WRITTEN SUBMISSIONS ON BEHALF OF
ENWIN POWERLINES LTD, ERIE THAMES POWERLINES CORP. AND ESSEX POWER CORPORATION,
(Hereafter The Southwestern ("SW") Applicants
In Proceeding RP-2003-0044)

During the Issues Conference held April 30, 2003 and in its letter to the Ontario Energy Board (the "Board") dated May 8, 2003, Hydro One Networks Inc. ("Hydro One") has argued that the licence amendment provisions of the Ontario Energy Board Act, (the "OEB Act") do not give the Board the jurisdiction to make Orders which would transfer ""existing customers"" of an incumbent Distributor to another Distributor. Hydro One's position, as the SW Applicants understand it, is that the Board may only make orders which would affect ""new customers".

In response to the question posed by Hydro One, the SW Applicants will address the following points:

1. Nature of the Question posed by Hydro One
2. Nature of the SW Applicants' Application
3. Jurisdiction of the OEB
4. Response to the Examples Presented

1. Nature of the Question Posed by Hydro One

First, the SW Applicants take issue with the wording of the question posed by Hydro One. The question as it is currently phrased presupposes an "effect" that "existing customers" will automatically be transferred where the Board is inclined to grant an Order expanding a distribution service territory which has within its bounds, "existing customers". This "effect" is not a natural consequence of an Order granting the expansion. The SW Applicants submit that the question as it is currently phrased, is improper and prejudicial. It presumes a result that will not necessarily occur.

Where the Board grants an Order to expand the service territory of a Distributor, it is the submission of the SW Applicants that the "existing customers" remain customers of the

incumbent Distributor. That is, until it is otherwise ordered by the Board pursuant to an Application brought for that purpose having regard to the principles of the OEB Act, the *Electricity Act*, S.O. 1998 c. 15 Schedule A ("Electricity Act") and the guidelines to be set by the Board in this consolidated hearing.

2. Nature of the SW Applicants' Applications

The Applications filed on behalf of EnWin, Erie Thames and Essex do not seek an Order at this time which would have the effect of transferring "existing customers". These Applications seek only to extend the service territory pursuant to s. 70(11) of the OEB Act.

Despite this fact, it is the position of the above SW Applicants that the Board necessarily has the jurisdiction to consider all Applications seeking amendments to a Distributor's service territory pursuant to s. 74(2) of the OEB Act regardless of whether the potentially affected customers are existing or new. The SW Applicants acknowledge that the Board may be governed by different considerations depending on the nature of the customer potentially impacted.

3. Jurisdiction of the Board

It is the submission of the SW Applicants that the Board has jurisdiction to consider license amendment applications which may impact "existing customers" of an incumbent Distributor for the following reasons:

The objectives of the Board are delineated in s. 1 of the OEB Act. Among other things, the Board will be guided by principles which will:

- Facilitate competition;
- Provide non discriminatory access to distribution systems in Ontario;
- Protect the interests of consumers with respect to prices, reliability and quality of electricity service; and
- Promote economic efficiency in…the distribution of electricity

"existing customers" are not exempted from the Board's application of these broad principles and in particular they are not specifically excluded from the Board's consideration of licence amendment Applications under s.74(2). In fact, the Board is explicitly authorized to consider an Application brought under s. 74(2) of **any person.** Any person, the SW Applicants submit, necessarily includes an "existing customer".

It is submitted that the licence amendment provision under s. 74 of the OEB Act must be read together with the licence conditions contained in s.70. The provisions governing the original grant of licences apply equally to amended licenses. An amended licence may therefore be subject to the same conditions which applied to the original grant . Further, the OEB Act does not stipulate that amended licences are exempt from the license conditions contained in s. 70.

S.70(6) of the OEB Act expressly acknowledges that distribution licences are not exclusive. Non-exclusivity presumes that customers will have a choice as to who their Distributor will be. Choice promotes economic efficiency and facilitates competition as set out in s.1 of the OEB Act. The OEB Act does not preclude an existing customer from having choice nor does s.70(6) limit the ability of the Board to consider only those Applications for licenses where there are "new customers". In fact, to the contrary, the Board is not hindered in its ability to grant a licence to a Distributor who intends to serve an area where there are "existing customers". S. 70(11) does not limit the granting of licences to service areas of a Distributor where there are only "new customers", it merely states that the licence must specify the geographical area to which it applies.

Most significantly, s. 70 (1), gives the Board the power to grant licences and prescribe conditions for those licences. Under 70(2)(c) these conditions may include provisions:

> Requiring the licensee to enter into agreements with other persons on specified terms (including terms for a specified duration) approved by the Board relating to its trading or operations or for the connection to or use of any lines or plant owned or operated by the licensee or the other party to the agreement.

And further at subsection (h):

> Specifying connection or retailing obligation to enable reasonable demands for electricity to be met;

Hydro One has argued that the OEB Act does not specifically provide the Board with the jurisdiction to make an Order which may transfer "existing customers" from an incumbent Distributor to another. This position is flawed. First, there is no reason to imply such an exclusion in the legislation. If the legislature had intended to limit the Board's jurisdiction in this manner, such an exclusion would have been expressly provided for. Certainly, there was no failure of the drafters of this legislation to specifically prohibit the Board from making orders which require "a person to dispose of assets or to undertake a significant corporate reorganization." The imposition of such a condition in a license is expressly prohibited by s. 70(13) of the *OEB Act.* As a result, it is unreasonable to read into the OEB Act, the exclusion or limit on Board's jurisdiction as advocated by Hydro One.

Further, the language of the text of 70(2)(c) and the related provisions of the OEB Act referred to above, is clear, unambiguous and capable of plain interpretation. In the SW Applicants' submission, these provisions, and in particular, s.70(2)(c), invest the Board with the jurisdiction to consider Applications and make Orders which could transfer "existing customers" (as opposed to assets) from an incumbent Local Distribution Company ("LDC") to a new LDC, if such relief were requested in an Application brought before it.

As an example of what conditions may be ordered by the Board in an amended distribution licence, the SW Applicants contend that while their own Applications do not address this circumstance, if a customer wanted to transfer to another distribution company, the Board could require an agreement between the incumbent and the new LDC which would allow the new LDC to use the incumbent's assets. The new LDC could be required to pay a low voltage charge or some other fee as deemed appropriate by the Board having regard to its objectives and the objectives delineated in the *Electricity Act.*

A similar approach was adopted in somewhat analogous circumstances with the deregulation of the Telecommunications Industry. In the Telecom Decision CRTC 94-

19, the Canadian Radio-television and Telecommunications Commission (the "Commission") held at page 31 of its reasons:

> In the opinion of the Commission, restrictions on entry into the local market should be removed and principles of open access, unbundling and co-location….should be pursued. The applications and solutions required to meet the needs of users in today's environment are not always possible if entry is restricted in some markets. Users should have the flexibility to obtain solutions from any supplier or mix of suppliers. This means that barriers to entry on the supply-side of telecommunications, including those that restrict telephone companies should be reduced. Conversely, service providers must have the means to access and serve subscribers without technical barriers to entry.

And at page 32,

> …The role of the Commission should be to ensure that the right economic and technical conditions for open access are in place, while ensuring that access remains affordable wherever local markets are not workably competitive.

And further at page 34

> …The Commission is of the view that the provision of co-location will facilitate competition by providing competitors with the option of delivering their traffic to the local switches over either leased or owned facilities, based on cost and efficiency consideration. Co-location may foster increased entry by creating an additional source of supply of local channels to end-users and to resellers.

The Commission's objectives as outlined at page 4 of its decision are similar to those of the Board's outlined in s.1 of its governing legislation.

As a further example of the Board's power under s.70(2)(c), the new LDC may be able to connect the customer without using the incumbent LDC's assets. In this case, where there are assets of the incumbent Distributor that have been built to serve that customer, the Board may impose a condition in the license which obligates the customer and/or the new LDC to compensate the incumbent Distributor for its stranded assets or it may decline the Application altogether because of uneconomic bypass. Nevertheless the Board is entitled to entertain an Application for a licence amendment which may impact an "existing customer" and make whatever order it deems appropriate given the objectives and the specific requirements of the Act.

With respect to the four examples raised by Hydro One in its letter dated May 8, 2003, the SW Applicants have the following comments:

1. We would submit that the “existing customers” of the incumbent Distributor would remain customers of that Distributor, unless, pursuant to an Application, the Board orders otherwise.

2. We would submit that the language of s. 74 is broad enough to allow an existing customer to bring an Application to be served by a different Distributor. In any event, the language of s. 70(2)(c) certainly would permit the new LDC to apply on behalf of an existing customer or a group of “existing customers”.

3. With respect, this is not an appropriate example or question for the Board to consider at this time. Each case will turn on its own facts.

4. With respect, this is not a question relating to the jurisdiction of the Board. Rather, the question relates specifically to the stranding of assets which is properly before the Board on the issues list. Under what terms and conditions an LDC is appropriately compensated for stranded assets is a matter for the Board to determine on a case by case basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 16, 2003

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