

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*,  
S.O. 1998, C. 15, Schedule B;

**AND IN THE MATTER OF** a review of a notice of proposal  
filed by Kruger Energy Inc. under section 81 of the *Ontario  
Energy Board Act, 1998*.

**Submission of the Power Workers' Union**

1. On September 13, 2007, the Ontario Energy Board (the "OEB" or "Board") issued a notice of review of Kruger Energy Inc.'s ("KEI") notice of proposal filed under section 81 of the Ontario Energy Board Act, 1998 (the "Act") related to the construction and operation of a 100 MVA substation in the Municipality of Chatham-Kent (the "Project" or "Proposal"). On October 10, 2008, the Board held a technical conference in this matter. Procedural Order No. 7, issued on October 24, 2008 states that the Board has determined that the review of the proposal will continue by way of a written hearing. The Board reminds parties that section 82(3) of the Act states that the "Board shall make an order approving a proposal described in section 81 if it determines that the impact of the proposal would not adversely affect the development and maintenance of a competitive market. Submissions must focus on answering this question and related issues that arose as a result of testimony given at the Technical Conference.

2. Procedural Order No. 7 sets out the issues that the Board expects parties to address as follows:

(a) *the capacity of the 230 kV lines between the Chatham Transformer Station and the Lauzon Transformer Station, in particular, whether the proposed substation could:*

(i) *limit future access to the 230 kV lines by other persons; and*

(ii) *impose limits on the Independent Electricity System Operator (“IESO”) operation of the lines which could restrict other persons; and*

(b) *the future operation of the proposed substation, in particular:*

(i) *what the process would be for selecting generation projects for connection to the proposed substation; and*

(ii) *whether the IESO and Hydro One connection processes could be adversely affected.*

3. The following is the Power Workers’ Union’s (“PWU”) submission on the above issues set out by the Board and on related issues that arose as a result of testimony given at the Technical Conference, and KEI’s written submissions.

**Issue 1: The capacity of the 230 kV lines between the Chatham Transformer Station and the Lauzon Transformer Station.**

4. The PWU submits that the proposed substation could, and will, limit the future access to the 230 kV lines between the Chatham Transformer Station and the Lauzon Transformer Station by other persons. The evidence before the Board in this proceeding supports this view based on the following facts:

- a. KEI filed its application under section 81 under the premise that it is exempt from the requirement of a transmission licence and therefore not bound by the licencing requirements, including the requirement for non-discriminatory access. Discriminatory access could limit the future access to the 230 kV lines by other persons.
- b. KEI’s intent to reserve 40% of the substation capacity for its own future generation is direct evidence that the substation could and will limit future access to the 230 kV lines by other persons.

5. In its September 11, 2007 preliminary submission, KEI states that the purpose of constructing the substation “is not grounded in an attempt to stifle

competition, but rather to address an identified need for interconnection infrastructure to support renewable energy generation“[Page 3, Paragraph 1]. Further, in its submission of November 5, 2007, KEI submits that the underlying purpose of the proposed substation is to enable new generation to enter the market and provides exhibits in support of its contention for the need of interconnection infrastructure in the Chatham Kent area. Included is a letter from Hydro One (“HO”) that indicates that it has received applications for the connection of new embedded generation facilities that is beyond the capacity of HO’s supply station in the area of the proposed substation.

6. However, Allus Power Inc. (“Allus Power”), a proponent of 300 MW wind generation in the Chatham-Kent area takes serious exception to KEI’s contention in its Preliminary Filing Requirements that the proposed substation will have little to no impact on competition in the province and to KEI’s confirmation that it will in no way affect Open Access, given the significant grid access constraints in the area. According to Allus Power, KEI’s Proposal would give KEI an unfair competitive advantage to proceed with its own projects. [Allus Power Letter, September 5, 2007]

7. KEI responded to OPA Interrogatory 1 that “KEI as an unlicensed transmitter/distributor it is not subject to the requirement for non-discriminatory access”. In the PWU’s view, this Interrogatory response validates Allus Power’s concern. KEI states that it plans to use 40% of the substation capacity leaving the remaining capacity for other potential future generation projects [Technical Conference Transcript, Page 32, Lines 21-24]. Further KEI indicates that a condition of turning the assets over to Chatham-Kent would be KEI having first access to capacity on the substation for its 40 MW of generation projects. The capacity available for the queuing process therefore would be 60 MW of the 100 MW total substation capacity. [Technical Conference Transcript, Page 62, Lines 24-27 and Page 63, Lines 1, and 7-14]

8. In the PWU's view, KEI's position that as an unlicensed transmitter it is not subject to the requirement for non-discriminatory access, and KEI's stated intent to discriminate in favour of its own generation is evidence that approval of the proposal could and will limit future access to the 230 kV lines by other persons. This is especially so given the system constraints in the Chatham Kent area.

9. The PWU notes that KEI's position is inconsistent with its stated intent in its response to OPA Interrogatory 4 that KEI and its partners "will operate the system according to all applicable regulations and rules". The PWU further notes KEI's acknowledgement at the technical conference that it does not know the rules that would apply with regard to entitlement for any specific generation projects to be connected through the proposed substation [Technical Conference Transcript, Page 45, Lines 4-7]. KEI's lack of familiarity with the rules that apply to licensed transmitters/distributors raises a concern that even with its stated intent to abide by the rules, and even if it were not deliberately limiting access by other persons to the 230 kV lines, there is a definite likelihood that KEI will not abide by all applicable regulations and rules.

## **Issue 2: Future Connections to the proposed Substation**

10. The PWU submits that the proposed substation could impose limits on the IESO's operation of the 230 kV lines between the Chatham Transformer Station and the Lauzon Transformer Station which could restrict the other persons based on the following fact: the Proposal is for a 100 MVA substation to connect future generation that is not as yet committed. From the IESO's perspective therefore, it is not possible to assess whether the substation will limit future access to the 230 kV lines by other persons. The possibility that it could do so therefore cannot be ruled out.

11. It is apparent from the IESO's submission and from KEI's testimony provided at the technical conference that it is not possible to establish at this

point in time whether the proposed substation could impose limits on the Independent Electricity System Operator's ("IESO") operation of the lines which could restrict other persons.

12. In its November 26, 2007 submission the IESO states:

***...information that we believe the Board will require to assess whether the proposal will adversely impact the development and administration of the competitive electricity market was not sufficiently defined or specified in the circumstance.*** [Page 1, Paragraph 2]

13. The PWU submits that the Board's inability to assess whether the proposal would impose limits on the IESO's operation of the lines which could restrict other persons is implicit in the above IESO statement on the Board's inability to assess whether the Proposal will adversely impact the development and administration of the competitive electricity market.

14. The IESO notes the lack of specific or apparent connection proposals associated with the proposed transformer station and the resulting difficulty in assessing the future impact of the station as follows:

***We find the reasons for the transformer station to be somewhat unclear especially given that there are no specific or apparent connection proposal(s) under consideration at this time. Accordingly, it is difficult to assess whether the proposal, if approved by the Board, would in fact lead to adverse impacts on the development and maintenance of the competitive electricity market- above all by limiting future access to the electricity market by generators and others in the area.*** [IESO Submission, November 26, 2007, Page 3, continuation of Paragraph 5]

15. While Procedural Order No. 7 sets out the issues in relation to the "proposed substation", the IESO points out that the Board cannot ignore the combined effects of the proposed transformer and future connecting generation facilities in keeping with the objective of the test (i.e. section 82(3) of the Act). The IESO submits the need to consider the combined effect and intended use of the substation, as follows:

***.. the Board cannot ignore the combined effects of the proposed transformer and future connecting generation facilities in keeping with the***

***objective of the required test. That is the test must consider more than just the physical effects of the transformer. Clearly the intended purpose of the transformer is to at some point convey electricity into or out of the IESO-controlled grid; as such, consideration must be given to the effects of the electricity being conveyed through the transformer station on the development and maintenance of the IESO-administered market, including the effects on flow patterns, system operability, congestion, and system losses in relation to other parties.*** [IESO Submission, November 26, 2007, Page 4, Paragraph 7]

16. The IESO's expert witness provided the following clarification at the technical conference in response to Board Staff counsel:

***So in the absence of any technical specifications associated with the generation and the load, the IESO will not be able to carry out a feasibility study.*** [Technical Conference Transcript, Page 14 Lines 24-26]

...

***The least amount of information that the IESO requires to perform a feasibility study is the amount and type of generation attached to the substation, or the amount and type of load attached to the substation.***

***In that case, the EISO could perform a feasibility study. The outcome of the study will indicate if there is an adverse impact on the system reliability and if the generation behind the station, would be contributed to congestion in the general electrical area.*** [Technical Conference Transcript, Page 15 Lines 4-8]

17. The PWU agrees with the IESO that the Board needs to assess the combined effects of the proposed transformer and future connecting generation facilities. There would be no purpose to the construction and operation of the proposed substation but for the possibility of connecting generation to the grid.

18. The IESO's expert witness confirmed that the IESO has not received any information from KEI on generation projects that KEI might propose to connect to the proposed substation [Technical Conference Transcript, Page 15, Lines 18-21]. As KEI indicates in its Preliminary Filing Requirements, generation projects that might connect to the substation are either only potential future projects or unidentifiable.

***"... The project consists of the construction and operation of a 100 MVA substation which will connect potential future generation project(s) of KEI or an affiliate of KEI to the IESO-controlled grid. In future, other generation facilities,***

*unrelated to the KEI, may wish to connect to the project.* [Preliminary Filing Requirements, section 1.5.1]

### **Issue 3: Future Operation of the Proposed Substation**

19. The PWU submits that there are significant issues concerning the future operation of the proposed substation, in particular, the process would be for selecting generating projects for connection to the proposed substation. Existing legislation and regulation applicable to licensed transmitters must apply to the future operation of the substation in order to ensure non-discriminatory access and the development and maintenance of the competitive market. The PWU submits the Proposal is not consistent with existing legislation and regulation for non-discriminatory access in the following respects:

- a. KEI (incorrectly) assumes that its Proposal qualifies it for exemption of a transmission licence and that it therefore is not required to provide non-discriminatory access.
- b. KEI's explicit intent is to reserve capacity on the proposed substation for its own or its affiliate's generation connection(s), thereby discriminating against other potential users.

20. As described earlier in this submission, it is KEI's position with regard to the selection of generation projects for connection to the proposed substation that as an unlicensed transmitter it is not subject to the requirement for non-discriminatory access. Consistent with this position, KEI intends to reserve 40% of the future substation's capacity for itself outside of a queuing process. KEI also contemplates that any generator moving forward with it in this Project, and that assumes a level of commercial risk in the construction of the substation, should be allocated a certain amount of interconnection capacity, as opposed to waiting until the substation is built and then queuing for it [Technical Conference Transcript, Page 36, Lines 1-8]. Any future partners in the Project therefore

would also not be subject to the requirement for non-discriminatory access. As noted by HO this creates a concern that approval of the project will result in harmful effects on the competitive market [HO Submission, November 26, 2007, Page 1 Last paragraph and Page 2 First paragraph].

21. For the remaining 60% capacity of the substation available for the connection of other potential future generation projects, KEI states that the 60 MW might be turned over to a third party that might manage its queuing process [Technical Conference Transcript, Page 63, Lines 7-14]. In response to Board Staff Interrogatory 3 on the criteria KEI plans to use to determine which generation projects (KEI, KEI affiliates, other) will be connected to the substation, KEI's response is:

***The process by which generation customers will be allotted the transformation capacity of the Substation will be similar to the "queuing" process established by Hydro One Networks Inc. ("Hydro One"); that is a "first-come, first served" basis. However proponents will have to demonstrate a "readiness" for construction (land control, access to turbines or any other electricity producing equipment, financial and technical capacity), such that the capacity does not get allocated to projects with minimal chances of being implemented. As outlined in KEI's November 5, 2007 filing, KEI is in the process of negotiating a Memorandum of Understanding ("MOU") with AIM PowerGen ("AIM") on the basis that AIM will have a generation facility(ies) that will demonstrate a readiness for connection. The terms of the MOU state that AIM will be able to utilize a certain portion of the Substation for its projects. It is contemplated that those whose proposed generation facilities meet the criteria for connection as previously described, may also become parties to the MOU.***

22. Further, statements made by counsel for KEI at the Technical Conference with regard to the connection process indicates that KEI does not consider the rules in place for licensed transmitters/distributors on the process for selecting generation projects for connection to the proposed substation as applying to the Proposal:

***...and we want to allay people's concerns that we want to be in charge of the queuing process in determining what generation projects come on line, other than ours.*** [Technical Conference Transcript, Page 58, Lines 19-22]

....

***We are open to a queuing system that works, that will get projects that are***



***ready to go on the substation, and we are willing to hear from anyone who has ideas as to how they think that would work.***[Technical Conference Transcript, Page 58, Lines 26-27 and Page 59, Lines 1-2]

23. With regard to the existing process, the IESO's expert witness explained part of the process as involving the signing of a construction cost recovery agreement ("CCRA") between a licensed transmitter and the generator for connection as follows:

***A CCRA is normally signed with a transmitter, and it's a connection cost recovery agreement by which a transmitter builds the connection from their own transmission system to the borders of the generation facility.*** [Technical Conference Transcript, Page 23, Lines 3-7]

24. In response to a question from HO as to how the CCRA would be signed in the absence of a licensed transmitter, counsel for the IESO responded that this is one of the issues raised by this proceeding and that it is not clear what KEI is proposing to enable other generation projects to connect through its substation. [Technical Conference Transcript, Page 31, Lines 19-25]

25. As reflected in the responses of KEI's counsel, Ms. Long, and KEI's expert witness, Mr. Gauthier, it would appear that counsel for the IESO, Mr. Rattray, surmised correctly that KEI has no details on a connection process other than a general statement that they are prepared to consider a third party administering the connection process as indicated below [Technical Conference Transcript, Page 59, Lines 3-9]:

***Mr. Rattray: So it is fair to say you have no detail, other than the general statement that you are prepared to consider a third party administering the connection process?***

***Ms. Long: We are absolutely committed to a third party running the process.***

***Mr. Gauthier: Yes, that's fair.***

26. The only connection process that KEI is certain off is the discriminatory connection of its own future generation. The PWU submits that discriminatory access for KEI's future generation combined with the absence of details on a connection selection process for the remaining capacity is not indicative of a process that would

not adversely affect the development and maintenance of a competitive market. In the PWU's view, to ensure that the proposal does not adversely affect the development and maintenance of a competitive market the selection process required of licenced transmission utilities should apply to KEI's proposal.

**Issue 4: The IESO and Hydro One Connection Processes Could be Adversely Affected.**

27. The PWU submits that the future operation of the proposed substation would adversely affect the IESO and Hydro One connection process. In particular, the Proposal precludes a process that is consistent with the IESO's process that enables generators to get into the IESO's queue based on a CCRA. In addition, connection of generation to the proposed substation through a discriminatory process results in the discriminatory access to HO's system that is inconsistent with HO's process that requires non-discriminatory access.

28. The IESO's expert witness described a process by which the IESO places generation proposals in its queue as follows:

*The IESO queue for generation projects is a priority list which gives generation proposals a queue position based on their commitment to be constructed and to connect to the grid.*

*A generation proposal is considered by the IESO to be committed if they have a power purchase agreement with a retailer, or they have a construction cost recovery agreement with a transmitter.*

*... one of these two conditions have to be met by a generation proposal for the IESO to be placing the proposal on their queue, on their generation queue, and for the particular generation proposal to be considered in our assessment of future transmission capacity.*[Technical Conference Transcript, Page 21, Lines 10-23]

29. KEI's selection process for connecting generators to its proposed substation does not appear to contemplate a CCRA and there is the issue noted above of how a CCRA might be struck given that KEI is not a licenced transmitter. Therefore, only generators connected to the proposed substation with power purchase contracts with retailers would be able to get into the IESO's

queue. In this instance, the IESO's connection processes would be adversely affected.

30. With regard to HO's connection process, the fact that KEI will not be meeting the requirement for non-discriminatory access will result in HO not meeting the requirement for non-discriminatory access in connecting the substation to its transmission system. Therefore, HO's connection process would be adversely affected.

#### **Issue 4: Applicable Licencing Requirements**

31. The PWU submits that before deciding on the Proposal, the Board must satisfy itself that KEI is eligible pursuant to the Act to obtain the relief it seeks. Essential to the determination of that eligibility is the demonstration of a legislative basis to exempt KEI from a transmitter's/distributor's licence. The PWU submits that no such demonstration has been made.

32. Section 57 of the *Act* requires that persons hold licences issued by the Board if they are to, *inter alia*, "own or operate" a distribution or transmission system. The Board has no statutory authority to exempt a person from holding such a licence.

33. On the other hand, in the provisions of O. Reg. 161/99, the government has established specific, discrete exemptions from the requirements of s. 57. KEI does not dispute that, but for the provisions of O. Reg. 161/99, it would be required to hold a licence in the circumstances. The issue therefore is whether, as a matter of law, KEI qualifies for one of the exemptions established by O. Reg. 161/99. If it does not, the OEB cannot approve the application unless or until KEI obtains the requisite licence. KEI has stated unequivocally that it has no intention of doing so.

34. HO raised the issue of KEI's presumed exemption from the requirement of a transmission licence under O.Reg. 161/99. In its written submissions, KEI confirms that it is claiming relief under s. 4.0.2. (1) (a) and (d).

35. Section 4.0.2 (1) (a) provides that:

The transmitter owns or operates a transmission system that is entirely or partially located on land on which one or more types of buildings or facilities described in 4.0.1(1) is also located.

36. Section 4.0.1 (1) provides that:

4.0.1 (1) Clause 57 (a) and sections 71, 72, 78, 80 and 86 of the Act do not apply to a distributor who distributes electricity for a price no greater than that required to recover all reasonable costs,

(a) with respect to a distribution system owned or operated by the distributor that is entirely located on land on which one or more of the following types of building or facilities is also located:

1. A building that forms part of a property as defined in the *Condominium Act, 1998*.
2. A residential complex as defined in the *Tenant Protection Act, 1997*.
3. An industrial, commercial or office building.
4. A university, a college of applied arts and technology established under the *Ministry of Training, Colleges and Universities Act* or another post-secondary institution.
5. A school or private school as defined in the *Education Act*.
6. A hospital as defined in the *Public Hospitals Act*, a private hospital as defined in the *Private Hospitals Act* or an institution as defined in the *Mental Hospitals Act*.
7. A shopping mall.
8. An airport.
9. A marina.
10. A mine as defined in the *Mining Act*;

(b) with respect to a distribution system owned or operated by the distributor that is entirely located on land owned or leased by the distributor;

(c) with respect to a distribution system that was owned or operated by the distributor as of January 1, 2002, if the distributor meets all of the following conditions:

1. The distributor is not incorporated under section 48 or 142 of the *Electricity Act, 1998*.

**2. The distributor is not incorporated under the *Business Corporations Act* or the *Canada Business Corporations Act* as an electricity company or an electricity distribution company and was not so incorporated as of January 1, 2002.**

**3. The distributor is not Cornwall Street Railway Light and Power Company Limited, Great Lakes Power Limited, Granite Power Distribution Corporation or Canadian Niagara Power; or**

**(d) with respect to a distribution system owned or operated by a distributor, if the distributor is a generator and distributes electricity solely for the purpose of conveying it into the IESO-controlled grid. O. Reg. 72/02, s. 2; O. Reg. 15/03, s. 1; O. Reg. 41/04, s. 2; O. Reg. 478/05, s. 1.**

37. Finally, section 4.0.2 (1) (d) provides that:

**(d) the transmitter is a generator and transmits electricity only for,**

**(i) the purpose of conveying it into the IMO-controlled grid,**

**(ii) the purpose of transmitting electricity during,**

**(A) planned outages as defined in the market rules that have been approved by the IMO in accordance with the market rules,**

**(B) forced outages as defined in the market rules, or**

**(C) emergencies as defined in the market rules, or**

**(iii) the purpose described in clause (b), if the transmission system owned or operated by the transmitter was in existence on January 1, 2002 and, since that day has been used, if at all, solely for the purposes described in clause (e);**

38. The PWU submits that where a party seeks the benefit of an exemption from obligations otherwise imposed upon it, the onus is on the party seeking the benefit of that exception to establish, as a matter of fact and law, that it qualifies for the exemption. The PWU submits that KEI has failed to discharge that onus.

39. With respect to s. 4.0.2(1)(a), the PWU understands that KEI claims to be exempt on the basis that it would be owning or operating a transmission system entirely or partially located on land where an “industrial or commercial building” is located [Technical Conference Transcript, Page 47, line 2-6]. It is not clear what “industrial or commercial building” KEI is referring to. Presumably, KEI is referring to the substation itself. If so, the PWU submits KEI is in error, for at least two reasons. First, it is clear that the list of buildings referred to in s. 4.0.1(1) and incorporated by reference in s. 4.0.2(1)(a) is directed at circumstances where an entity is, in effect, a “self” distributor or transmitter. In

other words, it is directed to entities that are conveying power *to themselves*, for their own consumption. That is manifestly not the situation in this case.

40. More fundamentally, the interpretation of the regulation implicit in KEI claimed exemption is entirely circular. If a transmission substation falls within the class of buildings eligible for exemption from licencing as an “industrial or commercial building”, then owners or operators of substations would never need to be licenced. If that was the intention of the regulation, it would have been more straightforward for the regulation to have simply made an explicit exemption for substations. It did not.

41. With respect to s. 4.0.2 (1)(d) the only potentially applicable exemption would be under s. 4.0.2(1)(d)(i), which exempts a transmitter from the need for a licence if the transmitter “is a generator and transmits electricity only for (i) the purpose of conveying it to the IMO controlled grid.” The PWU submits this exemption is not available to KEI on the facts of this case.

42. The PWU submits that the language and intent of s. 4.0.2(1)(d)(i) is clear: it allows generators to “self transmit” without the need to obtain a transmission licence. In other words, no licence is required for a generator to transmit its own generation output onto the IESO controlled grid. That is not the case in this application. KEI’s express intention is to utilize only 40% of the transformer station capacity, and to sell the other capacity to third party generators. Since KEI does not intend to limit its transmission activities to the transmission of its own generation output, it does not qualify for this exemption.

43. The PWU submits that a purposive interpretation of s.4.0.2(1)(d)(i) demands that the exemption be limited to situations where the transmission is limited to the output of the generator. Were it otherwise, any transmitter could avoid the requirement of obtaining a licence by acquiring a token amount of generation (eg. less than 1% of the transmission capacity) and conveying the output of that generation on the transmitter’s wires. Such an outcome would entirely subvert the scheme of the *Act*.

44. With legislation and regulation in place to ensure that licensed transmission utilities provide non-discriminatory access to their systems, it is inconsistent that the legislation would allow unlicensed transmitters to practice discriminatory access to the transmission system. It is counter-intuitive to contemplate that legislation intended to support the development and maintenance of a competitive market would permit transmission licence exemption in circumstances that would allow for discriminatory access. However, approval of the Project creates just this situation given KEI's clear statement that it intends to discriminate by giving priority in reserving capacity on the substation for its own future generation and for the future generation of any future partners in the Project.

45. The PWU agrees with HO's view:

***...that the concept of an unlicensed transmitter serving and connecting to customers other than itself is not explicitly contemplated in the Transmission System Code, the OEB Act, or the Electricity Act. Hydro One believes that a licence is required under such circumstances to protect customers who may otherwise be harmed in the market.*** [HO Submission, November 26, 2007, Page 2, Paragraph 4]]

46. Another issue that needs to be addressed is the "operation" of the substation by KEI. In section 3.1 of its Preliminary Filing Requirements KEI states:

***KEI proposes to construct a new 100 MVA substation in the Municipality of Chatham-Kent. It will be developed, constructed, owned and operated solely by KEI or an affiliate to be established in the future. The Project would connect potential future generation project(s) to be built by KEI or an affiliate of KEI as well as perhaps other future generation facilities to the IESO-controlled grid.***

47. In addition to the development, construction and ownership of the substation, KEI's Notice of Proposal specifies the operation of the substation by KEI. While KEI states that its objective is to make a value-based transfer of the substation to Chatham Kent Hydro (KEI September 11, 2007 letter to the Board), it is apparent that if such a transfer does not happen or until such a transfer happens, KEI will be operating the substation. In response to OPA Interrogatory 3, KEI states that in this

instance, KEI and its partners will operate the system according to all applicable regulations and rules. Further, in response to OPA Interrogatory 4, KEI states that in this circumstance it does not intend to become a licensed transmitter. In approving the proposal therefore, the Board would implicitly be exempting KEI from the transmission licencing requirements in its operation of the substation. This fact makes it all the more imperative that the Board satisfy itself that there is a legislative basis for exempting KEI from the requirement of being a licenced transmitter, failing which, the application should be denied.

48. With regard to KEI's objective of transferring the ownership and operation of the substation to Chatham-Kent Hydro on the condition that 40% of the capacity is reserved for KEI's future generation, it would appear that Chatham Kent Hydro as a licenced distributor that is required to provide non-discriminatory access would be out of compliance with its licence terms in accepting the terms of the transfer. Therefore, any transfer of the assets to and the operation of the assets by a licenced transmitter or distributor under KEI's terms would put the party acquiring the assets in non-compliance with its licencing requirements.

## **Conclusion**

49. In the PWU's view, approval of KEI's Notice of Proposal based on only an assessment of the substation in the absence of an assessment of generation or load that will connect to the grid through the proposed substation provides license for KEI to limit future access to the 230 kV lines by other persons. Information related to the proposal is incomplete and it is not feasible to assess whether it imposes limits on the IESO operation of the lines which could restrict other persons.

50. KEI's application assumes that it is exempt from transmission licence requirements. The PWU submits that assumption is not valid, and has not been established, as a matter of fact and law. Approval by the Board of the proposal



will result in impacts counter to the requirements of section 82(3). An approval of the proposal by the Board solely on the basis of the substation rather than the combined substation and generation connections would result in the Board having no authority to compel KEI to abide by transmission regulatory requirements that would ensure non-discriminatory access. KEI has made its position clear that as an unlicensed transmitter it is not subject to the requirement for non-discrimination and that it intends to reserve 40% of the substation's capacity for its own, or its affiliate's generation and allow other generators to connect to the remaining capacity at reasonable cost. In the PWU's view this interpretation of exemption under Ontario Regulation 161/99 is inconsistent with the intent of section 82(3) that the impact of the proposal would not adversely affect the development and maintenance of a competitive market.

51. The Board's approval of the Proposal would implicitly accept KEI as an unlicensed transmitter, exempt from licensing requirements in the absence of a review that ensures an explicit legal basis for a licensing exemption. Approving the Proposal without legally binding provisions for KEI to abide by legislative and regulatory requirements therefore will not ensure a selection process for connecting generation that is consistent with the development and maintenance of a competitive market. Approval of the Proposal that accepts the implicit exemption from the Board's licence requirement would set an inappropriate precedent that can trigger a flurry of similar applications and the derailment of Ontario's competitive electricity market.

52. The PWU therefore submits that based on information provided in the Proposal it is not possible for the Board to determine that the impact of the proposal would not adversely affect the development and maintenance of a competitive market. As a result, the Board should therefore reject KEI's Proposal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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