



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*.

BEFORE:

Pamela Nowina
Vice Chair and Presiding Member

Paul Sommerville
Member

Ken Quesnelle
Member

DECISION AND ORDER

INTRODUCTION

On September 6, 2007, the Board (the "Connection Procedures panel") issued its Decision and Order in relation to applications by Hydro One Networks Inc. ("Hydro One") and Great Lakes Power Limited ("GLPL") under section 6.1.5 of 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 (the “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* (the “Act”) from undertaking in relation to customer-owned facilities (the “Section 71 Issue”); 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 (the “Code Issue”).

The relief sought by Hydro One in its Notice of Motion is:

- i. an order that Hydro One may enter into, and honour, contracts with third parties wherein Hydro One provides to those third parties services ancillary to or related to transmission and distribution; and
- ii. an order that there be no capital contribution responsibility on the part of transmission customers whenever Hydro One is constructing a line connection facility serving multiple transmission customers.

Hydro One’s Notice of Motion also requested 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.

NOTICE OF HEARING AND PROCEDURAL ORDER NO. 1

On October 26, 2007, a Notice of Hearing and Procedural Order No. 1 (the “Notice and PO”) was issued indicating that the following four preliminary issues arising from Hydro One’s Notice of Motion (the “Preliminary Issues”) would be heard:

- 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* (the “Rules”), 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.

The Notice and PO indicated that all parties of record to the Combined Proceeding would be adopted as intervenors in this proceeding as would the following other persons: 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; all parties to Hydro One’s most recent transmission rates case (proceeding EB-2006-0501); and all licensed transmitters. The Notice and PO was served by the Board Secretary accordingly.

The Notice and PO established a schedule for the filing of a summary of submissions on the Preliminary Issues by Hydro One, Board staff and intervenors, and an oral hearing date for the hearing of the Preliminary Issues. A summary of submissions was filed by Hydro One on November 1, 2007. On November 7, 2007, summaries of submissions were filed by the following: the Ontario Power Authority (“OPA”), the Independent Electricity System Operator (“IESO”), the Power Workers’ Union (“PWU”), Bruce Power L.P. (“Bruce Power”), Ontario Power Generation Inc. (“OPG”), the Electricity Distributors Association (“EDA”), the Electrical Contractors Association of Ontario (“ECAO”) and Board staff. The following other parties filed letters with the

Board indicating their intention to participate in the review proceeding, but did not file summaries of submissions or appear at the oral hearing on the Preliminary Issues: GLPL, the Association of Major Power Consumers in Ontario (“AMPCO”); Five Nations Energy Inc.; Cambridge & North Dumfries Hydro; Kitchener-Wilmot Hydro Inc.; and Waterloo North Hydro Inc.

This panel of the Board heard oral submissions on the Preliminary Issues on November 9, 2007. In addition to Board staff and the parties that filed summaries of submissions, a representative of PowerStream Inc. also appeared at the hearing on behalf of the Coalition of Large Distributors (“CLD”) and indicated the CLD’s support for Hydro One’s Motion to review and for the EDA’s submissions. The CLD is comprised of the following electricity distributors: PowerStream Inc., Enersource Hydro Mississauga Inc., Horizon Utilities Corporation, Hydro Ottawa Limited, Toronto Hydro-Electric System Limited and Veridian Connections Inc.

THE COMBINED PROCEEDING

Section 6.1.5 of the Code contains a requirement that all licensed transmitters in Ontario file their respective connection procedures for Board approval. Connection procedures describe how a transmitter will process requests to connect to its transmission system and requests to modify existing connections. Section 6.1.4 of the Code identifies a number of matters that must be addressed in a transmitter’s connection procedures, including security deposits, economic evaluations, contestability and dispute resolution. In accordance with section 6.1.3 of the Code, a transmitter’s connection procedures must be consistent with the Code.

Once approved by the Board, the connection procedures (together with applicable provisions of the Code) govern the relationship between the transmitter and a customer during the period leading to connection of the customer’s facilities.

At issue in the Combined Proceeding were the connection procedures of Hydro One and GLPL.

The procedural history of the Combined Proceeding is described in detail in the Connection Procedures Decision and will not be repeated here. For present purposes, it is sufficient to note the following:

- Of the active parties to this proceeding, the following were intervenors in the Combined Proceeding from the outset: ECAO, the IESO, OPG and PWU. Board staff was also an active participant in the Combined Proceeding.
- On June 7, 2006, Procedural Order No. 3 was issued inviting submissions on what is referred to here as the Code Issue. The invitation was extended to a number of potentially interested parties beyond those that were already parties of record to the Combined Proceeding. Of the active parties to this proceeding, Hydro One and the following intervenors filed submissions in response to Procedural Order No. 3: CLD, the EDA, the OPA and PWU. Board staff also filed a submission. The following parties that confirmed their interest in, but did not actively participate in, this proceeding also filed submissions on the Code Issue during the Combined Proceeding: GLPL, AMPCO, Five Nations Energy Inc., Cambridge and North Dumfries Inc., Kitchener-Wilmot Hydro Inc. and Waterloo North Hydro Inc. (the latter three in a joint letter with Guelph Hydro Electric Systems Inc. that pre-dated but was received by the Board after the date of issuance of Procedural Order No. 3).

The Connection Procedures Decision addressed a variety of issues associated with the connection procedures of the two transmitters. Among those were the Section 71 Issue and the Code Issue.

With respect to the Section 71 Issue, the Connection Procedures panel concluded that section 71 of the Act acts as a bar to the performance of certain activities by a transmitter. As discussed below, divergent views have been expressed as to the scope of the Connection Procedures Decision in this regard. That aside, the Connection Procedures panel noted in the Connection Procedures Decision that ownership of facilities was a “critical distinction”. While the construction of transmitter-owned connection facilities is an integral component of the transmission of electricity, the construction of customer-owned connection facilities cannot be seen in the same light. The construction of customer-owned projects should be seen as independent undertakings by customers, the design and placement of which may be informed by the transmitter but which are fundamentally private in nature. The Connection Procedures Decision also noted that the effect of a transmitter competing in the marketplace for the construction of customer-owned connection facilities is to raise the spectre of potential cross-subsidization of unregulated activities by the regulated transmission revenue requirement.

The findings of the Connection Procedures panel with respect to the Code Issue are more complex. The Code Issue relates to the interpretation of the Code, and more specifically to section 6.3.6 of the Code, to the nature of the transmission plans referred to in that section, and to the implications for cost responsibility. To place the matter into context, at issue was Hydro One's interpretation of the Code to the effect that a capital contribution is not required for the construction or reinforcement of connection facilities which Hydro One characterizes as being for "Local Area Supply" or "LAS", except for advancement costs. An LAS connection facility is defined by Hydro One as a radial line (or line connection facility) that serves more than a single customer. It follows that any plan regarding a connection facility that is required to meet the needs of more than one customer would, under Hydro One's approach, be a transmission plan within the meaning of section 6.3.6 of the Code, and a capital contribution would therefore not be required.

The key findings in the Connection Procedures Decision in relation to the Code Issue can be summarized as follows:

- i. taken as a whole, section 6.3 of the Code provides that a capital contribution will be required in almost all cases where a transmitter is enhancing its equipment to accommodate the needs of a line connection;
- ii. section 6.3.6 of the Code provides a qualified exception that allows a customer to avoid a capital contribution where an enhancement has been "otherwise planned" by a transmitter to address system needs; and
- iii. whether a plan meets the criteria giving rise to the exception in section 6.3.6 of the Code is a matter of evidence to be considered by the Board on a case-by-case basis. The key feature of a plan giving rise to the exception is the extent to which it addresses system reliability and integrity concerns which arise from the transmitter's assessment of projected load growth and not the requirements of a specific customer or customers within a local area. It cannot be a "plan" that is created primarily at the request of a connecting customer. Where planning involves joint studies between Hydro One and one or more distributors to meet different timing and supply needs such as load growth, such plans are viewed as customer-driven where a capital contribution would be required.

The Connection Procedures Decision also discussed two further matters that have been raised by parties to this proceeding. The first is the regulatory treatment of capital contributions paid by distributors to transmitters. The second is adjustments to cost responsibility that can and should be made where a transmitter's plans call for the installation of unique system elements as part of the proposed reinforcement of connection facilities.

THE THRESHOLD QUESTION

1. Scope of the Power to Review

Under Rule 45.01 of the Rules, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

The Notice and PO provided guidance in relation to this threshold question, based in part on the Board's May 22, 2007 Decision with Reasons on the NGEIR Motions (proceeding EB-2006-0322/EB-2006-0338/EB-2006-0340) (the "NGEIR Motions Decision"). Specifically, the Notice and PO indicated that the Board would 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.

The moving party must also satisfy the Board of the following:

- To the extent that an error in the Connection Procedures Decision is alleged:
 - that the error is identifiable, material and relevant to the outcome of the Connection Procedures Decision and that, if the error is corrected, the reviewing panel could 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
 - that the findings of the Connection Procedures panel 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 incompleteness of evidence is raised as a ground for review:
 - 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
 - that those facts are material and relevant to the outcome of the Connection Procedures Decision and that, if considered by the reviewing panel, could 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).

With one exception, the parties did not expressly take issue with the threshold test as articulated above. In its written summary of submissions and at the oral hearing, the EDA argued that the Board cannot limit its substantive jurisdiction through its procedural rules, and that the issue of whether there is a “question as to the correctness of the order or decision” goes beyond whether there was a simple error. If the implications of a decision were not matters before the Board at the relevant time, and have only emerged subsequently, it is in the EDA’s view appropriate for the Board to reconsider the conclusions that were reached in the decision.

During the oral hearing, the OPA submitted that while reviews initiated by motion are subject to the constraints identified in Rule 44 of the Rules, the Board has a broader power to review under Rule 43.01. That broader power can be exercised even if the Board finds that the moving party has not made a case for review under Rule 44.

During the oral hearing, Board staff agreed that the Board has wide latitude in relation to reviews, under both Rule 43 and Rule 44. However, in the case of an applicant-driven motion to review, it is not sufficient to simply reargue the case, or to argue that a different outcome might have been preferred. The moving party must show that the decision at issue is incorrect in an identifiable, relevant and material way.

This panel acknowledges that the scope of the Board's power to review is broad, but remains of the view that a motion to review must raise a question as to the correctness of the decision at issue. The Board has previously indicated, in the NGEIR Motions Decision and in the Notice and PO, that the grounds for review set out in Rule 44.01 are not exhaustive. It may be that the emergence of previously unknown or unforeseen implications of a decision could be considered a ground for review. However, in the circumstances of this case this panel does not need to decide that issue given the findings below.

2. The Section 71 Issue

a. Introduction

Hydro One's Notice of Motion raised the following grounds for review in relation to the Section 71 Issue:

- i. the Connection Procedures panel 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 Connection Procedures panel, thereby raising a question as to the correctness of the Connection Procedures Decision;
- ii. the Connection Procedures panel erred in that, because of the absence of evidence and information referred to in (i), the Connection Procedures panel failed to protect the interests of consumers (third parties to whom Hydro One provides services and Hydro One's ratepayers), thereby raising a question as to the correctness of the Connection Procedures Decision; and
- iii. the Connection Procedures panel's interpretation of section 71 of the Act occurred in the absence of relevant evidence before it, thereby raising a question as to the correctness of the Connection Procedures Decision.

Hydro One's Motion in relation to the Section 71 Issue was supported by OPG, Bruce Power, the OPA, PWU, the EDA, CLD and the IESO. ECAO and Board staff submitted that the threshold for review has not been met on the Section 71 Issue.

During the course of this proceeding, it became clear that there were in fact two facets to the Section 71 Issue, one relating to the scope or reach of section 3.3 of the Connection Procedures Decision and the other to the substance of it.

b. Scope of the Connection Procedures Decision

A focus of Hydro One's Notice of Motion and the principal focus of the written and oral submissions of certain other parties was the implications of section 3.3 of the Connection Procedures Decision for the ability of Hydro One to perform a variety of services related to customer-owned facilities. Specific examples cited were metering, maintenance and repair, protection and control and emergency services provided to other utilities.

In the written summary of its submissions, Board staff submitted that section 3.3 of the Connection Procedures Decision stands only for the proposition that section 71 of the Act prohibits a transmitter from constructing, or acting as contractor in relation to the construction of, connection facilities in circumstances where the customer has elected not to require the transmitter to construct and own the connection facilities.

During the oral hearing, Hydro One asserted that the Connection Procedures Decision is not susceptible of being given the narrower meaning proposed by Board staff. ECAO, on the other hand, confirmed that, from its perspective, the Connection Procedures Decision deals only with this narrower issue, although it did add that section 71 of the Act would in ECAO's view similarly affect some of the other services identified by Hydro One and other parties.

At the end of the oral hearing, this panel provided some direction on this issue; namely, that pending a determination of the threshold question, the parties should proceed on the basis that the Connection Procedures Decision "made no determination on section 71 for services other than the construction of new connection facilities owned by customers".

This panel finds that the Connection Procedures Decision addresses only the narrower issue of the impact of section 71 of the Act on the ability of a transmitter to construct new connection facilities in circumstances where the customer has elected not to require the transmitter to construct and own the connection facilities (what is described in Hydro One's connection procedures as "Option 3 – Customer Builds and Owns the Connection Facility", where the customer has elected to decline "Option 1 – Hydro One

Builds and Owns the Connection Facility”). This, in the panel’s view, is the obvious conclusion from the purpose and record of the Combined Proceeding and of section 3.3 of the Connection Procedures Decision itself. As noted by ECAO during the hearing, the word “construct”, “construction” or “build” is used no less than eleven times on the two pages of the Connection Procedures Decision that comprise section 3.3. This panel acknowledges that there is one sentence in the Connection Procedures Decision that does not contain one of those words, or a word of similar import. That sentence states that “[T]he Board therefore concludes that section 71 of the Act prohibits Hydro One from acting as a contractor on behalf of the customer in relation to customer-owned facilities”. It appears to be the principal basis for the broader interpretation taken or assumed by a number of parties. That sentence must be read in context and, when read in context, is not understood by this panel as expanding the scope of section 3.3 of the Connection Procedures Decision beyond the issue of the construction of customer-owned connection facilities as described above.

Given this finding, it is not necessary for this panel to further consider the arguments of the parties in relation to the correctness of the Connection Procedures Decision as it relates to services other than the construction of new customer-owned connection facilities. This should not be misunderstood as an expression of this panel’s views as to the status of those other services in relation to section 71 of the Act one way or another. The status of those services was not determined by the Connection Procedures panel, and it is not determined by this panel now.

c. The Threshold Question Relative to the Narrower Scope

The question remains as to whether a case has been made for review of section 3.3 of the Connection Procedures Decision, when considered relative to the narrower scope attributed to that Decision above.

It is not altogether clear from the submissions of some of the parties whether the arguments supporting a review on the Section 71 Issue apply, or apply with equal force, regardless of the scope attributed to that aspect of the Connection Procedures Decision. This is perhaps most acute in relation to the submissions of Hydro One. During the oral hearing, it did become clear that the immediate concerns of OPG and Bruce Power were related to services other than the construction of customer-owned connection facilities. The IESO, for its part, voiced a remaining concern regarding the potential for the Connection Procedures Decision to have an adverse effect on the timeliness of the construction of facilities. This panel prefers to be over-inclusive in this

regard, and the discussion below therefore summarizes all of the principal arguments made by the parties other than those that appear to the panel to clearly and exclusively relate to services other than the construction of customer-owned facilities.

The arguments made by the parties can be classified along the following lines: (i) arguments relating to the adequacy of the notice given in the Combined Proceeding in relation to section 71 of the Act; and (ii) arguments relating to the factors considered by the Connection Procedures panel and, in particular, that panel's reliance on ownership of the facilities as the basis for the finding that a transmitter cannot construct connection facilities where the customer has elected not to require the transmitter to construct and own the connection facilities. In relation to each category of argument, Hydro One and parties supporting its Motion to review asserted that there are identifiable errors of fact, law or mixed fact and law, and that those errors are relevant and material.

i. Positions of the Parties on Adequacy of Notice

This argument was perhaps made most forcefully by PWU. PWU submitted that the Board failed to give adequate notice that the interpretation of section 71 of the Act was to be an issue in the Combined Proceeding and that this defect constitutes a failure of natural justice for which the only remedy is a new hearing. In support of its argument, PWU noted the following: that the Notice of Hearing issued in relation to the Combined Proceeding made no reference to section 71 of the Act nor to the fact that the statutory limits on the activities of transmitters was to be the subject of review in the Combined Proceeding; that the Connection Procedures panel did not promulgate an issues list of any kind and, in particular, no issues list identifying the section 71 issues as an issue for decision in the Combined Proceeding; that interrogatories and responses to interrogatories cannot determine or alter the scope of a proceeding; and that all intervenors in the Combined Proceeding were directed to file their written submissions at the same time and therefore had no opportunity to respond to the written submissions of other intervenors on the issue.

Hydro One submitted that the interpretation of section 71 of the Act was not an issue in the Combined Proceeding or was at best tangential and that, as a result, evidence was lacking on the matter even if the issue is narrowly construed. Hydro One also echoed the submission of PWU to the effect that the scope of a hearing cannot be enlarged simply by the asking of an interrogatory.

The IESO noted that neither the Notice of Application nor any of the procedural orders issued in the Combined Proceeding identified the interpretation of section 71 of the Act as an issue. The IESO also noted that the substantive position of Board staff and the ECAO was only made known on the last day for written submissions in the Combined Proceeding, and stated that intervenors were caught unaware. The IESO further noted that no extension of time was given for further submissions on the issue.

Bruce Power stated that it was not aware that the issues to be decided in the Combined Proceeding could lead to the Connection Procedures panel interpreting section 71 of the Act in a manner that severely adversely affects Bruce Power. Bruce Power also stated that, had it been aware that the Connection Procedures panel would make the decision that it did, it would have participated in the Combined Proceeding. In Bruce Power's view the outcome of the Combined Proceeding would have been different had the Connection Procedures panel had additional facts before it in relation to the implications of its interpretation of section 71 of the Act.

Both ECAO and Board staff submitted that notice of the Section 71 Issue was not lacking in the Combined Proceeding. It was noted by Board staff that the Notice issued in relation to the Combined Proceeding referred interested parties to Hydro One's application. Both Board staff and ECAO also noted that Hydro One's application included Hydro One's proposed connection procedures, and that those connection procedures expressly contemplated that Hydro One may be part of the bidding process to act as a contractor to the connecting customer if hired by the customer in relation to connection facilities that will be built and owned by the customer. Board staff and the ECAO also stated that each filed interrogatories on that statement in the early stages of the Combined Proceeding, specifically questioning whether section 71 of the Act allows Hydro One to construct customer-owned connection facilities. Board staff further noted that its interrogatory went further to express the view that this activity by Hydro One is not permitted by section 71 of the Act. ECAO and Board staff also stated that parties to the Combined Proceeding had an opportunity to make submissions, and noted that Board staff and ECAO made submissions on this issue, as did Hydro One in reply.

ii. Positions of the Parties on Factors Considered by the Connection Procedures Panel

As noted above, section 3.3 of the Connection Procedures Decision identifies ownership of facilities as a "critical distinction", and also expresses concerns regarding cross-subsidization.

Hydro One submitted that while ownership is relevant to the interpretation of section 6.6 of the Code, it is not the test to be used in interpreting section 71 of the Act. Hydro One noted that section 6.6 of the Code does not take any rights away from a transmitter but rather provides for customer choice, whether that choice is exercised initially or as a result of a competitive bidding process. Hydro One also noted that ownership is not referred to in section 71 of the Act. Further, had the Connection Procedures panel had before it additional evidence on the issue of the interpretation of section 71 of the Act during the Combined Proceeding, it would in Hydro One's view have been clear that the test of who owns the assets is not appropriate even on the narrower issue of the construction of customer-owned connection facilities. Hydro One stated that the evidence would have shown that the services provided by Hydro One are ancillary to, or related to, transmission and distribution and therefore not prohibited by section 71 of the Act.

Hydro One also submitted that the Board erred in fact and law by not considering the following: the harm caused to third parties and to the marketplace by forbidding Hydro One to perform work when the customer specifically chooses Hydro One from the available list of service providers; the fact that Hydro One's provision of services actually reduces rates; and the fact that Hydro One's ability to provide external transmission services improves efficiency and resource utilization.

As to the matter of cross-subsidization, Hydro One submitted that the Board erred in its concern in that regard. Hydro One stated that it prices all of its external work using transparent, fully-allocated costs. Hydro One also noted that ample safeguards are already in place to prevent cross-subsidization from occurring.

PWU submitted that the ownership "bright line" is both arbitrary and irrelevant to whether the work is "transmission" work for the purposes of section 71 of the Act. In PWU's view, the distinction required by section 71 between what is or is not transmission work must be one of substance (i.e., the nature and function of the assets in question) and not of form (i.e., ownership). If the assets in question are "transmission assets", then in PWU's submission their construction and maintenance is a "transmission" function.

PWU also submitted that the Connection Procedures Decision places reliance on the potential for cross-subsidization, yet no evidence that this phenomenon has actually occurred is referred to in the Connection Procedures Decision. PWU stated that the

evidence from Hydro One is precisely to the contrary, and to the effect that ratepayers financially benefit from the construction activity. PWU also asserted that the Connection Procedures Decision is incompatible with the Code and has the effect of amending the Code. Finally, PWU submitted that the Connection Procedures panel's interpretation of section 71 is inconsistent with the objectives set out in section 1 of the Act because it deprives customers of having the alternative of contracting with a transmitter to provide these services in cases where the customer considers it to be in its interests to do so.

The IESO agreed with and adopted Hydro One's submissions on the question of ownership as a critical distinction, and submitted that this is in error as it is inconsistent with the interpretation and definition under section 56 of the Act. The IESO stated that section 56 of the Act defines the term "transmit", and has as its focus the operation of the integrated transmission system and not the ownership of the assets. In the IESO's view, the Connection Procedures Decision introduced what amounted to a significant change in the interpretation of section 71 of the Act, with significant adverse impacts on consumer interests with respect to the adequacy, reliability and quality of electricity service.

The IESO also submitted that the record of the Combined Proceeding is incomplete and does not address: the impact of the prohibition on customers of Hydro One; the cost implications for consumers; and whether customer-owned transmission facilities are, in fact, integral to the business activity of transmitting electricity.

The OPA submitted that the Board's conclusion that permissible construction work should be determined solely on the basis of whether the assets are included in rate base is problematic from both a policy and legal perspective. The OPA stated that it is legally questionable whether asset ownership should be treated as determinative for purposes of section 71 of the Act. The OPA further stated that the Connection Procedures Decision is inconsistent with previous Board decisions and the governing legislation. In particular, the OPA referred to the Board's decision in proceeding RP-1999-0044 where the Board indicated that it would be guided by practical considerations in relation to the issue of what constitutes a distribution or transmission activity, and concluded that it would be premature to consider directing Hydro One to exit the connection construction market until the Board has evidence before it on the competitiveness of that market. This panel notes that the same decision was cited for the same purpose by the IESO in its submissions.

In terms of policy, the OPA submitted that the Connection Procedures panel's conclusion does not allow for the flexibility and innovation that will be required to enable the province to undertake a necessary review of its policy towards transmission expansion to meet renewable supply. Particularly given Ontario's current situation, it is in the OPA's view a mistake to constrain the approach to who builds transmission by reference to categorical legal conclusions based on property rights or legal ownership.

OPG submitted that while ownership of assets is a factor to be considered in determining whether services performed by Hydro One are part of the transmission of electricity under section 71 of the Act, it is not the only factor. Other relevant factors identified by OPG include, for example, the nature of the particular services performed by Hydro One, the extent to which the performance of the services is ancillary to Hydro One's responsibilities as a transmitter and the extent to which the customer-owned facilities are integral to the transmission system. OPG submitted that the Board should therefore re-examine the proposition that ownership is a "critical distinction" and undertake a full examination of all of the factors that would properly bear on the scope of section 71 of the Act.

The EDA submitted that the provisions of the Code regarding contestability were intended to allow for competition in the construction of connection facilities as a means of bringing down the overall cost that will ultimately be charged either to ratepayers or to connecting customers. In that regard, the Connection Procedures Decision appears in the EDA's view to lead to a perverse result in that it excludes from the competitive market one of the competitors. The EDA stated that this, in turn, seems on its face at least to be contrary to the normal principles of competition. While controlling cross-subsidization is important, in the EDA's view it is not properly controlled through an interpretation of section 71 of the Act. Moreover, the EDA noted that there are already rules in place to address cross-subsidization. The EDA submitted that the Board needs to consider a wider range of principles and a wider range of implications in relation to the interpretation of section 71 of the Act, whether as a continuation of Hydro One's Motion to review or in a separate process. The EDA noted in this regard that it is not clear that the Connection Procedures panel had the kind of record before it in the Combined Proceeding necessary to take a fully purposive approach to the question of how to interpret section 71 of the Act. The EDA also submitted that the Connection Procedures Decision does not address the issue of economic efficiency and the ratepayer benefits that flow from these activities.

ECAO submitted that Hydro One's connection procedures themselves make reference to ownership, and the Code has distinctions as to ownership. It is therefore reasonable that ownership be used as a basis for determining Hydro One's ability to perform competitive connection work. ECAO also noted that, in its view, the Connection Procedures Decision is not inconsistent with the Code.

ECAO also submitted that, contrary to Hydro One's assertion, the Connection Procedures panel did consider the benefits of providing choice in the marketplace in the Connection Procedures Decision. In this regard, ECAO noted its evidence in the Combined Proceeding regarding competition in the connection work market, and also noted that section 71 of the Act would not preclude an affiliate of a transmitter from carrying out customer connection work. ECAO also submitted that the facts referred to in Hydro One's submissions were reasonably discoverable at the time of the Combined Proceeding. In ECAO's view, the evidence referred to by Hydro One is not new, and could have been put forward during the Combined Proceeding had Hydro One acted with reasonable diligence. ECAO also noted that at no time after receiving the interrogatories or at any other time during the Combined Proceeding did Hydro One take the position that additional evidence was required or that there was any reason why Hydro One could not respond in a satisfactory manner to the Section 71 Issue. Finally, ECAO submitted that the facts which Hydro One now seeks to introduce would have no impact on the decision of the reviewing panel.

Board staff shared ECAO's view that Hydro One had ample and fair opportunity to make its case during the Combined Proceeding and did not, at the time, assert that it was unable to do so. Board staff also submitted that the facts now sought to be brought forward by Hydro One are not material or relevant to the outcome of the Connection Procedures Decision on the Section 71 Issue, as they are not such as could result in the Board deciding that a transmitter is not prohibited by section 71 of the Act from constructing, or acting as a contractor in relation to the construction of, customer-owned connection facilities. With respect to the issue of ownership, Board staff expressed the view that the arguments against the relevance of ownership as factor in relation to section 71 of the Act in the context of the construction of customer-owned facilities were not compelling.

iii. Board Findings

This panel finds that there is no reviewable error in section 3.3 of the Connection Procedures Decision.

This panel does not find the arguments relating to inadequacy of notice to be persuasive, nor do we agree with Hydro One's characterization of the issue as tangential to the review of its connection procedures. Interested parties had notice of Hydro One's connection procedures from the outset. The issue of Hydro One bidding to construct customer-owned connection facilities was squarely raised by Hydro One's connection procedures. Board staff and ECAO identified that this in turn raised an issue relative to section 71 of the Act, and other interested parties would no doubt have been capable of doing the same based on a review of Hydro One's connection procedures. The issue was canvassed by a number of parties to the Combined Proceeding. Based on the record of the Combined Proceeding, it was not argued at the time that the issue was out of scope, that adequate notice of the issue was lacking or that sufficient opportunity was not given to allow parties to make their case on the issue. This panel finds that there was no failure to give adequate notice in the circumstances of the Combined Proceeding.

With respect to the issue of the factors considered by the Board in relation to section 71 of the Act, this panel finds that a case has not been made that the Connection Procedures Decision is incorrect in that regard. Whatever might be the relevance of the ownership of facilities in relation to other services provided or business activities performed by a transmitter, in this panel's view it was a proper factor to consider in the circumstances of the Combined Proceeding and in relation to the narrow issue of the construction of customer-owned connection facilities that was before the Connection Procedures panel as described above.

This panel notes, without deciding the relevance of the evidence one way or another, that there was evidence before the Connection Procedures panel regarding the state of competition in the connection construction market. This panel does not believe that any of the other additional facts identified as being lacking in the Combined Proceeding are such as would lead us to decide that the Connection Procedures Decision should be varied, cancelled or suspended.

For the reasons noted earlier, this panel understands the scope of the Connection Procedures Decision to be limited to the narrower question of the impact of section 71 of the Act on the ability of a transmitter to construct new connection facilities in circumstances where the customer has decided not to require the transmitter to construct and own the connection facilities. This panel does not believe that this review proceeding should become a forum in which to determine the status of other services in

relation to section 71 of the Act for the first time. Accordingly, this panel will not, for that purpose, review the Connection Procedures Decision on its own motion in the absence of a reviewable error.

This panel does wish to address a further related issue that was raised by a number of parties during this proceeding. Specifically, Hydro One, OPG, the EDA and PWU each argued that, even were the Connection Procedures Decision to be given the narrower scope suggested by Board staff, the Connection Procedures panel's analysis of or approach to section 71 of the Act in that Decision, and in particular its reliance on ownership as a critical distinction, would per force apply to any other services performed by a transmitter in relation to customer-owned assets. In other words, the Connection Procedures Decision establishes the analytical framework by which the Board will be governed in determining whether other services are or are not permitted by section 71 of the Act.

In this panel's view, it does not follow from our conclusion (that there was no reviewable error in section 3.3 of the Connection Procedures Decision) that the findings in the Connection Procedures Decision are determinative of the factors that could be considered by the Board were it to be called upon to consider other services in the future.

3. The Code Issue

a. Introduction

Hydro One's Notice of Motion raised the following grounds for review in relation to the Code Issue:

- i. the Connections Procedures panel erred by not considering a Code-based conclusion that could have been reached and instead based its conclusions on principles and definitions not found in the Code; and
- ii. the Connection Procedures Decision failed to protect the interests of consumers and was contrary to regulatory principles, thereby raising a question as to the correctness of the Connection Procedures Decision.

Hydro One's Motion in relation to the Code Issue was supported by the OPA, the EDA, CLD and the IESO. Board staff submitted that the threshold for review has not been

met on the Code Issue. OPG, Bruce Power, PWU and ECAO made no submissions on the Code Issue.

b. Positions of the Parties

Hydro One submitted that the Board erred in fact and law by making a finding in the Connection Procedures Decision that was contrary to the evidence. In particular, the Board did not consider or reach a Code-based conclusion that could have been reached and instead based its conclusion on principles and definitions not found in the Code.

Hydro One asserted that its Local Area Supply plans are plans within the meaning of section 6.3.6 of the Code, and referred to the Board's July 25, 2005 "Synopsis of Changes to the Transmission System Code" as confirming both the intention underlying the Code and the consistency of Hydro One's approach with that intention. Hydro One noted that, by contrast, the Connection Procedures Decision states that the only exemptions from the requirement for a capital contribution are the cost responsibility exemptions associated with "unique system requirements" and "system reliability-only plans", neither of which concepts have a basis in the Code. According to Hydro One, the Code rightly does not refer to "system reliability-only" plans because, as the Connection Procedures Decision itself acknowledges, there can be ambiguity between system reliability and customer-driven plans. Hydro One submitted that transmission planning is an integrated exercise, that plans to address reliability and load growth are inexorably intertwined and that the Connection Procedures Decision fails to adequately address the issue. Hydro One noted that the Connection Procedures Decision treats section 6.3.6 of the Code as an exception to other cost responsibility provisions contained in the Code. In Hydro One's view, however, section 6.3.6 is the rule and not the exception.

Hydro One also submitted that the Connection Procedures Decision can result in outcomes that are inconsistent and unfair. Hydro One stated that the fact that the consequences of the Connection Procedures Decision implicitly assigns cost responsibility in identical circumstances based on the mechanics of the process by which the plan was developed, rather than based on who benefits, results in inconsistency. Hydro One submitted that the Code was, however, intended to assign cost responsibility based on benefits, and not on "who spoke to whom". In Hydro One's submission, this also calls into question the correctness of the Connection Procedures Decision.

Hydro One further submitted that the Connection Procedures Decision fails to recognize or adequately address the fact that Local Area Supply facilities are primarily for the benefit of the pool, and that that benefit is directly related to system reliability and integrity. Hydro One also stated that the Connection Procedures Decision also fails to recognize or adequately address 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. In so doing, the Connection Procedures Decision in Hydro One's submission fails to protect the interests of consumers.

Finally, Hydro One submitted that, in adopting a case-by-case approach to determining whether a plan meets the criteria giving rise to the exception in section 6.3.6 of the Code, the Connection Procedures Decision has created an unmanageable level of regulatory uncertainty and financial risk and therefore fails to protect the interests of consumers in this respect as well. Hydro One stated that customers will not know with any certainty whether a capital contribution is required, or the amount of that contribution, and Hydro One would need to incur delays in the development of leave to construct applications to seek clarity in advance for each project on the capital contribution issue. In Hydro One's submission, the approach embodied in the Connection Procedures Decision can lead to inconsistent and unfair outcomes, and is unworkable and impractical.

The IESO adopted and supported Hydro One's submissions on the Code Issue, and submitted that a review of the Connection Procedures Decision is required to ensure that the interests of consumers in relation to the reliable operation of the IESO-controlled grid are protected. The IESO also submitted that the Connection Procedures Decision creates uncertainty regarding cost responsibility, and may impede the efficient and timely study, planning, approval and implementation of transmission projects required for system reliability.

The OPA submitted that the mandate of the Connection Procedures panel in reviewing Hydro One's connection procedures was to determine if the procedures were consistent with the Code. The OPA stated that consistency, in this context, means logically compatible. The OPA further submitted that Hydro One's Local Area Supply plan approach is logically compatible with the Code, and achieves an appropriate balance between two somewhat conflicting concepts; namely, the responsibility of a transmitter to meet the needs of load growth and the responsibility of load customers to meet their own load growth needs. In the OPA's submission, the Connection Procedures panel erred in applying a higher standard, and in not accepting Hydro One's approach without

a demonstration that the approach is inconsistent with the Code. Moreover, the OPA stated that the Connection Procedures Decision effectively replaces Hydro One's transmission planning practice by a new, and less workable, planning practice put forward by the the Connection Procedures panel. In the OPA's view, Hydro One's approach is more workable than the approach reflected in the Connection Procedures Decision because it is more predictable. The OPA further asserted that the approach in the Connection Procedures Decision also creates the risk that customers may become reluctant to communicate with transmitters about their supply needs because of fear that the communication will trigger a requirement that the customer pay for an upgrade. The OPA submitted that this would not constitute good planning practice, and raises regulatory risk. Finally, in the OPA's view, the Connection Procedures Decision creates incentives for distortions between connection and network assets.

The focus of the EDA's submissions on the Code Issue was in relation to the statements contained in the Connection Procedures Decision regarding the regulatory treatment of capital contributions made by distributors to transmitters. In particular, the EDA referred to the statement in the Connection Procedures Decision that such capital contributions are a current expense. The EDA noted, however, that in the past such capital contributions, which can be very large, have been treated as being appropriately added to rate base as opposed to being a current expense. The EDA submitted that the Connection Procedures Decision therefore creates the potential for inconsistency between the approach used earlier by the Board, for example in the 2006 electricity distribution rate process, and the current state of affairs. The EDA also noted that the treatment of such capital contributions is of significant importance to distributors, and in the EDA's view needs to be addressed further.

Board staff submitted that there was no error in the Connection Procedures Decision in relation to the Code Issue. The Connection Procedures Decision reflects and is consistent with the cost responsibility policy of the Board as developed during the consultations that lead to the revisions to the Code and as ultimately embedded in the Code. That policy has three prongs; first, that cost responsibility for customer-driven connection facilities should rest with the customer; second, that this should also be the case where the facilities are triggered by the needs of more than one customer; and third, that there is an exception that applies when a connection facility was otherwise planned by the transmitter. Board staff also submitted that the implications of the Connection Procedures Decision raised by parties to this proceeding were largely before and considered by the Connection Procedures panel in the Combined Proceeding.

c. *Board Findings*

This panel finds that there is no reviewable error in section 3.5 of the Connection Procedures Decision.

The Connection Procedures Decision interprets and applies the Code in a manner that this panel believes to be consistent with the terms of the Code itself and with the cost responsibility policy that currently underlies the Code. Sections 6.3.1, 6.3.2 and 6.3.4 of the Code reflect the principle that a customer that requires new or upgraded connection facilities to meet its needs must bear the associated costs. Other sections of the Code speak more specifically to the principle that cost responsibility remains with the customer even where the work is triggered by more than one customer (sections 6.3.14 to 6.3.16 of the Code) or where the work avails to the benefit of more than one customer (sections 6.2.24, 6.2.25, 6.3.9 and 6.3.17 of the Code). The Connection Procedures panel's findings reflect the view that these sections articulate the general rule, and that section 6.3.6 of the Code must operate as an exception to them. While the balance achieved by the Connection Procedures panel may differ from the balance proposed by Hydro One and other parties, it is not for that reason incorrect.

By and large, the implications of the Connection Procedures Decision that have been raised in this proceeding were before the Connection Procedures panel at the relevant time. That this is the case is reflected in the Connection Procedures Decision itself, which describes in some considerable detail the positions of the parties to the Combined Proceeding on the matter.

This panel does acknowledge that the issue of the regulatory treatment of capital contributions made by distributors was not a matter addressed by the parties to the Connection Procedures Decision. However, even were we to agree that the Connection Procedures Decision was in error in relation to that particular finding, such error would not be considered by this panel as relevant to the outcome of the Connection Procedures Decision in relation to section 6.3.6 of the Code and the related issue of cost responsibility. The issue raised by the EDA is fundamentally a rates issue, and this panel believes that it is best addressed in future rates cases or through a process aimed at resolving the issue on a more generic basis.

This panel also acknowledges that the Connection Procedures Decision has not eliminated all uncertainty with respect to the application of section 6.3.6 of the Code.

However, the Connection Procedures Decision does provide parameters around what the Board might consider to be a transmission plan for purposes of that section of the Code and, in that regard, provides guidance where none existed before. In addition, the issue of cost responsibility remains subject to Board oversight in the context of leave to construct applications or rate applications, as the case may be depending on the nature of the facilities in question. Absent more prescriptive rules in the Code, certainty is not obtained until those processes have been completed.

This panel will also not on its own motion review section 3.5 of the Connection Procedures Decision in the absence of a reviewable error. The parties to this proceeding have raised, both now and during the Combined Proceeding, questions of transmission policy that are better addressed in a policy process than they are in a review hearing. The Board as a whole is aware of the issues, and it remains open to the Board to initiate such a process if it considers that to be necessary or desirable at this time.

THE OTHER PRELIMINARY ISSUES

1. The Request for a Stay

Given this panel's findings above on the threshold question, Hydro One's request for a stay has become moot and need not be considered further.

2. The Delay in Filing

In accordance with Rule 42.03 of the Rules, 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.

In its written submissions, Hydro One identified the following as reasons for its inability to meet the 20-day filing deadline: that Hydro One required time to weigh the significance and scope of the Connection Procedures Decision and the options available to it and to other parties that would be harmed by the Decision; that Hydro One required sufficient time to inform its Board of Directors of the level of concern and

allow time for seeking direction on whether to ask the Board to review the Connection Procedures Decision; that during that time a growing number of customers and other parties continued to raise concerns about the implications of the Connection Procedures Decision; and that Hydro One consulted with the Board's Chief Compliance Officer and customers to arrange a meeting to discuss the implications of the Connection Procedures Decision, but that it became apparent that a formal review by the Board would be more effective. During the oral hearing, Hydro One acknowledged that it should, prior to expiry of the 20-day deadline, have notified the Board of its inability to meet that deadline as required by Rule 7.03 of the Rules.

Parties that supported Hydro One's Motion to review also supported Hydro One's request to waive or extend the deadline for filing the Notice of Motion given the importance of the issues at hand. ECAO submitted that Hydro One's request should be denied. Board staff took no position on the issue.

Given this panel's findings above on the threshold question, Hydro One's request to waive or extend the deadline for filing of the Notice of Motion has also largely become moot, but for its request to extend the time in which to file revisions to those portions of its connection procedures that are affected by sections 3.3 and 3.5 of the Connection Procedures Decision.

While this panel does not find Hydro One's reasons for the delay in filing to be particularly persuasive, it is nonetheless prepared to exercise its discretion and accept the late filing. This panel does wish to remind the parties that adherence to the Board's deadlines is not a matter to be treated lightly, and that the inability to comply should be brought to the attention of the Board promptly.

3. Extending the Time to File Revised Connection Procedures

Under the terms of the Connection Procedures Decision, Hydro One was required to file revised connection procedures by October 12, 2007. Hydro One has complied with this direction, except for those portions of its connection procedures that are affected by sections 3.3 and 3.5 of the Connection Procedures Decision.

Parties that supported Hydro One's Motion to review and that spoke to Hydro One's request to extend the deadline for filing portions of its revised connection procedures also supported that request. ECAO submitted that Hydro One's request should be denied. Board staff submitted that it did not oppose the request.

As a practical matter, the deadline for filing has now expired. This panel does not believe that any public interest would be served in denying Hydro One's request.

COST AWARDS

The Notice and PO indicated that the Board may order costs in this proceeding. The Notice and PO also indicated that any party that was determined by the Connection Procedures panel to be eligible for costs in the Combined Proceeding and any party other than the EDA that was determined by the Board to be eligible for costs in the Hydro One transmission rates case (proceeding EB-2006-0501) would also be eligible for costs in this proceeding.

This panel has determined that cost awards will be available in this proceeding, and that costs awarded will be recovered from Hydro One.

Two parties to this proceeding have the benefit of automatic eligibility for costs under the terms of the Notice and PO; namely, ECAO and AMPCO. ECAO has actively participated in this proceeding. By letter dated November 1, 2007, AMPCO noted its interest in participating in the review of Hydro One's Motion to review should the Board decide to proceed with a substantive review of the issues, and indicated that it would be seeking costs for the review proceeding. AMPCO did not file a written summary of submissions, nor did it appear at the oral hearing on the Preliminary Issues. On the basis of the foregoing, it is not expected that AMPCO will file a cost claim.

By letter dated November 1, 2007, the EDA requested that it be found eligible for an award of costs in this proceeding, on the basis that it represents a distinct group of transmission customers whose interests are not otherwise represented before the Board and that it is in a position to add further perspective to the record that will contribute to the Board's process. As reflected in the Notice and PO, this panel previously determined that the EDA is not eligible for cost awards in this proceeding notwithstanding that it was eligible for an award of costs in the Hydro One transmission rates case. This panel notes that the EDA is not eligible for cost awards based on the criteria set out in section 3 of the Board's *Practice Direction on Cost Awards*, and remains of the view that no special circumstances exist that would persuade us to deviate from the Board's normal practice.

THE BOARD THEREFORE ORDERS THAT:

1. Hydro One Networks Inc. shall revise those portions of its “Transmission Connection Procedures” and of its Connection and Cost Recovery Agreement that are affected by sections 3.3 and 3.5 of the Connection Procedures Decision in accordance with the findings of the Board as set out in the Connection Procedures Decision. The revised “Transmission Connection Procedures” and Connection and Cost Recovery Agreement shall be filed with the Board for review and approval, and delivered to all intervenors in the Combined Proceeding, no later than **December 10, 2007**.
2. The Electrical Contractors Association of Ontario shall submit its cost claim by **December 10, 2007**. A copy of the cost claim must be filed with the Board and one copy is to be served on Hydro One Networks Inc. The cost claims must be completed in accordance with section 10 of the Board’s *Practice Direction on Cost Awards*. In accordance with the Board’s letter of November 16, 2007, cost claims for work performed prior to that date must be based on the tariff as it existed prior to the changes to the tariff that were announced on November 16, 2007.
3. Hydro One Networks Inc. will have until **December 28, 2007** to object to any aspect of the costs claimed by the Electrical Contractors Association of Ontario. A copy of the objection must be filed with the Board and one copy must be served on the Electrical Contractors Association of Ontario.
4. The Electrical Contractors Association of Ontario will have until **January 7, 2008** to make a reply submission as to why the cost claim should be allowed. A copy of the reply submission must be filed with the Board and one copy is to be served on Hydro One Networks Inc.

The Board will then issue its decision on cost awards. The Board's costs may also be dealt with in the cost awards decision. Service of cost claims, objections and reply submissions on parties may be effected by courier, registered mail, facsimile or e-mail.

ISSUED at Toronto, November 26, 2007.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary