

**RP-2003-0044**  
**EB-2003-0031**

**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.

## **SUBMISSIONS OF HYDRO ONE NETWORKS INC.**

### BACKGROUND

Applications have been made by various distribution companies for amendments to the designated service areas in their licences pursuant to Section 74(1) of the *Ontario Energy Board Act. (OEB Act)* At the Issues Day Conference a question arose as to the Board's jurisdiction over certain matters. Pursuant to the Board's Procedural Order No. 4, Hydro One Networks Inc. (HON Inc.) has filed with the Board a statement of the jurisdictional issue to be determined, including all relevant legislative references. The Board has directed that parties who wish to participate in the argument relating to the jurisdictional issue submit written submissions and authorities on which they intend to rely.

## QUESTION

“Do the licence amendment provisions of the *Ontario Energy Board Act* give the Ontario Energy Board 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 power only to consider licence amendments which would have the effect of transferring new customers?”

## ANALYSIS

### No Legislative Authority

1. The OEB is a creature of statute and is limited to the authority conveyed to it by its enabling legislation, in this case, the *Electricity Act*, and the *OEB Act*.
2. The Board clearly has the right to grant a licence to a Distributor to distribute electricity and to amend the licence from time to time. (Section 57; Section 74 *OEB Act*)
3. The Board has the power to prescribe conditions to licence, “having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*.” (Section 70 *OEB Act*)
4. Section 70 of the *OEB Act* sets out a code which governs the powers of the Board to prescribe conditions to licences. For convenience, Section 70 is attached at **TAB “A”**. Nothing in Section 70 conveys to the Board the power to effectively transfer a Distributor’s existing customers to another Distributor which has sought an amendment to expand its service territory.

5. A Distributor has an affirmative obligation to connect a customer which lies along the Distributor's distribution system. (Section 28, *Electricity Act* and predecessor legislation)
6. Hydro One Networks Inc. (Networks), through Section 28 of the *Electricity Act* and the similar obligations to serve found in predecessor legislation, has invested capital to connect customers to its system. In the case of Networks, through obligations imposed on its predecessors, a large number of customers in Ontario have been connected to its distribution system pursuant to its obligation to serve. Because of the historic regulatory scheme, many of the existing customers of Networks were made part of the Networks distribution system because no other Distributor was prepared to provide the service. Large investments have now been made pursuant to the obligation to serve.
7. The Board does have the power to grant licences for areas which overlap. In such cases the licence "shall not hinder or restrict the grant of a licence to another person within the same area and the licensee shall not claim any right of the exclusivity." (Section 70(6) *OEB Act*)
8. In interpreting this section it is important to take into account Section 70(13) which provides:

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

9. If the Board, through its licence amendment procedures, were to make an order which would have the effect of transferring a Distributor's existing customers to another Distributor in its expanded territory, this would contravene Section 70(13). If an existing customer were to be transferred to the expanding utility, the connecting assets of the original connecting utility would be by-passed and rendered useless. The investment would be lost. The utility would be required to "dispose of assets or to undertake a significant corporate reorganization" as a result. This would contravene Section 70(13).

#### Expropriation of Property

10. To allow cherry picking of existing customers is tantamount to expropriation.
11. It has long been a principal of common law that property is not to be expropriated without the clearest legislative authority for doing so. In the case of *Manitoba Fisheries Ltd. v. The Queen* [1979] 1 S.C.R. 101, the Court considered federal legislation (*Freshwater Fish Marketing Act*) which would deprive the plaintiff of its market and put the plaintiff out of business, without compensation. Ritchie, J. summarized the applicable rule of statutory construction as follows:

"There is no express language in the Act providing for the payment of compensation by the federal Crown but the appellant relies upon the long-established rule which is succinctly stated by Lord Atkinson in *Attorney-General v. DeKeyser's Royal Hotel Ltd.*, [1920] A.C. 508, at p. 552 where he said:

“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 rule of construction is more amply stated in Maxwell on Interpretation of Statutes, 11<sup>th</sup> ed., pp. 275 to 277 in language which was approved by Wilson J.A. in the British Columbia Court of Appeal in *B.C. Power Corp. Ltd. v. Attorney-General of British Columbia et al.* (1962), 34 D.L.R. (2d) 25, at p. 44, which is set out at length in the judgment of Mr. Justice Collier at [1977] 2 F.C. 457 at p. 462, where reference is also made to the approach adopted by Lord Radcliffe in *Belfast Corporation v. O.D. Cars Ltd.*, [1960] A.C. 490, at p. 523 (H.L.(N.I.)). In considering whether a particular piece of legislation contemplates taking without compensation, 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 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. This vigilance to see that the subject’s rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual liberty. It would be a mistake to look on it as representing any conflict between the legislature and the courts. The principle was, generally speaking, common to both.”

12. The Ontario courts have dealt with a related issue involving natural gas distribution in different but similar circumstances. In the case of *Kingston (City) v. The Ontario Energy Board* [2001] O.J. No. 3485 a case involving a franchise dispute (attached at **TAB "B"**) , the Court held at page 2 as follows:

“However, in our opinion, the Board’s power to order Union to continue to provide service does not extend to ordering Union to make its assets available, against its will, to some other party for that purpose . . . The proposal of Kingston may fall short of a formal “expropriation”. Nevertheless, it takes away from Union a property right it enjoys, namely, the ability to deny others the possession, use and enjoyment of its property.”

and further:

“Kingston should not be permitted to now do indirectly what the legislature has expressly renounced with the retroactive repeal of Section 62 of the *Public Utilities Act*.”

13. If the legislature intended to provide for a scheme whereby existing customers of the utility were to be transferred to an expanding utility, it would have clearly provided for a mechanism. No such mechanism exists. No such power was conveyed to the Board.
14. This point is demonstrated by the provisions of the previous governing statute, the *Power Corporation Act*, R.S.O. 1990, as amended by 1994, c.31.
15. There, specific provisions enabled a municipal corporation to expand the area within which it could supply power. The act provided specific legislative authority in Section 83 to govern the transfer of utility assets.

The legislation provided a code permitting the acquisition of these assets and providing a mechanism to establish the transfer price. Provision was made for arbitration in the event that price could not be agreed upon. The opportunity to expand was specifically time limited.

16. There is no comparable provision in the current legislation but Section 86 of the *OEB Act* does specifically limit the ability of a distributor to dispose of necessary assets without Board approval.

#### Objects of Act

17. The powers of the Board are to be exercised in accordance with the purposes of the *Electricity Act* and the *OEB Act*. Those purposes include, in addition to facilitating competition in the sale of electricity, protection of the interests of consumers and the promotion of economic efficiency. It would be contrary to the interests of consumers at large, and economic efficiency, to encourage or permit the by-pass of existing facilities which have been constructed in compliance with a public duty to connect and which remain used and useful.
18. Section 1 of the *Electricity Act* and the *OEB Act* have identical wording. These Sections are often misinterpreted, particularly concerning competition. Section 1 of the *OEB Act* is attached at **TAB "C"** for the Board's easy reference.
19. Section 1 provides an objective "to facilitate competition in the **generation and sale of electricity . . .**". It does not mention, and is not intended to,

encourage competition in the provision of **transmission or distribution facilities**.

20. Section 1(4) establishes the objective:

“To promote **economic efficiency** in the generation, **transmission and distribution** of electricity.”

Economic efficiency is, as has long been recognized in the case of high cost transmission and distribution facilities, best accomplished by a properly regulated monopoly. It is not economically efficient to encourage the duplication of such facilities.

21. The Section 1(3) objective is “to protect the interests of consumers”. The interests of consumers at large are best protected by a properly regulated distribution monopoly. There is nothing in the legislative scheme that seeks to undermine the fundamental, long recognized benefit, of a regulated monopoly in the provision of high cost transmission and distribution facilities. The theory of regulation, and common sense, holds that is uneconomic and wasteful to duplicate such facilities unnecessarily. It was never intended that there would be open competition in the provision of distribution assets. Such competition leads to duplication of assets and higher costs. Competitiveness is to be achieved through non-discriminatory access to transmission and distribution systems (Section 1(2)) and the freedom to purchase the commodity from more than one seller.



Regulatory Theory

22. Fundamental principles of utility regulation provide that utilities have certain obligations and rights. They go together. These are summarized in the text "*The Regulation of Public Utilities*" at page 118 - 120. (attached at **TAB "D"**) The obligation to serve must be balanced by the right of reasonable protection from competition in the service area. The author summarizes this principal at page 120 as follows:

"Third, when they furnish (*sic*) adequate service at reasonable rates, public utilities have the right of *protection* from competition from an enterprise offering the same service in the same service area. A public utility must receive a certificate of public convenience and necessity from the appropriate regulatory agency, and a franchise (generally dealing with the use of city streets and with city utility service) from the relevant local governmental unit, prior to commencing operations. In turn, such certificates and franchises, while not exclusive, offer a public utility some freedom from competition in its service area."

23. Accordingly, it is submitted that the Board does not have jurisdiction to make an order which would have the effect of transferring a distributor's existing customers to another distributor. Hence, it is submitted that any expansion of designated service areas should carry a condition pursuant to Section 70 restricting the expansion to new customers not already connected to an existing distributor.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED  
THIS 15<sup>TH</sup> DAY OF MAY, 2003**

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**D.H. ROGERS, Q.C.**