

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

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

**GREAT LAKES POWER LIMITED
RESPONSE TO PROCEDURAL ORDER NO. 4**

1. Great Lakes Power Limited ("GLPL") provides the following submissions related to the jurisdiction of the Ontario Energy Board (the "OEB") in response to Procedural Order No. 4 of the above-referenced matter.
2. The jurisdictional issue posed by Hydro One is as follows:

Do the licence amendment provisions of the Ontario Energy Board Act give the Ontario Energy Board the jurisdiction to make an order which would have the effect of transferring a Distributor's existing customers to another Distributor which as sought an amendment to expand its service territory, or does the Board have the power only to consider licence amendments which would have the effect of transferring new customers?

3. GLPL submits that the Board's jurisdiction, as it relates to the transfer of existing customers from one distributor to another, is limited by subsection 70(13) of the *Ontario Energy Board Act, 1998* (the "OEB Act"), which provides:

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

4. Subsection 70(13) prohibits the Board from including conditions in an electricity distribution licence that directly or indirectly require a distributor to dispose of assets.¹

¹ It is a generally accepted principle of law that a tribunal may not do indirectly what it is prohibited from doing directly. See *British Columbia (Minister of Social Services and Housing) v. Wiehardt*, [1991] B.C.J. No. 2406 (B.C.S.C.) at QL p.7.

5. GLPL submits that the meaning of the word "dispose" in subsection 70(13) must be interpreted in the context of distribution activities. This proposition is supported by the decision in *Cominco American Incorporated v. Duval*, in which the court provided:

Clearly the meaning of "dispose" must vary with the context.²

6. In the context of electricity distribution, the word "dispose" in subsection 70(13) should be interpreted to include the stranding of assets. For an electricity distributor, the inability to recover its costs associated with a used and useful distribution asset is tantamount to disposal of the asset, since the asset would have absolutely no value to the distributor.
7. Accordingly, the Board's jurisdiction as it relates to transferring customers from one distributor to another, is limited by subsection 70(13). GLPL submits that the board lacks jurisdiction to impose licence conditions that would directly or indirectly require a distributor to strand or sell a distribution asset³.
8. It is important to note, however, that this limitation on the Board's jurisdiction does not affect the right of distributors to voluntarily sell distribution assets, subject to leave of the Board.
9. This overriding jurisdictional principle can be used to address the issue and examples posed by Hydro One as follows:
10. Q. *Do the licence amendment provisions of the Ontario Energy Board Act give the Ontario Energy Board the jurisdiction to make an order which would have the effect of transferring a Distributor's existing customers to another Distributor which has sought an amendment to expand its service territory, or does the Board have the power only to consider licence amendments which would have the effect of transferring new customers?*
 - A. The Board lacks the jurisdiction to make an order that would have the effect of transferring an incumbent distributor's customer to an applicant distributor. The reason for this is that if the distribution assets associated with the incumbent distributor's customer are not voluntarily sold to the applicant distributor, they will become stranded. As mentioned above, subsection 70(13) prohibits the Board from imposing licence conditions that directly or indirectly cause a distributor's assets to be stranded.
11. Q. *If the Applicant for a licence amendment is successful in taking over part of an incumbent Distributor's territory, do the incumbent Distributor's existing customers in the area which is being added to the Applicant Distributor's territory also become*

² *Cominco American Limited v. Duval* [1993] B.C.J. No. 2556 (B.C.S.C.) at QL para. 7

³ subject to the emergency provisions contained in section 59 of the OEB Act

customers of the Applicant Distributor, or do they remain with the incumbent Distributor?

A. As set out above, the Board lacks the jurisdiction to make and order that would transfer existing distribution customers to another distributor. An applicant distributor could, however, service an incumbent distributor's customers if, subject to leave of the Board, the incumbent distributor voluntarily sells the associated distribution assets to the applicant distributor.

12. Q. *Can existing customers in an incumbent Distributor's territory apply to be served by a different Distributor?*

A. Such an application can be made by a customer, however, the Board lacks the jurisdiction to grant such an application if it will result in the stranding of the incumbent distributor's assets.

13. Q. *Will the Board consider the incumbent Distributor's existing customer to be a "new" customer when that existing customer requires additional facilities?*

A. The issue of whether the customer is considered "new" is irrelevant. The Board lacks the jurisdiction to allow the provision of additional facilities by an applicant distributor if the effect of the additional facilities would be to strand the incumbent distributor's distribution assets.

14. Q. *If the Board were to allow the transfer of existing customers of the incumbent Distributor, what rate treatment would be accorded to the assets that remain which are no longer used to serve these customers?*

A. As mentioned above, the Board lacks the jurisdiction to transfer existing customers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of May, 2003.

GREAT LAKES POWER LIMITED
By its counsel,
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