



EB-2007-0797

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

AND IN THE MATTER OF an application by Hydro One Networks Inc. for the review and approval of connection procedures;

AND IN THE MATTER OF an application by Great Lakes Power Limited for the review and approval of connection procedures;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

NOTICE OF HEARING AND PROCEDURAL ORDER NO. 1

On September 6, 2007, the Board issued its Decision and Order in relation to applications by Hydro One Networks Inc. ("Hydro One") and Great Lakes Power Limited under the Transmission System Code (the "Code") for the review and approval of their respective connection procedures (the "Connection Procedures Decision"). The file number assigned to Hydro One's application was EB-2006-0189 and the file number assigned to the application by Great Lakes Power Limited was EB-2006-0200. The applications were dealt with together in a combined proceeding.

On October 9, 2007, Hydro One filed with the Board a Notice of Motion for the review of two of elements of the Connection Procedures Decision; namely:

- i. section 3.3 of the Connection Procedures Decision, which deals with the issue of contestability and more specifically with the issue of activities that

a transmitter is prohibited by section 71 of the *Ontario Energy Board Act, 1998* from undertaking in relation to customer-owned facilities; and

- ii. section 3.5 of the Connection Procedures Decision, which deals with provisions of the Code that address transmission plans and cost responsibility for connection facilities.

Hydro One's Notice of Motion also requests the following additional relief:

- i. an order staying the implementation and effects of sections 3.3 and 3.5 of the Connection Procedures Decision until a reasonable time after a decision is rendered in respect of its Motion; and
- ii. an order extending the October 12, 2007 deadline by which it must file new connection procedures concerning matters affected by sections 3.3 and 3.5 of the Connection Procedures Decision.

In accordance with Rule 42.03 of the Board's *Rules of Practice and Procedure*, the deadline for filing a motion to review the Connection Procedures Decision expired on September 26, 2007. Hydro One's Notice of Motion was filed on October 9, 2007. In the covering letter accompanying the Notice of Motion, Hydro One indicated that it was unable to submit its Notice of Motion within the prescribed time period, and requested that the Board accept the Notice of Motion for filing and for review. No explanation was given for the inability to file the Notice of Motion within the 20 calendar day deadline set out in the *Rules of Practice and Procedure*.

A copy of Hydro One's Notice of Motion and the accompanying covering letter are attached as Appendix A to this Notice of Hearing and Procedural Order. Copies are also available for public inspection at the Board's offices at the address below and on the Board's website at www.oeb.gov.on.ca:

Ontario Energy Board
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Board Secretary

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The Board has determined that it will proceed to hear the following four preliminary matters arising from Hydro One's Notice of Motion:

- i. the request by Hydro One to waive the deadline for filing of its Notice of Motion;
- ii. the threshold question, under Rule 45.01 of the *Rules of Practice of Procedure*, of whether sections 3.3 and 3.5 of the Connection Procedures Decision should be reviewed;
- iii. Hydro One's request for an order staying the implementation and effects of sections 3.3 and 3.5 of the Connection Procedures Decision; and
- iv. Hydro One's request for an order extending the deadline by which it must file new connection procedures concerning matters affected by sections 3.3 and 3.5 of the Connection Procedures Decision.

Subject to the preliminary determination on the threshold question referred to in item (ii) above, the Board may conduct a review on the merits in relation to either or both of sections 3.3 and 3.5 of the Connection Procedures Decision.

The Board will adopt as intervenors in this proceeding the persons identified in Appendix B, being the following:

- i. the intervenors and other parties of record in the combined connection procedures proceeding (EB-2006-0189/EB-2006-0200), including persons that filed submissions with the Board in response to Procedural Order No. 3 issued on June 7, 2007;
- ii. Bruce Power L.P., further to the letter filed by it with the Board on October 16, 2007 indicating an intention to intervene in the hearing of Hydro One's Motion;
- iii. all parties to Hydro One's most recent transmission rates case (proceeding EB-2006-0501); and
- iv. any licensed transmitter that is not otherwise covered in (i) to (iii) above.

Each person identified in Appendix B is requested to file a letter with the Board as soon as possible indicating whether the person intends to participate in this proceeding. A copy of the letter should be delivered to all other parties identified in Appendix B, which delivery may be effected by e-mail.

Any person that is not automatically adopted as an intervenor by the Board in this proceeding and that wishes to participate as an intervenor or observer must notify the Board Secretary's office immediately.

The Board considers it expedient to provide the following guidance to parties regarding two of the preliminary matters identified above.

The Threshold Question

Under Rule 45.01 of the *Rules of Practice and Procedure*, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Rule 44.01 of the *Rules of Practice and Procedure* states that a motion for review must set out grounds that raise a question as to the correctness of the order or decision in question, which grounds may include the following: (i) error in fact; (ii) change in circumstances; (iii) new facts have arisen; and (iv) facts that were not placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

These provisions of the *Rules of Practice and Procedure* were recently considered at some length in relation to three Notices of Motion for review of certain aspects of the Board's November 7, 2006 Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (proceeding EB-2005-0551). Those Notices of Motion raised alleged errors of fact and law, whereas Hydro One's Notice of Motion also asserts as a ground for review that the evidence and information before the panel in the combined proceeding was incomplete and could not have been discovered by reasonable diligence at the time.

Based on the Board's May 22, 2007 Decision with Reasons on the NGEIR Motions (proceeding EB-2006-0322/EB-2006-0338/EB-2006-0340), in considering the threshold question the Board will wish to be satisfied that Hydro One's Motion to review raises a question as to the correctness of the Connection Procedures Decision, and is not being used as an opportunity to reargue the case. While the grounds set out in Rule 44.01 of the *Rules of Practice and Procedure* may not be exhaustive, it is not enough to argue that conflicting evidence should have been interpreted differently.

To the extent that an error in the Connection Procedures Decision is alleged, the Board will also wish to be satisfied of the following:

- i. the error is identifiable, material and relevant to the outcome of the Connection Procedures Decision and, if the error is corrected, the reviewing panel would change the outcome of the Connection Procedures Decision (in other words, there is enough substance to the issues raised that a review based on those issues could result in the reviewing panel deciding that the Connection Procedures Decision should be varied, cancelled or suspended); and
- ii. the findings of the panel in relation to the Connection Procedures Decision are contrary to the evidence that was before that panel, the panel failed to address a material issue, the panel made inconsistent findings, or another error of a similar nature was made by the panel.

To the extent that the Motion raises the incompleteness of evidence as a ground for review, the Board will also wish to be satisfied of the following:

- i. that the facts now sought to be brought to the attention of the Board could not have been discovered by reasonable diligence at the time; and
- ii. those facts are material and relevant to the outcome of the Connection Procedures Decision and, if considered by the reviewing panel, would change the outcome of the Connection Procedures Decision (in other words, the facts are such that a review based on a consideration of those facts could result in the reviewing panel deciding that the Connection Procedures Decision should be varied, cancelled or suspended).

The Request for a Stay

In determining whether to grant Hydro One's request for an order staying the implementation and effects of sections 3.3 and 3.5 of the Connection Procedures Decision, the Board will consider the following:

- i. the merits of the Motion to review;
- ii. the possibility of irreparable harm to any person;
- iii. the balance of convenience; and
- iv. the impact on consumers.

The considerations identified in items (i) to (iii) above reflect the criteria applied by the courts and others in determining whether to stay the implementation of an order or decision, as set out in the oft-cited Supreme Court of Canada decision in *R.J.R. MacDonald Inc. v. Canada (Attorney General)*.¹ The Board believes that it is appropriate to add to these considerations that of the impact on consumers. This is expressly included in the matters to be considered by the Board when determining whether to stay the operation of an amendment to the market rules, as set out in section 33(8) of the *Electricity Act, 1998*. Parties that believe that these four considerations should be amended or supplemented may make submissions to that effect as part of their submissions on Hydro One's request for a stay.

Both of the sections of the Connection Procedures Decision that are the subject matter of Hydro One's Notice of Motion involve questions of interpretation, one relating to section 71 of the *Ontario Energy Board Act, 1998* and the other relating to provisions of the Code. The Board would be assisted by submissions on the issue of the practical consequence of staying the implementation and effects of these sections of the Connection Procedures Decision. The Board would also be assisted by submissions on the issue of whether any conditions should be imposed in the event that the Board were to grant the stay order requested by Hydro One and, if so, what suitable conditions might be.

¹ [1994] 1 S.C.R. 311. The criteria were recently applied by the Ontario Divisional Court in *Association of Major Power Consumers in Ontario vs. Ontario Energy Board et al.* (July 3, 2007, Court File Number 207/07). An example from a non-judicial context is *Re IET-Aquarecherche Ltée*, (2002) LNCEPR 14 (Canada Environmental Protection Review Panel, December 4, 2002).

The Board considers it necessary to make provision for the following procedural matters related to this proceeding. Further procedural orders may be issued from time to time.

THE BOARD THEREFORE ORDERS THAT:

1. The Board will hear submissions on the four preliminary matters identified in this Notice of Hearing and Procedural Order at an oral hearing to be held on **Friday, November 9, 2007**. The hearing will commence at **9:30 a.m.** in the Board's North Hearing Room at 2300 Yonge Street, Toronto, Ontario on the 25th floor.
2. Hydro One Networks Inc. shall file a summary of its submissions with the Board, and delivery a copy to all other parties identified in Appendix B and to any new parties that the Board may accept, no later than **4:45 p.m.** on **Thursday, November 1, 2007**. Any other party or Board staff that intends to make submissions at the oral hearing shall file a summary of their submissions with the Board, and deliver a copy to all other parties identified in Appendix B and to any new parties that the Board may accept, no later than **4:45 p.m.** on **Wednesday, November 7, 2007**. Delivery of copies to other parties may be effected by e-mail.
3. The Board may order costs in this proceeding. Any party that was determined by the Board to be eligible for costs in the combined connection procedures proceeding (proceeding EB-2006-0189/EB-2006-0200) shall be eligible for costs in this proceeding. Any party, other than the Electricity Distributors Association, that was determined by the Board to be eligible for costs in the Hydro One Networks Inc. transmission rates case (proceeding EB-2006-0501) shall also be eligible for costs in this proceeding. Any party that is not automatically eligible for costs but expects to seek costs in this proceeding shall file a letter to that effect with the Board, and deliver a copy to Hydro One Networks Inc., no later than **4:45 p.m.** on **Friday, November 2, 2007**, which letter shall provide the grounds for that party's eligibility for costs. Delivery of a copy to Hydro One Networks Inc. may be effected by e-mail. Hydro One Networks Inc. will have an opportunity to

object to any new cost eligibility request at the oral hearing on November 9, 2007. Requests for cost eligibility and the determination of cost awards will be addressed in accordance with the Board's *Practice Direction on Cost Awards*. The Board will issue details with respect to the filing of cost claims at a later date. Hydro One Networks Inc. will be ordered to pay the cost awards for this proceeding.

DATED at Toronto, October 26, 2007.

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

TO NOTICE OF HEARING AND PROCEDURAL ORDER NO. 1

DATED OCTOBER 26, 2007

BOARD FILE NO.: EB-2007-0797

**NOTICE OF MOTION AND COVERING LETTER FILED BY HYDRO ONE
NETWORKS INC.**

[see document attached]

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Vice President and Chief Regulatory Officer
Regulatory Affairs

BY COURIER

October 9, 2007

Ms. Kirsten Walli
Secretary
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Dear Ms. Walli:

EB-2006-0189 - Hydro One Networks Connection Procedures pursuant to the Transmission System Code – Hydro One Networks' Notice of Motion

After receiving a number of comments and concerns from customers of Hydro One Networks Inc. ("Hydro One") as a result of the above-noted Decision and Order, and after careful consideration by Hydro One's Board of Directors, Hydro One has decided to request a Review of the Decision and Order.

Enclosed, therefore, are ten paper copies of a Notice of Motion to request the Review, pursuant to Rule 42 of the Board's Rules of Practice and Procedure.

As Hydro One was unable to submit the Notice of Motion within the prescribed time period, Hydro One respectfully requests that the Board accept the Notice of Motion for filing and for Review.

Sincerely,

ORIGINAL SIGNED BY SUSAN FRANK

Susan Frank

Attach.

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 a proceeding initiated by Hydro One Networks Inc. for the review and approval of its transmission connection procedures;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

NOTICE OF MOTION

Hydro One Networks Inc. (“the Applicant”) will make a motion to the Ontario Energy Board (“the Board”) at its offices at 2300 Yonge Street, Toronto, at a time and date to be fixed by the Board.

The Motion is for:

1. A review of those parts of the Board’s Decision and Order dated September 6, 2007 (“the Decision”) pertaining to:
 - (a) Section 3.3 of the Decision, which is in respect of Contestability-- Competition for Customer-Owned Connection Assets; and
 - (b) Section 3.5 of the Decision, which is in respect of Transmission Plans and Cost Responsibility for Connection Facilities.
2. An Order that:
 - (a) the Applicant may enter into, and honour, contracts with third parties wherein the Applicant provides, to those third parties, services ancillary to or related to transmission and distribution;
 - (b) there be no capital contribution responsibility on the part of transmission customers whenever the Applicant is constructing a line connection

facility serving multiple transmission customers (a “Local Area Supply facility”).

3. An Order staying the implementation and effects of Sections 3.3 and 3.5 of the Board’s Decision until a reasonable period of time after a decision has been rendered in respect of this Motion.
4. An Order extending from October 12, 2007, until a reasonable period of time after a decision has been rendered in respect of this Motion, the deadline by which the Applicant must file new Connection Procedures concerning matters affected by Sections 3.3 and 3.5 of the Board’s Decision.
5. Such further and other relief as counsel may advise and the Board permit.

The grounds for the Motion are:

A. SECTION 3.3 OF THE DECISION: *CONTESTABILITY-- COMPETITION FOR CUSTOMER-OWNED ASSETS*

1. The Board erred in that there was incomplete evidence and information, which evidence and information could not have been discovered by reasonable diligence at the time or which were otherwise not brought to the attention of the Board, thereby raising a question as to the correctness of the Decision.

(a) The appropriateness of the Applicant’s role as a contractor with respect to customer-owned connection assets was at no time identified as an issue in any of the Procedural Orders, nor could it reasonably have been expected to be an issue in the proceeding, which was intended to review specific Connection Procedures filed by the Applicant. Procedural Orders 1 and 2 did not identify any specific issues; and Procedural Order 3 referenced only the cost responsibility issue. The Applicant’s role as contractor was raised only in three interrogatories (ECAO #1 and #2, and Board Staff #28). A meaningful discovery of the issues surrounding the contractor role did not occur, nor could it have occurred, in such a limited exchange, especially since the subject was, at best, tangential to the Connection Procedures that formed the subject of the proceeding.

(b) As tangential as the Applicant’s role as a contractor with respect to construction of customer-owned connection assets was in the proceeding, it was even less possible for either the Applicant, intervenors or the Board to foresee issues regarding the numerous other contractual services provided by the Applicant to third parties, which contractual services could be gravely affected by the Decision. The consequence was that there was incomplete evidence and information before the Board on matters that did

not seem to be in issue in the proceeding, which could result in major effects on not only the Applicant, but also on third parties who are the beneficiaries of such services.

(c) Examples of facts that were not discovered at all in this proceeding or were only partially discovered are as follows. All of these aspects merit a fuller discovery and the opportunity for parties other than the ECAO and Board Staff to place evidence on the record in the proceeding. Given the scope of the proceeding, it could not reasonably be expected that such parties would have seen either an opportunity or the appropriateness of submitting such evidence:

- The Applicant acts as a contractor and service provider to meet the needs and demands of its customers, which needs and demands are often unique and cannot be easily met by other parties, particularly at nuclear facilities.
- The Applicant prices all of its external work using transparent, fully-allocated costs and by including a margin on top of those costs.
- The Board’s Decision states, “The effect of the transmitter competing in the marketplace for the construction of customer-owned connection facilities is to raise the spectre of potential cross-subsidization of these unregulated activities by the regulated transmission revenue requirement.” However, the work in question is costed in a rigorous and transparent manner as noted above, with the specific intent and effect of avoiding cross-subsidization.
- The Applicant’s provision of “contractor” services to customers actually reduces rates through external revenues, and specifically through the margins that are added to the fully-allocated costs and through the absorption of fixed overheads.
- The Applicant’s ability to provide external transmission services improves efficiency and resource utilization.
- A cessation of such work could cause significant hardship and risk for parties that use and rely on the Applicant for such services.
- Customers and contractors often request the Applicant to install protection and control equipment on new load and generator equipment on the customer’s assets, because of the critical need for such assets to communicate effectively with the transmitter’s corresponding equipment and because of the Applicant’s unique skills in this field.
- The Applicant’s contractor role is not limited only to connection assets. The contractual services provided by the Applicant to third parties, which services may or may not be on customer premises, include:

(i) *Engineering and construction for new or modified customer-owned transmission lines and stations (including protection and control)*

(ii) *MSP services*- Services for Metered Market Participants to maintain compliance with IESO Market Rules

(iii) *Station maintenance*- Routine maintenance on breakers, transformers, switches, etc.

(iv) *Protection and Control Maintenance*- Routine maintenance on relay panels, current transformers, potential transformers, etc.

(v) *Overhaul and Repair*- Major overhaul and repair activities on breakers, transformers, switches, etc., including specialized services for transportation (e.g. “Schnable” rail car) and machining (e.g. low-pressure spindles for nuclear) requirements

(vi) *Miscellaneous*- Minor services, such as fleet repair & inspection, specialty tool rentals, special studies, training, etc.

2. The Board erred in that, in large part because of the absence of evidence and information referred to the in the preceding ground, the Board failed to protect the interest of consumers, thereby raising a question as to the correctness of the Decision.

The Board was unable to consider the effect on consumers (not only the third parties to whom the Applicant provides services but also the Applicant’s ratepayers who benefit from the Applicant’s provision of such services to other third parties) of forbidding the Applicant from providing services to third parties.

3. The Board’s interpretation of Section 71 of the *Ontario Energy Board Act, 1998*, occurred in the absence of relevant evidence before the Board, thereby raising a question as to the correctness of the Decision.

Because of the absence of relevant evidence and information as to the Applicant’s services performed for third parties, the Board was without facts and submissions showing that the services provided by the Applicant are ancillary to, or related to, transmission and distribution, and therefore permissible.

B. SECTION 3.5 OF THE DECISION: *TRANSMISSION PLANS AND COST RESPONSIBILITY FOR CONNECTION FACILITIES*

1. The Board erred in fact and in law in the Decision by not considering a Transmission System Code (“TSC”)-based conclusion that could have been reached and instead basing its conclusion on principles and definitions not found in the TSC.

(a) Section 6.3.6 of the TSC specifically requires a transmitter to “develop and maintain plans to meet load growth and maintain the reliability and integrity of its transmission system”; and Section 6.2.5 requires a transmitter to “ensure that there is sufficient available capacity” to satisfy the requirements of its customers. These plans are the ones referenced in section 6.3.6 of the TSC, for which capital contributions are

exempted. Section 3 (Cost Responsibility) in the *Synopsis of Changes to the TSC* further states, “Such plans are expected to be developed by transmitters to address growing demand, system reliability and integrity. These plans will also be essential to determine whether a particular connection project is truly triggered by the needs of a specific customer.” Such plans are Local Area Supply plans as defined in the Applicant’s Connection Procedures, so such facilities should therefore be exempt from the requirement for capital contributions. The Board erred by not reaching a conclusion on the basis of the TSC, as is required.

(b) The Decision erred in fact and in law by stating that the only exemptions available to customers are the cost responsibility exemptions associated with “Unique System Elements” and “System Reliability Plans”. The Applicant can find no basis in the TSC for exemptions related to those two categories, yet those two categories seem to be not only the basis for the Decision but also essential to the basis of the Decision, because they serve as mechanisms to mitigate the effects (on the customer) of unreasonable cost allocations. Without the benefit of such mitigation measures, the Applicant states that the Decision would be impractical to implement and, according to the Ontario Power Authority, would have the potential to result in distorted planning and suboptimal system infrastructure.

Nowhere in the TSC is there a basis for the Board to find that “unique” system elements can serve to exempt a customer from the requirement to make a capital contribution. The Decision references section 6.3.8 of the TSC, but section 6.3.8 addresses the overbuilding of facilities, not unique system elements. Therefore, uniqueness, as an exemption for capital contribution, is not TSC-based. Additionally, the Decision references section 6.3.6 of the TSC as a basis for the concept of a “System Reliability Plan”, but section 6.3.6 contains no mention of a system reliability-only plan, nor is there any reference to such a plan anywhere else in the TSC. The result is that the concept of a System Reliability Plan is also not TSC-based.

The TSC rightly does not contemplate a system reliability-only plan since, even as the Decision acknowledges, there can be ambiguity between system reliability and customer-driven plans. Having acknowledged this ambiguity, the Decision nevertheless fails to adequately address the issue. Intervenor submissions noted that plans to address reliability and load growth are inexorably intertwined. To require a capital contribution from one customer who requests an enhancement on certain connection facilities, while exempting contribution from another customer who does not request it – even if the facilities are identical and serve the same purpose. – is simply unfair. Similarly, it is unfair to require a capital contribution from one customer who participates in a joint study with Hydro One on certain connection facilities, while exempting contribution from another customer who does not participate in such a study. The fact that the consequences of the Decision implicitly assign cost responsibility in identical circumstances based on the mechanics of the process by which the plan was developed rather than based on who benefited calls into question the correctness of the Decision.

2. The Decision failed to protect the interest of consumers and was contrary to regulatory principles, thereby raising a question as to the correctness of the Decision.

Section 3.5 of the Decision states:

It is clear that, taken as a whole, section 6.3 of the Code (including the sections referenced above) provides that in almost all cases where the transmitter is enhancing its equipment to accommodate the needs of a line connection, a capital contribution will be required from the customer or customers who benefit from the enhancement.

and further states:

Hydro One's interpretation of section 6.3.6 of the Code is not one adopted by the other transmitters, nor is it one that is without a fairly high degree of complexity and artifice.

The Decision fails to recognize or adequately address the following:

- (a) Local Area Supply Facilities are primarily for the benefit of the pool, and this benefit is directly related to system reliability and integrity.
- (b) The risk that properly planned Local Area Supply facilities will not be placed in service because of one or more customers' inability to raise the capital for contributions.
- (c) A substitute for the Applicant's [rejected] definition of a rule-based contribution policy that would exempt Local Area Supply facilities from a contribution. Instead, the Decision adopts a case-by-case approach for determining whether a plan meets the criteria giving rise to an exception, thereby introducing an unmanageable level of regulatory uncertainty and financial risk that is inconsistent with other aspects of the TSC.
- (d) The TSC was not intended to assign cost responsibility based on "who spoke to whom" but rather based on benefits. The nature of the discussions leading to new or modified facilities is irrelevant to cost responsibility.

The following documentary evidence will be used at the Motion:

- 1. Those portions of the record of the proceeding pertaining to Sections 3.3 and 3.5 of the Decision.

2. Additional evidence and information to be filed by the Applicant, insofar as such additional evidence and information were not provided to the Board at, or prior to, the rendering of the Decision.

3. Such further and other evidence as counsel may advise and the Board permit.

October 9, 2007

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APPENDIX B

TO NOTICE OF HEARING AND PROCEDURAL ORDER NO. 1

DATED OCTOBER 26, 2007

BOARD FILE NO.: EB-2007-0797

LIST OF PARTIES

As indicated in this Notice of Hearing and Procedural Order, each person identified in this Appendix is requested to file a letter with the Board as soon as possible indicating whether the person intends to participate in this proceeding. A copy of the letter should be delivered to all other parties identified in this Appendix, which delivery may be effected by e-mail.

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