Ontario

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RP-2003-0044

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

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AND IN THE MATTER OF applications by Centre Wellington Hydro, Veridian Connections Inc., EnWin Powerlines Ltd., Erie Thames Powerlines Corp., Chatham-Kent Hydro Inc., Essex Powerlines Corp., Cooperative Hydro Embrun Inc. and Hydro One Networks Inc. pursuant to subsection 74(1) of the *Ontario Energy Board Act, 1998* to amend Schedule 1 of their Transitional Distribution Licences.

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AND IN THE MATTER OF a ruling regarding the limits of the Board's jurisdiction with respect to existing customers in service area amendment applications.

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BEFORE:

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Paul Sommerville
Presiding Member

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Cathy Spoel
Member

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DECISION

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The Board received a number of applications from licensed electricity distributors seeking amendments to expand their service areas. By Procedural Order No.1, dated March 28, 2003, the Board combined this group of applications into a single proceeding. The purpose of this combination of cases was to enable the Board to consider the issues raised by service area amendment applications and to develop, to the extent possible, a series of principles to assist the Board in its consideration of current and future like applications. With the exception of a small number of applications which, for circumstances unique to each, were heard and determined on an expedited basis, all the outstanding service area amendment applications will be determined in the course of the combined proceeding.

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The combined proceeding has been assigned file No. RP-2003-0044.

11 The Board has issued an Issues List for the combined proceeding and the Board has received some written filings from the applicants and intervenors in the proceeding directed to the development of a series of principles to guide the Board in its consideration of service area amendment applications, and expects to receive more.

12 During the Issues Conference a number of parties expressed interest in receiving from the Board a ruling regarding the scope of its jurisdiction in the consideration of service area amendments with respect to existing customers. The Board agreed to expedite the hearing of this jurisdictional issue. Accordingly, the Board issued Procedural Order No. 4, which invited parties to the proceeding to make submissions on the jurisdictional issue. Written submissions were received and considered by the Board, and oral submissions were provided at a hearing on May 20, 2003.

13 This ruling arises from that hearing.

14 Any consideration of the scope of the jurisdiction of the Board on any subject begins with the basic proposition that the Board has no inherent jurisdiction. Such powers as it has stem from, and are strictly limited by, the enabling legislation. An equally fundamental proposition is that where powers have been bestowed upon the Board by enabling legislation, the Board cannot, without justification which must itself be provided for within the enabling legislation, refuse to exercise them.

15 Several sections of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 Sch. B ("the Act") confer jurisdiction on the Board to determine and amend electricity distributor service areas. Sections 63 and 65 of the Act confer joint jurisdiction on the Board and the Director of Licensing to issue distribution licences. Subsection 70(11) of the Act requires that a licence specify the area in which the distributor is authorized to distribute electricity.

16 Section 74(1) of the Act explicitly authorizes the Board to consider applications for amendments to licences and to grant them where it finds it in the public interest to do so:

17 > 74(1) Subject to subsections (2) and (3), the Board may, on the application of any person, amend a licence if it considers the amendment to be,
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> (a) necessary to implement a directive issued under section 27, 27.1 or 28; or
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> (b) in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*.

18 Subsections 74(2) and 74(3) are not relevant to the issues before us.

19 In addition, subsection 70(6) of the Act explicitly addresses the question of the non-exclusivity of licence service areas:

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> 70(6) Unless it provides otherwise, a licence under this Part shall not hinder or restrict the grant of a licence to another person within the same area and the licensee shall not claim any right of exclusivity.

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Taken together these provisions of the Ontario Energy Board Act unequivocally establish the Board's jurisdiction to specify and expand or reduce service areas by way of licence amendment even where such amendments will result in overlapping service areas, provided that the Board finds that it is in the public interest to do so.

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It was argued by some of the parties that the Board's jurisdiction to so amend service areas is limited by the application of Subsection 70(13) and a general, presumed prohibition against the expropriation of assets without compensation.

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Subsection 70(13) provides as follows:

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> 70(13) A licence under this Part shall not require a person to dispose of assets or to undertake a significant corporate reorganization.

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The line of reasoning advanced by some parties urging the Board to regard this subsection and a presumed prohibition against expropriation without compensation as a restraint on the Board's authority to grant licence service area amendments that may effect existing customers consists essentially of the proposition that granting such service area amendments is tantamount to a confiscation of existing distribution assets. These parties assert that assets used in providing service to existing customers become devalued or stranded when a competing distributor is granted rights to serve in the same area. This stranding or devaluation of the incumbent assets is equivalent, they argue, to a compelled disposition of those assets, and is therefore prohibited.

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This argument fails on a number of grounds.

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First, not every order which may affect existing customers will involve a devaluation or stranding of assets. The facts in each application will determine whether assets may be stranded.

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Second, it is the Board's view that the prohibition in Subsection 70(13) operates only where a licence requires a disposition of assets by a person. It is our view that unless the Board's order required the disposition of assets, the subsection would have no application.

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Further, if an order of the Board did result in some devaluation or stranding of assets, the simple determination that assets had become devalued or stranded is not by any reasonable interpretation a forced disposition or any species of confiscation. The stranding of or devaluation of incumbent distribution assets may be an important consideration for the Board in its determination of the public interest, and is an essential question in any licence amendment application, but it is not a circumstance which operates to deny the Board

jurisdiction per se. The Board finds that the prohibition in subsection 70(13) does not restrict the Board's jurisdiction to consider or grant every licence service area amendment application which may affect existing customers. The section may operate to limit the Board's powers in respect of some applications, but the effect of the subsection will depend on the facts of the individual case.

30 An argument was made by some parties that customers of distribution systems were themselves a species of asset of the distribution service provider. Under this line of reasoning, granting an application for an expansion of service area into an incumbent's service area would or could have the effect of forcing the disposal of such "assets" in a manner that contravened the prohibition contained in Subsection 70(13).

31 While the ongoing business of a company may for certain purposes be characterized as "goodwill" and treated as an asset of that company, the Board does not agree that it goes so far as to allow the characterization of individual customers as assets of a business in this context.

32 Third, the Board does not accept that any service area amendment involving existing customers will necessarily involve expropriation without compensation. It is not clear that the devaluation or even the stranding of assets constitutes expropriation. Further, the Board is empowered through the operation of Subsection 70(2) (c) to require a successful applicant to enter into agreements which can redress any demonstrable inappropriate prejudice to an incumbent service provider and to ensure that compensation is provided.

33 Subsection 70(2)(c) provides in part as follows:

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> 70(2) The conditions of a licence may include provisions,
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> (a) specifying the period of time during which the licence will be in effect;
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> (b) requiring the licensee to provide, in the manner and form determined by the Board, such information as the Board may require;
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> (c) requiring the licensee to enter into agreements with other persons on specified terms (including terms for a specified duration) approved by the Board relating to its trading or operations or for the connection to or use of any lines or plant owned or operated by the licensee or the other party to the agreement;

35 By this means a diminution of value in or stranding of incumbent assets which the Board considers to be contrary to the public interest can be addressed. The Board's consideration of the public interest could, in such circumstances, be at least partially dependent on the completion of an appropriate contractual arrangement.

36 If the legislature had intended to inhibit competition for distribution customers and prevent their migration to other providers, it could have done so explicitly. In fact, in providing for the presumption of non-exclusivity of service areas in subsection 70(6), and endowing the

Board with the power to amend licences in subsection 74(1), it is clear to the Board that the legislature intended that the Board exercise a very broad jurisdiction with respect to licensing in general and service areas in particular, provided that the public interest is protected. In subsection 70(2)(c) the Legislature has provided the Board with a tool to address circumstances where the protection of the public interest requires an arrangement between the incumbent service provider and the new participant.

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In summary, the Board finds that neither subsection 70(13) nor the avoidance of expropriation without compensation removes all jurisdiction in the Board to consider and grant service area amendment applications involving existing customers. Not every order affecting existing customers will involve asset devaluation or stranding. Even if asset devaluation or stranding is involved, this may not constitute forced disposition or expropriation without compensation. In some cases, depending on the facts, the nature or breadth of the order the Board can make may be restricted by s.70(13) and the need to avoid expropriation without compensation. However, the Board is of the view that these factors do not operate as a jurisdictional bar to consideration of service area amendment applications which involve existing customers.

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Having reached this conclusion, the Board wishes to state that it is very aware of the serious public interest concerns involved in granting service area amendment applications that affect existing customers. The Board will consider very seriously both the regulatory policy issues and the practical implications of such applications.

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DATED at Toronto, June 23, 2003.

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ONTARIO ENERGY BOARD

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Paul Sommerville
Presiding Member

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Cathy Spoel
Member