is being built by the developer Multi-Area Developments
26 Inc., which an intervenor in the proceeding and is here
27 today.

28 This new phase, Summit Park Phase 7, is entirely 100

1 percent within Hydro One's service territory. Multi-Area
2 was originally supportive of Hydro One's application, but
3 later changed its mind. In any event, it was not until
4 August 7 --

5 MS. SPOEL: Sorry, you said originally supportive of
6 Hydro One's application, or Horizon's?

7 MR. ENGELBERG: Excuse me, of Horizon's application.

8 MS. SPOEL: Thank you.

9 MR. ENGELBERG: In any event, it wasn't until August
10 17th that Horizon filed additional information for the
11 purpose of completing its application, which is still only
12 for the same territory that was encompassed by the June
13 18th filing. So part one has not changed in that regard.

14 On September 11th, the Board received a letter from
15 the developer, Multi-Area, that informed the Board that
16 Multi-Area had decided to go with its incumbent LDC, Hydro
17 One. Multi-Area then consummated that decision by
18 accepting Hydro One's offer to connect and entering into a
19 binding contract between itself and the licensed LDC.

20 One of the submissions that Hydro One is making today
21 is the Board should not act so as to abrogate a binding
22 contract between a licensed LDC and a customer entirely
23 within that LDC service territory.

24 In Hydro One's submission, this is very different from
25 the fact that would exist or the situation that would exist
26 if a customer inside an incumbent's service territory
27 purported to enter into a contract with a competing outside
28 LDC that had no right to serve that customer. What we have

1 here today is exactly the opposite of that; we have
2 everyday business that goes on throughout the province
3 where a new customer comes to its LDC and says: What do I
4 need to do to connect to you? And then they enter into a
5 binding agreement.

6 Horizon's reaction after having been notified that
7 Multi-Area was no longer willing to be the subject matter
8 of a service area amendment application was to notify the
9 Board on October 10th that not only did Horizon intend to
10 continue with the application, but also that Horizon
11 intended to greatly expand the subject matter of its
12 service area amendment application by asking the Board to
13 render a decision that would do the following in addition
14 to the Multi-Area matter.

15 Firstly, to transfer existing customers of Hydro One
16 along with that portion of Hydro One's service territory to
17 Horizon.

18 Secondly, to transfer vacant land within Hydro One's
19 service territory where there are no customers, but the
20 prospect of customers that may come in the future to
21 Horizon.

22 And thirdly, to transfer a school under construction
23 inside Hydro One's service territory, along with that
24 portion of Hydro One's service territory, to Horizon.

25 So those are the three additional matters raised by
26 the amended application.

27 Also on October 10th, Horizon filed its notice of
28 motion to ask for, among other things, an order requiring

1 Hydro One to immediately cease certain work within Hydro
2 One's service territory. The work being referred to was
3 the subject matter of an outage that Hydro One had arranged
4 in advance in cooperation with Horizon, so that work
5 protection could occur to enable Hydro One crews to do work
6 on October 16th to enable the stringing of Hydro One lines
7 now and Horizon lines later on poles owned by Bell Canada
8 within Horizon's service territory. This joint use of the
9 poles would enable service to the respective customers of
10 all three parties, Bell, Hydro One and Horizon.

11 Hydro One's customers had been contacted about the
12 planned outage, and had presumably made arrangements to
13 accommodate that notification. Horizon's customers had
14 been notified about the outage, and presumably also made
15 arrangements to accommodate the notification. And several
16 days before the planned outage that was arranged for
17 October 16th -- which I should point out is a very common
18 occurrence around the province between LDCs, where they
19 give each other work protection so that work can be done by
20 one to serve its customers -- that this outage was
21 cancelled by Horizon, despite the fact that the two LDCs
22 had cooperated all along to arrange the outage and the work
23 protection so that Hydro One's normal work could occur.

24 Nothing had changed, except for the fact that the
25 parties were now in dispute over the matters raised by
26 Horizon's service area amendment application.

27 The results were that, on short notice, all the
28 customers who had arranged to accommodate the outage had to

1 be notified that the outage would no longer take place and
2 Hydro One's work could no longer proceed. That work has
3 not proceeded to this date, because Hydro One cannot obtain
4 the necessary work protection from Horizon.

5 Pursuant to the Board's procedural order, that matter
6 will be dealt with at another time, but I am mentioning it
7 today because it's part of the chronology that got the
8 parties here today.

9 Several days later, Horizon filed an amended
10 application in accordance with its October 10th letter to
11 the Board, adding all the additional items. That was on
12 October 24th.

13 I will, therefore, proceed to make submissions
14 regarding the amended application, and I want to refer to
15 the decision that my friend referred to, the Board's
16 decision is in the combined hearing known as the generic
17 hearing on service area amendment applications, which is
18 known as RP-2003-0044. Relevant excerpts appear at page 5
19 of Hydro One's notice of motion, if I could refer you to
20 Hydro One's notice of motion at page 5.

21 I won't read the entire sections, but I want to read
22 the portions from paragraph 241 up until the end of the
23 bold-faced words:

24 "Similarly, proposals to align service areas with
25 municipal boundaries are ill-considered unless
26 the proponent can provide concrete evidence that
27 the extended area is needed to provide service to
28 actual customers in the area, using assets and

1 capacity in a manner that optimizes existing
2 distribution assets and does not prejudice
3 existing customers of the utility. Amendments
4 need to be anchored by real customers with an
5 economic case for the extension that is
6 convincing. Some parties argued that aligning
7 the service areas with municipal boundaries
8 advances distribution system planning. The Board
9 does not regard such alignment to be inherently
10 beneficial."

11 And before I leave paragraph 241, I would like to go
12 back up to the first sentence, to the bold-faced words,
13 that the proponent has to "provide concrete evidence that
14 the extended area is needed to provide service" to an
15 actual customer. I would submit that that refers to a
16 customer with no service.

17 The next paragraph from that decision that I want to
18 refer to is paragraph 267, and I will read the portion
19 there:

20 "Service area amendments should not result in the
21 Board-mandated transfer of customers from one
22 distributor to another. Such transfers should be
23 the subject of bilateral arrangements between
24 distributors wherein all of the issues engaged by
25 such transfers can be addressed. Such issues
26 involve appropriate compensation for any assets
27 stranded as a result of the arrangement. In this
28 way the interests of the customers of the

1 surrounding distributor can be -- surrendering
2 distributor can be reasonably protected. An
3 applicant should file evidence to demonstrate all
4 the effects on customers in the amendment area."

5 I go back again to the first sentence in that
6 paragraph:

7 "Service area amendments should not result in the
8 Board-mandated transfer of customers from one
9 distributor to another."

10 Now, dealing first with part 1 of the amended SAA
11 application, Hydro One submits that it was never
12 contemplated by the generic decision that was released in
13 2004 that an incumbent LDC with a new customer inside its
14 service territory, a new customer who already signed an
15 agreement with the incumbent LDC and in the ordinary course
16 of business, would have its binding contract with its own
17 service provider abrogated by an order of the Ontario
18 Energy Board.

19 Such an order of the Board would not only abrogate a
20 binding contract, but would have the effect of forcing
21 Multi-Area to connect to another LDC.

22 I think everyone here is aware that Multi-Area's
23 lawyer wrote a letter to the Board on October 19th. It's
24 on the letterhead of Goodmans law firm, stating in part:

25 "Our client is seeking service from the in-
26 territory distributor, no doubt a regime where
27 are distributor can try to poach new developments
28 without an invitation from the customer will lead

1 to considerable uncertainty for developers and
2 distributors and an increased case load for the
3 Board."

4 Not surprisingly, Hydro One has been made aware that
5 Multi-Area has installed underground plant in the
6 subdivision that meets Hydro One's standards. Every
7 customer is entitled to do exactly that. Multi-Area is
8 inside Hydro One's service territory, is proceeding with
9 the construction of a subdivision, is building even as we
10 speak. I believe you will hear from Multi-Area's lawyer
11 that they have done their contestable work.

12 I can inform the board that Hydro One has continued to
13 work, just as you would expect any licensed LDC to do in
14 order to serve its customers, and all of a sudden we are
15 facing the possibility that the customer and the territory
16 might be transferred to another LDC.

17 The letter on behalf of Multi-Area also says, and I
18 quote:

19 "Our client expects Horizon to act in this
20 proceeding and on the project ground in the very
21 spirit of timeliness and cost and not take the
22 project hostage to a larger dispute with Hydro
23 One."

24 Moving on to part 2 of the amended SAA application, it
25 relates to three existing residential Hydro One customers
26 inside Hydro One's service territory who have been served
27 by Hydro One for years. As I quoted earlier from paragraph
28 267 of the generic decision, service area amendments should

1 not result in the Board-mandated transfer of customers from
2 one distributor to another.

3 Part 3 of the amended application is similar to
4 part 2, except that it refers not only to existing
5 residential customers of Hydro One, but also to existing
6 commercial customers and also to two vacant lots.

7 Once again, regarding the residential and commercial
8 customers, I refer to paragraph 267 of the generic
9 decision:

10 "Service Area amendments should not result in the
11 Board-mandated transfer of customers from one
12 distributor to another."

13 And regarding the vacant lots, Hydro One submits that
14 there is no reason whatever in the context of the generic
15 decision for a Board order to transfer vacant land to
16 another LDC, whether by service area amendment application
17 or otherwise.

18 Moving on to part 5 of the amended SAA application,
19 this one relates entirely to vacant land within Hydro One's
20 territory. No customers exist. No prospective customers
21 exist. As I already said regarding vacant lands in part 3,
22 there is no reason whatever in the context of the generic
23 decision for a Board order to transfer vacant land to
24 another LDC.

25 The next portion of the amended SAA application refers
26 to two types of properties. That's part 4. First, some
27 vacant land entirely within Hydro One's service territory,
28 and I have already made my submissions on vacant land.

1 Secondly, part 4 refers to a property entirely within
2 Hydro One's territory on which a school is being
3 constructed. This is the portion of the Horizon
4 application that Hydro One has submitted should be stayed.
5 It's in a different category from all the other portions,
6 because it's premature and incomplete. It is within the
7 nature of the normal service area amendment applications
8 that the Board is accustomed to hearing.

9 School -- service for the school is required for April
10 15th, 2013. It was not until September 21st that Hydro One
11 received a request for an offer to connect. That offer to
12 connect has now been made earlier this week. Of course
13 there hasn't yet been a reply on behalf of the school, so
14 we don't know where that will stand, but unless and until
15 Hydro One's offer to the school has been rejected, should
16 that be the case, Hydro One submits that this portion is
17 premature and incomplete according to the Board's filing
18 requirements for service area amendment applications and
19 should be stayed until it is mature.

20 So to recap, Hydro One submits that to grant any
21 portion of the original or amended SAA application other
22 than the school portion would change the face of
23 electricity distribution in Ontario, which, in my
24 respectful submission, is why we are here today.

25 It would involve the reopening, revision and reversal
26 of the principles in the generic decision. It would create
27 uncertainty in the minds of customers. It would create
28 uncertainty in the context of construction and expansion

1 projects by licensed LDCs for their territory.

2 It would make LDCs hesitant about investing money and
3 assets inside their service territories, knowing that at
4 any time the portion of their service territories near the
5 boundaries could be taken away from them, either for new
6 customers or existing customers.

7 It would diminish the ability of LDCs to plan for
8 future, in particular, for future growth inside their
9 service territories. Additionally, to the problems created
10 for planning, the fact is is that when prospective new
11 customers are torn away from that LDC and given to another
12 LDC, the incumbent LDC and its ratepayers are denied the
13 benefit of the natural growth within their service
14 territory, something which has the effect of keeping rates
15 down for all of that LDC's customers, including those being
16 taken away, and even lowering rates for the customers of
17 the LDC, as well as making use of assets that were planned
18 and built to serve that territory.

19 These are the kind of considerations that form part of
20 the Board's objectives at the beginning of the act in
21 section 1, when the Board considers economic efficiency,
22 price reliability, and quality of service. We have heard a
23 lot from Horizon's submissions about how this is good for
24 Horizon, but the fact is LDCs all over the province are
25 mandated by their licence requirements to build and plan
26 for the future in their own territory to serve not only
27 their existing customers, but customers that may arise in
28 the future.

1 And any time growth within an LDC's service territory
2 is taken away from that LDC or the opportunity for growth
3 is taken away, that has effect on the larger body of
4 customers.

5 The incumbent LDC, these customers and territories are
6 taken away, are left with a diminished rate base, which
7 certainly does not help keep rates down, which contributes
8 to the raising of rates, however that incremental that
9 raising may be.

10 In such a landscape in Ontario, if that's going to
11 come to pass, LDCs should change their planning, in Hydro
12 One's submission, because they should be doing planning
13 only at their peril, knowing that at any time the customers
14 may be taken away from them and the opportunities for
15 future growth will be taken away from them.

16 To grant orders of the type being requested by Horizon
17 in parts 1 through 5 of its amended application would
18 undoubtedly confuse Hydro One's service territory
19 landscape, and along with it would confuse incumbent LDCs,
20 their customers, and the investment and planning process.

21 As was mentioned in Hydro One's notice of motion, this
22 would indeed initiate open season on the Ontario map of
23 distribution services, by allowing any LDC to use the
24 Board's SAA process to cherry-pick existing customers and
25 vacant land inside an incumbent LDC's service territory, as
26 well as to force the breach of existing contracts entered
27 into by an incumbent LDC and its own customers, something
28 which goes on every day of the week.

1 Hydro One asks whether the Board and the province
2 really want to create a situation in which one LDC
3 approaches customers of another LDC to persuade those
4 customers to leave their supplier, similar to the way we
5 have in Ontario of retailers knocking on doors throughout
6 the province to try to increase their customer base.

7 Hydro One agrees with the portion of the generic
8 decision released in 2004 that stated that events such as
9 these would be appropriately dealt with by negotiated
10 purchase and sale transactions between utilities.

11 Now, those are Hydro One's submissions regarding its
12 motion. I do want to add a few more items now to address
13 Horizon's, because I believe it would be in the interests
14 of the Board's time to do that.

15 The Board determined in Procedural Order No. 1 that
16 items (c) and (d) of Horizon's motion need to be addressed.

17 In item (c), Horizon asks for an order requiring Hydro
18 One to provide additional information about the signed
19 contract between Multi-Area and Hydro One.

20 Hydro One submits that there is no reason for such an
21 order to be made. The mischief that would be created by
22 permitting adjacent LDCs to use service area amendment
23 applications to question contracts entered into between an
24 incumbent LDC and that incumbent LDC's own customers far
25 outweighs any benefit that may accrue to the adjacent LDC
26 or to the Board's mandated goals in section 1 of the Act.

27 The last item is item (d) of Horizon's motion, where
28 Horizon is asking for an order requiring the Board Panel to

1 visit the site of Summit Park Phase 7, which is the
2 development entirely inside Hydro One's service territory.
3 That's the one that Multi-Area has already signed an
4 agreement with Hydro One.

5 For the reasons I gave when I made Hydro One's
6 submissions regarding part 1 and for the reasons I gave
7 earlier regarding Hydro One's submissions about the maps
8 and the Burman report, Hydro One submits that the contract
9 should not be abrogated, the unwilling developer inside
10 Hydro One's territory should not be forced to transfer to
11 another LDC, and that it goes without saying that it would
12 not be helpful either for this motion or for the
13 proceeding, if it goes to a full proceeding later on, for
14 anyone to visit the site.

15 I think the parties are in total agreement that the
16 two LDCs' service territories bump up against each other
17 throughout the area and throughout the expanded area, and
18 if they didn't bump up against each other and one have
19 facilities on one side and the other have the facilities on
20 the other side, we wouldn't be here today.

21 Now, my friend has provided a lengthy brief of
22 authorities, which all of you have seen, and will be making
23 legal arguments with respect to those. I propose to
24 respond to his submissions when Hydro One has its right of
25 response, rather than to anticipate what my friend is going
26 to say as a result of the authorities that he already
27 filed. And if it's acceptable to the Board, I will respond
28 to all of those points and the cases at that time.

1 Is that satisfactory?

2 MS. CONBOY: Thank you.

3 MS. SPOEL: Mr. Engelberg, I just have a question and
4 it's partly about timing. In your submissions, I think
5 that you said that one of the issues with the school board,
6 with the new school, is that, as they haven't yet responded
7 to the offer to connect provided by Hydro One, that it's
8 premature, in effect, to consider the service area
9 amendment application being put forward by Horizon. I
10 think that was what you suggested.

11 MR. ENGELBERG: That is one of the reasons.

12 MS. SPOEL: That was one of the arguments you made
13 about that specific parcel of land?

14 MR. ENGELBERG: Right, but that is only one of the
15 reasons why that part of the application is premature, in
16 Hydro One's submission.

17 MS. SPOEL: Okay, but I heard you correctly when you
18 said that?

19 MR. ENGELBERG: Yes.

20 MS. SPOEL: Okay. Then are you suggesting, then, by
21 inference that when Multi-Area developments sent a letter
22 last January to Horizon, encouraging Horizon to apply to
23 the Board for a service area amendment, that Multi-Area
24 shouldn't have done that without having first received and
25 rejected an offer to connect from Hydro One? That the
26 problem is that they did it too soon?

27 MR. ENGELBERG: I am not actually aware. I can
28 confirm for you whether that was done before Multi-Area had

1 received an offer to connect from Hydro One, but yes,
2 according to the Board's procedure for service area
3 amendment applications, a prospective customer inside an
4 LDC service territory is supposed to solicit competing
5 offers if it's thinking of leaving its incumbent supplier.

6 And in fact, I believe what the Board's rules and
7 procedures state is that if a customer does not do that,
8 perhaps even because the customer is not aware of that
9 process at the Board, the adjacent LDC who is approached by
10 that customer has a duty to tell the customer: You realize
11 you are inside the service territory of X, Y or Z LDC, and
12 in addition to coming to us, you are to approach them to
13 obtain an offer to connect from your incumbent supplier, so
14 that the two offers can be compared, and so that if the two
15 utilities do not reach a consent agreement, that when the
16 matter goes to the Board in the context of a service area
17 amendment application, the Board will have the two
18 competing offers to consider and be able to make a
19 determination.

20 MS. SPOEL: Okay. Thanks.

21 MS. CONBOY: Mr. Engelberg, I may have a couple of
22 questions about the Horizon motion, but I will wait until
23 after Horizon has made their arguments and perhaps pose
24 them to you at that point.

25 I am wondering what is it that the Board needs -- your
26 argument is we should dismiss the application outright. Is
27 there a test that we should use to say, without even
28 listening to the arguments, without even going through

1 discovery and perhaps coming to some of the conclusions
2 that you have made, that we should at the outset say we
3 don't even want to see this application?

4 MR. ENGELBERG: Well, the test that should be used is
5 probably best set out, in Hydro One's submission, in the
6 newly amended Rules of Civil Procedure, even though
7 everyone is aware that the Rules of Civil Procedure of the
8 courts of Ontario are not directly applicable to tribunals,
9 they are helpful.

10 And the amended Rule 20 and cases decided under the
11 amended Rule 20 appear in Horizon's brief of authorities.
12 Basically, what that test has now become is whether there
13 is a genuine issue that requires a trial.

14 The wording, as you will probably hear later on, had
15 been worded in such a way that a court could decide that it
16 had to proceed to a trial because there was a genuine
17 issue. But what the amended Rule 20 stated was, not only
18 it has to be a genuine issue, but it has to be a genuine
19 issue that requires a trial, and Hydro One's submission
20 here today is that the issue between the parties is that
21 the matter of whether customers should exist -- existing
22 customers, vacant land, customers who already have
23 agreements with their LDC to get service, that may be an
24 issue between the parties as to whether they should be
25 taken away from their incumbent LDC and sent to another
26 LDC, but is that an issue that requires a trial?

27 And to answer your question, Hydro One submits that
28 that is the test and that the issue before the parties

1 today is not an issue that requires a trial.

2 MS. CONBOY: Thank you. Mr. Malcolmson?

3 **SUBMISSIONS BY MR. MALCOLMSON:**

4 MR. MALCOLMSON: Thank you. At the outset, I would
5 describe my client, Multi-Area, as being in the proverbial
6 -- between a rock and a hard place in this proceeding.

7 As you have heard from Mr. Engelberg, and Mr. O'Leary
8 will agree, the first six phases of this development were
9 done with the servicing of Horizon outside of its territory
10 and without the objection of Hydro One.

11 Phase 7 came along. It consists of 285 residential
12 units, of which approximately 110 have been presold, with
13 closings scheduled to occur at the latest in June 2013.
14 And my client now finds itself in the predicament of being
15 caught up in this proceeding and perhaps not having power
16 to be able to construct the housing.

17 We have signed an offer to connect with the incumbent
18 LDC, Hydro One. That is a binding agreement on my client,
19 and our concern in today's motion is to ensure two things:
20 Number 1, that part 1 of the service amendment application
21 filed by Horizon does not somehow delay, obviate, abrogate
22 our arrangement with Hydro One, who at the time we signed
23 the contract was the incumbent LDC, and, number 2 -- and
24 it's less clear, and I may need Mr. O'Leary's help with
25 this, that his request for a stop work order again does not
26 prevent Hydro One from completing the work that it needs to
27 do in order to service phase 7, part 1, of my client's
28 subdivision.

1 So in a nutshell, those are our submissions. We are
2 prepared to talk about solutions, if there are solutions.
3 Clearly we find ourselves caught up in a broader proceeding
4 between two incumbent LDCs fighting over territory, and we
5 simply want to service our subdivision.

6 Quite frankly, we thought that when we executed the
7 offer to connect agreement with Hydro One as the incumbent
8 that that would have put an end to the part 1 service area
9 amendment application filed by Horizon, but clearly it did
10 not.

11 So here we sit in limbo trying to close construction
12 of our houses and get power to the site.

13 So in a nutshell, that's why we are here.

14 MS. CONBOY: Thank you. And those submissions that
15 you are making are in reference to saying, Board, you
16 should not even proceed with part 1 of the application.
17 You should not proceed to hear the application as opposed
18 to that may be the decision we render at the end of hearing
19 the application.

20 MR. MALCOLMSON: I think when we look at your decision
21 in 2003-0044 and the paragraphs that Mr. Engelberg referred
22 to, 267 and I think it's repeated at 291, that decision
23 does say that these type of applications should not result
24 in Board-mandated transfer of customers.

25 When we look at the relief being sought in respect of
26 part 1 by Horizon, that seems to be precisely what they are
27 asking for. So it seems to us, looking from the outside
28 in, that part 1 of the Horizon application is inconsistent

1 with that principle. We acted in accordance with our
2 understanding of the rules, and now find ourselves in a
3 difficult position.

4 So the short answer is, yes, we think that part 1 of
5 Horizon's SAA application should be dismissed on the basis
6 of that principle. And we have an issue with the stop work
7 order, to the extent that inhibits work being done.

8 MS. CONBOY: Okay, we have referred that to the
9 compliance, and there are certain reasons why internally
10 those are quite separate parts of the Board.

11 MR. MALCOLMSON: I understand.

12 MS. CONBOY: So I will stop you there, sorry. Thank
13 you very much. We will proceed with Horizon, and then, Mr.
14 Shepherd, in support of Horizon's application, we would
15 like to hear from you, and then Hydro One. Mr. O'Leary.

16 **SUBMISSIONS BY MR. O'LEARY:**

17 MR. O'LEARY: A couple of matters, first of all,
18 before I launch into our submissions. If I could respond
19 to Mr. Malcolmson, he did not mention it, but I believe he
20 is aware of the fact that Horizon has indicated to Multi-
21 Area that it will accept the civil work that is currently
22 being constructed on the property.

23 It's my understanding that there is a lesser standard
24 that's required by Hydro One in respect of the actual wires
25 that are being buried on the subject property, and Horizon
26 has indicated that it will accept that lesser standard,
27 and, if ultimately you grant the application, that work
28 will then be accepted by Horizon as part of its assets.

1 So --

2 MS. CONBOY: Sorry, just to clarify, that civil work
3 is currently part of Multi-Area's assets and not Hydro
4 One's assets; is that correct?

5 MR. O'LEARY: Multi-Area has decided to pursue the
6 option B under the standard offer to connect; and that is,
7 where they would actually build out the work that is
8 contestable, that they have retained actually a contractor.
9 I believe it's CANELCO, and we are all aware of what the
10 number is. It's in our filing.

11 It's a cost that ultimately will be used in in the
12 final economic evaluation for the transfer price.

13 But my point that I am trying to make, Madam Chair, is
14 that he indicated they were in limbo to some extent.
15 That's perhaps not correct, and perhaps Mr. Malcolmson
16 might be willing to confirm that there is no limbo in
17 respect of the work continuing at that site and that there
18 should not be any expected delay in the completion of the
19 project as a result of this application.

20 MS. CONBOY: Thank you.

21 MR. O'LEARY: Just if he wanted to respond to that, I
22 don't know.

23 MR. MALCOLMSON: Well, we are happy to hear that
24 Horizon will accept the work that's done to Hydro's
25 standards in the event that the application is successful.
26 My client did request that in writing. I don't think we
27 had a response in writing, but I take Mr. O'Leary and his
28 client at his word.

1 MS. CONBOY: Thank you.

2 MR. O'LEARY: In response to my friend's submissions,
3 Madam Chair, you have asked my friend the very question I
4 was going to ask him, which is: What is the legal test
5 that you say should be applied here today?

6 Frankly, it's the first time that I have ever been in
7 a position where the applicant, particularly on a motion
8 for summary dismissal, does not refer to any law and
9 doesn't provide you with the test, and indicates they would
10 prefer to hear from the respondent first, and then they are
11 going to respond to that.

12 Well, that's procedurally incorrect, as well. If I go
13 ahead and provide my views on a matter and my friend
14 ultimately responds to that, I have no right of reply. The
15 obligation on the applicant is to come forward and make
16 their best case in their original submissions.

17 I then have a chance to respond to that. My friend is
18 then limited to only dealing with the matters that I raise
19 which are new relative to what he did in the first
20 instance.

21 To say he is going to split his case and do it all at
22 the end is simply incorrect. So I am trying to understand.
23 Is it going to be a situation where we would have a
24 detailed submission, and then my friend will be entitled to
25 a detailed reply, or -- our respectful submission is that
26 Mr. Engelberg should conclude his original submissions, and
27 if that's it, he would only then be entitled to speak to
28 matters that are new, which, in our respectful submission,

1 means that he would not be able to respond to much of what
2 we are going to be raising because it is going to be
3 touching on his points, but he will then be trying to
4 really expand on the very same point that he should have
5 raised in the first instance.

6 MS. CONBOY: How is that different, though, than if
7 you are bringing up new matters, matters that he has not
8 brought up in his initial argument? Where do you draw --
9 where do you draw the line?

10 It's Hydro One's motion and they get the last -- they
11 get the last say on this, so I am not sure where that
12 demarcation is.

13 MR. O'LEARY: And that's a fair observation. My point
14 is simply this: How is it fair to Horizon if I don't have
15 an opportunity to respond to my friend's submissions? If
16 he is going to make detailed legal submissions as part of
17 his reply, I will have to opportunity to respond to those.

18 We have heard very, very brief explanation by my
19 friend about what is the legal test here. If he is going
20 to limit his legal argument to that, I am content with
21 that, but I am afraid that that is not his intention. His
22 intention is to go into more detailed analysis, and it
23 should be done at the outset, not in reply when I don't
24 have a chance to actually respond to it.

25 MS. CONBOY: Mr. Engelberg?

26 MR. ENGELBERG: Madam Chair, nobody here today is
27 trying to get a leg up on anybody in terms of procedure or
28 anything else.

1 I offered that method of proceeding to the Panel in an
2 effort to be a bit more expeditious. Hydro One is not
3 trying to get a benefit in the order of who goes first and
4 who responds last. I have my submissions ready; I am
5 available to make them in whatever order the Board Panel
6 decides. I am not trying to limit my friend's opportunity
7 to respond or reply in any way, and I am sure he's not
8 trying to limit my opportunity to respond or reply.

9 So whatever order the Board wishes to go in is fine
10 with Hydro One.

11 MS. CONBOY: So if you have submissions ready on that
12 legal test, or on that test that the Board should apply,
13 are you saying you're prepared to go ahead with them, go
14 ahead with them now, then Mr. O'Leary will respond to them?
15 Anything new he brings up, you can then have final reply?

16 MR. ENGELBERG: Of course, but my legal submissions
17 are not going to be limited simply to that legal test. I
18 have all the matters that I would like to deal with that
19 would support Hydro One's arguments on its notice of motion
20 or Horizon's.

21 MS. CONBOY: Well, I think if you have the submissions
22 ready, Mr. Engelberg, we would like to hear from you first.

23 MR. ENGELBERG: That's fine. Would this be a good
24 time for a break? Or I can go ahead first.

25 MS. CONBOY: I think we are happy to have a break. So
26 why don't we take 15 minutes? If that clock is right --
27 which I don't always have a lot of confidence in -- it's 10
28 to 11:00. We will come back at five after 11:00. Thank

1 you.

2 --- Recess taken at 10:52 a.m.

3 --- On resuming at 11:11 a.m.

4 MS. CONBOY: Mr. Engelberg, we will continue with you.

5 MR. ENGELBERG: Thank you, Madam Chair. I am going to
6 be referring to the various tabs in the brief of
7 authorities filed yesterday on behalf of Horizon. I don't
8 know that it's necessary, every time I refer to one, for
9 the members of the Panel to turn up those particular tabs,
10 but if you wish to do so, they are certainly there.

11 MS. CONBOY: This is KM5 you are going to be referring
12 to?

13 MR. ENGELBERG: I think that is right, yes.

14 MS. CONBOY: The book of law and authorities?

15 MR. ENGELBERG: Right, yes. And a couple of times I
16 will be referring to KM7, which are the two pages filed by
17 Hydro One. When I say the brief of authorities, I am going
18 to be referring to KM5.

19 MS. CONBOY: Thank you.

20 MR. ENGELBERG: At tab 1 of the brief of authorities
21 filed on behalf of Horizon, I think it's fair to say that
22 there is though dispute between the parties as to the
23 objectives of the Board regarding electricity, as seen in
24 section 1 of the OEB Act, 1998, and I have already
25 mentioned them. They refer to economic efficiency and to
26 price reliability and quality of service.

27 Regarding section 21(2) of the Ontario Energy Board
28 Act, which I believe appears at tab 1 -- or perhaps not.

1 MS. CONBOY: We have got it here. It's on tab 1.

2 MR. ENGELBERG: Okay, thank you. Hydro One submits
3 that the section does not take away from the Board its
4 inherent right to make determinations on points of law or
5 to consider decisions already made by the Board on points
6 of law and mixed fact and law as the Board did in the
7 generic decision released in 2004.

8 That inherent right of the Board is not only a right
9 of all tribunals, but also Hydro One relies on section
10 19(1) of the OEB Act, which I have filed as part of KM7,
11 and that section states that the Board has in all matters
12 within its jurisdiction authority to hear and determine all
13 questions of law and fact.

14 I'd like next to refer to tab 3 in the brief of
15 authorities where we see excerpts from the Statutory Powers
16 Procedure Act, in particular, Rule 4.6, in which certain
17 grounds are listed as grounds a Tribunal can use to dismiss
18 a proceeding without a hearing.

19 Hydro One does not rely on grounds (a), (b) or (c)
20 under section 4.6(1), but I submit that those grounds
21 listed there are not exhaustive of the reasons for which a
22 Tribunal can dismiss a proceeding without a hearing. And I
23 submit to you that that fact is shown in sections 4.6(2)
24 and 4.6(5) of the Statutory Powers Procedure Act where the
25 wording uses the phrase "dismiss a proceeding under this
26 section".

27 I submit to you that the words - they are used two or
28 three times in section 4.6 - that those words "under this

1 section" makes it clear that the general law regarding a
2 Tribunal's right to control its own process provides the
3 Board with authority to dismiss a proceeding without a
4 hearing on grounds that are not listed in (a), (b) or (c)
5 of section 4.6(1); otherwise, we wouldn't have the words
6 "dismissing a proceeding under this section".

7 And I suggest that that particularly applies when the
8 matter has previously been determined, as it has in the
9 decision with reasons in the generic hearing.

10 The right of a Tribunal to control its own process is
11 also seen in section 25.0.1 of the Statutory Powers
12 Procedure Act which also appears at that tab, along with an
13 analogy to Rule 20 of the Rules of Civil Procedure, which I
14 mentioned before the break, which provides the Board with
15 authority to dismiss a proceeding without a hearing.

16 Additionally, at Rule 18.1 of the Board's Rules of
17 Practice and Procedure, Hydro One submits that the grounds
18 listed in (a), (b) and (c) are, again, not exhaustive
19 grounds for dismissing a proceeding without hearing. They
20 are not the only grounds on which a proceeding may be
21 dismissed without a hearing.

22 In any event, I submit that Rule 18.01 refers to a
23 situation in which it is the Ontario Energy Board itself
24 that is proposing to dismiss a proceeding without a
25 hearing, which is not the situation we have today, where
26 the motion was brought by a party.

27 At tab 4 in the brief of authorities, we see Rule 20
28 of the Rules of Civil Procedure. As I mentioned before the

1 break, and as the brief of authorities shows, Rule 20.04
2 has changed.

3 At tab 9 of the brief of authorities, there is a copy
4 of a court decision called Cuthbert v. TD Canada Trust, and
5 it states in paragraph 9 of that decision that:

6 "The court shall grant summary judgment if,
7 "(a) the court is satisfied that there is no
8 genuine issue requiring a trial..."

9 At paragraph 10 of that case, the change in the rules
10 is discussed, and what the decision points out is that the
11 language in the rule is no longer just that there is no
12 genuine issue for trial, but that there is no genuine issue
13 requiring a trial. The last sentence in that paragraph
14 number 10 reads:

15 "As a result consistent as well with the new
16 principle of proportionality in Rule 1.04(1.1)
17 cases or issues need not proceed to trial unless
18 a trial is genuinely required."

19 MS. CONBOY: Sorry, I am struggling a bit with the
20 distinction between no genuine issue for trial and no
21 genuine issue requiring a trial. Can you repeat your
22 distinction between the two, please?

23 MR. ENGELBERG: Well, in my submission, what the
24 courts are trying to say about that decision is that the
25 reason the rule was amended was -- if I could put it in the
26 vernacular, it was probably easier for a party defending a
27 motion for judgment, for summary judgment, when the rule
28 was worded the way it had been, to say, Well, there is a

1 genuine issue for trial here. If the matter goes to trial,
2 there is an issue that would be capable of being determined
3 there.

4 The purpose in the change in the rules, in my
5 submission and in the argument used in some of the cases
6 prior to then, was that it's a different thing to say --
7 and it's a higher test for somebody trying to resist a
8 motion for summary judgment to argue that there is no
9 genuine issue that requires a trial.

10 Yes, there is one for trial. It could be raised at
11 trial, but does this really require a trial?

12 MS. CONBOY: Thank you.

13 MR. ENGELBERG: Additionally, Hydro One submits that
14 the analogy used by Horizon to Rule 20 of the Rules of
15 Civil Procedures can also be used to refer to rule 21.01(1)
16 of those rules, which appears on the second page of KM7,
17 the two pages that Hydro One submitted, which states that:

18 "A party may move before a judge for the
19 determination before trial of a question of law
20 raised by a pleading where the determination of
21 the question may dispose of all or part of the
22 action."

23 And Hydro One submits that that is also what Hydro One
24 is attempting to do today, to determine a matter that could
25 shorten or dispose of the action.

26 I would like to skip now to tab 10 in the brief of
27 authorities, where my friend has filed the case of Toronto
28 Hydro before the Ontario Energy Board.

1 There is a lot said about these tests there, but Hydro
2 One's submission is that this particular case is not very
3 helpful to what the Board has to deal with today, because
4 in the Toronto Hydro case the Board had already determined
5 that a hearing would be held.

6 Also, the factual basis of that proceeding bears no
7 comparison to the situation before the Board today. The
8 Toronto Hydro case was about rates, early rebasing and the
9 Board's third-generation incentive rate mechanism policy.

10 At tab 11, there is another case from the Board. It's
11 an application by Marie Snopko and others under section 19
12 of the OEB Act.

13 That case is helpful, in that it again describes the
14 change in Rule 20 of the Rules of Civil Procedure, which I
15 just mentioned. And at page 7 of the Board's decision in
16 Snopko, the Board explains, of course, that proceedings
17 before the Board are not, strictly speaking, governed by
18 the Rules of Civil Procedure, but that the Board accepts
19 the court's guidance in the Cuthbert decision, which talks
20 about Rule 20 and the change that had been made to it.

21 At tab 12 of the brief of authorities, we see the
22 interim decision of the Board on June 23rd, 2003 in the
23 generic proceeding. We haven't talked about that yet
24 today.

25 The Board stated in the interim decision that it does
26 have the jurisdiction to consider service area amendment
27 applications which involve existing customers. That can be
28 seen in the last sentence in the next-to-last paragraph of

1 the decision.

2 And in the next paragraph, the Board stated that it's
3 very aware of the serious public interest concerns involved
4 in granting service area amendment applications that affect
5 existing customers, and that the Board will consider very
6 seriously the regulatory policy issues and the practical
7 implications.

8 That is the task facing the Board today, namely,
9 whether the Board believes that, in the words of the
10 revised Rule 20.04, that there is not only a genuine issue,
11 but it's a genuine issue that requires a trial, or -- in
12 the context of a tribunal -- whether there is a genuine
13 issue that requires a full hearing to determine whether the
14 Board wishes to embark on a course of action in which there
15 would be repeated applications by LDCs not licensed to
16 serve a particular territory to acquire that territory and
17 the existing customers therein.

18 But I would go on to submit that the subsequent final
19 decision with reasons in the generic hearing, which was not
20 released until 2004, re-thought the Board's comments in the
21 interim decision, when the Board said in the paragraph
22 entitled "Board Findings" near the end of section 4.4 of
23 the decision with reasons:

24 "Service area amendments should not result in the
25 Board-mandated transfer of customers from one
26 distributor to another."

27 And I have already read the complete quote from that
28 section.

1 Going on to tab 13, there is the decision of the Board
2 in EB-2004-0445, in which Hamilton Hydro applied to acquire
3 a portion of Hydro One's service territory and Hydro One
4 supported the application.

5 I submit that Hydro One supported the application
6 because Hydro One agreed that Hamilton Hydro could serve
7 the location in a more economically efficient way. I
8 submit to you today -- and I am going to say it about other
9 cases before the Board in which Hamilton Hydro and, later
10 on, Horizon applied for portions of Hydro One's service
11 territory -- that when it was obvious that a decision to
12 allow the applicant LDC to serve a particular territory was
13 more economically efficient and more in line with the
14 Board's objectives in section 1 of the OEB Act, of course
15 Hydro One consented, or Hydro One decided not to oppose the
16 application.

17 So our submission today is that those decisions are
18 not helpful to what you have before you today, where there
19 was no doubt whatever that there was no contested service
20 territory application. These applications never proceeded
21 on the basis there was any dispute.

22 At tab 14, there is the OEB decision in EB-2004-0536,
23 a similar case, not contested by Hydro One although Hydro
24 One didn't provide a consent. In fact, Hydro One
25 acknowledged that in that particular case, Hamilton Hydro's
26 offer resulted in a lower cost of connection and a lower
27 capital contribution. And that decision is also not
28 helpful to either party in this proceeding because of the

1 fact there was no dispute.

2 Same with tab 15, OEB decision in another proceeding
3 involving Hamilton Hydro's application for a portion of
4 Hydro One's service territory, again not contested by Hydro
5 One, so not helpful to either party.

6 At tab 17, the decision of the Board in EB-2006-0216,
7 again Hydro One supported the application, so the decision
8 is unhelpful today.

9 At tab 18, similar application, 2006-0311, Hydro One
10 supported the application, so unhelpful to either party.

11 Tab 19 and 20, we see the same thing. Tab 19 is EB-
12 2007-0914, which Hydro One supported. Tab 20, EB-2009-
13 0035, which Hydro One supported.

14 Tab 21 was EB-2009-0059. Again, Hydro One supported
15 the application, so the decision is unhelpful.

16 I would like to go back to tab 16, where the matter
17 was different. That was a decision of the Board in EB-
18 2005-0504, in which Horizon applied for a portion of Hydro
19 One's service territory. The decision showed that Hydro
20 One was not contesting the proposed amendment, but pointed
21 out that there were a number of areas that may not be
22 consistent with the generic hearing's decision from 2004.
23 And I would like to go to tab 16, and to the heading on
24 page 3 of that Board decision called "Licensed Service
25 Area," the third paragraph down on the page:

26 "In Board decision RP-2003-0044, the Board
27 clearly set out its view that the transfer of
28 customers from one distributor to another should

1 be the subject of bilateral arrangements between
2 distributors. Horizon should have been aware of
3 this fact and it should have initiated
4 negotiations with Hydro One to arrange for the
5 transfer of the four Hydro One customers.
6 Horizon did not enter into negotiations with
7 Hydro One. Horizon stated that it 'understood
8 from previous conversations with Hydro One staff
9 that the province has not provided direction to
10 Hydro One to divest of customers and therefore
11 compensation [for the four customers] could not
12 be discussed.' Horizon did also state that it
13 'is open to negotiations with Hydro One,' but
14 this does not appear to have occurred before this
15 application was filed since Hydro One has stated,
16 in its response to this application, that it
17 '...was left out of any discussions with Horizon
18 prior to the filing of this application rather
19 than being included as would normally be the case
20 for service territory applications.'
21 "It does not appear that Horizon has met its
22 responsibility of following Board decision RP-
23 2003-0044 and attempted to negotiate a transfer
24 of Hydro One's customers with Hydro One directly.
25 Horizon's inability to carry out its
26 responsibility has left me no choice but to
27 follow the views of the Board in Board Decision
28 RP-2003-0044, namely that 'service area

1 amendments should not result in the Board-
2 mandated transfer of customers from one
3 distributor to another.' This means the four
4 Hydro One customers will remain with Hydro One
5 and will not become part of Horizon's service
6 area.

7 "While I feel it would have been best for Horizon
8 to enter into negotiations with Hydro One to
9 provide for the transfer of the four Hydro One
10 customers prior to filing this application, I
11 recognize that Multi-Area Developments" -- a
12 familiar name -- "needs the service from Horizon
13 to proceed quickly. In this case, I will grant
14 the service area amendment, but I will exclude
15 from the Hamilton Hydro Licence the addresses of
16 the four customers of Hydro One."

17 And the last paragraph I would like to point you to is
18 on the next page under the listing of the four addresses:

19 "I would like to point out that were it not for
20 the consideration of the larger public interest
21 served by ensuring timely service to Multi-Area
22 Developments Inc., I would have seriously
23 considered denying this application until such
24 time as it was shown that Horizon had entered
25 into negotiations with Hydro One to provide for
26 the transfer of the four Hydro One customers. I
27 expect that any service area amendment
28 applications will not be filed until the

1 acquiring utility can show that it has attempted
2 to negotiate with the adjoining utility where the
3 negotiations are likely to result in a more
4 efficient rationalization of the distribution
5 system."

6 MS. CONBOY: So how does that -- maybe you are going
7 to get to this. How does that help us determine right off
8 the bat whether to hear an application or not? This is
9 very application-specific, I think, and a conclusion
10 perhaps we would draw in this type of an application.

11 How does that help us with the initial test?

12 MR. ENGELBERG: I think it provides additional
13 evidence for the Board that notwithstanding the words
14 contained in the interim decision of the board in RP-2003-
15 0044, that the Board is mindful of the decision in the two
16 paragraphs that were read to you from the final decision
17 that was released in 2004, that the Board is still governed
18 by its principle that there should not be a Board-mandated
19 transfer of customers from one LDC to another.

20 MS. CONBOY: Thank you.

21 MR. ENGELBERG: I need to refer briefly to the letter
22 filed yesterday by Aird & Berlis on behalf of three LDCs
23 who are neither parties, intervenors or observers in the
24 proceeding before you today.

25 Those three LDCs are Brant County Power, EnWin
26 Utilities and Essex Powerlines. Has the Board had the
27 opportunity to see that letter?

28 MS. CONBOY: We have, Mr. Engelberg. Thank you.

1 MR. O'LEARY: Madam Chair, I am reluctant to
2 interrupt, but I think my friend has not perhaps fully read
3 the letter from the utilities. They have actually asked
4 for status in this proceeding. They indicated they did not
5 intend to make submissions today and, thus, these
6 submissions made in writing, but they have asked for status
7 in this proceeding.

8 So I don't think my friend's characterization of their
9 letter is correct.

10 MR. ENGELBERG: I'm sorry, if that was incorrect, I
11 stand corrected.

12 MS. CONBOY: Thank you.

13 MR. ENGELBERG: I have already dealt with the
14 arguments raised in the first part of Mr. Stoll's letter
15 regarding motions to dismiss in general. I don't want to
16 go through all the submissions in detail, but I would like
17 to add a few words regarding the matter of the Board's
18 objectives.

19 Hydro One agrees that the large group of consumers
20 must be considered in service area amendment applications.
21 I don't think there is any dispute between the parties on
22 that.

23 It is for that reason that Hydro One sometimes
24 consents or does not oppose such applications and sometimes
25 Hydro One does oppose. You have seen from a half a dozen
26 of the decisions that were filed in the brief of
27 authorities showing that Hydro One either consented or
28 didn't oppose applications by Hamilton Hydro or previously

1 Horizon -- subsequently Horizon. In a number of cases,
2 Hydro One considered the larger picture and made the
3 determination not to oppose or even to consent.

4 But in part 1 of the amended service area amendment
5 application, contrary to what Mr. Shepherd told you this
6 morning, the materials already filed have made it clear
7 that Hydro One is not relying solely on the preference of
8 the customer, Multi-Area, in part 1 of the application when
9 Hydro One opposed the application.

10 Hydro One's citation of the fact that Multi-Area
11 accepted the offer to connect from Hydro One is only an
12 additional reason why Hydro One submits that the
13 application in part 1 should not be entertained or granted.

14 The fact that Multi-Area has entered into a binding
15 contract with its own LDC after having had the opportunity
16 to see Horizon's price is also merely an additional reason
17 why Hydro One submits that the territory should not be
18 granted to Horizon and the customer should not be granted
19 to Horizon.

20 The fact that Multi-Area is under time constraints, as
21 pointed out by Mr. Malcolmson, is also merely an additional
22 reason.

23 The greatest reason for Hydro One's opposition to the
24 transfer of Multi-Area and the territory is found in the
25 Board's objective set out in section 1 of the OEB Act;
26 namely, protecting the adequacy, reliability, quality of
27 electricity service and promoting economic efficiency and
28 cost effectiveness.

1 And, in that regard, I would like to repeat that
2 continuous, repeated applications to acquire an adjacent
3 LDC's service territory for new customers, service
4 territory with old customers and service territory with no
5 customers at all, vacant land, are not and cannot be what
6 the Board meant in the generic decision when it referred
7 to, and I quote, "the rational optimization of existing
8 distribution systems".

9 Hydro One's submission is that this cannot possibly be
10 of benefit to the customers at large, to the province at
11 large, to the LDCs at large, and to rationalizing
12 electricity distribution at large.

13 Now, Hydro One's submission attached to the Hydro One
14 notice of motion that you have before you stated at
15 paragraphs 2(d) and 2(e) that to grant the service area
16 amendment application would enable an non-incumbent LDC to
17 solicit existing customers of an incumbent LDC just as
18 electricity retailers carry on business throughout the
19 province by knocking on doors, and it would initiate open
20 season on the Ontario map of distribution service
21 territories by allowing, as I said before the break, LDCs
22 to cherry-pick existing customers and vacant lots within an
23 incumbent LDC's service territory without going through
24 what the Board has said it wants.

25 What the Board has said it wants is negotiated
26 purchase and sale processes that would be beneficial to
27 both parties. Hydro One was not off the mark in using the
28 expression "open season". I think that we can see in the

1 letter filed yesterday by Mr. Stoll on behalf of the three
2 other utilities where Mr. Stoll states in the second
3 paragraph, and I quote:

4 "Each has been involved or will be involved in
5 service area amendments in the not too distant
6 future."

7 I am suggesting to you today that what is being
8 foreshadowed here is not the type of SAA applications that
9 the Board has seen up until now through all these years
10 where the Board has seen and dealt with a number of service
11 area amendment applications, both contested, uncontested,
12 unopposed, where an adjacent LDC has applied to the Board
13 for permission to acquire a proposed new customer at the
14 edge of an incumbent LDC service territory where there has
15 been no service already provided by the incumbent LDC.

16 If what was being spoken of were simply this type of
17 service area application that the Board has dealt with in
18 the past, where one of these proposed new customers were
19 being sought by an adjacent LDC, there is no question that
20 such applications have gone on for years. They will
21 continue to go on before the Board, as they always have.

22 What we are dealing with here today is something new;
23 new customers inside their own LDC who wish to connect to
24 their own LDC. And I ask rhetorically: Who would ever
25 have thought that that would present a problem?

26 We are also dealing today with vacant land inside an
27 incumbent LDC and with existing customers inside an
28 incumbent LDC. I suggest to you that we are indeed talking

1 about open season and a whole new landscape of repeated,
2 ongoing applications to the Board to redraw boundaries,
3 force customers to move from one utility to another,
4 performing service planning and forecasts on a pointless
5 basis, because you don't know whether you are going to keep
6 that customer or not. So what degree of planning should
7 you do to service your own territory, particularly near the
8 boundaries of it where it may be taken away from you next
9 month or next year? And furthermore, the solicitation and
10 enticement to switch suppliers.

11 I am suggesting to you today that this is not a pretty
12 picture and it's not what the generic decision was talking
13 about.

14 So those are the law submissions on behalf of Hydro
15 One.

16 MS. CONBOY: Thank you.

17 I think the Board would -- well, I don't think, I know
18 the Board -- we are going to take a break for about 15
19 minutes, and we will be back. Thank you.

20 --- Recess taken at 11:44 a.m.

21 --- On resuming at 12:06 p.m.

22 **DECISION**

23 MS. CONBOY: The Board finds that the onus is on Hydro
24 One, as the moving party, to persuade us that Horizon's
25 service area amendment application cannot succeed if it
26 proceeds to a hearing. The arguments put forward by Hydro
27 One are arguments that the Board will entertain on the
28 merits of the application.

1 The Board cannot come to a determination on these
2 issues in the absence of a full evidentiary record.
3 Therefore, the Board finds that there are genuine issues to
4 be determined in a hearing. Parts (a) to (d) of the Hydro
5 One motion are dismissed, and we do not need to hear from
6 Horizon on Hydro One's motion any further.

7 We will, however, proceed to hear the Horizon motion
8 with respect to the head of relief that dealt with the
9 information on the offer to connect of Hydro One.

10 The other head of relief on the motion dealing with
11 the site visit, the Board finds that we can deal with that
12 in the context of the application as opposed to dealing
13 with it in the motion.

14 I am looking at the time and wondering, Mr. O'Leary,
15 how long do you think you will be to present your motion?

16 MR. O'LEARY: I will be quite brief in respect of the
17 request, frankly, for the right to ask interrogatories that
18 are of relevance, which is really what we were trying to
19 request, and I was going to just briefly go into the areas
20 that we would submit are generally relevant. That
21 shouldn't take me more than five, ten minutes.

22 And in terms of the site view, I heard what you just
23 said, Madam Chair. The reason why we brought some of these
24 maps along was that we thought we might be able to perhaps
25 assist you for two reasons. One, you might find that by us
26 walking you through them that you might not require a site
27 visit, but then, again, as a result of it, you may decide
28 that this is the type of complicated situation that you may

1 want to go out and take a view.

2 I don't think there is any question - my friend didn't
3 raise it - that there is a lack of jurisdiction on your
4 part. It's clearly open to the Board, if it wishes to, to
5 go out and examine the evidence, and that is common. I
6 don't think that is an issue.

7 There is no question it's your discretion whether or
8 not you thought it would be helpful if I walked you through
9 several of the maps now as opposed to doing it later.

10 My question really is back to you, Madam Chair.
11 During the course of the proceeding, when it would be,
12 prior to the actual hearing, that I would have an
13 opportunity to raise the issue of a site view again?

14 MS. CONBOY: I think we have the maps right now. The
15 maps that we have seen to date on the application appear to
16 be relatively straightforward. The preference is that we
17 will take those maps and we will review them, and, if we
18 have any subsequent questions about the maps, either on our
19 own or raised through the application by any other party,
20 then we can determine at that point whether it would be
21 appropriate for us to either to ask more questions on the
22 maps or to actually come out and have a site visit.

23 So for the purposes of today, the Board finds that we
24 don't need to walk through those maps.

25 MR. O'LEARY: That's fine. And I might just reiterate
26 our offer on behalf of Horizon, which is to organize the
27 event and obviously do it in conjunction with my friend so
28 that it's done on a procedurally fair basis.

1 MS. CONBOY: Received with thanks.

2 MR. O'LEARY: Then my comments are strictly limited to
3 the request for relief, which really goes to the normal
4 step in --

5 MS. CONBOY: Before you get started, I would just like
6 to hear from Mr. Engelberg, please.

7 MR. ENGELBERG: I would just like to say that, if I
8 understand correctly that a determination has been made
9 that part 1 of the service area application will go ahead
10 with respect to Summit Park phase 7, then it would appear
11 to me to be unnecessary to hear part (c) of the relief
12 being sought by Horizon, 3(c), regarding the detailed
13 breakdown of Hydro One's offer to connect, because the
14 standard process in a service area amendment application is
15 for the parties to exchange all of that information, and
16 Hydro One will be providing information regarding its offer
17 to connect as part of the normal process.

18 MS. CONBOY: I understood the same thing, Mr.
19 Engelberg. I think what I heard Horizon say - and correct
20 me if I am wrong - is that we are here now and there were
21 some clarifications perhaps required. Mr. O'Leary, perhaps
22 you could correct me if I am wrong.

23 MR. O'LEARY: Madam Chair, at the time that the motion
24 was filed, we were concerned about the work that was being
25 undertaken at the time, which has now been moved over to
26 the compliance office.

27 The offer to connect did not apparently contain a
28 number of costs which we were aware of, including the very

1 work that we'd asked be discontinued and some other costs,
2 including the fact the poles on the south side of the
3 street which Hydro One is proposing to put in, what we
4 would describe as a redundant additional circuit which
5 parallels Horizons', will have to be moved for road
6 widening, and there did not appear to be any connection
7 costs and there did not appear to be any inclusion of the
8 expansion work that's necessary.

9 So our request really was for the opportunity, in the
10 context of the motion, to ask questions of Hydro One at
11 that point so we could make submissions on the application.
12 If we are going to move into an application of a normal
13 procedural basis, we would expect that each side would have
14 an opportunity to ask relevant interrogatories. And, if
15 that is your intention, my comments could be very, very
16 brief, because if my friend is going to agree that that is
17 an appropriate next step, we agree with that, as well.

18 MS. CONBOY: I think that is the intention. If we are
19 going to proceed to hear the full application, we will
20 provide for interrogatories, during which you can ask for
21 additional information or clarification of the information
22 that you do have.

23 MR. O'LEARY: One of the reasons why we did raise it
24 at the time was because -- and this will come out in due
25 course, but there was some concern about the fact that the
26 work that Hydro One was undertaking at the time was being
27 done in the face of a live application.

28 They have now spent some money replacing some poles

1 and putting in some circuits. If it comes down to now a
2 request from Hydro One that they want to be compensated for
3 that, it's appropriate that we look to who and why those
4 decisions were made in the face of a live application.

5 MS. CONBOY: And we can deal with that at the time,
6 can we not?

7 MR. O'LEARY: As long as it's understood, Madam Chair,
8 that we are going to probably want to ask some questions
9 about matters like that and that relate to the costs that
10 are relevant.

11 MS. CONBOY: Thank you. Mr. Engelberg.

12 MR. ENGELBERG: Hydro One has no problem with that,
13 and I don't think part (c) of the motion is a contested
14 motion anymore.

15 MS. CONBOY: Okay. So on that basis that part (c) is
16 no longer a contested component of the motion, on the
17 understanding that we are moving to a full hearing that
18 will include an appropriate interrogatory process, Mr.
19 O'Leary, you are free to ask those types of questions in
20 terms of compensation.

21 I am sure that Mr. Shepherd will also bring up those
22 comments, as he has highlighted them in his letter to us
23 already.

24 So unless there are any other questions - and I am
25 looking to my fellow panel members, as well - I think we
26 can conclude today's proceedings.

27 MR. ENGELBERG: I have one question, and perhaps Mr.
28 Malcolmson may want to weigh in on this. Where does this

1 leave Hydro One's customer, the developer, who is waiting
2 for connection?

3 MR. O'LEARY: I thought that we had already dealt with
4 that. Mr. Malcolmson had raised the issue of being in a
5 squeeze, and I reminded him of the fact that Horizon has
6 said that it will accept the civil work that is being
7 completed.

8 Indeed, I understand that the CEO of Horizon has dealt
9 with Mr. Spicer and has made that clear, so there should be
10 no impact on the development in terms of it going forward.

11 In terms of the contract that may exist between Hydro
12 One and Multi-Area, that may be an issue that Hydro One is
13 going to have to face up to later on, because it's our
14 submission that the costs are not fully stated in that, and
15 if they have made a contractual commitment and there are
16 now damages that flow from that, it's an issue that they
17 may have to take up in the courts.

18 But ultimately this Panel has to make its ultimate
19 decision based on the service area amendment proceeding,
20 the combined proceeding that looks at all the factors, and
21 it specifically states that all of those costs should be
22 taken into account and there should be no guarantees that
23 the contract that has been signed between Multi-Area and
24 Hydro One is in any way going to have any -- is not binding
25 on this Panel.

26 MR. ENGELBERG: If I may weigh in on that, my question
27 didn't relate to the contractual problems; it related to
28 the fact that Hydro One needs to continue to do work to

1 serve its customers.

2 MS. SPOEL: Perhaps -- I don't think that this Panel
3 is in a position to deal with the continuation of the work.
4 Some of the matters have been referred, for example, to our
5 compliance office, which is a separate department and part
6 of the Board over which we have no input or control.

7 Perhaps you can make arrangements -- this discussion
8 is a discussion that can be -- or a debate that could be
9 had off-line, if I can use that word. I am not sure it's
10 helpful. I am not sure we are going to be able to provide
11 you with any relief here today as to what the practical
12 arrangements on the ground should be.

13 If something can't be worked out, I expect the Board
14 might be able to provide something, but I don't think it's
15 something that we can help you with on the spot right now.

16 MR. O'LEARY: Ms. Spoel, I agree with you. It is my
17 understanding that the site has temporary power and all
18 that is required for it to continue with the construction,
19 and that it is not necessary for Hydro One to undertake any
20 additional work to facilitate the continued construction of
21 the site.

22 MS. CONBOY: I think I'm -- we can't help you. This
23 Panel cannot help you with that today.

24 There may be new information that Mr. Malcolmson's
25 client has as a result of what he has heard today that can
26 take him back to the two parties.

27 To Hydro One, you've got a contract with Multi-Area,
28 and you have got your avenues that you can deal with that.

1 We understand the concerns loud and clear from Multi-
2 Area in terms of timeliness, but as far as what we can get
3 achieved today by this Panel, I am not sure whether we can
4 go any further with the work that's being done on the
5 ground right now and the existing contracts that are there.

6 So I will leave it to you to work that out, to avail
7 yourselves, if you need to, of the compliance area of the
8 Board, but as far as we go today, we can't go any further.

9 MR. ENGELBERG: Thank you.

10 MS. CONBOY: Are there any other issues?

11 Okay. With that, we are adjourned for the day. Thank
12 you very much, everybody, and have a good weekend.

13 --- Whereupon the hearing adjourned at 12:19 p.m.

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