



EB-2007-0051

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

AND IN THE MATTER OF an Application by Hydro One
Networks Inc., pursuant to section 98 of the OEB Act, for
an Interim Order granting entry onto land in connection
with the Applicant's request for leave to construct a new
transmission line between the Bruce Power Facility and the
Milton Switching Station.

BEFORE: Pamela Nowina
Vice Chair and Presiding Member

Cynthia Chaplin
Member

Bill Rupert
Member

DECISION AND ORDER

August 20, 2007

1. SUMMARY

Hydro One Networks Inc. (Hydro One) is proposing to construct a new high voltage transmission line from the Bruce Power complex on the eastern shore of Lake Huron to Hydro One's Milton Switching Station. The new transmission line would be 180 km long and would cross approximately 450 different properties.

Hydro One requires the Board's approval to construct the new line. On March 29, 2007, it filed an application (the Leave to Construct Application) with the Board under section 92 of the OEB Act. The Board's consideration of that application is in process.

Having filed the Leave to Construct Application, Hydro One had the right under the OEB Act to apply to the Board for an interim order to enter on the land at the intended location of the new line. On March 30, 2007, Hydro One filed an application (the Access to Land Application) with the Board pursuant to section 98 (1.1) of the OEB Act.

This Decision and Order concerns only the Access to Land Application.

The Board has considered Hydro One's application, written submissions from the parties to the proceeding, testimony and argument presented at an oral hearing held in Orangeville, and subsequent written reply arguments. For the reasons expressed in this Decision and Order, the Board grants an interim order to Hydro One allowing entry onto land until April 1, 2009. Conditions of approval are set out in Appendix A.

2. THE PROCEEDING

On June 25, 2007, the Board heard oral submissions on motions filed by two landowner groups to stay or adjourn the proceeding. The Board decided not to stay or adjourn the proceeding for the reasons described in the July 4, 2007 Decision and Order on Motions (attached as Appendix B).

The Board held an Issues Day on July 9, 2007 to set the issues to be addressed in the hearing.

An oral hearing was held in Orangeville, Ontario on July 30 and 31. Directly affected landowners who chose not to cross examine the Hydro One witness panel or submit argument were given an opportunity to make oral comments. One landowner, Mr. Heinrich Eschlboek, made oral comments, which the Board has taken into consideration in reaching its decision.

A description of the proceeding and a list of participants are included in Appendix C.

3. HYDRO ONE'S APPLICATION

Hydro One owns and operates the largest transmission system in Ontario. Its transmission facilities include high voltage lines running from the Bruce Power complex to the Milton Switching Station.

The company applied to the Board on March 29, 2007 under section 92 of the OEB Act for leave to construct a new 500 kilovolt (kV) line from Bruce to Milton. The next day, the company applied to the Board pursuant to section 98 (1.1) (a) of the OEB Act for an interim order to allow entry by Hydro One and its agents to land affected by the proposed new line. Hydro One updated the application on July 26, 2007.

Relevant portions of section 98 of the OEB Act and section 100, which deals with compensation, read as follows:

Interim order

98. (1.1) The Board may, upon application, issue an interim order authorizing a person and the officers, employees and agents of that person to enter on land at the intended location of any part of a proposed work and to make such surveys and examinations as are necessary for fixing the site of the work and as are specified in the order if,

- (a) the person has applied for leave under section 90 or 92 and has complied with section 94;
- (b) the person has applied to the Board for an exemption under section 95; or
- (c) the Board has commenced a proceeding to determine whether to require the person, pursuant to a condition of the person's licence, to expand or reinforce a transmission or distribution system.

Damages

98. (2) Any damages resulting from an entry onto land carried out under subsection (1) or pursuant to an order under subsection (1.1) shall be determined by agreement or, failing agreement, in the manner set out in section 100.

Determination of compensation

100. If compensation for damages is provided for in this Part and is not agreed upon, the procedures set out in clauses 26 (a) and (b) of the *Expropriations Act* apply to the determination of the compensation, and the compensation shall be determined under section 27 of that Act or by the Ontario Municipal Board.

3.1 The land Hydro One seeks approval to enter

Hydro One proposes to locate the new transmission line on a strip of land adjacent to the corridor on which Hydro One's existing 230 kV and 500 kV lines are located. The land in question (the "proposed corridor") has a width of between 53 and 61 meters (175 to 200 feet) and lies immediately to the east and north of the existing corridor.

In its application, Hydro One requested approval to enter the proposed corridor, and also sought approval for route access for testing-related vehicles and equipment. At the oral hearing, Hydro One clarified that it was only seeking the Board's approval to enter land that comprises the proposed corridor.

Hydro One said it would negotiate with landowners should it be necessary to cross other land in order to access the proposed corridor. A company witness estimated that it will require off-corridor access across approximately 20 properties.

3.2 Proposed early access activities

Hydro One's application identified the activities that the company expects to carry out on the land that comprises the proposed corridor. In response to written interrogatories, the company provided detailed information about the nature, timing, duration, and impact of the proposed activities. Each of the activities is briefly described below.

- **Legal surveys** will be conducted on all properties to define limits of the proposed corridor for environmental examinations and engineering design, and to facilitate appraisals, negotiations, and acquisition of land rights.
- **Engineering surveys** will be conducted to examine topography to allow for detailed design of the towers and their location and footing requirements.
- **Soil testing** will be conducted at angle tower locations and on a limited number of locations of the other towers to verify soil conditions information for design of tower footings.
- **Property appraisals** are required to assess the impact of the proposed transmission line on specific property features including woodlots and structures on or adjacent to the widened corridor.
- **Archaeological surveys** will determine the type and extent of archaeological resources and appropriate mitigation.
- **Biological surveys** will be conducted to collect baseline environmental data for further determination of potential environmental effects and appropriate mitigation.
- **Environmental investigations** will obtain baseline environmental data for further determination of environmental impacts and mitigation.

3.3 Proposed conditions governing Hydro One's access

In its application, Hydro One did not propose any conditions to be included in an interim order issued by the Board. As part of the interrogatory process, the Board's staff provided several possible conditions to Hydro One and asked the company to comment on the appropriateness of each. Hydro One proposed revisions to the Board staff's list of

conditions. Subsequently, Hydro One provided a set of proposed conditions that had been negotiated with Powerline Connections, a group of over 150 landowners, and proposed that these conditions apply to all affected landowners.

4. THE ISSUES AND BOARD FINDINGS

The following issues were established by the Board at the Issues Day held on July 9:

1. Is it appropriate to grant Permission to Access
 - a. In advance of the approved EA [Environmental Assessment] Terms of Reference, or
 - b. In advance of the submission of the proposed EA Terms of Reference to the Ministry of the Environment?
2. The OEB Act allows the Board to authorize early access to land to allow an applicant “to make such surveys and examinations as are necessary for fixing the site of the work”. Are the early access activities proposed by Hydro One appropriate?
3. What conditions, if any, regarding the early access activities should the Board attach to its order under section 98 (1.1) (a)?

This decision addresses each issue in turn.

4.1 EA Terms of Reference and permission to access

This issue was not contested at the oral proceeding. It was originally raised by Powerline Connections at the Issues Day. Hydro One and Powerline Connections subsequently agreed to a set of conditions governing Hydro One’s access. At the oral hearing, counsel for Powerline Connections indicated the group did not oppose Hydro One’s application.

Hydro One reported that it had released its draft Environmental Assessment Terms of Reference. The Board understands that Hydro One filed the proposed Terms of Reference with the Ministry of the Environment on August 3, 2007.

In its July 2007 decision on motions related to Hydro One's Leave to Construct Application, the Board decided it would proceed to hear the Leave to Construct Application but "will reassess the matter in advance of the oral phase of the hearing if the Terms of Reference are still not approved at that time."¹ If at a future date the Board were to make any changes to its process for hearing the Leave to Construct Application because the Environmental Assessment Terms of Reference have not been approved, the Board would have to consider what, if any, changes would be required to an interim order to enter land. There is no need to deal with this potential issue now; the Board will deal with such an issue as and when it arises.

The Board concludes that it is not necessary for there to be approved Environmental Assessment Terms of Reference or proposed Terms of Reference in advance of the granting an interim order under section 98 (1.1).

4.2 Are the early access activities proposed by Hydro One appropriate?

The evidence indicated that, other than soil testing, none of the activities were expected to result in significant impacts on the land or on landowners. No substantial objections were raised in respect of the survey, testing, appraisal and investigative work. The focus was primarily on the way in which the work would be carried out, and those issues are addressed below in section 4.3 on the conditions of approval.

The Board concludes that the survey, testing, appraisal and investigative activities identified by Hydro One are appropriate activities to be conducted under an interim order for entry to land and that the granting of the requested interim order is in the public interest. The results of the activities will provide Hydro One with further information which is relevant to the Leave to Construct Application process, and the impacts on land and landowners, under suitable conditions of approval, will be minimal. Hydro One will also be responsible for any damages which occur.

¹ EB-2007-0050, Decision and Order on Motion, July 4, 2007, page 5.

The Board notes that the environmental investigations are primarily related to the Environmental Assessment process and are not directly related to the Leave to Construct Application, but we are satisfied that these activities meet the criteria of being related to “fixing the site” of the project, as stipulated in the OEB Act.

Hydro One proposed to enter into written agreements with landowners only in relation to route access for testing related vehicles and equipment. This is because that work is more intrusive (in that it involves the construction of access routes) and/or because the work involves land outside the proposed corridor. Hydro One estimated that it will require off-corridor access across approximately 20 properties.

The Board will not grant Hydro One authority to construct access routes on the proposed corridor as part of the interim order, but we will not prohibit this activity. The Board concludes that this activity could have too large an impact to allow authorization under the interim order without a negotiated agreement. If Hydro One needs to construct an access route, and the evidence is that this will be required in only a few cases, then Hydro One will have to negotiate for access with the landowner directly.

With respect to the lands to be covered by the interim order, the Board finds that the authorization will be limited to the proposed corridor in accordance with Hydro One’s application, that is, the strip of land up to 61 meters (200 feet) immediately to the east and north of the existing transmission corridor from Bruce to Milton. Hydro One did not object to this approach. If Hydro One needs access to other lands – for purposes of building access routes or in order to access the proposed corridor – it will have to negotiate such access with the landowner directly.

4.3 What conditions should the Board attach to its order?

Hydro One proposed that the conditions negotiated with Powerline Connections be applicable to all landowners.² Cross-examination and argument on the conditions focused primarily on four issues:

- compensation for access,
- the timing and manner of giving notice prior to entry,
- whether Hydro One should be required to provide proof of insurance and a performance bond, and whether landowners can supervise Hydro One's work, and
- the complaint process.

Compensation

Hydro One did not propose to offer any compensation to landowners for entering onto the proposed corridor. Hydro One will be required to provide compensation for any damages, in accordance with section 98 (2) of the OEB Act.

The Ross Firm Group and Fallis, Fallis & McMillan argued on behalf of two landowner groups that an interim order to access land would constitute an expropriation, and that therefore compensation was payable. Counsel representing two other landowners supported this position. The argument was essentially that an interim order allowing entry to land would infringe upon a landowner's right to exclude and was therefore an "interim easement by expropriation." Mr. Fallis stated: "The Supreme Court of Canada states that any order that takes property rights away from a person is unauthorized unless that person is compensated."³

² The negotiated conditions were included in the updated response to Board staff interrogatory #5 filed on July 25, 2007 (Exhibit B, Tab 1, Schedule 5).

³ Transcript Volume 2, page 41.

The Ross Firm Group and Fallis, Fallis & McMillan argued that the Board should adjourn the proceeding so that compensation could be negotiated with the landowners. In the alternative, they argued the Board should order Hydro One to amend its application to include expropriation and, therefore, trigger the compensation mechanisms in the *Expropriations Act*. Landowners represented by Fallis, Fallis & McMillan proposed a compensation schedule based on acreage.

Hydro One argued that the entry to land did not constitute an expropriation because Hydro One is not taking an interest in the land. Hydro One argued that one can obtain the right to use land without having to take a real property interest in the land.

Fallis, Fallis & McMillan referenced two Supreme Court of Canada decisions in support of its position. In the Manitoba Fisheries case,⁴ a commercial fishing company was effectively put out of business by the enactment of federal legislation which granted a commercial monopoly in the export of fish from Manitoba and other participating provinces. The Supreme Court of Canada allowed the appeal making specific reference to the “long-established rule” provided in the case of *Attorney-General v. De Keyser’s Royal Hotel Ltd.* [[1920] A.C. 508.], at page 542 where Lord Atkinson states:

The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.

The Manitoba Fisheries decision also refers to the case of *Belfast Corporation v. O.D. Cars Ltd.* [[1960] A.C. 490.], at page 523 (H.L.(N.I.)) where Lord Radcliffe said:

On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was “taking”. Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of the most explicit words before an acquisition

⁴ *Manitoba Fisheries Ltd. v. The Queen* [1979] 1 S.C.R. 101

could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it ...

In the second case⁵, the Teners were the registered owners of mineral claims on certain Crown lands. Legislation was later passed creating a provincial park on lands which encompassed the land subject to the Teners' mineral claims. Later legislation required that a park use permit be obtained before exploiting a natural resource in a park. Several questions were stated to the trial courts in British Columbia but only one issue was ultimately heard by the Supreme Court of Canada. That issue was whether a refusal by the Crown to grant a park use permit so as to enable the Teners to exploit their mineral claims gives rise to a statutory right to compensation. The Supreme Court of Canada found that the prohibitions in the legislation which became operative when the Teners were refused a park use permit resulted in the rights granted to the Teners being reduced in law and recovered in part by the Crown. The court found that this was a taking for which compensation was required.

The Board has determined that both cases are distinguishable on their facts from the situation faced by landowners in the current application, and that the findings related to compensation are not applicable in the case before us.

First, section 98 (1.1) of the OEB Act authorizes entry onto land. It does not authorize the expropriation of land for a work nor, to use Mr. Fallis' term, does it authorize a "taking." Rather, section 98 (1.1) gives the Board the power to grant leave for certain persons to "enter on land" for certain purposes, under an *interim order*. In the Board's view, this does not amount to a possession or a taking and is not an expropriation. The Board finds support for this finding from the language used in section 98, which does not refer in any way to expropriation. Section 98 of the OEB Act could easily have referred to section 99, which was enacted prior to section 98, and which refers explicitly to how a party obtains authority to expropriate land for a work; alternatively, similar

⁵ *British Columbia v. Tener* [1985] 1 S.C.R. 533

language could have been used. The Board concludes that the avoidance of such language was deliberate.

The legislation does provide additional guidance in section 98, and that guidance relates to damages resulting from an entry onto land, not compensation for the entry onto land. Again, the legislation has specifically addressed issues of expropriation and compensation in other contexts, and the Board finds the omission in the context of section 98 to be deliberate.

In this case, entry by Hydro One onto the land to conduct the planned activities will be temporary in nature. The present request of Hydro One for entry onto land is not in any way parallel to the facts in the Manitoba Fisheries and Tener cases. No cases or other legal arguments were brought forward which convinced this Board that a right to enter upon land on a temporary basis amounts to a taking.

The Board also received submissions relating to the *Alberta Surface Rights Act*. The Board has reviewed all of these submissions, and finds that the *Alberta Surface Rights Act* does not assist the Board in determining if the early access activities proposed by Hydro One amount to a *de facto* expropriation.

The Board concludes that an interim order granting entry to land is not an expropriation of land and not an expropriation of an interest in the land. Therefore, the Board concludes that there is no requirement for Hydro One to offer compensation to landowners for access authorized by an interim order under section 98. The Board also concludes that compensation is not necessary given the scope and nature of the activities which will be authorized. Compensation for damages is expressly provided under section 98 (2) of the OEB Act.

Notice

The proposed conditions of approval required oral or written notice 48 hours in advance of entry onto the lands that comprise the proposed corridor. If Hydro One plans to carry

out soil testing activities using tracked equipment, a minimum of five days' notice is required prior to entry.

An issue at the hearing was whether the conditions should require written notice to landowners in all cases. Notwithstanding the use of "or" in the proposed conditions submitted by Hydro One, Mr. Girard of Hydro One testified that "there will always be something in writing that goes to the owner in advance."⁶ He agreed that, where possible, Hydro One would also telephone landowners in advance.

Board staff submitted that, at a minimum, there should be written notice and, where possible or where prudent, a phone call or some type of personal notice as well. Counsel representing four landowners or landowner groups concurred with that approach.

In his reply argument, counsel for Hydro One argued that the notice process has to take into account practical realities. He submitted that weather, equipment breakdowns, or other circumstances might cause Hydro One to be unable to carry out work at the time specified in its written notice to a landowner. In those cases, he argued that a phone call to the landowner notifying them of a change would be the most practical approach. He advocated retaining the "oral or written" language in the conditions.

The Board will require that written notice be provided to ensure that the affected landowner receives a written description of the work to be conducted and a copy of the conditions of approval. Oral notice on its own is not sufficient because it does not include a written record of the work to be performed, nor does it provide the landowner with the conditions of approval. However, the Board notes Hydro One's evidence that its preference is to provide notice in person, and the Board expects Hydro One to act in accordance with this approach.

⁶ Transcript Volume 1, page 27.

Counsel for Cedarwell Excavating and Herman and Berta Weller expressed concerns regarding the level of disruption to Cedarwell's aggregate operation that could result from Hydro One's access. He argued that 48 hours' notice is insufficient. He suggested that Hydro One be required to provide a landowner at least 60 days' notice of the actual work studies contemplated for their property and 30 days' advance notice of the actual date on which access is to commence.

The Board finds that a 60/30 day notice period is excessive and not practical in the circumstances. The proposed provision of five days' notice regarding soil testing (the most intrusive activity) provides sufficient notice. The Board also notes the proposed condition regarding accommodation of landowner concerns, which states in part: "Reasonable accommodation is to be made to the early access schedule for landowner requests/concerns to ensure access activities do not interfere with landowner operations." The Board concludes that this condition is sufficient to address the concerns raised by Cedarwell Excavating, and the Board expects Hydro One to work cooperatively with all landowners to ensure that disruption is kept to a minimum.

Proof of Insurance/Performance Bond/Supervision

Counsel for Cedarwell Excavating and Herman and Berta Weller proposed that Hydro One be required to produce proof of insurance and that the landowner should be able to provide supervision for the access activities and should be compensated for that supervision. He further suggested that the Board consider a requirement for a performance bond, although he said he has no concerns about Hydro One's financial wherewithal and that a bond is probably not required. He argued, however, that the Board should consider that the conditions of access in this case might be a precedent for conditions in future section 98 applications.

Hydro One disagreed and argued that it was not necessary for the Board to set conditions for purposes of precedent. Hydro One maintained that there was no evidence that these requirements were warranted in the case of Hydro One and that therefore the

proposed conditions were unnecessary. Hydro One maintained that it was appropriate for the landowner to observe the activities, but it was not appropriate for the landowner to provide supervision for the activities.

The Board agrees with Hydro One. We note that Cedarwell Excavating did not argue that these requirements were necessary in the case of Hydro One, but rather, the focus was on possible future section 98 applications by other proponents. The Board notes that conditions of approval are application specific, and that it is established Board policy to ensure that the conditions meet the circumstances and requirements of the particular application.

Complaint Process

Landowners represented by the Ross Firm Group argued that there should be additional provisions regarding the complaint process and that there should be a complaint database accessible to all landowners to ensure consistency in the resolution of complaints. The following condition was proposed:

The property agent shall be the first point of contact for landowner complaints. Complaints shall be tracked in a central database. The property agent, in consultation with the special projects acquisition team leader, as needed, shall be responsible for initial resolution of complaints. If the complaint cannot be resolved, it shall be referred to the special projects acquisition team leader for resolution. Thereafter, unresolved issues shall be dealt with pursuant to 98(2) of the OEB Act. Upon request, landowners shall be provided with copies of any and all complaints in the central database and the details of their resolution.⁷

The Board believes that Hydro One should clearly communicate with landowners about its process for dealing with any complaints that relate to the early access activities, but the Board does not believe it needs to be prescriptive about the process Hydro One should use. Rather, the Board is more concerned about the outcomes of the process, namely that landowners are (a) informed about how to lodge complaints, (b) made

⁷ Transcript Volume 2, page 5.

aware of how to escalate an issue if it is not resolved satisfactorily or on a timely basis, and (c) have access, on request, to information on the nature and resolution of complaints by other landowners.

The conditions of approval include requirements with respect to a complaint process.

5. DECISION

The Board concludes that the early access activities identified by Hydro One are appropriate activities to be conducted under an interim order for entry onto land and that the granting of the requested interim order is in the public interest. The Board also concludes that it will require Hydro One to adhere to the conditions of approval attached as Appendix A. These conditions are largely the same as those filed by the company on July 25, 2007, but have been modified as appropriate for the findings set out in this Decision and Order.

THE BOARD ORDERS THAT:

1. Hydro One Networks Inc. is granted an interim order pursuant to section 98 (1.1) of the *Ontario Energy Board Act, 1998* to enter on the land proposed to be the site of a new 500 kV transmission line from the Bruce Power Facility to Hydro One's Milton Switching Station. That land is adjacent to the corridor on which Hydro One's existing 230 kV and 500 kV transmission lines are located, and is a strip of land 61 meters (200 feet) wide to the north and east of the existing corridor.
2. The interim order is subject to the conditions of approval attached in Appendix A to this Decision and Order.
3. Eligible participants who seek an award of costs in this proceeding shall file their cost submissions in accordance with the *Practice Direction on Cost Awards* with the Board Secretary and with Hydro One within 15 days of the date of this Decision and

Order. Hydro One may make submissions regarding the cost claims within 30 days of the Decision and Order and the affected party may reply within 45 days of the Decision and Order. A decision and order regarding cost awards will be issued at a later date. Upon receipt of the Board's cost award decision and order, Hydro One shall pay any awarded costs with dispatch.

4. Hydro One shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, August 20, 2007

ONTARIO ENERGY BOARD

Original Signed By

Peter H. O'Dell
Assistant Board Secretary

APPENDIX A

to

Decision and Order

In The Matter Of

Access to Land Application by Hydro One Networks Inc.

EB-2007-0051

Dated August 20, 2007

CONDITIONS OF APPROVAL

**Hydro One Networks Inc.
Bruce to Milton Transmission Project**

Section 98 Interim Order Granting Access to Land

CONDITIONS OF APPROVAL

These conditions of approval are an integral part of the Decision and Order EB-2007-0051 issued August 20, 2007 by the Ontario Energy Board (the "Board"). They define, for Hydro One Networks Inc. ("Hydro One") and affected landowners, the conditions that Hydro One shall adhere to when entering on land pursuant to the Board's interim order under section 98 of the *Ontario Energy Board Act*.

1. DEFINITIONS

- 1.1 **Proposed Corridor** – The Board's interim order authorizes Hydro One to enter only on land comprising the Proposed Corridor, being a strip of land 61 meters (200 feet) wide immediately to the north and east of the right-of-way used for Hydro One's existing transmission line from the Bruce Power nuclear generation facilities to Hydro One's Milton Switching Station.
- 1.2 **Permitted Activities** – Permitted Activities are:
- a. Legal surveys involving property staking and measuring by survey crews along the perimeter of the Proposed Corridor and along the perimeter of properties subject to buy-out;
 - b. Engineering surveys involving property staking and measuring by survey crews;
 - c. Soil testing on selected properties involving bore hole drilling using a tracked vehicle;
 - d. Property appraisals including woodlot assessments on each affected property;
 - e. Biological surveys by personnel on foot involving the collection of plant and wildlife information, habitat assessments and delineation of

wetland and Area of Natural and Scientific Interest (“ANSI”) boundaries;

- f. Archaeological surveys conducted by licensed personnel on foot in accordance with Provincial Guidelines. Work includes surface checks for items of interest in recently ploughed fields or digging of small test pits to a maximum depth of one meter should ploughing not be possible.
- g. Other environmental investigations by personnel on foot including hydrologic/water quality testing, landscape and visual assessment, cultural and built heritage assessment, landowner and business owner surveys, agricultural investigations and well water testing.

2. GENERAL REQUIREMENTS

- 2.1 Hydro One shall conduct the Permitted Activities in accordance with its application and evidence filed in EB-2007-0051, except as modified by the Board’s August 20, 2007 Decision and Order and these conditions of approval.
- 2.2 Unless otherwise directed by the Board, authorization for entry to land shall terminate on April 1, 2009.
- 2.3 A copy of these conditions of approval shall be attached to each written notice to landowners described in condition 3 below.
- 2.4 Hydro One shall obtain all other approvals required to conduct the Permitted Activities.

3. ADVANCE NOTIFICATION OF LANDOWNERS

- 3.1 Hydro One shall use all reasonable efforts to provide oral and written notice to landowners a minimum of 48 hours prior to entry. Unless otherwise agreed upon with landowners, entry is to be limited for a subsequent five-day window in which Permitted Activities could then occur. All Permitted Activities shall only take place during weekdays and not statutory holidays and between the hours of 8 am and 5 pm. (Example: Hydro One will provide notice by Friday for a five-day entry window beginning the next Monday and until and including the following Friday; all Permitted Activities will occur during this period between the hours of 8 am and 5 pm).

- 3.2 The notification described in condition 3.1 above shall include a list of the Permitted Activities Hydro One intends to perform during the entry time-window.
- 3.3 Where Hydro One has not been able to contact a landowner prior to entry, Hydro One shall keep a record of the Permitted Activities conducted and make it available to the landowner upon request.
- 3.4 In the event of soil testing activities are planned to be conducted on lands with tracked equipment, Hydro One shall give the landowner at least five days' advance notice and shall use all reasonable efforts to consult with the landowner in advance of entry and provide a sketch depicting the access route and the location of the soil testing activities. This period of time is intended to provide landowners with the opportunity to indicate the locations of any special fixtures (such as wells, tile drainage or septic areas) that are to be avoided while soil testing activities are carried out.

4. CONDUCT OF PERMITTED ACTIVITIES

- 4.1 Unless otherwise agreed to by the landowner, Hydro One or its representatives shall not clear or remove trees having a caliper diameter of more than two inches measured at three feet above ground level.
- 4.2 Reasonable accommodation is to be made in Hydro One's schedule for landowner requests/concerns to ensure the Permitted Activities do not interfere with landowner operations. These accommodations will be determined on a site specific basis but where appropriate may include the following:
 - a. The use of temporary fencing to surround soil testing area if tracked equipment remains onsite overnight; and
 - b. The use and installation of temporary drainage (i.e. culverts) instruments on access routes to maintain drainage flows.
- 4.3 Hydro One or its agents will consult with landowners in advance of entry as to the manner in which gates/fences/entryways are to be managed while entering property. In the event landowners cannot be contacted, Hydro One shall ensure that gates/fences/entryways used by Hydro One personnel or its agents are left as found. Work sites are to be left in a safe condition overnight.
- 4.4 Landowners can be present to observe the Permitted Activities subject to Hydro One's safety policies and procedures and the *Occupational Health and Safety Act*.
- 4.5 Hydro One shall keep records of the personnel attending and entering on lands, the time in which entry occurred and the locations entered.

- 4.6 Upon request, Hydro One shall provide a landowner with the results of the information collected as a result of conducting the Permitted Activities on the landowner's property (such as legal surveys and property appraisal information and the information described in 4.5 above) and biological information subject to applicable disclosure guidelines of the Ministry of Natural Resources or other agencies (e.g., with respect to species-at-risk protection). In the event biological information cannot be disclosed to a landowner, Hydro One will disclose that fact and provide to the landowner the rationale for such non-disclosure.
- 4.7 Affected areas are to be restored to their original condition to the extent possible and practicable, failing which damages shall be paid as per section 98 (2) of the *Ontario Energy Board Act*.

5. COMPLAINT PROCEDURE

- 5.1 Hydro One shall establish a complaint resolution process and provide a detailed description of the process to the affected landowners. For each affected property, Hydro One shall designate a property agent as a contact person to be responsible for addressing and resolving landowner concerns and complaints. Hydro One shall notify landowners who have lodged complaints about how to escalate an issue if it is not resolved satisfactorily or on a timely basis. Hydro One shall provide to a landowner, on request, non-confidential information about complaints made by other landowners.

6. COMMUNICATIONS WITH THE BOARD

- 6.1 The Board's designated representative for the purpose of these conditions of approval shall be the Manager, Facilities.
- 6.2 Hydro One shall designate a person as project manager and shall provide the name of the individual to the Board's designated representative. The project manager will be responsible for the fulfilment of the conditions of approval on the site. Hydro One shall provide a copy of the Board's Decision and Order and these conditions of approval to the project manager, within seven days of the Board's interim order being issued.
- 6.3 Hydro One shall furnish the Board's designated representative with all reasonable assistance for ascertaining whether Hydro One has complied with the Board's interim order.

APPENDIX B
to
Decision and Order
In The Matter Of
Access to Land Application by Hydro One Networks Inc.
EB-2007-0051
Dated August 20, 2007

DECISION AND ORDER ON MOTIONS, JULY 4, 2007



EB-2007-0051

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

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to section 98 of the Act, for an Interim Order granting access to land in connection with the Applicant’s request for leave to construct a transmission reinforcement project between the Bruce Power Facility and Milton Switching Station, all in the Province of Ontario.

AND IN THE MATTER OF Notices of Motion brought by Bordner Ladner Gervais on behalf of Powerline Connections and Fallis, Fallis and McMillan on behalf of a number of landowners.

BEFORE: Pamela Nowina
Presiding Member and Vice-Chair

Cynthia Chaplin
Member

Bill Rupert
Member

DECISION AND ORDER ON MOTIONS
The Access to Land Application

The Application

Hydro One Networks Inc. (the “Applicant” or “Hydro One”) has filed an application (the “Access to Land Application”) with the Ontario Energy Board (the “Board”) dated March 30, 2007 under section 98 of the *Ontario Energy Board Act* (“*OEB Act*”). The Board has assigned File No. EB-2007-0051 to this Application. The Access to Land Application is related to an application by Hydro One for leave to construct a transmission

reinforcement project between the Bruce Power Facility and Milton Switching Station (the Leave to Construct Application) which was assigned Board File No. EB-2007-0050.

The Bruce to Milton Transmission Reinforcement Project involves the proposed construction of approximately 180 kilometres of double-circuit 500 Kilovolt (“kV”) electricity transmission line adjacent to the existing transmission corridor (500 kV and/or 230 kV). The proposed transmission line extends from the Bruce Power Facility in Kincardine Township to Hydro One’s Milton Switching Station in the town of Milton, requiring related modifications at the Milton, Bruce A and Bruce B transmission stations. The target in-service date is the fall of 2011.

The Access to Land Application seeks an Interim Order allowing Hydro One and its agents access to land affected by the proposed Bruce to Milton Transmission Reinforcement Project. The stated purpose is to conduct legal and engineering surveys, soil testing, property appraisals, biological and archeological surveys and environmental investigations together with route access for testing-related vehicles and equipment. Hydro One indicated that delaying collection of information, beyond the spring, summer and fall of 2007, would delay the proposed in-service date of the Bruce-Milton Transmission Reinforcement Project beyond 2011.

A Notice of Application for the Access to Land Application was served on all directly affected landowners. Procedural Order No. 1 (“PO No. 1”) was issued on June 5, 2007. It established June 11, 2007 for the filing of motion records for those seeking an early ruling of the Board. Responses to the Motions were to be filed by June 18, 2007. PO No. 1 also set out timelines for a Motions Day, Issues Day and written interrogatories process. A draft Issues List proposed by Board Staff was attached to PO No. 1.

The Motions Proceeding

On June 11, 2007 Notices of Motion were filed by Powerline Connections, a group of directly affected landowners represented by Borden Ladner Gervais, and by certain directly affected landowners in Bruce, Grey and Wellington Counties (“Landowners”) represented by Fallis, Fallis and McMillan.

Responses to the Notices of Motion were filed by Board Staff, the Association of Power Producers of Ontario (“APPrO”), Hydro One, the Power Workers Union (“PWU”), the Independent Electricity System Operator (“IESO”), and the Ontario Power Authority (“OPA”).

A Motions Day was held on June 25, 2007, and oral submissions were made by

Powerline, the Landowners, Pollution Probe, Hydro One, Board Staff, APPrO, OPA, Ontario Federation of Agriculture (“OFA”) and PWU.

The Motions addressed requests on two issues:

- To stay or adjourn the proceeding
- Procedural matters

We will address each issue in turn.

Requests to Stay or Adjourn the Proceedings

Powerline Connections and the Landowners both requested a stay or adjournment of the Access to Land Application. Powerline Connections argued that section 12.2(2) of the *Environmental Assessment Act* (“EA Act”) prohibits the Board from issuing any authorizations at this time. It further submitted that there has been no public consultation, nor have the Terms of Reference for the Environmental Assessment been set. For these reasons, Powerline Connections submitted that the Leave to Construct Application should await completion of the Environmental Assessment (“EA”), or, at a minimum, completion of the Terms of Reference, and that, as a result, the Access to Land application should be stayed or adjourned as well. The Landowners and the OFA supported these submissions.

Powerline Connections also submitted that Hydro One’s application was deficient in a number of areas because it did not address issues such as notice provisions, routes for vehicle access, access to test results, damage and longer term impacts.

Hydro One opposed the motions to adjourn or stay the proceedings. Hydro One argued that under section 98(1.1) of the *OEB Act*, the only requirement for an application for access to land is that a leave to construct application has been made. With respect to the *EA Act* proceeding, the completion of Terms of Reference for the EA, and the timing of the Integrated Power System Plan (being prepared by the Ontario Power Authority), Hydro One’s position was that these have no bearing on the Board’s decision to grant access to land. Hydro One further submitted that proceeding with Access to Land Application would not bias or predetermine the Leave to Construct Application.

Hydro One also submitted that the activities it proposes under early access are consistent with section 12.2(1)(c) of the *EA Act* which reads: “ The person may prepare a feasibility study and engage in research in connection with the undertaking”. Hydro One also indicated that the results of the early access activities will provide more information on the proposed location of the project, which was a concern identified by the Landowners. Hydro One explained that it expects that an Interim Order of the Board on the Access to Land Application would specify the terms and conditions of access so that all of the affected landowners are treated in an open and transparent and uniform way.

The PWU also opposed the motions to stay or adjourn the Access to Land Application. In particular, the PWU submitted that most of the matters identified by the moving parties were either procedural matters or issues of substance to be addressed in the proceeding itself. The PWU submitted that an access to land approval would not constitute an approval to proceed with an undertaking.

Board Staff submitted that a stay should only be granted in a proceeding if the application is seriously flawed. It was the position of Board Staff that the Access to Land Application meets all of the statutory requirements. Board Staff pointed out that Powerline Connections and the Landowners had raised important issues of substance, but Board Staff submitted that these are the matters to be explored and addressed in the hearing itself.

Board Findings

The Board will not stay or adjourn the Access to Land proceeding. The Board has already determined that it will not stay or adjourn the Leave to Construct Application. The Board’s decision on the Leave to Construct Application Motions is being issued simultaneously with this decision. In that decision, the Board explains why it is not necessary to await the completion of the EA process, the Terms of Reference for the EA, or the IPSP, in advance of hearing the Leave to Construct Application. The same reasons apply in this Access to Land Application. However the Board’s concern expressed in the Leave to Construct Application Motions decision regarding the timing of the approval of the terms of reference of the EA does not apply in this case due to the limited scope and impact of the Access to Land Application,

The Board finds that proceeding with the Access to Land Application in no way prejudices or predetermines the outcome of the Leave to Construct Application. The legislative scheme explicitly contemplates the granting of an Interim Order allowing access to land in advance of the completion of a leave to construct application. The only prerequisite to the consideration of such an application is that a leave to construct application be filed. Hydro One has met that requirement.

Powerline Connections has raised a number of concerns regarding the specifics of Hydro One's Access to Land Application. The Board agrees that these are potentially relevant concerns, and expects these matters to be addressed during the course of the proceeding. The Board will also consider what conditions might be appropriate in the event that it approves Hydro One's application.

Requests Related to Procedural Matters

Powerline Connections and the Landowners requested that the timelines between the procedural events be extended so that counsel can communicate with and receive instructions from their clients. Powerline Connections and the Landowners argued that the proceeding is moving too quickly. Hydro One, OPA, APPrO and IESO were against any delays and opposed expanding the timeline for the proceedings.

Powerline Connections and the Landowners also requested that an oral hearing be held and that it be held at a location convenient to the affected landowners along the proposed route. They noted that if the Board is not prepared to adjourn or stay the proceeding, the oral hearing on the Access to Land Application is necessary to provide an opportunity for the landowners to address a number of their concerns related to property and owner impacts of access to land activities.

Hydro One questioned whether having an oral hearing in a location along the proposed route would cause a greater delay in the Board's review. Hydro One submitted that all the issues can be dealt with by a written interrogatory process already scheduled by the Board. As an alternative, Hydro One suggested that internet web broadcasting may be a good tool to involve local communities in an oral hearing.

The Landowners requested photo-based mapping, including the existing line and building and the proposed line, along with landowner name and address information. Hydro One did not oppose providing more detailed mapped information to interested parties. However, Hydro One emphasized that this should be done in the course of the proceeding.

Board Findings

The Board will not extend the schedule for the Access to Land Application. The Board has extended the schedule for the Leave to Construct Application to accommodate the concerns of landowners. However, the issues to be considered in the Access to Land Application are more limited, and the Board is of the view that the current schedule is appropriate.

The Board does agree, however, that an oral hearing should be held for the Access to Land Application. The Board also agrees that it should be held in a location that is reasonably convenient to the affected landowners. The hearing will take place in Orangeville on July 30 and 31, 2007. Further details will be contained in a procedural order to be issued shortly.

The Board has already addressed the issue of photo-based mapping in its decision on the Motions in the Leave to Construct Application. In brief, Hydro One has been directed to provide photo-based mapping, showing the existing line, existing buildings, and the proposed line.

Cost Awards

The Board has adopted a staged cost awards process for the Leave to Construct Application because that proceeding is expected to be long and complex. The same circumstances do not apply to the Access to Land Application, and therefore the Board will follow its standard practice of considering cost claims at the completion of the proceeding.

THE BOARD ORDERS THAT:

1. The Motions requesting a stay or adjournment of the Access to Land Application are denied.

DATED at Toronto, July 4, 2007

ONTARIO ENERGY BOARD

Original Signed By

Peter H. O'Dell
Assistant Board Secretary

APPENDIX C

to

Decision and Order

In The Matter Of

Access to Land Application by Hydro One Networks Inc.

EB-2007-0051

Dated August 20, 2007

PROCEEDING AND PARTICIPANTS

PROCEEDING AND PARTICIPANTS

Hydro One Networks Inc. (Hydro One) filed an application with the Ontario Energy Board on March 30, 2007 for approval to access land in connection with Hydro One's application to construct a new transmission line between the Bruce Power Facility and the Milton Switching Station. This Access to Land Application was given Board File No. EB-2007-0051. A Notice of Application and Written Hearing for the Access to Land Application was served by Hydro One on all directly affected landowners. In addition to the Notice of Application, on May 25, 2007, the Board sent an information letter to the affected landowners providing more information on the proceeding and extending the timeline for requests to participate in the proceeding.

A large number of landowners were registered as participants in the proceeding. Most of the landowner-participants were represented by counsel as follows: about 150 landowners represented by Borden Ladner Gervais LLP ("Powerline Connections Group"); about 30 landowners represented by Fallis, Fallis & McMillan; three landowners represented by Kevin W. McMeeken; and about 10 landowners represented by the Ross Firm Group. Approximately 25 landowners were registered as individual participants.

The following organizations were registered as participants: Ministry of Energy; Ontario Power Authority; Ontario Federation of Agriculture; Independent Electricity System Operator; Association of Power Producers of Ontario; Pollution Probe Foundation; Energy Probe Research Foundation; Power Workers' Union; Saugeen Ojibway Nations; Town of Halton Hills; and Halton Hills Hydro Inc.

A full list of the participants in the proceeding is part of the public record and is available upon request from the Board Secretary.

The Board issued four procedural orders in the proceeding.

Procedural Order No. 1, issued on June 5, 2007, established a partial timeline for the proceeding and provided a draft issues list proposed by Board staff.

In the Procedural Order No. 2, issued on July 5, 2007, the Board determined that an oral hearing would be held in Orangeville commencing on July 30, 2007.

On June 11, 2007, Notices of Motion were filed by Powerline Connections and by landowners represented by Fallis, Fallis & McMillan. The Motions addressed requests to stay or adjourn the proceeding and issues related to procedural matters. Responses to the Notices of Motion were filed by Board staff, the Association of Power Producers of Ontario, Hydro One, the Power Workers' Union, the Independent Electricity System Operator, and the Ontario Power Authority.

A Motions Day was held on June 25, 2007 in Toronto. On July 4, 2007, the Board issued its Decision and Order on Motions. The Board denied the requests to stay or adjourn the proceeding.

On July, 9, 2007, the Board held an Issues Day in Toronto. By way of an oral decision, the Board defined the final issues list for the proceeding, which was then attached to Procedural Order No. 3 issued on July 9, 2007.

On July 16, 2007, Powerline Connections, Wellenreiter & Wellenreiter on behalf of its clients, and Board staff asked Hydro One written interrogatories. Hydro One filed responses to the interrogatories with the Board and all the parties on July 23, 2007. Hydro One updated some responses on July 25 and July 31.

On July 16, 2007 the Board issued a letter to all registered participants and Hydro One to assist in preparation for the oral hearing.

On July 20, 2007, the Board issued Procedural Order No. 4 and ordered that any party wishing to file written evidence should do so by Wednesday, July 25, 2007. No written evidence was filed.

The oral hearing took place on Monday, July 30, 2007 and on Tuesday, July 31, 2007 at Best Western Hotel and Suites in Orangeville, Ontario.

The following parties participated in the oral hearing:

- Toad Hall Farm Inc., represented by Rick Waern, a landowner;
- Heinrich and Theresia Eschlboeck, landowners represented by Anthony Wellenreiter of Wellenreiter & Wellenreiter;
- Herman and Berta Weller and Cedarwell Excavating Ltd., represented by Kevin W. McMeeken of Halpin McMeeken Law Office;
- Powerline Connections Group, represented by Frank Sperduti of Borden Ladner Gervais LLP;
- a landowner group represented by Quinn Ross and Heather Ross of the Ross Firm Group;
- a landowner group represented by Peter Fallis of Fallis, Fallis & McMillan;
- Power Workers' Union, represented by Richard Stephenson of Paliare Roland Rosenberg Rothstein LLP; and
- Energy Probe Research Foundation, represented by David MacIntosh.

Transcripts of Issues Day, Motions Day and Oral Hearing days are part of the public record and are available at the OEB Information Resource Centre at the

Board's offices in Toronto or on the Board's website at
<http://www.oeb.gov.on.ca/documents/cases/EB-2007-0051/transcripts/>