Barristers & Solicitors
Patent & Trade-mark Agents

McCarthy Tétrault

McCarthy Tétrault LLP
Box 48, Suite 4700
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Telephone: 416 362-1812
Facsimile: 416 868-0673
mccarthy.ca

George Vegh
Direct Line: 416 601-7709
Direct Fax: 416-868-0673
E-Mail: gvegh@mccarthy.ca

November 7, 2007

Ms. Kirsten Walli
Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: EB-2007-0797-Hydro One Networks Inc. Connection Procedures Pursuant to the Transmission System Code - Ontario Power Authority Submissions for Notice of Motion to Review the OEB's Decision and Order Dated September 6, 2007

Pursuant to Procedural Order No. 1 in the above-noted proceeding, enclosed is a summary of the submissions of the Ontario Power Authority (OPA).

Yours very truly,

George Vegh

GV/ar
Encl.

Summary of Submissions of the Ontario Power Authority on Motion to Review

Introduction and Summary of Position

The OPA supports the motion for review of the Board's initial decision (the "Decision") on the following grounds:

(i) with respect to the Hydro One's approach to preparing plans under s. 6.3.6 of the Code, the Decision effectively struck down Hydro One's planning criteria without a demonstration that this criteria was inconsistent with s. 6.3.6 of the TSC. This finding is inconsistent with the Board's stated approach towards the test that Hydro One's practices had to meet with respect to compliance with the TSC. Specifically, the Decision indicated that Hydro One must demonstrate that its approach is not inconsistent with the TSC. Hydro One clearly met that test.

In addition, the OEB developed its own transmission planning requirements that transmitters should adopt, one which (a) expressly distinguishes between planning for load growth on the one hand, and planning for reliability and integrity, on the other; and (b) raises regulatory risk that accompanies consultations with customers.

This error is material in the sense that a reviewing panel, if it applied the test of consistency, could conclude that Hydro One's practice is consistent with s. 6.3.6 of the Code. It could also conclude that the Decision's proposed approach for transmission planning creates poor planning principles and incentives for distortions between connection and network assets

(ii) with respect to contestability, the Decision effectively made a legal declaration respecting the compliance of the CCRA and the TSC with s. 71 of the *OEB Act, 1998*. This declaration extended beyond the scope of the hearing, which was to consider whether transmitters' connection policies were consistent with s. 6.1.4 of the TSC. In addition, the declaration treated the issue of whether or not transmission assets are included in a transmitter's rate base as determinative. There is no legal or policy basis for this conclusion.

These errors are material in the sense that a reviewing panel could decline to provide a declaration of legality and, instead, have the Board approach the issue of who should build transmission connection facilities and how they should be funded as a matter of policy that will continue to develop to meet evolving sectoral requirements. Specifically, the Board can consider this issue in the context of the demands on the transmission system, especially in light of requirements for renewable power and transmission expansion in the Supply Mix Directive. Such a review could include consideration of the impact of a transmitter's participation in the design and construction of connection lines

on the competitive market. However, it could look at the issue more broadly in light of a number of policy challenges.

If the Decision stands, then such a review would necessarily be limited to a consideration of whether assets are in rate base. This limited perspective has been rejected by the Board for rate making purposes. It has also been rejected by other jurisdictions in North America as too limited a perspective to meet the challenges of transmission infrastructure to meet renewable power requirements.

As a result, allowing the decision to stand on this issue would have a material impact on the reviewing panel and all subsequent transmission policy development.

The Scope of the Board's Review

This application was initially framed to have a fairly narrow and technical focus, namely, whether a transmitter's connection procedures complied with s. 6.1.4 of the TSC (see Procedural Order #1). The Board's initial decision (the "Decision") also emphasized the narrow focus. It stated:

> "First, it is important to emphasize that the combined proceeding has as its exclusive focus the review and approval of the respective connection procedures filed by the Hydro One and GLPL pursuant to section 6.1.5 of the Code.
>
> It is not a process to review or revise the Code *per se*, which can only be undertaken pursuant to section 70.1 of the Act after appropriate notice to interested parties." (at p. 20)

On another occasion, the Decision addressed the level of prescriptiveness that the Board would apply to the activities of transmitters. Specifically, with respect to Connection Cost Recovery Agreements ("CCRA"), the Decision stated that it will not review specific contractual terms beyond the issue of whether they are consistent with the TSC:

> "The Board considers, however, that it is not necessary at this time to require that the template of the CCRA be specifically approved by the Board. It is important that the parties to these agreements have sufficient flexibility to meet their respective needs. Requiring the approval of a template would have the effect of freezing the terms of the CCRA in a way that would frustrate that objective.
>
> In its consideration of this issue, the Board is guided by the fact that the Code explicitly renders inoperable any contractual provision which appears in any contractual instrument which are inconsistent with the provisions of the Code. This means that any provision of the CCRA which is found by the Board to be inconsistent with the Code cannot be enforced.
>
> It is the Board's view that the various protections respecting conformity with the Code are sufficient to enable customers to contract confidently with transmitters. If it appears that this approach leads to abuses or unacceptable uncertainties it can be revisited." (at p. 4)

As a result, this proceeding was established and proceeded with on the basis that it would address technical compliance issues. The OPA submits that the parts of the decision that are subject of this motion departed from this focussed mandate and strayed into areas that went beyond the issue of compliance with 6.1.4 of the TSC. It did this both with respect to transmission planning under s. 6.3.6 of the TSC and with respect to the declaration on the legal meaning of "transmission business".

Transmission Planning under s. 6.3.6 of the Code

With respect to transmission planning under s. 6..3.6 of the TSC, the Board departed from its stated approach of granting room for a transmitter's discretion with respect to the application of the TSC except where such application was inconsistent with the TSC and leads to abuse and unacceptable uncertainties. The standard of consistency requires a transmitter to demonstrate that its approach is logically compatible with s. 6.3.6. The Supreme Court of Canada addressed the concept of consistency as follows:

> "'Inconsistent' means that the law logically contradicts its objectives, whereas 'unnecessary' simply means that the objective could be met by other means. It is quite apparent that the latter is a much broader term that involves a policy choice." (*Chaoulli v. Quebec (Attorney General) (A.G.)*, 2005 1 S.C.R. 791 (at para. 234).

Applying that here, the question is whether Hydro One's approach to transmission planning under s. 6.3.6 of the TSC logically contradicts the terms of s. 6.3.6.

The Decision does not support a finding of inconsistency.

Hydro One's practice was generally supported by all of its customers who participated in the proceeding as well as all other parties. In addition, the Board noted that there was ambiguity with respect to the type of plan that qualifies under s.6.3.6 of the Plan. In light of these findings, it is erroneous to conclude that Hydro One's practice is inconsistent with the TSC. This error was compounded by the Decision's direction to effectively replace Hydro One's transmission planning practice by a new transmission planning practice put forward by the Board. The creation of this new planning practice goes beyond the scope of this Board's mandate in this proceeding.

If a review of this issue is granted, the Board may consider the relative merits of the Hydro One transmission planning approach and the Board's proposed transmission planning approach. The OPA, which has a statutory mandate with respect to transmission planning, will register its qualified support for Hydro One's practice as being more consistent with sound planning rationale.[1]

Hydro One's approach is preferable because:

---

[1] The support is only qualified because Hydro One does not distinguish LDCs from other load customers. The OPA believes that LDCs are different than other load customers because, as currently constituted, LDCs passively follow load.

- it does not create incentives for distortions between connection and network assets; and
- it does not direct transmitters to develop plans without customer input.

Legal Declaration on the Meaning of "Transmission"

In previous proceedings, the OEB has always addressed the issue of who should build transmission connection facilities and how they should be funded as a matter of policy that will continue to develop to meet evolving sectoral requirements. Thus, for example, in RP-1999-0044, the Board stated:

> "The Board recognizes that the *Electricity Act* does not provide definitive answers as to what constitute transmission or distribution activities. In the case of transmitters, in the absence of any formal review or direction at this time, the Board has been guided by the practical considerations of this issue." (at para. 3.5.15)

There was nothing in the establishment of this proceeding which suggested that the OEB intended to depart from this approach and make categorical legal determinations that will bind future panels and restrict approaches to future transmission planning issues. The Decision's legal declaration that portions of the CCRA (and effectively the TSC) are unlawful – as opposed to merely inconsistent with s. 6.1.4 of the TSC - should be reviewed because it is inconsistent with the mandate of the application.

Further, the Board's conclusion that permissible design and construction work of transmitters be determined solely by whether the assets are included in rate base is problematic from a policy and legal perspective, where the concept of "rate base" is less central than in traditional cost of service regulation.

From a policy perspective, jurisdictions across North America, including Ontario, have major transmission expansion requirements. In large part, this is driven by the need to incorporate new generation capacity, especially renewable power, which tends to be far from loads. In the United States, this has led to the adoption of new policies towards funding enabler transmission lines. These policies depart from traditional approaches to including assets in rate base, and apply models of shared cost responsibility among generators and transmitters. As the FERC put it in approving a new transmission funding policy proposed by California:

> "Location constrained resources present unique challenges that are not faced by other resources and that are not adequately addressed in the Commission's current interconnection process. These resources tend to have an immobile fuel source, are small in size relative to the necessary interconnection facilities, tend to come on line incrementally over time, and are often remotely located from loads. Location constrained resources therefore have a limited ability to minimize their interconnection costs and, moreover, these factors can, in certain circumstances, impede the development of such resources altogether." (Order Granting Petition for Declaratory Order, April 19, 2007), (at paragraph 64)

Ontario faces a similar need for a review of its policy towards transmission expansion to meet renewable supply. Specifically, the Government's Supply Mix Directive incorporates ambitious goals for renewable power. It also contains a specific governmental goal to "Strengthen the transmission system to ...facilitate the development and use of renewable energy resources such as wind power, hydroelectric power and biomass in parts of the province where the most significant development opportunities exist." In this regard, the IPSP contains a recommendation that "the OEB, with assistance and input from the OPA, the IESO, transmitters, generators and other stakeholders consult and work towards implementing the necessary policy changes to address this issue." (IPSP Ex. E-2-2, p. 15) Any such policy review will require greater flexibility and innovation than is afforded by the Decision's categorical determination of rate base as the only and ultimate driver of permissible transmission design and development activity..

From a legal perspective, rate base is more relevant to cost of service jurisdictions than it is to Ontario. In Ontario, the concept of rate base has no inherent legal meaning. For example, in the *Cushion Gas* decision (EB-2005-0211, January 30, 2007), the Board noted that its jurisdiction with respect to incentive rate making "represents a sharp departure from traditional cost of service/rate base practice.":

> "The Board also has the authority to incent (or disincent) utility behaviour at its discretion. The Board is not limited to a traditional cost of service approach to rate regulation; as noted above, it considers a variety of rate setting methodologies. Inherent in that flexibility is the power to incent or disincent particular utility behaviour." (at p. 13)

Given this, the Board's categorical legal conclusion that ratebase is *the* relevant legal determinant in defining the transmission business for purposes of s. 71 of the *Act* is inconsistent with previous OEB decisions and the governing legislation.

If a rehearing of this issue is granted, the OPA recommends that the Board's review consider a broad range of issues, and not be restricted by the categorical legal restrictions in the Decision. In this review, the Board may, in addition to the contestability issue, also consider whether existing policy towards constructing transmission lines is consistent with the goals of the Government's supply mix directive as it relates to renewable power and transmission.

Conclusion

For the foregoing reasons, the OPA supports the relief requested in the Motion for Review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7TH DAY OF NOVEMBER, 2007

George Vegh

McCarthy Tetrault, LLP

Counsel for the Ontario Power Authority